JACKSON, DONOVAN, AND TARGETED KILLINGS: A LIMITED DEFENSE

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I. INTRODUCTION

The trials at Nuremberg are often raised as a primary progenitor of modern public international law. Figures such as Justice Robert Jackson and William Donovan[2] are viewed as defenders of human rights through judicial processes, believing that even the worst of evils deserves its day in court. Yet in the years since Nuremberg, the United States, amongst many other nations, has utilized "targeted killings"[3] as a means of political and military executions despite a near complete lack of due process. In this note I argue that despite recent arguments condemning the practice, both Jackson and Donovan would have condoned limited use of targeted killings in a wartime context. Though these men possessed stark differences, Jackson's overriding concerns for judicial legitimacy suggest he would have permitted limited targeted killings. Similarly, Donovan's military and intelligence background yielded significant concerns for the pragmatic difficulties in extracting the most difficult of war criminals for trial such that targeted killings may be necessary.

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2. Robert Jackson was the chief prosecutor of the surviving Nazi leaders at Nuremberg. *See generally The Jackson Center Research Archive,* ROBERT H. JACKSON CENTER, http://www.roberthjackson.org (last visited Dec. 12, 2012). William Donovan was an aide to the American prosecution at Nuremberg. *See generally A Look Back… Gen. William J. Donovan Heads Office of Strategic Services,* CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/news-information/featured-story-archive/gen.-william-j.-donovan-heads-oss.html (last updated Jan. 5, 2010).

3. "Targeted killings" as used in this context can be defined as the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them. NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW, 5 (2009). This is distinct from "wartime assassination" as defined as the killing of an individual through targeting and the use of treacherous means. *See generally* Howard A. Wachtel, *Targeting Osama Bin Laden: Examining the legality of assassination as a tool of U.S. Foreign Policy*, 55 DUKE L.J. 677 (2005) (arguing targeted killing is legal while assassination is per se illegal).

The issue addressed here is intentionally specific. It may be best to proceed by establishing exactly what this note does not address. The argument surrounding targeted killings, and the legality, illegality, or international prohibition of its use, has been addressed in great detail and in admirable scholarship elsewhere.[4] The purpose of this note is not to rehash this debate. Moreover, the concern is not with whether the legal norms sown at the Nuremberg trials have grown into the long-reaching branches of international law governing "just war." Lastly, the philosophical and theological examination of the subject matter of targeted killings will not be addressed here.

Rather, the purpose of this note is whether the American contingent at Nuremberg would have condemned or condoned the use of targeted killings.[5] To address this, first their views on targeted killings or summary forms of justice will be analyzed as it pertained to Nazi war criminals. This will then be projected forward for analysis with regards to today's conflicts. Commonly, the assertion has been that the Nuremberg legacy is about sustaining human rights, about demonstrating the resolve to uphold principles of dispassionate justice even when cries of vengeance threaten to carry the day,[6] and about setting the benchmark for judging international crimes.[7] Perhaps this is true, but as Whitney Harris detailed, "International law, in this vast area, has passed from conscience to precept."[8] The danger is that merely stating undefended assertions of Nuremberg's legacy runs the risk of reducing precepts to platitudes, and that is why such an examination is necessary.

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4. For an introduction to the legal analysis, *see generally* MELZER, *supra* note 3; Wachtel, *supra* note 3; Mark V. Vlasic, *Assassination & Targeted Killing—A Historical and Post Bin Laden Legal Analysis*, 43 GEO. J. INT'L L. 259 (2012); Joshua Raines, *Osama, Augustine, and Assassination: The Just War Doctrine and Targeted Killings*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 217 (2002); William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667 (2003).

5. The most obvious and pertinent example of targeted killing is that of Osama bin Laden. This case study will be referenced throughout.

6. *See* CHRISTOPHER J. DODD, LETTERS FROM NUREMBERG: MY FATHER'S NARRATIVE OF A QUEST FOR JUSTICE (2007).

7. *See* JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL (1994).

