COMMENT

EXECUTIVE PROCESS: THE DUE PROCESS OF EXECUTIVE CITIZEN TARGETING BY THE COMMANDER-IN-CHIEF

Noah Oberlander*

INTRODUCTION

A group of insurgents attacked on September 11 in defiance against the United States Federal Government.[1] Fueled by foreign radical ideology and terror, the insurgents threatened the safety and well-being of the nation. The President issued an initial proclamation denouncing the insurgency and establishing procedures to defeat the insurgent group. As the United States' confrontation against the insurgency continued, the President's most trusted national security advisor, the Secretary of the Treasury, began meeting with intelligence and military officials to compile a list of high value insurgents for the military to target. One of

* George Mason University School of Law, J.D. 2014; Patrick Henry College, B.A. 2011. Thank you to Brandon Bierlein, Jeff Jennings, and Jessica Wagner for being healthy skeptics of Executive Power.

[1] The following scenario is based on a historical account of the Whiskey Rebellion. WILLIAM HOGELAND, THE WHISKEY REBELLION: GEORGE WASHINGTON, ALEXANDER HAMILTON, AND THE FRONTIER REBELS WHO CHALLENGED AMERICA'S NEWFOUND SOVEREIGNTY 215-36 (2006).

the insurgents at the top of the list, an American citizen, was believed to play an operational and support role in the insurgency.

The Secretary of the Treasury advised the President that while due process may require judicial process for prolonged detainment of the insurgents, initial military action to capture or kill the insurgents did not require court involvement. The President stressed the highest standards of legality ought to be followed when confronting the insurgents. Acting under general Congressional authorization and inherent constitutional power as Commander-in-Chief, the President approved the list and authorized military action.

The preceding scenario is not a description of the post-9/11 War on Terrorism or President Obama's targeting of Anwar al-Awlaki ("al-Awlaki"),[2] an American citizen and al Qaeda Arabian Peninsula leader.[3] Rather, the scenario describes the events of September 11, 1794 and George Washington's response to the Whiskey Rebellion.[4] Though separated by over two hundred years and quantum leaps in technological sophistication, the presidential response to this type of national crisis is largely unchanged. Today, the Executive Branch continues to grapple with the same normative and legal issues surrounding due process when responding to national security threats from American citizens. Yet, from George Washington's response in the Whiskey Rebellion, to President Obama's targeting of al-Awlaki, presidential action as Commander-in-Chief constitutes executive process.

This Comment argues that President Obama's targeting of American citizens like al-Awlaki complies with the Fifth Amendment's procedural requirement of due process[5] by affording those citizens

[2] Certain sources will alternatively spell "al-Awlaki" as "al-Aulaqi" consistent with its phonetic pronunciation. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010).
[3] President Barack Obama, Remarks by the President at the "Change of Office" Chairman of the Joint Chiefs of Staff Ceremony (September 30, 2011) (transcript), *available at* http://www.whitehouse.gov/the-press-office/2011/09/30/remarks-president-change-office-chairman-joint-chiefs-staff-ceremony.
[4] *See* HOGELAND, *supra* note 1, at 208-09; THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION (1986).
[5] U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

executive process. Part I of this Comment explains that while judicial process is the most common form of due process, the omission of judicial procedure does not automatically violate due process. The Obama Administration argues the targeting process gave al-Awlaki sufficient due process to satisfy the constitutional requirement necessary for the killing of an American citizen. Specifically, the Obama Administration has established specific procedures for targeting American citizens like al-Awlaki. While critics argue targeting al-Awlaki violated due process, they overlook two alternative theories of due process: fairness and separation of powers. Part II of this Comment traces the progression of executive process under both theories of due process; fairness and separation of powers Necessity warrants executive process under a theory of due process as fairness. Discretion as Commander-in-Chief warrants executive process under a theory of due process as separation of powers. Part III of this Comment gives a rationale for targeting American citizens like al-Awlaki under both theories of due process. Under the *Mathews v. Eldridge*[6] balancing test, the Executive's targeting of al-Awlaki protected national security and President Obama's regularized procedure adequately minimized risk of error. Under the separation of powers theory, the Commander-in-Chief Clause confers on the President the discretion to act consistent with Congressional statute to ensure national security.

I. DUE PROCESS IS NOT MERELY JUDICIAL PROCESS

Judicial process is the most visible and commonly afforded type of due process, yet since the early days of the republic, the Supreme Court has recognized executive process as a real and meaningful species of due process.[7] Executive process is most often present when the President is acting under his authority as Commander-in-Chief against a national security threat.[8]

[6] 424 U.S. 319, 333-36 (1976).
[7] Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827).
[8] *Id.*

A. *The Obama Administration's Executive Citizen Targeting Program*

While the Obama Administration has established a program that can target U.S. citizens who are senior operational leaders of al Qaeda or associated forces,[9] the only known American targeted to date is Anwar al-Awlaki.[10]

1. The Executive's Targeting of American Citizen al-Awlaki

In April 2010, the Obama Administration authorized the Central Intelligence Agency ("CIA") to target al-Awlaki, an American citizen born in New Mexico living in the Arabian nation of Yemen.[11] Although al-Awlaki allegedly met two of the 9/11 hijackers while serving as an imam at a mosque in San Diego;[12] following the September 11, 2001 terrorist attacks, al-Awlaki communicated a message of moderate mutual understanding to a congregation at the Dar al Hijrah Islamic Center located in the Washington, D.C. metropolitan area.[13] Yet, when

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[9] U.S. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE (Nov. 8, 2011) (released Feb. 3, 2013), http://www.fas.org/irp/eprint/doj-lethal.pdf.

[10] *See* Charlie Savage, *Secret U.S. Memo Made Legal Case To Kill a Citizen*, N.Y. TIMES, Oct. 8, 2011, at A1 (explaining while U.S. citizen Samir Khan was also killed by a drone strike he was not the target and merely collateral damage); Tom Finn & Noah Browning, *An American Teenager in Yemen: Paying for the Sins of His Father?*, TIME (Oct. 27, 2011), http://www.time.com/time/world/article/0,8599,2097899,00.html ("A U.S. official said the young man 'was in the wrong place at the wrong time,' and that the U.S. was trying to kill a legitimate terrorist—al-Qaeda leader Ibrahim al-Banna, who also died—in the strike that apparently killed the American teenager."); Dana Priest & William M. Arkin, *Inside the CIA's "Kill List"*, PBS FRONTLINE (Sept. 6, 2011), http://www.pbs.org/wgbh/pages/frontline/iraq-war-on-terror/topsecretamerica/inside-the-cias-kill-list/ ("[A]nother American al-Qaeda member, Adam Gadahn, was never considered for execution because in the judgment of intelligence analysts he was all talk, a Tokyo Rose.").

