

# Drones: The Power to Kill

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## ABSTRACT

*After the terrorist attacks on September 11th, 2001, the Bush Administration began the use of unmanned armed aerial drones to pursue targets in Afghanistan and Pakistan. The Obama Administration has continued this policy, expanding it to pursue substantially more targets in Yemen and new ones in Pakistan. This Article analyzes the Obama Administration's procedures for placing American citizens on the list of targets for drone strikes and proposes additional measures that Congress and the President can take to ensure that the procedures comply with constitutional guarantees of due process. This Article uses Supreme Court precedents on enemy combatant designations and trials as a source of due process standards. It argues for the following steps: (1) the establishment of an "enemy combatant" definition specific to drone targets; (2) a requirement that the President notify Congress of any potential U.S. citizen target and of any executed strike; (3) verification, immediately before the strike, that the American target continues to meet the definition of enemy combatant; and (4) the opportunity for an advocate of the target to challenge the classification before a neutral decisionmaker.*

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## INTRODUCTION

Following the September 11th, 2001 attacks by al Qaeda, the Bush Administration took extraordinary measures to protect the United States,<sup>1</sup> including the use of a new and deadly technology—armed unmanned aircraft systems, commonly known as “drones”—to pursue targets in Afghanistan and Pakistan.<sup>2</sup> The Obama Administration has continued this policy, expanding it to pursue substantially more targets in Yemen and new ones in Pakistan.<sup>3</sup> According to published reports and limited disclosures by our government, such as recent comments by President Obama<sup>4</sup> and Attorney General Eric Holder<sup>5</sup> on the Administration's drone policy, the Obama Administration has repeatedly used drones to kill enemy combatants overseas, including American citizens.<sup>6</sup>

<sup>1</sup> See, e.g., Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); see also Donna Miles, *Deputy Secretary: 9/11 Changed America Forever*, U.S. DEP'T OF DEF. (Sept. 7, 2006), <http://www.defense.gov/news/NewsArticle.aspx?ID=726>.

<sup>2</sup> Mary Ellen O'Connell, *Seductive Drones: Learning from a Decade of Lethal Operations*, 21 J.L. INFO. & SCI. 116, 122 (2012) (“In sum, during the last decade, we know from media reports that the US has used [unmanned combat vehicles] in lethal operations in the following countries: Afghanistan, Iraq, Libya, Pakistan, Somalia, and Yemen.”).

<sup>3</sup> See David Rohde, *The Obama Doctrine*, FOREIGN POLICY, Mar.–Apr. 2012, at 65.

<sup>4</sup> President Barack Obama, Remarks by the President at National Defense University (May 23, 2013) [hereinafter Obama Speech on Drone Policy], available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>; President Barack Obama, Remarks by the President at the “Change of Office” Chairman of the Joint Chiefs of Staff Ceremony (Sept. 30, 2011) [hereinafter Obama Change of Office Speech], available at <http://www.whitehouse.gov/the-press-office/2011/09/30/remarks-president-change-office-chairman-joint-chiefs-staff-ceremony>.

<sup>5</sup> Letter from Eric H. Holder, U.S. Attorney Gen., to Senator Patrick J. Leahy, Chairman, Comm. on the Judiciary (May 22, 2013) [hereinafter Holder Letter], available at <http://i2.cdn.turner.com/cnn/2013/images/05/22/holder-letter-5-22-13.pdf>; Eric H. Holder, U.S. Attorney Gen., Remarks at Northwestern University School of Law (Mar. 5, 2012) [hereinafter Holder Speech at Northwestern], available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

<sup>6</sup> See Holder Letter, *supra* note 5, at 1–5; see also Obama Speech on Drone Policy, *supra* note 4.

Anwar Al-Aulaqi (sometimes referred to as Al-Awlaki) was an American citizen, yet a notorious enemy of the United States.<sup>7</sup> He was placed on the “kill list” by President Obama and then killed by a CIA drone strike in 2011 following a lengthy decisionmaking process.<sup>8</sup> Prior to his son’s death, Al-Aulaqi’s father challenged the President’s decision to place his son on the kill list in court, but the suit was dismissed for lack of jurisdiction.<sup>9</sup> Given the Obama Administration’s apparent commitment to using drones against enemy combatants overseas, including American citizens, future legal challenges are likely.<sup>10</sup>

The decision to use drones to kill American citizens abroad raises serious and substantial separation of powers questions. Who has the power to decide if and how America is to be protected? Who protects the constitutional rights of the American target? What role should the courts play? This Article will examine the President’s source of authority to designate Al-Aulaqi as an enemy combatant and place his name on the kill list.

The President, as Commander in Chief during a time of conflict, has the authority under the Constitution and under the laws of war to kill or detain the enemy.<sup>11</sup> When it comes to American citizens, however, the President’s authority is not absolute.<sup>12</sup> It may be helpful to think about the President’s decision-making process as two distinct decision points. The first is the decision to designate an American as an enemy combatant for purposes of the kill list. The second is the decision to execute a kill order. This Article will focus solely on the first decision point.<sup>13</sup>

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<sup>7</sup> See John C. Dehn & Kevin Jon Heller, Debate, *Targeted Killing: The Case of Anwar Al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 175 (2011), <http://www.pennlawreview.com/online/159-U-Pa-L-Rev-PENnumbra-175.pdf>.

<sup>8</sup> See *id.*; see also Seth Hettena, *The Anwar Awlaki Timeline*, INTERNET ARCHIVE (Mar. 10, 2013), <http://web.archive.org/web/20130310235748/http://awlaki.sethhettena.com/> [hereinafter Hettena, *Awlaki Timeline*].

<sup>9</sup> See generally *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010); see also Dehn & Heller, *supra* note 7, at 175.

<sup>10</sup> See generally Rohde, *supra* note 3.

<sup>11</sup> Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 662 (1952) (Clark, J., concurring in the judgment) (“[T]he Constitution does grant to the President extensive authority in times of grave and imperative national emergency.”).

<sup>12</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality opinion) (“We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”).

<sup>13</sup> Though this Article will not address the President’s second decision point, it is my belief that the President should have few restrictions beyond the laws of war with respect to that deci-

The reported facts appear to justify the drone killing of Al-Aulaqi in Yemen in 2011.<sup>14</sup> In light of recent Supreme Court decisions regarding the War on Terror, however, the President and Congress may wish to consider new procedures that will protect the rights of American citizens and place the President on firmer legal footing when using drones against American targets. Subject to military necessity and the President's Commander in Chief authority, possible procedures include congressionally established criteria for designating an American as an enemy combatant for purposes of the kill list and a requirement that the President notify Congress of any such designation.<sup>15</sup> In addition, in order to protect the due process rights of an American target, Congress should establish procedural guarantees in the designation process, including the appointment of an advocate to represent the American target's interests before a neutral decisionmaker, such as a military tribunal or an Article III judge.<sup>16</sup> These additional measures will protect the rights of innocent American citizens and will leave the President with enough flexibility and discretion to protect America and to bring our nation's enemies to justice.<sup>17</sup>

## I. A BACKGROUND ON DRONE STRIKES AND AL-AULAQI

### A. *Use of Drones as Weapons Against Terrorism*

Drones have immensely assisted the United States in fighting the War on Terror.<sup>18</sup> After 9/11, Congress passed legislation which sup-

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sion. Once a U.S. citizen has been properly designated as an enemy combatant and placed on the kill list, the President must be free to execute the kill order—the second decision point—at the moment of his choosing without additional consultation or approval from a third party or another branch of government, as if encountering an armed enemy suddenly on the battlefield. To require otherwise would constitute an unconstitutional infringement on the powers of the Commander in Chief, particularly during a time of armed conflict.

<sup>14</sup> See *infra* Part II.B.

<sup>15</sup> The President is authorized under the laws of war to kill or detain an enemy combatant. See *infra* Part II.A. The only issue I examine here is whether the President, acting on his own, has the constitutional authority to designate an American citizen as an enemy combatant. See *infra* Part III.

<sup>16</sup> See *Hamdi*, 542 U.S. at 509 (“We hold that . . . due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”).

<sup>17</sup> See *id.* at 539 (“We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.”).

<sup>18</sup> See Richard D. Rosen, *Drones and the U.S. Courts*, 37 WM. MITCHELL L. REV. 5280, 5280–81 (2011) (“Using Predator drones capable of carrying Hellfire missiles and the larger Reaper, which can carry both Hellfire missiles and laser-guided bombs, the United States has killed over 1,800 leaders of Taliban, al Qaeda, and allied groups.” (footnotes omitted)).



plemented the President's constitutional authority and authorized him to use military force against those responsible for the 9/11 attacks.<sup>19</sup> In discharging his authority, President Bush ordered the use of drones to protect the United States.<sup>20</sup> Drones can be used to transmit live video with valuable intelligence or to carry out air strikes to kill the enemy.<sup>21</sup> They are a valued and sometimes preferred asset because they carry no risk of a pilot's loss of life<sup>22</sup> and, using today's technology, are less expensive than conventional aircraft.<sup>23</sup>

During President Obama's first term, the Administration's drone use reportedly doubled from President Bush's two terms.<sup>24</sup> During his entire presidency, President Bush reportedly allowed fifty-one drone strikes in Pakistan to fight the War on Terror,<sup>25</sup> whereas President Obama allowed fifty-two strikes in 2009 alone<sup>26</sup> and 179 by the end of 2010.<sup>27</sup> As of January 3, 2014, the total number of drone strikes by the Obama Administration was reportedly 327.<sup>28</sup> While much of our drone strike capabilities are classified, President Obama reportedly has about 7000 drones at his disposal to defend the United States against al Qaeda and other terrorists.<sup>29</sup>

President Obama reportedly personally approves every drone strike that targets an enemy combatant, including American citizen

19 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

20 *The Bush Years: Pakistan Strikes 2004–2009*, BUREAU OF INVESTIGATIVE JOURNALISM (Aug. 10, 2011), <http://www.thebureauinvestigates.com/2011/08/10/the-bush-years-2004-2009/>; see also Rohde, *supra* note 3, at 67 (describing President Bush's use of drone strikes).

21 See Brendan Gogarty & Meredith Hagger, *The Laws of Man over Vehicles Unmanned: The Legal Response to Robotic Revolution on Sea, Land and Air*, 19 J.L. INFO. & SCI. 73, 86–89 (2008) (describing uses of unmanned aerial vehicles).

22 *Id.* at 73.

23 *Id.* at 84.

24 Rosen, *supra* note 18, at 5280.

25 *The Bush Years: Pakistan Strikes 2004–2009*, *supra* note 20.

26 *Obama 2009 Pakistan Strikes*, BUREAU OF INVESTIGATIVE JOURNALISM (Aug. 10, 2011), <http://www.thebureauinvestigates.com/2011/08/10/obama-2009-strikes/>.

27 See *id.*; *Obama 2010 Pakistan Strikes*, BUREAU OF INVESTIGATIVE JOURNALISM (Aug. 10, 2011), <http://www.thebureauinvestigates.com/2011/08/10/obama-2010-strikes/>.

28 *Obama 2013 Pakistan Drone Strikes*, BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/2013/01/03/obama-2013-pakistan-drone-strikes/> (last updated Jan. 3, 2014).

29 Gogarty & Hagger, *supra* note 21, at 85–86. The use of drones is expanding in other countries. See *id.* at 88–89, 135–37; Dion Nissenbaum, *Pakistan Moves to Build Its Own Drones, Push Aside U.S.*, WALL ST. J., Dec. 19, 2012, at A13; see also Simon Rogers, *Drones by Country: Who Has All the UAVs?*, GUARDIAN DATABLOG (Aug. 3, 2012, 12:00 PM), <http://www.guardian.co.uk/news/datablog/2012/aug/03/drone-stocks-by-country>. Drones are used in the United States for domestic purposes as well. See Greg McNeal, *DOJ Report Reveals Details of Domestic Drone Usage*, FORBES (Sep. 28, 2013, 9:11 PM), <http://www.forbes.com/sites/gregorymcneal/2013/09/28/doj-report-reveals-details-of-domestic-drone-usage/>.

targets.<sup>30</sup> Before President Obama gives such an order, the target must be on the “kill list.”<sup>31</sup> The details of precisely how a person’s name is placed on the kill list are classified.<sup>32</sup> One can speculate, however, that this process begins with the Intelligence Community<sup>33</sup> compiling a comprehensive master list of persons of interest.<sup>34</sup>

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<sup>30</sup> See Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES, May 29, 2012, at A1.

<sup>31</sup> See *id.*

<sup>32</sup> See Benjamin McKelvey, Note, *Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of the Executive Killing Power*, 44 VAND. J. TRANS-NAT’L L. 1353, 1358 (2011) (stating that lack of information on how the target list is assembled is a “fundamental problem” with the current targeted killing program); Holder Speech at Northwestern, *supra* note 5 (explaining the considerations for adding an individual to the list of targets, but stating that he could not “discuss or confirm any particular program or operation”).

<sup>33</sup> “The U.S. Intelligence Community is a coalition of 17 agencies and organizations . . . within the Executive Branch that work both independently and collaboratively to gather and analyze the intelligence necessary to conduct . . . national security activities.” OFFICE OF THE DIRECTOR OF NAT’L INTELLIGENCE, <http://www.dni.gov/> (last visited Dec. 31, 2013). Agencies in the Intelligence Community include the Federal Bureau of Investigation (“FBI”), the Drug Enforcement Administration (“DEA”), the National Security Agency (“NSA”), the Department of State, the Department of Homeland Security, and the Central Intelligence Agency (“CIA”). *Id.*

<sup>34</sup> A similar endeavor is the effort to compile the Terrorist Watchlist (“TWL”), which incorporates information about “both international and domestic terrorist[s].” *Sharing and Analyzing Information to Prevent Terrorism: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 21 (2010) [hereinafter Healy Statement] (statement of Timothy J. Healy, Dir., Terrorist Screening Center, Federal Bureau of Investigation). Prior to 9/11, each agency had its own list; after 9/11, these separate lists were combined into the TWL so every agency had access to information about every suspected and known terrorist. CENT. INTELLIGENCE AGENCY, 2002 ANNUAL REPORT OF THE UNITED STATES INTELLIGENCE COMMUNITY, SUPPORT TO THE WAR ON TERRORISM AND HOMELAND SECURITY (2003) [hereinafter CIA 2002 Annual Report], available at [https://www.cia.gov/library/reports/archived-reports-1/Ann\\_Rpt\\_2002/swtandhs.html](https://www.cia.gov/library/reports/archived-reports-1/Ann_Rpt_2002/swtandhs.html). The Intelligence Community, as well as foreign governments, recommends which names are to be placed on the TWL. *Id.* It has also been reported that the TWL is compiled from a foundation of names developed through a “nomination process.” Healy Statement, *supra*, at 21. Law enforcement and intelligence agencies, known as the Originators, submit nominations of “credible information” of “known or suspected international terrorists.” *Id.* at 21–22.

TWL nominations are placed into the National Counterterrorism Center’s (“NCTC”) database so the NCTC has the opportunity to evaluate them and in turn nominate them to the Terrorist Screening Center (“TSC”). *Id.* at 21–22. These entries “include sufficient biographical or biometric identifiers and supporting derogatory information . . .” *Id.* at 22. The FBI follows this same process for domestic terrorists:

[The] TSC accepts nominations when they satisfy two requirements. First, the biographic information associated with a nomination must contain sufficient identifying data so that a person being screened can be matched to or disassociated from a watch listed terrorist. Second, the facts and circumstances pertaining to the nomination must meet the reasonable suspicion standard of review established by terrorist screening Presidential Directives.

*Id.* The TSC is the final authority in deciding whether a person makes it onto the TWL. *Id.*

The Obama Administration reported that it initiates “top secret nominations” to place potential targets on the kill list.<sup>35</sup> A committee of over 100 national security members reportedly videoconferences once a week to discuss suspected enemy combatants and analyze their “biographies.”<sup>36</sup> The committee deliberates on each of the potential targets for a month or two, then recommends which names should ultimately be placed on the kill list and which names should not because they “no longer appear[ ] to pose an imminent threat.”<sup>37</sup>

One can speculate that the Terrorist Watch List (“TWL”) or a similar master list constitutes a foundation or first stage of the Obama Administration’s process to select targets on the kill list.<sup>38</sup> It has been reported that, because of his citizenship, Al-Aulaqi’s case was reviewed by the President’s National Security Council (“NSC”) before his name was finally placed on the kill list.<sup>39</sup> Little is known, however, about the investigative methods or evidentiary standards by which information is obtained and analyzed.<sup>40</sup> The *New York Times* has tried to obtain more information about this process in court, but the requests have been opposed by the Obama Administration and denied by the courts.<sup>41</sup> Even with the review process discussed above, based on my participation in numerous National Security Council meetings, I would find it hard to imagine that the name of an American citizen would be presented to the President prior to a final review and recommendation by the NSC principals, including the Secretary of Defense, Secretary of State, the Director of National Intelligence, the Attorney General, and the Assistant to the President for National Security Affairs.<sup>42</sup> The President is entitled to know, and should receive, the

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During this lengthy process, the potential target has no notice that he may be placed on the list, nor is he aware of the reasons why.

<sup>35</sup> Becker & Shane, *supra* note 30 (internal quotation marks omitted).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See CIA 2002 Annual Report, *supra* note 34.

<sup>39</sup> See McKelvey, *supra* note 32, at 1358.

<sup>40</sup> *Id.* (“However, beyond official descriptions of a rigorous and methodical process, few specific details are known about the evaluation of evidence against suspected terrorists or the standard of proof.”).

<sup>41</sup> Jonathan Stempel & Jennifer Saba, *NY Times Loses Bid to Uncover Details on Drone Strikes*, REUTERS, Jan. 2, 2013, available at <http://www.reuters.com/article/2013/01/02/newyork-times-drone-lawsuit-idUSL1E9C2A5120130102>.

