EXECUTIVE POWER, DRONE EXECUTIONS, AND THE DUE PROCESS RIGHTS OF AMERICAN CITIZENS

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Few conflicts have tested the mettle of procedural due process more than the War on Terror. Although fiery military responses have insulated the United States from another 9/11, the Obama administration's 2011 drone execution of a U.S. citizen allegedly associated with al-Qaeda without formal charges or prosecution sparked public outrage. Judicial recognition that this nonbattlefield execution presented a plausible procedural due process claim ignited questions which continue to smolder today: What are the limits of executive war power? What constitutional privileges do American citizens truly retain in the War on Terror? What if the executive erred in its judgment and mistakenly executed an innocent citizen?

Currently, no legal regime provides answers or guards against the infringement of procedural due process the next time the executive determines that an American citizen must be executed to protect the borders of the United States. The executive remains free to unilaterally target and execute an American citizen via drone strike without the formal process that typically accompanies a death sentence under U.S. law. Protected under the aegis of national security, executive discretion has trumped the procedural due process rights of American citizens.

To contextualize these issues of presidential power and procedural due process, this Note first surveys the modern War on Terror by examining the statutory authority enabling drone strikes and the scope of executive war-making powers. Next, this Note employs the balancing test devised by the U.S. Supreme Court in Mathews v. Eldridge *to assess the due process afforded a citizen targeted for extrajudicial drone execution under the executive's unilateral methodology. Two potential safeguards—ex post and ex ante judicial review of drone strikes—are examined as possible defenses against the unjustified execution of an American citizen.*

After comparing these two systems of judicial review, this Note details and advocates for the congressional implementation of a narrowly tailored ex

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ante schema to provide an additional layer of process and reduce the risk of an unfounded drone execution. By lowering the likelihood of an erroneous execution, this precise ex ante legal regime strives to fulfill the procedural due process requirements delineated in Mathews v. Eldridge*. This finely tailored ex ante regime mitigates executive discretion while still bending to meet the onerous demands of national security imposed in the modern age of terror.*

INTRODUCTION

In September 2011, the Obama administration employed a targeted drone strike to covertly execute Anwar al-Aulaqi in Yemen.[1] Anwar al-Aulaqi was born in the United States, rose to notoriety as a fiery preacher of violent jihad, and purportedly joined the ranks of al-Qaeda.[2] Aulaqi's prolific YouTube sermons endorsing acts of terror connected him with numerous jihadists.[3]

Despite a large body of public evidence connecting Aulaqi to violent extremist positions and acts of terrorism,[4] he was executed as a suspected terrorist outside an active combat zone without ever being formally charged, convicted, or detained in connection with plotting or assisting a terrorist attack.[5] At the time of Aulaqi's execution, Yemen was not a formal battleground for U.S. armed forces.[6] The U.S. government refused to produce specific evidence linking Aulaqi to al-Qaeda to prevent the dissemination of alleged "state secrets" that could jeopardize national security.[7] Aulaqi's death at the hands of the Obama administration marks the first time since the Civil War that the U.S. government publicly acknowledged the execution of an American citizen as an enemy combatant without a trial.[8]

Although conspicuously absent from Aulaqi's case, formal prosecutions, trials, and convictions are all examples of the procedural due process guaranteed to U.S. citizens by the Fifth Amendment of the Constitution.[9] This constitutional safeguard is infringed when the federal government intentionally deprives a citizen of life, liberty, or property without the

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1. Mark Mazzetti, Charlie Savage & Scott Shane, *How a U.S. Citizen Came to Be in America's Cross Hairs*, N.Y. TIMES (Mar. 9, 2013), http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html [https://perma.cc/9R95-ZXFA].

2. *Id.*

3. *See* Scott Shane, *The Lessons of Anwar al-Awlaki*, N.Y. TIMES MAG. (Aug. 27, 2015), https://www.nytimes.com/2015/08/30/magazine/the-lessons-of-anwar-al-awlaki.html [https://perma.cc/AAJ6-R4AR].

4. In a February 2010 interview, Aulaqi called for jihad against America, praised the actions of the Christmas Day bomber and the Fort Hood shooter, and implored others to follow in their footsteps. *See Interview: Anwar al-Awlaki*, AL-JAZEERA (Feb. 7, 2010), http://www.aljazeera.com/focus/2010/02/2010271074776870.html [https://perma.cc/893Y-WZ3K]. Aulaqi founded the al-Qaeda publication *Inspire* and frequently contributed articles advocating for assassinations, bombings, and other attacks against Western targets. Ian Black, *Inspire Magazine: The Self-Help Manual for al-Qaida Terrorists*, GUARDIAN (May 24, 2013), https://www.theguardian.com/world/shortcuts/2013/may/24/inspire-magazine-self-help-manual-al-qaida-terrorists [https://perma.cc/7W9R-HBRJ]; *see also* Shane, *supra* note 3 (referencing Aulaqi's "digital legacy" of YouTube sermons advocating for war against the West).

5. Al-Aulaqi v. Obama (*Aulaqi I*), 727 F. Supp. 2d 1, 10 (D.D.C. 2010).

6. *See* Shane, *supra* note 3.

7. Al-Aulaqi v. Panetta (*Aulaqi II*), 35 F. Supp. 3d 56, 64, 80–81 (D.D.C. 2014); Reply Memorandum in Support of Plaintiff' Motion for a Preliminary Injunction and in Opposition to Defendant's Motion to Dismiss at 40, 45, *Aulaqi I*, 727 F. Supp. 2d 1 (No. 10-cv-01469), 2010 WL 4974323, at *14.

8. Mazzetti, Savage & Shane, *supra* note 1.

9. U.S. CONST. amend. V (providing that no American shall "be deprived of life, liberty, or property, without due process of law").

sufficient procedural protection demanded by the particular situation.[10] The complete absence of formal process afforded Aulaqi prior to his execution was recognized in a 2014 decision from the District Court for the District of Columbia, which found that Aulaqi's death presented a "plausible" procedural due process claim.[11]

In July 2010, before any litigation concerning Aulaqi arose and over a year prior to his execution, the Department of Justice (DOJ) concluded in a classified internal memo that the executive could unilaterally execute Aulaqi without infringing upon his Fifth Amendment due process rights.[12] In coming to this conclusion, the DOJ referenced a test devised by the U.S. Supreme Court in *Mathews v. Eldridge*[13] to assess the appropriate measure of due process mandated by the Fifth Amendment.[14] This fact-specific balancing test weighs: (1) the citizen's interest in life, liberty, or property affected by the official action; (2) the government's interest in carrying out the official action; (3) the possibility that the official action erroneously deprived the citizen's life, liberty, or property; and (4) the potential benefit of implementing additional safeguards.[15] This framework evaluates government procedures to ensure adequate process accompanies official actions that affect a private citizen's life, liberty, or property.[16] While this memorandum (the "DOJ White Memo") briefly acknowledged the risk of an unfounded drone strike, it never considered Aulaqi's life interest nor

10. *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 766 (2005) (holding that an individual's entitlement to due process protection must be closely and concretely tied to a life, liberty, or property interest); Daniels v. Williams, 474 U.S. 327, 331 (1986) (asserting that the Due Process Clause does not protect against an injury caused by negligent conduct); O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 789 (1980) (recognizing that due process protection does not extend to "indirect adverse effects of governmental action"); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

11. *Aulaqi II*, 35 F. Supp. 3d at 73–74 (holding that the complaint stated a plausible procedural due process claim given Aulaqi "was executed without charge, indictment, or prosecution"). See *infra* notes 112–25 for a discussion of the litigation surrounding Aulaqi's execution.

12. Memorandum from David J. Barron, Acting Assistant Att'y Gen., U.S. Dep't of Justice, to Eric Holder, Att'y Gen., U.S. Dep't of Justice 38 (July 16, 2010) [hereinafter DOJ White Memo], https://www.aclu.org/sites/default/files/assets/2014-06-23_barron-memorandum.pdf [https://perma.cc/FF84-QZD6] ("[W]e do not believe that al-Aulaqi's U.S. citizenship imposes constitutional limitations that would preclude the contemplated lethal action . . . ."). This Note will not attempt to reconcile whether it was appropriate to target Aulaqi as an "enemy belligerent" due to the significant amount of classified information redacted from the DOJ White Memo. *Id.* at 21–23. The DOJ White Memo also contains an explanation of why Aulaqi's execution did not violate federal statutory law or the Fourth Amendment. *Id.* at 1–37, 41. An analysis of the DOJ's reasoning concerning these issues is beyond the purview of this Note.

13. 424 U.S. 319 (1976).

14. DOJ White Memo, *supra* note 12, at 39.

15. *See Mathews*, 424 U.S. at 335. See *infra* Part II for the application of this test. Although "the risk of an erroneous deprivation" and "the probable value, if any, of additional or substitute procedural safeguards" can be treated as a single prong of the *Mathews* test, this Note will discuss each concept individually to fully flesh out the relevant analysis. *See infra* Parts II.C–D.

16. *See Mathews*, 424 U.S. at 335.

evaluated nonlethal methods of providing additional process beyond a "capture operation."[17]

The tension between the DOJ White Memo's greenlight to execute Aulaqi absent formal process and subsequent judicial recognition of a plausible due process claim demand further exploration. This Note examines the outer limits of unilateral executive military power[18] and explicitly balances all factors of the *Mathews* test[19] to analyze whether additional safeguards should be implemented to protect against an unjustified execution and the infringement of procedural due process.[20] Specifically, this Note assesses judicial review as an additional measure to safeguard against the risk of the mistaken deprivation of life[21] and advocates for implementing a narrow ex ante methodology to review proposed drone strikes targeting American citizens.[22] This precisely tailored ex ante regime provides greater due process and diffuses federal power without unduly burdening necessary executive decision-making in the War on Terror.[23]

Part I of this Note provides an overview of drone strikes in the War on Terror, the due process rights of U.S. citizens, and how the government's methodology for the drone execution of a U.S. citizen reconciles such rights. Part I also examines the scope of the executive's war-making authority.

Part II evaluates the procedural due process concerns underlying the executive's current methodology for targeting an American citizen for drone execution. Part II.A examines the magnitude of a citizen's life interest at stake in a drone execution, and Part II.B discusses the government's interest in national security. Part II.C evaluates the risk of an unjustified execution of an American citizen under the executive's current methodology. Part II.D appraises the potential benefits of implementing judicial review of drone strikes to safeguard against an unjustified execution of an American citizen and the infringement of procedural due process rights.

