

Targeted Killing

United States Policy, Constitutional Law, and Due Process

Mark Febrizio

A Senior Thesis submitted in partial fulfillment
of the requirements for graduation
in the Honors Program
Liberty University
Spring 2014

Acceptance of Senior Honors Thesis

This Senior Honors Thesis is accepted in partial fulfillment of the requirements for graduation from the Honors Program of Liberty University.

Thomas Metallo, Ph.D.
Thesis Chair

Gai Ferdon, Ph.D.
Committee Member

Kenneth Reed, Ph.D.
Committee Member

Brenda Ayres, Ph.D.
Honors Director

Date

Abstract

The increased incorporation of targeted killing, primarily through the use of unmanned aerial vehicles, into United States policy raises salient questions regarding its consistency with the U.S. Constitution. This paper contrasts interpretations of constitutional due process with the current legal framework for conducting targeted killing operations. The Fifth Amendment to the Constitution establishes the due process owed to U.S. citizens. This paper determines that the killing of Anwar al-Awlaki, an American citizen, was accomplished in a manner inconsistent with constitutional due process and demonstrates an over-extension of executive branch power. This paper examines one scholarly recommendation that seeks to increase the accountability of the executive and increase the level of due process afforded citizens in the context of targeted killing.

Targeted Killing: United States Policy, Constitutional Law, and Due Process

Military warfare has existed since humankind's earliest days. Although the techniques and methods of warfare have continually changed, the objectives have not. Nations typically seek stability, prosperity, and national security. As technologies have developed, military techniques have become more specialized and sophisticated. Historically, targeting specific individuals has been a common practice. The book of Joshua records Ehud, a Benjaminite who acted as a judge for the Israelites, killing the tyrannical King Eglon of Moab with a knife (Judges 3:12-30). World War I was triggered through the targeted assassination of the Archduke Franz Ferdinand of Austria. Throughout World War II numerous attempts were made on the German leader Adolf Hitler's life.

Today, the focus of the targeted killing debate is largely centering on the use of unmanned aerial vehicles (UAVs) and missile strikes. Since President Barack Obama was elected in 2008, he has increasingly exploited such tactics to accomplish national security objectives. In fact, President Obama increased the use of drones so significantly that in less than four years in office he authorized six times the number of strikes that the Bush Administration authorized over eight years. Yet, during this time the percentage of strikes that have killed militant leaders has decreased.¹ While some have questioned the efficacy of such strikes, legal questions also abound. This paper seeks to determine the place of targeted killing relative to its constitutionality and to ascertain its viability as a component of national security policy. In order to do this, a brief history and background of targeted killing and the evolution of UAVs is necessary. This paper will also examine

1. Peter Bergen and Megan Braun, "Drone is Obama's weapon of choice," *CNN* (September 19, 2012), <http://www.cnn.com/2012/09/05/opinion/bergen-obama-drone> (accessed April 26, 2013).

the Department of Justice's justification for killing American citizens to determine the Department's consistency in adhering to the Constitution's due process requirements. An analysis is provided of expansive executive power and its interaction with due process rights. Solutions to the problem of insufficient due process will also be investigated and compared with constitutional law in order to provide a path forward.

A Brief History of Targeted Killing

Targeted killing has been employed as a military strategy when a nation or organization identifies a certain target as worthy of elimination. The actual term "targeted killing" has only been in use for approximately a decade since Israel declared its policy of "targeted killings" aimed at terrorists residing in Palestine.² Before that nations and individuals eliminated targets through a number of methods, but without a coherent concept of what those actions constituted. Utilizing methods such as "sniper fire, shooting at close range, missiles from helicopters, gunships, the use of car bombs, and poison," nations eliminated targets to accomplish their foreign policy objectives.³ The common element between these killings was lethal intent rather than the method of accomplishing them. The United Nation's definition of targeted killing clarifies this underlying intention:

A targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.⁴

2. Philip Alston, "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions," Human Rights Council, 14th sess., add. 6, May 28, 2010: 4, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> (accessed January 30, 2014).

3. Ibid.

4. Ibid., 3.

Clearly, any killing committed involuntarily or accidentally falls outside the bounds of targeting. Additionally, a killing committed by an individual without authorization from his or her state would also be excluded. Alston explains that the crucial factor must be premeditation, and not merely a last resort preparation.⁵ This means that a “reckless” killing or one carried out without a conscious choice would not be considered a targeted killing, nor would the elimination of a suspected suicide bomber during a law enforcement operation, since the initial goal of the operation was not to remove the suspect.⁶ Since this report was explicitly prepared by the United Nations, the international community largely agrees with these definitions. Since the United Nations lacks enforcement power, a definitional approach does nothing substantively to regulate strikes.

Although these sorts of killings have gone on for many years, they have only recently been highlighted. This newfound focus has mainly come about because of technological advances. In particular, the development and mass commercialization of UAVs has completely altered approaches to targeted killing. Drones have been around for over six decades, and originally envisioned as a means to gather intelligence and conduct surveillance and reconnaissance operations.⁷ Drone technology was modified to contribute to wartime operations as weapons, first appearing in World War II as the German FX-1400 “which consisted of a 2,300 pound bomb, dropped from an airplane

5. Alston, “Report of the Special Rapporteur,” 5.

6. *Ibid.*

7. *Ibid.*, 9.

and steered by a pilot in the ‘mothership.’”⁸ Nevertheless, not much progress was made with this early drone. At least in the United States, there was not a significant technological investment in this direction until the Vietnam War. The U.S. experimented with drones dubbed ‘Fireflies’ in order to conduct reconnaissance missions in Southeast Asia; however, the program was discontinued when it went over budget.⁹

During the Lebanon War in 1982 the Israeli Air Force employed a weaponized drone called the Pioneer, which demonstrated that other nations were also investigating the technology.¹⁰ Investment accelerated in the latter 1980s and the United States introduced its own version of the Pioneer during the Persian Gulf War.¹¹ Yet at that point, the use of drones for targeting individuals was still not widely implemented as a national security tactic. When the attacks of 2001 occurred, U.S. strategy changed as the nation saw the need to “hunt down terrorists in remote areas of Afghanistan and Pakistan.”¹² As mentioned earlier, the use of drone strikes to accomplish targeted killings has continued to increase after Barack Obama replaced George W. Bush as president. Clearly the ability to eliminate targets without significant risk to military personnel is a powerful tool; however, it is not one that is unique to the U.S. According to the United Nations, over 40 nations have the capacity to use drones in military operations, including some potentially

8. Andrew Callam, “Drone wars: Armed unmanned aerial vehicles.” *International Affairs Review* 18, no. 3 (Winter 2010), <http://www.iar-gwu.org/node/144> (accessed April 24, 2013).

9. Ibid.

10. Ibid.

11. Ibid.

12. Ibid.

hostile nations, such as Russia, China, and Iran.¹³ If there is confusion over the role and legality of targeted killings, the continued development of drone technology and its dissemination will only complicate the matter.

