



TRUST THE PROCESS: EXECUTIVE DUE PROCESS AND THE RIGHTS OF NONCITIZENS

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While American history has been filled with discussions about the rights of American citizens, seldom does the focus turn to the rights of noncitizens. This Comment examines the historical legal discussion of the rights of noncitizens and its applicability to the controversial nature of targeted killing. This Comment provides evidence of historical legal prevalence from what I title an "internationalist" perspective, which argues that the United States Constitution limits the federal government's violation of rights, regardless of a person's citizenship. However, American institutions are not currently prepared to handle a President or Supreme Court that decides to embrace an internationalist perspective, particularly as it applies to targeted killing programs. This Comment argues that under an internationalist perspective in which noncitizens receive due process rights, an executive due process procedure similar to the Obama administration's procedure for American citizens accused of terrorism would be both a practical and legally sufficient solution if applied to all persons suspected of terrorism, regardless of citizenship.

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INTRODUCTION

3,797: the total number of people killed by drones, America's silent predator and controversial weapon, in the War on Terror.¹ Drone strikes were a valuable tool under the Obama administration.² Drawing authority from the 2001 Authorization for Use of Military Force (AUMF),³ drones were weaponized in the struggle against al-Qaeda.⁴ Operations by both the U.S. military and the Central Intelligence Agency (CIA) have led to numerous successful deployments of drones beyond Afghanistan, including to Pakistan, Somalia, and Yemen,⁵ with targeting choices made on the other side

¹ Micah Zenko, *Obama's Final Drone Strike Data*, COUNCIL ON FOREIGN REL. (Jan. 20, 2017), <https://www.cfr.org/blog/obamas-final-drone-strike-data>.

² See Greg Miller, *Plan For Hunting Terrorists Signals U.S. to Keep Adding Names to Kill Lists*, WASH. POST (Oct. 23, 2012), https://www.washingtonpost.com/world/national-security/plan-for-hunting-terrorists-signals-us-intends-to-keep-adding-names-to-kill-lists/2012/10/23/4789b2ae-18b3-11e2-a55c-39408fb6a4b_story.html?utm_term=.add48cfcf186.

³ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF] (awarding the President broad authority to use his power to use all necessary force against organizations and persons who are working with, aiding, or are members of al-Qaeda).

⁴ Greg Miller, *CIA Seeks to Expand Drone Fleet, Officials Say*, WASH. POST (Oct. 18, 2012), https://www.washingtonpost.com/world/national-security/cia-seeks-to-expand-drone-fleet-officials-say/2012/10/18/01149a8c-1949-11e2-bd10-5ff056538b7c_story.html?tid=pm_pop&utm_term=.bb15e889da70.

⁵ *Id.*; Zenko, *supra* note 1.

of the world in Washington, D.C.⁶ Targets are placed on kill lists, officially known as a Disposition Matrix.⁷ The President and senior military officials have discretion to decide who the targets are, but the procedure for doing so must satisfy procedural due process requirements.⁸

There is increasing debate in the U.S. over the rights of noncitizens.⁹ The current polarized political climate has sparked more discussion over what rights, if any, noncitizens have in the U.S.¹⁰ While conventional wisdom suggests that noncitizens do not have equal rights under the Constitution,¹¹ many scholars argue noncitizens have the same rights as U.S. citizens.¹²

This Comment argues that under a particular legal perspective, while noncitizens on foreign soil have procedural due process rights, these rights are not necessarily infringed when noncitizen terrorists are placed on kill lists and eliminated. However, the executive branch must abide by a due process procedure that closely mirrors the procedure established under the Obama administration for American citizens. Part I of this paper will explain the process and applicability of procedural due process and will discuss the debate surrounding due process for Americans listed for targeted killing. Part II will highlight the debate surrounding the extent of noncitizen rights, using numerous cases as examples. Part II will also apply these cases to a legal theory that endorses noncitizens'

⁶ Miller, *supra* note 2.

⁷ *Id.*

⁸ See Noah Oberlander, *Executive Process: The Due Process of Executive Citizen Targeting by the Commander-In-Chief*, 1 NAT'L SEC. L.J. 124, 125-26 (2013) (explaining that the executive branch can engage in its own due process procedures to satisfy Fifth Amendment requirements on due process).

⁹ Compare Julie Hunter, *Breaking Legal Ground: A Bivens Action for Noncitizens for Trans-Border Constitutional Torts Against Border Control Agents*, 15 SAN DIEGO INT'L L.J. 163 (2013) with Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463 (2007).

¹⁰ Daniel Fisher, *Does the Constitution Protect Non-Citizens? Judges Say Yes*, FORBES (Jan. 30, 2017, 12:08 PM), <https://www.forbes.com/sites/danielfisher/2017/01/30/does-the-constitution-protect-non-citizens-judges-say-yes/#6202570e4f1d>.

¹¹ See, e.g., Kent, *supra* note 9.

¹² See, e.g., Hunter, *supra* note 9.

rights under the Constitution as equal to the rights of American citizens. Part III will describe executive due process and how it can solve legal and policy issues that may arise if the legal framework for noncitizens' rights highlighted in Part II becomes reality. Additionally, Part III will conclude that future presidents who want or need to apply due process to noncitizens accused of terrorism need only satisfy the Obama administration's executive due process procedures that were used for American citizens accused of terrorism. This is because the executive due process used for Americans satisfies Fifth Amendment standards and is more efficient than creating an alternative due process system to determine whether individuals should be placed on kill lists.

As a preliminary matter, I must clarify what this Comment does not intend to do. First, this Comment does not attempt to promote the controversial drone strike program, attest to its effectiveness, or address the morality of drone strikes. Further, this Comment does not intend to imply that executive due process renders other forms of due process inadequate or nonvaluable. Finally, the argument of this paper is based on the premise that future courts and administrations believe noncitizens have due process rights. This paper then addresses the solution to a plausible resulting legal problem. Although Part II will discuss in detail the foundation of the debate surrounding rights of noncitizens, this paper does not attempt to interject itself into that debate. Rather, the focus of this paper is the practical applications that could result if such legal thought became adopted by the courts or the executive branch.

I. DUE PROCESS AND DRONES

The Due Process Clause of the Fifth Amendment states that “no person shall . . . be deprived of life, liberty, or property, without due process of law.”¹³ Courts use the *Mathews v. Eldridge* balancing test to determine whether procedural due process was followed by the government, in order to prevent an unlawful deprivation of an

¹³ U.S. CONST. amend. V.

individual's life, liberty or property.¹⁴ The courts first look at the private interests that will be impacted through government action.¹⁵ Then, the courts look at the risk of an erroneous deprivation of that private interest, sometimes comparing it to the probative value of substitute procedures.¹⁶ Finally, the courts weigh the government's interest in the procedure, including financial costs.¹⁷

In applying the due process questions established under the *Mathews v. Eldridge* balancing test to American drone programs,¹⁸ the accused terrorist's private interest in his or her life is an appropriate concern, as is the government's national security interest regarding drone strikes. The only factor in question is the risk of erroneous deprivation and the probative value of additional procedural safeguards.¹⁹ The Obama administration addressed this factor by establishing a process for identification and targeting involving the cooperation of multiple federal departments and agencies.²⁰

Details of the process for placing suspected terrorists on kill lists are classified, but the process focuses on factors such as the individual's importance within terrorist organizations.²¹ Under President Obama, the terrorists to be targeted were selected by officials from about a half-dozen agencies.²² After layers of review, the names were ultimately presented to the Director of the CIA, and then finally the President.²³ While almost always foreigners, occasionally some of the terrorists placed on these lists were American citizens. Famously, an American citizen and a leader of al-

¹⁴ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004); *Zinermon v. Burch*, 494 U.S. 113, 127 (1990).

