Florida Journal of International Law

Volume 24 | Issue 1 Article 3

April 2012

Ready . . . Fire . . . Aim!: A Case for Applying American Due Process Principles Before Engaging in Drone Strikes

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READY . . . FIRE . . . AIM! A CASE FOR APPLYING AMERICAN DUE PROCESS PRINCIPLES BEFORE ENGAGING IN DRONE STRIKES

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I. INTRODUCTION

In November 2002, a drone operated by the Central Intelligence Agency (CIA) launched a Hellfire missile at an automobile carrying suspected al-Qaeda members in Yemen.[1] The airstrike, one of the first known operations of its type,[2] allegedly resulted in six deaths, including those of a prominent al-Qaeda leader and a U.S. citizen.[3] Since that assault, the use of drones by U.S. personnel engaged in the war on terror has increased dramatically, both in number and scope.[4] Most starkly, as evidenced by the September 30, 2011 strike that killed U.S.-born Anwar al-Awlaki, government officials have even authorized drone operators to target American citizens believed to be engaged in the war on terror.[5]

Despite the expanded use of drones, however, the legitimacy of these attacks remains unclear. Most commentators who have addressed the legitimacy of more general targeted killings have examined the issue within the framework of either international humanitarian law (IHL) or international human rights law (IHRL).[6] Those limited few who have

1. James Risen & Marc Santora, *Man Believed Slain in Yemen Tied by U.S. to Buffalo Cell,* N.Y. TIMES, Nov. 10, 2002, at A17.

2. In 2001, a drone strike in Afghanistan killed a senior al-Qaeda operative named Muhammad Atef. *See* David Byman, *Do Targeted Killings Work?*, 85 FOREIGN AFF. 95, 106 (2006). The Yemen strike was unique, however, in that it was the first publicly-disclosed strike that was not conducted in a country within which the United States was engaged in ongoing combat operations.

3. Risen & Santora, *supra* note 1, at A17.

4. *See, e.g.*, Peter Bergen & Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, NEW AMERICA FOUNDATION (Oct. 19, 2009), http://counterterrorism.newamerica.net/publications/policy/revenge_of_the_drones ("Obama, far from curtailing the drone program he inherited from President George W. Bush, has instead *dramatically increased* the number of U.S. Predator and Reaper drone strikes."). *See also* discussion *infra* Part II.B. It is worth noting that there are allegedly two drone programs operated by the U.S. government; one is reportedly directed by the CIA, while the military purportedly directs the other. *See* Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.'s Covert Drone Program?*, NEW YORKER, Oct. 26, 2009, at 36, 37.

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

6. *See, e.g.*, HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 336-46 (2005); NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW (2008); GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 538-55 (2010); W. Jason Fisher, *Targeted Killing, Norms, and International Law*, 45 COLUM. J. TRANSNAT'L L. 711, 717 (2007) (arguing that the divide between IHL and IHRL "is so splintered that . . . it is doubtful that current international law is in a position to guide the behavior of States with respect to targeted killing"); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171 (2005) (pointing out the conflict between these two models in the context of the war on terror and proposing instead a mixed model incorporating elements of each); Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1411-18 (2007) (presenting a summary of the scholarship discussing this

analyzed the subject through the lens of American due process have limited their scrutiny to the absence of *post-deprivation* rights.[7] They suggest, for instance, that the United States should implement some sort of *Bivens*-type action as a remedy for the survivors of erroneous drone strikes.[8]

As this Article explains, however, none of these approaches yield wholly satisfactory answers as to which framework should govern the use of drones within the context of the war on terror. And though the idea that American due process principles ought to be applied *ex post* represents a significant contribution to the debate, it too ultimately falls flat. Indeed, such an approach unduly narrows the obligation of U.S. officials to the standard of readying, firing, and then aiming—requiring them to perform a detailed review of the strikes only after the fact. Instead, this Article argues that the United States ought to be held to a higher, *ex ante* standard—that of "aiming" before firing—and posits that such a standard is practically attainable.