[11] Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, NYTIMES.COM, Apr. 6, 2010, http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html.

[12] Mark Mazzetti, Eric Schmitt, and Robert F. Worth, *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES, Sept. 30, 2011, http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html.

[13] *See NewsHour with Jim Leher*, *Fighting Fear: Ray Suarez Examines How Life Has Changed for one American Muslim Community Since Sept. 11* (PBS television broadcast

al-Awlaki left the United States for Yemen in 2004, his message shifted to anti-Americanism[14] and encouraging attacks against the United States.[15]

Once in Yemen, al-Awlaki became the "leader of external operations for al Qaeda in the Arabian Peninsula."[16] In 2010, the United States determined al-Awlaki was involved with the killing of thirteen persons at Fort Hood in Texas and linked to the plot to detonate explosives on an airliner in Detroit on Christmas Day 2010.[17] Al-Awlaki's confirmed his involvement with Nidal Hasan in the Fort Hood attack in a propaganda video.[18]

In April 2010, the New York Times reported that the National Security Council approved placing al-Awlaki on the CIA's list of terrorists targeted for killing with a drone strike.[19] In August 2010, al-Awlaki's father filed a lawsuit in the United States District Court for the District of Columbia seeking relief under the Alien Tort Statute and an injunction preventing the Executive from using lethal force against al-Awlaki.[20] The District Court found "the political question doctrine bar[red] judicial resolution" of the case, and therefore no injunction was issued.[21] On September 30, 2011, President Obama announced al-Awlaki was successfully killed in an American drone strike in Yemen, dealing "a major blow to al-Qaeda's most active operational affiliate."[22]

Oct. 30, 2001), http://www.pbs.org/newshour/bb/religion/july-dec01/fear_10-30.html.

> The fact that the U.S. has administered the death and homicide of over one million civilians in Iraq, the fact that the U.S. is supporting the deaths and killing of thousands of Palestinians does not justify the killing of one U.S. civilian in New York City or Washington, D.C., and the deaths of 6,000 civilians in New York and Washington, DC, does not justify the death of one civilian in Afghanistan.

[14] Mazzetti, Schmitt, and Worth, *supra* note 13.
[15] *Al-Awlaki Threatens Americans* (CNN.com broadcast Nov. 9, 2010), http://www.cnn.com/video/#/video/world/2010/11/09/todd.al.awlaki.threat.cnn.
[16] Obama, *supra* note 3.
[17] Shane, *supra* note 12.
[18] *Message to the American People by Sheikh Al-Awlaki* (2010), http://archive.org/details/AwlakiToUsa.
[19] Shane, *supra* note 12.
[20] Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 12 (D.D.C. 2010).
[21] *Id.* at 52.
[22] Obama, *supra* note 3.

2. The Obama Administration Agrees al-Awlaki Was Entitled to Due Process

Although the Department of Justice has composed a roughly fifty page memorandum explaining the legal rationale for targeting al-Awlaki, the memorandum is classified and remains secret despite Freedom of Information Act requests.[23] Despite the memorandum's secrecy, the Obama Administration acknowledged the importance of publically explaining the rationale for the targeted killing of citizens. Several senior White House officials give a handful of speeches that generally explained the program.[24] Additionally, in the Department of Justice released a White Paper summarizing its legal rationale for targeting U.S. citizens who are senior operational leaders of al Qaeda.[25] These Administration speeches, the DOJ White Paper, along with scattered press articles,

[23] On October 27, 2011, the Department of Justice denied the New York Times' two requests and the American Civil Liberties Union's one request for release of documents regarding the al-Awlaki memorandum under the Freedom of Information Act. The ACLU's first request has been partially stayed by the United States District Court for the Northern District of California. *See* First Amendment Coal. v. U.S. Dep't of Justice, No. C 12-1013, 2012 WL 3027460 (N.D. Cal.). The ACLU's second request was denied on January 3, 2013 by the United States District Court for the Southern District of New York. *See* N.Y. Times Co. v. U.S. Dep't of Justice, Nos. 11 Civ. 9336 & 12 Civ. 794, 2013 WL 50209 (S.D.N.Y.).

[24] *See, e.g.*, Attorney Gen. Eric Holder, Speech at Northwestern University School of Law (Mar. 5, 2012) (transcript available at http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html); John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Speech at Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011) (transcript available at http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an); Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Speech at Annual Meeting of the American Society of International Law: The Obama Administration and International Law (March 25, 2010) (transcript available at http://www.state.gov/s/l/releases/remarks/139119.htm); Jeh Charles Johnson, Gen. Counsel, U.S. Dep't of Def., Dean's Lecture at Yale Law School: National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012) (transcript available at http://www.cfr.org/national-security-and-defense/jehjohnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448).

[25] U.S. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE (Nov. 8, 2011) [hereinafter D.O.J. WHITE PAPER], *available at* http://www.fas.org/irp/eprint/doj-lethal.pdf.

provide enough details to piece together an evaluation of Executive Citizen Targeting.[26]

To the surprise of many of the program's critics, the legal rationale for Executive Citizen Targeting does not rely on emergency circumstances to justify bypassing the strictures of procedural due process.[27] Rather, the program affirms that even United States citizens who try to kill innocent Americans are entitled to the Fifth Amendment's procedural guarantee that the government may not deprive a citizen of his or her life without due process of law.[28] On the contrary, the central tenant of Executive Citizen Targeting is that "'due process' and 'judicial process' are not one and the same, particularly when it comes to national security."[29]

3. The Process Used to Target al-Awlaki

Evaluation of the Executive's action against al-Awlaki first requires a detailed understanding of the procedures already in place. The CIA and the military's Joint Special Operations Command ("JSOC") both keep lists of non-citizen terrorists who may be lawfully targeted.[30] The CIA list requires that potential targets must pose a "current and ongoing threat to the United States."[31] This requires evidentiary proof that is greater than a "some evidence" standard and is more like a "reasonable

[26] Savage, *supra* note 10.
[27] Amos Guiora, *Targeted Killing: Lawful if Conducted in Accordance with the Rule of Law*, *in* PATRIOTS DEBATE: CONTEMPORARY ISSUES IN NATIONAL SECURITY LAW 162-67 (2012); Toren G. Evers-Mushovic & Michael Hughes, *Rules for When There Are no Rules: Examining the Legality of Putting American Terrorists in the Crosshairs Abroad*, 18 NEW ENG. J. INT'L & COMP. L. 157 (2012); Michael Epstein, *The Curious Case of Anwar Al-Aulaqi: Is Targeting a Terrorist for Execution by Drone Strike a Due Process Violation when the Terrorist is a United States Citizen?*, 19 MICH. ST. J. INT'L L. 723 (2011).
[28] Holder, *supra* note 25; D.O.J WHITE PAPER, *supra* note 25, at 5 ("The Department assumes that the rights afforded by the Fifth Amendment's Due Process Clause . . . attach to a U.S. citizen even while he is abroad.").
[29] Holder, *supra* note 25.
[30] Mark Hosenball, *Secret Panel Can Put Americans on Kill List*, REUTERS (Oct. 5, 2011 7:59 PM), http://www.reuters.com/article/2011/10/05/us-cia-killlist-idUSTRE79475C20111005.
[31] Priest, *supra* note 10.