Constitutional Law and Targeted Killing

Although there is a lack of international law consensus regarding how to evaluate the legality of targeted killings, an examination of the constitutional law of the United States should provide a clearer legal picture. The framers of the Constitution constructed the American republic to be one of diffused powers and divided authority. Nevertheless, disputes exist regarding the Constitution's application to executive prerogative and its use of targeted killing. At the heart of the constitutional debate is the extrapolation of due process norms.

Due Process and the Fifth Amendment

The Fifth Amendment contains the constitutional basis of opposition to targeted killing. This is because the crux of the controversy typically centers on the method by which targeted killings are conducted and decided, rather than the targets themselves. The portion of the text that specifically relates to due process is actually quite short and concise. It says, "No person shall...be deprived of life, liberty, or property, without due process of law."¹⁴ The legal concept of due process found in the Fifth Amendment should be understood in relation to the First Amendment to the Constitution. The First Amendment protects the people from infringements upon their right to free speech,

13. Alston, "Report of the Special Rapporteur," 9.

14. U.S. Constitution, amend. 5.

exercise of religion, press, assembly, or petition of grievances.¹⁵ It is understood that persons who commit a crime, in most cases a felony, effectively give up aspects of their constitutional rights. Persons who are or have been imprisoned frequently cannot vote or move as freely as they desire. In capital cases, a person may receive the death penalty if tried by a jury and found guilty through due process of law. A restriction of an individual's First Amendment right or of the natural rights of life, liberty, or property can only occur in conjunction with the Fifth Amendment.

Although the Fifth Amendment does not specify what due process entails, the context of the Constitution is crucial to understanding the clause's intent. As is widely known, the Founding Fathers were heavily influenced by British legal traditions, such as Magna Charta, Petition of Right, Bill of Rights 1689, and English Common Law. Particularly the principle of legality, which informed the framers' meaning of due process, is founded in Magna Charta 1215.¹⁶ The intention behind this due process was to prohibit "unilateral, arbitrary action by the king against certain protected private interests."¹⁷ Here due process is seen to be closely linked to restrictions upon the King of England, and was proactively added as a provision against the expansion of the executive power of the United States.

Although in a technical sense "the due process of law" might refer to pleading technicalities, contextually it is much more likely to refer to the principle of legality, limiting infringements on one's private rights by the government, and more specifically,

15. U.S. Constitution, amend. 1.

16. Gary Lawson, "Due Process Clause," *The Heritage Guide to the Constitution* (2012), <http://www.heritage.org/constitution#!/amendments/5/essays/150/due-process-clause> (accessed March 2, 2014).

17. *Ibid.*

the executive.¹⁸ The confusion probably occurred because Sir Edward Coke (1552-1634) had explained the terms “law of the land” and “the due process of law” as equivalent, even though there were definitional distinctions between the two.¹⁹ Regardless of possible confusion of terms, it is important to understand what was meant by the individual tenets of the Fifth Amendment’s due process clause. Both the original meanings of life and liberty were largely influenced by the writings of Sir William Blackstone (1723-1780). He identified liberty with a person’s ability to control his or her movements or adapt to situational changes without risking imprisonment or restraint except by the due course of law.²⁰ Blackstone threw a wider net over the concept of life; it encompassed an “array of rights lumped together under the general heading of personal security.”²¹ Conveniently, the example of targeted killing mainly corresponds to the taking of life and liberty because the meaning behind the term property is much more ambiguous. Still, any infringement that is accomplished through a targeted killing would certainly reach the level of a denial of both life and liberty.

Many assert that due process has too constrictive of an effect when attempting to mitigate threats of terrorism. However, due process laws of the United States are not as rigid as typically assumed. It is reasonable to suppose that due process differs depending upon the context of the situation. Evers-Mushovic and Hughes concur by saying, “due process balances the severity of the potential deprivation and the substantive grounds that

18. Lawson, “Due Process Clause.”

19. Ibid. Lawson indicates that the term “law of the land” had been associated with restraints on government from depriving citizens of life, liberty, or property, which was probably the intentional meaning of the framers. The term “the due process of law” had a technical meaning referring to the right of a defendant to appear in court on order of a writ.

20. Ibid.

21. Ibid.

might justify that deprivation.”²² In other words, the process of determining procedures can change based on circumstances. Depending on how severe the deprivation of rights is, and how critical reasons are for its undertaking, due process might differ. In the context of terrorist activities, both the individual being targeted and the U.S. government have strong arguments. On the one hand, the individual who is targeted is potentially losing his or her life, but on the other the government is attempting to avoid a catastrophic loss of life. Applying a significant degree of due process might increase the probability that a just decision is reached that properly balances the two claims and enhances the decision-making ability of the executive.

The idea of a flexible due process was settled by the Supreme Court’s decision in *Mathews v. Eldridge*. Drawing from *Cafeteria Workers v. McElroy* and *Morrissey v. Brewer*, the Court’s opinion stated that due process “is not a technical conception with a fixed content unrelated to time, place and circumstances,” rather it is “flexible and calls for such procedural protections as the particular situation demands.”²³ This flexibility purportedly allows due process to be modified based on the distinct aspects of a case. Specifically, the Court lays out three distinct factors that must be considered in order to determine the level of due process necessary for a particular instance:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁴

22. Toren G. Evers-Mushovic and Michael Hughes, “Rules for When There are No Rules: Examining the Legality of Putting American Terrorists in the Crosshairs Abroad,” *New England Journal of International and Comparative Law* 18 (2012): 170, LexisNexis Academic (accessed April 16, 2013).

23. *Mathews, Secretary of Health, Education, and Welfare v. Eldridge*, 424 U.S. 319 (1976), 334.

24. *Ibid.*, 335.

Although *Mathews v. Eldridge* was not interpreted in the context of national security policy,²⁵ Richard Murphy and Afsheen John Radsan explain that the benefit of using the case is that it “provides a general framework for developing” due process measures, rather than “determinative answers.”²⁶ In a similar way to how courts have developed a due process for prisons, civil service, and public education, *Mathews* can be applied to the context of targeted killing to assist in the creation of due process requirements.²⁷

Despite the convenience of this “balancing test,” there are problems with such an approach. Primarily, the implementation of such a test is extremely unpredictable.²⁸ Eschewing a historical interpretation of what due process entails makes the guarantees of the Fifth Amendment superfluous. If the Court can interpret what due process means and the extent of its application based on this balancing test, then the government might not be consistently limited from targeting suspected terrorists. Significantly changing the meaning of due process based on the situation could lead to abuse. Also, the Court’s assumption that these issues can be accurately weighed reflects a great deal of optimism in judicial review.²⁹ Despite this, Supreme Court precedent exists on the matter of due process rights afforded citizens that were affiliated with terrorist organizations. In one case in particular, *Hamdi v. Rumsfeld*, the Supreme Court used the balancing test

25. *Mathews v. Eldridge*, 319. As the opinion of the Court states, “The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing.”

26. Richard W. Murphy and Afsheen John Radsan, “Notice and an Opportunity To Be Heard Before the President Kills You,” *Wake Forest Law Review* 48, no. 4 (Fall 2013): 858, LexisNexis Academic (accessed February 2, 2014).