¹⁵ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Mike Dreyfuss, *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) (stating that the Court's reasoning in *Hamdi* strongly suggests that the *Mathews* balancing test would apply to targeted killings).

¹⁹ See *Mathews*, 424 U.S. at 335.

²⁰ Miller, *supra* note 2.

²¹ *Id.*

²² Miller, *supra* note 4.

²³ Miller, *supra* note 2.

Qaeda in the Arabian Peninsula, Anwar al-Aulaqi, was placed on a kill list,²⁴ and was eliminated in Yemen by a drone strike.²⁵

Extraordinary circumstances allow the government to bypass standard due process procedures.²⁶ These extraordinary circumstances are present in the national security context, permitting the government to target suspected terrorists through drone strikes without any judicial due process procedures. The drone strike programs were justified by the Obama administration as “acts of self-defense against senior officials of terrorist groups that pose an ‘imminent threat of violent attack.’”²⁷ By posing a “continued” and “imminent” threat to national security, even American citizens could be targeted without notice or any judicial ruling.²⁸

The AUMF was enacted soon after the terrorist attacks on September 11th, 2001, giving the President broad authority to use his powers against persons associated with terrorist organizations that took part in terrorist attacks.²⁹ Using this authority, Presidents have authorized drone strikes against members of al-Qaeda throughout the world.³⁰ When suspected terrorists who were American citizens

²⁴ Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8 (D.D.C. 2010) (dismissing a suit brought by the family of Anwar al-Aulaqi to remove his name from the kill list).

²⁵ President Barack Obama, Remarks by the President at the “Change of Office” Chairman of the Joint Chiefs of Staff Ceremony (Sept. 30, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/09/30/remarks-president-change-office-chairman-joint-chiefs-staff-ceremony>.

²⁶ See Connecticut v. Doehr, 501 U.S. 1, 23-24 (1991) (expanding the *Mathews* balancing test to prejudgment attachments or similar procedures). In this case, the Court ruled that a state law allowing the prejudgment attachment of real property denied the defendant due process. The Court ruled the state law was unconstitutional without notice to the defendant or a hearing and without any *showing of extraordinary circumstances* [emphasis added]. *Id.* at 4. While Doehr covers much of the procedural due process doctrine, it does not extend to drone strikes due to its extraordinary circumstances exception.

²⁷ Christopher M. Sarma, *Citizenship and the War On Terror: Should Federal Courts Consider A Plaintiff's Citizenship In Post-9/11 Litigation?*, 100 CORNELL L. REV. 733, 756 (2015) (quoting Eric Holder, Attorney General Eric Holder Speaks at Northwestern University School of Law (Mar. 5, 2012) [hereinafter Holder], <http://www.Justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>).

²⁸ *Id.* at 757.

²⁹ AUMF, *supra* note 3.

³⁰ Miller, *supra* note 2.

were targeted, such as Anwar al-Aulaqi, they received a form of due process.³¹ Suspected American terrorists needed to meet a set of standards and the intelligence community was required to receive specific permission before they could execute targeting missions.³²

Under the Obama administration, noncitizens accused of terrorism did not receive the same rights as American citizens accused of terrorism.³³ The government had a system in place for analyzing due process for noncitizens, but the checks on this system and standard of due process afforded were inferior to the system for American citizens.³⁴ While it is unclear how protections for American citizens were established during the Trump presidency, the Trump administration removed the bureaucratic protections in place for drone strikes for noncitizens.³⁵

The U.S. military and the CIA's practice of conducting drone strikes has called into question whether the practice violates the procedural due process of accused terrorists, particularly when it targets Americans instead of foreign terrorists. Courts, however, have permitted these drone strikes, most famously in *Al-Aulaqi v. Panetta*, where relatives of Anwar al-Aulaqi sued after he was killed in a drone strike.³⁶ Al-Aulaqi was a threat to America's national security because

³¹ Oberlander, *supra* note 8, at 125-26.

³² *Id.* at 130-32 (providing details of the different executive due process procedures used for noncitizens and citizens).

³³ Aaron Mate, Amy Goodman & Hima Shamsi, *Can the President Strike an American Anywhere in the World?: Drone Memo Raises Troubling Questions*, DEMOCRACY NOW, (June 24, 2014),

https://www.democracynow.org/2014/6/24/can_the_president_strike_an_american (mentioning that there are multiple legal memoranda by the United States Department of Justice on the drone strike program, that some of these memoranda relate to citizens and some relate to noncitizens, and that the public does not have access to this body of information).

³⁴ See Samuel Issacharoff & Richard Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. REV. 1521, 1586 (2013).

³⁵ Luke Hartig, *Trump's New Drone Strike Policy: What's Any Different? Why it Matters*, JUST SECURITY (Sept. 22, 2017), <https://www.justsecurity.org/45227/trumps-drone-strike-policy-different-matters/> (explaining how the Trump administration removed the interagency review process, replacing it with specific country plans that awarded the Secretary of Defense and counterterrorism operators greater targeting authority).

³⁶ *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 58-59 (D.D.C. 2015).

he successfully persuaded members of al-Qaeda to carry out attacks against the United States from within Yemen.³⁷ Al-Aulaqi's relatives argued that the U.S. government violated al-Aulaqi's due process rights and that they were entitled to damages under a *Bivens* claim,³⁸ which allows individuals to pursue a claim against the government for the deprivation of constitutionally protected interests.³⁹ The court, however, said precedent has never allowed a *Bivens* claim for matters of national security.⁴⁰ While the allegations of targeting an American citizen overseas with a drone strike without charge, indictment, or prosecution were sufficient to allow a *Bivens* claim for due process violations, the court found that allowing a *Bivens* claim would expand the judiciary's reach into national security policy.⁴¹ As "Congress and the Executive acted in concert, pursuant to their constitutional authorities to provide for national defense and to regulate the military," the court decided it was ill-equipped to answer national security questions better solved by the other two branches.⁴² Even though the U.S. may have violated al-Aulaqi's due process rights, the court determined allowing a *Bivens* claim would impermissibly draw the judiciary too deep into national security issues.⁴³

Many Americans were uneasy after the Obama administration announced that it had killed al-Aulaqi with a drone strike, instigating debate over the executive branch's national security powers and Fifth Amendment due process.⁴⁴ Although his relatives'

³⁷ *Id.* at 79.

³⁸ *Id.* at 59.

³⁹ See *Davis v. Passman*, 442 U.S. 228, 248-49 (1979) (extending *Bivens* claims to Fifth Amendment violations); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (holding that individuals may sue government officials who have violated their rights; since this holding, individual suits against the government for violating rights are called *Bivens* claims).

⁴⁰ *Al-Aulaqi*, 35 F. Supp. 3d at 76; see also *Lebron v. Rumsfeld*, 670 F.3d 540, 554-55 (4th Cir. 2012.); *Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012).

⁴¹ *Al-Aulaqi*, 35 F. Supp. 3d at 78.

⁴² *Id.*

⁴³ *Id.* at 78-79.

⁴⁴ Jonathan Topaz, *Paul Slates Next Filibuster on Drones*, POLITICO (May 16, 2014), <http://www.politico.com/story/2014/05/rand-paul-filibuster-drones-106754> (demonstrating concern among United States senators in both parties, particularly Republican senator and future presidential candidate Rand Paul's concern regarding

suit was unsuccessful, the court did not deny that al-Aulaqi's due process rights may have been violated.⁴⁵ Several legal scholars questioned whether the Obama administration gave al-Aulaqi the due process he was owed as an American citizen.⁴⁶ A common critique was that the U.S. government was using a different, inferior standard for American citizens on foreign soil compared to American citizens on U.S. soil.⁴⁷ The administration's decision arguably defies the Court's ruling in *Hamdi v. Rumsfeld* by making the executive branch the decision-maker for deprivation of due process rather than a neutral third-party.⁴⁸ Additionally, the balance of interest under the *Mathews* balancing test may have weighed in favor of al-Aulaqi because the government failed to disclose legal justification for the drone strike on an American citizen, obscuring the level of risk of erroneously depriving an accused terrorist's rights.⁴⁹ A common solution proposed by scholars to the due process issue is having alternative decision-makers determine whether the executive branch is satisfying its due process obligations.⁵⁰ This could

the drone strike program and the due process issue regarding United States citizens); John D. Nichols, *The Mixed Reactions to Killing al-Awlaki*, MSNBC (Aug. 30, 2011), <http://www.msnbc.com/the-last-word/the-mixed-reactions-al-awlaki-killing> (showing former U.S. congressman and Republican presidential candidate Ron Paul express concern regarding the due process procedures used in the killing of al-Aulaqi).

