Lastly, the insurance framework furthers car manufacturers' chief concern—increasing profit margins—by placing a ceiling on damages and providing car manufacturers with insurance that will arguably provide the manufacturers with full coverage. Thus, like many other industries, products and strict liability still apply to autonomous cars, as the manufacturers should compensate those their products harm. Yet, due to the social utility of autonomous cars, manufacturers also deserve a special insurance framework to reduce risk.

V. CONCLUSION

With the passing of time, cars are becoming more autonomous and independent of humans.305 Cars can park themselves with minimal human intervention,306 prevent accidents, and drive themselves on marked roads with almost no human involvement.307 Still, with this shift in control from humans to technology, there also comes a shift in liability.308 While autonomous cars will eliminate many accidents currently caused by human error, many other accidents will undoubtedly arise due to technological malfunctions.309 Consequently, in order to ensure that autonomous car technology enters the marketplace in a timely fashion, the liability of autonomous car and technology manufacturers requires mitigation.

The autonomous car industry should adopt a two-tiered insurance framework, similar to that of the nuclear power industry that would also establish a ceiling on damages.310 A similar two-tiered insurance framework is necessary to provide certainty to manufacturers of autonomous cars and technology regarding their liability so they have an incentive to develop and produce autonomous cars. Hence, if the current liability framework is not altered in some way, autonomous cars will take much longer to enter the market and society will be unable to fully reap the benefits of autonomous cars until a much later time. With the current state of transportation and the burden it has on society,311 it is desirable that autonomous cars enter the marketplace as soon as possible.

305. Vanderbilt, supra note 286 (displaying an interactive timeline of car's "Automatic Transition.").

306. Murray, supra note 33.

307. Hachman, supra note 43.

308. KALRA ET AL., supra note 217.

309. Koehler, supra note 226.


311. See Life in the Slow Lane, THE ECONOMIST (Apr. 28, 2011) available at http://www.economist.com/node/18629844 ("Americans are gloomy about their economy's ability to produce. Are they right to be? We look at two areas of concern, transport infrastructure and innovation.").
Drones have offered a military solution to eliminate suspected terrorists, but have also raised numerous legal issues.

There has been considerable discourse on the legality of drone strikes. Many of those opinions assume, as per the common scenario, that the target is not a U.S. citizen. The legal complexity of drone strikes greatly increases when the United States subjects one of its own citizens to a drone strike. As is evident, monumental constitutional questions surrounding the limitations of a citizen’s due process rights are raised in such circumstances.

Part I of this Note offers an introduction to drones and details the legal dilemma involved in determining what procedural due process citizens retain when engaged in terrorist activities abroad. Included is an account of the genesis of this debate, the drone strike on Anwar Al-Aulaqi (Al-Aulaqi). Part II provides a discussion of due process requirements, including the foundations of procedural due process, an analogy to recent Supreme Court opinions regarding due process owed to detainees in the War on Terror, and the applicability of the Authorization of the Use of Military Force (AUMF) to the subject. Part III proposes a novel judicial proceeding, similar to a warrant, which requires judicial approval before the Executive can conduct a drone strike on a citizen. Part IV retroactively applies the proposed judicial hearing to the drone strike on Al-Aulaqi. Part V responds to likely counterarguments, while Part VI concludes the Note.

A. Drones

The use of U.S. military drones has grown exponentially. From 2005 to 2011, there was a 1,200 percent increase in U.S. air combat patrols by drones, and the United States now conducts more flight hours in drones than manned strike aircraft.4 U.S. drones come in a dizzying array of varieties and capabilities, ranging from the Global Hawk, with a 116 foot wingspan and capability to take-off with a 3,000 pound payload, to the Wasp III, a hand-launched reconnaissance vehicle with a maximum takeoff weight of 20 pounds.5 The future is likely to see an even broader collection, including nanodrones, which are insect-sized vehicles capable of navigation inside buildings6 and “large-sized” drones with functions like air refueling platforms.7

Drones offer numerous military advantages. Most importantly, drones operate without an on-board pilot, eliminating the risk to human life and allowing for dangerous missions into contested airspace.8 Drones are also cheaper, in part because of the reduction in size and number of systems that were necessary for on-board pilots,9 and reduced training costs due the ability of simulators to provide all necessary training.10 Furthermore, drones are typically more effective than most manned aircraft, offering more accurate strikes, stealthier capabilities, and the ability for extended airborne loiter.11 Drones also offer increased autonomy, especially because take-offs and landings are nearly independent of human assistance.12 The U.S. military is dedicated to incorporating autonomous capabilities in drones “where it increases overall effectiveness.”13 These advantages also account for drones’ Achilles heel, extreme reliance on GPS guidance and communications satellites.14 Still, much information on the technical vulnerabilities of drones, such as electronic jamming, remains classified.15

B. Legal Issue

Employing Hellfire missiles and laser-guided munitions,16 drone strikes usually result in the death of the target, which is typically referred to as a “targeted killing.” Targeted killing is legally defined as an “intentional, premeditated and deliberate use of lethal force by [a] State ... against a specific individual who is not in the physical custody of the [State employing the lethal force].”17 Prior to the War

7. Flight Plan, supra note 2, at 25.
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7. Flight Plan, supra note 2, at 25.
on Terror, the United States repudiated targeted killings; however, since the September 11 attacks, the United States has employed targeted killings with increased frequency.\textsuperscript{29} Despite the Government’s refusal to comment on the existence of a targeted killing program,\textsuperscript{30} it is widely believed\textsuperscript{31} that the Central Intelligence Agency (CIA) is responsible for the program.\textsuperscript{32} According to a former CIA General Counsel, the program functions as a hit list, with drone strikes as the typical modus operandi.\textsuperscript{33} Such a revelation is not surprising given the considerable increase of drone strikes under the Obama Administration.\textsuperscript{34}

There have been numerous proponents arguing the legality of employing drones in the War on Terror. However, these arguments are somewhat limited for the purposes of this Note, considering the common assumption is that the target is foreign national, rather than a U.S. citizen. This Note is limited to the domestic procedural due process issues surrounding drone strikes on U.S. citizens. Discussion of international legal issues regarding drone strikes in general and specifically on U.S. citizens is detailed in numerous other works.\textsuperscript{35} Various questions need to be addressed, including: does the calculus change when the intended target of the strike is a U.S. citizen engaged in terrorist activities? And, is there a method to preserve the individual’s due process right while addressing the national security interests at stake?

The Fifth Amendment states, “[n]o person shall be . . . deprived of life . . . without the due process of law.”\textsuperscript{36} The Constitution provides no direct instruction as to whether the Fifth Amendment’s Due Process Clause is nullified by an individual’s actions. This Note is an attempt to offer a legal solution to protect a citizens’ due process rights while providing the necessary discretion to the Government to ensure national security. This Note provides that solution in the context of the Fifth Amendment and proposes a judicial proceeding and test for such circumstances.

C. Proposed Procedural Due Process Solution

In order to meet the unique legal challenges identified in the preceding section, a solution must account for “the obligation[s] of a civil, democratic society to respect and uphold the rule of law,”\textsuperscript{37} while enacting proper safeguards to ensure national security. I propose that before the Government can legally conduct a drone strike on a citizen alleged to be engaged in terrorist activities abroad, it must first seek approval before the D.C. Circuit Court or a court modeled on the Foreign Intelligence Surveillance Act (FISA) Court to meet the demands of procedural due process. The details and elements of the test will be discussed later in the Note.\textsuperscript{38}

D. Anwar Al-Aulaqi Scenario

The debate over the legality of drone attacks on citizens greatly intensified on September 30, 2010, when Al-Aulaqi, a natural-born U.S. citizen, and Samir Khan, a naturalized U.S. citizen, were killed by a drone strike in Yemen.\textsuperscript{39} Al-Aulaqi was a radical Muslim cleric and external operations leader for Al-Qaeda in the Arabian Peninsula (AQAP).\textsuperscript{40} He was described as the ‘Osama bin Laden of the Internet’ for his propensity to recruit potential terrorists and to

\textsuperscript{27} U.S. CONST. amend. V.

\textsuperscript{28} Amos N. Guiora, Where are the Terrorists to be Tried: A Comparative Analysis of Rights Granted to Suspected Terrorists, 56 CATH. U. L. REV. 805, 805 (2011).

\textsuperscript{29} See infra Part III(A).

\textsuperscript{30} Peter Finn & Sudarsan Raghavan, Yemeni al-Qaeda Took a Blow but Remains a Threat to U.S., WASH. POST, Oct. 2, 2011, at AI.

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27. U.S. CONST. amend. V.


