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Due Process Rights and the Targeted Killing of Suspected Terrorists

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NOTES

Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power

ABSTRACT

The Central Intelligence Agency (CIA), with the approval of the Obama Administration, conducts targeted killings of individual suspected terrorists. These killings have significantly increased since the Iraq war and are now a central component of U.S. counterterrorism strategy. The targeted killing program consists mainly of missile strikes from Predator drones, which are unmanned aerial vehicles operated by the CIA. In May 2010, President Obama's National Security Council approved the targeted killing of Anwar al-Aulaqi, a U.S. citizen and suspected al-Qaeda senior leader believed to be hiding in Yemen. As the first American targeted for extrajudicial lethal force, Aulaqi's situation quickly became a source of great controversy and concern. His father challenged this decision in federal court in December 2010, but the court ruled in favor of executive authority and awarded summary judgment to the government. Aulaqi was subsequently killed by a drone strike in September 2011. This Note challenges the asserted statutory and constitutional basis for the president's authority to order the targeted killing of an American citizen. As the case of Anwar al-Aulaqi demonstrates, the constitutionality of targeted killing is highly suspect. To clarify the state of the law, Congress should pass legislation that either prohibits targeted killing or establishes judicial oversight.

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I. INTRODUCTION

In September 2011, the Obama Administration killed Anwar al-Aulaqi, an American citizen, through a covert counterterrorism program known as targeted killing.¹ The Department of Justice (DOJ) claims that Aulaqi was a senior leader of al-Qaeda in the Arabian Peninsula and that he represented an imminent threat to national security.² Although the government would not produce specific evidence against Aulaqi,³ there is a large body of publicly available evidence that linked Aulaqi to jihadist, anti-American views and to several terrorist plots.⁴ However, Aulaqi was never detained in connection with terrorist activity or convicted of plotting or aiding a terrorist attack.⁵ Aulaqi was eventually killed by a drone missile strike in Yemen.⁶

In August 2010, Aulaqi's father, Nasser al-Aulaqi, filed suit against the federal government and requested an injunction against the targeted killing of his son.⁷ The complaint alleged that a targeted killing would violate Anwar al-Aulaqi's Fifth Amendment right to due process of law before a deprivation of life.⁸ In response, the DOJ argued that the decision to target Aulaqi for extrajudicial killing was purely within executive branch authority and that to litigate this matter would require judicial infringement on executive power.⁹ Nasser al-Aulaqi asserted that the Executive Branch claimed the

1. Complaint for Declaratory and Injunctive Relief ¶ 3, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.C.C. 2010) (No. 10-CV-1469) [hereinafter *Al-Aulaqi Complaint*].

2. Brief in Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss at 5, *Al-Aulaqi*, 727 F. Supp. 2d 1 (No. 10-CV-1469) [hereinafter *Al-Aulaqi Response*].

3. *Id.* at 2–3 (arguing that the complaint is based on unconfirmed speculation and raises nonjusticiable claims beyond the purview of the judiciary).

4. For a detailed overview of the publicly available information on Aulaqi's radical teachings, beliefs, and associations, including connections to known terrorists such as Nidal Malik Hassan (the "Fort Hood Shooter"), Umar Farouk Abdulmutalib (the "Christmas Day Bomber"), Faisal Shahzad (the "Times Square Bomber"), and many others, see *Profile: Anwar al-Awlaki*, ANTI-DEFAMATION LEAGUE (Nov. 24, 2009), http://www.adl.org/main_Terrorism/anwar_al-awlaki.htm?Multi_page_sections=sHeading_2. Aulaqi had an infamous reputation in the general media and had been called "the bin Laden of the internet" and "the world's most dangerous man." See, e.g., Aamer Madhani, *Cleric Al-Awlaki Dubbed "Bin Laden of the Internet,"* USA TODAY, Aug. 25, 2010, at A1; Andrew Malcolm, Editorial, *Awlaki Strikes Again*, INVESTOR'S BUS. DAILY (May 10, 2010), <http://www.investors.com/NewsAndAnalysis/Article/532892/201005101836/Awlaki-Strikes-FI7Again.aspx>.

5. See *Al-Aulaqi Response*, *supra* note 2 (making no specific allegation of criminality).

6. Mark Mazzetti et al., *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1.

7. *Al-Aulaqi Complaint*, *supra* note 1, ¶ 6.

8. *Id.* ¶ 5.

9. *Al-Aulaqi Response*, *supra* note 2, at 3.

power to kill an American without producing any justification.¹⁰ The government's response essentially suggested that, in fact, it had this power in the context of counterterrorism and that this power was not subject to judicial review.¹¹

In December 2010, the District Court for the District of Columbia rejected Nasser al-Aulaqi's claims and granted summary judgment to the government.¹² While acknowledging the profound and troubling nature of the issues at stake in the case,¹³ the court deferred to the assertion of executive authority and declined to review the evidence against Aulaqi.¹⁴ The court held that these issues were nonjusticiable and that Aulaqi's father did not have standing to bring this claim on behalf of his son.¹⁵

This Note challenges the statutory and constitutional basis for the government's authority to conduct the targeted killing of Americans and attempts to resolve important legal questions left unanswered by the controversial outcome of *Al-Aulaqi v. Obama*. Applied broadly, the practical effect of the *Aulaqi* holding suggests that the president has the unchecked authority to kill Americans accused of terrorism without providing the accused with some minimum form of due process.¹⁶ According to the defendants' reasoning in *Aulaqi*, the government's use of lethal force, even against its own citizens, is shielded from judicial review merely on the assertion that lethal force was necessary to respond to the threat of terrorism.¹⁷ Although the use of force in the specific case of *Aulaqi* may be justifiable, the precedent established by this case creates a broader and more unnerving form of executive power than is permissible under the constitution.¹⁸

While targeted killing is utilized much more frequently against foreign suspected terrorists, which is itself a subject of controversy in international law, this Note focuses on the constitutional and

10. Al-Aulaqi Complaint, *supra* note 1, ¶ 16.

11. Al-Aulaqi Response, *supra* note 2, at 4–5.

12. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (granting summary judgment on all four of the plaintiff's claims).

13. *Id.* at 51.

14. *Id.* at 47.

15. *Id.* at 54.

16. John C. Dehn & Kevin J. Heller, Debate, *Targeted Killing: The Case of Anwar al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 186 (2011), http://www.pennumbra.com/debates/pdfs/Targeted_Killing.pdf (Heller, Rebuttal) (“This statement—and there are many more like it in the [Aulaqi] opinion—would seem to preclude any U.S. citizen overseas from ever challenging her inclusion on the JSOC kill list.”).

17. Al-Aulaqi Response, *supra* note 2, at 4–5.

18. See *supra* note 4 (providing an overview of a large body of publicly available evidence linking Aulaqi to known terrorists and anti-American propaganda).

prudential objections to the targeted killing of Americans.¹⁹ Part II provides an overview of the concept of targeted killing and analyzes the court's reasoning in the *Aulaqi* opinion to provide a framework for analysis. Part III challenges the court's conclusion that targeted killing represents a nonjusticiable political question, reasoning that a premeditated killing does not satisfy the imminence standard for the use of defensive force as a matter of law. Part IV expands on the constitutional criticism of targeted killing by arguing that a deprivation of life without notice or opportunity to protest is a clear violation of minimum due process rights. Part V raises a number of historical and prudential grounds for distrusting the president's exclusive authority over targeted killing. Finally, Part VI proposes that congress either prohibit targeted killing or establish independent oversight of this controversial program.

II. AN OVERVIEW OF TARGETED KILLING AND THE CASE OF ANWAR AL-AULAQI

A. *Defining Targeted Killing as a Concept and Practice*

Targeted killing is an “extra-judicial, premeditated killing by a state of a specifically identified person not in its custody.”²⁰ The CIA conducts the majority of U.S. targeted killings using missile strikes from unmanned aerial vehicles, more commonly known as Predator drones.²¹ According to John Rizzo, the CIA's former acting general counsel, the targeted killing program is “basically a hit list” in which the “Predator is the weapon of choice, but it could also be someone putting a bullet in your head.”²² These covert drone strikes are an integral part of U.S. counterterrorism strategy and have increased significantly during the Obama Administration.²³

The government has neither confirmed nor denied the existence of an official targeted killing program.²⁴ However, media outlets have

19. There are moral and legal objections to the premeditated killing of any person by any government, regardless of nationality. However, this Note focuses on the targeted killing of Americans because this is an issue of first impression that raises profoundly difficult questions of constitutional law. For an analysis of targeted killing in the context of International Humanitarian Law (IHL), see David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?*, 16 EUR. J. INT'L. L. 171, 202 (2005).

20. Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 405 (2009).