8. WHITNEY HARRIS, TYRANNY ON TRIAL: THE TRIAL OF THE MAJOR GERMAN WAR CRIMINALS AT THE END OF WORLD WAR II AT NUREMBERG GERMANY 1945-1946, 539 (Southern Methodist Univ. Press rev. ed. 1999) (1954).

II. THE ARGUMENT AGAINST TARGETED KILLINGS

Since the War on Terror began, and with particularly renewed vigor since the killing of Osama bin Laden, a tremendous amount of ink has been expended in scholarship against targeted killings.

Kenneth Roth, the executive director of Human Rights Watch, succinctly summarized the central tenets of the argument against targeted killings. Notably, via his Twitter account (@KenRoth), he opined, "Ban Ki-moon wrong on #Osama bin Laden: It's not "justice" for him to be killed even if justified; no trial, conviction."[9] Noam Chomsky wrote that it was not a targeted killing. Rather, he argued, "It's increasingly clear that the operation was a planned assassination, multiply violating elementary norms of international law."[10]

The response across much of Western Europe was also tepid at best. For instance, German Chancellor Angela Merkel said she was "glad it was successful, the killing of Bin Laden."[11] She was harangued for her comments. Siegfried Kauder of the Christian Democratic Union said, "I wouldn't have used those words. That is a vengeful way of thinking that one shouldn't have; that's medieval."[12] Guido Westerwelle, a Free Democrat, said more tempered responses are appropriate as celebration "could again lead to incitement or the heroization of Al Qaeda."[13] Added Heribert Prantl, a columnist at Süddeutsche Zeitung, "The decision to kill the godfather of terror was political."[14]

Claus Kress, professor of international law at the University of Cologne, argues that retributive justice for crimes is "not achieved through summary executions, but through the punishment that is

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9. Ben Birnbaum, *Human Rights Watch chief: bin laden killing not 'justice'*, WASHINGTON TIMES, May 4, 2011, *available at* http://www.washingtontimes.com/news/2011/may/4/human-rights-group-raps-us-bin-laden-killing/.

10. Noam Chomsky, *My Reaction to Osama Bin Laden's Death*, GUERNICA (May 6, 2011), http://www.guernicamag.com/blog/noam_chomsky_my_reaction_to_os/.

11. Steve Erlanger, *In Europe, Disquiet Over Bin Laden and U.S.*, N.Y. TIMES, May 5, 2011, *available at* http://www.nytimes.com/2011/05/06/world/europe/06europe.html?pagewanted=all&_moc.semityn.www.

12. *Id.*

13. *Id.*

14. *Id.*

meted out at the end of a trial."[15] Kress says that the normal way of handling a man who is sought globally would be to arrest him, put him on trial and ultimately convict him. In the context of international law, military force can be used in the arrest of the suspect.[16]

There were harsher comments elsewhere. In France, the killing was described as a result of "toxic rhetoric" of the campaign against terrorism. In Britain, Geoffrey Robertson rebuked Obama's assertion that justice was done to Bin Laden, saying it was "a total misuse of language." He added, "This is the justice of the Red Queen: sentence first, trial later."[17]

Or, consider further what Jonathan Turley wrote in his article *10 Reasons the U.S. Is No Longer the Land of the Free*.[18] Turley includes in these reasons indefinite detention, arbitrary justice, and the assassination of U.S. citizens citing the case[19] of Anwar al-Awlaqi.[20]

What these arguments against the killing of Osama bin Laden or Anwar al-Awlaqi have in common is a general notion that "justice" in this sense of international law categorically means a full trial replete with due process protections. It does not, however, automatically follow that this is truly Nuremberg's legacy.

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15. Thomas Darnstädt, *Was bin Laden's Killing Legal?*, SPIEGEL ONLINE (May 3, 2011), http://www.spiegel.de/international/world/justice-american-style-was-bin-laden-s-killing-legal-a-760358.html.

16. *Id.*

17. Erlanger, *supra* note 11.

18. Jonathan Turley, *10 Reasons the U.S. Is No Longer the Land of the Free*, WASHINGTON POST, Jan. 15, 2012, *available at* http://jonathanturley.org/2012/01/15/10-reasons-the-u-s-is-no-longer-the-land-of-the-free/.