suspicion" or "probable cause standard."[32] The JSOC list requires the government to show potential targets are an enemy terrorist based on "two verifiable human sources", along with "substantial additional evidence."[33] Both lists include an unambiguous and unqualified preference to take custody of terrorists rather than kill them.[34]

For an American citizen to be targeted, the intelligence community must get approval and "specific permission"[35] through a two-tiered process at the National Security Council (NSC).[36] First, mid-level NSC officials,[37] likely the NSC Deputies Committee,[38] must recommend an American citizen terrorist for targeting. After this initial process, the

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[32] *See* D.O.J WHITE PAPER, *supra* note 25 (stating that for a citizen to be targeted there must be "no evidence suggesting that he has renounced or abandoned such [terrorist] activities"). *Compare* Tara Mckelvey, *Inside the Killing Machine*, NEWSWEEK (Feb. 13, 2011), http://www.thedailybeast.com/newsweek/2011/02/13/inside-the-killing-machine.html:

> The CIA cables are legalistic and carefully argued. . . . The dossier, he says, "would go to the lawyers, and they would decide. They were very picky." Sometimes . . . the hurdles may have been too high. . . . Sometimes . . . the evidence against an individual would be thin, and high-level lawyers would tell their subordinates, "You guys did not make a case. . . ." "Sometimes the justification would be that the person was thought to be at a meeting" "It was too squishy." The memo would get kicked back downstairs.

with Hamdi v. Rumsfeld, 542 U.S. 507, 527 (2004) (explaining that a some evidence standard focuses "exclusively on the factual basis supplied by the Executive to support its own determination" and "does not require a weighing of the evidence, but rather calls for assessing whether there is any evidence in the record that could support the conclusion").

[33] S. COMM. ON FOREIGN RELATIONS, 111TH CONG, AFGHANISTAN'S NARCO-WAR: BREAKING THE LINK BETWEEN DRUG TRAFFICKERS AND INSURGENTS (Comm. Print 2009).

[34] Brennan, *supra* note 24.

[35] Shane, *supra* note 11.

[36] *Id.*

[37] Hosenball, *supra* note 30.

[38] The National Security Council Deputies Committee is chaired by the Assistant to the President and Deputy National Security and includes the Deputy Secretary of State, the Deputy Secretary of the Treasury, the Deputy Secretary of Defense, the Deputy Attorney General, the Deputy Secretary of Energy, the Deputy Secretary of Homeland Security, the Deputy Director of the Office of Management and Budget, the Deputy to the United States Representative to the United Nations, the Deputy Director of National Intelligence, the Vice Chairman of the Joint Chiefs of Staff, and the Assistant to the Vice President for National Security Affairs. *See* National Security Presidential Directive/PPD-1: Organization of the National Security Council System 3-4 (2009), http://www.fas.org/irp/offdocs/ppd/ppd-1.pdf.

NSC Principals Committee[39] reviews the target recommendations under the criteria outlined below.[40] Finally, the National Security Advisor notifies the President of the NSC's targeting decision and the President can unilaterally nullify the NSC's targeting decision for any reason.[41] Consistent with the constitutional system of checks and balances, the Executive Branch regularly informs appropriate members of Congress[42] and the public[43] about lethal force used against American citizens consistent with the constitutional system of checks and balances.

When reviewing an American terrorist target recommendation, Executive officials carefully determine whether (1) the citizen poses an imminent threat of violent attack against the United States, (2) capture is not feasible, and (3) the operation will be conducted in a way consistent with applicable law of war principles.[44] First, the Executive Branch determines a threat is imminent by weighing the relevant window to act, the possible harm to civilians by waiting, and the likelihood of future disastrous attacks against the United States.[45] For instance, the Executive Branch determined American citizen al-Awlaki's operational role was an imminent threat, whereas American citizen Adam Gadahn's anti-American rhetoric and al Qaeda membership was not an imminent threat.[46] While this view of imminence is more flexible than in the law enforcement context, it is consistent with the understanding of imminence under the international laws of war.[47] Second, the Executive

[39] Hosenball, *supra* note 30. The National Security Council Principals Committee is the senior interagency forum for consideration of policy issues affecting national security since 1989 and is chaired by the President's National Security Advisor and its members include the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the Attorney General, the Secretary of Energy, the Secretary of Homeland Security, the Director of the Office of Management and Budget, the Representative of the United States of America to the United Nations, the Chief of Staff to the President, the Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff. *See* National Security Presidential Directive/PPD-1, *supra* note 38, at 4.
[40] Hosenball, *supra* note 30.
[41] *Id.*
[42] Holder, *supra* note 30.
[43] Shane, *supra* note 11.
[44] Holder, *supra* note 30.
[45] *Id.*
[46] Priest, *supra* note 10.
[47] Brennan, *supra* note 24.

Branch determines feasibility by examining the specific facts, time considerations, location of the targeted person,[48] the presence of hostile allies,[49] danger to civilians, risk to U.S. personnel, and the availability and willingness of local authorities to capture rather than kill the target.[50] Lastly, the program derives its ultimate authority from applicable law of war principles, including the 9/11 Authorization of Use of Military Force ("AUMF");[51] which authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.[52] However, the President does not have the authority to target Americans who are outside the scope of Presidential war power that is congressionally authorized[53] or inherent.[54]

In evaluating these criteria, the NSC debates, scrutinizes, and reviews the evidence before it while recognizing the seriousness of their decision to use lethal force.[55] While the exact evidentiary standard applied is classified, a "substantial evidence" standard or greater is likely the evidentiary standard.[56] After being placed on the list, the government

