DEATH FROM ABOVE: THE EXECUTIVE BRANCH’S TARGETED KILLING OF UNITED STATES CITIZENS IN THE WAR ON TERROR

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On September 30, 2011, the Obama administration announced the death of alleged terrorist Anwar al-Awlaki, the first U.S. citizen to be the subject of a targeted drone strike. While targeted killings are not a recent development in the international community, they have been increasingly utilized following the events of September 11, 2001 and the United States’ subsequent War on Terror. Embroiled in an asymmetric war against a network of nonstate actors, the United States has increasingly relied upon targeted killings to defend against terrorist threats.

The addition of U.S. citizens to government “kill-lists,” however, raises troubling questions regarding due process and separation of powers. This Note discusses the recent historical background and constitutional considerations relevant to targeted killings, and analyzes the inadequate constitutional protections currently employed by an overly powerful executive branch.

In light of these concerns, this Note ultimately recommends that the executive branch adopt a new form of judicial review that allows a neutral decision maker to review evidence and ensure that decisions to target U.S. citizens are justified, thereby preventing errors and providing targeted citizens with a minimum level of due process.

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I. INTRODUCTION

The unfortunate reality is that our nation will likely continue to face terrorist threats that—at times—originate with our own citizens. When such individuals take up arms against this country—and join al Qaeda in plotting attacks designed to kill their fellow Americans—there may be only one realistic and appropriate response. We must take steps to stop them—in full accordance with the Constitution. In this hour of danger, we simply cannot afford to wait until deadly plans are carried out—and we will not.1

—Eric Holder, United States Attorney General

On September 30, 2011, the Obama administration announced the death of Anwar al-Awlaki,2 a terrorist believed to be “the leader of external operations for Al Qaeda in the Arabian Peninsula.”3 Al-Awlaki was killed in Yemen by a drone strike,4 the seemingly preferred method of killing terrorists for the Obama administration.5 The drone strike also killed Samir Khan, an editor of Inspire, Al Qaeda’s English online magazine.6 While the government lauded the deaths of these men, the Obama administration glossed over one crucial detail: al-Awlaki was the first known U.S. citizen to be the subject of a targeted killing.7

A targeted killing is “the intentional killing by a state of an individual identified in advance and not in the state’s custody.”8 Targeted killings are not a recent development in the international community,9 but

2. Anwar al-Awlaki’s name has a variety of spellings. His case before the D.C. District Court spelled his name as al-Aulaqi. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010).
4. Mazzetti et al., supra note 3.
8. Andrew Altman, Introduction to TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 1, 5 (Claire Finkelstein et al. eds., 2012).
9. Nils Melzer, TARGETED KILLING IN INTERNATIONAL LAW 29 (2008). Israel’s targeted killing policy brought the topic to the forefront, but Russia has also admitted to targeting Chechen
until recently were more sparse and covert when used. \textsuperscript{10} Targeted killings have since gained traction and popularity, particularly after the September 11, 2001 (“September 11th”) attacks. \textsuperscript{11} Proponents of targeted killings argue that terrorists have changed the very nature of war. \textsuperscript{12} The War on Terror does not conform to traditional concepts of war, that is, one where nations with uniformed soldiers fight on discernible battlefields. \textsuperscript{13} Rather, the United States now faces a worldwide network of individuals (often referred to as nonstate actors) who intentionally blend into the civilian population, indiscriminately carrying out terrorist attacks against both military forces and civilians. \textsuperscript{14} Supporters contend that targeted killings are justified under these new realities of war. \textsuperscript{15}

But the targeted killing of a U.S. citizen raises important constitutional concerns regarding due process and the separation of powers. Under the Fifth Amendment, “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . .” \textsuperscript{16} Additionally, the recent War on Terror Supreme Court cases \textsuperscript{17} suggest that the Constitution affords due process rights not only to U.S. citizens, \textsuperscript{18} but also, in some cases, to foreign nationals. \textsuperscript{19} The targeted killing of al-Awlaki afforded him no constitutional due process. Al-Awlaki was never tried and convicted before a court for accused terrorist activity. \textsuperscript{20} Al-Awlaki was never even formally notified that he had made President Obama’s “kill list.” \textsuperscript{21} His killing appears to be the result of an extrajudicial order decided entirely by the executive branch.

This Note proposes that U.S. citizens must be afforded some due process before they can be the subjects of targeted killings. In Part II, this Note will briefly discuss September 11th’s significance, the history of targeted killings, the relevant constitutional law on executive war power and due process, and end with al-Awlaki’s targeted killing. Part III then analyzes three key areas: (1) the War on Terror’s inapplicability to tradi-

\begin{thebibliography}{99}
\bibitem{10}Id. at 10. Melzer briefly mentions that the United States may have been using targeted killings since Vietnam. \textit{Id.} at 37.
\bibitem{11}Id. at 9.
\bibitem{13}Mark Maxwell, \textit{Rebutting the Civilian Presumption: Playing Whack-A-Mole Without a Mallet?}, in \textit{TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD} 31, 36 (Finkelstein et al. eds., 2012); see also John Yoo, \textit{Assassination or Targeted Killings After 9/11}, 56 N.Y.L. SCH. L. REV. 57, 64 (2012).
\bibitem{14}Altman, \textit{supra} note 8, at 7.
\bibitem{15}Id. at 2.
\bibitem{16}Maxwell, \textit{supra} note 12, at 38; see also Yoo, \textit{supra} note 12, at 64.
\bibitem{17}U.S. CONST. amend. V.
\bibitem{19}\textit{Hamdi}, 542 U.S. at 533.
\bibitem{20}Boumediene, 553 U.S. at 766.
\end{thebibliography}
tional notions of war, (2) how the War on Terror created an overly powerful executive branch, and (3) the executive branch’s inadequate interpretation of the Fifth Amendment’s constitutional protections. Taking these three areas into account, Part IV recommends creating a court designed to balance the need for a responsive executive branch facing national security threats without jeopardizing U.S. citizens’ fundamental civil liberties. Part V offers concluding remarks.

II. BACKGROUND

The legality of subjecting a U.S. citizen to a targeted killing cannot be understood without discussing basic constitutional rights and how these change in times of war and peace. Part II.A provides a brief overview of how the United States combated and prosecuted terrorists prior to September 11th and how those events contributed to the War on Terror’s current framework. Part II.B covers the history and current use of targeted killings. Part II.C discusses the relevant constitutional law, statutes, and case law on presidential power. Part II.D outlines procedural and substantive due process and how times of war and peace alter certain constitutional rights. Finally, within the context of the previous information, Part II.E provides the backdrop to the al-Awlaki case.

A. How September 11th Changed Everything

Generally speaking, two models have emerged for assessing the legality of governmental responses to terrorism: the armed-conflict model and the law-enforcement model. The law-enforcement model requires the government to overcome more hurdles and dedicate more resources to capturing terrorists. Its proponents believe that terrorism should be handled similarly to serious domestic crimes: police, prosecutors, trials, warrants, a right to counsel, a right to confront accusers, etc. Only when a terrorist (or any individual) poses a direct, imminent threat to civilian lives, and killing him is the only method to neutralize the threat, may an individual be killed outside these procedural safeguards. Before September 11th, the United States followed the law-enforcement model, viewing terrorists as suspected criminals. The preferred response was investigating and trying the suspect rather than using lethal force. September 11th exposed the weaknesses of the law-enforcement model and caused the United States to rethink its views on combating terrorism.

22. Altman, supra note 8, at 5.
23. Maxwell, supra note 12, at 36.
24. Id.
25. Id.; see also Yoo, supra note 12, at 64.
27. Id. at 37; see also Yoo, supra note 12, at 70–71 (noting that the United States government missed three attempts to kill Osama bin Laden prior to 9/11 due to concerns over violating domestic laws against assassination and the imminent threat requirement).
In the wake of September 11th, the United States embraced the armed-conflict model, declaring a “War on Terror.” Under the armed-conflict model, once nations are at war, there is no legal requirement to pursue the capture of enemy belligerents; instead, it is legally permissible to use lethal force as a first response—even when the enemy poses no immediate threat. Proponents of the armed-conflict paradigm argue that the law-enforcement model is inadequate to deal with the realities of fighting terrorist organizations because the model’s imminent threat requirement unduly hampers governments from responding effectively to credible terrorist threats. Since September 11th, the government has pointed to the armed-conflict model and declarations that we are “at war” to justify new military responses aimed at defending the United States from future terrorist attacks. The executive branch’s newest response is to increasingly use targeted killings against Al Qaeda members, even members that are U.S. citizens.

In addition to changing our legal frame of reference, the United States’ fight against terrorism is an asymmetrical conflict. Unlike previous wars, the United States’ enemy is not another state, but a group of nonstate actors. The battle against these actors is different from any other; the global network of Al Qaeda requires U.S. troops to fight on changing battlefields against opponents who intentionally hide in civilian populations and clearly disregard the laws of war.

B. The History and Current Status of Targeted Killings

Targeted killings authorize “the use of lethal force . . . with the intent, premeditation and deliberation to kill individually selected persons who are not in the custody of those targeting them.” This type of killing has been used in the international community, but these operations were not openly acknowledged until November 2000, when Israel first publicly admitted to using targeted killings. The United States has engaged in

28. Altman, supra note 8, at 6.
29. See, e.g., Maxwell, supra note 12, at 58; Fernando R. Tesón, Targeted Killing in War and Peace: A Philosophical Analysis, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 403, 416 (Finkelstein et al. eds., 2012).
31. Altman, supra note 8, at 2.
32. Id.
33. Id.; see also Jeff McMahan, Targeted Killing: Murder, Combat or Law Enforcement?, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 135, 138 (Claire Finkelstein et al. eds., 2012).
34. MELZER, supra note 9, at 5. Definitions of targeted killings vary widely, but for purposes of this Note this is the guiding definition. See Philip Alston, The CIA and Targeted Killings Beyond Borders, 2 HARV. NAT’L Sec. J. 283, 285–99 (2011) for other definitions of “targeted killings.”
targeted killings,36 but support for the practice and actual increases in use are a recent phenomenon, likely due to the events of September 11th.37

The United States uses two methods of targeted killing: drone strikes and kill/capture missions.38 Drones are a fleet of small, unmanned aircraft equipped with surveillance cameras and weaponry39 and flown by civilians (typically former military members).40 In armed conflict zones like Afghanistan and Iraq, drone strikes are typically managed by the Department of Defense,41 while the Central Intelligence Agency (CIA) reportedly conducts drone strikes from its headquarters in Langley, Virginia42 in areas outside recognized armed conflict zones, such as Pakistan.43 Using drones, the U.S. government can kill targets from thousands of miles away.44 The target never sees or hears the weapon as it is fired.45 In the case of terrorists who often hide in remote, hard-to-access areas, capture or conventional attack is sometimes impossible.46 Drone strikes are thus praised for their remarkable accuracy and ability to limit both U.S. military and civilian casualties.47 But targeted killings are not limited to drone strikes. Indeed, perhaps one of the most famous targeted killings in our nation’s history occurred on May 2, 2011 when a special unit of the U.S. Navy killed Osama bin Laden in Pakistan.48 These special operation raids are controlled by the Joint Special Operations Command (“JSOC”), which works directly with the executive branch.49 According to the Council on Foreign Relations, the raids typically occur late at night with ninety percent ending without a shot fired.50

Statistically speaking, the Obama administration appears to prefer targeted killings in the War on Terror.51 From 2004 to 2008, the Bush

