notice and an opportunity to be heard before the president kills you

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publication information
48 wake forest law review 829 (2013)

repository citation
murphy, richard and radsan, afsheen john, "notice and an opportunity to be heard before the president kills you" (2013). faculty scholarship. 448.
https://open.mitchellhamline.edu/facsch/448

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Notice and an Opportunity to be Heard Before the President Kills You

Abstract
The United States identifies particular people as especially dangerous members of al Qaeda, the Taliban, or associated forces, and then kills them. Critics insist that this targeted killing is illegal; some go so far as to call it assassination. The drone strike that killed Anwar al-Awlaki, an American citizen, generated furious criticism for purportedly violating his due process rights.

In spring 2013, President Obama responded in a wide-ranging speech on national security policy. On the topic of drones, he stated that terrorists are targeted only if they constitute “a continuing and imminent threat to the American people.” He announced that he had signed, the day before, a new Presidential Policy Guidance to codify “clear guidelines, oversight, and accountability.” That was not all. Going forward, he said the administration would consider additional proposals to control targeted killing. Some of these proposals have “virtues in theory,” he said, but present “problems in practice.” President Obama mentioned in particular FISA-style courts and independent, intra-executive oversight boards. In short, the “due process” of targeted killing is evolving, and is still shrouded in some secrecy.

To contribute to this evolution, this Article suggests two proposals based on two traditional elements of due process — notice and an opportunity to be heard before an unbiased decision-maker. Regarding notice, we suggest a default rule of transparency: The United States should publish the names of persons who satisfy its targeting criteria, at least where publication would not unreasonably compromise security. As for an opportunity to be heard, a key problem is to reconcile a hearing with the Constitution’s allocation of the commander-in-chief power to the President. Administrative law’s template for formal adjudication suggests a means to do so. Along these lines, the process for target selection would involve an adversarial (though obviously ex parte) hearing before an administrative judge (“AJ”). Yet the AJ’s decision would be subject to the President’s plenary review, unlike an order from an Article III judge.

One virtue of these proposals is that they do not depend on legislative or judicial action that may never come. They instead are steps that the executive can and should take on its own to honor the Constitution and the laws of war.

Keywords
Targeted killing, Drones, Due process, Notice, Opportunity to be heard, Feasible precaution

Disciplines
Military, War, and Peace | National Security Law

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Mr. Obama... insisted on approving every new name on an expanding "kill list," poring over terrorist suspects' biographies on what one official calls the macabre "baseball cards" of an unconventional war.\(^1\)

It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.\(^2\)

INTRODUCTION

For more than a decade, the United States has identified particular people as members of al Qaeda, the Taliban, and associated forces (collectively, "QTA"), and killed them—usually by missiles from drones. Critics say that these targeted killings, or "personality strikes," amount to murder.\(^3\) If the critics are correct, then President Obama, who has exercised final authority over who is on the kill list, is, besides a Nobel Peace Prize winner, a mass
We disagree. The President's role in approving targets does not make him a murderer. His participation is powerful evidence of the seriousness of the administration's evolving efforts to develop a "due process" that ensures that these strikes are proper and legal. To this end, in May 2013, the President declared in a major speech on national security that he had just signed a Presidential Policy Guidance codifying his administration's long effort to develop "clear guidelines, oversight and accountability" to govern the use of force against terrorists.\(^5\)

The ancient practice of targeted killing does not require high-tech drones to raise well-founded fears of terrible abuse. Killer drones do, however, compound these fears by rapidly accelerating the means of finding and terminating targets. Accordingly, the drone campaign has spawned a vigorous debate over its legality. This debate has largely focused on which legal regime applies: the laws of war (otherwise known as international humanitarian law ("IHL")) or international human rights law ("IHRL").\(^6\) Deciding

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4. Cf. Benjamin Wittes, Is Barack Obama a Serial Killer?, LAWFARE: HARD NAT'L SECURITY CHOICES (Oct. 25, 2010, 3:00 PM), http://www.lawfareblog.com/2010/10/is-barack-obama-a-serial-killer/ (rejecting the conclusion that President Obama is a serial killer but noting that this is the logical implication of the contention that drone strikes are illegal).

5. See President Barack Obama, Remarks of President Barack Obama (May 23, 2013), available at http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama; see also Greg Miller et al., CIA Drone Strikes in Pakistan to Get Pass in 'Playbook,' WASH. POST, Jan. 20, 2013, at A1 (describing efforts to develop a "playbook" to institutionalize clear rules for targeted-killing operations); Scott Shane, Election Spurred a Move to Codify U.S. Drone Policy, N.Y. TIMES, Nov. 25, 2012, at 1 (quoting President Obama on the need to create "a legal structure, processes, with oversight checks on how we use unmanned weapons").

6. On the issue of whether the United States is in an "armed conflict" with QTA subject to IHL, see, e.g., Harold Hongju Koh, Legal Adviser, U.S. Dept. of State, The Obama Administration and International Law: Remarks to the Annual Meeting of the American Society of International Law (Mar. 25, 2010), available at http://www.state.gov/s/1l/releases/remarks/139119.htm ("As a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces."). But see, e.g., Mary Ellen O'Connell, The Choice of Law Against Terrorism, 4 J. NAT'L SECURITY L & POL'Y 343, 368 (2010) (concluding that "peacetime criminal law" provides the correct model for controlling al Qaeda).

between the two legal frameworks is crucial because IHRL, based in
civil law enforcement, imposes much stricter limits on the use of
lethal force.\footnote{See, e.g., Nils Melzer, \textit{Targeted Killing in
International Law} 59 (2008) (observing that human rights law permits
targeted killing “only in the most extreme circumstances, such as to
prevent a concrete and immediate danger of death or serious physical
injury”).}

Although this debate about frameworks is important, this
Article sidesteps it. In point of plain fact, the United States strongly
asserts that it is in an armed conflict with QTA and has legal
authority, consistent with IHL, to target and kill its members.\footnote{See
Koh, \textit{supra} note 6 (“[I]n this ongoing armed conflict, the United
States has the authority under international law, and the responsibility
to its citizens, to use force, including lethal force, to defend itself, including
by targeting persons such as high-level al-Qaeda leaders who are planning
attacks.”).} The United States is unlikely to abandon this stance in the near to
medium term. For that reason, it makes sense for those hoping to
influence policy developments to examine the legal limits on
targeted killing that exist \textit{even in} an armed conflict. Following this
strategy, this Article explores how the constitutional requirement of
due process, along with the related IHL principle of “feasible
precaution,” may be used to impose procedural controls on targeted
killing.

The September 2011 killing of Anwar al-Awlaki, an American
citizen born in New Mexico, put procedural controls back into the
spotlight.\footnote{See Daniel Klaidman, \textit{Kill or Capture: The War on
Terror and the Soul of the Obama Presidency} 264 (2012) (“[P]erhaps no other
action upset liberals and civil libertarians more than the killing of
Anwar al-Awlaki,” which critics “saw as a summary execution carried out
on the basis of secret evidence.”).} Critics used al-Awlaki’s American citizenship to argue
that his extrajudicial killing violated due process under the United
States Constitution.\footnote{See, e.g., Glenn Greenwald, \textit{The
Due-Process-Free Assassination of U.S. Citizens Is Now Reality}, \textit{Salon}
For a detailed and balanced discussion of the legal issues raised by the
killing of al-Awlaki, see generally Robert Chesney, \textit{Who May Be
Killed? Anwar al-Awlaki as a Case Study in the International Legal
Regulation of Lethal Force}, 13 Y.B. Int’l Humanitarian L. 3 (2010).} In our opinion, granting al-Awlaki greater
procedural protections because of an accident of birth is morally and
legally questionable insofar as it obscures the fact that all potential
targets, regardless of citizenship, are entitled to responsible
targeting procedures. Similarly, we have argued elsewhere that due
process, properly understood, should apply whenever the United
States targets someone for death, no matter the person or
geographical location.\footnote{Richard Murphy & Afsheen John Radsan, \textit{Due Process and
Fortunately, we need not resolve the extraterritorial reach of the U.S. Constitution, a problem likely to last as long as the Republic. Regardless of whether American-style due process protects everyone around the world, the laws of war require attackers to use feasible precaution to ensure that their targets are proper objects for attack. For targeted killing, we should expect the requirements of due process and this aspect of feasible precaution to converge. As we explain below, both standards essentially require officials to apply the rule of reason of the canonical Mathews v. Eldridge balancing test to develop procedural controls for targeted killing. The application of these standards should be much different for personality strikes than for tank battles on a conventional battlefield. The former allow for deliberation rather than split-second decisions, and their targets should be selected through careful discussions. It should thus come as no surprise that the law requires formal procedures for targeted killing in ways that would be impracticable for other uses of force during armed conflicts.

Any proposal for a better process should be based on a clear understanding of the current process. Although the President has spoken eloquently about the need to control the use of force against terrorists, current procedures, now codified in a Presidential Policy

the logic of Boumediene v. Bush, 553 U.S. 723 (2008), compels the conclusion that CIA drone strikes against noncitizens outside the United States implicate due process under the U.S. Constitution); see also Gerald L. Neuman, Understanding Global Due Process, 23 GEO. IMMIGR. L.J. 365, 400 (2009) (explaining that Boumediene demonstrates “majority support for the global due process functional approach” to determining the extraterritorial reach of constitutional rights). But see, e.g., Rasul v. Meyers, 563 F.3d 527, 529 (D.C. Cir. 2009) (“[T]he Court in Boumediene disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause.”).

12. Attackers must use feasible precaution both (1) to ensure that they honor the principle of “distinction,” which forbids direct attacks on protected persons or objects, such as peaceful civilians, and (2) to minimize collateral damage that direct attacks on legitimate military targets cause to protected persons or objects. This Article’s focus on the process of target selection implicates the first of these requirements. For further discussion of “feasible precaution,” see generally infra Subpart III.C.


Guidance signed in May 2013, are classified. Some details of the administration’s evolving procedures, however, have appeared in public sources. These sources demonstrate that executive branch officials have made great efforts to develop a reasonable and accurate framework to control targeted killing of members of QTA. Officials claim that, thanks to careful implementation of these procedures, the drone campaign has become fantastically accurate, causing almost no civilian deaths in recent years. If these reports are true, the government arguably already satisfies any demands of due process or feasible precaution. Critics, with some justification, contend that the United States is causing far more collateral damage than it will admit. The truth of the matter, of course, is difficult to discern. Government secrecy and the difficulty of gathering facts “on the ground” impede outsiders from judging the adequacy of the government’s procedures or their application to individual cases.

In addition to the problem of gaps in information, developing a “due process” for a particular context is not a mathematical exercise that yields clear, black-and-white results free of qualitative judgments. Far from mathematics, notions of “due process” evolve out of an extended conversation among interested parties in which concerns over legitimacy, fairness, and accuracy all play their roles. In the American political system, the dominant voice in conversations about due process comes from the federal courts as they spell out the constitutional requirements in authoritative opinions. But the federal courts are not playing this authoritative role regarding targeting procedures for drones, and there is little reason to expect them to assume this role anytime soon.


16. See generally infra Subparts II.A–C (describing the evolution of procedures for selecting targets for personality strikes).


18. See, e.g., Micah Zenko, Politics, Power, and Preventive Action: How Many Civilians Are Killed by U.S. Drones, COUNCIL ON FOREIGN REL. (June 4, 2012), http://blogs.cfr.org/zenko/2012/06/04/how-many-civilians-are-killed-by-u-s-drones/ (summarizing reports on civilian deaths and concluding that “it is safe to assume that Brennan has either ignored such research or purposefully misled the American public”).

19. Id.

20. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 14–52 (D.D.C. 2010) (invoking a variety of procedural grounds to dismiss a case brought by the father of al-
Practically speaking, we are in a situation in which the executive branch determines the demands of due process and feasible precaution based on qualitative, contestable, and secret judgments. For now, it is a due process of internal checks and balances within the executive branch.

Secrecy, uncertain facts, contestable value judgments, and the absence of the courts all create difficulties for those who would assess the legality of the administration's procedures for targeted killing. Ensuring that the United States uses lethal force legally rather than murderously is nonetheless crucial. To that end, this Article, as suggested by its title, presents two recommendations for executive reform—both with deep roots in the ancient principle of fairness that those whom the government wishes to harm should be granted notice and an opportunity to be heard before an unbiased decision maker. To be more specific:

Notice: At first glance, it may seem odd to apply this principle of due process to targeted killing; except in the theater of the absurd, one does not serve a summons and complaint on a person before a missile strike. Yet, as we discuss below, the United States should adopt a default rule of publishing the names of those persons who satisfy its criteria for a personality strike. The United States should, in other words, publish a list of targetable persons (if not targets).

Opportunity to be heard before a neutral decision maker: Borrowing from well-established administrative law, an administrative judge ("AJ") should hold adversarial proceedings to determine whether a person is a legal target.22 These proceedings

Awlaki to enjoin targeting of his son); cf. Eric Holder, Attorney Gen., Attorney General Eric Holder Speaks at Northwestern University School of Law (March 5, 2012), available at http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html (declaring, a few months after the killing of al-Awlaki, the administration's stance that a purely executive process could satisfy due process requirements for targeted killing in the conflict with al Qaeda).

21. Cf. Hamdi v. Rumsfeld, 542 U.S. 507, 597 (2004) (Thomas, J., dissenting) (suggesting that the plurality's efforts to apply due process to detention of enemy combatants were absurd as they led to the conclusion that the CIA would have to give notice to a terrorist before a missile strike).

22. We are not alone in proposing a role for independent administrative adjudication as part of the targeting process. Most notably, in his May 2013 speech, the President suggested that "an independent oversight board in the Executive Branch" could oversee strikes. Obama, supra note 5 (noting this possibility but adding that it might increase bureaucracy "without inspiring additional public confidence"); see also Carla Crandall, Ready . . . Fire . . . Aim! A Case for Applying American Due Process Principles Before Engaging in Drone Strikes, 24 Fla. J. Int'l L. 55, 86–88 (2012) (suggesting that Combat Status Review Tribunals ("CSRT") used by the military at Guantanamo Bay to review whether persons may be held as enemy combatants could serve as a model for adjudicating personality strikes); Neal K. Katyal, Op-Ed., Who Will Mind the Drones?, N.Y. TIMES, Feb. 21, 2013, at A27 (criticizing proposals for a Foreign
would help ensure that a groupthink, prosecutorial mind-set does not take over targeting. Unlike the decisions of an Article III judge, an AJ’s decisions would be subject to plenary presidential review.