[48] Savage, *supra* note 10.
[49] *Id.*
[50] *Id.*
[51] Johnson, *supra* note 24.
[52] Authorization for Use of Military Force, PUB. L. NO. 107-40, § 2(a), 115 Stat..224, 224 (2001).
[53] Letter from Eric H. Holder, U.S. Attorney Gen., to Rand Paul, U.S. Sen. (March 7, 2013), *available at* http://www.washingtonpost.com/blogs/post-politics/files/2013/03/Senator-Rand-Paul-Letter.pdf ("'Does the President have the authority to use a weaponized drone to kill an American not engaged in combat on American soil?' The answer to that question is no.").
[54] Nat'l Comm'n on Terrorist Attacks upon the U.S., The 9/11 Commission Report 40-41 (2004),
available at http://www.gpoaccess.gov/911/index.html (explaining that President Bush authorized the shootdown of domestic commercial flight United 93); *see* The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 669 (1863) ("The President was bound to meet it 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.").
[55] Johnson, *supra* note 24.
[56] Priest, *supra* note 10.

must renew the target's approval every six months to ensure the threat remains imminent and not outdated.[57]

B. *Critics of Executive Citizen Targeting Argue Due Process is Only Judicial Process*

While critics vary in the amount of judicial process required, all critics of Executive Citizen Targeting argue the Fifth Amendment's Due Process Clause requires a U.S. citizen be given a certain level of judicial process.[58] Interestingly, even scholars who defend Executive Citizen Targeting acknowledge that due process is judicial process, but argue that wartime exigency creates an exception to applying due process to the battlefield.[59]

Generally, those who believe due process only refers to judicial process argue that courts must employ common law judicial procedure in the tradition of Magna Carta.[60] According to Judge Easterbrook, the Fifth Amendment's Due Process Clause merely requires following certain

[57] *Id.*

[58] Michael D. Ramsey, *Meet the New Boss: Continuity in Presidential War Powers?,* 35 HARV. J.L. & PUB. POL'Y 863, 868 (2012) (arguing that while al-Awlaki received some process within the Executive Branch, this process was not due process of law because the Fifth Amendment requires pronounced guilt by a court); Mike Dreyfuss, Note, *My Fellow Americans, We Are Going To Kill You: The Legality of Targeting And Killing U.S. Citizens Abroad*, 65 VAND. L. REV. 249, 282-83 (2012) (arguing that the Fifth Amendment entitled al-Awlaki to some level of trial process before an Article III court); Epstein, *supra* note 27 (arguing that the Fifth Amendment requires al-Awlaki be formally charged and be given a pre-deprivation judicial hearing); Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 409-10 (2009) (arguing that Executive Citizen Targeting requires a minimal level of judicial intervention analogous to the "due process model of Hamdi/Boumediene" in the detention context); Kristen E. Eichensehr, Comment, *On Target? The Israel Supreme Court and the Expansion of Targeted Killings*, 116 YALE L.J. 1873, 1879 (2007) (arguing al-Awlaki is entitled to post-deprivation judicial review of a Bivens-style action); Jane Y. Chong, Note, *Targeting the Twenty-First-Century Outlaw*, 122 YALE L.J. 724 (2012) (arguing that persons such as al-Awlaki should be given the same judicial procedural protections given to outlaws under centuries of English common law).

[59] William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 679 (2003) ("Necessity gives rise to the constitutional authority in both cases, and also justifies the President in exercising it without awaiting legislation").

[60] Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 95-98 (1982).

judicial procedures as they existed in 1791 common law.[61] To support this view, scholars frequently quote Alexander Hamilton's speech to the New York legislature that "[t]he words 'due process' have a precise technical import, and are only applicable to the process and proceedings of courts of justice; they can never be referred to an act of the Legislature."[62] The public's experience[63] and the black letter rule of Civil Procedure from *Mullane v. Central Hanover*[64] make this view, that due process is judicial process, almost instinctual. Even Justice Jackson explained the Due Process Clause's "cryptic and abstract words" were no more than the plain assurance of adjudication with prior notice and the opportunity to be heard.[65]

But while due process may often refer to judicial process, "[d]ue process is not necessarily judicial process."[66] Although various courts in the 1830's, 1840's and even in the 1870 Confiscation Act Cases held that due process was only judicial process, this movement was short lived.[67] After a thorough examination of the common law, courts largely reverted to their prior view that due process is a procedural function relating to inherent justice, fairness, and restraint on government generally.[68] By the turn of the twentieth century, the legal community returned to the

[61] *Id.* at 98.
[62] 8 THE WORKS OF ALEXANDER HAMILTON 29 (Henry Cabot Lodge ed., G.P. Putnam's Sons 1904). Some scholars argue Hamilton's statement is ambiguous at best and does not support Due Process as only judicial procedure. Since Hamilton's statements were given on the floor of the New York legislature, it would seem schizophrenic to argue passing the bill would violate Due Process while arguing Due Process is strictly judicial and not legislative. However, if Hamilton was arguing that Due Process is only judicial procedure, scholars argue Hamilton is plainly wrong. *See* Douglas Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable*, 60 TEX. L. REV. 875, 890-91 (1982).
[63] Ann Woolhandler, *Judicial Deference to Administrative Action–A Revisionist History*, 43 ADMIN. L. REV. 197, 238 (1991) ("Such direct exactions are those for which we tend to think that due process is judicial process. Thus criminal prosecutions remained under the de novo model, as did the civil actions against officials that fit most squarely into the common-law forms of action.").
[64] Jack H. Friedenthal, Arthur R. Miller, John E. Sexton & Helen Hershkoff, CIVIL PROCEDURE: CASES AND MATERIALS, 199-265 (10th ed., 2009).
[65] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).
[66] Reetz v. Michigan, 188 U.S. 505, 507 (1903).
[67] RODNEY L. MOTT, DUE PROCESS OF LAW, 214 (1926).
[68] *Id.* at 217-19.

consensus that "legislative, executive, or administrative process may be due process."[69]

C. *Two Alternative Theories of Due Process*

The nature and meaning of due process is controversial and widely disputed even among scholars who maintain that due process is more than merely judicial process.[70] Scholars' various views of due process largely divide into two dominant theories of the phrase: those who view due process as fairness and those who view due process as a question of separation of power.[71]

1. Due Process as Fairness

Legal scholars developed the theory of due process as fairness out of frustration from nearly a century of ambiguity caused by the Supreme Court's questionable historic link between due process and Magna Carta.[72] The Supreme Court adopted the fairness theory and explained that the Due Process Clause's ambiguous text is unlike other specific provisions in the Bill of Rights because fairness is inherently less rigid and more fluid than other rights.[73] Fairness involves examining "contrary experiences, standards, and precedents to determine what is due."[74]

Justice Frankfurter's concurrence in *Joint Anti-Fascist Refugee Committee v. McGrath* develops the theory of due process as "[f]airness of procedure."[75] Due process is not a fixed "technical conception,"

[69] Thomas P. Hardman, *Judicial Review as a Requirement of Due Process in Rate Regulation*, 30 Yale L.J. 681, 689 (1921).
[70] *See* Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL. HIST. 265 (1975).
[71] Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L. J. 1672, 1676 (2012).
[72] Edward Corwin's frustration with the Due Process Clause's ambiguity and historical inaccuracies led him by 1938 to end his long quarrel with the Supreme Court over the interpretation of the Due Process Clause and instead to find Due Process to constitute basic fairness. *See* Jurow, *supra* note 70, at 265.
[73] Betts v. Brady, 316 U.S. 455, 462 (1942).
[74] Andrew T. Hyman, *The Little Word "Due*," 38 AKRON L. REV. 1, 2 (2005).
[75] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring).