<sup>42</sup> Cf. Press Release, White House Office of the Press Sec’y, Press Briefing by Senior Administration Officials on the Killing of Osama bin Laden (May 2, 2011) [hereinafter Bin Laden Press Briefing], available at <http://www.whitehouse.gov/the-press-office/2011/05/02/press-briefing-senior-administration-officials-killing-osama-bin-laden> (discussing NSC review before the killing of Osama Bin Laden).

views of his top national security advisors before making such a decision.

Once the final vetting process is completed, names are recommended to the President (presumably through the NSC), who reportedly personally approves each person placed on the kill list (the first decision point).<sup>43</sup> Again, during this lengthy process, the target is given no notice of the list, the reasons his name is on the list,<sup>44</sup> or the opportunity to contest the President's decision before the Administration or a neutral decisionmaker.<sup>45</sup>

After the President approves the targets, the kill list is reportedly sent to a small group of CIA agents to carry out the drone strikes.<sup>46</sup> Reportedly, President Obama personally gives the final approval to carry out the strike (the second decision point), reserving for himself the decision of whether the collateral damage that may result from a drone strike is legally and morally justified.<sup>47</sup>

### B. *The Case of Anwar Al-Aulaqi*

Anwar Al-Aulaqi was an American citizen of Yemeni descent born in Las Cruces, New Mexico on April 21, 1971.<sup>48</sup> In 1978, he moved to Sana, Yemen with his family<sup>49</sup> and went to school in Yemen

<sup>43</sup> See Becker & Shane, *supra* note 30.

<sup>44</sup> In Al-Aulaqi's case, for example, his father only became aware of Al-Aulaqi's alleged presence on the kill list through media reports. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 11 (D.D.C. 2010).

<sup>45</sup> See *infra* notes 106–08 and accompanying text; cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (concluding that a citizen detainee has a right to challenge his designation as an enemy combatant before a neutral decisionmaker).

<sup>46</sup> See McKelvey, *supra* note 32, at 1353; see also Bin Laden Press Briefing, *supra* note 42 (explaining the procedures that led to the killing of Osama Bin Laden).

<sup>47</sup> See, e.g., Bin Laden Press Briefing, *supra* note 42; Becker & Shane, *supra* note 30. The President is charged with the execution of the laws. U.S. CONST. art. II, § 3. As a general matter, the Attorney General is charged with determining whether government action is lawful. 28 U.S.C. § 512 (2012). Although the President has the authority as head of the executive branch to draw conclusions about legality, there is an unnecessary and avoidable risk in having the President making legal and tactical decisions.

<sup>48</sup> WILLIAM H. WEBSTER ET AL., FINAL REPORT OF THE WILLIAM H. WEBSTER COMMISSION ON THE FEDERAL BUREAU OF INVESTIGATION, COUNTERTERRORISM INTELLIGENCE, AND THE EVENTS AT FORT HOOD, TEXAS, ON NOVEMBER 5, 2009, at 33 (2012), [hereinafter WEBSTER COMMISSION REPORT] available at <http://www.fbi.gov/news/pressrel/press-releases/final-report-of-the-william-h.-webster-commission>; Mark Mazzetti, Eric Schmitt & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1; Hettena, *Awlaki Timeline*, *supra* note 8. Much of the reporting on Anwar Al-Aulaqi is based on leaks and reports based on earlier reporting. The background reporting is sometimes confusing and inconsistent. I have included the most relevant information, even though the timeline described may not match up perfectly.

<sup>49</sup> Hettena, *Awlaki Timeline*, *supra* note 8.

from 1979 to 1990.<sup>50</sup> He returned to the United States in 1991 for college and in 1994, “received a Bachelor of Science in Civil Engineering from Colorado State University.”<sup>51</sup> During college, Al-Aulaqi “reportedly served as the President of the Muslim Student Association (MSA) and worked as an imam at the Denver Islamic Society.”<sup>52</sup> In 1994, he married his cousin, Gihan Yosen Baker.<sup>53</sup> In 1995, his son, Abdulrahman Al-Aulaqi, was born in Denver, Colorado.<sup>54</sup>

Shortly thereafter, Al-Aulaqi moved to San Diego, attended San Diego State University to pursue his Master’s degree in Education Leadership (the school has no record that he ever earned the degree),<sup>55</sup> and “served as an imam at the Al-Ribat Mosque from December 1995 until mid-2000.”<sup>56</sup> It was then that he reportedly began associating with two of the 9/11 hijackers, Khalid al-Mindhar and Nawaf al-Hazmi.<sup>57</sup> Al-Aulaqi was also the “vice president of the now-defunct Charitable Society for Social Welfare Inc., the U.S. branch of a Yemen-based charity.”<sup>58</sup> This charity has been described as a “‘front organization’ that was ‘used to support Al Qaeda and Osama bin Laden.’”<sup>59</sup> While in San Diego, Al-Aulaqi became the subject of investigations by the Joint Terrorism Task Force.<sup>60</sup>

Between 1996 and 1997, Al-Aulaqi was arrested once “for hanging around a school” and twice for soliciting a prostitute.<sup>61</sup> From 1999 to 2000, the Federal Bureau of Investigation (“FBI”) reportedly began investigating Al-Aulaqi because they believed “he may have been contacted by Ziyad Khaleel,”<sup>62</sup> a “procurement agent” for Osama bin

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50 WEBSTER COMMISSION REPORT, *supra* note 48, at 33.

51 *Id.*; Hettena, *Awlaki Timeline*, *supra* note 8.

52 ANTI-DEFAMATION LEAGUE, PROFILE: ANWAR AL-AWLAKI 7 (2011) [hereinafter PROFILE], available at <http://www.adl.org/assets/pdf/combating-hate/anwar-al-awlaki-2013-6-4-v1.pdf>.

53 Hettena, *Awlaki Timeline*, *supra* note 8.

54 *Id.* Abdulrahman Al-Aulaqi, an American citizen like his father, was also reportedly killed in a separate drone strike with eight other people in Yemen. *Id.*

55 *See id.*; PROFILE, *supra* note 52, at 7; Memorandum of the Federal Bureau of Investigation on Anwar Nasser Aulaqi Opening LHM 1 (Sept. 26, 2001) [hereinafter FBI Opening LHM Memorandum], available at <http://intelfiles.egoplex.com/2001-09-26-fbi-lhm-anwar-nasser-aulaqi.pdf>.

56 *See* WEBSTER COMMISSION REPORT, *supra* note 48, at 33.

57 *See* PROFILE, *supra* note 52, at 7; Mazzetti et al., *supra* note 48.

58 PROFILE, *supra* note 52, at 7.

59 *See id.*

60 WEBSTER COMMISSION REPORT, *supra* note 48, at 33.

61 *See* Chitra Ragavan, *The Imam’s Very Curious Story*, U.S. NEWS & WORLD REP., June 21, 2004, at 68; Hettena, *Awlaki Timeline*, *supra* note 8.

62 Hettena, *Awlaki Timeline*, *supra* note 8.

Laden.<sup>63</sup> The FBI discovered Al-Aulaqi had “extremist connections” with members of the Holy Land Foundation, an Islamic charitable organization in the United States, and Hamas, a Palestinian terrorist group.<sup>64</sup> In February 2000, the FBI intercepted several calls between Al-Aulaqi and Omar al-Bayoumi, a Saudi Arabian who assisted the two aforementioned 9/11 hijackers, al-Mihdhar and al-Hazmi, in finding a place to live in San Diego.<sup>65</sup> In addition, the FBI reportedly discovered Al-Aulaqi had “closed-door meetings in San Diego” with al-Hazmi, al-Mindhhar, and a third person they approached for help with the 9/11 hijackings.<sup>66</sup> In March 2000, the FBI ended its investigation.<sup>67</sup>

In 2001, Al-Aulaqi moved to Falls Church, Virginia to pursue a doctorate in human resource development at The George Washington University.<sup>68</sup> During this time, he served as an imam at Dar Al-Hijrah mosque, “one of the largest mosques in the U.S.”<sup>69</sup> Two 9/11 hijackers, Hani Hanjour and al-Hazmi, attended this mosque.<sup>70</sup> During this time, the FBI’s Washington Field Office “opened a full investigation” on Al-Aulaqi.<sup>71</sup>

After 9/11, the FBI interviewed Al-Aulaqi four times.<sup>72</sup> Al-Aulaqi told the FBI “he knew Nawaf [al-Hazmi] from the Al-Ribat mosque in San Diego,” but he did not know Khalid al-Mindhhar.<sup>73</sup> Al-Aulaqi reportedly “admitted to meeting with al-Hazmi several times in San Diego” and “reportedly served as [al-Hazmi’s and al-Mindhhar’s] spiritual advisor.”<sup>74</sup> Furthermore, German authorities found Al-Aulaqi’s phone number in the home of Ramzi Binalshibh, “a Yemeni who was a leading figure in the 9/11 plot.”<sup>75</sup>

In March 2002 after the FBI interviews, Al-Aulaqi moved to London,<sup>76</sup> where “he reportedly lectured youth groups on jihad.”<sup>77</sup> A

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63 PROFILE, *supra* note 52, at 8.

64 Hettena, *Awlaki Timeline*, *supra* note 8.

65 *Id.*

66 *Id.* (internal quotation marks omitted).

67 Ragavan, *supra* note 61, at 68.

68 FBI Opening LHM Memorandum, *supra* note 55, at 1.

69 *See, e.g.*, WEBSTER COMMISSION REPORT, *supra* note 48, at 33.

70 PROFILE, *supra* note 52, at 7; Hettena, *Awlaki Timeline*, *supra* note 8.

71 WEBSTER COMMISSION REPORT, *supra* note 48, at 34.

72 FBI Opening LHM Memorandum, *supra* note 55, at 2.

73 *Id.*

74 PROFILE, *supra* note 52, at 7.

75 Hettena, *Awlaki Timeline*, *supra* note 8.

76 PROFILE, *supra* note 52, at 8; WEBSTER COMMISSION REPORT, *supra* note 48, at 34.

77 WEBSTER COMMISSION REPORT, *supra* note 48, at 34.

few months later, he was reportedly placed on the TWL.<sup>78</sup> In June 2002, Al-Aulaqi was subject to an arrest warrant for passport fraud, which was rescinded in October.<sup>79</sup> Later that year, he reportedly went to Ali al-Timimi's home to "ask[ ] him about recruiting young Muslims for 'violent jihad.'" <sup>80</sup> Al-Timimi "frequently gave anti-Semitic, anti-Israel and anti-Western lectures at the Dar al-Arqam Mosque in Falls Church, Virginia, and inspired a group of men dubbed the 'Virginia Jihad Network' to attend Lashkar-e-Taiba terrorist training camps in Pakistan."<sup>81</sup> In May 2003, the Washington Field Office ended its investigation "for lack of evidence of a pattern of activity suggesting international terrorism."<sup>82</sup>

In 2004, Al-Aulaqi moved back to Yemen and began working at the Imam University.<sup>83</sup> In January 2006, the Washington Field Office "reopened its investigation" of Al-Aulaqi and, in April, transferred it to the Joint Terrorism Task Force in San Diego.<sup>84</sup> Later in 2006, at the request of the United States government, Al-Aulaqi was arrested in Yemen for "charges of kidnapping for ransom and being involved in an [al Qaeda] plot to kidnap a U.S. official."<sup>85</sup> He was released in December 2007.<sup>86</sup> By 2008, based on his travels and contacts, the United States government believed Al-Aulaqi was involved in "serious terrorist activities since leaving the United States."<sup>87</sup> Nothing is reported, however, to suggest he was on a kill list at that time.<sup>88</sup>

In 2009, "[Al-]Aulaqi or his rhetoric may have inspired or played a role in encouraging" Nidal Malik Hasan, the Fort Hood shooter.<sup>89</sup> The FBI only had proof of a virtual connection, but Hasan confessed to meeting Al-Aulaqi at the Dar al-Hijrah Mosque in Falls Church, Virginia in the early 2000s.<sup>90</sup> In addition, the FBI intercepted emails between Hasan and Al-Aulaqi prior to the Fort Hood shootings in

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<sup>78</sup> See Hettena, *Awlaki Timeline*, *supra* note 8.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> PROFILE, *supra* note 52, at 8.

<sup>82</sup> WEBSTER COMMISSION REPORT, *supra* note 48, at 34.

<sup>83</sup> *Id.*; Hettena, *Awlaki Timeline*, *supra* note 8.

<sup>84</sup> See WEBSTER COMMISSION REPORT, *supra* note 48, at 34.

<sup>85</sup> Hettena, *Awlaki Timeline*, *supra* note 8 (internal quotation marks omitted); *see also* WEBSTER COMMISSION REPORT, *supra* note 48, at 34.

<sup>86</sup> Hettena, *Awlaki Timeline*, *supra* note 8.

<sup>87</sup> Susan Schmidt, *Imam from Va. Mosque Now Thought to Have Aided Al-Qaeda*, WASH. POST, Feb. 27, 2008, at A3.

<sup>88</sup> See WEBSTER COMMISSION REPORT, *supra* note 48, at 34.

<sup>89</sup> *See id.*

<sup>90</sup> *Id.*; *see also* Hettena, *Awlaki Timeline*, *supra* note 8.

2009.<sup>91</sup> Hasan claimed Al-Aulaqi advised him to “kill other American soldiers” and gave “Hasan permission to carry out his attacks at Ford Hood.”<sup>92</sup> However, the FBI was “not aware of any evidence that Aulaqi instructed [Hasan] to engage in violent acts” or that Al-Aulaqi “made these purported statements to Hasan.”<sup>93</sup>

By 2009, the effect of Al-Aulaqi’s anti-America speeches had increased exponentially.<sup>94</sup> His sermons reached even more terrorists over the Internet.<sup>95</sup> One of his February blog posts stated, “I pray that Allah destroys America and all its allies and the day that happens, and I assure you it will and sooner than you think, I will be very pleased.”<sup>96</sup> Other Internet lectures included “Constants on the Path of Jihad” and “44 Ways to Support Jihad.”<sup>97</sup>

Al-Aulaqi reportedly inspired several other attacks on Americans.<sup>98</sup> In the fall of 2009, Umar Farouk Abdulmutallab, the Nigerian national who attempted to blow up Northwest Airlines Flight 253, met with Al-Aulaqi and other members of al Qaeda and sought their guidance about becoming “involved in jihad.”<sup>99</sup> For several days, Abdulmutallab stayed at Al-Aulaqi’s house and “discussed martyrdom and jihad.”<sup>100</sup> After obtaining Al-Aulaqi’s approval for the mission, Abdulmutallab trained for two weeks at a terrorist camp in Yemen.<sup>101</sup> The FBI reported that Al-Aulaqi “prepared Abdulmutallab for his attempted bombing of Northwest Flight 253.”<sup>102</sup> President Obama later stated Al-Aulaqi “directed the failed attempt to blow up an airplane on Christmas Day in 2009.”<sup>103</sup>

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91 WEBSTER COMMISSION REPORT, *supra* note 48, at 41, 43, 47–55, 57–58, 60–61.

92 *Id.* at 62 (internal quotation marks omitted).

93 *Id.* at 34, 62.

94 *See id.*; Mazzetti et al., *supra* note 48. In a released recording, Al-Aulaqi stated that after “the American invasion of Iraq and continued U.S. aggression against Muslims, I could not reconcile between living in the U.S. and being a Muslim.” PROFILE, *supra* note 52, at 8 (internal quotation marks omitted). One can speculate that Al-Aulaqi became more anti-American because of this. *Id.*

95 Mazzetti, et al., *supra* note 48; Hettena, *Awlaki Timeline*, *supra* note 8.

96 Hettena, *Awlaki Timeline*, *supra* note 8.

97 WEBSTER COMMISSION REPORT, *supra* note 48, at 34.

98 *Id.*

99 Government Sentencing Memorandum at 12, *United States v. Abdulmutallab*, No. 2:10-cr-20005, 2012 WL 432112 (E.D. Mich. Feb. 10, 2012) (ECF No. 130).

100 *Id.* at 13.

101 *Id.*; *see also* Obama Change of Office Speech, *supra* note 4 (stating that Al-Aulaqi “directed the failed attempt to blow up an airplane on Christmas Day in 2009”).

102 Lauren B. O’Brien, *The Evolution of Terrorism Since 9/11*, FBI L. ENFORCEMENT BULL., Sept. 2011, at 3, 9.

103 Obama Change of Office Speech, *supra* note 4.



Attorney General Holder confirmed these facts in his letter to Senator Patrick Leahy of the Judiciary Committee (the “Holder Letter”), explaining that

when [Abdulmutallab] . . . went to Yemen in 2009, al-Aulaqi arranged an introduction via text message. Abdulmutallab told U.S. officials that he stayed at al-Aulaqi’s house for three days, and then spent two weeks at an AQAP training camp. Al-Aulaqi planned a suicide operation for Abdulmatallab, helped Abdulmutallab draft a statement for a martyrdom video to be shown after the attack, and directed him to take down a U.S. airliner. Al-Aulaqi’s last instructions were to blow up the airplane *when it was over American soil*.<sup>104</sup>

In October 2009, the Yemeni government requested the CIA’s help in capturing Al-Aulaqi, but the CIA refused because they “lacked specific evidence that he threatened the lives of Americans.”<sup>105</sup> Shortly thereafter, however, the NSC reviewed Al-Aulaqi’s status and found him to be a “top terrorist threat,” and President Obama placed him on the kill list.<sup>106</sup> Aside from this general outline, the Government has provided few details of the procedures followed to place Al-Aulaqi on the kill list.<sup>107</sup> There is no evidence that he was aware of being on the kill list or of the reasons for his being on the kill list.<sup>108</sup> In December, President Obama sanctioned an ultimately unsuccessful drone strike to kill Al-Aulaqi in Yemen.<sup>109</sup> A “senior U.S.

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<sup>104</sup> Holder Letter, *supra* note 5, at 3.

<sup>105</sup> David Ignatius, *One That Got Away*, WASH. POST, Mar. 26, 2010, at A25. I should note, however, that based on his public comments and writings, and his relationship to known and suspected terrorists, Al-Aulaqi would most likely have been viewed by the CIA as a valuable target. It seems counterintuitive, based on my experience, that the CIA would not assist a friendly government in his capture.

