DUE PROCESS AND TARGETED KILLING OF TERRORISTS

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ABSTRACT

"Targeted killing" is extra-judicial, premeditated killing by a state of a specifically identified person not in its custody. States have used this tool, secretly or not, throughout history. In recent years, targeted killing has generated new controversy as two states in particular—Israel and the United States—have struggled against opponents embedded in civilian populations. As a matter of express policy, Israel engages in targeted killing of persons it deems members of terrorist organizations involved in attacks on Israel. The United States, less expressly, has adopted a similar policy against al Qaeda—particularly in the border areas of Afghanistan and Pakistan, where the CIA has used unmanned Predator drones to fire Hellfire missiles to kill al Qaeda leaders and affiliates. This campaign of Predator strikes has continued into the Obama Administration.

This Article explores the implications for targeted killing of the due process model that the Supreme Court has developed in Hamdi v. Rumsfeld *and* Boumediene v. Bush *for detention of enemy combatants. Contrary to a charge leveled by Justice Thomas in his* Hamdi *dissent, this model does not break down in the extreme context of targeted killing. Instead, it suggests useful means to control this practice and heighten accountability. Our primary conclusion is that under* Boumediene, *the executive has a due process obligation to develop fair, rational procedures for its use of targeted killing no matter whom it might be targeting anywhere in the world. To implement this duty, the executive should, following the lead of the Supreme Court of Israel (among others), require an independent, intra-executive investigation of any targeted killing by the CIA. These investigations should be as public as is reasonably consistent with national security. Even in a war on terror, due process demands at least this level of accountability for the power to kill suspected terrorists.*

I. THE ATTACK OF THE DRONE

Suppose President Obama decides to kill a suspected terrorist. The President might use a marvel called the "Predator drone," a small, unmanned aircraft equipped with surveillance cameras.[1] By Hellfire missiles launched from the drone, he can kill people thousands of miles away from the White House. The target does not see or hear the weapon as it is fired. The hit, from far enough away, has the tidiness of a video game.

The United States government has used the Predator with considerable success since 9/11. One important attack occurred in 2002, when a Predator killed a group of al Qaeda members driving in the Yemeni desert.[2] Their remote location ruled out capture or conventional attack. So the President or one of his delegates gave an order. Then somebody pushed a button that fired a missile, killing all the suspects. Among the dead was an American citizen.[3] Did our government mean to kill an American this way? No one outside the cone of silence knows, and the CIA will neither confirm nor deny.[4]

The Yemeni strike provides a dramatic example of "targeted killing," defined here as extra-judicial, premeditated killing by a state of a specifically identified person not in its custody. States have used this tool—secretly or not—throughout history.[5] In recent years, targeted killing has generated new controversy as two states in particular—Israel and the United States—struggle against opponents embedded in civilian populations. Israel expressly adopted targeted killing against

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1 *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 196-97 (2004), *available at* http://www.9-11commission.gov/report/911Report.pdf.

2 Dana Priest, *CIA Killed U.S. Citizen in Yemen Missile Strike: Action's Legality, Effectiveness Questioned*, WASH. POST, Nov. 8, 2002, at A1.

3 *See id.*; *see also* James Risen, *Drone Attack: An American Was Among 6 Killed by U.S., Yemenis Say*, N.Y. TIMES, Nov. 8, 2002, at A13.

4 Deputy Secretary of Defense Paul Wolfowitz, who came close to bragging, was not as tight-lipped as CIA officials about the Yemeni job. *See* David Johnston & David E. Sanger, *Fatal Strike in Yemen Was Based on Rules Set Out by Bush*, N.Y. TIMES, Nov. 6, 2002, at A16 ("We've just got to keep the pressure on everywhere we are able to, and we've got to deny the sanctuaries everywhere we are able to . . . .").

5 The term "assassination" is a legal term of art that signifies a type of targeted killing that is illegal by definition. With this definitional caveat noted, "[b]efore the seventeenth century, assassination was regarded as a normal means for states to conduct their business, similar to diplomacy and war." Steven R. David, *Israel's Policy of Targeted Killing*, 17 ETHICS & INT'L AFF. 111, 115 (2003).

Palestinian militants in the West Bank and Gaza.[6] Less expressly, the United States adopted a similar policy against al Qaeda—particularly in the border areas of Afghanistan and Pakistan.[7] In January 2009, a U.S. official claimed that an intensified campaign of CIA Predator strikes into Pakistan had killed eight out of al Qaeda's top twenty leaders.[8] President Obama, on his third full day of office, authorized two more strikes, embracing President Bush's policies at least to some degree.[9] Since then, many additional Predator strikes have been reported.[10] Targeted killings, whether ordered by Republicans or Democrats, provide a demoralized public with some tangible evidence that democracies are tough enough to strike at suspected terrorists, to kill before we are killed. Any backlash overseas is a different story.

Targeted killing by any state poses frightening risks of error and abuse. The fears are heightened by American mistakes at Guantanamo Bay and by the use of coercive techniques on detainees held outside the full protections of the criminal justice system.[11] It is therefore not surprising that targeted killing has generated a wide range of commentary about its legality. Some condemn targeted killing as extra-judicial execution.[12] Others accept it as a legitimate aspect of armed

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[6] *See, e.g.*, HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr., [Dec. 11, 2005] slip op. para. 2, *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf [hereinafter *PCATI*] (observing that it is official Israeli policy "to kill members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel").

[7] *See, e.g.*, NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 442-44 (2008) (citing public sources documenting missile attacks intended to kill leading members of al Qaeda at sites near the Afghan/Pakistani border); *see also* Mark Mazzetti & Eric Schmitt, *U.S. Takes to Air to Hit Militants Inside Pakistan*, N. Y. TIMES, Oct. 27, 2008, at A1 (reporting that the CIA launched eighteen Predator strikes on targets in Pakistan during the preceding three months).

[8] Brian Ross et al., *Obama to CIA: Bombs Away! No Let Up in US Drone Attacks*, ABC NEWS, Jan. 23, 2009, http://www.abcnews.go.com/Blotter/story?id=6718124&page=1.

[9] *Id.*

[10] *See, e.g.*, Pir Zubair Shah & Sabrina Tavernise, *Strike Reportedly Missed Chief of Pakistani Taliban by Hours*, N.Y. TIMES, June 25, 2009, at A8; Pir Zubair Shah, *25 Militants Are Killed in Attack in Pakistan*, N.Y. TIMES, May 17, 2009, at A16.

[11] *See* JANE MAYER, THE DARK SIDE 150-81 (2008) (detailing the use of techniques such as waterboarding and sleep deprivation against al Qaeda members).

[12] *See, e.g.*, Antonio Cassese, Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists Is Consonant with International Humanitarian Law at 20, HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr., [Dec. 11, 2005] slip op., *available at* http://www.stoptorture.org.il/files/cassese.pdf (last visited Oct. 15, 2009) ("To hold that killing civilians suspected of terrorism, while they are not engaged in military action, is internationally lawful, would involve *a blatant departure from the fundamental principles of international humanitarian law* . . . [that] may amount to a *war crime*."); Amnesty Int'l, *Israel and the Occupied Territories: Israel Must End Its Policy of Assassinations*, AI Index MDE 15/056/2003, July 4, 2003, *available at* http://amnesty.org/en/library/info/MDE15/056/2003/en (follow PDF download hyperlink) (condemning Israeli policy of targeted killing as an illegal scheme of "extrajudicial executions").

conflict against determined, organized terrorists from al Qaeda and other groups.[13]

From the technical stance of the law, much of the controversy over targeted killing stems from the fact that it does not fit comfortably into either of two models that generally control the state's use of deadly force: human rights law and international humanitarian law (IHL).[14] The human rights model controls law enforcement operations generally, and it permits the state to kill a person not in custody only if necessary to prevent him from posing a threat of death or serious injury to others.[15] IHL is that part of the laws of war that enforces minimum standards of humane treatment of individuals.[16] As part of the *lex*

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[13] For a recent, extremely important judicial exploration of the legality of targeted killing concluding that terrorists are "civilians" who may be targeted only while directly participating in hostilities but adopting an expansive approach to the concept of "direct participation," see the Israeli High Court of Justice's discussion in *PCATI*, *supra* note 6. *See also* MELZER, *supra* note 7, at 418-19 ("[T]he international normative paradigm of hostilities does not prohibit, but imposes extensive restraints on the method of targeted killing."); William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 749 (2003) (concluding a detailed study of the legality of targeted killing under U.S. domestic law by observing that the current legal framework "leave[s] the nasty business of targeted killing where it should lie, as a permissible but tightly managed and fully accountable weapon of national self-defense in an era of horrific terrorist attacks on the United States and its people"); Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319, 334 (2004) ("Israel's experience instructs us that targeted killing is a legitimate and effective form of active self-defense that has helped Israel protect its people."); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171 (2005) (concluding that targeted killing of terrorists can be legal under the laws of war but that these laws should incorporate elements of international human rights law to provide greater protection against improper targeting).

[14] For discussion of whether one or the other of these models (or something in between) should govern the war-on-terror, see for example, Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL'Y 457 (2002). For discussion of how the two-model dichotomy is blurring as its components converge, see generally Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008). *See also* John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765, 767 (2007) ("[W]ar has changed in its functions, to become more like policing, [and] that policing too has changed, to become more like war.").

[15] *See, e.g.*, MELZER, *supra* note 7, at 59 ("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 . . . ."); *cf.* Tennessee v. Garner, 471 U.S. 1, 3 (1985) ("[Deadly] force . . . may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."); Scott v. Harris, 550 U.S. 372, 385-386 (2007) (clarifying *Garner* and holding that the use of deadly force, which is subject to a general "reasonableness" standard under the Fourth Amendment, was justified where a fleeing suspect in a high-speed chase "posed a substantial and immediate risk of serious physical injury to others").

[16] It is fairly common to equate IHL with the laws of war or *jus in bello*. This Article, however, will follow Melzer insofar as he characterizes IHL as "those rules that establish minimum standards of humanity which must be respected in any armed conflict." MELZER, *supra* note 7, at 244 n.9. This characterization excludes from IHL those portions of the laws of war that govern relations among sovereigns rather than protection of individuals. Given that this Article focuses on the nature of legal protections for individuals against targeted killing, it is more

specialis of war, IHL displaces the human rights model during armed conflicts, granting the state broad authority to kill opposing combatants as well as civilians who are directly taking part in hostilities.[17] Under this two-model dichotomy, extra-judicial, targeted killing of a person who is *not* an imminent threat can be legal only as permitted under IHL. However, conceding that IHL—as part of the laws of war—can apply to targeted killing might seem to grant the executive too much power to categorize suspected terrorists as combatants and then kill them off without a shred of process.

Disinclined to issue a general hunting license, much of the scholarship that accepts the potential legitimacy of targeted killing also seeks to prevent abuse. To this end, some scholars have argued that IHL imposes stricter controls on killing than is commonly thought.[18] Others have suggested that the law should control targeted killing by developing a mixed model that combines elements of the human rights model and IHL.[19] Yet most of this scholarship shies away from examining the legality of targeted killing under American law, preferring instead to focus on this practice's legality under international law.[20]

This Article stays closer to home, arguing that American due process principles should control targeted killing of suspected terrorists and applying those principles to alleged CIA Predator strikes. One obvious spur to our inquiry is the text of the Fifth Amendment itself, which, without obvious limitation, bars the federal government from depriving "any person" of "life" without "due process of law."[21] Other spurs include recent blockbuster opinions—*Hamdi v. Rumsfeld*[22] and *Boumediene v. Bush*[23]—that use administrative law principles to limit executive authority to detain persons as enemy combatants. If due

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concerned with IHL (thus defined).

17 *See generally infra* Part III (discussing authority to kill under IHL).

18 *See* MELZER, *supra* note 7, at 418-19 (identifying a set of "extensive restraints" that the "international normative paradigm of hostilities" places on the use of targeted killing).

19 *See, e.g.*, Orna Ben-Naftali & Keren R. Michaeli, *'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L.J. 233, 289 (2003) (contending that, in armed conflicts, human rights law should control where IHL fails to provide clear guidance); Kretzmer, *supra* note 13, at 203-04 (proposing a mixed model that would subject targeted killings to the requirements of necessity and proportionality borrowed from Article 51 of the U.N. Charter and also subject them to the investigation requirements that human rights law imposes after the use of deadly force).

20 For an especially notable exception to this generalization, see Banks & Raven-Hansen, *supra* note 13.

21 U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property without due process of law . . . .").

22 542 U.S. 507 (2004) (O'Connor, J., plurality) (holding, with the assent of a majority of the Court, that American citizens held as enemy combatants were entitled to due process protections).

23 128 S. Ct. 2229 (2008) (holding that non-citizen detainees at Guantanamo Bay had constitutional right to seek habeas corpus review in federal courts and that the contours of this review would be a function of due process principles).

process controls whom the executive may *detain* in the war on terror, then surely due process controls whom and how the executive may *kill*.

But on another view, nothing could be more absurd than courts attempting to conform armed conflict to judicial norms. Justice Thomas has been a vocal proponent for this view.[24] Indeed, he used the 2002 Predator strike cited at the beginning of this Article to mount a *reductio ad absurdum* attack on his colleagues' efforts in *Hamdi* to impose due process on the detention of enemy combatants.[25] Dissenting, he contended that the controlling plurality's approach led to the absurd conclusion that the government should give terrorists notice and an opportunity to be heard before firing a missile at them.[26] More broadly, Justice Thomas asserted that the courts have neither the authority nor the competence to second-guess the executive's detention of enemy combatants.[27] Implicit is that courts should not second-guess the killing of enemy combatants either.

Responding to Justice Thomas's challenge, we contend that the due process model of *Hamdi/Boumediene* does not break down when applied to the extreme case of targeted killing. Instead, this model supports adoption of procedures that would increase transparency and accountability for targeted killing while still respecting national security needs.

