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DUELING NATIONALITIES: DUAL CITIZENSHIP, DOMINANT AND EFFECTIVE NATIONALITY, AND THE CASE OF ANWAR AL-AULAQI

INTRODUCTION

The U.S. government ended a two-year manhunt in September 2011 when armed drones operated by the Central Intelligence Agency (“CIA”) “crossed into northern Yemen and unleashed a barrage of Hellfire missiles” at a car carrying, among others, Anwar al-Aulaqi (also spelled “al-Awlaki”¹)—a dual U.S.–Yemeni citizen.² Formerly a moderately religious Muslim, al-Aulaqi had become a leader for radical Muslims abroad over the past decade, inspiring jihadist attacks against the West and playing an increasing role in the operations and planning of attacks by al Qaeda’s affiliate organization based in Yemen. Al-Aulaqi was born in the United States to Yemeni parents in 1971, lived in Yemen from 1978 to 1991, returned to the United States to study and work in 1991, and left the United States permanently in 2002, returning to live in Yemen in 2004. In early 2010, the Obama Administration took the “extraordinary step” of promoting the targeted killing of an individual with U.S. citizenship by authorizing the CIA and U.S. military to capture or kill al-Aulaqi.³ Later that year, U.S. Attorney General Eric Holder suggested that al-Aulaqi “should be on the same most-dangerous list as Osama bin Laden,”⁴ and New York Police Department counterterrorism officials labeled al-Aulaqi, not bin Laden, as “the most dangerous man in the world.”⁵

¹ See, e.g., Evan Perez, *Suit Challenges Reach of U.S. ‘Targeted Killings,’* WALL ST. J. (Aug. 31, 2010), <http://online.wsj.com/article/SB10001424052748704323704575462030737701908.html>.

² Mark Mazzetti et al., *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES (Sept. 30, 2011), <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html>.

³ Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 7, 2010, at A12.

⁴ Geoff Earle & Andy Soltis, *The Enemy Within: AG Sounds Alarm on Homegrown Terror*, N.Y. POST (Dec. 22, 2010, 2:00 AM), http://www.nypost.com/p/news/national/the_enemy_within_FVSBheZuXxZzzn bj3xRrwI.

⁵ Matthew Cole & Aaron Katersky, *Awlaki: ‘The Most Dangerous Man in the World,’* ABC NEWS (Nov. 10, 2010), <http://abcnews.go.com/Blotter/awlaki-dangerous-man-world/story?id=12109217>. Indeed, only days after bin Laden was killed by a team of U.S. Navy Seals in May 2011, a U.S. strike nearly succeeded in killing al-Aulaqi. Martha Raddatz & Luis Martinez, *Anwar al-Awlaki Targeted by U.S. Drones*, ABC NEWS (May 6, 2011), <http://abcnews.go.com/Blotter/anwar-al-awlaki-targeted-us-drones-osama-bin/story?id=13549218>.

The United States has, on occasion, killed U.S. citizens involved in conflict in the Middle East.⁶ In 2002, for example, Ahmed Hijazi, an American citizen,⁷ was killed when a U.S. Predator drone fired a missile at a car in Yemen, killing six men—all suspected al Qaeda operatives.⁸ The targeted individual, however, was Abu Ali Qaed Senyan al-Harithi, an al Qaeda leader allegedly responsible for the *USS Cole* bombing.⁹ The addition of al-Aulaqi to the U.S. government's "hit-list" represented the first time in this post-9/11 conflict that a person with U.S. citizenship was specifically targeted.¹⁰

Al-Aulaqi's death made waves among news media, politicians, and law professors, sparking national debate over the legality of killing an individual with American citizenship.¹¹ For its part, the Obama Administration defended the strike, claiming that an internal review—involving senior lawyers from across the administration—determined that the killing of al-Aulaqi was legal.¹²

⁶ See, e.g., *U.S. Defends Yemen Strike*, BBC NEWS (Nov. 10, 2002, 10:50 PM), <http://news.bbc.co.uk/2/hi/americas/2439305.stm>.

⁷ Hijazi, in fact, held dual citizenship with the United States and "an unidentified Middle Eastern country He was not born in the United States, but resided here for an unknown period of time." Dana Priest, *CIA Killed U.S. Citizen in Yemen Missile Strike: Action's Legality, Effectiveness Questioned*, WASH. POST, Nov. 8, 2002, at A1. Though it was widely reported that Hijazi was an American citizen, it is possible that he was not a dominant and effective American national.

⁸ *Id.*

⁹ Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings*, at 7, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter *Rep. of the Special Rapporteur*]; Priest, *supra* note 7.

¹⁰ Shane, *supra* note 3; Catherine Herridge, *EXCLUSIVE: Al Qaeda Leader Dined at the Pentagon Just Months After 9/11*, FOX NEWS (Oct. 20, 2010), <http://www.foxnews.com/us/2010/10/20/al-qaeda-terror-leader-dined-pentagon-months>. *But see* Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, WASH. POST (Jan. 27, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012604239.html> ("The [targeted killing] list includes three Americans, including Aulaqi, whose name was added late last year. As of several months ago, the CIA list included three U.S. citizens, and an intelligence official said that Aulaqi's name has now been added.").

¹¹ See, e.g., Michael Martinez, *U.S. Drone Killing of American al-Awlaki Prompts Legal, Moral Debate*, CNN (Sept. 30, 2011), http://articles.cnn.com/2011-09-30/politics/politics_targeting-us-citizens_1_al-awlaki-yemeni-embassy-drone-missile. For example, U.S. Representative Ron Paul denounced President Obama for "assassinating" al-Aulaqi, while U.S. Representative Peter King, former U.S. Vice President Dick Cheney, and former U.S. Speaker of the House Newt Gingrich applauded the strike and insisted that it was legal. Wolf Blitzer, *BLITZER'S BLOG: Impeach Obama? Ron Paul, Newt Gingrich Disagree*, CNN (Oct. 6, 2011, 4:04 PM), <http://situationroom.blogs.cnn.com/2011/10/06/blitzers-blog-impeach-obama-ron-paul-newt-gingrich-disagree>; Martinez, *supra*.

¹² Peter Finn, *Secret U.S. Memo Sanctioned Killing of Aulaqi*, WASH. POST (Sept. 30, 2011), http://www.washingtonpost.com/world/national-security/aulaqi-killing-reignites-debate-on-limits-of-executive-power/2011/09/30/gIQAx1bUAL_story.html.

This controversy, however, was not entirely new; in fact, the U.S. government's targeting of al-Aulaqi was challenged in a domestic court just one year earlier. Al-Aulaqi's father, with help from two civil liberties groups,¹³ filed a lawsuit in federal court for the District of Columbia as "next friend" of his son in August 2010, challenging the legality of the Obama Administration's targeting of al-Aulaqi.¹⁴ The suit raised several issues, some of which fall outside of the scope of this Comment,¹⁵ in an attempt to block the United States from targeting al-Aulaqi.¹⁶ The thrust of the plaintiff's argument, however, lay in the fact that the U.S. government was targeting a person with U.S. citizenship without affording him due process or other constitutional protections typically afforded to citizens.¹⁷ The plaintiff argued that "the question was whether the government has the power to kill any American citizen it labels as a terrorist without review by the courts."¹⁸

Modern theory of citizenship is premised on the idea that citizens accept certain duties and give up certain freedoms, and in return, government is instituted to secure for citizens their fundamental rights.¹⁹ This understanding of "reciprocal" rights and duties is heavily grounded in seventeenth- and eighteenth-century theories of social contract,²⁰ and to this day, the U.S.

¹³ The American Civil Liberties Union ("ACLU") and the Center for Constitutional Rights ("CCR").

¹⁴ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 1 (2010); Perez, *supra* note 1.

¹⁵ For example, plaintiff argued that the United States could not target any person for killing within Yemen, regardless of citizenship, because at the time of filing, the United States was not in "armed conflict" with Yemen or Yemeni groups. *Al-Aulaqi*, 727 F. Supp. 2d at 9; Perez, *supra* note 1. The plaintiff distinguished conflict in Yemen from that of the United States' wars in Iraq and Afghanistan: "The expansion would exceed the legal limits of the program, the civil-liberties groups say. Jameel Jaffer, director of the ACLU's National Security Project [and lead lawyer for plaintiff], said 'Yemen is not Afghanistan or Iraq. The legal limits on the authority they claim hasn't been specified.'" Perez, *supra* note 1. In addition, the plaintiff sought "an injunction ordering defendants to disclose the criteria that the United States uses to determine whether a U.S. citizen will be targeted for killing." *Al-Aulaqi*, 727 F. Supp. 2d at 9.

¹⁶ Perez, *supra* note 1.

¹⁷ Scott Shane & Robert W. Worth, *Challenge Heard on Move To Kill Qaeda-Linked Cleric*, N.Y. TIMES, Nov. 9, 2010, at A12.

¹⁸ *Id.*

¹⁹ Timothy A. Canova, *Democracy's Disappearing Duties: The Washington Consensus and the Limits of Citizen Participation*, in DEMOCRATIC CITIZENSHIP AND WAR 199 (Yoav Peled et al. eds., 2011).

²⁰ *Id.*; see also, e.g., THOMAS HOBBS, LEVIATHAN (Richard Tuck ed., Cambridge Univ. Press 1996) (1651); JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1689); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Maurice Cranston trans., Penguin Putnam 1968) (1762). For example, Thomas Hobbes believed that in the absence of political authority, humans would live in a state of nature and constant war with all other men, where the life of man would be "solitary, poore [sic], nasty, brutish, and short"; to avoid this dark fate, Hobbes writes, the free man must establish a civil society through a social contract in which each gains civil rights in return for subjecting himself to civil law. HOBBS, *supra*, at 84, 96. However, perhaps in contradiction to contemporary understandings of citizenship, Hobbes

government provides naturalization candidates with a document enumerating some of the reciprocal duties and rights that come with U.S. citizenship.²¹

One problem inherent to matters of citizenship is that each state is free to choose the basis on which it will confer citizenship on individuals,²² and in most cases, a state allows individuals to acquire citizenship through any one of several avenues.²³ The inescapable result is that two (or more) states may simultaneously confer their nationality on the same individual.²⁴ A person may acquire citizenship of one country by virtue of being born on its soil, while simultaneously acquiring citizenship of a second country through the citizenship of her parents.²⁵ A person may be born a citizen of one country, and may later acquire citizenship of a second country through marriage.²⁶ And so on.

Customary international law has long recognized the anomaly of dual citizenship. In doing so, however, international tribunals have been faced with problems that arise when an individual's dual set of rights or dual set of duties

ultimately uses this underlying premise to advocate that citizens should submit to absolute authority of their sovereign to best attain a civil society. *Id.* at 519–22.

As another example, Jean-Jacques Rousseau detailed a model of citizenship in which men assume certain duties for the betterment of all; in exchange for giving up unlimited freedom, men gain civil liberties and the protection of their property rights. ROUSSEAU, *supra*, at 19 (“What man loses by the social contract is his natural liberty and an unlimited right to everything . . . what he gains is civil liberty and the proprietorship of all he possesses.”). Rousseau writes, “The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone and remain as free as before.” *Id.* at 14. This is the problem for “which the *Social Contract* provides the solution.” *Id.* The social contract “tacitly includes the undertaking . . . that whoever refuses to obey the general will shall be compelled to do so by the whole body.” *Id.* at 18.

It is arguable that a version of social contract theory may be found in writings as far back as Plato's *Crito*. See Canova, *supra* note 19.

²¹ *Citizenship Rights and Responsibilities*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.749cabd81f5ffc8fba713d10526e0aa0/?vgnnextoid=39d2df6bdd42a210VgnVCM100000b92ca60aRCRD&vgnnextchannel=39d2df6bdd42a210VgnVCM100000b92ca60aRCRD> (last visited Nov. 10, 2011).

²² See *Claims of Dual Nationals in the Modern Era: The Iran-United States Claims Tribunal*, Note, 83 MICH. L. REV. 597, 601 (1984) [hereinafter *Claims of Dual Nationals in the Modern Era*].

²³ *Citizenship*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=a2ec6811264a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=a2ec6811264a3210VgnVCM100000b92ca60aRCRD> (last visited Oct. 23, 2011).

²⁴ *Claims of Dual Nationals in the Modern Era*, *supra* note 22, at 601.

²⁵ *US State Department Services Dual Nationality*, TRAVEL.STATE.GOV, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1753.html (last visited Oct. 23, 2011).

²⁶ Under the laws of some states, marriage automatically confers citizenship on a foreigner, while in other states, marriage simply puts a foreigner on a fast-track to naturalization. INVESTIGATIONS SERV., U.S. OFFICE OF PERS. MGMT., *CITIZENSHIP LAWS OF THE WORLD* (2001), available at <http://www.opm.gov/extra/investigate/is-01.pdf>.

conflict.²⁷ To deal with these legal difficulties, customary international law precedent dictates that when hearing a case in which an individual's citizenship has bearing either on jurisdiction to hear the case or on the merits of the claim itself, a tribunal must first determine, as a threshold matter, the individual's "dominant and effective" nationality.²⁸ Only after determining the individual's dominant nationality should a tribunal proceed to the merits of the case.

In *Al-Aulaqi v. Obama*, the court ultimately threw out the suit on procedural grounds, holding that al-Aulaqi's father lacked standing to file the lawsuit on behalf of his son.²⁹ In addition, the court held that "[e]ven if plaintiff [had] standing to bring his constitutional claims . . . his claims should still be dismissed because they raise non-justiciable political questions."³⁰ The end result of the case—namely, its dismissal—may well have been the correct one, even if the case had been decided on the merits of the claim. But had the case not been dismissed on procedural grounds, what then? A reading of the court's opinion suggests that the parties and the court took for granted the fundamental assumption that al-Aulaqi was, in fact, entitled to the full protections of U.S. citizenship.³¹

Before assuming that al-Aulaqi should be afforded the rights granted to American citizens, the court should have followed customary international law by first determining al-Aulaqi's dominant and effective nationality. Essentially, if the court had made the threshold determination that al-Aulaqi was a dominant and effective Yemeni national, why should he even have been entitled to U.S. Constitutional protections?

²⁷ The issue has come up most frequently through international claims tribunals, where a dual national makes a claim against one of her states of citizenship, but has been brought before the International Court of Justice and other tribunals, under various circumstances, as well. *See, e.g.*, *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4 (Apr. 6).

²⁸ This practice has come to be known as the "doctrine of dominant and effective nationality." DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 89 (3d ed. 2010).

²⁹ Charlie Savage, *Suit over Targeted Killings Is Thrown Out*, N.Y. TIMES, Dec. 8, 2010, at A12. Al-Aulaqi's father had neither standing himself, "next friend" standing, nor "third party" standing. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 49 (2010).

³⁰ *Al-Aulaqi*, 727 F. Supp. 2d at 65, 80; *see also* Savage, *supra* note 29 (noting the court's holding that "decisions about targeted killings in such circumstances were a 'political question' for executive branch officials to make—not judges"). Interestingly, the court did not reach defendants' invocation of the state secrets privilege, "because plaintiff [lacked] standing and his claims [were] non-justiciable, and because the state secrets privilege should not be invoked 'more often or extensively than necessary.'" *Al-Aulaqi*, 727 F. Supp. 2d at 83.

³¹ *See Al-Aulaqi*, 727 F. Supp. 2d at 2. Even CIA Director Leon Panetta seemed to take al-Aulaqi's U.S. citizenship for granted when quoted, in June 2010, as saying, "[al-Aulaqi] is a terrorist and yes, he's a U.S. citizen, but he is first and foremost a terrorist and we're going to treat him like a terrorist." Perez, *supra* note 1.

Beyond al-Aulaqi's case, the doctrine of dominant and effective nationality should prove valuable to the United States in its continued fight against terrorism, more generally. The U.S. government has been challenged at times over the past decade to find legal support for its treatment of terror suspects, particularly those who hold U.S. citizenship.³² Faced with a growing number of homegrown terrorism suspects, many of whom hold dual nationality, the U.S. government can use the doctrine of dominant and effective nationality to its benefit by distinguishing dual nationals who hold dominant foreign citizenship from those who, in fact, hold dominant U.S. citizenship.

This Comment argues that when hearing a case involving a suspected terrorist who holds dual citizenship, a domestic court³³ should first determine, as a threshold matter, the dominant and effective nationality of the accused. This determination is significant because a dominant foreign national can essentially be treated as a non-citizen, for the purposes of adjudication, and may not be entitled to the full rights and protections of domestic citizenship. In Part I, this Comment provides a brief background on the practice of targeted killing and the U.S. government's basis for targeting al-Aulaqi. Part II explains the development of the doctrine of dominant and effective nationality under customary international law. Part III discusses the usefulness of applying the doctrine in combating terrorism-related offenses, even beyond targeted killings cases, particularly in dealing with threats and acts of homegrown terrorism against the West. In addition, Part III forecasts some of the difficulties likely to arise when applying the doctrine in cases where the target or detainee holds dual citizenship. Finally, Part IV looks at the al-Aulaqi affair as an illustrative case study, applying the doctrine to determine al-Aulaqi's dominant and effective nationality.

³² Dawud Walid, Editorial, *U.S.-Born Terror Suspects Deserve Legal Due Process and Open Trials*, DETROIT NEWS (Oct. 12, 2011, 1:00 AM), <http://www.detnews.com/article/20111012/OPINION01/110120313/1008/opinion01/U.S.-born-terror-suspects-deserve-legal-due-process-and-open-trials>.

³³ This Comment places emphasis on domestic courts of the United States; but because the doctrine of dominant and effective nationality is a part of customary international law, the doctrine could just as rightly be applied by the domestic courts of any other nation.

I. BACKGROUND

A. *Background on Targeted Killings*

The term “targeted killing” is typically used to describe the intentional, direct targeting of a person using lethal force intended to cause death.³⁴ Generally, “international law permits the use of lethal force against individuals . . . that pose an imminent threat to a country,”³⁵ and in the case of the United States, “Congress [explicitly] approved the use of military force against Al Qaeda after the Sept. 11, 2001, terrorist attacks.”³⁶ Although the United States has had an official ban on political assassination since the presidency of Gerald Ford,³⁷ the U.S. government maintains that individuals on the “target list” are considered to be “military enemies of the United States” and not subject to the ban on assassination.³⁸ This Comment does not purport to take a position on the legality of the United States’ targeted killing program in the war on terror, but a summary of the general arguments for and against its legality provides a meaningful context in understanding the debate over the United States’ specific targeting of al-Aulaqi.

³⁴ Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* 9 (Brooking Inst. et al., Working Paper No. 9, 2009), available at http://www.brookings.edu/~media/Files/rc/papers/2009/0511_counterterrorism_anderson/0511_counterterrorism_anderson.pdf [hereinafter Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*]. However, the term is not a “generally defined legal term in domestic or international law.” *Id.*; see also Kenneth Anderson, *Predators over Pakistan*, WKLY. STANDARD, Mar. 8, 2010, at 26, 34 [hereinafter Anderson, *Predators over Pakistan*]. An alternative definition may be a “premeditated killing by a state of a specifically identified person not in its custody.” Richard Murphy & John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 406 (2010).

³⁵ U.N. Charter art. 51; Shane, *supra* note 3.

³⁶ Priest, *supra* note 7; Shane, *supra* note 3.

³⁷ *U.S. Policy on Assassinations*, CNN (Nov. 4, 2002), http://articles.cnn.com/2002-11-04/justice/us.assassination.policy_1_assassination-prohibition-cia-lawyers. Customary international law also has a long-standing history of banning political assassination. JASON D. SÖDERBLOM, WORLD INT’L CMTY. EXPERTS GRP., TIME TO KILL? STATE SPONSORED ASSASSINATION AND INTERNATIONAL LAW 11 (2004), available at <http://world-ice.com/Articles/Assassinations.pdf>.

³⁸ Shane, *supra* note 3. In a May 2010 article, Scott Shane reported:

In the fullest administration statement to date, Harold Koh, the State Department’s legal adviser, said in a March 24 speech the drone strikes against Al Qaeda and its allies were lawful as part of the military action authorized by Congress after the Sept. 11, 2001, attacks, as well as under the general principle of self-defense. By those rules, he said, such targeted killing was not assassination, which is banned by executive order.

Scott Shane, *A Legal Debate as C.I.A. Stalks a U.S. Jihadist*, N.Y. TIMES, May 14, 2010, at A1 [hereinafter Shane, *A Legal Debate*].

Much of the difficulty in determining the legality of targeted killing stems from the fact that the underlying context for the killings deviates from antiquated standards of armed conflict under international law. The Geneva Conventions “recognize only two types of armed conflict: an international armed conflict, which takes place between two states, and an internal armed conflict, a civil war taking place within the territory of a single state.”³⁹ Some observers argue that because the United States’ aggression against al Qaeda, for example, falls under neither of the established categories of “armed conflict,”⁴⁰ the conflict, generally, should be governed by law-enforcement standards.⁴¹ Others argue that the laws of armed conflict should still control in the fight against al Qaeda because the scope and scale of the attacks on September 11, 2001, made them an act of war.⁴² In “a traditional war, anyone allied with the enemy, regardless of citizenship is a legitimate target; German-Americans who fought with the Nazis in World War II were given no special treatment.”⁴³

Similarly, observers disagree over whether the U.S. government’s current targeting practices, in particular, violate international law standards. Those supportive of the practice believe that the United States’ use of targeted killings abroad, even within nations with which the United States is not engaged in formal war, falls under “the traditional American legal view of ‘self-defense’ in international law.”⁴⁴ The self-defense theory is grounded in Article 51 of the United Nations (“UN”) Charter, which arguably permits anticipatory self-defense,⁴⁵ and in U.S. doctrinal law, which has interpreted

³⁹ Anthony Dworkin, *The Yemen Strike: The War on Terrorism Goes Global*, CRIMES WAR PROJECT (Nov. 14, 2002), <http://www.mafhoum.com/press4/122P7.htm>.