27. *Ibid.*

28. Lawson, “Due Process Clause.”

29. *Ibid.*

outlined in *Mathews v. Eldridge* in order to determine the amount of process due an American citizen.³⁰ Court precedents are worthwhile to consider, since they provide some interpretative guidelines.

Hamdi v. Rumsfeld as an instructive case. The case of Yaser Esam Hamdi investigates the situation of a United States citizen classified as an enemy combatant, captured in Afghanistan, and detained at a naval brig in Charleston, South Carolina without trial or due process.³¹ Although the ruling deals specifically with indefinite detention rather than targeted killing, due process precedents have been extracted from the case that provide valuable application. In the majority opinion, Justice O'Connor holds, "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."³²

In a petition submitted by Hamdi's father, the elder Hamdi alludes that "Hamdi's detention in the United States without charges, access to an impartial tribunal, or assistance of counsel 'violated and continue[s] to violate the Fifth and Fourteenth Amendments to the United States Constitution.'"³³ The elder Hamdi continued further on behalf of his son's innocence, declaring that Hamdi was present in Afghanistan to conduct relief work and not participate in military training against the United States.³⁴ Nevertheless, the majority opinion of the Court upheld that the capture and detainment of

30. Murphy and Radsan, "Notice and an Opportunity," 858.

31. *Hamdi et al v. Rumsfeld, Secretary of Defense, et al.*, 542 U.S. 507 (2004), 507.

32. *Ibid.*, 509.

33. *Ibid.*, 511.

34. *Ibid.*

Hamdi was authorized based upon the Authorization for Use of Military Force 2001 (AUMF).³⁵

The key facet to this case related to targeted killing is the due process owed a citizen, even if he or she has been properly detained by the U.S. government. Thus, through the AUMF, the United States had the proper authorization to detain Hamdi as an enemy combatant, because the “‘necessary and appropriate force’ referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces.”³⁶ Still, the Court held that even if the detention was legitimate, Hamdi’s situation warranted access to the rights of due process reserved for all U.S. citizens. Even if his detainment was legitimate, the government did not have the authority to strip him of his constitutional rights. Although Hamdi was not the subject of a targeted strike, his enemy combatant status makes his situation comparable. For example, if capturing Hamdi had not been feasible, would the United States have had the legal right to terminate his life? Assuming that all other factors remained constant, Hamdi could have been denied the right to due process, and targeted by the U.S. government, if his capture proved too difficult.

This Supreme Court case would at least offer some support to the idea that the executive branch cannot rescind a citizen’s Fifth Amendment rights if they are considered an enemy combatant or impossible to capture. There exists scholarly support for this stance. For example, Thompson writes that the presence of war or conflict does not entirely abrogate the rights of citizens of the U.S. He posits that “it is only logical that if due process limitations apply to detention during armed conflict then similar limitations

35. Hamdi v. Rumsfeld, 509.

36. Ibid., 515.

would also apply to targeting during armed conflict.”³⁷ Nevertheless, some might oppose extending due process rights to terrorists, even if they are due those rights as American citizens. In a court case against Ahmed Ghailani, who was not a citizen of the U.S., some evidence was excluded because it was gathered through illegitimate means, namely “physical and psychological abuse of the defendant.”³⁸ In a telling statement, an opponent declared that this use of due process was improper, since it afforded al-Qaeda terrorists the same due process rights as American citizens.³⁹ This statement implies that “the outgroup not entitled to due process may be any noncitizen.”⁴⁰ However, how should the Constitution be interpreted when the terrorist in question is an American citizen? Robertson contends that “the legal doctrine of constitutional due process protects against a desire to withhold legal protections from those perceived to be enemies.”⁴¹ While those enemies might originate predominantly from outside the United States, a number of American citizens have also become enemies of the U.S.

Due Process and Targeting of American Citizens

At the heart of the debate about targeted killing is the government’s ability to order the death of an American citizen through a targeted strike. In September 2011, Anwar Al-Awlaki, an American citizen, was targeted by a drone strike in Yemen and killed. Prior to Al-Awlaki’s death, his father, Nasser Al-Aulaqui, brought forward a case

37. Marshall Thompson, “The legality of armed drone strikes against U.S. citizens within the United States,” *Brigham Young University Law Review* 2013, no. 1 (2013): 164, <http://search.proquest.com/docview/1346347608?accountid=12085> (accessed February 1, 2014).

38. Cassandra Burke Robertson, “Due Process in the American Identity,” *Alabama Law Review* 64 (2012): 273, LexisNexis Academic (accessed January 29, 2014). Ahmed Ghailani was born in Tanzania and retains Tanzanian citizenship.

39. *Ibid.*

40. *Ibid.*, 274.

41. *Ibid.*, 281.

against President Obama, Secretary of Defense Robert Gates, and CIA Director Leon Panetta in the federal district court of the District of Columbia.⁴² In this case, the Court dismissed the case before substantively dealing with its implications for due process. Regardless, Benjamin McKelvey explains that if the Court had utilized the balancing test in this instance, the first and third factors would have collided.⁴³ He notes that “[t]he deprivation in question was Aulqi’s life, the most serious deprivation in law...the deprivation of life is permanent. However, the government's interest in protecting American citizens from the unrelenting threat of terrorism is also compelling.”⁴⁴ The seriousness of deprivation of life, as well as the singular nature of the Al-Awlaki killing makes it quite useful to examine in depth.

The DOJ’s justification of the killing of Al-Awlaki. In order to justify the targeted killing of Anwar al-Awlaki, the Department of Justice (DOJ) retroactively produced a White Paper that defends the president’s decision to eliminate an American citizen. The DOJ does confirm that even while abroad a citizen carries along his or her Fifth Amendment due process rights and Fourth Amendment rights; however, the DOJ is quick to point out that the “citizenship of a leader of al-Qa’ida...does not give that person constitutional immunity from attack.”⁴⁵ Although the Constitution does not grant absolute immunity from punishment for citizens, it establishes that any penalty be conducted in

42. Al-Aulqi v. Obama, 727 F.Supp.2d 1 (D.D.C. 2010).

43. Benjamin McKelvey, “Due Process Rights And The Targeted Killing Of Suspected Terrorists: The Unconstitutional Scope Of Executive Killing Power,” *Vanderbilt Journal of Transnational Law* 44, no. 5 (November 2011): 1370, HeinOnline (accessed February 24, 2014).

