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The Drone Games, 47 J. Marshall L. Rev. 1507 (2014)

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THE DRONE GAMES

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I. INTRODUCTION

“I learned that my 16-year-old grandson, Abdulrahman – a United States citizen – had been killed by an American drone strike . . . [t]he missile killed him, his teenage cousin, and at least five other civilians on October 14, 2011, while the boys were eating dinner at an open-air restaurant in southern Yemen.”¹ These are the words of Nasser al-Awlaki, grandfather of Abdulrahman and father of Anwar al-Awlaki², the intended target of that particular drone strike. The United States started to employ drones to carry out targeted killings a year into the War on Terror.³ *USA Today* described the event as, “Opening up a visible new front in the War

¹ Nasser al-Awlaki (also spelled Al-Aluqi), *The Drone That Killed My Grandson*, N.Y. TIMES, July 17, 2013, at A23.

² See generally Michael Epstein, *The Curious Case of Anwar Al-Awlaki: Is Targeting a Terrorist for Execution by Drone Strike a Due Process Violation When the Terrorist is a United States Citizen?*, 19 MICH. ST. J. INT'L L. 723 (2011) (providing a thorough analysis of the al-Awlaki case). Anwar al-Awlaki was identified as a leader of al-Qaeda in the Arabian Peninsula (“AQAP”) by the Obama Administration, labeled a “Specially Designated Global Terrorist”, placed on the United Nations’ list of known al-Qaeda associates, and on President Obama’s kill list. *Id.* at 724-25. The Obama Administration claimed that al-Awlaki recruited individuals to join AQAP, facilitated training at camps in Yemen in support of acts of terrorism, and helped to focus AQAP’s attention on attacking U.S. interests. *Id.* at 725. Al-Awlaki’s father, Nasser, retained the American Civil Liberties Union and Center for Constitutional Rights to provide him with legal representation in connection with the Government’s reported decision to add his son to its list of suspected terrorists authorized to be killed. *Id.* at 726. Specifically, Nasser sought an injunction to prevent the Obama Administration from killing his son without stating a “concrete, specific, and imminent threat to life” and that or physical safety” that he may pose. *Id.* The complaint alleged that the government’s policy of targeting United States citizens abroad without articulating a specific crime or threat violated the Fourth Amendment right to be free from unreasonable seizures and the Fifth Amendment right not to be deprived of life without due process of law. *Id.* at 726-27; see also Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 7, 2010, at A12 (providing extensive background information on al-Awlaki). Al-Awlaki is a popular cleric whose lectures on Islamic scripture have a large English speaking Muslim following. *Id.* Democrat Representative Jane Harman of California and chairwoman of a House subcommittee on Homeland Security described al-Awlaki as “probably the person, the terrorist, who would be terrorist No. 1 in terms of threat against us.” *Id.* The C.I.A. and the military have lists of terrorists linked to al Qaeda and its affiliates approved for capture or killing. *Id.* Because al-Awlaki is an American, his inclusion on the kill list had to be approved by the National Security Council. *Id.*; John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, *The Ethics and Efficacy of the President’s Counterterrorism Strategy*, (Apr. 30, 2012) (stating “[W]e only authorize a particular operation against a specific individual if we have a high degree of confidence that the individual being targeted is indeed the terrorist we are pursuing”).

³ Ryan L. Brown & Brian G. Smith, *Unmanned Drones Technical Elegance vs. Political Consequences*, 7 NO. 1 ABA SCITECH LAW 24, 24 (2010).

on Terror.”⁴ John Rizzo, the CIA’s former acting General Counsel, described the targeted killing program as “basically a hit list”⁵ in which the “predatory is the weapon of choice.”⁶

Targeted killing allows for the use of premeditated lethal force on an individual subject to international law with the sole objective of killing that individual.⁷ In most circumstances, an unmanned aerial vehicle, otherwise known as a drone, is the apparatus employed to carry out the targeted killing.⁸ The toll of using this weaponry has raised concerns among countries all over the world. Headlines such as *US Acknowledges Killing 4 Americans in Drone Strikes*⁹ and *Drone Strikes Killed Pakistani Grandmother and Workers, Amnesty International Claims*¹⁰ highlight some of the concerns.

This Comment focuses on the Executive’s power to target American citizens who are believed to be terrorists abroad and the due process implications of such attacks. Part II provides background information pertaining to the rise of drone use in the War on Terror and details the United States government’s legal arguments contained in the Department of Justice White Paper supporting the use of drone strikes. Part III examines through the lenses of *Hamdi v. Rumsfeld* and *Matthews v. Eldridge* the implications that the targeted killing program has on due process rights when American citizens are targeted. The targeted killing program allows the Executive to make adjudicative-like decisions by individuating enemy responsibility. Without providing any type of due process, the Executive has carte blanche on who, when, where, and what the next drone strike will target. Part IV

⁴ *U.S. Kills Al Qaeda Suspects in Yemen*, USA TODAY (Nov. 5, 2002), available at http://usatoday30.usatoday.com/news/world/2002-11-04-yemen-explosion_x.htm# (stating that a pinpoint missile strike killed a top Al Qaeda operative in his car and is believed to have been carried out by a CIA aircraft.)

⁵ Benjamin McKelvey, *Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power*, 44 VAND. J. OF TRANS. LAW 1353, 1357 (2011).

⁶ *Id.*

⁷ NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 5 (Oxford University Press 2008). Melzer explains that the ultimate goal of a targeted killing operation is to premeditatedly and deliberately kill the targeted individual opposed to situations where death is an incidental result. *Id.*; see also Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT’L L. POL’Y, 101, 103 (2010) (explaining that unmanned aerial vehicles or drones have been increasingly utilized by the U.S. to target and kill enemies in its armed conflicts).

⁸ Vogel, *supra* note 7, at 103.

⁹ Charles Savage, *Obama, in a shift, to limit Targets of Drone Strikes*, N.Y. TIMES, May 22, 2013, at A1.

¹⁰ *Amnesty International: USA Must Investigate Unlawful Drone Killings in Pakistan*, AMNESTY INTERNATIONAL (Oct. 22, 2013) available at <http://www.amnestyusa.org/news/press-releases/amnesty-international-usa-must-investigate-unlawful-drone-killings-in-pakistan>.

discusses various mechanisms the Obama Administration can implement to ensure that due process rights are not violated in the use of drone strikes. Without sufficient procedural due process mechanisms in place, this program runs the risk of violating the due process rights guaranteed by the United States Constitution. However, because due process varies on a case-to-case basis, the requirement of an individualized weighing of the private actor's interest against the government's interest may lead to the conclusion that due process rights are not violated.

II. BACKGROUND

A. *The Drone Game: How the Battlefield Changed*

After the events of September 11, 2001, Congress passed the Authorization to Use Military Force ("AUMF") granting the President of the United States the authority to "use all necessary and appropriate force" against the perpetrators of the 9/11 attacks, their sponsors, and those who protected them.¹¹ On September 18, 2001, the AUMF was signed and the United States formally adopted a war paradigm to defeat terrorism.¹² Labeled "Operation Enduring Freedom," the United States and its allies led a coalition of forces into Afghanistan.¹³

The decentralized nature of Al Qaeda became increasingly apparent after the invasion of Afghanistan, as its leaders escaped capture and fled into nearby countries.¹⁴ Today, terrorism risks

¹¹ Authorization for use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF].

¹² Barack Obama, President of the United States, *Remarks by the President at the National Defense University* (May 23, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (stating, "[w]e were attacked on 9/11. Within a week, Congress overwhelmingly authorized the use of force. Under domestic law and international law, the United States is at war with Al Qaeda, the Taliban, and their associated forces"). The United Nations defines terrorism as:

[an] act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, art.2, U.N. Doc. A/RES/54/109 (Dec. 9, 1999).