Let us set the stage for further discussion in this Article. Part I discusses the scale of the United States’ drone campaign and what is known about targeting criteria. Part II summarizes the procedures that the Central Intelligence Agency (“CIA”), the military, the White House, and Congress have developed for the relatively small percentage of drone strikes that actually involve targeted killing or “personality strikes.” This Part also discusses in some detail Al-Aulaqi v. Obama, in which a federal court pointedly refused to intervene in a targeted killing. Part III provides a brief overview of due process and the IHL concept of “feasible precaution” and explores how these two basic themes support our two suggested reforms. Adopting these reforms would help legitimize targeted killing in the conflict with QTA by making the process more transparent and enhancing its rigor without substantial risk to national security. For those reasons, due process and feasible precaution demand these reforms.

I. THE TARGETS

Legal discussion tends toward abstraction, but the requirements of due process (and feasible precaution) depend on granular detail. To provide as much of that detail as possible, this Part discusses the scale of the drone campaign and then turns to the criteria governing target selection for personality strikes.

Intelligence Surveillance Act (“FISA”)-style Article III court to vet drone strikes; proposing as an alternative “a national security court” housed within the Executive Branch itself). But see Jack Goldsmith, Neal Katyal on a Drone “National Security Court” Within the Executive Branch, LAWFARE: HARD NATIONAL SECURITY CHOICES (Feb. 21, 2013, 8:49 PM), http://www.lawfareblog.com/2013/02/neal-katyal-on-a-drone-national-security-court-within-the-executive-branch/ (suggesting that Katyal’s proposal for an Executive Branch “national security court” would add little to the “extant and pretty robust Executive Branch process for high-value target list decisions”).

23. Cf. text accompanying notes 272–280 (recounting how senior administration officials participated in nominal review of targeting decisions but felt largely powerless to affect them).

24. 727 F. Supp. 2d at 9, 54 (dismissing, on a variety of threshold procedural grounds, a suit brought by al-Awlaki’s father seeking to enjoin targeting of his son).
A. The Scale of the Drone Campaign

The United States has, unsurprisingly, made heavy use of drones inside the “hot” battlefield of Afghanistan. Drone strikes in Afghanistan have tended to create relatively modest controversy and scrutiny, presumably because an armed conflict has plainly existed there.

More controversially, the United States has also launched drone strikes into Pakistan, Yemen, and Somalia. The administration, despite criticism, refuses to account for the number of drone strikes and their precise effects. Several nongovernmental organizations, however, including the Bureau of Investigative Journalism (“BJJ”), the New America Foundation (“NAF”), and the Long War Journal (“LWJ”), maintain databases that attempt to collect and assess comprehensive information for drone strikes outside Afghanistan.

The vast majority of strikes, several hundred, have been aimed at targets in Northwest Pakistan. The pace of strikes into Pakistan greatly accelerated during the first two years of the Obama administration, with fifty-three strikes in 2009 and 118 strikes in 2010. More recently, drone activity has diminished, with seventy strikes in 2011 and forty-eight during 2012. As of September 2013, the NAF estimated that drone strikes in Pakistan had killed between 2,065 and 3,404 people; the LWJ estimated 2,708; and the BJJ estimated between 2,525 and 3,613. Estimates of civilian deaths in Pakistan through September 2013 have been somewhat more varied but generally indicate

26. See id. (noting the “quick[ ] and virtually unnoticed” expansion of drone use in Afghanistan).
29. The Drone War in Pakistan, supra note 28.
30. Id.
31. Id.
32. Id.
increasing success in avoiding collateral damage. According to the NAF, drone strikes in Pakistan have killed between 258 to 307 civilians; in 2012, however, only five of 306 persons killed could be identified as civilians (but 33 had unknown status).\textsuperscript{35} The LWJ estimates that drone strikes in Pakistan have killed 153 civilians; in 2012, civilians accounted for just four of 304 persons killed.\textsuperscript{36} These low figures for recent civilian deaths are broadly consistent with official claims of accuracy in public remarks and leaks to the press.\textsuperscript{37} The BIJ offers a somewhat higher estimate of overall civilian deaths, with a minimum of 427 civilians killed during the course of the campaign; it estimates a minimum of four civilian deaths in 2012.\textsuperscript{38}

The number of drone strikes in Yemen and Somalia has been comparatively small. NAF reported that the United States struck Yemeni targets with drones or aircraft 103 times as of August 30, 2013;\textsuperscript{39} the LWJ reported eighty-one air strikes;\textsuperscript{40} the BIJ reported between fifty-four and sixty-four “confirmed drone strikes.”\textsuperscript{41} The overwhelming majority of these strikes have occurred during the last two years.\textsuperscript{42} For Somalia, the BIJ reported three to nine drone strikes through September 2013.\textsuperscript{43}

The sheer scale of drone strikes and attendant deaths has certainly intensified the controversial nature of the drone campaign as well as debates over its legality. Even so, it bears emphasis that only a subset of the drone strikes—perhaps a small one—includes

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35. The Drone War in Pakistan, supra note 28 (reporting percentages of casualties among “militants,” “civilians,” and “unknowns”).
37. See, e.g., Brennan, supra note 17 (describing civilian casualties from drone strikes as “exceedingly rare”).
38. Serle, supra note 34; see also Pakistan Drone Statistics Visualized, BUREAU INVESTIGATIVE JOURNALISM (July 2, 2012), http://www.thebureauinvestigates.com/2012/07/02/resources-and-graphs/.
41. Serle, supra note 34; see also Yemen: Reported U.S. Covert Actions 2013, BUREAU INVESTIGATIVE JOURNALISM (Jan. 3, 2013), http://www.thebureauinvestigates.com/2013/01/03/yemen-reported-us-covert-actions-2013/.
“targeted killings” or “personality strikes” that have been launched against particular people already on a kill list.44 Most strikes, at least inside Pakistan, have been “signature strikes” aimed at groups of men whose identities may be unknown but are believed to be militants due to their patterns of behavior.45

B. Targeting Criteria for Personality Strikes

Official operational control over drone strikes outside Afghanistan has been split between the CIA and the military’s Joint Special Operations Command (“JSOC”), sometimes known as the President’s “secret army.”46 The CIA has controlled drone strikes in Northwest Pakistan;47 the CIA and JSOC have shared control over strikes in Yemen;48 and JSOC has controlled strikes in Somalia.49

On some levels, jurisdictional distinctions have become less important given the high level of cooperation between the CIA, the Defense Department, and the centralized control at the White House.50 Still, some aspects of the distinction may have legal significance. JSOC’s authority flows from an executive order and the Authorization for the Use of Military Force (“AUMF”) that


45. See Entous et al., supra note 44; see also Miller et al., supra note 5 (reporting CIA officials’ claim that signature strikes have killed more senior terrorist operatives than personality strikes). The standards for signature strikes have themselves sparked controversy. See Becker & Shane, supra note 1 (quoting a senior official for the State Department’s joke that “when the C.I.A. sees ‘three guys doing jumping jacks,’ the agency thinks it is a terrorist training camp”).


47. Adam Entous, U.S. Acknowledges Its Drone Strikes, WALL ST. J., June 16–17, 2012, at A9 (noting the widely conceded but officially unconfirmed fact that “the CIA conducts drone strikes against militants in the tribal areas of Pakistan”).


49. See Entous, supra note 47 (noting that the CIA has conducted strikes in Yemen and Pakistan but mentioning nothing about Somalia).

50. See, e.g., Greg Miller & Julie Tate, Since Sept. 11, CIA’s Focus Has Taken Lethal Turn, WASH. POST, Sept. 2, 2011, at A1 (reporting that the “comingling at remote bases” of CIA and military officials “is so complete that U.S. officials ranging from congressional staffers to high-ranking CIA officers said they often find it difficult to distinguish agency from military personnel”).
Congress passed in the immediate aftermath of 9/11. These two sources of authority combine to give JSOC "latitude to hunt broadly defined groups of al-Qaeda fighters, even outside conventional war zones." The CIA's authority, on the other hand, flows from a presidential finding "described as more narrow."

Whatever classified distinctions may exist between CIA and JSOC targeting authority, they do not figure in public pronouncements. The administration does not delve into organizational details and continues to claim broad authority to target and kill persons who are "part of al-Qa'ida, the Taliban, and associated forces." This claim creates two major definitional problems. First, what does it mean to be a "part" of any of these entities? This definitional problem is endemic to noninternational armed conflicts in which an enemy is a nonstate, organized, armed group that does not wear uniforms or otherwise clearly distinguish itself from the peaceful civilian population. Second, what does it mean to be an "associated force"? Shedding some light on this question, Jeh Johnson, the former General Counsel for the Department of Defense, explained that an "associated force" has two characteristics: "(1) [it is] an organized, armed group that has entered the fight alongside al Qaeda, and (2) it is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners." His definition excludes al Qaeda sympathizers unconnected to any organized armed force. By contrast, it captures organizations such as al Qaeda in the Arabian Peninsula ("AQAP"), which operates primarily in Yemen, and al-Shabab, which operates primarily in Somalia.
The government refers to targeted killing of known individuals as "personality strikes." Administration officials have emphasized that mere membership in QTA is not sufficient to merit targeting. In his May 2013 speech, the President declared that individuals outside the Afghan theater are targeted only if they "pose a continuing and imminent threat to the American people." Although this standard has been characterized as toughening the requirements for a strike, it is broadly consistent with earlier remarks by high-level administration officials who had limited targets to those who pose a "significant threat" to United States interests.

John Brennan, President Obama's leading adviser on counterterrorism, now Director of the CIA, explained as follows:

I am not referring to some hypothetical threat—the mere possibility that a member of al-Qa'ida might try to attack us at some point in the future. A significant threat might be posed by an individual who is an operational leader of al-Qa'ida or one of its associated forces. Or perhaps the individual is himself an operative—in the midst of actually training for or planning to carry out attacks against U.S. interests. Or perhaps the individual possesses unique operational skills that are being leveraged in a planned attack. The purpose of a strike against a particular individual is to stop him before he can carry out his attack and kill innocents. The purpose is to disrupt his plots and plans before they come to fruition.

On this view, the United States might target a bomb maker, a person training to carry out a bombing, or a person who orders or organizes bombings, but not, absent further information, a run-of-the-mill al Qaeda foot soldier.

Brennan's insistence that only especially dangerous persons are targeted is consistent with statements from Harold Koh, Legal Adviser for the State Department during the first Obama term,


57. See, e.g., Becker & Shane, supra note 1 ("Mr. Obama had approved not only 'personality' strikes aimed at named, high-value terrorists, but 'signature' strikes that targeted training camps and suspicious compounds in areas controlled by militants.").

58. Obama, supra note 5; cf. infra text accompanying notes 73–74 (discussing the administration's elastic concept of "imminence").

59. Brennan, supra note 17 ("We do not engage in lethal action in order to eliminate every single member of al-Qa'ida in the world .... Rather, we conduct targeted strikes because they are necessary to mitigate an actual ongoing threat—to stop plots, prevent future attacks, and save American lives."); see also Miller et al., supra note 5 (reporting that the Obama administration is developing a "playbook" to govern targeted killing that requires that a target pose a specific threat to Americans).

60. Brennan, supra note 17.
former Dean of the Yale Law School, and leading human rights lawyer. According to Koh, he would approve a target only where: (1) the target is a "senior" member of al Qaeda rather than an easily replaceable low-level member; (2) the target is "externally focused" on attacking American interests; and (3) there is evidence that the target was plotting a strike. In Koh's view, where these prerequisites are satisfied, the United States may attack under the doctrine of self-defense, which permits a state to respond to a "continuing and imminent threat," independent of a struggle intense enough to qualify as an armed conflict.

Several other conditions must be satisfied before the United States will strike. Capture when feasible is categorically preferred to killing because, in addition to any legal concerns, capture enhances possibilities for gathering intelligence. Strikes will not proceed where they would infringe national sovereignty under international law. This means that a strike requires either (1) that the country in which the target is located consents to the strike or (2) that this country has demonstrated an unwillingness or inability to take steps to eliminate the threat. Also, all strikes must satisfy the law of war's basic requirements of "distinction" and "proportionality." Distinction requires an attacker to ensure that the target is a legitimate object of attack rather than, for instance, a peaceful civilian. Proportionality requires an attacker to ensure that an attack does not cause excessive collateral damage to peaceful civilian interests.

C. The Not-So-Special Case of U.S. Citizens

The United States justifies its operations against QTA under IHL and as a matter of legitimate self-defense. When conducting an attack in an armed conflict, a state is free to target its own citizens who have joined the opposition—an American operating a German tank in World War II was a perfectly legitimate target for American fire. As a more recent example, the targeting of Anwar al-

61. KLAIDMAN, supra note 9, at 219.
62. Id. For discussion of the self-defense rationale as justification for attacks on al Qaeda, see generally Anderson, supra note 6.
63. KLAIDMAN, supra note 9, at 218; see also Brennan, supra note 17 (“[O]ur unqualified preference is to only undertake lethal force when we believe that capturing the individual is not feasible.”).
64. Brennan, supra note 17.
65. See Koh, supra note 6 (“[T]he Obama Administration is firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts.”) (emphasis omitted).
66. See, e.g., id. (defining “distinction”).
67. See, e.g., id. (defining “proportionality”).
68. See id. (asserting both armed combat and self-defense rationales for attacks against al Qaeda).
Awlaki, an American citizen, raised strong political and legal concerns. He was located, after all, on a less conventional battlefield, and the United States had time to prepare for his killing.

In response to the legal concerns, the Office of Legal Counsel ("OLC") of the Department of Justice issued a classified memo to executive branch officials.69 Regarding al-Awlaki's Fourth Amendment and due process rights, the memo observed "what was reasonable, and the process that was due, was different for Mr. Awlaki than for an ordinary criminal."70 To support this contention, the memo stated that American citizens who join an enemy in an armed conflict can "be detained or prosecuted in a military court just like noncitizen enemies."71 Examples from other contexts were helpful; court cases involving high-speed chases and pursuit of fleeing suspects establish that it is "constitutional for the police to take actions that put a suspect in serious risk of death in order to curtail an imminent risk to innocent people."72

Applying judicial precedents to al-Awlaki's circumstances placed great weight on the meaning of an "imminent" threat. Al-Awlaki might have been planning AQAP terrorist attacks, but he was not, by any stretch, driving at extreme speed away from the police and immediately threatening other drivers and pedestrians. The OLC thus argued for a broad understanding of "imminence" under which "an individual poses an 'imminent threat' of violent attack against the United States where he is an operational leader of al-Qa'ida or an associated force and is personally and continually involved in planning terrorist attacks against the United States."73 Thus, "an enemy leader who is in the business of attacking the


70. Savage, supra note 69 (summarizing OLC memo based on discussions with anonymous officials).

71. Id.

72. Id.; see also Scott v. Harris, 500 U.S. 372, 385–86 (2007) (holding that use of deadly force in a high speed car chase was justified under the Fourth Amendment "reasonableness" standard); Tennessee v. Garner, 471 U.S. 1 (1985) (holding that a statute allowing the use of deadly force against an unarmed and nondangerous suspect was unconstitutional).