44. Ibid.

45. Department of Justice, “Lawfulness Of A Lethal Operation Directed Against A U.S. Citizen Who Is A Senior Operational Leader Of Al-Qa’ida Or An Associated Force,” *White Paper* (February 4, 2013): 5, http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (accessed February 2, 2014).

consistency with due process. After confirming the existence of the rights due a citizen of the U.S., the DOJ expounds that in order to determine the process due a citizen the private interests involved and the burdens that the government should undertake in order to provide greater due process must be contrasted.⁴⁶ While the government recognizes that there is no higher private interest than a person protecting their own life, this interest must be balanced against the “government’s interest in waging war, protecting its citizens, and removing the threat posed by members of enemy forces.”⁴⁷ The logical assumption would be to suppose that the government had used a balancing test similar to that which the Supreme Court implements. What is problematic is the lack of explanation offered regarding how this scale is interpreted and weighed by the executive branch. Since the decision-making process is done in secret, the public aspect that the Supreme Court would allow for is also missing. The determination by the government lacks specific justification as well as a methodology for evaluating the appropriate level of due process to be provided. Going beyond the inherent problems that the balancing test elicits in the first place, the use of this test by the executive branch is concerning. Even if the executive branch properly used the Supreme Court’s balancing test, there is no clear reason as to why the president and other high-level officials have the authority to conduct such a test.

In regard to the Fourth Amendment, the DOJ uses a similar justification that balances the individual’s interests against that of the government’s.⁴⁸ Crucial to this justification is the “reasonableness” test, which differentiates between searches and

46. Department of Justice, “Lawfulness of a Lethal Operation,” 6.

47. *Ibid.*

48. *Ibid.*, 9.

seizures classified as reasonable or unreasonable as was mentioned in the discussion on the Fourth Amendment. The White Paper claims that the “‘reasonableness’ test is situation-dependent.”⁴⁹ The nature of the DOJ’s argument in this instance gains some latitude, since it is typically up to the discretion of the responding officer whether initiating a search is warranted. If a hypothetical scenario does in fact meet the government’s idea of an imminent attack, where “the targeted person is an operational leader of an enemy force and an informed, high-level government official has determined that he poses an imminent threat of violent attack against the United States, and those conducting the operation would carry out the operation only if capture were infeasible,” there would seem to be a reasonable level of suspicion to conduct a seizure.⁵⁰ Although in a perfect scenario this situation might prove reasonable, the executive is not held accountable if the seizure was later determined to be unreasonable. There is also no process for petition within the court system against the executive, and the decision would most likely be made in secret with no verification from an “informed, high-level official of the U.S. government.”⁵¹

Before the White Paper was released, various news sources reported small snippets of the process that the executive branch used to make the decision to target Al-Awlaki. For example, the *New York Times* revealed that “President Obama’s National Security Council had to approve the order to pursue him [al-Awlaki] with lethal force,” although there is no clear explanation of why this “approval was necessary or

49. Department of Justice, “Lawfulness of a Lethal Operation,” 9.

50. *Ibid.*

51. *Ibid.*, 6.

constitutionally satisfactory.”⁵² McKelvey details that current and former government officials, such as former CIA officer Bruce Reidel, have offered words of assurance and nominal amounts of information on the process that the executive branch takes in such cases. He claims that the CIA’s Counterterrorist Center directs ten attorneys to review evidence against a potential target and submit memos to the General Counsel that are rigorously reviewed before a final decision is rendered.⁵³ Besides assurances about the process, a detailed description is never given, nor any method of auditing the program provided. Either the way the CIA evaluates evidence, or determines what “standard of proof” is necessary, is never explicated.⁵⁴

Additionally, the National Security Council decided it was more appropriate to “view the legality of this killing” under international law rather than domestic law.⁵⁵ This decision to defer to international standards before domestic ones is inconsistent with the Constitution and reinforces the irresponsible nature of the Administration’s policies. At the very minimum, the decision should have been made consistent with both international and constitutional law, rather than ignoring the constitutional protections that every citizen possesses and deferring to international law instead.⁵⁶

To date, this White Paper is the most comprehensive justification released by the current administration. As the White Paper indicates, the explanations serve only to

52. McKelvey, “Due Process Rights and the Targeted Killing of Suspected Terrorists,” 1358.

53. *Ibid.*

54. *Ibid.*

55. Ryan Patrick Alford, “The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens,” *Utah Law Review* 4 (March 7, 2011): 1253, <http://ssrn.com/abstract=1780584> (accessed February 2, 2014).

56. *Ibid.*

validate the elimination of a U.S. citizen who is acting as a “senior operational leader of al-Qa’ida,” and not establish the minimum requirements for carrying out an attack against another U.S. citizen or foreign national.⁵⁷ The otherwise lack of justification of President Obama’s increasing use of drone strikes is disturbing. Although the White Paper purportedly substantiates the legality of killing an American citizen who is a leader of a terrorist organization (clearly a reference to al-Awlaki), its argument is weak at best. It fails to address the substantive issues of constitutional law; however, these arguments only touch the surface of the issue and typically end in the premature phrase “an operation in the circumstances and under the constraints described above would not result in a violation of due process rights.”⁵⁸ The problem is succinctly summed up by Deborah Pearlstein, who explains that in order to justify the legality of targeted killings, the White Paper would have to both “identify a source of authority in the U.S. Constitution, or in laws passed by Congress, that gives the president the power to use force” and “identify and apply the U.S. and international laws that limit when such force can be used.”⁵⁹ In the end, the White Paper does neither.

While the government hints at the president’s ability to use force to defend the nation, the paper does not even address any specific provision of the Constitution or of Article II, failing to explain what is meant by the president’s “constitutional

57. Department of Justice, “Lawfulness of a Lethal Operation,” 1.

58. *Ibid.*, 9.

59. Deborah Pearlstein, “Targeted Killings Can Be Legal: But The Obama Administration’s White Paper Fails To Explain Why,” *Slate* (February 8, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/02/white_paper_on_drones_targeted_killings_can_be_legal_but_the_obama_administration.html (accessed February 2, 2014).

responsibility to defend the nation.”⁶⁰ The White Paper mentions utilizing the AUMF as a justification, but it never addresses the obligation that the president has to restrict the powers derived from AUMF to only what is legal under international law.⁶¹ Since the DOJ fails to “identify a legal rule about who is targetable under the law of war,” the arguments laid forth by the administration are at best incomplete.⁶² As a result, the Obama Administration must provide a substantial justification under international law if it is to defer to the AUMF for its validation.

Assuming that the AUMF’s allowance of unrestrained military action against those accused of terrorism is dubious, judicial review is necessary to limit the scope of executive power in this context and prevent the eschewing of due process. McKelvey explains that “there is ample precedent to suggest that the scope of congressionally authorized war power is a matter subject to judicial review and not an exclusively political question.”⁶³ In its defense in the matter, the DOJ argued that the political question doctrine established Al-Aulaqui’s lack of standing to bring his claim to court.⁶⁴ If the court exercised its ability to review the scope of the AUMF, it would discover the potentially extensive nature that an unrestrained allowance would justify. Such an “interpretation would allow the Executive to use lethal force against any person, anywhere in the world, simply by accusing that person of a relationship to terrorist

60. Pearlstein, “Targeted Killings Can Be Legal.”

61. *Ibid.*

62. *Ibid.*

63. McKelvey, “Due Process Rights and the Targeted Killing of Suspected Terrorists,” 1364.

64. *Ibid.*, 1356.

organizations that were involved in the September 11 attacks.”⁶⁵ The sweeping nature of that interpretation would likely invalidate the application of due process rights in the name of national security.