In doing so, the Article proceeds as follows. Part II describes the capabilities and current employment of drones and explains why resolving the legitimacy of their use is so critical. Specifically, it highlights that, despite the unsettled nature of the law in this area, targeted killings by drone strikes have increased exponentially in recent years—in some instances against arguably questionable targets. Part III examines current attempts to address the legitimacy of drone assaults and explains why they fail to adequately govern the use of these weapons. While this Part explores the applicability of IHRL and IHL, it does not undertake to resolve the debate as to which regime does or ought to apply to these operations. To the contrary, it argues that limitations within each framework have prevented consensus from forming around the applicability of either. Accordingly, U.S. officials

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debate); Ariel Zemach, *The Unpleasant Responsibilities of International Human Rights Law*, 38 DENV. J. INT'L L. & POL'Y 421, 422 (2010) ("The prevailing view in the legal literature is that the current structure of international law—the law enforcement/armed conflict dichotomy—is ill-suited to address large-scale hostilities between a state and a terrorist organization.").

7. *See* Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405 (2009) (primarily proposing post-strike intra-executive reviews and the creation of *Bivens*-type judicial actions). The framework these scholars propose for post-deprivation analysis mirrors, in some respects, the approach taken to targeted killings in Israel. There, the Israeli Supreme Court patently endorsed targeted killing of Palestinian civilians actively engaged in terrorist activities, but "to ensure objectivity, added that judicial review of the ex post executive review should be allowed." Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing*, 2011 U. ILL. L. REV. 1201, 1234 (2011). Though the present Article argues that the analysis of Professors Murphy and Radsan is unnecessarily limited, the author acknowledges the significant contribution made by their proposal for applying American due process principles at all. Their proposal was, in fact, the impetus for the approach presented in this Article.

8. *See* Murphy & Radsan, *supra* note 7, at 410.

must arguably look to other sources to find guiding principles to legitimize targeted killings via drones. Though it is admittedly not entirely clear whether constitutional guarantees apply in the foreign locales where these strikes occur—or to the foreign nationals who are often their target—this Part proposes that American due process principles nevertheless ought to be invoked before such strikes occur, because failing to do so allows the executive to act with impunity in a legal void. Part IV argues that, in *Hamdi v. Rumsfeld*[9] and *Boumediene v. Bush*,[10] the Supreme Court signaled the process that may be due before drones are used to eliminate known terrorist targets. In extending the *Hamdi* and *Boumediene* analysis to targeted killings by drones, this Part also begins the inquiry into the procedural protections that due process may demand before U.S. officials engage in such actions. Part V concludes.

II. BACKGROUND & CONTEXT

As used here, targeted killing is defined as the "extra-judicial, premeditated killing by a state of a specifically identified person not in its custody."[11] Though some have argued that targeted killing so defined amounts to illegal assassination,[12] others have instead suggested that "assassination generally is regarded as an act of murder for *political* reasons."[13] Given that targeted killings via drones do not, to this point, appear to have been undertaken for political reasons, the author accepts, for present purposes, that these attacks "can be a legally and morally justifiable means of protecting the American people."[14] The inquiry here is what procedures, if any, are necessary before the commencement of a drone strike to ensure that it is indeed legitimate.[15]

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9. 542 U.S. 507 (2004).

10. 553 U.S. 723 (2008).

11. Murphy & Radsan, *supra* note 7, at 406.

12. *See, e.g.*, Amos N. Guiora, *Legislative and Policy Responses to Terrorism, a Global Perspective*, 7 SAN DIEGO INT'L L.J. 125, 147 (2005) ("Targeted killings are primarily criticized based on the premise that they constitute either extrajudicial killings or assassinations.").