"yardstick," or "mechanical instrument," but rather a "process" tailored to fairness given the particular circumstances.[76] To aid in balancing the interests of fairness, due process considers "history, reason, [and] the past course of decisions."[77] While Frankfurter acknowledged due process as fairness gives great flexibility, he also acknowledged, as Justice Brandeis had earlier, that due process also requires regularity.[78] The regular procedural safeguards of fairness are notice and hearing.[79] Yet, fairness "sanctioned by history or obvious necessity" may dictate "rare" and "isolated instances" where notice and hearing may be dispensed with altogether.[80] For Frankfurter, the exception to notice and hearing required examining the "precise nature of the interest . . . adversely affected" as well as existing protections, and alternatives to balance the "hurt complained of and good accomplished."[81]

After *McGrath*, the Supreme Court looked for a regularized framework to evaluate the costs and benefits of minimized notice and hearing to result in fair procedure.[82] When evaluating the various interests, the Supreme Court in *Goldberg v. Kelly* gave great weight to the "overpowering need[s]" of the individual's interest.[83] The deference given to individual interest by the Supreme Court in *Goldberg* placed a heavy, and perhaps unsustainable, procedural burden on the government.[84]

Later, the Supreme Court, in *Fuentes v. Shevin*, acknowledged the government's interest may demand minimized procedure in "extraordinary situations" while still satisfying the due process fairness requirement.[85] For example, historically weighty government interests

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[76] *Id.* at 162-63.
[77] *Id.*
[78] *Id.* at 164; *see* Burdeau v. McDowell, 256 U.S. 465, 477 (Brandeis, J., dissenting).
[79] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 165 (1951) (Frankfurter, J., concurring).
[80] *Id.* at 168.
[81] *Id.* at 163.
[82] *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Fuentes v. Shevin, 407 U.S. 67 (1972).
[83] *Goldberg* 397 U.S. at 261 (1970).
[84] RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 66 (2004).
[85] Fuentes v. Shevin, 407 U.S. 67, 90 (1972).

demanding minimized procedure include the government seeking to "collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food."[86] *Fuentes* focused on the directness and necessity of the government's interest, the need for special and prompt government action, and the assurances of strict control by narrowly drawn standards.[87]

On the foundation of *McGrath*, *Goldberg*, and *Fuentes*, the Supreme Court finally arrived at a regularized balancing test in *Mathews v. Eldridge* that evaluates both the individual and government interests in a particular instance.[88] The balancing test includes three factors: (1) the private interest affected, (2) the risk of erroneous deprivation, and (3) the government's interest involved.[89] While the holding in *Mathews* involved termination of social security disability benefits,[90] the Supreme Court continues using the *Mathews* balancing test in nearly every area of procedural due process to assess the appropriate level of fairness required to this day.[91] The *Mathews* balancing test meets the approval of those in the Law and Economics Movement because the "purpose of legal procedure is . . . the minimization of the sum of two types of costs: "error costs" and "direct costs."[92] The *Mathews* balancing test ensures fairness because it "maximize[s] efficiency."[93]

[86] *Id.* at 92.
[87] *Id.* at 91.
[88] Mathews v. Eldridge, 424 U.S. 319, 334-35, (1976).
[89] *Id.*
[90] *Id.*
[91] WASSERMAN, *supra* note 84, at 71.
[92] Richard A. Posner, *An Economic Approach To Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 399-400 (1973). ("'[E]rror costs' [are] the social costs costs generated when a judicial system fails to carry out the allocative or other social functions assigned to it [and] . . . "direct costs" [are those costs] such as lawyers', judges', and litigants' time. . . .").
[93] *Id.*

2. Separation of Powers

The theory of due process as separation of powers originated with Sir Edward Coke's linkage of due process and Magna Carta's "law of the land" constraint on the King.[94] Between 1613 and 1615, King James sought to expand his will as law an expansion of royal prerogative to extend his will as law through and through executive courts, which were not bound by the common-law.[95] Yet according to Coke, due process required separation of power ensuring "the Crown . . . coordinate governance involving deprivations of rights with Parliament and the common law courts."[96] Specifically, Coke maintained Magna Carta limited the King's authority to deprive citizens of certain rights "only according to existing law" as defined by custom and parliamentary declaration.[97] Coke's view became the accepted view organic to English law. During the American Revolution, American colonists quoted Coke and argued Parliament violated due process and abused its power by not acting under the "law of the land."[98] During the Constitution's ratification, anti-federalists such as George Mason sought to codify due process in a Bill of Rights to ensure separation of powers and avert "legislative as well as judicial and executive tyranny."[99] In 1791, the First Congress considered the Fifth Amendment to ensure separation of powers by applying due process "to all government action"[100] to serve as a "limit on the powers of all three branches."[101] While the Constitution left in place "limited prerogative powers of the President and inherent powers of the judiciary," the Due Process Clause ensured that the executive and judicial branches were limited to "executing and interpreting the law."[102] The Framers understood due process as dividing

[94] Chapman, *supra* note 71, at 1681-82.
[95] David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 573-75 (1986).
[96] Chapman, *supra* note 71, at 1692.
[97] *Id.* at 1681.
[98] *Id.* at1699.
[99] MOTT, *supra* note 67, at 147.
[100] Chapman, *supra* note 71, at 1717.
[101] *Id.* at 1721.
[102] *Id.* at 1723.

"the authority to deprive subjects of life, liberty, or property between independent political institutions."[103]

The Supreme Court's first major case involving the Fifth Amendment Due Process Clause, *Murray's Lessee*, cited Coke and Magna Carta to support their holding that due process is "a restraint on the legislative as well as on the executive and judicial powers of the government."[104] Since *Murray's Lessee*, separation of powers remains an integral element of due process jurisprudence.[105] The rise of the modern political question doctrine, however, limits the number of cases the Supreme Court actually decides on the merits of due process under the theory of separation of powers.[106]

Most vividly, in *Nixon v. United States*, the Supreme Court left unanswered the question of whether due process required the Senate to grant a federal district judge a full evidentiary hearing before the entire

[103] *Id.* at 1681; Charles M. Hough, *Due Process of Law – to – Day*, 32 HARV. L. REV. 218 (1919) ("For present purposes it makes no difference whether Coke was right or wrong in identifying due process with the law of the land . . . . [I]t is accepted legal history, and lies at the bottom of all our classic legal writing.").