¹³ *Operation Enduring Freedom Fast Facts*, CNN (June 26, 2014), available at <http://www.cnn.com/2013/10/28/world/operation-enduring-freedom-fast-facts/> (providing a timeline regarding the important dates and facts of Operation Enduring Freedom, which began on October 7, 2011).

¹⁴ Nathan Hamilton & David H. Gray, *Decentralized Terrorism*:

materialize from smaller radicalized groups that share in Al Qaeda's ideology all across the globe.¹⁵

Three characteristics of terrorists spawned the creation of the targeted killing program. First, terrorists target civilians, which leaves open the questions of when, where, and who they will target next.¹⁶ Second, the concept of a battlefield or "hot zone" is nonexistent because Al Qaeda's cells are located across the world.¹⁷ Lastly, terrorists do not wear uniforms to show affiliations

Ramifications for a Centralized International System, 3 GLOBAL SECURITY STUDIES 24, 36 (2012). Hamilton and Gray argue that the War on Terrorism forces terrorist organizations to decentralize. *Id.* See generally *The 9/11 Commission Report*, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004), available at <http://govinfo.library.unt.edu/911/report/911Report.pdf> (providing a complete account of 9/11 along with detailed information on previous terrorist attacks conducted by Al Qaeda).

¹⁵ Oren Dorell, *Al-Qaeda on the run? No way, say experts*, USA TODAY (Aug. 6, 2013), available at

<http://www.usatoday.com/story/news/world/2013/08/06/al-qaeda-middle-east/2623475/>. Threats today from Al Qaeda affiliates come from North Africa, East Africa, Sinai, Yemen, and Iraq. *Id.* Islamic radicals, many of whom are affiliated with al-Qaeda, send their fighters into areas of the Middle East and Africa plagued with ongoing conflicts. *Id.* However, some argue that it is not possible to win the War on Terror. See, e.g., Guy Raz, *Defining the War on Terror*, NPR (Nov. 1, 2006), available at <http://www.npr.org/templates/story/story.php?story=Id=6416780> (quoting Michael Burliegh, stating, "It's possible that terrorism cannot be conclusively defeated . . . that makes the phrase 'war on terror' a problematic term. Terrorism is a tactic . . . so it's a bit like saying the Second World War was a war against Blitzkrieg.>").

¹⁶ Issachroff & Pildes, *infra* note 86, at 1527 (I don't think this should be *infra*, right? Shouldn't the original cite be moved here and note 86 be changed to *supra*?); see also Major William H. Ferrell, III, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 MIL. L. REV. 94, 105 (2003) (stating that "[n]ot only must parties to the conflict refrain from targeting civilians and civilian objects, they must also ensure that their own combatants are distinguishable from civilians"). However, this is not the case in dealing with terrorists, as insurgents perpetrate most attacks on civilians as part of a strategy to coerce and terrorize the civilian population and to undermine the state. Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1099 (2008).

¹⁷ STAFF OF CATO INSTITUTE & EDWARD H. CRANE, CATO HANDBOOK ON POLICY 495-96 (6th ed. 2005). See also Hamilton & Gray, *supra* note 14, at 32 (explaining that terrorists are forced to decentralize due to the complexities of the War on Terror). According to John Brennan:

The United States does not view our authority to use military force against al-Qa-ida as being restricted solely to "hot" battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa'ida, the United States takes the legal position that—in accordance with international law — we have the authority to take action against al-Qa'ida and its associated forces without doing a separate elf defense analysis each time.

Benjamin Wittes, *John Brennan's Remarks at HLS-Brookings Conference*,

with Al Qaeda, leading to difficulties in determining who is and who is not a member.¹⁸

Collectively, these reasons explain why the only effective means the United States has to combat global terrorism, is to target specific individuals based on specific acts those individuals are believed to have committed.¹⁹ However, the ability to know for certain that an individual is part of a terrorist organization, even based on his specific acts, is difficult to determine.²⁰ While advocates of the use of drones assert they are efficient and limit collateral damage, target misidentification is responsible for 70% of collateral damage in Afghanistan and Iraq.²¹ The families of those killed by unintentional drone strikes want answers.²² Two years later, Nasser al-Awlaki is still waiting to find out why his grandson was killed.²³

LAWFARE BLOG (Sept. 16, 2011), <http://www.lawfareblog.com/2011/09/john-brennans-remarks-at-hls-brookings-conference/>.

¹⁸ Issachroff & Pildes, *infra* note 86, at 1536 (same as previous comment, I think this should be a *supra*) (explaining that terrorism and the new face of warfare has completely changed the way states engage in war). “There was no need to determine whether such a soldier had committed a specific identifiable act . . . group membership in the opposing army was enough.” *Id.* The recognition of membership in an armed force was codified in the Geneva Conventions. Geneva Conventions Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 3320, 75 U.N.T.S. 135, 138. Prisoner of war privileges were afforded only when the individual carried arms openly and had some sort of insignia recognizable at a distance. *Id.*

¹⁹ Issachroff & Pildes, *infra* note 86, at 1524. (*supra*)

²⁰ Part the problem lies in faulty on the ground intelligence. See Peter Bergen & Katherine Tiedemann, *The Year of the Drone: Key Observations*, NEW AMERICA FOUNDATION (Feb. 24, 2010), available at <http://counterterrorism.newamerica.net/sites/newamerica.net/files/policydocs/bergentiedemann2.pdf> (reporting that one out of every seven drone strikes killed a militant leader from the start of the war through the summer of 2011).

²¹ Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681, 738 (2014).

²² While advocates of drones cite their use for efficiency purposes, those in the Middle East continue to argue that drones cause more harm than good. This is true, in that often a drone missile strike will kill or injure more than just its intended target. See *Rep. of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Addendum: Study on Targeted Killings*, Human Rights Council, UN Doc. A/HRC/14/24/Add.6 (May 28, 2010) available at

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> (reporting on a number of criticisms commentators and agencies have condemned in regards to the practice of drone warfare). The Special Rapporteur compared the drone to “other commonly used weapons, including a gun fired by a soldier or a helicopter or gunship that fires missiles.” *Id.* at ¶ 79. Further, the report acknowledged that there is a “greater concern with drones” because “policy makers and commanders will be tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively.” *Id.* at ¶ 80.

²³ See al-Awlaki, *supra* note 1 (stating that “[n]early two years later, I still

B. The Drone Movement

The United States utilizes drones in areas considered “hot” battlefields as well as areas where conflict is less pronounced.²⁴ Within the first two years of the Obama Administration, there were fifty-three and 118 drone strikes in Pakistan, respectively.²⁵ Today, drone strikes have decreased, with only seventy strikes in 2011 and a mere twenty-eight in 2012.²⁶ However, the New America Foundation estimated that drone strikes killed roughly 1,953 to 3,279 people in 2013.²⁷ United States drones have killed at least thirty-five key Al Qaeda militants, including Anwar al-Awlaki in September 2011 and Fahd al-Quso, who is suspected of involvement in the 2000 bombing of the USS Cole.²⁸

In many ways, the Obama Administration has followed in the footsteps of the Bush Administration. Former President Bush described his strategy to win the war on terror as “get the enemy and hunt them down, one by one.”²⁹ While the Bush Administration utilized a campaign focused on detaining enemy combatants indefinitely,³⁰ the Obama Administration turned

have no answers. The United States government has refused to explain why Abdulrahman was killed”). “It was not until May of this year that the Obama Administration, in a supposed effort to be more transparent, publicly acknowledged what the world already knew—that it was responsible for his death.” *Id.*

²⁴ See Jameel Jaffer, *Judicial Review of Targeted Killings*, 126 HARV. L. REV. 185, 185 (2013) (stating that the targeted killing program is justified through the sweeping constructions of the 2001 AUMF and the President’s authority to use force when acting out of self defense). The United States views its authority to use military force against Al Qaeda and its affiliated networks broadly and not limited to the “hot” battlefields of Afghanistan. *Id.*; Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2117-19 (2005). *But see* Claus Kress, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflict*, 15 J. CONFL. & SEC’Y L. 245, 266 (2010) (asserting that armed conflicts are restricted to the territory in which a non-state actor has a military presence). In conflicts with non-state actors, members that are found in a third party state does not extend the conflict into that third party state. *Id.* at 266.