29. See infra Part III(A).


spread propaganda through the Internet, especially using YouTube. Al-Aulaqi was especially effective at influencing fellow U.S. citizens due to his ability to speak American-accented English and his strong command of Arabic; “[Al-Aulaqi] was able to transition seamlessly between the two languages, creating an aura of religious authenticity with his English-speaking followers.”

After gaining notoriety for jihadist propaganda, Al-Aulaqi took on an increased operational and planning function for AQAP.

In 2010, the Obama Administration denoted Al-Aulaqi as a Specially Designated Global Terrorist and allegedly placed him on a pre-approved list of terror suspects for targeted killing. Al-Aulaqi was deemed an AQAP leader that “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.” Under Obama Administration policy, the National Security Council had to specially approve Al-Aulaqi’s addition to the targeted kill list since he was a U.S. citizen. The Administration justified adding Al-Aulaqi to the list by claiming that he was an imminent threat to Americans, was engaged in armed conflict against the United States, and there existed no viable means to arrest him.

Al-Aulaqi was undoubtedly an imminent threat to Americans. Allegations of Al-Aulaqi’s influence were abundant; he had been associated with numerous terror attacks and plots in recent years.

34. Delahunt & Motz, supra note 33, at 9.
36. Shane, supra note 21.
39. Id.
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34. Delahunty & Motz, supra note 33, at 9.
36. Shane, supra note 21.
37. Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum in Support of Defendants’ Motion to Dismiss at 5, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-10-CV-1469) [hereinafter Al-Aulaqi Response]; see also Public Declaration of James R. Clapper, Dir. of Nat’l Intelligence (DNI), Exhibit 1, ¶ 13, Unclassified Declaration in Support of Formal Claim of State Secrets Privilege.
39. Id.

Nidal Malik Hasan, a U.S. Army Major, admitted that Al-Aulaqi compelled him to commit the 2009 Fort Hood Shooting Attack. 41 Moreover, Al-Aulaqi is alleged to have trained and instructed Umar Farouk Abdulmutallab, who attempted the 2009 underwear bombing onboard Northwest Airlines Flight 253. 42 Al-Aulaqi also allegedly helped plan the 2010 Cargo Plane Bomb Plot 43 and aided the unsuccessful bombing of Times Square by Faisal Shahzad in 2010. 44

In August 2010, Al-Aulaqi’s father brought suit against the United States, claiming the Government unlawfully authorized the targeted killing of Al-Aulaqi in violation of Al-Aulaqi’s Fifth Amendment due process rights. 45 Al-Aulaqi’s father sought an injunction, stating that the Government had not provided adequate evidence that Al-Aulaqi posed a “concrete, specific, and imminent threat to life or physical safety” and it failed to show that there were “no means other than lethal force that could reasonably be employed to neutralize the threat.” 46 The Government responded, stating that targeting Al-Aulaqi was solely in the authority of the Executive, and any judicial foray into the matter would be a violation of separation of powers. 47 Specifically, the Government asserted that Al-Aulaqi constituted an imminent threat to national security. 48 The District Court granted summary judgment to the Government, finding Al-Aulaqi’s father did not have legal standing to challenge Al-Aulaqi’s targeting and holding the court did not have authority to decide the case due to the political question doctrine. 49 The dismissal of the case on procedural grounds leaves open a constitutional chasm in deciding how a citizen’s due process rights overlay the Government’s national security responsibility in such circumstances.

It may seem as though a drone strike on a citizen is so unlikely a situation that it should be considered an aberration. However, the Al-Aulaqi killing was not the first time a U.S. drone strike had resulted in the death of a citizen. In November 2002, Ahmed Hijazi, a

41. Id.
42. Id.; OFAC Designation, supra note 35.
43. Finn & Raghavan, supra note 30 (explaining that the “2010 Cargo Plane Bomb Plot” resulted in the crash of a cargo plane, causing two deaths; a second bomb was found on another plane, but was removed without incident).
44. Id.
45. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 10 (D.D.C. 2010). The suit also included claims that the Government violated the Alien Tort Statute.
46. Al-Aulaqi, 727 F.Supp.2d at 8.
47. Al-Aulaqi Response, supra note 37, at 3.
48. Id. at 5.
49. Al-Aulaqi, 727 F.Supp.2d at 57.
suspected Al-Qaeda operative and naturalized citizen, was killed in Yemen.50 The discourse regarding the legality of this drone strike was not as rampant as after the Al-Aulaqi strike, perhaps because Hijazi was a lesser-known figure and due to the prevailing conciliatory mood toward counterterrorism action immediately following the September 11 attacks. Nevertheless, the Hijazi, Al-Aulaqi, and Khan killings, in addition to the inevitability that other citizens will engage in terrorism, like Major Hasan and Faisal Shahzad, lead to the incontrovertible conclusion that drone strikes on citizens is a pressing issue. This conclusion, taken with a broad interpretation of the Al-Aulaqi holding (that the Executive is at liberty to target citizens abroad without any measure of procedural due process if it deems those citizens are threats to national security),51 creates a frightening prospect. Such a confluence of practical realities and legal precedent creates outcomes that violate the Constitution, necessitating the implementation of procedural due process safeguards.

II. DISCUSSION

Concerning the use of force against terrorists, the U.S. Government has largely relied on self-defense under international law. As stated by State Department Legal Advisor Harold Koh, “the United States is in an armed conflict with Al-Qaeda . . . and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law . . . including lethal force, to defend itself.”52 In fact, most legal scholarship concerning targeted killings and drone attacks focuses on international law.53 Perhaps mainstream legal scholarship will conclude that international law justifies drone strikes on citizens despite constitutional due process concerns; however, those discussions exceed the scope of this Note. The focus of this Note is to propose a solution providing Fifth Amendment due process rights to citizens engaged in terrorism abroad, while permitting the Executive to defend the nation with minimal impediment.


53. Murphy & Radsan, supra note 19, at 409.

As argued below, citizens engaged in terrorist activities in foreign countries maintain their constitutional procedural due process rights. Supreme Court precedent on Fifth Amendment due process rights holds that these rights remain intact despite the citizen being outside U.S. jurisdiction.54 Furthermore, Supreme Court precedent regarding detainees in the War on Terror reveals that citizens and non-citizens alike are entitled to due process rights. Therefore, the current policy of targeted killings via drone strikes on such citizens, only subject to internal controls by the Executive, is unconstitutional.

The Government has also attempted to justify the targeted killings of citizens by connecting the citizen’s terrorist activities to the AUMF,55 which granted the Executive power to take necessary action to prevent future attacks from entities connected to the September 11 attacks.56 However, as argued below, the AUMF does not remove the demands of procedural due process, and the Government’s attempted connections between targeted citizens and the perpetrators of the September 11 attacks have become more tenuous and strained.

A. Fifth Amendment – Due Process Clause

The text of the Fifth Amendment states “[n]o person shall be . . . deprived of life . . . without due process of law.”57 Drone strikes undoubtedly constitute an attempt by the Government to deprive a citizen of his life. As evidenced by the Al-Aulaqi case, the Government has declined to afford targeted citizens any measure of due process before a drone strike by contending that judicial review is improper.58 However, such Government actions unconstitutionally deprive citizens of due process rights when drone strikes are conducted.

Procedural due process refers to the minimum procedural requirements the Government must meet before taking action against a citizen. “Procedural due process imposes restraints on governmental decisions which deprive individuals of liberty . . . interests within the meaning of the Due Process Clause of the Fifth Amendment.”59 But while procedural due process describes a liberty interest within the meaning of the Due Process Clause of the Fifth


57. U.S. CONST. amend. V.

58. Al-Aulaqi, 727 F.Supp.2d 1 at 8.

suspected Al-Qaeda operative and naturalized citizen, was killed in Yemen. The discourse regarding the legality of this drone strike was not as rampant as after the Al-Aulaqi strike, perhaps because Hijazi was a lesser-known figure and due to the pervading conciliatory mood toward counterterrorism action immediately following the September 11 attacks. Nevertheless, the Hijazi, Al-Aulaqi, and Khan killings, in addition to the inevitability that other citizens will engage in terrorism, like Major Hasan and Faisal Shahzad, lead to the incontrovertible conclusion that drone strikes on citizens is a pressing issue. This conclusion, taken with a broad interpretation of the Al-Aulaqi holding (that the Executive is at liberty to target citizens abroad without any measure of procedural due process if it deems those citizens are threats to national security), creates a frightening prospect. Such a confluence of practical realities and legal precedent creates outcomes that violate the Constitution, necessitating the implementation of procedural due process safeguards.

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53. Murphy & Radsan, supra note 19, at 409.
Amendment, the Court has not been clear in defining what constitutes a liberty interest. However, a liberty interest undoubtedly incorporates the interest to not be killed by the Government without due process. There is little merit to an argument that a targeted killing does not seek to deprive a person of a liberty interest.