To support this contention, we press two claims. The first responds directly to Justice Thomas's gibe that the logic of *Hamdi* implies an absurd level of judicial control of war. Together, *Hamdi* and *Boumediene* give detainees a due process right to judicial review of the government's decision to deprive them of their liberty *after* their imprisonment had started. On its face, this kind of judicial intervention does not suggest that the CIA must give terrorists notice and an opportunity to be heard before killing them. Rather, by analogy, it suggests that a proper plaintiff should be able to challenge the legality of a targeted killing *after* an attack. This challenge might take the form of a *Bivens*-style action.[28] If allowed, these lawsuits would face an

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24 *Hamdi*, 542 U.S. at 579 (Thomas, J., dissenting) ("This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision.").

25 *Id.* at 597 ("[I]n November 2002, a Central Intelligence Agency (CIA) Predator drone fired a Hellfire missile at a vehicle in Yemen carrying an al Qaeda leader, a citizen of the United States, and four others. It is not clear whether the CIA knew that an American was in the vehicle. But the plurality's due process would seem to require notice and opportunity to respond here as well." (citation omitted)).

26 *Id.*

27 *Id.* at 585 (Thomas, J., dissenting) ("[T]he question whether Hamdi is actually an enemy combatant is 'of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.'" (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948))).

28 *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388,

array of practical and legal obstacles—not the least that a proper plaintiff would need to be alive and willing to bring suit in the United States. Even so, judicial resolution of the merits of a lawsuit that survived these obstacles would increase accountability for targeted killing without posing a significant threat to national security.[29] Therefore, the principles of due process call for this minimal level of judicial intervention.

Yet as a practical matter, the judicial role just identified is vanishingly small. Justice Thomas is surely correct that the executive must dominate decisions about who lives and dies in war. This makes executive self-control all the more important—and leads to our second claim. Due process is everywhere. For a century, debate has bubbled over the extra-territorial reach of the Constitution.[30] The logic of *Boumediene*'s five-justice majority opinion is that the Due Process Clause binds the executive worldwide—from Alaska to Zimbabwe.[31] This duty exists even for matters that cannot or should not be subject to significant judicial control; the executive must obey the Constitution even if no court is in a position to say so. Honoring this obligation requires the executive to adopt procedures that maximize the accuracy and propriety of the CIA's targeted killing without unacceptably harming national security.[32] Following the lead of cases from the European Court of Human Rights and the Supreme Court of Israel,[33] we submit that as one integral element of these procedures, executive authorities should conduct independent, impartial, post-hoc review of the legality of any targeted killing by the CIA and that this review should be as public as national security permits.[34]

To set the stage for how due process limits targeted killing of suspected terrorists, we first pull back the veil—a little—on a very secret program. We describe what is publicly known or can be reasonably inferred about the process that precedes targeted killing by Predator strike. Next we examine targeted killing of suspected terrorists under the laws of armed conflict, which, in brief, grants broad authority

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397 (1971) (permitting plaintiff to seek damages for agents' purported violation of his Fourth Amendment rights).

29 *See infra* Part V.A.

30 For discussion of the case law on extra-territorial application of the Constitution, see *infra* notes 143-186 and accompanying text.

31 *See infra* text accompanying notes 149-185 (discussing *Boumediene*'s treatment of extra-territorial application of the Constitution).

32 *Cf.* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (observing that whether a given procedure is required by due process depends on whether the increased protection to private interests outweighs the costs it imposes on the public interest).

33 *See PCATI*, *supra* note 6, paras. 40, 54 (describing executive's duty to investigate targeted killings of alleged terrorists after the fact); McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A), paras. 157-64 (1995) (similar).

34 *See infra* Part V.B (discussing the implications of due process for internal, executive review of targeted killings).

to target enemy "combatants" but not "civilians"—unless they have forfeited their immunity by directly participating in hostilities. We then explore how the Court has applied due process to the detention of enemy combatants in *Hamdi v. Rumsfeld*[35] and *Boumediene v. Bush*.[36] Lastly, we assess some of the implications of *Hamdi/Boumediene* for the due process of targeted killing.

II. THE PREDATOR PROGRAM

A government stamp of secrecy stands in the way of an open discussion of the formal process, if any, for approving CIA Predator strikes. If the President has delegated trigger authority to another person within the executive branch, that fact as well as the standards of delegation are also classified. Therefore, as with so many topics about the intelligence community, the most we are able to do is speculate on the basis of common sense and the public record.

From the perspective of common sense, there are many reasons why the President might keep the trigger authority to himself. First, the fewer people involved in a secret decision, the less likely it will leak to the public. Second, launching a missile into a foreign country might be perceived as the making of war, an activity at the core of the Commander-in-Chief power. Third, if the United States notifies or seeks the permission of the foreign country into which the missile will be fired, diplomatic protocol suggests that the American head of state be involved. Fourth, related to the other three reasons, the President might trust his own judgment more than that of his advisers.

There are countervailing reasons why the President may choose to delegate the trigger authority. First, the President may not want to dirty his own hands. The making of war against a foreign country, along with dramatic announcements from the Oval Office, may carry an air of dignity. By contrast, the selective killing of individuals, even if well justified, seems more the business of a Mafioso than a statesman. Second, if something goes wrong with the strike, the President might be able to pass the blame to subordinates whom he would claim, rightly or wrongly, did not carry out the delegation as he intended. It would be a return to the era of "plausible deniability" when Presidents had their dirty work done on the basis of winks and nods.[37] Third, if the trigger

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35 542 U.S. 507 (2004).

36 128 S. Ct. 2229 (2008).

37 The doctrine of "plausible deniability" hinged on restricted congressional notice, or no notice at all, allowing the President, when necessary, to disclaim any knowledge of a covert action. *See* M.E. Bowman, *Secrets in Plain View: Covert Action the U.S. Way*, 72 INT'L L. STUD. 1, 9 (1998) (stating that the goal was to conduct activities in secret and avoid the disclosure of

authority is delegated closer to the personnel who operate the Predator drone, the time between spotting the target and deciding to fire the missile would be measured in minutes. On the other hand, if the President pulls the trigger, the time it would take for the intelligence from the field to be passed to him would be measured in hours, if not days.

All in all, it is not clear as a matter of common sense whether during the Bush Administration, the President or a subordinate was the person on the trigger of the Predator drone. The public record, however, presents some clues. Jane Mayer, Dana Priest, and other investigative journalists have reported that soon after 9/11, President Bush delegated trigger authority to the Director of the Central Intelligence Agency (DCIA), and in turn, the DCIA delegated his authority to the head of the CIA's Counterterrorist Center.[38] That means that two men who garnered their own controversy on other stories, Cofer Black and Jose Rodriguez,[39] had the power to kill or not kill. These two were neither elected nor subject to Senate confirmation. They also were not part of the Pentagon's chain-of-command or, so far as is publicly known, subject to the extensive body of rules that the Department of Defense has developed to ensure its compliance with the laws of war.[40]

If the journalists are correct, the Bush Administration chose speed over accountability on Predator strikes. America's ghost warriors, men and women at the CIA, were trusted to do the right thing in protecting America's national security. Any formal process that preceded a CIA strike was secret. Determinations that the target had been properly identified and that collateral damage would be acceptable may have occurred solely at Langley without any input from the National Security Council, the White House, or other parts of the executive branch.

U.S. involvement).

[38] *See, e.g.*, MAYER, *supra* note 11, at 39 (asserting that "[t]o give the President deniability, and to keep him from getting his hands dirty," the CIA program for targeted killing of al Qaeda members delegated "blanket authority to [CIA Director] Tenet to decide on a case-by-case basis whom to kill . . . and how"); Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, Dec. 4, 2005, at A1.

[39] *See, e.g.*, Joby Warrick & Walter Pincus, *Station Chief Made Appeal to Destroy CIA Tapes*, WASH. POST, Jan. 16, 2008, at A1 (discussing Rodriguez's role in the destruction of tapes of detainee interrogations).

[40] For an example of the military's controls on killing, see UNITED STATES AIR FORCE, TARGETING: AIR FORCE DOCTRINE DOCUMENT 2-1.9 (2006), *available at* http://www.fas.org/irp/doddir/usaf/afdd2-1.9.pdf. This document describes the multi-step process the Air Force has developed for determining its targets. This process includes a vetting step that reviews available intelligence to confirm the appropriateness of the target and whether it can be destroyed consistent with the laws of war and applicable rules of engagement (ROE). *Id.* at 34. It also includes a validation step that ensures the viability of the target and again reviews its legality. *Id.* at 34-35. Military lawyers, or "Judge Advocates," are actively involved in making these determinations. *Id.* at 95.

Participation by the other two branches, if any, appears to have been limited to the provision of notice to the heads of Intelligence Committees in the House and Senate.[41]

We know less about the Obama Administration in its early days. To start, it attempted a clean break from some of the Bush Administration's counter-terrorism policies. In his first week in office, President Obama signed executive orders that required closure of Guantanamo Bay as a detention center within a year and precluded the CIA from conducting interrogations using methods beyond those outlined in the Army Field Manual.[42] Predator strikes against suspected terrorists, however, have continued.[43]

III. TARGETED KILLING AND INTERNATIONAL HUMANITARIAN LAW

Due process depends on the severity of the potential deprivation as well as the substantive grounds that might justify that deprivation. The procedures suited for determining whether a student should be suspended because she has violated school rules are not suited for determining whether a person should be killed because he has committed murder.[44] Therefore, to assess the due process of targeted killing, we begin by identifying the circumstances under which this practice has been justified under substantive law.

As a threshold matter, the legality of one form of targeted killing is relatively clear: Recall that the human rights model for law enforcement permits targeted killing where necessary to prevent a person from posing an imminent threat of death or serious injury to others.[45] Here, the human rights model and IHL overlap.

More difficult is the scope of legal authority to kill persons who do *not* pose an imminent threat. It is commonly (but not universally)

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[41] *See* MAYER, *supra* note 11, at 39 (observing that all covert actions require congressional notification, but that, for purposes of the CIA's war on al Qaeda, "this would be pared down to a bare minimum of four elected representatives [the chairs and ranking minority members of the House and Senate Intelligence Committees], none of whom were allowed to reveal publicly what they had learned").

[42] Scott Shane, *Obama Orders Secret Prisons and Detention Camps Closed*, N.Y. TIMES ON THE WEB, Jan. 22, 2009, http://www.nytimes.com/2009/01/23/us/politics/23GITMOCND.html?pagewanted=1&_r=1.

[43] *See* Ross et al., *supra* note 8 (reporting Predator strikes during the first week of the Obama Administration); *supra* note 10 and accompanying text.

[44] *Compare* Goss v. Lopez, 419 U.S. 565 (1975) (holding that students facing temporary suspension from public school were entitled to notice and an *informal* chance to respond to school authorities—preferably before the suspension), *with* O'Dell v. Netherland, 521 U.S. 151, 171 n.3 (1997) (Stevens, J., dissenting) ("[T]he unique character of the death penalty mandates special scrutiny of . . . procedures in capital cases.").

[45] *See supra* note 15 and accompanying text.

accepted that for such killing to be legal, it must comply with IHL.[46] This body of law includes various international treaties and customary international law that can interact in complex ways with American domestic law. In theory, domestic law could bar practices that would otherwise be legal under IHL. As Professors Raven-Hansen and Banks have ably demonstrated, however, American domestic law does not bar the President from using the tool of targeted killing under some circumstances.[47] Alternatively, domestic authorities might purport to legalize practices that IHL proscribes.[48] In this regard, scholars have debated the degree to which customary international law binds the executive.[49] Some have gone so far as to claim that the President can, pursuant to his Commander-in-Chief power, override treaties limiting his authority to wage war.[50] For the present purpose, however, we will not wade into this dispute about executive power. As we will show, a reasonable construction of IHL grants the executive considerable power to kill the state's enemies. So for the sake of argument, we accept that the substantive legality of targeted killing depends on its consistency with IHL.[51]

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[46] For extended discussion of the view that the customary law of self-defense—not IHL—should control the legality of targeted killing, see Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* 16 (Working Paper of the Series on Counterterrorism and American Statutory Law, Paper No. 9, 2009), *in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM (Benjamin Wittes ed., forthcoming 2009), *available at* http://ssrn.com/abstract=1415070 ("[W]hat the United States needs, and its historic position has asserted, is a claim that self-defense has an existence as a doctrine apart from IHL armed conflict that can justify the use of force against an individual.").

[47] *See* Banks & Raven-Hansen, *supra* note 13, at 749.

[48] *Cf.* Anderson, *supra* note 46, at 22 (identifying the "fundamental assumption that U.S. domestic law permits in certain circumstances the uses of force, including targeted killing, by civilian agents of the government in circumstances that implicate self-defense under international law but do not necessarily constitute an IHL armed conflict").

[49] *See, e.g.*, David J. Barron & Martin S. Lederman, *The Commander-in-Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 953 n.16 (2008) (collecting sources for the modern debate over whether customary international law binds the executive).

[50] *See, e.g.*, Julian G. Ku, *Is There an Exclusive Commander-in-Chief Power?*, 115 YALE L.J. POCKET PART 84 (2006) ("[T]he President does possess an exclusive Commander-in-Chief power that authorizes him to refuse to execute laws and treaties that impermissibly encroach upon his inherent constitutional power.").

[51] Broadly speaking, the legality of a targeted killing would also depend on whether the strike accorded with the laws of war that address interstate relations. For instance, absent permission, an attack by one state on terrorists in another state might violate the protection of sovereignty enshrined in Article 2(4) of the U.N. Charter unless the attack could be characterized as falling within Article 51, which preserves "the inherent right of individual or collective self-defense if an armed attack occurs." U.N. Charter art. 51. The scope of a state's right to self-defense under Article 51—or customary international law for that matter—has been the subject of extensive controversy as the United States, in particular, has claimed a right to wage preemptive attacks in anticipatory self-defense. *See* Robert J. Delahunty, *Paper Charter: Self-Defense and the Failure of the United Nations Collective Security System*, 56 CATH. U. L. REV. 871, 874-75 (2007) (discussing American claim of a right to counter emerging threats); *see also* Amos N. Guiora, *Anticipatory Self-Defence and International Law—A Re-Evaluation*, 13 J. CONFLICT & SECURITY L. 3 (2008) (suggesting evolution of international law to allow for active, anticipatory defense

For IHL to apply, an "armed conflict" must exist as a matter of fact.[52] An armed conflict is something more than sporadic violence—for example, putting down a riot does not constitute an armed conflict.[53] Rather, armed conflict requires "protracted armed violence" to which the parties may be states or organized armed groups.[54] The applicability of IHL thus does not depend on whether Congress has formally declared war or otherwise announced the existence of an armed conflict. Facts on the ground drive the analysis.