19. Awlaki was born in New Mexico in 1971, moved to Yemen when he was seven, returned to the United States to attend college, and became a radical Muslim cleric, allegedly linked to Major Nidal Malik Hasan, the Army psychiatrist accused of killing thirteen people at Fort Hood, Texas and Umar Farouk Abdulmutallah, the so-called "underwear bomber." President Obama took the extremely rare, if not unprecedented, step of putting an American citizen on a list of terrorists linked to Al Qaeda and its affiliates approved for capture or killing. Awlaki was killed in an American drone attack in Yemen on September 30, 2011. *See Islamist cleric Anwar al-Awlaki killed in Yemen*, BBC NEWS (Sept. 30, 2011), http://www.bbc.co.uk/news/world-middle-east-15121879.

20. Turley, *supra* note 18.

III. ANALYSIS

There was not a uniform approach amongst the allies or even within any one specific allied country as to how the Nuremberg trials should be structured or conducted. Therefore, there are two primary reasons to select Robert Jackson and William Donovan as case studies. First, Jackson and Donovan represent distinct backgrounds and approaches. Although they were on "Bob" and "Bill" terms, they were long-time political rivals, and their relationship was not an easy one.[21]

Second, other American members of the prosecution have either written about this previously[22] or they fall somewhere on the continuum between Jackson's views and Donovan's. Even within the President's Cabinet, the continuum existed. Henry Morgenthau, Jr. vehemently objected to the trials as "unwarranted leniency" and feared they would result in Nazis escaping punishment. Contrastingly, Henry L. Stimson argued that formal international trials were necessary to achieve justice, legally outlaw aggression, and "prove to all the wickedness of the Third Reich."[23] Therefore, demonstrating that both Jackson and Donovan, though for different reasons, would agree with the limited use of targeted killings demonstrates that it is worth reinvestigating what exactly their intentions were about the legacy of the Nuremberg trials.

A. Justice Robert Jackson

Of the two, Jackson is perhaps the easier case to resolve owing in no small part to the record he left of not only his view of how the Nuremberg trials should operate but also the subsequent statements and writings he produced to establish what he saw as the legacy of the Nuremberg trials. Moreover, on May 2, 1945, President Truman formally designated, by Executive Order,[24] Jackson

21. Daniel Smith, *The Legacy of Nuremberg: Sustaining Human Rights*, 25 CORNELL LAW FORUM 3 (1999), *available at* http://www.lawschool.cornell.edu/library/WhatWeHave/SpecialCollections/Donovan/upload/Legacy_of_Nuremberg-2.pdf.

22. *See* DODD, *supra* note 6; HARRIS, *supra* note 8; BRADLEY F. SMITH, REACHING JUDGMENT AT NUREMBERG, 33 (1977); DREXEL SPRECHER, INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT (1999); TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (1970).

23. WILLIAM J. BOSCH, JUDGMENT ON NUREMBERG: AMERICAN ATTITUDES TOWARD THE MAJOR GERMAN WAR-CRIME TRIALS 232 (1970).

24. Exec. Order No. 9547, 10 CFR 4961 (May 4, 1945), *available at* http://www.archives.gov/federal-register/executive-orders/1945-truman.html#9547.

to act as the representative of the United States in drafting the protocol, and as its chief of counsel in preparing and prosecuting charges of atrocities and war crimes.[25] This effectively left Donovan on the outside looking in. While Donovan went to Paris and then back to the United States to eventually resume his work in various capacities, Jackson remained a prominent legal mind up to his death on October 9, 1954, just a few months after taking part in the *Brown v. Board of Education*[26] decision.