13. Memorandum from W. Hays Parks, Special Assistant for Law of War Matters to the Judge Advocate General of the Army 4 (NOV. 2, 1989), http://hks.harvard.edu/cchrp/Use%20of%20Force/October%202002/Parks_final.pdf (emphasis added).

14. Jonathan Ulrich, *The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism*, 45 VA. J. INT'L L. 1029, 1031 (2005).

15. Though there are obvious differences, this proposal in some sense parallels calls by Alan Dershowitz for a "torture warrant." *See* Alan Dershowitz, *Tortured Reasoning, in* TORTURE: A COLLECTION 257, 264 (Sanford Levinson ed., 2004). Dershowitz essentially argues that, though it is not clear that nonlethal torture is ever appropriate, if a government is going to employ torture techniques, its actions ought to be "subject to some kind of judicial (or perhaps executive) oversight." *Id.*

Unfortunately, neither U.S. law nor U.S. policy has kept pace with evolving technological advances related to warfare, or with the changing operational realities presented specifically by the war on terror. This Part discusses why addressing this failing—at least as it pertains to drones—is of such critical importance. In particular, it highlights that the use of drones has expanded exponentially during the past two decades. There are two major explanations for this momentous growth. First, advances in technology have increased drone capabilities and, therefore, the contribution they make to various operational missions. As importantly, the asymmetrical nature of the war on terror[16] has factored significantly in the employment of drones and made them a critical tool in the execution of military operations related to the war.

A. *The Development and Capabilities of Drones*

Today's drones were developed in the early 1990s, and as their value became more evident, their deployment by the CIA and U.S. military mushroomed.[17] From 2000 to 2006, for instance, "the Department of Defense's inventory of unmanned aircraft grew from fewer than 50 to over 3,000."[18] Originally designed to provide persistent surveillance of targets, drones offer a strategic advantage over conventional military aircraft because they can "hover above a target for up to forty hours before" refueling.[19] They do this without an onboard pilot,[20] so even when malfunctions or anti-aircraft weapons cause drones to crash, U.S. military casualties are limited.[21] This feature has become increasingly important to U.S. military strategists and policymakers as public support for overseas troop deployments has waned.[22] With "pilotless" weapons

16. There are several features of the war on terror making it an "asymmetrical" conflict. Among these are al-Qaeda's numerical inferiority, its lack of a cohesive command structure, its general inability to procure sophisticated equipment, and its geographic dispersion. *See generally* DOUGLAS KELLNER, FROM 9/11 TO TERROR WAR: THE DANGERS OF THE BUSH LEGACY 91 (2003) ("Military theoreticians described the [war on terror] as 'asymmetrical,' as the Taliban had no sophisticated weaponry or modern military organization.").

17. *See* Jack M. Beard, *Law and War in the Virtual Era*, 103 AM. J. INT'L L. 409, 412 (2009); Mayer, *supra* note 4, at 37.

18. Paul McBride, Comment, *Beyond Orwell: The Application of Unmanned Aircraft Systems in Domestic Surveillance Operations*, 74 J. AIR L. & COM. 627, 633 (2009).

19. Mayer, *supra* note 4, at 44.

20. McBride, *supra* note 18, at 629.

21. Maj. Kenneth M. Kniskern, *The Need for a USAF UAV Center of Excellence*, AIR COMMAND AND STAFF COLLEGE 3 (Apr. 2006), http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA475634.

22. Mayer, *supra* note 4, at 38; Helene Cooper & Mark Landler, *Afghan Strategy has Fresh Focus, Targeted Killing*, N.Y. TIMES, Aug. 1, 2010, at A1. This capability has also caused consternation, though. One commentator has noted, for example, that use of drones creates amidst the public a perception that warfare is costless and that governments will therefore be

systems like drones, operational missions can be carried out without such deployments.