36. Maxwell, supra note 12, at 34–5. At the time that the United States first engaged in targeted killings, these covert operations were largely against political leaders and labeled assassinations. Id. The public outrage at the widespread assassinations uncovered by the Church Committee led President Ford to issue Executive Order 12333, which prohibits the United States government from engaging in political assassination. Id. The Order is still in effect today. Id.
37. Sides, supra note 11.
41. Masters, supra note 38.
43. Masters, supra note 38. In some instances, these operations are combined, such as the drone strikes in Yemen. Id.
44. Murphy & Radsan, supra note 39 at 406.
45. Id.
46. Id.
47. Alston, supra note 34, at 286, 289 (noting the “perceived effectiveness” of drone programs and that targeted killings effectively spare civilians from being collateral damage to traditional war). While proponents claim drone strikes limit these casualties, “[t]he accuracy of drone strikes is heavily contested and . . . impossible for outsiders to verify.” U.N. Report, supra note 35, at ¶ 19.
48. Tesón, supra note 29, at 403.
49. Masters, supra note 38.
50. Id.
administration authorized forty-two targeted killings by drone strikes.\textsuperscript{52} In contrast, by February 2011, the Obama administration had authorized 180 drone strikes.\textsuperscript{53} To date, the New America Foundation estimates 321 drone strikes under the Obama administration in Pakistan alone, killing an estimated 2374 people.\textsuperscript{54} Under President Obama, the Pentagon conducted 675 special operations raids in 2009 and 2200 in 2011.\textsuperscript{55} Targeted killings are also seemingly less messy than the “so-called ‘enhanced interrogation’ techniques” used by the Bush administration.\textsuperscript{56} By using targeted killings, the executive branch avoids dealing with issues of indefinite detention, torture in interrogation, and the thorny and ambiguous aspect of how to try detainees.\textsuperscript{57}

The Obama administration’s use of targeted killings is even more significant in light of his first presidential campaign promises. In 2007, Senator Obama heavily criticized then-President George W. Bush for unlawfully detaining individuals in Guantanamo Bay and using torture methods in Bush’s fight against terrorism.\textsuperscript{58} As a candidate, Obama argued against the Bush administration’s tactics because he believed such tactics disregarded constitutional rights and the role of the other two branches of government.\textsuperscript{59} Immediately after taking office, President Obama appeared poised to capitalize on his campaign promises, issuing several executive memoranda regarding the treatment of detainees and promising to close Guantanamo within a year.\textsuperscript{60} It became apparent soon after, however, that the Obama administration would not eliminate Bush’s policies but would instead attempt to adopt even more expansive presidential powers.\textsuperscript{61}

\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{55} Masters, supra note 38.
\textsuperscript{56} Finkelstein, supra note 51, at 156.
\textsuperscript{57} Id. at 156–57.
\textsuperscript{58} See, e.g., Charlie Savage, Barack Obama’s Q&A, BOS. GLOBE (Dec. 20, 2007), http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/ (stating, “I reject the Bush Administration’s claim that the President has plenary authority under the Constitution to detain U.S. citizens without charges as unlawful enemy combatants” and that “[t]he President is not above the law, and the Commander-in-Chief power does not entitle him to use techniques that Congress has specifically banned as torture.”); Senator Barack Obama, Remarks at the Wilson Center in Washington, D.C. (Aug. 1, 2007) (transcript available at http://www.realclearpolitics.com/articles/2007/08/the_war_we_need_to_win.html) (“When I am President, America will reject torture without exception. . . . I have faith in America’s courts, and I have faith in our JAGs. As President, I will close Guantanamo, reject the Military Commissions Act, and adhere to the Geneva Conventions. . . . [The Bush] Administration acts like violating civil liberties is the way to enhance our security. It is not.”).
\textsuperscript{59} See David K. Nichols, Professor Obama and the Constitution, in THE OBAMA PRESIDENCY IN THE CONSTITUTIONAL ORDER 25, 34 (Carol McNamara & Melanie M. Marlowe eds., 2011).
\textsuperscript{60} Id. at 36.
\textsuperscript{61} Id. at 37 (noting that the presidential responsibility for national security has led Obama to follow Bush’s lead in seeking to use “the full arsenal of presidential tools”).
C. The President’s Powers As Commander-in-Chief

As the Founding Fathers debated and drafted the Constitution, they created a government with three branches, designed to operate as checks and balances against one branch becoming too powerful. The Framers believed that this division of power would force the branches to cooperate and compete in a way to best serve the nation. Article I, Section 1 created the legislative branch, vesting “all legislative powers” to a bicameral Congress. Article II created the executive branch, vesting power in one individual to lead the nation as its Commander-in-Chief. Finally, Article III, Section 1 created the judiciary, serving as the court system for the country and ultimate resolver of legal issues. The Constitution’s language dictates broadly (though sometimes specifically) what the three branches’ powers are, but these powers have also been refined and developed in certain settings.

In the specific area of war powers, the Constitution’s text suggests that the executive branch and Congress must work together. Article I, Section 8 gives Congress certain powers with respect to war: the “Power . . . [t]o declare War,” “[t]o raise and support Armies,” “[t]o provide and maintain a Navy,” “[t]o provide for calling forth the Militia,” and “[t]o provide for organizing, arming, and disciplining, the Militia.” Article II, Section 2 declares the president as “Commander in Chief of the Army and Navy . . . and of the Militia of the several States.” The Framers intentionally divided these war-related powers; the Constitution provided for a responsive executive when necessary, but one that could not hastily rush into war nor have unlimited access to the purse of the people. Additionally, while the executive has authority over the Army, Navy, and Militia, Article I, Section 8 gives Congress the power to “call[] forth” the Militia and maintain an Army and Navy. According to Louis Fisher, the war-powers provisions of the Constitution should largely tilt in favor of Congress, with the president’s only unilateral power being the ability to repel sudden attacks.

Yet, over time, in the context of war, the executive branch has developed broad powers, despite these specific constitutional provisions. Because of wars and national crises, the president and the executive branch have slowly expanded the president’s war-making powers, argua-
bly beyond the Framers’ intent. Harold Koh notes that the president often wins in the war powers arena due to the pattern of “executive initiative, congressional acquiescence, and judicial tolerance” that has developed over time. An often-cited example of this expansion is the fact that only Congress can formally declare the United States as at war, yet the president has sent military forces into armed conflict zones without Congressional authorization. John Yoo suggests that our branches of government have developed a “system of war powers” whereby the president is responsible for engaging in hostilities, Congress acquiesces to this leadership and is involved through appropriation approvals or declarations of support, and the courts invoke political question doctrine to avoid addressing war powers questions.

As technology has developed, the president has also become more involved in everyday aspects of fighting wars. This access to information and the new realities of modern war have expanded the president’s power beyond basic war powers such as commanding troops, but also to powers affecting the rights of individuals—even U.S. citizens. John Dehn posits that the concepts of governmental, public, and military necessity have formed the current understanding of the president’s war powers.

“Military necessity is the power to employ all military measures that are not prohibited by applicable law and are reasonably calculated to defeat a national enemy.” Military necessity appears to have existed since the Founding, but was explicitly articulated as a concept of implied, discretionary power during the Civil War in the Lieber Code. The Lieber

73. Id. at 12. Louis Henkin notes that President Lincoln used his military powers and claims of national emergency to start the expansion of presidential war power, solely in a domestic context. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 46 (Oxford Univ. Press 2nd ed. 1996).


75. JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 12 (2005) [hereinafter YOO, POWERS] (citing to examples in Korea, Vietnam, Panama, and Kosovo). It is important to note that while Congress acquiesced to some of these actions, they have also tried to control presidential war-making with little success. Id. at 12. Congress passed the War Power Resolution (WPR) in 1973 prohibiting the president from placing the American military in zones of hostilities without (1) a formal declaration of war, (2) statutory authorization, or (3) an attack on the United States or its forces. Id. at 12. The WPR requires the president to cooperate with Congress by notifying the legislature within forty-eight hours of committing troops to military action and forbidding military action for more than sixty days without Congressional approval or declaration of war. Id. at 12–13. Despite its enactment, presidents have routinely disregarded the statute. YOO, CRISIS, supra note 62, at 420.

76. YOO, POWERS, supra note 75, at 13.


78. Id.

79. KOH, supra note 74, at 46.

80. Dehn, supra note 77, at 604–05.

81. Id. at 605.

82. See id. at 626–29.

83. INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863) (prepared by Francis Lieber), reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION
Code explained military necessity in three articles as the permissible measures needed to secure the ends of war according to modern law and war. These three articles formed the basis for the customary international laws of war and the Code’s ideas on military necessity continue to serve as “one of the fundamental principles upon which the United States military structures its understanding of the laws of war.”

Public necessity is a common law tort doctrine, which allows the government to invade private property rights if necessary to avoid a public harm. During wartime, the doctrine permits the abrogation of certain constitutional rights in exigent circumstances. The Supreme Court has extensively explored public necessity justifications in the context of war, most notably in Juragua Iron Co. v. United States, Ex parte Quirin, and the War on Terror cases. When constitutional rights yield for public necessity concerns, the government must only prove that the necessity is required as to rights of U.S. citizens. Quirin eventually became the foundational case for the Bush administration’s authorization of military commissions to try captives in the War on Terror.

Governmental necessity is “a general power to counter a threat to the nation’s existence without legal constraint.” Dehn suggests that this would allow the executive to temporarily violate domestic and international laws in the name of national emergencies or war, so long as Congress is informed and ratifies the presidential action. This theory of

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84. Article 14: “Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.” Id. at 6.

Article 15: “Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; . . . and of such deception as does not involve the breaking of good faith . . . supposed by the modern law of war to exist.” Id.

Article 16: “Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.” Id.

85. Id.


87. Dehn, supra note 77, at 605.

88. Id.

89. 212 U.S. 297 (1909).

90. 317 U.S. 1 (1942).


92. Dehn, supra note 77, at 630.

93. Hamdi, 542 U.S. at 569 (Scalia, J., dissenting).

94. Dehn, supra note 77, at 605.

95. Id.
presidential power does not appear in the Constitution and “appears to be legally unmanageable.” 96 Following September 11th, “saving American lives” was repeatedly used to justify actions that violated both domestic and international laws, leading some to believe that the United States was already using governmental necessity to expand presidential power. 97

D. Due Process Rights Under the Fifth Amendment of the Constitution

The Constitution contains two due process clauses in the Fifth and Fourteenth Amendments, applicable against the federal and state governments respectively. Because the federal government carries out targeted killings, this Note will only examine the Fifth Amendment. The Fifth Amendment provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . .” 98 Due process requires the government to respect certain legal rights before depriving citizens of life, liberty, or property and consists of both procedural and substantive considerations.

1. Procedural Due Process

“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of Due Process of the Fifth . . . Amendment.” 99 The criminal law framework provides rigorous requirements before a suspect can be convicted of a crime. These broad requirements are: a statutorily created or defined crime, an impartial court with jurisdiction, accusation in a manner that describes the nature and cause of allegation, timely notification of the offense and an opportunity to defend, trial before an impartial court following established criminal procedure, and the right to release if found innocent. 100 The core of criminal due process is the right to a fair opportunity to defend against accusations. 101

Broadly speaking, Mathews v. Eldridge 102 provides the touchstone test for due process in assessing the constitutionality of depriving a citizen of due process. 103 At its core, due process requires “the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’ ” 104 While due process requires an opportunity to be heard, Mathews holds that due process is flexible and varies based on situational demands. 105 To determine the amount of process due, the Supreme Court identified three fac-

96. Id.
97. Id. at 655.
98. U.S. Const. amend. V.
100. 16 C.J.S. Constitutional Law § 1528 (2013).
101. Id.
105. Id. at 334.
tors that must be considered: (1) “the private interest that will be affect-
ed by the official action;” (2) “the risk of an erroneous deprivation of
such interest through the procedures used, and the probable value, if any,
of additional or substitute procedural safeguards;” and (3) “the Govern-
ment’s interest, including the function involved and the fiscal and admin-
istrative burdens that the additional or substitute procedural requirement
would entail.”