Robert Jackson was born in Spring Creek, Pennsylvania on February 13, 1892, but was raised in Frewsburg, New York. He did not attend college, but after he apprenticed at a law office, he attended Albany Law School only for a year, going on to become the last member of the Supreme Court to gain admission to the bar by reading law in a law office rather than through graduation from law school.[27]

Jackson seemed to embody the principles of the small-town life. His apprenticeship in law focused on "justice court" cases in which non-lawyer judges presided around the countryside where trials would commonly be in barns or taverns.[28] As senior partner in the firm of Jackson, Herrick, Durkin & Leet, his specialties were country law and business law.[29]

From these rural roots stemmed a pragmatic and practical approach to law and the judicial process, all the more evident once Jackson entered the fray of the Nuremberg prosecution. As he stated, "Courts try cases, but cases also try courts."[30] The concern that seemed to permeate Jackson's approach was anything less than a trial that was viewed throughout the international arena as legitimate would be worse than extrajudicial executions of the Nazi war criminals. As he stated, "[O]ur profession should see that it is understood that any trials to which lawyers worthy of their calling lend themselves will be trials in fact, not merely trials in name, to ratify a predetermined result."[31]

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25. HARRIS, *supra* note 8, at 11.

26. 347 U.S. 483 (1954).

27. Smith, *supra* note 21.

28. ROBERT CONOT, JUSTICE AT NUREMBERG, 58 (1966).

29. *Jackson's Life*, ROBERT H. JACKSON CENTER, http://www.roberthjackson.org/the-man/timeline (last visited Dec. 12, 2012).

30. Justice Robert H. Jackson, Speech to the American Society of International Law (Apr. 13, 1945) [hereinafter *Jackson's Speech*], transcript *available at* http://www.roberthjackson.org/the-man/speeches-articles/speeches/ speeches-by-robert-h-jackson/the-rule-of-law-among-nations/.

31. *Id*.

This challenge was exacerbated by the fact that the Germans could not conduct these trials by their domestic institutions alone. As Jackson wrote, "There was no authoritative judicial system except remnants of the violently partisan judiciary set up by Hitler."[32] Absent a functioning domestic German judiciary, the allies still faced "an insistent and world-wide demand for immediate, unhesitating, and undiscriminating vengeance."[33]

As Whitney Harris noted, "There was no international criminal court in existence at the end of World War II. The Tribunal, therefore, had to be created…This was unfortunate, but it was unavoidable."[34] With genuine concern over legitimacy in mind, Jackson seemed to reign in the unabashed idealism that some, such as Henry Stimson, held in mind as the trial's ultimate legacy. By limiting the scope of what Nuremberg was supposed to accomplish and ultimately represent, Jackson attempted to refocus the prosecution to the central task: creating a factual record to be developed in the trials that showed the crimes of the Nazi war criminals in Hitler's regime and to prove it beyond a reasonable doubt.

Jackson's comments to the American Society of International Law fit neatly into this context.

> I have no purpose to enter into any controversy as to what shall be done with war criminals either high or humble. If it is considered good policy for the future peace of the world, if it is believed that the example will outweigh the tendency to create among their own countrymen a myth of martyrdom, then let them be executed. But in that case let the decision to execute be made as a military or political decision. We must not use the forms of judicial proceedings to carry out or rationalize previously settled political or military policy.[35]

He expanded on his reasoning behind this point by noting certain judicial results may not be supported by the world, even if "perfectly justified as a political policy." Moreover, the danger in this twist is that judicial results that appear manipulated based upon political motivations would damage the future credibility of judicial proceedings. If the personnel, procedure, or results are not

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32. Justice Robert H. Jackson, *Introduction* to WHITNEY HARRIS, TYRANNY ON TRIAL: THE TRIAL OF THE MAJOR GERMAN WAR CRIMINALS AT THE END OF WORLD WAR II AT NUREMBERG, GERMANY, 1945-1946, at xxxi, xxix-xxxvii (Rev. Southern Methodist Univ. Press ed., 1999) (1954).

33. *Id*. at xxxii.

34. HARRIS, *supra* note 8, at 501.

35. *Jackson's Speech*, *supra* note 30.

all committed to a judicious outcome, then adjudication loses its legitimacy. He stated that some within legal academia would argue that courts should be used as agencies to further policy just as any other agency would; however, he dismissed them as "cynics." This is a peculiar word choice, but it is nevertheless revealing. He seemed to be using the term to criticize legal scholars who were self-interested in expanding the use of the judiciary beyond the scope of what Jackson considered acceptable.