Overall, the arguments the DOJ presents to validate its targeted killing policy, albeit an extremely limited portion of that policy, are largely defensive and do not provide true guidance of their legality. Its discussion of due process does begin to explain why the government’s policy is not a violation of certain amendments; however, it never reaches the point of identifying where the Constitution gives the president the authority to conduct such an operation. The absence of a prohibition in the Constitution is not equivalent to a grant of executive power.

Constitutional rights and the location of citizens. Supreme Court precedent supports the idea that the U.S. cannot act “against citizens abroad...free of the Bill or Rights.”⁶⁶ In the plurality opinion of the Court in *Reid v. Covert*, Justice Hugo L. Black maintains that “[w]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill or Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away.”⁶⁷ *Reid v. Covert* addresses the case of Clarice Covert who “killed her husband, a sergeant in the United States Air Force, at an

65. McKelvey, *Due Process Rights and the Targeted Killing of Suspected Terrorists*, 1365.

66. *Reid, Superintendent, District of Columbia Jail, v. Covert*, 354 U.S. 1 (1957), 5. Justice Hugo L. Black wrote the plurality opinion of the court. Chief Justice Earl Warren, Justice William O. Douglas and Justice William J. Brennan, Jr. joined him. Justice Felix Frankfurter and Justice John Marshall Harlan II concurred on different grounds. Justice Tom C. Clark, who was joined by Justice Harold Burton, dissented.

67. *Ibid.*, 6.

airbase in England.”⁶⁸ Despite the fact she was not a member of the armed services a court-martial tried her under the Uniform Code of Military Justice.⁶⁹

Even though *Reid v. Covert* does not assume the context of terrorism, the plurality opinion requires the DOJ to consider the Fifth Amendment rights of a citizen regardless of their physical location. In addition, the plurality agreed that “no agreement with a foreign nation can confer on Congress or any other branch of the Government power which is free from the restraints of the Constitution,” reaffirming the sole authority of the Constitution as the law of the land and its application to all government power.⁷⁰ Since the court determined that “under our Constitution courts of law alone are given power to try civilians for their offenses against the United States,” a decision by the executive branch to target an American citizen, an action that affords significantly less process than a military tribunal, would also be illegitimate.⁷¹ Neither the executive branch nor the U.S. military have the authority to condemn a civilian based upon their own determinations, regardless of the citizen’s physical location.

Scholarly support of the targeted killing of citizens. Some scholars support the decision to kill American citizens involved in the operations of a terrorist organization, such as al-Qaeda. John Yoo contends that criticisms of the president’s authority to kill American citizens abroad accused of terrorism stem from misconceptions of the nature of

68. *Reid v. Covert*, 3.

69. *Ibid.*

70. *Ibid.*, 2.

71. *Ibid.*, 40-41.

the War on Terror.⁷² He contends that the targeted killing of American citizens is consistent with the Constitution, “[b]ecause the United States is at war with al-Qaeda, it can use force-especially targeted force-to conduct hostilities against the enemy’s leaders.”⁷³ Yoo cites the example of Kamal Derwish, an American citizen killed by a drone strike in Yemen, “who was said to be the leader of an al-Qaeda sleeper cell” found in Buffalo, New York.⁷⁴ After other members of the cell were arrested and plead guilty, Derwish fled to Yemen, and was subsequently killed by a CIA drone strike.⁷⁵ Yoo defends the targeting of Derwish, explaining:

Launching a missile to kill al-Qaeda commanders like Derwish, even though he was an American citizen, is legal. They are members of the enemy forces, the equivalent of officers – Derwish amounted to a captain or major in command of al-Qaeda cells, the equivalent of enemy military units. The U.S. military and intelligence services are legally and morally free to target them for attack whether they were on the front lines or behind them.⁷⁶

Even though Yoo presents a compelling case, there are some differences relative to al-Awlaki’s case that are worth mentioning. Derwish’s cohort was accused of terrorism and given the opportunity to appear in court. Derwish himself never had that opportunity because he fled to a foreign nation instead. Nevertheless, Yoo never establishes where the president has authority to commit such an act of war. The War on Terror was never legitimized by a declaration of war from Congress, and as discussed earlier, the AUMF is a questionable justification of the president’s ability to remove a citizen’s right to life.

72. John Yoo, “Assassination or Targeted Killings after 9/11,” *New York Law School Review* 56 (2011): 63, <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2215&context=facpubs> (accessed February 14, 2014).

73. *Ibid.*

74. *Ibid.*, 58.

75. *Ibid.*

76. *Ibid.*, 65.

Yoo must provide a substantial defense of the President's ability to forgo due process if he is to declare that a targeted killing of American citizens is justified. Thus, a closer look at the case of Al-Awlaki and how it relates to executive power and the deprivation of due process is crucial to understanding the Constitution's position on such matters.

Al-Awlaki's Case and the Conflict Between Due Process and Executive Power

In addressing the situation of al-Awlaki, it is important to examine the precedential nature of the instance of targeting an American citizen without incorporating the judicial or legislative branches. Alford invokes the case of David ap Gruffydd, who was targeted by Edward I to be killed via an "executive order" or its equivalent in the thirteenth century.⁷⁷ He expounds that this instance "was the last time that the executive branch of any common law country, without the involvement of its judicial or the legislative branches, asserted that it was legal to kill a citizen on the basis of an executive order," until the killing of al-Awlaki.⁷⁸ Instances of excessive executive prerogative like this explain why the framers intended to prevent the "arbitrary judgment of kings," and instead favor the "support of the rule of law."⁷⁹ Alford contends that the killing of al-Awlaki is another example of improper executive behavior, since he was "effectively labeled a traitor" but was not provided the proper due process or tried in the proper court in person or in absentia.⁸⁰ It is important to remember a formal charge was never brought against Al-Awlaki. Although high treason would appear to be a fitting charge, the government never clarified Al-Awlaki's crime.

77. Alford, "The Rule of Law at the Crossroads," 1204. More traditionally spelled Dafydd ap Gruffydd. He "was a Welsh prince" and "the last ruler of an independent Wales."

78. Ibid.

79. Ibid., 1209.

80. Ibid., 1220.

To emphasize the serious nature of the President's decision to target a U.S. citizen without proper due process standards, Alford concludes:

To allow the president to operate above the Constitution (by placing his actions above constitutional review, even when they are precisely those behaviors that the Constitution was created to constrain) is to secretly overthrow the rule of law, and to walk a path which in the past has led directly to repression, totalitarianism, and ultimately, destruction.⁸¹

Clearly, a new or modified framework must be sought in order to make current U.S. targeted-killing policy consistent with the Constitution. The violation of the Constitution is not isolated to an abrogation of the Fifth Amendment.