Part III advocates for the narrow implementation of ex ante judicial review. Part III.A details the pragmatic benefits of ex ante review that would not be present in an ex post regime. Finally, Part III.B enumerates an ex ante methodology that provides additional process without unduly burdening the executive.

I. A BIRD'S-EYE VIEW OF THE WAR ON TERROR

The September 11, 2001, terrorist attacks ignited the War on Terror. Unconventional enemies, shocking tragedies, and urban guerilla warfare

17. DOJ White Memo, *supra* note 12, at 40.
18. *See infra* Part I.E.
19. 424 U.S. at 335.
20. *See infra* Part II.
21. *See infra* Part II.D.
22. *See infra* Part III.
23. *See* discussion *infra* Part III.B.

soon defined this conflict.[24] Ever-changing threats have expanded this conflict throughout the Middle East and over several presidential administrations.[25] Part I.A surveys the role of drone strikes in the War on Terror. Part I.B examines the statutory authority enabling the executive's drone strikes. Part I.C details the extent of due process rights that protect Americans even when targeted abroad under the aforementioned statutory authority. Part I.D inspects the executive's methodology for assessing whether an American citizen should be targeted for drone execution. Finally, Part I.E analyzes the breadth of the executive's unilateral military authority and how the political question doctrine defines the scope of this authority.

A. Mapping the Landscape of Drone Strikes

Upon taking the oath of office in 2009, President Obama inherited two covert counterterrorism strategies developed during the Bush administration: the black-site interrogation program and unmanned predator-drone assassinations.[26] Within forty-eight hours of assuming office, President Obama signed an executive order prohibiting torture in accordance with international conventions and federal law, thereby officially eliminating the black-site interrogation program.[27] Within seventy-two hours of assuming office, President Obama ordered drone strikes in Pakistan that killed an estimated eleven people, including up to five children.[28] Not to be outdone by his predecessor, President Trump has reportedly eliminated bureaucratic drone regulations and expanded the scope of such attacks.[29] Torture was formally removed from the War on Terror, but drone strikes are emphatically here to stay.[30]

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24. *See* Stephanie Gaskell, *How the War on Terror Changed the Way America Fights*, ATLANTIC (Sept. 1, 2013), https://www.theatlantic.com/politics/archive/2013/09/how-the-war-on-terror-changed-the-way-america-fights/279250/ [https://perma.cc/YQH8-X43E].

25. *Id.*

26. Micah Zenko, *Obama's Embrace of Drone Strikes Will Be a Lasting Legacy*, N.Y. TIMES: ROOM FOR DEBATE (Jan. 12, 2016), https://www.nytimes.com/roomfordebate/2016/01/12/reflecting-on-obamas-presidency/obamas-embrace-of-drone-strikes-will-be-a-lasting-legacy [https://perma.cc/YM6W-28D8].

27. *Id.*

28. *Id.*

29. Daniel J. Rosenthal & Loren Dejonge Schulman, *Trump's Secret War on Terror*, ATLANTIC (Aug. 10, 2018), https://www.theatlantic.com/international/archive/2018/08/trump-war-terror-drones/567218/ [https://perma.cc/88TZ-HG47].

30. Notwithstanding President Obama's 2009 prohibition of torture, a laundry list of human rights abuses stemming from unbridled executive discretion permeate the War on Terror. *See, e.g.*, Vance v. Rumsfeld, 701 F.3d 193, 196 (7th Cir. 2012) (alleging abusive interrogations during military detention); Jewel v. NSA, 673 F.3d 902, 906 (9th Cir. 2011) (alleging widespread warrantless eavesdropping on American citizens); El-Masri v. United States, 479 F.3d 296, 300–02 (4th Cir. 2007) (alleging illegal detainment under the CIA "extraordinary rendition program" and torture). *See generally* Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel, U.S. Dep't of Def. (Mar. 14, 2003), https://www.aclu.org/files/pdfs/safefree/yoo_army_torture_memo.pdf [https://perma.cc/E796-VNJ7] (notoriously defending the legality of "enhanced interrogation techniques," informally known as the "Torture Memos").

Unmanned drone strikes provide the Central Intelligence Agency (CIA) with a discrete weapon to attack targets which does not risk the lives of American service members.[31] Predator drones' hellfire missiles target those believed to be high-ranking members of terrorist organizations.[32] In recent years, the list of targeted groups has grown to encompass the Islamic State and affiliated groups.[33] Initially focused on targets in Iraq and Afghanistan, the Obama administration expanded the breadth of drone strikes to a variety of noncombat theaters, such as Pakistan, Yemen, and Somalia.[34] The Obama administration not only expanded the breadth of drone strikes but also increased the volume of targeted attacks.[35] While President Bush authorized roughly fifty drone strikes over the course of his presidency, President Obama sanctioned over five hundred strikes.[36] This ten-fold increase has generated controversy as experts claim that 12 percent of the nearly four thousand deaths from the Obama administration's drone strikes were civilians.[37] While American citizens are included in the approximately 480 civilians mistakenly executed under the Obama administration, Anwar al-Aulaqi remains the only American citizen who the president publicly acknowledged was intentionally targeted and executed.[38] Despite the Obama administration's drone legacy, President Trump has reportedly indicated that he wants the CIA to "take a more aggressive posture" with regard to drone strikes.[39]

B. Killing as a Matter of Law: The Statutory Authority for Drone Executions

The Bush, Obama, and Trump administrations relied on the Authorization for Use of Military Force (AUMF or "the Act") as statutory authority to

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This is not a modern legacy isolated to the War on Terror. *See* Korematsu v. United States, 323 U.S. 214, 224–25 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

31. Scott Shane, *Drone Strikes Reveal Uncomfortable Truth: U.S. Is Often Unsure About Who Will Die*, N.Y. TIMES (Apr. 23, 2015), https://www.nytimes.com/2015/04/24/world/asia/drone-strikes-reveal-uncomfortable-truth-us-is-often-unsure-about-who-will-die.html [https://perma.cc/2KFM-S227].

32. *See id.*

33. Mary Louise Kelly, *When the U.S. Military Strikes, White House Points to a 2001 Measure*, NPR (Sept. 6, 2016, 4:30 PM), https://www.npr.org/sections/parallels/2016/09/06/492857888/when-the-u-s-military-strikes-white-house-points-to-a-2001-measure [https://perma.cc/WSN9-RKTU].

34. *Id.*

35. Zenko, *supra* note 26.

36. *Id*.

37. Jeffrey S. Brand & Amos N. Guiora, *Judicial Review of Planned Drone Attacks Would Save Lives*, N.Y. TIMES: ROOM FOR DEBATE (July 15, 2016), https://www.nytimes.com/roomfordebate/2015/04/24/should-a-court-approve-all-drone-strikes/judicial-review-of-planned-drone-attacks-would-save-lives [https://perma.cc/ZS9R-V5AT].

38. Shane, *supra* note 31.

39. Ken Dilanian & Courtney Kube, *Trump Administration Wants to Increase CIA Drone Strikes*, NBC NEWS (Sept. 18, 2017), https://www.nbcnews.com/news/military/trump-admin-wants-increase-cia-drone-strikes-n802311 [https://perma.cc/2XUR-58WK].

conduct targeted drone executions.[40] Congress expediently passed the AUMF three days after the 9/11 attacks, which succinctly grants the president broad authority to use any "necessary and appropriate force" against those determined to have "planned, authorized, committed, or aided" the 9/11 attacks.[41] The Obama administration asserted that the AUMF also provides authority to target ancillary groups, such as ISIS (also known as ISIL), that are more tenuously related to the 9/11 attacks than al-Qaeda or the Taliban.[42] The Trump administration's drone policy echoes a similar—if not broader—understanding of the AUMF's reach.[43] The authority granted by the AUMF has no expiration date and no geographic limits—no corner of the earth is outside the Act's broad grant of executive killing power.[44] The AUMF could theoretically be used for drone strikes in London, Paris, or Madrid.[45]

The scope of the AUMF's vague language has been consistently challenged and refined, especially with regard to precisely who is considered affiliated with the 9/11 attacks, the breadth of activity covered under the Act, and the outer limits of the executive's authority under the Act.[46] Courts have noted that determining who is covered under the AUMF, and the extent of such coverage, is a highly challenging and nuanced fact-driven inquiry.[47] The executive's modern-day use of the AUMF to target ISIS, a group that has actively fought al-Qaeda and did not exist when the AUMF was enacted, is a bold display of presidential discretion that further muddied the murky

40. Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2012)); Gene Healy & John Glaser, Opinion, *Repeal, Don't Replace, Trump's War Powers*, N.Y. TIMES (Apr. 17, 2018), https://www.nytimes.com/2018/04/17/opinion/repeal-replace-trump-war-powers.html [https://perma.cc/N325-7B3H].

41. Authorization for Use of Military Force § 2(a), 115 Stat. at 224; Healy & Glaser, *supra* note 40.

42. Kelly, *supra* note 33.

43. *See* Julian Borger, *U.S. Air Wars Under Trump: Increasingly Indiscriminate, Increasingly Opaque*, GUARDIAN (Jan. 23, 2018), https://www.theguardian.com/us-news/2018/jan/23/us-air-wars-trump [https://perma.cc/T9GE-C3VA].

44. Authorization for Use of Military Force, 115 Stat. at 224–25; Kelly, *supra* note 33; *see* Borger, *supra* note 43.

45. *See* sources cited *supra* note 44.

46. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 594 (2006) (holding that the AUMF does not expressly authorize the president to convene a military commission to try prisoners otherwise detained under the AUMF); Hamdi v. Rumsfeld, 542 U.S. 507, 521–22 (2004) (holding that the AUMF's "necessary and appropriate force" language authorizes detention of enemy combatants but does not authorize indefinite detention nor supersede a minimal due process requirement); Hamlily v. Obama, 616 F. Supp. 2d 63, 76 (D.D.C. 2009) ("Detaining an individual who 'substantially supports' [a violent extremist organization], but is not part of it, is simply not authorized by the AUMF itself or by the law of war."); Gherebi v. Obama, 609 F. Supp. 2d 43, 62 (D.D.C. 2009) (holding that the AUMF not only encompasses the organizations responsible for the 9/11 attacks but also the nations that sponsored those acts of terrorism); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2109 (2005) (recognizing that new members who join al-Qaeda after September 11, 2001, are still covered by the AUMF because of their affiliation with an "organization" that falls under the AUMF).