Ultimately these concerns led Jackson to suggest before his appointment that summary executions of the Nazi leaders would be favored.[36] The analysis must turn to what conclusions can be drawn from Justice Jackson's speeches and conversations and applied to the current political and military context. There are two issues here: (1) the legitimacy of the proceedings; and (2) military and political interests implicated.

1. The Legitimacy of Proceedings

First, to the legitimacy of the proceedings, Jackson was concerned over how the trials would be viewed both domestically and internationally—whether the result would be accepted as a true exercise in judicial process rather than a mere formality to reach a foregone conclusion, particularly in the trials of the highest ranking Nazi war criminals.

In the case of Osama bin Laden, the challenge of getting a result that was accepted in either the domestic or international sphere would likely be insurmountable. It recently has been revealed that President Obama had considered a criminal trial for bin Laden in the event that he surrendered and was captured. Obama was quoted as saying, "[F]rankly, my belief was if we had captured him, that I would be in a pretty strong position, politically, here, to argue that displaying due process and rule of law would be our best weapon against al-Qaeda, in preventing him from appearing as a martyr."[37] This is similar to what Attorney General

36. MICHAEL SALTER, NAZI WAR CRIMES, US INTELLIGENCE AND SELECTIVE PROSECUTION AT NUREMBERG, 316 (2007) (quoting Franz Neumann, Neumann to Donovan memo, May 4, 1945, National Archives, Record Group 226, Microfilm Publication M1642, Roll 121); RICHARD DUNLOP, DONOVAN—AMERICA'S MASTER SPY, 480 (1982).

37. *President Obama Considered Putting Osama bin Laden on Trial if Taken Alive*, VANITY FAIR, Oct. 3, 2012, *available at* http://www.vanityfair.com/online/daily/2012/10/obama-put-osama-bin-laden-on-trial. *See also* MARK BOWDEN, THE FINISH (2012).

Eric Holder had planned for Khalid Sheikh Mohammed.[38] However, the efforts by the Obama Administration to have the case tried in a federal court in New York caused tremendous domestic political uproar sufficient to abandon the efforts.[39]

Aside from the challenges, creating a factual record to prove guilt beyond a reasonable doubt may have been possible—but even that would likely yield disquiet in the international sphere. Consider one of the strongest criticisms that Nuremberg was just an elaborate scheme of victor's justice. This form of attack comes in one of three rationales: either that the law was improper,[40] the proceedings were improper,[41] or the result was improper.[42]

2. Military and Political Interests

Second and related to the first point, the military and political interests implicated are considerable. The concern that a court would be a policymaker rather than a neutral adjudicator was very real to Jackson. The world may well support a political policy if the military and political interests have a lot at stake. But when these

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38. Khalid Sheikh Mohammed was captured in Pakistan in March 2003. In the transcripts from his interrogation, he proclaimed himself to be the head of al-Qaeda's military committee and personally responsible for the planning of many of the seminal terrorist plots over the last few decades, including the 1993 World Trade Center bombing, bombings in Bali and Kenya in 2002, the failed attempt by the so-called "shoe bomber" Richard Reid, and the 9/11 attacks. *See Profile: Khalid Sheikh Mohammed*, BBC NEWS, http://www.bbc.co.uk/news/world-12964158 (last updated May 5, 2012).

39. Jane Mayer, *The Trial: Eric Holder and the battle over Khalid Sheikh Mohammed*, THE NEW YORKER, Feb. 15, 2010, *available at* http://www.newyorker.com/reporting/2010/02/15/100215fa_fact_mayer.

40. The London Agreement that established the International Military Tribunal "for the just and prompt trial and punishment of the major war criminals of the European Axis" declared crimes within their jurisdiction for prosecution to be: (i) Crimes Against Peace; (ii) War Crimes; and (iii) Crimes Against Humanity. Criticism has been levied against these as being blatant ex post facto laws. *See* Richard Overy, *Making Justice at Nuremberg, 1945-1946*, BBC HISTORY, *available at* http://www.bbc.co.uk/history/worldwars/wwtwo/war_crimes_trials_01.shtml (last updated Feb. 17, 2011).