73. DOJ White Paper, supra note 69, at 8.
United States whenever possible” may pose an imminent risk “even if he is not in the midst of launching an attack at the precise moment he is located.”

The upshot of OLC’s analysis was that al-Awlaki, like any other senior operational member of QTA, could be targeted for a drone strike as an “imminent threat.” This targeting authority was subject to the qualifications that a deadly attack could not go forward if capture were feasible and that any strike had to comply with the laws of war. These qualifications, in turn, did not require preferential treatment of al-Awlaki because of his American citizenship.

II. PROCEEDURES FOR TARGETED KILLING

Laying out the current procedures for targeted killing is difficult for several reasons. First, the relevant information is largely secret. Second, the leaks and interviews that have disclosed some procedures are incomplete and may be self-serving. Third, these procedures continue to evolve.

Notwithstanding these difficulties, publicly available information tells the following story: Outside Afghanistan, responsibility for drone strikes has been split between the JSOC and the CIA. These two agencies have maintained independent but overlapping lists of about two dozen approved targets. The two agencies follow different procedures for assembling their lists and are subject to different sorts of congressional oversight. Recently, the White House has taken significant steps to centralize authority over targeted killing. Targeted killing commands attention at the very highest levels of the executive branch, including, in some cases, vetting by the President.

74. Savage, supra note 69.
75. DOJ White Paper, supra note 69, at 16.
76. Id.
77. See Brennan, supra note 17 (“[O]ur unqualified preference is to only undertake lethal force when we believe that capturing the individual is not feasible”).
78. Kimberley Dozier, Who Will Drones Target? Who in the US Will Decide?, ASSOCIATED PRESS (May 21, 2012, 1:49 PM), http://bigstory.ap.org/content/who-will-drones-target-who-us-will-decide (reporting that, as of May 2012, the DOD’s list had about two dozen names).
79. See, e.g., id. (“White House counterterror chief John Brennan has seized the lead in guiding the debate on which terror leaders will be targeted for drone attacks or raids, establishing a new procedure to vet both military and CIA targets.”).
80. See, e.g., Becker & Shane, supra note 1 (discussing President Obama’s direct involvement in making “kill list” determinations).
A. The JSOC Process

The military has developed general procedures to help ensure that it strikes proper targets and minimizes collateral damage. In papers filed in the Al-Aulaqi litigation, Defense officials confirmed that these targeting procedures apply to the specific task of personality strikes. These procedures require both “vetting” and “validation.”

Vetting requires a combatant command to “engage the intelligence community (IC) and other organizations subject matter experts (SMEs) to establish a reasonable level of confidence in a candidate target's functional characterization based on a review of the supporting intelligence.” Vetting concludes with a formal vote among intelligence community subject-matter experts on the “validity of the target intelligence and any identified intelligence gain/loss concerns.” An attack does not require unanimous approval among these experts, but absence of consensus is an “indication[] of evaluated operational and strategic risk” that a commander should consider.

Validation requires, among other things, that a strike against a vetted target comply with all pertinent laws of war and rules of engagement. For that reason, military lawyers have a significant role to play. A staff judge advocate “must be immediately available

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81. See generally JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-60: JOINT TARGETING (2007), available at http://www.aclu.org/files/dronefoia/dod/drone_dod_jp3_60.pdf (detailing the military’s “joint targeting” process). For confirmation that the military uses these procedures for drone strikes, see Declaration of Jonathan Manes at Exhibit B, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10cv-1469 (JDB)). The Herrington letter was sent to the ACLU in response to a request for “records relating to the use of unmanned aerial vehicles—commonly known as ‘drones’—for the use of targeting and killing individuals since September 11, 2001.” Id. The letter noted, “[W]e have informed you that, generally speaking, weapons fired by drones are treated identically to weapons fired by other aircraft.” Id. Accompanying the letter was a set of PowerPoint slides explaining the Joint Targeting Cycle. Id. at Exhibit A; see also GOLDSMITH, supra note 3, at 135–42 (summarizing detailed military rules on targeting and the extensive role that members of the JAG Corps play in implementing them); Geoffrey S. Corn & Lt. Col. Gary P. Corn, The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens, 47 TEX. INT'L L.J. 337, 339 (2012) (providing an extensive discussion of “[h]ow operational commanders select, attack, and assess potential targets and how the LOAC reflects the logic of military doctrine related to this process”); Gregory S. McNeal, Are Targeted Killings Unlawful? A Case Study in Empirical Claims Without Evidence, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 326, 328–31 (Finkelstein et al. eds., 2012) (describing military's targeting procedures for minimizing collateral damage).
82. JOINT CHIEFS OF STAFF, supra note 81, at II-7.
83. Id. app. at D-6.
84. Id. app. at D-7.
85. Id. at II-8.
and should be consulted at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations." Validation is not permanent and should be "revisited as new intelligence becomes available."

For targeted killing, it is critical to develop reliable intelligence that a particular person is an appropriate target. To satisfy this need in Afghanistan, the military applied a categorical rule that required "two verifiable human sources" and "substantial additional evidence" to justify placing a person on a "joint integrated prioritized targeting list." Yet determining whether available intelligence is good enough to justify targeting depends in large part on the sound judgment of those who gather and assess the underlying facts.

The Obama administration developed a "nominating" process for interagency review of the military's targets. This process included regular meetings run by the chairman of the Joint Chiefs of Staff via secure video teleconference. These meetings also included up to one hundred officials, including representatives from the State Department, the National Counterterrorism Center, and the White House. A press account described these meetings as "a grim debating society that vets the PowerPoint slides bearing the names, aliases and life stories of suspected members of Al Qaeda's branch in Yemen or its allies in Somalia's Shabab militia." Meetings could be "contentious," sometimes requiring "five or six sessions for a name to be approved." Approvals were not permanent—"[i]f a target isn't captured or killed within 30 days after he is chosen, his case must be reviewed to see if he's still a threat." Nominations vetted by this process have been subject to President Obama's approval. As discussed below, the military's interagency process has now been supplemented or replaced by a process led by White House officials.

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86. Id. app. at E-6.
87. Id. at II-8.
89. Dozier, supra note 78.
90. Id.; see also Becker & Shane, supra note 1.
91. Becker & Shane, supra note 1.
92. Id. (stating the that "the spirit of the exchanges" is illustrated by persons asking questions such as "What's a Qaeda facilitator?" or "If I open a gate and you drive through it, am I a facilitator?").
93. Dozier, supra note 78.
94. KLAIDMAN, supra note 9, at 204–05 ("So intimate was Obama's involvement with JSOC that he personally signed off on each kill or capture operation conducted in Yemen and Somalia."); Becker & Shane, supra note 1.
95. See infra Subpart II.C (discussing recent centralization of procedures at the White House).
JSOC drone strikes fall within the oversight of the armed services committees in Congress. Concerns have been expressed that the military is not subject to the same statutory requirements for prompt reporting as the CIA. Oversight of the CIA by the intelligence committees is considered better. Responding to this disparity, a senior Senate aide indicated that the Senate Armed Services Committee would "catch up." Time may tell.

B. The CIA Process

A February 2011 article in Newsweek outlined the CIA's target selection, describing a system in which the CIA's Counterterrorism Center chooses targets subject to multilevel review by agency attorneys. According to Michael Scheuer, former head of the CIA's bin Laden unit, analysts first assemble "a dossier" on a potential target including a "two-page document," along with "an appendix with supporting information, if anybody wanted to read all of it." Agency lawyers, whom Scheuer described as "very picky," review the dossier to determine whether targeting is justified. As part of this legal review, lawyers within the Counterterrorism Center "write a cable asserting that an individual poses a grave threat to the United States." These cables are said to be "legalistic and carefully argued, often running up to five pages."

The approval of a target requires further review by higher-level attorneys within the agency and concurrence from the CIA's General Counsel. According to former Acting CIA General Counsel John Rizzo, some targets are rejected at this stage due to lack of evidence. He recalled that "[s]ometimes the justification would be that the person was thought to be at a meeting . . . . It was too squishy."

96. Andru E. Wall, Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action, 3 HARV. NAT'L SECURITY J. 85, 102 (2011) ("[A]ll activities conducted under Title 10 authorities are subject to oversight by the armed services committees and, for example, commanders of special operations forces regularly brief the armed services committees on their clandestine activities.").

97. Miller, supra note 51 (noting that it may take days for the Senate Armed Services Committee to receive a report of a JSOC drone strike).

98. Id.


100. Id.

101. Id.

102. Id.

103. Id.

104. Id.

105. Id.
During Rizzo's tenure, which ended with his retirement in 2009, the agency had about thirty people targeted at a given time.¹⁰⁶

Later reporting in May 2012 indicates that "a select number of high-ranking staff can preside over the debates run by the agency's Covert Action Review Group" over whom to target.¹⁰⁷ At the end of the process, the list of targets is forwarded to the CIA's Counterterrorism Center to carry out the strikes.¹⁰⁸ Unlike the military, the CIA has run a "cloistered selection process" with little interagency participation.¹⁰⁹ But, as with the military, the CIA's target selections are now subject to centralized review at the White House.¹¹⁰

The CIA is required by statute to report all covert actions to high-ranking members of the Senate Select Committee on Intelligence ("SSCI") and the House Permanent Select Committee on Intelligence.¹¹¹ If the CIA is indeed running a drone program, it would be considered a "covert action" because there is no official acknowledgement of an activity meant to affect political conditions in other countries. One congressional staffer for the SSCI reported that the committee is "notified of specific operations within a day or so of them taking place."¹¹² This same staffer explained that, where the CIA intends a "new" type of activity, the committees "are generally told about it in advance."¹¹³ To give an example of advance notice, Senator Saxby-Chambliss observed that the strike against al-Awlaki "was talked about all the way to its conclusion" and that "[w]e were briefed any number of times during the process, and also on the final authorization of what could take place."¹¹⁴ Also, as "part of a marked increase in congressional attention paid to the agency's targeted killing program over the last three years," staff members from the intelligence committees make a monthly trip to CIA headquarters to review video of the strikes and the intelligence on which the strikes are based.¹¹⁵ Commenting on these

¹⁰⁶ Id.
¹⁰⁷ Dozier, supra note 78.
¹⁰⁸ Id.
¹⁰⁹ Becker & Shane, supra note 1.
¹¹⁰ Dozier, supra note 78.
¹¹³ Id.
¹¹⁴ Id.
¹¹⁵ Ken Dilanian, Congress Zooms in on Drone Killings, L.A. TIMES (June 25, 2012), http://www.latimes.com/news/nationworld/world/middleeast/la-na-drone-oversight-20120625,0,7967691,full.story (quoting Senator Diane Feinstein, chair of the SSCI, that "Committee staff has held 28 monthly in-depth oversight meetings to review strike records and question every aspect of the program including legality, effectiveness, precision, foreign policy
meetings, a senior staff member stated, "I don't know that we've ever seen anything that we thought was inappropriate." In sum, the clues from the public record suggest that Congress is trying to conduct appropriate oversight of this counterterrorism activity.

C. Increased Centralization by the White House and the Playbook

The White House provides another check on the drone campaign. The process for targeted killing evolved considerably during 2012 as the White House centralized its control, concentrating authority in John Brennan, at that time Deputy National Security Advisor for Homeland Security and Counterterrorism, and Assistant to the President. According to reports in late 2012, the system operates "like a funnel, starting with input from half a dozen agencies and narrowing through layers of review until proposed revisions [to the target list] are laid on Brennan's desk, and subsequently presented to the president." Lists are subject to review every three months by an interagency process led not by the military but by the National Counterterrorism Center ("NCTC"), an agency formed in the aftermath of 9/11 that "is staffed by personnel from multiple departments and agencies from across the Intelligence Community." This interagency review process includes participants from the CIA, the State Department, and the military.

Absent objections, which have been "rare" in the interagency process, the next step for adding a name has been discussion by a panel of National Security Council officials that also includes high-ranking officials from the State Department, the Pentagon, the NCTC, the CIA, and the FBI. Final approval for adding a name rests with the White House. President Obama's role is considerable, but he does not appear to be immersed in the details of the process. Instead, he "approves the implications and the care taken to minimize noncombatant casualties"); cf. id. (quoting a former senior CIA official who left the agency in 2009 that "[d]uring my time, the committees didn't do any oversight on drone strikes to speak of").

116. Id.
117. Dozier, supra note 78; Greg Miller, U.S. Set to Keep Kill Lists for Years, WASH. POST, Oct. 24, 2012, at A1 ("Targeted killing is now so routine that the Obama administration has spent much of the past year streamlining the processes that sustain it.").
118. Miller, supra note 117.
119. Id. (discussing NCTC's role in interagency review); see also About the National Counterterrorism Center, NAT'L COUNTERTERRORISM CENTER, http://www.nctc.gov/about_us/about_nctc.html (last visited Sept. 25, 2013) (describing the NCTC).
120. Miller, supra note 117.
121. Id.
122. Id.
criteria for lists and signs off on drone strikes outside Pakistan, where the CIA director decides when to fire."

Media reports in early 2013 revealed that the White House was about to complete a year-long effort to write a "playbook" designed "to establish clear rules for targeted-killing operations" that are more "consistent and rigorous." These efforts culminated in May 2013 with President Obama's signing of a classified Presidential Policy Guidance ("PPG"). According to reports, the PPG's controls on targeted killing outside an overt war zone are broadly consistent with the 2012 reforms. Nominations for the targets involve multiple agencies, including the State Department. Actual drone strikes require White House approval. The CIA will continue to control strikes in Pakistan for some period of time, but there will be a review every six months to determine whether control should be handed to the military.

D. Absent Courts

A primary complaint against targeted killing, particularly of an American citizen, has been the lack of judicial authorization. It is not true, though, that there has been no judicial involvement at all. Courts have heard—but rejected—several challenges to the substance and the secrecy of the targeted killing campaign.