47. *See, e.g.*, *Hamlily*, 616 F. Supp. 2d at 75 ("The key inquiry, then, is not necessarily whether one self-identifies as a member of the organization (although this could be relevant in some cases), but whether the individual functions or participates within or under the command structure of the organization . . . .").

boundaries of the AUMF's authority.[48] This expansive reading of the AUMF invites future exercises of increased executive discretion.[49] Many of the AUMF's puzzling applications and legal challenges derive from the its exceptional brevity—the original public law was under 400 words.[50]

In addition to a slew of legal disputes challenging its authority, the AUMF has consistently faced congressional resistance.[51] On June 29, 2017, the House Appropriations Committee approved an amendment that would have effectively repealed the AUMF.[52] Citing concerns that the AUMF grants the president "authority to wage war in perpetuity," the amendment was intended to induce Congress to pass new legislation that would appropriately modernize defense appropriations for the fight against ISIS.[53] Although the Senate ultimately rejected this proposal, this amendment was only the most recent attack in a long history of congressional rebuffs to the AUMF's sprawling power.[54] Despite congressional resistance, the AUMF remains a valid authority for the executive to conduct drone strikes against al-Qaeda, the Taliban, and the Islamic State across the globe.

C. The Global Procedural Due Process Rights of U.S. Citizens

Although the AUMF remains intact and continues to provide for assertive displays of executive power throughout the world, it does not grant boundless dominion. Even in the context of national security, some measure of constitutional shielding always tempers the government's ability to target a U.S. citizen under the AUMF.[55] However, the entirety of constitutional protection does not extend globally—U.S. citizens only retain the Constitution's "fundamental guarantees" when abroad.[56]

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48. Kelly, *supra* note 33.

49. *See id.*; *see also* Daniel Brown, *Trump Will Keep the U.S. Military in Syria Without New Congressional Authorization—and It Could Set a Dangerous Precedent*, BUS. INSIDER (Feb. 23, 2018), https://www.businessinsider.com/trump-aumf-us-military-syria-without-new-authorization-2018-2 [https://perma.cc/3T5Q-SQ88].

50. *See generally* Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2012)).

51. Jeremy Herb & Deirdre Walsh, *House Panel Votes to Repeal War Authorization for Fight Against ISIS and Al Qaeda*, CNN (June 29, 2017), http://www.cnn.com/2017/06/29/politics/house-panel-repeal-war-authorization-isis-al-qaeda/index.html [https://perma.cc/8C2K-36H3].

52. *Id.*

53. *Id.* (quoting the concerns of Democratic Representative Barbara Lee of California).

54. Joshua Keating, *Barbara Lee's Long War on the War on Terror*, SLATE (Aug. 7, 2017), http://www.slate.com/articles/news_and_politics/politics/2017/08/is_barbara_lee_finally_winning_her_fight_to_repeal_the_aumf.html [https://perma.cc/7WL2-EJV6].

55. Reid v. Covert, 354 U.S. 1, 5–6 (1957) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.").

56. *Id.* at 6 ("When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land."); *see also id.* at 8–9 (noting that "fundamental" constitutional rights travel with U.S. citizens but declining to explicitly list which rights travel and under what circumstances).

The Supreme Court has recognized the right to procedural due process as indivisibly tied to American citizenship on a global scale.[57] In *Reid v. Covert*,[58] the Court found that a U.S. citizen was constitutionally entitled to trial by jury, perhaps the supreme measure of formal process, despite living abroad and falling under the scope of an international treaty granting exclusive jurisdiction to a U.S. military tribunal.[59] Although U.S. citizens targeted under the AUMF may not be entitled to such a strong form of procedural due process, the thrust of *Reid* implies that they enjoy some Fifth Amendment protections, especially given that matters of life and death are much more likely to receive constitutional protection.[60] While American citizens targeted domestically for their suspected links to terrorism are virtually guaranteed to receive far greater due process,[61] American citizens targeted abroad under the sweeping power of the AUMF are not without procedural protection.[62] American citizens are a unique class under the AUMF because they retain at least some modicum of procedural due process protection regardless of their location.[63]

D. Justifying the Extrajudicial Drone Execution of an American Citizen

The DOJ White Memo provides incredible insight into how the executive reconciles the modicum of procedural due process guaranteed to American citizens abroad and the AUMF's broad authority to conduct drone executions.[64] Originally a classified internal executive memo, public access to the DOJ White Memo only resulted from a tense legal battle for more information about Aulaqi's execution.[65] After Aulaqi's death, the *New York Times* and the American Civil Liberties Union (ACLU) sued the DOJ under the Freedom of Information Act (FOIA), seeking disclosure of documents

57. United States v. Verdugo-Urquidez, 494 U.S. 259, 264, 270 (1990) (holding that fundamental elements of the Fifth Amendment travel with citizens abroad); *cf.* Johnson v. Eisentrager, 339 U.S. 763, 769–71 (1950).

58. 354 U.S. 1 (1957).

59. *Id.* at 16–17, 40–41.

60. *See id.* at 77 (Harlan, J., concurring) ("In such cases [involving capital punishment] the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial . . . .").

61. Federal criminal prosecution of domestic terror suspects relies upon numerous substantive statutes. JENNIFER K. ELSEA, CONG. RESEARCH SERV., R40932, COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT 8–9 (2014), https://fas.org/sgp/crs/natsec/R40932.pdf [https://perma.cc/J4VT-T2HU]. U.S. federal courts have been internationally recognized for their "stringent procedural protection" of terror suspects. Oona Hathaway et al., *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT'L L. 123, 163–67 (2013).

62. *Verdugo-Urquidez*, 494 U.S. at 264, 270; *Reid*, 354 U.S. at 40–41, 77.

63. *See supra* notes 55–57. Noncitizens generally lack constitutional protection outside the United States. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens . . . .").

64. *See* DOJ White Memo, *supra* note 12, at 38–41.

65. N.Y. Times Co. v. U.S. Dep't of Justice, 756 F.3d 100, 103–08 (2d Cir.), *opinion amended on denial of reh'g*, 758 F.3d 436 (2d Cir.), *and supplemented*, 762 F.3d 233 (2d Cir. 2014).

detailing the executive's rationale and methodology behind targeting a U.S. citizen for drone execution.[66] Although FOIA is designed to facilitate the disclosure of previously unreleased information from the government, the *New York Times* and ACLU faced a tumultuous and grueling legal battle.[67] However, after nearly four years, they eventually succeeded in obtaining the release of the government's procedure for the targeted drone killing of an American—the DOJ White Memo.[68]

Although the publicly released memo was redacted to remove classified information and limited to disclosing solely legal analysis, it remains an invaluable resource when assessing why the government opined that the Fifth Amendment would not "preclude the contemplated lethal action" against Aulaqi.[69] The DOJ White Memo acknowledged that, as a U.S. citizen, various elements of the Fifth Amendment shielded Aulaqi even while abroad in Yemen.[70] The DOJ White Memo roughly utilized the balancing test devised in *Mathews v. Eldridge* to assess the requisite measure of due process owed Aulaqi: weighing the private interest affected by the official action against the government's interest, while considering the burden of providing greater process.[71] Although much of the government's reasoning is unavailable to the public, the DOJ White Memo asserts that the "imminent" threat Aulaqi posed to the American people significantly increased the government's interest in maintaining national security.[72] The determination that capturing Aulaqi would be "infeasible" likely supported the government's notion that providing greater due process would have been difficult.[73]

The DOJ White Memo recognized that the risk of an unjustified execution in the absence of sufficient process is an especially pertinent concern during wartime.[74] However, the weight of the government's interest in nullifying what it singularly deemed an imminent threat, coupled with "the realities of combat," was deemed to override any constitutional demand for additional process.[75] In coming to this determination, nearly one-third of the government's analysis relied on foreign jurisprudence.[76] The DOJ White

66. *Id.* at 103–05.

67. Freedom of Information Act, 5 U.S.C. § 552 (2012); *see N.Y. Times Co.*, 756 F.3d at 104–08. Before suing, representatives from the *New York Times* and the ACLU filed numerous FOIA requests to the DOJ's Office of Legal Counsel, CIA, and Department of Defense, all of which were all denied. *N.Y. Times Co.*, 756 F.3d at 106–07. The *New York Times* and ACLU also had to overcome the district court's grant of summary judgment in favor of the government. *Id.* at 108.

68. *N.Y. Times Co.*, 756 F.3d at 103.

69. DOJ White Memo, *supra* note 12, at 38.

70. *Id.*

71. *See id.* at 39.

72. *Id.*

73. *Id.* at 40.

74. *Id.* (citing Hamdi v. Rumsfeld, 542 U.S. 507, 530 (2004) (plurality opinion)).

75. *Id.*

76. *See id.* (citing HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel (2) IsrLR 459, 504 (2006)). See *infra* notes 202–07 and accompanying text for further discussion of the

Memo did not explicitly balance Aulaqi's private life interest against the other factors from the *Mathews* test, but instead asserted that the burden imposed by the "circumstances of war," together with the government's interest in neutralizing a perceived threat, justified the proposed execution under the procedural requirements of the Fifth Amendment.[77] Although deemed an imminent threat, over a year elapsed between the date of the DOJ White Memo and Aulaqi's execution.[78]

E. Executive War-Making Authority and Unilateralism Within a Federal Government of Divided Powers

In less than three pages, the DOJ White Memo concluded that the executive could unilaterally assume the roles of prosecutor, jury, and executioner and could kill an American citizen without affording any formal process.[79] Although the executive has broad authority to conduct military affairs,[80] our federal government is founded upon a delicate framework of diffuse power.[81] This system of checks and balances prevents one political branch from developing tyrannical power.[82] Examining traditional and modern notions of the scope of executive war power within the greater framework of the federal government provides insight into the executive's authority to act as a prosecutor, jury, and executioner when targeting an American under the AUMF. This Part details historical views of unilateral executive military power, analyzes contemporary interpretations of this power, and describes how the political question doctrine can protect the executive's unilateral war-making power.

1. Founding Conceptualizations of Executive Military Authority

Literature from the Framers of the U.S. Constitution provides valuable conceptualizations of the limits of executive war power. Reeling from the injustices of the British monarchy leading up to the Revolutionary War, the Framers were reluctant to imbue any branch of the federal government with unchecked discretionary power and risk restarting another cycle of tyranny and revolution.[83] James Madison, hailed as the "Father of the

executive's reliance on foreign jurisprudence when assessing the constitutional rights of a U.S. citizen.

77. DOJ White Memo, *supra* note 12, at 39–40 (quoting *Hamdi*, 542 U.S. at 530). See *infra* Part II for an analysis of all elements of the *Mathews* test.