⁴⁵ *Al-Aulaqi*, 35 F. Supp. 3d at 78.

⁴⁶ See, e.g., Dreyfuss, *supra* note 18, at 272; Samuel Adelsberg, *Bouncing the Executive's Blank Check: Judicial Review and the Targeting of Citizens*, 6 HARV. L. & POL'Y REV. 437, 438 (2012).

⁴⁷ See, e.g., Issacharoff & Pildes, *supra* note 34, at 1586 (noting the controversial nature of differentiating between citizens and noncitizens in drone strikes and the peculiarity of American policy affording greater protections to American citizens even if they are just as threatening as a noncitizen counterpart).

⁴⁸ *Al-Aulaqi*, 35 F. Supp. 3d at 78-79; *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2009) (holding that citizens held in detention as enemy combatants have the right to contest the factual basis for that contention before a neutral decisionmaker).

⁴⁹ See Dreyfuss, *supra* note 18, at 283 ("The government still needs to disclose a process for determining who it will kill and why it can kill them that can survive strict scrutiny.")

⁵⁰ See *id.* at 288; Sarma, *supra* note 27, at 760-63.

occur through expanding the jurisdiction of Article III courts,⁵¹ the establishment of specialized drone courts,⁵² or even military courts.⁵³

Several U.S. senators disapproved of the Obama administration's handling of drone strike targeting of American citizens, some of whom filibustered appointments to the CIA and demanded changes to the drone policy.⁵⁴ Ultimately, the Obama administration responded to the criticism by releasing a previously secret memorandum outlining the legality of the drone strike program.⁵⁵ The memorandum recognized that the absence of sufficient due process creates a risk of erroneous deprivation of liberty, but maintained that such risks are acceptable when the accused terrorist is a continued and imminent threat to Americans, even if the target is an American citizen.⁵⁶ Due to the danger al-Aulaqi posed as an al-Qaeda leader, review of the factual basis of the operation by leaders in the intelligence community, and inability to capture al-Aulaqi, lethal force was appropriate as a reality of war.⁵⁷ While the executive branch determined that the policy did not violate due process, the full legal reasoning was classified, particularly regarding the government's process and whether there was a burden to establish greater process.⁵⁸ The likely reason is that the policy satisfied a due process procedure conducted entirely within the executive branch, known hereinafter as "executive due process."⁵⁹

⁵¹ Sarma, *supra* note 27, at 760-61.

⁵² *Id.* at 761-62.

⁵³ See Dreyfuss, *supra* note 18, at 288.

⁵⁴ Topaz, *supra* note 44.

⁵⁵ See generally Memorandum from David J. Barron, Acting Assistant Att'y Gen., Off. of Legal Couns., to Eric Holder, Att'y Gen., U.S. Dep't of Justice (July 16, 2010), available at https://www.aclu.org/sites/default/files/assets/2014-06-23_barron-memorandum.pdf.

⁵⁶ *Id.* at 39-40.

⁵⁷ *Id.* at 39-41.

⁵⁸ See *id.*; Greg Miller, *Legal Memo Backing Drone Strike that Killed American Anwar al-Awlaki is Released*, WASH. POST (June 23, 2014), https://www.washingtonpost.com/world/national-security/legal-memo-backing-drone-strike-is-released/2014/06/23/1f48dd16-faec-11e3-8176-f2c941cf35f1_story.html?utm_term=.49adfe60fe42.

⁵⁹ See generally Oberlander, *supra* note 8. Executive due process will be discussed in more detail in Part III of this Comment.

While debate on the legality of the use of drones continues, recent court decisions,⁶⁰ as well as current U.S. policy,⁶¹ suggest that the due process practices the executive branch has established for American citizens who are suspected terrorists will continue in the near future. While the focus has been on whether drone strikes violate the due process rights of American citizens, little discussion has occurred on whether drone strikes may violate the due process rights of noncitizens.

II. RIGHTS OF NONCITIZENS

The courts have provided limited answers to the debate surrounding the constitutional rights of noncitizens. Additionally, international law scholars hold a spectrum of views on this issue. For the sake of simplicity, I am going to roughly divide the legal camps into the “internationalists” and the “nationalists.” The internationalists argue for an expansion of rights for noncitizens under U.S. law.⁶² Internationalists believe that rights defined in the Constitution limit government action when it may violate the rights of Americans or noncitizens.⁶³ The nationalist camp argues that constitutional rights only apply to American citizens and suggest that because the Constitution was made to restrict government infringement on the rights of Americans, the Constitution’s protections do not apply to foreigners.⁶⁴ They believe that in practice,

⁶⁰ *Al-Aulaqi*, 35 F. Supp. 3d at 56.

⁶¹ See generally 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>; Holder, *supra* note 27.

⁶² See generally Sarma, *supra* note 27; Peter J. Spiro, *Expatriating Terrorists*, 82 FORDHAM L. REV. 2169 (2014); Hunter, *supra* note 9; Louis Henkin, *The Constitution as Compact and as Conscious: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11 (1985).

⁶³ See generally Sarma, *supra* note 27; Spiro, *supra* note 62; Hunter, *supra* note 9; Henkin, *supra* note 62.

⁶⁴ See generally Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs*, 115 COLUM. L. REV. 1029 (2015); Andrew Kent, *Citizenship and Protection*, 82 FORDHAM L. REV. 2115 (2014); Michael D. Ramsey, *Meet the New Boss: Continuity in Presidential War Powers?*, 35 HARV. J.L. & PUB. POL’Y 863 (2012);

the U.S. has historically and continually pushed for policies that favor its citizens abroad over noncitizens, and therefore these policies indicate a precedent of viewing constitutional rights as limited to American citizens.⁶⁵ This section will provide background to this conflict in legal thought by providing examples of the opinion differences between nationalists and internationalists.

A. Historical Cases Reflect Nationalist Views

For more than a century, debate has continued over whether the Constitution protects the rights of noncitizens. In 1893, the central issue of *Fong Yue Ting v. United States* was whether the Chinese Deportation Act of 1892 was constitutional.⁶⁶ The law placed the burden of proof on Chinese residents to show that they were present in the United States prior to 1892.⁶⁷ Here, the Court embraced a nationalist perspective and stated that the power to exclude or to expel aliens is a right of any sovereign power.⁶⁸ The court held that the law was constitutional because in the United States that power is held by the federal government.⁶⁹

However, this ruling was not without bitter dissents.⁷⁰ Justice Brewer in particular fiercely argued that the constitutional rights of Americans applied to noncitizens.⁷¹ He reasoned that by lawfully residing in the United States, noncitizens are granted constitutional guarantees including due process.⁷² The Fifth Amendment uses the word ‘person’ rather than the word ‘citizen’ to guarantee protections for all people lawfully within the United States.⁷³ While the

Afsheen Radsana & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing*, 2011 U. ILL. L. REV. 1201 (2011); Kent, *supra* note 9.

⁶⁵ See generally Ramsey, *supra* note 64; Radsana & Murphy, *supra* note 64; Kent, *supra* note 9.