The Bill of Attainder and its relation to due process. As was described earlier, the provision of the Fifth Amendment never existed in a vacuum; historical context and the experiences of the framers influenced its creation and underlying intention. Since some framers viewed the Bill of Rights as unnecessary, it would make sense that other parts of the Constitution also provide procedures for due process. The Constitution says, "No Bill of Attainder or ex post facto Law shall be passed."⁸² The Heritage Guide to the Constitution indicates that "[i]n common law, bills of attainder were legislative acts that, without trial, condemned specifically designated persons or groups to death."⁸³ Even though the Bill of Attainder clause restricts Congress's authority ability to violate due process, viewing the history of Bills of Attainder reveals it was intended to restrict the executive as well.

81. Alford, "The Rule of Law at the Crossroads," 1270.

82. U.S. Constitution, art. 1, sect. 9, clause 3.

83. Daniel Troy, "Bill of Attainder," The Heritage Guide to the Constitution (2012), <http://www.heritage.org/constitution#!/articles/1/essays/62/bill-of-attainder> (accessed March 3, 2014).

Although some historical dispute existed over the authority of the legislature to try a citizen for treason, the authority of the executive to do so is largely dismissed as untenable and irrelevant. For example, Alford purports that Alexander Hamilton recognized that there was a long-going dispute at the time of the ratification of the Constitution whether or not the legislature could exact punishment on citizens for high treason.⁸⁴ On the other hand, “there was no contemporary dispute over the purported power of the executive to punish—this issue had been decided in the negative a century earlier.”⁸⁵ The lack of an explicit clause of this fact in the Constitution only amplified the consensus that existed on the matter, rather than leaving the option open that the executive could punish citizens for treason.⁸⁶ Thus, it appeared that there was widespread agreement at the time of ratification that the President should not have the power to try a citizen for treason. Ironically, this is very similar to what had happened to Al-Awlaki.

More so, it would appear that the a citizen who is guilty of treason against the United States must be tried according the to Treason Clause in “open court.”⁸⁷ Instead of being subject to military tribunals, the text of the Article 3 clause suggests that such crimes are to be tried in a civilian court.⁸⁸ In addition, Alford contends that the “the special procedural and evidentiary protections specified in the Treason Clause...exceed even the protections of the Bill of Rights.”⁸⁹ As a result, if al-Awlaki’s case had been

84. Alford, “The Rule of Law at the Crossroads,” 1215.

85. *Ibid.*

86. *Ibid.*

87. U.S. Constitution, art. 3, sect. 3, clause 1.

88. Alford, “The Rule of Law at the Crossroads,” 1216.

89. *Ibid.*, 1217.

properly adjudicated, it should have been tried in a civilian court rather than a military tribunal. Since Congress governs the President's ability to initiate acts of war or other actions that would not reach that level of conflict, deferring to the Article II powers of the executive appears to be illegitimate.⁹⁰

Since Anwar al-Awlaki's case typifies the problem with the United States' policy of targeted killing, it is unfortunate that the substantive merits of the case were never developed. Instead, the District Court dismissed Nasser Al-Aulaqi's claims on the grounds of its non-justiciability under the political question doctrine.⁹¹ The expansion of executive power at the cost of due process is not a development specific to Al-Awlaki's case; it began at the outset of the declared "War on Terror."

A history of executive power in the war on terror. The presidency of George W. Bush saw the greatest onset of terrorism, and the development of a global war on terrorism. The Bush administration increased the use of terrorist holding military prisons, such as Guantanamo Bay, Cuba, and stepped up its efforts to apprehend and eliminate terrorists. During his pursuit of the presidency, Barack Obama promised he would strive to bring US counterterrorism policies in line with legal restraints.⁹² Clearly, the opposite has occurred as the Obama Administration has massively increased the use of drone strikes without subsequent increases in congressional or constitutional oversight. Instead, the norm has been extrajudicial killings solely decided by the president and his advisors without significant or defined legal restrictions.

90. Alford, "The Rule of Law at the Crossroads," 1218.

91. Al-Aulaqi v. Obama, 727 F.Supp.2d 1 (D.D.C. 2010), 80.

92. Michael Boyle, "Obama's Drone Wars and the Normalisation of Extrajudicial Murder," *The Guardian*, June 11, 2012, <http://www.guardian.co.uk/commentisfree/2012/jun/11/obama-drone-wars-normalisation-extrajudicial-killing> (accessed May 2, 2013).

The expectation of the Obama Administration is quite broad regarding its own authority to determine when targeted killings are necessary or justified. For example, returning the DOJ's White Paper, "the Obama administration argued that it has domestic legal authority to use drones globally and to kill its own citizens, since the Authorization for the Use of Military Force empowers the president 'to use all necessary and appropriate force' in pursuit of those responsible for the 9/11 terrorist attacks."⁹³ This assertion, however, does not establish "domestic legal authority" as equivalent to constitutional law. Even if the President is authorized to eliminate terrorists via targeted killings in a manner consistent with international law, this cannot mean that the Constitution no longer applies to presidential actions. In the final analysis, the Constitution should decide the extent of executive discretion in the context of targeted killing.

One of the main arguments consistently leveled by supporters of executive prerogative is that the context of the War on Terror requires an increased amount of military flexibility that only the President can effectively utilize. This is false for a few reasons. First, the executive responsibility to defend the nation is consistent with the President's responsibility to uphold the laws of the United States. Unfortunately, it is becoming the commonly accepted view, where "the president's constitutional responsibility to act within the law...is secondary to his constitutional duty to defend and protect the country."⁹⁴ The Bush Administration also operated under this view to a

93. Dawood I. Ahmed, "Rethinking Anti-Drone Legal Strategies: Questioning Pakistani and Yemeni 'Consent'," *Yale Journal of International Affairs* 8 (June 11, 2013): 4, HeinOnline (accessed February 2, 2014).

94. Stephen Holmes, "The Brennan Center Jorde Symposium on Constitutional Law: In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror," *California Law Review* 97 (April 2009): 303, LexisNexis Academic (accessed January 22, 2014).

significant extent, as the existential nature of the threat of terrorism could be legitimately combated outside constitutional means. In essence, “restraints on the power of the president, according to the Cheney-Addington view, necessarily diminish the capacity of the country’s national-security agencies to respond effectively.”⁹⁵

Therefore, do the new threat dimensions of terrorism, especially of the WMD variety, invalidate or ineffectuate due process norms? One problem with adopting this view is that counterterrorist policies are made to be just as “improvisational” as the new strategies of terrorist organizations, and hence becoming more ad hoc.⁹⁶ This ad hoc nature of counterterrorism policies is inherently problematic, because procedural methods that have survived via trial and error are jettisoned for the sake of expediency or ease. Complications almost always accompany threatening environments and overwhelming dangers can distract from less visible but still harmful effects. Rules and precautions prevent the pressure of acting in disaster situations from clouding a policymaker’s judgment and exacerbating the situation.⁹⁷

Additionally, relying on rule-based approaches does not hamper the effectiveness of national security policy. While flexibility in national-security policy is important, a situation may not always be completely understood, making it crucial to implement rules. This does not necessarily constrain executive authority, but instead poor decision-making.⁹⁸ In his article, Holmes relies on the analogy of responding to hospital emergencies, and shows how this can specifically apply to issues of national security by

95. Holmes, “Misunderstanding Tradeoffs in the War on Terror,” 304.

96. *Ibid.*, 306.