<sup>106</sup> Adam Entous, *U.S. Targets American-born Cleric in Yemen: Officials*, REUTERS, Apr. 6, 2010, available at <http://www.reuters.com/article/2010/04/06/us-yemen-usa-cleric-idUSTRE63543820100406>.

<sup>107</sup> Lesley Wexler, *Litigating the Long War on Terror: The Role of al-Aulaqi v. Obama*, 9 LOY. U. CHI. INT’L L. REV. 159, 161 (2011) (“At the time the government allegedly placed Anwar al-Aulaqi on a kill list, remarkably little was known about the procedures for listing and reviewing placements of individuals.”).

<sup>108</sup> Mike Dreyfuss, Note, *My Fellow Americans, We Are Going to Kill You: The Legality of Targeting and Killing U.S. Citizens Abroad*, 65 VAND. L. REV. 249, 273 (2012) (“[T]he United States does not publish the criteria it uses to decide who will be killed by targeted killing . . . . Nor, for that matter, does the United States publish the list of U.S. citizens who it intends to kill.” (footnotes omitted)).

<sup>109</sup> See Brian Ross et al, *Obama Ordered U.S. Military Strike on Yemen Terrorists*, ABC NEWS (Dec. 18, 2009), <http://abcnews.go.com/Blotter/cruise-missiles-strike-yemen/story?id=9375236>.

official” reportedly told Fox News Al-Aulaqi had “gone operational.”<sup>110</sup> At this point, he was reportedly considered a “High Value Target.”<sup>111</sup>

In January 2010, Yemen’s National Security Agency asked Al-Aulaqi to turn himself in, which he refused to do.<sup>112</sup> At this time, the United States government considered Al-Aulaqi a “direct threat to U.S. interests.”<sup>113</sup> In February, Rajib Karim, the British Airlines employee who plotted to blow up a plane heading for the United States, also reportedly emailed with Al-Aulaqi.<sup>114</sup> Al-Aulaqi reportedly informed Karim of al Qaeda’s priority in killing American citizens.<sup>115</sup> Nothing has been reported, however, to support the idea that Al-Aulaqi was operationally involved in this plot.<sup>116</sup>

In March 2010, Al-Aulaqi “call[ed] on American Muslims to take up Jihad against the United States.”<sup>117</sup> In April, Representative Jane Harman, the chairwoman of the House Committee on Homeland Security, stated that Al-Aulaqi was “probably the person, the terrorist, who would be terrorist No. 1 in terms of threat against us.”<sup>118</sup> Yemen reportedly agreed with targeting Al-Aulaqi<sup>119</sup> and in May, a United States drone attack in Yemen again failed to kill him.<sup>120</sup> Reportedly, the President’s order for the strike was based in part on legal advice from the Department of Justice that he had the authority to do so.<sup>121</sup> Based on my experience as White House counsel, I speculate that the NSC’s review process included a classified legal opinion from the Office of Legal Counsel at the Justice Department confirming that (1) the facts support the designation of Al-Aulaqi as an enemy combatant and (2) the President had the authority to designate Al-Aulaqi as an enemy combatant and to have him killed, even though he was an

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<sup>110</sup> Catherine Herridge, *Radical Imam Tied to Terror Plots Has Gone ‘Operational’ in Yemen*, FOX NEWS.COM, Dec. 29, 2009, <http://www.foxnews.com/politics/2009/12/29/radical-imam-tied-plots-gone-operational-yemen/>.

<sup>111</sup> Dana Priest, *U.S. Playing a Key Role in Yemen Attacks*, WASH. POST, Jan. 27, 2010, at A1.

<sup>112</sup> See Hettana, *Awlaki Timeline*, *supra* note 8.

<sup>113</sup> *Id.*

<sup>114</sup> Wexler, *supra* note 107, at 160; Hettana, *Awlaki Timeline*, *supra* note 8.

<sup>115</sup> Hettana, *Awlaki Timeline*, *supra* note 8.

<sup>116</sup> See *id.*

<sup>117</sup> *Id.*

<sup>118</sup> Entous, *supra* note 106.

<sup>119</sup> *Id.*

<sup>120</sup> Mohammed Jamjoun & Hakim Almasmari, *Yemeni Source: Drone Strike Misses al-Awlaki, Hits Two Supporters*, CNN.COM, May 7, 2011, <http://www.cnn.com/2011/WORLD/meast/05/07/yemen.drone.strike/index.html>.

<sup>121</sup> See Hettana, *Awlaki Timeline*, *supra* note 8.

American citizen.<sup>122</sup> The scope of the President's authority here, however, is a close legal question and one likely to be challenged. Because the Justice Department will have to defend against any such challenges, it would have been prudent, in my judgment, to have its opinion before taking action.

Also in May 2010, several other terrorists claimed Al-Aulaqi influenced them.<sup>123</sup> Faisal Shahzad, the Times Square attempted bomber, stated Al-Aulaqi inspired him.<sup>124</sup> Roshonara Choudhry, a British student who "stabbed a member of Parliament," claimed "listening to more than 100 hours" of Al-Aulaqi's speeches motivated her.<sup>125</sup> The FBI also believed Al-Aulaqi influenced Michael Finton and Zachary Chesser.<sup>126</sup> But, as with Hasan and Shahzad, the FBI was "not aware of any evidence that [Al-]Aulaqi instructed any of these individuals to engage in violent acts."<sup>127</sup> Al-Aulaqi "was not known directly to have instructed anyone contacting him through his website to engage in violent action."<sup>128</sup>

Nevertheless, the United States government suspected Al-Aulaqi helped facilitate "terrorist training camps" and several other terrorist attacks.<sup>129</sup> Based on these facts and advice from his NSC team, President Obama named Al-Aulaqi "the leader of external operations for Al Qaeda in the Arabian Peninsula."<sup>130</sup> In June 2010, the Justice Department reportedly wrote "a 50-page memorandum" that found it lawful to kill Al-Aulaqi "only if it were not feasible to take him alive."<sup>131</sup> It is unclear whether this fifty-page classified memorandum is the same report referred to earlier in the March/April 2010 timeframe, or whether this memorandum reflected new guidance from the Justice Department.<sup>132</sup>

In August 2010, after the widely publicized failed attempt in May to kill his son, Al-Aulaqi's father, Nasser Al-Aulaqi, assisted by the Center for Constitutional Rights and the American Civil Liberties

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<sup>122</sup> See generally Bin Laden Press Briefing, *supra* note 42.

<sup>123</sup> See Hettena, *Awlaki Timeline*, *supra* note 48.

<sup>124</sup> See WEBSTER COMMISSION REPORT, *supra* note 48, at 34; Mazzetti et al., *supra* note 48; Hettena, *Awlaki Timeline*, *supra* note 8.

<sup>125</sup> See Hettena, *Awlaki Timeline*, *supra* note 8.

<sup>126</sup> WEBSTER COMMISSION REPORT, *supra* note 48, at 34.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 35.

<sup>129</sup> Wexler, *supra* note 107, at 160.

<sup>130</sup> Mazzetti et al., *supra* note 48.

<sup>131</sup> Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1.

<sup>132</sup> See *id.*; *supra* notes 121–22 and accompanying text.

Union, brought suit against the United States government seeking an injunction prohibiting the government from carrying out a targeted killing against his son.<sup>133</sup> The court dismissed the suit in December 2010 for lack of standing because his father “failed to provide an adequate explanation for his son’s inability to appear on his own behalf, which is fatal to plaintiff’s attempt to establish ‘next friend’ standing.”<sup>134</sup>

Also in 2010, Al-Aulaqi reportedly “directed the failed attempt to blow up U.S. cargo planes.”<sup>135</sup> Packages containing explosive material were shipped from Yemen to two Chicago Jewish groups, but were intercepted in Dubai and the United Kingdom before they reached their destination.<sup>136</sup>

Attorney General Holder recently confirmed these facts in the Holder Letter saying:

Al-Aulaqi also played a key role in the October 2010 plot to detonate explosive devices in two U.S.-bound cargo planes: he not only helped plan and oversee the plot, but was also directly involved in the details of its execution—to the point that he took part in the development and testing of the explosive devices that were placed on the planes. Moreover, information that remains classified to protect sensitive sources and methods evidences al-Aulaqi’s involvement in the planning of numerous *other* plots against the U.S. and Western interests and makes clear he was continuing to plot attacks when he was killed.<sup>137</sup>

In January 2011, a Yemeni court sentenced Al-Aulaqi in absentia to ten years in prison for “inciting to kill foreigners.”<sup>138</sup> On February 9, David Leiter, the Director of the National Counterterrorism Center (“NCTC”), told the House Homeland Security Committee that Al-Aulaqi was “designated in July as a specially designated global terrorist” and “his operational role in AQAP remain[ed a] key concern[ ] for” the United States.<sup>139</sup> In September, the CIA reportedly placed

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133 See generally *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 17 (D.D.C. 2010); see also Hettena, *Awlaki Timeline*, *supra* note 8.

134 *Al-Aulaqi*, 727 F. Supp. 2d at 17.

135 Obama Change of Office Speech, *supra* note 4.

136 *Yemen-Based al Qaeda Group Claims Responsibility for Parcel Bomb Plot*, CNN.com, Nov. 6, 2010, <http://edition.cnn.com/2010/WORLD/meast/11/05/yemen.security.concern/?hpt=T2>.

137 Holder Letter, *supra* note 5, at 3.

138 *Yemen Sentences Frenchman’s Killer to Death, Two AQAP Inciters Get Jail*, SABANEWS.NET, Jan. 17, 2011, <http://www.sabanews.net/en/news233457.htm>.

139 *Understanding the Homeland Threat Landscape—Considerations for the 112th Congress*:

Al-Aulaqi under surveillance for at least two weeks, set up a “secret airstrip in the Arabian Peninsula so it [could] deploy armed drones over Yemen,”<sup>140</sup> and on the morning of September 30, 2011, launched a missile from an unmanned aerial drone, killing Al-Aulaqi.<sup>141</sup> There is nothing reported about the views, assessments, or attempts by the United States government to capture Al-Aulaqi even though he was under surveillance for two weeks.

Based on the public record summarized above, it appears Al-Aulaqi was a legitimate national security threat.<sup>142</sup> His actions, if reported accurately—particularly his operational involvement in the 2010 plan to blow up United States cargo planes and in the failed attempt to blow up a plane on Christmas Day in 2009—go well beyond freedom of speech and association rights protected under our Constitution.<sup>143</sup> Nevertheless, the question this Article attempts to answer is whether the President has the authority, acting alone, to designate an American citizen overseas as an enemy combatant for purposes of placing that citizen on a kill list, without providing that citizen the procedural due process of notice and an opportunity to contest the government’s findings before a neutral decisionmaker.<sup>144</sup> Concluding that the circumstances surrounding future American targets may pose a more difficult question, especially when there appears to be ample time to provide some form of due process, this Article suggests steps the United States government should consider to supplement the President’s existing constitutional and statutory authority.

## II. THE LEGAL FRAMEWORK FOR DRONE STRIKES

### A. Defining “Enemy Combatant”

Before addressing the President’s authority to place a person on the kill list, it is important to understand first who is considered an enemy combatant. Unfortunately, there are multiple statutory and

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*Hearing Before the H. Comm. on Homeland Sec.*, 112th Cong. 21 (2011) (statement of Michael E. Leiter, Dir., National Counterterrorism Center).

<sup>140</sup> Craig Whitlock & Greg Miller, *U.S. Creating a Ring of Secret Drone Bases*, WASH. POST, Sept. 21, 2011, at A1.

<sup>141</sup> Hettena, *Awlaki Timeline*, *supra* note 8; see also *U.S. Officials Warn of Possible Retaliation After al Qaeda Cleric Is Killed*, CNN.COM, Sept. 30, 2011, <http://www.cnn.com/2011/09/30/world/africa/yemen-radical-cleric/index.html>.

<sup>142</sup> See Obama Change of Office Speech, *supra* note 4.

<sup>143</sup> See *id.*

<sup>144</sup> Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality opinion) (concluding that a citizen detainee has a right to challenge his designation as an enemy combatant before a neutral decisionmaker).

common law definitions. In *Ex parte Quirin*,<sup>145</sup> the Supreme Court described an unlawful enemy combatant as a “spy who secretly and without uniform passes the military lines of a belligerent in times of war, seeking to gather military information and communicate it to the enemy” or one “who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property.”<sup>146</sup>

In *Hamdi v. Rumsfeld*,<sup>147</sup> Justice O’Connor accepted the government’s non-exclusive definition of an enemy combatant as “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States.”<sup>148</sup> The Military Commissions Act of 2006<sup>149</sup> defined an unlawful enemy combatant as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States . . . (including a person who is part of the Taliban, al Qaeda, or associated forces).”<sup>150</sup>

The Military Commissions Act of 2009<sup>151</sup> abandoned the use of the term “enemy combatant” and replaced it with “unprivileged enemy belligerent,” which was defined as:

an individual (other than a privileged belligerent) who—  
(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was part of al Qaeda at the time of the alleged offense.<sup>152</sup>

It is unclear what factors are considered by the Obama Administration in determining whether an American is an enemy combatant for purposes of the kill list. The Holder Letter appears to define enemy combatants as any “U.S. citizen who is a senior operational leader of al-Qa[e]da or its associated forces, and who is actively engaged in planning to kill Americans.”<sup>153</sup> What is also known is that Yaser Hamdi was an American citizen, as was one of the Nazi sabo-

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<sup>145</sup> *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>146</sup> *Id.* at 31.

<sup>147</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>148</sup> *Hamdi*, 542 U.S. at 516 (internal quotation marks omitted).

<sup>149</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

<sup>150</sup> *Id.* sec. 3(a)(1), § 948a(1)(i), 120 Stat. at 2601.

<sup>151</sup> Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2574 (codified at 10 U.S.C. §§ 948a–950t (2012)).

<sup>152</sup> 10 U.S.C. § 948a(7). For purposes of this Article, I will use the term enemy combatant.

<sup>153</sup> Holder Letter, *supra* note 5, at 2.

teurs in *Ex parte Quirin*.<sup>154</sup> Thus, clearly American citizenship does not disqualify one from being an enemy combatant. We will presume for the purpose of this Article that the President relies upon the definition discussed in the Holder Letter.<sup>155</sup> We now turn to the question of presidential authority.

### B. *The President's Authority in Times of War*

Determining the scope of the President's power in a time of war or armed conflict is one of the most difficult separation of powers questions to answer in constitutional law.<sup>156</sup> There are three possible sources of authority under domestic law guiding the President's decision to unilaterally designate an American citizen as an enemy combatant and place him on the kill list: express constitutional authority, implied constitutional authority, and statutory authority from Congress.<sup>157</sup>

Turning first to the President's constitutional authority, the Constitution makes the President the "Commander in Chief of the Army and Navy"<sup>158</sup> and the "Nation's organ for foreign affairs."<sup>159</sup> It gives him the "executive [p]ower"<sup>160</sup> to make sure "[l]aws [are] faithfully executed,"<sup>161</sup> to "carry into effect all laws passed by Congress for the conduct of war,"<sup>162</sup> "to wage war which Congress has declared,"<sup>163</sup> to "command the instruments of national force,"<sup>164</sup> and extends his "authority in times of grave and imperative national emergency."<sup>165</sup>

Several Supreme Court cases have clarified the President's Commander in Chief powers. In *Ex parte Quirin*, the Court found that the President had the power in times of war and "grave public danger" to

<sup>154</sup> *Hamdi*, 542 U.S. at 510; *Ex parte Quirin*, 317 U.S.1, 20 (1942).

<sup>155</sup> See *supra* note 153 and accompanying text.

<sup>156</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.").

<sup>157</sup> See *id.* at 635–37.

<sup>158</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>159</sup> *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

<sup>160</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>161</sup> *Id.* § 3.

<sup>162</sup> *Ex parte Quirin*, 317 U.S. at 26.

<sup>163</sup> *Id.*

<sup>164</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring).

<sup>165</sup> *Id.* at 662 (Clark, J., concurring).

order “the detention and trial” of enemy combatants.<sup>166</sup> In *Johnson v. Eisentrager*,<sup>167</sup> the Court found that the President’s “grant of war power includes all that is necessary and proper for carrying these powers into execution.”<sup>168</sup> In *Youngstown*, Justice Jackson, in his oft-cited concurrence, stated the President had the “exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.”<sup>169</sup>

In *Loving v. United States*,<sup>170</sup> the Court found that the President had authority under his Commander in Chief powers “to take responsible and continuing action to superintend the military.”<sup>171</sup> Justice Douglas, dissenting in *Massachusetts v. Laird*,<sup>172</sup> noted that the Commander in Chief power was one of the greatest powers of all, “subject to constitutional limitations,”<sup>173</sup> and the Framers of the Constitution intended “to authorize the President the power to repel sudden attacks and to manage, as Commander in Chief, any war declared by Congress.”<sup>174</sup> Finally, in *Hamdi*, Justice Souter accepted that the President, as Commander in Chief, was “authorized to deal with enemy [combatants] according to the treaties and customs known collectively as the laws of war.”<sup>175</sup> Even so, over the course of the history of our country, the Supreme Court has never held that the Constitution provides explicit authority for the President on his own to designate an American as an enemy combatant.<sup>176</sup>

Even if there is no express constitutional grant of authority for the President to unilaterally designate an American citizen as an enemy combatant, he may nevertheless have implied authority under the Constitution.<sup>177</sup> A Department of Justice memo produced during the

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<sup>166</sup> *Ex parte Quirin*, 317 U.S. at 25; see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 680 (2006) (Thomas, J., dissenting) (quoting *Quirin*, 317 U.S. at 25).

<sup>167</sup> *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

<sup>168</sup> *Id.* at 788.

<sup>169</sup> *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring).

<sup>170</sup> *Loving v. United States*, 517 U.S. 748 (1996).

<sup>171</sup> *Id.* at 768, 772 (the court also found that the Uniform Code of Military Justice properly delegated to the President the power to “define aggravating factors for capital crimes”).

<sup>172</sup> *Massachusetts v. Laird*, 400 U.S. 886 (1970).