2. **Substantive Due Process**

Procedural due process focuses on the adjudication methods needed
before the government may deprive U.S. citizens of life, liberty, or prop-
erty, whereas substantive due process focuses on the result of the gov-
ernmental action. An extremely controversial constitutional principle,
modern substantive due process focuses on protecting fundamental rights
protected by the Constitution, both express and implied. At the heart
of substantive due process is the idea that the government cannot use its
power to take “arbitrary” action. The Supreme Court has held,
though, that in “dealing with abusive executive action . . . only the most
egregious official conduct can be said to be ‘arbitrary in the constitution-
al sense . . . .’” Only abuse that “shock[s] the conscience” will be con-
sidered a due process violation.

These two considerations serve as important checks against poten-
tial government abuse of power. In the case of targeted killings, for the
government to constitutionally deprive a citizen of life, both procedural
and substantive due process requirements must be met. While substan-
tive due process analysis is important, this Note will focus solely on a
procedural due process analysis.

3. **Due Process Rights During Times of War and Peace**

The two preceding sections discuss constitutional understandings of
the powers of the president and the Fifth Amendment’s due process
clause. While these understandings are in effect for most U.S. citizens at
all times, both presidential power and due process rights change depend-
ing on whether the United States is in a time of peace or war. Distingui-
shing between war and peace becomes important to accurately identi-
fy the applicable legal framework. During times of war, the legal
framework is the law of armed conflict, which affords much wider lati-

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106. Id. at 334–35.
108. Id.
110. Id. at 846 (quoting Collins v. Harker Heights, 503 U.S. 115, 129 (1992)).
111. Id. at 847.
112. See Mike Dreyfuss, Note, My Fellow Americans, We are Going to Kill You: The Legality of Targeting and Killing U.S. Citizens Abroad, 65 VAND. L. REV. 249, 275–78 (2012).
tude for targeted killings. Only killings by “treacherous means” are barred under the law of armed conflict. In times of peace, the legal model is criminal law, which requires compliance with significant constitutional procedures before a citizen can be executed by the state. Under the criminal law framework, the Fourth Amendment prohibits the government from killing a suspect without judicial process unless the action was taken in self-defense or defense of others due to the threat of imminent harm.

a. Times of Peace

In times of peace, the people’s rights are at their absolute peak and citizens are entitled to the Constitution and Bill of Rights’ full protections. The Bill of Rights was passed to guard against tyrannical, government intrusion. This generally means that the government cannot justifiably execute one of its own citizens without following the traditional criminal law framework. Thus, if a government official or agent killed a citizen outside the criminal law framework, this killing could only be legally justified if done in self-defense or defense of others.

b. Times of War: Justifications for Greater Executive Powers and Limited Civil Liberties

In times of war, the Court has shown greater deference to expanding presidential powers to win wars and address national security concerns—even if this comes at the expense of reduced constitutional protections for U.S. citizens. Examination of historical war cases yield valuable insight as to when due process rights can and cannot be violated by the executive branch in the name of national security.

i. When Civil Rights Yield to the Executive’s War Powers

The Supreme Court has frequently upheld invasions of liberty and property out of deference to the executive’s decisions during wartime. During the Civil War and the Spanish-American War, the Supreme

114. Id.
116. See Tennessee v. Garner, 471 U.S. 1, 3 (1985). In Tennessee v. Garner, the Supreme Court ruled that preventive killing is only allowed where there is probable cause to believe the subject is a serious danger to the surrounding public. Id. Scott v. Harris further clarified Garner’s holding that the test for permissible deadly force is an objective reasonableness test based on the facts of the case. 550 U.S. 372, 383 (2007). The Court noted that relative culpabilities of the parties involved went to the reasonableness of force; thus, because the defendant had created the risk to the public, it was reasonable for the responding officer to use deadly force to prevent harm to bystanders. Id. at 384.
117. Ex parte Milligan, 71 U.S. (4 Wall.) 2, 120 (1866) (noting that the Constitution’s initial exclusion of these rights created serious opposition to the Constitution’s ratification).
119. Id.
120. Henkin, supra note 73, at 291.
Court allowed the president to seize private property without regard to the due process clause. In the *Prize Cases*, President Lincoln ordered the naval blockade of several seceding states, effectively declaring the Confederacy and its citizens as enemies.121 Because of their enemy status, the Court held that Confederate citizens’ property was “enemy property” and therefore not subject to the usual constitutional protections.122 Similarly, in *Juragua Iron Co. v. United States*,123 the Court held that the government did not need to compensate an American business for destruction of property because the business was operating in enemy territory and appeared to be supporting the enemy’s war effort.124 *Juragua* supports the proposition that enemies of the state, U.S. citizens included, cannot claim the constitutional protections against proper use of military powers.125 In World War II, the executive invaded substantial liberty rights due to military necessity. Following the attacks on Pearl Harbor, in *Korematsu v. United States*, the Supreme Court maintained the constitutionality of Executive Order 9066, which ordered the Japanese Americans into internment camps.126 The Court’s holding relied on deference to Congress and the military while the United States was at war with Japan.127 *Ex parte Quirin* upheld the jurisdiction of a military tribunal that presided over German saboteurs (one of whom was a U.S. citizen) during World War II.128 When the saboteurs were captured, they were tried and sentenced to death by a secret military tribunal.129 The Court upheld the commissions as they complied with international law and a Congressionally sponsored course of action.130 More importantly, *Quirin* became the foundational case for the Bush administration’s authorization of military commissions to try captives in the War on Terror.131

ii. When Due Process Trumps the Executive’s War Powers

Courts frequently defer to executive decisions during war; occasionally, however, the Court will block the executive from taking actions beyond the branch’s war powers that invade constitutional due process rights. In *Ex parte Milligan*, Lambdin Milligan, a U.S. citizen, was arrested and sentenced to death by a military commission, even though Congress had ordered that cases like Milligan’s be brought into local federal district court.132 The Court determined Milligan’s imprisonment was wrongful, noting that the threat of an invasion was not enough to deny...
citizens’ access to the judicial system. The court rejected the idea that “in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it . . .), has the power, within the lines of his military district, to suspend all civil rights and their remedies.”

The recent War on Terror cases are also important because the Court injected itself into a role that previously had been left to Congress and the executive. In these cases, the Supreme Court refused to favor the executive’s national security concerns at the expense of key constitutional rights. In *Hamdi v. Rumsfeld*, a plurality of the Court determined that Yaser Hamdi had a due process right to “notice of the factual basis for his classification [as an enemy combatant], and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” In *Boumediene v. Bush*, the Court reaffirmed *Reid v. Covert*’s holding that the Constitution applied beyond United States borders and implemented a *Mathews*-esque balancing test to determine whether aliens detained as enemy combatants at Guantanamo Bay had the right to invoke the Constitution’s writ of habeas corpus.

**E. Anwar al-Awlaki and the Kill List**

In 1971, Anwar al-Awlaki was born in the United States while his father, Nasser al-Awlaki, obtained a Ph.D. degree on a Fulbright scholarship. Al-Awlaki grew up in the United States, obtained a college education at Colorado State University, and started a family. Al-Awlaki seemingly led the normal life of an American citizen. The events of September 11th changed al-Awlaki, however, and after a series of negative encounters with the U.S. government, he moved his family back to Yemen. Once in Yemen, al-Awlaki quickly rose to “fame for his ‘inflammatory’ rhetoric and his transfixing ability to radicalize young Muslims” as a leader for the group Al Qaeda in the Arabian Peninsula (“AQAP”). Al-Awlaki’s familiarity with the United States and ability to speak English was a major concern for U.S. officials, presumably because this would be used to recruit more AQAP followers in Western nations.

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133. *Id.* at 76–78.
134. *Id.* at 124.
140. *Id.; see also Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 10 (D.D.C. 2010).
141. Junod, supra note 139.
142. *Id.*
144. Al-Aulaqi, 727 F. Supp. 2d at 10.
This prominence attracted followers both abroad and in the United States. One follower was Major Nidal Malik Hasan, the Army psychiatrist responsible for killing thirteen people and injuring another thirty at Fort Hood.\footnote{Junod, supra note 139.} In the days following the Fort Hood attacks, al-Awlaki praised Hasan’s actions.\footnote{Al-Aulaqi, 727 F. Supp. 2d at 10 (\textquoteleft\textquoteleft Recently, Anwar Al-Aulaqi has made numerous public statements calling for ‘jihad against the West,’ praising the actions of ‘his students’ Abdulmutallab and Hasan, and asking others to ‘follow suit.’\textquoteright\textquoteright\textquoteright\textquoteright\textquoteright\textquoteright).} Months later, on Christmas day, a Nigerian man, Umar Farouk Abdulmutallab, attempted to detonate a bomb in his underwear over American airspace.\footnote{Junod, supra note 139.} When Abdulmutallab was questioned, he told authorities his plot was conceived under al-Awlaki’s direction.\footnote{Id.} It appears that this was the final straw for the U.S. government.\footnote{Maxwell, supra note 12, at 35. \textquoteleft\textquoteleft Mr. al-Awlaki, according to U.S. officials, is no longer merely encouraging terrorist activities against the United States; now he is ‘acting for or on behalf of Al Qaeda in the Arabian Peninsula (AQAP) . . . and providing financial, material or technological support for . . . acts of terrorism.’\textquoteright\textquoteright\textquoteright\textquoteright\textquoteright\textquoteright Id. (quoting Designation of Anwar al-Awlaki as a Specially Designated Global Terrorist, pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594, 75 Federal Register 43233, 43234, Number 141 (July 23, 2010)).} Shortly after the attempted Christmas Day bombing, al-Awlaki was placed on the Obama administration’s kill list, the first U.S. citizen to make the list.\footnote{Greg Miller, \textit{Muslim Cleric Aulaqi Is 1st U.S. Citizen on List of Those CIA is Allowed to Kill}, WASH. POST (Apr. 7, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/04/06/AR2010040604121.html?hpid=topnews.}

Nasser al-Awlaki discovered through a Washington Post article that his son had made the kill list and immediately tried to save his life by suing the U.S. government.\footnote{Junod, supra note 139.} In 2010, before a D.C. District Court, Nasser al-Awlaki sought to enjoin the government from carrying out the targeted killing of his son, arguing that allowing such a killing violated the Constitution and international law.\footnote{Id.} The elder al-Awlaki also sought an injunction ordering the U.S. government to disclose the criteria used to determine if a U.S. citizen will be placed on the kill list.\footnote{Id. at 12. Nasser al-Awlaki also sought two forms of declaratory relief: (1) a declaration that the Constitution prohibited killing U.S. citizens outside of armed conflict unless they presented a “concrete, specific, and imminent threat to life or physical safety” that only lethal force could neutralize and (2) a declaration that outside of armed conflict, treaty and international law prohibited the “targeted killing of all individuals—regardless of their citizenship—except in those same, limited circumstances.” Id. (emphasis added).} Nasser al-Awlaki lost. In December 2010, the D.C. District Court dismissed the case because Nasser al-Awlaki did not have sufficient standing to bring suit and because political question doctrine exempted the issue of targeted killings from judicial review.\footnote{Id. at 52–54.}