In Mathews v. Eldridge, the Supreme Court provided a three-factor balancing test to determine the sufficiency of due process procedures. The first factor to be considered is “the private interest that will be affected by the official action.” The second factor entails “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value... of additional or substitute procedural safeguards.” The final factor is “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

Regarding the first element, the private interest that will be affected by government action, surely there can be no greater interest than one’s life. With that precious interest in mind, the due process procedure that is “constitutionally due cannot be divorced from the nature of the ultimate decision that is being made,” in this case, the taking of a citizen’s life. Thus, in considering drone strikes on citizens, the first element deserves the maximum weight attributable.

The second element, wrongful deprivation of the private interest and the value obtained by additional procedures, again affords considerable merit to the implementation of some sort of procedural due process in the context of drone strikes. This factor must also carry the greatest possible weight, considering the only deprivation of a private interest that can be considered worse than being killed is to be killed erroneously. Thus, the value of developing “additional or substitute procedural safeguards” to prevent an erroneous killing is also quite considerable.

60. Id. at 333.
63. Mathews, 424 U.S. at 335.
64. Id.
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68. Mathews, 424 U.S. at 335.

The final element in the Mathews test concerns the Government’s interest, which in this context is national security. National security is certainly a compelling interest and is perhaps the foremost function of Government. Yet, implementing due process procedures in this context would impose a minimal burden on the Government. The Government alleges that a rigorous internal legal analysis is conducted before placing a person on the targeted killing list, and that the process is even more stringent for U.S. citizens. Therefore, the Government should have no difficulty in submitting such information to judicial review to afford targeted citizens their constitutionally mandated due process rights. As discussed below, the proposed procedural solution entails safeguards for secrecy, expedited proceedings to allow for prompt military action, and other considerations to address national security concerns.

Mathews test, when applied to drone strikes on citizens, firmly establishes that the implementation of procedural due process safeguards is the correct outcome. The two initial factors hold immense weight in favor of the implementation of procedural due process measures. Although the Executive claims its internal vetting process for subjecting citizens to a targeted killing is scrupulous, such procedures are secret and conducted with no external oversight. Of the three notable due process interests—life, liberty, and property—life is the only interest that once taken can never be restored, and the function of the legal process is to minimize the risk of erroneous decisions. Thus, the implementation of procedural safeguards to prevent such an outcome carries extensive value. Furthermore, the proceeding imposes a limited burden on the Government that does not endanger national security. Thus, the implementation of the proposed proceeding would ensure a commitment to the rule of law and constitutional mandates, provide increased legitimacy when the Government conducts drone strikes on citizens suspected of terrorism abroad, and provide the citizen with procedural due process.

70. Shane, supra note 38.
71. See supra Part III(C).
72. McKelvey, supra note 23; Koh, supra note 52 (Koh described the Executive branch’s method for determining individuals subjected to targeted killings was “extremely robust,” but did not offer details on the process).
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71. See infra Part III(C).
72. Mckelvey, supra note 23; Koh, supra note 52 (Koh described the Executive branch’s method for determining individuals subjected to targeted killings was “extremely robust,” but did not offer details on the process).
The fact that this proposed proceeding is novel does not upset the conditions of procedural due process. "Due process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances . . . due process is flexible and calls for such procedural protections as the particular situation demands."77 No single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause.78 Moreover, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."79

The Supreme Court has held that constitutional protections accompany a citizen when abroad. In Reid v. Covert, the Court held that citizens are protected by the Constitution when outside U.S. jurisdiction.77 Reid concerned two cases, both involving a woman convicted in a military court for the murder of her U.S. armed forces personnel husband while on a foreign U.S. military base.79 The Court found the Constitution prohibited citizens from being tried by military authorities.80 When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.81 Indeed, constitutional due process protections remain with citizens when abroad.82 Thus, in the context of drone strikes, Reid supports the view that the Constitution prevents the Government from denying a citizen procedural due process just because the Government seeks to act upon that citizen outside U.S. jurisdiction.83

74. Mathews, 424 U.S. at 334.
77. 304 U.S. 1, 5 (1957) (Reid further emphasized the Constitution applies abroad by repudiating In re Ross, 140 U.S. 453 (1891), which held the Constitution has no operation in another country. Reid repudiated Ross by stating that the opinion was "obviously erroneous" and "should be left as a relic from a different era." Reid, 354 U.S. at 12); See Murphy & Radin, supra note 19, at 428-37 (contending that Boumediene v. Bush, 553 U.S. 723 (2008), also subjects the Government to due-process restrictions wherever it acts in the world).
78. Reid, 354 U.S. at 4.
79. Id. at 5.
80. Id. at 6.
81. Id.
82. William C. Banks & Peter Raven-Hansen, Targeted Killing and Assassination: The U.S. Legal Framework, 37 U. RICH. L. REV. 667, 675 (2002); Reid, 354 U.S. at 1 ("[T]he U.S. is entirely a creature of the Constitution. Its power and authority have no other source . . . .")

B. Analogizing to Recent Supreme Court Detainee Cases

In the past decade, the Supreme Court has established that detainees from the War on Terror are afforded some amount of procedural due process rights. In Hamdi v. Rumsfeld83 and Boumediene v. Bush,84 the Court held that both citizens and non-citizens have a constitutional right to writs of habeas corpus in federal court.85 Thus, these cases insinuate that the current Government policy in conducting drone strikes on citizens without due process procedures is unconstitutional.

1. Hamdi v. Rumsfeld

In Hamdi, a U.S. citizen was declared an enemy combatant after allegedly fighting for the Taliban in Afghanistan.86 While being held in a military base in the United States, Hamdi filed a writ of habeas corpus, arguing his Fifth Amendment due process rights were being violated by his indefinite detention and denial of right to counsel and trial. The Government claimed it had a right to detain enemy combatants during wartime and, thus, Hamdi had no right to due process.87

The four Justice plurality, authored by Justice O'Connor, held the AUMF did authorize the Executive to detain U.S. citizens as enemy combatants,88 however, such detainees retain basic due process rights.89 Further, the plurality found the Fifth Amendment ensures that a citizen detained as an enemy combatant must, at minimum, be given notice of the factual basis for his designation as an enemy combatant and an opportunity to contest the detention before a neutral decision-maker.90 Yet, the exigencies of the situation, namely that Hamdi was deemed an enemy combatant, dictated that Hamdi

U.S.] can only act in accordance with all the limitations imposed by the Constitution.

83. Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (O'Connor, J., plurality) (holding, with the assent of the majority of the Court, that American citizens held as enemy combatants are entitled to due process protections).
84. Boumediene v. Bush, 553 U.S. 723 (2008) (holding that non-citizen detainees at Guantanamo Bay had constitutional right to seek habeas corpus review in federal courts and that the contours of this review would be a function of due process principles).
85. Hamdi, 542 U.S. at 507; Boumediene, 553 U.S. at 723.
86. Hamdi, 542 U.S. at 510.
87. Id. at 513.
88. Id. at 517-18.
89. Id. at 521.
90. Id. at 533.
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was not entitled to the functional equivalent of a trial.91 Elements such as hearsay and a presumption in favor of Government evidence, as long as said presumption would be rebuttable, were identified as possible curtailments to alleviate the Executive’s burden during military conflict.92

Justice Souter, joined by Justices Ginsburg and Breyer, concurring in part and in the judgment, agreed that Hamdi had the right to challenge his enemy combatant status. Souter dissented in part, arguing the Executive did not have authority to detain citizens, except via an act of Congress, based on the Non-Detention Act.93 Justice Scalia, joined by Justice Stevens, dissented, arguing a strict civil liberties viewpoint and claiming the appropriate process for detaining a citizen accused of waging war against his country is prosecution for treason.94 Thus, absent a congressional suspension of the writ of habeas corpus, the Government must prosecute Hamdi or release him.95

Justice Thomas adamantly dissented, arguing in favor of Executive branch discretion in conflict while noting the judiciary’s lack of expertise in such matters.96 Thomas contended the judiciary could examine whether the Executive held the power to detain enemy combatants,97 and that the Executive had such power, since the power to wage war necessitates the power to detain those who fight in opposition, even U.S. citizens.98 Thomas claimed that in the context of a detention of an enemy combatant, “due process requires nothing more than a good-faith executive determination.”99