Armed conflicts can be either "international" or "non-international."[55] In *Hamdan v. Rumsfeld*, the Supreme Court held that the conflict with al Qaeda is of the latter type.[56] We take as given that the Court's characterization is correct—a non-international armed conflict does in fact exist between al Qaeda and the United States, which leaves room for IHL to apply. The law of non-international armed conflicts, however, is best understood in light of the much better developed law of international armed conflicts—to which we now turn.

The law of international armed conflicts grants states broad authority to kill opposing "combatants" but sharply limits their authority to kill "civilians." The category of lawful combatant includes members of the armed forces of an opposing state as well as members of other organized armed groups of the state that satisfy the following four conditions: (a) they are commanded by responsible authority; (b) they wear a fixed, distinctive emblem recognizable at a distance; (c) they carry their arms openly; and (d) they comport with the laws and customs of war.[57]

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against terrorists). This Article will not wade into these deep waters given that its chief concern is how the law directly protects *individuals* rather than states.

52 MELZER, *supra* note 7, at 245.

53 *Id.*

54 *Id.* (citing Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995)).

55 MELZER, *supra* note 7, at 245. The law of international armed conflict regulates wars among nation-states whereas the law of non-international armed conflict was long generally thought to govern intra-state civil wars. *See* Geoffrey S. Corn, Hamdan*, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295, 308 (2007) (explaining the evolution of the view that the category of non-international armed conflict was limited to intra-state civil wars). Application of these categories to the extra-territorial conflict between the United States and al Qaeda has therefore been controversial. *Compare* Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006) (holding that conflict with al Qaeda is "not of an international character"), *with* Hamdan v. Rumsfeld, 415 F.3d 33, 41-43 (D.C. Cir. 2005) (Randolph, J.) (deferring to the President's "reasonable view" that the war with al Qaeda was "international" in scope), *rev'd*, 548 U.S. 557 (2006). For an argument that the laws of war should avoid this type of characterization game by developing a new, hybrid category of transnational armed conflict for regulating extra-territorial conflicts between states and non-state actors, see generally Corn, *supra*.

56 *Hamdan*, 548 U.S. at 630.

57 *PCATI*, *supra* note 6, para. 24; Kretzmer, *supra* note 13, at 191.

It is often asserted that a combatant can legally kill opposing combatants provided they have not made plain that they are *hors de combat* by, for instance, surrendering with the proverbial white flag.[58] Unlike the law enforcement model, this assertion leaves room to kill persons without regard to whether they pose any immediate threat at all—think of bombing soldiers while they sleep in their barracks. Some, however, maintain that this room to kill opposing combatants is not so absolute given a proper understanding of "military necessity," which requires that "the kind and degree of force resorted to must be actually necessary for the achievement of a legitimate military purpose."[59] This limits "senseless slaughter of combatants where there manifestly is no military necessity to do so, for example where a group of defenseless soldiers has not had the occasion to surrender, but could clearly be captured *without additional risk to the operating forces*."[60] In the archetypical battle zone in which well-matched adversaries fight each other in real time, the choice between these models does not much matter; often, opposing forces have not clearly surrendered or been incapacitated. But, as applied to targeted killing, one might argue that the principle of military necessity blocks killing an isolated enemy combatant who can be captured without risk to his captors or bystanders.[61] On this view, neither the CIA nor the military could kill an unarmed al Qaeda operative who could easily be captured. They could not, for instance, shoot Jose Padilla at O'Hare Airport rather than arrest him.[62] This view of military necessity suggests that apart from other legal and diplomatic concerns, it is more difficult to justify targeted killing in locations the United States or its allies control than elsewhere; it is just easier to capture a terrorist in Chicago or London than in the mountains of Pakistan. Given that executive officials have every incentive to capture al Qaeda members to interrogate them, a limited approach to military necessity—which allows killing only where capture is risky—is presumably consistent with United States policy toward terrorists.

Consistent with "military necessity," attacks must be designed to reduce an adversary's military strength and force submission rather than to punish in a reprisal.[63] Of course, in the context of the war on terror, a

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58 Kretzmer, *supra* note 13, at 191.

59 MELZER, *supra* note 7, at 288 (contending that, "contrary to what powerful States and many authors appear to believe," the doctrine of military necessity limits legal authority under IHL to kill combatants who are not *hors de combat*).

60 *Id.*

61 *Id.* at 397-98.

62 *See* Kirk Semple, *Padilla Gets 17 Year-Term for Role in Conspiracy*, N. Y. TIMES, Jan. 23, 2008, at A14 (summarizing proceedings against Padilla from his arrest at O'Hare Airport through sentencing for criminal conspiracy).

63 *See* John Quigley, *Missiles with a Message: The Legality of the United States Raid on Iraq's Intelligence Headquarters*, 17 HASTINGS INT'L & COMP. L. REV. 241, 265–67 (1994)

suspected terrorist's past actions such as prior attacks on civilians, prior assembly of bombs, and prior financial support to terrorist cells will inevitably be factored into decisions about future intent and dangerousness. Moreover, the higher the suspected terrorist is within the hierarchy of his group, the greater the need for self-defense against that terrorist. A Predator strike on Osama bin Laden has a greater claim on necessity than a strike on his driver Salim Hamdan.

Also, the laws of war bar treachery or "perfidy."[64] This does not bar a surprise attack on a legitimate military target by a Predator strike—at least if the attacker has not unfairly tricked the target into thinking he is safe.[65] It does, however, bar attackers from posing as members of the Red Cross to lure targets into an ambush. Similarly, it would be treacherous, and a violation of the laws of war, to hoist a white flag and shoot at the people who then attempt to capture you.

"Civilians" are shielded from *direct* attack except when they are "tak[ing] a direct part in the hostilities."[66] To give effect to the crucial combatant-civilian distinction, plans of attack must discriminate between lawful and unlawful targets, and planners must use feasible precautions to avoid harming civilians.[67] Attacks also must be "proportionate"—i.e., they must not cause excessive "collateral damage" to persons or property that the laws of war do not permit to be directly targeted.[68] Thus, it would be a war crime to drop a nuclear bomb on Tehran to kill one suspected terrorist.

In both theory and practice, all of these limits are hazy and subject to interpretation. For instance, given the bar on disproportionate collateral damage, would Osama bin Laden be off-limits for a Predator strike in Pakistan if he always kept a (civilian) wife with him? Two wives?[69] Such scenarios are not farfetched. According to the 9/11 Commission, the United States called off a strike on bin Laden before

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(discussing the illegality of reprisals under the U.N. Charter).

64 *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 37, *adopted* June 8, 1977, 1125 U.N.T.S. 3 ("It is prohibited to kill, injure or capture an adversary by resort to perfidy.").

65 *See* MELZER, *supra* note 7, at 413 ("Perfidy is understood to comprise any act inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under IHL, carried out with the intent to betray that confidence.").

66 *PCATI*, *supra* note 6, para. 26.

67 *See generally* MELZER, *supra* note 7, at 355-57, 363-66.

68 *Id.* at 361 ("A military operation becomes unlawful once the expected collateral damage is deemed to be excessive in relation to the expected military advantage.").

69 It would be a war crime for Osama bin Laden to use civilian wives as human shields. Even so, it would also be a war crime for the United States to use a Predator strike to kill bin Laden if doing so required it to cause excessive "collateral damage" to such shields. *See PCATI*, *supra* note 6, para. 42 (observing that the requirement of avoiding disproportionate collateral damage applies where civilians are forced to act as human shields).

9/11 while he was on a hunting trip with some Arab princes from the Emirates.[70]

No matter the specifics, the war on terror is a severe challenge to IHL's combatant-civilian distinction. Plainly, many terrorists *function* as combatants, but they do not satisfy the requirements—such as wearing a recognizable emblem—for legal "combatant" status and for the various burdens and privileges that come with that status. Are committed terrorists, then, properly categorized as combatants or civilians?

Confronted with this dilemma, some say that a person who does not satisfy the requirements of a legal combatant is necessarily a "civilian."[71] This implies that terrorists may only be targeted for such time as they are "taking a direct part in hostilities."[72] It is not clear, however, just what "direct participation" means.[73] On the one hand, a single visit to a pro-al Qaeda website should not subject the internet surfer to a Predator strike. On the other hand, the Predator strike should not have to wait until a split second before an al Qaeda operative pushes the button on a bomb. Adopting too narrow an understanding of "direct participation" would, as Professor Kretzmer observes, allow terrorists, who do not obey the laws of war, to "enjoy the best of both worlds—they can remain civilians most of the time and only endanger their protection as civilians while actually in the process of carrying out a terrorist act."[74] Surely, U.S. authorities ought to be able to target Osama bin Laden even when he is off-duty.

Two ways out of the "revolving door" problem have been suggested. One is to relax the meaning of "for such time as [civilians] take direct part in hostilities." This is what the Israeli Supreme Court did in its recent, in-depth exploration of the legality of targeted killing in international armed conflicts in *The Public Committee Against*

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70 *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 1, at 129 ("No strike was launched. . . . [T]he immediate strike plans became moot. According to CIA and Defense officials, policymakers were concerned about the danger that a strike would kill an Emirati prince or other senior officials who might be with Bin Laden or close by.").

71 *PCATI*, *supra* note 6, para. 28 ("It is difficult for us to see how a third category [beyond that of "combatant" and "civilian"] can be recognized in the framework of the *Hague* and *Geneva Conventions*.").

72 *Id.* para. 31 ("A civilian who . . . commits acts of combat does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not enjoy—during that time—the protection granted to a civilian.").

73 *See, e.g.*, MELZER, *supra* note 7, at 332 ("Despite the significant consequences of 'direct participation in hostilities' for the protection of the involved civilians, conventional IHL provides no express definition of the notion, nor can a clear interpretation be derived from State practice, international jurisprudence or the *travaux preparatoires*."); *see also* Chesney & Goldsmith, *supra* note 14, at 1124 (observing that "direct participation" is a contested concept because: (a) whether conduct rises to the level of "direct participation" is uncertain outside of clear, paradigm cases; and (b) experts disagree over the temporal scope of the concept).

74 Kretzmer, *supra* note 13, at 193.

Torture in Israel v. The Government of Israel (*PCATI*).[75] In this case, the court explained that a civilian can lose his immunity by taking direct part in hostilities by, *inter alia*: (a) "preparing himself for the hostilities";[76] (b) planning a hostile act or sending others to commit one;[77] or (c) engaging in a "chain of hostilities" as an active member of a terrorist organization.[78] The combined effect of this guidance seems to be that active members of terrorist groups are "civilians" in a technical sense but are proper targets for direct attack at any time until they decisively withdraw from the group.[79]

A second way out of the revolving door is to deny that persons who are not lawful combatants are necessarily civilians and then to designate them in a distinct legal category of "unlawful combatants."[80] This category could embrace active members of terrorist groups, who, as a result, could be targeted without regard to whether they are directly participating in hostilities at a given moment.

In *PCATI*, the Israeli Supreme Court treated the conflict between Israel and terrorist groups in the West Bank and Gaza as an *international* armed conflict. As noted above, however, the United States Supreme Court has categorized the United States' conflict with al Qaeda as a *non-international* armed conflict because it is not between nations.[81] The laws of war regarding those conflicts are less well developed in part because they are designed to control the conduct of civil wars, and the states that negotiate international treaties are not so

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[75] *PCATI*, supra note 6, para. 2.

[76] *Id.* para. 33.

[77] *Id.* para. 37.

[78] *Id.* para. 39.

[79] For criticism of this aspect of *PCATI*, see generally Kristen E. Eichensehr, Comment, *On Target? The Israeli Supreme Court and the Expansion of Targeted Killings*, 116 YALE L.J. 1873 (2007) (contending that *PCATI* improperly lowered the evidentiary burden for demonstrating that a civilian is a proper object of direct attack).

[80] *See, e.g.*, *Ex parte* Quirin, 317 U.S. 1, 31 (1942) ("Unlawful combatants are . . . subject to capture and detention [like lawful combatants], but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."); *PCATI*, *supra* note 6, paras. 27, 28 (ascribing this position to the Israeli government but then rejecting it); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 29 (2004) (explaining that, by taking up arms, a civilian becomes an unlawful combatant who "can be lawfully targeted by the enemy, but . . . cannot claim the privileges appertaining to lawful combatancy"); R.J. Delahunty, *Is the Geneva POW Convention "Quaint"?* 33 WM. MITCHELL L. REV. 1635, 1646-48 (2007) (contending that "unlawful combatants" are distinct from "civilians" but are nonetheless entitled to certain basic legal protections); Unlawful Enemy Combatants, Posting of John Bellinger to Opinio Juris, http://opiniojuris.org/2007/01/17/unlawful-enemy-combatants/ (Jan. 17, 2007, 07:01 EST) (posting by Legal Adviser to the United States Department of State contending, contrary to *PCATI*, that "'unlawful enemy combatant' is a category of combatant, distinct from civilians, recognized under international law"). *But see, e.g.*, Cassese, *supra* note 12, para. 26 (insisting the phrase "unlawful combatant" is purely descriptive and "may not be used as proving or corroborating the existence of a third category of persons: in wartime a person is either a combatant or a civilian; *tertium non datur*").

[81] Hamdan v. Rumsfeld, 548 U.S. 557, 630-31 (2006).

interested in developing legal regimes that limit their power to crush insurgencies.[82] Even so, it appears that the law of non-international armed conflict offers the same two ways out of the revolving door as the law of international armed conflict.