Nearly a year later, Anwar al-Awlaki was finally killed after evading two previous drone attacks.\footnote{Junod, supra note 139.} Samir Khan, also a U.S. citizen, was killed
in the drone strike, but he was not on the kill list.\textsuperscript{156} Al-Awlaki was the target; his death marked the first targeted killing of a U.S. citizen.\textsuperscript{157}

III. Analysis

U.S. Attorney General Eric Holder addressed the issue of targeted killings against U.S. citizens in early 2012 at the Northwestern University School of Law.\textsuperscript{158} Holder spoke to the law student community about the legality of such killings, citing the Constitution and international laws of war principles for support.\textsuperscript{159} The exact criteria used to determine the membership of the kill list remains undisclosed, but Holder spoke of a general, three-prong test used to determine whether or not to target a U.S. citizen.\textsuperscript{160} The criteria were: (1) the individual poses an imminent threat of violent attack against the United States, (2) capture of this individual is not feasible, and (3) the killing would be carried out in accordance with the laws of war.\textsuperscript{161} The vague generalities Holder spoke in were recently clarified when a Department of Justice (“DOJ”) white paper was leaked exclusively to NBC in February 2013. The white paper detailed the instances where the U.S. government could kill a U.S. citizen in a foreign country outside of active conflict zones. A citizen determined to be a “senior operation leader” for Al Qaeda or one of its “associated force[s]” “actively engaged in planning operations to kill Americans” can legally be the subject of a targeted killing if the three-prong test is met.\textsuperscript{162}

This section examines the three-prong test presented by Holder and the DOJ’s white paper in the context of (1) the new realities of fighting the War on Terror, (2) balancing the need for a responsive Commander-in-Chief with potential executive abuses of power, and (3) the relevant due process considerations that guard against an unchecked executive branch.

\textsuperscript{156} Id.


\textsuperscript{158} Holder, supra note 1.

\textsuperscript{159} Id.


\textsuperscript{161} Holder, supra note 1.

No. 3] DEATH FROM ABOVE 985

A. The War on Terror: Realities of the New Battlefield

Ministers, today I repeatedly heard how irrelevant my department has become. Why do we need agents, the 00 section? . . . I suppose I see a different world than you do. And the truth is that what I see frightens me. I’m frightened because our enemies are no longer known to us. They do not exist on a map. They’re not nations. They’re individuals. Look around you . . . . Can you see a face, a uniform, a flag? No. Our world is not more transparent now—it’s more opaque. It’s in the shadows. That’s where we must do battle.163

—M, Fictional Head of Secret Intelligence Service

Traditional warfare and the domestic and international laws that developed were based around symmetrical rules of conduct; that is, “the permissions and restrictions that govern the soldiers of one side in war are the same as for the other side . . . .”164 Identifiable armed forces are characterized by a strict chain of command, precisely defined roles in the command hierarchy, and conformity with the legal requirement that members take steps to distinguish themselves from the civilian population.165 In a discernible war zone, military strikes are commonplace and commanders receive wider latitude than in zones of peace regarding who can be legally killed.166

On the battlefield, military commanders can select lawful targets for attack; traditionally, these targets are known as enemy combatants.167 Enemy combatants are “any person in an armed conflict who could be properly detained under the laws and customs of war.”168 The Geneva Conventions refer to combatants as either members of an opposing nation’s armed forces or part of an armed group under responsible command, both of which wear “a fixed, distinctive sign . . . carry[] arms openly . . . [and] conduct[] . . . operations in accordance with the laws and customs of war.”169 In traditional war, combatants engage in battle and can therefore lawfully kill and be killed by other lawful combatants “as a measure of first resort” within the theater of war.170

Lawful enemy com-

164. Claire Finkelstein, Preface to TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMETRICAL WORLD at v, v (Claire Finkelstein et al. eds., 2012).
165. Id.
166. Dreyfuss, supra note 112, at 254.
167. Tesón, supra note 29, at 410.
batants may never legally target and kill civilians, but lawful combatants are given “combatant immunity” for acts on the battlefield.

Outside the battlefield, the only other traditionally defined status in international war is the civilian. Civilians are all people who are not members of an organized armed force to a party in conflict. Because of this, civilians are afforded the highest protections under the laws of war: “states are obligated to never make civilians the object of attack” unless they partake directly in hostilities.

The terrorist attacks of September 11th changed how the United States conducts war. By declaring a War on Terror, the government entered into an asymmetrical conflict. The conflict is asymmetrical because the United States is an identifiable state with armed forces while the other side consists of irregular forces of non-state groups and movements. Irregular forces typically follow something similar to a chain of command, but these groups tend to be loosely organized and do not follow the legal requirement of being readily identifiable soldiers. To the contrary, terrorist groups actively seek to blend in with the civilian population to offset their disadvantages in firepower, technology, and organizational strength. Terrorists also fundamentally violate the laws of war because they deliberately kill civilians.

Because terrorists do not fit within the two categories established under the Geneva Conventions, Israel and the United States introduced a third status: the unlawful enemy combatant. This status allows unlawful combatants to be targeted with lethal force as a first resort, but, unlike lawful combatants, they receive no combatant immunity for previous war-like acts if captured. In the case of Anwar al-Awlaki and


172. Dreyfuss, supra note 112, at 262. Soldiers who fight for a nation are considered “privileged belligerents.” This status provides combatant immunity, meaning soldiers may engage in hostile activities without fear of prosecution for acts committed on the battlefield so long as the acts fall within the rules of war. Id.


174. Id.

175. Maxwell, supra note 12, at 39.

176. Geneva Protocol, supra note 171, at art. 51(3).

177. September 11th changed how the United States conducted war, but other countries have faced and continue to face similar struggles. In fact, the war between Israel and Palestine has taken a bizarre turn, as the Israeli Defense Forces used Twitter to broadcast impending attacks as well as live blogging and video footage of the attacks. Fruzsina Eördögh, Israeli Defense Forces Announce Major Assault on Gaza via Twitter, Live-Blog the Whole Thing, SLATE (Nov. 14, 2012, 3:15 PM), http://www.slate.com/blogs/future_tense/2012/11/14/idf_announces_gaza_assault_death_of_ahmed_al_jabari_via_twitter.html.

178. See Altman, supra note 8, at 2.

179. Id.

180. Id.

181. Id.

182. Id.

183. Maxwell, supra note 12, at 46.

184. Dreyfuss, supra note 112, at 262.
others like him, the U.S. government would classify him as an unlawful enemy combatant. If al-Awlaki can be classified as an unlawful enemy combatant, choosing to kill him as a first response would not violate the international laws of war.

Though this Note focuses on the targeted killings of U.S. citizens, some discussion of international law is relevant. The president must abide by the Constitution as well as relevant international laws.\textsuperscript{185} “[T]he deliberate killing of another human being is presumptively a deeply immoral act” and, therefore, is theoretically an illegal action under international law unless it can be justified under an exception.\textsuperscript{186}

Justifications vary and depend on whether or not the killing occurs in the context of peace or war. In times of peace, states may only use lethal force in limited circumstances, typically in cases of self-defense or to protect others from deadly threats.\textsuperscript{187} Beyond this, suspected criminals are entitled to due process and may not be killed unless handed down as a lawful sentence once a court of law has determined guilt.\textsuperscript{188} During war, the strict conditions imposed on use of lethal force are significantly relaxed.\textsuperscript{189} Once an enemy combatant is identified, lethal force as a first response does not violate any laws of war.\textsuperscript{190}

But the justification for using lethal force during war becomes more difficult when examining the realities of modern warfare. In addition to the difficulty in distinguishing terrorists from civilians, the location of the battlefield is unclear. We have concrete battlefield examples in areas like Afghanistan and Iraq, but what about the harder cases? Does Yemen, where al-Awlaki was killed, count as battlefield? In 2003, “AQAP rose to prominence after attacking Western housing complexes” in Saudi Arabia.\textsuperscript{191} In response, Saudi forces focused on expelling the group, causing many AQAP members to flee and establish themselves in Yemen.\textsuperscript{192} Because of Yemen’s weak central government and political turmoil, AQAP was able to reorganize and add new members and leaders.\textsuperscript{193} In January 2009, the group gained greater strength when the Yemen and Saudi Arabia branches of AQAP merged.\textsuperscript{194} The group is estimated to be compromised of about fifty-six percent Yemeni, thirty-seven percent Saudi, and seven percent foreigners, with most of the group’s fighters being veterans of the Iraqi and Afghan wars.\textsuperscript{195} Efforts to expel the group from Yemen have proven difficult, as AQAP has quickly established roots in the country by providing services and jobs amidst a weak econ-

\begin{itemize}
  \item \textsuperscript{185} HENKIN, supra note 73, at 234–238.
  \item \textsuperscript{186} Tesón, supra note 29, at 403. Tesón offers three exceptions: killing in war, self-defense, and law enforcement. \textit{Id.}
  \item \textsuperscript{187} \textit{Id.} at 405.
  \item \textsuperscript{188} \textit{Id.}
  \item \textsuperscript{189} \textit{Id.} at 411.
  \item \textsuperscript{190} \textit{Id.}
  \item \textsuperscript{191} Mapping Militant Orgs. Project, \textit{supra} note 143.
  \item \textsuperscript{192} \textit{Id.}
  \item \textsuperscript{193} \textit{Id.}
  \item \textsuperscript{194} \textit{Id.}
  \item \textsuperscript{195} \textit{Id.}
\end{itemize}
Yemen falls outside the zone of active hostilities, but given its proximity to Saudi Arabia and the prominence of AQAP, its geographical location and ties to terrorist organizations suggest that it comes closer to being considered a battlefield in the War on Terror.

The leaked DOJ white paper suggests that lethal force against a U.S. citizen can be used seemingly anywhere—whether the citizen is in a traditional battlefield setting or nowhere near an ongoing conflict zone. The unlimited geographic scope proposed by the DOJ’s white paper creates a problematic standard open to potential abuse by the executive branch. International law distinguishes between lawful and unlawful killings by drawing distinctions between combatants and zones of conflict. The DOJ’s white paper is troubling because it effectively creates no boundary to the use of targeted killing against a U.S. citizen: in identifiable conflict zones/battlefields, such a killing would be permitted if the citizen was a combatant; outside active hostility zones, citizens could still be targeted assuming they meet the DOJ’s vaguely outlined criteria.

While Yemen seems reasonable under the DOJ’s white paper, the unreasonableness of allowing targeted killings without any form of review in such a broad geographical zone becomes more apparent if we change the country and increase the distance from an active zone of hostilities. Would a targeted killing in Peru be acceptable? Even more alarming, would this zone extend to the United States? The broad scope of the white paper creates serious concerns about the implications of executing a U.S. citizen without formalized review and the possibility of unchecked, abusive executive power. During wartime, military commanders have historically been granted “broad powers . . . [when] engaged in day-to-day fighting in a theater of war.” Al Qaeda maintains a global presence, but this cannot mean that the entire world is considered a zone of potential hostility.

