

**TRIAL BY SNIPER: THE LEGALITY OF TARGETED KILLING IN
THE WAR ON TERROR**

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I. INTRODUCTION

On September 30, 2011, Anwar Al-Awlaki, a U.S. citizen and Muslim cleric residing in Yemen, was killed by a C.I.A.-led U.S. drone strike.¹ Al-Awlaki had been linked to Nidal Malik Hassan, the Fort Hood shooter, as well as Umar Farouk Abdulmutallab, the man charged with the attempted Christmas 2009 bombing.² Al-Awlaki was alleged to be affiliated with a Yemeni branch of Al-Qaeda.³

The notion that individuals can be targeted for death is not new. Indeed, the United States has been using drone missile strikes as part of the Global War on Terror for years.⁴ The use of targeted killing has received increased attention in recent months due to the successful killing of Osama bin Laden on May 1, 2011.⁵ The successful bin Laden mission led to increased efforts on the part of the Obama administration to kill Al-Awlaki.⁶

Although targeted killing has become somewhat commonplace, the idea that a U.S. citizen could be targeted for death has incited criticism and concern from many constitutional theorists. Former CIA attorney Vicki Divoll notes the irony that the executive branch can target a citizen for death unilaterally, but would have to get permission from the judicial branch in order to listen in on his phone

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¹ Jennifer Griffin & Justin Fishel, *Two U.S.-Born Terrorists Killed in CIA-Led Drone Strike*, FOXNEWS.COM (Sept. 30, 2011), <http://www.foxnews.com/us/2011/09/30/us-born-terror-boss-anwar-al-awlaki-killed/>.

² Vicki Divoll, *Will We Kill One of Our Own?*, L.A. TIMES, Apr. 23, 2010 at A1.

³ Scott Shane, *A Legal Debate As C.I.A. Stalks A U.S. Jihadist*, N.Y. TIMES, May 14, 2010, at A1.

⁴ *Id.*; see also Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 32 CARDOZO L. REV. 405, 406 (2009) (describing the use of “predator drones” in the war on terror).

⁵ Peter Baker et al., *Bin Laden is Dead, Obama Says*, N.Y. TIMES, May 2, 2011 at A1.

⁶ *Al-Awlaki Targeted by U.S. Military Drone in Yemen*, CNN.COM (May 6, 2011), http://articles.cnn.com/2011-05-06/world/yemen.drone.strike_1_awlaki-al-awlaki-al-qaeda-members?s=PM:WORLD.

calls.⁷ Many assert that the fate of a U.S. citizen should not rest solely in the hands of the executive branch, and that some kind of process should be implemented to satisfy the due process demands of the Fifth Amendment of the U.S. Constitution.⁸

In early 2010, Nasser Al-Awlaki, Anwar Al-Awlaki's father, filed suit in the United States District Court for the District of Columbia to enjoin the U.S. government from carrying out the targeted killing of his son.⁹ The court denied his motion, on the grounds that Nasser Al-Awlaki lacked standing and that the question was a "political question" that was inappropriate for judges to address.¹⁰ The court did not reach the merits of the constitutional claims.

This Comment seeks to analyze and address the constitutional issues that arise from the U.S. government's efforts to target a U.S. citizen for death. In doing so, I hope to address many of the issues that the district court failed to reach. I will argue that while the executive does have the authority to target an individual for death, such a decision should be subject to review in a hearing before an Article III judge before the killing is carried out.

My analysis will be twofold. First, I will analyze whether the executive branch has authority to target an individual for death, and if so, under what circumstances such an action is authorized. I will compare and contrast the idea of targeted killing within the context of criminal law and the law of war, and try to determine what (if either) framework best applies to the situation faced by a U.S. citizen allegedly engaged in terrorist activity. I will analyze what role the Authorization for Use of Military Force might play in determining whether targeted killing is ever authorized. Given these considerations, I will propose that targeted killing should be authorized only in limited circumstances, namely where it is the only feasible way to prevent the individual from engaging in terrorist activity, and other means (such as capture) have been exhausted or would be impossible.

Second, I will address the due process concerns raised by the notion of targeted killing. Even in circumstances where the executive has authority to target a citizen for death, that citizen is still entitled to the due process guarantees of the U.S. Constitution. I will address various arguments regarding what process (if any) should be due a citizen targeted for death. In doing so, I will be cognizant of the

⁷ See Divoll, *supra* note 2.

⁸ U.S. CONST. amend. V.

⁹ Al-Aulaqi v. Obama, No. 10-1469 (JDB), 2010 U.S. Dist. LEXIS 129601, at *2 (D.D.C. Dec. 7, 2010).

¹⁰ *Id.* at *6-7.

practical concerns that underlie this discussion. After considering conflicting ideas and concerns, I will propose the executive's decision to target a citizen for death should be reviewed in a private hearing before an Article III judge before the killing is carried out.

This article will address constitutional concerns by referring to "an individual in Al-Awlaki's position." This phrase refers to a U.S. citizen residing outside of the U.S. allegedly engaging in terrorist activity who has been targeted for death by the U.S. government. This article will analyze whether the killing of Al-Awlaki was constitutional, and will suggest ways in which the executive branch can comply with constitutional demands in the future.

II. EXECUTIVE POWER

The threshold question in determining whether (or when) a citizen can legally be targeted for death is determining when, if ever, the executive has authority to use targeted killing. This inquiry depends in part on whether the framework of criminal law or the law of war applies. To provide some background for this discussion, I will first provide a brief summary of the history of U.S. assassination policy. I will then explore whether targeted killing is permissible under the authority of criminal law and the law of war.

A. *History of U.S. Assassination Policy*

The U.S. government has yet to explicitly address the legality of targeted killing as it is used in the War on Terror. However, the U.S. government has previously addressed the legality of assassinations during peacetime. In the 1970s, the Church Committee's investigation regarding the use of assassination gave rise to the inference that the CIA had viewed this as a viable option.¹¹ The investigation focused on past attempted assassinations of government leaders such as Fidel Castro and Rafael Trujillo.¹² The committee concluded that Castro and Trujillo (among others) were in fact the targets of CIA assassination plots.¹³ As a result of the committee's investigation (and the me-

11 See David Ennis, Comment, *Preemption, Assassination, and the War on Terrorism*, 27 CAMPBELL L. REV. 253, 265 (2005) (discussing assassination plots by the CIA).