Despite the plurality’s vague enunciation of what constitutes an adequate level of due process for detainees, the overall message of Hamdi is clear: citizen detainees are entitled to some form of due process, despite being declared enemy combatants.100 Only Justice Thomas expressed a position that can be rectified with recent Executive pronouncement regarding drone strikes on citizens, what he conceived of as a “good-faith executive determination.”101 Furthermore, Justice Scalia advocated that if Hamdi was not released he must be prosecuted for treason,102 which, in going beyond the due process requirements enunciated by the plurality, would result in the full due process procedures entailed in a criminal trial. Indeed, the citizen identified for targeted killing is more entitled to due process proceedings considering the finality of death compared to the restriction of liberty. Using Hamdi’s reasoning, if a citizen that is deemed an enemy combatant is entitled to some form of due process when detained of liberty, it should follow that a citizen targeted for deprivation of life is also entitled to due process.103

2. Boumediene v. Bush

In accordance with Hamdi’s mandate, the Government began conducting Combatant Status Review Tribunals (CSRTs) to determine if each detainee was a threat and whether they should remain detained as enemy combatants.104 Following the suggestions proposed in Hamdi, the CSRTs entailed a presumption for Government evidence105 and allowed hearsay.106 Additional restrictions on due process were also imposed, including denying the detainee access to classified information used as evidence,107 and assigning the detainee a “Personal Representative.”108 However, the personal representatives did not act as the detainee’s lawyer, nor were they even an advocate for the detainee.109

In an attempt to counteract the Hamdi ruling, Congress enacted the Detainee Treatment Act of 2005 (DTA), which removed jurisdiction from federal courts for non-citizen Guantanamo detainees and granted the D.C. Court of Appeals exclusive jurisdiction over

101. Id. at 590 (Thomas, J., dissenting).
102. Id. at 554 (Scalia, J., dissenting).
105. Id. at 767.
106. Id. at 816.
107. Id. at 784.
108. Id. at 767.
109. Id.
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101. Id. at 590 (Thomas, J., dissenting).
102. Id. at 554 (Scalia, J., dissenting).
103. Gardner v. Florida, 430 U.S. 349, 357-358 (1977) ("[T]he action of the sovereign in taking the life of one of its citizens...differs dramatically from any other legitimate state action"); Ford v. Wainwright, 477 U.S. 399, 411 (1986) ("[E]xecution is the most irredeemable and unfathomable of penalties; that death is different"); O'Dell v. Netherland, 521 U.S. 151, 171 n.3 (1997) (Stevens, J., dissenting) ("[T]he unique character of the death penalty mandates special scrutiny of...procedures in capital cases").
105. Id. at 767.
106. Id. at 816.
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CSRTs decisions.110 Subsequently, the Court limited the applicability of the DTA in Hamdan v. Rumsfeld,111 holding that the removal of habeas corpus jurisdiction from federal courts for Guantanamo detainees did not apply to those writs pending when the DTA was passed.112 Congress again responded by passing the Military Commissions Act of 2006 (MCA), providing that the DTA did apply retroactively to the writs at issue in Hamdan and that CSRTs were controlled by the DTA.113 Thus, the framework in which Boumediene v. Bush was decided on was in place.

Boumediene, a non-citizen, was classified as an enemy combatant and detained at Guantanamo Bay.114 He filed a writ of habeas corpus, claiming, inter alia, his detention violated the Due Process Clause.115 The Supreme Court first held that the MCA § 7 did not deny federal courts jurisdiction for writs of habeas corpus from non-citizen detainees at Guantanamo.116 Finding jurisdiction, the Court held CSRTs were insufficient replacements for writs of habeas corpus; therefore, the MCA was effectively an unconstitutional violation of the Suspension Clause.117 The Court then found that the Fifth Amendment due process right to liberty applied to non-citizen Guantanamo detainees and that the detainees could challenge the adequacy of CSRTs before they sought writs of habeas corpus.118

Thus, Boumediene provides that even non-citizen detainees held outside U.S. jurisdiction are owed some measure of due process rights. The first element of importance that Boumediene holds is that even non-citizens outside U.S. jurisdiction are entitled to some measure of due process before being subject to government action.119 Hence, Boumediene reaffirms Reid v. Covert in holding the

112. Id. at 574-76.
114. Boumediene, 553 U.S. at 723.
115. Id.
116. Id. at 795.
117. Id. U.S. Const. art. I, §9, cl 2. [Suspension Cl. “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”].
118. Boumediene, 553 U.S. at 771.
119. Id.
120. Murphy & Radaa, supra note 19, at 429-37 (contending Boumediene subjects the Government to due-process restrictions wherever it acts in the world).

Government is subjected to the confines of the Constitution, even abroad.121 Secondly, the liberty interest at stake in Boumediene is the entitlement to be free from unjust captivity. Undoubtedly, the interest to be free from unjust captivity is significant, yet as previously established, the interest in being free from erroneous deprivation of life is more significant. Furthermore, Boumediene held that procedural due process was due to non-citizens;122 thus, undoubtedly, citizens should also be afforded procedural due process rights. These elements from Boumediene reveal that a non-citizen who is outside U.S. jurisdiction is still entitled to procedural due process when the detainee's freedom is the liberty interest at stake.123 Applied to drone strikes, it is a logical conclusion that a citizen abroad, with a more significant liberty interest with his life at stake, is also entitled to procedural due process before the Government attempts to deprive him of life in violation of the Fifth Amendment.

C. Authorization for Use of Military Force Against Terrorists (AUMF)

For the President to lawfully order a drone strike on a citizen, the authority must derive from either an act of Congress or Article II of the Constitution.124 As evidenced in Al-Aulaqi v. Obama, the Government claims legal justification from the AUMF when it engages in drone strikes on citizens engaged in terrorism,125 which was passed in the aftermath of the September 11 attacks. The AUMF authorized the President to use necessary and appropriate force against all "nations, organizations, or persons he determines planned, authorized, committed, or aided or harbored such organizations or persons" to prevent future attacks against the United States.126 This legislation granted the President authority to conduct the war in Afghanistan and numerous worldwide counterterrorism operations. The Government has continued to offer the AUMF as justification for counterterrorism actions, including drone strikes; however, the AUMF requires a nexus to the September 11 attacks, and as time elapses the connection to those attacks becomes more tenuous.127

121. 354 U.S. 1, 6 (1957).
122. Boumediene, 553 U.S. at 771.
123. Id.
124. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Delahanty & Mota, supra note 33, at 16.
125. 727 F. Supp. 2d 1, 4-5, 24 (D.D.C. 2010); Ramsden, supra note 26, at 396.
127. Hamdi, 542 U.S. at 536 (stating the AUMF cannot function as "a blank check for the President when it comes to the rights of the Nation's citizens.").
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The Al-Aulaqi scenario provides a helpful medium for understanding this point. In Al-Aulaqi, the Government contended the AUMF justified its drone strike.118 The Government argued that AQAP is "either part of Al-Qaeda, or is an associated force, or cobelligerent, of Al-Qaeda that has directed armed attacks against the United States."119 Thus, the Government claimed the AUMF justified the use of force against AQAP, and by extension, Al-Aulaqi.120

However, the Government's interpretation of the AUMF is untenable broad and fails to justify the use of force against AQAP. The AUMF was enacted in order to "prevent any future acts of . . . terrorism against the United States."121 Yet, the AUMF authorizes the use of force only against entities that were somehow associated with the September 11 attacks.122 The futility of the Government's connection between the AUMF and AQAP is evident by the fact that AQAP did not exist in the period before or immediately after the September 11 attacks. In fact, the Government itself states, "AQAP's predecessor, Al-Qaeda in Yemen, came into existence . . . in February 2006" and "AQAP emerged in January 2009."123 The United States did not even designate AQAP a terrorist organization until January 2010.124 Therefore, it is difficult to imagine how AQAP could have "planned, authorized, committed, or aided" the September 11 attacks without being in existence at the time.125

Furthermore, in Hamilby v. Obama, the D.C. District Court in interpreting the AUMF held that "[a]ssociated forces" do not include terrorist organizations who merely share an abstract philosophy or even a common purpose with Al-Qaeda — there must be an actual association in the current conflict with Al-Qaeda or the Taliban.126 While holding that Al-Qaeda and the Taliban clearly meets this standard, the Court dictated "AQAP is a separate and distinct group that is not known to have any actual association with Al-Qaeda, whether in terms of command structure or activities, and no connection to September 11.127 Many commentators have analogized Al-Qaeda to a franchise.128 Prior to the 9/11 attacks, Al-Qaeda was a "relatively hierarchical and centralized, though geographically dispersed, organization that operated through cells."129 Mainly due to the war in Afghanistan and counterterrorism efforts worldwide, Al-Qaeda has become an ideal for a loose collection of like-minded movements, "acting less through its own cells than through a confederacy of affiliated terrorist organization . . . that it inspires, leads, and supports."130

The floor debates in the Senate and House on [the AUMF] make clear that the focus of the military force legislation was on the extent of the authorization that Congress would provide to the President for use of U.S. military force against the international terrorists who attacked the United States on September 11, 2001 and those who directly and materially assisted them in carrying out their actions. The language of the enacted legislation, on its face, makes clear — especially in contrast to the White House’s draft joint resolution of September 12, 2001 — the degree to which Congress limited the scope of the President’s authorization to use U.S. military force through [the