The most notable challenge was brought by the father of al-Awlaki. This suit claimed that the government's decision to target al-Awlaki violated his Fourth Amendment right to be free of unreasonable seizure, violated his Fifth Amendment right to due process, and was actionable under the Alien Tort Statute. Based on these claims, al-Awlaki's father sought to enjoin the government "from intentionally killing Anwar Al-Aulaqi 'unless he presents a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be
employed to neutralize the threat.”¹³⁰ The suit also sought to force disclosure of the government’s targeting criteria.¹³¹

Judge Bates dismissed the lawsuit without reaching the merits. He devoted much of the opinion to explaining why the father lacked standing. Anwar al-Awlaki, according to Judge Bates, could have gone to court himself to contest his targeting, either by turning himself in or, if he were disinclined to spend his life in prison, through videoconferencing.¹³² Further, it was far from clear that the father’s interests aligned with the son’s, given evidence that the younger al-Awlaki wanted nothing to do with the American court system.¹³³

The court’s deferential attitude toward the President and his senior officials on foreign affairs and military functions infused the entire opinion.¹³⁴ This attitude was most prominent in the court’s treatment of targeting as a political question.¹³⁵ On that issue, the court observed that “[a]n examination of the specific areas in which courts have invoked the political question doctrine reveals that national security, military matters and foreign relations are ‘quintessential sources of political questions.’”¹³⁶ Courts generally lack both authority and competence to resolve such questions. Authority is lacking because the Constitution delegates national security to the political branches.¹³⁷ Competence is lacking because courts have “no covert agents, no intelligence sources, and no policy advisors.”¹³⁸ The necessary determinations require “delicate, complex policy judgments with large elements of prophecy, and are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility.”¹³⁹

¹³⁰. Al-Aulaqi, 727 F. Supp. 2d at 8.
¹³¹. Id.
¹³². Id. at 18–19 (discussing “next friend” standing).
¹³³. Id. at 20–21, 33 (noting that the absence of evidence suggesting al-Awlaki wished to pursue a case in federal court and that his interests therefore diverged from those of his father).
¹³⁴. See, e.g., id. at 43 (observing that it would be “extraordinary for this Court to order declaratory and injunctive relief against the President’s top military and intelligence advisors, with respect to military action abroad that the President himself is alleged to have authorized”).
¹³⁵. See generally id. at 44–52 (applying political question doctrine to plaintiff’s claims).
¹³⁶. Id. at 45 (quoting El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 841 (D.C. Cir. 2010) (en banc)).
¹³⁷. Id. (“[N]ational security and foreign relations . . . involve the exercise of a discretion demonstrably committed to the executive or legislature.”) (quoting El-Shifa, 607 F.3d at 841).
¹³⁸. Id. (quoting Schneider v. Kissinger, 412 F.3d 190, 196 (D.C. Cir. 2005)).
Judge Bates, after making these general observations, hammered home his conclusion in a passage worth quoting at length that he lacked authority to determine al-Awlaki's father's claims:

Judicial resolution of the "particular questions" posed by plaintiff in this case would require this Court to decide: (1) the precise nature and extent of Anwar Al-Aulaqi's affiliation with AQAP; (2) whether AQAP and al Qaeda are so closely linked that the defendants' targeted killing of Anwar Al-Aulaqi in Yemen would come within the United States's current armed conflict with al Qaeda; (3) whether (assuming plaintiff's proffered legal standard applies) Anwar Al-Aulaqi's alleged terrorist activity renders him a "concrete, specific, and imminent threat to life or physical safety," ... and (4) whether there are "means short of lethal force" that the United States could "reasonably" employ to address any threat that Anwar Al-Aulaqi poses to U.S. national security interests.... Such determinations, in turn, would require this Court, in defendants' view, to understand and assess "the capabilities of the [alleged] terrorist operative to carry out a threatened attack, what response would be sufficient to address that threat, possible diplomatic considerations that may bear on such responses, the vulnerability of potential targets that the [alleged] terrorist[] may strike, the availability of military and nonmilitary options, and the risks to military and nonmilitary personnel in attempting application of non-lethal force."... Viewed through these prisms, it becomes clear that plaintiff's claims pose precisely the types of complex policy questions that the D.C. Circuit has historically held non-justiciable under the political question doctrine.140

Because the Al-Aulaqi opinion represents the views of just one federal judge, we should be careful about drawing too many conclusions from it. Still, this opinion, along with others on which it relies,141 sends the unmistakable message that courts should think long and hard before interfering with matters beyond their expertise. The court's analysis, at its heart, rests on a realistic assessment that it would be very bad for the judiciary, given its lack of relevant authority and competence, to second-guess the executive on a targeted killing. This is consistent with a pattern of judicial deference to the executive on matters of national security.142

140. Id. at 46 (citations to pleadings and motion papers omitted).
141. See El-Shifa, 607 F.3d at 844 (dismissing claims arising out of United States' attack on a pharmaceutical plant in Sudan; observing that "[i]f the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target").
That said, it bears noting that the court’s deployment of the political question doctrine in *al-Aulaqi* was naturally colored by the facts of the case. Al-Awlaki had publicly and vehemently encouraged terrorist strikes against United States interests. In addition to this propaganda role, the government claimed that he had shifted into an operational role, actively participating in plans to blow up several airplanes. So, except for the head of al Qaeda, it would have been difficult for the government to choose a more “reasonable” sounding target. Courts, in theory, are supposed to dispose of threshold issues without taking a “sneak peak” at the merits, but the facts of the *al-Aulaqi* case must have made it easier for the court to dismiss at the threshold.

Judges do, under some circumstances, intervene in national security and military matters, as recent cases such as *Hamdi v. Rumsfeld* and *Boumediene v. Bush* emphatically demonstrate. Intervention is more likely where (1) the government’s conduct seems clearly unreasonable and (2) national security concerns seem less urgent. Suppose that the government claimed authority to kill anyone who ever said something nice about

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on threshold grounds of national security cases relating to extraordinary renditions, detentions, and alleged torture); Robert J. Pushaw, Jr., The “Enemy Combatant” Cases in Historical Context: The Inevitability of Pragmatic Judicial Review, 82 NOTRE DAME L. REV. 1005, 1009 (2007) (“[M]ilitary decisions have always been accorded a far more deferential standard of judicial review than purely domestic ones, with the result that the government's policies usually pass muster...”). Not every judicial culture, however, is so deferential on national security. The Supreme Court of Israel has issued an extremely important opinion that creates a legal framework for targeted killing. See generally HCJ 769/02 Public Committee Against Torture in Israel v. Government of Israel [2006] (unreported) [hereinafter PCAT], available at http://elyon1.court.gov.il/FilesENG/02/690/007/a34/02007690.a34.pdf.


144. *Id.* at 10.


147. 553 U.S. 723 (2008) (holding that the right to invoke constitutional habeas corpus extended to noncitizens held at Guantanamo Bay).

148. Cf. Pushaw, supra note 142, at 1016 (observing that the Supreme Court’s “War on Terrorism” cases such as *Hamdi* “eventually will be grouped with others in which the Court seized opportunities to vindicate legal rights against politically vulnerable Presidents in perceived nonemergency situations”).

149. See generally id. at 1014 (identifying prudential and political factors that affect the willingness of federal courts to review claims that national security actions have violated individual rights).
al Qaeda. Notwithstanding any concerns over the sensitive nature of foreign policy, a court, given a plausible chance, would condemn this far-reaching targeting as illegal. Thus, even though the court in Al-Aulaqi chose to dismiss, the possibility of judicial review serves as a shadow check on executive procedures and actions.

In other words, Al-Aulaqi does not stand for the proposition that government decisions to target American citizens are never subject to any judicial process. Another plaintiff may bring a suit in which the court itself will determine whether the court itself should play any role in reviewing the executive's decision making. Where a court perceives that it can safely correct outrageous government conduct, it might well find a way around threshold issues, such as the political question doctrine. As a practical matter, we should expect courts to continue to be strongly disinclined to reach the merits of targeted killing cases since targeting the enemy lies at the heart of military authority and expertise.

E. Summarizing the Current Process

Our summary of procedures for targeted killing is based on disclosures that are partial, perhaps self-serving, difficult to confirm, and in some cases dated. No matter the imperfections of our public sources, the following outline emerges: JSOC follows military protocols for targeting; its targeting has at times been subject to an intense interagency process. The CIA process, on the other hand, has included review by multiple officials and legal counsel, but has been more insular.

Within the executive branch, new procedures in 2012 called for the participation of the NCTC, the State Department, the CIA, the military, and other agencies for nominating suspected terrorists for targeting. More recent changes have strengthened White House control; President Obama personally signs off on drone strikes outside of Pakistan.

In Congress, the armed service committees have jurisdiction to monitor drone strikes by JSOC within the military. The degree to which Congress exercises this oversight authority is not clear. As for CIA drone strikes, the intelligence committees receive prompt notice, and congressional staffers hold regular meetings to review the strikes. Congressional oversight of the CIA may thus be better than oversight of JSOC. The possibility of this fact should caution those reformers who call for the CIA to transfer all its authority over drones to the Pentagon.

Within the judicial branch, the courts play an extremely limited role in controlling targeted killing, as exemplified by dismissal of the al-Aulaqi case. If a more egregious case arises, however, courts retain the power to expand their role. The executive branch, if wise, bears this shadow check in mind when determining and publicizing its policies.
III. DUE PROCESS AND FEASIBLE PRECAUTION—FRAMING THE BASIC QUESTION

A. Two Doctrines to Apply: Due Process and Feasible Precaution

As discussed, executive and congressional officials have poured time and energy into developing and implementing procedures to enhance the accuracy of targeted killing. Given those facts, it seems worthwhile to pause and ask a very basic, even naive question: Why are President Obama's critics convinced that these extensive procedures violate due process?

One answer stems from fierce opposition to the drone campaign as a matter of morality and policy. It is a short step from being convinced that the drone campaign is killing far too many innocent civilians and alienating local populations to stating that it is illegal on multiple grounds, including violation of due process requirements. Policy arguments tend to blur into legal arguments.

On a related point, those opposed to the drone campaign are inclined to insist that the conflict with QTA—at least outside the “hot zone” of Afghanistan—is not severe enough in terms of violence to trigger IHL with its broader authority to kill. Instead, they argue that IHLR should apply to American efforts to dismantle QTA. This human rights framework bars extrajudicial lethal force except where necessary to eliminate an imminent threat to life or of serious physical injury. Absent such an imminent threat, due process for lethal force requires judicial process, which is absent from the current procedures for targeted killings.

The United States, not accepting that criminal justice is sufficient for handling all aspects of international terrorism, insists that it has authority under IHL to attack an enemy that has committed multiple acts of mass terror, vows to commit more, and is embedded in areas beyond the control of any centralized state

150. For a detailed critique of the view that any “armed conflict” with QTA is subject to geographic limits, see Chesney, supra note 10 at 33–38. But see, e.g., O'Connell, supra note 6, at 355 (“The fighting or hostilities of an armed conflict occurs within limited zones, referred to as combat zones, theaters of operation, or similar terms.”).
151. See, e.g., O'Connell, supra note 6 (contending that the United States is not in an armed conflict with al Qaeda and that “[p]eacetime criminal law, not the law of armed conflict, is the right choice against sporadic acts of terrorist violence”).
152. See, e.g., MELZER, supra note 7 (“It is generally found that, under human rights law, targeted killings are permitted only in the most extreme circumstances, such as to prevent a concrete and immediate danger of death or serious physical injury....”). This standard is broadly consistent with Supreme Court interpretations of the Fourth Amendment. See, e.g., Scott v. Harris, 550 U.S. 372, 386 (2007) (holding that use of deadly force was justified under Fourth Amendment “reasonableness” standard where fleeing suspect “posed a substantial and immediate risk of serious physical injury to others.”).
power.\textsuperscript{153} Determining whether the United States or its critics have the better end of this argument is contentious in part because the concepts and categories of IHL and IHRL did not evolve with transnational terror groups in mind.\textsuperscript{154} Regardless of who wins this debate, the United States is currently struggling to determine the limits on its authority \textit{given} the assumption that IHL applies.

The United States apparently concedes that constitutional due process applies to attacks against its own citizens, as illustrated by the OLC's legal analysis of attacking al-Awlaki.\textsuperscript{155} Whether due process covers (or should cover) noncitizens, who constitute the vast majority of targets, is unclear. This murkiness is not surprising as the extraterritorial reach of the United States Constitution has been the subject of debate ever since the United States became a great power over a century ago.\textsuperscript{156}

On this point, the most recent clash in the Supreme Court came with \textit{Boumediene v. Bush}.\textsuperscript{157} There, a five-Justice majority ruled that noncitizens held as enemy combatants at Guantanamo Bay outside the de jure sovereign territory of the United States had a constitutional right to invoke habeas corpus to seek release.\textsuperscript{158} One fair reading of \textit{Boumediene} suggests that due process, properly understood, applies to any effort by the United States to deprive a person of life, liberty, or property wherever and whoever that person may be.\textsuperscript{159} This reading is consistent with the plain constitutional text of the Fifth Amendment as well as with a moral recognition that all people should be treated decently no matter their nationality.\textsuperscript{160} Still, the position that due process protects everyone in the world from the American government is hardly settled—no matter what the logic of \textit{Boumediene} may suggest.\textsuperscript{161} We therefore

\begin{footnotes}
\textsuperscript{153} See Koh, supra note 6 (contending that the United States is in an armed conflict with QTA and has the right to attack in self-defense).


\textsuperscript{155} See Savage, supra note 69, at 12 (noting the conclusion of a secret OLC memo that “what was reasonable, and the process that was due, was different for Mr. Awlaki than for an ordinary criminal”); see also Hamdi v. Rumsfeld, 542 U.S. 507, 537 (2004) (applying due process to detention of a United States citizen as an enemy combatant).


\textsuperscript{157} Id. at 793–95.

\textsuperscript{158} Id. at 771 (“We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay.”).

\textsuperscript{159} See Murphy & Radsan, supra note 11.

\textsuperscript{160} U.S. CONST. amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law.”).

\textsuperscript{161} See Boumediene, 553 U.S. at 841 (Scalia, J., dissenting) (“There is simply no support for the Court's assertion that constitutional rights extend to

concede, for the sake of argument, that due process does not apply to noncitizen members of QTA who lack substantial connections to the United States and are outside of its territorial control.