⁴⁰ The United States’ battle with al Qaeda and other terrorist groups is not a conflict that takes place “between two states,” because none of the terrorist groups is a “state,” nor can the fight be classified as an internal conflict because the majority of the alleged terrorists are not citizens of the United States and the majority of the fighting has not occurred within the borders of any one state.

⁴¹ Dworkin, *supra* note 39; Mary Ellen O’Connell, *Killing Awlaki Was Illegal, Immoral and Dangerous*, CNN (Oct. 1, 2011), <http://globalpublicsquare.blogs.cnn.com/2011/10/01/killing-awlaki-was-illegal-immoral-and-dangerous>.

⁴² Dworkin, *supra* note 39.

⁴³ Shane, *A Legal Debate*, *supra* note 38.

⁴⁴ Anderson, *Predators over Pakistan*, *supra* note 34, at 27.

⁴⁵ Article 51 states that nothing in the UN Charter shall “impair the inherent right of individual . . . self-defence if an armed attack occurs against a Member of the United Nations.” U.N. Charter art. 51. Kenneth Anderson, for one, argues that “in the long-standing U.S. view, self-defense encompasses at least three categories: ‘[s]elf-defense against an actual use of force or hostile act;’ ‘[p]reemptive self defense against an imminent use of force;’ and ‘[s]elf defense against a continuing threat.’” Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, *supra* note 34, at 18–19. In support, Anderson cites to a memorandum on assassinations produced in 1989 by Senior Department of Defense law of war lawyer Hays Parks. *Id.* at 19–20

international custom to allow for “anticipatory self-defense.”⁴⁶ Those opposed to the government’s current practice argue that targeted killings violate international law standards, at least when performed where actual armed conflicts are not occurring, or where the United States is not a party to the armed conflict.⁴⁷ Rather, they claim that international standards for law enforcement, which do not allow for anticipatory self-defense,⁴⁸ should apply to killings outside of armed conflict zones.⁴⁹

The U.S. Supreme Court has not examined the legality of a government’s targeted killing program, but Israel’s Supreme Court sitting as the High Court of Justice recently tackled the issue.⁵⁰ In *Public Committee Against Torture in Israel v. Israel*, petitioners argued that Israel’s practice of targeted killings, even in response to the Second Intifada, was “totally illegal and contradictory to international law, Israeli law, and basic principles of human morality” under international rules of law enforcement.⁵¹ Respondents argued that because of the continuing “acts of combat and terrorism being committed against Israel,” Israel’s policy was legal under international laws of armed conflict.⁵² The Israeli Supreme Court recognized the complexities of the issue before it,⁵³ but ultimately sided with the respondents and chose to apply the laws of armed

(citing Memorandum, Hays Parks, Executive Order 12333 and Assassination 4, 7 (Nov. 2, 1989), available at http://www.hks.harvard.edu/cchrp/Use%20of%20Force/October%202002/Parks_final.pdf).

⁴⁶ Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, *supra* note 34, at 19 (“The United States grounds its customary law views concerning anticipatory self-defense on the so-called Caroline Doctrine, which permits such actions but also limits them to circumstances in which the ‘necessity of self-defense is instant, overwhelming, leaving no choice of means, and no moment for deliberation.’”).

⁴⁷ *Lawful Use of Combat Drones: Hearing on Rise of the Drones II: Examining the Legality of Unmanned Targeting Before the H. Comm. on Nat’l Sec. and Foreign Affairs*, 111th Cong. 20 (2010) (statement of Mary Ellen O’Connell, Professor, Notre Dame Univ.) [hereinafter *Lawful Use of Combat Drones*]. For example, on November 3, 2002, “the CIA used a drone to fire laser-guided Hellfire missiles at a passenger vehicle traveling in a thinly populated region of Yemen,” killing all six passengers. *Id.* at 21. O’Connell argues that “the strike constituted a clear case of extrajudicial killing” because there was no armed conflict in Yemen at the time. *Id.*

⁴⁸ The United Nations’ *Basic Principles for the Use of Force and Firearms by Law Enforcement Officials* states that “intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.” Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, ch. I.B.2, Annex, at 114, U.N. Doc. A/Conf.144/28/Rev.1 (1991).

⁴⁹ *Lawful Use of Combat Drones*, *supra* note 47, at 2; Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. NAT’L SECURITY L. & POL’Y 343, 362 (2010).

⁵⁰ See H CJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel [2005], http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf (English translation).

⁵¹ *Id.* paras. 3, 4.

⁵² *Id.* para. 10.

⁵³ *Id.* para. 60.

conflict.⁵⁴ The court did charge that before the Israeli Defense Forces may target an individual, an independent, intraexecutive investigation must first balance the individual's civil liberties with the needs of national security;⁵⁵ but significantly, the court held that the Israeli government's use of targeted killing is not inherently illegal under international law.⁵⁶

Again, this Comment does not purport to take a position on the legality of the United States' targeted killing program in the war on terror, but simply recognizes that the United States has run such a program for much of the past decade. Though it is unprecedented for an individual with U.S. citizenship to be approved for targeted killing,⁵⁷ the United States has engaged in the practice of targeting particular individuals abroad as a key tool in its "War on Terror."⁵⁸ And for its part, the U.S. government insists that its use of targeted killings does not violate international law; in March 2010, the legal advisor to the U.S. Department of State, Harold Koh, claimed that the United States' targeting practices "comply with all applicable law, including the laws of war."⁵⁹ There is reason to believe that the United States will continue to target certain individuals for the foreseeable future.⁶⁰

B. Reasons for the United States' Targeting of al-Aulaqi

In recent years, Anwar al-Aulaqi had "emerged as an eloquent and unapologetic advocate of violence against the West. His online sermons attract

⁵⁴ *Id.* para. 18 (citing A. CASSESE, INTERNATIONAL LAW 420 (2d ed. 2005) ("An armed conflict which takes place between an Occupying Power and rebel or insurgent groups—whether or not they are terrorist in character—in an occupied territory, amounts to an international armed conflict.")).

⁵⁵ *Id.* para. 63; Murphy & Radsan, *supra* note 34, at 450.

⁵⁶ Anthony Dworkin, *Israel's High Court on Targeted Killing: A Model for the War on Terror?*, CRIMES WAR PROJECT (Dec. 15, 2006), <http://www.crimesofwar.org/onnews/news-highcourt.html>. The court defined "targeted killings" as "the preventative strike causing the deaths of terrorists, and at times also of innocent civilians." H CJ 769/02 *Pub. Comm. Against Torture in Isr.*, para. 60.

⁵⁷ Shane, *supra* note 3.

⁵⁸ See, e.g., *Rep. of the Special Rapporteur*, *supra* note 9; Anderson, *Predators over Pakistan*, *supra* note 34, at 26 ("The Predator drone strategy is a rare example of something that has gone really, really well for the Obama administration."); CNN Wire Staff, *U.S. Is World's Top User of Targeted Killings*, *U.N. Says*, CNN (June 2, 2010), http://articles.cnn.com/2010-06-02/us/un.targeted.killings.report_1_drone-attacks-killings-pakistan. This is despite the fact that the Fifth Amendment of the U.S. Constitution states, "No *person*," rather than citizen, "shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V (emphasis added).

⁵⁹ Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Remarks at Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010).

⁶⁰ However, this Author recognizes that in a greater context, legal justification *does* matter, "partly for reasons of legitimacy and partly because the United States is, and wants to be, a polity governed by law." Anderson, *Predators over Pakistan*, *supra* note 34, at 29.

wide international audiences and are a source of particular concern to U.S. authorities because they are delivered in English.”⁶¹ Observers have described al-Aulaqi as “a leading light among militant Sunni preachers seeking to reach out to English-speaking Muslims and encourage them to engage in jihad in the West.”⁶² Until his death, al-Aulaqi maintained a website devoted to the “glories of jihad,” through which users were able to email him with questions.⁶³ He frequently posted sermons online, easily accessible to audiences worldwide through personal web pages of his supporters and through popular commercial websites, such as YouTube.⁶⁴ U.S. officials believe that al-Aulaqi’s rhetoric has inspired more than a dozen terrorist plots.⁶⁵

Al-Aulaqi has been specifically linked to several terrorists and terrorist plots, spanning nearly a decade, against the United States. The 9/11 Commission Report, released in 2004, “found that [two] Saudi Arabians who helped hijack and fly American Airlines Flight 77 into the Pentagon . . . had made contact with [al-Aulaqi], then prayer leader at the Rabat mosque in the San Diego suburb of La Mesa, soon after they moved to San Diego in February 2000”;⁶⁶ al-Aulaqi is also suspected to have met with the same two hijackers at his mosque in Virginia shortly before the 9/11 attacks.⁶⁷ His writings “have

⁶¹ Greg Miller & Spencer S. Hsu, *Muslim Cleric Tied to Bomb Attempt*, WASH. POST, July 1, 2010, at A9. For a discussion on al-Aulaqi’s evolution from a relatively moderate student of Islam during his college days in Colorado in the early 1990s, to a radical preacher seeking war against the United States and its allies by the time he fled to Yemen in the mid-2000s, see Sudarsan Raghavan, *Cleric Linked to Fort Hood Attack Grew More Radicalized in Yemen*, WASH. POST, Dec. 10, 2009, at A15; Scott Shane & Souad Mekhennet, *From Condemning Terror to Preaching Jihad*, N.Y. TIMES, May 9, 2010, at A1.

⁶² Dan Murphy, *Fort Hood Shooting: Was Nidal Malik Hasan Inspired by Militant Cleric?*, CHRISTIAN SCI. MONITOR (Nov. 10, 2009), <http://www.csmonitor.com/World/Global-News/2009/1110/fort-hood-shooting-was-nidal-malik-hasan-inspired-by-militant-cleric>. For example, al-Aulaqi has “authored a treatise urging Muslims to violence called the ‘44 Ways to Support Jihad.’” *Id.*

⁶³ *Id.*

⁶⁴ See, e.g., Anwar Al Awlaki, *The Battle of Hearts and Minds*, YOUTUBE (Dec. 9, 2009), http://www.youtube.com/watch?v=G_T2I6mEGqc.

⁶⁵ Shane, *A Legal Debate*, *supra* note 38. In addition, al-Aulaqi was accused of other terrorism-related offenses, distinct from the allegations based on his rhetoric. For example, he had been accused of using a U.S.-based Islamic charity to send money to terrorist organizations such as al Qaeda and Hamas. See Murphy, *supra* note 62.

⁶⁶ Murphy, *supra* note 62; see also THE 9/11 COMMISSION REPORT 221 (2004).

⁶⁷ James Gordon Meek, *Fort Hood Gunman Nidal Hasan “Is a Hero”: Imam Who Preached to 9/11 Hijackers in Va. Praises Attack*, N.Y. DAILY NEWS (Nov. 9, 2009), http://articles.nydailynews.com/2009-11-09/news/17938669_1_awlaki-nidal-hasan-al-qaeda. Although there has been no direct evidence of al-Aulaqi’s involvement in the 9/11 attacks, one FBI agent has suggested that “if anyone had knowledge of the plot, it would have been [al-Aulaqi, since] someone had to be in the [United States] and keep the hijackers spiritually focused.” Shane & Mekhennet, *supra* note 61. Additionally, “the 9/11 commission staff members themselves

been found on the computers of British, U.S., and Canadian terror suspects in recent years, among them the New Jersey men accused of plotting an attack against Fort Dix in 2007.”⁶⁸

Media outlets and government officials report that al-Aulaqi was a driving force behind several of the most serious radical Muslim attacks, and attempted attacks, within the United States in the past couple of years. He held significant ties with U.S. Army Major Nidal Malik Hasan, who murdered thirteen soldiers and wounded thirty-two others in a shooting rampage in November 2009 at Texas’ Fort Hood.⁶⁹ Following the attack, it was widely reported that Hasan, mimicking the rhetoric of al-Aulaqi, “had espoused the belief that America’s wars in Iraq and Afghanistan were wars against all Muslims.”⁷⁰ U.S. officials believe that al-Aulaqi “had a direct operational role” in the attempted bombing of a Detroit-bound airliner on Christmas Day of 2009.⁷¹ Officials believe that al-Aulaqi put the would-be bomber—a Nigerian man named Umar Farouk Abdulmutallab—in touch with members of al Qaeda’s Yemeni offshoot, al Qaeda in the Arabian Peninsula (“AQAP”), who then trained him;⁷² had it succeeded, the attack could have killed more than 300 people.⁷³ Al-Aulaqi reportedly influenced Faisal Shahzad, the naturalized American citizen who attempted to detonate a bomb in Times Square in May 2010.⁷⁴ As was the case

had sharp arguments” about al-Aulaqi. *Id.* One staff member told reporters, “Do I think he played a role in helping the hijackers here, knowing they were up to something? Yes. Do I think he was sent here for that purpose? I have no evidence for it.” *Id.*

⁶⁸ Murphy, *supra* note 62. In May 2007, six would-be terrorists—“immigrants from Jordan, Turkey and the former Yugoslavia who came together because of a shared infatuation with Internet images of jihad”—were “charged with conspiring to attack Fort Dix and kill soldiers there with assault rifles and grenades.” Dale Russakoff & Dan Eggen, *Six Charged in Plot To Attack Fort Dix*, WASH. POST, May 9, 2007, at A1.

⁶⁹ Murphy, *supra* note 62; *see also* Shane, *supra* note 3. Hasan reportedly attended services at the Dar al-Hijrah mosque in Virginia in 2001, at a time when al-Aulaqi served as its imam; and prior to Hasan’s 2009 attack, he and al-Aulaqi exchanged ten to twenty “communications,” in which Hasan asked al-Aulaqi for spiritual guidance regarding violence. Meek, *supra* note 67.

⁷⁰ James C. McKinley, Jr., *Major Held in Fort Hood Rampage Is Charged with 13 Counts of Murder*, N.Y. TIMES, Nov. 13, 2009, at A14. In the wake of Hasan’s attack, al-Aulaqi wrote online, “Nidal Hassan is a hero. He is a man of conscience who could not bear living the contradiction of being a Muslim and serving in an army that is fighting against his own people.” Meek, *supra* note 67.

⁷¹ Miller & Hsu, *supra* note 61. The failed plot “employed a would-be suicide bomber . . . accused of boarding the flight with explosives in his underwear.” *Id.* The would-be bomber was “subdued by other passengers as he allegedly tried to detonate the bomb.” *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Shane & Mekhennet, *supra* note 61; Damien McElroy, *Times Square Bomb Suspect Had Links to Terror Preacher*, TELEGRAPH (May 7, 2010, 4:34 PM), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/7691929/Times-Square-bomb-suspect-had-links-to-terror-preacher.html>. Following his arrest, Shahzad told interrogators that he had been “inspired to take up the cause of al Qaeda and radical Islam

with Hasan, Abdulmutallab, and a number of others, Shahzad was in contact with al-Aulaqi shortly before his attempted terrorist attack.⁷⁵

Beyond mere rhetoric, U.S. officials believe that al-Aulaqi had, in recent years, become increasingly involved with the operations of AQAP.⁷⁶ While his precise role in AQAP is unclear, U.S. officials believe he had “become ‘operational,’ plotting, not just inspiring, terrorism against the West.”⁷⁷ In June 2010, AQAP released “a slick new English-language Web magazine” called *Inspire*.⁷⁸ *Inspire* is believed to be the work of two American citizens—Samir Khan, a Saudi-born American who lived with his parents in New York before fleeing to Yemen in 2007, and al-Aulaqi.⁷⁹ Having released seven issues as of September 2011,⁸⁰ *Inspire* is “available as a download from an array of websites” and aims to mobilize individuals “for violent jihad in their home countries.”⁸¹ Al-Aulaqi is accused of connection to an October 2010 plot to detonate bombs, hidden in mail parcels, on two airplanes.⁸² AQAP claimed

by the internet messages of [al-Aulaqi].” *Id.*; see also Richard Esposito et al., *Sources: Shahzad Had Contact with Awlaki, Taliban Chief, and Mumbai Massacre Mastermind*, ABC NEWS (May 6, 2010), <http://abcnews.go.com/Blotter/faisal-shahzad-contact-awlaki-taliban-mumbai-massacre-mastermind/story?id=10575061>.

⁷⁵ NewsCore, *Times Square Suspect Contacted Radical Cleric*, MY FOX BOS. (May 6, 2010, 5:10 PM), http://www.myfoxboston.com/dpps/news/times-square-suspect-contacted-radical-cleric-dpgonc-km-20100506_7411371.

⁷⁶ Miller & Hsu, *supra* note 61. Indeed, shortly after al-Aulaqi was killed, President Obama remarked that al-Aulaqi had taken “the lead role in planning and directing the efforts to murder innocent Americans,” and that “[t]he death of Awlaki is a major blow to Al Qaeda’s most active operational affiliate.” Mazzetti et al., *supra* note 2.

⁷⁷ Shane & Mekhennet, *supra* note 61. Government officials allege that al-Aulaqi acts as “a recruiter and facilitator [for AQAP] who has a deep familiarity with U.S. cities and society.” Miller & Hsu, *supra* note 61. However, “he is not . . . thought to have the skills to lead operations or build a bomb.” *Id.*

⁷⁸ Judith Miller & David Samuels, *A Glossy Approach to Inciting Terrorism*, WALL ST. J., Nov. 27, 2010, at A2. The magazine, “whose title comes from a Koranic verse, ‘inspire the believers to fight,’ remixes old-school jihadist tropes for an English-speaking Western audience raised on videogames and consumer magazines.” *Id.*

⁷⁹ *Id.* On September 30, 2011, Khan was killed in the same CIA strike that killed al-Aulaqi. Mark Schone & Matthew Cole, *American Jihadi Samir Khan Killed with Awlaki*, ABC NEWS (Sept. 30, 2011), <http://abcnews.go.com/Blotter/american-jihadi-samir-khan-killed-awlaki/story?id=14640013>. However, Khan was not directly targeted in the killing—the target was al-Aulaqi. *Al Qaeda’s Anwar al-Awlaki Killed in Yemen*, CBS NEWS (Sept. 30, 2011, 5:02 AM), <http://www.cbsnews.com/stories/2011/09/30/501364/main20113732.shtml>.

⁸⁰ INSPIRE, Fall 2011.

⁸¹ Miller & Samuels, *supra* note 78.

⁸² International authorities intercepted two mail parcels, one in Britain and the other in the United Arab Emirates, containing bombs in October 2010. *Yemen Mail Bomb “Could Have Detonated over Eastern U.S.”*, BBC NEWS [hereinafter *Yemen Mail Bomb*], <http://www.bbc.co.uk/news/world-us-canada-11729720> (last updated Nov. 10, 2010, 5:30 PM). The packages had originated from the Yemeni capital of Sanaa and were sent through UPS and FedEx; the parcels were intercepted on cargo planes awaiting transport to the United States. *Id.*; see also *Yemen Puts Preacher al Awlaki on Trial in His Absence*, REUTERS, Nov. 2, 2010,

responsibility for the plot,⁸³ and shortly afterwards, the editors of *Inspire*—presumed to include Khan and al-Aulaqi—used its November 2010 issue to encourage smaller-scale attacks on the West, boasting that “the recent effort to bomb FedEx and UPS cargo planes . . . cost only \$4,200.”⁸⁴ Yemeni officials have implicated al-Aulaqi in having been involved with or having “blessed the recent mail bomb plot, though [he did not] necessarily [take] an active part in it,”⁸⁵ while some U.S. officials have gone so far as to suggest that al-Aulaqi “master minded” the plot.⁸⁶

II. FORMATION OF THE DOCTRINE OF DOMINANT AND EFFECTIVE NATIONALITY UNDER CUSTOMARY INTERNATIONAL LAW

There are two key elements in the creation of a customary international law rule.⁸⁷ To convince the relevant decision-maker (whether it be an international tribunal, domestic court, or government actor) that a rule has become customary international law, one must show that the rule has (1) been followed as a “general practice,” and (2) that the rule has been “accepted as law.”⁸⁸ Once established as part of customary international law, a practice becomes binding on states.⁸⁹

The “general practice” element is an objective inquiry.⁹⁰ Evidence that the proponent of the practice might offer includes a showing that international actors have followed the rule, that the practice has been consistent, and that the practice has been followed for a sufficient period of time (though not

<http://www.thenational.ae/news/worldwide/middle-east/yemen-puts-preacher-al-awlaki-on-trial-in-his-absence>. When intercepted, the packages had already been transported by four planes—two of them passenger jets—and authorities believe that the bombs were set to explode en route to the United States; the two packages were addressed to synagogues in Chicago, Illinois. Mark Mazzetti et al., *Bomb Plot Shows Key Role Played by Intelligence*, N.Y. TIMES, Oct. 31, 2010, at A1; *Yemen Mail Bomb*, *supra*.