As a threshold matter, the instruments governing non-international armed conflicts do not expressly define a category of "combatants" entitled to various legal privileges, such as POW status, that apply in international armed conflicts.[83] Responding to this lacuna, the International Committee of the Red Cross (ICRC) has stated that the legal category of "combatant" has no relevance to non-international armed conflicts.[84] One might infer from this that the most hardened and dangerous members of al Qaeda—including Osama bin Laden himself—are necessarily "civilians" who may be directly targeted for killing only "for such time as they directly participate in hostilities."[85] But as *PCATI* itself exemplifies, the ICRC's approach leaves room for a broad construction that any member of a terrorist group who is actively committed to violence is subject to targeting when an armed conflict has triggered IHL.[86]

Another view is that by expressly protecting "civilians," the law of non-international armed conflict implicitly recognizes the existence of a less protected group of "combatants."[87] Any armed conflict is composed of at least two opposing, organized armed forces. By their function, the members of these opposing forces are the "combatants" to the conflict. The concept of non-international armed conflict presupposes that combatants need not fight for a state or for a group that seeks state power. It follows that at least the "fighting" members of a powerful, organized terrorist group committed to violence might be regarded as "combatants."[88] Given that the laws of non-international

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82 *Id.* at 631.

83 *See id.* at 630-31.

84 *See* Int'l Comm. of the Red Cross [ICRC], Official Statement, *The Relevance of IHL in the Context of Terrorism* (July 21, 2005), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/html/terrorism-ihl-210705 ("In non-international armed conflict combatant status does not exist."); *see also* al-Marri v. Pucciarelli, 534 F.3d 213, 233 (4th Cir. 2008) (en banc) (Motz, J., concurring) (contending that laws of war did not authorize detention of legal resident of the United States as an al Qaeda member and enemy combatant because the legal category of "combatant" does not exist in "conflict[s] not of an international character"), *vacated as moot sub nom.* al-Marri v. Spagone, 129 S. Ct. 1545 (2009) (mem.).

85 *See* Kretzmer, *supra* note 13, at 197 (quoting Article 13 of Additional Protocol II to the Geneva Conventions and other instruments governing non-international conflicts to demonstrate prohibition on direct targeting of civilians except when they are directly participating in hostilities).

86 *PCATI*, *supra* note 6, paras. 33, 37, 39.

87 Kretzmer, *supra* note 13, at 197.

88 *Id.* at 198 ("The logical conclusion of the definition of a non-international armed conflict as one between the armed forces of a state and an organized armed group is that members of both the armed forces and the organized armed group are combatants."); MELZER, *supra* note 7, at 350-52 (discussing the "membership approach" to determining combatant status in a non-

armed conflict are, generally speaking, *less* protective than the laws of international armed conflict, it also follows that a state should be at least as free to kill enemy combatants in the former kind of conflict as the latter. The result of this chain of reasoning is that a state may directly target committed terrorists as enemy combatants in a non-international armed conflict even when they are not directly participating in hostilities.

To summarize, where IHL applies, the United States may kill terrorists either as "civilians" who are directly participating in hostilities or, possibly, as "combatants" provided their commitment to terrorism is sufficiently active and deep. In practice, the difference between these two approaches may be more theoretical than real because what is needed to show direct participation in hostilities may also show active and deep support. On either approach, the legality of an attempt to kill would depend on many factors—for example, the attack would need to be part of an armed conflict, satisfy the requirement of military necessity (which in this context may preclude the possibility of safe arrest), target a person not protected from direct attack, honor the rules against treachery and perfidy, avoid disproportionate civilian casualties, etc.[89]

IV. DUE PROCESS AND ENEMY COMBATANTS

In our age of terror, one challenge is to determine whether the Constitution's Due Process Clause imposes procedural controls on *how* the government goes about killing suspected terrorists. A conclusion that no limits exist might allow the government to engage in extra-judicial, targeted killing with impunity. Limits that are too constrictive, by contrast, might prevent the government from protecting the nation from attacks more catastrophic than 9/11.

Similar concerns about the balance between oversight and discretion have played out in federal cases discussing detention of "enemy combatants." Two blockbusters demand attention. The first is

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international conflict, which "implies that membership in an organized armed group entails loss of civilian protection against direct attack for the entire duration of such membership"); *cf.* NILS MELZER, THIRD EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES: SUMMARY REPORT 48-51, 63-64 (2005), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-article-020709 (follow "Expert meeting report" hyperlink under the heading "DPH 2005: third expert meeting, Geneva, 23/25 October 2005") (discussing the merits of the "membership" approach to determining loss of civilian protection against direct attack). *But see* Eichensehr, *supra* note 79, at 1877 (criticizing the Supreme Court of Israel's adoption, in *PCATI*, of the "membership-based model" for determining when civilians may be directly targeted for attack).

[89] *See* MELZER, *supra* note 7, at 419 (summarizing IHL's legal restrictions on targeted killing).

Hamdi v. Rumsfeld[90]—arguably still the most important decision that the Supreme Court has handed down relating to due process in the war on terror. In *Hamdi*, a controlling plurality of the Court invoked the Due Process Clause to sketch a framework for deciding whether an American citizen could be detained as an "enemy combatant."[91] The second is *Boumediene v. Bush*,[92] in which the Court ruled that prisoners at Guantanamo Bay had a constitutional right to habeas corpus in the federal courts.[93] For purposes of this discussion, *Boumediene* is especially important for what it says and suggests about extra-territorial application of the Due Process Clause.[94]

A. Hamdi v. Rumsfeld *Sketches a Due Process Framework for Detention*

Yaser Esam Hamdi, an American citizen by virtue of his birth in Louisiana to Saudi parents, was plucked from the battlefield in Afghanistan after 9/11.[95] The government claimed the authority to designate him an "enemy combatant," and, given this designation, to detain him for the duration of the war on terror.[96] It claimed constitutional authority from the President's inherent power to protect national security.[97] It also claimed congressional support from the Authorization for the Use of Military Force (AUMF), which granted the President authority to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks."[98]

Even on the assumption that the government has the power to detain persons like Hamdi as enemy combatants, what procedures must the government provide? As an answer to this question, the Bush Administration argued that either: (a) courts should play no role whatsoever in determining whether a given person was an enemy combatant; or, at most, (b) courts should confine themselves to determining whether "some evidence" proffered by the government supported the designation—a standard the government said it satisfied

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90 542 U.S. 507 (2004).
91 *Id.* at 533 (O'Connor, J., plurality).
92 128 S. Ct. 2229 (2008).
93 *Id.* at 2240.
94 *Id.* at 2253-62.
95 *Hamdi*, 542 U.S. at 510.
96 *Id.* at 516.
97 *See id.* at 516-17.
98 *Id.* (citing the government's reliance on the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 (2006))).

in Hamdi's case by a hearsay affidavit from a Defense Department official.[99]

In deciding these intertwined questions of power and process, the Supreme Court broke into four groups. One group, including Justices Scalia and Stevens, dissented based upon a hard-line of protecting civil liberties. They insisted that the traditional and proper means for detaining a citizen accused of treason or similar crimes was via criminal prosecution.[100] The government could avoid this process only if Congress had used its constitutional authority to suspend the writ of habeas corpus, which it had not done.[101] The choice confronting the government was therefore simple: Bring criminal charges such as treason against Hamdi and honor the Bill of Rights, or release him.[102]

Justice Thomas, writing solely for himself, dissented based on a hard-line of protecting executive discretion during an armed conflict.[103] He conceded that it was a proper judicial function to determine whether the executive possessed the power to detain enemy combatants.[104] The answer to this question was a straightforward "yes," because detaining the enemy for the duration of a conflict is a fundamental incident of war.[105]

Turning to process, Justice Thomas contended that the judiciary has no role to play in second-guessing executive judgments that any particular person is an enemy combatant. He insisted that "the question [of] whether Hamdi is actually an enemy combatant is 'of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.'"[106] He added that, "[i]n this context, due process requires nothing more than a good-faith executive determination" that a detained person was, in fact, an "enemy combatant."[107]

A third group, composed of Justice O'Connor as well as Justices Rehnquist, Kennedy, and Breyer, issued a controlling plurality opinion that straddled the civil liberties and executive supremacy camps. Writing for this group, Justice O'Connor did not reach the issue of whether the President has inherent authority to detain people as enemy

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99 *Id.* at 512, 514, 527.

100 *Id.* at 554 (Scalia, J., dissenting).

101 *Id.* at 554, 562.

102 *Id.* at 573.

103 *Id.* at 579 (Thomas, J., dissenting) ("This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision.").

104 *Id.* at 585.

105 *Id.* at 587.

106 *Id.* at 585-86 (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

107 *Id.* at 590.

combatants because she concluded that the AUMF provided legislative authorization in any event.[108]

As to process, Justice O'Connor was much less willing than Justice Thomas to defer to the executive. To frame her discussion of the process owed Hamdi, she used the "ordinary mechanism" from *Mathews v. Eldridge*.[109] For O'Connor, this case,

> dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards."[110]

Of course, this *Mathews* framework, which the Court first used to address the necessity of an oral hearing before the termination of Social Security disability payments,[111] is famously indeterminate and provides little guidance on how to weigh private and public interests to reach a result.[112] It leaves ample room for judicial policymaking.

Applying *Mathews*—in all its squishiness—to the facts of *Hamdi*, Justice O'Connor observed that the private interests included: (a) Hamdi's strong interest in avoiding long-term, mistaken detention; and (b) a more broadly shared interest in preventing executive detention from becoming an engine of arbitrary oppression.[113] On the other side, the government's interests included: (a) preventing false negatives that would allow enemy combatants to return to the battlefield; and (b) preventing excessive procedures from interfering with the military's ability to function properly.[114]

Balancing these heavy interests, Justice O'Connor concluded that Hamdi was entitled to what are, in most contexts, the two fundamental requirements of due process: "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker."[115] The government's

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108 *Id.* at 517-18 (O'Connor, J., plurality opinion).

109 *Id.* at 528-29 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).

110 *Id.* at 529 (quoting *Mathews*, 424 U.S. at 530) (citations omitted).

111 *Mathews*, 424 U.S. at 323.

112 *See* Lawson et al., *"Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 NOTRE DAME L. REV. 1, 4-5 (2005) (observing that "the *Mathews* due process inquiry . . . is routinely assailed as unworkable, subjective [and] incomplete" but also aptly noting that it serves the useful function of "providing a framework or structure for discussion of the issues arising in . . . due process law").

113 *Hamdi*, 542 U.S. at 529-30 (O'Connor, J., plurality).

114 *Id.* at 531-32.

115 *Id.* at 533.

position that its initial screening had given Hamdi all the process to which he was entitled failed because an interrogator is obviously not a neutral decision-maker.[116] The government's alternative position that it had "some evidence" to detain Hamdi failed because Hamdi was not allowed any opportunity to rebut the government's allegations.[117]

The Supreme Court left open what the notice and the opportunity to be heard should entail. In light of military and security needs, Justice O'Connor made clear that due process for Hamdi did not entail a full-blown trial. She explained:

> [T]he exigencies of the circumstances *may demand* that . . . enemy-combatant proceedings *may be tailored* to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, *may need to be accepted* as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, *so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided*. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant.[118]

The minimalism and flexibility of this passage are notable. It does not give a detailed template of how enemy combatant proceedings should function. Justice O'Connor's template is also quite hesitant. She does not state that hearsay is always acceptable; rather, hearsay "*may* need to be accepted as the most reliable available evidence."[119] Leaving room for executive maneuver, her opinion further suggests that, were the executive itself to apply acceptable procedures, the need for additional judicial scrutiny could be reduced or eliminated.[120]

Justice Souter dissented and concurred in an opinion joined by Justice Ginsburg. They preferred to dispose of the case on the ground that the President lacked authority to detain Hamdi in light of the Non-Detention Act (NDA), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant

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116 *Id.* at 537.
117 *Id.*
118 *Id.* at 533-34 (emphases added).
119 *Id.* (emphasis added).
120 *Id.* at 538.

to an Act of Congress."[121] But a majority of the Court had blocked this path by holding that the AUMF provided authority to detain. These two justices therefore threw their weight behind Justice O'Connor's plurality opinion as "ordering remand on terms closest to those [they] would impose."[122] They were careful, however, to reserve judgment on whether the plurality's template was sufficiently protective of Hamdi's right to due process.[123]

Adding up the results of these four opinions, after *Hamdi* an American citizen detained as an enemy combatant is entitled to at least as much process as sketched in the plurality opinion—but certainly not so much as would be provided in a criminal trial. As one might expect, the vagueness of this result is causing trouble for the lower courts.[124]

To the pessimist, *Hamdi* veers off in the wrong direction, allowing long-term, perhaps lifelong detention on the basis of something other than criminal charges and in the absence of an explicit suspension of the writ of habeas corpus. From *Hamdi*, it may be only a few steps to the internments of *Korematsu v. United States*.[125] But *Hamdi* has not, in point of fact, paved the way to mass internments. Hamdi himself was shipped back home to Saudi Arabia.[126] Only one other American

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121 *Id.* at 545-51 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (citing 18 U.S.C. § 4001(a) (2000)).

122 *Id.* at 553.

123 *Id.* at 553-54.

124 *See* al-Marri v. Pucciarelli, 534 F.3d 213, 218, 253 (4th Cir. 2008) (en banc), *vacated as moot sub nom.* al-Marri v. Spagone, 129 S. Ct. 1545 (2009) (mem.). *Hamdi* involved detention as an enemy combatant of an American citizen captured overseas; *al-Marri*, by contrast, involved detention as an enemy combatant of an alien residing in the United States. *Id.* at 217 (Motz, J., concurring). The nine judges of the en banc court issued seven opinions concurring and dissenting on various issues. By a 5-4 margin, they agreed that the executive had the power to detain al-Marri as an enemy combatant if its allegations about his al Qaeda membership were true. *See id.* at 261 (Traxler, J., concurring in the judgment); *id.* at 286 (Williams, C.J., concurring in part and dissenting in part); *id.* at 307 (Wilkinson, J., concurring in part and dissenting in part); *id.* at 342 (Niemeyer, J., concurring in part and dissenting in part). By a different 5-4 grouping, however, they also ruled that al-Marri had not received the process he was due under a proper understanding of *Hamdi*. In this regard, the controlling concurring opinion indicated that the government would bear the burden of demonstrating that practical obstacles warranted lessening the "full protections that accompany challenges to detentions in other settings . . . ." *Id.* at 268 (Traxler, J., concurring in the judgment) (quoting *Hamdi*, 542 U.S. at 535); *see also id.* at 253 (Motz, J., concurring) ("We join in ordering remand on the terms closest to those we would impose."). More concretely, if the government wished to rely on hearsay evidence or switch the burden of disproving "enemy combatant" status to al-Marri—as *Hamdi* suggested might be in order—the government needed to make a persuasive case for doing so. *Id.* at 268 (Traxler, J., concurring in the judgment). After the Supreme Court agreed to hear the case, the new Obama administration—which presumably wanted time to devise its own detention policies without immediate Supreme Court interference—transferred al-Marri to the custody of the Attorney General, and the Court dismissed the matter as moot. Al-Marri v. Spagone, 129 S. Ct. 1545 (2009) (mem.).