12 *Id.*

13 *Id.* at 265–66.

dia backlash that resulted),¹⁴ in 1976, President Ford signed executive order¹⁵ 11,905 which prohibited “political” assassinations.¹⁶

Despite the ban on political assassinations, it is unlikely that this policy would govern targeted killings as they are used in the War on Terror. It is generally understood that the American policy against assassination only applies during peacetime.¹⁷ The Church Committee’s proposed legislation supported the conclusion that the anti-assassination policy did not apply during times of war.¹⁸ Moreover, the bar on assassination only went as far as the scope of the Church Committee’s investigation, which focused on assassination plots during peacetime.¹⁹ Because of this, it is unlikely that the policy is applicable to the War on Terror.²⁰ President Bush has asserted that this policy does not apply in the context of the War on Terror.²¹ Following from this assertion, the CIA has employed lethal missile strikes against suspected Al-Qaeda leaders.²²

The use of drone strikes against Al-Qaeda does not mark the first time the United States has engaged in targeted killing during wartime. During World War II, President Roosevelt authorized a mission to shoot down Japanese General Yamamoto’s plane after learning of his flight plans.²³ Thus, while precedent exists for targeting individuals for death during wartime, the problem is complicated in the context of the War on Terror. Unlike Yamasoto, Al-Awlaki is not a un-

14 See *id.* at 264 (discussing the media coverage of the Church committee’s findings and the public outcry that resulted).

15 Although President Ford suggested that Congress pass a law criminalizing assassination, Congress failed to do so. See *id.* at 269 (“The Church Committee’s recommendation to Congress to enact a statute criminalizing assassination was ultimately dismissed and no law has since been created that even addresses the issue.”). However, Ford’s executive order banning assassination was followed by both the Carter and Reagan administrations, which renewed the order. *Id.* at 261–62.

16 *Id.* at 261.

17 *Id.* at 269 (“Given the history behind Ford’s Executive Order 11,905, it would be reasonable to conclude that the assassination prohibition only applies during peacetime.”).

18 *Id.*

19 *Id.*

20 *Id.* at 270.

21 *Id.* at 263.

22 See Stephen Knoepfler, Note, *Dead or Alive: The Future of U.S. Assassination Policy Under a Just War Tradition*, 5 NYU J.L. & LIBERTY 457, 458 (2010) (examining the legitimacy of some assassinations under just war theory). It should be noted, however, that these strikes are inherently different from the targeted killing attempt on Al-Awlaki, as the strikes that have already been employed have been made amidst active combat. See Shane, *supra* note 3, at A1 (commenting that Mr. Al-Awlaki is located “far from [the] hostilities in Afghanistan and Pakistan”).

23 *Yamamoto Isoroku (1884–1943)*, THE PACIFIC WAR ONLINE ENCYCLOPEDIA, available at http://pwencycl.kgbudge.com/Y/a/Yamamoto_Isoroku.htm (last visited June 26, 2011).

iformed enemy soldier, and the War on Terror is not a traditional war.²⁴ Thus, the issue of targeted killing is complicated by the unusual nature of the War on Terror. Because the War on Terror is not a traditional war, I will analyze how targeted killing would be viewed under a criminal law framework and under a law of war framework, and then assess which (if either) should apply.

B. Criminal Law and the Law of War

Under the authority of criminal law, the government's ability to use deadly force is quite limited. Ostensibly, the Obama Administration seeks to employ targeted killing in order to prevent the person targeted from engaging in future terrorist activity. Under *Tennessee v. Garner*, such preventive killing is impermissible except where there is probable cause to believe that the suspect is dangerous to others.²⁵ Under U.S. criminal law, the use of deadly force without the threat of imminent danger is impermissible under the Fourth Amendment.

The Court further clarified the standard for the use of deadly force in *Scott v. Harris*.²⁶ There, the Court observed that the *Garner* test for when deadly force is permissible is an objective reasonableness test that is not meant to be applied rigidly.²⁷ The Court found there that the officer's use of deadly force was reasonable when he bumped the defendant's speeding car, noting that the defendant's actions posed an "actual and imminent" danger.²⁸ In determining whether deadly force was warranted, the Court noted that it was not only necessary to consider the number of lives at risk, but also the relative culpabilities of the parties.²⁹ Because the defendant had created the risk, the Court found that it was reasonable for the officer to prevent him from harming innocent bystanders.³⁰ Thus, if an individual targeted for death is in fact engaging in terrorist plots, the *Scott v. Harris* analysis suggests that the use of deadly force is warranted,

²⁴ Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2066 (2005) (observing that "some commentators have suggested that the conflict with al Qaeda does not qualify as a 'real' war").

²⁵ See *Tennessee v. Garner*, 471 U.S. 1, 3 (1985) (holding that deadly force is only allowed to apprehend felons who the police had probable cause to believe were dangerous to them or the public).

²⁶ 550 U.S. 372, 382 (2007).

²⁷ *Id.*

²⁸ *Id.* at 384 ("[I]t is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase.").

²⁹ *Id.*

³⁰ *Id.*

since a number of innocent lives are at stake and the target is responsible for that risk.

However, *Garner* also requires that the threat must be “imminent.” Lower courts have clarified this by observing that courts will consider “whether the officers were in danger at the precise moment that they used force” in evaluating whether the use of deadly force was reasonable.³¹ This imminence standard is problematic in the context of targeted killing for a number of reasons. First, the government may not have sufficient intelligence to know when a possible attack might take place. Second, even if they had information regarding a possible attack, the timeframe is much different than most cases that discuss the use of deadly force, since most cases focus on a situation that takes place in a matter of seconds. Finally, Al-Awlaki’s situation in particular is problematic because he was not necessarily the person who was conducting (or even planning) the attack; rather, he posed a threat primarily because of the violent rhetoric he allegedly espoused. Considering the fact that it would be tremendously difficult to establish the “imminence” factor in the context of targeted killing, the criminal law framework (if applied) would not permit targeted killing in most situations.³²

The law of war framework, if applied, would provide at least broader authority to use targeted killing than would the criminal law framework. Under the law of war, the executive is permitted to kill enemy soldiers, even as a preventive measure.³³ As long as the attack is on a legitimate military target and treacherous means³⁴ are not used, the use of targeted killing is permissible.³⁵ Civilians, however, cannot be attacked unless they are actively participating in the hostilities.³⁶ This suggests that under a traditional war framework, targeted

³¹ *Philips v. James*, 422 F.3d 1075, 1083 (10th Cir. 1985).

³² *But see* William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 682–85 (2003) (arguing that U.S. criminal law does not bar the use of targeted killing abroad).

³³ *See* Ennis, *supra* note 11, at 256–57 (noting that targeted killing is legal in the context of war as long as treacherous means are not employed).

³⁴ Ennis notes that the following actions may be considered as “treacherous” means: (1) a treacherous killing of a specifically targeted person is an assassination; (2) falsely inducing the victim into believing he is safe will likely be treachery; (3) the victim’s status as a non-combatant does not lessen the treacherous quality of the killing; (4) the disproportionateness and the lack of necessity surrounding the targeted act of killing has some bearing on whether it is treacherous. *Id.* at 257.

³⁵ *Murphy & Radsan*, *supra* note 4, at 418 (observing that the law of war only ban targeted killing where the target is “tricked” into “thinking that he is safe”).