97. *Ibid.*, 308.

98. *Ibid.*

positing how “the importance of training, disciplining, and coordinating the behavior of front-line emergency responders reinforces the suspicion that rules may be just as crucial for managing national-security crises as for handling life-and-death situations in the hospital.”⁹⁹ Increased accountability is likely to support the ability of the nation and the president to combat the threat of terrorism, rather than constrain the president from effective action. Insulating the executive will not increase security, but instead prevent accountability and rational action as well as undermine both security and liberty.¹⁰⁰

Holmes argues that “shielding government incompetence from public view may damage national security by delaying the correction of potentially lethal mistakes.”¹⁰¹ While supporters of executive discretion might propose that legal restrictions preclude effectiveness, they fail to balance this assertion with how the lack of constitutional regulation “can encourage irresponsible, profligate, and self-defeating choices.”¹⁰²

In the final analysis, removing restrictions on presidential power as an effective national security policy does not have any substantiated basis in reality:

To prevent the president and his subordinates from being “strangled by law,” especially in moments of grave danger, advocates argue that restrictive regulations must be replaced by broad grants of discretion or enabling acts that effectively turn Congress and the courts into passive and ill-informed observers of unilateral executive action. This arrangement makes sense, needless to say, only if its proponents are correct to argue that unrestrained power, by definition, is effective power.¹⁰³

99. Holmes, “Misunderstanding Tradeoffs in the War on Terror,” 308.

100. *Ibid.*, 323.

101. *Ibid.*, 325.

102. *Ibid.*, 333.

103. *Ibid.*, 312.

Although Holmes comments on the failures of the Bush Administration, his arguments still have useful application for the Obama Administration. He attacks the underlying assertion that executive discretion is the most effective means to respond to the unique threat of terrorism. This view favoring executive discretion was present in the Bush Administration's policies, and core assumption current in the Obama Administration's policy of targeted killing. Avoiding congressional oversight, the input of publicly verifiable scrutiny, or review by judicial, means risks the abrogation of due process as well, and enhances questionable decision-making by the executive branch. Admittedly, one major difference between the administrations is that President Bush was largely responding to the massive attacks of 9/11, which tempers criticism of his decision-making in invading Iraq. President Obama had more precedent to work with, which should have informed his policies. Despite this, the ad hoc nature of much of President Obama's decisions makes his targeted killing policy more frustrating and confusing. Essentially, if the President can effectively abrogate any citizen's rights to due process or life within an unaccountable framework, then the Constitution's restraints upon him are not binding law. Without the proper checks and balances on executive action, death warrants could be issued for lesser offenses. This concern is consistent with the majority opinion in *Hamdi v. Rumsfeld*. Justice O'Connor argues that war "is not a blank check for the President when it comes to the rights of the Nation's citizens," but that executive powers granted by the Constitution must also be subject to "a role for all three branches when individual liberties are at stake."¹⁰⁴ As a result, a targeted killing

104. *Hamdi v. Rumsfeld*, 29.

policy that incorporates the three branches and observes the due process rights of citizens should be sought after.

A Potential Solution to the Issues Surrounding Targeted Killing

What is needed is a specific format for conducting targeted killings that is constitutional and can be regulated by the other branches of government to public knowledge. A framework that achieves this level of accountability can effectively address national security concerns while protecting individual right due process guarantees in the Constitution. The analysis of Evers-Mushovic and Hughes provides a fairly comprehensive example crafted specifically for the United States. Their approach incorporates specific rules of engagement (ROEs) and administrative measures that intend to guide the administrative process and provide restrictions on unregulated executive power.¹⁰⁵

The rules of engagement provided deal with the conditions upon which the U.S. may target an American citizen. First, they state that the location of the terrorist may preclude capture. Unlike what the current administration has determined as an infeasible capture, Evers-Mushovic and Hughes recommend, “It is both sound legal and war-fighting policy to attempt to capture an American terrorist before targeting him.”¹⁰⁶ The U.S. must make a serious effort to apprehend the target, even if it must request permission from a foreign government to do so. This approach will improve the perception of the U.S. on the international front, as well as assist in forging alliances and cooperative partnerships against terrorist organizations. Second, the target must take

105. Evers-Mushovic and Hughes, “Rules for When There are No Rules,” 176.

106. *Ibid.*, 177.

direct part in hostilities.¹⁰⁷ This facet is quite similar to what is found in international law and already appears to be an aspect of the current administration's policy, as mentioned previously.

Evers-Mushovic and Hughes also provide two administrative procedures to enhance accountability. First, they propose that the president himself should place the individual on the High Value Individuals (HVI) list, which is effectively the kill list of the U.S.¹⁰⁸ This authority should not be delegated to a non-elected official of the executive branch, but executed in a manner that allows for public accountability, because the public "must have the ability to send a message at the ballot box by voting out a single official."¹⁰⁹ While President Obama could still receive advice and counsel from his advisors concerning a target, it would be necessary for him to officially make the decision to target an individual. The second administrative procedure outlined is to undertake an independent and impartial investigation of the targeted killing. Evers-Mushovic and Hughes recommend that this be done post-operationally, "because a pre-operation investigation and hearing through the courts is impractical."¹¹⁰ Although this would be inconsistent with the arguments that Alford puts forward regarding due process and the targeting of al-Awlaki, it might be necessary to garner approval from Congress. The authors also impress that it is crucial to find a way to disclose the results of this review to the public without compromising national security.¹¹¹

107. Evers-Mushovic and Hughes, "Rules for When There are No Rules," 177.

108. *Ibid.*, 179.

109. *Ibid.*, 180.

110. *Ibid.*, 181.

111. *Ibid.*, 183.

It is worth noting that Holmes does address the concern of disclosing highly sensitive counterterrorism methods, even if it is made in the context of U.S. detainment practices. He expounds the importance of public trials and disclosure, even if they “expose the sources and methods of U.S. counterterrorism agencies” to an extent; otherwise, “trials conducted on the basis of undisclosed information, will likely cause equivalent damage, due to the perverse incentives that they engender.”¹¹² The potential costs of an unaccountable executive not “enforced by habeas and other forms of judicial oversight” are worth considering in light of the security tradeoffs that disclosure entails.¹¹³ Although no suggestion will be perfect, considering solutions like the ones described is crucial if any progress is to even be made on this issue. As public approval of the administration continues to fall, resolutions to the problem will likely be sought more intently. Thus, considering options and formulating new solutions is a key part of this investigation.

Conclusion

Since the terrorism is a very real threat, policies that counteract terrorist actions, such as drone strikes, are a significant part of national security policy. As a result, the targeted killing policy of the United States is quite active and continuously developing. In fact, “The Obama administration is considering a drone attack against an American believed to be associated with al Qaeda,” which is supposed to incorporate recent changes in the president’s policy governing the use of drones.¹¹⁴ Even though the new

112. Holmes, “The Brennan Center Jorde Symposium on Constitutional Law,” 334.

113. *Ibid.*, 352.