125 323 U.S. 214 (1944).

126 Eric Lichtblau, *U.S., Bowing to Court Ruling, Will Free 'Enemy Combatant*,' N.Y. TIMES, Sept. 23, 2004, at A1.

citizen, Jose Padilla, arrested in 2002 at O'Hare Airport, was detained as an enemy combatant, and he was later transferred into the criminal justice system.[127] By the end of the Bush Administration, Guantanamo Bay's detainee population had fallen to about 245 from a peak of 680.[128] This relatively small number does not make these detentions legal, but it does pale next to the detention of 120,000 Japanese-Americans and Japanese aliens during World War II.[129] More to the point, on the Obama Administration's second full day, the new president signed an executive order that required the detention facility at Guantanamo Bay to be closed within one year.[130]

Seen from a historical perspective, *Hamdi* might best be understood as part of a cyclical flow of power among the branches. During times of crisis, power flows towards the executive, and the other branches retreat.[131] As crises cool, the courts suck power back. Three years after 9/11, *Hamdi* illustrated this tendency by blocking the executive's claim to almost limitless power to detain American citizens in the United States in the name of war. At the same time, by refusing to impose the law enforcement model and in keeping with the basic teachings of administrative law, the Court left space for the executive to exercise discretion and judgment in the realm of national security.

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127 For a summary of the government's proceedings against Padilla, see Semple, *supra* note 62. Similarly, al-Marri—a resident alien—was captured and detained within the United States as an enemy combatant. Since due process protections apply to legally admitted aliens in the United States, al-Marri's detention raised many of the same issues as Hamdi's and Padilla's detentions. For discussion of the proceedings before the en banc Fourth Circuit in the al-Marri case, see *supra* note 124.

128 *See* Mark Tran, *Obama Signs Order to Close Guantanamo Bay*, GUARDIAN.CO.UK, Jan. 22, 2009, http://www.guardian.co.uk/world/2009/jan/22/hillary-clinton-diplomatic-foreign-policy (reporting that, as of January 2009, an estimated 245 prisoners were being held at Guantanamo Bay); Jeffrey Toobin, *Camp Justice*, NEW YORKER, Apr. 14, 2008, at 32 (reporting that the population of prisoners peaked at about 680).

129 *See* COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 2-3 (1982). Most were interned without individual review and despite demonstrated loyalty to the United States. *Id.*

130 Shane, *supra* note 42.

131 *See generally* ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 3 (2007) (observing that, during national emergencies, the courts and Congress have deferred to executive judgment while reserving recriminations for later); *id.* at 16-17 (contending that the judicial tendency to defer to executive judgment during times of national crisis is proper given the branches' differing institutional competencies).

B. Boumediene v. Bush *and the Worldwide Reach of Due Process*

On a crabbed reading, one might think that *Hamdi* should have little relevance to the broader war on terror because it addressed the executive's power to detain as an enemy combatant *an American citizen in the United States*. The overwhelming majority of detainees in the war on terror are not Americans, and the group that has attracted the most attention languishes in Guantanamo, technically not American soil. The detainees were shipped to Guantanamo Bay when the Bush Administration was under the mistaken impression that federal courts would not interfere with military detentions outside of American sovereign territory.[132] Even so, on the same day it issued *Hamdi*, the Supreme Court also issued *Rasul v. Bush*, which extended the statutory right of habeas corpus to Guantanamo.[133]

The Court's decisions triggered reactions from the other branches. Given *Rasul*, the military concluded that it would be wise to grant hearings of the sort suggested in *Hamdi* to Guantanamo detainees. These hearings were held by entities called Combatant Status Review Tribunals (CSRTs). They determined whether each detainee was such a threat to national security that he should remain imprisoned as an enemy combatant.[134] Consistent with *Hamdi*'s template, the rules for CSRTs departed from the criminal justice model by, among other things, presuming the government's evidence to be valid and allowing CSRTs to base their conclusions on hearsay and classified evidence kept secret from the detainee.[135]

Congress responded to *Rasul* and *Hamdi* by passing the Detainee Treatment Act of 2005 (DTA).[136] The DTA contained strong language that seemed to strip federal courts of jurisdiction on habeas petitions from Guantanamo detainees.[137] Plus, the DTA funneled review of CSRT determinations to the D.C. Circuit,[138] but with unclear limits on that court's scope of review.[139]

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132 *See* MAYER, *supra* note 11, at 147 (explaining the White House's "hope[]" that Guantanamo's legal status would allow "the executive branch to hold and interrogate foreign prisoners there in any manner it deemed necessary, beyond meddling from Congress and courts").

133 542 U.S. 466, 473 (2004).

134 Boumediene v. Bush, 128 S. Ct. 2229, 2241 (2008).

135 *Id.* at 2260.

136 Detainee Treatment Act (DTA) of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

137 The DTA provided in part that:

> Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba . . . .

Id. § 1005(e)(1) (amending 28 U.S.C. § 2241).

138 *See id.* § 1005(e)(2), (3) (vesting "exclusive jurisdiction" in the U.S. Court of Appeals for

The Supreme Court's next swing in national security ping-pong came in *Hamdan v. Rumsfeld*, in which a slim majority held that the DTA's limits on habeas did not apply to petitions pending at the time of the statute's enactment.[140] Congress responded with the Military Commissions Act of 2006 (MCA), which, among many other things, clarified that the DTA's limits on habeas had retroactive effect and reiterated that the DTA governed review of CSRT proceedings.[141]

The legal ground was thus laid for *Boumediene v. Bush*.[142] In this case, Guantanamo detainees claimed that, notwithstanding the MCA (and the DTA), they had a *constitutional* right to habeas corpus.[143] And five justices agreed.[144]

Because Guantanamo is not technically United States territory, reaching this conclusion required the Court to discuss the extra-territorial reach of the Constitution as applied to non-resident aliens.[145] The case law on this point has long been cloudy. The most basic reason why the Constitution should apply outside U.S. territory is that, because the federal government's powers all flow from the Constitution, where the Constitution does not apply, the federal government should be powerless.[146] Even so, there are constitutional provisions that are impossible or senseless to apply overseas. For instance, it does not make much sense to apply the Fourth Amendment's warrant requirements in countries that have entirely different regimes for

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the District of Columbia Circuit "to determine the validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant").

139 The DTA granted the D.C. Circuit power to determine:

> (i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the government's evidence); and
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> (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

Id. § 1005(e)(2)(C). For an application by the D.C. Circuit of the DTA's review provisions, see Parhat v. Gates, 532 F.3d 834 (D.C. Cir. 2008) (throwing out CSRT's determination that Parhat, an ethnic Uighur, was an "enemy combatant" for lack of reliable evidence supporting the government's position).

140 548 U.S. 557, 574-76 (2006).

141 Military Commissions Act of 2006, § 7, Pub. L. 109-366, 120 Stat. 2600, 2635-36 (amending 28 U.S.C. § 2241(e) (Supp. 2007)).

142 128 S. Ct. 2229 (2008).

143 *Id.* at 2240.

144 *Id.*

145 *See generally id.* at 2253-62 (discussing the Court's precedents on extra-territorial reach of the Constitution).

146 *Cf.* Reid v. Covert, 354 U.S. 1, 12 (1957) (Black, J., plurality) ("[T]he United States Government . . . has no power except that granted by the Constitution.").

controlling searches.[147] So as the United States became a great power, the clash between constitutional theory and practicality created one hundred years of convoluted jurisprudence.[148]

In 2008, *Boumediene* gave Justice Kennedy a chance to embed in a controlling precedent his long-held view that extra-territorial application of the Constitution should depend on a functional, pragmatic inquiry rather than bright line formalism.[149] With Justice O'Connor and Justice Rehnquist gone from the Court, Justice Kennedy carried Justice Breyer from the *Hamdi* plurality and added Justices Ginsburg, Souter, and Stevens. To support his approach, he focused on the "Insular Cases" and picked apart the various opinions the Court had issued in 1957 in *Reid v. Covert*.[150]

The Insular Cases arose in the aftermath of the United States' acquisition of territories including the Philippines, Puerto Rico, and Hawaii. In one form or another, each of these cases concerned whether a given constitutional provision limited American authority in these territories.[151] Collectively, they came to stand for the proposition that only "fundamental" constitutional rights apply to inhabitants of territories not intended for full statehood.[152] According to Justice Kennedy, this pragmatic approach requires a broad, fact-sensitive inquiry into "practical difficulties" of enforcing a constitutional right outside the United States.[153]

The major roadblock to this pragmatism was a World War II era case, *Johnson v. Eisentrager*.[154] This case concerned a habeas petition brought by enemy aliens who were detained as war criminals during the

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147 *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 279 (1990) (Stevens, J., concurring) ("I do not believe the Warrant Clause has any application to searches of noncitizens' homes in foreign jurisdictions because American magistrates have no power to authorize such searches.").

148 *Boumediene*, 128 S. Ct. at 2253 ("Fundamental questions regarding the Constitution's geographic scope first arose at the dawn of the 20th century when the Nation acquired noncontiguous Territories . . . ceded to the United States by Spain."); Parry, *supra* note 14, at 807-10 (discussing the uncertain extra-territorial reach of the United States Constitution under pre-*Boumediene* case law).

149 *Boumediene*, 128 S. Ct. at 2259, 2262; *cf. Verdugo-Urquidez*, 494 U.S. at 277-78 (Kennedy, J., concurring) (applying a functional test to determine whether Fourth Amendment applied to search in Mexico made at behest of U.S. Drug Enforcement Administration officials).

150 354 U.S. 1 (1957).

151 *See, e.g.*, Balzac v. Porto Rico, 258 U.S. 298 (1922) (Sixth Amendment right to jury trial did not apply in Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914) (Fifth Amendment's grand jury provision did not apply in Philippines); Dorr v. United States, 195 U.S. 138 (1904) (jury trial provision inapplicable in Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (grand jury and jury trial provisions did not apply in Hawaii); Downes v. Bidwell, 182 U.S. 244 (1901) (Revenue Clauses did not apply to Puerto Rico).

152 *See, e.g.*, *Balzac*, 258 U.S. at 312-13; *Dorr*, 195 U.S. at 148; *see also Verdugo-Urquidez*, 494 U.S. at 268-69 (discussing the Insular Cases).

153 *Boumediene*, 128 S. Ct. at 2255.

154 339 U.S. 763 (1950).

Allies' post-war occupation. The Supreme Court denied access to the writ, observing:

> We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners *at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States*.[155]

The *Boumediene* majority quoted the italicized portion of the preceding paragraph and declared that the "Government seizes upon this language as proof positive that the *Eisentrager* Court adopted a formalistic, sovereignty-based test" that precludes non-resident aliens held abroad from invoking the writ.[156]

In point of fact, the government's "formalistic" reading of *Eisentrager* was reasonable—even natural. *Eisentrager*'s majority opinion contains several passages suggesting a bright line that neither habeas nor the Fifth Amendment protects aliens outside United States sovereign territory.[157] Moreover, Justice Black's dissent in *Eisentrager* characterized the majority opinion as a bright line approach.[158] Forty years later, in *United States v. Verdugo-Urquidez*, four justices joined an opinion that cited *Eisentrager* for the proposition that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."[159] And contradicting Justice Kennedy, the four dissenting justices in *Boumediene* declared that "*Eisentrager . . .* held—*held* beyond any doubt—that the Constitution does not ensure habeas for aliens held by

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155 *Id.* at 777-78 (emphasis added).

156 *Boumediene*, 128 S. Ct. at 2257.

157 *Eisentrager*, 339 U.S. at 771 ("But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the *alien's presence within its territorial jurisdiction* that gave the Judiciary power to act." (emphasis added)).

158 *Id.* at 794 (Black, J., dissenting) ("Except insofar as this holding depends on . . . gratuitous conclusions . . . (and I cannot tell how far it does), it is based on the facts that (1) they were enemy aliens who were belligerents when captured, and (2) *they were captured, tried, and imprisoned outside our realm, never having been in the United States*." (emphasis added)).