196. Id.
197. Within the first three lines of the Department of Justice’s memo, the department clearly states that lethal force may be used “in a foreign country outside the area of active hostilities” and that the white paper solely covers this geographic zone and not areas that constitute a traditional battlefield. DOJ Memo, supra note 162, at 1.
199. DOJ Memo, supra note 162, at 1.
200. The answer appears to be no, for now. The killing spree and subsequent manhunt of LAPD officer, Christopher Dorner, had one Twitter user snidely tweeting that “if Dorner was . . . across the border, [the cabin he was hiding in] could be a crater . . . #drones.” Michael Crowley, @CrowleyTIME, TWITTER (Feb. 12, 2013, 5:47 PM), http://twitter.com/CrowleyTIME (screenshot on file with author).
B. Balancing the Need for a Responsive Executive with Separation of Powers Concerns

The Constitution empowers the President to protect the nation from any imminent threat of violent attack. And international law recognizes the inherent right of national self-defense. None of this is changed by the fact that we are not in a conventional war.203 —Eric Holder, United States Attorney General

The executive branch has historically been given broad grants of authority to protect and defend the United States.204 Combined with Congressional power, the president has broad power to exercise judgment and discretion in determining the nature and extent of the threatened injury and the best methods of resistance.205 The War on Terror arguably requires a particularly responsive executive branch leading war efforts because attacks can come at any time and, more importantly, are not always waged in a battlefield setting.206 The fact that terrorists attack both military and civilian populations in unpredictable ways207 means that the executive branch must constantly monitor terrorist group movements with some freedom to take prompt defensive or preemptive action to thwart plans.

1. Current State of Executive Power in the War on Terror

The executive branch conducts targeted killings usually through specialized forces of U.S. military or by CIA agents.208 This authority is broadly given under the Constitution which declares that “[t]he President shall be Commander in Chief of the Army and Navy . . . .”209 More specifically, the president’s power to wage war on terrorist groups comes from the Authorization for Use of Military Force Act (“AUMF”). Passed just one week after the September 11th attacks, the AUMF explicitly authorizes the president to:

- use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organization or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.210

Concurrent to the president’s powers, Article I grants Congress the power “[t]o declare War,” “[t]o raise and support Armies,” and “provide

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203. Holder, supra note 1.
204. HENKIN, supra note 73, at 46–48.
206. See discussion supra Part III.A.
207. See supra notes 178–183 and accompanying text.
208. See discussion supra Part II.B.
and maintain a Navy.” While the Constitution’s text suggests the two branches combine to generate the military’s full power, modern understandings of the Commander in Chief power tend to “confla[t] executive powers rather than isolat[e] its components.”

In the seminal case, Youngstown Sheet & Tube Co. v. Sawyer, Supreme Court Justice Jackson’s concurrence argued that the president has certain implied, unenumerated powers that allow him or her to act during times of national emergency. Using the famous “zones of power” analysis, Jackson argued that “[p]residential powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress.” Jackson divided presidential authority into three zones, ranked in order of decreasing executive power. In the first zone, when the president acts with support of Congress, presidential power is at its maximum because the presidential power includes the powers of Congress. In the second zone, called the “zone of twilight”, the president acts with authority during Congressional silence. In this zone, Congress is silent long enough, Jackson suggests that the president is free to grab as much power as he or she can take—even if this infringes upon matters typically given to Congress. Finally, the third zone contains the “lowest ebb” of presidential power because the president acts against congressional wishes. In this zone, the president only has his or her Constitutional Article II powers. Justice Frankfurter’s concurrence also explored how custom impacts the separation of powers. Frankfurter noted that while the Constitutional text and legislation are supreme, “[d]eeply embedded” customary practices of government could give meaning to the Constitution’s text. To Frankfurter, “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, . . . may be treated as a gloss on ‘executive Power’ vested . . . by § 1 of Art. II.”

The executive’s current framework argues the president has the authority to use lethal force against U.S. citizens from four sources: (1) the executive’s constitutional responsibility to protect and defend the nation, (2) Congress’ authorization under the AUMF, (3) the right under inter-

212. Dehn, supra note 77, at 609.
213. 343 U.S. 579 (1952).
214. Id. at 635 (Jackson, J., concurring) (“The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”).
215. Id.
216. Id.
217. Id. at 637 (Jackson, J., concurring).
218. Id. (“Any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”).
219. Id.
220. Id.
221. Id. at 610 (Frankfurter, J., concurring).
222. Id. at 610–11.
national law to national self-defense, and (4) the United States’ state of war against Al Qaeda.\footnote{DOJ Memo, supra note 162, at 1.} Applying the \textit{Youngstown} analysis to Congress’ passage of the AUMF gives the president the strongest argument for legal authority. When targeting a U.S. citizen with significant ties to Al Qaeda, the president theoretically operates in Jackson’s first zone of power; he or she has Article II Commander-in-Chief powers \textit{and} assumes Congressional power to use “all necessary and appropriate force” against a person poised to launch a future act of terror.

2. \textit{The Strategic Military Appeal of Targeted Killings}

As Commander-in-Chief during a Congressionally authorized war, the president exercises complete control over the conduct of war.\footnote{See KOH, supra note 74, at 46.} Targeted killings appeal to the current administration not only because they are “neater” and more efficient, but also because of the enemy. The executive branch has realized that by declaring war on terrorists, successful campaigns will not be based on who has more manpower, technology, or weapons.\footnote{See Yoo, supra note 12, at 65.} Instead, the executive branch must strategically identify key people in the chain of command for terrorist groups. John Yoo characterizes Al Qaeda as a “free-scale network” with a few widely known people (called “hubs”) who dictate the network’s trends and strategy.\footnote{Id. at 66.}

Under this line of thought, targeted killings are not an extrajudicial punishment, but rather part of the president’s military strategy in fighting the War on Terror. In this respect, the Courts and Congress typically defer to the executive in the national security and military strategy arenas.\footnote{Hamdi v. Rumsfeld, 542 U.S. 507, 531 (2004).} Stephen Knott argues that expansive presidential power in the national security arena was precisely what the Framers anticipated.\footnote{Knott, supra note 135, at 121–22.} Alexander Hamilton emphasized the need for an “energetic,” “vigorous” executive, contending that an energetic executive was vital for a successful government, and even more so for repelling foreign attacks.\footnote{The Federalist No. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).} Building on his theory of an energetic president, Hamilton wrote “the direction of war . . . demands those qualities . . . exercise[d] . . . by a single hand” and “implies the direction of the common strength . . . .”\footnote{The Federalist No. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).} Using this historical understanding and previous instances of acquiescence, the executive now argues that deciding to kill a U.S. citizen is not subject to examination because the executive branch has invoked its military and emergency powers.\footnote{Alford, supra note 7, at 1272-73.} This invocation of the war power, it is argued, blocks judicial oversight over targeted killings because military strategy in war requires a singular voice.
3. A Cautionary Tale on Expanding Executive Branch War Powers

While the executive branch needs degrees of increased power to respond quickly and effectively to prevent terrorist attacks, this cannot come at the price of creating an unchecked executive branch. History provides important examples of egregious executive conduct when left unchecked in the name of national security. Perhaps the best example of the dangers of an unchecked executive branch comes from the Church Committee’s findings in 1975 and 1976. Amidst the unfolding Watergate scandal and the increasingly unpopular Vietnam War, the Church Committee formed to investigate the intelligence communities. The committee conducted 800 interviews, presided over 21 public hearings and 250 executives hearings, and compiled over 110,000 pages of documentation. After eighteen months of investigation and publishing fourteen reports, the Committee and nation were shocked to uncover the intelligence communities’ abuse of civil liberties in the United States and the extensive political assassinations and attempts abroad against foreign leaders.

These abuses were committed in the name of national security and allowed to continue because of inadequate or nonexistent oversight. The Church Committee’s investigation into the CIA found the agency’s decision process filled with “confusion, ambiguity, and disarray.” Communication breakdowns were frequent, supervisors who authorized assassination missions often did not check their operatives’ assumptions, and limits were unknown. The Committee wrote:

[T]he extension of the doctrine to the internal decision-making process of the Government is absurd. Any theory which . . . places elected officials on the periphery of the decision-making process is an invitation to error, an abdication of responsibility, and a perversion of democratic government. The doctrine is the antithesis of accountability.

The FBI’s rampant abuse of Americans’ civil liberties led to the passage of the Foreign Intelligence Surveillance Act (“FISA”) and the creation of the Foreign Intelligence Surveillance Court (“FISC”). Today, the

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233. LeRoy Ashby, The Church Committee’s History and Relevance: Reflecting on Senator Church, in U.S. NATIONAL SECURITY, INTELLIGENCE, AND DEMOCRACY: FROM THE CHURCH COMMITTEE TO THE WAR ON TERROR 57, 63 (Russell A. Miller ed., 2008).
234. Frederick A.O. Schwarz, Jr., The Church Committee, Then and Now, in U.S. NATIONAL SECURITY, INTELLIGENCE, AND DEMOCRACY: FROM THE CHURCH COMMITTEE TO THE WAR ON TERROR 22, 26 (Russell A. Miller ed., 2008).
236. Id.
237. Id.
FISC oversees requests for surveillance warrants of suspected foreign intelligence agents inside the United States.\textsuperscript{240} The Committee’s findings of the CIA’s involvement in international political assassinations also led to passage of Executive Order 12333, which bans government officials or employees from taking part in political assassinations of foreign leaders.\textsuperscript{241}

To say, however, that our nation has learned from the executive branch’s past abuses of power would be incorrect, particularly in the context of the War on Terror. Similar to the executive abuses investigated by the Church Committee, these recent executive branch abuses were justified in the name of national security. In 2003, the world learned of the human rights violations committed at Abu Ghraib prison in Iraq.\textsuperscript{242} These human rights violations were sanctioned under the “Torture Memos,”\textsuperscript{243} a set of memoranda under the Office of Legal Counsel (“OLC”) and DOJ,\textsuperscript{244} as legally permissible under an expansive interpretation of executive authority. Since 2002, the United States has also used the Guantanamo Bay Naval Base in Cuba as a detainment and interrogation center for people suspected of having ties to terrorists in Afghanistan and Iraq.\textsuperscript{245} Prior to 2004, the OLC and DOJ determined that the base’s location in Cuba placed it outside of United States’ legal jurisdiction and therefore did not entitle its prisoners to the protections of the Geneva Conventions or domestic law.\textsuperscript{246} Prisoners were detained indefinitely without trial or notice of their charges.\textsuperscript{247} Allegations of torture and abuse surfaced.\textsuperscript{248} The treatment of Guantanamo Bay’s prisoners did not change until 2004 when the Supreme Court issued the first of its War on Terror opinions.\textsuperscript{249} Combined, these cases hold that U.S. courts have jurisdiction over Guantanamo Bay and that minimal constitutional protections apply to its prisoners, sometimes regardless of citizenship.\textsuperscript{250} With these recent abuses in mind, former Church Committee member Frederick Schwarz aptly cautioned, “[c]risis has always made it tempting to ignore restraints . . . . [b]ut democracy cannot work where . . . . Congress knowingly turn[s] a blind eye to . . . the conduct of the [executive branch which they are] supposed to check and balance.”\textsuperscript{251}

\textsuperscript{240}. Id.
\textsuperscript{244}. Id. at 89-91.
\textsuperscript{245}. Id. at 90.
\textsuperscript{246}. Id.
\textsuperscript{247}. Id. at 84.
\textsuperscript{249}. Clarke, supra note 243, at 97.
\textsuperscript{250}. See supra notes 135–38 and accompanying text.
\textsuperscript{251}. Schwarz, supra note 234, at 26.
4. Controlling the Executive Branch’s Invocation of the War Power

The Constitution diffuses power across the three branches to guard against abuse of power. The Framers recognized that the “inevitable consequence” of government was abuse of power and that the separation of powers doctrine was fundamental to keeping men free. Proponents of a powerful executive often quote Hamilton’s phrase “[d]ecision, activity, secrecy, and dispatch” in Federalist No. 70 as qualities the Framers expected the president to have, particularly in national security and war matters. While Hamilton does say this, Federalist No. 70 addressed the benefits of having one person as the executive, rather than two, and does not argue for secrecy as an inherent part of the executive branch. Hamilton’s references to decision and activity do not mean the other branches of government cannot check his or her power when in error. The current understanding of the executive’s power reaches far beyond what the Framers envisioned when Hamilton first advocated for a decisive, energetic executive.