114. Julian E. Barnes and Siobhan Gorman, “U.S. Looks To Target American With Drone,” *The Wall Street Journal* (February 11, 2014), Dow Jones Factiva (accessed April 7, 2014).

policy requires that “the Justice Department must review any decision to add Americans to the target list,”¹¹⁵ there still appears to be little accountability as the decision-making process is contained within the executive branch. The problems surrounding U.S. targeted killing policies are by no means resolved, and the fact that the government is considering another strike against a U.S. citizen emphasizes the need for further review of these policies.

As a nation of laws and limited government, the United States has survived nearly 250 years while preserving the freedom of individual citizens and resident aliens. The extension of U.S. targeted killing policy has uniquely threatened that freedom by abrogating due process rights and expanding unaccountable presidential authority. The Constitution establishes clear rules of the allocation of power and where the executive branch is constrained. Therefore, an approach that ensures American citizens the rights of due process should continue as constitutional law despite a war on terror. Examining into the history of due process is critical to determining the original intentions of the framers as well as deciding how the Constitution limits the use of targeted killing against American citizens. This paper concludes that the due process procedures contained in the Fifth Amendment and other parts of the Constitution such as the Bill of Attainder and Treason clauses prohibit the government from killing American citizens without trial. This is supported by Supreme Court precedent in *Hamdi v. Rumsefeld*, which supports that citizens who are allegedly opposing the United States are still owed constitutional due process; additionally, *Reid v. Covert*, holds that citizens of the U.S. are to be offered due process consistent with a civilian court of law regardless of their physical location. Although solutions do exist to help mitigate the problematic effects of targeted killing

115. Barnes and Gorman, “U.S. Looks To Target American With Drone.”

policy, none of them are as simple as would be preferred. Regardless, restricting targeted killing policy to constitutional authority is necessary to preserve the limited government that the framers intended and uphold the right of due process.

Bibliography

- Ahmed, Dawood I. "Rethinking Anti-Drone Legal Strategies: Questioning Pakistani and Yemeni 'Consent.'" *Yale Journal of International Affairs* 8 (June 11, 2013): 1-11. Accessed February 2, 2014. HeinOnline.
- Alford, Ryan Patrick. "The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens." *Utah Law Review* 4 (March 7, 2011): 1203-1273. Accessed February 2, 2014. <http://ssrn.com/abstract=1780584>.
- Alston, Philip. "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions." Human Rights Council, Fourteenth session, Addendum 6 (May 28, 2010). Accessed January 30, 2014. <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.
- Barnes, Julian E. and Siobhan Gorman. "U.S. Looks to Target American With Drone." *The Wall Street Journal* (February 11, 2014). Accessed April 7, 2014. Dow Jones Factiva.
- Bergen, Peter and Megan Braun. "Drone is Obama's Weapon of Choice." *CNN* (September 19, 2012). Accessed April 26, 2013. <http://www.cnn.com/2012/09/05/opinion/bergen-obama-drone>.
- Boyle, Michael. "Obama's Drone Wars and the Normalisation of Extrajudicial Murder." *The Guardian* (June 11, 2012). Accessed May 2, 2013. <http://www.guardian.co.uk/commentisfree/2012/jun/11/obama-drone-wars-normalisation-extrajudicial-killing>.
- Callam, Andrew. "Drone Wars: Armed Unmanned Aerial Vehicles." *International Affairs Review* 18, no. 3 (Winter 2010). Accessed April 24, 2013. <http://www.iar-gwu.org/node/144>.
- Department of Justice. "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or an Associated Force." *White Paper* (February 4, 2013). Accessed February 2, 2014. http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.
- Evers-Mushovic, Toren G. and Michael Hughes. "Rules for When There are No Rules: Examining the Legality of Putting American Terrorists in the Crosshairs Abroad." *New England Journal of International and Comparative Law* 18, no. 1 (2012): 157-184. Accessed April 16, 2013. LexisNexis Academic
- Holmes, Stephen. "The Brennan Center Jorde Symposium on Constitutional Law: In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror."

California Law Review 97, no. 2 (April 2009): 301-356. Accessed January 22, 2014. LexisNexis Academic.

International Committee of the Red Cross. "The Law of Armed Conflict: Non-International Armed Conflict." Lesson 10 (June 2002). Accessed February 2, 2014. http://www.icrc.org/eng/assets/files/other/law10_final.pdf.

Lawson, Gary. "Due Process Clause." *The Heritage Guide to the Constitution* (2012). Accessed March 2, 2014. <http://www.heritage.org/constitution#!/amendments/5/essays/150/due-process-clause>.

McKelvey, Benjamin. "Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power." *Vanderbilt Journal of Transnational Law* 44, no. 5 (November 2011): 1353-1384. Accessed February 24, 2014. HeinOnline.

Murphy, Richard W. and Afsheen John Radsan. "Due Process and Targeted Killing of Terrorists." *Cardozo Law Review* 31, no. 2 (2009): 405-450. Accessed February 19, 2013. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349357.

Murphy, Richard W. and Afsheen John Radsan. "Notice and an Opportunity to Be Heard Before the President Kills You." *Wake Forest Law Review* 48, no. 4 (Fall 2013): 829-886. Accessed February 2, 2014. LexisNexis Academic.

Pearlstein, Deborah. "Targeted Killings Can Be Legal: But the Obama Administration's White Paper Fails to Explain Why." *Slate* (February 8, 2013). Accessed February 2, 2014. http://www.slate.com/articles/news_and_politics/jurisprudence/2013/02/white_paper_on_drones_targeted_killings_can_be_legal_but_the_obama_administration.html.

Robertson, Cassandra Burke. "Due Process in the American Identity." *Alabama Law Review* 64 (2012): 255-288. Accessed January 29, 2014. LexisNexis Academic.

Scaperlanda, Chris. "Approximating Due Process." *The Review of Litigation* 28, no. 4 (Summer 2009): 983-1006. Accessed February 2, 2014. <http://search.proquest.com/docview/206841828?accountid=12085>.

Thompson, Marshall. "The Legality of Armed Drone Strikes Against U.S. Citizens Within the United States." *Brigham Young University Law Review* 2013, no. 1 (2013): 153-182. Accessed February 1, 2014. <http://search.proquest.com/docview/1346347608?accountid=12085>.

- Troy, Daniel. "Bill of Attainder." *The Heritage Guide to the Constitution* (2012). Accessed March 3, 2014.
<http://www.heritage.org/constitution#!/articles/1/essays/62/bill-of-attainder>.
- United Nations. "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977." June 8, 1977. Accessed February 1, 2014.
<http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563CD002D6CE4&action=openDocument>.
- United Nations. "Universal Declaration of Human Rights, General Assembly Resolution 217 A (III), 10 December 1948." December 10, 1948. Accessed February 1, 2014.
<http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx>.
- Yoo, John. "Assassination or Targeted Killings After 9/11." *New York Law School Review* 56 (2011): 57-80. Accessed February 14, 2014.
<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2215&context=facpubs>.