159 494 U.S. 259, 269 (1990) (Rehnquist, C.J.). For other examples of courts adopting *Eisentrager*'s bright line approach to the extra-territorial reach of the Constitution, particularly the Due Process Clause, see Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003) (observing that the D.C. Circuit has read *Eisentrager* to hold that the First, Second, Fourth, Fifth, and Sixth Amendments do not apply to aliens outside the sovereign territory of the United States), *rev'd sub nom. Boumediene*, 128 S. Ct. 2229; Harbury v. Deutch, 233 F.3d 596, 604 (D.C. Cir. 2000) (observing that Fifth Amendment does not apply to aliens outside of United States territory), *rev'd on other grounds sub nom*. Christopher v. Harbury, 536 U.S. 403 (2002); People's Mojahedin Org. v. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999) ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.").

the United States in areas over which our Government is not sovereign."[160]

Undeterred, the *Boumediene* majority rejected this "formalistic" reading of *Eisentrager*.[161] To justify this rejection, Justice Kennedy stressed portions of *Eisentrager* in which the Court had focused on "practical barriers to the running of the writ."[162] Among these barriers, habeas proceedings for the German prisoners would "require allocation of shipping space, guarding personnel, billeting and rations."[163] This allocation of resources would also "damage the prestige of military commanders at a sensitive time."[164] According to Justice Kennedy, *Eisentrager*'s discussion of pragmatic factors was consistent with a "functional approach to the question of extraterritoriality."[165] Moreover, if—contrary to this functional approach—*Eisentrager* had actually established a bright line denying constitutional rights to aliens outside the United States, then the *Eisentrager* Court had overruled the Insular Cases without even bothering to say so, a possibility Justice Kennedy regarded as out of bounds.[166]

As further support for a functional reading of *Eisentrager*, Justice Kennedy relied on a case the Court decided just seven years later, *Reid v. Covert*.[167] This case addressed whether military spouses accused of murder in Japan and Great Britain were entitled to jury trials or could be prosecuted before military courts instead.[168] A majority of the *Reid* Court held that the spouses of American military officers had a right to jury trial, but the justices split on how they got there. For the four-justice plurality, the spouses' citizenship was dispositive as "[t]he mere fact that these women had gone overseas with their husbands should not reduce the protection the Constitution gives them."[169]

Two concurring Justices—Frankfurter and Harlan—were more circumspect. Justice Frankfurter, rejecting bright lines, contended that extra-territorial application of the Constitution depended on the "specific circumstances of each particular case."[170] Elaborating on this theme, Justice Harlan stressed that in light of the Insular Cases, the extra-territorial effect of any given constitutional provision depends on "the particular circumstances, the practical necessities, and the possible

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160 *Boumediene*, 128 S. Ct. at 2298-99 (Scalia, J., dissenting).
161 *Id.* at 2257 (majority opinion).
162 *Id.* at 2258.
163 *Id.* at 2257 (quoting *Eisentrager*, 339 U.S. at 779).
164 *Id.* (citing *Eisentrager*, 339 U.S. at 779).
165 *Id.* at 2258.
166 *Id.* at 2258 (refusing to accept a reading of *Eisentrager* as a "complete repudiation [of] the Insular Cases' (and later *Reid*'s) functional approach to questions of extraterritoriality").
167 354 U.S. 1 (1957) (Black, J., plurality).
168 *Id.* at 3, 15.
169 *Id.* at 33.
170 *Boumediene*, 128 S. Ct. at 2255 (quoting *Reid*, 354 U.S. at 54 (Frankfurter, J., concurring)).

alternatives which Congress had before it" as well as whether judicial enforcement would be "impracticable and anomalous."[171] Translating this same point into more positive language, he added that the practical inquiry into "which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is '*due*' a defendant in the particular circumstances of a particular case."[172]

In essence, Justice Kennedy took Justice Harlan's *Reid* concurrence and made it the law. This functional approach opened up the possibility that constitutional habeas might extend to aliens detained as enemy combatants at Guantanamo. Justice Kennedy explained the factors to be considered in making this determination:

> (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.[173]

Applying these factors, Justice Kennedy concluded that the Guantanamo detainees, unlike the German prisoners of *Eisentrager*, did have a constitutional right to seek habeas relief.[174] Circumstances favoring the Guantanamo detainees included: (a) that they contested whether they were, in fact, enemy combatants and had not been provided an adequate means to prove this contention; (b) that Guantanamo, though technically not part of the United States, is subject to its total control in perpetuity; and (c) that, notwithstanding the expense and inconvenience of habeas proceedings, the "Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims."[175] Yet, by common sense, the *Boumediene* Court strongly hinted that its result would have been different "if the detention facility were located in an active theater of war," which would make the running of the writ "impracticable or anomalous."[176]

Critical to Justice Kennedy's analysis is that the *availability* of judicial review (via habeas, as it happened) depended on a rough-and-ready inquiry into whether the benefits associated with judicial review were worth the potential costs in security. In other words, just as the Court in *Hamdi* used a *Mathews*-style balancing test to sketch *how*

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171 *Id.* (quoting *Reid*, 354 U.S. at 74-75 (Harlan, J., concurring)).

172 *Reid*, 354 U.S. at 74-75 (Harlan, J., concurring) (emphasis added).

173 *Boumediene*, 128 S. Ct. at 2259.

174 *Id.* at 2262 ("We hold that [Article I, Section 9, Clause 2] of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.").

175 *Id.* at 2259-62.

176 *Id.* at 2261-62 (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)).

much process was due an American citizen held as an enemy combatant, so the Court in *Boumediene* used a *Mathews*-style balancing test (or a close cousin) to determine whether the Guantanamo detainees were entitled to *any* judicial process.

The relationship between *Boumediene* and *Mathews* suggests that the Due Process Clause applies, after a fashion, to government action worldwide. This is consistent with the plain text of the Fifth Amendment, which bars—without any express territorial limitation—the government from depriving "any person" of "life, liberty, or property without due process of law."[177] At its core, due process requires the government to be *fair*,[178] which requires it to use reasonable procedures to ensure that it does not arbitrarily deprive people of life, liberty, or property. It is repulsive to suggest, whether for Guantanamo detainees or for Predator targets, that the government may hurt people arbitrarily just because they are non-resident aliens.[179]

For Justice Harlan in *Reid* and for Justice Kennedy in *Boumediene*, a provision of the Constitution—whether the right to jury trial or the right to habeas corpus—applies overseas if this is not "impracticable or anomalous."[180] Thus we detect a sort of universal right to due process (including reasonable treatment) that even applies to aliens without obvious connections to the United States. This universal right disavows bright lines that withhold constitutional protection because of the single factor of citizenship. Instead, whether a constitutional protection actually applies outside the United States depends upon a pragmatic inquiry into many factors—which will of course include the extent of the claimant's connections to the United States.[181] Sometimes, due process demands that a constitutional guarantee apply overseas—thus,

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177 U.S. CONST. amend. V.

178 *See* Lawson et al., *supra* note 112, at 14 (surveying leading Supreme Court cases of the nineteenth and twentieth centuries on due process and concluding that, as the law of procedural due process entered the last quarter of the twentieth century, "[t]he ultimate inquiry . . . remained, as it had always been, a search for what procedures are fair under the circumstances of each particular case").

179 *Cf.* Johnson v. Eisentrager, 339 U.S. 763, 798 (1950) (Black, J., dissenting) ("Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live."). For a cautionary note on this point, however, see Gerald L. Neuman, *The Extra-Territorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 271-72 (2009) (expressing reluctance to attribute to *Boumediene* the proposition that the Constitution presumptively applies to all foreign nationals abroad on the ground that "every human being's liberty has value" because "Kennedy's *Verdugo-Urquidez* concurrence expressly rejected the notion that the U.S. Constitution extends constitutional rights to every person on the planet").

180 *Boumediene*, 128 S. Ct. at 2255 (quoting Reid v. Covert, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring)); *see also Reid*, 354 U.S. at 74-75 (Harlan, J., concurring) ("[W]hich specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case.").

181 *See Boumediene*, 128 S. Ct. at 2255.

the *Reid* military spouses and their right to a jury trial or the Guantanamo detainees and their right to habeas. Sometimes, however, due process does *not* demand overseas application—for example, the Fourth Amendment's warrant requirement did not apply to a search conducted in Mexico of a Mexican citizen's residence at the behest of American officials.[182]

As it happened, both Justices Harlan and Kennedy applied a general right of reasonable treatment when determining whether a specific constitutional provision traveled overseas. The general informed the specific. But note that this general right to due process should exist *regardless* of whether a particular constitutional provision is in play. In other words, separate from any other provision—such as the right to jury trial in *Reid*—one can ask what protections the Due Process Clause demands *of its own force.* On this view, even if there were no constitutional right to habeas corpus, the Guantanamo detainees could have argued that the Due Process Clause by itself required more protections than the government had given them.

An obvious objection to applying the Due Process Clause across the board is that it would cause excessive judicial interference with executive action; anyone harmed by our government overseas would be tempted to run to court for relief. Due process, however, does not demand *judicial* process to review the merits of executive action if this review would be unreasonable (and thus not "due"). *Boumediene* itself demonstrates this point. Justice Kennedy applied a fact-sensitive, *Matthews*-like balancing test to determine whether the Guantanamo petitioners had a right to judicial process via habeas corpus.[183] Under the extraordinary facts of that case, the majority determined that the balance of factors favored judicial review. This holding should not, however, obscure that *Boumediene* itself instructs courts not to interfere with executive action abroad if such interference would be "impracticable or anomalous."[184] In short, *Boumediene* can still be understood in light of a long tradition of judicial deference to executive action on foreign policy and national security.[185] In light of this strong, persistent tradition, there is little reason to fear that courts would seize on worldwide due process to usurp the deep powers and grave responsibilities of the executive abroad.

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[182] *See Verdugo-Urquidez*, 494 U.S. at 277-78 (Kennedy, J., concurring) (concluding that it would be "impracticable and anomalous" to apply the Fourth Amendment's warrant requirement).

[183] *See supra* text accompanying notes 173-176 (discussing *Boumediene*'s analysis of whether the constitutional right of habeas corpus extended to the Guantanamo detainees).

[184] *Boumediene*, 128 S. Ct. at 2255 (quoting *Reid*, 354 U.S. at 74-75 (Harlan, J., concurring)).

[185] *See* POSNER & VERMEULE, *supra* note 131, at 3 (describing cyclical pattern in which courts extend extreme deference to the executive branch during times of national crisis).

Although due process does not always demand judicial review of executive action, the executive has an *independent* obligation to uphold due process as part of the Constitution that executive officials—like judges—swear to uphold. Insofar as a general right to due process limits the federal government's authority worldwide, the executive branch has an obligation to use fair and reasonable procedures to control how it goes about depriving people of life, liberty, or property anywhere in the world.[186]

V. DUE PROCESS AND TARGETED KILLING

In this Part, we make two basic claims on how the due process model of *Hamdi/Boumediene* might extend to targeted killing. The first relates to judicial control. Recall that in his *Hamdi* dissent, Justice Thomas said the absurdity of applying due process principles to a Predator strike demonstrated the absurdity of courts using these principles to second-guess executive detentions of enemy combatants.[187] We claim that to the contrary, *Hamdi/Boumediene* suggests a sound model for judicial control of targeted killings under which courts, applying duly deferential standards, might—on rare occasions—determine the legality of attacks after they occur. Due process requires at least this minimal level of judicial control.

The second claim relates to executive *self*-control. Given the limited role of courts in national security, it is imperative for the executive to develop internal procedures to ensure accuracy of targeted killings and accountability for the officials who order them. Both the Supreme Court of Israel and the European Court of Human Rights have ruled that targeted killings conducted in counter-terrorism operations must receive close, independent review *within* the executive branch.[188] We explain why due process demands the same of American authorities. If the CIA has not already done so, it should put these procedures in place to help bring Predator strikes within the rule of law.

A. *Identifying One Very Limited Role for the Courts*

Where the paradigm of war applies, the executive dominates in deciding who lives or dies. Justice O'Connor nonetheless claimed in

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186 *See infra* Part V.B (contending that due process requires the executive to conduct impartial, internal investigations of the use of targeted killing).

187 Hamdi v. Rumsfeld, 542 U.S. 507, 597 (2004) (Thomas, J., dissenting).

188 *See* McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A), paras. 157-64 (1995); *PCATI*, *supra* note 6, paras. 40, 54.

Hamdi that the war on terror does not give the executive a "blank check" to do as it pleases in the name of security.[189] If one accepts this premise, then the question becomes how to control the executive's war power without unduly hampering it. Under a *Mathews*-style approach, to determine whether due process demands a particular procedural control over targeted killing, one should: (a) identify the range of legitimate interests that the procedure might protect; (b) assess the degree to which adoption of the procedure actually would protect these interests; and (c) weigh these marginal benefits against the damage the procedure may cause other legitimate interests.[190]

Judicial control of targeted killing could increase the accuracy of target selection, reducing the danger of mistaken or illegal destruction of lives, limbs, and property. Independent judges who double-check targeting decisions could catch errors and cause executive officials to avoid making them in the first place.

More broadly, judicial control of targeted killing could serve the interests of *all* people—targets and non-targets—in blocking the executive from exercising an unaccountable, secret power to kill.[191] If possible, we should avoid a world in which the CIA or other executive officials have unreviewable power to decide who gets to live and who dies in the name of a shadow war that might never end. Everyone has a cognizable interest in stopping a slide into tyranny.

Yet—in favor of executive autonomy—we live in an imperfect world where judicial obstacles to killing could hinder national security. It would be silly, for instance, to require the military to use the full procedures of the law enforcement model to decide what to bomb in the midst of a war. Likewise, given the conflict with al Qaeda, it may be silly to judicialize the process for killing its committed members. Moreover, not only does judicialization threaten national security, it might not deliver countervailing benefits because courts lack the competence to improve military and national security decisions.[192]

Reasonable minds can and do differ on how to balance such concerns. That said, one possible balance is to reject virtually all judicial control of targeted killing, a position that comports with Justice Thomas's treatment of executive detentions in his *Hamdi* dissent.[193] A

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189 *Hamdi*, 542 U.S. at 536 (O'Connor, J., plurality).

190 Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

191 *Cf. Hamdi*, 542 U.S. at 530 (O'Connor, J., plurality) (identifying interests relevant to a *Mathews* balancing to determine procedures for detaining enemy combatants). O'Connor observed that "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat." *Id.*

192 *Cf. Hamdi*, 542 U.S. at 583 (Thomas, J., dissenting) ("[W]ith respect to certain decisions relating to national security and foreign affairs, the courts simply lack the relevant information and expertise to second-guess determinations made by the President.").

193 *See, e.g.*, *id.* at 592 ("[T]he Executive's decision that a detention is necessary to protect the

hands-off approach, however, is impossible to square with the historical fact that courts can and do judge whether military actions constitute war crimes. Indeed, the Geneva Conventions *require* states to prosecute or extradite persons who have committed "grave breaches," a category that includes, among other crimes, willful, wanton, unjustified killing or infliction of great suffering.[194] The United States has codified this requirement in the War Crimes Act.[195]

Besides legal barriers, there are many practical barriers to prosecutions under the laws of war. Primary among them, a prosecuting authority must see enough evidence to conclude that a war crime occurred. Such information will often be buried under the rubble of war or surrounded in secrecy. Also, the prosecuting authority must have the political will to bring an action. As a general rule, no government wishes to prosecute one of its own officials for war crimes. Still, a war criminal from one country—especially a weak or defeated one—just might find himself facing prosecution in the courts of another country or an international authority.

For these and related reasons, it is beyond doubt that *many* more war crimes occur than are prosecuted. Nonetheless, even if a CIA official who authorizes a Predator strike faces little threat of criminal liability, the potential for criminal prosecution proves our point: It is common—indeed, obvious—that courts *do* have a role to play in identifying the limits of acceptable warfare.