²⁵ Richard Murphy & Afsheen John Radsan, *Notice and an Opportunity to be Heard before the President Kills You*, 48 WAKE FOREST L. REV. 829, 836-37.

²⁶ *Id.*

²⁷ *Id.* at 837. See generally Bergen & Tiedemann, *supra* note 20 (reporting that from 2004 to February, 2010, 114 reported drone strikes killed between 830 and 1,210 individuals in northwest Pakistan).

²⁸ Tim Lister & Paul Cruickshank, *Anwar al-Awlaki: al Qaeda’s rock star no more*, CNN (Sept. 30, 2011), available at <http://www.cnn.com/2011/09/30/world/meast/analysis-anwar-al-awlaki/index.html>.

²⁹ GEORGE W. BUSH, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, BOOK I, JAN. 1 TO JUNE 30 493 (2005).

³⁰ The Bush Administration’s policies were also highly controversial. See,

indefinite detention into targeted killing.³¹ The Obama Administration, as will be discussed in more detail below, posits that it can target Al Qaeda members or an associated force anywhere in the world.³² The battlefield, which once was contained to a specific area, is now global, and United States citizenship does not immunize one from lethal targeting.³³

1. The White Paper

On February 4, 2013, NBC News released a leaked Department of Justice memorandum known as the “White Paper” that described the legality of drone targeting United States citizens.³⁴ Due to the highly sensitive nature of terrorism and national security, much remains unknown about the Obama Administration’s targeted killing policies. However, the White Paper is one document that does provide insight into the Obama Administration’s legal defense for drone strikes against United States citizens.³⁵

The White Paper, captioned “Lawfulness of a Lethal Operation Direct Against a U.S. Citizen Who is A Senior

e.g., *Hamdan v. Rumsfeld*, 464 F.Supp.2d 9, 18-19 (D.D.C. 2006) (ruling that Guantanamo detainees could not invoke the protection of the Suspension Clause because they were foreign nationals capture and detained outside the sovereign territory of the United States); Gerald L. Neuman, *The Extraterritorial Constitution after Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 260 (2009) (explaining that the *Boumediene* decision confirms that certain constitutional rights extend to foreign nationals detained at Guantanamo Bay). In *Boumediene v. Bush*, the Court stated that the petitioners’ access to the writ of habeas corpus is necessary in order to determine the lawfulness of their status regardless of whether or not they obtain the relief they seek. 553 U.S. 723, 797 (2008).

³¹ Jonathon Hafetz, *Targeted Killing and the ‘War on Terror’*, ALJAZEERA (Oct. 19, 2011), available at <http://www.aljazeera.com/indepth/opinion/2011/10/2011101872910456159.html>.

³² Mark V. Vlasic, *Assassination & Targeted Killing – A Historical and Post-Bin Laden Legal Analysis*, 43 GEO. J. INT’L L. 259, 294 (2012).

³³ U.S. DEP’T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE [hereinafter DOJ White Paper], available at http://msnbc.media.msn.com/i/msnbc/sections/news020413_DOJ_White_Paper.pdf. See also Carla Crandall, *If You Can’t Beat Them, Kill Them: Complex Adaptive Systems Theory and the Rise in Targeted Killing*, 43 SETON HALL L. REV. 595, 639 (2013) (explaining that “the expansion of the drone program is in part due to a ‘balloon effect in national security law . . . as a result of squeezing out what many . . . regard as effective wartime domestic policies, such as those permitting detention at Guantanamo and enhanced interrogation techniques”).

³⁴ Michael D. Shear & Scott Shane, *Congress to See Memo Backing Drone Attacks on Americans*, N.Y. TIMES, Feb. 6, 2013, at A1.

³⁵ DOJ White Paper, *supra* note 33.

Occupational leader of Al-Qaeda or An Associated Force,” provides a framework into how and when the Executive can target an American citizen.³⁶ As described within the paper, the Obama Administration has the authority to target a United States citizen in a foreign country for lethal attack by a drone missile if three conditions are met:

- (1) an informed, high-level official of the United States (IF THIS IS A QUOTE, DO NOT CHANGE) government has determined that the targeted individual poses an imminent threat of violent attack against the United States;
- (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible;
- and (3) the operation would be conducted in a manner consistent with applicable law of war principles.³⁷

The White Paper does not elaborate on who an “informed, high-level official” is nor does it elaborate on who qualifies as a senior operational leader of Al Qaeda and associated forces, leaving much uncertainty as to who can and cannot be legally targeted.³⁸

The White Paper further asserts that the President has the authority to respond to imminent threats posed by Al Qaeda.³⁹ As defined in the White Paper, imminent threat does not require “clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.”⁴⁰ This is due to the nature of violent terrorist attacks. The White Paper justifies this definition by purporting that if any other definition of imminent were provided for, it would require the United States to refrain

³⁶ *Id.*

³⁷ *Id.*

³⁸ In a talk given at Harvard Law School, John O. Brennan, stated that the United States would only target individuals whose elimination would cause major disruptions to Al-Qaeda initiatives. John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at Harvard Law School, *Program on Law & Security: Strengthening Our Security by Adhering to our Values and Laws* (Sept. 16, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

³⁹ *Id.*

⁴⁰ *Id.* The White Paper also cites to Lord Goldsmith, the Attorney General of the United Kingdom’s, 2004 speech before the House of Lord’s explaining the queen’s interpretation of Article 51 of the United Nations Charter. Article 51 of the United Nations Charter recognizes a nation’s right to self-defense only in two situations: (1) in response to an armed attack or (2) anticipation of an imminent armed attack. 660 Parl. Deb., H.L. (5th ser.) (2004) 370 (U.K.) (referring to the testimony of Attorney-General Lord Goldsmith), available at <http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm>.

from action until preparations for an attack are concluded, leaving the United States with an insufficient amount of time to defend itself, open to attack from Terrorists abroad.⁴¹

This explanation suggests that “imminent” includes two scenarios. First, imminent includes preparations for an attack that will take place in the future.⁴² Second, “imminent” includes individuals who were in the past involved in activities posing an imminent threat of violent attack when there is no evidence suggesting the individual has renounced or abandoned such activities.⁴³

Lastly, the White Paper indicates that capture is not feasible “if it could not be physically effectuated during the relevant window of opportunity or if the relevant country were to decline to consent to a capture operation.”⁴⁴ It further states that feasibility “requires a highly fact specific and time sensitive inquiry.”⁴⁵

C. The Legal Arguments in Favor of Drone Strikes

Pursuant to the AUMF, President Obama is authorized to take action against those who are responsible for the 9/11 attacks or affiliates of Al Qaeda and its associated forces.⁴⁶ While this Congressional grant of authority is much broader in scope than those that preceded it,⁴⁷ it begs the question of whether, under the AUMF, the President can unilaterally designate an American citizen as an enemy combatant and use lethal force against him or her. Understandably, the Obama Administration acknowledged

⁴¹ *Id.*

⁴² DOJ White Paper, *supra* note 33.