⁶⁶ *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893).

⁶⁷ *Id.* at 726

⁶⁸ *Id.* at 713.

⁶⁹ *Id.* at 731-32.

⁷⁰ *Fong Yue Ting*, 149 U.S. at 732, (Brewer, J., dissenting); *id.* at 744 (Field, J., dissenting); *id.* at 761 (Fuller, J., dissenting).

⁷¹ *Fong Yue Ting*, 149 U.S. at 732-744 (Brewer, J., dissenting).

⁷² *Id.* at 733.

⁷³ *Id.* at 739.

nationalist camp was in the majority for this case, the presence of a strong internationalist dissent reflects the historical ideological divide between these two legal camps dating back over a century.⁷⁴

The *Insular Cases* were a series of decisions made by the Supreme Court regarding the application of rights to American-controlled territories seized after the Spanish-American War and the acquisition of Hawaii.⁷⁵ One prominent case was *Dorr v. United States*.⁷⁶ The central issue in *Dorr* was whether a right to a trial by jury existed in the Philippines, whose people were not considered American citizens,⁷⁷ despite the country's status as an American territory.⁷⁸ No congressional statute expanded Sixth Amendment rights to American territories that were not states or were not in the process of becoming states.⁷⁹ The Court decided rights were determined by territoriality, not citizenship, thereby limiting American rights to states and territories destined to become states.⁸⁰ Territoriality mattered, according to the Court, because the current legal system in the Philippines was Spanish-based and interrupting that legal system with the instillation of America's would be very disruptive.⁸¹

Supporters of noncitizen rights were dealt a major blow in *United States v. Verdugo-Urquidez*.⁸² In this case, the U.S. and Mexico worked together in a joint effort to take down Verdugo, a suspected leader in a Mexican drug smuggling organization.⁸³ After the U.S. acquired an arrest warrant, Mexican authorities apprehended Verdugo and brought him to America where he was

⁷⁴ *Fong Yue Ting*, 149 U.S. at 705.

⁷⁵ See *Boumediene v. Bush*, 553 U.S. 723, 726 (2008) (giving background and describing the circumstances of the *Insular Cases*).

⁷⁶ *Dorr v. United States*, 195 U.S. 138 (1904).

⁷⁷ See *Licudine v. Winter*, 603 F. Supp. 2d 129, 132 (D.D.C. 2009) (describing the circumstances in *Dorr*).

⁷⁸ *Dorr*, 195 U.S. at 140.

⁷⁹ *Id.* at 139.

⁸⁰ *Id.* at 144.

⁸¹ *Id.* at 145-46.

⁸² *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

⁸³ *Id.* at 262.

formally arrested.⁸⁴ Drug Enforcement Administration agents, working cooperatively with Mexican officials, raided Verdugo's house and seized documents to prove his involvement with the drug smuggling.⁸⁵ Verdugo argued that the evidence should be suppressed because it was taken during an unreasonable search and seizure under the Fourth Amendment.⁸⁶ The Court took a staunchly nationalist view by holding that the Fourth Amendment did not apply to property owned by noncitizens in a foreign country.⁸⁷ Citing the *Insular Cases* and *Johnson v. Eisentrager*, the Court identified the term "person" in the Fourth and Fifth Amendments to mean only U.S. persons.⁸⁸ This means noncitizens have no extraterritorial rights under the Constitution.⁸⁹ The Court ultimately addressed how impractical a decision ruling on behalf of Verdugo would be; U.S. agents would be paralyzed abroad, and the U.S. military might invite an avalanche of claims against them for their actions in wartime.⁹⁰ Any action abroad might subject U.S. officials to suits in violations of Fourth Amendment rights.⁹¹

In dissent, Justice Brennan voiced internationalist viewpoints when he argued the majority opinion was nonsensical, translating its ruling into saying, "the Constitution authorizes our government to enforce our criminal laws abroad, but when government agents exercise this authority, the Fourth Amendment does not travel with them."⁹² Justice Brennan further argued that *Eisentrager* was mischaracterized by the majority; the Court did not deny captured German soldiers habeas corpus because of a lack of citizenship, but because they were enemy soldiers.⁹³ While historically the Court adopted nationalist beliefs, the doctrine did not go unchallenged and the foundations of the internationalist perspective can be found in several dissents.

⁸⁴ *Id.*

⁸⁵ *Id.* at 262-63.

⁸⁶ *Id.* at 263.

⁸⁷ *Id.* at 274-75.

⁸⁸ *Verdugo-Urquidez*, 494 U.S. at 268-69.

⁸⁹ *See id.*

⁹⁰ *See id.* at 274.

⁹¹ *Id.*

⁹² *Verdugo-Urquidez*, 494 U.S. at 282 (Brennan, J., dissenting).

⁹³ *Id.* at 290.

B. Importance of Practicality

While internationalists and nationalists continue their ideological dispute regarding whether constitutional rights protect noncitizens from the U.S. government, there is another group that avoids the question. This group, who I will call the ‘pragmatists,’⁹⁴ focus on how easy it is to reward noncitizens with certain rights. If rewarding such rights to noncitizens is impractical due to cost, then the pragmatists argue it would be unreasonable to extend these rights. As seen in some cases, such as *Dorr*, practicality played a pivotal role in the outcome.

The issue of practicality in giving noncitizens rights continued in *Eisentrager*.⁹⁵ Immediately following WWII, twenty-one captured Germans petitioned the U.S. courts for writs of habeas corpus.⁹⁶ The Germans were held on German soil by the U.S. military.⁹⁷ U.S. military tribunals convicted the Germans of violating the laws of war.⁹⁸ The Supreme Court ruled against the Germans, citing the impracticability of granting writs of habeas corpus to enemy aliens.⁹⁹ If American military leaders were to frequently appear in court to testify against enemy prisoners in U.S. courts, it could have disastrous effects on the war effort.¹⁰⁰ It would be costly and impractical to ship every wartime prisoner back to the U.S. for trials in Article III courts, as would it to attempt to have witnesses appear on behalf of the prosecution or the defense.¹⁰¹

The dissenting opinion took an internationalist perspective, noting that the Germans could only appeal to U.S. courts because

⁹⁴ I chose the name ‘pragmatists’ for this group due to their concerns regarding the cost of expanding rights to noncitizens, not because their stance on rights of noncitizens is inherently practical.

⁹⁵ *Johnson v. Eisentrager*, 339 U.S. 765, 765 (1950).

⁹⁶ *Id.*

⁹⁷ *Id.* at 766.

⁹⁸ *Id.*

⁹⁹ *Id.* at 779.

¹⁰⁰ *Id.*

¹⁰¹ *Eisentrager*, 339 U.S. at 779.

they were held by the United States military in U.S. controlled territory.¹⁰² Justice Black wrote:

[O]ur constitutional principles are such that their mandate of equal justice under law should be applied as well when we occupy lands across the sea as when our flag flew only over thirteen colonies. Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live. Habeas corpus, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot in my judgment be constitutionally abridged by Executive or by Congress. I would hold that our courts can exercise it whenever any United States official illegally imprisons any person in any land we govern.¹⁰³

However, the matter of practicality in military matters swayed enough justices to relegate Justice's Black's internationalist opinion to the dissent.

While practicality can play an important role for cases involving noncitizens, the Supreme Court has adopted a position that favors rights over practicality when it comes to the rights of American citizens. In *Reid v. Covert*, the issue was whether the Fifth and Sixth Amendments applied when a woman killed her husband, a sergeant in the U.S. Air Force, at an airbase in the U.K.¹⁰⁴ At the time, an executive agreement existed between the U.K. and the U.S. that permitted crimes committed by U.S. soldiers or their dependents to be tried by military tribunals.¹⁰⁵ Part of the government's argument was that due to the small jurisdiction claimed by the military and great practical necessity, tiny infringements on the Bill of Rights were acceptable.¹⁰⁶ However, the Court dismissed this argument, saying it would be impermissible to allow even minor violations of an American's rights because it would lead to a slippery slope of gradual deprivation of rights.¹⁰⁷ The Court held that the military could not

¹⁰² *Id.* at 797 (Black, J., dissenting).