⁸³ Robert F. Worth, *Yemen Judge Orders Arrest of Cleric Linked to al Qaeda*, N.Y. TIMES, Nov. 7, 2010, at A14; *see also* Shane & Worth, *supra* note 17.

⁸⁴ Miller & Samuels, *supra* note 78.

⁸⁵ *Yemen Charges U.S.-Born Radical Cleric Anwar al-Awlaki*, USA TODAY (Nov. 2, 2010), http://www.usatoday.com/news/world/2010-11-01-al-quaida-turncoat-alerted-saudis-to-plot_N.htm. *But see* Jeralyn, *Yemen Judge Orders Al Awlaki Arrest “by Any Means,”* TALKLEFT (Nov. 6, 2010, 11:45 AM), <http://www.talkleft.com/story/2010/11/6/124536/723>.

⁸⁶ Earle & Soltis, *supra* note 4.

⁸⁷ BEDERMAN, *supra* note 28, at 16.

⁸⁸ Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055 (noting that custom is “evidence of a general practice accepted as law”); BEDERMAN, *supra* note 28, at 16.

⁸⁹ BEDERMAN, *supra* note 28, at 16.

⁹⁰ *Id.* at 17.

necessarily a “long” time).⁹¹ To satisfy this element, one typically must look at the conduct of states, as recorded in writing.⁹² For this reason, case decisions issued by international tribunals are good places to find evidence of general practice.

The “accepted as law” element demands a more subjective inquiry.⁹³ It asks “*why* an international actor has observed a particular practice,” which is known as *opinio juris*.⁹⁴ To satisfy this element, a proponent of a rule of custom may demonstrate the reasonableness or utility of the rule.⁹⁵ Although this element is open to subjectivity, one typically demonstrates *opinio juris* through analyses found in international tribunal decisions and through the writings of publicists and international legal scholars.⁹⁶

Where conflicting domestic laws or policies have led to disputes involving international litigants, tribunals frequently have used customary international law to fill the void.⁹⁷ As has been noted, “matters of nationality are regulated . . . by municipal, not international, law,”⁹⁸ and each state is free to choose how and under what terms to confer citizenship on individuals.⁹⁹ In the United States a person obtains citizenship at birth by having been born on U.S. soil (*jus soli*).¹⁰⁰ Under certain circumstances, a person may acquire U.S. citizenship at birth even on foreign soil, where one or both of her parents hold U.S. citizenship (*jus sanguinis*).¹⁰¹ And of course, an individual may be naturalized as a U.S. citizen.¹⁰² Britain distinguishes among six different forms

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *See id.*

⁹⁷ *See, e.g.,* The Paquete Habana, 175 U.S. 677 (1900) (looking to rules of customary international law).

⁹⁸ *Claims of Dual Nationals in the Modern Era*, *supra* note 22, at 601.

⁹⁹ *See id.*

¹⁰⁰ *United States v. Wong Kim Ark*, 169 U.S. 649, 732 (1998) (stating that a child born in the United States of parents of foreign nationality but who are permanently located in the United States, may become a U.S. citizen at the time of her birth by virtue of the Fourteenth Amendment of the Constitution). The first clause of the Fourteenth Amendment states, “All persons born or naturalized in the United States . . . are citizens of the United States and of the state wherein they reside.” U.S. CONST. amend. XIV; *see also* Edward J. Erler, *American Citizenship and Postmodern Challenges*, in EDWARD J. ERLER ET AL., *THE FOUNDERS ON CITIZENSHIP AND IMMIGRATION: PRINCIPLES AND CHALLENGES IN AMERICA* 67 (2007).

¹⁰¹ *See Acquisition of U.S. Citizenship by a Child Born Abroad*, TRAVEL.STATE.GOV, http://travel.state.gov/law/citizenship/citizenship_5199.html (last visited Nov. 12, 2011).

¹⁰² U.S. CITIZENSHIP & IMMIGRATION SERVS., *A GUIDE TO NATURALIZATION* 3 (2011), *available at* <http://uscis.gov/files/articleM-476.pdf>.

of British nationality, and each form is acquired under different conditions.¹⁰³ One way that Ireland, Israel, and Italy confer citizenship is through the “law of return.”¹⁰⁴ Many countries confer citizenship to a foreigner through marriage.¹⁰⁵ “The inevitable result of the absence of a uniform international law to determine nationality is the anomaly of dual nationality: two states may simultaneously confer their nationality on the same individual.”¹⁰⁶

In dealing with international claims involving a dual national, customary international law has seen the development of two competing doctrines: the doctrine of state nonresponsibility and the doctrine of dominant and effective nationality.¹⁰⁷ The doctrine of state nonresponsibility recognizes that, in the realm of international arbitration, either state of nationality is internally competent to bring a claim on behalf of the dual national, but provides that neither can present her claim against another state of which she is a national.¹⁰⁸ In contrast, the doctrine of dominant and effective nationality provides that an individual’s claim may be presented against a state that also regards her as a citizen, as long as her connection to the claimant state predominates.¹⁰⁹ In a given situation, the competing doctrines may dictate opposite results.¹¹⁰

¹⁰³ *What Is British Citizenship?*, U.K. BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/britishcitizenship/aboutcitizenship> (last visited Nov. 12, 2011).

¹⁰⁴ *See Citizenship*, DEP’T FOREIGN AFF. & TRADE, <http://www.dfa.ie/home/index.aspx?id=267> (last visited Nov. 1, 2011) (Ir.) (explaining that applicants for Irish citizenship on the basis of an Irish grandparent must provide proof of direct lineage in the form of birth and death certificates); *Acquisition of Israeli Nationality*, ISR. MINISTRY FOREIGN AFF. (Aug. 20, 2001), http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2001/8/Acquisition%20of%20Israeli%20Nationality (explaining that the Law of Return grants every Jew the right to come to Israel and become an Israeli citizen); *Italian Dual Citizenship Requirements*, IT. DUAL CITIZENSHIP, <http://www.italiandualcitizenship.com> (last visited Nov. 1, 2011).

¹⁰⁵ *See, e.g., Citizenship*, *supra* note 104; *Naturalization for Spouses of U.S. Citizens*, U.S. CITIZENSHIP & IMMIG. SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=a0ffa3ac86aa3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=a0ffa3ac86aa3210VgnVCM100000b92ca60aRCRD> (last updated Aug. 17, 2011).

¹⁰⁶ *Claims of Dual Nationals in the Modern Era*, *supra* note 22, at 601.

¹⁰⁷ *See, e.g., id.* at 599.

¹⁰⁸ The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws art. 4, *opened for signature* Apr. 12, 1930, 179 U.N.T.S. 89 (“A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.”); *Claims of Dual Nationals in the Modern Era*, *supra* note 22, at 599. At the time of the Hague Convention, a minority of states, including the United States, proposed that “a qualification to the principle of absolute nonresponsibility be added precluding protection only if the individual were ‘habitually resident’ in the ‘defendant state.’” *Claims of Dual Nationals in the Modern Era*, *supra* note 22, at 599 n.10.

¹⁰⁹ *Claims of Dual Nationals in the Modern Era*, *supra* note 22, at 598–99.

¹¹⁰ *Id.* at 599. Under the doctrine of state nonresponsibility, a claim, perhaps otherwise justified, is “rejected *ipso facto* because the individual also happens to be a national of the respondent country.” *Id.* In contrast, the doctrine of dominant and effective nationality “favors allowing the individual an opportunity for

State nonresponsibility is the older, more traditional of the two doctrines, but its justifications “are anachronistic in the modern era and lead to the conclusion that the traditional doctrine should be rejected as a statement of international law.”¹¹¹ The preferred standard, reflecting the modern trend, favors the doctrine of dominant and effective nationality.¹¹²

A. *Development of the Doctrine of “Dominant and Effective” Nationality in Customary International Law*

Though the theory of effective nationality emerged as early as 1834,¹¹³ the law on treatment of dual nationals, at least those involved in international claims arbitration, prior to World War II was uncertain—some precedent favored nonresponsibility,¹¹⁴ while other precedent favored dominant and effective nationality.¹¹⁵ In 1955, two key decisions—the *Nottebohm Case* and the *Mergé Claim*—indicated a shift toward more uniform international adoption of dominant and effective nationality.¹¹⁶

The International Court of Justice (“ICJ”), in the *Nottebohm Case*, demonstrated the acceptance and approval of the search for an individual’s “real” and effective nationality based on the facts of the case.¹¹⁷ The ICJ recognized that international arbitrators have given their preference to the real and effective nationality of a person, and that different factors are taken into consideration, including the habitual residence of the individual concerned, his family ties, and his participation in public life.¹¹⁸ In the years since, several

redress if the facts indicate that he has a more substantial connection with the claimant state than with the respondent state.” *Id.* at 599–600.

¹¹¹ *Id.* at 602. For further discussion on problems with adopting the doctrine of nonresponsibility, see Iran–United States, Case No. A/18, 5 Iran–U.S. Cl. Trib. Rep. 251 (1984); *Claims of Dual Nationals in the Modern Era*, *supra* note 22, at 602–11.

¹¹² See, e.g., *Claims of Dual Nationals in the Modern Era*, *supra* note 22, at 624. For example, claims tribunals have repeatedly used the dominant and effective nationality analysis. *Id.*

¹¹³ *Id.* at 611 n.66 (discussing the historic invocation of effective nationality).

¹¹⁴ See, e.g., *Case No. A/18*, 5 Iran–U.S. Cl. Trib. Rep. 260 (discussing the 1930 Hague Convention’s adoption of nonresponsibility).

¹¹⁵ *Id.* at 262–66.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4, 22 (Apr. 6). In *Nottebohm*, the ICJ examined the authenticity of the claimant’s naturalization. The ICJ held that *Nottebohm* had sought naturalization “with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations . . . and exercising the rights pertaining to the status thus acquired.” *Id.* at 26. There, “[t]he Court invoked the theory of nationality to declare the claim brought by the

commentators have observed that “one can only satisfy the *Nottebohm* standards of connections with a *single* nation.”¹¹⁹ In addition to showing the ICJ’s interest in searching for the effective nationality of dual nationals, *Nottebohm* shows an application of the doctrine in a context different from those of the claims tribunals in which issues of dual nationality typically arise.

In that same year, the *Mergé Claim* gave the principal statement of the doctrine of dominant and effective nationality.¹²⁰ There, the Italian–U.S. Conciliation Commission “looked to general principles of international law for resolution to the issue of dual nationality,”¹²¹ finding that “the sovereign equality of States . . . must yield before the principle of effective nationality whenever such nationality is that of the claiming State.”¹²² The commission established considerations by which an individual’s nationality would be evaluated, including “habitual residence, . . . [t]he conduct of the individual in his economic, social, political, civic and family life, as well as the closer and more effective bond with one of the two States.”¹²³ The commission applied this same “link” analysis in several other similar cases involving dual nationals,¹²⁴ as did the Franco–Italian Conciliation Commission during the late 1950s.¹²⁵

The dominant and effective nationality approach—articulated in *Nottebohm*, *Mergé*, and subsequent cases—embodies the two fundamental principles that bear on the contemporary view of a person’s nationality:

First, the concept of nationality embodies more than a tenuous legal bond asserted by municipal law. Nationality, according to the

Government of Liechtenstein against the Government of Guatemala inadmissible.” *Claims of Dual Nationals in the Modern Era*, *supra* note 22, at 615 n.93.

¹¹⁹ *Claims of Dual Nationals in the Modern Era*, *supra* note 22, at 616, 616 n.97.

¹²⁰ *Id.* at 611. There:

Mrs. Mergé was an American citizen by birth and an Italian citizen through marriage. The Commission held that since Mrs. Mergé did not reside habitually in the United States and the interests and the permanent professional life of her husband were established elsewhere, she could not be regarded to be dominantly a U.S. national within the meaning and for the purpose of [the relevant Treaty establishing the Commission].

Id. at 612 n.70; *accord* Mergé Case (U.S. v. It.), 14 R.I.A.A. 236 (It.–U.S. Conciliation Comm’n 1955).

¹²¹ *Claims of Dual Nationals in the Modern Era*, *supra* note 22, at 611–12.

¹²² *Mergé Case*, 14 R.I.A.A. at 247.

¹²³ *Id.*

¹²⁴ Iran–United States, Case No. A/18, 5 Iran–U.S. Cl. Trib. Rep. 251, 263 (1984). Following the *Mergé Claim*, “the Conciliation Commission admitted 11 of the 52 claimants with dual nationality.” *Claims of Dual Nationals in the Modern Era*, *supra* note 22, at 612 n.71.

¹²⁵ *Case No. A/18*, 5 Iran–U.S. Cl. Trib. Rep. at 263.

International Court of Justice [in *Nottebohm*], is a “legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.” It is, by nature, incapable of division between two or more states. Second, nationality is a product of personal choice and action. The conduct of the individual furnishes the only sound juridical foundation for recognition of a single nationality.¹²⁶

In the years following *Nottebohm* and *Mergé*, customary international law has dictated that arbitral tribunals tasked with resolving the conflict of dual nationality look to those factors indicating a “genuine link” to one country more than the other.¹²⁷

B. Contributions of the Iran–United States Claims Tribunal to the Doctrine of Dominant and Effective Nationality

The most recent, and perhaps most significant, example of a modern tribunal using this approach is that of the Iran–United States Claims Tribunal (“Claims Tribunal”), which was established as a direct result of the Islamic Revolution and resolution to the Iran Hostage Crisis.¹²⁸ The Islamic Revolution, culminating with the proclamation of the Islamic Republic of Iran in February 1979, disrupted many American businesses involved in projects within Iran.¹²⁹ As the revolution advanced, contracts “with various United States business interests were terminated . . . assets in Iran were confiscated or abandoned . . . [and] virtually all of the Americans who had been living in Iran departed . . . frequently [leaving] personal belongings and important documents behind.”¹³⁰ Events reached a climax on November 4, 1979, when Iranian protestors stormed the U.S. embassy in Tehran, taking embassy personnel hostage.¹³¹ In response, “President Jimmy Carter issued . . . a series of orders freezing all Iranian assets subject to the jurisdiction of the United

¹²⁶ *Claims of Dual Nationals in the Modern Era*, *supra* note 22, at 613 (quoting *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4, 23 (Apr. 6)).

¹²⁷ *Id.* at 613–14; *see also* WAYNE MAPP, *THE IRAN–UNITED STATES CLAIMS TRIBUNAL: THE FIRST TEN YEARS, 1981–1991*, at 62–69 (1993); David J. Bederman, *Nationality of Individual Claimants Before the Iran–United States Claims Tribunal*, 42 INT’L & COMP. L.Q. 119, 124 n.32 (1993).

¹²⁸ *See, e.g.*, BEDERMAN, *supra* note 28, at 253.

¹²⁹ CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN–UNITED STATES CLAIMS TRIBUNAL* 4 (1998).

¹³⁰ *Id.*

¹³¹ *Id.*

States.”¹³² “American individuals, companies and banks that had suffered losses in Iran [then] rushed into court to obtain judicial attachments of Iranian property in the United States.”¹³³ Generally, these lawsuits were unable to advance because “the United States Department of Justice requested that no action be taken pending resolution of the hostage crisis.”¹³⁴

The hostage crisis dragged on for 444 days, until Iran and the United States reached the settlement agreement that came to be known as the “Algiers Accords.”¹³⁵ As part of the Algiers Accords, the two governments agreed to “establish an arbitral body—the Iran–United States Claims Tribunal— . . . to hear and adjudicate claims by United States nationals against Iran, claims by Iranian nationals against the United States Government, and those between the two Governments.”¹³⁶

1. *The Dominant and Effective Test*

The question of how to treat dual nationals created controversy because the Algiers Accords provided jurisdiction only for claims by U.S. nationals against Iran or for Iranian nationals against the United States; the Accords were silent as to treatment of Iranian–U.S. dual nationals.¹³⁷ The Claims Tribunal (sitting in full) ultimately invoked the doctrine of dominant and effective nationality, holding in *Case No. A/18* (“*A/18 Decision*”) that the Claims Tribunal had jurisdiction over claims against Iran by Iranian–U.S. dual nationals “when the dominant and effective nationality of the claimant during the relevant period . . . was that of the United States.”¹³⁸ In its opinion, the Claims Tribunal

¹³² *Id.* at 5.

¹³³ *Id.*

¹³⁴ *Id.* at 6.

¹³⁵ *Id.* at 6–7. As part of the agreement, \$1 billion in unfrozen Iranian assets was “retained in a special ‘Security Account’ as a fund for payment of awards by the Tribunal to American claimants.” *Id.* at 8. In addition, the Algiers Accords “provided for the release of the hostages in return for a series of actions and undertakings by the United States,” including the release of “approximately \$8.1 billion held by the New York Federal Reserve Bank and by overseas branches of United States banks.” *Id.* at 7. The United States “also waived any right to proceed further, whether before the International Court of Justice or elsewhere, in respect of the hostages.” *Id.* at 8.

¹³⁶ *Id.*

¹³⁷ *Id.* at 32 (“Iran consider[ed] persons who are nationals of Iran and claiming to possess American nationality to be barred from bringing claims against Iran before the Tribunal; the United States [took] the contrary view.”).

¹³⁸ Iran–United States, Case No. A/18, 5 Iran–U.S. Cl. Trib. Rep. 251, 265 (1984); BROWER & BRUESCHKE, *supra* note 129, at 32. The Full Tribunal “adopted this rule rather than the traditional doctrine of ‘nonresponsibility of states’ asserted by Iran.” *Claims of Dual Nationals in the Modern Era*, *supra* note 22, at 599.

explicitly rejected the doctrine of nonresponsibility.¹³⁹ The Claims Tribunal echoed both *Nottebohm* and *Mergé*, stating that “[i]n determining the dominant and effective nationality, [it would] consider all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment.”¹⁴⁰

2. The “Relevant Period”

The Claims Tribunal’s *A/18 Decision* noted that there is a “relevant period” to consider in making the determination of an individual’s dominant and effective nationality.¹⁴¹ A literal reading of the *A/18 Decision* suggests that the relevant period is only “the time between the date the claim arose and the signing of the Claims Settlement Declaration”;¹⁴² but in practice, the Claims Tribunal’s chambers typically adopted a wider notion of *A/18 Decision*’s “relevant period.”¹⁴³ In *Malek v. Iran*, for instance, the claimant, who was born with Iranian citizenship, left Iran at age seventeen in 1958, lived and worked in the United States from 1966 onward, and became a U.S. permanent resident in 1972 before finally becoming a naturalized U.S. citizen in November 1980.¹⁴⁴ Because his injuries stemmed from the Islamic Revolution in 1979, the claim arose prior to his naturalization as a U.S. citizen.¹⁴⁵ Yet in *Malek*, the Claims Tribunal interpreted the *A/18 Decision* as giving a license to look at “the entire life of the [c]laimant, from birth, and all the factors which, during this span of time, evidence the reality and sincerity of the choice of national allegiance” made by the claimant and found that the claimant’s dominant and effective nationality was that of the United States during the relevant period.¹⁴⁶ The

¹³⁹ *Case No. A/18, 5 Iran–U.S. Cl. Trib. Rep. at 262–63.* The Full Tribunal rejected the 1930 Hague Convention’s adoption of the nonresponsibility doctrine because it was “more than 50 years old and found in a treaty to which only 20 States [were] parties.” *Id.* at 260. In adopting the dominant and effective nationality approach, the Full Tribunal recognized that “great changes have occurred since then in the concept of diplomatic protection.” *Id.* at 260–61. For discussion of the nonresponsibility doctrine, see *supra* Part II.A.

¹⁴⁰ *Case No. A/18, at 5 Iran–U.S. Cl. Trib. Rep. at 265 (1984); see also* Bederman, *supra* note 127, at 125; *supra* Part II.A. For a longer list of specific factors considered by the individual chambers of the tribunal in subsequent cases, see BROWER & BRUESCHKE, *supra* note 129, at 34–35.

¹⁴¹ Bederman, *supra* note 127, at 125.

¹⁴² *Id.* at 125–26.

¹⁴³ *Id.* at 127–28.

¹⁴⁴ *Malek v. Islamic Republic of Iran, 19 Iran–U.S. Cl. Trib. Rep. 48, 49–50 (1988).*

¹⁴⁵ *Id.* at 52.

¹⁴⁶ *Id.* at 51, 55. The tribunal gave “little weight to a claimant’s activities *after* January 1981.” Bederman, *supra* note 127, at 128 (emphasis added).