⁴³ *Id.* But see Benjamin Wittes, *Are People Overreading the White Paper on Imminence?*, LAWFARE BLOG (Feb. 12, 2013) (stating that “the memo requires a conclusion that the target is personally and in an ongoing fashion engaged in plots against the United States”). “A finding of imminence for a senior level Al Qaeda operational leader can be based on a finding that the figure is ‘personally and continually’ planning such attacks – not on a finding that any one planned attack is nearing ripeness.” *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See AUMF, *supra* note 11 (stating, “[W]hereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States”).

⁴⁷ Richard F. Grimmet, Cong. Research Serv., RS22357, AUTHORIZATION FOR THE USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS: LEGISLATIVE HISTORY 1 (Jan. 16, 2007), available at <http://fas.org/sgp/crs/natsec/RS22357.pdf> The Authorization to Use Military Force (AUMF) delegated broad authority to the President and allows him to make determinations as to whether a specific individual fits within the scope of the resolution. *Id.* The AUMF’s goal is to prevent another terrorist attack, but it’s premised upon September 11, calling into question whether all suspected terrorists fall within this framework. McKelvey, *supra* note 5, at 1364.

this may be a concern and included it in the White Paper precedent to support its position.⁴⁸

First, the White Paper concedes that a citizen's rights under the Due Process Clause and Fifth Amendment attach while abroad and cites to *Reid v. Covert*, *United States v. Verdugo-Urquidez*, and *In re Terrorist Bombings of United States Embassies in East Africa*.⁴⁹ However, the White Paper further states that, "were the target of a lethal operation a U.S. citizen . . . who may have rights under the Due Process Clause and the Fourth Amendment, that individual's citizenship would not immunize him from a lethal operation."⁵⁰ It further elaborates on the notion of due process citing to the plurality opinion of *Hamdi v. Rumsfeld*⁵¹ and *Matthews v. Eldridge*.⁵² In any due process analysis, the starting point is the *Matthews v. Eldridge* balancing test⁵³ and the White Paper begins its analysis there.

III. ANALYSIS

A. Do the Justifications Measure Up?

The attacks on 9/11 marked the most horrendous attack on American soil of all time. Since then, the need to protect civil liberties and the need to ensure national security have stood in stark contrast to one another. The White Paper explicitly states that due to "the realities of combat"⁵⁴ certain uses of force "necessary and appropriate"⁵⁵ allow for the use of force against the United States citizen who is deemed an imminent threat. "[A]nd [the] due process analysis need not blink at those realities."⁵⁶

⁴⁸ DOJ White Paper, *supra* note 33.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality opinion).

⁵² *Matthews v. Eldridge*, 424 U.S. 319 (1976). There, petitioner, who originally had been deemed disabled, was informed that his disability status was ending and he would no longer receive his benefits. *Id.* The Social Security Administration provided notice and an evidentiary hearing before a final determination was made, but Eldridge did not receive his benefits during the interim period. *Id.* Eldridge argued that the pretermination of his benefits violated his due process rights. *Id.*

⁵³ *Id.* at 335. The balancing test enunciated weighs three factors: (1) the private interest of the defendant; (2) the cost to and interest of the government; and (3) the "risk of erroneous deprivation" of the private interest of the defendant by not providing additional procedural safeguards.

⁵⁴ DOJ White Paper, *supra* note 33.

⁵⁵ *Id.*

⁵⁶ See *Hamdi*, 542 U.S. at 533 (plurality opinion) (explaining that in times of national emergency and the realities of combat detention may be both necessary and appropriate and our due process analysis should not change). The Court goes on to stress that proper constitutional balance is crucial here

Does the threat of terrorism justify a restriction on due process rights and civil liberties?⁵⁷ This is not the first time the United States has had to balance civil liberties and national security against one another, and it surely will not be the last. As will be discussed in more detail below, the implications of the Obama targeting policy have ramifications across the world.

B. The Due Process Dilemma

The White Paper concedes that the Fifth Amendment's Due Process Clause attaches to United States citizens located abroad.⁵⁸ However, in doing so, one should focus the extent to which the Due Process Clause applies in the particular situation. The White Paper examines the due process question through *Matthews v. Eldridge*⁵⁹ and also cites to the plurality opinion of *Hamdi v. Rumsfeld*.⁶⁰

but we should not forget about the values of American citizenship. *Id.* at 532. “It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.” *Id.* see also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963) (explaining that it is times of national emergencies that it is imperative we safeguard one’s rights to procedural due process). It is during times of national crisis that a temptation to dispense of fundamental constitutional guarantees exists. *Kennedy*, 372 U.S. at 164-65; *United States v. Robel*, 389 U.S. 258, 264 (1967) (stating, “It 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.”).

⁵⁷ U.S. CONST. amend. V.:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

See also Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 63 (2012) (explaining the origins of due process). The term “due process” articulated a standard that no person could be imprisoned or punished unless his peers or the laws of the land rendered a legal judgment against him. *Id.*

⁵⁸ DOJ White Paper, *supra* note 33.

⁵⁹ 424 U.S. 319 (1976).

⁶⁰ *Hamdi*, 542 U.S. at 507 (plurality opinion).

1. *Hamdi v. Rumsfeld*

In *Hamdi v. Rumsfeld*, the United States Supreme Court grappled with the question of what process is due to a United States citizen detained and labeled an “enemy combatant.”⁶¹ Hamdi, born in Louisiana, moved to Saudi Arabia as a child and later resided in Afghanistan.⁶² Members of the Northern Alliance apprehended Hamdi and turned him over to the United States military.⁶³ The Government alleged that Hamdi was an enemy combatant and used that label to justify holding him indefinitely.⁶⁴

In June 2002, Hamdi’s father filed a petition for writ of habeas corpus and alleged that the government held his son without notice of any charges or access to counsel.⁶⁵ In a plurality opinion, all but one of the justices agreed that the Executive Branch alone does not have the power to designate “enemy combatants”⁶⁶ and then use that designation as a reason to hold the individual indefinitely without due process.⁶⁷ The opinion went on to state that courts are required to review presidential decisions based on the Constitution’s separation of powers and that a state of war does not give the President unbridled power when it comes to the rights of the nations citizens.⁶⁸

2. *Matthews v. Eldridge* Analysis of the White Paper

One of the most important principles of due process is that an individual will receive notice and an opportunity to be heard before any deprivation of life, liberty, or property.⁶⁹ The White Paper acknowledges that the private interest of the individual subject to lethal targeting is at its highest.⁷⁰ There can be no higher private interest than an individual’s right to live.⁷¹ However, the government also asserts that its interest in “waging

⁶¹ *Id.* at 509.

⁶² *Id.* at 510.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 511.

⁶⁶ *Id.* at 510–11.

⁶⁷ *Id.* at 509, 533–34 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

⁶⁸ *Id.* at 536.

⁶⁹ *Id.* at 533.