78. *See* DOJ White Memo, *supra* note 12, at 1.

79. *See id.* at 38–41.

80. *See* U.S. CONST. art. II, § 2, cl. 1.

81. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring) ("[The Framers] rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity.").

82. *Id.*

83. THE FEDERALIST NO. 47, at 245 (James Madison) (Ian Shapiro ed., 2009) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."); *see also* THE FEDERALIST NO. 41, at 205–06 (James Madison) (Ian Shapiro ed., 2009).

Constitution,"[84] articulated that the Constitution's checks and balances ensured federal power was both "necessary to the public good" and sufficiently limited to prevent "a perversion of the power to the public detriment."[85] Qualified power served as a guiding principle to Madison's constitutional contributions.[86]

Nowhere is the notion of qualified power more apparent than in the Federalists' literature surrounding executive military affairs.[87] In one of the earliest publications of *The Federalist Papers*, John Jay endorsed a unified republic over the boundless power of a monarchy to prevent military action "not sanctified by justice or the voice and interests of [the] people."[88] Alexander Hamilton similarly noted that the distribution of war powers among multiple branches prevented the executive from developing sovereign military powers and degrading democracy into despotism.[89] Although the congressionally enacted AUMF evidences legislative consent to the executive's power to make war, its broad language enables executive discretion and unilateralism that resemble a sovereign military power[90]—a status quo starkly antagonistic to the Framer's views on executive military authority.[91]

Madison envisioned "constitutional barriers" as a shield against unilateralism and sovereign tyranny, even during tenuous periods of national crisis and war.[92] Early Supreme Court jurisprudence quickly recognized the federal judiciary as one such constitutional barrier.[93] Shortly after the ratification of the Constitution, the Court staked out its role as the ultimate protector of constitutional liberties and the arbiter between the political branches.[94] In *Marbury v. Madison*,[95] the Court recognized its purpose as

84. *Who's the Father of the Constitution?*, LIBRARY CONGRESS (May 2005), https://www.loc.gov/wiseguide/may05/constitution.html [https://perma.cc/LB8B-YMHM]. Despite Madison's political and philosophical sophistication, it is worth noting that his conceptualizations of race and civil liberties, along with many of the Framers, fall quite short when examined under a modern lens. *See, e.g.*, LAWRENCE GOLDSTONE, DARK BARGAIN: SLAVERY, PROFITS, AND THE STRUGGLE FOR THE CONSTITUTION 110 (2009) (acknowledging that Madison proposed and formalized the adoption of the infamous Three-Fifths Clause during the Constitutional Convention in Philadelphia).

85. THE FEDERALIST NO. 41, at 206 (James Madison) (Ian Shapiro ed., 2009); *see also* THE FEDERALIST NO. 47, at 245 (James Madison) (Ian Shapiro ed., 2009).

86. *See* THE FEDERALIST NO. 47, at 245–46 (James Madison) (Ian Shapiro ed., 2009).

87. *See* THE FEDERALIST NO. 69, at 347–50 (Alexander Hamilton) (Ian Shapiro ed., 2009); THE FEDERALIST NO. 4, at 18–19 (John Jay) (Ian Shapiro ed., 2009).

88. THE FEDERALIST NO. 4, at 19 (John Jay) (Ian Shapiro ed., 2009).

89. *See* THE FEDERALIST NO. 69, at 349 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("In this respect [as Commander-in-Chief] his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it."); *see also id.* at 347–50.

90. *See supra* Part I.B.

91. *See supra* notes 83–90 and accompanying text.

92. THE FEDERALIST NO. 41, at 207 (James Madison) (Ian Shapiro ed., 2009) ("It is in vain to oppose constitutional barriers to the impulse of self-preservation.").

93. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166–67 (1803).

94. *Id.* at 167 ("The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority."). The Court recognized its own constitutionally vested power of final review for both executive and legislative action. *Id.*

95. 5 U.S. (1 Cranch) 137 (1803).

not only monitoring the constitutionality of government action but also establishing whether a given right was vested by the Constitution.[96] The Court swiftly asserted the judiciary's ability to temper executive actions that threatened constitutionally vested rights of citizens, even in light of legislative authority.[97] Although over two hundred years old, this judicial empowerment remains highly relevant today: the Court has repeatedly rebuffed abusive executive actions made pursuant to the AUMF, recognized the limits of the Act's authority, and remedied the resulting infringements of constitutional rights.[98]

2. Contemporary Views of Presidential War Power

Modern understandings of executive war power are largely grounded on the tripartite framework introduced by Justice Robert H. Jackson's seminal concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[99] Jackson understood presidential authority as existing within a three-tiered hierarchy:

> 1. 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. . . .
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight . . . .
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . .[100]

Jackson's framework has been consistently used to evaluate executive action since its inception.[101] In the context of the War on Terror, the AUMF's broad language[102] provides, at the very least, congressional authorization for limited detention power[103] and targeted killings.[104] The AUMF's authorization for the executive to employ "all necessary and

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96. *Id.* at 167.

97. *Id.* at 176 ("To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"). Constitutional rights always trump congressional grants of authority. *Id.*

98. *See, e.g.*, *supra* note 46 and accompanying text.

99. 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

100. *Id.* at 635–37 (footnote omitted).

101. *See, e.g.*, Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2083 (2015); Medellin v. Texas, 552 U.S. 491, 524–25 (2008); INS v. Chadha, 462 U.S. 919, 959 (1983); *see also* Dames & Moore v. Regan, 453 U.S. 654, 669 (1981) (finding Jackson's tripartite framework "analytically useful" for evaluating executive action as a "spectrum running from explicit congressional authorization to explicit congressional prohibition").

102. *See supra* note 41 and accompanying text.

103. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) ("[W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict . . . .").

104. John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Keynote Address at the Wilson Center: The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012), http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy [https://perma.cc/PQ9P-FAQH] (addressing targeted drone executions).

appropriate force" does not carve out any exceptions for actions taken against U.S. citizens.[105] Thus, it is very likely that an executive drone execution of a U.S. citizen pursuant to the AUMF is a demonstration of presidential power at its strongest ebb under Jackson's tripartite framework.[106]

3. The President's Shield: The Political Question Doctrine

The adage "the best defense is a good offense" has rung true for centuries.[107] In those terms, the political question doctrine provides the executive with an incredible defense: to effectuate the separation of powers, it bars the judiciary from scrutinizing the merits of fundamentally political executive determinations, which include presidential decisions to initiate military action.[108] Under this doctrine, the judiciary abstains from reviewing challenges to the wisdom of the president's national policymaking.[109] For such determinations, the executive is solely accountable to the voting public and "his own conscience."[110] However, while the judiciary is barred from evaluating the *wisdom* of national political determinations, the political question doctrine does not prevent the judiciary from reviewing the *legality* of such decisions.[111]

Roughly ten months prior to Aulaqi's execution, the government successfully invoked the political question doctrine to prevent judicial resolution of the executive's impending death sentence for Aulaqi.[112] Upon learning that his son was added to an executive "kill list," Aulaqi's father brought suit questioning his son's impending execution and seeking, among

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105. *See supra* note 41 and accompanying text.

106. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

107. *See* Letter from George Washington to John Trumbull (June 25, 1799), https://founders.archives.gov/documents/Washington/06-04-02-0120 [http://perma.cc/7GF6-LSET] ("[O]ffensive operations, often times, is the *surest*, if not the *only* (in some cases) means of defence.").

108. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–66 (1803); *see, e.g.*, El-Shifa Pharm. Indus. v. United States, 607 F.3d 836, 842 (D.C. Cir. 2010). The state-secrets privilege also protects executive unilateralism and may be invoked by the government to block evidence or completely bar adjudication to prevent the release of classified information. United States v. Reynolds, 345 U.S. 1, 7 (1953); Totten v. United States, 92 U.S. 105, 107 (1876). This Note will exempt discussion of the state-secrets privilege and its relationship to executive unilateralism given that the District Court for the District of Columbia strongly rebuffed the government's invocation of this privilege when assessing whether Aulaqi's execution presented an infringement of procedural due process. Al-Aulaqi v. Panetta (*Aulaqi II*), 35 F. Supp. 3d 56, 81 (D.D.C. 2014) (noting the government's "truculent opposition" made the case "unnecessarily difficult").

109. *Marbury*, 5 U.S. (1 Cranch) at 165–66 ("The subjects [of exclusive executive discretion] are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.").

110. *Id.*

111. *El-Shifa Pharm. Indus.*, 607 F.3d at 842 ("[T]he presence of a political question . . . turns not on the nature of the government conduct under review but more precisely on the question the plaintiff raises about the challenged action."); *see also* Schneider v. Kissinger, 412 F.3d 190, 198 (D.C. Cir. 2005); Koohi v. United States, 976 F.2d 1328, 1331 (9th Cir. 1992).

112. Al-Aulaqi v. Obama (*Aulaqi I*), 727 F. Supp. 2d 1, 46 (D.D.C. 2010).

other things, a preliminary injunction to stop the government's proposed execution unless concrete standards were implemented and satisfied.[113] The court in *Al-Aulaqi v. Obama*[114] (*Aulaqi I*) held that the political question doctrine barred judicial review of Aulaqi's links to terrorist groups, the extent of his alleged terrorist activity, and his inclusion on an executive "kill list" because such inquiries scrutinized the *merits* of discretionary executive policymaking as opposed to questioning the *legality* of such decisions.[115] The government's motion to dismiss was granted and Aulaqi was executed within a year.[116]

After Aulaqi's death, his father once again brought suit against the government, this time seeking redress for his son's execution.[117] The same court that had previously dismissed his case in *Aulaqi I* found this second suit was not barred from judicial review under the political question doctrine.[118] The complaint in *Al-Aulaqi v. Panetta*[119] (*Aulaqi II*) focused on the executive's alleged infringement of due process rights and other constitutional liberties.[120] Shifting away from evaluating discretionary executive decisions toward the legality of executive action resulted in justiciable subject matter.[121] Despite recognizing that Aulaqi's execution presented a plausible due process claim,[122] the court was forced to dismiss the case after finding that no remedy under U.S. law could provide relief.[123] The executive escaped culpability for Aulaqi's execution a second time.[124]

II. A THUMB ON THE SCALE: THE BALANCING ACT OF PROCEDURAL DUE PROCESS RIGHTS AND DRONE EXECUTIONS

The judiciary's recognition of a potential due process infringement arising from the outer limits of executive power warrants a deeper inquiry.[125] The *Mathews v. Eldridge* balancing test,[126] used by both the government in the DOJ White Memo[127] and the Supreme Court in assessing due process issues arising from the War on Terror,[128] guides an exploration of the executive's unilateral methodology for the drone execution of an American citizen.