But might due process require courts to play a more expansive role in controlling targeted killing than adjudicating a war crime prosecution that may never come? Justice Thomas mocked this possibility in *Hamdi* as leading to the conclusion that executive officials must give notice and an opportunity to be heard to a person before killing him with a missile.[196] This *reductio ad absurdum* does not stand up to scrutiny, however, for the simple reason that due process does not always demand notice and an opportunity to be heard before a deprivation occurs. Where such pre-deprivation procedures would be impracticable, due process may take the form of post-deprivation procedures. *North American Cold Storage Co. v. City of Chicago* provides a canonical example.[197] In this case, local authorities seized and destroyed meat

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public need not and should not be subjected to judicial second-guessing.").

194 *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 146-47, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (declaring duty to prosecute "grave breaches").

195 18 U.S.C. § 2441 (2006).

196 *Hamdi*, 542 U.S. at 597 (Thomas, J., dissenting) ("Because a decision to bomb a particular target might extinguish life interests, the plurality's analysis seems to require notice to potential targets.").

197 211 U.S. 306 (1908).

they had determined was putrid and unfit for sale.[198] The Court held that, because of health concerns, immediate destruction was acceptable to prevent the meat from being sold on the sly during the pendency of any hearings.[199] The owners of the meat were not left without a remedy, though; they were free to sue the local officials in tort for the value of their destroyed meat.[200]

In application, *Hamdi* and *Boumediene* fit rather neatly into this paradigm of requiring post-deprivation review when pre-deprivation process is impracticable. Enemy forces in the conflicts after 9/11 were not neatly arrayed in uniforms and units that made for easy identification. As a result, American forces found themselves in custody of thousands of persons whose status was unclear. By definition, every one of these detainees was deprived of their liberty immediately upon detention. Obviously, the military cannot provide notice and an opportunity to be heard before detaining these suspects, and any process that occurs immediately after capture will be constrained by the conditions of war.[201] As *Hamdi* and *Boumediene* make plain, however, due process may nonetheless demand that a detainee receive meaningful notice and an opportunity to be heard at a later time.[202]

The *Hamdi/Boumediene* model of judicial control therefore does *not* suggest the odd prospect of holding hearings where a terrorist gets to argue that he ought not be killed by a Predator strike. Rather, a more direct analogy suggests that targeted killings should be subject to some form of judicial review in civil proceedings initiated by private parties. The vehicle for this review cannot be habeas, the thousand-year-old vehicle for testing the legality of detentions. But the vehicle might take the form of a *Bivens*-style action in which the plaintiff—who might be a survivor of an attempted targeted killing or an appropriate next friend—claims that the attack was unconstitutional either because it violated the Fifth Amendment on a "shock the conscience" theory or because it constituted excessive force under the Fourth Amendment.[203]

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198 *Id.* at 308.

199 *Id.* at 315.

200 *Id.* at 316.

201 *Cf. Hamdi*, 542 U.S. at 537 (O'Connor, J., plurality) (observing that the military's initial screening process and its interrogations of detainees do not provide "constitutionally adequate factfinding before a neutral decisionmaker").

202 *Id.* at 533 ("[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."); Boumediene v. Bush, 128 S. Ct. 2229 (2008) (relying heavily on Due Process principles to hold that non-resident aliens detained at Guantanamo Bay had constitutional right to seek habeas relief).

203 *Cf.* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (allowing plaintiff to seek damages from officials whom he claimed had violated his Fourth Amendment rights). For an in-depth discussion of the evolution of *Bivens* actions and an exploration of their evolving role in the war-on-terror, see especially, George D. Brown,

Before discounting the possibility of *Bivens* actions, it bears noting that the federal courts *already* allow plaintiffs to use the Alien Tort Statute (ATS)[204] to bring suits against individual defendants for violating the laws of war.[205] As the name of this statute suggests, the plaintiff in an ATS suit must be an alien.[206] But an alien cannot use this statute against the United States because it has not waived sovereign immunity.[207] Also, the exclusivity provisions of the Federal Tort Claims Act (FTCA) would likely bar an ATS suit brought against a federal official acting to implement government policy.[208] We thus have the anomaly that aliens can use the ATS to sue alien officials but not American ones in federal courts.

In defense of this anomaly, there are obvious policy reasons for not allowing *Bivens*-style claims against American officials for targeted killings wherever they occur in the world. Among them, we do not want federal courts damaging national security through excessive, misdirected second-guessing of executive judgments; nor do we want

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"Counter-Counter-Terrorism via Lawsuit"—The Bivens *Impasse*, 82 S.C. L. REV. (forthcoming 2009), *available at* http://ssrn.com/abstract=1360775. Professor Brown concludes that, on balance, it would be better for the courts to avoid "[i]ntrusion via tort suits on the difficult policy choices involved" in the war-on-terror. *Id.* at 86. This Article, by contrast, suggests *Bivens* actions may be appropriate in those limited circumstances where a plaintiff's case can survive the government's potent threshold weapons of the state-secrets privilege and the qualified immunity defense. *See infra* text accompanying notes 212-221.

204 28 U.S.C. § 1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

205 *See* Kadic v. Karadzic, 70 F.3d 232, 239-41 (2d Cir. 1995) (explaining that private individuals can be held liable for violations of the laws of nations); *cf.* Sosa v. Alvarez-Machain, 542 U.S. 692, 733 (2004) (indicating that private actors may be held liable for violation of the laws of nations under some circumstances).

206 28 U.S.C. § 1350.

207 Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 764 (2006).

208 Analysis of this point is rather technical, but briefly, the FTCA allows plaintiffs to sue the United States for money damages for, inter alia, "wrongful act[s] . . . of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1) (2006). Where the FTCA applies to an official's action, its remedy is exclusive—*i.e.*, the FTCA allows the plaintiff to sue the government but takes away the right to sue the official. *Id.* § 2679(b)(1). The government's liability under the FTCA is, however, subject to many exceptions. For instance, the government remains immune to claims that arise in foreign countries or in combat, or are based on an official's exercise of a discretionary function. *Id.* § 2680(a), (j), (k). One or more of these exceptions would presumably block a suit arising out of a targeted killing from proceeding against the government under the FTCA. A plaintiff blocked in this way from suing the government could not, however, sue the offending official, who would remain immune thanks to the FTCA's exclusivity provision. *See generally* Seamon, *supra* note 207, at 725-53, 767-70 (discussing the interaction of the FTCA and ATS in the context of assessing whether they might allow torture claims against the U.S. government or its officials); *cf.* Rasul v. Myers, 512 F.3d 644, 661 (D.C. Cir.) (affirming dismissal of ATS claims brought by former Guantanamo detainees against government officials because the latter had acted within the scope of their employment—therefore, the claims were properly characterized as FTCA claims against the government itself, and the plaintiffs had not satisfied the FTCA's exhaustion requirements for such claims), *vacated*, 129 S. Ct. 763 (2008) (ordering reconsideration in light of *Boumediene*).

the litigation process to reveal information that national security requires to be kept secret. In *Arar v. Ashcroft*, a divided panel of the Second Circuit cited these "special factors" to disallow a plaintiff from bringing a *Bivens* claim against officials he alleged subjected him to extraordinary rendition.[209]

But as the dissenting judge in *Arar* noted, these special factors lose much of their force once one acknowledges that a *Bivens*-style action needs to overcome formidable hurdles of fact and law.[210] As to practical hurdles, most people left alive by a Predator strike or other targeted killing would not turn to American courts for relief. Some would not sue because they are, in fact, the enemy—Osama bin Laden is not going to hire an American lawyer.[211] Others would not sue because doing so is beyond their means—a villager from the mountains of Afghanistan is not likely to hire an American lawyer either.

As to legal hurdles, *Boumediene* itself poses a high one to lawsuits by non-U.S. citizens for overseas attacks. Here we may seem to contradict our earlier insistence that *Boumediene* presupposes some form of constitutional protection worldwide for everyone.[212] Yet *Boumediene* shows that the requirement of *judicial* process depends on a pragmatic analysis.[213] As part of its balancing, *Boumediene* made clear that courts should favor the interests of American citizens and of others with strong connections to the United States.[214] Although the *Boumediene* petitioners lacked the preference in favor of citizens, they persuaded a slim majority of the Court to extend constitutional habeas to non-resident aliens detained at Guantanamo. This result, however, took place under exceptional circumstances: among them, Guantanamo is *de facto* United States territory;[215] the executive had held detainees

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209 *See* Arar v. Ashcroft, 532 F.3d 157, 179-84 (2d Cir. 2008) (refusing to allow "new" type of *Bivens* claim where the plaintiff's action implicated national security, state secrets, and immigration concerns), *reh'g en banc granted* (Aug. 12, 2008); *cf.* Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (explaining that, in determining whether to allow plaintiffs to rely on the *Bivens* remedy in a new context, courts should consider, inter alia, whether "'any special factors counsel[] hesitation before authorizing a new kind of federal litigation'" (quoting Bush v. Lucas, 462 U.S. 367, 378 (1983))).

210 *Arar*, 532 F.3d at 212 (Sack, J., dissenting) (opining that plaintiff had stated a *Bivens* claim and contending that "[a]ny legitimate interest that the United States has in shielding national security policy and foreign policy from intrusion by federal courts . . . would be protected by the proper invocation of the state-secrets privilege").

211 *But cf.* Stephen I. Vladeck, *Enemy Aliens, Enemy Property, and Access to the Courts*, 11 LEWIS & CLARK L. REV. 963, 996 (2007) ("[T]here simply is no traditional bar on access to the courts for enemies during wartime, particularly where the principal issue is whether the individual at issue is, in fact, an 'enemy.'").

212 *See supra* text accompanying notes 177-186.

213 *See supra* text accompanying notes 173-176 and 183-185.

214 *See* Boumediene v. Bush, 128 S. Ct. 2229, 2259 (2008) (identifying the "citizenship and status" of detainees as factors to consider in determining the extra-territorial reach of the Suspension Clause).

215 *Id.* at 2258.

there for years and claimed authority to do so indefinitely; and the Supreme Court doubted the fairness and accuracy of the CSRTs.[216] Absent such circumstances, *Boumediene* leaves courts to follow their habit of deferring to the executive on national security. For targeted killing, that may mean cutting off non-citizens from American courts.

The state-secrets privilege poses another barrier to *Bivens*-style actions. This privilege allows the government to block the disclosure of information in court that would damage national security.[217] It could prevent a case from proceeding in any number of ways. For instance, the government could block plaintiffs from accessing or using information needed to determine whether a Predator attack had a sound basis through human or technical sources of intelligence.[218] By this trump card, the government could prevent litigation from seriously compromising intelligence sources and methods.[219]

In addition, the doctrine of qualified immunity requires dismissal of actions against officials if a court determines they reasonably believed they were acting within the scope of their legal authority.[220] Defendants would satisfy this requirement so long as they reasonably

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216 One remarkable aspect of *Boumediene* is how it made it to the Supreme Court. The Court initially denied the petition for a writ of certiorari. Boumediene v. Bush, 549 U.S. 1328 (2007). In an almost unprecedented move, several months later the Court reversed this decision and granted the petition. Boumediene v. Bush, 551 U.S. 1160 (2007). This reversal prompted a great deal of speculation regarding its rationale, much of which centered on the June 15, 2007 Declaration of Stephen Abraham, a Lieutenant Colonel and a lawyer who had served on a Combatant Status Review Tribunal (CSRT). *See* William Glaberson, *In Shift, Justices Agree to Review Detainees' Case*, N.Y. TIMES, June 30, 2007, at A1. This declaration was submitted to the Court just prior to its reversal. In it, Abraham reported that the process for gathering information for CSRTs was extremely haphazard and that members were subject to command pressure to find that detainees were properly designated as enemy combatants. Reply to Opposition to Petition for Rehearing app., Al Odah v. United States, 551 U.S. 1161 (2007) (No. 06-1196), *available at* http://humanrights.ucdavis.edu/search?SearchableText="abraham:+first" (follow "Abraham: First Affidavit, June 15, 2007" hyperlink; then scroll down and follow "Get original here" hyperlink) (last visited Oct. 15, 2009).

217 *See, e.g.*, Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1196 (9th Cir. 2007) ("The state secrets privilege is a common law evidentiary privilege that permits the government to bar the disclosure of information if there is a reasonable danger that disclosure will expose military matters which, in the interest of national security, should not be divulged." (citation omitted) (internal quotation marks omitted)); *see also* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1270-1308 (2007) (detailing the evolution of the state-secrets privilege).

218 *Cf.* El-Masri v. United States, 479 F.3d 296, 309 (4th Cir. 2007) (upholding government's assertion of state-secrets privilege in case seeking liability for extraordinary rendition and noting that, to establish liability of the CIA Director, the plaintiff would be "obliged to show in detail how the head of the CIA participates in such operations, and how information concerning their progress is relayed to him").

219 *See* Arar v. Ashcroft, 532 F.3d 157, 212-13 (2d Cir. 2008) (Sack, J., dissenting) (opining, in a case challenging extraordinary rendition, that the state-secrets privilege would sufficiently protect "national security policy and foreign policy from intrusion by federal courts").

220 *See, e.g.*, Brosseau v. Haugen, 543 U.S. 194, 198 (2004) ("Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.").

claimed they had authority under the laws of war (assuming their applicability). These standards are hazy, and a court applying them would tend to defer to the executive on matters of military judgment.[221]

In view of so many practical and legal hurdles, some courts and commentators might be inclined to categorically reject all *Bivens*-style challenges to targeted killings. In essence, they might view lawsuits related to targeted killing as a political question left to the executive.[222] This view parallels Justice Thomas's that courts should not second-guess executive judgments as to who is an enemy combatant.[223] Contrary to Justice Thomas's view, the potency of the government's threshold defenses means that targeted-killing cases that make it to the merits would likely involve the most egregious conduct—for example, killing an unarmed Jose Padilla at O'Hare Airport on a shoot-to-kill order. For these egregious cases, a judicial check on executive authority is most necessary.