41. As Professor Richard Overy wrote, "In the end the Allies chose defendants in ways that can be regarded as nothing other than arbitrary." *See id.* As Goering's wrote on a copy of the statement indicting him of war crimes and crimes against humanity, "The victor will always be the judge and the vanquished the accused." *Id.*

42. Though the trials at Nuremberg resulted in three of the twenty-two defendants being acquitted, critics have decried that many perpetrators evaded justice entirely.

interests are high, the use of judicial proceedings to rationalize previously settled political or military policy is unacceptable. It is hard to conceive of any series of events that implicated more political and military interests than the execution of Osama bin Laden.[43]

It is not to be dismissive of the purpose and validity of due process protections even in this context. The argument here is not merely that when a trial would be difficult summary execution is appropriate. What Jackson was defending, however, was the judicial process itself. When it is the case that the challenges facing the judicial process are so severe as to undermine the perceived validity of the very system itself, and that any result, no matter how thorough the adjudicative process, would be perceived to be invalid, then military and political policy can be the grounds for resolution.

B. William Donovan

There are two main challenges in assessing Donovan's view and projecting it towards conflicts in international law today. First, Donovan was a man of adverse interests even within his own person. He was a man who wore many hats including soldier, lawyer, diplomat, and the "Father of American Intelligence."[44] In each of these capacities, his view of the role of international law is potentially conflicting.

Second, Donovan felt frustrated at his dismissal from the American contingent at Nuremberg, said to have been "shaking

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43. An alternative case study would be the trial and execution of Saddam Hussein, which is, in effect, the exception that proves the rule. As Jackson was concerned about the perceived legitimacy of the judicial proceedings, Hussein's trial has been criticized on these exact grounds. The Coalition Provisional Authority authorized the Iraqi Governing Council to create a tribunal for the trial, arguably in violation of the fourth Geneva Convention. The United Nations also said the tribunal would never satisfy its standards for justice. There has also been criticism that the United States exerted too much influence on the tribunal. *See generally* Dave Johns, *Defining Justice*, PBS, http://www.pbs.org/frontlineworld/stories/iraq501/defining_victors.html (last visited Dec. 12, 2012).

44. *A Look Back… Gen. William J. Donovan Heads Office of Strategic Services*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/news-information/featured-story-archive/gen.-william-j.-donovan-heads-oss.html (last updated Jan. 5, 2010).

with anger and frustration."[45] Donovan departed Germany in December 1945, taking an extensive collection of documents with him. In 1946, Donovan took these documents and hid them, locked away in the back of his law firm's vaults.[46] One of the benefits of this action was that it prevented these documents from being subject to the Central Intelligence Agency's "selective and phased declassification" programs.[47] However, the literal locking of the vault doors also symbolically seemed to close this area of Donovan's life that had consumed the previous three years. Whereas Jackson continued to write and give speeches about his role and views from Nuremberg, Donovan returned to his work, leaving some of these conclusions tenuous and perhaps strained, though still worth considering.

It appears that from as early as the summer of 1942, Donovan had been considering the issue of Germany war criminal prosecution. This included an analysis of the difficulties posed by trials of the Japanese. In a memo to Commander Vanderbilt, Donovan wrote, "I wish you would discuss among yourselves the possibility of setting up a fact finding board that would inquire into this whole matter of Japanese atrocities and treatment of prisoners."[48]

By the end of October 1943, President Roosevelt asked Donovan to what extent the Office of Strategic Services (hereinafter "OSS") had examined the question of war crime trials for German war criminals, and by late 1943, Donovan was making detailed plans for the extradition of listed Nazi war criminals.[49] In considering the extensive institutional implications of these issues, Donovan suggested to President Roosevelt that the government should mobilize other governmental agencies to coordinate these efforts. Donovan wrote, "You will recall that you asked me certain questions about the possibility for the trial of war criminals. I enclose a proposal, prepared by our Planning Group, which I sent to the State Dept. some months ago, which would have the United Nations conclude a convention for the extradition of Axis war criminals."[50]

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45. FABIAN VON SCHLABRENDORFF, THE SECRET WAR AGAINST HITLER, 263 (1944).