21. Tara McKelvey, *Inside the Killing Machine*, NEWSWEEK, Feb. 21, 2011, at 34.

22. *Id.*

23. *Id.*

24. See, e.g., *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 11 (D.D.C. 2010) (neither confirming nor denying issuing an order to kill the plaintiff's son).

reported extensively on the existence and nature of the U.S. targeted killing program.²⁵ The *New York Times* reported that because Aulaqi is an American citizen, President Obama's National Security Council had to approve the order to pursue him with lethal force.²⁶ It is unclear why the National Security Council's approval was necessary or constitutionally satisfactory.²⁷ This ambiguity raises a fundamental problem with the current targeted killing program: what are the procedures for determining the targets of lethal force and how is the program managed? Understanding the procedural mechanisms that determine this process is an essential step in evaluating the legitimacy of targeted killing safeguards and oversight.

Rizzo has called the process by which suspected terrorists are identified and targeted for lethal force as "punctilious."²⁸ Bruce Reidel, a former CIA officer, claims there is a "well-established protocol."²⁹ Within the CIA's Counterterrorist Center, a team of roughly ten agency attorneys reviews the evidence against suspected terrorists and prepares memos arguing whether or not the collected evidence merits an order for targeted killing.³⁰ Memos that recommend targeted killing are sent to the General Counsel for approval.³¹ Rizzo described the subordinate lawyers as "very picky" and the memos as "carefully argued."³² He also described situations in which flimsy cases were rejected for lack of persuasive evidence.³³ However, beyond official descriptions of a rigorous and methodical process, few specific details are known about the evaluation of evidence against suspected terrorists or the standard of proof.³⁴ How is evidence collected by field agents in foreign countries verified by American attorneys for authenticity and veracity? Are there minimum standards for the quantity and quality of evidence required for a targeted killing order? Is the evidence evaluated under the criminal "beyond a reasonable doubt" standard, or under something less strict, such as the "preponderance of the evidence" standard? These are critical questions, but as the case of Anwar al-Aulaqi

25. See, e.g., McKelvey, *supra* note 21; *supra* note 4.

26. Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 7, 2010, at A12.

27. *Cf. id.* (failing to explain why the approval of the National Security Council was necessary).

28. McKelvey, *supra* note 21.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* Beyond a general description of the process, the *Newsweek* article does not offer any specifics on the legal guidelines or standards used by the CIA lawyers.

demonstrates, the legal standards for targeted killing are unknown, a chilling thought given the extraordinary power involved.³⁵

B. *The Aulaqi Case in Federal Court*

In August 2010, Nasser al-Aulaqi, Anwar's father, filed suit in the District Court for the District of Columbia requesting an injunction against the targeted killing of his son.³⁶ Represented by the American Civil Liberties Union (ACLU), Nasser al-Aulaqi claimed that outside of the zone of armed conflict, the targeted killing of an American citizen represents an extrajudicial killing without due process of law.³⁷ The claim stated that under customary international law, the only circumstances allowing an exception to this general rule are those presenting a "concrete, specific, and imminent threat of death or serious physical injury."³⁸ The targeted killing of an American citizen outside of these circumstances is a violation of the Fourth and Fifth Amendments.³⁹

The complaint asserted three constitutional challenges to the targeted killing program.⁴⁰ By targeting an American for an extrajudicial killing outside of circumstances that present concrete, specific, and imminent threats of harm, the government had violated Aulaqi's Fourth Amendment right to be free from unreasonable seizure and his Fifth Amendment right not to be deprived of life without due process of law.⁴¹ In addition, by refusing to disclose the standards used in determining that Aulaqi should be targeted for extrajudicial killing, the government violated the Fifth Amendment's notice requirement.⁴² The complaint further asserted that by claiming this broad and unreviewable power, the Executive Branch permitted itself to conduct at-will extrajudicial killings of Americans, in secret, without any notice.⁴³

In the suit—filed against President Obama, then-Defense Secretary Robert Gates, and then-Director of the CIA Leon Panetta⁴⁴—Nasser al-Aulaqi requested several forms of relief to

35. See discussion *infra* Part II.C.

36. Al-Aulaqi Complaint, *supra* note 1, ¶ 3.

37. *Id.* ¶ 4.

38. *Id.*

39. *Id.* ¶¶ 4, 27–28.

40. *Id.* ¶¶ 27–28, 30. The complaint also listed a fourth claim, a violation of the Alien Tort Statute, 28 U.S.C. § 1350 (2006). Al-Aulaqi Complaint, *supra* note 1, ¶ 29. This Note focuses on the constitutional claims raised in this case. The Alien Tort Statute claim was dismissed along with the other constitutional claims by the district court. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010).

41. *Id.* ¶¶ 27–28.

42. *Id.* ¶ 30.

43. *Id.* ¶¶ 1, 22.

44. See *id.* ¶¶ 10–12.

prevent the targeted killing of his son.⁴⁵ He requested a preliminary injunction against the order to pursue Anwar al-Aulaqi with lethal force, and declaratory relief requiring the government to disclose the standards used for placing people on the targeted killing list.⁴⁶

In its brief in response, the DOJ moved for summary judgment on several alternative grounds, with emphasis on standing, the political question doctrine, and the state secrets privilege.⁴⁷ The DOJ argued that Nasser al-Aulaqi did not meet the requirements for next-friend standing for two reasons.⁴⁸ First, Aulaqi was not denied access to the courts.⁴⁹ Rather, Aulaqi seemed to be hiding in Yemen of his own accord.⁵⁰ Second, there was no evidence that Aulaqi desired to raise these claims in court to challenge the government's authority to conduct an extrajudicial killing against him.⁵¹ Therefore, Nasser al-Aulaqi did not demonstrate that he was representing his son's interests or purpose.⁵²

The DOJ also challenged Nasser al-Aulaqi's complaint on grounds of executive authority, arguing that litigating this matter would violate established boundaries in the separation of judicial and executive power.⁵³ First, the government asserted that the decision to target Anwar al-Aulaqi was a nonjusticiable political question, and that conducting judicial review of this decision would require an infringement on textually committed executive authority.⁵⁴ Second, the government invoked the state secrets privilege, a rarely used but mostly successfully employed doctrine claiming that certain issues cannot be litigated because litigating them would require the disclosure of classified intelligence.⁵⁵ According to the state secrets doctrine, classified information cannot be disclosed through discovery and public trial because it would threaten national security and disrupt the Executive's ability to discharge its constitutional obligations.⁵⁶

The district court granted the defendant's motion to dismiss in December 2010.⁵⁷ The court held that Nasser al-Aulaqi did not have

45. *Id.* ¶ 6.

46. *Id.*

47. Al-Aulaqi Response, *supra* note 2, at 10, 19, 39, 43. The brief also responded to the plaintiff's claim under the Alien Tort Statute. *Id.* at 39–42.

48. *Id.* at 11, 15.

49. *Id.* at 11.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 19.

54. *Id.*

55. *Id.* at 43.

56. *Id.*

57. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 54 (D.D.C. 2010) (dismissing all four of plaintiff's claims due to lack of standing and nonjusticiability).

standing to raise these constitutional claims on his son's behalf.⁵⁸ By ruling on standing grounds the court focused on a narrow legal doctrine and avoided confrontation with the larger, more controversial issues in the suit.⁵⁹ However, the court also expressed discomfort with the outcome and its potential implications on due process rights and executive power.⁶⁰

C. *The Aulqi Opinion Reveals a Judicial Impasse*

A more thorough overview of the *Aulqi* opinion reveals an irreconcilable conflict between due process rights and the CIA targeted killing program.⁶¹ Moreover, the opinion demonstrates the many obstacles, if not the utter futility, of attempting to resolve this critical problem in federal court.⁶² Although the court expressed serious concern over the extraordinary nature of Aulqi's claims and the circumstances of the case, it also hesitated to infringe on executive military power or on decisions regarding national security, especially in the absence of any judicially manageable standard.⁶³ The court's ruling is technically sound in terms of the standing analysis, but it nonetheless resulted in an American citizen targeted for lethal force without any due process of law.⁶⁴

58. *Id.* at 49.

59. *Id.* at 9 (declining to evaluate the case on other grounds "because plaintiff lacks standing and his claims are non-justiciable"); see Charlie Savage, *Suit over Targeted Killing Is Thrown Out*, N.Y. TIMES, Dec. 7, 2010, at A12 (claiming that the court "sidestepped several issues").

60. See *Al-Aulqi*, 727 F. Supp. 2d at 8 (calling the nature of the case "stark," "perplexing," and "extraordinary").

61. See *id.* at 51 (acknowledging the difficulty in reconciling the political question doctrine with questions of citizens' constitutional rights). Although the court recognized the "extraordinary" and "unsettling" nature of the case and its outcome, the court also expressed great deference to the executive interests at stake and the compelling grounds for dismissal.

62. See *id.* at 9 (noting that constitutional elements of jurisdiction may seem "less significant" than the questions posed by the merits of the case, but that they serve an essential part of ensuring separation of powers).