In terms of a *Mathews* balancing, the question becomes whether the benefits of *Bivens* actions on targeted killings of terrorists outweigh the harms. The potential harm is to the CIA's sources and methods on the Predator program. Lawsuits might harm national security by forcing the disclosure of sensitive information. The states-secrets privilege should block this result, however. Lawsuits might also harm national security by causing executive officials to become risk-averse about actions needed to counter terrorist activities. Qualified immunity, however, should ensure that liability exists only where an official lacks any justification for his action. On the benefit side, allowing lawsuits to proceed would, in truly exceptional cases, serve the private interest of the plaintiff in seeking compensation and, perhaps more to the point given the incommensurability of death and money, would provide accountability. Still more important, all people have an interest in casting light on the government's use of the power to kill in a world-wide war in which combatants and targets are not easily identified.

This balance of interests favors judicial challenges to targeted killings. Court cases, suitably circumscribed, will not harm national security and will help protect liberty. To be sure, for many practical reasons, it is unlikely that a Predator plaintiff will ever bring a case. And we hope the government exercises its power to kill wisely enough to avoid judicial challenge. Yet if the federal courts ever confront a

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221 *Cf.* MELZER, *supra* note 7, at 298-99 (noting that judicial review of military necessity turns on whether the military commander's decision fell "within the limits of honest judgment" given prevailing conditions (internal quotation marks omitted)).

222 *Cf.* Eichensehr, *supra* note 79, at 1880 (observing, with regret, that any challenge to a targeted killing "before a U.S. Court would likely be ruled a political question or decided in view of the President's power as Commander in Chief rather than on the merits of the international legal claims").

223 Hamdi v. Rumsfeld, 542 U.S. 507, 585 (2004) (Thomas, J., dissenting).

case that has survived the government's threshold defenses, the *Hamdi/Boumediene* model suggests that the judiciary should hold the executive to account.

B. *Due Process and Intra-Executive Control of Targeted Killing*

Realistically, the role we have just identified for the courts in monitoring targeted killings is vanishingly small. This makes it all the more important for the executive to develop its own rational, fair procedures for controlling targeted killing.

Recall that *Boumediene* is best understood as an embodiment of Justice Harlan's argument that due process extends worldwide to everyone, but the form this protection takes depends on a pragmatic inquiry.[224] This pragmatic inquiry can lead to the conclusion that a particular constitutional provision—such as the right to jury trial—should not apply overseas because to do so would be "impracticable or anomalous" under local conditions.[225] More broadly, it can convince *courts* not to hear constitutional claims from overseas where judicial interference with executive action would likely do more harm than good.[226]

It should *never* be impracticable or anomalous, however, for the *executive* branch to follow *its own* views of what is fair and reasonable for due process. Our conclusion flows from a simple, definitional point: By determining that a procedure is fair and reasonable, the executive necessarily concludes that the procedure is *not* impracticable or anomalous. Therefore, the executive's obligation to provide due process must follow it everywhere without any functionalist excuses. For this reason, FBI Director Mueller could not have been more wrong when, responding to concerns that the United States was using illegal interrogation techniques overseas, he quipped, "I'm not concerned about due process abroad."[227]

The executive, like the courts, cannot practicably offer suspected terrorists full-blown notice and an opportunity to be heard before an attempted targeted killing. The CIA, before firing a missile, need not

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[224] *See supra* text accompanying notes 173-186 (discussing *Boumediene*'s analysis of the extra-territorial reach of the U.S. Constitution).

[225] Boumediene v. Bush, 128 S. Ct. 2229, 2255-57 (2008) (quoting and discussing Justice Harlan's concurring analysis in Reid v. Covert, 354 U.S. 1 (1957)).

[226] *See supra* text accompanying notes 183-185 (explaining that *Boumediene* indicates that courts should apply a *Mathews*-style cost-benefit analysis to determine when judicial process should be available for resolution of constitutional claims brought by aliens based on conduct that occurred outside of United States territory).

[227] MAYER, *supra* note 11, at 106.

and should not invite Osama bin Laden or his lawyer to a hearing to contest whether he is, in fact, a committed member of al Qaeda.

But if due process for a targeted killing should not take the form of pre-deprivation notice and an opportunity to be heard, what form should it take? Many systems might be devised under a *Mathews v. Eldridge* analysis.[228] Rather than discuss the merits and demerits of imaginary systems, however, here we highlight one procedural requirement that two foreign courts have already imposed: After using deadly force in counterterrorism operations, executive authorities should conduct an independent, impartial, prompt, and (presumptively) public investigation of its legality.[229]

The Supreme Court of Israel's decision in *PCATI* is again informative.[230] As noted above, the Court regarded the Israeli-Palestinian conflict as subject to the law of international armed conflict.[231] It categorized the Palestinian targets as "civilians" who could be targeted only when directly participating in hostilities.[232] This decision did not put security forces in a straitjacket, though, because the Court also adopted a generous interpretation of what it means to "directly participate" in hostilities.[233]

The Court recognized that this generous interpretation increased the risk of improper targeting of peaceful civilians. It therefore crafted a set of legal limits to curb errors and abuses, citing customary international law, human rights case law, and a raft of secondary authorities.[234] The checks include: (a) thorough verification "regarding the identity and activity of the civilian who is allegedly taking part in the hostilities"; (b) forbidding deadly attacks if other means, such as arrest, can be used without imposing too great a risk on security forces or others; and (c) following up an attack on a civilian by an independent, intra-executive investigation "regarding the precision of the identification of the target and the circumstances of the attack."[235]

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228 424 U.S. 319, 335 (1976) (noting that whether the Due Process Clause requires a particular procedure depends on a rough cost-benefit analysis that gauges the procedure's effects on any relevant private or public interests).

229 *See, e.g.*, *PCATI*, *supra* note 6, paras. 40, 54 (imposing a duty on the executive to investigate its use of targeted killing); McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A), para. 161 (1995) (holding that the state's obligation to secure the right to life stated in Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms "requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter ali[a], agents of the State"); MELZER, *supra* note 7, at 431-32 (collecting authorities).

230 *PCATI*, *supra* note 6.

231 *Id.* para. 21.

232 *Id.* paras. 25, 28.

233 *Id.* paras. 35-40.

234 *Id.* para. 40.

235 *Id.*

For good measure, the Court said the internal investigation should be subject to judicial review.[236]

In fashioning these limits, the Israeli Court relied on, among other sources, human rights law developed by the European Court of Human Rights. For example, in *McKerr v. United Kingdom,* that court addressed the legality of shooting three suspected IRA terrorists after they ran a police roadblock at high-speed.[237] After years of inquests, criminal investigations, and civil litigation, the son of one of the decedents, McKerr, filed an application with the European Court of Human Rights. In this filing, McKerr claimed that the state had not satisfied its duty under Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This provision declares that "[e]veryone's right to life shall be protected by law," but that a killing does not violate this right if it results from the "use of force which is no more than absolutely necessary . . . in defence of any person from unlawful violence . . . [or] to effect a lawful arrest."[238] The European Court has repeatedly held that, by implication, protection of this right to life "requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by . . . agents of the State."[239]

Responding to McKerr's petition, the Court elaborated that Article 2's purpose "is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility."[240] To perform this function adequately: (a) the state must initiate an investigation promptly and not rely on the next-of-kin to initiate action; (b) the persons "responsible for and carrying out the investigation" should be "independent from those implicated in the events"; (c) the investigation should be designed to determine whether the use of deadly force was justified and should lead to identification and punishment of those responsible if the use of force was illegal; and (d) there must be "a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory."[241]

In both *PCATI* and *McKerr*, the courts rooted the duty to investigate in an express right to life. In the United States, this right to life finds a home in the doctrine of substantive due process.[242] A

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236 *Id.* para. 54.

237 McKerr v. United Kingdom, 2001-III Eur. Ct. H.R. 475.

238 EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, art. 2, Nov. 4, 1950, Europ. T.S. No. 5.

239 *See, e.g.*, McCann v. United Kingdom, (1996) 21 Eur. H.R. Rep. 97, 163 (1995).

240 *McKerr*, 2001-III Eur. Ct. H.R., para. 111.

241 *Id.* paras. 111-15.

242 *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 841, 846 (1998) (noting that

Mathews-style balancing suggests that to protect this right to life, the United States, too, has a duty to conduct intra-executive review of the use of deadly force through targeted killing. Of course, one can imagine situations in which an investigation that satisfied everything spelled out by the Israeli or European courts would be unwise. For instance, official acknowledgment of the United States' role in a fully public investigation of a Predator strike might cause diplomatic repercussions with countries that had helped us or had looked the other way. Further, the executive might not be able to explain its targeting decision without compromising intelligence sources and methods.[243]

Internal investigations, however, do not always pose a plausible threat to national security. Consider the Predator program. Within the CIA, the task of investigating the legality of its actions is entrusted to the CIA's Inspector General (IG). He holds an office created by statute, is subject to Senate confirmation, and can only be removed by the President.[244] Where the IG's investigation finds evidence of criminality, he or she refers the matter to the Department of Justice for further investigation and possible prosecution.[245] One could easily impose a categorical requirement that all CIA targeted killings be subject to IG review. To support the IG, review teams could be established within the CIA's Clandestine Service or existing "accountability boards" could be used. The CIA's Office of General Counsel could also play a role. And the National Security Council, a link between the CIA and the White House, could coordinate the internal oversight.

Review within the CIA ensures the proper handling of classified information. Plus, internal review protects private interests by encouraging careful, sparing use of targeted killing and by ensuring some accountability when mistakes or abuses do occur. The increasing accountability on Predator strikes, in turn, serves an even broader interest in the legitimacy and fairness of deadly government action. Thus, the *Mathews* balance favors an intra-executive review *at least* as intrusive as IG review.

One might object that the investigatory program just sketched for Predator strikes does not go far enough to protect the right to life. Taking a page from the *McKerr* case, one might contend: (a) that the

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substantive due process protects a right to life and is violated by arbitrary government action that "shocks the conscience").

243 *See* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 32-34 (2004) (suggesting criteria for triggering the investigation of deadly force in armed conflicts and noting that security concerns may limit the transparency of such investigations and the degree to which victims or their relatives can reasonably participate).

244 On the powers and responsibilities of the CIA's IG, see generally 50 U.S.C. § 403q (2006).

245 *See id.* § 403q(b)(5).

IG's independence from political influence upon the CIA is questionable;[246] and (b) that internal investigations cannot generate accountability unless they are made public.[247] There are many responses to such objections. First, investigations of targeted killings could be made public except when it is clear that publicity would cause substantial harm to national security. Second, some judicial review could be included.[248] To alleviate security concerns while honoring accountability, judicial review might take place in a special national security court designed along the lines of the Foreign Intelligence Surveillance Court.[249] To the degree these (and other) moves toward openness might threaten intelligence sources or otherwise compromise security, they present closer calls under *Mathews*.

To stress, our argument for serious intra-executive review of targeted killings, after the fact, does not preclude other types of controls—some of which due process might also require. Many such requirements may already be in place. We assume, for instance, the CIA corroborates its intelligence before anyone is targeted; a human's eyes on the target may be part of the CIA's procedures. More generally, we hope the CIA has developed pre-mission controls on targeting that draw on Department of Defense procedures.[250] Further, the legislative branch plays a role in light of the executive's statutory obligation to keep the Intelligence Committees of the House and Senate apprised of "covert actions" and other "intelligence activities"—which, under either label, include targeted killing by the CIA.[251] Congress, after all, controls the purse on the Predator program.

No matter the variations between internal and external oversight, we stand by our central point: Under the Due Process Clause, the executive must conduct *some kind* of serious investigation of any targeted killing. In keeping with the purpose and the pragmatism of *Mathews v. Eldridge*, this investigation should be as thorough, independent, and public as possible without damage to national security.

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246 For a discussion of the IG's vulnerability to political influence, see MAYER, *supra* note 11, at 288-89 (describing Vice President Cheney's efforts to influence IG Helgerson after he concluded in a 2004 report that CIA treatment of detainees violated the Convention Against Torture).

247 McKerr v. United Kingdom, 2001-III Eur. Ct. H.R. 475, para. 115.

248 *PCATI*, *supra* note 6, para. 54.

249 *Cf.* Amos N. Guiora, *Where Are Terrorists to Be Tried: A Comparative Analysis of Rights Granted to Suspected Terrorists*, 56 CATH. U. L. REV. 805, 834-35 (2007) (recommending amendment of Foreign Intelligence Surveillance Act (FISA) to allow criminal prosecution of terrorists before FISA courts to ensure civilian control while respecting security needs).

250 *See supra* note 40 (describing briefly Air Force procedures for deliberate targeting of attacks).

251 *See* The Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, 105 Stat. 429.

Striking the balance between openness and security requires nuance. Even so, failing to develop any investigatory program for Predator strikes is not an option under law. Since executive officials swear to uphold the Constitution, they should—if they have not done so already—develop a solid review of the Predator program without waiting for a court order which is unlikely to come.

CONCLUSION

This Article has explored the implications of the due process model that the Supreme Court developed in *Hamdi v. Rumsfeld*[252] and *Boumediene v. Bush*[253] for targeted killing—particularly Predator strikes by the CIA. Contrary to Justice Thomas's charge,[254] this model does not break down in the extreme context of targeted killing but, instead, suggests useful means to control this practice and heighten accountability. One modest control is for appropriate plaintiffs to bring *Bivens*-style actions to challenge the legality of targeted killings, no matter where they may have occurred in the world. Resolution of any such action that surmounted all the practical and legal obstacles in its way—including the state-secrets privilege and qualified immunity—would enhance accountability without causing substantial risk to national security. Yet as a practical matter, this role for the courts is vanishingly small. It is therefore all the more important that the executive branch itself develop fair, rational procedures for its use of targeted killing. Under *Boumediene*, it has a constitutional obligation to do so. To implement this duty, the executive should, following the lead of the Supreme Court of Israel and the European Court of Human Rights, require an independent, intra-executive investigation of targeted killing by the CIA. Even in a war on terror, due process demands at least this level of accountability for the power to kill suspected terrorists.

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252 542 U.S. 507 (2004).
253 128 S. Ct. 2229 (2008).
254 *Hamdi*, 542 U.S. at 579 (Thomas, J., dissenting).