113. *Id.* at 12.
114. 727 F. Supp. 2d 1 (D.D.C. 2010).
115. *Id.* at 52. The court also found that Aulaqi's father lacked standing to bring a claim on Aulaqi's behalf, who theoretically could have appeared in court himself despite being added to an executive "kill list." *Id.* at 35.
116. *Id.* at 54; *see* Al-Aulaqi v. Panetta (*Aulaqi II*), 35 F. Supp. 3d 56, 60 (D.D.C. 2014).
117. *Aulaqi II*, 35 F. Supp. at 58–59.
118. *Id.* at 70. In *Aulaqi II*, Aulaqi's father was unhindered by any issues of standing because he was bringing a claim on behalf of a decedent. *See id.* at 59.
119. 35 F. Supp. 3d 56 (D.D.C. 2014).
120. *Id.* at 70.
121. *Id.* at 69.
122. *Id.* at 74.
123. *Id.* at 80.
124. *See id.*
125. *See id.* at 73–74.
126. 424 U.S. 319, 335 (1976).
127. DOJ White Memo, *supra* note 12, at 39–41.
128. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004).

While the DOJ White Memo did not explicitly balance all of the *Mathews* factors,[129] this Note fully examines each factor to assess whether additional measures of process should be implemented to prevent an unjustified drone execution.[130] This Part maps the *Mathews* test's four elements: Part II.A analyzes the private life interest of American citizens targeted for drone execution under the AUMF, while Part II.B explores the government's underlying national security interests in drone strikes. Part II.C scrutinizes the risk of an unjustified execution or erroneous loss of life under the executive's current methodology, and Part II.D examines the benefits of implementing a system of judicial review to reduce the risk of an unjustified drone execution.

A. Private Life Interest of Drone Targets

The exploration of procedural due process concerns underlying drone strikes targeting Americans commences by evaluating the first prong of the *Mathews* test: the private citizen's interest affected by the official action.[131] This private interest is an individual citizen's right to life, liberty, or property.[132]

Drone executions are not intended to maim, injure, or merely frighten their victims—the government shoots to kill.[133] Thus, the private citizen's interest at stake in a drone strike is the private citizen's life.[134] Not only traditionally revered since the dawn of legal scholarship[135] and explicitly enumerated within the safeguards of the Fifth Amendment,[136] the protection of a citizen's life also enjoys the utmost consideration by our highest court:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[137]

Indeed, it is difficult to overstate the value of the private life interest at risk in drone executions. No other private interest is as incapable of redress upon

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129. *See supra* note 17 and accompanying text.
130. *See Mathews*, 424 U.S. at 335; *supra* Parts II.A–D.
131. *Mathews*, 424 U.S. at 335.
132. *See id.*; *see also* Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 894–96 (1961).
133. *See* Brennan, *supra* note 104.
134. *See id.*
135. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *125 (describing the Magna Carta's protection of "personal security" as encompassing "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation").
136. *See supra* note 9.
137. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943); *see also* Ake v. Oklahoma, 470 U.S. 68, 78 (1985) ("The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling.").

deprivation or as inherently valuable as one's own life.[138] The private life interest is in a singular class of individual rights that are irretrievable upon deprivation.

Supreme Court deliberations on the government's deprivation of a U.S. citizen's liberty interest are a useful comparative measure to assess the magnitude of a citizen's life interest. In *Hamdi v. Rumsfeld*,[139] a U.S. citizen designated as an enemy combatant was captured in Afghanistan pursuant to the AUMF and eventually detained in a naval brig in South Carolina without formal charges, access to an impartial tribunal, or any assistance of legal counsel.[140] The detainee's father petitioned for writ of habeas corpus, alleging that the government's lack of formal process infringed his son's Fifth Amendment rights.[141] Through an analysis guided by the *Mathews* balancing test, a plurality of the Court found that the AUMF's grant of "necessary and appropriate force" did not authorize indefinite detention, as the government had argued.[142] Furthermore, the plurality determined that the citizen-detainee must be informed of the factual basis for his detention and provided a reasonable opportunity to protest his detainment.[143] The plurality also acted to lessen the government's burden in recognizing the citizen-detainee's liberty interest by permitting the "realities of combat" to relax the requisite measure of due process owed to the detainee[144] and lessening evidentiary burdens during detainment proceedings.[145]

Nevertheless, the Supreme Court ensured that at least some formal measures of due process accompanied the deprivation of a liberty interest to comport with constitutional guarantees.[146] In *Woodson v. North Carolina*,[147] Justice Potter Stewart masterfully articulated the vast difference between the indefinite deprivation of liberty at risk in *Hamdi* and the permanent termination of life at risk in drone executions: "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."[148] Given that a life interest is unequivocally more

138. *See* Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 283 (1990) ("An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction."); Woodson v. North Carolina, 428 U.S. 280, 287 (1976) (noting that death is a "unique and irreversible penalty").

139. 542 U.S. 507 (2004).

140. *Id.* at 510–11.

141. *Id.* at 511.

142. *Id.* at 520–21.

143. *Id.* at 533.

144. *Id.* at 531.

145. *Id.* at 533–34 ("Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding.").

146. *See id.* at 530 ("[A]s critical as the Government's interest may be in detaining those who actually pose an immediate threat . . . history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse . . . .").

147. 428 U.S. 280 (1976).

148. *Id.* at 305.

valuable than a liberty interest,[149] *Hamdi* implies that some measure of formal process should necessarily accompany decisions that could result in the deprivation of a citizen's life.[150]

Four years after *Hamdi* was decided, the Supreme Court held that noncitizens are also entitled to formal measures of due process when detained pursuant to the AUMF.[151] This holding further supports the notion that American citizens targeted for drone execution under the AUMF deserve some manner of formal procedural protection. First, U.S. citizens undoubtedly enjoy stronger constitutional protection than noncitizens in times of war.[152] Second, a drone execution poses a much more punitive sentence than interim detainment[153]—as noted above, the permanent deprivation of a private life interest is infinitely weightier than the temporary deprivation of a private liberty interest.[154] If even noncitizens are afforded bilateral measures of due process in connection with the deprivation of a liberty interest,[155] it certainly follows that the magnitude of an American citizen's private life interest deserves at least some formal measure of procedural protection.[156]

However, some would argue that the benefits of U.S. citizenship should not extend to those who may be actively seeking the destruction of the United States.[157] Under such an analysis, those who forfeit their allegiance to America by aligning themselves with a group targeted under the AUMF are undeserving of any due process protection, regardless of the high value the Supreme Court has associated with a private citizen's life interest.[158] Despite this appeal to base emotion, the Supreme Court has held that treasonous activity does not diminish the private interest of a U.S. citizen when assessing that citizen's due process rights.[159] Moreover, U.S. citizenship, and its

149. *See id.* ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long."); *see also supra* notes 133–38 and accompanying text.

150. *See Hamdi*, 542 U.S. at 535 ("[T]he threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights . . . ."); *Woodson*, 428 U.S. at 305.

151. Boumediene v. Bush, 553 U.S. 723, 797–98 (2008) (holding that noncitizens detained as enemy combatants under the AUMF were entitled to have the merits of their detention reviewed by both executive military officers in tribunal proceedings and Article III judges in federal courts).

152. *See* Johnson v. Eisentrager, 339 U.S. 763, 771 (1950) ("It is war that exposes the relative vulnerability of the alien's status."); *see also supra* note 63 and accompanying text.

153. *See Boumediene*, 553 U.S. at 794 (noting that, in related cases, detainees had been imprisoned for six years without judicial oversight).

154. *See Woodson*, 428 U.S. at 305.

155. *Boumediene*, 553 U.S. at 795.

156. *See id.*; *Woodson*, 428 U.S. at 305; *see also supra* notes 135–38, 149 and accompanying text.

157. *See, e.g.*, Jim Moret, *What Rights Should Terrorists Have?*, HUFFINGTON POST (June 20, 2013), https://www.huffingtonpost.com/jim-moret/what-rights-should-terror_b_3123290.html [https://perma.cc/KRB4-9S48] (arguing that a suspected terrorist forfeits the advantages of U.S. citizenship when he declares war on his country).

158. *See supra* notes 135–38 and accompanying text.

159. Hamdi v. Rumsfeld, 542 U.S. 507, 530 (2004) ("Nor is the weight on [the private interest] side of the *Mathews* scale offset by . . . the accusation of treasonous behavior.").

associated constitutional protection, can stem from purely geographical qualities that are wholly unrelated to an individual's actions or loyalties.[160] Once bestowed, the constitutional benefits of U.S. citizenship are utterly inalienable.

B. Government's Interest in National Security

The investigation of procedural due process rights and drone executions targeting Americans continues with the second prong of the *Mathews* test: the government's interest in carrying out the official action.[161] This interest drives the actions of federal actors who, in turn, affect the private citizen's interest in life, liberty, or property.[162]

AUMF drone strikes are an indispensable element of the United States's global counterterrorism strategy that protects American citizens.[163] National security has long been recognized as a deeply persuasive, if not the most persuasive, government interest.[164] Much like a citizen's life interest, the executive's broad control over the military is explicitly enumerated within the Constitution.[165] Alexander Hamilton provided one of the earliest conceptualizations linking this remarkable grant of power to demanding the vigorous maintenance of our nation's borders and fiercely protecting the lives of American citizens.[166] Over two centuries later, Hamilton's arguments for a strong and "energetic" executive remain highly relevant: the former legal advisor to the Bush administration explicitly relied on Hamilton's reasoning when interpreting the executive's constitutionally enumerated military power as a preeminent responsibility to anticipate and defend against foreign attacks.[167] This responsibility could naturally extend to employing drone strikes to preemptively neutralize the threat posed by dangerous individuals.[168] The Constitution's explicit grant of presidential military

160. 8 U.S.C. § 1401 (2012) ("The following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof . . . ."); *see also* Trop v. Dulles, 356 U.S. 86, 92 (1958) ("Citizenship is not a license that expires upon misbehavior."); State v. Moore, 25 Iowa 128, 135–36 (1868) ("The right to life and to personal safety is not only sacred in the estimation of the common law, but it is *inalienable*." (emphasis added)).

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

162. *See id.*

163. *See supra* Parts I.A–B.