118. Al-Aulaqi, 727 F.Supp.2d at 4-5, 24; Ramsden, supra note 26, at 306.
119. Al-Aulaqi Complaint, supra note 31, at 1.
120. Id. at 24.
122. Banks & Raven-Hansen, supra note 82, at 737.
125. Ackerman, supra note 133.
132. Id. at 3.
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AUMF] to military actions against only those international terrorists and other parties directly involved in aiding or materially supporting the September 11, 2001 attacks on the United States. The authorization was not framed in terms of use of military action against terrorists generally.113

The result is that, as time passes, the AUMF is less likely to offer adequate justification for counterterrorism action. "[I]t is increasingly tough to say that [the AUMF] authorizes the United States' continuing activities . . . given America's recent decimation of the original Al-Qaeda's fighting capacity."114 Yet the Government continues to rely on the AUMF as justification, erroneously as argued in the Al-Aulaqi context, thus necessitating the need to institute due process protections. As stated in Hamdi, the AUMF cannot function as "a blank check for the President when it comes to the rights of the Nation's citizens."115

Even if the AUMF was found to grant the Executive authority to engage in the drone strikes discussed, the judiciary has the power to review determinations made by the Executive for targeted killings.116 Specifically, the judiciary has the "ability to review whether the executive has properly identified specific individuals or objects as being within the scope of congressionally authorized hostilities."117 The Supreme Court has previously instituted judicial review on the scope and intent of the AUMF in Hamdan v. Rumsfeld,118 stating "there is nothing in the AUMF's text or legislative history even hinting that Congress intended to expand or alter the authorization set forth."119

III. PROPOSED LEGAL SOLUTION

To review, Reid holds that the protections of the Constitution remain with citizens when they are abroad.120 The previous discussion of the Mathews balancing test shows that the factors point to providing a procedural due process right to citizens engaged in terrorist activities outside the United States121 as Hamdi makes clear, a U.S. citizen engaged in terrorist activities is entitled to due process rights; however, not the due process protections that equate to a full trial.122 In addition, the Boumediene Court held that detainees outside the United States are entitled to habeas corpus relief in federal courts.123 Accordingly, citizens are entitled to procedural due process before the Government subjects them to drone strikes. It is imperative the Government adhere to these constitutional requirements before taking the momentous choice to kill a citizen. The challenge is to formulate a procedure that will protect the due process rights of such citizens while allowing the discretion the Executive needs to maintain national security.124 The touchstone of procedural due process is "a search for what procedures are fair under the circumstances of each particular case."125

This Note proposes legislation, under Article III,126 to provide the Federal Judiciary with az ante judicial review before the Government can target a citizen for a drone strike. The hearing, similar to a warrant proceeding, would require the Government to prove to the D.C. Circuit Court or a newly created court, similar to the FISA

143. Id. at 4.
144. Ackerman, supra note 133.
145. Hamdi, 542 U.S. at 536.
146. John Dehn & Kevin Heller, Targeted Killing: The Case of Anwar al-Aulaqi, 150 U. PA. L. REV. 175, 178 (2011) ("The jurisdiction of federal courts exists to review executive war measures in appropriate cases.").
147. Id. at 178-179 (citing The Amiable Nancy, 16 U.S. (3 Wheat) 546, 557-58 (1818)) (stating that "[t]he Supreme Court found that general grants of admiralty jurisdiction included the power to review maritime captures of suspected enemy ships and property."). Grants of habeas corpus jurisdiction have also permitted judicial review of some detentions and military commissions, see Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Ex Parte Quirin, 317 U.S. 1 (1942); Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866).
149. Id.
AUMF] to military actions against only those international terrorists and other parties directly involved in aiding or materially supporting the September 11, 2001 attacks on the United States. The authorization was not framed in terms of use of military action against terrorists generally. \(^{148}\)

The result is that, as time passes, the AUMF is less likely to offer adequate justification for counterterrorism action. "[I]t is increasingly tough to say that [the AUMF] authorizes the United States' continuing activities...given America's recent decimation of the original Al-Qaeda's fighting capacity." \(^{144}\) Yet the Government continues to rely on the AUMF as justification, erroneously as argued in the Al-Aulaq context, thus necessitating the need to institute due process protections. As stated in Hamdi, the AUMF cannot function as "a blank check for the President when it comes to the rights of the Nation's citizens." \(^{146}\)

Even if the AUMF was found to grant the Executive authority to engage in the drone strikes discussed, the judiciary has the power to review determinations made by the Executive for targeted killings. \(^{146}\) Specifically, the judiciary has the "ability to review whether the executive has properly identified specific individuals or objects as being within the scope of congressionally authorized hostilities." \(^{146}\) The Supreme Court has previously instituted judicial review on the scope and intent of the AUMF in Hamdan v. Rumsfeld, \(^{146}\) stating "there is nothing in the AUMF's text or legislative history even hinting that Congress intended to expand or alter the authorization set forth." \(^{146}\)

143. Id. at 4.
144. Ackerman, supra note 133.
145. Hamdi, 542 U.S. at 536.
146. John Dehn & Kevin Heller, Targeted Killing: The Case of Anwar al-Aulaq, 150 U. PA. L. REV. 175, 178 (2011) ("The jurisdiction of federal courts exists to review executive war measures in appropriate cases.").
147. Id. at 178-179 (citing The Amiable Nancy, 16 U.S. (3 Wheat) 546, 557-58 (1818)) (stating that "[t]he Supreme Court found that general grants of admiralty jurisdiction included the power to review maritime captures of suspected enemy ships and property."). Grants of habeas corpus jurisdiction have also permitted judicial review of some detentions and military commissions, see Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Ex Parte Quirin, 317 U.S. 1 (1942); Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866).
149. Id.
Court,\textsuperscript{157} that adequate justification exists for conducting a drone strike on a citizen allegedly engaged in terrorist activities. Such a proceeding allows for protection of the citizen’s due process rights, limits unfettered Executive discretion to kill citizens without legal justification and provides considerations to ensure national security.

Congress has previously created specialized jurisdiction courts under Article III, such as District Bankruptcy Courts, the Court of International Trade, and the FISA Court.\textsuperscript{158} In recent years, there has been a plethora of advocates for the creation of an Article III court capable of handling the unique challenges trying a terror suspect would present; these proposals are commonly called ‘National Security Courts’ or ‘Domestic Terror Courts.’\textsuperscript{159} Other ideas propose trying suspected terrorists in the FISA Court.\textsuperscript{160} Commenting on the proposals for a National Security Court, former U.S. Attorney General Mukasey agreed that the proposals need to be taken seriously by Congress subject to its Article III power to establish inferior courts.\textsuperscript{161}

A. Legal Elements

The Government must prove the elements listed below beyond a reasonable doubt.\textsuperscript{162} “Beyond a reasonable doubt” is the appropriate

\textsuperscript{157} Foreign Intelligence Surveillance Act, 50 U.S.C. §§1801-62 (2006). Specifically, § 1803 provides for the establishment of FISA courts: “the Chief Justice of the United States shall publicly designate 11 district court judges ... who shall constitute a court.” Id. § 1803(a)(1).

\textsuperscript{158} Kevin E. Lunday & Harvey Rishikof, Due Process as a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court, 39 CAL. W. INT’L L.J. 87, 111 n. 87 (2008) (discussing the history of Congress creating District Bankruptcy Courts and the Court of International Trade before establishing the FISA Court).

\textsuperscript{159} Jack Golden & Neal Katyal, The Terrorists’ Court, N.Y. TIMES, July 11, 2007, at A10; Guiora, supra note 28, at 834–35 (Recommending amendment of the FISA to allow prosecution of terrorists before the FISA Court, to ensure civilian control while respecting security); Amos N. Guiora, Quirin to Hamdan: Creating a Hybrid Paradigm for the Detention of Terrorists, 19 FLA. J. INT’L L. 2 (2008); Andrew C. McCarthy & Alykhan Velshi, We Need a National Security Court (unpublished White Paper submitted to Am. Enter. Inst.), available at http://www.defenddemocracy.org/research_topics/research_topics_scoh.htm#:~:text=did%3D510924.

\textsuperscript{160} Amos N. Guiora, Military Commissions and National Security Courts After Guantanamo, 103 NW. U. L. REV. 199, 204 (2008).


\textsuperscript{162} For discussion on standards of proof in similar scenarios, see Lunday & Rishikof, supra note 158, at 121 (advocating for beyond a reasonable doubt as the standard of proof in trials of alleged terrorists in a proposed National Security Court); see also Loftier Standards for the


\textsuperscript{163} See Radsan & Murphy, supra note 162, at 1224. (“Drone strikes ... are executions without any appeals in court.”).