Claims Tribunal followed the same approach in other cases for claimants similarly situated.¹⁴⁷

A commonly recurring factual setting faced by the Claims Tribunal would involve “the claim of an American-born woman who had acquired Iranian nationality involuntarily through the operation of Iranian marriage law.”¹⁴⁸ In one such case, *Perry-Rohani v. Iran*, the claimant would probably have been considered a dominant and effective American under a literal reading of the *A/18 Decision*’s timing requirement, “by virtue of her return to the United States in 1978, well before her claim arose.”¹⁴⁹ But there, the Claims Tribunal “nonetheless held that Ms. Perry’s entire personal history suggested that she had decided to [center] her life in Iran and that she had lost her cultural ties to the United States.”¹⁵⁰

Despite the body of cases in which the Claims Tribunal examined a claimant’s entire life in determining her dominant and effective nationality, there was, at some times, controversy.¹⁵¹ The American arbitrator in *Perry-Rohani* criticized the tribunal for focusing on “a temporary interlude in [the claimant’s] life that ended, clearly and decisively, in August 1978, well before the relevant period.”¹⁵² And of course critics of examining a claimant’s entire life might point to a more literal reading of the *A/18 Decision*’s “relevant period” discussion.¹⁵³ But the majority of the Claims Tribunal’s cases after the *A/18 Decision* seem to firmly establish that a claimant’s entire lifetime should be considered the “relevant period” on which dominant nationality is earned.

3. Procedural Timing

In the aftermath of the Claims Tribunal’s *A/18 Decision*, the individual chambers of the tribunal generally addressed the question of a dual national claimant’s dominant and effective nationality as “a separate preliminary issue,” before hearing the merits of the claim.¹⁵⁴ In these proceedings, the burden of

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Bederman, *supra* note 127, at 128; *Perry-Rohani v. Iran*, 22 Iran–U.S. Cl. Trib. Rep. 194 (1989).

¹⁵⁰ Bederman, *supra* note 127, at 128, 128 n.58.

¹⁵¹ *Id.* at 128.

¹⁵² *Perry-Rohani*, 22 Iran–U.S. Cl. Trib. Rep. at 202 (Allison, Arb., dissenting); Bederman, *supra* note 127, at 128.

¹⁵³ See Bederman, *supra* note 127, at 125–26.

¹⁵⁴ BROWER & BRUESCHKE, *supra* note 129, at 33. Such procedural practices were put in place “in the interests of efficiency and conservation of Tribunal and party resources.” *Id.*

proof was “heavily placed on claimants to prove an eligible nationality.”¹⁵⁵ After initially deferring consideration of all dual national cases following the *A/18 Decision*, the Claims Tribunal decided in 1988 “to bifurcate the procedure by first deciding whether the Tribunal had jurisdiction in each claim [by determining the dominant and effective nationality of each claimant], and only then turning to the merits.”¹⁵⁶

4. *Significance: The Dominant and Effective Test Has Application to Other Contexts*

The Claims Tribunal’s adoption of the dominant and effective nationality approach “clearly reflected the growing trend to adopt the modern view of non-responsibility.”¹⁵⁷ However, the Claims Tribunal’s treatment of dual nationals should not be limited to application in arbitration claims. The *A/18 Decision* was grounded in preexisting customary international law of nationality and claims. The *A/18 Decision* may be seen as a codification of preexisting international custom, noting that “the relevant rule of international law . . . flows from the *dictum* of *Nottebohm*, the rule of real and effective nationality, and the search for ‘stronger factual ties between the person concerned and one of the States whose nationality is involved.’”¹⁵⁸ In their leading treatise on the Claims Tribunal, Charles Brower and Jason Brueschke suggest that the significant number of cases in which the Claims Tribunal applied the dominant and effective nationality test “certainly represent a large source of precedent on the subject, which should serve as useful examples *in other contexts*.”¹⁵⁹

III. USE OF THE DOCTRINE IN THE TWENTY-FIRST CENTURY FIGHT ON TERRORISM

One of the “other contexts” in which use of the doctrine of dominant and effective nationality should prove valuable is with the West’s fight against terrorism. The U.S. government, in particular, has been challenged at times

¹⁵⁵ Bederman, *supra* note 127, at 135.

¹⁵⁶ *Id.* at 126.

¹⁵⁷ BROWER & BRUESCHKE, *supra* note 129, at 320–21 (“It is significant that the Claims Tribunal, as the international tribunal most recently to address the issue of dual nationals in arbitration claims, adopted the dominant and effective nationality approach.”). For further reading on the Claims Tribunal’s approach, as well as a summary of preexisting customary international law on which the Claims Tribunal relied, see MAPP, *supra* note 127, at 73–81.

¹⁵⁸ Iran–United States, Case No. A/18, 5 Iran–U.S. Cl. Trib. Rep. 251, 265 (1984).

¹⁵⁹ BROWER & BRUESCHKE, *supra* note 129, at 321 (emphasis added).

over the past decade to find legal support for its targeting of, detention of, and adjudication practices with respect to terror suspects, particularly those who hold U.S. citizenship.¹⁶⁰ Faced with a growing number of homegrown terrorist suspects, many of whom hold dual nationality, the U.S. government should use the doctrine of dominant and effective nationality to its benefit in distinguishing dual nationals who hold dominant foreign citizenship from those who, in fact, hold dominant U.S. citizenship.

Part III.A establishes that customary international law is, in fact, incorporated into domestic U.S. law. Part III.B demonstrates the need and opportunity for the United States to invoke the doctrine of dominant and effective nationality in dealing with a growing homegrown terrorist threat. Part III.C briefly reflects on the doctrine's utility for other Western nations, who are engaged in combating homegrown terrorist threats of their own. Finally, Part III.D examines two substantial dilemmas that domestic courts are likely to face, and suggests an appropriate resolution to each.

A. *Incorporation of Customary International Law in U.S. Domestic Law*

More than a century ago, the U.S. Supreme Court proclaimed that “[i]nternational law is part of our law.”¹⁶¹ In *The Paquete Habana*, the Court was asked to determine whether two Cuban fishing boats, captured by U.S. naval forces in the Spanish–American War and condemned as “prizes” of war, were immune from capture under customary international law.¹⁶² The Court accepted the premise that “where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the

¹⁶⁰ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 536–37 (2004) (“[I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process.”); Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1, 3 (2006) (“The Bush administration has claimed the authority to detain American citizens indefinitely as enemy combatants without warrants, grand jury indictments, or trial by jury and proof beyond a reasonable doubt. . . . [T]hese actions are an assault on the Constitution.”); Mary Ellen O’Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 863–64 (2009) (arguing that it is unlawful to use targeting killings against terrorism suspects who are not fighting in a zone of hostilities and instead arguing that governments must arrest suspects according to international human rights law); *ACLU Statement on Killing of Anwar al-Aulaqi*, AM. CIV. LIBERTIES UNION (Sept. 30, 2011), <http://www.aclu.org/national-security/aclu-statement-killing-anwar-al-aulaqi> (“As we’ve seen today, [the U.S. targeted killing program] is a program under which American citizens far from any battlefield can be executed by their own government without judicial process.”).

¹⁶¹ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

¹⁶² *Id.* at 678.

customs and usages of civilized nations.”¹⁶³ Finding significant evidence of international custom as support, the Court ruled against the U.S. government in holding that the capture was unlawful.¹⁶⁴ While *The Paquete Habana* is the Court’s most well-regarded proclamation of customary international law’s place in domestic courts, several decisions have suggested the same.¹⁶⁵

The Supreme Court has reaffirmed, as recently as 2004, the proposition that customary international law is incorporated into U.S. domestic law.¹⁶⁶ In *Sosa v. Alvarez-Machain*, the Court held firmly that “[i]t would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.”¹⁶⁷ There, the Court noted that although it “would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations, nothing Congress has done is a reason for us to shut the door to the law of nations entirely.”¹⁶⁸

In *The Paquete Habana*, the Supreme Court noted that it was “the general policy of the government to conduct the war in accordance with the principles of international law,”¹⁶⁹ seemingly giving it the muster necessary to effectively trump an executive decision with customary international law. Similarly, the Obama Administration has repeatedly stated its intent to comply with

¹⁶³ *Id.* at 700.

¹⁶⁴ *Id.* at 714.

¹⁶⁵ See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (“[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances.”); *The Nereide*, 13 U.S. 388, 423 (1815) (Marshall, C.J.) (“[T]he Court is bound by the law of nations which is a part of the law of the land.”).

¹⁶⁶ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”).

¹⁶⁷ *Id.* at 730.

¹⁶⁸ *Id.* at 731. However, “[i]t is enough to say that Congress may do that at any time (explicitly, or implicitly by treaties or statutes that occupy the field), just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.” *Id.* The Authorization of Use of Military Force Act of 2001, passed in response to the attacks of September 11, 2001, did broaden the president’s powers and ability to fight al Qaeda; but despite the recent ruling of a three-judge panel of a federal circuit court in *Al-Bihani*, the Act probably does not represent an attempt by Congress to exclude international law from binding on the Act, as may have been contemplated by the Court in *Sosa*. See *infra* Part III.A.1.

¹⁶⁹ *The Paquete Habana*, 175 U.S. 677, 712 (1900). As evidence of this “general policy,” the Court cited a proclamation issued by the President at the outset of the war, declaring that the United States would institute and maintain its blockade of Cuba “in pursuance of the laws of the United States, and the law of nations.” *Id.* Another Presidential proclamation contained the recital: “It being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice.” *Id.*

principles of international law.¹⁷⁰ President Barack Obama himself, in his Nobel Lecture, said, “I have reaffirmed America’s commitment to abide by the Geneva Conventions. We lose ourselves when we compromise the very ideals that we fight to defend.”¹⁷¹ As was the case with the McKinley Administration during the Spanish–American War, this presidential administration has made clear its general policy to conduct wars in accordance with the principles of international law.

1. Al-Bihani and the 2001 Authorization for the Use of Military Force as a Possible Challenge to the Incorporation of International Law into Domestic Law

Despite established precedent that international law is incorporated into U.S. law, there have been recent challenges. On January 5, 2010, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit released a decision in which it claims that the war powers granted to the President by the Authorization for Use of Military Force (“AUMF”),¹⁷² which empowered the President to respond to the attacks of September 11, 2001, are not limited even by international laws of war.¹⁷³ In that case, Al-Bihani, a Yemeni citizen who had been captured in 2002 and detained since that time, challenged his detention with a petition for habeas corpus.¹⁷⁴ The three-judge panel of the D.C. Circuit Court of Appeals upheld a federal district court’s denial of Al-Bihani’s release.¹⁷⁵ The court stated that “[t]here is no indication in the AUMF, the Detainee Treatment Act of 2005 . . . , or [Military Commissions Act] of 2006 or 2009, that Congress intended the international laws of war to act as extra-textual limiting principles for the President’s war

¹⁷⁰ See, e.g., Harold Hongju Koh, Legal Adviser, Dep’t of State, The Obama Administration and International Law, Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm>. In his speech to the American Society of International Law, Koh remarked that the “[Obama] Administration has pursued principled engagement with the [International Criminal Court] and the Human Rights Council, and has reaffirmed its commitment to international law with respect to all three aspects of the armed conflicts in which we find ourselves: detention, targeting and prosecution.” *Id.*

¹⁷¹ President Barack Obama, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009), <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>.

¹⁷² Authorization for Use of Military Force Act of 2001, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (reprinted at 50 U.S.C. § 1541).

¹⁷³ *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011); see also John Schwartz, *Court Backs War Powers over Rights of Detainees*, N.Y. TIMES, Jan. 6, 2010, at A12.

¹⁷⁴ Schwartz, *supra* note 173.

¹⁷⁵ *Al-Bihani*, 590 F.3d at 881.

powers under the AUMF.”¹⁷⁶ The Supreme Court denied certiorari for the case on April 4, 2011.¹⁷⁷

Ultimately, it appears that the panel’s broad holding was erroneous. Although the AUMF and later legislation did not expressly state that the President should be bound by international treaties that have been ratified by the Senate, such as the Geneva Convention, they did not need to; Article VI of the Constitution clearly states that all treaties “shall be the supreme Law of the Land.”¹⁷⁸ One commentator stated that the court had “gone out of its way to poke a stick in the eye of the Supreme Court.”¹⁷⁹ Some commentators who are typically unenthusiastic for the incorporation of international law into domestic jurisprudence have stated that the court went too far in its *Al-Bihani* decision.¹⁸⁰

Perhaps most telling, Judge Williams, one of the three members of the *Al-Bihani* panel, pointed out that the majority’s conclusion that the AUMF and other statutes are not limited by the international laws of war is entirely inconsistent with the approach that the Supreme Court took in *Hamdi v. Rumsfeld*.¹⁸¹ In his concurring opinion, Williams suggests that the court’s broad pronouncements against incorporation of international law were unnecessary, noting that “[c]uriously, the majority’s dictum goes well beyond what even the *government* has argued in this case.”¹⁸²

2. *Though Not Overturned by the Supreme Court, Al-Bihani Still Does Not Preclude the U.S. Government’s Use of the Dominant and Effective Doctrine*

Even though the Supreme Court declined to review the panel decision in *Al-Bihani*, the U.S. government should still be free to use the doctrine of dominant and effective nationality in combating suspected terrorists. Two out

¹⁷⁶ *Id.* at 871 (citation omitted); *see also* Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190 (2009); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006); Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (2005).

¹⁷⁷ *Al-Bihani v. Obama*, 131 S. Ct. 1814 (2011), *denying cert. to Al-Bihani*, 590 F.3d at 866.

¹⁷⁸ Ilya Somin, *The Al Bihani Case and the Domestic Application of International Law*, VOLOKH CONSPIRACY (Jan. 5, 2010, 11:52 PM), <http://volokh.com/2010/01/05/the-al-bihani-case-and-the-domestic-application-of-international-law>; *see also* U.S. CONST. art. VI.

¹⁷⁹ Schwartz, *supra* note 173. The court’s decision represents an effort to expand government power even beyond the limits laid out in *Boumediene v. Bush*, 553 U.S. 723 (2007). Schwartz, *supra* note 173.

¹⁸⁰ *See, e.g.*, Somin, *supra* note 178.

¹⁸¹ *Al-Bihani*, 590 F.3d at 883 (Williams, J., concurring).

¹⁸² *Id.* at 885.

of the three judges on the panel held that the president's powers under the AUMF are not limited by "international laws of war."¹⁸³ The doctrine of dominant and effective nationality is not part of the "international laws of war"; rather, it stems from customary international law.¹⁸⁴ Therefore, the panel's statement was probably too narrow to reach the doctrine.

Moreover, the panel made no suggestion that Congress' enacting of the AUMF *precludes* the U.S. government from following international law standards if it should so choose. The use of the doctrine of dominant and effective nationality in dealing with suspects of terrorism-related offenses only works in the government's favor. Even if *Al-Bihani*'s proposition against incorporation of international law into domestic law were someday reviewed upheld, it would nonetheless behoove the U.S. government to push for application of the doctrine in situations where a defendant or a targeted individual held dual citizenship with the United States and another country. Such action would be perfectly legal under international law,¹⁸⁵ and may prove an invaluable tool in the government's "War on Terror" going forward.

B. The United States' Potential Use of the Doctrine of Dominant and Effective Nationality in Fighting an Increasing Homegrown Terrorist Threat

In recent years, the United States has seen a surge in homegrown terrorist threats and attempted attacks.¹⁸⁶ U.S. Attorney General Eric Holder noted in December 2010 "that 50 of the 126 people indicted in the United States on terror-related charges over the past two years were American citizens."¹⁸⁷ Holder continued to state the increased threat of homegrown terrorists facing the United States:

The threat has changed from simply worrying about foreigners coming here to worrying about people in the United States, American citizens—raised here, born here, and who, for whatever reason, have decided that they are going to become radicalized and take up arms against the nation in which they were born.¹⁸⁸

¹⁸³ *Id.* at 873 (majority opinion).

¹⁸⁴ *Id.* at 871.

¹⁸⁵ Provided, of course, that the underlying detention or targeting of the individual were itself allowable under international and U.S. law.

¹⁸⁶ Toni Johnson, *Threat of Homegrown Islamist Terrorism*, COUNCIL ON FOREIGN REL., http://www.cfr.org/publication/11509/threat_of_homegrown_islamist_terrorism.html (last updated Sept. 30, 2011).

¹⁸⁷ Earle & Soltis, *supra* note 4.

¹⁸⁸ *Id.*

A survey of indictments only scratches the surface of the United States' growing problem. In 2010 alone, the U.S. government charged, convicted, or sentenced more than sixty Americans, most of them labeled as "Muslim extremists," on terrorism-related offenses—many of which involved plots of violent attacks within the United States.¹⁸⁹ A noticeably high number of those charged were naturalized U.S. citizens,¹⁹⁰ and the figures for 2009 are staggeringly similar.¹⁹¹ Naturalized U.S. citizens charged in the past few years with terrorism-related offenses hail from Afghanistan,¹⁹² Australia,¹⁹³ Bosnia,¹⁹⁴ Dominican Republic,¹⁹⁵ Egypt,¹⁹⁶ Guyana,¹⁹⁷ Iran,¹⁹⁸ Jordan,¹⁹⁹

¹⁸⁹ *Criminal Proceedings: A Timeline of U.S. Terror Cases, Criminal Proceedings in 2010*, ANTI-DEFAMATION LEAGUE (Mar. 9, 2010), http://www.adl.org/main_Terrorism/american_muslim_extremists_criminal_proceedings.htm?Multi_page_sections=sHeading_2.

¹⁹⁰ *Id.*

¹⁹¹ *Criminal Proceedings: A Timeline of U.S. Terror Cases, Criminal Proceedings in 2009*, ANTI-DEFAMATION LEAGUE (Mar. 9, 2010), http://www.adl.org/main_Terrorism/american_muslim_extremists_criminal_proceedings.htm?Multi_page_sections=sHeading_3.

¹⁹² See, e.g., Jerry Markon, *Terror Defendant Says al-Qaeda Leaders Ordered Subway Attack*, WASH. POST, Apr. 24, 2010, at A4 (describing the case of Zarein Ahmedzay, a New York City cab driver, who pled guilty to charges that he plotted suicide attacks in "what authorities call one of the most serious terrorism plots on American soil since the Sept. 11, 2001, attacks"); *Virginia Man Charged with Threatening To Carry Out Attacks in D.C.*, ANTI-DEFAMATION LEAGUE (Dec. 16, 2010), http://www.adl.org/main_Terrorism/dc_attacks_threat.htm (describing the case of Awais Younis, a naturalized U.S. citizen who was arrested and charged with threatening to bomb high-traffic areas in Washington, D.C.).

¹⁹³ Benjamin Weiser, *2 Ex-Brooklyn Men Charged in Terror Plot*, N.Y. TIMES, May 1, 2010, at A16 (describing the case of Sabirhan Hasanoff, who was charged and indicted for conspiring "to modernize Al Qaeda by providing computer systems expertise").

¹⁹⁴ John Marzulli et al., *Queens Man Adis Medunjanin, Linked to Zazi NYC Terror Bomb Plot, Pleads Not Guilty*, N.Y. DAILY NEWS (Jan. 9, 2010), http://www.nydailynews.com/news/ny_crime/queens_man_adis_medunjanin_linked_zazi_nyc_terror_bomb_plot_pleads_guilty_article_1.193704 (describing the case of Adis Medunjanin, who was charged with spending "two months at a terrorist training camp in Pakistan and planning an attack against New York targets").

¹⁹⁵ Perry Chiamonte et al., *Bloodlust of NJ 'Jihadists'*, N.Y. POST (June 7, 2010, 3:28 AM), http://www.nypost.com/p/news/local/bloodlust_of_tjUWgKCSnGMpRDez9eUBXJ (describing the case of Carlos Eduardo Almonte, a Muslim convert, who was arrested in June 2010 while trying to leave the country, "allegedly en route to Somalia for training to kill Americans overseas—and back at home"). The criminal complaint alleged that Almonte boasted, "I'm gonna get a gun. . . . It's already enough that you don't worship Allah, so . . . that's a reason for you to die." *Id.* (internal quotations omitted).

¹⁹⁶ *Massachusetts Man Arrested for Attempting To Wage "Violent Jihad" Against America*, ANTI-DEFAMATION LEAGUE (Oct. 22, 2009), http://www.adl.org/main_Terrorism/tarek_mehanna_arrest.htm (describing the case of Tarek Mehanna, who was charged with "conspiring to provide material support to Al Qaeda").

¹⁹⁷ John Marzulli & Bill Hutchinson, *Guilty: Would-Be Terrorists Russell Defreitas, Abdul Kadir Face Life in Prison for JFK Bomb Plot*, N.Y. DAILY NEWS (Aug. 2, 2010), http://articles.nydailynews.com/2010-08-02/news/27071504_1_russell-defreitas-jfk-bomb-plot-jet-fuel (describing a case in which two men were convicted "of plotting to turn Kennedy Airport into a gargantuan fireball that would rival the 9/11 attacks").

Lebanon,²⁰⁰ Morocco,²⁰¹ Nicaragua,²⁰² Pakistan,²⁰³ Somalia,²⁰⁴ as well as Palestine.²⁰⁵

In the aftermath of Faisal Shahzad's failed car-bombing in Times Square, Senator Joseph Lieberman, head of the Homeland Security and Governmental Affairs Committee, told Fox News that he planned to introduce a bill that would amend current law "that bars American citizens from fighting for

¹⁹⁸ Associated Press, *52-Year-Old Iranian Widow Faces Terror Charges in New York City*, N.Y. DAILY NEWS (June 19, 2008, 6:58 AM) <http://www.nydailynews.com/news/crime/52-year-old-iranian-widow-faces-terror-charges-york-city-article-1.293912>.