¹⁰³ *Id.* at 798.

¹⁰⁴ *Reid v. Covert*, 354 U.S. 3, 3 (1957).

¹⁰⁵ *Id.* at 15.

¹⁰⁶ *Id.* at 39.

¹⁰⁷ *Id.*

infringe on citizens' rights by trying them in military tribunals because Americans' rights stretch beyond the territorial boundaries of the United States.¹⁰⁸

The ultimate takeaway from *Reid* is that while practical considerations play a major role in whether due process rights must be applied to noncitizens, Americans should receive full protections of the Fifth Amendment when possible. As seen in *Eisentrager*, the pragmatists' unwillingness to extend the same protections to noncitizens reflects an additional challenge internationalists must face; not only must internationalists convince skeptics that the Constitution's protections should extend to noncitizens, they may also have to convince the pragmatists that the extension of those rights is not overly costly or unreasonable.¹⁰⁹

C. *Recent Cases Support Internationalist Beliefs*

Boumediene v. Bush is a case frequently cited by the internationalists that reflects a recent extension of constitutionally protected rights to noncitizens, at least on territory controlled by the United States.¹¹⁰ In *Boumediene*, noncitizens captured as enemy combatants were taken to the Guantanamo Bay Naval Base for interrogations and indefinite detainment.¹¹¹ The detainees argued that their right to petition for a writ of habeas corpus had been denied by the government.¹¹² The Court ruled that because the U.S. exercises a degree of control over the detainees in Guantanamo Bay, an American territory, habeas corpus cannot be suspended on noncitizens.¹¹³ The ruling was narrow, however, in that it explicitly only applies to noncitizens held in any American territory.¹¹⁴ Again,

¹⁰⁸ *Id.* at 5-6.

¹⁰⁹ See *Johnson v. Eisentrager*, 339 U.S. 765, 779 (1950).

¹¹⁰ *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).

¹¹¹ *Id.* at 732, 734.

¹¹² *Id.* at 734.

¹¹³ *Id.* at 763-64.

¹¹⁴ *Id.* at 762 (declining to discuss whether noncitizens, on foreign territory where the United States has no jurisdiction, have any rights that protect them from the American government. While the Court implies that constitutional rights can extend beyond the United States, they do not describe if there are limits, if any, or if all rights are protected or only the right of habeas corpus is safeguarded).

the issue of practicality was brought up as a major part of the decision.¹¹⁵ Writing for the majority, Justice Kennedy argued the common thread binding the *Insular Cases*, *Reid*, and *Eisentrager* together is “the idea that extraterritoriality questions turn on objective factors and practical concerns.”¹¹⁶

Importantly, *Boumediene* may have extended the authority of *Hamdi v. Rumsfeld*. In *Hamdi*, the plaintiff was a United States citizen detained as an enemy combatant in Afghanistan.¹¹⁷ He challenged the legality of his detention in the courts.¹¹⁸ The Supreme Court ruled that the executive branch had the authority to detain enemy combatants, regardless of their citizenship.¹¹⁹ However, the Court said that because the petitioner was an American citizen, he was entitled to due process regarding his status as an enemy combatant.¹²⁰ *Boumediene* emphasizes that the executive branch’s degree of control over detainees is enough to grant the noncitizens rights to habeas corpus on U.S. soil. *Hamdi* stresses that even detained enemy combatants must be afforded some due process. Therefore, it is plausible to assume that these cases extend due process to noncitizens on territory controlled by the United States or in its jurisdiction.

As evidenced in the cases presented, including the concurring opinions and dissents, debate has continued for over a century regarding the extent of noncitizen rights in this country. For the most part, the nationalist camp has been in the majority. However, the continued presence of the dissents and concurring opinions stressing the internationalist view demonstrates that such ideological trends have endured. The relatively recent internationalist majority opinions in *Boumediene* and *Hamdi* demonstrate that there may be a growing segment of internationalists in American courts.¹²¹ The mainstreaming of this legal thought adds more credibility to the

¹¹⁵ *Boumediene*, 553 U.S. at 761, 764.

¹¹⁶ *Id.* at 764.

¹¹⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2009).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 516.

¹²⁰ *Id.* at 537.

¹²¹ *See Boumediene*, 553 U.S. at 764; *Hamdi*, 542 U.S. at 534.

strong possibility that in the near future, the United States will have an internationalist administration or a Supreme Court that supports more rights for noncitizens.

D. Application of Internationalist Legal Thought to Drone Strikes

The modern internationalist perspective argues that when the U.S. government holds a certain degree of control over a person, the government must afford them equal rights and protections, regardless of their citizenship. This idea is foreshadowed in Justice Black's dissent in *Eisentrager*, where he argues the principles espoused in our Constitution afford protection to people living on any lands under U.S. control "no matter what their nationality or where they happen to live."¹²² The use of the term 'denizen' in both England and early state constitutions, used in the context to describe whose rights were being protected, was to extend rights beyond that of citizens to include lawfully residing noncitizens.¹²³ Similarly, the Fifth Amendment reflects such an understanding by using the word 'person' rather than 'citizen' when describing who receives protections from the government.¹²⁴ Rights enshrined in the Constitution limit the government's ability to enforce America's laws abroad on noncitizens.¹²⁵ Furthermore, because noncitizens have a right to habeas corpus while on American-controlled territory,¹²⁶ and due process must be given to citizens attempting to challenge their enemy combatant status,¹²⁷ due process and other rights must extend to noncitizens in an American-controlled area, even if those noncitizens are captured or suspected enemy combatants. Ultimately, this means that when the U.S. controls an area, the government is equally restricted in infringing on the rights of both noncitizens and American citizens.

¹²² *Johnson v. Eisentrager*, 339 U.S. 765, 798 (1950) (Black, J., dissenting).

¹²³ *Fong Yue Ting v. United States*, 149 U.S. 698, 736-37 (1893) (Brewer, J., dissenting).

¹²⁴ *Id.* at 739.

¹²⁵ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 282 (1990) (Brennan, J., dissenting).

¹²⁶ *Boumediene*, 553 U.S. at 770-71.

¹²⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2009).

Internationalist thought can be applied to drone strikes against noncitizens accused of terrorism by giving accused persons the same protections the United States gave to American citizens suspected of terrorism, such as Anwar al-Aulaqi. Under an internationalist view that the United States should respect the rights of noncitizens in the same way it would for American citizens on territory under American control,¹²⁸ it is probable that territory in which the United States enforces its laws could fall under this category.¹²⁹ Drone strikes are such an enforcement of U.S. laws on noncitizens abroad. U.S. targets for drone strikes are not random; they are persons suspected of working with terrorist organizations.¹³⁰ When drone strikes eliminate a suspected terrorist, it is as if the U.S. is planting a symbolic American flag on the strike site, as it has lethally enforced American law on the scorched earth. Therefore, internationalist legal thought reasons that noncitizen targets of drone strikes must receive the same level of due process rights that Americans citizens receive before being placed on the Disposition Matrix.

A counterargument to this viewpoint is that there is no precedent for the United States expanding due process protections to land it does not control. The Fifth Amendment was never intended to assert America's due process laws on land controlled by a separate sovereign government. However, in matters of targeted killing, foreign nations often consent to America's use of drone strikes.¹³¹ When another country effectively cedes territorial sovereignty to the United States, America's territorial control is effectively expanded, and therefore, so are its due process protections.