\textsuperscript{165} Eric Holder, U.S. Att’y Gen., Speech at NW. U. Sch. of Law (Mar. 5, 2012).

\textsuperscript{166} Id.

\textsuperscript{167} See Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8 (D.D.C. 2010); Savage, supra note 164, at A1 (claiming the secret Executive branch memo holds that it would only have been legal to kill Al-Aulaqi if capture or lesser means were determined to be incapable).

\textsuperscript{168} Savage, supra note 164; Holder, supra note 165.
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A. Legal Elements

The Government must prove the elements listed below beyond a reasonable doubt. See supra note 160. "Beyond a reasonable doubt" is the appropriate standard because a drone strike will likely result in the death of the citizen and the proposed hearing does not provide typical procedural safeguards to innocence, such as adversarial proceedings. Most of the legal elements are based, in part, on accounts of the secret Obama Administration legal memorandum created to justify the Al-Aulaqi drone strike. In a recent speech, U.S. Attorney General Eric Holder provided elaboration on some of the legal reasoning in the memorandum.

First, the suspected terrorist must pose an imminent and lethal or substantial threat to the United States, U.S. citizens in any part of the world, the U.S. military, or any other entity the Government shows is sufficient to protect. Holder stated that for the Government to engage in a targeted killing of a U.S. citizen, the citizen must pose "an imminent threat of violent attack against the United States." Second, the killing must be necessary. The Government must show that lesser actions like freezing of assets, enhanced security, or other counterterrorism actions are insufficient measures to protect the United States, U.S. citizens in any part of the world, the U.S. military, or any other entity the Government shows is sufficient to protect.

Third, there must be considerable difficulty in capturing the suspected terrorist, including a foreign government denying U.S. authorities or military access to the country in which terrorist is located, considerable danger to the U.S. authorities or military that would be engaged in capture operation, or any other considerable difficulty deemed prohibitive. Indeed, the Obama Administration memorandum reportedly argues the Al-Aulaqi drone strike would only have been legal if the Government was not able to secure his


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capture.\textsuperscript{169} Furthermore, Holder pronounced, “[i]t is preferable to capture suspected terrorists where feasible.”\textsuperscript{170} The Government must also pledge to take reasonable and appropriate measures to avoid killing or harming innocent persons and collateral damage when conducting the drone strike.\textsuperscript{171}

### B. Designated Judicial Forum

The appropriate forum for such a proceeding offers considerable difficulties. Judicial approval for a targeted killing, unlike a warrant, does not provide the full safeguards of an adversarial proceeding. Once judicial approval is granted, the citizen is subject to lethal force by the Government. Therefore, such a determination is of much greater weight than a warrant proceeding and thus requires enhanced scrutiny,\textsuperscript{172} for “the action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action.”\textsuperscript{173}

The judiciary, as opposed to Congress, is a more appropriate forum for such a hearing. Congress is inherently political, and political pressures would likely supersede evidence in decisions. A Member likely may base a decision on a number of issues, such as political popularity, special interests, or ideology, rather than on facts. “[The Bill of Attainder Clause, Art. I, §9, cl. 3.] and the separation of powers doctrine generally, reflect the Framers’ concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power.”\textsuperscript{174} In addition, Congress lacks the expertise and skills that such a legal hearing would necessitate.

The D.C. Circuit Court is the appropriate forum for such a hearing. A Circuit Court offers the benefit of not only of multiple judges, but also the likelihood of more distinguished judges capable of making sound decisions. Following such reasoning, it may seem that the Supreme Court would be the optimal forum for such a hearing. However, the Supreme Court is subjected to much more intense public scrutiny and considerably more political pressure than lower courts. Such a proceeding in the Supreme Court would lead to a media circus and demands for open proceedings. Furthermore, the Supreme Court functions in a limited capacity, in which additional inquiries may be burdensome to the established docket. Still, the cognizable downside of employing a Circuit Court is that the judges typically deal with issues of law, not typically with issues of fact, as district judges do. However, circuit judges typically have district court experience where they would have been exposed to issues of fact.

A second forum alternative is the creation of a federal court similar to the FISC Court,\textsuperscript{175} which grants requests for surveillance warrants against suspected foreign intelligence agents in the United States.\textsuperscript{176} The FISA Court offers a template to develop a judicial forum that can adequately balance a citizen’s due process rights against national security demands in the context of handling classified information and time-sensitive demands.\textsuperscript{177} The FISA Court model also provides numerous implementations that would be helpful to the proposed proceeding.\textsuperscript{178} First, FISA Court proceedings are closed to the public due to the classified information and sensitive intelligence at issue\textsuperscript{179} (although, as discussed below, closed proceedings may not always be necessary.)\textsuperscript{180} Additionally, there is a procedure to allow for the publication of FISA Court proceedings.\textsuperscript{181} Furthermore, FISA Court judges have developed expertise in deciding sensitive issues relating to national security\textsuperscript{182}, and it is likely that judges in a FISA-type Court would develop the same expertise in their subject matter.

Yet, there must be alterations from the FISA Court model. FISA Court hearings only provide for Government lawyers who are seeking

\textsuperscript{169} Savage, supra note 164.

\textsuperscript{170} Holder, supra note 165.

\textsuperscript{171} Id. (“[O]peration[s] would be conducted in a manner consistent with applicable law of war principles.” (These principles include proportionality, collateral damage must be in relation with military advantage gained) and distinction of targets (only combatants or civilians directly engaging in hostilities may be targeted)).

\textsuperscript{172} Ford v. Wainwright, 477 U.S. 399, 411 (1986) (“execution is the most immediate and unfathomable of penalties; that death is different”); O’Neill, 921 U.S. at 171 n.3 (Stevens, J., dissenting) (“[The unique character of the death penalty mandate special scrutiny of those procedures in capital cases.”).


\textsuperscript{175} Mckelvey, supra note 51, at 1378.


\textsuperscript{177} Mckelvey, supra note 51, at 1378.

\textsuperscript{178} Guina, supra note 28, at 834-35.


\textsuperscript{180} See infra Part III (C).

\textsuperscript{181} Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-62, Ct. Rule 5(c) (2006). (However, only one FISA Court opinion has ever been approved for publication: In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611 (U.S. Foreign Intell. Surveil. Ct. 2002)).

\textsuperscript{182} Mckelvey, supra note 51, at 1378.
But also the likelihood of more distinguished judges capable of making sound decisions. Following such reasoning, it may seem that such a legal hearing would necessitate the enhanced power of the legislature lacks the safeguards necessary to prevent the abuse of doctrine generally, reflect the Framers' concern that trial by a Bill of Attainder Clause, Art. I, §9, cl. 3.] and the separation of powers doctrine generally, reflect the Framers' concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power. 174 In addition, Congress lacks the expertise and skills that such a legal hearing would necessitate. The judiciary, as opposed to Congress, is a more appropriate forum for such a hearing. Congress is inherently political, and political pressures would likely supereede evidence in decisions. A Member likely may base a decision on a number of issues, such as political popularity, special interests, or ideology, rather than on facts. "[The Bill of Attainder Clause, Art. I, §9, cl. 3.] and the separation of powers doctrine generally, reflect the Framers' concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power." 174 In addition, Congress lacks the expertise and skills that such a legal hearing would necessitate.

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to gain permission to conduct intelligence gathering.\(^{188}\) Thus, there is no opposing party arguing against the Government. In the proposed hearing, the stakes are significantly higher after all, the Government is seeking permission to kill a citizen. Therefore, it is a necessity that the alleged terrorists have some type of advocate during the proceeding to provide an adversarial setting.\(^{184}\) Because the evidence at issue will contain significant amounts of classified material, the advocate arguing against the drone strike cannot be a typical private lawyer. A federal public defender that has been granted security clearance should be the advocate for the citizen.\(^{184}\) In addition, a wide array of court personnel would need pre-approved security clearances, including judges, Government advocates, and court staff.\(^{180}\)

C. Government Option for Secret Proceedings

An additional safeguard that may be necessitated is secrecy of the proceeding. A common refrain is the need for courts trying terror suspects to have the ability to protect military intelligence and classified information,\(^{187}\) and arguments exist that suggest the failures of current military tribunals in trying terrorists lies in the inability to protect intelligence.\(^{188}\) The Bush Administration deemed typical


184. Yaroshetsky, supra note 179, at 1066 (describing the fundamental assumption of adversarial proceedings in Article III of the Constitution).

185. See Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 52,834-35 (Nov. 16, 2001) (granting the Secretary of Defense the decision on whether counsel for detainees would be appointed or chosen. The Secretary chose appointed counsel).