164. Haig v. Agee, 453 U.S. 280, 307 (1981).

165. U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . .").

166. THE FEDERALIST NO. 70, at 354 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks . . . ."); *see also* THE FEDERALIST NO. 74, at 375 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.").

167. *See* Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487, 489–90 (2002).

168. *See id.* at 487–88.

power provides nearly peerless authority for recognizing national security as an utmost and robust government interest.

The authoritative interpreters of the Constitution have consistently arrived at a similar conclusion. In *Haig v. Agee*,[169] Chief Justice Warren Burger declared that "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."[170] Chief Justice Earl Warren similarly recognized national security as one of the "weightiest considerations" when assessing due process rights.[171] The pages of history provide further validation of the incredible latitude given to the executive in matters of national security: in the *Prize Cases*,[172] the Court commended President Lincoln's preemptive blockade of Southern ports during the Civil War absent an official congressional declaration of war.[173] More recently, Justice Sandra Day O'Connor recognized the value of preventive military action by acknowledging the government's interest in detaining individuals who pose an impending threat to the lives of U.S. citizens as "crucially important" and "critical."[174] The Court's continued endorsement of preventive military action supports the executive's use of the AUMF to carry out preemptive drone strikes against imminent threats.[175] The AUMF is an integral component of the government's mighty interest in maintaining our nation's post-9/11 security blanket and fighting the War on Terror.[176] However, drone executions of Americans advance a grim question: Under what circumstances can taking one citizen's life preemptively be justified to potentially save many others' lives?

C. The Risk of an Unjustified Drone Execution

Explicit constitutional enumerations and powerful Supreme Court jurisprudence firmly entrench both the private citizen's life interest and the government's interest in preserving national security. The third prong of the *Mathews* procedural due process test ascertains the likelihood that the government's actions would cause the erroneous deprivation of a private citizen's interest in life, liberty, or property.[177] The risk of an erroneous deprivation is the likelihood that the government's actions would unjustifiably affect an individual's life, liberty, or property rights in the absence of sufficient due process.[178] Assessing the risk of erroneous

169. 453 U.S. 280 (1981).

170. *Id.* at 307 (quoting Aptheker v. Sec'y of State, 378 U.S. 500, 509 (1964)).

171. Zemel v. Rusk, 381 U.S. 1, 14–16 (1965) (holding that the plaintiff's right to travel to Cuba, a "liberty" under the Fifth Amendment, was trumped by national security concerns stemming from the Cuban Missile Crisis).

172. 67 U.S. (2 Black) 635 (1862)

173. *See id.* at 669 ("The President was *bound* to meet [the Civil War] in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact." (emphasis added)).

174. Hamdi v. Rumsfeld, 542 U.S. 507, 520, 530 (2004).

175. *Cf. id.*

176. *See id.* at 510; Kelly, *supra* note 33; *see also supra* Parts I.A–B.

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

178. *Id.*

deprivation is the cornerstone of procedural due process evaluations and an integral component of the *Mathews* test.[179] In the context of AUMF drone strikes, the risk of erroneous deprivation is the probability that the executive targets and executes an innocent individual.[180] The high value of an individual's right to life substantially raises the stakes of this assessment: while property can be returned or compensated for, death is irreversible.[181] Avoiding the unjustified or mistaken deprivation of life is of the utmost importance.[182]

Strikingly, the executive never formally charged Aulaqi in connection with plotting, aiding, or committing an act of terror before his execution.[183] The absence of formal charges eviscerated any opportunity for Aulaqi to understand the nature of his alleged crimes or to protest such claims.[184] Indictments and formal charges make criminal proceedings legitimate.[185] Few legal principles are more fundamental than articulating the nature of a suspect's crimes before enacting punishment.[186] The Magna Carta recognized this cardinal tenet over 800 years ago: "No freeman shall be seized, or imprisoned, or dispossessed, or outlawed, *or in any way destroyed* . . . except[] by the legal judgment of his peers, or by the laws of the land."[187] In Aulaqi's case, the executive provided no discernible method to stake out which "law of the land" was violated and instead substituted legal examination by peers for execution by adversary.[188] Executive officials made their own classified determination of the illegality of the citizen's actions and refused to abide by traditional criminal process or sentencing.[189] The absence of formal charges and standard criminal process removes an integral grounding mechanism for executive discretion and eliminates any opportunity to understand or refute the alleged illegality prior to execution, thereby increasing the likelihood of an unjustified execution and the risk of an erroneous deprivation.

Another grounding mechanism for executive power is public accountability and, by extension, the decisions of the voting public in

179. *See* Carey v. Piphus, 435 U.S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."); *see also Mathews*, 424 U.S. at 344 ("[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process . . . .").

180. *See Mathews*, 424 U.S. at 335, 344.

181. *See supra* notes 135–38 and accompanying text.

182. *See supra* notes 135–38 and accompanying text.

183. *See supra* note 5 and accompanying text.

184. *See supra* note 5 and accompanying text.

185. *See* Gilbert v. Homar, 520 U.S. 924, 934 (1997); Kirby v. Illinois, 406 U.S. 682, 689 (1972).

186. *See Kirby*, 406 U.S. at 689 ("The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice.").

187. MAGNA CARTA, ch. 39 (1215) (emphasis added).

188. *See supra* notes 5–6 and accompanying text.

189. *See supra* notes 5–6, 12 and accompanying text.

elections.[190] The wisdom of the executive's political decisions, albeit outside the realm of the judicial review,[191] is subject to constant evaluation by the voting public and their elected representatives.[192] Public scrutiny limits executive discretion.[193] Employing a secretive, internal procedure to carry out the drone execution of a U.S. citizen enables the executive to distance itself from the laws and procedures publicly elected officials enacted to combat terrorism.[194] In turn, this methodology marginalizes the public's voting decisions and minimizes the impact of public accountability on executive decision-making.[195] The absence of meaningful public accountability erases another necessary check on executive discretion and further magnifies the possibility that an AUMF drone strike erroneously deprives an American citizen's life.

Beyond eschewing standard criminal process, the executive's calculated unilateralism also significantly increases the risk of an unjustified execution. The DOJ White Memo asserts that "a decision-maker could reasonably decide that the threat posed by al-Aulaqi's activities to United States persons is 'continued' and 'imminent.'"[196] This argument implies that a federal judge (the aforementioned "decision-maker") would likely sanction a citizen's execution as a valid response to the "imminent threat of violence or death."[197] Executive officials are inserting their own analysis of imminence and assuming a federal judge would agree.[198] However, federal judges are the experts on evaluating imminence, not the executive: imminence is a legal standard federal judges authoritatively determine as a regular component of federal standing.[199] Supplanting a "decision-maker['s]" legal expertise with

190. *See supra* note 110 and accompanying text; *see also* THE FEDERALIST NO. 70, at 355 (Alexander Hamilton) (Ian Shapiro ed., 2009) (arguing that the executive's "due dependence on the people" is the primary "ingredient" to preserve republican and democratic values).

191. *See supra* Part I.E.3.

192. *See supra* note 110 and accompanying text; *see also* THE FEDERALIST NO. 70, at 355 (Alexander Hamilton) (Ian Shapiro ed., 2009).

193. *See supra* note 110 and accompanying text; *see also* THE FEDERALIST NO. 70, at 355 (Alexander Hamilton) (Ian Shapiro ed., 2009).

194. *See* Karen J. Greenberg, *Prosecuting Terrorists in Civilian Courts Still Works*, ATLANTIC (Nov. 20, 2017), https://www.theatlantic.com/international/archive/2017/11/isis-trump-terrorist-obama-court-military-guantanamo/546296/ [https://perma.cc/HFG7-GLZG] (recognizing the viability of federal courts to successfully try terrorism subjects under domestic U.S. law).

195. The appointment of chief federal prosecutors, who try terrorism cases on behalf of the government, is subject to Senate confirmation and is an extension of public voting decisions. *Direct Election of Senators*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Direct_Election_Senators.htm [https://perma.cc/V2QH-NGF5] (last visited Nov. 15, 2018); *see, e.g.*, Benjamin Mueller et al., *Prosecutors Describe Driver's Plan to Kill in Manhattan Terror Attack*, N.Y. TIMES (Nov. 1, 2017), https://www.nytimes.com/2017/11/01/nyregion/driver-had-been-planning-attack-in-manhattan-for-weeks-police-say.html [https://perma.cc/VX4G-KYT9] (describing the role of federal prosecutors in pursuing an alleged terrorist).

196. DOJ White Memo, *supra* note 12, at 39 (quoting a redacted source).

197. *Id.* at 39, 40.

198. *See id.*

199. *See* U.S. CONST. art. III, § 1; Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (holding that Article III standing requires that "the alleged harm must be actual or imminent,

unqualified executive judgment risks creating differing standards of imminence and dramatically increases the possibility of an unjustified drone execution and an erroneous death.

Beyond a unilateral determination of imminence, the DOJ White Memo's recommended methodology entails the executive exclusively assessing the constitutional rights of an American citizen.[200] In doing so, the executive singularly defines the extent of procedural due process afforded a citizen targeted for drone execution.[201] Additionally, the DOJ White Memo evidenced executive reliance on Israeli jurisprudence to justify the absence of formal process afforded Aulaqi.[202] However, the executive is not equipped to unilaterally assess the boundaries of constitutional liberties—as noted over 200 years ago in *Marbury v. Madison*, the judiciary is the unparalleled and supreme interpreter of the Constitution.[203] The judiciary is solely empowered to declare the existence and extent of constitutional rights, such as procedural due process minimums.[204] The harm posed by the executive's unqualified analysis of procedural due process rights is magnified by its reliance on foreign jurisprudence.[205] As Justice Breyer succinctly noted: "[F]oreign authority does not bind us. After all, we are interpreting a 'Constitution for the United States of America.'"[206] The executive's reliance on foreign jurisprudence is especially conspicuous given it is employing non-U.S. law to constrain the scope of rights explicitly granted under the Fifth Amendment—in other words, the executive is deploying foreign law to limit supreme domestic law.[207] The executive unilaterally gauging the requisite due process mandated by the Constitution, and supporting such propositions with foreign jurisprudence that narrows domestic law, greatly increases the likelihood that an American citizen could be unjustifiably targeted and executed via drone strike. The executive's

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not 'conjectural' or 'hypothetical'" (quoting Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983))). The standard of "imminent harm" has been evaluated by federal judges in a plethora of contexts. *See, e.g.*, Clapper v. Amnesty Int'l USA, 568 U.S. 398, 411–13 (2013) (wiretapping foreign contacts); Baze v. Rees, 553 U.S. 35, 50 (2008) (lethal injection); MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128–29 (2007) (pending patent prosecution); Meghrig v. KFC W., Inc., 516 U.S. 479, 481–82 (1996) (contaminated soil); Lujan v. Defs. of Wildlife, 504 U.S. 555, 564–65 (1992) (endangered animals).