Beyond this, as technological innovations emerged, new capabilities were incorporated into drone platforms, making them more potent tools in military operations. Most significantly, though they were originally designed solely for reconnaissance purposes, drones became a self-contained weapons system when their platforms were reconfigured to support armament with laser-guided Hellfire missiles.[23] This engineering development was accompanied by commensurate advancements in the onboard optics systems that facilitated better target identification.[24] In the meantime, drones became more lethal given increases in both the speed and altitude at which they were capable of operating.[25] Finally, the effectiveness of drones also increased as stealth technology emerged to make attacks more clandestine.[26]

B. *The Use of Drones During the War on Terror*

As important as these developments were to the burgeoning of drones, it was not until the U.S. government had a sustained requirement for their deployment that their full force became evident. That requirement came after the attacks of September 11th with the commencement of the global war on terror. Since the very first night of the U.S. invasion in Afghanistan,[27] drones have been used for a wide array of terrorism-related missions. For example, though their primary mission has remained reconnaissance, they have also been used for battle-damage assessments, relaying target information to on-ground operators, and spotting hazards to U.S. forces like roadside improvised

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more likely to use force impetuously. PETER W. SINGER, WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE 21ST CENTURY 316 (2009). *See also* Mary L. Dudziak, *To Whom is a Drone Loyal?*, SOC'Y FOR HISTORIANS OF AM. FOREIGN REL. (Oct. 13, 2009), http://www.shafr.org/2009/10/13/to-whom-is-a-drone-loyal/ ("Drones are a technological step that further isolates the American people from military action, undermining political checks on contemporary warfare. And the isolation of the people, historians of war have argued, helps enable on-going, endless war.").

23. *See* Rebecca Grant, *An Air War Like No Other*, A.F. MAG., Nov. 2002, at 30, 34. Currently, at least one drone—the Reaper—even carries other guided munitions. *See* Radsan & Murphy, *supra* note 7, at 1216.

24. *See, e.g.*, SINGER, *supra* note 22, at 33 (describing the optics of the Predator drone); Andrew Callam, *Drone Wars: Armed Unmanned Aerial Vehicles*, INT'L AFF. REV. (Feb. 21, 2010), http://www.iar-gwu.org/node/144 (noting that the Predator's optics "can read a license plate from two miles up").

25. *See* Eric Hagerman, *A Field Guide to Flying Robots*, POPULAR SCI., Mar. 2010, at 36, 38-42.

26. *Id.*

27. *See* Seymour M. Hersh, *King's Ransom: How Vulnerable are the Saudi Royals?*, NEW YORKER, Oct. 22, 2001, at 35.

explosive devices.[28] The most contentious aspect of drone operations, however, has been their role in targeted killings.

1. Killing via Drone

News articles are littered with reports of drone strikes against alleged terrorists around the globe—from Afghanistan and Iraq, to Yemen and Pakistan.[29] Though the classified nature of the drone program makes precise estimates difficult, one study indicates that in Pakistan alone, drones operated by the United States killed over one-thousand people between 2006 and 2009.[30] Among these were numerous senior al-Qaeda leaders, and other high-value targets. In fact, "[c]ounterterrorism officials credit drones with having killed more than a dozen senior Al Qaeda leaders and their allies in the past year, eliminating more than half of the C.I.A.'s twenty most wanted 'high value' targets."[31]

Drones have played such a significant part in the war on terror largely because conventional military force has proven ineffective at combating the asymmetrical threats posed by small pockets of al-Qaeda terrorists.[32] Moreover, given that the war's battlefields have often been located in urban environments, using drones has arguably limited collateral damage that might otherwise have occurred with more conventional weapons systems.[33] Further, at least from the U.S. government's perspective, the results have been remarkable. During the early stages of the war, for example, General Tommy Franks, who was then commanding all U.S. troops in the Middle East, stated that drones

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28. Ramon Lopez, *The Deadliest Drone: An American Pilot on Flying the Unmanned Predator*, POPULAR SCI., Jan. 2003, at 86; Brian Mockenhaupt, *We've Seen the Future, and It's Unmanned*, ESQUIRE, (Oct. 14, 2009), http://www.esquire.com/features/unmanned-aircraft-1109.