⁷⁰ DOJ White Paper, *supra* note 33. “An individual’s interest in avoiding erroneous deprivation of his life is ‘uniquely compelling.’” *Id.*

⁷¹ *Id.* “No private interest is more substantial.” *Id.* But see *60 Minutes: The Defense Secretary: Leon Panetta*, (CBS television broadcast June 10, 2012), <http://www.cbsnews.com/video/watch?id=7396830n> (conducting an interview with Leon Panetta where he states that “[d]espite the fact that these people are citizens, they are first and foremost terrorists”).

war, protecting its citizens, and removing the threat posed by members of the enemy forces” is similarly paramount.⁷²

The most important component of the *Matthews* balancing test is the weighing of the individual’s private interest against the government’s interest by assessing the adequacy of the existing procedures to guard against the risk of erroneous deprivation during the government’s determination and the probable reduction of risk by including additional procedural safeguards.⁷³

This is where the White Paper falls short. With targeted killings, there is no room for error. The risk of error is a matter of life or death,⁷⁴ as the individual who has been unlawfully killed by a drone cannot be brought back to life.⁷⁵ In an attempt to circumvent this realization, the White Paper states the “realities of combat” must be considered in assessing the burdens the government would face in providing greater process.⁷⁶ Those “realities are such that the Constitution would not require the government or provide further process”⁷⁷

C. “Procedural Mechanisms”

The White Paper is silent as to the “process” used in determining who may be subject to lethal targeted killing. Absent a “informed, high-level official of the U.S. government,” who has reached the determination that “the targeted individual poses an imminent threat of violent attack against the United States,” the White Paper is silent as to what analysis goes into the process of targeted killings.

Procedural due process mandates a party be provided notice and be heard at a meaningful time and in a meaningful manner.⁷⁸

⁷² DOJ White Paper, *supra* note 33. The White Paper also cites to *Hamdi* in its discussion stating, “on the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States.” *Id.*

⁷³ *Hamdi*, 542 U.S. at 529 (plurality opinion) .

⁷⁴ *Assessing U.S. Drone Strike Policies*, COUNCIL ON FOREIGN RELATIONS, (Mar. 1, 2013) (transcript available at <http://www.cfr.org/counterterrorism/assessing-us-drone-strike-policies/p30144>).

⁷⁵ *Id.*

⁷⁶ DOJ White Paper, *supra* note 33.

⁷⁷ *Id.*

⁷⁸ Noah Feldman, *Obama’s Drone Attack On Your Due Process*, BLOOMBERG (Feb. 8, 2013), <http://www.bloomberg.com/news/2013-02-08/obama-s-drone-attack-on-your-due-process.html>. Feldman explains that without some opportunity to be heard before a neutral decision maker, the individual has been deprived of his due process rights. *Id.* Feldman argues that U.S. enemies are not entitled to due process if captured on the battlefield. *Id.* This is so because in times of war, you try to the kill the enemy before the

However, the Supreme Court has made clear that due process does not impose a one-size fits all system.⁷⁹ Due process evolves and is flexible, allowing for factors unique to the situation to be taken into account.⁸⁰ The Supreme Court in *Hamdi* touched upon this notion and stated that, “enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”⁸¹

In light of *Hamdi*, as well as the fact that courts have recognized due process for detainees,⁸² prisons,⁸³ and public education,⁸⁴ framing and answering the due process question should not be considered a ludicrous endeavor. The Executive Branch has systematically designed and implemented a program clothed in a veil of secrecy, making it next to impossible to assess the program’s legality accurately by determining whether it can actually accommodate formal due process procedures.⁸⁵

As one scholar described, the transformation in the use of military force has moved toward an “individuated model of

enemy kills you. *Id.*

⁷⁹ *Hamdi*, 542 U.S. at 533 (plurality opinion).

⁸⁰ See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (stating, “[d]ue process is flexible and calls for such procedural protections as the particular situation demands”).

⁸¹ *Hamdi*, 542 U.S. at 532 (plurality opinion). Justice O’Connor listed examples of how flexible due process can be. *Id.* Her examples included accepting hearsay as reliable evidence, placing the burden on the defendant to rebut the Government’s evidence, or holding a military tribunal. *Id.* at 533-35.

⁸² See Stephanie Carvin, *Commentary, POWS, The Geneva Conventions and The Second Gulf War*, CAN. INST. STRATEGIC STUD., (2003) available at <http://www.mafhoum.com/press5/139S27.htm> (highlighting the controversy surrounding the Bush administration’s refusal to apply Geneva Convention principles to detainees held at Guantanamo). The Bush administration placed individuals captured off the battlefield into long-term law-of-war detention that grew into a highly controversial matter subject to multiple court challenges, criticism, and commentary. Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting outside the “Hot” Conflict Zone*, 161 U. PA. L. REV. 1165, 1198 (2013).

⁸³ See *Sandin v. Conner*, 515 U.S. 472 (1995) (holding that “states may under certain circumstances create liberty interests which are protected by the Due Process Clause”).

⁸⁴ See *Goss v. Lopez*, 419 U.S. 565 (1975) (holding that any student accused of wrongdoing that may result in suspension has a right to tell his or her version of the story in an informal hearing).

⁸⁵ Murphy & Radsan, *supra* note 25, at 884. Murphy and Radsan argue targeted killings against high-level members of Al Qaeda or associate forces accommodate somewhat formal procedurals. *Id.* They believe that because target selection depends largely in part on individuated facts about specific people based on contestable evidence and this process occurs over a long period of time. *Id.* See also Issacharoff & Pildes, *infra* note 86, at 1525 (*supra*) (stating the use of military force against terrorists has moved away from conventional group based membership attributes to individuated judgments of responsibility).

responsibility.”⁸⁶ Military force resembles an implicit adjudication of individual responsibility.⁸⁷ This is because the extent that someone can be targeted is premised on precise, specific acts in which he or she is believed to have participated.⁸⁸ While much of the determination process remains behind closed doors because of national security concerns, we know that this type of determination is based on adjudicative facts.⁸⁹

Adjudicative facts are those that relate to the individual and his activities, businesses, and properties.⁹⁰ This should open up multiple channels of communication and dialogue in order to facilitate an appropriate decision.⁹¹ However, the White Paper is essentially silent as to any type of process that is actually utilized to identify targets.

1. Is the Executive Going too Far?

In *Hamdi*, the Court found that prohibiting an American citizen from challenging his status as an enemy combatant

⁸⁶ Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. REV. 1521, 1523 (2013) (explaining that targeted killings highlight the fact that in asymmetric conflicts, one must conduct an analysis and look at the specific acts a particular individual is alleged to have committed prior to the use of force).

⁸⁷ *Id.* Issacharoff & Pildes argue that this type of individuation of enemy responsibility applies to all exertions of military force over enemies including the use of lethal force, capture, detention, incapacitated, or tried. *Id.*

⁸⁸ Jo Becker & Scott Shane, *Secret Kill List Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, at A1. Becker and Shane provide an in depth look into the procedures the Executive utilizes in determining if the individual should be placed on the kill list. *Id.* Given the serious nature of the issue, it can take five or six sessions before a name will be approved and added to the list. *Id.* Additionally, if the individual no longer poses an imminent threat, he or she will be removed from the kill list. *Id.*

⁸⁹ Issacharoff & Pildes, *supra* note 86, at 1524. “The government is making what appear to be (and in reality, are) quasi-adjudicative judgments based on highly specific facts about the alleged actions of particular individuals.” *Id.*

⁹⁰ George Blum et al., *Distinguishing Adjudicative and Legislative Facts*, 29 AM. JUR. 2D EVIDENCE § 30 (2014); Issacharoff and Pildes, *supra* note 86, at 1530-31. “A tremendous premium is immediately placed on . . . adjudicative facts – is this the person who did X? – rather than ‘legislative facts’ – is this person a soldier in the opposing army?” *Id.* It is reasonable for some critics to question why the military is engaged in making these inquiries based on adjudicative facts because traditionally the judicial system handles them. *Id.*