¹²⁸ See *Eisentrager*, 339 U.S. at 798 (Black, J. dissenting).

¹²⁹ See *Verdugo-Urquidez*, 494 U.S. at 282 (Brennan, J. dissenting).

¹³⁰ See Dreyfuss, *supra* note 18, at 282.

¹³¹ See e.g., Greg Miller and Bob Woodward, *Secret Memos Reveal Explicit Nature of U.S., Pakistan Agreement on Drones*, WASH. POST (Oct. 24, 2013), https://www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e_story.html; Greg Miller, *Yemeni President Acknowledges Approving U.S. Drone Strikes*, WASH. POST (Sept. 29, 2012), https://www.washingtonpost.com/world/national-security/yemeni-president-acknowledges-approving-us-drone-strikes/2012/09/29/09bec2ae-0a56-11e2-aff-d6c7f20a83bf_story.html.

It is important to recognize limitations in the internationalist legal perspective, particularly if internationalists want to win over the pragmatists and create an internationalist legal framework in the near future. There is a well-established distinction between American citizens and noncitizens in territory not controlled by the United States. No Supreme Court holding has awarded rights to noncitizens when they are not on U.S. soil. Litigation over whether Fifth Amendment protections apply to noncitizens on foreign soil when injured by American officials on U.S. soil currently favors preventing additional *Bivens* claims.¹³² Even legal arguments in favor of expanding *Bivens* to such claims would not be applicable to drone strikes and would not have an impact on U.S. foreign policy.¹³³ Therefore, it is important to understand that an internationalist expansion of Fifth Amendment rights to noncitizens in drone strikes would be a narrow doctrine for that specific situation. It is in no way expanding full Fifth Amendment rights to all noncitizens. It could only apply under the internationalist perspective if a drone strike is equivocated to territorial control, such as how the petitioners in *Hamdi* and *Boumediene* were deemed to be in U.S. custody.¹³⁴ Such a position is plausible under an internationalist perspective, as a legitimate danger exists in erroneously striking persons who are not actual enemy combatants, and therefore are not subject to targeted killing in accordance with the AUMF.¹³⁵ However, it must be noted that even Supreme Court justices who were in favor of expanding rights to noncitizens would disagree with expanding such protections to noncitizen enemies during wartime.¹³⁶

¹³² See *Hernandez v. Mesa*, 885 F.3d 811, 823 (5th Cir. 2018).

¹³³ See *id.* at 827-28 (Prado, J., dissenting). The reasoning is that *Bivens* is the only legal remedy the plaintiffs have and that expanding *Bivens* actions here would not impact U.S. foreign policy, as the case only deals with a disobedient American agent and not with the U.S. government.

¹³⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004); *Boumediene v. Bush*, 553 U.S. 723, 762 (2008).

¹³⁵ See AUMF, *supra* note 3. A foreigner who is not an enemy of the United States is not a person who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” *Id.*

¹³⁶ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 292 (1990) (Brennan, J., dissenting).

Furthermore, it is important to note that such stringent due process protections should not be applicable to every situation on U.S. controlled territory. If every enemy belligerent were held to U.S. due process standards, thorough and careful review required by the principles of due process would severely handicap America's ability to function on foreign soil.¹³⁷ Due process reviews are not necessary in situations in which American servicemembers do not have the luxury of time. In times of emergency or extraordinary circumstances, the executive branch need not follow procedural due process.¹³⁸

Privileged belligerents, as defined in the Geneva Convention Relative to the Treatment of Prisoners of War,¹³⁹ would not need to be subject to a full due process review. Armed forces of a state and militia forces normally must openly carry weapons and have a fixed, distinctive sign recognizable at a distance.¹⁴⁰ If an individual is openly a member, or associate of, armed forces currently at war with the United States, a procedural due process analysis is unnecessary, as there is a reasonable certainty the individual is a belligerent.

In short, the internationalist approach to drone strikes would only apply (1) on territory controlled by the United States, either on U.S. soil or in a location where the United States has territorial sovereignty, (2) when there is adequate time for a due process review to be conducted, and (3) to unprivileged belligerents or where the lawful status of the belligerents is uncertain.

A policy-centered counterargument to this framework would likely point to how this limitation seems to grant a special protective status to unprivileged belligerents. However, this is derived from the fact that privileged belligerents are likely easily identifiable by their

¹³⁷ See Holder, *supra* note 27 (targeting American citizens must come after a "thorough and careful review" that the individual poses an imminent threat to the United States).

¹³⁸ *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 299-300 (1981).

¹³⁹ 10 U.S.C. § 948a(6) (2012); Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

¹⁴⁰ Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 139.

uniforms and openly carrying weapons.¹⁴¹ Unprivileged belligerents and belligerents with uncertain status increase the risk of the U.S. targeting a nonparty to the conflict, necessitating the importance of a due process review in this situation. In addition, because a thorough due process review would drastically reduce the risk of the U.S. targeting a nonparty, and such a framework would only apply when the U.S. has territorial control over an area, this legal framework may encourage countries to cede sovereignty to the U.S., in order to guarantee their citizens receive American due process protections. Given that drone strikes may be used without another country's permission under the AUMF, this legal framework may encourage greater cooperation in the targeting of terrorists.

Finally, support for an internationalist legal perspective does not mean calling for all rights awarded to citizens to be granted to noncitizens.¹⁴² Support has been for expanding specific rights of noncitizens, particularly for those who may be impacted by American laws,¹⁴³ or to whom a plausible expansion of rights would not be completely impractical.¹⁴⁴ This limiting principle is important, as the ideological struggles regarding granting noncitizens rights occur on a case-by-case basis, or more accurately, a right-by-right basis. As discussed above, there is no strong argument for awarding noncitizens rights when the United States does not exert any direct control over the land. Although noncitizens may have the right to habeas corpus within the United States,¹⁴⁵ the U.S. owes no responsibility of habeas corpus to noncitizens not under American territorial control, such as persons held in an oppressive foreign country. While the United States can afford a process to those within its territorial control, it is unrealistic to expand such authority worldwide.

¹⁴¹ *See id.*

¹⁴² *See, e.g.,* Henkin, *supra* note 62, at 32-34.

¹⁴³ *Id.*

¹⁴⁴ Hunter, *supra* note 9, at 190-92 (arguing in favor of allowing *Bivens* actions for noncitizens not on U.S. soil for otherwise unconstitutional actions from agents of U.S. Customs and Border Protection).

¹⁴⁵ *See generally* Boumediene v. Bush, 553 U.S. 723 (2008).

Changing government to award noncitizens the same rights as citizens is plausible,¹⁴⁶ but such changes often require fundamental structural changes in government, necessitating a careful analysis of the reasons for granting such rights and a practical method that sets out how these rights can be protected. While noncitizens are often entitled to the same protections as citizens on U.S. soil,¹⁴⁷ noncitizens do not receive all rights inside the U.S. For example, voting rights in federal elections are only awarded to U.S. citizens,¹⁴⁸ and state and local governments are permitted to discriminate against noncitizens in hiring for essential government positions, such as police officers,¹⁴⁹ and public school teachers.¹⁵⁰ The issue of expanding rights to noncitizens is not an unlimited principle, and good faith arguments require a right-by-right argument for why and how the U.S. can appropriately and practically expand each right to noncitizens.

The questions regarding the extent of the rights of noncitizens, such as whether noncitizens receive due process rights, will likely remain a controversial constitutional issue. The majority of justices present for the decision in *Hamdi* have left the Court.¹⁵¹ This may potentially lead to holdings that distinguish or circumvent the relatively recent precedents. Under the Trump administration, immigration issues have become a focal point in national dialogue.¹⁵² In a high-profile case, *Hawaii v. Trump*, the Supreme Court decided that the executive branch has broad authority to prevent certain noncitizens from entering the U.S.¹⁵³ Regardless of the Supreme

¹⁴⁶ See, e.g., Joe Mathews, *You Heard Me California: Give Noncitizens the Right to Vote*, THE SACRAMENTO BEE (Aug. 4, 2017),

<https://www.sacbee.com/opinion/california-forum/article165368987.html>.