But this concession does not affect the legal authority to engage in targeted killing as much as one might first suppose. The United States claims that its drone campaign adheres to all IHL requirements.\(^\text{162}\) The IHL doctrine of "distinction" requires attackers to limit their direct attacks to legitimate targets, such as enemy combatants, rather than peaceful civilians.\(^\text{163}\) Honoring distinction does not happen by accident; it requires effort. IHL therefore requires that attackers take "feasible precautions" to limit attacks to legitimate targets.\(^\text{164}\) For an intelligence-driven targeted killing campaign directed at a small number of suspected terrorists, the IHL doctrine of "feasible precaution" and the IHRL doctrine of "due process" may demand similar procedures or, at the very least, their demands may substantially converge.

B. Framing the Due Process Inquiry

At first glance, it may seem odd to apply due process to an armed conflict.\(^\text{165}\) Military authorities in an armed conflict need to make innumerable life-or-death decisions, often with very little time and based on uncertain information. In those circumstances, applying the archetypical forms of due process, particularly a predeprivation hearing, seems absurd. Indeed, Justice Thomas used just this reaction to mock the plurality opinion in *Hamdi v. Rumsfeld* for invoking due process to impose constraints on military

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\(^{162}\) See, e.g., GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 251–53 (2010) (noting that "distinction" is the "most significant battlefield concept a combatant must observe" and that it forbids attacks against civilians unless they are taking direct part in hostilities); Kenneth Watkin, Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict, 98 AM. J. INT'L L. 1, 15 (2004) (discussing development of "distinction" as a fundamental tenet of IHL).

\(^{163}\) See Kermit Roosevelt III, Guantanamo and the Conflict of Laws: Rasul and Beyond, 153 U. PA. L. REV. 2017, 2058 (2005) (observing that in discussions of whether "aliens abroad should enjoy exactly the same rights as Americans in their interactions with the government ... someone always asks, must the military give enemy soldiers hearings before shooting them in battle?").
procedures for determining whether to detain American citizens as enemy combatants.\textsuperscript{166}

This reaction misses a fundamental point about due process: as it evolves to accommodate new settings, it is flexible and reasonable, never demanding "undue" process.\textsuperscript{167} In well-established systems, the level of process that is "due" is largely determined by legal history and culture, naturally intertwined with participants' perceptions of fairness and reasonability. Seldom do we pause to consider whether due process should require hundred-person juries; twelve will do just fine, although we may not be quite sure why.

In many situations, legal history and culture may be inadequate guides for the appropriate level of due process. To help address novel situations, the Supreme Court declared in \textit{Mathews v. Eldridge} that courts should consider the following:

\begin{quote}
First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.\textsuperscript{168}
\end{quote}

In other words, assessing whether due process warrants a new procedure requires a court to determine whether the requested procedure would do more good than harm after weighing all the relevant interests.

The \textit{Mathews} framework leaves an uncomfortable amount of discretion to the courts. This discretion is nonetheless somewhat constrained. The judges who apply \textit{Mathews} are themselves products of a legal culture that prizes the norms of fairness, accuracy, and legitimacy. One important norm goes by the shorthand of "notice and an opportunity to be heard."\textsuperscript{169} Prior to suffering a deprivation at the hands of the government, a person should receive notice of the grounds for that deprivation and an opportunity to contest those grounds before a neutral decision maker.

\textsuperscript{167} Among countless citations for this proposition, see, e.g., \textit{Morrissey v. Brewer}, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").
\textsuperscript{168} Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
\textsuperscript{169} See, e.g., \textit{Cleveland Bd. of Educ. v. Loudermill}, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" (quoting \textit{Mullane v. Cent. Hanover Bank & Trust Co.}, 339 U.S. 306, 313 (1950))).
Another constraint on judicial discretion is the force of accumulating precedent. Courts have applied Mathews in innumerable and highly varied circumstances. In Mathews itself, the Court concluded that due process did not require the Social Security Administration to give a recipient an opportunity for an evidentiary hearing before disability benefits were terminated. In City of Los Angeles v. David, the Court applied Mathews to determine whether it was legal for the city to force David to wait twenty-seven days for a hearing on whether his car had been properly towed. One year later, in Hamdi v. Rumsfeld, a plurality of the Court invoked Mathews for the very different task of outlining the requirements for holding an American citizen as an “enemy combatant” as part of the conflict with al Qaeda and the Taliban. In so doing, Justice O’Connor fused war talk (using the AUMF as a source of authority) and due process talk (using a canonical case as a guide for the procedures). Mathews can apply across such varied contexts because, instead of providing determinate answers, it provides a general framework for developing them. As courts provide answers for particular contexts, bodies of due process precedent evolve. Just so, courts have developed a due process for prisons, for civil service, for public education, and so on.

Following the Hamdi plurality’s example, it is not difficult to see how one could, with the right will, sensibly apply Mathews to targeted killing in an armed conflict while avoiding the absurd results Justice Thomas predicted. Suppose that a soldier is in a firefight. Among the many interests in play are the lives of all those potentially in the line of fire. The government’s interest in subduing the enemy is plainly implicated. Perhaps the most accurate way for the soldier to determine whether a person is a legitimate target would be to hold some sort of hearing before a neutral decision maker. But an attempt to do so might lead to the soldier’s death and enable the enemy to escape. It would thus be silly to require formal process in a firefight, and due process, with its sensible flexibility, would not so require.

173. The conclusion that due process would not demand formal process in a firefight relates to an important objection to extending due process to armed conflicts. The claim, in essence, is that the cost of applying a weak, indeterminate form of due process based on a balancing test to armed conflicts would weaken due process as it is applied to more traditional contexts. See, e.g., Watkin, supra note 163, at 22 (“[T]he attempt to apply human rights standards to a situation of armed conflict could have an adverse impact on the integrity and strength of peacetime norms.”); Noah Feldman, Obama’s Drone Attack on Your Due Process, BLOOMBERG (Feb. 8, 2013, 12:49 PM), http://www.bloomberg.com/news/2013-02-08/obama-s-drone-attack-on-your-due
By contrast, the campaign of targeted killing against high-level members of QTA involves circumstances that invite and can accommodate relatively formal procedures. The demands of procedural due process key into what administrative law calls “adjudicative facts.” These are facts that relate to the individualized circumstances of people whom the government has targeted for deprivation. Target selection requires an intense, intelligence-driven effort to determine adjudicative facts concerning people who are often halfway around the world from the United States (e.g., whether a person is a member of al Qaeda, whether that person performs combat functions, whether that person poses a severe threat). These individuated questions call out for the application of due process.

The form that due process takes is sensitive to practical requirements. The United States cannot practicably apply formal, ex ante procedures to a firefight, but it can apply them to personality strikes because the process of target selection unfolds over a considerable period of time in a bureaucratic setting.

As for the interests at stake, the private interest is critical: life itself. The public interests are multilayered and point in different directions. One set of interests includes protecting national security and the lives of victims of potential terrorist attacks. These interests weigh against impeding targeted killing with extra procedures that might lead to false negatives. Yet the public also has a strong interest in avoiding strikes against peaceful persons based on incorrect intelligence. The reasons are two-fold: to avoid killing innocents and to avoid unnecessarily inflaming local

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174. See Bimetallic Inv. Co. v. Colorado, 239 U.S. 441, 446 (1915) (declaring that the right to a hearing applied where “[a] relatively small number of persons was concerned, who were exceptionally affected, in each upon individual grounds”).

175. See Issacharoff & Pildes, supra note 13, at 6 (“[T]he use of military force against terrorists necessarily must shift, and has shifted, away from the traditional group-based membership attributions of responsibility to individuated judgments of responsibility.” (emphasis omitted)).

176. See Miller & Tate, supra note 50 (quoting a senior official for the proposition that “[t]he kinetic piece of any counterterror strike is the last 20 seconds of an enormously long chain of collection and analysis”). See generally supra Part II (discussing the procedures for targeted killing in the conflict with QTA).
sentiment against the United States. These reasons combine the principles of morality and of counterinsurgency. Just as important, our democracy has a deep and abiding interest in avoiding secret death squads. That translates into a need for procedures on the use of lethal force that are as transparent, fair, and accurate as national security permits. Given this range of interests, targeted killing calls for procedures in a way that a firefight does not.

It is one thing to recognize that targeted killing demands some type of process; it is quite another to specify its details. Reasonable people, especially if they identify with differing interests and points of view, will reach different conclusions. In a further complication, our usual methods for resolving disagreements cannot or will not settle them. The law of due process generally evolves as targets of government action go to court to demand additional protections. Courts, after extensive hearings, then determine whether due process demands these protections, and the other branches of government and the public accept these determinations as authoritative. Sure, it is possible that an American court will, at some point, hear and rule on a claim connected to the targeted killing campaign. But a long American tradition of judicial deference to executive authority over war and foreign affairs, exemplified by the political question analysis in al-Aulaqi, suggests that judicial intervention is unlikely for some time to come.177

These difficulties for a due process of targeted killing do not, however, change the basic inquiry: to determine whether a particular process is "due," the United States must weigh the advantages of adopting this process against the risk to security from losing the chance to kill a dangerous member of QTA. Moreover, the executive branch, which upholds the same duty as the judiciary to protect the Constitution, must ask and answer this question about due process regardless of whether courts ever choose to intervene. That due process is not provided by the courts does not excuse the executive from developing its own, internal due process.178

C. Feasible Precaution Asks Much the Same Question

One might object that the due process analysis outlined above is largely irrelevant because it should apply outside the United States


178. Cf. Holder, supra note 20 (declaring administration’s stance that due process for targeted killings could be satisfied by executive procedures). But see Philip Alston, The CIA and Targeted Killings Beyond Borders, 2 Harv. J. Nat’l Sec. 283, 405 (2011) (strongly arguing that intraexecutive controls on CIA targeted killing have failed to produce accountability required by both IHL and IHRL).
only to those very few members of QTA who happen to be United States citizens or have other strong connections to the United States. For all other targets, according to this objection, the IHL doctrine of feasible precaution controls. On inspection, this objection rests on a false dichotomy. Due process and feasible precaution, at bottom, both require government officials to take reasonable steps to ensure that coercive force against targets is authorized by substantive law.

Commentators—whether from academia or the military or both—agree that feasibility essentially boils down to reasonableness. Dr. Nils Melzer, Legal Adviser for the International Committee of the Red Cross and a leading expert on IHL, explains that there is "general agreement" that feasible measures include all those that are "practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations." Similarly, Professor Michael Schmitt describes precaution as essentially asking, "What would a reasonable attacker do in the same or similar circumstances?" Finally, the U.S. Army's Field Manual states:

Those who plan or decide upon an attack ... must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places ... but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated.

So the inquiry into feasible precaution invites the same sort of broad, indeterminate rule-of-reason inquiry that Mathews v. Eldridge applies to due process.

This similarity is easy to miss for at least two reasons. First, we consciously apply the doctrines to very different circumstances. We invoke due process, for instance, to determine whether a recipient of Social Security disability benefits is entitled to a predeprivation hearing before a provisional cutoff of payments. We invoke feasible precaution to determine whether a person or

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179. See supra notes 157–61 and accompanying text (briefly discussing controversy over the extraterritorial reach of the U.S. Constitution).
184. Id.
object is a legitimate military target. These different circumstances generally should and do yield different answers as to process.

Second, courts have decided thousands of cases that provide relatively concrete, authoritative guidance concerning what process is “due” in various situations outside of armed conflict. Adjudication is not entirely absent from IHL (e.g., signatories of the Geneva Conventions have an obligation to prosecute grave breaches). Still, judicial scrutiny of military action is far less frequent and intense than in the civil sphere. As a result, “feasible precaution,” unlike “due process,” does not conjure a vast body of constraining judicial precedent.

Even so, due process and feasible precaution do impose the same general duty of care on government officials as they determine whether to take actions that will harm people. As discussed, the circumstances of a targeted killing campaign bear a strong resemblance to circumstances associated with civil law enforcement (e.g., the decision whether to harm an individual depends on close scrutiny of adjudicative facts and there is considerable time to assess these facts). All in all, it should not come as a surprise that due process and feasible precaution converge toward similar procedures for targeted killing.

IV. TWO SUGGESTIONS: PUBLISH THE LISTS AND ADAPT FORMAL ADMINISTRATIVE ADJUDICATION

The rule of reason demanded by both due process and feasible precaution leaves room for many procedural innovations. One might argue that due process and feasible precaution demand transparent procedures, a high evidentiary standard of proof for target
selection, independent intraexecutive investigations of targeting decisions, judicial controls, etc. In the absence of an authoritative judicial voice, we should expect disagreements to persist over which of these or other innovations the law demands. Creating another handicap for resolution, much of the information that government officials use to assess security threats is secret for legitimate reasons of national security. Outsiders thus lack both the authority and the information to determine the exact contours of due process and feasible precaution.

Bearing these difficulties in mind, we suggest the following starting point: The United States should adopt a procedural constraint on targeted killing in the conflict with QTA where (1) the procedure may enhance accuracy, fairness, or legitimacy and (2) adding the procedure will not cause notable harm to security. In more blunt terms, the United States must adopt at least those constraints that are reasonably likely to help and not very likely to hurt. Something should beat nothing in the Matheus balance.

Applying this approach, we offer two reforms rooted in basic principles of due process. First, the United States should regularly publish a list of targetable persons along with a statement of its grounds for including them. This duty to publish would not apply if doing so would create a clear and genuine risk to security (e.g., by revealing an extremely sensitive source or intelligence method). Second, the United States should adapt formal administrative adjudication to target selection. Under this model, an AJ would conduct an adversarial hearing to determine whether a particular person is a proper target. Unlike Article III proceedings, the AJ’s determination would be subject to de novo review by the President. Administrative adjudication, unlike adjudication by federal courts, would leave ultimate targeting power in the hands of the Commander-in-Chief.

191. See, e.g., Afshen John Radsan & Richard Murphy, Measure Twice, Shoot Once: Toward Higher Care for CIA Targeted Killing, 2011 U. ILL. L. REV. 101 (proposing that IHL principles require the CIA to be certain of its targets beyond reasonable doubt).

192. See, e.g., PCATI, supra note 142, at ¶ 40 (requiring an independent, intraexecutive investigation “regarding the precision of the identification of the target and the circumstances of the attack”); Toren G. Evers-Mushovic & Michael Hughes, Rules for When There Are No Rules: Examining the Legality of Putting American Terrorists in the Crosshairs Abroad, 18 NEW ENG. J. INT’L & COMP. LAW 157, 181–83 (2012) (proposing a procedure for independent and impartial ex post investigations of targeted killings of American citizens outside of recognized battlefields); Murphy & Radsan, supra note 11, at 448 (suggesting that due process requires review of CIA strikes by the CIA’s Inspector General).