63. See *id.* at 46-47 ("[T]here are no judicially manageable standards by which courts can endeavor to assess the President's interpretation of military intelligence and his resulting decision . . . whether to use military force against a terrorist target overseas.").

64. See *id.* The court based its dismissal of the case on a reasonable analysis of standing, concluding that Nasser al-Aulqi did not meet the requirements for filing a claim on the basis of next-friend standing. *Id.* at 35. First, the court found that there was no adequate explanation for Anwar al-Aulqi's inability to file the claim on his own behalf, which the court observed is fatal to next friend standing. *Id.* at 17. The court stated that all available evidence suggested that Aulqi is incommunicado as a matter of personal choice and philosophy, not coercion. *Id.* at 21. Also, Nasser al-Aulqi had not provided adequate evidence that his claims represented his son's actual interests. *Id.* at 20. There was no basis for the assumption that Anwar al-Aulqi wished to challenge the constitutionality of the government's decision in federal court. *Id.* at 21. In fact, the court inferred that the opposite was more likely. *Id.* Finally,

The district court went further, however, and agreed with the government that the claims and requested relief represented a “quintessential” political question and were therefore nonjusticiable.⁶⁵ The court analyzed the specifics of the *Aulaqi* scenario to determine whether it encompassed a form of authority reserved for the Executive Branch.⁶⁶ The court determined that the *Aulaqi* scenario encompassed exactly the sort of complex military, intelligence, and policy judgments that are the province of the Executive Branch.⁶⁷ The court also emphasized several times that the fundamental reason why this issue was nonjusticiable was the lack of judicially manageable standards for reviewing the judgment of the National Security Council.⁶⁸ Because the court did not have the necessary expertise for evaluating the merits of this decision, this claim could not be settled in court.⁶⁹

The court’s ruling rests firmly on standing grounds, but its conclusion that the issue in the case was a nonjusticiable political question amplified the dangerous scope of the holding.⁷⁰ Even if the court had granted standing in this case, the claims likely still would not have proceeded past the summary judgment stage.⁷¹ Further contributing to this concern is the fact that the court declined to address the state secrets doctrine, a formidable barrier to litigation in its own right.⁷²

Despite ruling on a technicality, the court did acknowledge the troubling and unsettling nature of the outcome, as well as the extraordinary circumstances of the case.⁷³ Yet, the court also rejected the plaintiff’s assertion that allowing the Executive to proceed in this manner amounted to a grant of unchecked and unreviewable killing power.⁷⁴ But a major question remains: after *Aulaqi*, does the government owe an American citizen any form of due process if he or

although the plaintiff claimed that the order of targeted killing prevented Anwar al-Aulaqi from emerging in public, the court observed that, under domestic and international law, the government could not kill Aulaqi if he attempted peaceful surrender. *Id.* at 31.

65. *Id.* at 45.

66. *See id.* at 46 (noting the “particular questions” the court would have to decide, including Aulaqi’s affiliation with al-Qaeda in the Arabian Peninsula, the link between that organization and al-Qaeda, whether Aulaqi is a “concrete, specific, and imminent threat to life or physical safety,” and whether there are other means the United States could reasonably employ).

67. *Id.* at 45.

68. *Id.* at 47.

69. *Id.*

70. *Id.*

71. *Id.* (finding in the alternative the claims nonjusticiable).

72. *Id.* at 54; *see also* discussion *infra* Part V.B (arguing that the state secrets privilege is “problematic” and should be “met with skepticism”).

73. *Al-Aulaqi*, 727 F. Supp. 2d at 51 (recognizing the “unsettling nature” of the conclusion.).

74. *Id.* at 52.

she is suspected of terrorism and selected for targeted killing?⁷⁵ The court's opinion does not directly answer this question, but it suggests that in practical terms, the answer is no.⁷⁶

III. CHALLENGING THE ASSERTED GROUNDS OF AUTHORITY FOR THE TARGETED KILLING OF AMERICANS

In its brief in response, the DOJ argued that the President's power to conduct the targeted killing of Aulqi comes from two sources of authority.⁷⁷ First, and more narrowly, the DOJ argued that the Authorization for the Use of Military Force (AUMF) serves as a statutory grant of authority to retaliate against threats of terrorism from al-Qaeda.⁷⁸ Second, and much more broadly, the DOJ argued that the authority to use defensive force against imminent threats of terrorism is inherent in the President's Article II military power.⁷⁹ Both arguments turn on the theory that targeted killing decisions are nonjusticiable political questions beyond judicial review.⁸⁰ As the following analysis demonstrates, this is a dubious assertion based on overbroad and inaccurate interpretations of the AUMF and the President's constitutional war powers.

A. *The Scope of the AUMF Is Not a Political Question*

In *Aulqi*, the DOJ asserted that the President has the authority to conduct targeted killing pursuant to congressionally granted war power,⁸¹ but this argument relies on an overbroad interpretation of the AUMF. It is debatable whether the scope of the AUMF and the powers it grants the Executive Branch encompass the circumstances of the *Aulqi* case. Furthermore, the scope of a congressional authorization for the use of military force is certainly an appropriate subject for judicial review, particularly where powers under the authorization may infringe on due process rights.⁸² As a matter of law, courts may properly review this issue.

Congress passed the AUMF in response to the terrorist attacks of September 11, but the actual text of the Authorization casts doubt

75. See *id.*

76. See *id.* at 46 ("Viewed through these prisms, it becomes clear that plaintiff's claims pose precisely the types of complex policy questions that the D.C. Circuit has historically held non-justiciable under the political question doctrine.").

77. Al-Aulqi Response, *supra* note 2, at 23–24.

78. *Id.* at 24.

79. *Id.* at 23–24.

80. *Id.* at 3–4.

81. *Id.* at 4.

82. See *infra* note 92 (citing the jurisdiction of federal courts regarding the scope of congressionally authorized war power).

on whether this authority extends to all suspected terrorists or only those responsible for the September 11 attacks.⁸³ The AUMF authorizes the President to use “all necessary and proper force” against those “he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”⁸⁴ The purpose of this authorization is to “prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.”⁸⁵ Although the goal of the Authorization is the prevention of more terrorist attacks, the designated authority appears to rest on a September 11 predicate.⁸⁶ In other words, those involved in the September 11 terrorist attacks are legal targets, but do all suspected terrorists fall within this construction?

In its brief in response, the DOJ never alleged that Aulahi was connected to the September 11 attacks.⁸⁷ However, the DOJ did assert that Aulahi had emerged as a senior leader in al-Qaeda in the Arabian Peninsula.⁸⁸ So, while it appears that Aulahi did not personally satisfy the September 11 predicate of the AUMF, it can be argued that membership or affiliation with al-Qaeda is enough to satisfy the AUMF.⁸⁹ Al-Qaeda planned and executed the terrorist attacks of September 11, and the AUMF authorizes lethal force against al-Qaeda.⁹⁰ Yet, the scope of the AUMF is unclear, as is the conclusion that Aulahi fit within this scope.⁹¹

More importantly, the argument that the AUMF grants the President authority to conduct targeted killings of Americans is itself likely subject to judicial review. Contrary to the DOJ’s assertion, 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.⁹² Whether Anwar al-Aulahi satisfies

83. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)) (delegating broad authority to the President to make determinations as to whether a person fits within the scope of the resolution).

84. *Id.* § 2(a).

85. *Id.*

86. William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 737 (2002).

87. See Al-Aulahi Response, *supra* note 2, at 6 (alleging that Aulahi held a senior leadership role in current al-Qaeda operations, but no September 11 relationship).

88. *Id.*

89. See Banks & Raven-Hansen, *supra* note 86, at 737.

90. See *id.* (discussing the scope of the AUMF to include the organizations involved in the terrorist attacks of September 11).

91. See *id.*

92. See Dehn & Heller, *supra* note 16, at 178 (“The jurisdiction of federal courts extends to the review of executive war measures in appropriate cases . . . This jurisdiction has traditionally included the ability to review whether the Executive has properly identified specific individuals or objects as being within the scope of congressionally authorized hostilities.”).

the September 11 predicate in specific circumstances may be a political question, but the targeted killing of Americans without due process is a matter of law subject to judicial review.⁹³ The court in *Aulaqi* should have focused on this broader question of law and probably erred in declining to do so.⁹⁴

If a court were to decide whether the AUMF permits the targeted killing of Americans, it would likely exercise restraint so that the AUMF does not operate to permit total global military power.⁹⁵ An unrestrained 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 organizations that were involved in the September 11 attacks.⁹⁶ A more balanced interpretation would not go as far while still enabling the Executive to effectively confront the threat of global terrorism.⁹⁷ A demonstration of specific evidence that Aulaqi was a senior leader with al-Qaeda would have gone a long way toward establishing the AUMF as the proper source of authority in this situation.⁹⁸ However, the DOJ argued that no such demonstration of evidence or independent review was even required.⁹⁹ This position supports an unrestrained interpretation of the AUMF in which the Executive can use lethal force against any person in any location simply on the basis of an unsubstantiated accusation. This is arguably an improper interpretation of the congressional purpose and intent behind the passage of the AUMF.¹⁰⁰

93. See *id.* at 187 (arguing that there is an important distinction in the *Aulaqi* case between ruling on a specific finding of fact and the broader question of law at issue).