46. SALTER, *supra* note 36, at 435.

47. *Id.*

48. Donovan to Com. Vanderbilt, August 17, 1942, National Archives, RG 226, M1642, Roll 121.

49. SALTER, *supra* note 36, at 310.

50. Donovan to Roosevelt, October 25, 1943, National Archives, RG 226, M1642, Roll 121.

Keeping in mind Donovan's background as a solider and forefather of the American intelligence community, his views on the judicial process of the Nazi war criminals were pragmatically grounded, though in very distinct ways from Jackson. Donovan's OSS Research and Analysis Branch colleague, Franz Neumann, directly influenced Donovan's personal views on how Nazi war criminals should be tried. Neumann was the OSS's leading analyst specializing in Nazi Germany. Donovan and Neumann shared the plan to have the trials held by anti-Nazi Germans according to traditional German law as a way to avoid the view that the trials were merely victor's justice.[51]

As previously noted, in an internal OSS memo from Franz Neumann to Donovan, Neumann criticized Jackson and implicitly referenced Donovan's opposing view. "Mr. Justice Jackson, in a statement made before his appointment, seemed to stress his preference for a disposal of Nazi leaders accused of political crimes by non-judicial procedure—that is, by straight execution without trial."[52] Neumann went on to argue that this approach would provide even less respect for the law than that supported by Stalin's Soviet Union. It is significant to remember that these two members, Neumann and Donovan, given their position in the United States intelligence community, were certainly cognizant of the icy relations pending between the United States and the Soviet Union. Donovan and others within the OSS viewed the trials as mediated by legalistic as well as significant geopolitical considerations. "Clearly, the shadow of what was to become the Cold War was already beginning to exert an impact, and Donovan, who was in receipt of current secret intelligence on the intentions of foreign powers, was able to advise Jackson over how best to handle these aspects."[53]

Beyond this geopolitical context, in the discussions as to how the trials should function, Donovan seemed genuinely concerned with legitimacy of the judicial process. Adolph Schmidt recalled that Donovan was practicing his German language skills so that he could play a leading role in the trial room as "prosecuting attorney." Schmidt said to Donovan, "You are going to do it in German?" To which Donovan replied, "I am going to do it all in Ger-

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51. SALTER, *supra* note 36, at 315-16.

52. *Id.* at 316 (quoting Franz Neumann, Neumann to Donovan memo, May 4, 1945, National Archives, Record Group 226, Microfilm Publication, M1642, Roll 121).

53. *Id.* at 354.

man so the men in the box know just why they are being tried."[54] In a handwritten letter to Justice Jackson dated October 26, 1945, Donovan wrote, "I'm sure you agree that as a matter of fairness as well as of wisdom they should have a copy of the indictment and an opportunity to obtain counsel."[55]

So, it would appear that Donovan was every bit as opposed to targeted killings as modern detractors would hope. However, it appears even Donovan, for all their conflicts and misgivings, may not have been as far apart from Jackson as one may initially believe. While Roosevelt never gave the OSS formal responsibility for identifying and selecting appropriate defendants, Donovan did take the informal inquiries seriously.

This serious inquiry stemmed seemingly from a few sources aside from Donovan's personal interests. First, perhaps in part, the OSS had to keep up with the British intelligence counterparts in the Special Operations Executive that had already been in the process of preparing a list of Nazi war criminals. Second, the OSS had its own spies, agents, and double agents within Germany. There was a fear that a list not carefully researched and prepared could result in his agency's personnel being on the list of Nazi war criminals as a result of their convincing work.[56]

Nevertheless, as a result of this initial inquiry, in an exchange of memos with the Polish ambassador, it is clear that Donovan's early thinking had separated the Nazi war criminals into two groups: (1) those for full trial and (2) those for a "summary" form of justice.[57] This latter category was reserved for Nazi leaders, particularly those responsible for the indiscriminate extermination of both Christian and Jewish civilians, such as Göring and Himmler.[58]

All of Donovan's records outside of this relatively narrow time frame in 1942-43 suggest he took the judicial process that was to be created and enshrined at Nuremberg as seriously as any one could. That judicial process, however, was seemingly reserved for those lesser war criminals as the pragmatics of the geopolitical situation coupled with the military and intelligence requirements

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54. DUNLOP, *supra* note 36, at 480.