⁹¹ *Drones And The War on Terror: When Can the U.S. Target Alleged American Terrorists Overseas?: Hearing Before the Comm. of the Judiciary H.R.*, 113th Cong. 1 (2013) [hereinafter *Drones and the War on Terror House Hearing*] (statement of Robert Chesney, Charles I. Francis Professor in Law, Associate Dean for Academic Affairs, University of Texas School of Law). Mr. Chesney described the process of determining whether an individual fits the criteria as, “[m]ultiple parties weigh in debate what, if anything, the intelligence suffices to prove. And debates take place regarding the notional legal boundaries of the Government’s targeting authority.” *Id.*

captured on the battlefield was a violation of Hamdi's due process rights.⁹² A majority of the Court believed some process beyond only an executive declaration was necessary.⁹³ Targeted killings present the same problem at issue in *Hamdi*. Both allowed the Executive Branch, through the AUMF, to unilaterally make a decision as to whether someone falls within the ambit of being labeled an enemy combatant with no means of rebutting that presumption.⁹⁴

It is problematic that alleged members of Al Qaeda and related terrorist organizations are afforded greater due process rights once captured than when being targeted for a lethal drone strike.⁹⁵ When dealing with detained enemy combatants, one must provide sufficient evidence as to why it is appropriate to label the individual an enemy combatant.⁹⁶ This can only be accomplished with concrete evidence. However, under the terms of the White Paper, concrete and specific evidence is not necessary to execute a targeted lethal drone strike.⁹⁷

⁹² See generally *Hamdi*, 542 U.S. at 507 (plurality opinion) (holding that an American citizen being held at Guantanamo Bay as an enemy combatant was entitled to a hearing to rebut the factual basis of his determination).

⁹³ *Id.*; see also *Hamdi*, 542 U.S. at 527 (plurality opinion) (holding that "a citizen detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis of his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker). Justice Souter, who partially concurred in an opinion joined by Justice Ginsburg, believed that due process required the procedural protections that Justice O'Connor detailed. *Id.* at 553-54 (Souter, J., concurring in part and dissenting in part).

⁹⁴ *Hamdi*, 542 U.S. at 533 (plurality opinion).

⁹⁵ Amien Kacou, *Expanding "Practical Sovereignty": Pre-Deprivation Due Process Suits for Drone Strikes on Non-U.S. Persons*, 92 N.C. L. REV. ADDENDUM 57, 61 (2013). In the detention context, the appropriateness of Afghan detainees is evaluated on an individual basis. Lt. Col. Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, 2010 ARMY LAW 9, 22-23 (2010).

⁹⁶ See generally Jonathon Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantanamo*, 5 CARDOZO PUB. L. POLY & ETHICS J. 127 (2006) (examining how habeas review guarantees a meaningful inquiry into the factual and legal basis for the detentions and the way secrecy has contributed to a system that indefinitely holds individuals).

⁹⁷ DOJ White Paper, *supra* note 33. The White Paper is silent on the need for concrete evidence. Some drone strike subjects are targeted due to suspicious behavior. See Greg Miller, Ellen Nakashima & Karen DeYoung, *CIA Drone Strikes Will Get Pass in Counterterrorism "Playbook", Officials Say*, WASH. POST (Jan. 19, 2013), available at http://articles.washingtonpost.com/2013-01-19/world/36474007_1_drone-strikes-cia-director-playbook (explaining that one of the main points of disagreement . . . was the use of "signature strikes" in which the CIA approves strikes based off of suspicious behavior even when intelligence is not probable). Ironically, CIA signature strikes allegedly have resulted in more deaths of senior terrorist leaders than strikes where the identity was known ahead. *Id.*

One could argue, though, that those targeted and killed are not wholly stripped of their due process rights. As previously mentioned, due process is not a one size fits all mechanism.⁹⁸ Sufficient due process could already have been provided through internal checks within the Executive Branch before the execution of drone strikes.⁹⁹ According to the White Paper, “an informed, high-level official” within the Executive Branch satisfies due process requirements through its review.¹⁰⁰

The little information that has come out regarding the process in which the drone program is conducted indicates that multiple players are involved. One commentator described the system operating as a “funnel, starting with input from half a dozen agencies and narrowing through layers of review until proposed revisions [to the target lists] are laid on [John] Brennan’s desk and subsequently presented to the President.”¹⁰¹ The National Counterterrorism Center (“NCTC”), an agency formed after the 9/11 attacks and staffed by personnel from multiple departments and agencies in the intelligence community, reviews the lists every three months.¹⁰² Those involved include CIA officials, State Department personnel, and the military.¹⁰³ Next, officials from the National Security Council weigh in on the discussion. Amongst those in this conversation include high-ranking officials from the State Department, the Pentagon, the NCTC, the CIA, and the FBI.¹⁰⁴ The final step of adding a name to

⁹⁸ Eric H. Holder, U.S. Attorney Gen., Remarks at Northwestern University School of Law (Mar. 5, 2012) [hereinafter Holder Speech], *available at* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>. Specifically, Mr. Holder cited to the U.S. Supreme Court case of *Fuentes v. Shevin* in his assertion that due process is flexible. *Id.*

⁹⁹ Kacou, *supra* note 95, at 70. Sufficient due process could be provided for already, based on internal checks from the Executive Branch including input from multiple agencies, offices, and forums offering competing perspectives. *Id.*; see also Stephen W. Preston, *CIA and the Rule of Law*, 6 J. NAT’L SECURITY L. & POL’Y 1, 4-5 (2013) (discussing intra-executive checks and balances); Nathan A. Sales, *Self-Restraint and National Security*, 6 J. NAT’L SECURITY L. & POL’Y 227, 233-35 (2012) (describing the incentives to intra-executive checks and balances).

¹⁰⁰ DOJ White Paper, *supra* note 33.

¹⁰¹ Greg Miller, *Plan for hunting terrorists; U.S. intends to keep adding names to kill lists*, WASH. POST (Oct. 23, 2012), *available at* http://www.washingtonpost.com/world/national-security/plan-for-hunting-terrorists-signals-us-intends-to-keep-adding-names-to-kill-lists/2012/10/23/4789b2ae-18b3-11e2-a55c-39408f6e6a4b_story.html (noting “targeted killing is now so routine that the Obama Administration has spent much of the past year codifying and streamlining the processes that sustain it”).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

the list requires Presidential approval. Clearly, there are many more players involved than some seem to suggest.

D. Are the Justifications Enough to Leave Out the Judiciary?

The President, as Commander in Chief of the Armed forces, is responsible for military and foreign affairs.¹⁰⁵ While the due process inquiry is generally answered by the courts, there are sufficient justifications to allow the executive to act alone in the determination of due process when executing drone strikes.¹⁰⁶

The Executive has far more knowledge in the area of national security than the judiciary does.¹⁰⁷ Matters that involve national security, foreign policy, and military judgments may best be left to those in the Executive Branch.¹⁰⁸ This is because the judiciary does not have the requisite knowledge or expertise to adequately answer these questions.¹⁰⁹ These matters involve highly sensitive and rapidly developing questions.

However, as it is unlikely the War on Terror will end in the foreseeable future, we must set a precedent rooted in upholding the values of our Constitution. Even if the Executive is more knowledgeable and skilled in national security matters, jurisdiction of federal courts extends to review of executive war measures in certain scenarios.¹¹⁰ If the drone program is here to stay, there must be more accountability to ensure a balance remains between national security and civil liberties.¹¹¹

¹⁰⁵ See U.S. CONST. art. II § 2 (outlining the Commander-in-Chief's powers). "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual service of the United States." *Id.*

¹⁰⁶ Kacou, *supra* note 95, at 69. Among the reasons cited as objections to judicial review include separation of powers, the political question doctrine, and the need for judicial deference to the President's national security expertise. *Id.* The political question doctrine prohibits the judiciary from adjudicating issues that are to remain solely within the Executive and legislative branches. *Id.*

¹⁰⁷ *Id.* at 91; ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 4-6 (2007) (stating the executive is the only branch of government with the resources and power capable of addressing threats to national security).