<sup>173</sup> *Id.* at 897 (Douglas, J., dissenting).

<sup>174</sup> *Id.* at 893 n.1. Justice Douglas based his conclusion on a change made during the drafting of the Constitution; while before it would have authorized Congress to “make” war, the version ultimately approved authorized Congress to “declare” war.

<sup>175</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 548 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

<sup>176</sup> See *id.* at 516–17 (plurality opinion).

<sup>177</sup> Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“The actual art of governing under our Constitution does not and cannot conform



Bush Administration stated that the President “has inherent constitutional authority to conduct warrantless electronic surveillance for foreign intelligence purposes” during wartime to protect the United States from attack.<sup>178</sup> A Library of Congress researcher later noted, however, that the Supreme Court disagreed.<sup>179</sup> The Department of Justice memo also explained that the President has the “inherent constitutional authority to receive all foreign intelligence information in the hands of the government necessary for him to fulfill his constitutional responsibilities and that statutes and rules should be understood to include an implied exception so as not to interfere with that authority.”<sup>180</sup>

Third, the memo quoted the Fourth Circuit’s decision in *Hamdi* for the proposition that “‘capturing and detaining enemy combatants is an inherent part of warfare’ and that the ‘necessary and appropriate force . . . includes’ such action.”<sup>181</sup> However, the Fourth Circuit’s decision in *Hamdi* was vacated by the Supreme Court and remanded.<sup>182</sup>

Fourth, the memo mentioned that Congress “expressly recognized” the President’s inherent authority “to take action to defend the United States even without congressional support,” which the Department considered remarkable “for while the courts have long acknowledged an inherent authority in the President to take action to protect Americans abroad,” Congress has not usually done so.<sup>183</sup> Finally, the

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to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.”).

178 Memorandum from Jack L. Goldsmith, III, Assistant Attorney Gen., Office of Legal Counsel to the Attorney Gen. Regarding Review of the Legality of the [President’s Surveillance] Program 22 (May 6, 2004), available at <http://www.justice.gov/olc/docs/memo-president-surveillance-program.pdf> (citing *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (en banc)). However, lawyers at the Department of Justice work for the President, advise the President, and defend the President’s actions. Although lawyers at the Department strive to faithfully interpret the law, critics wary of executive power may believe the Department is likely to interpret the President’s inherent authority very broadly.

179 *Constitutional Limitations on Domestic Surveillance: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 72 (2007) (citing *United States v. United States District Court (Keith)*, 407 U.S. 297, 316–17 (1972)) (statement of Louis Fisher, Specialist in Constitutional Law, American Law Division, Library of Congress).

180 Memorandum from Jack L. Goldsmith, III, *supra* note 178, at 23 n.19 (citing *Rainbow Navigation, Inc. v. Dep’t of Navy*, 783 F.2d 1072, 1078 (D.C. Cir. 1986) (Scalia, J.)).

181 *Id.* (quoting *Hamdi v. Rumsfeld*, 316 F.3d 450, 467 (4th Cir. 2003), *vacated and remanded*, 542 U.S. 507 (2004)).

182 *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).

183 Memorandum from Jack L. Goldsmith, III, *supra* note 178, at 32 (citing War Powers Resolution, 50 U.S.C. §§ 1541–1548 (2006); *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863); *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186)).

memo stated that the President has the inherent authority to act in self-defense of the United States to respond to any attack.<sup>184</sup>

Another Justice Department memo stated that the "Constitution grants the President inherent power to protect the Nation from foreign attack . . . and to protect national security information."<sup>185</sup> In addition, the Court in *Hamdi* did not reject the assertion that the President has inherent authority "to detain those arrayed against our troops."<sup>186</sup> Congress itself in the Authorization for Use of Military Force ("AUMF")<sup>187</sup> acknowledged the inherent authority of the President to protect the United States.<sup>188</sup>

Even the courts have long recognized the President's broad control over foreign policy.<sup>189</sup> In *United States v. Curtiss-Wright Export Corp.*,<sup>190</sup> the Court held that while the President's inherent power over internal affairs is limited, external affairs are substantially different and only the President has the inherent power to negotiate with leaders of other nations.<sup>191</sup> In addition, several presidents have argued that being the Commander in Chief implies that the President has the authority to protect national security.<sup>192</sup> Using this argument,

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<sup>184</sup> *Id.*

<sup>185</sup> Legal Authorities Supporting the Activities of the Nat'l Security Agency Described by the President, 32 Op. O.L.C. 1, 6 (2006) (citations omitted).

<sup>186</sup> See *Hamdi*, 542 U.S. at 516–17 (plurality opinion) ("We do not reach the question whether Article II provides such authority, however, because we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the [Authorization for Use of Military Force]."); *id.* at 587 (Thomas, J., dissenting) ("Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so.").

<sup>187</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>188</sup> *Id.* ("Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.").

<sup>189</sup> *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) ("Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring))).

<sup>190</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

<sup>191</sup> *Id.* at 319 ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.").

<sup>192</sup> Jonathan Ulrich, Note, *The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism*, 45 VA. J. INT'L L. 1029, 1045 (2005) ("Both Reagan and Clinton successfully argued that the inherent authority to use lethal force embodied in Article II allowed them to launch airstrikes against Qadhafi and bin Laden, even in the absence of a declaration of war. The Bush administration has, likewise, laid the president's targeted killing directives on this constitutional foundation." (footnotes omitted)).

the President can use military force to protect the United States against imminent attacks.<sup>193</sup> In “time[s] of extreme emergency,” the President can draw on “‘the aggregate of his powers under the Constitution’” to find implicit powers if he has no express authority.<sup>194</sup> In spite of all this precedent, the Supreme Court has never directly held that the President has inherent unilateral authority to designate an American as an enemy combatant.<sup>195</sup>

The third and final source of authority for the President to act in a time of war is statutory authority.<sup>196</sup> Congress gave the President the power to protect the United States against terrorist attacks.<sup>197</sup> After 9/11, Congress enacted the AUMF, authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons” who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States.”<sup>198</sup> The AUMF does not itemize specific grants of authority to the President.<sup>199</sup> However, the language in this grant of authority is as broad, if not broader, than previous congressional authorizations.<sup>200</sup> Fortunately, the Supreme Court has spoken to the scope of the AUMF in the case of *Hamdi v. Rumsfeld*.<sup>201</sup>

Yaser Hamdi was born in Baton Rouge, Louisiana in 1980,<sup>202</sup> while his father, Esam Hamdi, worked as a petroleum engineer for Exxon.<sup>203</sup> When Hamdi was three years old, his parents and four brothers moved back to Saudi Arabia, making him a dual American-

193 McKelvey, *supra* note 32, at 1366 (“The DOJ is correct in arguing that the President is constitutionally empowered to use military force to protect the nation from imminent attack.”).

194 *Massachusetts v. Laird*, 400 U.S. 886, 898 (1970) (Douglas, J., dissenting) (quoting *Youngstown*, 343 U.S. at 587 (majority opinion)).

195 See *Hamdi v. Rumsfeld*, 542 U.S. 507, 516–17 (2004) (plurality opinion).

196 *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”).

197 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

198 *Id.* § 2(a).

199 See *id.* § 2.

200 Compare *id.*, with Authorization for Continuing Hostilities in Kosovo, Pub. L. No. 106-31, 113 Stat. 57, 76–77 (1999).

201 *Hamdi v. Rumsfeld*, 542 U.S. 507, 509, 517 (2004).

202 Charles I. Lugosi, *Rule of Law or Rule by Law: The Detention of Yaser Hamdi*, 30 AM. J. CRIM. L. 225, 229 (2003).

203 Tony Bartelme, *Born in Louisiana, Captured in Afghanistan, Jailed in Hanahan: Yaser Hamdi Travels Long, Strange Road*, POST & COURIER (S.C.), Mar. 7, 2004, at 1A.

Saudi citizen.<sup>204</sup> He reportedly lived in Saudi Arabia until he was twenty.<sup>205</sup>

During the summer of 2001, the government reported that Hamdi joined forces with the Taliban to fight the Northern Alliance.<sup>206</sup> In October 2001, the United States began fighting al Qaeda in Kunduz, Afghanistan and by the end of November, Hamdi and thousands of other Taliban soldiers surrendered to the United States troops.<sup>207</sup> The captured soldiers were kept in Qala-i-Jangi prison, near Mazar-i-Sharif, Afghanistan.<sup>208</sup> Shortly thereafter, the Taliban prisoners took over the prison and fought for several days against the American soldiers.<sup>209</sup> After the prisoners surrendered, they were "loaded in metal shipping containers and flatbed trucks and taken to the Sherberghan prison in Northern Afghanistan."<sup>210</sup>

During his interrogation, Hamdi reportedly stated he was a Saudi Arabian citizen who was "born in the United States and who entered Afghanistan the previous summer to train with and, if necessary, fight for the Taliban."<sup>211</sup> He also reportedly told a Department of Defense official "he was carrying an AK-47 when he surrendered."<sup>212</sup>

In January 2002, Hamdi and over 600 other Taliban soldiers were transferred to the U.S. military prison at Guantanamo Bay, Cuba.<sup>213</sup> In April, the government reportedly realized Hamdi was an American citizen and transferred him to a military prison in Norfolk, Virginia.<sup>214</sup> A year and a half later, he was moved to another military prison in South Carolina, where "he was held incommunicado and in isolation without access to a lawyer or his family and with no charges filed."<sup>215</sup>

Hamdi's father brought suit alleging a violation of 18 U.S.C. § 4001(a), that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."<sup>216</sup> The government argued Hamdi, an American citizen, was detained under

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<sup>204</sup> *Id.*

<sup>205</sup> Peter Jan Honigsberg, *Chasing "Enemy Combatants" and Circumventing International Law: A License for Sanctioned Abuse*, 12 UCLA J. INT'L L. & FOREIGN AFF. 1, 35 (2007).

<sup>206</sup> *Id.*

<sup>207</sup> Bartelme, *supra* note 203.

<sup>208</sup> *See id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Lugosi, *supra* note 202, at 230.

<sup>215</sup> Honigsberg, *supra* note 205, at 36.

<sup>216</sup> 18 U.S.C. § 4001(a) (2012); *see Hamdi v. Rumsfeld*, 542 U.S. 507, 511, 517 (2004).

the AUMF, an “explicit congressional authorization.”<sup>217</sup> The case made it up to the United States Supreme Court, where Justice O’Connor, writing for the plurality, held that under the AUMF, Congress had “authorized Hamdi’s detention.”<sup>218</sup> Necessary and appropriate force “includes the capture and detention of any and all hostile forces arrayed against our troops,”<sup>219</sup> such as “a person who was part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.”<sup>220</sup>

Justice O’Connor held:

[I]t is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.<sup>221</sup>

She found this “limited category” of permissible detention “for the duration of the particular conflict in which” an enemy combatant was “captured . . . so fundamental and accepted [as] an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress . . . authorized the President to use.”<sup>222</sup> Justice O’Connor stated American citizens could be detained as enemy combatants when they “associate[d] themselves with the military arm of the enemy government,”<sup>223</sup> but, “indefinite detention” was not within the scope of “necessary and appropriate force,” which only included the right to “detain [enemy combatants] for the duration of the relevant conflict.”<sup>224</sup>

The Administration argues today that killing the enemy is fundamentally incident to waging war, including through the use of

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<sup>217</sup> See *Hamdi*, 542 U.S. at 517.

<sup>218</sup> *Id.* at 509, 517.

<sup>219</sup> *Id.* at 515 (internal quotation marks omitted).

<sup>220</sup> See National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b)(2), 125 Stat. 1298, 1562 (2011); see also *Hedges v. Obama*, No. 12 Civ. 331(KBF), 2012 WL 1721124, at \*4 (S.D.N.Y. May 16, 2012).

<sup>221</sup> *Hamdi*, 542 U.S. at 519.

<sup>222</sup> *Id.* at 518.

<sup>223</sup> *Id.* at 519.

<sup>224</sup> *Id.* at 521.

drones.<sup>225</sup> Few would disagree with this proposition. Agreeing that is true, however, we must still answer whether the AUMF authorizes the President to unilaterally designate an American citizen an enemy combatant for purposes of the kill list, particularly when circumstances may provide ample time to have some formal review process.<sup>226</sup>

When questions arise over the scope of the powers of the President and Congress, many scholars turn to the Supreme Court's decision in *Youngstown* as the framework to find the answer.<sup>227</sup> During the Korean War, President Harry Truman issued an executive order directing the Secretary of Commerce to seize most of the nation's steel mills to avert an anticipated strike by the United Steel Workers of America.<sup>228</sup> The Court held that the President did not have the authority to issue such an order.<sup>229</sup> In a concurring opinion, Justice Jackson articulated the following three-prong framework to analyze the scope of presidential power.<sup>230</sup>

According to Justice Jackson, the President's authority to take action should be evaluated in a framework that includes three levels or zones of authority.<sup>231</sup> In Zone One, "the President acts pursuant to an express or implied authorization of Congress," which elevates his authority to its maximum, "for it includes all that he possesses in his own right plus all that Congress can delegate."<sup>232</sup> In Zone Two, "the President acts in absence of either a congressional grant or denial of authority," and therefore "he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may

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<sup>225</sup> See Holder Speech at Northwestern, *supra* note 5.

<sup>226</sup> Cf. *Hamdi*, 542 U.S. at 533 (concluding that a citizen detainee has a right to challenge his designation as an enemy combatant before a neutral decisionmaker).

<sup>227</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). Admittedly, some have argued that *Youngstown* was not a foreign affairs case; it was a case involving seizure of private property in the United States without due process. See *Goldwater v. Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring); LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, 340–41 (1972). Although this Article focuses on the President's actions overseas in matters relating to national security and foreign affairs (areas where his authority is greater than in internal matters), here the deprivation is not of property, but of a life. Consequently, it is my judgment that on balance the application of the *Youngstown* framework remains appropriate here. See *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

<sup>228</sup> *Youngstown*, 343 U.S. at 582–83, 590 (majority opinion).

<sup>229</sup> *Id.* at 587.

<sup>230</sup> *Id.* at 635–38 (Jackson, J., concurring).

<sup>231</sup> See *id.*

<sup>232</sup> *Id.* at 635.

have concurrent authority, or in which its distribution is uncertain.”<sup>233</sup> Finally, in Zone Three, “the President takes measures incompatible with the expressed or implied will of Congress,” decreasing his power to its “lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”<sup>234</sup>

Under this framework, the President’s authority is strongest when he has congressional authorization, placing his actions in Zone One of the Jackson test.<sup>235</sup> On the other hand, the President’s authority is most questionable when acting in contravention of Congress and thus in Zone Three.<sup>236</sup> The reader, however, should understand that on rare occasions, even when acting with an express grant of authority from Congress, presidential action may still be unconstitutional.<sup>237</sup> Furthermore, because Congress may lack authority over certain matters, presidential action in contravention of a congressional statute under Zone Three may nevertheless be constitutional.<sup>238</sup>

Although the Constitution does not expressly give the President the sole authority to designate an American citizen as an enemy combatant and place him on the kill list, it is generally understood that the President’s Commander in Chief powers under Article II cloak him with the power to make tactical decisions on the battlefield.<sup>239</sup> Arguably, this is the source of the President’s power to direct the battlefield tactic of using drones to kill enemy combatants.<sup>240</sup> The more difficult question, however, is whether the President has the tactical discretion to designate an American citizen as an enemy combatant using a one-sided process, when it appears from the public record there is ample time to have a deliberate review process.<sup>241</sup>

In previous declarations of war and authorizations to use force, Congress historically has identified against whom such force may be

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<sup>233</sup> *Id.* at 637.

<sup>234</sup> *Id.*

<sup>235</sup> *See id.* at 635.

<sup>236</sup> *Id.* at 637.

<sup>237</sup> *Id.* at 636–37 (concluding that usually, when a Zone Three presidential act is unconstitutional, “the Federal Government as an undivided whole lacks power”).

<sup>238</sup> *Id.* at 637–38 (“Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.”).

<sup>239</sup> *Id.* at 645 (“I should indulge the widest latitude of interpretation to sustain [the President’s] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.”).

<sup>240</sup> *See* Holder Speech at Northwestern, *supra* note 5.

<sup>241</sup> *See id.*

used.<sup>242</sup> Identifying a specific individual or group of individuals as the enemy target or combatant, however, is rightly the authority of the President and his battlefield commanders; they have the institutional flexibility and expertise to make these judgments.<sup>243</sup> Often these decisions are made in a split-second encounter on the battlefield when there is little or no opportunity to question the allegiance or citizenship of the person standing across the line.<sup>244</sup> If the individual is eye to eye with American forces on the battlefield and armed or showing hostile intent, that is sufficient to respond to him as an enemy combatant irrespective of his citizenship.<sup>245</sup> If, however, the potential target is known to be an American citizen in a far away, remote location, and the government has time to use a deliberative review process to determine whether the target is an enemy combatant and to place him on the kill list, then the process required from our government to that American citizen becomes less clear.<sup>246</sup>

### C. *Due Process Rights of American Citizens in Times of War*

While American citizens are guaranteed certain due process rights under our Constitution, courts have found flexibility in the extent of these rights during times of war.<sup>247</sup> In *Hamdi*, an American citizen argued he was being detained in violation of a federal statute and in violation of his constitutional due process rights.<sup>248</sup> The Court held that the AUMF authorized the President to detain enemy combatants indefinitely for the duration of hostilities, even American citizens.<sup>249</sup> However, a majority of the Court also found that Hamdi was guaranteed due process as a United States citizen, including “a mean-

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<sup>242</sup> See, e.g., Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. 107-243, § 3, 116 Stat. 1498, 1501; Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001).

<sup>243</sup> See U.S. CONST. art. II, § 2, cl. 1; Michael P. Kelly, *Fixing the War Powers*, 141 MIL. L. REV. 83, 121 (1993) (“The framers simply meant for the Commander-in-Chief to furnish civilian leadership for the military and to control operations, thereby exploiting the institutional advantages that only a unitary executive could provide.” (footnote omitted)).