29. *See, e.g.*, Siobhan Gorman, *Drone Kills a Leader of Al Qaeda*, WALL ST. J., Dec. 12, 2009, at A10; Laura King, *Afghanistan Drone Attacks May Hint at Change of Tactics*, L.A. TIMES, Jan. 13, 2010, at A15; Risen & Santora, *supra* note 1, at A17; Matthew Rosenberg, *U.S. Drone Kills Chief of Taliban in Pakistan*, WALL ST. J., Aug. 8, 2009, at A1; Pir Zubair Shah, *Drone Attack Reported in Pakistan*, N.Y. TIMES, Feb. 24, 2010, at A13; Pir Zubair Shah, *U.S. Strike Kills 21 in Pakistan, Officials Say*, N.Y. TIMES, Mar. 10, 2010, at A8; Timothy Williams, *U.S. Drone Strikes Office of Sunni Party in Iraq's North*, N.Y. TIMES, Sept. 27, 2009, at A12.

30. Bergen & Tiedemann, *supra* note 4, app. 1.

31. Mayer, *supra* note 4, at 40. Drone targets have included, for instance, the leader of the Taliban in Pakistan, a son and former lieutenant of Osama bin Laden, and terrorists believed to have been involved in the 1998 attacks against U.S. Embassies in Kenya and Tanzania. *Id.* at 40, 42.

32. *See* Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law, in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346, 352 (Benjamin Wittes ed., 2009).

33. *Id.* at 353-54. *But see* Bergen & Tiedemann, *supra* note 4 (asserting that roughly one-quarter of those killed by drone strikes carried out during the Obama Administration have been non-combatants).

were his "most capable sensor[s] in hunting down and killing Al Qaeda and Taliban leadership and [that they proved] absolutely critical to [the U.S.] fight."[34] Moreover, as the lethality of drones became more evident to insurgents, their utility increased simply because strikes began to "serve as a deterrent to potential combatants and sow paranoia and distrust among terrorists groups."[35] Even those militants who remained true to their cause were forced to "operate far more cautiously, which divert[ed] their energy from planning new attacks."[36]

As apparently effective as these drone attacks have been, though, some commentators argue that in light of the collateral damage they cause, their use actually foments the terrorist insurgency. "[E]very one of these dead noncombatants represents an alienated family, a new desire for revenge, and more recruits for a militant movement that has grown exponentially even as drone strikes have increased."[37] Indeed, after a particularly high barrage of drone assaults in early 2009, one senior Pakistani Taliban leader specifically vowed to carry out suicide attacks against security forces until the strikes ceased.[38] This response is indicative of the attitude that "[w]hile violent extremists may be unpopular, for a frightened population they seem less ominous than a faceless enemy that wages war from afar and often kills more civilians than militants."[39] And though some may have believed the Obama Administration would stop both the literal and figurative bleeding carried out under the Bush Administration, drone strikes during the Obama presidency have only increased.[40] "During his first nine and a

34. ELIZABETH BONE & CHRISTOPHER BOLKCOM, CONG. RESEARCH SERV., RL 31872, UNMANNED AERIAL VEHICLES: BACKGROUND AND ISSUES FOR CONGRESS 24 (Apr. 25, 2003), *available at* http://www.fas.org/irp/crs/RL31872.pdf.

35. Callam, *supra* note 24. Similarly, after the 2002 drone strike in Yemen, Paul Wolfowitz, then U.S. Deputy Secretary of Defense, stated that "one hopes each time you get a success like that, not only to have gotten rid of somebody dangerous, but to have imposed changes in their tactics and operations and procedures." *U.S. Missile Strike Kills al Qaeda Chief: CIA Drone Launched Missile*, CNN.COM (Nov. 5, 2002), http://archives.cnn.com/2002/WORLD/meast/11/05/yemen.blast/.