³⁶ *Id.*

killing is permissible as applied to legitimate military targets.³⁷ But this distinction increases the lack of clarity as applied to the War on Terror. For example, it would be difficult to decisively say whether or not an individual like Al-Awlaki should be considered a legitimate military target or a civilian.³⁸ Because Al-Awlaki was not clearly a legitimate military target, it was questionable whether he could be targeted for death even under the law of war framework.

Despite this lack of clarity, the law of war undoubtedly provide at least broader support for the use of targeted killing. Under the authority of criminal law, targeted killing is impermissible absent an imminent threat. Under the law of war, targeted killing is permissible but only as against legitimate military targets.

Complications arise in determining whether the criminal law framework or the law of war framework should even apply to the situation before us, since the War on Terror is not a traditional war. Some factors lean in favor of applying the criminal law framework. For example, the enemy's identity as a "nonstate actor" implies that the criminal framework should apply.³⁹ However, several other considerations lean in favor of applying the traditional war framework. The wrongdoing is performed by someone outside of the relevant jurisdiction (here, the United States) as a challenge to the right of the United States to exist. Al-Qaeda has declared war against the United States, and has attacked U.S. military facilities.⁴⁰ The U.S. Congress and President have always treated the War on Terror as a war.⁴¹ Moreover, the "scale" of the wrongdoing at stake is quite severe. Surely terrorist attacks that aim to kill thousands are more "severe" than most wrongs sought to be redressed by traditional criminal law.⁴²

³⁷ See, e.g., Knoepfler, *supra* note 22, at 487–88 (concluding that targeted killing is permissible within the context of war).

³⁸ See Murphy & Radsan, *supra* note 4, at 419 (noting the difficulties of determining whether terrorists should be classified as "civilians" or legitimate military targets).

³⁹ See Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL'Y 457, 459–61 (2002) (noting that the crucial factors in determining whether the war or crime framework should apply are the identity of the actor, the jurisdictional province of the wrongdoing, the scale of the crime, and the intent of the actor).

⁴⁰ Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terror*, 118 HARV. L. REV. 2047, 2068 (2005).

⁴¹ See *id.* at 2070 ("When, as here, both political branches have treated a conflict as a 'war,' and that characterization is plausible, there is no basis for the courts to second-guess that determination based on some metaphysical conception of the true meaning of war.").

⁴² See *id.* at 2068 ("The scale and organized nature of the September 11 attacks and the scope of their destruction in terms of lives, economic loss, and psychological trauma also transcend what is typical of mere criminal action."); see also Charles I. Lugini, *Rule of Law or Rule By Law: The Detention of Yaser Hamdi*, 30 AM. J. CRIM. L. 225, 227 (2003) (arguing that the key factors in determining whether criminal law or the law of war should apply

These factors suggest that the framework of war should apply to the War on Terror.⁴³

But the War on Terror differs from “traditional” wars in many other crucial ways. The enemy intermingles with civilians and attacks both civilian and military targets, and the geographic location of the “battlefield” is indeterminate.⁴⁴ While in a traditional war opposing forces wear “distinct uniforms, carry their arms openly, and comply with the law of war,” none of these conventions are followed in the War on Terror.⁴⁵ The opposing forces in the War on Terror wear no distinct emblem that would afford them legal “combatant” status under the law of war.⁴⁶ These factors suggest that the “traditional war” framework would be problematic as applied to the War on Terror.

Despite these differences, some argue that targeted killing is an appropriate use of force in the War on Terror. For example, at the outset of the War on Terror, President Bush suggested that assassination may be a viable option in preventing future terrorist attacks.⁴⁷ This assertion was based on his preemption strategy, which recognized that “traditional concepts of deterrence will not work against a terrorist enemy.”⁴⁸ Bush concluded that the U.S. must adapt its approach in dealing with the new terrorist enemy, and assassination may be a necessary tool in preempting future attacks.⁴⁹

The idiosyncrasies of the War on Terror have perplexed constitutional theorists, who have proposed numerous solutions. Feldman argues that neither the criminal law framework nor the law of war framework should exclusively apply, but rather the framework must

are “the selected target, the nature, identity and number of the victims, the psychological impact, the political motivation of the enemy, the scale of the attacks, and the magnitude of the resulting devastation”).

43 See Feldman, *supra* note 39, at 459–61 (discussing the elements of the crime/war distinction).

44 See Bradley & Goldsmith, *supra* note 40, at 2048–49 (questioning the applicability of the traditional wartime framework to the Global War on Terror). But see Ennis, *supra* note 11, at 271 (concluding that the war on terrorism is undoubtedly a war in the traditional sense).

45 Tung Yin, *Procedural Due Process to Determine “Enemy Combatant” Status in the War on Terrorism*, 73 TENN. L. REV. 351, 352 (2006); see also Lugosi, *supra* note 41, at 226 (noting that the enemy in GWOT ignores the conventional laws of warfare).

46 See Murphy & Radsan, *supra* note 4, at 419 (“[M]any 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.”).

47 See Ennis, *supra* note 11, at 254 (discussing President Bush’s doctrine for the War on Terror).

48 *Id.* at 253.

49 *Id.* at 254.

be reexamined altogether.⁵⁰ Bradley and Goldsmith suggest that, given the lack of clarity, the Authorization for Use of Military Force (AUMF) should be controlling.⁵¹

Indeed, Bradley and Goldsmith's approach is most consistent with the approach traditionally taken by the U.S. Supreme Court. Because the War on Terror neither falls directly into the category of "criminal law" nor "traditional war," the executive's authority to use targeted killing is unclear. *Youngstown* suggests that when the executive's authority is unclear, the executive should obtain congressional authorization for his action to be valid.⁵² Because Congress may have authorized the executive's use of targeted killing when it passed the Authorization for Use of Military Force (AUMF), it is essential to explore whether this provides the executive with authority to go forward with targeted killing.

C. *Under AUMF, The Executive May Target an Individual for Death if it is the Only Way to Prevent the Individual from Engaging in Terrorist Activity*

In passing the AUMF, Congress authorized the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁵³

President Obama has claimed that this gives him authority to use military force all over the world against Al-Qaeda.⁵⁴ The language of AUMF is subject to a broad interpretation. As the *Hamdi* Court

50 See Feldman, *supra* note 39, at 458 ("The general suggestion of the Essay is that it may not be necessary to choose either crime or war as an exclusive general framework for addressing problems of international terror. Rather, the framework itself may require reexamination—a reexamination perhaps long overdue, but in any case prompted in the United States by the events of September 11.")

51 See Bradley & Goldsmith, *supra* note 40, at 2050 (noting that the "Authorization for Use of Military Force (AUMF) deserves to be a more central part of the analysis of the war on terrorism").