¹⁴⁷ See generally *Bernal v. Fainter*, 467 U.S. 216 (1984) (holding that the Fourteenth Amendment's Equal Protection Clause extends to noncitizens legally in the United States).

¹⁴⁸ 18 U.S.C. § 611 (2012).

¹⁴⁹ *Foley v. Connelie*, 435 U.S. 291, 299-300 (1978).

¹⁵⁰ *Ambach v. Norwick*, 441 U.S. 68, 80 (1979).

¹⁵¹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 507 (2009). Justices Rehnquist, Stevens, O'Connor, Scalia, and Souter are no longer on the Court.

¹⁵² Sarah Dutton et al., *Poll: Immigration is the Most Important Problem for Trump and Congress*, CBS NEWS (Feb. 27, 2017), <https://www.cbsnews.com/news/poll-immigration-is-most-important-problem-for-trump-and-congress/>.

¹⁵³ *Hawaii v. Trump*, 138 S. Ct. 2392, 2408-09 (2018).

Court's holding, it is important to note that the rights of noncitizens have returned as a pressing subject of legal conversation.

Currently, it is known that noncitizens accused of terrorism do not have the same due process requirements as American citizens accused of the same crime.¹⁵⁴ However, due to the classified nature of that information, the public does not know the precise details of how drastic the distinction is.¹⁵⁵ Due to the Trump administration's willingness to embrace a nationalist perspective, America may have already reduced the current procedural due process required for noncitizens.¹⁵⁶ The controversial nature of much of the Trump presidency could plausibly be met with a potential sudden shift to a more internationalist perspective with his immediate successor.

The focus on the rights of noncitizens could very well give rise to a staunch internationalist executive branch or Supreme Court in the near future. The Court could continue on the path demonstrated in recent cases of extending due process rights to all persons in U.S. territory. The President could unilaterally decide all protections provided for American citizens must be granted to noncitizens as well. If internationalists dominate one or more branches of government, the legal implications regarding the military and CIA's current drone program could force a drastically new approach for targeting noncitizens accused of terrorism.

III. EXECUTIVE DUE PROCESS

A sudden shift in American drone strike policy to comply with internationalist legal principles could lead to fears of drastic spending to create a new system to deal with persons in foreign countries accused of terrorism, such as a drone court. However, there is an efficient and legal policy option that could ease a potential adjustment to an internationalist legal perspective. This would

¹⁵⁴ Mate, Goodman & Shamsi, *supra* note 33.

¹⁵⁵ *Id.*

¹⁵⁶ See Charlie Savage and Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. TIMES (Sept. 21, 2017), <https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html>.

involve embracing the same executive due process for noncitizens that the Obama administration used for suspected terrorists who were U.S. citizens.¹⁵⁷ While some legal commentators are under the impression that any adequate due process must come from the judiciary or a source unaffiliated with the executive branch, who makes the targeting decisions,¹⁵⁸ this costly addition to government is unnecessary because executive due process has long been established in American history, dating back to George Washington's response to the Whiskey Rebellion.¹⁵⁹ The Fifth Amendment does not specify where due process must come from.¹⁶⁰ If the Executive is acting under his constitutional Commander-in-Chief authority and takes steps to ensure a fair process, then executive due process meets the due process requirements of the Constitution.

A. *Executive Due Process Under the Obama Administration*

During the Obama administration, executive due process was different for suspected terrorists who were noncitizens and suspected terrorists who were Americans.¹⁶¹ For noncitizens, either the CIA or the military through the Joint Special Operations Command ("JSOC") targeted suspected terrorists.¹⁶² Both the CIA and the military had separate kill lists and could carry out drone strikes independently.¹⁶³ For the CIA, the targets needed to be a current threat to the U.S.¹⁶⁴ Targeting recommendations were made by mid-level officials for the National Security Council (NSC),¹⁶⁵ and

¹⁵⁷ Oberlander, *supra* note 8, at 125.

¹⁵⁸ See, e.g., Sarma, *supra* note 27, at 761-63.

¹⁵⁹ Oberlander, *supra* note 8, at 130-33.

¹⁶⁰ U.S. CONST. amend. V.

¹⁶¹ Oberlander, *supra* note 8, at 130-33.

¹⁶² *Id.* at 130.

¹⁶³ *Id.* at 130-31.

¹⁶⁴ *Id.* (explaining how the evidentiary standard used is likely a "reasonable suspicion" or "probable cause" rather than the lower "some evidence" standard) (*citing* 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-QAEDA OR AN ASSOCIATED FORCE (Nov. 8, 2011), <http://www.fas.org/irp/eprint/doj-lethal.pdf>).

¹⁶⁵ The National Security Council is the small council used by the President to make national security and foreign policy decisions. A select few members make up this group. Under President Obama, the National Security Council only included the President, Vice President, the Representative of the United States to the United

were then approved by Cabinet secretaries and intelligence unit leaders on the NSC.¹⁶⁶ Under the Trump administration, the bureaucratic processes were simplified, further reducing bureaucratic oversight over America's drone operations against noncitizens.¹⁶⁷

Under the Obama administration, executive due process as applied to Americans suspected of terrorism offered greater protections than it did for noncitizens.¹⁶⁸ Specifically, it involved explicit permission from the NSC before targeting a person.¹⁶⁹ First, officials working for the NSC needed to make a recommendation for targeting an American citizen.¹⁷⁰ Next, recommendations were reviewed by the NSC Principal Committee.¹⁷¹ The officials here "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."¹⁷² Finally, the President would be notified of the targeting decision and had the authority as Commander-in-Chief to decide not to target the American for any reason.¹⁷³ Eventually, the executive branch would inform the "appropriate members of Congress" about the decision to use a drone strike against an American citizen.¹⁷⁴

The additional due process steps taken for American citizens provide greater protections than noncitizens. The multi-layered

Nations, the President's Chief of Staff, the National Security Advisor, the Attorney General, and Secretaries of State, Treasury, Defense, Energy, and Homeland Security. See THE WHITE HOUSE, NATIONAL SECURITY PRESIDENTIAL DIRECTIVE-1 (2009), <https://fas.org/irp/offdocs/ppd/ppd-1.pdf>.

¹⁶⁶ Mark Hosenball, *Secret Panel Can Put Americans on "Kill List"*, REUTERS (Oct 5, 2011), <https://www.reuters.com/article/us-cia-killlist/secret-panel-can-put-americans-on-kill-list-idUSTRE79475C20111005>.

¹⁶⁷ Hartig, *supra* note 35.

¹⁶⁸ Oberlander, *supra* note 8, at 130-33.

¹⁶⁹ Oberlander, *supra* note 8, at 131 (*citing* Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, (Apr. 6, 2010), <http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html>).

¹⁷⁰ Oberlander, *supra* note 8, at 131.

¹⁷¹ *Id.* at 131-32.

¹⁷² *Id.* at 132.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

process creates extra safeguards, particularly that the highest ranking members of the NSC, including the President, are informed of individual Americans recommended to be targeted, and have the authority to stop the suspected terrorist from being targeted.¹⁷⁵ Since the terrorists who are being targeted are labeled as threats to America's national security, it is nonsensical that American citizens must go through these additional layers of executive due process unless the government believed this due process was owed by the Constitution. Assuming that is the case, the denial of the same level of due process to noncitizens reflects a nationalist belief.