36. Mayer, *supra* note 4, at 42; *see also* Callam, *supra* note 24 ("Only a few of the recent terrorism plots against the United States can be traced back to Pakistan and al Qaeda seems to be more concerned with self-preservation than carrying out attacks since the expansion of the drone program."); Radsan & Murphy, *supra* note 7, at 1223 ("A *New York Times* reporter who survived harrowing captivity by the Taliban reported that his captors lived in constant fear of drone strikes.").

37. David Kilcullen & Andrew McDonald Exum, Op-Ed., *Death from Above, Outrage Down Below*, N.Y. TIMES, May 17, 2009, at WK13.

38. *Suspected U.S. Drone Kills 3 in Pakistan*, CNN.COM (Apr. 19, 2009), http://www.cnn.com/2009/WORLD/asiapcf/04/19/pakistan.drone/.

39. Kilcullen & Exum, *supra* note 37, WK13.

40. *See* Mayer, *supra* note 4, at 36. *See also* Anderson, *supra* note 32, at 346 ("It is a slight exaggeration to say that Barack Obama is the first president in U.S. history to have campaigned in part on a platform of targeted killing—but not much of one.").

half months in office, [Barak Obama] authorized as many C.I.A. aerial attacks in Pakistan as George W. Bush did in his final three years in office."[41]

2. The Hunted

All of this raises the question of who precisely is being targeted by these drone strikes. Most operational details on this front are veiled in secrecy, preventing an entirely comprehensive understanding of the drone program.[42] Nevertheless, given classified leaks and certain public disclosures, the program's broad contours are clear enough to raise concern. In 2002, for example, the *New York Times* reported that the U.S. government had created a secret list of terrorist leaders dubbed high-value targets.[43] With the creation of the list came authority for the CIA to kill these targets should capture be impractical and if collateral civilian casualties could be minimized.[44] Authority for such targeted killings apparently rested on law of war principles; namely, that the listed persons were enemy combatants, and thus legitimate targets.[45]

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41. *See* Mayer, *supra* note 4, at 37.

42. *See* Radsan & Murphy, *supra* note 7, at 1218 ("Observers outside the government, including the American Civil Liberties Union and the United Nations Special Rapporteur, have asked the CIA to reveal its standards and procedures for targeted killing, as well as its legal justifications. The CIA, to no one's surprise, has declined to do so.").

43. James Risen & David Johnston, *Threats and Responses: Hunt for Al Qaeda; Bush has Widened Authority of C.I.A. to Kill Terrorists*, N.Y. TIMES, Dec. 15, 2002, at A1. Similarly, during Operation Iraqi Freedom, U.S. officials created a deck of playing cards with the fifty-five most wanted Iraqi leaders, indicative of the fact that, even there, the United States had a list of specific individuals subject to targeting. *See* MATTHEW MOTEVERDE, AMERICA'S PRESENCE IN IRAQ: WINNING THE PEACE 22 (2005).

44. Risen & Johnston, *supra* note 43, at A1. This authority presumably permits capture or killing of terrorists by *any* means, and not simply those killings that occur as a result of drone assaults. While the legitimacy of such a directive in any context may be questioned, the scope of this Article is limited to attacks via drones. The reason for this focus is that operations carried out with drones are arguably more suspect from a legal perspective, given the standoff nature of the capability. Also, the ease with which drones can be employed makes their use especially vulnerable to abuse. *See* Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Rep. on Extrajudicial, Summary, or Arbitrary Executions*, Human Rights Comm'n, ¶ 80, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter Alston] ("The greater concern with drones is that because they make it easier to kill without risk to a State's forces, policy makers and commanders will be tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively.").