[104] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855).

[105] *See* United States v. Montalvo-Murillo, 495 U.S. 711, 723-24 (1990) ("[T]he fundamental separation of powers among the Legislative, the Executive and the Judicial Branches of Government—all militate against this abhorrent practice [of detention prior to trial]."); Buckley v. Valeo, 424 U.S. 1, 124 (1976) ("The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787."); In re Winship, 397 U.S. 358, 380 (1970) (Black, J., dissenting) ("The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will."); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680 ("The federal guaranty of due process extends to . . . [the] legislative, executive, or administrative branch of government."); Wilson v. New, 243 U.S. 332, 366 (1917) ("The due process clause restrains alike every branch of the government, and is binding upon all who exercise Federal power, whether of an executive, legislative, or judicial character.") (Day, J., dissenting).

[106] James M. McGoldrick, Jr., *The Separation of Powers Doctrine: Straining Out Gnats, Swallowing Camels?*, 18 PEPP. L. REV. 95, 98 (1990) ("The Court's use of the political question doctrine to avoid resolution of foreign affairs issues has left us without any clear line of authority as to ultimate responsibility for making life and death decisions about use of military force in addressing international conflict.").

Senate prior to impeaching Judge Walter Nixon[107] Rather than examine the due process issue, the Supreme Court found the issue a nonjusticiable political question.[108] The Supreme Court explained for impeachment there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department or a lack of judicially discoverable and manageable standards for resolving it."[109] Allowing judiciary involvement in the impeachment proceedings would "eviscerate" the Constitution's limit on the Judiciary imposed by separation of powers.[110] While the Supreme Court ultimately did not evaluate the merits of Nixon's claim, their rationale supports the concept that former Judge Nixon was given appropriate legislative process and therefore sufficient Fifth Amendment Due Process.[111]

Despite a robust modern political question doctrine, the Supreme Court has on rare occasion injected itself into the merits of separation of powers disputes. In *United States v. Nixon*, a unanimous Supreme Court determined President Nixon must comply with a subpoena because to hold otherwise would "cut deeply into the [Fifth Amendment's] guarantee of due process of law and gravely impair the basic function of the courts."[112] Essentially, the President's immunity claim failed to constitute sufficient due process, because the function of criminal adjudication is a judicial, as opposed to an executive process.[113]

II. THE EXECUTIVE PROCESS OF THE COMMANDER-IN-CHIEF

When acting under the authority granted in the Constitution's Commander-in-Chief Clause, both the fairness and separation of powers theories of due process establish a rich foundation of executive process grounded in history and reason.[114]

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[107] Nixon v. United States, 506 U.S. 224 (1993).
[108] *Id.* at 228.
[109] *Id.* (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).
[110] *Id.* at 235.
[111] *Id.* at 237-38.
[112] United States v. Nixon, 418 U.S. 683, 712 (1974).
[113] *Id.* at 713.
[114] U.S. CONST. art. II, § 2.

A. *Necessity, Executive Process, and Due Process as Fairness*

Under the theory of due process as fairness, executive process is founded on the basis of necessity. In the early decades of the twentieth century, the Supreme Court heard a series of Gubernatorial Insurrection Cases where necessity warranted executive process. In *Moyer v. Peabody*, Justice Holmes explained the necessities of insurrection warranted the Colorado Governor, as Commander-in-Chief of state forces, to substitute his own discretion on whether to kill citizens inciting insurrection and resisting peace, rather than follow ordinary judicial procedure.[115] Necessity required the "ordinary rights of individuals" yield to what the governor "deems the necessities of the moment."[116] As Commander-in-Chief, the governor, not a court, is the final judge in determining the use of soldiers, those who may be killed, those who may be "seized, and other methods of quelling insurrection and restoring peace.[117] Holmes concluded that "[p]ublic danger warrants the substitution of executive process for judicial process."[118] Only where the governor fails to act in "good faith" or with no "reasonable ground(s) for his belief" may the judiciary interfere.[119] But even then, the governor's subjective view of the facts control, rather than an objective view of those facts.[120]

In a later gubernatorial insurrection case, the Supreme Court again noted that when a governor acts as Commander-in-Chief, his discretion "whether an exigency . . . has arisen" is "conclusive."[121] The nature of the Commander-in-Chief power "necessarily implies that there is a permitted range of honest judgment."[122] Despite this limit, the outer "allowable limits of military discretion" are "judicial questions" when considering good faith.[123] Consistent with Chief Justice Evan Hughes decision in *Blaisdell*, these gubernatorial insurrection cases do not "create

[115] Moyer v. Peabody, 212 U.S. 78, 85 (1909).
[116] *Id.*
[117] *Id.* at 84-85.
[118] *Id.* at 85.
[119] *Id.*
[120] *Id.* at 78, 85.
[121] Sterling v. Constantin, 287 U.S. 378, 399 (1932).
[122] *Id.*
[123] *Id.* at 401.

power"[124] in an emergency, but rather necessity "furnish[es] the occasion for the exercise of power" as Commander-in-Chief.[125]

While the necessity of domestic insurrection warrants executive process, the Supreme Court's recent terrorist detention cases show the narrow scope of executive process. In *Hamdi v. Rumsfeld*, the President's finding that Yaser Esam Hamdi was an enemy combatant did not provide sufficient due process.[126] While the Supreme Court ultimately gave Hamdi a type of judicial process, the Supreme Court recognized such process was only due "when the determination is made to *continue* to hold those who have been seized."[127] For battlefield captures, the President's discretion through his military officers is sufficient due process.[128] The Supreme Court employed the *Mathews* balancing test to conclude fairness required Hamdi receive "notice" and hearing "before a neutral decisionmaker."[129] Justice Souter explained in his concurring opinion that there was no "actual and present" necessity since Hamdi had been "locked up for over two years."[130] Therefore, under *Mathews*, the government's national security interest was limited because "emergency power of necessity must at least be limited by the emergency." [131]

B. *Presidential Discretion, Executive Process, and Due Process as Separation of Powers*

The theory of due process as separation of powers also establishes a strong foundation for executive process. While codified only in history and not in the annals of a case reporter, President Washington's response in the Whiskey Rebellion constitutes the first exercise of executive process as Commander-in-Chief. The 1792 Militia Act required a federal judge notify the President when insurgents were "too powerful to be suppressed by the ordinary course of judicial