94. See *id.* (arguing that the court failed to recognize this distinction despite the fact that Nasser al-Aulaqi's pleadings asked for relief in the form of declarations of law, not the specific findings of fact held nonjusticiable by the court).

95. See Banks & Raven-Hansen, *supra* note 86, at 737 (discussing the AUMF's limitations and noting the role of 18 U.S.C. § 1116 (2006) in restricting targeted killing).

96. See *id.* at 736–37 (“All persons are permissible targets provided that they planned, authorized, committed, or aided the September 11 attacks or harbored those who did.”).

97. See *id.* at 737.

98. See *id.* (noting that certain figures, such as Osama bin Laden, are implicated under the AUMF because there is causal evidence linking them to the September 11 attacks). The possibility of *in camera* review of the government's evidence against Aulaqi was never raised, though it might have resolved many of the concerns over verifying the government's accusations. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 46 (D.D.C. 2010) (noting that judicial resolution of plaintiff's claims would require the court to determine many of the factual issues involving Aulaqi's association with al-Qaeda and his potential as a threat to the United States).

99. See *Al-Aulaqi Response*, *supra* note 2, at 4–5 (noting that the new DOJ guidelines for states secret privilege would bar the disclosure of necessary evidence to establish standing for suit).

100. There is clear precedent for judicial review of the scope of congressional intent in the AUMF. For example, in *Hamdan v. Rumsfeld*, the Supreme Court rejected

B. *The Constitutionality of Targeted Killing Is Not
a Political Question*

In the alternative, and far more broadly, the DOJ argued that executive authority to conduct targeted killings is constitutionally committed power.¹⁰¹ Under this interpretation, the President has the authority to defend the nation against imminent threats of attack.¹⁰² This argument is not limited by statutory parameters or congressional authorization, such as that under the AUMF.¹⁰³ Rather, the duty to defend the nation is inherent in the President's constitutional powers and is not subject to judicial interference or review.¹⁰⁴

The DOJ is correct in arguing that the President is constitutionally empowered to use military force to protect the nation from imminent attack.¹⁰⁵ As the DOJ noted in its brief in response, the Supreme Court has held that the president has the authority to protect the nation from "imminent attack" and to decide the level of necessary force.¹⁰⁶ The same is true in the international context. Even though Yemen is not a warzone and al-Qaeda is not a state actor, international law accepts the position that countries may respond to specific, imminent threats of harm with lethal force.¹⁰⁷

the government's argument that the AUMF authorized the President to convene military tribunals under the circumstances of the case, observing that congressional intent did not support this interpretation of statutory authorization. 548 U.S. 557, 734 (2006) (finding nothing in the AUMF text or its legislative history to even hint that Congress intended to expand the President's authority to convene military commissions).

101. Al-Aulaqi Response, *supra* note 2, at 23–24.

102. *Id.*

103. *Id.*

104. *See id.* (contrasting the President's constitutional authority to protect the nation from imminent attack and the lack of constitutional authority for the Judicial Branch to engage in policymaking for national security).

105. *Id.* at 24; *see infra* notes 107–08 (discussing the use of defensive force to address an imminent threat to the nation).

106. Al-Aulaqi Response, *supra* note 2, at 24. In addition, the Supreme Court has held that domestic law enforcement may use lethal force against those who pose an imminent threat of violence or harm to others. *See Tennessee v. Garner*, 471 U.S. 1, 4 (1985) ("[Deadly] force may not be used unless . . . the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.").

107. This is a fundamental principle in international law derived from the "Caroline incident." *See Dale Stephens, Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 135 (1998) ("The right of unit of self defense exists as a matter of customary international law and it is the 'Caroline' principles which provide the legal basis for the contours of the right . . ."). The UN Charter also permits the use of defensive force by a nation when attacked by another nation. *See U.N. Charter art. 51* ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . .").

Under these doctrines of domestic and international law, the use of lethal force against Aulahi was valid if he presented a concrete, specific, and imminent threat of harm to the United States.¹⁰⁸

Therefore, the President was justified in using lethal force to protect the nation against Aulahi, or any other American, if that individual presented a concrete threat that satisfied the “imminence” standard.¹⁰⁹ However, the judiciary may, as a matter of law, review the use of military force to ensure that it conforms with the limitations and conditions of statutory and constitutional grants of authority.¹¹⁰ In the context of targeted killing, a federal court could evaluate the targeted killing program to determine whether it satisfies the constitutional standard for the use of defensive force by the Executive Branch. *Targeted* killing, by its very name, suggests an entirely premeditated and offensive form of military force.¹¹¹ Moreover, the overview of the CIA’s targeted killing program revealed a rigorous process involving an enormous amount of advance research, planning, and approval.¹¹² While the President has exclusive authority over determining whether a specific situation or individual presents an imminent threat to the nation, the judiciary has the authority to define “imminence” as a legal standard.¹¹³ These

108. Stephens, *supra* note 107, at 136–37 (discussing the justification of unit self-defense “in the most pressing of circumstances” where “the imminence of attack is so clear and the danger so great that defensive action is absolutely necessary”). However, the notion of defining and ascertaining an imminent threat is particularly difficult in the context of international terrorism. Modern-day terrorist attacks often involve extensive planning, training, and other forms of preparation, as well as cooperation among individuals in different geographical locations carrying out disparate responsibilities. See *Eight Years After 9/11: Confronting the Terrorist Threat to the Homeland: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 111th Cong. (2009) (statement of Robert S. Mueller III, Dir. of the Fed. Bureau of Investigation) (acknowledging the “many different directions” from which modern-day terrorism threatens our country).

109. See *supra* notes 106–07 (discussing the use of defensive force to address an imminent threat to the nation).

110. Dehn & Heller, *supra* note 16, at 178 (observing that the jurisdiction of federal courts “has traditionally included the ability to review whether the executive has properly identified specific individuals or objects as being within the scope of congressionally authorized hostilities”); see also *Ex parte Quirin*, 317 U.S. 1, 24 (1942) (reviewing whether the President has constitutional authority to order the petitioners tried by military tribunal).

111. See Dehn & Heller, *supra* note 16, at 183 (“Perhaps the premeditated targeting of a U.S. citizen deserves a higher standard.”).

112. See *supra* Part II.A (discussing the nature and protocol of the U.S. targeted killing program).

113. See Al-Aulahi Response, *supra* note 2, at 24 (“[T]he President may act to protect the Nation from imminent attack and ‘determine what degree of force [a] crisis demands.’” (alteration in original) (quoting *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 670 (1863))); Dehn & Heller, *supra* note 16, at 179, 187 (criticizing Al-Aulahi for failing to indicate whether “the case involved an extant armed conflict or a separate, discrete act of self-defense” and arguing that the courts should make a legal determination as to the standard for targeted killing).

are general concepts of law, not political questions, and they are subject to judicial review.¹¹⁴

Under judicial review, a court would likely determine that targeted killing does not satisfy the imminence standard for the president's authority to use force in defense of the nation. Targeted killing is a premeditated assassination and the culmination of months of intelligence gathering, planning, and coordination.¹¹⁵ "Imminence" would have no meaning as a standard if it were stretched to encompass such an elaborate and exhaustive process.¹¹⁶ Similarly, the concept of "defensive" force is eviscerated and useless if it includes entirely premeditated and offensive forms of military action against a perceived threat.¹¹⁷ Under judicial review, a court could easily and properly determine that targeted killing does not satisfy the imminence standard for the constitutional use of defensive force.¹¹⁸

IV. CHALLENGING THE CONSTITUTIONALITY OF TARGETED KILLING: A CLEAR VIOLATION OF DUE PROCESS

The President's supposed authority to conduct targeted killings of Americans is highly questionable.¹¹⁹ Moreover, the DOJ's argument that targeted killing is a political question within executive discretion inaccurately portrays the judiciary's power to review broader questions of law.¹²⁰ Yet in addition to these compelling objections to the legal underpinnings of targeted killing authority, targeted killing likely violates existing law as well.¹²¹ Targeted killing is a unilateral government execution that completely

114. Al-Aulaqi Response, *supra* note 2, at 24–25 (acknowledging its authority to define "imminence" yet declining to do so because it would require the court to determine "ex ante the permissible scope of particular tactical decisions"); Dehn & Heller, *supra* note 16, at 179 (referring to the government's motion to dismiss on the basis that it "involv[es] an executive-branch decision to target an individual in the context of a congressionally authorized, armed conflict"); *id.* at 187 (noting Aulagi's request for the court to make a legal determination of the correct standard for the targeted killing of a U.S. citizen).