200. *See* DOJ White Memo, *supra* note 12, at 38–41.

201. *See id.*

202. *Id.* at 40 (noting that "arrest, investigation and trial" may be impracticable (quoting HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel (2) IsrLR 459, 504 (2006))).

203. 5 U.S. (1 Cranch) 137, 165–67 (1803); *see supra* notes 93–98 and accompanying text.

204. *Marbury*, 5 U.S. (1 Cranch) at 165–67; *see supra* notes 93–98 and accompanying text.

205. Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari) (asserting that the Supreme Court "should not impose foreign moods, fads, or fashions on Americans"); Knight v. Florida, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari); *see also* Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32, 86 (2005) ("If foreign decisions are freely citable, any judge wanting a supporting citation has only to troll deeply enough in the world's *corpora juris* to find it.").

206. *Knight*, 528 U.S. at 996 (Breyer, J., dissenting from the denial of certiorari) (quoting Thompson v. Oklahoma, 487 U.S. 815, 868, n.4 (1988) (Scalia, J., dissenting)).

207. *See supra* notes 9, 200–02 and accompanying text.

unilateral methodology, as evidenced throughout the DOJ White Memo, greatly increases the risk of an erroneous deprivation of life.

D. Judicial Review as a Safeguard Against the Erroneous Deprivation of Life

The final element of the *Mathews v. Eldridge* balancing test analyzes the potential benefit of implementing additional procedural safeguards to ensure against an erroneous deprivation.[208] The abuses of the AUMF drone program have prompted various proposals incorporating judicial review as a means of providing additional due process and safeguarding against unjustified executions.[209] The wide spectrum of proposed judicial solutions can be segregated into ex ante review (i.e., preemptive judicial review of proposed drone strikes)[210] and ex post review (i.e., implementing an effective post hoc legal regime that enables courts to provide meaningful relief for the families of those killed by unjustified drone strikes).[211] Part II.D.1 examines the significant benefits of the judiciary reviewing AUMF drone executions targeting American citizens, and Part II.D.2 surveys the foundational aspects of ex ante and ex post regimes.

1. The Merits of Judicial Review

While some may shudder at imposing a judicial check on the sphere of military power explicitly accorded the executive,[212] it remains integral to a federal government of divided powers.[213] Justice Anthony Kennedy vividly articulated the necessity of the judiciary reviewing executive war-making authority:

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208. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). While a plethora of potential safeguards could be implemented to reduce the possibility of an unjustified drone execution, this Note will solely examine two popular judicial solutions: ex post and ex ante judicial review.

209. *See, e.g.*, Mark Mazzetti & Scott Shane, *Drones Are Focus as C.I.A. Nominee Goes Before Senators*, N.Y. TIMES (Feb. 7, 2013), http://www.nytimes.com/2013/02/08/us/politics/senate-panel-will-question-brennan-on-targeted-killings.html [https://perma.cc/T9KH-CAE8]; Scott Shane, *Debating a Court to Vet Drone Strikes*, N.Y. TIMES (Feb. 8, 2013), http://www.nytimes.com/2013/02/09/world/a-court-to-vet-kill-lists.html [https://perma.cc/362Z-GXR2]; Editorial, *A Court for Targeted Killings*, N.Y. TIMES (Feb. 13, 2013), http://www.nytimes.com/2013/02/14/opinion/a-special-court-is-needed-to-review-targeted-killings.html [https://perma.cc/Y2AA-79AA].

210. *See generally* Jeh Johnson, Former Gen. Counsel, Dep't of Def., Keynote Address at the Center on National Security at Fordham Law School: A "Drone Court": Some Pros and Cons (Mar. 18, 2013), https://www.lawfareblog.com/jeh-johnson-speech-drone-court-some-pros-and-cons [https://perma.cc/Y33A-6MQD].

211. *See generally* Joshua Andresen, Note, *Due Process of War in the Age of Drones*, 41 YALE J. INT'L L. 155 (2016).

212. *See supra* Part II.B; *see also* Neomi Rao, *Real Drone Strike Accountability Requires Political Checks*, N.Y. TIMES: ROOM FOR DEBATE (Apr. 25, 2015), https://www.nytimes.com/roomfordebate/2015/04/24/should-a-court-approve-all-drone-strikes/real-drone-strike-accountability-requires-political-checks [https://perma.cc/9UNM-2KXR] (arguing that Congress should provide the necessary political solutions to curb transparency and due process concerns irrespective of the federal judiciary).

213. *See supra* Parts I.E.1–2.

> Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. . . .
>
> Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch.[214]

Justice Kennedy espoused the value of the political branches engaging in "genuine debate" over how to best preserve constitutional values while fending off the threat of terrorism.[215] The Court has held that the limits of military discretion, which could include targeting an American citizen for drone execution, is one such area of "genuine debate" reserved exclusively for the judiciary.[216]

Originalist critics fearful of judicial overreach need not worry: Justice Kennedy's conceptualization of separation of powers is not isolated nor modernist; rather, as noted above, this viewpoint has been consistently articulated since the days of the Framers.[217] Hamilton, Jay, and Madison all championed a system of checks and balances that restrained executive authority from devolving into tyrannical rule empowered by reckless military discretion.[218] *Marbury v. Madison* recognized the ability of the judiciary to temper executive authority whenever constitutionally vested rights come under siege, even by actions purportedly supported by federal legislation.[219] In the Framers' eyes, the judiciary ensures that broad federal legislation—such as the AUMF—can never grant free rein to the executive over the military and the constitutional rights of American citizens.

However, we do not live in the colonial era of the Framers and 200-year-old conceptualizations of diffuse federal power are not necessarily determinative.[220] Per Justice Jackson's modern tripartite framework for analyzing executive power, the AUMF's explicit congressional authorization of executive war-making power elevates presidential power to its strongest ebb.[221] However, the judiciary has consistently established that it is fully empowered to review and rebuff executive actions made pursuant to the AUMF.[222] In *Hamdi v. Rumsfeld*, a plurality of the Supreme Court rejected the government's claim that the AUMF authorized indefinite detention.[223] In

214. Boumediene v. Bush, 553 U.S. 723, 797 (2008).

215. *Id.* at 798.

216. Sterling v. Constantin, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.").

217. *See supra* Part I.E.1.

218. *Id.*; *see also* Loving v. United States, 517 U.S. 748, 756 (1996) ("Even before the birth of this country, separation of powers was known to be a defense against tyranny.").

219. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–66, 176–77 (1803); *see also supra* notes 93–98 and accompanying text.

220. *See generally* Aaron Blake, *Neil Gorsuch, Antonin Scalia and Originalism, Explained*, WASH. POST (Feb. 1, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/01/neil-gorsuch-antonin-scalia-and-originalism-explained/ [https://perma.cc/JEC5-XA7S].

221. *See supra* notes 99–106 and accompanying text.

222. *See supra* note 46 and accompanying text.

223. 542 U.S. 507, 521 (2004).

Hamdan v. Rumsfeld,[224] the Court rejected the government's assertion that the AUMF enabled the executive to convene military commissions.[225] In *Hamlily v. Obama*,[226] a court found that the AUMF does not authorize the detention of those who "substantially support" al-Qaeda but are not a part of it, again rejecting the government's assertion of its detention authority under the AUMF.[227] Even when the executive is vested with the strongest possible level of authority via the AUMF,[228] presidential power always remains subject to judicial scrutiny and tempering. The judiciary's authority to rebuff executive discretion under the AUMF makes it the preeminent safeguard against an unjustified execution. Put simply, "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[229]

2. The Spectrum of Judicial Assessment: Ex Post vs. Ex Ante Review

A tragic history of unintended civilian casualties, further compounded by Aulaqi's execution, has produced a wide spectrum of proposals advocating for the implementation of judicial review to safeguard against the erroneous deprivation of life frequently associated with drone strikes.[230] On one end of the spectrum, some have advocated for a preemptive, ex ante judicial check on proposed drone strikes targeting American citizens analogous to the surveillance courts currently in operation.[231] These surveillance courts review classified information provided solely by the executive in nonadversarial hearings before providing surveillance warrants.[232] Similarly, preemptive judicial review of proposed drone strikes would not resolve preexisting cases or controversies, but rather evaluate whether the proposed use of lethal force against an enemy combatant would be justified based upon classified information provided by the executive.[233] Preemptive judicial review of proposed drone strikes targeting Americans would introduce an independent arbiter to examine the legal sufficiency of the executive's evidence.[234] Introducing an independent system of review could mitigate executive discretion and prevent drone strikes for which the executive lacks sufficient evidence, thereby reducing the risk of an unjustified drone execution.[235] Theoretically, this approach may delay drone

224. 548 U.S. 557 (2006).
225. *Id.* at 559.
226. 616 F. Supp. 2d 63 (D.D.C. 2009).
227. *Id.* at 75–77.
228. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952); *supra* notes 99–106 and accompanying text.
229. Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).
230. *See supra* notes 37, 209–11 and accompanying text.
231. Johnson, *supra* note 210.
232. *Id.*
233. *Id.*
234. Editorial, *supra* note 209.
235. *See id.*

strikes pending judicial decision and could be more burdensome for the executive.[236]

On the other end of the judicial-safeguard spectrum, ex post review provides the opportunity for a retrospective adversarial hearing in which both the government and a private individual or entity can present evidence after a drone strike has occurred.[237] Adversarial hearings provide increased "procedural legitimacy" and "substantive accuracy," which can help victims of unjustified drone strikes find relief.[238] These post hoc hearings would enable judges to examine a complete set of facts, which would not always be possible during preemptive ex ante review.[239] While there is currently no remedy for families suing on behalf of American citizens killed by drone strikes,[240] some have proposed the creation of a statutory right to nominal damages as the "least-worst" option to rein in AUMF drone strikes.[241] Legislation that provides for damages could incentivize increased executive diligence—both out of a desire to avoid the costs of being sued and the associated negative publicity—and potentially decrease the likelihood of an erroneous execution.[242]

III. AN OUNCE OF PREVENTION IS WORTH A POUND OF CURE: IMPLEMENTING AN EX ANTE LEGAL REGIME TO PREVENT UNJUSTIFIED DRONE EXECUTIONS

A high risk of the erroneous deprivation of life,[243] coupled with incredibly weighty private and government interests,[244] demand additional procedural protection to ensure that the next Aulaqi is not the victim of a potentially unjustified execution.[245] Ex ante judicial review of proposed drone strikes is the superlative check on executive discretion and the best safeguard of the Fifth Amendment's guarantee of procedural due process. Part III.A identifies the pragmatic benefits offered by ex ante review that would be impracticable under any post hoc legal regime. Part III.B details an ex ante methodology that respects the judiciary's constitutionally vested authority but is not overly burdensome to the government's vital interest in preserving national security.