52 See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.")

53 Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

54 Eli Lake, *Yemeni Gains Civil Liberties Backing; Dad Wants Him off U.S. Hit List*, WASH. TIMES, Aug. 4, 2010, at A1.

noted, AUMF did not use the specific language of detention.⁵⁵ Because the means used by the President are not contemplated, killing may be authorized if it is necessary and appropriate.⁵⁶ Thus, it is essential to determine when, if ever, the targeted killing of a U.S. citizen outside of a war zone would be necessary and appropriate.⁵⁷

Although it has never been determined whether or not AUMF authorizes targeted killing, there is significant support for a broad reading of AUMF.⁵⁸ AUMF provides no limits on the means that the President can employ.⁵⁹ Bradley and Goldsmith note that past executive branch practice largely informs the determination of whether any particular action taken by the executive branch is authorized by AUMF.⁶⁰ As a result, a Court would more likely find the use of targeted killing permissible if there was a longstanding practice of the executive branch using this method in wartime. Indeed, as previously mentioned, the executive branch has used targeted killing through the use of predator strikes in the War on Terror. This provides support for the notion that AUMF authorizes at least some use of targeted killing.

The U.S. citizenship of the individual does not limit the authority of the executive. The Court clearly stated in *Ex Parte Quirin* that a U.S. citizen is subject to the law of war when he takes up arms against the United States.⁶¹ The Court reaffirmed this proposition in *Hamdi v. Rumsfeld*, in which the Court addressed the scope of the President's

⁵⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

⁵⁶ See Banks & Raven-Hansen, *supra* note 32, at 736 (suggesting that AUMF may authorize the use of targeted killing, since the means are left to the discretion of the executive).

⁵⁷ A crucial point should be noted here: By its terms, AUMF only authorizes the use of military force against those who were somehow connected to the September 11, 2001 attacks. *Id.* at 737. Because it is not alleged that Anwar Al-Awlaki was in any way involved with those particular attacks, AUMF by its terms does not apply to the targeted killing of him specifically. However, Al-Awlaki is merely used as a case study for purposes of this Comment. Indeed, this Comment is meant to address the broader issue of when a U.S. citizen may be targeted for death by the executive branch. Thus, I will continue to explore the applicability of AUMF as it may apply in certain situations.

⁵⁸ See Bradley & Goldsmith, *supra* note 40, at 2080-82 (arguing that Congress intended for AUMF to confer broad authority to the President).

⁵⁹ *Id.* at 2080 (“[T]he AUMF does not appear to impose any limitation on either the resources or the methods that the President can employ. Instead, the AUMF broadly authorizes the President to use ‘all necessary and appropriate force’ to prosecute the war.”).

⁶⁰ *Id.* at 2085 (observing that the *Hamdi* Court focused on the past executive branch practice of detaining enemy combatants in assessing whether or not the practice was authorized by AUMF).

⁶¹ *Ex Parte Quirin*, 317 U.S. 1, 37 (1942) (“Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.”).

authority under AUMF.⁶² In *Hamdi*, the Court dealt with the issue of whether the executive branch was authorized under AUMF to detain a U.S. citizen captured on the battlefield and, if so, what process was due him.⁶³ The Court held that pursuant to AUMF, the executive could detain the citizen, but that the citizen was entitled to notice, a fair opportunity to rebut the assertions against him, and a neutral decisionmaker.⁶⁴

Because a targeted individual's citizenship in itself poses no barrier to the use of targeted killing and because AUMF should be read broadly, it appears that targeted killing may be used against a U.S. citizen in at least some circumstances. However, complications arise from the fact that Al-Awlaki was not engaged in "active combat," and was in fact located far away from any specified war zone. As noted, President Obama has claimed that AUMF permits him to use force anywhere in the world, and that he is not confined to any specific battlefield.⁶⁵ But the Court's decision in *Hamdi* undermines this idea for two reasons. First, the Court found the location of the individual at the time of capture to be crucial. The Court noted that the application of AUMF depended in large part on the location of the individual within a war zone.⁶⁶ Indeed, the Court distinguished *Ex Parte Milligan*⁶⁷ by asserting that, unlike Milligan (who was detained on U.S. soil), Hamdi was detained on the battlefield.⁶⁸ Because of this difference, the Court determined that the executive had authority to detain Hamdi.

Second, and perhaps more importantly, the Court explained why this geographic distinction was crucial: the location of the individual indicates whether executive action is necessary to prevent future harm to the United States.⁶⁹ The reasoning in the Court's decision in *Hamdi* was mainly functional; detention was "necessary and appropri-

62 542 U.S. 507 (2004).

63 *Id.* at 509.

64 *Id.*

65 *See* Lake, *supra* note 54 ("Mr. Obama, as did his predecessor, President George W. Bush, has claimed that a Sept. 14, 2001, resolution of war from Congress authorizes the use of military force all over the world against al Qaeda."); *see also* Bradley & Goldsmith, *supra* note 40, at 2057 (arguing the AUMF grants extensive powers to the executive).

66 *Hamdi*, 542 U.S. at 515–16 (noting that detention of an enemy combatant participating in a foreign theater of war is an inherent part of warfare).

67 71 U.S. 2 (1866) (holding that the executive branch could not try a citizen detained on U.S. soil in a military tribunal when the civilian courts were functioning).

68 *Hamdi*, 542 U.S. at 522 ("Had Milligan been captured while he was assisting Confederate Soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different.").

69 *Id.* at 518.

ate” there because it prevented Hamdi from engaging in active combat.⁷⁰ Because capture and detention was the only way to prevent Hamdi from engaging in activity that would harm the United States, it was authorized by AUMF. Such a concern is not necessarily present in the case of someone like Al-Awlaki, who is not currently engaged in battle. Thus, the *Hamdi* Court’s concern about preventing the individual from engaging in “active combat” is not necessarily present here.⁷¹

But this is not the end of the inquiry. Even if a targeted individual is not located on a field of battle, he may still be a threat, and targeted killing may potentially be necessary and appropriate in some circumstances. Applying the reasoning of *Hamdi* here, a court would likely find that the use of targeted killing is only “necessary and appropriate” if it is the only way to prevent someone like Al-Awlaki from engaging in terrorist activity or otherwise harming the United States. The *Hamdi* Court was concerned with assuring that the executive used the least intrusive means in achieving its objective of preventing the enemy combatant from returning to battle.⁷² The Court made clear that the means used to achieve this objective should be no more intrusive than necessary.⁷³ It is consistent with the Court’s concern to allow targeted killing only when it is the only means available to prevent harm to the United States.

If the executive can demonstrate that an individual outside of a war zone will harm the United States unless he is killed, targeted killing may be authorized. This is consistent with *Hamdi*, in which the main concern was preventing future harm to the United States while using the least intrusive means available. This is also consistent with U.S. criminal law, in which the executive branch is permitted to kill an individual if there is no peaceful means left to apprehend him.⁷⁴

Such an approach is also consistent with the approach of the Supreme Court. Even the most stalwart protectors of constitutional rights of alleged terrorists recognize that immediate action by the ex-

⁷⁰ *Id.* (“The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.”).

⁷¹ *Id.* at 521 (asserting that detention was “necessary and appropriate” because Hamdi was detained amidst active combat).

⁷² *Id.*

⁷³ *Id.* (explaining that the detainee should be held no longer than the duration of the conflict and should not be subject to interrogation).