45. *See* Alston, *supra* note 44, ¶ 80; Press Release, Am. Soc'y of Int'l Law, U.S. State Dept. Adviser Lays Out Obama Administration Position on Engagement, "Law of 9/11" (Mar. 25, 2010), http://www.asil.org/pdfs/pressreleases/pr100325.pdf (quoting Harold H. Koh, State Department Legal Adviser, as saying that the U.S. government considers "targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles (UAVs), [to be compliant] with all applicable law, including the laws of war"). The legitimacy of this contention is explored further in Part III.B.

Initially, this high-value target list evidently contained only "the worst of the worst" terrorists.[46] The Yemeni drone strike mentioned at the outset, for instance, was allegedly carried out against a listed senior al-Qaeda leader who had directed the group's October 2000 attack against the U.S.S. Cole, a U.S. naval warship that had been refueling in Yemen's Gulf of Aden.[47] Other notorious figures on the original list were Osama bin Laden and his deputy Ayman al-Zawahiri.[48] Significantly, however, though the individuals on the initial list were perhaps the most incorrigible terrorists, the target selection was evidently not intended to remain static. While "[t]he precise criteria for adding someone to the list [were] unclear," anonymous government sources have indicated that "the evidence against each person [had to] be clear and convincing" before his or her name appeared.[49]

However rigorous the target selection process may have been in the beginning, it appears to have quickly devolved in ways that lead one to question the legitimacy of attacking listed persons. In August 2009, for example, a Senate Foreign Relations Committee report revealed principles for listing individuals on a kill-list called the Joint Integrated Prioritized Target List (JIPTL).[50] The report noted that the "standards for getting on the list require two verifiable human sources and substantial additional evidence."[51] Although this might sound robust, it led to a significant expansion of listed high-value targets.[52] In fact, the report acknowledged that the JIPTL, which originally contained only about two dozen names,[53] had over three-hundred and fifty targets by August 2009.[54] Philip Alston, a former U.N. Special Rapporteur, explains that this is evidence of a type of mission-creep seen in other terrorism-related programs.[55]

It is a lot like the torture issue. You start by saying we will just go after the handful of 9/11 masterminds. But, once you have put the

46. Risen & Johnston, *supra* note 43, at A1.

47. *Id.*

48. *Id.*

49. *Id.*

50. STAFF OF S. COMM. ON FOREIGN REL., 111TH CONG., REP. ON AFGHANISTAN'S NARCO WAR: BREAKING THE LINK BETWEEN DRUG TRAFFICKERS AND INSURGENTS 15-16 (Comm. Print 2009) [hereinafter COMMITTEE REPORT]. Presumably, this list is the same as the original list created in 2002, though public disclosure to that end appears to be lacking. For present purposes, the two lists are treated as one.

51. *Id.*

52. Mayer, *supra* note 4, at 42-43 ("[T]he Joint Integrated Prioritized Target List . . . was recently expanded to include some fifty Afghan drug lords who are suspected of giving money to help finance the Taliban. These new targets are a step removed from Al Qaeda.").

53. Risen & Johnston, *supra* note 43, at A1.

54. COMMITTEE REPORT, *supra* note 50, at 16.

55. Alston was a Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions. *See* Mayer, *supra* note 4, at 42.

regimen of waterboarding and other techniques in place, you use it much more indiscriminately. It becomes standard operating procedure. It becomes all too easy. Planners start saying, "Let's use drones in a broader context." Once you use targeting less stringently, it can become indiscriminate.[56]

Even as the list expands, multiple sources have indicated that informants with targeting information have been "notoriously unreliable."[57] A former CIA officer noted, for example, that sources often "say an enemy of theirs is Al Qaeda because they just want to get rid of somebody. Or they [make information] up because they want[] to prove they [are] valuable, so that they [can] make money."[58] Mistakes in discerning an informant's credibility are fatal; once an individual is placed on the JIPTL, "[t]he military places no restrictions on the use of force" against him or her.[59]