A. Publish a Targetable Persons List

On many occasions, the federal courts have intoned that the core of due process is notice and an opportunity to be heard before the government deprives a person of life, liberty, or property. The central idea is to "ensure that the person threatened with loss has an opportunity to present his side of the story to a neutral decisionmaker at a time when the deprivation can still be prevented." This promotes accuracy insofar as it enables a targeted person to provide pertinent information about adjudicative facts. It also appeals to the deep-seated intuition that fairness and justice require the government to let persons subject to its power "have their say" before that power is deployed against them.

Promoting accuracy, fairness, and legitimacy, in addition to serving the private interests of the targets, also serves obvious public interests. The government should base its actions—especially those that will harm targeted individuals—on an accurate understanding of the adjudicative facts. Holding other factors equal, it is better to live under a government that is both fair and appears to be fair than to live under a government that either wields coercive power arbitrarily or appears to do so.

Even so, process carries obvious costs. As Justice Thomas observed in his Hamdi dissent, extending notice and an opportunity to be heard to a suspected terrorist poses problems. Notice might allow the target of a missile strike to "get away." Notice might also endanger sensitive sources and methods of intelligence if the target is able to track down how the United States discovered his identity and his activities. Further, the "opportunity to be heard" could prove counterproductive if poorly designed to fit the issues and concerns of targeting. Importing hearsay limitations into the proceedings, for example, might put undue strain on the government's ability to make its case and might lead to excessive false negatives.

These sorts of problems highlight that many forms of formal process for targeted killing would be impracticable and

198. Cf. id., 533-34 (plurality opinion) (acknowledging that it may be necessary and appropriate for the government to rely on hearsay in detention proceedings for enemy combatants).
unreasonable. However, due process is nothing if not flexible. The requirement, for instance, of a predeprivation hearing is commonly characterized as a prime element of due process. The Court nonetheless sidesteps this element in a variety of emergency situations, approving procedures that lack predeprivation hearings for seizure of enemy property in wartime,199 seizure and destruction of food unfit for human consumption,200 and suspension from public school of students “whose presence poses a continuing danger to persons or property.”201 Where a predeprivation hearing poses too many problems, postdeprivation procedures may suffice. With this sort of flexibility, the question is not whether some forms of process for targeted killing would be unreasonable and thus “undue.” No, the real due process question is whether any forms of notice and an opportunity to be heard might be practicable, reasonable, and beneficial.

Consider the following possibility: The United States should maintain a public list of members of QTA who the United States has concluded pose a severe enough threat to merit targeting. To the extent security concerns reasonably permit, the United States should also provide public justifications for placements on the list. Ayman al-Zawahiri, the leader of al Qaeda, would presumably be the first name. In our interconnected age, publication on the Internet would give notice to listed persons that they may be targeted as well as partial notice of the grounds supporting their selection. A statement in the Federal Register might be added for good measure.

One can think of this proposal as formalizing and generalizing the approach to notice that the United States government informally extended to al-Awlaki himself. Somebody in government leaked the highly classified information that al-Awlaki was on the kill list.202 One motive may have been to provide a form of notice consistent with his due process rights as a citizen. If that was a reason for the government’s disclosure, it provides tacit support from the United States that the kill list could and should be published.

Along with notice by publication would at least come an informal opportunity to be heard. As Judge Bates noted in his Al-Aulaqi opinion, al-Awlaki knew perfectly well that he had been targeted by the United States. If he had wished, he could have
contested this targeting himself: either in court after turning himself in or via videoconferencing or some other means. 203

Building on Judge Bates's point, it bears repeating that the United States' conflict with QTA is a highly public matter in many respects. The impact of a drone strike, unlike a brush pass between an intelligence officer and a human source, cannot be hidden from all eyes. Persons who appear on the proposed list would have a megaphone for responding to eager audiences among journalists and human rights workers. This opportunity to respond would not be a perfect substitute for formal proceedings before a neutral judge but it would foster a form of public accountability that the United States could not ignore.

Publishing the kill list might improve accuracy both by increasing the level of care that the administration uses when selecting targets and by eliciting exculpatory information from those named. The potential improvements depend in large part on how well the current system operates under mostly secret procedures. Given the moral, political, and legal sensitivities implicated by the drone campaign, as well as the high-level White House involvement, we think it highly unlikely that the administration is targeting many members of QTA without reasonable grounds. In other words, we suppose that there are very few "false positives" on the White House-approved kill lists. Separate from our suppositions, though, publishing a list would help bring any errors to light. And, in some calculations, there is no limit to the value of human life. Without our suggested reforms, it is possible that somebody other than al-Awlaki is on the kill list but does not belong there. It is also possible that this person has no idea that a classified, interagency process has designated him to be killed.

In addition, publishing the list would enhance the legitimacy of the drone campaign. Many complaints against this campaign are rooted in a reasonable fear that the United States is exercising uncontrolled, unaccountable power to determine whom to kill outside the context of a traditional armed conflict where combatants are well defined by uniforms or other insignia. In response, the United States can identify persons (the fighters without uniforms) who satisfy its targeting criteria and can explain its selections for the list to the degree that security reasonably permits.

These advantages in accuracy and legitimacy must be weighed against risks to security. To repeat a recurring theme of this Article, this weighing is fraught with uncertainty over facts and with discretionary calls over how to evaluate the facts. All the same, we submit that the advantages of publication dominate the

disadvantages given that the latter should be slight and controllable.

Publishing terrorist lists is not novel for the United States. Pursuant to the 1996 Antiterrorism and Effective Death Penalty Act, the Secretary of State publishes a list of Foreign Terrorist Organizations.\(^{204}\) It is a crime to provide material support to a designated Federal Terrorist Organization ("FTO").\(^{205}\) The State Department also maintains a "Terrorist Exclusion List" with designees subject to exclusion or deportation from the United States.\(^{206}\) Of particular note, the Office of Foreign Assets Control within the Department of Treasury maintains a lengthy list of "specially designated nationals" ("SDNs"), which includes, among other categories, "specially designated global terrorists" ("SDGTs").\(^{207}\) SDGTs are subject to a variety of financial sanctions, including freezing of assets.\(^{208}\) It should come as little surprise that al Qaeda, its associated groups, and their members appear on one or more of these lists. Designated FTOs include, among others, al Qaeda, al-Shabab, and AQAP.\(^{209}\) The United States has identified many members of these organizations as SGDTs, including al-Awlaki himself.\(^{210}\)

In one sense, publishing a kill list would amount to a relatively small change in existing practices. This list would identify the small number of people who satisfy the legal and policy prerequisites that United States officials have identified for targeted killing. It is likely that most of these targets are already on various terrorist lists the United States publishes.


\(^{207}\) See 31 C.F.R. Ch. V, App. A (listing groups to be identified by the "specially designated nationals" list maintained by the Office of Foreign Assets Control). For the current list of SDNs, see Resource Center: Specially Designated Nationals List (SDN), U.S. DEPARTMENT TREASURY (Oct. 7, 2013), http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx.


One argument against publishing the kill list is the possibility that listed persons will increase their efforts to hide from United States forces. The more notorious leaders of QTA, however, already know that the United States regards them as enemies. Even less well-known leaders of QTA presumably assume that the United States is going after them. Regardless of whether their names appear on a public list of potential targets, these persons are likely already doing their best to prevent the United States from finding them. But in the end, there is a difference between assuming that you are on a tracking list within the intelligence community and knowing that the President has decided you are in the bull's-eye to be killed. Further, publication might alert QTA members who believe they have escaped detection. These persons, unless they are suicidal, will increase their efforts to conceal themselves. Next, publication might compromise intelligence sources and methods if those named are able to deduce how the United States identified them.

For these reasons, security concerns could justify a refusal to identify a limited subset of potential targets (e.g., members of QTA who the United States concludes do not already regard themselves as potential targets of the United States). One might address these concerns by treating the duty of public identification as a rebuttable presumption. Names would be publicly identified except in those situations where publication would create a substantial risk to national security. Even in these cases, public identification would be required after changes in circumstances eliminate the risk to national security, whether because the United States has killed the target or for other reasons. Moreover, even where security concerns block the release of a name, the United States should enhance transparency and legitimacy by stating the number of people it regards as targetable but unsafe to identify.211 With these reforms, the American and international public should no longer need to depend on the media for information on the scope of the targeted killing program. The necessary information should come directly from the American government.

B. Adapt and Adopt the Tools of Formal Administrative Adjudication

Our proposal for publishing the kill list suggests another question: Who would be in charge of determining whether security concerns justify excluding a target from the public list? A regular court? A special court that holds closed proceedings? Officials from

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211. By including one or more unnamed persons on a kill list, the United States could also prevent persons who are not named from inferring that they have escaped targeting.
the executive branch? Given bureaucratic, intelligence, and military impulses to secrecy, one would expect executive officials to be too quick to excuse publication. Even worse, executive officials, erring on the side of national security, might be too quick to designate suspects as appropriate targets. These concerns relate to another key demand of due process: the requirement of unbiased decision making.

Seizing on this requirement, some critics of the drone campaign have insisted that decisions to kill targets should be approved by Article III judges, whether via criminal trials or through some FISA-like process. Someday, a consensus might form that these critics are correct, and independent judges might play a strong role in target approval. On the other hand, these proposals for judicial control present major problems of their own, including the constitutionality of limits on powers at or near the core of the Commander-in-Chief clause.

Pragmatically and realistically, we therefore consider whether the executive branch might act independently and devise alternative means, at acceptable costs, to reduce the problem of bias in target selection. This subsection thus draws from well-established administrative law to suggest that formal administrative adjudication be adapted to target selection for personality strikes.

1. Due Process and (Reasonably) Unbiased Decision Making

From its beginnings, due process has been tightly bound with a requirement of independent judicial process to protect against

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212. In his May 2013 speech, President Obama himself suggested the possibility of legislative action to create a FISA-like court to control targeted killing. Obama, supra note 5; see also Adelsberg, supra note 193 (suggesting a FISA-like process for approving targeted killings of citizens); Scott Shane, A Court to Vet Kill Lists, N.Y. TIMES, Feb. 9, 2013, at A1 (quoting various legal experts on the viability of FISA-style review). But see Shane, id. (reporting response of Hina Shamsi, director of the ACLU’s national security program, that “judicial review in a new secret court is both unnecessary and un-American” and that the United States should instead use the criminal justice tools of extradition and criminal trial against suspected terrorists).

213. See, e.g., Shane, supra note 212 (quoting Professor Robert Chesney’s observation regarding a FISA-style court for targeted killing, “[w]e’ve gone from people scoffing at this to it becoming a fit subject for polite conversation”).

214. After raising the possibility of creating FISA-style courts to control targeted killing, the President observed, “[B]ringing a third branch of government into the process…raises serious constitutional issues about presidential and judicial authority.” Obama, supra note 5. The administration held internal discussions over this proposal, which “became tied up in knots about how it would work.” Baker, supra note 125 (noting concerns over the timing of judicial control, ceding presidential authority, and reducing military operational control); see also Shane, supra note 212 (“A drone court would face constitutional, political and practical obstacles, and might well prove unworkable, according to several legal scholars and terrorism experts.”).
biased, arbitrary application of the law.\textsuperscript{215} The Magna Carta declared that King John could not deprive a subject of his rights except as determined by "the lawful judgment of his peers."\textsuperscript{216} The requirement that peers, rather than the King himself, apply the law of the land accords with the dictum of due process and natural justice that "no man can be a judge in his own case."\textsuperscript{217}

The reason that we do not want any person to judge her own cause is screamingly obvious. We would expect a person in this situation to develop a "will to win" and, consciously or not, to twist the law to fit her ends.\textsuperscript{218} This applies whether the executive is a medieval king who wishes to eliminate inconvenient subjects or is a senior member of the intelligence community who justifies an action that will harm another person. It explains why the law insists that prosecutors obtain convictions from independent judges and juries.

From this angle, separation of powers—insofar as it carves the judicial power away from the political branches—can be understood as a manifestation of the core of due process.\textsuperscript{219} Indeed, some judges and scholars, stressing this connection, insist that due process boils down to a guarantee of judicial process in which courts apply the law of the land.\textsuperscript{220}

The idea that due process must equal judicial process could not survive the modern administrative state in which innumerable administrative agencies adjudicate countless deprivations of property (and sometimes of liberty or life). Final agency actions are,

\begin{itemize}
\item \textsuperscript{215} See generally Nathan S. Chapman \& Michael W. McConnell, \textit{Due Process as Separation of Powers}, 121 Yale L.J. 1672, 1672 (2012) ("From its conceptual origin... due process of law has required that government can deprive persons of rights only pursuant to a coordinated effort of separate institutions that make, execute, and adjudicate claims under the law.").
\item \textsuperscript{216} \textit{Id.} at 1682; see A.E. Dick Howard, \textit{Magna Carta: Text and Commentary} § 39, at 45 (1998) ("No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed... except by the lawful judgment of his peers and/or by the law of the land.").
\item \textsuperscript{217} \textit{In re} Murchison, 349 U.S. 133, 136 (1955) ("To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."); see also 1 William Blackstone, \textit{Commentaries} 91 ("[I]t is unreasonable that any man should determine his own quarrel.").
\item \textsuperscript{218} Cf. Grolier Inc. \textit{v.} FTC, 615 F.2d 1215, 1220 (9th Cir. 1980) (observing that the Administrative Procedure Act separates investigative and prosecutorial functions from adjudication to prevent biased decision making by persons who have developed a "will to win" due to their prior involvement in a case).
\item \textsuperscript{219} See generally Chapman \& McConnell, supra note 215.
\item \textsuperscript{220} See, e.g., \textit{In re} Winship, 397 U.S. 358, 378 (1970) (Black, J., dissenting) ("Due process of law' was originally used as a shorthand expression for governmental proceedings according to the 'law of the land' as it existed at the time of those proceedings."); see also Chapman \& McConnell, supra note 215, at 1676 n.5 (collecting scholarly authorities for the proposition that "due process' meant nothing more than judicial procedure").
\end{itemize}
however, commonly subject to judicial review, which allows courts to apply principles of due process to ensure that administrative adjudications meet minimum requirements. Protections against bias include the following: (1) an adjudicator may not determine a matter in which she has a substantial pecuniary interest;\(^2\) (2) an adjudicator may not determine a matter involving a party who has leveled personal abuse or criticism at the adjudicator;\(^2\) and (3) an adjudicator may not determine a matter where it appears she has "in some measure adjudged the facts as well as the law of a particular case."\(^3\)

The first two of these principles are relatively cheap and easy to enforce. Judges should not earn their pay by skimming off a portion of the fines they impose. Plus, if a party and a judge have a history of publicly detesting each other outside of court, another judge should be found. The third principle, avoiding adjudicators who have prejudged the merits, presents far greater difficulties. Here, courts apply a rule of reason, enforcing the principle where it is not too expensive.