186. Lundy & Rishikof, supra note 158, at 111; Gregory S. McNeal, Beyond Guantanamo, Obstacles and Options 103 NW. U. L. REV. COLLOQUIY 29 (2005) (citing a confidential interview with a senior Dept. of Justice, Nat’l Sec. Div. official in Cleveland, Ohio (Jul. 13, 2007)) (a considerable bar to transferring Guantanamo detainees to Article III courts is the Government would not be able to provide enough prosecutors with security clearance).


188. McNeal, supra note 186, at 29 (noting what he calls the “non-prosecution paradox” suggests the failure of the current system to try alleged terrorists is due to an inability to protect intelligence.); Guiora, supra note 28, at 806 (2011); Guiora, supra note 160, at 203.

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Article III courts unsuitable for suspected terrorists, in part because of the challenges presented by presenting classified information as evidence. It is certain that the proposed proceedings will present information, sources, or methods the Government wishes to keep classified. Specifically, there may be instances where the Government does not wish to broadcast to a suspected terrorist that he is being targeted. For instance, there are accounts that Osama bin Laden first learned the Government was on his trail based on information the Government was required to make public during a terrorism trial.

However, the secrecy of the proceedings should be at the Government’s discretion. In cases of high profile terrorists, the Government may wish to make a public case, detailing legal justifications, thus removing the need for closed proceedings, or allowing a portion of the proceedings to be open. Furthermore, opening certain proceedings or portions of proceedings would increase public confidence in the hearings.

D. Government Option for Inadmissibility of Proceedings

Military necessity often requires operations be completed extremely quickly, sometimes based on actionable intelligence. It is likely the Government would seek judicial approval for a targeted killing prior to the need for such a strike, likely when sufficient intelligence supports approval. However, there may be an instance when judicial approval for a drone strike is needed immediately. In such circumstances, national security provides an appropriate justification for expedited access to the judicial system, including leapfrogging other cases on the docket and emergency hearings. For example, FISA requires that a judge be on call no matter the time of day, and on weekends and holidays, and requires judges to live
within a certain distance of the courtroom. A similar provision should also be implemented in the proposed legislation considering the ramifications of national security.

E. Denial and Appeal

If the Government is denied judicial approval for a targeted killing, the Government is prevented from killing the suspected terrorist. However, a denial in no way limits other actions the Government seeks to take in order to combat terrorism, minimize the threat posed by the individual, or a variety of other security measures. Moreover, denial is not a bar to the Government seeking later approval. The Government may seek judicial approval once any substantial development occurs, including obtaining additional intelligence, additional action taken by the suspected terrorist, any sufficient development, or change in circumstance. In accordance with Article III, the Supreme Court would have appellate jurisdiction to review a denial by the D.C. Circuit Court or a FISA-type court.

IV. PROPOSED SOLUTION APPLIED TO ANWAR AL-AULAQI SCENARIO

The applicability of the proposed proceeding can be shown by an application to the Al-Aulaqi scenario. Initially, the Government would need to prove the first element of the proposed test: that Al-Aulaqi posed a lethal or substantial threat to the United States, U.S. citizens in any part of the world, the U.S. military, or any other entity the Government shows is sufficient to protect. The Government would have had no difficulty satisfying this element based solely on information in the media. Evidence sufficient to meet the first element would have included Aulaqi's link to numerous terror plots like the 2009 Fort Hood Shooting Attack and the attempted 2009 underwear bombing of Northwest Airlines Flight 253, not to mention other classified material.

The second element the Government would have had to satisfy is the necessity of killing Al-Aulaqi, that is, showing that lesser actions would be insufficient to protect the United States, U.S. citizens in any part of the world, the U.S. military, or any other entity the Government shows is sufficient to protect. Al-Aulaqi was placed on designated as a Specially Designated Global Terrorist in July 2010, which subjected Al-Aulaqi and AQAP to counterterrorism sanctions by the Treasury Department. Yet these sanctions were insufficient to prevent Al-Aulaqi from planning subsequent terror attacks, such as the 'Cargo Plane Bombing' attempt that occurred in October 2010.

The third element the Government would need to prove, in the Al-Aulaqi scenario, is that there would have been considerable difficulty in capturing the target. The United States and Yemen cooperate extensively on counterterrorism efforts, including Yemen allowing the U.S. military access to Yemeni airspace to conduct drone strikes. Yet, despite this cooperation, Yemen does not have operational control over substantial parts of its territory. Anti-government tribal clan control vast areas of the country, particularly in the north. These groups have threatened they would have supported and defended Al-Aulaqi from Yemeni and U.S. forces; in fact, the Al-Awlaki tribe has stated that it would "not remain with arms crossed if a hair of [Al-Aulaqi] is touched or if anyone plots or spies against him. Whoever risks denouncing [Al-Aulaqi] will be the target of Al-Awalik weapons." Moreover, the secret Obama Administration legal memorandum reportedly states Yemen was unable or unwilling to capture Al-Aulaqi.

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In analyzing this element, the U.S. military raid into Pakistan that killed Osama bin Laden is an interesting counterpoint. The...
counterargument would contend that the ability to capture bin Laden in such circumstances proves that similar raids are possible, making the third element exceedingly difficult to satisfy. However, it must be acknowledged that the bin Laden raid was an exceptional scenario and easily distinguished from most situations. First, bin Laden was a unique target to the United States. As the recognized head leader of Al-Qaeda, bin Laden was responsible for killing thousands of U.S. citizens during the September 11 attacks in addition to involvement in innumerable other terrorist plots. The risks the United States was willing to accept in capturing bin Laden far exceed the danger the United States would accept in most other counterterrorism actions. Second, although Pakistan claims it had no knowledge of the bin Laden raid,209 such claims must be viewed skeptically based on the United States-Pakistan relationship in the War on Terror. Publicly, the Pakistani government denies it has given the United States access to its airspace to conduct drone strikes, perhaps in part to protect its own domestic popularity. Nevertheless, the Pakistani government frequently cooperates with U.S. military action. This kind of doublespeak may result from the Pakistani population’s strong anti-American views.210 Although based on speculation, it is possible that Pakistan was aware of the bin Laden raid and took steps to facilitate the U.S. action, while maintaining ignorance for political purposes. Furthermore, the issue of immediacy would not have played a factor in the Al-Aulaqi scenario. The Obama Administration placed Al-Aulaqi on the targeted kill list in April 2010211 and he was not killed until September 2011, seven months later.212 Given the provision in the proposed proceeding allowing the Government to expedite hearings, there is no conceivable reason the proceeding would impinge the Government to act in the interest of national security.


209. Shane, supra note 200.


V. COUNTERARGUMENTS AND REBUTTAL

The Constitution vests the President with the responsibility to protect the nation from attack,213 yet the Fifth Amendment protects citizens from arbitrary government action.214 When two constitutional principles conflict, resolution is undoubtedly difficult, a difficulty magnified when the issue concerns national security. Thus, there are several plausible critiques to the proposed proceeding.

A. Due Process v. Judicial Process

The Obama Administration offers a unique counterargument: the Executive is capable of providing due process to its citizens by conducting an internal review. Holder, discussing targeted killings of citizens, recognized the Fifth Amendment’s due process requirement.215 However, he offered a novel interpretation of what would satisfy the requirements of due process, stating, “[d]ue 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.”216 Holder seemed to imply that due process is equally satisfied by the Executive’s secret determinations that a citizen should be killed.

However, “Holder’s defense of these assassinations depends on an entirely new definition of due process”217 that no case law or statute supports and directly contradicts the Constitution. His reasoning implies that the President, under the advice of the National Security Council, acting as judge, jury, and executioner, satisfies the Fifth Amendment’s due process command. Holder promoted a “dangerous policy that creates the illusion of external standards, the illusion of limitations on principled government action by establishing requirements... entirely at the discretion of the Executive... and that should be of extraordinary concern.”218

In the speech, Holder offered a broad outline of the Mathews balancing test, which guides the level of due process required under the Fifth Amendment.219 Holder noted that, in order to determine

211. U.S. CONST. art. II.; The Prize Cases, 67 U.S. 635, 668 (1863) (explaining the President’s duty to defend against attack).

212. U.S. CONST. amend. V.

213. Holder, supra note 165.

214. Id.


216. Id.

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http://www.washingtonpost.com/national/osama-bin-laden-killed-in-us-raid-buried-at-sea/2011/05/02/AFxFtyAZF_story.html


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The Constitution vests the President with the responsibility to protect the nation from attack. Yet the Fifth Amendment protects citizens from arbitrary government action. When two constitutional principles conflict, resolution is undoubtedly difficult, a difficulty magnified when the issue concerns national security. Thus, there are several plausible critiques to the proposed proceeding.