55. Donovan to Jackson, October 26, 1945, Donovan Nuremberg Trial Collection, Vol. V Section 10.04.

56. SALTER, *supra* note 36, at 310.

57. Donovan to Polish Ambassador, October 15, 1943, National Archives, RG 226, M1642, Roll 121.

58. SALTER, *supra* note 36, at 311.

of extraction weighed heavily in favor of "summary execution" of the worst of the Nazi war criminals. Of course, as history would have it, Hitler, Heinrich Himmler, and Joseph Goebbels all committed suicide before the trial, leaving only Hermann Goering as the prize defendant.[59] He too would ultimately take his own life to avoid hanging at the hands of the allies, so the issue as Donovan feared it was nearly all for naught. It remains, though, that Donovan, like Jackson, understood the gravity of the situation. While Jackson was concerned with judicial legitimacy, Donovan was concerned with the challenge of extradition in a wartime setting.

IV. CONCLUSION

In the end, this analysis demonstrates that one should hesitate before dogmatically accepting the argument that targeted killings violate the legacy of Nuremberg.

As Michael Walzer noted:

> Killing Osama did him no injustice… Should he have been treated as a criminal rather than an enemy—brought back to the United States and put on trial? He was indeed both a criminal and an enemy, but I don't see the justice or the morality of asking U.S. commandos to act like policemen when they clearly were not operating in a zone of peace and when arresting Osama might have made their mission much more dangerous than it already was.[60]

There lies the rub: in western European countries, Islamist terrorists are regarded as criminals and are pursued in accordance with the local rules of engagement for the police. But bin Laden was not tracked down on the streets of Paris, London or Berlin. The rules of engagement for the military are separate and apart from the rules of police conduct. Does this ring of American Exceptionalism considering the routine criticism heaved at nations such as Nigeria, Iran, and Syria for extrajudicial killings of enemies of the state? Perhaps it does.

But the bottom line from Jackson and Donovan is that despite their differences in background and opinion, they still agreed to the core element that the justice Nuremberg represented had to be

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59. JACKSON J. SPIELVOGEL, HITLER AND NAZI GERMANY: A HISTORY, 305-06 (4th ed. 2001).

60. Symposium, *The Killing of Osama bin Laden*, DISSENT MAGAZINE (May 10, 2011), *available at* http://dissentmagazine.org/online.php?id=484.

paramount. It is exactly this concern that would have kept these two men from unabashedly claiming justice in this context always requires a trial. The pragmatic elements not only weigh against the practicality of the trial but also in fact may damage the judicial process itself. More specifically for Donovan, as Walzer argues, one cannot expect U.S. commandos to act like policemen. This was the challenge Donovan considered in 1942-43, and it is a challenge that remains today.

That is far from a ringing endorsement for the use of targeted killings or indiscriminate use of drone strikes, and that is exactly the point. While these men may have agreed that a limited use of targeted killings is permissible, and in fact, necessary to eliminate the worst of the worst targets as threats to peace, this is an incredibly narrow ground for permissibility.

One should not forget the legacy of Nuremberg. As William Bosch wrote, "Nuremberg is significant not so much because of what happened once and for all in 1946 in a Bavarian city, but because of what it has become for many men—sign and symbol of greater realities."[61] It can still mean that even in light of what Jackson or Donovan wrote in private memos considering the permissibility of targeted killings; all that changes is one should carefully consider the argument that for justice in international conflict there must be a trial. As Jackson feared, some cases may be too trying on incipient courts.

61. BOSCH, *supra* note 23, at 239.