For a fine example of cheap enforcement, consider *Cinderella Career & Finishing Schools, Inc. v. FTC*.\(^4\) There, the Commission initiated enforcement proceedings against Cinderella Career & Finishing Schools, Inc. ("Cinderella") for unfair trade practices. The Hearing Examiner dismissed the charges, and the Commission's staff appealed this loss to the Commission itself. While the appeal was pending, FTC Chairman Dixon made public remarks that, without naming Cinderella, strongly suggested that he thought the firm was liable as charged.\(^5\) Cinderella seized on these remarks to argue that Dixon could not properly participate in the administrative appeal. An outraged D.C. Circuit agreed, holding that Dixon's participation would violate due process because his remarks indicated that he had prejudged the facts of the case.\(^6\)

\(^{221}\) Gibson v. Berryhill, 411 U.S. 564, 579 (1973) ("It is sufficiently clear from our cases that those with substantial pecuniary interests in legal proceedings should not adjudicate these disputes.")

\(^{222}\) Withrow v. Larkin, 421 U.S. 35, 47 n.15 (1975) (collecting authority to support this proposition).

\(^{223}\) *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (approving test for unconstitutional bias as "whether a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it" (internal quotation marks omitted)).

\(^{224}\) *Cinderella*, 425 F.2d at 583.

\(^{225}\) *Id.* at 590 (suggesting that advertisements that one can "become[] an airline hostess by attending a charm school" raise a "strong enough" "odor" of deception for a "savvy" newspaper advertising manager to smell (quoting Paul Rand Dixon, Chairman, Fed. Trade Comm'n, Speech Before the Government Relations Workshop of the National Newspaper Association (Mar. 15, 1968))).

\(^{226}\) *Id.* at 591.
The court was free to take this step because no strong public interest was served by agency commissioners shooting off their mouths during the pendency of proceedings before them.

An irony of *Cinderella* is that the court sidestepped the systemic problem of agency bias in the FTC’s procedures. The Commission had both authorized initiation of an enforcement action against Cinderella and adjudicated Cinderella’s liability. Permitting an agency to investigate infractions, initiate enforcement actions, and later adjudicate their merits raises the exact danger of bias that the guarantee of due process has long sought to block. Agencies commonly exercise all of these powers, a practice known as “combination of functions.” Although this practice raises an obvious problem of prejudgment, it is simply too expensive to block as a categorical matter.

The leading case on this problem has long been *Withrow v. Larkin*, in which the Supreme Court was emphatic in refusing to hold that due process categorically bars agencies from combining investigative and adjudicative functions. The examining board in charge of licensing physicians in Wisconsin held an investigative hearing to determine whether Dr. Larkin, whose practice included abortions, had “engaged in practices that are inimical to the public health . . . [or] conduct unbecoming a person licensed to practice medicine.” After the investigative hearing, the board notified Dr. Larkin that it would hold a contested hearing to determine whether to suspend his license. At this point, Dr. Larkin sought a restraining order in federal court to block the board’s proceedings. The district court granted the order based on its view that Dr. Larkin’s suit raised a “substantial federal question” of whether the board’s adjudication of charges that it had developed and investigated would violate Dr. Larkin’s rights to procedural due process.

The Supreme Court reversed. Acknowledging the obvious, the Court said that there was something “to the argument that those who have investigated should not then adjudicate.” Yet the
combination of investigative and adjudicatory functions did not create such a probability of unfairness as to require categorical separation as a matter of constitutional law.\textsuperscript{235} To support this proposition, the Court noted "a presumption of honesty and integrity in those serving as adjudicators."\textsuperscript{236} More importantly, the Court observed that both agencies and courts are frequently called upon to revisit issues of fact that they have determined, at least provisionally, in earlier proceedings.\textsuperscript{237} A categorical constitutional rule requiring that the mind of an adjudicator be free from the taint of earlier, provisional determinations on the merits would require a fundamental and impractical reworking of the judicial and administrative justice systems.

The Court conceded, though, that this combination might, under "special facts and circumstances," present an intolerably high risk of unfairness.\textsuperscript{238} Withrow, in that sense, implicitly embraced another Mathews-style balancing test.\textsuperscript{239} Bias due to prejudgment is a real problem, and procedures that require a decision maker to revisit the merits create an obvious danger of prejudgment. Preventing bias is not, however, the only value that due process seeks to serve. It also seeks to preserve an effective government that serves the citizenry at an acceptable cost. Balancing these interests, courts root out sources of potential bias where it is cheap enough to do so. Under well-settled law, the threat of bias inherent in the combination of investigative and adjudicative functions does not pose a significant enough threat to justify a categorical bar. Yet due process may require separation of functions where the risks from bias are especially great or the costs of eliminating those risks are especially low or both.\textsuperscript{240}

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\textsuperscript{235} Withrow, 421 U.S. at 58.
\textsuperscript{236} Id. at 47.
\textsuperscript{237} Id. at 56–57 (noting examples of when judges repeatedly return to issues throughout the adjudication in both judicial and administrative proceedings).
\textsuperscript{238} Id. at 58.
\textsuperscript{239} See A GUIDE TO FEDERAL AGENCY ADJUDICATION, supra note 229, at 150 (identifying the three-factor Mathews analysis as a means for determining whether a particular combination of functions violates due process).
\textsuperscript{240} See, e.g., Humphries v. Cnty. of L.A., 554 F.3d 1170, 1197 (9th Cir. 2009) ("[A] single person, charged with investigating serious allegations of child abuse, may not adjudicate those allegations for placement on the CACI and serve as appellate commissioner in review of his own decision. The risk of perpetuating any original error is too great."); White v. Ind. Parole Bd., 266 F.3d 759, 767 (7th Cir. 2001) (noting that due process would block an officer who investigated a charge of prison misconduct from sitting on a prison disciplinary board charged with determining whether to reduce the prisoner's "good-time" credits).
The Supreme Court’s important decision in *Hamdi v. Rumsfeld* provides an especially apt example of due process requiring the separation of investigative and adjudicative functions.\(^\text{241}\) In the aftermath of 9/11, the Northern Alliance captured Hamdi in Afghanistan and turned him over to the United States, which detained him as an “enemy combatant” in a South Carolina brig.\(^\text{242}\) Hamdi turned out to be an American citizen because he was born in Louisiana. His father, acting as next friend, filed a petition for a writ of habeas corpus contending that his son’s detention violated due process.\(^\text{243}\) At the Supreme Court, the government argued that due process required, at most, extremely limited judicial review to determine whether “some evidence” supported the conclusion that Hamdi was an enemy combatant.\(^\text{244}\) Under this standard, “a court would assume the accuracy of the Government’s articulated basis for Hamdi’s detention . . . and assess only whether that articulated basis was a legitimate one.”\(^\text{245}\) Justice O’Connor, writing for a four-Justice plurality but with pertinent support from a two-Justice concurrence, rejected this stance; she held 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.”\(^\text{246}\)

Justice O’Connor also rejected the government’s idea that the military’s initial screening or subsequent interrogation of Hamdi could have satisfied the requirement of a “neutral decisionmaker.”\(^\text{247}\) She curtly explained:

> An interrogation by one’s captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker. Compare Brief for Respondents 42–43 (discussing the “secure interrogation environment,” and noting that military interrogations require a controlled “interrogation dynamic” and “a relationship of trust and dependency” and are “a critical source” of “timely and effective intelligence”) with *Concrete Pipe*, 508 U.S., at 617–18 (“[O]ne is entitled as a matter of due process of law to an adjudicator who is not in a

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\(^\text{242}\) Id. at 510.
\(^\text{243}\) Id. at 511.
\(^\text{244}\) Id. at 527.
\(^\text{245}\) Id. at 527–28.
\(^\text{246}\) Id. at 533. Although Justice O’Connor wrote only for a four-Justice plurality, Justice Souter, partially concurring in an opinion joined by Justice Ginsburg, opined that due process required at least the procedural protections that Justice O’Connor had outlined. *See id.* at 553 (Souter, J., concurring in part and dissenting in part).
\(^\text{247}\) Id. at 537 (plurality opinion).
situation which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true” (internal quotation marks omitted)). That even purportedly fair adjudicators “are disqualified by their interest in the controversy to be decided is, of course, the general rule.” Tumey v. Ohio, 273 U.S. 510, 522 (1927). Plainly, the “process” Hamdi has received is not that to which he is entitled under the Due Process Clause. 248

The preceding terse passage is the opinion’s sum total on the problem of bias. Even so, Justice O’Connor’s underlying concern is clear enough. At least after emergency conditions have passed, the danger of bias is too great to put the captors in charge of deciding whether they can hold the captive indefinitely. Hamdi was therefore entitled to some sort of adversarial proceeding in which he could contest the factual basis for his detention. 249

On inspection, a Withrow-style problem of combination of functions was embedded in Hamdi. As a general rule, an investigator can also adjudicate without violating due process. 250 But a majority of the Court treated Hamdi’s case as outside this general rule. 251 The pragmatic rationale was that the Court could, at acceptable cost to security concerns, reduce the risk of biased, inaccurate decision making by according Hamdi a right to an adversarial hearing “tailored” to fit the circumstances. 252 Accordingly, a Mathews-style balancing demanded these proceedings. 253

2. Formal Administrative Adjudication for Targeted Killing

There is enough information in the public record to suggest that adding something close to formal adjudication to the targeting

248. Id. at 537–38.
249. Id. at 533.
251. Hamdi, 542 U.S. at 537 (plurality opinion) (requiring that the propriety of Hamdi’s capture be decided by a “neutral decisionmaker” rather than his captors); id. at 553 (Souter, J., concurring in part and dissenting in part) (acknowledging that due process required at least as much procedural protection for Hamdi as the plurality had outlined).
252. Id. at 533–34 (identifying steps that might be taken to minimize damage to government interests caused by adversarial hearings, including: allowing the government to rely on hearsay, granting government evidence a rebuttable presumption of correctness, or using military tribunals without Article III court intervention).
253. Id. at 529–33 (applying Mathews framework to determine the procedure owed Hamdi). As an afterword, Hamdi was later transferred to Saudi Arabia, and the courts lost his case as a vehicle for further developing a due process of counterterrorism, at least as it relates to indefinite detention.
process could prove sufficiently helpful to be legally required.\textsuperscript{254} The source of the requirement could be either due process or feasible precaution.

We base this second proposal on the Administrative Procedure Act's well-established template for formal adjudication by administrative law judges ("ALJs"). With powers delegated from Congress, the archetypical modern agency combines legislative, executive, and judicial functions (i.e., the agency makes the rules, initiates enforcement actions, and adjudicates them).\textsuperscript{255} This seemingly wholesale violation of separation of powers presents obvious potential for abuse. Nonetheless, the Supreme Court has, as discussed, refused to adopt a categorical constitutional rule proscribing such combinations.\textsuperscript{256} Instead, our legal system attempts to curb abuses with statutory provisions that allocate prosecutorial and judicial power within agencies to different officials.\textsuperscript{257} Administrative law refers to this statutory approach as "separation of functions" to distinguish it from the constitutional separation of powers.

Under the Administrative Procedure Act ("APA") template, enforcement officials at agencies must, generally, bring their cases before ALJs for adjudication.\textsuperscript{258} To preserve their independence, ALJs enjoy statutory protections for tenure and salary.\textsuperscript{259} Within
the agency, they are not "responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions."\textsuperscript{260} Also, these investigative and prosecuting officials may not participate in adjudicatory decision making.\textsuperscript{261} By these means, the APA creates a statutory framework for protecting independent decision making that largely mirrors the constitutional framework for Article III judges.\textsuperscript{262} Unlike the orders of an Article III judge, however, an ALJ’s decision is subject to executive control in the form of de novo review by agency heads.\textsuperscript{263} Therefore, from an agency’s perspective, an ALJ provides independent advice rather than a binding order. The great virtue of formal administrative adjudication is that it enables a fresh, neutral set of eyes to assess, after an adversarial clash, whether a particular action should be taken. This helps defuse the danger of prosecutorial groupthink, where everyone on the “team” forms a bias against targets of the group, whether the targets are criminal defendants or alleged members of al Qaeda.\textsuperscript{264}

Adapting this template to targeted killing is relatively straightforward. The President could issue an order to government officials that, as part of their target selection, they need to make their cases to an AJ.\textsuperscript{265} To protect against bias, the AJ would not participate in “building the case” against the target and would not be subject to discipline by officials playing an investigatory or prosecutorial role.\textsuperscript{266} To enhance accuracy, fairness, and legitimacy, the AJ would decide the matter based on an adversarial proceeding

\textsuperscript{260} Id. § 554(d).
\textsuperscript{261} Id.
\textsuperscript{262} U.S. CONST. art. III, § 1.
\textsuperscript{263} 5 U.S.C. § 557(b).
\textsuperscript{264} See Barkow, supra note 257, at 889 (discussing widespread agreement during the development of the APA that separation of functions within agencies was necessary due to “the concern that those individuals involved in investigating and prosecuting a case would have a ‘will to win’ that would make them inappropriately partial in making a decision on the merits of a case”).
\textsuperscript{265} The use of the abbreviation “AJ” rather than “ALJ” is deliberate. “ALJ” is a term of art that refers to an office subject to a set of statutory limits on appointment, removal, salary, etc. See, e.g., 5 U.S.C. § 7521 (establishing good cause protections for ALJs). Although this proposal borrows from the ALJ template for formal adjudication under the APA, it does not expect all the protections required for ALJ status to apply. Some of these protections are quite rigid, and we start from the assumption that congressional action to control targeted killing is quite unlikely. We thus explore how the President might act unilaterally. The various protections for ALJs are ensconced in binding legislation to protect them from executive reprisals. But the President cannot, of course, issue protections with such legislative force. As a result, we follow the common practice of referring to administrative adjudicators who lack full ALJ protections as “administrative judges” or “AJs.”
\textsuperscript{266} Cf. 5 U.S.C. § 554(d) (imposing these limitations on formal adjudication by ALJs).
between “prosecutors” and officials charged with defending the interests of the proposed target. The exemplary conduct of military lawyers defending alleged terrorists at Guantanamo Bay suggests that these lawyers would make especially suitable “defense counsel.”