⁷⁴ *See* Banks & Raven-Hansen, *supra* note 32, at 678 (“[A]s we have seen, even at home in the United States, the government may constitutionally use deadly force to prevent a dangerous suspect from doing harm to others if no peaceful means is left to apprehend him.” (citation omitted)).

ecutive is at times necessary to prevent attacks.⁷⁵ An approach that allows the executive to use deadly force when it is the only available means of preventing harm effectively balances the need to protect citizen's constitutional rights while affording sufficient deference to the executive.

As a final note, even if AUMF does not permit the use of targeted killing, it is possible that Congress has nonetheless authorized the President to use targeted killing by acquiescence. Under this line of reasoning, because Congress knows about the prior use of assassination and targeted killing by the CIA and has failed to pass a law specifically banning its use, Congress has acquiesced to the use of targeted killing.⁷⁶ However, this argument is problematic in the current context. Although it is alleged that the U.S. government has implemented targeted killing plots against foreign nationals, the use of targeted killing against a U.S. citizen is unprecedented. Thus, it would be difficult to argue that Congress has acquiesced to the use of targeted killing against a U.S. citizen.

III. DUE PROCESS

Even if the executive has the authority to target an individual for death, this does not resolve the issue of what is required to satisfy the target's due process rights. The *Hamdi* Court recognized that, even where the President has authority to take an action under AUMF, the citizenship of the individual in question implicates special due process concerns.⁷⁷ Even if the President is authorized to use targeted killing under AUMF, it is essential to determine what process is due to a U.S. citizen targeted for death. After determining that at least some procedure is required before an individual is targeted for death, I will argue that the executive's decision to target an individual for death must be reviewed by an Article III judge before the killing takes place in order to satisfy due process.

⁷⁵ See, e.g., *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting) ("Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction.")

⁷⁶ See *Banks & Raven-Hansen*, *supra* note 32, at 708.

⁷⁷ *Hamdi*, 542 U.S. at 524 ("Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is due to a citizen who disputes his enemy-combatant status."); see also *Yin*, *supra* note 45, at 353 (noting that the Court's determination in *Hamdi* that the detainee was entitled to procedural protections was in large part based on the fact that the detainee was a U.S. citizen).

The location of the citizen targeted does not impede his due process rights under the Fifth Amendment. The Supreme Court has recognized that U.S. citizens living abroad were entitled to the protections of the Due Process Clause.⁷⁸ Thus a citizen's location outside of the United States is not determinative in the assessment of his Due Process rights.

The Supreme Court, of course, has yet to address the issue of what due process requires for a U.S. citizen who is targeted for death. In *Hamdi*, the Court addressed the due process requirements for a U.S. citizen within the context of detention, and held that the detainee was entitled to notice, a fair opportunity to rebut the assertions against him, and a neutral decisionmaker.⁷⁹ Although the reasoning in *Hamdi* is instructive, it is not determinative in the present context. Targeted killing raises unique concerns that are not at stake in the context of detention. For example, unlike with detention, targeted killing does not allow for the possibility of appeal.⁸⁰

Despite the lack of clarity regarding the Court's approach to targeted killing, I will assess what Due Process may require in that context. The Court typically employs the *Mathews* balancing test in determining what procedural rights an individual is entitled to, even in cases involving suspected terrorists.⁸¹ Thus, I will apply that test here.

A. *Under the Mathews Balancing Test, Some Procedure Is Required Before a Citizen Can Be Targeted for Death*

Given the fact that a citizen located outside of the U.S. is protected by the guarantees of the Fifth Amendment, the next inquiry is determining what process is due to him. Applying the *Mathews* balancing test⁸² and considering various critiques by constitutional scholars, I will argue that an individual in Al-Awlaki's position should be entitled to notice by publication and review by a neutral decisionmaker.

The Court addressed the issue of procedural due process in *Mathews v. Eldridge*. There, the Court implemented a "balancing test" for

78 Reid v. Covert, 354 U.S. 1, 5 (1957).

79 *Hamdi*, 542 U.S. at 509.

80 See Vincent Joel-Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801, 892 (2005) (discussing the unique due process issues posed by targeted killing).

81 See, e.g., *Hamdi*, 542 U.S. at 529 (introducing use of the *Mathews* balancing test). But see Yin, *supra* note 45, at 391-92 (2006) (arguing that the *Mathews* test is not an appropriate test to apply to cases involving terrorism).

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

determining what process is constitutionally required.⁸³ Under the *Mathews* balancing test, the Court considers the importance of the individual's interest, the importance of the government's interest, and the risk of erroneous deprivation of rights under current procedures.⁸⁴

Under the first prong, the individual's interest must be considered. Here, a targeted individual faces a threat to his life interest. If he is in fact killed by orders of the executive branch, this is a deprivation of his life interest, which is explicitly protected by the terms of the Fifth Amendment.⁸⁵ Indeed, this interest is generally recognized as being tremendously important.⁸⁶ Members of the Court have recognized that the life interest is qualitatively different from the deprivation of a lesser liberty interest.⁸⁷

The Court has yet to address the issue of how a life interest is to be weighed under the *Mathews* balancing test. Because most cases applying *Mathews* deal with property interests (and occasionally liberty interests), the determination of the value of one's life is novel.⁸⁸ The *Hamdi* decision made clear that even an interest in liberty that would be deprived as a result of detention is crucially important, and entitles an individual to procedural rights.⁸⁹ Moreover, the Court recognized that this interest was not affected by the circumstances of war.⁹⁰ Because even a lesser interest (liberty) was considered tremendously important by the *Hamdi* Court and entitled the detainee to procedural protections, it appears that an interest in life would also entitle an individual to at least some procedure.

Under the second *Mathews* factor, the government's interest must be considered. As the *Hamdi* Court recognized, the government has an interest in assuring that enemies do not return to battle.⁹¹ Analo-

83 *Id.*

84 *Id.* at 341–44.

85 U.S. CONST. amend. V.

86 Yin argues that because the life interest is so important, *Mathews* is ill-suited for such determinations because the cost-benefit analysis is better suited for property interests, which are quantifiable. Yin, *supra* note 45, at 394–95.

87 See *Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (Stevens, J., concurring) (“Because a deprivation of liberty is qualitatively different from a deprivation of property, heightened procedural safeguards are a hallmark of Anglo-American criminal jurisprudence. But that jurisprudence has also unequivocally established that a State’s deprivation of a person’s life is also qualitatively different from any lesser intrusion on liberty.”).

88 See Yin, *supra* note 45, at 394–95.

89 *Hamdi v. Rumsfeld*, 542 U.S. 507, 529–30 (2004) (observing that the right to be free from detention by one’s government is “the most elemental” liberty interest).

90 *Id.* at 530 (“Nor is the weight on this side of the *Mathews* scale offset by the circumstances of war . . .”).