115. See *supra* Part II.A.

116. See *supra* note 111 (suggesting that a premeditated killing requires a higher standard than the use of defensive force).

117. See *supra* note 108 and accompanying text (explaining the current understanding of the imminence standard).

118. See Al-Aulaqi Response, *supra* note 2, at 31 (noting that the judiciary has a long and established history of reviewing the scope of congressionally authorized war power).

119. See discussion *supra* Part III.

120. See *supra* note 118.

121. See discussion *infra* Part IV.A–C.

circumvents traditional notions of law enforcement and violates even minimum notions of established due process.¹²²

A. How Due Process Rights Are Determined

Despite the fact that Aulaqi was hiding in Yemen, the Fifth Amendment still protected him. The Supreme Court has held that Americans enjoy the same constitutional protections abroad as in American territory, unless the application of the Bill of Rights would prove “impracticable and anomalous.”¹²³ The rationale for this principle is that although Americans are not completely without constitutional protections abroad, it may not always be feasible to ensure all of these protections.¹²⁴ The application of the Bill of Rights abroad must take into account “the particular circumstances, the practical necessities, and the possible alternatives” of the situation at hand.¹²⁵ Analyzing Aulaqi’s Fifth Amendment rights is especially complex given the many political, economic, and security problems in Yemen at the time of his killing.¹²⁶

The Fifth Amendment provides, in part, that no American may be “deprived of life, liberty, or property, without due process of law.”¹²⁷ The case of Anwar al-Aulaqi implicates procedural due process because the plaintiff’s complaint alleges that the government is attempting to deprive Aulaqi of life without any formal presentation of the charges against him or an opportunity to protest these charges at a hearing before an impartial judge.¹²⁸ The Supreme

122. *Id.*

123. *See Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring) (asserting that the protections of the Constitution apply overseas, but that special circumstances may limit the application of these protections).

124. *Id.*

125. *Id.*

126. Yemen has teetered on the edge of “failed state” status in recent years. For an assessment of the critical political conditions on the ground in Yemen, see *The Failed States Index 2011*, FOREIGN POLY, <http://www.foreignpolicy.com/failedstates> (last visited Nov. 1, 2011). These conditions would implicate the particularized analysis described in *Reid v. Covert*. *See id.*

127. U.S. CONST. amend. V.

128. Al-Aulaqi Complaint, *supra* note 1, ¶¶ 4–6. Due process has both procedural and substantive meanings. Substantive due process refers to an evolving set of fundamental rights recognized by the Supreme Court that have “for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.” *Albright v. Oliver*, 510 U.S. 266, 272 (1994). The Supreme Court has described substantive due process as “all fundamental rights comprised within the term liberty [that] are protected by the federal Constitution by invasion from the states.” *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (applying the due process clause of the Fourteenth Amendment). Procedural due process, on the other hand, refers to the minimum level of procedures that must be satisfied before the government may complete any deprivations of life, liberty, or property. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

Court uses a balancing test for determining the level of due process in different contexts.¹²⁹ This balancing test has three factors: the private interest that will be affected by a deprivation, the risk of an erroneous deprivation by the procedural method in question, and the government interests involved.¹³⁰

Aulaqi's case represents a collision of the first and third factors.¹³¹ The deprivation in question was Aulaqi's life, the most serious deprivation in law.¹³² In the case of judicial error or procedural shortfall, property can be returned and liberty can be restored, but the deprivation of life is permanent. However, the government's interest in protecting American citizens from the unrelenting threat of terrorism is also compelling.¹³³ The exigencies involved in combating terrorism require decisive action and safeguards for intelligence sources that help identify threats.¹³⁴ Under such extraordinary circumstances, the time and resources involved in satisfying procedural due process rights might also serve to inadvertently amplify specific threats of terrorism.¹³⁵

The purpose of the Fifth Amendment, however, is to provide protections for citizens, not to increase the power of government or to ease the burden of government agencies under exigent circumstances.¹³⁶ Given this constitutional purpose and the unique importance of life as a civil liberty, it is clear that Aulaqi is owed at least the minimum form of due process protection.

B. A Comparative Perspective: The Due Process Rights of Detainees

The position that minimum due process protections are required in *Aulaqi* is a natural extension of the holding in *Hamdi v. Rumsfeld*. In *Hamdi*, the Supreme Court held that the government may not indefinitely detain a citizen without providing some form of

129. See *Mathews*, 424 U.S. at 334–35 (establishing the procedural due process balancing test).

130. *Id.*

131. See *id.*; Al-Aulaqi Complaint, *supra* note 1, ¶¶ 4–6.

132. Al-Aulaqi Complaint, *supra* note 1, ¶¶ 4–6.

133. Al-Aulaqi Response, *supra* note 2, at 43–46 (“The state secrets privilege should be invoked only rarely, but its assertion in this case is proper and entirely consistent with the Attorney General’s Policy. Without admitting or denying plaintiff’s allegations (and indeed regardless of whether any particular allegations are true), the Complaint puts directly at issue the existence and operational details of alleged military and intelligence activities directed at combating the terrorist threat to the United States.”).

134. *Id.*

135. *Id.*

136. See *Mathews*, 424 U.S. at 332 (“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”).

procedural due process.¹³⁷ Yaser Hamdi was an American captured in Afghanistan in 2001 and turned over to U.S. authorities during the invasion of Afghanistan.¹³⁸ He was initially held at the detention facility in Guantanamo Bay, but was transferred to military holding brigades in Virginia and South Carolina after the military learned that he was an American.¹³⁹ Originally, President George W. Bush claimed the authority to hold Hamdi as an enemy combatant caught within a theatre of war.¹⁴⁰ As an enemy combatant, Hamdi was not entitled to any procedural rights such as the right to an attorney or access to a federal court.¹⁴¹ However, the Eastern District of Virginia granted next-friend standing to his father, and that court subsequently found the evidence against Hamdi insufficient to support his detention.¹⁴² The Fourth Circuit reversed, citing the broad wartime powers designated to the president under Article II of the Constitution and the infringement on executive power that would occur if judicial review proceeded in this case.¹⁴³ Hamdi's father appealed the reversal of the Fourth Circuit and the Supreme Court granted certiorari.¹⁴⁴

Although the Court did not reach a majority opinion in its decision, a plurality of Justices agreed that the Executive Branch does not have the power to detain an American citizen indefinitely without providing some basic due process protections.¹⁴⁵ A majority of Justices agreed that Hamdi had the right to challenge his detention.¹⁴⁶ Because it is a plurality opinion, the extent of the due process protections required in a federal detention scenario is unclear.¹⁴⁷ But the basic principle of *Hamdi* is that the Executive does not have the authority to detain an American citizen without some form of due process.¹⁴⁸

If elements of due process are required when the government deprives an American of liberty, is it not logical to conclude that the government must also satisfy due process when depriving an American of life? This is a natural extension of the Hamdi holding,

137. *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004).

138. *Id.* at 510.

139. *Id.*

140. *Id.* at 512.

141. *Id.* at 513.

142. *Hamdi v. Rumsfeld*, 316 F.3d 450, 476 (2003).

143. *Hamdi*, 542 U.S. at 514–15.

144. *Id.* at 516.

145. *Id.* at 521.

146. *Id.* at 539–40.

147. *Id.* at 538–39.

148. *Id.* at 521.

especially because a deprivation of life must be treated more seriously and carefully than a deprivation of liberty.¹⁴⁹

Not only is the *Hamdi* holding a natural theoretical cousin of *Aulaqi*, but the legal analysis is also similar. In its brief in response to the *Aulaqi* complaint, the DOJ made several arguments that echo the overturned Fourth Circuit's arguments in *Hamdi*: judicial review represents an infringement on textually committed executive authority and litigating this issue would involve the disclosure of sensitive intelligence that would threaten national security.¹⁵⁰ *Hamdi* was an American citizen, and the government detained him due to allegations that he was fighting for the Taliban in Afghanistan.¹⁵¹ Similarly, *Aulaqi* was an American citizen accused of providing leadership and spiritual counsel to al-Qaeda terrorists.¹⁵² He was therefore considered a high-risk threat to national security, and the DOJ claims that the authority to kill *Aulaqi* is a nonjusticiable political question protected by the state secrets privilege.¹⁵³ Because the Supreme Court held that *Hamdi*'s deprivation of liberty merited due process, it is a natural extension of this holding to find that the government also owes *Aulaqi* basic due process.