<sup>244</sup> See Holder Speech at Northwestern, *supra* note 5.

<sup>245</sup> See *id.*

<sup>246</sup> Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 532–33 (2004) (plurality opinion) (concluding that a citizen detainee has a right to challenge his designation as an enemy combatant before a neutral decisionmaker).

<sup>247</sup> See *id.* at 533.

<sup>248</sup> See *id.* at 511.

<sup>249</sup> See *id.* at 509.



ingful opportunity to contest the factual basis for [his] detention before a neutral decisionmaker.”<sup>250</sup>

Recognizing the President has the authority under the AUMF to detain enemy combatants who are American citizens, a majority of the Court, relying upon the precedent of *Mathews v. Eldridge*,<sup>251</sup> found that he does not have the unilateral power to designate an American citizen as an enemy combatant.<sup>252</sup> In *Eldridge*, the Court weighed three factors to ensure a defendant was guaranteed due process: (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.<sup>253</sup>

Hamdi’s private interest was his “interest in being free from physical detention by [his] own government.”<sup>254</sup> In her opinion, Justice O’Connor carefully stressed the importance of making sure Hamdi’s liberty was not ignored.<sup>255</sup> Even in times of war, “‘commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.’”<sup>256</sup> In addition, an individual has a significant interest in not being “erroneously” detained.<sup>257</sup> The importance of the private interest is to make sure “an unchecked system of detention” does not emerge and “become a means for oppression and abuse of others who do not present that sort of threat.”<sup>258</sup> The Supreme Court reaffirmed “the fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law.”<sup>259</sup>

Balancing against Hamdi’s liberty interest was the government’s interest in “ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States.”<sup>260</sup> The war made it “necessary and appropriate” to detain Hamdi because having his trial in the midst of a war would substantially inter-

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250 *Id.* at 509; *id.* at 553–54 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

251 *Mathews v. Eldridge*, 424 U.S. 319 (1976).

252 *See Hamdi*, 542 U.S. at 521, 532–33 (plurality opinion).

253 *See Eldridge*, 424 U.S. at 335.

254 *Hamdi*, 542 U.S. at 529.

255 *Id.* at 529–30.

256 *Id.* at 530 (quoting *Jones v. United States*, 463 U.S. 354, 361 (1983)).

257 *Id.* (emphasis removed); *see* Holder Speech at Northwestern, *supra* note 5.

258 *Hamdi*, 542 U.S. at 530.

259 *Id.* at 531.

260 *Id.*

fere with the war effort.<sup>261</sup> Furthermore, Attorney General Eric Holder later noted the importance of the government "counter[ing] threats posed by senior operational leaders of [A]l Qaeda," in addition "to protect[ing] the innocent people whose lives could be lost in their attacks."<sup>262</sup>

The third part of the *Eldridge* test requires a balancing of the risk of erroneous deprivation of liberty by not providing the procedural safeguards sought by the defendant, against the cost to the government in providing such safeguards.<sup>263</sup> The Court found that to achieve the appropriate balance, "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."<sup>264</sup>

Procedural due process requires a party to be notified and heard "at a meaningful time and in a meaningful manner."<sup>265</sup> However, as Attorney General Eric Holder explained, "[w]here national security operations are at stake, due process takes into account the realities of combat."<sup>266</sup> He noted "[t]he Supreme Court has made clear that the Due Process Clause does not impose one-size-fits-all requirements, but instead mandates procedural safeguards that depend on specific circumstances."<sup>267</sup> The *Hamdi* Court discussed this flexibility, explaining "enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."<sup>268</sup>

Indeed, Justice O'Connor cited some examples of this flexibility, including accepting hearsay as "the most reliable available evidence from the Government," shifting the burden of proof to the defendant "to rebut [the Government's] evidence with more persuasive evidence," or holding the trial in a military tribunal so it can use its "time-honored and constitutionally mandated roles of reviewing and resolving claims" like *Hamdi*'s.<sup>269</sup>

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261 *Id.* at 531-32.

262 Holder Speech at Northwestern, *supra* note 5.

263 *See Hamdi*, 542 U.S. at 532.

264 *Id.* at 533.

265 *Id.* (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)) (internal quotation marks omitted).

266 Holder Speech at Northwestern, *supra* note 5.

267 *Id.*

268 *Hamdi*, 542 U.S. at 533.

269 *Id.* at 533-35.

After applying the three-part *Eldridge* test, the plurality found the Government did not need to provide Hamdi the full protection of a customary habeas proceeding.<sup>270</sup> However, Hamdi was entitled to (1) challenge his enemy combatant classification, (2) receive notice of the factual allegations against him, and (3) have a “fair opportunity to rebut” these allegations before a neutral decisionmaker.<sup>271</sup>

Justice Souter, joined by Justice Ginsburg, concurred and found that Hamdi should be given the opportunity to be heard on remand, but also dissented because he concluded Hamdi’s detention was unauthorized.<sup>272</sup> Referring back to notorious examples of government detention, such as the government internment of Japanese Americans following the bombing of Pearl Harbor, Justice Souter stated that Congress intended to require a “clear congressional authorization before any citizen [could] be placed in a cell,”<sup>273</sup> and found the Government failed to prove the AUMF clearly authorized detention.<sup>274</sup>

Justice Scalia dissented, concluding that “Hamdi [wa]s entitled to a habeas decree requiring his release unless (1) criminal proceedings [we]re promptly brought, or (2) Congress . . . suspended the writ of habeas corpus.”<sup>275</sup> He found that absent a suspension of the writ of habeas corpus, which the AUMF did not constitute, “detention without charge” was unjustified.<sup>276</sup> Justice Thomas separately dissented that Hamdi’s habeas petition “should fail” because his “detention [fell] squarely within the Federal Government’s war powers, and [the Court] lack[ed] the expertise and capacity to second-guess that decision.”<sup>277</sup>

Therefore, following *Hamdi*, it appeared that at least a majority of the Justices on the Supreme Court supported the proposition that an American citizen, accused of being an enemy combatant, was entitled to certain protections under the Fifth Amendment.<sup>278</sup> It also appeared, however, that a majority of the Justices recognized that during a time of war, the government is allowed some flexibility, and the

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<sup>270</sup> *Id.* at 533–34.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 539, 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

<sup>273</sup> *Id.* at 543.

<sup>274</sup> *Id.* at 551.

<sup>275</sup> *Id.* at 573 (Scalia, J., dissenting).

<sup>276</sup> *Id.* at 554.

<sup>277</sup> *Id.* at 579 (Thomas, J., dissenting).

<sup>278</sup> *Id.* at 533 (plurality opinion); *id.* at 553–54 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

American target is not entitled to all of the procedures provided to a criminal defendant.<sup>279</sup>

In July 2004, partially in response to *Hamdi*, the Department of Defense announced the Combatant Status Review Tribunals ("CSRTs") for Guantanamo Bay detainees.<sup>280</sup> The Tribunal is "a forum for detainees to contest their status as enemy combatants."<sup>281</sup> It requires the detainees to "be notified within 10 days of their opportunity to contest their enemy combatant status" and "of their right to seek a writ of habeas corpus" in the United States court system.<sup>282</sup> The Tribunals are "comprised of three neutral officers" and "[e]ach detainee [is] assigned a military officer as a personal representative."<sup>283</sup> The Tribunal decides "whether the detainee is properly [being] held as an enemy combatant."<sup>284</sup>

Consequently, by regulations of the executive, detainees who choose to contest their designation as enemy combatants for purposes of detention are entitled to the due process protections of notice and opportunity to challenge their status before a neutral decisionmaker.<sup>285</sup> A few sections of the CSRTs have been codified in the Detainee Treatment Act of 2005<sup>286</sup> and the Military Commissions Act of 2006.<sup>287</sup>

The Court next had an opportunity to apply the due process analysis to enemy combatants in the case of *Boumediene v. Bush*.<sup>288</sup> In that case, six petitioners (including Boumediene) were arrested in Bosnia in October 2001 and transported to Guantanamo Bay in January 2002.<sup>289</sup> The petitioners had been confined for two years when they filed suit.<sup>290</sup> The six petitioners filed for writs of habeas corpus, "on the grounds that their indefinite detention without criminal

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<sup>279</sup> See *id.* at 533 (plurality opinion); *id.* at 553–54 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

<sup>280</sup> See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1110 (2008); Press Release, Dep't of Defense, Combatant Status Review Tribunal Order Issued (July 7, 2004), available at <http://www.defense.gov/releases/release.aspx?releaseid=7530>.

<sup>281</sup> Press Release, Dep't of Defense, *supra* note 280.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> See *id.*; *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality opinion).

<sup>286</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

<sup>287</sup> See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

<sup>288</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>289</sup> Petition for Writ of Certiorari at 4–5, *Boumediene v. Bush*, 553 U.S. 723 (2008) (No. 06-1195), 2007 WL 680794, at \*4–5.

<sup>290</sup> See *id.* at 6.

charge was unlawful and violated the Constitution, laws, and treaties of the United States.”<sup>291</sup> In 2004, the district court dismissed the suit because the AUMF allowed the President to “capture and detain those who the military determined were either responsible for the 9/11 attacks or posed a threat of future terrorist attacks.”<sup>292</sup>

On appeal, the Supreme Court found the Guantanamo detainees were technically under control of the United States and therefore were entitled to the privilege of habeas corpus, unless the Suspension Clause was in effect at the time.<sup>293</sup> The Court found that the procedural guarantees afforded to Boumediene fell “well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review.”<sup>294</sup> Boumediene was only given a “Personal Representative” who assisted little in his defense, not a lawyer or an “advocate.”<sup>295</sup> Because the Suspension Clause was not in effect, the Court found this non-American detainee was “entitled to the privilege of habeas corpus to challenge the legality of [his] detention.”<sup>296</sup> Although the defendant was not an American citizen, the Court nevertheless required more due process than had been previously provided to an American detainee under *Hamdi*.<sup>297</sup>

Therefore, today individuals detained by our government as enemy combatants are provided procedural due process through the Supreme Court’s precedents and the Executive’s CSRT process. We now arrive at the central question of the Article. Was Al-Aulaqi, killed by our government as an enemy combatant, afforded the necessary due process under the law?

#### *D. Application of the Framework to the Strike Against Al-Aulaqi*

Virtually all intelligence relating to Al-Aulaqi remains classified by the American government.<sup>298</sup> What is known is from the public record, the Obama speech, and the Holder Letter tends to support the conclusion that the President’s actions with respect to Al-Aulaqi were

<sup>291</sup> *Id.*

<sup>292</sup> See *Khalid v. Bush*, 355 F. Supp. 2d 311, 319, 330 (D.D.C. 2005), *vacated sub nom. Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev’d*, 553 U.S. 723 (2008).

<sup>293</sup> *Boumediene*, 553 U.S. at 771.

<sup>294</sup> *Id.* at 767.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 771.

<sup>297</sup> Compare *id.* (finding that the detainee was entitled to the privilege of habeas corpus, absent suspension of the writ), with *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (holding that a citizen-detainee was entitled to “receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker”).

<sup>298</sup> See Becker & Shane, *supra* note 30.

lawful. Al-Aulaqi, by his words and actions, was an enemy of the United States during a time of conflict and thus a legitimate military target.<sup>299</sup> Applying the balancing test set forth in *Eldridge*, Al-Aulaqi arguably received adequate due process under the circumstances.<sup>300</sup>

The first factor of the *Eldridge* test, the subject of Al-Aulaqi's private interest, was his life.<sup>301</sup> Al-Aulaqi was killed in a drone strike, which obviously was a "serious deprivation"—the ultimate deprivation.<sup>302</sup> The risk of erroneous deprivation could not be higher because if he was targeted by mistake, the price was his life.<sup>303</sup> Similar to the sovereign execution of an innocent man, any mistake with these consequences is irreversible.

The second factor, the government's interest, is also strong.<sup>304</sup> The government has the paramount obligation to protect Americans from terrorist attacks.<sup>305</sup> In order to protect the United States, the President as Commander in Chief must first identify the enemy.<sup>306</sup> By any one of the various definitions of "enemy combatant" discussed above, Al-Aulaqi was an enemy combatant.<sup>307</sup> While he may not have carried a gun on the battlefield, he incited and encouraged terrorists around the world against the United States, encouraged violent jihads against Americans, was connected with the 9/11 hijackers, and ultimately became operationally involved.<sup>308</sup> According to President Obama, Al-Aulaqi "was continuously trying to kill people."<sup>309</sup> The government had a high interest in stopping the actions of Al-Aulaqi.<sup>310</sup>

Under the third factor of the *Eldridge* test, we examine whether in this case the national security risks and costs to the government in providing additional procedural safeguards is outweighed by the possibility of erroneously designating Al-Aulaqi as an enemy combatant.<sup>311</sup> Here, it was widely reported that the government considered

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299 See Obama Change of Office Speech, *supra* note 4 (explaining Al-Aulaqi's role as leader of al Qaeda in the Arabian Peninsula).

300 See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

301 McKelvey, *supra* note 32, at 1370.

302 *Id.*

303 See Dreyfuss, *supra* note 108, at 276.

304 See *Eldridge*, 424 U.S. at 335.

305 McKelvey, *supra* note 32, at 1370.

306 See *id.* ("The exigencies involved in combating terrorism require decisive action and safeguards for intelligence sources that help identify threats.").

307 See *supra* Part III.A.

308 See *supra* Part II.B.

309 Obama Speech on Drone Policy, *supra* note 4.

310 See Obama Change of Office Speech, *supra* note 4.

311 See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Al-Aulaqi a terrorist and a member of al Qaeda.<sup>312</sup> For national security reasons, however, the government chose not to give Al-Aulaqi notice that he was being evaluated as an enemy combatant for the kill list. Notice might have caused him to go further underground and made it more difficult for the United States to bring him to justice.<sup>313</sup> He was not informed directly of the reasons for the President's decision or what factors the government considered.<sup>314</sup> Yet even if the government had provided a hearing, there was virtually no possibility Al-Aulaqi would have participated.<sup>315</sup>

Al-Aulaqi was guaranteed due process as an American citizen, but as Attorney General Holder made clear, "[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."<sup>316</sup> While Al-Aulaqi's life was important, so equally were the lives of every other American citizen who was protected by Al-Aulaqi's death.<sup>317</sup> It is hard to imagine that even if given multiple opportunities to explain his behavior and defend his actions, Al-Aulaqi could sustain an argument that he was not an enemy combatant.<sup>318</sup> Al-Aulaqi arguably had the due process to which he was entitled under the circumstances of an ongoing conflict in the months it took the NSC to place him on the kill list.<sup>319</sup> The Due Process Clause cannot act as a straitjacket on a President under these circumstances.<sup>320</sup> Once there was a legally dependable determination that Al-Aulaqi was an enemy combatant, the President had the unilateral authority as Commander in Chief to kill him according to the laws of war at any point he deemed appropriate.<sup>321</sup>

<sup>312</sup> See Holder Speech at Northwestern, *supra* note 5.

<sup>313</sup> Lindsay Kwoka, Comment, *Trial by Sniper: The Legality of Targeted Killing in the War on Terror*, 14 U. PA. J. CONST. L. 301, 317–18 (2011).

<sup>314</sup> See *supra* notes 106–08 and accompanying text; cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (concluding that an enemy combatant designee must receive notice of the basis for classification).

<sup>315</sup> *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 10–11 (D.D.C. 2010) ("For his part, Anwar Al-Aulaqi has made clear that he has no intention of making himself available for criminal prosecution in U.S. courts, remarking in a May 2010 AQAP video interview that he 'will never surrender' to the United States.").

<sup>316</sup> Holder Speech at Northwestern, *supra* note 5.

<sup>317</sup> See Kwoka, *supra* note 313, at 316.

<sup>318</sup> See Obama Change of Office Speech, *supra* note 4 (explaining Al-Aulaqi's role as leader of al Qaeda in the Arabian Peninsula).

<sup>319</sup> See generally Bin Laden Press Briefing, *supra* note 42.

<sup>320</sup> Holder Speech at Northwestern, *supra* note 5.

<sup>321</sup> See *id.*

President Obama called Al-Aulaqi “the leader of external operations’ for [al Qaeda] in the Arabian Peninsula” and stated that “his death ‘mark[ed] another significant milestone in the broader effort to defeat [al Qaeda] and its affiliates.’”<sup>322</sup> The President evidently decided the likelihood of an erroneous designation based on the months of review and discussions was virtually zero, and the cost and possible delay of providing additional formal process was substantially outweighed by the possible danger to innocent lives.<sup>323</sup>

The Administration has touted its careful review process, a process that took months, as a check on Presidential power and as insurance that no innocent American will ever be targeted.<sup>324</sup> Some may question, however, why the Administration did not take advantage of this delay to provide some level of additional procedural due process to Al-Aulaqi. Was it because members of the Administration were neither aware of his location nor had an idea when he might be located? Did they feel they could not take the chance of institutionalizing requirements of a hearing or other process in the event they located Al-Aulaqi and had to take immediate action against him?<sup>325</sup> These concerns, while understandable, could apply to any person deemed dangerous by the government. The reporting indicates that the nominating process by the Originators took months; certainly that seems a sufficient amount of time to provide additional procedural safeguards for Al-Aulaqi’s interests.<sup>326</sup>

The Administration will likely continue to use some version of their current lengthy evaluation process to reassure skeptics that no innocent American could ever be mistakenly targeted. Ironically, it is this lengthy process that casts doubts on the government’s claim of military necessity. If there is sufficient time to do such a thorough and extensive evaluation, why is there not time to provide some form of

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<sup>322</sup> Lisa Daniel, *Panetta: Awlaki Airstrike Shows U.S.-Yemeni Cooperation*, U.S. DEP’T OF DEF. (Sept. 30, 2011), <http://www.defense.gov/news/newsarticle.aspx?id=65512>.

<sup>323</sup> See Holder Speech at Northwestern, *supra* note 5.

<sup>324</sup> See *id.* (summarizing the government’s procedures in the following way: “First, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles”).