91 *Hamdi*, 542 U.S. at 531.

gizing to the situation regarding Al-Awlaki, the government has an interest in assuring that Al-Awlaki does not engage in terrorist activity that will harm the United States. The government has a strong interest in preventing terrorist attacks against the United States, and may argue that targeted killing is necessary to do this in a timely fashion.⁹² The government also has an interest in reducing the process available to those individuals that are targeted, because affording those individuals with procedural protections may lead to the disclosure of state secrets.⁹³

Third, a Court applying the *Mathews* balancing test must consider the risk of erroneous deprivation of rights under existing procedures, and whether additional procedures are necessary.⁹⁴ In the current context, this factor is problematic because there is no publicly available information regarding what, if any, process the Obama administration employs in determining the rights of a targeted individual. For present purposes, I will proceed on the assumption that there currently exists no process, as I explore what process would be appropriate in light of this absence.

Finally, the public interest may be considered in assessing what process should be due.⁹⁵ This factor seems to cut both ways. The public certainly has an interest in preventing terrorism.⁹⁶ Of course, the public also has an interest in assuring that citizens are entitled to a certain amount of process before they are killed.⁹⁷

It is apparent that there are many competing interests at stake. Considering the nature of the individual's interest, a Court would likely find that an individual in Al-Awlaki's position should at least be

⁹² See Shane, *supra* note 3, at A1 (stating the success of drone missile strikes in countering terrorism).

⁹³ Al-Aulaqi, v. Obama, No. 10-1469 (JDB), 2010 U.S. Dist. LEXIS 129601, at *140 (D.D.C. Dec. 7, 2010).

⁹⁴ *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976) ("An additional factor to be considered here is the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards.").

⁹⁵ *Id.* at 347 ("In striking the appropriate due process balance the final factor to be assessed is the public interest.").

⁹⁶ Shane, *supra* note 3, at A1 (observing that the failure to target dangerous individuals for death may result in devastating terrorist attacks on U.S. soil).

⁹⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) ("[I]t is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." (citation omitted)); see also Divoll, *supra* note 2, at A25 (finding targeted killing by the executive branch to be problematic in light of the values of American citizenship).

entitled to some procedural protections.⁹⁸ In the next section, I will analyze which procedural protections should be granted, given the practical realities of the situation.

B. Due Process Requires That a Neutral Decisionmaker Review the Decision of the Executive to Target an Individual for Death

Application of the *Mathews* balancing test indicates that a citizen in Al-Awlaki's position should be entitled to at least some procedural protections. But there are no guidelines regarding which specific protections he should be afforded. The Court in *Hamdi* concluded that Hamdi should be entitled to a neutral decisionmaker, a fair opportunity to rebut the assertions against him, and notice.⁹⁹ But differences in the nature of the situation imply that these and other protections may not be practicable in the context of targeted killing. Indeed, most scholarship and most court decisions related to due process in the war on terror relate to detention, not targeted killing. While such procedural protections as affording actual notice and providing the opportunity to rebut the assertions against him are not feasible in the context of targeted killing, a neutral decisionmaker should review the executive's decision to use targeted killing before a citizen can be killed.

1. Although Actual Notice Is Not Feasible, Notice by Publication Is Sufficient to Satisfy the Demands of Due Process

In *Hamdi*, the Court held that the detainee was entitled to notice of the claims against him.¹⁰⁰ While it is generally accepted that notice is required in the context of an individual contesting his detention,¹⁰¹ the requirement of actual notice is complicated in the context of targeted killing.¹⁰² Justice Thomas' dissent in *Hamdi* recognizes the problem that notice and opportunity to be heard would pose in such a situation. He observes that it would be ridiculous to require notice

⁹⁸ See, e.g., Murphy & Radsan, *supra* 4, at 444 (asserting that the balance of interests under *Mathews* leans in favor of judicial challenges to targeted killing).

⁹⁹ *Hamdi*, 542 U.S. at 533.

¹⁰⁰ *Id.* (emphasizing that due process fundamentally requires that the individual receive notice of the claims against him).

¹⁰¹ See Yin, *supra* note 45, at 402 ("Once one establishes that a detainee is entitled to due process, it should be uncontroversial to conclude that there must be notice of the reason for the person's detention and a hearing in which the detainee is afforded the opportunity to challenge that detention.").

¹⁰² See Murphy & Radsan, *supra* note 4, at 439 (discussing the problems associated with affording notice and opportunity to be heard to an individual targeted for death).

for an individual who is targeted on the battlefield before he is killed.¹⁰³ Other commentators have also recognized that providing actual notice for suspected terrorists would be impractical.¹⁰⁴ National security concerns and state secrets may be compromised by affording an individual targeted for death with notice of the claims against him.

While actual notice may not be practicable in the context of targeted killing,¹⁰⁵ notice by publication should be employed to apprise those citizens targeted for death of their rights. The Supreme Court has recognized that notice by publication is sufficient where actual notice would not be practical.¹⁰⁶ Although there would be no effective and safe way to personally notify those citizens that they have been targeted, the government could easily create a public database or website containing the names of those targeted. This would satisfy the notice requirements of due process without endangering U.S. forces.

2. *A Jury Trial Is Not Feasible*

Many of the procedural rights associated with a full jury trial have been said to be necessary to satisfy due process. For example, many have recognized that access to counsel is a hallmark of due process.¹⁰⁷ Such a right protects against mistakes and prevents the erroneous deprivation of a constitutional right.¹⁰⁸ Others note that the Sixth Amendment¹⁰⁹ right to confront witnesses is a fundamental right that is typically required by due process.¹¹⁰

Despite this, affording suspected terrorists a right to a jury trial and the right to confront witnesses is problematic. The few jury trials of suspected terrorists in federal court that have occurred have been

¹⁰³ *Hamdi*, 542 U.S. at 597 (Thomas, J., dissenting).

¹⁰⁴ See Murphy & Radsan, *supra* note 4, at 445 (“The executive, like the courts, cannot practicably offer suspected terrorists full-blown notice and an opportunity to be heard before an attempted targeted killing.”).

¹⁰⁵ *Id.* at 445–46.

¹⁰⁶ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950).

¹⁰⁷ See *Gideon v. Wainwright*, 372 U.S. 335 (1963); see also *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting) (“Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process.”).

¹⁰⁸ *Id.*

¹⁰⁹ U.S. CONST. amend. VI.

¹¹⁰ Amos N. Guiora, *Where are Terrorists to Be Tried: A Comparative Analysis of Rights Granted to Suspected Terrorists*, 56 CATH. U.L. REV. 805, 805–06 (2007) (posing the question of whether terrorist defendants should be granted the right to confront witnesses).

more like a “circus” than a process.¹¹¹ Not only are jury trials of suspected terrorists problematic because of public reaction, but such trials also may require the disclosure of intelligence sources.¹¹² Similarly, allowing someone in Al-Awlaki’s position (or an individual representing his interests) to have a jury trial would be problematic for these same reasons.¹¹³ Additionally, affording an individual targeted for death with a full jury trial would be extremely time-consuming, and may unduly interfere with the executive’s ability to prevent terrorism.