The Obama administration’s source of authority analysis for targeted killings plainly violates the separation of powers doctrine. The Constitution vests judicial power in the Supreme Court and its inferior Courts and legislative power in Congress; despite this, the executive branch currently serves as the judicial “process” and legislature for citizens on the kill list. Furthermore, the executive branch asserts that the courts have no jurisdiction to review targeted killing decisions because these decisions are a valid exercise of executive war power. No prescribed law currently exists on the due process rights of Americans subject to targeted killings. If Congress and the Judiciary remain silent, no laws will be made, other than the confidential memoranda created by the Office of Legal Counsel.

Furthermore, though necessity justifications can expand the president’s powers in times of war, the executive branch has exploited this reasoning to such unreasonable lengths that Congress and the judiciary must reclaim power. Jackson and Frankfurter’s concurrences in Youngstown discuss how executive power can extend beyond the Constitution’s text with alarming results. From one perspective, both concurrences encourage vigilance and active participation in the system; if one branches attempts to usurp power, the other branches must respond back. Cynically speaking, the concurrences could also invite “presidential raids of power” because when the other branches fail to combat these raids,

254. Knott, supra note 135, at 121; Yoo, POWERS, supra note 75, at 21.
255. See generally THE FEDERALIST No. 70 (Alexander Hamilton).
256. Alford, supra note 7, at 1272.
257. See id.
258. See supra notes 80–96 and accompanying text.
259. FISHER, supra note 69, at 191.
260. Id.
the executive will have successfully seized additional power. Further expansion of the executive’s war power in the name of national security cannot continue without creating serious separation of powers implications. Protecting the nation from a new enemy should not be taken lightly, but “[t]o what purpose are powers limited . . . if these limits may, at any time, be passed by those intended to be restrained?”

The Obama administration’s suggestion that the judiciary has no power of review because of the potentially negative effects on the military cannot hold under *Hamdi* and *Youngstown*. When individual citizens’ liberties are at stake, the Court has long held that the Constitution calls for the participation of all three branches, not a condensation of power. As such, invoking “even the war power does not remove constitutional limitations safeguarding essential liberties.”

### C. The Due Process Clause As a Necessary Limitation to Executive Power

Some have argued that the President is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of al Qaeda or associated forces. This is simply not accurate. “Due process” and “judicial process” are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.

—Eric Holder, United States Attorney General

While the executive needs broad power to interact with other nations or enemy organizations during war, the Supreme Court has stated “that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” In fact, the Supreme Court has held that the privilege of American citizenship should not be ignored lightly. Referencing the due process clause specifically, the Supreme

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261. Id. Fisher is particularly critical of Jackson’s concurrence, arguing that when other branches attempt to usurp power they act unconstitutionally and that, no matter how often such actions occur, the law cannot be built on illegality. Id.
267. Holder, supra note 1.
269. Id. at 532.
Court indicated “[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.” The executive branch clearly requires broader power in military arenas; however, the preceding section and this section caution against expansion that could lead to abuse. This Note suggests that due process does and should continue to serve as a limitation to the executive’s war powers.

1. The Obama Administration’s Current “Due Process”

Determining what due process was afforded al-Awlaki and will be afforded to future targeted U.S. citizens is shaky at best because the DOJ has not publicly released its criteria for determining the kill list’s members. What little we know is gleaned from Holder’s speech at Northwestern, the leaked DOJ white paper, and stories from the media. The DOJ white paper and Holder’s speech suggest that the “due process” currently given is conducted by “an informed, high-level official of the U.S. government” who determines that the targeted citizen: (1) “poses an imminent threat of violent attack against the United States,” (2) cannot be feasibly captured, and (3) would be killed consistent with applicable law of war principles. Citing to the Supreme Court’s opinion in Hamdi v. Rumsfeld, the memo states that the basic legal framework for analyzing the due process rights of a U.S. citizen who is an operational leader of an enemy force is the Mathews v. Eldridge balancing test. The memo additionally defines “imminent threat,” “feasibility of capture,” and the laws of war principles.

The DOJ memo expands upon Holder’s explanation of imminence at Northwestern detailing that “imminence” might not need to be so imminent. “An ‘imminent’ threat of violent attack against the United States does not require the United States to have clear evidence that a

271. Ryan Devereaux, Obama Praised for Releasing Kill List Memo but Rights Groups Call for More, GUARDIAN (Feb. 7, 2013, 2:40 PM), http://www.guardian.co.uk/world/2013/feb/07/obama-kill-list-memo-release-rights-groups (“[I]t has been ‘virtually impossible’ to ascertain facts about the administration’s targeted killing program. ‘The administration at this point in time . . . basically doesn’t even acknowledge that it’s involved in drone strikes, let alone have an honest conversation about policy.’”). To date, only members of the House and Senate intelligence committees have seen four of the reportedly eleven memos detailing the legal justification for the targeted killing of United States citizens. Scott Shane & Mark Mazzetti, Strategy Seeks to Bolster Bid of C.I.A. Pick, N.Y. TIMES, Feb. 21, 2013, at A1; Charlie Savage, @Charlie_Savage, TWITTER (Feb. 13, 2013, 9:06 AM), https://twitter.com/charlie_savage/ (screenshot on file with author). Even then though, the members were not given a copy of the memorandum, but instead had to visit a Justice Department office. Siobhan Gorman & Evan Perez, Obama Relents on Secret Drone Memo, WALL ST. J., Feb. 7, 2013, at A4. The documents were available for a limited time and only the representatives were allowed to view the documents, meaning they could not bring along their lawyers or experts. Shane & Mazzetti, supra note 271, at A3. Alston notes that exact information about the drone program has come almost completely from news media sources who rely on officials to leak information. Alston, supra note 34, at 286, 330.
272. DOJ Memo, supra note 162, at 1.
273. Id. at 5–6.
274. Id. at 7–9.
275. Id. at 7.
specific attack on U.S. persons and interests will take place in the immediate future.”276 Citing to the “sporadic” and “drawn out” nature of terrorist attacks, the memo argues that Al Qaeda’s threat “demands a broader concept of imminence” that incorporates considerations of “the relevant window of opportunity,” reducing potential collateral damage, and the probability of preventing future attacks on Americans.277 The memo reasons that the continual and regular planning of attacks, regardless of the attack’s stage of development, makes an Al Qaeda senior operational leader an imminent threat.278 The only escape valve to rebutting an imminent threat is evidence that the leader has renounced or abandoned his part in the plan.279

Feasibility of capture depends on a few considerations. The main consideration is whether capture could be secured in the relevant window of opportunity or if the sovereign nation housing the U.S. citizen denied the United States’ request for a military capture operation.280 Feasibility determinations can also be affected based on the risk to military personnel involved in a capture operation.281 This inquiry “would be a highly fact-specific and . . . time-sensitive inquiry.”282 At Northwestern, Holder indicated that where U.S. citizen terrorists present an imminent threat, the improbability of timely capture gives the government “clear authority to defend the United States with lethal force.”283

Finally, consistent with Holder’s speech, the memo notes that a U.S. citizen cannot be legally targeted unless the four fundamental laws of war principles are complied with.284 The principles are (1) necessity, (2) distinction, (3) proportionality, and (4) humanity.285 Necessity requires the target to have definite military value.286 Distinction mandates that only lawful targets may be purposely pursued.287 Proportionality requires that collateral damage may not exceed the anticipated military advantage.288 Humanity requires using weapons that do not inflict unnecessary suffering.289 The memo concedes that, under the laws of war, the United States must accept a citizen’s surrender when feasible.290

Based on what we know, the current framework for targeting U.S. citizens has significant procedural due process flaws. The executive’s “due process” clearly fails the procedural due process requirements un-

276. Id.
277. Id.
278. Id. at 8.
279. See id.
280. Id.
281. Id.
282. Id.
283. Holder, supra note 1.
284. DOJ Memo, supra note 162, at 8.
286. Id.
287. Id.
288. Richard Murphy, Responses to the Ten Questions, 37 WM. MITCHELL L. REV. 5062, 5068 (2011); Holder, supra note 1.
289. Holder, supra note 1.
290. DOJ Memo, supra note 162, at 9.
nder the criminal law framework. Future targets like al-Awlaki are not charged with a specific crime, have no notification of their offense, no opportunity to defend themselves, and none of the trial rights guaranteed under domestic criminal law. This fact alone might end the analysis for some, but the realities of modern warfare, particularly the War on Terror, suggest that law enforcement’s stringent due process requisites are not a realistic basis for evaluating due process anyway. The Mathews test seems to be the proper baseline for analyzing whether the current due process afforded is sufficient. The Mathews test strives to balance the interests of a citizen against the government to determine what procedures are required before a citizen can be deprived of constitutional rights.

The test recognizes that “[d]ue process is flexible” and varies based on a case’s factual scenarios. Thus, while the “fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner,’” the procedures utilized will not always look the same.

In the context of targeted killings, the Mathews interests involved are (1) the citizen’s right to life, (2) the serious and irreversible error if the government incorrectly killed the citizen and the value of additional procedural safeguards, and (3) the government’s need to protect the American public from future terrorist attacks. In Hamdi, Justice O’Connor carefully detailed the substantial interest of every citizen to be free under Mathews’ first prong. If the weight given to freedom from detention cannot be offset by “circumstances of war or the accusation of treasonous behavior,” deprivation of life also cannot be outweighed. Those who were old enough to experience it will always remember September 11th. The government’s need and duty to protect America from a repeat event is, therefore, substantial. Here, the government’s interests are preventing a citizen from threatening or attacking the United States. Courts generally try not to intrude upon military or national security decisions, recognizing that some strategies in war are best left to the executive. Finally, the executive has practical interests against implementing additional procedures due to the necessity to respond quickly to terrorist threats.