¹⁹⁹ Brian Bennett, *How the U.S. Nabbed Alleged Terrorists in Toledo*, TIME (Feb. 21, 2006), <http://www.time.com/time/nation/article/0,8599,1161879,00.html>.

²⁰⁰ See, e.g., *Bolivia's Triborder Zone a Haven for Terror Funding*, WASH. TIMES (July 13, 2010), <http://www.washingtontimes.com/news/2010/jul/13/bolivia-triborder-zone-a-haven-for-terror-funding> (detailing the arrest of Moussa Ali Hamdan, a Lebanese-American accused of financing Hezbollah).

²⁰¹ Terry Frieden, *U.S. Citizen Pleads Guilty to Sending Funds to al Qaeda*, CNN (May 19, 2010), http://articles.cnn.com/2010-05-19/justice/missouri.al.qaeda.funding.plea_1_qaeda-united-arab-emirates-guilty (recounting Khalid Ouazzani's admission of "providing more than \$23,000 to al Qaeda, to which he had pledged an oath of allegiance in 2008").

²⁰² *Baltimore Man Arrested for Attempting To Bomb Army Recruiting Center*, ANTI-DEFAMATION LEAGUE (Dec. 9, 2010), http://www.adl.org/main_Terrorism/Antonio_Martinez.htm; Maria Glod, *Bomb Plot Case May Be Harbinger: Defense Sees 'Sting'*, WASH. POST, Dec. 14, 2010, at B1; Mara Gay, *Who Is Accused Baltimore Terrorist Antonio Martinez?*, AOL NEWS (Dec. 9, 2010, 2:32 PM), <http://www.aolnews.com/2010/12/09/who-is-accused-baltimore-terrorist-antonio-martinez> (discussing Antonio Martinez, a Muslim convert who was arrested and charged in December 2010 with attempting to blow up a military recruiting station in Maryland).

²⁰³ See, e.g., Aaron Katersky & Richard Esposito, *Faisal Shahzad: 'War With Muslims Has Just Begun'*, ABC NEWS (Oct. 5, 2010), <http://abcnews.go.com/Blotter/times-square-bomber-faisal-shahzad-sentenced-life/story?id=11802740> (describing the sentencing of Faisal Shahzad, the Pakistani-American convicted of attempting to detonate a car bomb in New York's Times Square); Kerry Willis et al., *Farooque Ahmed, Man Busted in Alleged Metro Bomb Plot, Wanted To Fight US Overseas, FBI Says*, N.Y. DAILY NEWS (Oct. 28, 2010), http://www.nydailynews.com/news/national/2010/10/28/2010-10-28_farooque_ahmed_man_busted_in_alleged_metro_bomb_plot_wanted_to_fight_us_overseas.html.

²⁰⁴ See, e.g., Jana Winter, *Portland Terror Suspect a Self-proclaimed Moral Authority Online*, FOX NEWS (Dec. 3, 2010), <http://www.foxnews.com/us/2010/12/03/oregon-alleged-tree-bomber-online-moral-authority> (describing the case of Mohamed Osman Mohamud, a Somali-born American teenager who was "accused of plotting to blow up a tree-lighting ceremony" in Oregon in December 2010); *The Road to Terror Training Camps Sometimes Begins in the U.S.*, CNN (Aug. 12, 2010, 2:43 PM), <http://news.blogs.cnn.com/2010/08/12/the-road-to-terror-training-camps-sometimes-begins-in-the-u-s> ("14 U.S.-born and naturalized citizens [were indicted in August 2010] . . . on charges of conspiring with a Somali terrorist organization affiliated with al Qaeda.").

²⁰⁵ *Arizona Man Charged with Lying About Alleged Hamas Fundraising*, ANTI-DEFAMATION LEAGUE (Aug. 26, 2008), http://www.adl.org/main_Terrorism/akram_musa_abdallah_charged.htm (describing the sentencing of Akram Musa Abdallah to eighteen months in prison for making false representations to FBI agents about his involvement in fund-raising activities for a Muslim charity accused of "funneling over \$12 million to individuals and organizations linked to Hamas").

foreign armies at the price of losing their citizenship”²⁰⁶ to extend to Americans who are *accused* of joining foreign terrorist organizations.²⁰⁷ If it were ever to become law, such legislation would allow the United States to strip American citizens accused of affiliating with foreign terrorist groups of their citizenship and try them in a military tribunal, in which the accused would retain fewer protections than does a U.S. citizen being tried in domestic courts.²⁰⁸ As a practical and constitutional matter, however, such a bill is unlikely to be passed within the United States.²⁰⁹

Insofar as the United States generally lacks the ability to unilaterally strip a dual national of her American citizenship, even if the U.S. government initially granted her U.S. citizenship through naturalization,²¹⁰ determination of her

²⁰⁶ Jordan Fabian, *Lieberman Wants To Strip Citizenship of Americans Who Join Foreign Terror Orgs.*, HILL (May 4, 2010, 3:46 PM), <http://thehill.com/blogs/blog-briefing-room/news/95967-lieberman-wants-to-strip-citizenship-of-americans-who-join-foreign-terror-orgs>; *Lieberman Unveils Bill To Strip U.S. Citizenship of Terror Suspects Arrested Abroad*, FOX NEWS (May 6, 2010), <http://www.foxnews.com/politics/2010/05/06/lieberman-unveils-strip-citizenship-terror-suspects-abroad>.

²⁰⁷ Fabian, *supra* note 206. Senator Lieberman stated on Fox News on May 4, 2010, “I think it’s time for us to look at whether we want to amend that law to apply it to American citizens who choose to become affiliated with foreign terrorist organizations, whether they should not also be deprived automatically of their citizenship and therefore be deprived of rights that come with that citizenship when they are apprehended and charged with a terrorist act.” *Id.*; see also Tony Karon et al., *Times Square Bomb Arrest Raises U.S. Security Questions*, TIME (May 5, 2010), <http://www.time.com/time/nation/article/0,8599,1987126,00.html>. However, Lieberman suggested that “it would be going too far to re-examine naturalized U.S. citizens from select countries like Pakistan in light of the Times Square bombing attempt.” *Bomb Suspect’s Citizenship Raises Questions About Naturalization Process*, FOX NEWS (May 4, 2010), <http://www.foxnews.com/politics/2010/05/04/times-square-suspects-citizenship-raises-questions-naturalization-process> (quoting Lieberman’s statement, “I wouldn’t want to single out a group”).

²⁰⁸ Fabian, *supra* note 206. This proposed legislation is different from the use of the doctrine of dominant and effective nationality as advocated in this Comment. First, although a dominant foreign citizen may be treated like a noncitizen for purposes of the court proceeding at hand, application of the doctrine does not “strip” an individual of their dual citizenship. Second, Senator Lieberman’s proposal, if adopted, would allow the government to strip a U.S. citizen of their citizenship *regardless* of whether they are a dual national; and if the accused were a dual national, their U.S. citizenship would be revoked irrespective of whether a court would have found them to have been a dominant U.S. citizen.

²⁰⁹ See, e.g., Steve Benen, *Lieberman’s Tenuous Understanding of Due Process*, WASH. MONTHLY (May 5, 2010), http://www.washingtonmonthly.com/archives/individual/2010_05/023652.php.

²¹⁰ *Schneider v. Rusk*, 377 U.S. 163 (1964). There, the Court was faced with a statute that allowed the United States to revoke the nationality of “a person who has become a national by naturalization” if that person had “a continuous residence for three years in the territory of a foreign state of which he was formerly a national.” *Id.* at 164. The Court rejected the statute, holding:

A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens [in the statute] drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance.

dominant and effective nationality remains ever important. The U.S. Department of State instructs, “[A] person naturalized as a U.S. citizen may not lose the citizenship of the country of birth. U.S. law does not . . . require a person to choose one citizenship or another.”²¹¹

In Shahzad’s case, for example, the press made much ado about Shahzad’s holding of U.S. citizenship while attempting an attack on U.S. soil.²¹² Yet upon his naturalization as a U.S. citizen in 2009,²¹³ Shahzad needed only to “swear allegiance” to the United States—neither the United States²¹⁴ nor Pakistan²¹⁵ required him to renounce his Pakistani citizenship when acquiring U.S. citizenship. At the time of his capture and trial, therefore, Shahzad held dual citizenship and the doctrine of dominant and effective nationality could have

Id. at 168–69. In another case, the Court held that a dual U.S.–Mexican national—who had been living in the United States from birth in 1922, moved to Mexico in 1942 “for the purpose of evading [compulsory] military service in [the U.S.] armed forces,” and returned to the United States only upon the conclusion of World War II—could not be stripped of his U.S. citizenship simply for having intentionally evaded the wartime draft. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 146 (1963) (explaining that upon return to the United States, a draft dodger’s subjection to criminal prosecution is penalty enough; intentional evasion of military service is not so egregious as to merit expatriation).

²¹¹ *US State Department Services Dual Nationality*, *supra* note 25; *see also Dual Citizenship*, NEWCITIZEN.US, <http://www.newcitizen.us/dual.html> (last visited Jan. 10, 2011). However, “a person who acquires a foreign citizenship by applying for it may lose U.S. citizenship [if the person applies] for the foreign citizenship voluntarily, by free choice, and with the intention to give up U.S. citizenship. Intent can be shown by the person’s statements or conduct.” *US State Department Services Dual Nationality*, *supra* note 25. Yet, absent explicit renunciation of her U.S. citizenship, the intent of a person who is naturalized in a foreign country to retain U.S. citizenship is presumed. *Advice About Possible Loss of U.S. Citizenship and Dual Nationality*, TRAVEL.STATE.GOV (Feb. 1, 2008), http://travel.state.gov/law/citizenship/citizenship_778.html.

²¹² *See, e.g.*, Josh Barbanel et al., *From New Citizen to Suspect in a Year*, WALL ST. J. (May 5, 2010), <http://online.wsj.com/article/SB10001424052748703866704575224451665380256.html>; Alison Gendar et al., *Faisal Shahzad, Times Sq. Bomb Suspect, Nabbed Within “Minutes” of Escape; 2 Held in Pakistan*, N.Y. DAILY NEWS (May 4, 2010), http://articles.nydailynews.com/2010-05-04/local/27063454_1_bomb-plot-bomb-materials-international-flight.

²¹³ Barbanel et al., *supra* note 212.

²¹⁴ Transcript of Faisal Shahzad’s Sentencing Hearing at 5, *United States v. Shahzad*, 10 Cr. 541 (S.D.N.Y. 2007), *available at* http://www.N.Y.post.com/p/news/local/manhattan/read_the_faisal_shahzad_transcript_zDoUXIGEMoqZMwzIRrkM. One portion of the transcript reads:

THE COURT: . . . Didn’t you swear allegiance to this country when you became an American citizen?

THE DEFENDANT: I did swear, but I did not mean it.

THE COURT: I see. You took a false oath?

THE DEFENDANT: Yes.

Id.; *see also US State Department Services Dual Nationality*, *supra* note 25 (“U.S. law does not . . . require a person [being naturalized as a U.S. citizen] to choose one citizenship or another.”).

²¹⁵ *Immigration Policy*, DIRECTORATE GEN. IMMIGR. & PASSPORTS, MINISTRY INTERIOR, GOV’T PAK., <http://www.dgip.gov.pk/files/Immigration.html> (last visited Nov. 12, 2011) (noting that the “[g]overnment of Pakistan has dual nationality arrangements with . . . 16 countries,” including the United States).

been applied. Although the United States arrested, tried, and sentenced Shahzad affording him the full protections of U.S. citizenship, it may not have been required to under customary international law (if the court were to hold, as a threshold determination, that Shahzad was a dominant and effective Pakistani national).

C. *The Need and Potential Use of the Doctrine by Foreign Nations*

The fight against homegrown terrorist threats is not confined to the United States. European nations, too, face an increased threat posed by their own nationals.²¹⁶ In March 2011, for example, a dual German–Yugoslavian citizen²¹⁷ opened fire on a U.S. military bus at Germany’s Frankfurt Airport, killing two U.S. airmen, after having been recently radicalized from spending time on local, radical Islamist websites.²¹⁸ In December 2010, Dutch authorities arrested twelve men of Somali origin whom officials believed were about to carry out a terrorist attack within the Netherlands; some of the twelve suspects held Dutch citizenship.²¹⁹ Earlier that month, a suicide bomber attacked shoppers in central Stockholm, Sweden,²²⁰ the bomber was an Iraqi-born Swedish national.²²¹ In October 2010, French police arrested twelve people in southern France for suspected trafficking of arms and explosives, allegedly in connection with al Qaeda,²²² and up to eight German Islamic

²¹⁶ For a report on Europe’s homegrown terrorism phenomenon, including a lengthy discussion on the motivations driving such extremists, see TOMAS PRECHT, DEN. MINISTRY OF JUST., HOME GROWN TERRORISM AND ISLAMIST RADICALISATION IN EUROPE: FROM CONVERSION TO TERRORISM (2007), available at www.justitsministeriet.dk/fileadmin/downloads/Forskning_og_dokumentation/Home_grown_terrorism_and_Is_lamist_radicalisation_in_Europe_-_an_assessment_of_influencing_factors_2_.pdf.

²¹⁷ The twenty-one-year-old man was originally from Kosovo, but held a passport from Yugoslavia that was issued before Kosovo’s declaration of independence from Serbia in 2008. *Two U.S. Airmen Killed in German Airport Shooting*, CNN (Mar. 3, 2011, 8:20 AM), <http://www.cnn.com/2011/WORLD/europe/03/02/germany.shooting/index.html>.

²¹⁸ *German Official: Airport Gunman a Muslim Who Wanted To Kill American Troops*, CNN (Mar. 3, 2011, 7:33 AM), <http://news.blogs.cnn.com/2011/03/03/german-official-airport-gunman-a-muslim-who-wanted-to-kill-american-troops>; *Two U.S. Airmen Killed in German Airport Shooting*, *supra* note 217.

²¹⁹ Per Nyberg, *Dutch Arrest 12 on Suspicion of Terrorism*, CNN (Dec. 25, 2010), <http://www.cnn.com/2010/WORLD/europe/12/25/netherlands.arrests/index.html>.

²²⁰ Ben Quinn, *Stockholm Explosions Leave One Dead and Two Injured*, GUARDIAN (Dec. 12, 2010, 12:26 AM), <http://www.guardian.co.uk/world/2010/dec/12/stockholm-sweden-bombs-explosions>.

²²¹ *Stockholm Suspect Taimour Abdulwahab al-Abdaly Profiled*, BBC NEWS (Dec. 13, 2010, 9:20 AM), <http://www.bbc.co.uk/news/uk-11981228>; see also Andrew Ward, *Sweden Reveals Home-Grown Terror Threat*, FIN. TIMES (Dec. 15, 2010, 6:26 PM), <http://www.ft.com/cms/s/0/35bfc826-0873-11e0-80d9-00144feabdc0.html#axzz1AkUhYXV7>.

²²² Ariel Zirulnick, *France Arrests 12 as Concerns Grow About “Homegrown” Terrorism*, CHRISTIAN SCI. MONITOR (Oct. 5, 2010), <http://www.csmonitor.com/World/terrorism-security/2010/1005/France-arrests-12-as-concerns-grow-about-homegrown-terrorism>. Zirulnick writes, “Western governments are concerned that

militants were killed in a U.S. strike in Pakistan.²²³ The most significant homegrown terror attack in Europe to date, which occurred on July 7, 2005, claimed the lives of fifty-six people (including the four bombers) and injured more than 700 others in a coordinated attack on London's subways;²²⁴ the bombers were British-born citizens of Pakistani descent.²²⁵

Europe, like the United States, has even been touched by the breadth of al-Aulaqi's influence. In March 2011, following the conviction of a former British Airways computer specialist for terrorism-related offenses, British politicians pressed internet giants Google and YouTube to remove all of al-Aulaqi's video content from their websites.²²⁶ Al-Aulaqi inspired the former British Airways employee to explore ways of staging attacks.²²⁷ In the aftermath of the March 2011 shooting of U.S. military at Frankfurt Airport, bloggers immediately began questioning whether al-Aulaqi inspired or had a direct hand in aiding the shooter, pointing out the similarities between this and other attacks from the past few years for which al-Aulaqi has been implicated.²²⁸

Al Qaeda is turning to sympathizers who hold citizenship in Western countries to assist Al Qaeda operatives in carrying out terrorist attacks in Western Europe." *Id.*

²²³ David Crossland, 'Germany Must Do More to Combat Homegrown Terrorism,' SPIEGEL (Oct. 6, 2010), <http://www.spiegel.de/international/world/0,1518,721584,00.html>.

²²⁴ *London on Edge*, CBC NEWS, http://www.cbc.ca/news/background/london_bombing (last updated July 7, 2006). British officials say that Britain continues to face a growing homegrown terrorist threat. Carole Erskine, *Warning over Threat of Home-Grown Terrorism*, SKY NEWS (Aug. 27, 2010, 10:33 AM), <http://news.sky.com/skynews/Home/Politics/Terror-Britain-Faces-Increasing-Threat-From-Home-Grown-Terrorists-Warn-Rusi-Experts/Article/201008415707485>.

²²⁵ *Family Who 7/7 Bomber Khan Left Behind*, YORKSHIRE POST (May 10, 2007), <http://www.yorkshirepost.co.uk/news/Family-who-77-bomber-Khan.2867933.jp>; Mark Townsend, *Leak Reveals Official Story of London Bombings*, GUARDIAN (Apr. 8, 2006), <http://www.guardian.co.uk/uk/2006/apr/09/july7.uksecurity>.

²²⁶ *UK Politicians Press Google/YouTube To Remove al-Awlaki Videos AGAIN*, UN:DHIMMI (Mar. 1, 2011), <http://undhimmi.com/2011/03/01/uk-politicians-press-googleyoutube-to-remove-al-awlaki-videos-again>. Interestingly, this article points out that "Google/YouTube are, it seems, able to ensure that virtually no hard core pornography or significant portions of copyrighted Big Media/Hollywood content is show by their site. Yet when it comes to violent Jihadists inciting murder . . . there's simply insufficient incentive . . . to act in anything other than the most half-hearted and token manner." *Id.* Part of this lack of incentive stems from the fact that Google and YouTube face an ever-present threat of legal action from Hollywood producers and producers of pornography, while terrorists who use the internet are more than happy to allow these websites to provide free hosting and to distribute their materials worldwide. *Id.*

²²⁷ *Id.*

²²⁸ See, e.g., Robert, *Frankfurt Airport Attack "Fits in the Category of 'Armed Jihadist Assault' Similar to What . . . al-Awlaki Called for,"* JIHAD WATCH (Mar. 2, 2011, 9:26 AM), <http://www.jihadwatch.org/2011/03/frankfurt-airport-attack-fits-in-the-category-of-armed-jihadist-assault-similar-to-what-american-bor.html>.

Of course, not every nation embraces the idea of dual citizenship,²²⁹ and each state is free to allow or treat dual nationality as it pleases.²³⁰ But inevitably, European law enforcement officials will arrest and charge naturalized citizens with homegrown terrorism-related offenses. In hearing such cases, a nation's domestic courts should, to establish the relevant rights and protections owed to the suspect, determine the dominant and effective nationality of the accused before proceeding to the merits of the case.

D. Difficulties That May Arise in Applying the Doctrine of Dominant and Effective Nationality to Other Dual Citizen Terrorists

While the body of precedent in customary international law provides some guidance on issues involving dual citizenship, it leaves ever more questions open. Determining al-Aulaqi's dominant and effective nationality involves a complex analysis;²³¹ but in many ways, compared with situations that are likely to arise in the near future, his illustrates the "easy" case.

For example, al-Aulaqi, for the most part, spent his entire life residing either in Yemen or the United States, and his cultural and familial ties lay, in great part, either in Yemen or the United States.²³² But one can imagine the case of a dual national whose habitual residence or cultural ties lay with a third state, of which the individual is not a citizen. In applying the doctrine of dominant and effective nationality, a tribunal must make the ultimate determination of dominant nationality by choosing from only the countries of which the individual is a citizen. Part III.D.1 examines how the tribunal should treat an individual's significant ties with a third state.

As another example, consider that al-Aulaqi was born holding dual citizenship, and was not required to go through any naturalization process. Even so, he spent enough time in the United States and in Yemen to become culturally familiar with the practices and societies of both countries. But one can imagine the case of a recently naturalized citizen who has every intention to fully integrate into her new nation of citizenship, but has not yet had

²²⁹ See, e.g., James Butty, *US, Liberians Launch Dual Citizenship Petition Drive*, VOICE AM. NEWS (Jan. 5, 2011), <http://www.voanews.com/english/news/africa/Butty-Liberia-Dual-Citizenship-Petition-Drive-Kamara-05january11-112918084.html> (discussing a petition to urge the current Liberian government to make dual citizenship recognizable under Liberian law).

²³⁰ *US State Department Services Dual Nationality*, *supra* note 25 ("Each country has its own citizenship laws based on its own policy.").

²³¹ See *infra* Part IV.

²³² See *infra* Part IV.B.

sufficient time to do so. Part III.D.2 considers how, under the doctrine, naturalized citizens may be treated differently from individuals who received dual nationality at birth.