However, there are important factual distinctions between *Hamdi* and *Aulaqi* to balance against the similarities. Although both cases fit the general category of due process rights in the context of national security concerns, the circumstances of the *Hamdi* holding limit its application to *Aulaqi*.¹⁵⁴ *Hamdi* was captured in a theatre of war and originally accused of aiding the Taliban in hostilities against the United States.¹⁵⁵ But once he was moved to holding briggs within the United States, *Hamdi* was fully secured under government control.¹⁵⁶ Therefore, at the time of the Supreme Court's decision, *Hamdi* was not an imminent threat to national security and was completely subject to government authority.¹⁵⁷

The same cannot be said of *Aulaqi*. As an alleged high-value terrorist target hiding in Yemen, a known staging ground for al-

149. *Id.* at 529. Expanding on the Court's reasoning in *Hamdi*, which applies *Mathews* to detention cases, citizens the U.S. government targets and kills may be entitled to notice and a hearing. *Id.* at 597; Mike Dreyfuss, Note, *My Fellow Americans, We Are Going to Kill You: The Legality of Targeting and Killing U.S. Citizens Abroad*, 65 VAND. L. REV. (forthcoming Jan. 2012).

150. Al-*Aulaqi* Response, *supra* note 2, at 43-47.

151. *Hamdi*, 542 U.S. at 510.

152. Al-*Aulaqi* Response, *supra* note 2, at 5.

153. *Id.* at 5, 7.

154. *Hamdi*, 542 U.S. at 510.

155. *Id.*

156. *Id.* at 510, 512.

157. *Id.* At the time of the *Hamdi* holding, the government asserted that his alleged ties to the Taliban rendered him an ongoing threat to national security. Contrary to the *Aulaqi* scenario, however, if *Hamdi* did have anti-American goals, his detainment sufficiently neutralized that threat.

Qaeda operations, Aulahi was not under government control.¹⁵⁸ Assuming that the government's allegations against him were true, Aulahi posed an imminent threat to national security.¹⁵⁹ These are important factual distinctions that may render the *Hamdi* opinion inapplicable to the *Aulahi* case. The lack of government control over Aulahi and the potential for an imminent threat to national security may serve as government interests that trump Aulahi's due process rights. The exigencies of the Aulahi situation are important distinctions that may render the *Hamdi* analysis inapplicable.

However, even if the *Hamdi* holding is not directly controlling in the *Aulahi* context, it is still highly relevant to the analysis. After *Hamdi*, it is clear that very serious constitutional rights are implicated, and perhaps violated, when the president authorizes the targeted killing of an American without any independent judicial review of that decision or of the criteria involved.¹⁶⁰ As demonstrated in *Aulahi*, it is equally clear that litigating this issue in federal court is an ineffective ex post mechanism for ensuring basic due process protections.¹⁶¹ Yet the result in *Aulahi* is unsatisfactory and potentially very dangerous. Given the constitutional protections guaranteed by the Supreme Court in *Hamdi*, it is important to clarify the law of targeted killing and ensure basic safeguards against the abuse of this power.

V. CHALLENGING THE EXECUTIVE BRANCH DEFENSE OF TARGETED KILLING

A. *The Obama Administration's Reassurances Are Circular and Unsatisfactory*

The Obama Administration has addressed the controversy over targeted killing in an effort to assuage concerns over the program's constitutionality, including concerns over due process protections.¹⁶² However, the Administration's explanations do little but reiterate the gaping hole in guaranteed due process protections if Americans are

158. Al-Aulahi Response, *supra* note 2, at 6.

159. See *id.* (describing Aulahi's leadership role and involvement with al-Qaeda in the Arabian Peninsula).

160. *Hamdi*, 542 U.S. at 516.

161. See *Al-Aulahi v. Obama*, 727 F. Supp. 2d 1, 9 (D.D.C. 2010) (observing the unsettling nature of the case but also deference owed the Executive Branch under the circumstances).

162. Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks at Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

targeted with lethal force.¹⁶³ In fact, the Administration's attempts to justify the current response emphasize the desperate need for a clear articulation of the law and a mechanism for constitutional safeguards.¹⁶⁴ Harold Koh, the Legal Adviser to the Department of State, addressed the criticisms of targeted killing in a speech at the Annual Meeting of the American Society of International Law in March 2010.¹⁶⁵ Koh addressed the concern that "the use of lethal force against specific individuals fails to provide adequate process and thus constitutes *unlawful extrajudicial killing*."¹⁶⁶ First, he asserted that a state engaged in armed conflict is not required to provide legal process to military targets.¹⁶⁷ Koh then attempted to reassure the critics of targeted killing that the program was conducted responsibly and with precision.¹⁶⁸ He said that the procedures for identifying targets for the use of lethal force are "extremely robust," without providing any explanation or details to substantiate this claim.¹⁶⁹ He then argued that "[i]n my experience, the principles of proportionality and distinction . . . are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with international law."¹⁷⁰ Koh dismissed constitutional claims over targeted killing by simply suggesting that the program is legal and responsible.¹⁷¹ But this response only begs the question over targeted killing: what mechanisms are in place to prevent the unsafe and irresponsible use of this extraordinary power? Asserting that the program is legal and responsible without substantiating this assertion rests on notions of blind faith in executive prudence and responsibility, and provides no grounds for reassurance.¹⁷²

The Obama Administration's assurances regarding the targeted killing program are unsatisfactory because they fail to address the primary concern at issue: the possibility that an unchecked targeted killing power within the Executive Branch is an invitation for abuse.¹⁷³ Without some form of independent oversight, there is no mechanism for ensuring the accurate and legitimate use of targeted killings in narrowly tailored circumstances.¹⁷⁴

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *See id.*

173. *See id.*

174. *See infra* notes 188–99 and accompanying text (arguing that the Obama Administration's justification amounts to an insufficient due process guarantee).

B. A Record of Error and Abuse of Authority

Currently, there is no specific evidence that the targeted killing program has been used for illegitimate purposes other than national defense and security. However, the Executive's exercise of authority in identifying and pursuing threats of terror has produced a worrisome error rate.¹⁷⁵ According to an analysis of Predator drone strikes in Pakistan conducted by the New America Foundation, since 2004, the non-militant fatality rate has been roughly 20 percent.¹⁷⁶ In other words, about one-fifth of those killed by Predator drone strikes have been non-military targets, including innocent civilians.¹⁷⁷ In June of 2010, it was reported that the government lost nearly 75 percent of the cases involving habeas petitions filed by detainees at Guantanamo Bay.¹⁷⁸ This suggests that for the majority of detained enemy combatants, the government has had insufficient evidence for the assertion that the detained individuals were involved in hostilities against the United States.¹⁷⁹ The rate of error in these instances only adds to the concern over the procedural guarantees of the targeted killing process and the need for a more standardized process with a robust system of screening and oversight.

There is also historical precedent for cautiously evaluating the legitimacy and constitutionality of unreviewable executive authority in matters of espionage and national security. In 1976, President Ford issued an executive order outlawing political assassination.¹⁸⁰ The order was a response to revelations after the Watergate scandal that the CIA had attempted to assassinate Cuban President Fidel Castro multiple times.¹⁸¹ Every U.S. president since Ford has upheld the ban on political assassinations in subsequent executive orders.¹⁸² This is an example of classified CIA activity that, once publicly known, was deemed unacceptable as a matter of law and policy.¹⁸³ The current targeted killing program conducted in executive secrecy raises concerns similar to those of political assassination.

175. See *infra* notes 195–97.

176. *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004–2011*, NEW AM. FOUND., <http://counterterrorism.newamerica.net/drones> (last visited Nov. 1, 2011).

177. *Id.*

178. Carol Rosenberg, *U.S. Has Now Lost 75 Percent of Guantanamo Habeas Cases*, *Guantanamo: Beyond the Law*, MCCLATCHY (July 8, 2010), <http://www.mcclatchydc.com/2010/07/08/97211/federal-judge-order-release-of.html>.

179. *See id.*

180. Exec. Order No. 11,905, 3 C.F.R. 90 (1976).

181. *U.S. Policy on Assassinations*, CNN JUST., Nov. 4, 2002, http://articles.cnn.com/2002-11-04/justice/us.assassination.policy_1_assassination-prohibition-cia-lawyers?_s=PM:LAW.

182. *Id.*

183. *Id.*

The state secrets privilege is another form of unreviewable executive power that ought to be met with skepticism. In *Aulaqi*, the DOJ raised the state secrets privilege as alternative grounds for summary judgment, claiming that litigating the issues before the court would require the disclosure of sensitive classified intelligence and would endanger national security.¹⁸⁴ Originally, the state secrets privilege was a rarely-used but formidable evidentiary objection.¹⁸⁵ Since the terrorist attacks of September 11, however, it has been used much more frequently and as grounds for the dismissal of entire cases.¹⁸⁶

Not only is the expanded use of the state secrets privilege problematic, so too is the privilege itself.¹⁸⁷ The Supreme Court formally recognized the privilege in *United States v. Reynolds*.¹⁸⁸ However, the validity of even this first use of the privilege has been called into question, raising concerns over the potential for government abuse.¹⁸⁹ In *Reynolds*, the government argued that certain accident reports containing state secrets should be kept out of trial.¹⁹⁰ Although the Court agreed, the merits of this decision have since been cast in doubt.¹⁹¹ When the accident reports in *Reynolds* later became public, they were shown to contain no sensitive state secrets.¹⁹² Instead, the reports contained potentially embarrassing evidence of negligent government conduct.¹⁹³ As long as targeted killing is conducted under the cloak of the state secrets privilege, there is no guarantee that the program will be free of government misconduct.