The second interest is particularly weighty in the case of targeted killings. If the executive branch incorrectly identifies and later kills a U.S. citizen, the erroneous deprivation is the loss of life. The risk of this deprivation is even higher than the mistaken deprivation of liberty. Equally important to evaluating the second prong is the unknown existence of additional procedural safeguards to protect against killing the

291. See id. at 2; discussion supra Part II.D.1.
293. Id. at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).
294. Id. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).
296. Id. at 530.
wrong person. A recent Newsweek article suggests that CIA agency lawyers prepare detailed memoranda to justify additions to the kill list.\textsuperscript{298} The cables are described as “legalistic and carefully argued,” often totaling as many as five pages.\textsuperscript{299} If approved by an unknown team of “high-level” lawyers, the General Counsel for the CIA authorizes the lethal operation.\textsuperscript{300} Looking past the irony of suggesting that a five-page memo is an adequate procedural safeguard, this account comes from John Rizzo, former Acting General Counsel of the CIA, who retired in 2009.\textsuperscript{301} We cannot be certain that this safeguard even remains in place. In fact, representing the Obama Administration in 2010, Harold Koh argued that no legal process was required before using lethal force.\textsuperscript{302} Koh reassured the audience that when citizens are considered for the kill list, the procedures in place are “extremely robust” and use “advanced technologies” to ensure accurate targeting.\textsuperscript{303}

Absent from the DOJ memo’s vague descriptions of its “due process” considerations is any mention of how a U.S. citizen receives notice of their kill list status, providing a meaningful opportunity to be heard. Targeted citizens do not receive notice because the executive claims this would only heighten national security issues and the alert would make capture more difficult.\textsuperscript{304} In al-Awlaki’s case, he received notice after his status was leaked to the press.\textsuperscript{305} Some speculate this was an attempt by the executive branch to meet the Supreme Court’s notice standard.\textsuperscript{306}

Under \textit{Mullane v. Central Hanover Bank & Trust Co.},\textsuperscript{307} due process requires notice “reasonably calculated, under all the circumstances, to apprise the interested party of the action.”\textsuperscript{308} Notice must be “desirous” of informing the party and not a “mere gesture,” but in circumstances where a party is difficult to locate, the Court has indicated publication in newspapers could be sufficient notice.\textsuperscript{309} Keeping the Court’s qualification in mind and assuming a U.S. citizen could not be located, it appears that even a leak to the press could be sufficient notice under \textit{Mullane}. Assuming a U.S. citizen is lucky enough to have his or her status leaked to the press and learn of it, the executive does not appear to have a mechanism for the citizen to challenge his or her status on the kill list. If U.S. citizens in Guantanamo Bay can invoke the writ of habeas corpus to

\begin{footnotesize}
\begin{itemize}
\item 299. \textit{Id.}
\item 300. \textit{Id.}
\item 301. \textit{Id.}
\item 302. Koh, supra note 30.
\item 303. \textit{Id.}
\item 304. Defendants’ Reply to Plaintiff’s Opposition to Defendants’ Motion to Dismiss at 23–24, Al Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-CV-1469). The government invoked the state secrets privilege, which permits the government to deny releasing evidence in a lawsuit because disclosure would threaten national security. Romero, supra note 202, at 221–222.
\item 305. Junod, supra note 139.
\item 306. \textit{Id.}
\item 308. \textit{Id. at 314}.
\item 309. \textit{Id. at 315, 317}.
\end{itemize}
\end{footnotesize}
challenge their detention, why is there no method for citizens to safely protest their classification on the kill list?310

Analyzing under Mathews, Hamdi, and Mullane, the current procedures offered by the executive branch fail to afford U.S. citizens adequate due process protection. A citizen’s right to live, the irreversible consequences of killing an innocent person, and the need for a meaningful opportunity to be heard demand more process than what is currently given.

2. Other Legal Alternatives

As the executive does not afford adequate process, the next inquiry is determining what process is due to a U.S. citizen before the executive can legally kill him or her. Because targeted killings are a recent warfare tactic, particularly as a tool against U.S. citizens, no law currently exists to address due process rights. This Section examines whether or not current legal alternatives afford a citizen due process without impeding the executive branch’s duty to protect and defend the nation.

a. The Criminal Law Framework

Unsurprisingly, the criminal law framework will likely not serve the competing goals of a citizen terrorist and the U.S. government. Implementing the strict constitutional requirements would certainly afford the targeted citizen with ample due process,311 but at the expense of the government’s national security and military concerns. Unless a targeted citizen posed an imminent, perceivable threat to the public, the criminal law model requires the government to provide notice, right to counsel, and conviction by traditional jury trials to all suspected citizen terrorists before a citizen can be lawfully executed.312 This would also require the military to physically capture the citizen, much like domestic law enforcement, before trial could commence.313 Targets can only make the executive kill list when capture is unfeasible; it logically follows then that attempting to find these people for trial would be extremely costly and difficult. Federal Criminal Procedure Rule 43 provides an additional hurdle by requiring all defendants to make, at minimum, an initial appearance before they can waive continued presence.314

When the government has national security concerns at stake, the Mathews test calculates the public interest by examining the potential hardship and financial burdens created if additional processes are re-

310. A key argument by Nasser al-Awlaki was that only he could bring suit for his son because if his son tried to return to America, he would be killed before he could protest his membership on the kill list. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 12 (D.D.C. 2010).
311. See discussion supra Part II.D.1.
313. See discussion supra Part II.D.1.
314. FED. R. CRIM. P. 43(c).
The public interest in protecting Americans from future terrorist attacks and the military's need to act swiftly make the application of a traditional criminal law framework to all suspected citizen terrorists unreasonable under *Mathews*.

b. Treason

As the criminal law paradigm is likely too harsh on the government’s interests, perhaps convicting a citizen of treason would provide due process, while allowing the government to kill the citizen. Article III, section 3, clause 1 defines treason as “levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”

The punishments for treason are loss of the right to hold any U.S. office, a fine of at least $10,000, and either death or imprisonment for at least five years. Treason, unfortunately, does not appear to be a feasible source of due process. Like a typical trial under the criminal law framework, a suspected citizen terrorist would need to be present at trial for treason. The unlikelihood of capture, Rule 43’s ban on trials in absentia, and the unlikelihood of the suspect willingly coming to court to confess make treason an implausible due process alternative.

c. Renunciation of Citizenship

In *Hamdi*, Justice O’Connor emphasized that American citizenship is a privilege seriously considered in calculating due process under *Mathews*. As citizenship guarantees suspected terrorists significant rights that could impede the executive from using lethal force, perhaps suspected terrorists should be stripped of their citizenship. Other countries have implemented this idea: in 2010, the British government implemented a secret program to strip British nationals of their citizenship on national security grounds. By stripping these individuals of their citizenship, the United Kingdom is no longer obligated to interfere on their behalf if they are later detained and tortured. While some may believe U.S. citizenship can never be relinquished, 8 U.S.C. § 1481 details the ways in which a U.S. citizen, by birth or naturalization, can voluntarily resign.
lose his/her nationality. Applicable to targeted killings are the following provisions:

(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state . . . after having attained the age of eighteen years; or

(3) entering, or serving in, the armed forces of a foreign state if (A) such armed forces are engaged in hostilities against the United States . . . ; or

(5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(7) committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, violating or conspiring to violate any of the provisions of section 2383 of title 18, or willfully performing any act in violation of section 2385 of title 18, or violating section 2384 of title 18 by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction.

If the government can prove a citizen has voluntarily renounced their citizenship, the newly-stripped citizen has the burden of proving by a preponderance of the evidence that the acts committed under 8 U.S.C. §1481(a) were involuntary. Stripping a suspected terrorist of their citizenship seems like an ideal workaround for the executive: without citizenship, the targeted killing must now only follow international law.

Unfortunately, stripping an American-born or naturalized citizen does not appear to be a viable solution. The primary obstacle comes from the statute’s “foreign state” designation. Al Qaeda is not a foreign state, which eliminates the Act’s second and third provisions. The fifth provision has the strongest possibility of success, but the standards would have to be relaxed, as it is unlikely that a targeted citizen abroad would risk his safety to seek out a diplomatic officer. The seventh provision would require the suspected terrorist to first be convicted of treason. Because of the problems listed earlier with trials in absentia, the likelihood of stripping an alleged American terrorist is extremely low. Unless Congress modifies 8 U.S.C. §1481(a)’s options for renunciation, stripping an American of his/her citizenship is unlikely to solve the executive’s due process problem.

3. Due Process Standards in Analogous Situations

Having now determined that the executive affords insufficient due process under Mathews, and that current legal alternatives are not viable,
this Note examines three cases with arguably analogous concerns to the constitutional issues at stake with targeted killings.

a. Reid v. Covert

When two army wives killed their husbands abroad, the Supreme Court was faced with the question of whether Congress could require civilians to be tried by military tribunals, subject to military rules, rather than in civilian courts with civilian laws and protections. Writing for the majority, Justice Black pointedly began his opinion by rejecting the idea that the Bill of Rights no longer attached to U.S. citizens overseas. “Entirely a creature of the Constitution,” the United States is required to act in accordance with the Constitution’s proscriptions. In Reid, the women were being punished by the United States, so their constitutional rights still applied. The women were being deprived of their right to a civilian trial, much like in Milligan. The majority recognized that in active zones of hostilities, military commissions could be appropriate venues; however, the women committed their crimes in England and Japan, which were not areas of active hostilities. Black expressed further concern that military commissions inherently result in the executive branch serving legislative (creating the substantive law) and judicial (presiding over the trial) functions, and that expanding the military’s jurisdiction beyond military personnel to civilians was inappropriate. Concurring with the result, Justice Harlan wrote separately because he felt that not every Constitutional provision automatically applied in every foreign country. The question for Harlan was “which guarantees . . . should apply in view of the particular circumstances, the practical necessities, and the possible alternatives . . . .”

Following Reid, constitutional rights attach to U.S. citizens abroad. Citizens who are candidates for the executive’s kill list are, thus, still protected by the Bill of Rights and entitled to some form of due process. Black’s concerns about the executive branch assuming all three branches of the government’s powers in the military context parallel the concerns this Note has explored with regard to the executive branch being the sole decision maker over a U.S. citizen’s life, without any form of oversight. Black’s reasoning was grounded in respect for the separation of powers and the court’s responsibility to ensure that well-meaning “slight encroachments” on liberties would not lead to “unconstitutional practices.” Perhaps more illuminating and applicable to targeted U.S. citizens is Harlan’s concurrence, which parallels Mathews in suggesting that con-
institutional rights of citizens abroad can fluctuate depending on the circumstances, practicalities, and alternatives of a situation.333

b. Hamdi v. Rumsfeld

In 2002, Yaser Hamdi challenged his detention status under the AUMF via a writ of habeas corpus.334 Hamdi argued that his U.S. citizenship guaranteed him the full protection of the Constitution.335 Looking to balance Hamdi’s interests with the government’s, the Supreme Court applied the Mathews test and ultimately determined that the government could detain Hamdi,336 but that failing to notify him of the charges and opportunity to challenge the government before a neutral party violated his due process rights.337 Justice O’Connor provided examples of how the government could meet these new notice and hearing requirements, suggesting that these proceedings could relax the evidentiary rules on hearsay or adopt a rebuttable presumption in favor of the government’s proffered evidence.338 Hamdi reaffirms that even the executive’s war powers have limitations and that some executive decisions implicate such important constitutional rights for citizens that meaningful judicial review is required.339

c. Boumediene v. Bush

Prior to Boumediene, the Congress passed the Military Commissions Act of 2006, denying habeas corpus petitions to detained alien enemy combatants.340 The Act was passed in direct response to Hamdan v. Rumsfeld’s ruling that the Detainee Treatment Act jurisdiction-stripping provision did not apply.341 Writing for the Court, Justice Kennedy held that detention by executive order, without trial or conviction, created a strong need for collateral review by the judiciary.342 Kennedy’s opinion also pointedly dismissed the idea that the opinion undermined the executive’s war powers. In response, Kennedy declared that “[t]he political branches, consistent with their independent obligations . . . [were perfect-
ly capable] of engaging in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.”

Using Reid v. Covert, Hamdi v. Rumsfeld, and Boumediene v. Bush as miniature case studies provides best practice suggestions for creating a due process framework for targeted killings. The cases suggest that the Supreme Court places significant importance on an individual citizen’s right to liberty, such that some form of collateral review by the judiciary is necessary. The right to life certainly ranks higher than liberty; thus, before a U.S. citizen can be the subject of a targeted killing, they should receive pre-deprivation review by an Article III court.