¹⁰⁸ *Al-Awlaki v. Obama*, 727 F. Supp. 2d 1, 52 (D.D.C. 2010) (stating that "[b]ecause decision-making in the realm of military and foreign affairs is textually committed to the political branches, and because courts are functionally ill-equipped to make the types of complex policy judgments . . .").

¹⁰⁹ *Id.*

¹¹⁰ See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that in certain situations the Constitution requires judicial review of a suspected enemy's indefinite detention).

¹¹¹ In addition to due process concerns, Fourth Amendment issues have been included in the debate. See, e.g., David Cole, *Where Liberty Lies: Civil Society and Individual Rights after 9/11*, 57 WAYNE L. REV. 1203, 1267 (2010)

E. *Utility in the Drone Program*

Critics view the targeted killing program as extrajudicial murder,¹¹² but there are valid reasons for its use. The War on Terror is unconventional and the task of defeating terrorists cannot be achieved through conventional war tactics.¹¹³ Our enemies do not wear uniforms, and they are not located in camps, bases, or bunkers separate from the civilian populations.¹¹⁴ The targeted killing program is an effective mechanism to disable non-uniformed combatants deemed extremely dangerous, with little risk of putting American soldiers in danger.¹¹⁵

Again, while there are sound justifications,¹¹⁶ the United States needs to establish its priorities. Our nation is involved in a war without a foreseeable end in sight. The rhetoric used to define the parameters of the targeted killing program will shape the future of this nation, serving as a guide for future Presidents and policy leaders.¹¹⁷ It is crucial that this policy ensures accuracy in

(discussing the radical changes that occurred post 9/11 and describing these changes as an “assault on constitutional and human rights”). The FBI turned its focus from law enforcement to intelligence gathering, preventing terrorism, and aggressively employing informants to “flush out” terrorists before they acted. *Id.* at 1213. Furthermore, Congress expanded the Government’s ability to compile intelligence on citizens of the United States, imposed preventive detention and military trials on suspected “enemy combatants,” and enacted laws that prosecute speech deemed to provide “material support” to terrorist organizations. *Id.*

¹¹² Philip Alston, *The CIA and Targeted Killings beyond Borders*, 2 HARV. NAT’L SEC. J. 283, 295 (2011).

¹¹³ Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQUIRIES IN L. 179, 185 (2004). See also Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1382–83 (2008) (explaining that terrorist organizations, such as Al Qaeda, do not identify their affiliation, rather they blend in with local populations and operate in the shadows). As a result, terrorist organizations take identification problems long posed by guerilla warfare to a completely new level. *Id.* at 1383.

¹¹⁴ *Id.*

¹¹⁵ See Charli Carpenter, *Response to “Notes on Asymmetric War”*, CURRENT INTELLIGENCE (Feb. 2, 2011), available at <http://www.currentintelligence.net/reviews/2011/2/15/notes-on-asymmetric-war.html> (stating “initially condemned as extra judicial execution . . . targeted killing has emerged as an effective means to disable non-uniformed combatants while sparing many of the horrors of full-scale battle”).

¹¹⁶ See generally Daniel L. Byman, *Why Drones Work: The Case for Washington’s Weapon of Choice*, BROOKINGS INSTITUTE (2013) available at <http://www.brookings.edu/research/articles/2013/06/17-drones-obama-weapon-choice-us-counterterrorism-byman> (citing several reasons why drones are an effective counterterrorism mechanism).

¹¹⁷ “[A]s a student of history I believe that those who govern today must ask ourselves how we will be judged 10, 20 or 50 years from now.” Jeh Johnson, General Counsel, *U.S. Dep’t of Defense, National Security Law*,

target identification, drone strike execution, and a low risk of error. Otherwise the likelihood for abuse is high.¹¹⁸

IV. PROPOSAL

We now know that American citizens who take up arms with a terrorist organization can be targeted and killed.¹¹⁹ The absence of due process protections in the al-Awlaki case was unconstitutional because the due process rights afforded by the Constitution extend to American citizens abroad.¹²⁰ Additionally, in light of *Hamdi v. Rumsfeld*, and the Guantanamo Bay Detainee litigation, American citizens targeted should be afforded some form of due process. Reasonable minds can and will differ on what action the Executive Branch must take to address these constitutional concerns, but it is imperative changes are made to increase public awareness and develop some form of oversight.

Lawyers and Lawyering in the Obama Administration, Remarks at Yale Law School (Feb. 22, 2012), available at <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/>. “Our applications of law must stand the test of time, because, over the passage of time, what we find tolerable today may be condemned in the permanent pages of history tomorrow.” *Id.*

¹¹⁸ *But see* Miller, Nakashima & DeYoung, *supra* note 97 (stating, [t]he adoption of a formal guide to targeted killing marks a significant – and to some uncomfortable – milestone: the institutionalization of a practice that would have seemed anathema to many before the Sept. 11, 2001, terrorist attack”).

¹¹⁹ *Al-Awlaki*, 727 F.Supp.2d at 20-52. The court did not reach a decision on the merits of the case and dismissed it for lack of standing and due to the political question doctrine. *Id.* In dismissing the suit Judge Bates expressed her apprehension on the issue stating, “How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to defendants, judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death?” *Id.* at 8.

¹²⁰ *Hamdi*, 524 U.S. at 533 (plurality opinion) (holding that due process requires that a United States citizen held as an enemy combatant be afforded a meaningful opportunity to contest the basis of his enemy combatant status and detention). *But see* Amitai Etzioni, *A Communitarian Paradigm For Counterterrorism*, 49 STAN. J. INT’L L. 330, 359 (2013) (explaining that due process of law does not mean one is entitled to judicial process in all circumstances). The *Mathews* balancing test should be used to determine whether a trial or hearing is appropriate in a specific context. *Id.*; Jared Perkins, *Habeas Corpus in the War Against Terrorism: Hamdi v. Rumsfeld and Citizen Enemy Combatants*, 19 BYU J. PUB. L. 437, 448 (2005) (asserting that citizen enemy combatants are entitled to a hearing before a neutral decision maker). Any further protections of due process will be balanced against the executive’s national security interests and war-making powers. *Id.* This may result in a lower standard of due process. *Id.*

A. *Step 1: Transparency*

The Obama Administration needs to publicly disclose the methods and procedures it utilizes in determining how an American citizen may find himself or herself on the targeted kill list. President Obama's address at the National Defense University shed some light on these standards, but the public needs clear, explicit terms.¹²¹ Specifically, the term "continuing and imminent threat" needs to be defined. How much evidence is enough to render that individual a high level senior operative of Al-Qaeda?

Additionally, the public needs a concrete definition of what "associated with terrorism" means. Without a concrete definition, the meaning is flexible and open to multiple interpretations. This, in turn, makes its expansion very easy, specifically to include a broader category of individuals.

B. *Step 2: Judicial Oversight or an Independent Oversight Board within the Executive Branch*

President Obama acknowledged that the targeting of American citizens raises constitutional issues¹²² and announced that his Administration would review proposals to provide oversight.¹²³

The Fifth Amendment affords due process to "all persons,"¹²⁴ but no United States court has ever answered whether any form of process is owed to an American citizen when selected for targeted killing.¹²⁵ In *al-Awlaki*, the government argued, and the Court

¹²¹ President Obama stated that the use of drones is constrained and that he will not order strikes if the ability to capture the individual terrorist is viable. President Barack Obama, Remarks by the President at National Defense University, *The Future of Our Fight against Terrorism* (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>).