C. The Need for a Resolution

Concerns over targeted killing error rates and historical abuses of executive power cast extraordinary doubt over the adequacy of the Obama Administration's legal justification of targeted killing, as

184. Al-Aulaqi Response, *supra* note 2, at 6.

185. 154 CONG. REC. 198, 199 (2008) (statement of Sen. Kennedy) (introducing the State Secrets Protection Act, S. 2533, 110th Cong. 154 (2008)).

186. *Id.* at 200.

187. *See id.* (stating that the privilege's limitation on judicial review has led to further litigation and public skepticism).

188. *Id.* (citing *United States v. Reynolds*, 345 U.S. 1 (1953)).

189. *See id.* ("When the documents finally became public just a few years ago, it became clear that the government had lied. The papers contained information embarrassing to the government but nothing to warrant top secret treatment or denying American citizens honest adjudication of their lawsuit.")

190. *Reynolds*, 345 U.S. at 11.

191. *See* 154 CONG. REC. 2008 (stating that the privilege's limitation on judicial review ultimately led to further litigation and public skepticism when the accident from the *Reynolds* case was later declassified).

192. *Id.*

193. *Id.*

articulated by the Department of State.¹⁹⁴ The government's argument is that it should be taken at its word when it assures the public that the process for identifying and targeting suspected terrorists with lethal force is careful, rigorous, and legal.¹⁹⁵ This is not an adequate explanation of targeted killing law for two reasons. First, this explanation leaves unanswered the question of *how* the targeted killing program is careful, rigorous, and legal.¹⁹⁶ Second, there is ample historical evidence that suggests that executive guarantees of authority and privilege ought to be met with skepticism.¹⁹⁷ Without some form of independent oversight or review, taking the Executive Branch at its word is not an adequate form of due process and provides no minimum constitutional guarantee.¹⁹⁸

VI. THE RESPONSIBLE WAY FORWARD: CONGRESS SHOULD EITHER PROHIBIT THE TARGETED KILLING OF AMERICANS OR ESTABLISH OVERSIGHT

The targeted killing of Americans, as demonstrated by the *Aulaqi* case, presents complex questions of constitutional law that are not easily answered or resolved.¹⁹⁹ This is more than an academic debate; the stakes are high, as targeted killing in its current form provides the Executive Branch with a power over American lives that is chillingly broad in scope.²⁰⁰ It is concerning that the President's grounds for claiming this extraordinary authority are tenuous and subject to compelling challenges.²⁰¹ Furthermore, the absence of basic due process protection in *Aulaqi* appears unconstitutional after *Hamdi*.²⁰² But the *Aulaqi* case shows that the constitutional objections to targeted killing cannot be resolved in federal court.²⁰³ For these reasons, Congress should intervene by passing legislation with the goal of establishing clear principles that safeguard fundamental due process liberties from potential executive overreach.

194. Koh, *supra* note 162.

195. *See id.* ("Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise.").

196. *Contra id.* (offering no actual evidence to support this claim).

197. *See supra* notes 191–96.

198. Al-Aulaqi Complaint, *supra* note 1, ¶ 5; *see also* Murphy & Radsan, *supra* note 20, at 437 (asserting that in the context of targeted killing, due process requires at least a minimum level of judicial control).

199. *See supra* Part II.B–C.

200. *See* Dehn & Heller, *supra* note 16, at 187 ("Judge Bates's opinion [in *Al-Aulaqi*], in short, makes it impossible for an American citizen to challenge her inclusion on the JSOC kill list.").

201. *See supra* Part III.

202. *See supra* Part IV.B.

203. *See supra* Part II.B–C.

A. Option One: Congress Could Pass Legislation to
Establish Screening and Oversight of
Targeted Killing

As the *Aulaqi* case demonstrates, any resolution to the problem of targeted killing would require a delicate balance between due process protections and executive power.²⁰⁴ In order to accomplish this delicate balance, Congress can pass legislation modeled on the Foreign Intelligence Surveillance Act (FISA) that establishes a federal court with jurisdiction over targeted killing orders, similar to the wiretapping court established by FISA.²⁰⁵ There are several advantages to a legislative solution. First, FISA provides a working model for the judicial oversight of real-time intelligence and national security decisions that have the potential to violate civil liberties.²⁰⁶ FISA also effectively balances the legitimate but competing claims at issue in *Aulaqi*: the sensitive nature of classified intelligence and national security decisions versus the civil liberties protections of the Constitution.²⁰⁷ A legislative solution can provide judicial enforcement of due process while also respecting the seriousness and sensitivity of executive counterterrorism duties.²⁰⁸ In this way, congress can alleviate fears over the abuse of targeted killing without interfering with executive duties and authority.

Perhaps most importantly, a legislative solution would provide the branches of government and the American public with a clear articulation of the law of targeted killing.²⁰⁹ The court in *Aulaqi* began its opinion by explaining that the existence of a targeted killing program is no more than media speculation, as the government has neither confirmed nor denied the existence of the program.²¹⁰ Congress can acknowledge targeted killing in the light of day while ensuring that it is only used against Americans out of absolute

204. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 51 (D.D.C. 2010) (noting the complex and disconcerting conflict between constitutional claims at issue in the case).

205. Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–1862 (2006).

206. *Id.*

207. *See id.*

208. *See id.*

209. *Rise of the Drones: Unmanned Systems and the Future of War*, Hearing Before the Subcomm. on Nat'l Sec. & Foreign Affairs of the H. Comm. on Oversight & Gov't Reform, 110th Cong. 2 (2010) (written testimony of Professor Kenneth Anderson) (arguing that Congress must clearly establish the authority for targeted killing of suspected terrorists).

210. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 11 (D.D.C. 2010).

necessity.²¹¹ Independent oversight would promote the use of all peaceful measures before lethal force is pursued.²¹²

i. FISA as an Applicable Model

FISA is an existing legislative model that is applicable both in substance and structure.²¹³ FISA was passed to resolve concerns over civil liberties in the context of executive counterintelligence.²¹⁴ It is therefore a legislative response to a set of issues analogous to the constitutional problems of targeted killing.²¹⁵ FISA also provides a structural model that could help solve the targeted killing dilemma.²¹⁶ The FISA court is an example of a congressionally created federal court with special jurisdiction over a sensitive national security issue.²¹⁷ Most importantly, FISA works. Over the years, the FISA court has proven itself capable of handling a large volume of warrant requests in a way that provides judicial screening without diminishing executive authority.²¹⁸ Contrary to the DOJ's claims in *Aulaqi*, the FISA court proves that independent judicial oversight is institutionally capable of managing real-time executive decisions that affect national security.²¹⁹

The motivation for passing FISA makes this an obvious choice for a legislative model to address targeted killing. With FISA, Congress established independent safeguards and a form of oversight in response to President Nixon's abusive wiretapping practices.²²⁰ The constitutional concern in FISA involved the violation of Fourth Amendment privacy protections by excessive, unregulated executive

211. See Kretzmer, *supra* note 19, at 202 ("Under ordinary human rights principles, based on a law-enforcement model with its guarantees of due process, use of lethal force to defend persons against unlawful violence is justified only when absolutely necessary.").

212. See Banks & Raven-Hansen, *supra* note 86, at 678–79 (concluding that the Constitution does not prohibit the targeted killing abroad of foreign nationals, at least in anticipatory self-defense when other more peaceful means of defense have been exhausted).

213. Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–1862 (2006).

214. See Larry Abramson, *The Secret Court of Terror Investigations*, NPR, Dec. 13, 2005, <http://www.npr.org/templates/story/story.php?storyId=5049679> (noting that FISA was enacted to end the practice of placing wiretaps on enemies of President Nixon).

215. See *id.*

216. 50 U.S.C. §§ 1801–1862.

217. *Id.* § 1803.

218. See Ellen Yaroshesky, *Secret Evidence Is Slowly Eroding the Adversary System: CIPA and FISA in the Courts*, 34 HOFSTRA L. REV. 1063, 1081 (2006).

219. See *id.*

220. See Abramson, *supra* note 214 ("The Foreign Intelligence Surveillance Court was supposed to put an end to the kinds of wiretaps that were placed on the phones of enemies of President Nixon, such as Morton Halperin.").

power.²²¹ Similarly, the current state of targeted killing law allows for executive infringement on Fifth Amendment due process rights. Although there is no evidence of abusive or negligent practices of targeted killing, the main purpose of congressional intervention is to ensure that targeted killing is conducted only in lawful circumstances after a demonstration of sufficient evidence.