Plus, they are more likely than an ordinary defense lawyer to have a security clearance or to be eligible for a clearance. Having heard from “defense lawyers” among others, the AJ would render an initial decision on the legality of the target selection, complete with formal findings of fact and conclusions of law. Yet this decision would not bind the President. Unlike the orders of an Article III judge from a FISA-style court, AJ decisions would not infringe the President’s Article II power as Commander-in-Chief. Presumably, the President would overrule the AJ’s decision only where other trusted officials make a strong case for reversal.

Revelations about the targeted killing campaign imply that its decision-making process is vulnerable to problems our proposal could alleviate. Targeting procedures should encourage full, frank discussion by officials with relevant information to share. Otherwise, once substantial resources have been sunk into an operation, it can be difficult for anyone to object. Strong hierarchies, as exist within the executive branch, compound this problem.

Some press accounts indicate both an official awareness of these problems and the need to address them. In describing the “nominations” process then in place for targeted killing by JSOC, the New York Times reported the following in 2011:

The video conferences are run by the Pentagon, which oversees strikes in those countries, and participants do not hesitate to call out a challenge, pressing for the evidence behind accusations of ties to Al Qaeda.

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267. This proposal obviously depends on the professionalism of persons appointed to represent the interests of targets. For a strong defense of the high professionalism of military lawyers as defense counsel for alleged terrorists, see, e.g., Charles J. Dunlap, Jr. & Linell A. Letendre, Military Lawyering and Professional Independence in the War on Terror: A Response to David Luban, 61 STAN. L. REV. 417, 438–40 (2008); see also GOLDSMITH, supra note 3, at 175–77 (discussing the role of military lawyers as part of the “GTMO Bar”).

268. Cf. 5 U.S.C. § 557(b) (providing for de novo review by agencies of AJ initial decisions).

269. For examples of the difficulty of objecting to a targeted killing in the advanced stages of planning, see infra text accompanying notes 272–80.

"What’s a Qaeda facilitator?" asked one participant, illustrating the spirit of the exchanges. "If I open a gate and you drive through it, am I a facilitator?" Given the contentious discussions, it can take five or six sessions for a name to be approved, and names go off the list if a suspect no longer appears to pose an imminent threat, the official said.\textsuperscript{271}

As described, administration officials seem free to express their knowledge and opinions—as they should be. But one does not have to be too cynical to realize that the anonymous official who offered this bracing account to a prestigious newspaper hoped, not to put too fine a point on the matter, to make the administration look good.

Other accounts have been less reassuring. In December 2009, six months after becoming legal adviser for the State Department, Harold Koh had to assess the legality of killing several targets.\textsuperscript{272} To conduct his assessment, he was given a set of "highly classified PowerPoint slides," which the military calls "baseball cards," making the case for the strike.\textsuperscript{273} He spent forty-five minutes "[i]n between a packed schedule of meetings" trying to "absorb the intelligence and assess the legality of what was, in effect, a preplanned, presidentially authorized hit job."\textsuperscript{274} Later that day, Koh participated in a videoconference that involved up to seventy-five officials and was led by JSOC commander Admiral William McRaven. Koh was "awed by McRaven’s crisp efficiency" but felt that "there was also an inexorable quality to the meeting, a machinelike pace that left him feeling more like an observer than a participant."\textsuperscript{275}

Nor was this the first time that Koh felt powerless to resist the military’s plans for a targeted killing. Some months earlier, he had, with little time to prepare, participated in his first videoconference to discuss a targeted killing in Somalia.\textsuperscript{276} He had questions about the operation "but did not get a chance to raise them, having to leave the meeting early for a business dinner."\textsuperscript{277} Reflecting on this incident,

[Koh] was disturbed by his own passivity during the SVTS meeting. The military was a juggernaut. They had overwhelmed the session with their sheer numbers, their impenetrable jargon, and their ability to create an atmosphere of do-or-die urgency. How could anybody, let alone a humanitarian law professor, resist such powerful

\begin{footnotes}
\footnotetext[271]{Becker & Shane, \textit{supra} note 1.}
\footnotetext[272]{KLAIDMAN, \textit{supra} note 9, at 199.}
\footnotetext[273]{Id. at 200.}
\footnotetext[274]{Id.}
\footnotetext[275]{Id. at 201.}
\footnotetext[276]{Id. at 201–02.}
\footnotetext[277]{Id. at 202.}
\end{footnotes}
momentum? ... Trying to stop a targeted killing "would be like pulling a lever to stop a massive freight train barreling down the tracks," he confided to a friend.\textsuperscript{278}

Later, to his relief, Koh was able to review the full intelligence file on the target and concluded that the strike was justified.\textsuperscript{279} Ex post facto review, of course, could not alter his inability to influence the discussions when they mattered.

Jeh Johnson, former General Counsel of the Defense Department, also experienced the practical and psychological difficulties of blocking a targeted killing at an advanced stage of military planning. Regarding his participation in the same December 2009 operation that so impressed Koh with the military's "machinelike pace," Johnson thought about how hard it would be to resist the momentum toward kinetic force—the heavy pressure exerted by the military to kill. It was easier to say yes than to say no, he realized. In his mind he used the same metaphor as Koh—it was like a one-hundred-car freight train hurtling down the tracks at eighty miles an hour. You would have to throw yourself on the tracks to try to stop it. He wasn't entirely comfortable with his decision; he'd felt rushed and unprepared. ... Later[, after watching imagery of the attack] he would confide to others, "If I were a Catholic, I'd have to go to confession."\textsuperscript{280}

In sum, two extraordinarily accomplished lawyers and public servants, Koh and Johnson, found it difficult to intervene in the process of targeted killings. By the time the review reached them, military officials had already invested mental and physical resources against a particular target. Reviewing officials with many other responsibilities and little time to develop expertise about the target naturally felt diffident in the face of a relentless set of PowerPoint slides. The sheer number of participants in the video conferences heightened this problem as any given participant would know that he or she must share time with scores of others. Koh's and Johnson's accounts create the impression that, at least as of late 2009, the real decision making was not occurring during huge videoconferences with their seventy-five to hundred participants. These videoconferences diffused rather than increased accountability and responsibility. The big decisions were happening somewhere else, lower in the hierarchy.

Since these events in 2009, the process for targeted killing has evolved extensively, culminating with the Presidential Policy
Guidance of May 2013.  

Perhaps Koh and Johnson fostered this evolution by taking their concerns to the press. Whatever the source of the evolution, during 2012, control became concentrated at the White House in an office then led by John Brennan.  

Centralization carries potential risks and benefits. On the risk side, some agency officials have expressed concerns that an office at the White House “could turn . . . into a pseudo military headquarters, entrusting the fate of al-Qaida targets to a small number of senior officials.” On the benefit side, if the reviewing group has a smaller number of officials, they may find it easier to say “no” at an advanced stage of target selection—a power that Koh and Johnson apparently found lacking in earlier iterations of the interagency process.  

Centralized control may also ameliorate the combination-of-functions problem embedded in the targeting process. The CIA and the military, in essence, act like prosecutors who build cases against targets. White House officials then “adjudicate” whether these cases justify placing a name on the target list. Perhaps because he was thinking along these lines himself, Brennan, while at the White House, ended the practice of interagency videoconferences led by the Chairman of the Joint Chiefs of Staff because “the process shouldn’t be run by those who pull the trigger on strikes.” Without far greater disclosure of procedures and their outcomes, it is impossible for outsiders to assess whether Brennan acted as a neutral adjudicator or more in the nature of another prosecutor. He was, after all, the President’s chief counterterrorism adviser over a drone campaign that has killed thousands of people.  

In addition to the worrisome accounts from Koh and Johnson, there have been other suggestions that target selection may be vulnerable to prosecutorial groupthink and inertia. Formal adjudication might alleviate these problems. Some officials have worried that targets have been selected on weak evidence. Just
as disturbing, some officials have said that, as the United States kills off its most dangerous adversaries, it may be targeting persons who do not pose a significant threat to the United States.\footnote{288 See Worth et al., supra note 284 (noting concerns of former head of JSOC, General Stanley McChrystal, and former CIA Director Michael Hayden that "the drone wars in Pakistan and Yemen are increasingly targeting low-level militants who do not pose a direct threat to the United States").}

We note these objections not to impugn the good faith of any officials. The problems at issue are not rooted in the particular virtues and vices of the officials who carry out targeting decisions. Rather, they are precisely the sorts of problems that ancient principles of due process tell us to expect in the absence of a neutral decision maker. For American counterterrorism, the United States' commitment of vast resources to finding and killing members of QTA compounds our concerns.\footnote{289 See Miller & Tate, supra note 50 (reporting that the CIA Counterterrorism Center has about 2000 employees and that approximately 20\% of CIA analysts now work as "targeters").} We expect this machinery, once in place, to exert a bureaucratic tendency to find work to do. That means an impulse to identify more and more targets.

The advantages of adding some sort of formal adjudication to the targeting process cannot be quantified. We cannot say how many inaccurate "false positives" might be corrected, an inability due to secrecy, but also inherent in the task. Determining which members of QTA are dangerous enough to merit targeting requires value judgments, and we cannot compare the United States' target selections to an absolutely correct master list. Perfection comes from a higher power.

Still, we can safely and reasonably argue that the \emph{Mathews v. Eldridge} balancing test—and thus due process and feasible precaution—demand formal adjudication, as adapted to the circumstances, as a part of targeting. Groupthink, bureaucratic inertia, and a tendency for human beings to exaggerate the strength of facts that support their settled positions are all familiar phenomena—and, as discussed, there is reason to think that they taint current targeting procedures. Adding formal adjudication to the targeting process would ameliorate these problems by adopting a careful and neutral framework to elicit full information and multiple points of view. Reducing false positives via formal adjudication would obviously serve the private interests of persons taken off target lists. They get to live. It would also benefit the
United States, which, for a potent mix of moral, legal, and policy reasons, should not wish to kill the wrong people. On a closely related point, the public has a broad, shared interest in ensuring that the targeting is as accountable, careful, and self-critical as security concerns reasonably permit.

"False negatives" are the primary downside to formal adjudication (i.e., the United States would fail to kill genuinely dangerous terrorists). This problem is no more amenable to quantification than the problem of determining how many "false positives" are occurring under the present system. Even so, unlike the orders of Article III courts, the decisions of administrative judges are subject to de novo review by higher executive authorities. Even with administrative judges added to the targeting process, security concerns would have another opportunity to enter the balance at the top. Under our proposal, the President, or perhaps a delegate like John Brennan, could overrule the AJ's independent, neutral advice. Given this power to overrule, any costs to security should be de minimis.

CONCLUSION

To critics, the targeted killing of members of QTA, at least outside a "hot zone" of armed conflict, is extrajudicial murder. Implicitly, President Obama is a serial killer. The United States claims, to the contrary, that it has the authority to kill QTA members consistent with the laws of war even in places where American troops are not on the ground. Even if the United States is correct on these substantive points, it does not answer the crucial procedural question of how the United States should decide whom to kill.

Debate over this "how" question has focused on the due process owed to the very few American citizens at risk. This focus obscures the relationship between due process and the law-of-war requirement of feasible precaution, which certainly applies to all targets regardless of their connections to the United States. Both standards demand that the United States take reasonable steps to ensure that only legitimate targets are hit. At their core, both standards call for something akin to the Mathews v. Eldridge balancing test, which requires the government to adopt an additional procedural protection where a weighing of all relevant interests indicates that doing so would do more good than harm.

290. See supra note 3 and accompanying text (noting these charges).
291. See, e.g., Koh, supra note 6 (declaring United States' position that it is in an armed conflict with QTA).
292. See supra Part IV (discussing due process, feasible precaution, and their relation).
On reflection, it should not surprise that these doctrines require
greater predeprivation process for targeted killing than are
consonant with our usual conceptions of armed conflict. After all,
the conflict with QTA is not a “usual” one. Targeted killing, as an
American tool in this conflict, invites relatively formal process
because (1) target selection depends intensely on individuated facts
about particular people developed through intelligence that may be
highly contestable and (2) the process unfolds over a considerable
period of time. These factors make additional process both more
useful and more practicable than it would be in, say, a firefight. As
a result, we should expect the procedures for targeted killing in an
armed conflict, whether nominally rooted in due process or feasible
precaution, to adopt tools we associate with “peacetime” procedures.

Mindful of that convergence, we have explored how the due
process components of notice and an opportunity to be heard before
a neutral decision maker could apply to the targeted killing
campaign. As for notice, we suggest that the United States could
improve the fairness, legitimacy, and perhaps the accuracy of its
target selection by publishing the names of persons who satisfy its
targeting criteria, at least where doing so would not unreasonably
compromise intelligence sources and methods. As for neutral
decision making, even if the doors of regular courts are closed to
cases on targeted killing, the executive branch could and should
improve its process by adapting the tools of formal administrative
adjudication. Target selection would include an adversarial
hearing within the executive branch before an AJ. Unlike a decision
by an Article III judge, the AJ’s decision would be subject to plenary
presidential review. The power to kill by armed drone during an
armed conflict would be left where it belongs by constitutional
design: in the President of the United States of America.

In closing, we recognize that many on both sides of the great
debate about drones will be dissatisfied with the messiness of a
middle ground that rests on indeterminate balancing tests. We also
recognize that not everyone will agree with how we have applied
this balance to develop new procedures. In our view, these
dissatisfactions and disagreements come with the challenge of
confronting international terrorism within the rule of law. To put
our conclusion in stark and basic terms, the law requires any

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[294. See generally Issacharoff & Pildes, supra note 13, at 9–10 (observing influence of due process principles as military targeting focuses on individuated facts concerning particular people).]

[295. See supra notes 174–76 (discussing the role of adjudicative facts in triggering due process requirements and noting that target selection unfolds over time).]

[296. See supra Subpart IV.A.]

[297. See supra Subpart IV.B.]
procedural protection that does more good than harm in light of all relevant interests. Different people will balance these interests differently. That does not alter the duty of those in power, in any branch of government, to strike the balance as best they can. When it comes to America’s use of lethal force, no matter who is the target and no matter where he resides, there must be at least this much justice for all.
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