*1. A Dual National's Ties to a State with Which She Does Not Hold
Citizenship*

The vast majority of precedential cases involve a dispute in which the individual resided in one of the countries of her citizenship.²³³ And in the al-Aulaqi matter, with the exception of a brief stint in England from 2002 to 2004, al-Aulaqi continuously resided either in the United States or in Yemen.²³⁴ But what if, rather than fleeing to Yemen in 2004, al-Aulaqi had remained in England after leaving the United States? Had al-Aulaqi remained in England from 2002 until his death, how should the location of his residence have played into the determination of his dominant and effective citizenship? While not itself dispositive, the “habitual residence” factor appears generally to be heavily weighted in the determination of an individual’s dominant and effective nationality (particularly because the place in which an individual lives has a direct effect on her ability to integrate into a particular nation’s society, participate in public life, etc.). Yet customary international law provides little guidance on exactly how to treat an individual whose habitual residence is in neither of her two states of citizenship.

A fairly mechanical test is used to determine an individual’s country of “habitual residence.”²³⁵ However, because a tribunal must determine a dual citizen’s dominant citizenship by choosing between her states of citizenship, a fundamental dilemma arises when an individual resides in a third state. After all, the consideration of “habitual residence” leaves little room for a tribunal to exercise subjectivity.²³⁶ If a dual national’s habitual residence lies in a country of which she is not a citizen, a tribunal has two options: (1) it may ignore the third-state residence entirely, or (2) it may try to reconcile the third-state residence by inferring that its location or society has allowed the individual to keep closer ties with one of her nations of citizenship.

It seems that a tribunal would be in error to entirely ignore an individual’s third-state residency. Indeed, the U.S. Department of State’s website explains

²³³ Bederman, *supra* note 127, at 126.

²³⁴ *See infra* Part IV.B.

²³⁵ *See infra* Part IV.C.1.

²³⁶ *See infra* Part IV.C.1.

that “[t]he country where a dual national is located generally has a stronger claim to that person’s allegiance.”²³⁷ The doctrine of dominant and effective nationality aims to determine an individual’s primary national allegiance; if an individual’s third-state residence helps identify allegiance to a particular nation or a particular region, then a tribunal should be able to consider it in determining an individual’s dominant nationality.²³⁸

This second option, however, carries its own set of difficulties. For argument’s sake, suppose that instead of returning to Yemen in 2004, al-Aulaqi remained in England from 2002 until his death. If a tribunal were to view this third state as somewhat of an extension of one of al-Aulaqi’s two states of citizenship, then a court reasonably might find that England is socially, culturally, politically, and economically more similar to the United States than it is to Yemen. Should that determination, then, weigh in favor of a finding that al-Aulaqi would be considered a dominant national of the United States? Suppose, instead, that al-Aulaqi left the United States for Saudi Arabia in 2002, and remained there until his death. Should a tribunal find that because Saudi Arabia is more culturally and politically tied to Yemen than the United States, al-Aulaqi’s residence in Saudi Arabia favors a finding that he was a dominant national of Yemen?

This hypothetical can become even more muddled. Imagine that al-Aulaqi moved to China, which is easily relatable to neither the United States nor Yemen, in 2002 and remained there until his death. Or imagine a case involving a dual national of the United States and Canada, two nations that are fairly geographically and culturally similar, whose habitual residence is in a third state. The difficulties that face a tribunal tasked with determining how to treat third-state residency quickly become obvious.

Although questions still abound, the Claims Tribunal did attempt to reach this issue. One case before the Claims Tribunal, *Benedix v. Islamic Republic of Iran*, involved a claimant who resided in neither the United States nor Iran during the “relevant period.”²³⁹ Iranian by birth, Mrs. Benedix married a U.S. national in 1954.²⁴⁰ The couple “lived in the United States for three years, then

²³⁷ *US State Department Services Dual Nationality*, *supra* note 25.

²³⁸ The problem inherent to this approach, however, is that the doctrine, it would seem, becomes ineffective when an individual’s nation of “primary allegiance” (which, frequently, is also her nation of habitual residence) lies with a nation of which she cannot, by definition, be considered a “dominant and effective citizen.”

²³⁹ *Benedix v. Islamic Republic of Iran*, 21 Iran–U.S. Cl. Trib. Rep. 20 (1989).

²⁴⁰ *Id.*

lived in Iran for twenty years until 1978. Thereafter the couple lived in the United Kingdom.”²⁴¹ The Claims Tribunal noted:

At present [the claimant] apparently lives in London, England, where she and her husband chose to reside upon leaving Iran in 1978. Evidence provided by the Claimant . . . [is] insufficient to support a finding that Mrs. Benedix’s links to the United States were dominant during the relevant period between the time when her Claims allegedly arose in 1979 and [the signing of the Claims Settlement Declaration in 1981].²⁴²

In *Benedix*, “the decisive fact *must* have been the couple’s choice not to return to the United States.”²⁴³ Yet at the same time, it can be said that the claimant, similarly, chose not to remain in Iran. *Benedix* is rendered even less useful because the chamber of the Claims Tribunal that heard the case adopted a literal interpretation of the *A/18 Decision* in determining the relevant period of inquiry (and, in turn, found that the claimant had lived in England throughout the relevant period).²⁴⁴ In practice, the chambers typically considered a claimant’s entire lifetime as part of the relevant period.²⁴⁵ Thus, *Benedix* is of limited use in guiding contemporary application of the doctrine of the dominant and effective nationality.

Several other cases show that the Claims Tribunal held claimants having contacts with third countries to a high standard of proof of attachment.²⁴⁶ For cases heard by the Claims Tribunal, it was generally “insufficient for these individuals to show that their dominant and effective nationality was *not* Iranian, but, rather, that it was indisputably American.”²⁴⁷ On the other hand, modern commentators suggest that this standard may ask too much.²⁴⁸

Perhaps a tribunal’s best approach, when faced with a dual citizen whose habitual residence (or center of interests, family ties, or other evidence of attachment) during the relevant period lies within neither of her two states of

²⁴¹ MAPP, *supra* note 127, at 79.

²⁴² *Benedix*, 21 Iran–U.S. Cl. Trib. Rep. at 23.

²⁴³ Bederman, *supra* note 127, at 130. Otherwise, Professor Bederman writes, “[T]his claim is indistinguishable from a number of cases in which individuals left Iran in mid- to late 1978 after long stays, returned to America, and were found to have acquired dominant and effective American nationality by the close of the ‘relevant period’ in January 1981.” *Id.* at 130–31.

²⁴⁴ *Benedix*, 21 Iran–U.S. Cl. Trib. Rep.

²⁴⁵ See, e.g., *Malek v. Islamic Republic of Iran*, 19 Iran–U.S. Cl. Trib. Rep. 48 (1988).

²⁴⁶ Bederman, *supra* note 127, at 131.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

citizenship, is simply to give greater weight to each of the other considerations. The tribunal should use the third-state residence in its consideration of the other factors. If an individual is a dual U.S.–Yemeni national, for instance, but lived in each nation only briefly and has spent the majority of her life as a permanent resident of Canada, a tribunal should not be precluded from considering the effect that such habitual residence has had on her center of interests and cultural ties, as it deems appropriate, with each the United States and Yemen. In diminishing the weight it grants to one factor, however, the tribunal must afford greater weight to each of the other factors. Likewise, when the dominance of an individual's center of interests or cultural ties are simply unclear or indeterminable, even if they do not necessarily lie with a third state, a tribunal should give greater weight to each of the other factors in determining an individual's dominant nationality.

2. *Problems Presented by Recently Naturalized Dual Citizens*

In *Danielpour v. Islamic Republic of Iran*, the Claims Tribunal accepted that a young woman held dual nationality by virtue of being born in the United States of Iranian parents.²⁴⁹ In determining her dominant nationality, the Claims Tribunal contemplated that the eighteen months she had lived in the United States prior to her claim arising “would not have been adequate for the Claimant to integrate into American society and to familiarize herself with American culture so as to predominate over her years spent in Iran under the influence of her Iranian family and the society and culture of Iran.”²⁵⁰ The Claims Tribunal's approach in *Danielpour*, if applied by U.S. courts in contemporary contexts, appears rather problematic for newly naturalized U.S. citizens.

In the United States, an applicant for naturalization typically must be a permanent resident (green card holder) before filing.²⁵¹ An applicant for

²⁴⁹ *Danielpour v. Islamic Republic of Iran*, 22 Iran–U.S. Cl. Trib. Rep. 118 (1989).

²⁵⁰ *Id.*

²⁵¹ *Citizenship Through Naturalization*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextchannel=d84d6811264a3210VgnVCM10000b92ca60aRCRD&vgnextoid=d84d6811264a3210VgnVCM100000b92ca60aRCRD> (last updated June 3, 2011). In addition to the residency requirement, an applicant usually must take the naturalization test to demonstrate that she is able to read, write, and speak basic English and that she has a basic knowledge of U.S. history and government, must have her fingerprints taken, must submit to a naturalization interview, and must take an oath of allegiance to the United States. *Id.*; see also U.S. CITIZENSHIP & IMMIGRATION SERVS., A GUIDE TO NATURALIZATION 31 (2011), available at <http://www.uscis.gov/files/article/M-476.pdf>; *Bomb Suspect's Citizenship Raises Questions About Naturalization Process*, *supra* note 207. To get a green card, and

naturalization generally needs to be a permanent resident for only five years and present in the United States for thirty months out of those five years;²⁵² if the applicant's spouse is a U.S. citizen residing in the United States, she must be a permanent resident for only three years and present in the United States for eighteen months;²⁵³ and if the applicant's spouse is a U.S. citizen employed by the U.S. government and stationed abroad, "[n]o specific period as a permanent resident . . . [or of] physical presence in the United States is required."²⁵⁴ Under certain circumstances, the child of a U.S. citizen may be naturalized as a U.S. citizen, if that applicant was born abroad, before ever residing in the United States.²⁵⁵ It is entirely conceivable that a naturalized U.S. citizen will have spent eighteen months or less at the time of application for naturalization, with the naturalization process taking an additional four months.²⁵⁶

In cases heard by the Claims Tribunal, late naturalization (i.e., naturalization after the Islamic Revolution but before the signing of the Claims Settlement Declaration) was not a conclusive bar to a finding of dominant and effective U.S. nationality.²⁵⁷ But in cases where the Claims Tribunal found in favor of dominant U.S. nationality for a dual citizen who had undergone late naturalization, the individual typically had resided in the United States for an extended period of time prior to naturalization.²⁵⁸

thus qualify for permanent residency, applicants "generally need a sponsor—a relative, spouse or employer." *Id.*

²⁵² *Path to U.S. Citizenship*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=86bd6811264a3210VgnVCM100000b92ca60aRCD&vgnnextchannel=86bd6811264a3210VgnVCM100000b92ca60aRCD> (last updated June 8, 2011).

²⁵³ *Naturalization for Spouses of U.S. Citizens*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=a0ffa3ac86aa3210VgnVCM100000b92ca60aRCD&vgnnextchannel=a0ffa3ac86aa3210VgnVCM100000b92ca60aRCD> (last updated Oct. 17, 2011).

²⁵⁴ *Id.*

²⁵⁵ *Biological or Adopted Children Residing Outside the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=8554a3ac86aa3210VgnVCM100000b92ca60aRCD&vgnnextchannel=8554a3ac86aa3210VgnVCM100000b92ca60aRCD> (last updated Apr. 7, 2011).

²⁵⁶ *Bomb Suspect's Citizenship Raises Questions About Naturalization Process*, *supra* note 207. *But see USCIS Process*, U.S. CITIZENSHIP.INFO, <http://www.uscitizenship.info/ins-citizenship-process.html> (last visited Nov. 12, 2011) (saying it takes an additional five months to more than two years).

²⁵⁷ Bederman, *supra* note 127, at 127.

²⁵⁸ *See, e.g.,* Malek v. Islamic Republic of Iran, 19 Iran–U.S. Cl. Trib. Rep. 48 (1988) (describing the case of Reza Said Malek, who resided in the United States for approximately fourteen years prior to his "late naturalization" as a U.S. citizen); Hemmat v. Islamic Republic of Iran, 22 Iran–U.S. Cl. Trib. Rep. 129, 132 (1989) (describing the case of Nahid Hemmat Danielpour, who immigrated to the United States from Iran approximately twenty-one years before her "late naturalization" as a U.S. citizen).

The United States requires that naturalized citizens, as part of the process of naturalization, pledge allegiance to the United States; but the United States does not require an individual to renounce citizenship of her country of birth.²⁵⁹ Thus, if a modern tribunal were to follow the Claims Tribunal's treatment in cases like *Danielpour* and *Malek*, a naturalized U.S. citizen who has not resided in the United States for an extended period of time, and who does not explicitly renounce her original citizenship upon U.S. naturalization, risks the label of dominant and effective nationality of the foreign country (at least during the initial portion of her U.S. citizenship).

It is unclear at which point, or after how many years of permanent residency in the United States, a naturalized U.S. citizen will be considered to have adequately integrated into American society and to have familiarized herself with American culture so as to predominate over her foreign nationality, as required by the Claims Tribunal in *Danielpour*.²⁶⁰ But if *Danielpour* were strictly followed, a newly naturalized U.S. citizen who has resided in the United States for only about eighteen months or less would not be a dominant American national. It appears that the only way for a newly naturalized U.S. citizen to assure herself of immediate dominant and effective U.S. nationality is to explicitly renounce her foreign citizenship.²⁶¹

This precedent may prove problematic to newly naturalized U.S. citizens—dual nationals, on account of retaining their foreign citizenship while acquiring U.S. citizenship—whom the U.S. government accuses of terrorism-related offenses. At the time of his arrest in May 2010, Faisal Shahzad had been a naturalized U.S. citizen for little more than a year.²⁶² In Shahzad's case, for example, the decade that the thirty-year-old²⁶³ had spent living in the United States prior to his naturalization would probably have been enough time to

²⁵⁹ *US State Department Services Dual Nationality*, *supra* note 25 (“U.S. law does not . . . require a person [being naturalized as a U.S. citizen] to choose one citizenship or another . . . [D]ual nationals owe allegiance to both the United States and the foreign country.”).

²⁶⁰ See *Danielpour v. Islamic Republic of Iran*, 22 Iran–U.S. Cl. Trib. Rep. 118 (1989).

²⁶¹ “Information on losing foreign citizenship can be obtained from the foreign country’s embassy and consulates in the United States. Americans can renounce U.S. citizenship in the proper form at U.S. embassies and consulates abroad.” *US State Department Services Dual Nationality*, *supra* note 25.

²⁶² *Bomb Suspect’s Citizenship Raises Questions About Naturalization Process*, *supra* note 207. Shahzad “became a U.S. citizen in April 2009. He first entered the United States on a student visa in the late 1990s, was granted a special work visa a few years later and obtained a green card in 2006 after his wife, an apparent U.S. citizen, petitioned on his behalf.” *Id.*

²⁶³ Peter Finn et al., *Feds Arrest N.Va. Man in D.C. Metro Bomb Plot*, WASH. POST (Oct. 28, 2010, 12:03 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/27/AR2010102704857.html>.

familiarize himself with American culture under *Danielpour's* standard.²⁶⁴ But it is easy to imagine a situation arising in the future where a dual citizen accused of a terrorism-related offense will have been, like Shahzad, a newly naturalized U.S. citizen but who, unlike Shahzad, will have spent only a short amount of time residing in the United States prior to naturalization. In such a case, a court may hold that the individual should be labeled a dominant national of the country of her foreign citizenship as a matter of procedure, under *Danielpour's* standard, without even needing to consider the factors enumerated in the *A/18 Decision*.

Is it fair that a newly naturalized U.S. citizen may not be considered a dominant U.S. citizen until she either: (1) has formally renounced her foreign citizenship (which itself is not a requirement of U.S. citizenship), or (2) has resided in the United States for an extended period of time? It may feel a bit unfair to the individual, but this approach remains a perfectly reasonable one for a court to take.

The body of customary international law precedent that establishes the dominant nationality approach to treatment of dual citizens is underscored by the search for an individual's "genuine link" to one country.²⁶⁵ When given the authority to determine an individual's predominant citizenship out of two particular countries, a court is reasonable to require that the individual live in a country for a certain length of time before she is considered to have firmly integrated into its culture and society. Of course, there are immigrants to the United States who may live decades in the United States without ever learning so much as the English language; but the length of time that those individuals have lived in the United States at least puts them in position for a court to apply the *A/18 Decision's* multi-tiered test.

Adoption of this approach does not lead to the creation of naturalized citizens as "second-class citizens," as was contemplated by the Supreme Court in *Schneider v. Rusk*.²⁶⁶ In *Schneider*, the Court held that in the context of the case, the U.S. government could not strip a naturalized citizen of her U.S. citizenship.²⁶⁷ However, that decision has no bearing on the examination of an

²⁶⁴ This is despite the fact that *after* his naturalization as a U.S. citizen, Shahzad traveled to Pakistan, where he stayed for several months and where he allegedly received bomb-making training. *American Who Recently Visited Pakistan Eyed in Times Square Bomb Plot*, FOX NEWS (May 3, 2010), <http://www.foxnews.com/politics/2010/05/03/officials-reportedly-foreign-plot-times-square-car-bomb>.

²⁶⁵ See, e.g., *Nottebohm Case (Liech. v. Guat.)*, 1953 I.C.J. 4, 7 (1955).

²⁶⁶ *Schneider v. Rusk*, 377 U.S. 163, 167 (1964); see also *supra* note 210 and accompanying text.

²⁶⁷ *Schneider*, 377 U.S. at 168–69.

individual's cultural integration into society where a court must determine the predominant nationality of a dual citizen. The holding in *Schneider*, and the Court's fear of creating second-class citizens, is limited to threats of or attempts to strip a U.S. citizen of her citizenship entirely.²⁶⁸

Finally, any potential unfairness to a naturalized citizen is outweighed by the fact that there is a simple preventative remedy: upon naturalization as a U.S. national, an individual may expressly renounce her foreign citizenship. Once she relinquishes her dual citizenship and is a citizen only of the United States, an individual entirely removes the dilemma caused by dual citizenship, and the issue of determining dominant and effective nationality becomes moot. This easy fix may be similarly adopted by naturalized citizens facing trials at home in Europe or elsewhere abroad.

IV. THE AL-AULAQI AFFAIR AS AN ILLUSTRATION OF APPLICATION OF THE DOCTRINE OF DOMINANT AND EFFECTIVE NATIONALITY

In the 2010 lawsuit to block the United States from targeting Anwar al-Aulaqi abroad, the district court's opinion asked:

Can a U.S. citizen . . . use the U.S. judicial system to vindicate his constitutional rights while simultaneously evading U.S. law enforcement authorities, calling for "jihad against the West," and engaging in operational planning for an organization that has already carried out numerous terrorist attacks against the United States?²⁶⁹

In framing the issue this way, the court seems to have taken for granted the assumption that al-Aulaqi, as a holder of U.S. citizenship, should be treated just as if he did not hold citizenship with a foreign country—an assumption that, if taken as fact, would probably lead to the inference that al-Aulaqi deserves the full constitutional protections of the U.S. judiciary and due process afforded to U.S. citizens.²⁷⁰ But under customary international law's rule of dominant and effective nationality, the court's assumption was flawed.

²⁶⁸ See *supra* note 210 and accompanying text.

²⁶⁹ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 2 (D.C. Cir. 2010). Even CIA Director Leon Panetta seemed to take al-Aulaqi's U.S. citizenship for granted when he was quoted, in June 2010, as saying, al-Aulaqi "is a terrorist and yes, he's a U.S. citizen, but he is first and foremost a terrorist and we're going to treat him like a terrorist." Perez, *supra* note 1.

²⁷⁰ Suzanne Ito, *ACLU Lens: American Citizen Anwar al-Aulaqi Killed Without Judicial Process*, AM. CIV. LIBERTIES UNION (Sept. 30, 2011, 11:43 AM), <http://www.aclu.org/blog/national-security/aclu-lens-american-citizen-anwar-al-aulaqi-killed-without-judicial-process>.

Over the course of more than fifty years, international tribunals have established the principle that when a dispute arises in which a tribunal's jurisdiction or the validity of a claim rests on the nation of citizenship of a dual national, the tribunal must first, as a threshold matter, determine the dominant and effective nationality of the individual.²⁷¹ Here, al-Aulaqi's dominant and effective nationality—entirely ignored by the U.S. District Court for the District of Columbia, and seemingly by commentators and media outlets in the wake of al-Aulaqi's death—is of the greatest importance to the validity of the claim. If the court had made the threshold determination that al-Aulaqi was a “dominant and effective” Yemeni national, why should he even be entitled to the full Constitutional protections afforded to U.S. citizens? Quite simply, he should not have been entitled to such protections.

Had the court allowed the al-Aulaqi lawsuit to proceed, rather than dismissed it based on lack of standing and the political question doctrine, customary international law dictates that the court should have first determined al-Aulaqi's dominant and effective nationality. Guided by the body of international case law, largely derived from litigation under the Iran–United States Claims Tribunal, as a source of precedent, the court should have engaged in a factual analysis to determine al-Aulaqi's effective nationality at the time that the claim arose. In doing so, the court would test, as a threshold matter, the validity of the claim's underlying assumption that al-Aulaqi deserves the full protections of U.S. citizenship.