<sup>325</sup> See *id.* (“[T]he Constitution does not require the President to delay action until some theoretical end-stage of planning—when the precise time, place, and manner of an attack become clear. Such a requirement would create an unacceptably high risk that our efforts would fail, and that Americans would be killed.”).

<sup>326</sup> See Becker & Shane, *supra* note 30.



hearing with an advocate representing the target's interests before a neutral decisionmaker?

Attorney General Holder concedes the point of due process when he states an American citizen "who is a senior operational leader of [A]l Qaeda" may be targeted in a foreign country if he is "actively engaged in planning to kill Americans" when "after a thorough and careful review," he "poses an imminent threat of violent attack against the United States," "capture is not feasible," and "the operation would be conducted in a manner consistent with applicable law of war principles."<sup>327</sup> Attorney General Holder goes on to explain that while an American citizen is not "immune from being targeted," due process must be taken into consideration.<sup>328</sup> Thus the evidence shows the Administration clearly believed Al-Aulaqi was entitled to some level of due process.<sup>329</sup> Was he entitled to more process than required under *Hamdi* and *Boumediene*?<sup>330</sup> May we assume an American citizen targeted for killing is entitled to more due process than an alien being detained abroad?<sup>331</sup> Presumably the courts would answer yes; however, uncertainty exists whenever the courts employ a balancing test because it affords the judiciary a great deal of discretion.<sup>332</sup>

Such flexibility may be desirable in other contexts. On matters related to national security, foreign policy, and military judgments, however, the courts are the least qualified of the three branches to exercise discretion.<sup>333</sup> Judges have neither the expertise nor experience to evaluate threats against the United States, nor the staff necessary to develop such expertise.<sup>334</sup> Separation of powers would appear to demand less discretion by the courts on these types of issues.<sup>335</sup>

By its actions and most recently by its public defense of the policy, the Administration appears to believe that the nomination process and the President's personal involvement in placing an American enemy combatant on the kill list meets the due process required by the

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<sup>327</sup> Holder Speech at Northwestern, *supra* note 5.

<sup>328</sup> *Id.*

<sup>329</sup> *See id.*

<sup>330</sup> *See Boumediene v. Bush*, 553 U.S. 723, 771 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004); *supra* Part II.C.

<sup>331</sup> *Cf. Boumediene*, 553 U.S. at 771.

<sup>332</sup> *See id.* at 766–70 (laying out the appropriate balancing in that case).

<sup>333</sup> *See id.* at 831 (Scalia, J., dissenting) ("Henceforth, as today's opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.").

<sup>334</sup> *See id.*

<sup>335</sup> *See id.*

Constitution.<sup>336</sup> In attempting to explain the legal justification for the President's designation of an American citizen as an enemy combatant, Attorney General Holder discussed the requirements for targeting rather than capturing an American enemy combatant.<sup>337</sup> He explained that once an enemy combatant is placed on the kill list as an "imminent threat," the government calculates the "window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States."<sup>338</sup> He rationalized that it was constitutional for the President to target an individual in these situations, if there was "an unacceptably high risk" of harm to American citizens if the President delayed.<sup>339</sup> As a matter of military necessity, these targeting procedures seem appropriate.<sup>340</sup>

Like Attorney General Holder, I believe that winning the war on terrorism requires our government to win the war on information.<sup>341</sup> I support our efforts to capture first. Enemy leaders are great sources of intelligence and it makes sense to attempt to capture first before eliminating a potentially valuable source of information.<sup>342</sup> The values reflected in a "kill if cannot capture" policy are also consistent with the values shared by many Americans.<sup>343</sup> Commendable as it may be, however, this policy relates to what the government should do with an enemy combatant (the second decision point); it does not address how an American citizen is to be designated as an enemy combatant (the first decision point).<sup>344</sup>

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336 See Holder Letter, *supra* note 5, at 3–4; Obama Speech on Drone Policy, *supra* note 4.

337 Holder Speech at Northwestern, *supra* note 5.

338 *Id.*; see Harold Koh, Legal Advisor, U.S. Dep't of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration & International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> (explaining how the Administration's use of force against individuals comports with international law principles of distinction and proportionality).

339 Holder Speech at Northwestern, *supra* note 5 ("[T]he Constitution does not require the President to delay action until some theoretical end-stage planning—when the precise time, place, and manner of an attack become clear. Such a requirement would create an unacceptably high risk that our efforts would fail, and that Americans would be killed.").

340 See *id.* ("[I]t is imperative for the government to counter threats posed by senior operational leaders of al Qaeda, and to protect the innocent people whose lives could be lost in their attacks.").

341 See *id.* ("It is preferable to capture suspected terrorists where feasible—among other reasons, so that we can gather valuable intelligence from them . . .").

342 See *id.*

343 See *id.*

344 See *supra* notes 12–13 and accompanying text.

In addition, Attorney General Holder argues that if capture is not feasible, the President has the authority to “defend the United States with lethal force” against “a United States citizen terrorist who presents an imminent threat of violent attack” once that enemy is on the kill list.<sup>345</sup> But, Attorney General Holder explains, the use of such force must “comply with the four fundamental law of war principles”: necessity, distinction, proportionality, and humanity.<sup>346</sup> Necessity restricts targets to only those that “have definite military value”; “distinction requires that only lawful targets—such as combatants, civilians directly participating in hostilities, and military objectives—may be targeted intentionally”; proportionality states that “anticipated collateral damage must not be excessive in relation to the anticipated military advantage”; and humanity “requires us to use weapons that will not inflict unnecessary suffering.”<sup>347</sup>

Furthermore, in his speech at Northwestern University, Attorney General Holder asserted that “stealth or technologically advanced weapons” ensure minimal “risk of civilian casualties” and “the best intelligence.”<sup>348</sup> Comporting with these four fundamental law of war principles is commendable; it may even be necessary under the laws of war.<sup>349</sup> However, it has nothing to do with the legality of the President alone designating an American citizen as an enemy combatant.

Attorney General Holder, presumably referring to Judge Bates’s opinion in *Al-Aulaqi v. Obama*, stated that the President does not need “judicial approval” to “use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war—even if that individual happens to be a U.S. citizen.”<sup>350</sup> However, Attorney General Holder’s reading is different from Judge Bates’s actual holding in *Al-Aulaqi*. The court dismissed the case for lack of jurisdiction, and therefore did not decide the substantive questions raised.<sup>351</sup> Furthermore, Judge Bates did not actually state that the President *can* use such force without judicial approval—he merely posed this as a rhetorical question.<sup>352</sup> As such,

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<sup>345</sup> Holder Speech at Northwestern, *supra* note 5.

<sup>346</sup> *Id.*; see also Koh, *supra* note 338.

<sup>347</sup> Holder Speech at Northwestern, *supra* note 5; see also Koh, *supra* note 338.

<sup>348</sup> Holder Speech at Northwestern, *supra* note 5.

<sup>349</sup> See *id.*

<sup>350</sup> See *id.*; *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 52 (D.D.C. 2010); Anthony M. Shults, Note, *The “Surveil or Kill” Dilemma: Separation of Powers and the FISA Amendments Act’s Warrant Requirement for Surveillance of U.S. Citizens Abroad*, 86 N.Y.U. L. REV. 1590, 1614 (2011).

<sup>351</sup> *Al-Aulaqi*, 727 F. Supp. 2d at 17, 54.

<sup>352</sup> *Id.* at 52.

the district court's dismissal in *Al-Aulaqi* actually means little about the President's authority to unilaterally designate an American citizen as a senior operational leader of a foreign terrorist organization with which the United States is at war.<sup>353</sup>

In addition to Attorney General Holder's justifications, former Department of State Legal Advisor Harold Koh has noted the due process rights owed to American citizen enemy combatants.<sup>354</sup> In a speech given at the Annual Meeting of the American Society of International Law, Koh explained that the use of drones was legal under the AUMF and international law because the government can use "lethal force" to defend its citizens, which includes "targeting persons such as high-level [Al] Qaeda leaders who are planning attacks."<sup>355</sup> In addition, he explained that due process is guaranteed by recent amendments to the Military Commissions Act of 2006, "render[ing] inadmissible any statements taken as a result of cruel, inhuman or degrading treatment," demanding the prosecution "to disclose more potentially exculpatory information, restrict[ing] hearsay evidence, and generally requir[ing] that statements of the accused be admitted only if they were provided voluntarily (with a carefully defined exception for battlefield statements)."<sup>356</sup>

Of course, this Article is not arguing that the government cannot use lethal force to defend America from high-level al Qaeda leaders who are planning attacks. Quite the contrary, the issue being debated is whether the executive alone can determine an American citizen as a high-level al Qaeda leader and place him on the kill list. As for the protections of the Military Commissions Acts, they are only available if the potential target is provided a military commission or some other type of hearing—that is, some level of due process before a neutral decisionmaker.<sup>357</sup>

Not surprisingly, both Attorney General Holder and Legal Advisor Koh rely on the AUMF as authority for the President's actions to kill Al-Aulaqi.<sup>358</sup> It is true that in the AUMF Congress recognized that the "President has [the] authority under the Constitution to take

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<sup>353</sup> See *id.* at 9 (finding that because it lacked jurisdiction over the case, "serious issues regarding the merits of the alleged authorization of the targeted killing of a U.S. citizen overseas must await another day or another (non-judicial) forum").

<sup>354</sup> Koh, *supra* note 338.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

<sup>358</sup> See Holder Speech at Northwestern, *supra* note 5; Koh, *supra* note 338; see also Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001).

action to deter and prevent acts of international terrorism against the United States.”<sup>359</sup> As previously noted, however, the AUMF says nothing about the President’s authority to unilaterally designate an American citizen as an enemy combatant for purposes of either detention or killing.<sup>360</sup> A majority in *Hamdi* expressly rejected this proposition.<sup>361</sup>

The government may argue that while the *Hamdi* requirements may have been appropriate under the circumstances relating to *Hamdi*, they are impractical relative to Al-Aulaqi. As discussed earlier, his location was unknown at the time he was placed on the kill list, so it was impossible to serve him with notice.<sup>362</sup> Additionally, providing an opportunity to be heard at a hearing would have been an empty gesture as it is a virtual certainty he would not have made an appearance.<sup>363</sup>

More importantly, formal notice would have been contrary to our national security interests. As mentioned above, Al-Aulaqi most likely would have taken additional precautions to avoid detection.<sup>364</sup> Additionally, laying out our government’s intelligence case against Al-Aulaqi might well have compromised sensitive sources and methods.<sup>365</sup> Finally, even after Al-Aulaqi was designated by the President as an enemy combatant and placed on the kill list, the President still weighed the consequences of killing him and personally gave the final go ahead to strike.<sup>366</sup> Arguably, while not judicial process, Al-Aulaqi was given adequate due process under the circumstances.<sup>367</sup> It appears all this would satisfy the flexible shifting requirements of *Hamdi*, as the Obama Administration contends.<sup>368</sup>

However, their arguments appear less persuasive when compared to the due process requirements established in *Boumediene*. Recall

<sup>359</sup> 115 Stat. 224.

<sup>360</sup> See *supra* notes 242–43 and accompanying text; cf. 115 Stat. 224.

<sup>361</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality opinion); *id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

<sup>362</sup> See *supra* text accompanying note 325.

<sup>363</sup> Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 10 (D.D.C. 2010).

<sup>364</sup> See Kwoka, *supra* note 313, at 317–18 (“[I]t would be ridiculous to require notice for an individual who is targeted on the battlefield before he is killed.” (citing *Hamdi*, 542 U.S. at 597 (Thomas, J., dissenting))); *supra* notes 311–15 and accompanying text.

<sup>365</sup> See Kwoka, *supra* note 313, at 319 (arguing that jury trials are not a feasible solution in the context of targeted killings because they “may require the disclosure of intelligence sources”).

<sup>366</sup> See Becker & Shane, *supra* note 30.

<sup>367</sup> See Holder Speech at Northwestern, *supra* note 5 (“Where national security operations are at stake, due process takes into account the realities of combat.”).

<sup>368</sup> See *id.* (describing the factors considered in placing someone on the list).

that Boumediene, a non-American, was detained at Guantanamo Bay and the Court found that he was entitled to habeas review of his detention and to more than just a "Personal Representative" provided by the government.<sup>369</sup> Thus, although the Obama Administration argues Al-Aulaqi received adequate due process, what was provided to this American was less than what the Supreme Court required for the detention of aliens in *Boumediene*.<sup>370</sup>

In my judgment, the decision by the Commander in Chief of who is and who is not an enemy of the State must, of course, be given great deference, particularly during a time of active hostilities.<sup>371</sup> The Administration's defense of its procedural guarantees is certainly not without merit.<sup>372</sup> Justice Thomas argued in *Hamdi* that in the context of wartime detention for nonpunitive purposes, "due process requires nothing more than a good-faith executive determination."<sup>373</sup> Certainly the nomination process and the President's personal involvement meet that standard.<sup>374</sup> Tellingly, however, no other member of the Court joined Justice Thomas's opinion.<sup>375</sup> Justice Thomas was therefore alone in his conclusion that the government could detain an American based solely on the good-faith determination by the Executive.<sup>376</sup> The requirement that the government must first conclude that capture is not possible before killing a target certainly is a factor that weighs in favor of the legality of the Administration's execution of the kill order.<sup>377</sup> Nevertheless, even under *Hamdi*'s standards relating to capture and detention of an enemy combatant, it appears an American citizen is entitled to notice and an opportunity to be heard before a neutral decisionmaker.<sup>378</sup> Indeed, many would find it perversely odd that an American would be afforded less protection relating to his death than with respect to his detention.

Recently, the Department of Justice's White Paper regarding targeting American citizens abroad who are senior operational al Qaeda leaders (the "White Paper") was leaked to the public.<sup>379</sup> Based

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<sup>369</sup> *Boumediene*, 553 U.S. at 767, 771.

<sup>370</sup> See *id.*; Holder Speech at Northwestern, *supra* note 5.

<sup>371</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (Jackson, J., concurring).

<sup>372</sup> See *supra* notes 316–68 and accompanying text.

<sup>373</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 590 (2004) (Thomas, J., dissenting).

<sup>374</sup> See Becker & Shane, *supra* note 30; *supra* notes 30–31 and accompanying text.

<sup>375</sup> See *Hamdi*, 542 U.S. at 579, 590.

<sup>376</sup> See *id.*

<sup>377</sup> See Holder Speech at Northwestern, *supra* note 5.

<sup>378</sup> See *Hamdi*, 542 U.S. at 507 (plurality opinion).

<sup>379</sup> Michael Isikoff, *Justice Department Memo Reveals Legal Case for Drone Strikes on*

on my experience in the Executive Branch, white papers are often used to explain the legal foundation, in an unclassified form, for executive action. In this case, the White Paper was undoubtedly a sanitized version of a classified opinion (or opinions) from the Department of Justice.<sup>380</sup> This specific White Paper was apparently intended to explain to certain members of Congress the legal reasoning behind the drone policy.<sup>381</sup> Bowing to political pressures, the Justice Department has provided access to members of Congress to the classified legal opinion (or opinions) on which the White Paper is based.<sup>382</sup>

While much remains unknown about the drone policy and the Justice Department's legal rationale, we do know this leaked White Paper provided little additional information to the public regarding the Administration's policy.<sup>383</sup> It primarily restated arguments previously made by Attorney General Holder and Legal Advisor Koh.<sup>384</sup> It acknowledged the need for balancing the American citizen's interests under *Eldridge*, but ignored the higher due process standards imposed in *Hamdi* and *Boumediene*, and is silent on the fact that the government often will have time to provide additional procedural guarantees.<sup>385</sup> Overall, the memo provided little to no further clarification to the American people.<sup>386</sup>

Other than the Obama speech and the Holder Letter, the Administration has not provided further details on the process used to designate individuals as enemy combatants and to place them on the kill list.<sup>387</sup> Instead, the Administration has based its arguments on Al-Aulaqi's public record.<sup>388</sup> In his defense of the Administration's drone policies, President Obama stated that:

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*Americans*, NBCNews.com, Feb. 4, 2013, [http://investigations.nbcnews.com/\\_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite](http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite).

<sup>380</sup> See *id.*

<sup>381</sup> *Id.*

<sup>382</sup> Michael D. Shear & Scott Shane, *Congress to Get Classified Memo on Drone Strike*, N.Y. TIMES, Feb. 7, 2013, at A1.

<sup>383</sup> See Isikoff, *supra* note 379.

<sup>384</sup> See 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 DEPARTMENT OF JUSTICE WHITE PAPER], available at [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf); Holder Speech at Northwestern, *supra* note 5; Koh, *supra* note 338.

<sup>385</sup> See DEPARTMENT OF JUSTICE WHITE PAPER, *supra* note 384, at 2–3.

<sup>386</sup> See *id.*

<sup>387</sup> See Holder Speech at Northwestern, *supra* note 5; Obama Speech on Drone Policy, *supra* note 4.

<sup>388</sup> See Obama Speech on Drone Policy, *supra* note 4.

[W]hen a U.S. citizen goes abroad to wage war against America and is actively plotting to kill U.S. citizens, and when neither the United States, nor our partners are in a position to capture him before he carries out a plot, his citizenship should no more serve as a shield than a sniper shooting down on an innocent crowd should be protected from a SWAT team.

That's who Anwar Awlaki was—he was continuously trying to kill people. He helped oversee the 2010 plot to detonate explosive devices on two U.S.-bound cargo planes. He was involved in planning to blow up an airliner in 2009. When Farouk Abdulmutallab—the Christmas Day bomber—went to Yemen in 2009, Awlaki hosted him, approved his suicide operation, helped him tape a martyrdom video to be shown after the attack, and his last instructions were to blow up the airplane when it was over American soil. I would have detained and prosecuted Awlaki if we captured him before he carried out a plot, but we couldn't. And as President, I would have been derelict in my duty had I not authorized the strike that took him out.<sup>389</sup>

If true, the evidence appears sufficient to justify the President's determination that Al-Aulaqi was an enemy combatant.<sup>390</sup> However, it also appears sufficient to easily persuade a neutral decisionmaker of that fact. Khalid Shaikh Mohammed, Richard Reid, and Zacarias Moussaoui also engaged in acts of terrorism and had overwhelming evidence against them, but they were still informed of their charges, were allowed representation by counsel, and were provided the choice to rebut the charges before a neutral decisionmaker.<sup>391</sup>

No court has ever ruled on the legality of the President's order to designate Al-Aulaqi as an enemy combatant.<sup>392</sup> Because of issues related to standing and the political question doctrine, it is possible no court will ever review this decision or future decisions affecting other Americans.<sup>393</sup> Unchecked power, even if exercised in good faith, con-

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<sup>389</sup> Obama Speech on Drone Policy, *supra* note 4.