[124] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425 (1934).
[125] *Id.* at 426.
[126] Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004).
[127] *Id.* at 534.
[128] *Id.*
[129] *Id.* at 533.
[130] *Id.* at 552 (Souter, J., concurring).
[131] *Id.*

proceedings."[132] Instead, President Washington "went directly to Justice Wilson for a finding of insurrection" so he could respond to the insurrection quickly.[133] Using Hamilton's compiled list of top rebel leaders, President Washington led his forces to quell the rebellion in Pennsylvania.[134] Consistent with President Washington's restrained and judicious character, President Washington's had Richard Peters, a federal judge, accompany the forces to help "coordinate civil process with the military authority."[135] The President made clear the judge was under instruction of the military arm, and "not the other way round."[136] The Executive Branch used force and made arrests independent of any judicial process, while acknowledging due process required charges for prolonged detention.[137] After President Washington's successful Whiskey Rebellion campaign, Congress in 1795 amended the 1792 Militia Act by removing the "requirement that the President seek judicial approval before calling out the militia—all that was required now was a presidential proclamation."[138]

Under the revised 1795 Militia Act, the Supreme Court twice affirmed the President's authority as Commander-in-Chief to determine when to use military force and what methods to use to preserve the peace.[139] In *Martin v. Mott*, Justice Story noted the President "exclusively" had the authority to determine whether an exigency invoking the 1795 Militia Act had arisen.[140] Subjecting the President's discretionary judgment to judicial review would subject the military to "ruinous litigation" and place in the hands of the judiciary questions lacking "strict technical proof" and "important secrets of the state."[141] Justice Story explained that where a statute gives the President discretionary power, the President is the "sole and exclusive judge of the

[132] Act of May 2, 1792, ch. 28, § 2, 1 Stat. at 264.
[133] John Yoo, *George Washington and the Executive Power*, U. ST. THOMAS J.L. & PUB. POL'Y 1, 14 (2010)
[134] HOGELAND, *supra* note 1, at 208-09.
[135] *Id.* at 219.
[136] *Id.*
[137] *Id.*
[138] Yoo, *supra* note 133, at 15.
[139] CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 17 (1976).
[140] Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827).
[141] *Id.* at 31.

existence of those facts."[142] While it is true that "such a power may be abused,"[143] all power is "susceptible of abuse."[144] Under the Constitution, the President's "public virtue" and honesty, frequent elections, and "watchfulness of the representatives" guard against "usurpation or wonton tyranny."[145]

Similarly in *Luther v. Borden*, Justice Taney noted no court of the United States is justified in contravening the President's factual determination as Commander-in-Chief.[146] While any branch may abuse power, the Constitution places Commander-in-Chief discretion solely in the hands of the President because his "elevated office," high responsibilities, and public expectations are the strongest safeguard "against a willful abuse of power as human prudence and foresight could well provide."[147] Quite plainly, "[t]he ordinary course of proceedings in courts of justice" would be utterly unfit for the crisis."[148] As Federalist 78 echoes, "[t]he Executive . . . holds the sword . . . [while] [t]he judiciary, on the contrary, has no influence over either the sword or the purse."[149]

Likewise, in *The Prize Cases*, the Supreme Court determined President Lincoln's proclamation blockading various southern ports constituted "official and conclusive evidence to the Court that a state of war existed."[150] The President's determination of a citizen's belligerency binds the courts because the Commander-in-Chief Clause entrusts the President, not the judiciary, to "determine what degree of force the crisis demands."[151]

The development of the political question doctrine has largely prevented the Supreme Court from addressing the executive process of

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[142] *Id.* at 31-32.
[143] *Id.* at 32.
[144] *Id.*
[145] *Id.* at 19, 32.
[146] *Luther v. Borden*, 48 U.S. (7 How.) 1, 44 (1849).
[147] *Id.*
[148] *Id.*
[149] THE FEDERALIST NO. 78 (Alexander Hamilton).
[150] The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 670 (1863).
[151] *Id.*

the President's Commander-in-Chief discretion.[152] Yet Justice Thomas' dissent in *Hamdi* shows that if the Supreme Court reached the merits of an executive process case, it would likely employ the nineteenth century rationale outlined in *Mott* and *Borden*.[153] This is due to the court's lack of "aptitude, facilities, [and] responsibility" to appropriately exercise Commander-in-Chief discretion.[154] Conversely, the President has discretion as Commander-in-Chief because the information is often "delicate, complex, and . . . prophe[tic]."[155] Consequently, due process requires deference to the President's determination of "all the factual predicates" and requires judicial intervention only where there is "the clearest conviction" the President's determination "cannot be reconciled with the Constitution and the constitutional legislation of Congress."[156]

C. *The Good Faith Limit to Executive Process*

Under the necessity and separation of power theories of executive process, good faith and consistency with the Constitution and Congressional authorization limit the scope of executive process. For example, the Supreme Court has consistently applied these limits to executive process. In *Little v. Barreme*, President Adams' determination that the *Flying Fish* vessel violated a non-intercourse law was reversed because the President seized the vessel in exact contradiction to the statute.[157] In *Youngstown Sheet & Tube v. Sawyer*, President Truman's seizure of the steel mills lacked good faith relationship to the Korean conflict given appropriate understanding of the "theater of war."[158] Under Justice Jackson's concurring rationale in *Steel Seizure*, the legislative history of the Taft-Hartley Act meant President Truman's directly contradicted the statute through his seizure.[159] Dissenting in *Korematsu*, Justice Murphy explained that the President's national

[152] McGoldrick, *supra* note 106.
[153] Hamdi v. Rumsfeld, 542 U.S. 507, 582-83 (2004) (Thomas, J., dissenting).
[154] *Id.* at 585.
[155] *Id.* at 582 (quoting Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).
[156] *Id.* at 584 (quoting Ex parte Milligan, 4 Wall. 2, 133 (1866) (Chase, C.J., concurring in judgment)).
[157] Little v. Barreme, 6 U.S. (2 Cranch) 170, 176-77 (1804).
[158] Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 587 (1952).
[159] *Id.* at 639-40 (Jackson, J., concurring).

security claims justifying Japanese internment lacked good faith relationship to national security threats from Japan and instead was obvious racial discrimination.[160] These cases show that even though executive process is a meaningful species of due process, executive process is not immunized from constitutional scrutiny by the judiciary.[161]

III. THE EXECUTIVE PROCESS OF EXECUTIVE CITIZEN TARGETING

The rich tradition in American jurisprudence of executive process under both the fairness and separation of powers theories provides two independent and robust legal rationales for the Obama Administration's Executive Citizen Targeting program.