Of course, as noted earlier, another practical problem with providing any of these rights to an individual targeted for death is that such a person is unlikely to come into court himself. There is a possibility that another person could represent the interests of the individual targeted in court.¹¹⁴ This would alleviate the practical problems associated with targeted killing while affording procedural protections.

However, such a solution is unlikely to solve the problems associated with providing a jury trial because courts are hesitant to confer standing to individuals seeking to represent the interests of suspected terrorists. Indeed, the District Court in *Al-Aulaqi v. Obama* held that Al-Awlaki’s father did not have next friend standing to represent the interests of his son, on the grounds that there is nothing preventing Anwar Al-Awlaki himself from appearing before the court.¹¹⁵ The Court also rejected Nasser Al-Awlaki’s claim of third party standing, on the grounds that Nasser Al-Awlaki did not himself suffer any injury in fact.¹¹⁶ Because Courts are unwilling to extend standing to those representing the interests of those targeted for death, this poses

111 *Id.* at 817 (“The proceedings in the Moussaoui trial . . . resembled a circus more than a process.”).

112 *See id.*; *see also* Gregory S. McNeal, *Beyond Guantanamo, Obstacles and Options*, 103 NW. U.L. REV. 29, 46–47 (2008) (discussing the difficulties of trying terrorism cases in federal courts); Murphy & Radsan, *supra* note 4, at 441–42 (noting that the litigation process would likely compromise classified information).

113 The District Court grappled with this issue and dismissed the case in part because of the potential disclosure of state secrets. *See Al-Aulaqi v. Obama*, No. 10-1469 (JDB), 2010 U.S. Dist. LEXIS 129601, at *140–44 (D.D.C. Dec. 7, 2010).

114 *See* Murphy & Radsan, *supra* note 4, at 440 (suggesting that an appropriate next friend of an individual targeted for death could adequately represent the interests of the individual targeted).

115 *Al-Aulaqi*, 2010 U.S. Dist. LEXIS 129601, at *29 (“[T]here is nothing preventing him from peacefully presenting himself at the U.S. Embassy in Yemen and expressing a desire to vindicate his constitutional rights in U.S. courts.”).

116 *Id.* at *51 (“Plaintiff cannot show that a parent suffers an injury in fact if his adult child is threatened with a future extrajudicial killing.”).

another obstacle to providing an individual targeted for death with a full jury trial.

3. *A Neutral Decisionmaker Should be Provided to Review the Executive's Decision*

Many procedural protections, such as providing actual notice or a jury trial, would raise practical problems in the unique context of targeted killing. Given these considerations, review by a neutral decisionmaker would ensure that the individual targeted would get some kind of process without interfering too heavily on the government's interest in national security.

Providing suspected terrorists with review by a neutral decisionmaker would help to prevent dissemination of confidential information. After observing the problems associated with providing suspected terrorists with a jury trial, Amos Guiora argues that a bench trial would effectively balance the executive's interest in preserving confidential information while also affording the suspects with their constitutionally guaranteed procedural rights.¹¹⁷ He notes that a bench trial would allow for the introduction of intelligence information without fear of compromising such information by presenting it before a jury.¹¹⁸

Similarly, allowing an individual targeted for death to be entitled to a neutral decisionmaker would solve the same problems in the context of targeted killing as a bench trial would in the context of trying suspected terrorists. A bench trial would not be sufficient in the context of targeted killing, since the target would be unlikely to appear in court. Given the exigencies of the situation, a full bench trial is unnecessary and time consuming. A brief proceeding before a neutral decisionmaker would alleviate the concerns for timeliness. A neutral decisionmaker could review the executive's evidence in confidence, thus alleviating concerns about disclosure of confidential information. Moreover, because such a proceeding would not be subject to the procedural requirements of a full trial, the standing requirements that prevented Nasser Al-Awlaki from pursuing his son's interests in court would not apply. Thus, in a hearing before a neutral decisionmaker, a friend or representative of the individual

117 See Guiora, *supra* note 110, at 835 ("It is recommended that trials of individuals suspected of involvement in terrorism would be heard before a bench trial, without a jury, to allow the introduction of intelligence information that would not be made available to the defendant or counsel.").

118 *Id.*

targeted for death could represent his interests without being required to demonstrate his standing.

A proceeding before a neutral decisionmaker could follow the *Hamdi* framework, under which there may be a presumption in favor of the government and hearsay may be admissible.¹¹⁹ Under this framework, if the executive put forth support for its assertion that targeted killing was the only feasible means for preventing an individual from engaging in terrorist activity, the targeted killing would be permissible. The government should only be required to meet a preponderance of the evidence standard. After reviewing the executive's evidence, the decisionmaker would have the final say regarding whether the killing is authorized.

Affording the individual targeted with review by a neutral decisionmaker would effectively balance the competing interests of the parties. From the government's perspective, this would limit the disclosure of confidential information, because only the decisionmaker would have access to information, and the proceedings would be kept private. From the target's perspective, providing review by a neutral decisionmaker ensures that the decision is not left solely to the unchecked discretion of the executive branch. Providing a neutral decisionmaker also decreases the risk of the erroneous deprivation of a life interest. Allowing a neutral decisionmaker to review the decision of the executive would help to reduce errors by catching them and ensuring the accuracy of the executive's decision.¹²⁰ Indeed, even those who assert that an intra-executive process satisfies due process in the context of targeted killing emphasize the importance of having an impartial decisionmaker review the decision to target an individual for death.¹²¹ Providing review by a neutral decisionmaker would effectively balance the competing interests considered by the *Mathews* test.

C. *The Neutral Decisionmaker Should Be an Article III Judge*

The executive's decision to target an individual for death should be reviewed by an Article III judge before the killing is carried out.

119 See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533–34 (2004) (noting that the procedures used in reviewing the detention of an enemy combatant could alter the burden of proof and hearsay requirements to fit the situation).

120 See *Murphy & Radsan*, *supra* note 4, at 438 (“Independent judges who double-check targeting decisions could catch errors and cause executive officials to avoid making them in the first place.”).

121 *Id.* at 448 (suggesting that the decisionmaker should be an individual who is subject to limited political influence.).

The use of an Article III judge as a neutral decisionmaker would legitimize the executive's actions and hold the executive branch accountable during wartime.

Providing an intra-executive process is not sufficient in the context of targeted killing of a U.S. citizen outside of a war zone.¹²² Murphy and Radsan argue that due process would be satisfied if, after a strike has already occurred, the executive branch launched an investigation of its legality.¹²³ They argue that interference from the judicial branch would undermine the executive's decisionmaking and compromise state secrets.¹²⁴

On the contrary, judicial intervention would not undermine the executive's decisionmaking, but rather would serve to legitimize the executive's actions. Even during wartime, many are critical of actions taken by the executive to deprive individuals of rights without intervention by the judicial branch. For instance, many objected to the Military Commissions Act on the grounds that it did not afford the accused of an independent judiciary.¹²⁵

Furthermore, as noted above, the concerns about minimizing the disclosure of state secrets would be alleviated by permitting only the decisionmaker to review the evidence. The hearing would be conducted privately and the information would be conveyed on a "need-to-know" basis only. Thus the confidentiality problems associated with affording suspected terrorists a full jury trial are not present in a process where the judge reviews the evidence in confidence.