A. *The “Relevant Period”*

Because al-Aulaqi was born with dual citizenship, rather than having been born a citizen of one nation and later naturalized as a citizen of another (as was the case with many of the cases in which the Claims Tribunal adopted a wider notion of the “relevant period”),²⁷² one might distinguish al-Aulaqi's case from those of the Claims Tribunal and argue that the “relevant period” should be as simple as looking at the period surrounding the time his claim arose. In the case of al-Aulaqi, it would appear that the claim arose as early as late 2009, during which time al-Aulaqi is accused of participating in or aiding the

²⁷¹ See, e.g., Iran–United States, Case No. A/18, 5 Iran–U.S. Cl. Trib. Rep. 251 (1984); Mergé Case (U.S. v. It.), 14 R.I.A.A. 236 (It.–U.S. Conciliation Comm'n 1955); Nottebohm Case (Liech. v. Guat.), 1953 I.C.J. 4, 4 (1995).

²⁷² See, e.g., Perry-Rohani v. Islamic Republic of Iran, 22 Iran–U.S. Cl. Trib. Rep. 194 (1989); Malek v. Islamic Republic of Iran, 22 Iran–U.S. Cl. Trib. Rep. 194 (1989); Bederman, *supra* note 127, at 125.

separate attacks by Hasan and Abdulmutallab,²⁷³ or early 2010, when it is believed that al-Aulaqi first appeared on the U.S. government's "kill list."²⁷⁴

However, customary international law precedent suggests a somewhat wider view of the relevant period. It is unlikely that al-Aulaqi's case can be wholly distinguished from those of the Claims Tribunal by the mere fact that al-Aulaqi was born with dual citizenship, rather than having had acquired dual citizenship through naturalization later in life. Thus, if the *al-Aulaqi Case* had moved beyond procedural hurdles, and the court were to follow the practices of the chambers of the Claims Tribunal, circumstance would demand a more nuanced approach to dominant and effective nationality; the relevant period of inquiry would extend to al-Aulaqi's entire life.

B. Timeline of al-Aulaqi During the "Relevant Period"

Anwar al-Aulaqi was born in Las Cruces, New Mexico, in 1971 to Yemeni parents.²⁷⁵ Because he was born on U.S. soil, and because his parents were citizens of Yemen, al-Aulaqi was born holding dual citizenship. Al-Aulaqi's family returned to Yemen when he was seven years old,²⁷⁶ but al-Aulaqi returned to the United States to study civil engineering at Colorado State University in 1991.²⁷⁷ Peculiarly, despite his family's relative wealth, al-Aulaqi falsely claimed that he was born in Yemen, rather than the United States, in order to receive "\$20,000 in scholarship money from a U.S. government program" for which, as a U.S. citizen (even as a dual citizen), he should not have been eligible.²⁷⁸ During college, al-Aulaqi was elected

²⁷³ Miller & Hsu, *supra* note 61; Meek, *supra* note 67. The U.S. government generally cites al-Aulaqi's alleged participation in these attacks as the driving force behind its authorizing the targeted killing of al-Aulaqi. See, e.g., Shane, *supra* note 3.

²⁷⁴ Shane, *A Legal Debate*, *supra* note 38.

²⁷⁵ Murphy, *supra* note 62. At the time of his birth, al-Aulaqi's parents were graduate students at New Mexico State University. Catherine Herridge, *Radical Muslim Cleric Lied To Qualify for U.S.-Funded College Scholarship*, FOX NEWS (Apr. 12, 2010), <http://www.foxnews.com/us/2010/04/12/radical-muslim-cleric-lied-qualify-funded-college-scholarship>. Al-Aulaqi's father first came to the United States as a Fulbright Scholar in the late 1960s. Paula Newton, *CNN Exclusive: Al-Awlaki's Father Says Son Is 'Not Osama Bin Laden'*, CNN (Jan. 10, 2010), http://articles.cnn.com/2010-01-10/world/yemen.al.awlaki.father_1_awlaki-qaeda-yemeni-officials.

²⁷⁶ Shane & Mekhennet, *supra* note 61, at 2; *Imam in Fort Hood Case Born in New Mexico*, UNITED PRESS INT'L (Nov. 11, 2009, 6:34 PM), http://www.upi.com/Top_News/US/2009/11/11/Imam-in-Fort-Hood-case-born-in-New-Mexico/UPI-43701257982479.

²⁷⁷ Herridge, *supra* note 275; Raghavan, *supra* note 61, at 1.

²⁷⁸ Herridge, *supra* note 275; Shane & Mekhennet, *supra* note 61, at 2.

president of his school's Muslim Student Association, and he discovered a knack for preaching at his local Islamic Center.²⁷⁹

In 1994, after receiving his Bachelor of Science degree, al-Aulaqi "married a cousin from Yemen, . . . left behind engineering, and took a part-time job as imam at the Denver Islamic Society."²⁸⁰ Two years later, al-Aulaqi moved to San Diego, where he earned a Master of Arts in Educational Leadership from San Diego State University, while at the same time serving as one of the imams at San Diego's Rabat mosque.²⁸¹ Starting in 2000, al-Aulaqi began recording a series of highly popular boxed sets of audio CDs devoted to the life of Muhammad, as well as the lesser prophets of Islam.²⁸² Al-Aulaqi left San Diego in mid-2000, and by early 2001 had relocated to northern Virginia,²⁸³ where he served as an imam at the Dar al-Hijra mosque.²⁸⁴ While living in Virginia, he spent two semesters pursuing a doctorate degree in Human Resource Development at George Washington University.²⁸⁵ Al-Aulaqi left the United States in 2002 and lived in Britain for two years, before moving to Yemen in 2004 to preach and study.²⁸⁶

In mid-2006, al-Aulaqi was imprisoned by Yemeni authorities after he intervened in a tribal dispute.²⁸⁷ The director of U.S. national intelligence "told Yemeni officials that the United States did not object to his detention But by the end of 2007, American officials, some of whom were disturbed at the imprisonment without charges of a [U.S.] citizen, signaled that they no longer insisted on [al-Aulaqi's] incarceration, and he was released."²⁸⁸

In response to increasing pressure from the United States after the foiled mail bomb plot in late 2010, Yemeni authorities put al-Aulaqi on trial in absentia, along with his cousin, as codefendants in the trial of another man,

²⁷⁹ Shane & Mekhennet, *supra* note 61, at 2.

²⁸⁰ *Id.* at 3.

²⁸¹ THE 9/11 COMMISSION REPORT, *supra* note 66, at 229; Shane & Mekhennet, *supra* note 61, at 3.

²⁸² Shane & Mekhennet, *supra* note 61, at 3. Although they deal with teachings of Islam, "[t]he recordings appear free of obvious radicalism." *Id.*

²⁸³ THE 9/11 COMMISSION REPORT, *supra* note 66, at 221.

²⁸⁴ *Id.* at 229.

²⁸⁵ Katie Rooney, *Ex-student and Chaplain Tied to 9/11 Hijackers in Report*, GW HATCHET (Sept. 6, 2005), http://www.gwhatchet.com/home/index.cfm?event=displayArticle&ustory_id=0c121487-aaa2-4bb2-a14d-08d373e149a4. During this time, al-Aulaqi "also served as the chaplain for [George Washington University's] Muslim Student Association." *Id.*

²⁸⁶ Murphy, *supra* note 62; Shane & Mekhennet, *supra* note 61, at 5.

²⁸⁷ Shane & Mekhennet, *supra* note 61, at 5.

²⁸⁸ *Id.* at 6.

Hisham Assem, who was “accused of killing a Frenchman in an October 6[, 2010,] attack at an oil firm compound” in Yemen.²⁸⁹ The prosecution alleged that al-Aulaqi’s cousin had put Assem “indirectly in e-mail contact” with al-Aulaqi leading up to Assem’s attack,²⁹⁰ and that al-Aulaqi “repeatedly ‘encouraged’” Assem to carry out the attack.²⁹¹ After al-Aulaqi failed to appear for the start of his trial in early November 2010, the presiding Yemeni judge ordered al-Aulaqi to be “arrested by force, dead or alive.”²⁹²

Government officials believe that al-Aulaqi remained in hiding in Yemen, where he continued to play an active role in fighting against the West and repeatedly issued videos online that call on Muslims, particularly Muslim Americans, to kill Americans.²⁹³ On September 30, 2011, after three weeks of tracking him, U.S. counterterrorism forces killed al-Aulaqi in northern Yemen.²⁹⁴

C. Application of the Relevant Factors to al-Aulaqi

Nottebohm, the *Mergé Claim*, and the *A/18 Decision* each list a number of relevant factors that a court should consider in determining an individual’s dominant and effective nationality.²⁹⁵ These factors, as identified in the *A/18 Decision*, include “habitual residence, center of interest, family ties, participation in public life, and other evidence of attachment.”²⁹⁶ In some way, each of the factors mentioned in *A/18 Decision* is problematic.²⁹⁷ Yet despite the complicated issues each may raise, these factors are supported by older customary international law precedent, in which courts considered similar factors and looked for an individual’s “genuine link” to one country more than another.²⁹⁸ Just as they were applied by the Claims Tribunal, these relevant

²⁸⁹ Worth, *supra* note 83; *Yemen Charges U.S.-Born Radical Cleric Anwar al-Awlaki*, *supra* note 85; *Yemen Puts Preacher al Awlaki on Trial in His Absence*, NATIONAL (Nov. 2, 2010), <http://www.thenational.ae/news/worldwide/middle-east/yemen-puts-preacher-al-awlaki-on-trial-in-his-absence>.

²⁹⁰ *Yemen Charges U.S.-Born Radical Cleric Anwar al-Awlaki*, *supra* note 85.

²⁹¹ Jeralyn, *supra* note 85.

²⁹² *Yemen Orders Arrest of U.S.-Born Radical Cleric Awlaki*, FOXNEWS.COM (Nov. 6, 2010), <http://www.foxnews.com/world/2010/11/06/yemen-orders-arrest-born-radical-cleric-awlaki>.

²⁹³ *Judge Tosses Targeted-Killing Case of Cleric*, ASSOCIATED PRESS (Dec. 7, 2010), <http://www.newsmax.com/Newsfront/ClericLawsuit/2010/12/07/id/379213>.

²⁹⁴ *Al Qaeda’s Anwar al-Awlaki Killed in Yemen*, *supra* note 79.

²⁹⁵ See, e.g., *Nottebohm Case* (Liech. v. Guat.), 1953 I.C.J. 4, 7 (1955); Case No. A/18, 5 Iran–U.S. Cl. Trib. Rep. 251 (1984); *Mergé Case* (U.S. v. It.), 14 R.I.A.A. 236 (It.–U.S. Conciliation Comm’n 1955).

²⁹⁶ Case No. A/18, 5 Iran–U.S. Cl. Trib. Rep. 251.

²⁹⁷ Bederman, *supra* note 127, at 129. For discussion of the problems raised by each factor, see *id.* at 129–34.

²⁹⁸ See, e.g., *Nottebohm*, 1953 I.C.J. at 7; *Mergé Case*, 14 R.I.A.A. at 236.

factors should have been considered by the District Court for the District of Columbia (had the claim been a justiciable issue) in determining, as a threshold matter, al-Aulaqi's dominant and effective nationality.

Before proceeding, it is worth mention that if the relevant period were 2009 to September 2011 (or, at the time of the lawsuit, late 2010), it would be clear that al-Aulaqi was a dominant and effective Yemeni national. He was believed to have resided in Yemen during the entirety of this period,²⁹⁹ his family and cultural ties continued to lie in Yemen,³⁰⁰ and it is arguable that the ways in which al-Aulaqi had disassociated himself with the United States during this period, by encouraging and participating in repeated attacks against the United States, serve as "other evidence of attachment" to Yemen, rather than to the United States.³⁰¹

In keeping with general practice of the Claims Tribunal, however, the relevant period should include al-Aulaqi's entire lifetime. With this in mind, al-Aulaqi's predominant nationality becomes less clear. The "habitual residence" factor is a fairly straightforward examination,³⁰² although in al-Aulaqi's case, it does not suggest dominant nationality one way or the other. It is difficult to view the other factors of consideration—"center of interest, family ties, participation in public life, and other evidence of attachment"³⁰³—entirely separate from one another because there is significant overlap among them, but it is worth attempting to do so in an effort to stay clear and thorough. Ultimately, their amalgamation probably weighs in favor of dominant Yemeni citizenship; thus, even when viewing the relevant period as al-Aulaqi's entire lifetime, an examination would most likely result once again in a finding that al-Aulaqi was a dominant Yemeni citizen.

1. *Habitual Residence*

An individual's "habitual residence" is a straightforward test, but in al-Aulaqi's case, a lifetime habitual residence is difficult to ascertain. The

²⁹⁹ Shane & Mekhennet, *supra* note 61, at 5.

³⁰⁰ *See, e.g., id.* at 3.

³⁰¹ *See infra* Part IV.C.5. There is no clear precedent that outward antagonism toward one of an individual's dual nationalities is a factor in determination dominant and effective nationality under the doctrine. On the other hand, also consider the fact Yemeni officials prosecuted al-Aulaqi and issued a warrant to catch him "dead or alive"; it is plausible that al-Aulaqi held disdain for the Yemeni government (though perhaps not its people and culture) as well.

³⁰² Bederman, *supra* note 127, at 130.

³⁰³ Case No. A/18, 5 Iran–U.S. Cl. Trib. Rep. 251 (1984).

language of the *A/18 Decision* diligently avoids any mention of the Anglo–American concept of domicile, which looks closely at an individual’s intent, and instead develops a more mechanical test which links an individual with a particular jurisdiction.³⁰⁴ In cases heard by the Claims Tribunal, determination of habitual residence connoted “a fairly mechanical determination of where the claimant had been living during the ‘relevant period.’”³⁰⁵

By the time of his death, al-Aulaqi had resided in both the United States and Yemen for approximately twenty years each;³⁰⁶ so even a mechanical measure fails to clear up ambiguity over al-Aulaqi’s habitual residence in determining his dominant nationality. One can point to the U.S. Department of State website, which explains that “[t]he country where a dual national is located generally has a stronger claim to that person’s allegiance,”³⁰⁷ for guidance; but this statement of principle is not made within the clear context of the dominant and effective nationality doctrine, so may garner little weight. So although al-Aulaqi’s more recent residence was within Yemen (although his exact location was unclear for quite some time),³⁰⁸ this, too, may be of little consequence to the court’s determination. Where an individual’s habitual residence—or any factor, for that matter—is unclear, a tribunal should defer to other considerations that demonstrate dominant nationality.³⁰⁹ In al-Aulaqi’s case, the lack of a clear habitual residence simply affords greater weight to each of the other factors.

2. *Center of Interests*

The *A/18 Decision*’s mention of center of interests “refers plainly to economic interests and financial ties to one country or the other.”³¹⁰ In cases before the Claims Tribunal, this factor was particularly useful in determining the dominant citizenship of a claimant who owned a business in Iran that

³⁰⁴ Bederman, *supra* note 127, at 129. However, “there is no agreement about what is meant by ‘habitual residence.’ The most that can be said is that it usually refers to the fact of an individual’s habitation in a particular place, and not to any intention to make that a permanent abode.” *Id.* at 129–30.

³⁰⁵ *Id.* at 127.

³⁰⁶ Al-Aulaqi lived in the United States from 1971 to 1978, and again from 1991 to 2002; he resided in Yemen from 1978 to 1991, and again from 2004 to 2011. *The Anwar al-Awlaki Timeline*, SETH HETTENA, <http://awlaki.sethhettena.com> (last visited Oct. 13, 2011).

³⁰⁷ *US State Department Services Dual Nationality*, *supra* note 25.

³⁰⁸ Newton, *supra* note 275, at 1. In January 2010, Yemeni officials claimed that al-Aulaqi was “hiding out in the southern mountains of Yemen with al Qaeda,” while Dr. Nasser al-Aulaqi, Anwar al-Aulaqi’s father, claimed that his son “is not hiding with al Qaeda.” *Id.*

³⁰⁹ *See supra* Part III.D.1.

³¹⁰ Bederman, *supra* note 127, at 130.

suffered injury as a result of the Iranian revolution, or where an American woman married an Iranian man but kept money or investments in American institutions.

Al-Aulaqi presents a different story. He did not own or operate a business in any traditional sense, and it is difficult to find any publicly available information on his finances. As “center of interests” was contemplated by the *A/18 Decision* alone, it would be quite challenging to determine al-Aulaqi’s center of interests.

In practice, however, the Claims Tribunal came to extend this factor to include a consideration not even mentioned in the *A/18 Decision*: the notion of an individual’s cultural integration into one or the other nation’s society.³¹¹ To this end, al-Aulaqi’s center of interests probably fell more with Yemen than with the United States.

Al-Aulaqi held significant interests with Yemen. He lived in Yemen from the time he was seven years old until he left for college,³¹² formative years in any person’s life. When al-Aulaqi did come to the United States to study, he used his Yemeni citizenship to obtain scholarship money.³¹³ Both of al-Aulaqi’s parents were born in Yemen, his wife is Yemeni, his children have grown up in Yemen, and he spent his final years being hidden by extended family members in southern Yemen.³¹⁴ Even when living in the United States, as a student and an imam, al-Aulaqi continued to identify with Islamic culture, if not with Yemen itself,³¹⁵ and when he fled the United States, he returned home to Yemen.

At times, it appeared that al-Aulaqi had legitimately integrated into American life. While living in the United States, he attended school and became a community leader in each city in which he lived, he expanded his

³¹¹ *Id.* at 131. Though not specifically mentioned in the *A/18 Decision*, this notion was “perhaps hinted at in *A/18*’s mention of ‘other evidence of attachment.’” *Id.*

³¹² Herridge, *supra* note 275.

³¹³ *Id.*

³¹⁴ See Oliver Holmes, *Why Hasn’t Yemen Hunted Down Anwar al-Awlaki?*, TIME (Nov. 9, 2010), <http://www.time.com/time/world/article/0,8599,2030277,00.html>.

³¹⁵ One might argue that al-Aulaqi’s integration into American society represented, for the most part, involvement with specific minority communities (i.e., Muslim Americans), rather than mainstream America, whereas his integration into Yemeni society was more in line with mainstream Yemeni culture. However, such an argument would be unfair, and perhaps inaccurate, because (1) the Claims Tribunal did not look at whether an individual integrated only with a nation’s “mainstream” society, and (2) the United States, more so than almost any other country, prides itself on welcoming all people, as a world melting pot.

influence outside of the communities in which he lived by distributing audio recordings, he brought his wife to the United States, and he remained in the United States for eleven years (after having already spent the first seven years of his life in the United States).³¹⁶ Nearly a decade after leaving the United States, al-Aulaqi recalled his experiences of American daily life in his online sermons.³¹⁷ Al-Aulaqi spoke fluent English, without a foreign accent.³¹⁸ It is obvious that, even after leaving the United States, al-Aulaqi continued to exert influence over at least some Americans.³¹⁹ Al-Aulaqi frequently used the internet to communicate with American Muslims both as a group, through online sermons³²⁰ and writings,³²¹ and as individuals.³²² For the better part of the relevant period of inquiry, al-Aulaqi remained at least somewhat integrated into American society.

Taken as a whole, al-Aulaqi's center of interests probably aligned more with Yemen than with the United States. This conclusion may be reached in large part because of his substantial family ties in Yemen and the fact that he

³¹⁶ See Aamer Madhani, *Cleric al-Awlaki Dubbed 'bin Laden of the Internet,'* USA TODAY (Aug. 24, 2010, 8:32 PM), http://www.usatoday.com/news/nation/2010-08-25-1A_Awlaki25_CV_N.htm.

³¹⁷ Anwar al-Awlaki, *Message to the American People*, DAILY MOTION, at 0'55"-1'23" (Aug. 27, 2010) [hereinafter *Message to the American People*], http://www.dailymotion.com/video/xelcve_message-to-the-american-people-anwa_people (recording al-Aulaqi in an incredibly collegial message to "the American people" in recalling the ease of domestic airline travel before September 11, 2001).

³¹⁸ See, e.g., *id.*

³¹⁹ To recognize the scope of his contact and influence within the United States, one need look no further than al-Aulaqi's relationship with Hassan or with Shahzad, each of whom was living in the United States at the time of contact with al-Aulaqi.

³²⁰ See, e.g., *Message to the American People*, *supra* note 317, at 10'55"-11'15". In this online sermon, easily accessible to Americans through websites like *Daily Motion*, al-Aulaqi said,

To the Muslims in America, I have this to say: How can your conscience allow you to live in peaceful coexistence with the nation that is responsible for the tyranny and crimes committed against your own brothers and sisters? How can you have your loyalty to a government that is leading the war against Islam and Muslims?

Id.