¹²² *Id.*

¹²³ Karen DeYoung, *Drone use remains cloaked despite Obama's pledge for more transparency*, WASH. POST (Apr. 6, 2013), available at http://www.washingtonpost.com/world/national-security/drone-use-remains-cloaked-despite-obamas-pledge-for-more-transparency/2013/04/06/352163d8-9e1d-11e2-a941-a19bce7af755_story.html. "The Obama Administration is still struggling with how to make good on the President's promise to ensure that its counterterrorism programs, including drone strikes, are made "even more transparent to the American people and to the world." *Id.*

¹²⁴ U.S. CONST. amend. V

¹²⁵ *Al-Awlaki*, 727 F.Supp.2d at 17. It is interesting to note that *al-Awlaki* was added to the U.S. Treasury Department as a Specially Designated Global Terrorist in July of 2010. Press Release, U.S. Dept. of the Treasury, *Treasury Designates Anwar Al-Awlaki, Key Leader of Al-Qa'ida in the Arabian Peninsula* (July 16, 2010). This designation froze any U.S. bank accounts al-

agreed, that the claims and requested relief represented “quintessential” political questions and therefore were nonjusticiable.¹²⁶ Contrary to the Department of Justice’s assertion that the scope of congressionally authorized war powers falls under the political question doctrine, there is precedent supporting the opposite.¹²⁷ Both the *Hamdi* and Guantanamo Bay Detainee Cases are exemplary of the judiciary taking up cases involving national security issues.

The known procedures that the Obama Administration uses in the targeted killing program can be separated into two stages. First, the target needs to be identified. When the government makes a determination to use lethal force against a United States citizen, it exercises an adjudicative-like judgment.¹²⁸

Ideally, this is where the judiciary could be utilized to ensure that the individual meets the criteria. When the individual is brought in front of a judge or a similar decision-maker, this review would constitute a check on the Executive.¹²⁹ Information is compiled, it is put before a group for debate, and that group provides insight as to what the intelligence regarding the targeted individual indicates.¹³⁰ At this stage, the inquiry centers on whether the individual meets the criteria defining who is a high level senior operational leader of Al-Qaeda.¹³¹

Awlaki possessed, forbade Americans from doing business with him, and banned him from traveling in the United States. Exec. Order No. 13,224, 66 FED. REG. 49,079 § 2(a)-(c) (Sept. 23, 2001).

¹²⁶ *Al-Awlaki*, 727 F. Supp. 2d at 17.

¹²⁷ McKelvey, *supra* note 5, at 1364. *See also* Dehn & Heller, *supra* note 115, at 178 (stating that the jurisdiction of federal courts, in appropriate cases, encompasses review of executive war measures). “This jurisdiction traditionally included review of whether the Executive properly identified specific individuals or objects as falling within the scope of congressionally authorized hostilities.” *Id.*

¹²⁸ Isscharoff & Pildes, *supra* note 86.

¹²⁹ Attorney General Eric Holder sent a letter to the Senate Judiciary Committee Chairman Patrick Leahy, detailing al-Awlaki’s involvement in the terrorist plots against the United States. Carol Cratty & Joe Johns, *Holder: Drone Strikes Have Killed Four Americans since 2009*, CNN (May 23, 2013), <http://www.cnn.com/2013/05/22/politics/drone-strikes-americans/>.

Holder stated that it was [al-Awlaki’s] “direct personal involvement” in the “planning and execution” of terror attacks against the United States that “made him a lawful target.” *Id.* Among the evidence, al-Awlaki “planned the [underwear bomber] suicide operation” and was involved in a plot to blow up cargo planes headed for the United States by hiding explosives in printers. *Id.* Holder indicated that Congress was briefed on the likelihood al-Awlaki would be targeted and when the decision was made to go forward, Congress was notified. *Id.* He characterized the decision to target al-Awlaki as involving an “exceptionally rigorous legal review” in addition to administering a policy screening. *Id.*

¹³⁰ *Drones and the War on Terror House Hearing*, *supra* note 91.

¹³¹ *Id.*

The judiciary could get involved in making this determination with some aid from Congress. Congress could enact legislation drawing on aspects of the Foreign Intelligence Surveillance Act of 1978 (“FISA”) and the Classified Information Procedures Act (“CIPA”). After 9/11, the Federal Bureau of Investigation (“FBI”) utilized electronic surveillance as a mechanism to gather foreign intelligence and conduct counter-intelligence.¹³² Recognizing the need to balance civil liberties while protecting national security, FISA mandates the Government obtain search warrants and wiretap orders from a FISA court before conducting any surveillance.¹³³ Section 1810 provides wronged parties with a cause of action against any person who discloses the electronic surveillance or uses it in violation of section 1809.¹³⁴ The wronged party is entitled to recover actual damages, punitive damages, and reasonable attorney’s fees.¹³⁵

A judge, in the targeted killing scenario, would take on a role akin to the judges on the FISA court. By providing a similar cause of action as Section 1810 of Title 50, families of individuals who are wrongly killed may assert a cause of action against the government. Due to the sensitive nature of the issues involved, classified information will likely become an issue. However, Congress could look to CIPA.¹³⁶ It provides comprehensive procedures for cases dealing with classified information that may arise in connection with a prosecution.¹³⁷ Some of the Guantanamo habeas cases have incorporated an ad hoc form of CIPA, providing individual litigants with security-cleared counsel to view classified information while maintaining and protecting national security interests.¹³⁸

¹³² Nicolas J. Whilt, *The Foreign Intelligence Surveillance Act: Protecting the Civil Liberties That Make Defense of Our Nation Worthwhile*, 35 SW. U. L. REV. 361, 362-63 (2006). Congress enacted FISA as a tool to establish procedures for the use of electronic surveillance. *Id.*

¹³³ *Surveillance under the Foreign Intelligence Surveillance Act (FISA): The History of FISA*, SURVEILLANCE SELF-DEFENSE, <http://ssd.eff.org/foreign/fisa> (last visited June 11, 2014, 6:17 A.M.).

¹³⁴ Foreign Intelligence Surveillance (FISA) Act 50 U.S.C § 1810.

¹³⁵ 50 U.S.C § 1810 (a)-(c).

¹³⁶ Ellen Yaroshefsky, *Secret Evidence is Slowly Eroding the Adversary System: CIPA and FISA in the Courts*, 34 HOFSTRA L. REV. 1063, 1067-69 (2006). CIPA protects government officials or intelligence operatives who would divulge confidential government information as defendants in a case, unless the charges against them were dropped. *Id.*

¹³⁷ *Id.*

¹³⁸ See generally *In re Guantanamo Bay Detainee Litigation*, No. 08-0442, 2008 WL 4858241 (D.D.C. Nov. 6, 2008). See also *Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba*, (Sept. 9, 2008) available at http://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1_08-mc-00442/pdf/USCOURTS-dcd-1_08-mc-00442-7.pdf (detailing the procedures required for counsel to access and provide legal representation to detainees at

V. CONCLUSION

The contours surrounding the legality of the targeted killing program of American citizens are murky and clothed in secrecy. Drawing on the habeas corpus cases in Guantanamo, if due process is guaranteed in detention cases, it should undoubtedly be guaranteed when an individual's life is at stake. As modern warfare continues to develop, the precedents set now in utilizing these new technologies are assuredly what other states will follow in the future. In asymmetric warfare against non-state actors, we must make case-by-case judgments as to who is and who is not an enemy. The need for the Executive, Judiciary, and Legislative branches to work together and develop sound law and policies is greater now than ever before.