IV. RECOMMENDATION

The War on Terror will likely be a protracted battle lasting across several more presidential administrations. As long as the War on Terror exists, the president and his or her executive branch will vary on the best approach to protect and defend the United States from terrorist threats. Nevertheless, targeted killings appear to be a new way of waging war against nonstate actors who do not fit neatly into the current international laws of war. Some would argue the U.S. government should never be able to kill its citizens without significant procedural due process requirements. Yet, requiring the executive branch to adhere to the traditional law enforcement model for every suspect citizen terrorist is unrealistic and idealistic in the current landscape. The executive branch probably does need more flexibility to respond to credible, imminent national security threats, so long as some measure of due process is afforded to targeted citizens.

Recognizing the need for a responsive executive branch that can protect and defend our country, this Note does not argue that the targeted killing of U.S. citizens is per se unconstitutional. Instead, this Note proposes that Congress create a special court, similar to the FISC, which would solely evaluate the legality of the targeted killing of U.S. citizens. The court would provide an objective, expedited form of due process that allows for a responsive executive while creating a necessary check against potential civil liberties violations.

A. The Targeted Killing Review Court

The executive branch has argued that targeted killings are legal under the laws of war and assures the American public and Congress that the executive officials afford every United States citizen some form of “due process” before being placed on the JPEL. The legal framework

343. Id. at 798.

344. Murphy, supra note 288, at 5064–65 (2011) ("According to Harold Koh, . . . current Legal Adviser to the State Department, all targeted killings by drone carried out by the United States government use 'extremely robust' procedures that are 'implemented rigorously' using 'advanced technology.'").
for killing a U.S. citizen, however, lacks transparency and supervision, as the executive branch is the only decision maker. The DOJ white paper notes that “an informed, high-level official of the U.S. government” will be responsible for determining if the targeted citizen poses an imminent threat of violence against the United States and capture is infeasible. But the white paper provides no details regarding what makes an official “informed” or at a “high-level.” Nor does the white paper discuss the standards for determining imminence or whether capture is infeasible. This unchecked power and broad language invites potentially arbitrary, incorrect decisions. When the end result is the death of a citizen who has never been formally tried, justice demands some procedure to ensure the killing is justified. For the reasons outlined above and highlighted in recent history, the executive branch’s ever-expanding war power must be checked by other branches of government.

Depending on the individual, this Note proposes that the Court would either perform an expedited review of the proposed individual’s file or convene a pseudo-trial for individuals who pose less of a threat. Like the FISC, the recommended court would be composed of eleven district court judges, from at least seven of the United States judicial circuits. These judges would be appointed by the Chief Justice of the United States and serve for a single term of seven years. Unlike the FISC, though, at least five of the eleven judges would be required to live within forty miles of the District of Columbia. This close proximity would allow judges to hear applications and grant orders quickly in time-sensitive situations. The model of the Court would be akin to a grand jury in that the federal government would be the only party to the proceedings. Maintaining the secrecy of these proceedings would allow for judicial review without presenting national security problems (the rationale frequently invoked, along with the state secrets doctrine, to prevent more transparency).

B. Targeted Killing Review Court Process and the Burden of Proof

The Court would preside over cases on two tracks, designated according to the urgency of judicial review. The executive would propose a track designation for judicial review, but it would ultimately be up to the Court, using a Mathews-style balancing test, to determine which track the case belonged in, essentially issuing a preliminary determination on the amount of due process afforded to an individual. Due to the sensitive nature of its jurisdiction, court opinions should largely be kept classified.

345. DOJ Memo, supra note 162, at 1.
346. See discussion supra Part III.B.3.
348. Id. § 1803(a), (d).
from public viewing, like FISC opinions. To provide some form of transparency, however, these opinions should be subject to oversight by the Senate Select Committee on Intelligence. Furthermore, all court opinions should be available to attorneys appearing before the court—particularly for the government attorneys appointed to represent certain targeted citizens. Court rulings must be made available to attorneys trying these cases because the opinions are still interpretations of law and, therefore, have precedential value. Where possible, through redaction, court opinions should be made publicly available to provide citizen oversight over the executive branch, rather than leaving such monitoring solely with the legislative and judicial branches. Finally, all citizens should be represented at these \textit{ex parte} hearings by a court-appointed JAG officer.

Track one citizens must pose a significant threat to American national security, requiring immediate judicial review. Track one applications would go before a single judge who could only approve a targeted killing if the government proved a citizen’s guilt by clear and convincing evidence. Because track one cases require the government to only prove its case by clear and convincing evidence, these determinations should be reserved for the most pressing cases and judges should be extremely wary of approving these applications. These cases would be brought against U.S. citizens who cannot be captured, are definite imminent threats, and face overwhelming evidence of guilt. Citizens can only be placed in the track one review if they are irrefutably an imminent threat. If ruled against, the government could not file the same application with another judge, but instead would have to appeal to a court similar to the FISC Appellate Court.

Track two citizens would be given pseudo-trials before panels of three judges. Track two designations make sense for cases where capture is not possible, but the evidence regarding “imminence” of threat level is questionable. Unlike track one cases where the government can prove beyond a reasonable doubt that the citizen is an imminent threat, track two cases would be tried where the government has less than irrefutable evidence of an imminent threat. Most applications should fall under this track. The imminence determination is, therefore, the key threshold question in classifying a case’s track designation. In the absence of an imminent threat, the government should use other methods before taking a citizen’s life without due process.

Though the court would operate largely in secrecy, like a grand jury and the FISC, the court would still require adherence to the Federal Rules of Evidence for both tracks of cases. Critics may levy that such a standard makes it unnecessarily difficult to present evidence in time-sensitive situations, but in the context of deciding whether or not a citizen lives or dies, the government should be forced to meet exacting standards. This is particularly true since, at most, three judges will de-
cide someone’s fate rather than a jury, and the proceeding will be conducted entirely by government attorneys.

C. Due Process Considerations

1. Location of the Target

When the executive branch proposes that a U.S. citizen poses an imminent threat to the safety of Americans and is a candidate for being placed on the kill list, the first criteria to be evaluated should be the target’s location. The target’s location matters because if the citizen is within a known battlefield area (such as Afghanistan), the laws of war likely apply. To evaluate whether or not a location qualifies as a battlefield, the executive should follow international law standards. International law recognizes armed conflict where there is “protracted armed violence between governmental authorities and organized armed groups . . . .” So long as the citizen is killed in a zone of conflict and the rest of the laws of war are followed, the legality of the killing can be justified without any judicial review. The number of cases that fall into this category will likely shrink, however, as the United States is poised to withdraw almost completely from Afghanistan by the end of 2014. This Note anticipates that the Targeted Killing Review Court’s work will focus on the harder cases, where the targeted individual is outside known battlefields.

Once a citizen is outside a zone of conflict, the laws of war no longer apply and the Constitution’s due process rights attach. Because the amount of due process afforded is subject to the Mathews balancing test, geographic location can be a preliminary step in determining the baseline level of due process required for the individual. The judicial branch should look to factors such as the location’s distance from the zone of conflict, the country’s involvement with Al Qaeda, and whether or not the country is willing to assist in the individual’s capture. For example, if a U.S. citizen was located in Japan (far from the zone of conflict, with little to no terrorist cells tied to Al Qaeda, a known ally of the United States) the level of due process required would be extremely high, arguably the same as if the individual was in the United States. In the case of al-Awlaki, his location in Yemen was significant: the country is a stronghold for AQAP, geographically proximate to Afghanistan and Saudi Arabia, and Yemen’s weak government has only helped strength-

349. See discussion supra Part III.A.
351. See discussion supra Part III.A.
353. See discussion supra Part III.A.
354. These factors are not exhaustive considerations, but examples of information to consider.
355. In fact, following Reid v. Covert, 354 U.S. 1, 5 (1956), the citizen would likely be due a full jury trial.
The baseline of due process required for al-Awlaki would thus be considerably lower than a target located in a stable country with few ties to terrorist cells. The foreign country’s ability and willingness to assist in capture should not be overlooked as this would also be an informative way of assessing the likelihood of capture. Where possible, capture should be used over lethal strikes.

2. Which Citizens Can Be Targeted

Once a location determination has been made, the judiciary should determine the U.S. citizen’s involvement with Al Qaeda, the feasibility of capture, and the imminence of violent attacks against the United States promulgated by the individual. Based on these predetermined factors presented to the court, the judiciary should review the executive’s suggested track classification. The location analysis will also be useful to determine which track the citizen is placed in. The individual’s classification will be important, as this will determine the type of judicial review given and the urgency of the review.

Track one individuals should consist of U.S. citizens who are senior operational leaders for Al Qaeda or future terrorist organizations that attain a similar status. This Note extends the senior operational leader association past Al Qaeda because in order for the court’s evaluation process to endure, it must adapt to future conditions. Al Qaeda presented a considerable threat to the United States; but its influence appears to be waning and could become obsolete in the future. A senior operational leader of a new organization that rises to the same threat level that Al Qaeda presented in the 2000s should not escape track one designation simply because the organization’s name is different.

Track two individuals should consist of citizens who are senior operational leaders for an associated force of Al Qaeda or a lesser leader of Al Qaeda. This means that, unlike the DOJ white paper, the executive branch would not be able to classify citizens serving as senior operational leaders for Al Qaeda affiliates under track one. Limiting the number of citizens who can be classified under track one is necessary because of the expedited judicial review and lower burden of proof required to prove their guilt. Furthermore, using a Youngstown zone of power analysis, the


executive’s jurisdiction under the AUMF is limited to Al Qaeda. Classifying senior operational leaders of Al Qaeda affiliates broadens the scope of targeted killings past the statutory language of the AUMF.358

Finally, the imminence factor should be considered in the context of military involvement, in addition to factors like a present ability to carry out the threat. Defining the exact contours of “military involvement” is likely impossible, but things like knowledge of military tactics or the target’s record of combat involvement are surely informative and relevant to the imminence question. For example, al-Awlaki’s involvement in military operations was questionable; it seemed that his true danger to the United States was his oratory skills and knowledge of the West. Classifying al-Awlaki as an imminent threat seems more attenuated than a leader who actively trains terrorists or plans and carries out attacks.

V. CONCLUSION

Just as surely as we are a nation at war, we also are a nation of laws and values. Even when under attack, our actions must always be grounded on the bedrock of the Constitution—and must always be consistent with . . . the rule of law and our founding ideals. Not only is this the right thing to do—history has shown that it is also the most effective approach we can take in combating those who seek to do us harm.359

—Eric Holder, United States Attorney General

The United States is embroiled in a lengthy asymmetric war against a network of constantly growing terrorist groups. These groups and individuals defy the laws of war and launch attacks in previously defined “off-limits” areas. Adapting to the conflict’s asymmetry, the United States has developed a series of tactics to defend and attack these terrorist groups. Targeted killings have increasingly become the primary method. The new realities of war suggest that targeted killings will become permanent fixtures of military strategy.360 And while the benefits of targeted killings are numerous, their use against U.S. citizens is particularly troubling because of due process and separation of powers concerns. If targeted killings are to be used against U.S. citizens, the Obama administration’s current legal framework cannot be continued.

To preserve civil liberties, some form of judicial review is needed. This Note’s proposed form of review balances the needs of the executive branch to respond quickly to imminent attacks while upholding the rights of U.S. citizens from being erroneously deprived of life or liberty. The method of judicial review proposed allows a neutral decision maker to reduce potential errors by reviewing the evidence and ensuring the decision to target a U.S. citizen is justified. Our nation’s historical abuses in the executive branch provide further justification that in the midst of

358. See discussion supra Part III.C.1.
359. Holder, supra note 1.
360. MELZER, supra note 9, at 9–10.
war, foundational principles like due process and the separation of powers must be upheld.