³²¹ See, e.g., Miller & Samuels, *supra* note 78. His magazine, *Inspire*, "offers a canny blend of photos, feature stories, insider details . . . and verse-quoting theological justifications for terrorist attacks, all of it calculated to appeal to American Muslims who grew up on glossy magazines like *Details* and *GQ*." *Id.*

³²² See, e.g., Brian Ross & Rhonda Schwartz, *Major Hasan's E-Mail: 'I Can't Wait to Join You' in Afterlife*, ABC NEWS (Nov. 19, 2009), <http://abcnews.go.com/Blotter/major-hasans-mail-wait-join-afterlife/story?id=9130339> ("United States Army Major Nidal Hasan told a radical cleric considered by authorities to be an al-Qaeda recruiter, 'I can't wait to join you' in the afterlife, according to an American official with top secret access to 18 e-mails exchanged between Hasan and the cleric, Anwar al Awlaki, over a six month period between Dec. 2008 and June 2009."); Jason Ryan, *Texas Terror Sting: Feds Say Suspect Was in Contact with Anwar al-Awlaki*, ABC NEWS (June 3, 2010), <http://abcnews.go.com/US/texas-terror-sting-feds-barry-walter-bujol-contact/story?id=10821525> ("Barry Walter Bujol, 29, allegedly was in contact with Awlaki going back to 2008, when he gained the attention of the FBI's Joint Terrorism Task Force in Houston.").

apparently felt safe in Yemen. Little is known of al-Aulaqi's financial interests, but it seems a reasonable assumption that he was more economically connected with Yemen; this inference is supported by the fact that even when attending school in the United States, he received significant scholarship money by virtue of his Yemeni citizenship.³²³ And by many accounts, al-Aulaqi more recently had fully integrated into Yemeni society, having become so popular in the southern region of the nation that, until he left for the North, the Yemeni government lacked the political clout to hunt him down.³²⁴

Undoubtedly, one cannot say that al-Aulaqi's center of interests lay *more* with the United States than with Yemen. On one end of the spectrum of possibility, his center of interests lay with Yemen; at the other end, his interests were shared equally between the two. Therefore, it is probably reasonable to suggest that al-Aulaqi's center of interests favor dominant Yemeni citizenship.

3. *Family Ties*

Al-Aulaqi's family ties suggest dominant Yemeni citizenship. Even while living in the United States, al-Aulaqi married a woman from Yemen, with whom he had three children,³²⁵ who themselves have spent the better part of their lives in Yemen. Al-Aulaqi's family comes from a powerful tribe in southern Yemen, and "has many connections to the government of Yemen, including the country's prime minister, who is a relative of the [al-Aulaqi] family."³²⁶ There have even been some claims that al-Aulaqi, while hiding in Yemen, was protected by his tribe.³²⁷ Al-Aulaqi's family ties heavily favor dominant Yemeni citizenship.

4. *Participation in Public Life*

Having interpreted "center of interests" to include the integration of an individual into society, one might think that the chambers of the Claims Tribunal left little need for additional examination of "participation in public

³²³ Herridge, *supra* note 275.

³²⁴ Holmes, *supra* note 314 ("[F]or many Yemenis, [al-Aulaqi] is . . . an Al Capone, a known outlaw traveling with impunity and some social cachet.").

³²⁵ Warren Richey, *Anwar al-Awlaki: ACLU Wants Militant Cleric Taken off U.S. 'Kill List'*, CHRISTIAN SCI. MONITOR (Aug. 31, 2010), <http://www.csmonitor.com/USA/Justice/2010/0831/Anwar-al-Awlaki-ACLU-wants-militant-cleric-taken-off-US-kill-list>.

³²⁶ Newton, *supra* note 275, at 1.

³²⁷ *Id.* (quoting al-Aulaqi's father, who stated, "[Al-Aulaqi] is not hiding with al Qaeda; our tribe is protecting him right now").

life.” Although they likely overlap in most cases, the two factors *are* distinct. The cases in which these two factors may lead to contradictory conclusions of dominant citizenship are those in which the individual in question has lived in hiding or in exile.³²⁸

By all accounts, al-Aulaqi was quite active in public life during his years living in the United States; not only did he attend American schools, but he also became a leader in student organizations and his local Muslim communities. Likewise, by some accounts, al-Aulaqi became active in public life after returning to Yemen, even though he was “in hiding” for much of that period.³²⁹ In the United States, al-Aulaqi became a community leader in each place he lived;³³⁰ and in Yemen, he was a community and tribal leader, so active in public life that his intervention in a tribal dispute got him arrested in 2006.³³¹

One might argue that because al-Aulaqi was either imprisoned or in hiding for the majority of his life after returning to Yemen in 2004, he was not as actively participatory in public life as he had been in the United States; and even more so, to a certain degree, that al-Aulaqi remained active in American public life through use of the internet, even after his departure from the United States in 2002.³³² Following his arrest and subsequent release from prison, al-Aulaqi retained a relatively low profile within Yemen (at least enough of one to continue to evade arrest by government authorities), while his public persona within the United States experienced significant growth. Ultimately, it is possible that al-Aulaqi’s participation in public life favors dominant American citizenship. However, because the degree of his participation in

³²⁸ Although he lacks dual nationality, consider as an illustrative example the Dalai Lama, who has been in exile from Tibet for fifty-two years. By nature of his exile and China’s tight control over communications within Tibet, the Dalai Lama probably has not been very active in Tibetan public life throughout his lifetime. Yet at the same time, it is quite possible that his center of interests have remained with Tibet throughout this relevant period. See *1959: Dalai Lama Escapes to India*, BBC NEWS, (Mar. 31, 2011), http://news.bbc.co.uk/onthisday/hi/dates/stories/march/31/newsid_2788000/2788343.stm.

³²⁹ See Holmes, *supra* note 314. However, little is known about his participation in public life in Yemen before coming to the United States in 1991.

³³⁰ See, e.g., Shane & Mekhennet, *supra* note 61, at 2.

³³¹ *Id.* at 5.

³³² In addition to individualized communications with Muslim Americans, al-Aulaqi even made attempts to reach out to the greater American public. See, e.g., *Message to the American People*, *supra* note 317, at 0’40”–1’55” (recording al-Aulaqi in an online sermon, which begins, “To the American people I say: Do you remember the good old days, when Americans were enjoying the blessings of security and peace? When the word ‘terrorism’ was rarely invoked, and you were oblivious to any threats?” and then discusses the hassles of commercial air travel in the United States, both past and present).

Yemeni public life is for the most part unknown, the strength of this factor in support of American dominancy is, at best, tenuous.

5. *Other Evidence of Attachment*

The greatest hurdle in determining al-Aulaqi's cultural affiliation and "other evidence of attachment" is that he did not clearly identify himself with any one country—rather, he culturally identified himself mainly with the religion of Islam and its people, wherever they may be located. Al-Aulaqi endeavored to associate more substantially with Muslims, as a group, than with the people of any one nation in particular. His rhetoric touched on issues involving Yemen,³³³ but no more than it discussed the plight of Muslims (and the carnage of Americans) in Iraq, Afghanistan, Pakistan, and within the United States.

Though it does not strip him of American citizenship entirely, the fact that al-Aulaqi showed disassociation with the United States may be enough to tilt this factor in favor of al-Aulaqi's holding dominant Yemeni citizenship. In considering the "habitual residence" factor, the Claims Tribunal generally held that it was insufficient for individuals with residency in a third state "to show that their dominant and effective nationality was *not* Iranian, but, rather, that it was indisputably American."³³⁴ It is unclear whether the Claims Tribunal would also have established such a high burden with regard to cultural affiliation; but even so, commentators suggest that this standard may have asked too much.³³⁵

To be sure, prior to his departure from the United States in 2002, al-Aulaqi would probably have been a dominant American citizen. In a January 2010 interview with CNN, al-Aulaqi's father stated, "[My son] lived his life in America, he's an all-American boy. My son would love to go back to America."³³⁶ But in a recent online sermon, al-Aulaqi describes his former attachment to, and subsequent fall-out, with the United States:

I, for one, was born in the [United States] and lived in the [United States] for twenty-one years. America was my home. I was a

³³³ See, e.g., *Message to the American People*, *supra* note 317, at 9'25"–9'40" ("If George W. Bush is remembered as being the President who got America stuck in Afghanistan and Iraq, it's looking like Obama wants to be remembered as the President who got America stuck in Yemen. Obama has already started his war on Yemen.").

³³⁴ Bederman, *supra* note 127, at 131.

³³⁵ *Id.*

³³⁶ Newton, *supra* note 275.

preacher of Islam involved in non-violent Islamic activism. However, with the American invasion of Iraq and continued U.S. aggression against Muslims, I could not reconcile between living in the [United States] and being a Muslim—and I eventually came to the conclusion that jihad against America is binding upon myself, just as it is binding on every other able Muslim.³³⁷

He continues to say, in his message apparently directed toward the American public, “It is true that we are facing the arsenal of the greatest army on earth with our simple modest means, but victory is on our side . . . because there is a difference between us and you.”³³⁸ Indeed, the tenor of al-Aulaqi’s “Message to the American People” highlights a strong disconnect in his relationship to the United States.

As apparent as his disdain for the United States may have been, al-Aulaqi’s conduct is not enough to strip him of U.S. citizenship entirely. One might argue that many of al-Aulaqi’s statements and conduct over the past few years demonstrate his “intention” to give up U.S. citizenship; and in truth, a U.S. citizen who “acquires a foreign citizenship by applying for it may lose U.S. citizenship” if the person applies “for the foreign citizenship voluntarily, by free choice, and with the intention to give up U.S. citizenship.”³³⁹ Even so, al-Aulaqi was never at risk of losing his U.S. citizenship outright, no matter how damning his statements or conduct may appear, because he gained dual citizenship “automatically” at birth. The U.S. State Department’s website makes clear that a U.S. citizen “who is automatically granted another citizenship does not risk losing U.S. citizenship.”³⁴⁰ Although al-Aulaqi’s conduct over the past decade did not strip him of citizenship, his recent exploits are probably enough to sway the other evidence of attachment factor in favor of dominant Yemeni citizenship.

In addition, al-Aulaqi did show legitimate attachment to Yemen throughout the relevant period of inquiry. While little is known about his formative years in Yemen, a tribunal may reasonably assume that al-Aulaqi’s residence in Yemen from ages seven to nineteen must have left him feeling some type of attachment to the country. He used his Yemeni citizenship, and hid his American citizenship, to obtain a college scholarship. While living in the

³³⁷ *Message to the American People*, *supra* note 317, at 6’19”–6’53”.

³³⁸ *Id.* at 7’33”–7’45”.

³³⁹ *US State Department Services Dual Nationality*, *supra* note 25. In such a case, “[i]ntent can be shown by the person’s statements or conduct.” *Id.*

³⁴⁰ *Id.*

United States, he chose to marry a Yemeni woman (although he did bring her back to the United States with him). When he left the United States, al-Aulaqi soon returned to Yemen, where he undoubtedly felt safe and welcome.³⁴¹ Al-Aulaqi spoke both in English and in Arabic in his online sermons and interviews. It is not known what language he primarily spoke at home, but if he used Arabic at home, particularly while he was living in America (which is probable, since his wife immigrated from Yemen), it would evidence attachment to Yemen more than to the United States. And although al-Aulaqi may, at times, have shown distaste for Yemeni politicians,³⁴² he typically spoke fondly of the Yemeni public, much more so than he did of its American counterpart. Ultimately, *A/18 Decision's* "other evidence of attachment" factor should weigh in favor of al-Aulaqi holding dominant Yemeni citizenship.

D. Determination of al-Aulaqi's Dominant and Effective Nationality

It is apparent that, throughout his lifetime, al-Aulaqi made an effort to take advantage of his dual citizenship by using each one of his nationalities to his advantage, whenever most convenient. For example, when coming to the United States to attend college, al-Aulaqi used his Yemeni citizenship (and withheld information about his U.S. citizenship) to obtain a \$20,000 scholarship.³⁴³ Fifteen years later, when he was arrested and imprisoned by Yemeni authorities, al-Aulaqi grew angry, on grounds that he held U.S. citizenship, with the U.S. government because it did not immediately object to his prolonged detention without charges; and he was quick to use the argument that he, himself, was an American citizen as a rhetorical tool of influence over his followers.³⁴⁴

An observer reasonably might recognize that al-Aulaqi considered himself a citizen of the "world," or a citizen of the "Islamic world," more than a citizen

³⁴¹ He was likely justified in feeling safe, considering the fact that the United States officially targeted him for death for over a year, planned to spend up to \$63 million in operations in Yemen in 2010, and only found him in September 2011. Mark Landler, *U.S. Has Few Resources To Face Threats in Yemen*, N.Y. TIMES, Jan. 8, 2010, at A9.

³⁴² See, e.g., *Message to the American People*, *supra* note 317, at 10'03"–10'28" ("The corrupt Yemeni government officials . . . are having a ball these days. . . . The Yemeni government officials are giving [the United States] big promises and handing [the United States] big bills—welcome to the world of Yemeni politicians.").

³⁴³ Letter from Frank Wolf, U.S. Congressman, to Robert S. Mueller, III, Dir., FBI (May 24, 2010), available at <http://www.investigativeproject.org/documents/misc/376.pdf> ("[I]t is my understanding that Aulaqi fraudulently obtained more than \$20,000 in federal scholarship funds reserved for foreign students for which he was not eligible.").

³⁴⁴ See Shane & Mekhennet, *supra* note 61.

either of Yemen or of the United States.³⁴⁵ Consider, for example, that in one February 2011 audio message, al-Aulaqi criticized the U.S. government for carrying out bomb strikes in Yemen and for oppressing WikiLeaks founder Julian Assange, then criticized the Yemeni government for convicting a journalist of helping al Qaeda and of cooperating with the U.S. government in those strikes.³⁴⁶ Al-Aulaqi wrote and spoke as if he did so on behalf of Muslims everywhere (even if, in reality, he spoke on behalf only of a relatively small group of radical Muslims).³⁴⁷

In many ways, his public persona was reminiscent of those of Osama bin Laden and other leaders of terrorist organizations.³⁴⁸ Terrorist organizations, such as al Qaeda and AQAP, are typically borderless and, by definition, illegitimate under international law; so perhaps a leader who feels more married to his cause than to any one nation is an appropriate figurehead. Yet even the most transnational of leaders must fall within the purview of the reciprocal rights and duties of at least one nation.

Existing precedent does not firmly identify how much weight to give to each of the *A/18 Decision*'s factors. Habitual residence tends to weigh heavily in a tribunal's determination, in part because it is such an objective measure; but because al-Aulaqi split his residence nearly equally between the United States and Yemen, the factor is of little guidance. Al-Aulaqi's center of interests either lay slightly with Yemen, or was about evenly split; and while his participation in public life arguably lay slightly with the United States, it most likely was about evenly split (or possibly even aligned slightly with Yemen), too.

The strongest evidences of al-Aulaqi's dominant citizenship are his family ties and his "other evidence of attachment"—both of which favor dominant Yemeni citizenship. Had the court in the *al-Aulaqi Case* proceeded beyond the issues of justiciability, it should have found, before reaching a decision on the merits, that al-Aulaqi was a dominant and effective Yemeni national. Only after making this determination would the court have been in position to make

³⁴⁵ Nonetheless, a legitimately recognized concept of "world citizenship" does not exist under international law, or under the municipal laws of any nation.

³⁴⁶ *Anwar al-Awlaki Calls Yemenis To Back Journalist and al-Qaeda Expert, Abdu Elah Haidar*, YEMEN POST (Feb. 14, 2011, 9:40 PM), <http://yemenpost.net/Detail123456789.aspx?ID=3&SubID=3135>.

³⁴⁷ See Shane & Mekhennet, *supra* note 61.

³⁴⁸ Indeed, one article explains, "[i]n the West, [al-Aulaqi] is caricatured as a Yemeni Osama bin Laden," but notes that "for many Yemenis, [al-Aulaqi] is more of an Al Capone, a known outlaw traveling with impunity and some social cachet." Holmes, *supra* note 314.

an appropriate and accurate ruling on the legality of the U.S. government's targeting of al-Aulaqi.

CONCLUSION

Just as the U.S. government can use the doctrine of dominant and effective nationality to its benefit in justifying its targeting of al-Aulaqi, recognition of the doctrine by domestic courts may prove an invaluable tool in the government's defense of targeting, detaining, or trying an individual in a way that it may typically reserve for non-citizens. Although the doctrine is useful only in cases where a targeted or detained individual holds dual citizenship, this group is rather substantial because the West has seen a growing trend of homegrown terrorism in recent years. With increasing accessibility to the internet and other technology, coupled with anger over the continued U.S. military presence in Muslim nations abroad, this trend is likely to continue into the foreseeable future.

In applying the doctrine, customary international law precedent provides some degree of guidance; and undoubtedly, as they apply the doctrine in more and more instances, U.S. courts would fill in the gaps and add to existing precedent as needed. But widespread adoption of the doctrine leads to another underlying question: if domestic courts are tasked with determining, as a threshold matter, the dominant nationality of a dual citizen before proceeding to the merits of the case (if the individual's state of citizenship has bearing on the court's jurisdiction or on the merits of the case), then what, if any, are the benefits to dual citizenship?

Less-developed countries may benefit from embracing dual citizenship as a means to boost the economy and encourage expatriated, former citizens to return home.³⁴⁹ In early 2011, for example, senators in Liberia, a country that has not traditionally allowed dual citizenship, introduced a bill to make dual citizenship possible.³⁵⁰ The rationale behind the bill is that by granting dual citizenship to 500,000 expatriated Liberians—many of whom have been educated, are working, and are living in wealthy Western nations—the country will encourage these former citizens to return home to bring professional skills, economic growth, and other contributions to Liberia's reconstruction.³⁵¹ It is conceivable that, for parallel reasons, other developing countries would benefit

³⁴⁹ See, e.g., Butty, *supra* note 229.

³⁵⁰ *Id.*

³⁵¹ *Id.* Liberia is emerging from fourteen years of civil war. *Id.*

from allowing dual citizenship. In a similar vein, even some wealthier nations benefit from allowing dual citizenship in the form of the “law of return,” as a means of enticing direct descendants of nationals of the home country, or believers in the state religion, to repatriate.³⁵²

Because of the doctrine of dominant and effective nationality, individuals who hold dual citizenship are provided few substantial benefits; even the benefits to less-developed or “law of return” nations seem aimed at benefitting the state itself more than any individual dual citizen.³⁵³ Yet despite the potential conflicts caused by dual citizenship, dual nationals do enjoy a number of “smaller” benefits: dual citizens can enjoy dual voting rights, cheaper (and sometimes safer) travel, ease of being able to work and study overseas, and in some cases, reduced tax burdens, expanded rights to property ownership, and increased access to investment opportunities.³⁵⁴

Although individuals may enjoy the limited benefits of dual citizenship, the pitfalls remain great. Individuals with dual citizenship may be denied certain judicial protections, by virtue of the doctrine of dominant and effective nationality, that they may have assumed they held. Dual nationals typically lose the consular help of one country of citizenship when they visit the other.³⁵⁵ Dual nationals may have difficulty bringing a claim against either of their nations of citizenship, and in times of emergency, dual nationality may limit the assistance that one of the nations of citizenship can provide to an individual.³⁵⁶ Finally, with the benefits of a dual set of rights comes the reciprocal dual set of duties. Establishing dominant citizenship in one country does not necessarily relieve a dual citizen of her duties owed to the other; in some cases, for example, dual nationals face conscription by one or both of their nations of citizenship.³⁵⁷

³⁵² See *Citizenship*, *supra* note 104; *Acquisition of Israeli Nationality*, *supra* note 104 (explaining that the “law of return” grants every Jew the right to come to Israel and become an Israeli citizen); *Italian Dual Citizenship Requirements*, *supra* note 104.

³⁵³ See Shane & Mekhennet, *supra* note 61.

³⁵⁴ Mark Bridge, *Dual Status Can Be a Passport to New Riches*, *TIMES* (London), May 31, 2008, at 6; *Dual Citizenship Benefits (and Pitfalls) for Bilinguals (and Others)*, *BLOGGING ON BILINGUALISM* (Mar. 30, 2010, 1:34 PM), <http://bloggingonbilingualism.com/2010/03/30/dual-citizenship>. For example, British citizens cannot buy property in India, but Britain’s “‘persons of Indian origin’ . . . who enjoy certain benefits of citizenship without full dual status, are free to buy there.” Bridge, *supra*.

³⁵⁵ Bridge, *supra* note 354.

³⁵⁶ *US State Department Services Dual Nationality*, *supra* note 25 (“Claims of other countries on dual national U.S. citizens may conflict with U.S. law, and dual nationality may limit U.S. Government efforts to assist citizens abroad.”).

³⁵⁷ See Bridge, *supra* note 354.

For many of these reasons, the U.S. government discourages individuals from keeping dual nationality; but it does continue to recognize the existence of dual nationality, and allows its citizens to hold dual citizenship if they so choose.³⁵⁸ In doing so, the U.S. government has put itself in a position to deny dual nationals the full protections of U.S. citizenship in instances where it can demonstrate that the individual is a dominant and effective foreign national. The U.S. government would be wise to advocate that domestic courts take such an approach because the doctrine is firmly grounded in preexisting customary international law. In practice, invocation of the doctrine of dominant and effective nationality could aid the government in its fight against terrorism by giving the government greater discretionary authority in how it targets, detains, and tries suspected terrorists who hold dual citizenship. Most significantly, this tool may be particularly useful in combating a growing homegrown terrorist threat; and in a “war” against a non-traditional enemy, and with no clear end in sight, every little bit helps.

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³⁵⁸ *US State Department Services Dual Nationality*, *supra* note 25 (“The U.S. Government recognizes that dual nationality exists but does not encourage it as a matter of policy because of the problems it may cause.”).

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