A. *Targeting al-Awlaki Satisfies* Mathews *Balancing*

Under the theory of due process as fairness, the circumstantial nature of the *Mathews* balancing test only allows examining the specific circumstances of President Obama's targeting of al-Awlaki.[162] The Department of Justice's legal memorandum defending the President's action limits itself to the particular factual situation surrounding al-Awlaki and therefore cannot make a programmatic argument for Executive Citizen Targeting.[163]

Under the first prong of the *Mathews* balancing test, the President's targeting of al-Awlaki implicated the nation's security given al-Awlaki's leadership in al Qaeda Arabian Peninsula and his repeated attempts to orchestrate terrorism in the United States. Unlike *Hamdi*, al-Awlaki posed an actual and present security risk, implicating the true necessity of national security.[164] However, under the second prong of *Mathews*, al-Awlaki's interest in his own life is one of the most important

[160] Korematsu v. United States, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting).
[161] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").
[162] See *supra* text accompanying note 88.
[163] Savage, *supra* note 10 ("The memo, however, was narrowly drawn to the specifics of Mr. Awlaki's case and did not establish a broad new legal doctrine to permit the targeted killing of any Americans believed to pose a terrorist threat.").
[164] See supra text accompanying note 130.

interests protected by due process.[165] Indeed, preservation of one's life is the foundation of social contract and a core responsibility of government.[166] Even though al-Awlaki's life interest was at stake, as *Moyer* and *Sterling* note, necessity may empower the Commander-in-Chief to kill or arrest citizens. Furthermore, President Obama and the NSC also sought to capture rather than kill al-Awlaki, but capture proved infeasible. Moreover the Supreme Court's recent Fourth Amendment seizure analysis in *Scott v. Harris* shows that under certain circumstances deadly force constitutes reasonable seizure.[167] While the police used deadly force in *Harris*, for purposes of the reasonableness analysis, the Supreme Court viewed the deadly force as a type of seizure given the danger posed by the motorist's reckless behavior to the public.[168]

While the necessity of national security is grave, the appropriateness of President Obama's action against al-Awlaki largely stems from the third prong of *Mathews* requiring minimized risk of erroneous deprivation. Al-Awlaki's targeting required approval by the NSC's Deputies Committee, approval by the NSC's Principals Committee, and ultimate approval from the President himself. Much like the Administrative Procedure Act regularizing due process in the Executive, "the National Security Act of 1947 formalized the principle of centralized presidential *management* of those officials' external acts."[169] In addition to the regularized process of the NSC, the Executive Branch informed appropriate members of Congress and the public about the use of lethal force against al-Awlaki. While the specific evidentiary standard is classified, the standard is certainly robust and weighty enough for the President to publically disclose al-Awlaki's involvement in the 2010 Fort Hood attack and attempted 2010 Christmas Day attack.[170] President Obama could have merely relied on his demonstration of good faith, but instead relied on these additional procedures to minimize the risk of

[165] D.O.J White Paper, supra note 25, at 6 ("An individual's interest in avoiding erroneous deprivation of his life is 'uniquely compelling.' . . . No private interest is more substantial.").
[166] *See* THOMAS HOBBES, LEVIATHAN 112 (Michael Oakeshott ed., 3d ed. 1966) (1651).
[167] Scott v. Harris, 550 U.S. 372, 382 (2007).
[168] *Id.* at 373.
[169] Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1281 (1988).
[170] See *supra* text accompanying note 3 and 17.

error when targeting al-Awlaki. Satisfying *Mathews*, the necessity of national security coupled with President Obama's robust procedures, ensure the President's actions constitute a form of executive process that harmonizes with the fairness of due process.

B. *Executive Citizen Targeting is Within the Executive's Authority*

Under a theory of due process as separation of power, not only is President Obama's targeting of al-Awlaki warranted, but programmatic Executive Citizen Targeting is also warranted to combat terrorism. The 9/11 AUMF approved by Congress specifically confers on the President the authority to use all necessary and appropriate force against those "he determines" are responsible for 9/11 or to prevent future terrorism.[171] While the AUMF uses some qualifying language, ultimately the authorization leaves to the President, as Commander-in-Chief, the final determination of when military force is targeted against citizens. The AUMF is similarly structured to the amended 1795 Militia Statute giving the President discretion to determine the existence of an insurrection.

Consistent with the executive precedent of President Washington's judiciousness and restraint during the Whiskey Rebellion, President Obama's Executive Citizen Targeting program also shows restraint. The use of a two-tier approval from the NSC, consulting with Congress, and communicating with the public, when approving citizen targets all show restrained executive process. Additionally, the President himself must approve citizen targets. This level of accountability in the President is consistent with the rationale of *Luther v. Borden*.[172] Indeed, all power is subject to abuse, but there is no greater accountability than the President himself bearing direct political responsibility for his actions as Commander-in-Chief.

C. *Extending Justiciability to Executive Citizen Targeting Cases*

While the United States District Court's invocation of the political question doctrine in *Al Aulaqi v. Obama* gave the President a

[171] Authorization for Use of Military Force Pub. L. No. 107-40 § 2(a) 115 Stat.C224, 224 (2001).
[172] See *supra* text accompanying notes 146-47.

victory, courts should consider extending justiciability to executive process cases, particularly Executive Citizen Targeting cases.[173] Unless courts pierce the veil of the political question doctrine, application of good faith, statutory contradiction, and constitutional overreach will not meaningfully limit executive process. Rendering a decision on the merits will strengthen the legal legitimacy of Executive Citizen Targeting as a constitutional program employed by the President as Commander-in-Chief in good faith and consistent with statute. Though executive process is a form of due process, the Fifth Amendment also demands that the judiciary play a critical role in "judgment" while having "neither FORCE nor WILL."[174]

IV. CONCLUSION

Due process is not limited to merely judicial process, but rather is a check on all three branches from abusing power. Executive process is a type of due process that ensures the President can accomplish those duties conferred on him by the Constitution. Even in the midst of enormous national security necessities, due process as fairness requires the President minimize the risk of error. Fairness also requires judicial checks on presidential judgments lacking a good faith relationship to asserted impending necessities. Similarly, due process as separation of powers requires the President bear the political responsibility of Commander-in-Chief himself. Separation of powers also demands that the judiciary check presidential actions when they contravene statutory or constitutional provisions. To strengthen the legitimate exercise of executive process and to protect against abuse, the judiciary should extend justiciability to cases involving presidential wartime actions. The concept of due process meaningfully checks abuses of power and undergirds the core ideals of American constitutional governance. From the early actions of President Washington to the present actions by President Obama, executive process demands the President exercise restraint while exhibiting the discretion necessary to ensure our nation's safety.

[173] See *supra* text accompanying note 20.
[174] THE FEDERALIST NO. 78 (Alexander Hamilton).

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