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236. *See id.*
237. Jameel Jaffer, *Judicial Review of Targeted Killings*, 126 HARV. L. REV. F. 185, 186 (2013).
238. *Id.*
239. *See id.*
240. *See supra* notes 122–23.
241. Steve Vladeck, *Why a "Drone Court" Won't Work—but (Nominal) Damages Might . . .* , LAWFARE (Feb. 10, 2013), https://www.lawfareblog.com/why-drone-court-wont-work-nominal-damages-might [https://perma.cc/YL2P-MQKV].
242. *See id.*
243. *See supra* Part II.C.
244. *See supra* Parts II.A–B.
245. *See* Al-Aulaqi v. Panetta (*Aulaqi II*), 35 F. Supp. 3d 56, 74 (D.D.C. 2014) (noting that Aulaqi's execution gave rise to a "plausible" due process claim).

A. The Pragmatism of Ex Ante Review over Ex Post Review

An ex ante legal regime is a supremely more effective means of supplying additional process and curbing executive excess than ex post review. Ex ante review allows for the prevention of constitutional infringement that may otherwise be incapable of judicial redress. In addition to highlighting the problematic standing requirements that may impede those seeking relief, *Aulaqi I* demonstrated the hardship imposed by the political question doctrine, which prohibited Aulaqi's father from questioning his son's inclusion on an executive "kill list" and effectively ended his efforts to stop his son's impending execution.[246] Aulaqi's family was similarly denied relief in *Aulaqi II*—despite bringing a plausible due process claim—because no U.S. law could provide damages or other remedies.[247] As such, ex post review would likely require a congressional remedy for damages to ensure any form of meaningful post hoc judicial process.[248] However, the significant procedural burdens noted above would be nearly prohibitive for plaintiffs seeking relief from such a congressional remedy. Many plaintiffs would be denied relief in an ex post regime simply because of how their complaint was framed[249] or due to lack of standing.[250] Ex post review hinges upon an inaccessible remedy that, given the immense value of human life, will necessarily be inadequate every time.[251]

In contrast, preemptive judicial inquiries in an ex ante regime could be narrowly centered on evaluating legal concerns and thus not be barred under the political question doctrine.[252] To avoid issues of justiciability under the political question doctrine, ex ante judicial review would not attack foreign policymaking but rather examine compliance with law and constitutional guarantees[253]—both of which are quintessential judicial functions.[254] Preemptive ex ante review can effectively sidestep the legal roadblocks that would make an ex post regime unworkable for plaintiffs seeking relief.

Plaintiffs in an ex post review are not the only ones who would needlessly suffer. The post hoc nature of ex post review makes it nearly impossible to *prevent* an unjustified drone execution, which effectively nullifies the value of the private citizen's life interest in the due process calculus.[255] The

246. *See supra* notes 112–16.
247. *See supra* notes 122–23.
248. Vladeck, *supra* note 241.
249. *See supra* notes 112–16 and accompanying text.
250. *See supra* notes 122–23.
251. *See supra* Part II.A.
252. *See supra* notes 108–16 and accompanying text.
253. *See supra* notes 108–16; *cf.* Davis v. Bandemer, 478 U.S. 109, 126 (1986) (stating that the "narrow categories of 'political questions'" should not be transformed into an "ad hoc litmus test of this Court's reactions to the desirability of and need for judicial application of constitutional or statutory standards to a given type of claim").
254. *See supra* notes 92–98 and accompanying text; *see also* Baker v. Carr, 369 U.S. 186, 211 (1962); Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 935 (D.C. Cir. 1988) ("[T]he Supreme Court has repeatedly found that claims based on [due process] rights are justiciable, even if they implicate foreign policy decisions.").
255. *See supra* note 138.

executive's record of abuse and mistreatment throughout the War on Terror provides a cautionary tale of the dangers posed by unchecked executive discretion.[256] Ex ante review provides an opportunity to preemptively curb such discretion, while ex post review would do little, if anything, to slow the government's escalating record of human rights abuses in the War on Terror.[257] Ex ante review offers an invaluable preventive mechanism that lives up to the promises of our Constitution.

B. Toeing the Line: A Narrow Ex Ante Legal Regime

An ex ante regime to review proposed drone strikes could be efficiently implemented via congressional act. Congress has already displayed its willingness to promulgate acts that create courts dedicated to specialized, preemptive review[258] and has repeatedly rebuffed the AUMF's expansive power.[259] Ex ante review of proposed drone strikes must be precisely tailored to provide an additional layer of process without devolving into an undue burden on the government.[260] To ensure that the executive is free to vigorously conduct counterterrorism operations overseas,[261] ex ante review should be limited to instances where the executive believes it is necessary to target an American citizen. Notwithstanding that noncitizens lack significant (if any) procedural due process rights outside the United States that would merit ex ante judicial review,[262] this initial threshold significantly reduces the government's burden by allowing them to conduct the vast majority of AUMF drone operations unfettered by judicial review. Article III judges, as opposed to state judges, should be selected for ex ante review as they are the preeminent arbiters between the political branches and are uniquely equipped to assess the constitutional rights of citizens.[263]

But how should such Article III judges be selected? Permitting the executive to select judges would acquiesce to a new cycle of unilateralism and defeat the ideals of diffuse power inherent in independent review.[264] Rather, a panel of three federal judges should be selected randomly from the circuit court that has jurisdiction over the targeted citizen's last known domicile in the United States. This procedure ensures a randomized system of independent review by competent decision makers that would break the pattern of executive unilateralism. A panel of three judges tips the due process scales in favor of the private citizen's life interest and greatly

256. *See supra* note 30.
257. *See supra* note 30.
258. *See* 50 U.S.C. § 1802 (2012).
259. *See supra* notes 51–54 and accompanying text.
260. Hamdi v. Rumsfeld, 542 U.S. 507, 531 (2004) (noting that the "realities of combat" may induce "necessary and appropriate" military action and that "due process analysis need not blink at those realities"). However, the Court proceeded to assert that "essential constitutional promises may not be eroded." *Id.* at 533.
261. *See* Kelly, *supra* note 33.
262. *See supra* note 63.
263. *See supra* Part I.E.1.
264. *See supra* Part I.E.1.

decreases the risk of erroneous deprivation by promoting a more thorough review than a single judge and decreasing the likelihood that the executive can coercively present evidence. This balance is necessary given these hearings would be nonadversarial and would only involve evidence presented by the government. However, heightened review from a panel is likely to be less timely than a single judge's assessment and is therefore more burdensome to the government's interest in robustly maintaining national security.[265]

To offset this increased burden, the panel should only review information precisely tailored to the preeminent legal concept at stake: whether the citizen poses an imminent threat.[266] Given that Article III judges are solely qualified to make an authoritative determination of imminence in the context of the federal government, judicial review of the imminency of harm greatly reduces the risk of an unjustified execution.[267] Prohibiting the executive from making an authoritative judgment on imminence will greatly improve the accuracy of the decision-making underlying drone executions and align ex ante drone proceedings with both the promises of the Fifth Amendment and the constitutional empowerments of the executive and the judiciary.[268]

To further improve the integrity of these ex ante proceedings and to protect national security, all evidence presented to the panel should be redacted to remove identifying information about the proposed target's identity. Not only would these omissions lessen the executive's evidentiary burden to comport with analogous Supreme Court precedent,[269] it also decreases the likelihood of bias entering the panel's determinations and greatly diminishes the probability that classified information could leak to the public and disrupt the executive's proposed strike.[270] If a majority of the panel believes the citizen poses an imminent threat, the proposed strike may proceed. Requiring only a majority of the judges to sanction the strike lessens the burden on the government by ensuring that a single judge cannot exercise veto power.

This methodology greatly refines the scope of evidence the executive must provide the panel of judges, which diminishes the government's burden while still allowing for a thorough review of the integral legal concern at stake. While fully recognizing both the executive's military power[271] and the judiciary's constitutional authority,[272] this legal regime reduces the likelihood of an unjustified execution by centering judicial review around the

265. *See supra* notes 163–76 and accompanying text.
266. *See supra* notes 196–99 and accompanying text.
267. *See supra* notes 196–99 and accompanying text.
268. *See supra* notes 196–99 and accompanying text.
269. *See, e.g.*, *supra* note 145 and accompanying text.
270. Justice Thomas's dissent in *Hamdi v. Rumsfeld* voiced his concerns that the plurality's holding would open the door for mandating that proposed bombing targets be afforded notice and a hearing. 542 U.S. 507, 597–99 (2004) (Thomas, J., dissenting). This narrow ex ante methodology circumvents this problem while still providing a necessary additional layer of process.
271. *See supra* Part II.B.
272. *See supra* notes 199, 203–04.

imminency of harm posed by an American citizen.[273] This system of preemptive review significantly reduces the risk of an erroneous deprivation and, in doing so, greatly diminishes the likelihood that a citizen's procedural due process rights would be infringed under the *Mathews* test.

CONCLUSION

The executive's harsh unilateral treatment of an American citizen's most valuable private interest in the DOJ White Memo coupled with the recognition of a plausible due process claim incapable of redress in *Aulaqi II* scream for reform. The high risk of erroneous deprivation inherent in the executive's current methodology should be offset by allocating power to the federal branch most qualified to assess constitutional rights—the judiciary. The narrowly tailored ex ante judicial regime described above provides a much-needed system of independent review that allows the executive to carry out its vital mission of safeguarding our nation while still providing adequate procedural due process for U.S. citizens. Although little can be done to remedy past transgressions, hope remains for the next Aulaqi—there is still time to mitigate the slippery slope toward executive despotism so feared by the Framers of our Constitution. As Justice O'Connor masterfully articulated: "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."[274] It would be of the highest shame if, cloaked under the banner of national security, we lost sight of the values that make our nation worth defending.

273. *See supra* notes 266–68 and accompanying text.
274. *Hamdi*, 542 U.S. at 532.