A. Due Process vs. Judicial Process

The Obama Administration offers a unique counterargument: the Executive is capable of providing due process to its citizens by conducting an internal review. Holder, discussing targeted killings of citizens, recognized the Fifth Amendment’s due process requirement. However, he offered a novel interpretation of what would satisfy the requirements of due process, stating, “[d]ue 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.” Holder seemed to imply that due process is equally satisfied by the Executive’s secret determinations that a citizen should be killed.

However, “Holder’s defense of these assassinations depends on an entirely new definition of due process: that no case law or statute supports and directly contradicts the Constitution. His reasoning implies that the President, under the advice of the National Security Council, acting as judge, jury, and executioner, satisfies the Fifth Amendment’s due process command. Holder promoted a ‘dangerous policy that creates the illusion of external standards, the illusion of limitations on principled government action by establishing requirements . . . entirely at the discretion of the Executive . . . and that should be of extraordinary concern.’”

In the speech, Holder offered a broad outline of the Mathews balancing test, which guides the level of due process required under the Fifth Amendment. Holder noted that, in order to determine
what procedures would satisfy due process, Mathews balances the private interest against the government interest and the burdens the government would endure in providing that additional process. However, Holder omitted an integral part of the Mathews test: "the risk of an erroneous deprivation of the liberty interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." This omission is greatly magnified, as earlier argued, when the deprivation is the taking of a citizen’s life. Furthermore, Holder argued this power is granted to the Executive via the AUMF. But this argument assumes that Congress, in enacting the AUMF, intended to give the Executive the power to kill citizens without due process. While such a proposition may be subject to harsh public debate, it is legally moot, as Congress has no power to override the Fifth Amendment via ordinary legislation. The Fifth Amendment guarantees “force cannot be used against citizens, on a pre-targeted, individualized basis, without the factual predicates for the action being put to the test in an independent, judicial forum.” Under Holder’s reasoning, a drone strike on a citizen entails such a use of force on a pre-targeted, individualized basis that the Fifth Amendment prohibits without judicial review.

**B. Political Question**

The obvious counterargument to the proposed due process procedure is that drone strikes against terrorists are simply political questions lying solely in the realm of the Executive. If this is the case, "it is well established that federal courts will not adjudicate political questions." For example, in *Baker v. Carr*, the Supreme Court noted that political questions are not justiciable primarily because of the separation of powers within the Federal Government. Courts will find a non-justiciable political question when "a textually demonstrable constitutional commitment of the issue to a coordinate political department." Those believing the political question doctrine bars judicial inquiry into drone strikes argue the Executive must make prompt decisions regarding national security based on the information, expertise, and experience that only it possesses. In fact, the Supreme Court has been reluctant "to intrude upon the authority of the Executive in military and national security affairs." In *Hamdi v. Rumsfeld*, the Government contended that "a system of trial-like process" would require discovery into military operations that would "intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war." The Executive branch suggests that a targeted drone strike on a citizen is a non-justiciable political question because foreign policy and military affairs "involve discretion the exercise of discretion demonstrably committed to the executive or legislature." The District Court in *Al-Aulaqi v. Obama* supported this conclusion when it found that the courts should be excluded from exercising oversight of the Executive in this realm, stating "there are no judicially manageable standards by which courts can endeavor to assess the President’s interpretation of military intelligence and his resulting decision . . . whether to use military force against a terrorist." As earlier addressed, the Government argues that when vetting potential targets of drone strikes, internal Executive branch judgments satisfy due process. Although "courts should accord the utmost deference to executive assertions of privilege upon grounds of military or diplomatic secrets," "[not] every case or controversy

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217. Viadeck, supra note 217.
218. Holder, supra note 165.
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220. See supra Part II (A).
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which touches foreign relations lies beyond judicial cognizance." Courts must perform "a discriminating analysis of the particular question posed . . . in the specific case." Here, the Executive contends that it can provide the due process that the Fifth Amendment requires with respect to citizens engaged in terrorism abroad. However, the adequacy of the proposed due process is a matter of constitutional interpretation that must be decided by the courts. "[W]hether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of [the judiciary]." The courts must determine "what power the Constitution confers upon the [Executive] through [the Fifth Amendment] before [the courts] can determine to what extent, if any, the exercise of that power is subject to judicial review." Thus, the issue is not barred by the political doctrine question and is justiciable.

C. State Secrets Doctrine

In United States v. Reynolds, the Supreme Court recognized the State Secrets Privilege, a Government privilege against court ordered disclosure of state and military secrets. The privilege is founded on the idea that "in exceptional circumstances, courts must act in the interest of the country's national security to prevent disclosure of state secrets." The Government may prevent the disclosure in a judicial proceeding if "there is a reasonable danger" that such disclosure will expose military matters which, in the interest of national security, should not be divulged. The doctrine includes a wide range of information that could reasonably result in "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments."

Those suggesting the state secrets doctrine bars the proposed judicial proceedings argue that the proposed proceeding would require the revelation of state secrets that would be detrimental to national security. Specifically, the argument suggests that sensitive information would be revealed, including the identities of individuals targeted for killings, military tactics and strategy, and relations with foreign states.

Although the District Court in Al-Aulaqi v. Obama did not decide on the case on the state secrets issue (the case was dismissed for lack of standing), the Court did acknowledge that the evidence of the case may very well constitute state secrets. In a typical legal proceeding, the state secrets privilege may be an insurmountable barrier to the introduction of such evidence. However, the proposed legal proceeding accounts for these concerns in a manner analogous to FISA Court proceedings, where the Government has the option to implement secrecy into the hearing and all persons involved would have security clearances. As a result, the proposed proceeding allows for the protection of classified information while abiding by the Constitution's mandate of due process before deprivation of life.

VI. CONCLUSION

Many non-legal arguments have been made that drone strikes are a beneficial tool, and that killing Al-Aulaqi was prudent given the danger he posed to the United States. Nevertheless, targeted killings without any legal justification or judicial review present a considerable risk of error and abuse, not to mention unfettered Executive discretion. After all, "[l]egal authority is what differentiates murder from lawful policy." From the view of the

235. Baker, 369 U.S. at 211; Powell v. McCormack, 395 U.S. 486, 519 (1969). ("In order to determine whether there has been a textual commitment to a coordinate department of the Government, [the judiciary] must interpret the Constitution.").
236. Powell, 395 U.S. at 519.
239. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1077 (9th Cir. 2010) (en banc).
242. Rosen, supra note 4, at 5292; Murphy & Radan, supra note 18, at 443; Brown, supra note 19, at 212.
243. McNeal, supra note 186, at 29 (noting what he calls the "non-prosecution paradox" suggests the failure of the current system to try alleged terrorists is due to an inability to protect intelligence); Gura, supra note 28, at 806; Rosen, supra note 4, at 5293.
245. See supra Part III (C).
246. See supra Part III (B).
247. U.S. CONST. amend. V.
248. Murphy & Radan, supra note 19, at 407.
249. Banks & Raven-Hansen, supra note 82, at 668.
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Drone Strikes on Citizens

person controlling the drone, the attack may seem more like to a video game than reality. Thousands of miles can separate the prey from the predator, making it all too easy to forget that the consequences are real. Yet, a drone strike on a citizen implicates the fundamental constitutional principles of due process and arbitrary government action, not to mention the resulting death of the citizen. These serious issues necessitate judicial review.

Some will claim that the proposed solution is nothing more than a fig leaf of procedural safeguards; that courts, just as in Al-Aulaqi v. Obama, will defer to the Executive in the name of national security. Others will claim that the proposed solution is a judicial intrusion onto the Executive’s realm of foreign policy and military affairs, resulting in a diminution of national security. However, the ends never justify the means. In the past, the United States has set aside the Constitution in the name of security. The results of those instances have been stains on the country’s legacy, such as the internment of thousands of Japanese Americans250 and the Alien and Sedition Acts.251

We must not forsake seminal constitutional principles due to fear. If the Executive can kill a citizen without judicial review because it has determined the citizen is a terrorist and the means to arrest the citizen are not reasonable, what is the boundary of such power and in what other situations could that power be utilized? The scope of that authority and its consequences will become “too extravagant to be maintained.”252

Targeted killing without due process is more akin to policy that terrorists would evoke than a democracy. In this struggle, the United States must hold itself to a higher standard. The strength of a democratic state is its legitimacy,253 which must be maintained even at dear costs. As Justice O’Connor eloquently pronounced in Hamdi v. Rumsfeld, “[i]t 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.”254


253. Lunday & Rishikof, supra note 158, at 89.

254. Hamdi, 542 U.S. at 532.

255. United States v. Robel, 389 U.S. 258, 264 (1967); see also Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164-66 (1963) (“The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action.”).
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