<sup>390</sup> *See id.*

<sup>391</sup> Edward A. Adams, *Moussaoui v. The United States: How Due Process Thwarted a Courtroom Jihad*, ABA J., Sept. 2007, at 18; Pam Belluck, *Unrepentant Shoe Bomber Is Given a Life Sentence For Trying to Blow Up Jet*, N.Y. TIMES, Jan. 31, 2003, at A13; Charlie Savage, *Legal Clashes at Hearing for Defendants in 9/11 Case*, N.Y. TIMES, Feb. 15, 2013, at A17 (discussing the rights granted to Khalid Shaikh Mohammed but also stressing some of the differences between a civil and a military trial).

<sup>392</sup> *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8–9 (D.D.C. 2010).

<sup>393</sup> *See id.*



stitutes a threat to liberty. Granting one branch of government unchecked power to kill American citizens is considered by some to be the first step on the road to tyranny.<sup>394</sup> This is all the more reason that critics believe the designation process should involve some kind of neutral decisionmaker to ensure the power of the President is checked.<sup>395</sup> Attorney General Holder attempted to calm fears by saying the President “regularly informs the appropriate members of Congress about [the Executive’s] counterterrorism activities, including the legal framework.”<sup>396</sup> While laudable, and perhaps politically necessary, notification to Congress does not, and cannot, transform an unconstitutional use of power into a constitutional one.<sup>397</sup>

Considering the totality of the circumstances, the President’s actions with respect to Al-Aulaqi were lawful. Al-Aulaqi, by his words and actions, was an enemy of the United States, posed an imminent threat as surely as if he were on the battlefield and pointing a gun at American forces, and was therefore a legitimate military target.<sup>398</sup> It would be simplistic and irresponsible to classify the President’s action as a mere assassination.<sup>399</sup>

However, any assessment as to the legality of the targeted strike against Al-Aulaqi is based on information solely provided by the Executive Branch, and therein lies the problem. How is this information to be verified? Do we simply trust the word of the President? The facts supporting the designation of the next American as an enemy combatant for placement on the kill list may not be so clear. What if that American does not get involved in operational details of an attack, but merely encourages violence or criticizes American policy under his First Amendment rights? What if that American plays no leadership role but merely associates with a group of suspected terrorists? What if the support is given directly to one of the legitimate and lawful programs of a terrorist group? Who is to make these determinations? One can certainly make the case that Al-Aulaqi’s actions were treasonous and he should be put to death. Perhaps so, but

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<sup>394</sup> Bruce Schneier, *Unchecked Police and Military Power Is a Security Threat*, BRUCE SCHNEIER (June 24, 2004), <http://www.schneier.com/essay-045.html> (discussing unchecked power and the threat of tyranny in the context of the 2004 Guantanamo Supreme Court cases).

<sup>395</sup> See McKelvey, *supra* note 32, at 1377.

<sup>396</sup> Holder Speech at Northwestern, *supra* note 5.

<sup>397</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding that constitutional due process requirements cannot be circumvented by mere Congressional authorization).

<sup>398</sup> See *id.*

<sup>399</sup> See Dreyfuss, *supra* note 108, at 254–55 (“Specifically, assassinations are killings that are politically motivated and use subterfuge, while targeted killings are military strikes.”).

even others accused of treason are given some type of hearing where they are allowed to respond to charges before a neutral decisionmaker.

The President appears satisfied with the current drone policy because of its effectiveness and the reduced risk of American casualties.<sup>400</sup> Therefore, it appears likely the United States government will continue to deploy drones.<sup>401</sup> If the war on terrorism expands further, it is likely other Americans will join the ranks of the enemy.<sup>402</sup> Other Americans may be targeted and more legal challenges may arise in our courts.<sup>403</sup> Eventually, a judge may elect to consider the constitutionality of the President's actions with respect to American citizens. In anticipation of this possibility, there are measures Congress and the President should consider implementing to place the President's drone program on firmer legal footing. We now turn to these additional measures.

### III. SUGGESTIONS FOR REINFORCING THE CONSTITUTIONAL DUE PROCESS STANDARD

Under the *Youngstown* framework discussed above, courts are more likely to defer to presidential action when the President is acting consistent with the express will of Congress.<sup>404</sup> Consequently, other than acting under a constitutional amendment specifically authorizing the President to designate Americans as enemy combatants, the President's authority is strongest if he designates American citizens as enemy combatants for the kill list pursuant to express authority from Congress.<sup>405</sup> Courts would presumably be more willing to accept the President's actions if they were subject to review and approval by a neutral body such as a military tribunal or an Article III judge.<sup>406</sup> This is not to say that these guarantees would come at no cost.

Relying on Congress unvaryingly results in additional problems. There is an understandable, institutional reluctance for any White House to pursue or even support congressional action if it believes the President already has constitutional authority to act. The legislative

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<sup>400</sup> See Obama Speech on Drone Policy, *supra* note 4.

<sup>401</sup> See Rohde, *supra* note 3.

<sup>402</sup> See Wexler, *supra* note 107, at 162 ("As home-grown terrorism grows, the number of Americans listed will likely increase as well." (footnote omitted)).

<sup>403</sup> See generally *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 9 (D.D.C. 2010).

<sup>404</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring).

<sup>405</sup> See *id.*

<sup>406</sup> See *id.*

process is unpredictable, frustratingly slow, and often becomes politicized. Congress may well achieve the opposite of the result intended, passing a law that inadvertently limits the President's discretion and hurts the nation's ability to respond to threats. Additionally, the legislative process requires open debate, and discussions about drone operations threaten to expose sensitive foreign relationships and classified methods, capabilities, and operations. Moreover, despite recent public concern over drone strikes, Congress appears to have little appetite to tackle this politically sensitive issue, and I believe it is extremely unlikely that the President would call for legislation under such circumstances.<sup>407</sup>

Review of designations by a neutral body could add to the list of difficulties as well. The involvement of an Article III judge—or any other neutral decisionmaker—in matters of national security raises concerns about inevitable delays because time is often of the essence.<sup>408</sup> From a practical perspective, when the President has instituted a deliberate process to protect against unwarranted harm and to minimize mistakes, his judgments and efforts to protect national security should be given substantial weight by Congress and the courts.

Consequently, any new legislation aimed at providing additional due process protections to American citizens must be consistent with the President's constitutional authority to protect our national security.<sup>409</sup> As White House Counsel, I worked every day to protect the institutional prerogatives of the presidency. Based on my experience, I expect that, as an institutional matter, the White House would likely oppose statutory requirements that are not subject to military necessity, or that do not expressly provide the President with discretion to take action necessary to protect the nation's interests.

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<sup>407</sup> Given this political climate, the legislative proposals discussed in this Article may prove to be purely academic at present. Nevertheless, should future Congresses take up the issue, the proposals discussed herein would provide an appropriate balance between the rights of American citizens and the ability of the President to exercise discretion in dealing with threats to our national security.

<sup>408</sup> See Holder Speech at Northwestern, *supra* note 5 (“The conduct and management of national security operations are core functions of the Executive Branch, as courts have recognized throughout our history. Military and civilian officials must often make real-time decisions that balance the need to act, the existence of alternative options, the possibility of collateral damage, and other judgments—all of which depend on expertise and immediate access to information that only the Executive Branch may possess in real time.”).

<sup>409</sup> Cf. *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring) (“We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief.”).

As a point of qualification, the following recommendations relate only to the decision to designate an American citizen *overseas* as an enemy combatant for purposes of the kill list.<sup>410</sup> The use of drones against Americans located within the borders of the United States raises a host of new concerns beyond the scope of this Article, and triggers other constitutional and statutory provisions.<sup>411</sup> Recently, Attorney General Holder made news when he testified that the President had the authority to use drones to kill Americans in the United States.<sup>412</sup> Critics immediately pounced, arguing the President does not have the constitutional authority to kill an American located in the country without filing charges and bringing that target to trial.<sup>413</sup>

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<sup>410</sup> See *supra* note 13 and accompanying text.

<sup>411</sup> See Catherine Herridge, *Government Plans for Drastic Expansion of Domestic Mini-Drones*, FOXNEWS.COM, Feb. 23, 2013, <http://www.foxnews.com/politics/2013/02/23/government-plans-for-drastic-expansion-domestic-mini-drones/>. The Department of Justice White Paper leaked in February does not reject the possibility that the AUMF authorizes force in the United States. See DEPARTMENT OF JUSTICE WHITE PAPER, *supra* note 384, at 16 (“[T]his paper does not . . . assess what might be required to render a lethal operation against a U.S. citizen lawful in other circumstances.”). Use of the AUMF to justify activities in the United States was also a point of contention with respect to electronic surveillance under the President’s Terrorist Surveillance Program. See 18 U.S.C. § 2511 (2012).

<sup>412</sup> Andrea Mitchell Reports (MSNBC television broadcast Mar. 6, 2013), available at <http://video.msnbc.msn.com/mitchell-reports/51070018#51070018>. On this point, because the President would be acting within the United States, it would be harder for supporters of drone use to argue that *Youngstown* does not apply. See *Goldwater v. Carter*, 444 U.S. 996, 1004–05 (1979) (Rehnquist, J., concurring) (distinguishing the question of which branch has the power to terminate treaties from the facts in *Youngstown* because the former only had effects outside of the United States); *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring) (“I should indulge the widest latitude of interpretation to sustain [the President’s] exclusive function to command the instruments of national force, at least when turned against the *outside world* . . .”) (emphasis added).

<sup>413</sup> Press Release, Senator Rand Paul, Sen. Paul Testimony on Constitutional and Counterterrorism Implications of Targeted Killing (Apr. 24, 2013), available at [http://www.paul.senate.gov/?p=press\\_release&id=780](http://www.paul.senate.gov/?p=press_release&id=780) (“When I filibustered the nomination of John Brennan, I focused on whether the President has the authority to assassinate American citizens on American soil without trial or due process. My critics said I was being absurd because this had not happened yet. But that wasn’t the point. The point was whether or not it could happen in the future.”).

Concerns over the use of military force against Americans within our borders are understandable. Before condemning such actions out of hand, however, we should remember that immediately following the September 11th attacks, President Bush gave the order to shoot down commercial aircraft over U.S. territory if necessary. Dana Milbank, *Cheney Authorized Shooting Down Planes*, WASH. POST, Jun. 18, 2004, at A1. Combat air patrols flew over New York City and Washington, D.C. for weeks following the attacks. Priscilla Jones, *Operation Noble Eagle*, AIR FORCE HIST. STUD. OFF. (Sept. 6, 2012), <http://www.afhso.af.mil/topics/factsheets/factsheet.asp?id=18593>. Our military, armed to repel another attack, conducted “random patrols over urban areas, nuclear power plants, weapons storage facilities, and laboratories.” *Id.* In short, following the extraordinary events of 9/11, we were prepared to use military force within our borders—even if the threat was at the hands of an American citizen.

However, these critics failed to remember that often in responding to an attack or threat, government officials do not know whether the attacker is a citizen or not. Even so, because the use of force within our borders has not been specifically authorized under the AUMF (but neither is it specifically prohibited),<sup>414</sup> because killings in the United States dramatically increase the probability that American citizens will be involved or affected, and because constitutional rights attach to all persons physically within the United States,<sup>415</sup> the courts will likely look upon such actions with a higher degree of scrutiny.

We now examine recommended actions that should enhance the President's legal authority under the *Youngstown* framework and protect the constitutional rights of American citizens by checking the authority of the President.<sup>416</sup>

#### A. *Step 1: Legislation Authorizing the President's Actions and Providing for Limited Congressional Review*

The highest level of executive authority under the *Youngstown* framework is reached when the President acts pursuant to congressional authorization.<sup>417</sup> For this reason, obtaining congressional authorization is essential to ensuring that the President's targeting policies have a strong constitutional basis. I propose four ways in

<sup>414</sup> See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>415</sup> See U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty or property, without due process of law.").

<sup>416</sup> See *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

<sup>417</sup> See *id.* Questioning the legality of long distance drone strikes against Americans overseas raises an ancillary set of difficult questions that are beyond the scope of this Article. Should Congress consider legislation that would apply to long distance killings of any American citizens overseas deemed enemy combatants? What is the difference between killing an American by drone strike and a targeted killing by a missile fired by an Air Force pilot flying 50,000 feet above or a targeted killing by an artillery shell fired by a Marine sergeant fifty miles away? Perhaps the difference is simply an acceptance of a historical practice that commenced at a time the U.S. government had neither the same capability to discern among American and foreign targets as we do today, nor the ability to target and kill with the accuracy we can today. Debating the difference in treatment among long distance killings is beyond the scope of this Article; however, members of Congress may be forced to confront these questions if they decide to move forward with legislation on drone killings.

Furthermore, there has been some concern expressed recently by Human Rights Watch and Amnesty International that the use of drones constitutes a war crime. See Greg Miller & Bob Woodward, *Secret Deal with Pakistan on Drones*, WASH. POST, Oct. 24, 2013, at A1; Kimberley Dozier, *2 Human Rights Groups Criticize US Drone Program*, U.S. NEWS & WORLD REP., Oct. 22, 2013, <http://www.usnews.com/news/politics/articles/2013/10/22/2-human-rights-groups-criticize-us-drone-program>. A full discussion of these concerns is beyond the scope of this Article, however it should be noted that passing domestic legislation, in addition to placing the President on the firmest constitutional footing in this area, would also likely ease the concerns of both foreign allies and international groups that the United States may be engaged in war crimes.

which Congress may authorize and supervise the President's drone policy while granting the Executive enough flexibility to act in the interests of national security.

First, to ease concerns that the authority the President now claims for his office would allow him to place at his discretion any American overseas on the kill list, Congress should codify the definition of enemy combatant in connection with the drone program. As discussed earlier, there are multiple definitions of enemy combatant currently recognized and used by Congress, the Executive Branch, and the courts.<sup>418</sup> There may be legitimate reasons for those differences and for the need for flexibility in other contexts. However, flexibility and uncertainty can be dangerous when the life of an American citizen hangs in the balance. The definition should include factors traditionally found in an enemy combatant definition, such as the requirement that the target be part of an enemy force engaged in hostilities against the United States or its coalition partners.<sup>419</sup> It should reflect the reality that al Qaeda, the Taliban, and their affiliates are forces engaged in hostilities against the United States.<sup>420</sup> Finally, consistent with our rights of freedom of association and freedom of speech, the definition should require more than hostile speech and condemnation of United States policies and American values; it should require active involvement, such as supervising or being involved in operational planning, material or direct operational support, or implementation of terrorist activities.<sup>421</sup> It should not include activities recognized by the Supreme Court as protected under the First Amendment. With respect to American citizens, the definition set out in the Holder Letter appears to meet these conditions: "a U.S. citizen who is a senior operational leader of al-Qa'[e]da or its associated forces, and who is actively engaged in planning to kill Americans."<sup>422</sup>

Second, Congress should require that within a specified period following a presidential enemy combatant status designation, the President formally inform Congress of the name of the American citizen and the reasons for the designation. This should not prove to be a hardship because Attorney General Holder stated the President already "regularly informs the appropriate members of Congress about

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<sup>418</sup> See *supra* Part II.A.

<sup>419</sup> See *id.*

<sup>420</sup> See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>421</sup> Cf. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble.").

<sup>422</sup> Holder Letter, *supra* note 5, at 2.

[the Administration's] counterterrorism activities, including the legal framework."<sup>423</sup> This notification may be in a classified memo or setting, and at the President's discretion, the notification could be limited to a select group of congressional members with appropriate security clearances, such as the Gang of Eight.<sup>424</sup> Notification may also be delayed for a reasonable period if the President determines it is necessary to protect our national security.

Third, legislation should provide that immediately before executing the order to kill an American target, the President must determine that the individual continues to meet the statutory definition of an enemy combatant. The Administration has already disclosed that it requires additional measures before executing a kill order.<sup>425</sup> Consequently, it appears it would not be an additional burden for the legislation to require that the President also determine that: (1) "the individual poses an imminent threat of violent attack against the United States," (2) "capture is not feasible," (3) "the operation would be conducted in a manner consistent with applicable law of war principles," and (4) the individual is physically located outside the United States.<sup>426</sup>

Fourth, if and when an American placed on the drone kill list is targeted and killed, the President should provide formal notification to Congress of the kill, information regarding the circumstances of the kill, and the President's confirmation of his determination that the conditions above had been satisfied. This requirement should not constitute a hardship since President Obama recently confirmed that Congress is informed of every strike.<sup>427</sup> This notification may be in a classified memo or setting, and at the President's discretion, the notification can be limited to a select group of congressional members with appropriate security clearances. The notice should be provided within a specified period of time, subject to military necessity and national security.

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<sup>423</sup> Holder Speech at Northwestern, *supra* note 5.

<sup>424</sup> The Gang of Eight is made up of the bipartisan chairs and ranking members of the House and Senate Intelligence Committees, the Speaker of the House, House Majority Leader, Senate Majority Leader, and the Senate Ranking Member. See 50 U.S.C. § 413b(c)(2) (2006).

<sup>425</sup> Holder Speech at Northwestern, *supra* note 5.

<sup>426</sup> *Id.* It is my belief that, in order to maintain the flexibility the President needs and the authority the Constitution provides, the President must be able to make these determinations in his sole discretion without consulting with or requiring the approval of another branch of government. The decision to execute the kill order means that the target has been located. The window of opportunity to take action may be small, leaving little to no time to consult with or notify Congress.