Finally, a FISA-style court is a potentially effective possibility because it would provide *ex ante* review of targeted killing orders, and the pre-killing stage is the only stage during which judicial review would be meaningful.²²² In the context of targeted killing, due process is not effective after the decision to deprive an American of life has already been carried out. Pre-screening targeted killing orders is a critical component of judicial oversight. Currently, this screening is conducted by a team of attorneys at the CIA.²²³ Despite assurances that review of the evidence against potential targets is rigorous and careful, due process is best accomplished through independent judicial review.²²⁴ The FISA court provides a working model for judicial review of real-time requests related to national security.²²⁵ FISA also established the requisite level of probable cause for clandestine wiretapping and guidelines for the execution and lifetime of the warrant, whereas the legal standards used by the CIA's attorneys are unknown.²²⁶ The only meaningful way to ensure that Americans are not wrongfully targeted with lethal force is to screen the evidence for the decision and to give ultimate authority to an impartial judge with no institutional connection to the CIA.

221. *See id.* (acknowledging the tension between FBI agents who try to obtain warrants and the Justice Department that refuses to take the cases to the Foreign Intelligence Surveillance Court for privacy concerns).

222. *See* Murphy & Radsan, *supra* note 20, at 438 (stating that the pre-killing review could increase the accuracy of target selection, reducing the danger of mistaken or illegal destruction of lives, limbs and property).

223. *See supra* Part II.A (describing CIA procedural process for targeted killing program).

224. *See* Murphy & Radsan, *supra* note 20, at 437 (arguing that courts are capable of applying duly deferential standards and determining the legality of attacks after they occur); *supra* Part III.B (arguing that under judicial review, a court could easily and properly determine that targeted killing does not satisfy the imminence standard for the constitutional use of defensive force).

225. Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–1862 (2006).

226. *Id.* § 1805(a); *see supra* Part II.A (describing how few specific details are known about the evaluation of evidence against suspected terrorists or the standard of proof).

ii. CIPA: An Alternative Model

The Classified Intelligence Procedures Act (CIPA) provides another blueprint for a possible legislative solution.²²⁷ CIPA was passed to protect against the practice of “graymailing,” in which defendants accused of crimes by the government would cause the release of classified information through discovery if prosecuted.²²⁸ This left the government with a difficult choice: either drop the charges or continue the case and risk the exposure of sensitive information.²²⁹ CIPA responded to this problem by providing unclassified substitutes to privileged information that allow the litigation to proceed.²³⁰ During discovery, security-cleared defendants and defense counsel are allowed to review classified evidence.²³¹ Also, defendants in possession of classified evidence for use at trial are allowed to utilize this evidence using a similar procedure that protects against public release.²³²

Legislation modeled on CIPA and applied to the context of targeted killing would allow a case like *Aulaqi* to proceed in federal court. Rather than dismiss the entire suit out of deference to the state secrets privilege, a CIPA-style procedure would allow a court and the defendant to review the government charges without endangering sensitive intelligence sources. If the government reveals compelling evidence that confirms the specific and imminent nature of a threat from a suspected terrorist, as it claimed in *Aulaqi*, then a court can at least review this evidence before granting summary judgment.

A legislative solution modeled on CIPA also creates a less invasive procedure for the review of privileged information. This has the added advantage of avoiding the delicate balance of constitutional powers that a FISA-style remedy would involve.²³³ FISA responded to evidence of executive abuse by creating a direct form of judicial supervision.²³⁴ Because there is no such charge of misconduct in the case of targeted killing, perhaps a less intrusive remedy is

227. Classified Intelligence Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. §§ 1-16 (2006)).

228. Yaroshefsky, *supra* note 218, at 1067.

229. Timothy J. Shea, *CIPA Under Siege: The Use and Abuse of Classified Information in Criminal Trials*, 27 AM. CRIM. L. REV. 657, 658 (1990).

230. Classified Intelligence Procedures Act § 4.

231. Yaroshefsky, *supra* note 218, at 1067-68.

232. *Id.*

233. See Banks & Raven-Hansen, *supra* note 86, at 678-79 (“The President’s authority [to order a targeted killing], like the constitutional authority for self-defense itself, may well depend on the necessity for action and the gravity of risk, but depending on those factors would leave room for Congress to ban or regulate targeted killings except in the extreme case of an otherwise unavoidable catastrophic attack.” (footnote omitted)).

234. Abramson, *supra* note 214.

sufficient.²³⁵ Rather than creating a new judicial institution and altering the Executive's chain of decision making, a CIPA-style procedure would allow for litigation in this extraordinary context without altering the balance of power between the Executive and the judiciary. This alternative solution is less complicated to design and easier to implement. Although it would not allow for *ex ante* review of targeted killing orders, a solution modeled on CIPA might be a more practical and realistic solution given the bureaucratic hurdles of a FISA-style solution.

*B. Option Two: Congress Could Pass Legislation Prohibiting
the Targeted Killing of Americans*

Alternatively, Congress could pass legislation that explicitly prohibits the targeted killing of Americans unless the circumstances present a concrete threat of imminent danger.²³⁶ As the analysis in Part II.A indicates, *targeted* killing is a premeditated offensive military strategy, not a defensive practice.²³⁷ Congress could exercise its own constitutional powers as the war-making body of government to ensure that no American may be targeted for extrajudicial lethal force by the Executive Branch.²³⁸

Similarly, Congress could amend the AUMF to include a prohibition of the targeted killing of Americans.²³⁹ Although this has the potential to limit the military in counterterrorism measures in circumstances such as the *Aulaqi* case, it would emphasize congressional commitment to fundamental constitutional rights even in the face of terrorist threats.²⁴⁰ The irony of the *Aulaqi* case is that based on the publicly available evidence, there is good reason to believe the DOJ's assertion that Anwar al-Aulaqi presented significant danger to the country.²⁴¹ But allowing the president to target Aulaqi for extrajudicial killing presents its own danger, as it establishes a broad and unreviewable killing power with potential for

235. See Al-Aulaqi Complaint, *supra* note 1 (no allegation of government misconduct).

236. See *supra* notes 107–08 (noting that the notion of defining and ascertaining an imminent threat is particularly difficult in the context of international terrorism). Although this is simply a reiteration of the existing standard and therefore appears redundant, legislation of this kind has two important benefits. First, it reaffirms legislative commitment to the defense of individual liberties. Second, it provides a statutory basis for judicial review of challenges to targeted killing.

237. See discussion *supra* Part II.A.

238. U.S. CONST. art. I, § 8, cl. 11 (Congress's war-making power).

239. Al-Aulaqi Response, *supra* note 2, at 24 (citing the AUMF as congressional authority for the targeted killing of Aulaqi).

240. *Id.* at 4 (arguing that the judiciary should not interfere with the complexities of military and national security decisions).

241. See *supra* note 4 (providing an overview of the publicly available evidence linking Aulaqi to known terrorists).

error and abuse.²⁴² Americans must have more reassurance that the powers of the Executive Branch are limited and reasonable.

Although a legislative solution is appealing given the success of the analogous FISA court, a statutory ban on the targeted killings of Americans is certainly the preferable option. When a government unilaterally assassinates one of its own citizens in circumvention of civil liberties, this raises profound questions about the legitimacy of that government, especially in a representative democracy. It also stands in contradiction to the American constitutional legacy, in which separate but coequal branches of government were created primarily to limit the possibility of tyranny and other government abuses of power. A congressional ban on the targeted killing of Americans would represent a legislative rebuke of executive excesses in protection of fundamental civil liberties.

Congressional action of any kind, however, faces a very serious hurdle: as the DOJ made clear in the *Aulaqi* case, the executive branch position is that any infringement on the President's targeted killing authority is simply unconstitutional. Yet if congress were to prohibit targeted killing and a court found that such a law is an unconstitutional infringement on executive authority, there is still another and perhaps final option. In the event that a federal court interprets the constitution to actually permit the targeted killing of Americans by the Executive Branch, then it would be necessary to fix this constitutional flaw. A constitutional amendment prohibiting the practice of targeted killing would thus permanently extinguish the concerns over targeted killing.²⁴³

VI. CONCLUSION

The targeted killing of Americans raises serious due process concerns. But the law and protocol for targeted killing are unclear. Currently there is no independent enforcement of due process rights when the Executive targets Americans with lethal force on the basis of unsubstantiated accusations. As the *Aulaqi* case makes clear, the threat of international terrorism is very real, but so is the risk of an unchecked killing power with the potential for error and abuse. Congress should respond to this problem by clarifying the law and procedure of targeted killing in a way that enforces fundamental due process rights and keeps this power in check. The Executive owes due process rights in detention scenarios and must request a warrant

242. See *supra* Part V.B.

243. I credit Professor Michael Newton of Vanderbilt University Law School for advocating this solution during a discussion about targeted killing.

before wiretapping. The law of targeted killing should be updated to reflect similar minimum commitments to civil liberties.

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