B. Alternatives to Executive Due Process Are Inadequate

By merely expanding application of the doctrine from covering only American citizens to covering all targets regardless of citizenship, recent doctrine can deal with a potentially difficult and costly legal issue. If the executive branch or the Supreme Court decries the current lethal targeting process because of an internationalist mindset, or because they do not believe the current executive due process for noncitizens is adequate, then they will reasonably seek or demand changes to the process.¹⁷⁶ Many legal scholars have stated their dissatisfaction with the drone strike process and have proposed several alternative due process procedures.¹⁷⁷ A common recommendation is to allow Article III courts to hear these cases,¹⁷⁸ either by using a different judicially manageable standard,¹⁷⁹ or allowing a *Bivens* remedy in which relatives can successfully sue if the executive branch violates the accused terrorist's due process rights.¹⁸⁰ Another suggestion is for the government to develop a specialized "drone court" to hear these types of cases.¹⁸¹ A final

¹⁷⁵ *Id.* at 132-33.

¹⁷⁶ *See, e.g.,* Sarma, *supra* note 27, at 760-62; Dreyfuss, *supra* note 18, at 288-89. There have been numerous demands for changes to the due process model used for drone strikes. Reopening the drone strike issue will inevitably lead to various calls for changes from different groups.

¹⁷⁷ *See, e.g.,* Sarma, *supra* note 27, at 760-62; Dreyfuss, *supra* note 18, at 288-89.

¹⁷⁸ Sarma, *supra* note 27, at 760.

¹⁷⁹ *Id.*

¹⁸⁰ *Contra Panetta*, 35 F. Supp. 3d at 58-59.

¹⁸¹ Sarma, *supra* note 27, at 761.

suggestion is that the decisions should fall to the military in the form of military tribunals because drone strikes are acts of warfare.¹⁸²

Each of these alternative due process procedures comes with great weaknesses that would make their use impractical. Allowing Article III courts to hear targeted killing cases would cause national security issues to be revealed during discovery.¹⁸³ In addition, Article III courts believe they lack the necessary information to make sound decisions about national security matters, so the judiciary prefers to defer to the political branches for such matters.¹⁸⁴ It would be difficult to find qualified judges for a drone court, as they would need sufficient experience in national security law and the ability to make fast decisions before drone strikes took place.¹⁸⁵ Finally, relegating decisions about drone strikes from the NSC to military tribunals would diffuse responsibility for determining the legality of individual drone strikes from the Commander-in-Chief and officials working under him to members of the Judge Advocate General's (JAG) Corps.¹⁸⁶ The multi-layered system developed by the NSC with intelligence and national security officials specializing in the legality of drone strikes would more likely guarantee greater protections for accused terrorists than the nonpublic trials held by military tribunals, and greater accountability if a mistake went public.

Another proposed solution calls for a court within the executive branch that would review the President's kill list decisions.¹⁸⁷ These decisions would be reviewed by a group of national security experts.¹⁸⁸ Such deliberations of this executive court would ignore the target's citizenship and make decisions from a constitutional and public policy perspective.¹⁸⁹ However, this 'executive court' model is very similar to the current executive due

¹⁸² Dreyfuss, *supra* note 18, at 288.

¹⁸³ Sarma, *supra* note 27, at 761.

¹⁸⁴ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 at 52 ("the courts are functionally ill-equipped to make the types of complex policy judgments").

¹⁸⁵ Sarma, *supra* note 27, at 762.

¹⁸⁶ Dreyfuss, *supra* note 18, at 288-89.

¹⁸⁷ Sarma, *supra* note 27, at 763.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

process model used for suspected American terrorists.¹⁹⁰ It can be distinguished from the executive due process model by an additional check on the President's kill list, which may be both unnecessary and possibly unconstitutional. It is unnecessary because the multiple checks that suspected terrorists go through under executive due process would cover these matters, and executive due process is done before the President is informed of the decision.¹⁹¹ Doing so after the fact would not only be superfluous to the previous process, but possibly unconstitutional because giving judiciary powers to a component of the executive branch may be a violation of the principle of separation of powers.¹⁹² Furthermore, this proposal may be unconstitutional because an executive court could potentially interfere with the President's ability to function as the sole executive authority.¹⁹³

C. Executive Due Process Paired with Internationalist Legal Thought

Adopting for citizens the same form of executive due process used by the Obama administration for noncitizens solves the need for adequate due process and satisfies internationalist legal thought. Internationalist legal thought is predicated on the presumption that protections in the Constitution ultimately protect all persons, not just Americans. By applying the same due process standard for citizens and noncitizens, both categories of people are treated equally, ending procedural discrimination based on citizenship. The Obama administration believed its executive due process for Americans satisfied due process steps.¹⁹⁴ By merely upgrading the due process noncitizens receive to that which Americans receive for suspicions of the same crime, the transition to embracing internationalist legal thought is the most efficient method for

¹⁹⁰ Oberlander, *supra* note 8, at 131-32.

¹⁹¹ *Id.*

¹⁹² See *Morrison v. Olsen*, 487 U.S. 654, 685-96 (1988). Since Congress may not increase its own powers or the powers of the judiciary at the expense of the executive branch, the executive branch likely cannot be coerced to adopt quasi-judicial powers against itself.

¹⁹³ See U.S. CONST. Art. II, § 1, cl. 1.

¹⁹⁴ Oberlander, *supra* note 8, at 125.

granting noncitizens due process rights, while also less costly than adopting a new system to evaluate due process for all persons to be targeted by drone strikes.

Preserving and expanding executive due process for drone strikes is a simple solution to the issue of how to bring due process procedures for noncitizens in compliance with internationalist legal thought. Such a solution will satisfy concerns by pragmatists. The benefit of adopting these reforms is critical, particularly if an internationalist Supreme Court is faced with an executive branch that does not believe in noncitizen rights. *Boumediene* demonstrated that the practicability of the executive branch to recognize the rights of noncitizens was essential for the judicial branch to recognize those rights.¹⁹⁵ Executive due process is a cheaper solution than other proposed reform plans, as the process has already been in place under the Obama administration and reasonably could be duplicated. The only cost would be growing the size of the program to evaluate procedure for all persons placed on kill lists by the same standards used for American citizens. This should not be abnormally costly, as there were staff who helped develop drone strike procedures under the Obama administration for noncitizens, albeit not as thoroughly as the procedures for U.S. citizens.¹⁹⁶ By changing due process for noncitizens and not reworking the entire due process system for drone strikes, executive due process both satisfies the concerns of internationalists and assuages the fears of pragmatists.

Expanding executive due process for noncitizens to match the executive due process given to Americans would face criticism. This approach would expand the authority of the executive branch. By keeping due process inside the executive branch, not only would the public be forced to trust the Executive with this internal process, but the power of the Executive would be increased by preserving the inability to be challenged on these issues. However, as stated by the court in *Al-Aulaqi v. Obama*, “the courts are functionally ill-equipped to make the types of complex policy judgments.”¹⁹⁷ Granting expanded authority to another branch of government that

¹⁹⁵ *Boumediene v. Bush*, 553 U.S. 723, 737 (2008).

¹⁹⁶ Mate, Goodman & Shamsi, *supra* note 33.

¹⁹⁷ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d at 52.

admits its inability to competently deal with national security issues of this type would be unwise.

CONCLUSION

Under the internationalist perspective, noncitizens could be entitled to the same due process rights as American citizens. America's national security policies could be upended if the executive branch or the courts adopt an internationalist approach. However, just like American citizens, noncitizens' due process rights are satisfied by an executive due process system such as the one established under the Obama administration. Adopting the executive due process model as a method to satisfy noncitizens' Fifth Amendment rights is practical because it will save the government from establishing an additional legal system to meet the burgeoning supply of due process now owed to noncitizens accused of terrorism. As long as noncitizens' rights are recognized and applied in a manner that creates more work for the executive branch but does not increase risks for America's national security, the United States could avoid further divisive constitutional battles over the rights of noncitizens abroad.