<sup>427</sup> See Obama Speech on Drone Policy, *supra* note 4.

While Congress would not have the authority to directly stop the President's actions, the requirement of notice would allow Congress some measure of oversight. Congress has routinely required notification of certain executive branch actions as a check on presidential discretion, such as in the case of sensitive covert actions<sup>428</sup> or the introduction of the United States Armed Forces into hostilities.<sup>429</sup> With respect to notices of covert actions, Congress gave the President the ability to limit the information disclosed when essential to meeting extraordinary circumstances affecting vital U.S. interests.<sup>430</sup> If the practical considerations outlined here are observed, congressional review could augment the President's authority without hindering his discretion and flexibility in protecting our nation's safety.

*B. Step 2: Review of Designation by a Neutral Body*

Although the standards and reporting requirements suggested above would provide some check on the exercise of presidential power, the actual decision to designate an American citizen as an enemy combatant would still be solely in the hands of the President. Therein lies the greatest legal vulnerability for the President, considering the limitations on executive power recognized by the Supreme Court in *Hamdi*.<sup>431</sup> Therefore, Congress should also require that a neutral third party, such as an independent Executive Branch board, a military tribunal, or an Article III judge, be involved in the decision to designate a citizen as an enemy combatant. More specifically, legislation should require the Executive Branch to provide (1) an advocate (with appropriate security clearances) to represent the interests of the potential American target in challenging his designation as an enemy combatant; (2) relevant information and exculpatory evidence about the proposed target to the advocate; and (3) some type of proceeding in which the advocate is afforded the opportunity to present arguments and evidence on behalf of the potential target.<sup>432</sup>

Fortunately, we have the existing CSRTs as a workable model. Consistent with the principle articulated by the plurality in *Hamdi*

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428 See MARSHALL CURTIS ERWIN, CONG. RESEARCH SERV., R40691, SENSITIVE COVERT ACTION NOTIFICATIONS: OVERSIGHT OPTIONS FOR CONGRESS 1-2 (2013).

429 War Powers Resolution, 50 U.S.C. §§ 1541-1548 (2006).

430 See ERWIN, *supra* note 428, at 1-2.

431 See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality opinion) ("We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.").

432 See *id.*; 10 U.S.C. § 948k (2012).



that national security interests and military necessity permit flexibility in the due process hearing requirements, the proceeding to determine enemy combatant status for the kill list need not have all the “bells and whistles” of a full-blown criminal proceeding or habeas hearing.<sup>433</sup> Consequently, while it appears absolute discretion in favor of the executive will not satisfy due process requirements, the courts may be willing to defer to the procedures already used in the CSRTs.<sup>434</sup> Consistent with the existing CSRT requirements, in the new drone proceedings the executive branch would provide the American enemy combatant an advocate who would review “information relating to” the target’s possible placement on the kill list, argue on the target’s behalf, and “call witnesses on [the target’s] behalf.”<sup>435</sup> Because the outcome of this process might lead to the death of the target, loosening the restrictions on the advocate’s access to classified information may be a reasonable accommodation. The name of the target would remain classified to the advocate to avoid any conflicts of interest with the advocate’s ethical obligations as a lawyer.<sup>436</sup>

In the CSRTs, the advocate has the opportunity to argue on the target’s behalf in front of “a tribunal of three commissioned military officers [or some other neutral decisionmaker] who [will] determine the [target’s enemy combatant] status by majority vote.”<sup>437</sup> The tribunal “may make only one determination: whether or not the [target] is an ‘enemy combatant’” suitable to be placed on the kill list.<sup>438</sup> All probative evidence is admissible and the neutral decisionmaker must determine that the target is an enemy combatant by a preponderance of the evidence.<sup>439</sup> A decision by a neutral decisionmaker using a process established by law would be binding on the executive. Utilizing procedures similar to those of the CSRTs would appear to satisfy the

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<sup>433</sup> See *Hamdi*, 542 U.S. at 533–34.

<sup>434</sup> See Thomas J. Bogar, *Unlawful Combatant or Innocent Civilian? A Call to Change the Current Means for Determining Status of Prisoners in the Global War on Terror*, 21 FLA. J. INT’L L. 29, 60 (2009).

<sup>435</sup> *Id.* at 61–62.

<sup>436</sup> One potential source of conflict is the attorney’s duty to “keep the client reasonably informed about the status of the matter.” MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(3) (2011).

<sup>437</sup> See 10 U.S.C. § 948d (2012); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; Bogar, *supra* note 434, at 61.

<sup>438</sup> See Bogar, *supra* note 434, at 62.

<sup>439</sup> See *id.* at 61.

requirements under *Hamdi*, and substantially satisfy the requirements under *Boumediene*.<sup>440</sup>

The President may express concerns that involving a neutral decisionmaker unduly frustrates his ability to carry out his national security and foreign affairs responsibilities, and is neither required under the Constitution nor under *Youngstown*.<sup>441</sup> He may object that this procedure would add a hurdle that hinders the Executive's flexibility.<sup>442</sup> Such concerns are legitimate because enemy combatants hide in the shadows, and the U.S. may only have limited opportunities—a small window—to capture or kill them.<sup>443</sup> Involving a third party such as a tribunal to decide the enemy combatant status of an American citizen targeted for a drone killing may limit the President's ability to act quickly within that tiny window of opportunity against military targets.<sup>444</sup> Yet these arguments are undercut by the reality that the Administration already employs a designation process that takes months to complete.<sup>445</sup> Congress, by statute, could provide for expedited procedures for the tribunal in order to alleviate the risk that the President may be unable to act within a window of opportunity. However, increasing flexibility also increases the risk of enhanced judicial scrutiny. The more truncated the process, the more likely the procedures will be subject to attack in our courts on due process grounds.

Some have suggested the creation of a special national security court to make the determination of whether an American citizen is an enemy combatant and therefore eligible to be killed by drone strike.<sup>446</sup>

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<sup>440</sup> See *Boumediene v. Bush*, 553 U.S. 723, 771 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality opinion).

<sup>441</sup> See U.S. CONST. art. II, § 2, cl. 1; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring).

<sup>442</sup> See Holder Speech at Northwestern, *supra* note 5 (“Military and civilian officials must often make real-time decisions that balance the need to act, the existence of alternative options, the possibility of collateral damage, and other judgments—all of which depend on expertise and immediate access to information that only the Executive Branch may possess in real time.”).

<sup>443</sup> See Obama Speech on Drone Policy, *supra* note 4 (“Al Qaeda and its affiliates try to gain foothold in some of the most distant and unforgiving places on Earth. They take refuge in remote tribal regions. They hide in caves and walled compounds. They train in empty deserts and rugged mountains.”).

<sup>444</sup> See Holder Speech at Northwestern, *supra* note 5 (“Some have argued that the President is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of al Qaeda or associated forces. This is simply not accurate. ‘Due process’ and ‘judicial process’ are not one and the same, particularly when it comes to national security.”).

<sup>445</sup> See *supra* notes 30–47 and accompanying text.

<sup>446</sup> Kim Dozier, *CIA Nominee Brennan Says a Special Drone Court Overseeing Deadly Strikes Is Worth Considering*, FoxNews.com, Feb. 15, 2013, [www.foxnews.com/us/2013/02/15/](http://www.foxnews.com/us/2013/02/15/)

While this would address some of the concerns about the current process, given the relatively few instances (we all hope) in which the Executive would be targeting an American citizen, perhaps a less expensive and more efficient alternative to creating a new layer of bureaucracy would be to use the existing Foreign Intelligence Surveillance Court ("FISC").

The Foreign Intelligence Surveillance Act ("FISA")<sup>447</sup> was enacted in 1978 to provide the executive branch with an appropriate means to investigate and counter foreign intelligence threats.<sup>448</sup> FISA created a special process to be followed by the government in order to receive a court order authorizing a search or surveillance for foreign intelligence purposes.<sup>449</sup> FISA requires that the Attorney General file an application that details the facts that lead to a finding of probable cause to believe a target meets the statutory requirements for surveillance under FISA.<sup>450</sup> These applications are reviewed *ex parte* in a classified setting by one Article III judge specially appointed to the FISC by the Chief Justice of the United States.<sup>451</sup> If the application meets the statutory requirements, then the judge must issue the order and the government may commence its search or surveillance.<sup>452</sup>

As Attorney General, I reviewed and approved hundreds of FISA applications, and I know completing and approving an application that satisfies the statutory requirements can be burdensome depending on the circumstances. In an age of instant communication, unfortunately a delay of just an hour can hinder the government's ability to identify and stop terrorist plots. For this reason, FISA allows the Attorney General to authorize an Emergency FISA when necessary, provided the Attorney General believes all statutory requirements under FISA are present, and provided further that the Attorney General submits an application to the FISC within a specified time.<sup>453</sup>

Because of their experience with surveillance requests, members of the executive branch already have experience dealing with the

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cia-nominee-brennan-says-special-drone-court-overseeing-deadly-strikes-is-worth/ (discussing John Brennan's proposal of a national security court to "oversee deadly drone strikes.").

<sup>447</sup> Foreign Intelligence Surveillance Act ("FISA") of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–1871 (2006)).

<sup>448</sup> See 50 U.S.C. § 1802; Shults, *supra* note 350, at 1593.

<sup>449</sup> 50 U.S.C. § 1804.

<sup>450</sup> *Id.*; Shults, *supra* note 350, at 1597.

<sup>451</sup> 50 U.S.C. § 1803(a).

<sup>452</sup> *Id.* § 1805(a).

<sup>453</sup> *Id.* § 1802.

FISC in the national security context. Judges on the FISC already are accustomed to dealing with national security matters. Both lawyers and judges know the importance of acting with deliberate speed to protect our country, while protecting the rights of American citizens. Instead of creating a new court to determine if an American is an enemy combatant, Congress should expand the jurisdiction of the FISC for the limited purpose of establishing a new statutory framework outlining criteria for enemy combatants. Under this proposal, the Attorney General would submit an application detailing facts that satisfy the newly established statutory framework. If the FISC agrees, it would issue a finding that an American target is an enemy combatant. That judicial finding would be all the President would need by law from a neutral decisionmaker before executing a drone strike against that target.

While having an Article III judge determine whether an American is an enemy combatant according to standards established by Congress is substantially more process than an American target currently receives today, we must still ask whether this is sufficient due process when a life hangs in the balance. Yes, there is a neutral decisionmaker involved in the FISA process; however, the FISC operates *ex parte*.<sup>454</sup> Under FISA, the target has no right to be advised of the evidence and charges against him, and no opportunity to rebut those charges.<sup>455</sup> It is one thing for a neutral decisionmaker to rely on an *ex parte* presentation for purposes of conducting electronic surveillance; it is another matter indeed to do so in connection with a decision to designate an American as an enemy combatant for purposes of a drone strike. Furthermore, while an *ex parte* proceeding has the advantage of speed over an adversarial proceeding, the necessity of an *ex parte* proceeding is not so obvious when, by its own admission, the Administration today employs a designation process that takes months to complete.

On balance, I would not recommend expanding the jurisdiction of the FISC to determine enemy combatant status through adversarial proceedings. This would be fundamentally inconsistent with the procedures long used by FISC judges in the surveillance context.<sup>456</sup> Instead, if Congress determines that a potential American target should be entitled to present his case before a neutral decisionmaker, then

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<sup>454</sup> See *id.* § 1803.

<sup>455</sup> See *id.*

<sup>456</sup> See *supra* notes 448–53 and accompanying text.

perhaps the use of a military panel such as CSRTs would be a better alternative.

Whatever new procedures Congress may adopt, the President will rightly be concerned about having the necessary flexibility to act quickly if a target is identified and located.<sup>457</sup> Any legislation must be consistent with military necessity and recognize the President's authority to act as Commander in Chief to protect our country. If the circumstances of war do not permit sufficient time to conduct a CSRT hearing or the completion of a FISA application as the case may be, the legislation should recognize the President's authority to act, followed by a full reporting to Congress.<sup>458</sup>

Finally, I am not oblivious to the difficulty of passing legislation today on controversial subjects such as the exercise of presidential war powers and drone strikes. The poisoned political climate in Congress has, until now, stymied progress on such important issues as immigration and the deficit.<sup>459</sup> If the partisanship that deadlocks today's Congress prevents legislation on drones, then an alternative would be for the President to rely on his own authority to ease fears of an unchecked Executive. For example, he could issue a military order or presidential memorandum formally establishing objective criteria that must be satisfied before the Executive designates an American as an enemy combatant and places him on the drone kill list. The President could also impose on his Administration reporting requirements to Congress of all actions relating to drones and American citizens. Of course, because designations of Americans as enemy combatants relate to national security and are often classified, the President may have already secretly exercised his independent authority to minimize an abuse of power.<sup>460</sup> Unfortunately, presidential action in isolation of congressional legislation can be rolled back by the next administra-

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<sup>457</sup> See *supra* notes 243–45 and accompanying text.

<sup>458</sup> See *id.*

<sup>459</sup> See, e.g., Lori Montgomery, *Bowles-Simpson 2.0 Aims to Cut Through Deficit Debate*, WASH. POST, Apr. 19, 2013, at A19; Julie Pace, *6 Months After Ambitious Inaugural, Obama Saddled by Political Realities Early in 2nd Term*, STAR TRIB., July 20, 2013, <http://www.startribune.com/politics/national/216277181.html>.

<sup>460</sup> Unnamed members of the Administration have suggested an attempt by the Administration to formalize the process by the use of such terms as “codified” approaches. Bin Laden Press Briefing, *supra* note 42. However, there is no real evidence that the President has issued a formal order involving his drone policy. Press Release, White House, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>.

tion and overridden completely by future congressional action. Additionally, no matter how well intentioned, presidential action alone would not be enough to place the President's actions on drones within the first tier of Justice Jackson's framework in *Youngstown*.<sup>461</sup> Nevertheless, while formal presidential action might not materially improve the President's legal position in a subsequent court challenge, such steps would calm the fears of the American people of potential abuses of power and provide—at least to Congress—some predictability and consistency to the designation process, while leaving the President the flexibility to deal with national security threats.

Providing all or some of these protections, or ones similar, will ensure that an American target overseas is afforded more due process under the circumstances, yet also provide the President with the flexibility to keep our country safe. Congressional legislation would supplement the President's constitutional authority, placing the President in the first tier of Justice Jackson's framework in *Youngstown*.<sup>462</sup>

#### CONCLUSION

I am a strong proponent of executive power, and I strongly believe in the use of drones to keep America safe. It is possible that, under the right circumstances, the President of the United States already has constitutional and statutory authority (under the AUMF), acting alone, to designate American citizens as enemy combatants and, if located overseas, to kill them using drones.<sup>463</sup> However, even those who support the President's authority to unilaterally carry out drone strikes should be wary of how this authority would be interpreted by courts in the future.

I advised President Bush on several terrorism-related issues that eventually came before the Supreme Court. Given the public record of Al-Aulaqi's activities, and the process used to designate him as an enemy combatant and place him on the kill list (including, as reported, reliance on multiple classified legal opinions from the Justice Department), I probably would have advised the President that he had the unilateral authority to designate *this* American citizen as an enemy combatant and place him on the kill list. During a time of ongoing conflict, the Commander in Chief must have the discretion and au-

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<sup>461</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

<sup>462</sup> See *id.* at 635.

<sup>463</sup> See U.S. CONST. art. 2, § 2; Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

thority to designate the threats to our national security and to respond appropriately. There is an inherent tension between the rights of the individual, and the safety of the many.<sup>464</sup> Were the decision up to me, I would have concluded that the Executive has sufficient power, under certain circumstances, to identify targets and carry out strikes. But it is difficult to predict how the Court would balance these competing interests.<sup>465</sup>

I agree that the Supreme Court has a role to play. As Justice O'Connor said in *Hamdi*, "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."<sup>466</sup> Consequently, as a matter of caution, I would also have advised the President that if the Supreme Court elected to hear a challenge, I am not sure there are five votes on the Court today to support the President's decision to act alone.

The scope of the President's wartime powers has long been subject to debate. It is possible a politically strong and popular President will not be challenged in the courts for using drone strikes to protect America. Questions involving war powers are often resolved in the political arena, not the courts. Even if the President's actions to kill Americans by drones were challenged, the courts may well find the issue to be a nonjusticiable political question that should be resolved by the elected branches. On the other hand, the recent announcement by Attorney General Holder about authority to use drones in the U.S. may encourage judges to take a second look.<sup>467</sup> Nonetheless, even if the courts do elect to hear a challenge, judges may hear the case and simply defer to the President's judgment and expertise in the national security area.<sup>468</sup>

It is hard to predict how the war on terrorism will evolve, where future battle lines will be drawn, and whether the American public will continue to support our terrorism policies. In the future, enemies may well strike here in this country, and subsequent threats may well come from American citizens. Technology will continue to evolve and change the nature and timing of battlefield decisions. Given the tre-

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<sup>464</sup> Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529–31 (2004) (plurality opinion) (discussing the private interest of a prisoner designated as an enemy combatant).

<sup>465</sup> Cf. *Boumediene v. Bush*, 553 U.S. 723, 831 (2008) (Scalia, J., dissenting) ("Henceforth, as today's opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.").

<sup>466</sup> *Hamdi*, 542 U.S. at 536.

<sup>467</sup> See *Andrea Mitchell Reports*, *supra* note 412.

<sup>468</sup> See *Crockett v. Reagan*, 720 F.2d 1355, 1356–57 (D.C. Cir. 1983) (*per curiam*).

mendous advantages and successes of unmanned aerial drones, it is a virtual certainty that this country and others will expand the use of this technology here and abroad.

New technology is already changing the way wars are fought in the twenty-first century. Long distance targeted killings by drones, artillery, or air-to-ground missiles will become more common.<sup>469</sup> In anticipation of these probabilities, at least with respect to drones, this Article describes a framework that balances the fundamental rights of American citizens with the need for the Commander in Chief to have the flexibility and discretion to deal with evolving national security threats using the most advanced technology.

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<sup>469</sup> See *supra* notes 24–29 and accompanying text.