Not only would judicial intervention decrease public skepticism of the executive's decisions, but would also promote accuracy and fairness.¹²⁶ Because mistakes are possible (and have happened regarding misclassification of terrorists), accuracy is better preserved by allowing the judiciary to check the actions of the executive.¹²⁷ The process

¹²² *Id.*

¹²³ *See id.* at 446.

¹²⁴ *Id.*

¹²⁵ *See* Guiora, *supra* note 110, at 809 (noting that criticism of the Military Commissions Act centered on the lack of an independent judiciary).

¹²⁶ *See* Matthew C. Waxman, *Guantanamo, Habeas Corpus, and Standards of Proof: Viewing the Law Through Multiple Lenses*, 42 CASE W. RES. J. INT'L L. 245, 260 (2009) (noting that while the executive branch is concerned with intelligence collection and interpretation, the judicial branch is better able to balance competing values.); *see also* Murphy & Radsan, *supra* note 4, at 438 ("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.").

¹²⁷ *See, e.g.*, Gerald E. Rosen, *War on Terrorism in the Courts*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 101, 110 (2006) (observing instances where the executive branch has misclassified individuals suspected of terrorism).

would likely be fairer because federal judges are appointed for life tenure, and thus are less likely to be subject to public pressure.¹²⁸ Moreover, having a federal judge decide on whether targeted killing is permissible would alleviate executive branch pressure. If a member of the executive branch were to be the neutral decisionmaker, he would have incentive to permit the President to do whatever he deems necessary. A federal judge would not likely be subject to such influence.

Advocates for judicial deference argue that the executive branch should be given extensive authority during wartime, and the judicial branch should not interfere with executive decisionmaking. Justice Thomas' dissent in *Hamdi* reflects this sentiment. He argues that allowing process on the battlefield would undermine the executive's authority.¹²⁹ He asserts that the constitutional structure is based upon the notion of a unitary executive with extensive war powers, and that this structure would be undermined by judicial interference.¹³⁰ As a result of this structure, he argues that due process merely requires a "good-faith executive determination."¹³¹

Similarly, others argue that the lack of judicial deference during a war could disrupt the system of political cooperation in wartime.¹³² Under this argument, the executive branch is better suited to interpret laws relating to wartime and foreign affairs.¹³³ As a result, the executive branch is better able to make determinations regarding wartime issues not only because it has expertise in this area, but also because the executive branch is more politically accountable than the judicial branch.¹³⁴ Because the judicial branch lacks expertise in these areas, the judicial branch must afford significant deference to the executive branch during wartime.¹³⁵

These arguments in favor of judicial deference are problematic for a number of reasons. First, permitting the decision to target an individual for death to take place solely within the executive branch

128 See Yin, *supra* note 45, at 404.

129 *Hamdi v. Rumsfeld*, 542 U.S. 507, 582 (2004) (Thomas, J., dissenting) (arguing that the Court should not interfere with executive decisionmaking in the context of war).

130 *Id.* ("[I]t is crucial to recognize that *judicial* interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive.").

131 *Id.* at 590.

132 Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 180 (2006).

133 *Id.* at 199 (asserting that the judiciary is ill-suited to resolve issues relating to war because they have access to limited information and are "unable to take into account the broader factual context" in making decisions).

134 *Id.* at 201.

135 *Id.* at 200 (noting that federal judges may have little to no expertise in foreign affairs).

would strengthen precedent for an unchecked executive in wartime. To allow the executive to act without judicial review would legitimize a constitutional doctrine whereby the executive would be subject to no limitations and would not be constrained by any requirements of due process.¹³⁶ Permitting the judiciary to review decisions made by the executive in the context of the war on terror would uphold a constitutional system of checks and balances whereby the executive branch is subject to constraints.

Secondly, even if the argument of “executive expertise” is accepted, judicial intervention would serve the interests of the public by ensuring that the executive does not have a blank check to unilaterally determine who should be killed.¹³⁷ Even during wartime, it is inappropriate to allow the executive branch to act as all three branches of government.¹³⁸ The judicial branch should be involved in cases relating to terrorism in order to prevent an arbitrary exercise of power by the executive.¹³⁹

Finally, the Court itself has rejected the notion that the judicial branch must defer when the rights of a citizen are involved. The *Hamdi* Court places great emphasis on the notion that the Courts play a key role even in the context of war.¹⁴⁰ Given the importance of the civil rights and liberties at stake, it would be counterintuitive to deprive the courts of their role in such a circumstance.¹⁴¹ Thus, there is tremendous support for judicial involvement in the war on terror. Judicial intervention would increase the accuracy of the determination while also giving legitimacy to the executive’s decision and upholding civil rights.

¹³⁶ *Id.*

¹³⁷ See Murphy & Radsan, *supra* note 4, at 438 (“[J]udicial 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.”).

¹³⁸ See Jared Perkins, Note, *Habeas Corpus in the War Against Terrorism: Hamdi v. Rumsfeld and Citizen Enemy Combatants*, 19 BYU J. PUB. L. 437, 456 (2005) (arguing that the executive branch should not act as all three branches of government).

¹³⁹ *Id.* at 457.

¹⁴⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (“Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”).

¹⁴¹ See, e.g., Rosen, *supra* note 127, at 109 (advocating for judicial intervention in the war on terror).

IV. CONCLUSION

The targeted killing of a U.S. citizen presents a novel issue that cannot be easily resolved. While the idea that a U.S. citizen could be unilaterally killed by the executive branch is troubling, the new age of terrorism presents new challenges to preventing attacks on the United States. In light of such challenges, the executive branch may need to employ new methods in order to prevent attacks, which may include targeted killing.

Despite the difficulties in addressing these complicated and conflicting concerns, solutions are possible. Under the framework of AUMF, the executive may be able to use targeted killing where it is the only practicable means of preventing an attack. This approach allows the executive to fulfill its duty to protect the United States while still preserving civil rights where possible. In addition, due process need not be completely sacrificed in the name of national security. Providing a citizen targeted for death with review by a neutral decisionmaker will reduce errors in decisionmaking by the executive and ensure that the decision is justified. At the same time, this limited protection will not unduly interfere with the executive's ability to respond appropriately to legitimate terror threats. Although the killing of Al-Awlaki raises deep concerns about the due process rights of U.S. citizens accused of terrorist behavior, this article suggests that the constitutional demands of due process can be met in the future if the decision to carry out such a killing is reviewed by a neutral decisionmaker in the judicial branch.