III. CURRENT PROPOSALS TO LEGITIMIZE DRONE STRIKES

Given the escalating use of drones, the potential for error in their employment, and the finality of such strikes, addressing the legitimacy of targeted killings carried out with drones is of utmost concern. Indeed, "[l]egal authority is what differentiates murder from lawful policy."[60] There have been numerous attempts to legitimize targeted killings such as those carried out by drones. Three frameworks have proven particularly compelling—international human rights law (IHRL), international humanitarian law (IHL), and post-deprivation American due process analysis. Given shortcomings inherent in each approach, however, consensus has yet to emerge as to which of these legal

56. *Id.*

57. *Id.*; *see also* Callam, *supra* note 24.

58. Mayer, *supra* note 4, at 44. Though CIA operatives presumably receive training and are skilled in techniques related to source verification, mistakes in this realm are inevitable. "The CIA's attempted recruitment of an Al Qaeda member who later killed seven CIA officers in a suicide bombing in Khost, Afghanistan serves as a stark reminder of how difficult this job can be." Radsan & Murphy, *supra* note 7, at 1216-17.

59. COMMITTEE REPORT, *supra* note 50, at 15. In some ways, the questionable classification of drone targets may be analogous to reports of misclassification of detainees at Guantanamo Bay as enemy combatants. One study, for instance, indicates that "the large majority of detainees never participated in any combat against the United States on a battlefield." Mark Denbeaux & Joshua Denbeaux, *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data* 4 (2006), http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf. Assuming the same can be said about *any* of the persons listed on the JIPTL, the case is even stronger for a pre-strike review process since the deprivation would be that of life itself.

60. William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 668 (2003).

regimes should govern the use of drones.

A. *International Human Rights Law and Drone Strikes*

International human rights law seeks to protect those rights that are inherent, universal, and inalienable in all human beings by simple virtue of their humanity.[61] As pertinent here, IHRL condemns arbitrary deprivation of life,[62] and suggests that a state is permitted "to kill a person not in custody only if necessary to prevent him from posing a threat of death or serious injury to others."[63] This premise is based on the foundational principle of IHRL that "[e]very human being has the inherent right to life."[64] Accordingly, rather than adopting a use of force perspective, IHRL generally employs a law enforcement model—with its accompanying due process rights[65]—and responds to terrorism with prosecution.[66] IHRL anticipates that when there is credible evidence that individuals have been "involved in planning, promoting, aiding and abetting or carrying out terrorist acts they should be afforded a fair trial

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61. *See* International Covenant on Civil and Political Rights art. 6, § 1, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (recognizing "the inherent dignity and . . . equal and inalienable rights of all members of the human family"); PAUL SIEGHART, THE INT'L LAW OF HUMAN RIGHTS 17 (1984) (emphasizing the "twin principles of 'universal inherence' and 'inalienability'" of human rights); David Aronofsky & Matthew Cooper, *The War on Terror and International Human Rights: Does Europe Get it Right?*, 37 DENV. J. INT'L L. & POL'Y 567, 591 (2009) ("The primary purpose of human rights law is to promote and protect human dignity, as well as life, liberty and security of person.") (internal quotations omitted).

62. *See* ICCPR, *supra* note 61, art. 6, § 1.

63. Murphy & Radsan, *supra* note 7, at 408. Importantly, this is true even if there is convincing evidence of a terrorist's past grievous misdeeds. *See, e.g.*, Orna Ben-Naftali & Keren R. Michaeli, *'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L.J. 233, 287 ("The targeting of non-combatants who took part in the hostilities, but are no longer thus engaged, that is, killing which is undertaken for past deeds, is forbidden and entails [instead] criminal responsibility.").

64. ICCPR, *supra* note 61.

65. *See, e.g.*, Mykola Sorochinsky, *Prosecuting Torturers, Protecting "Child Molesters": Toward a Power Balance Model of Criminal Process for International Human Rights Law*, 31 MICH. J. INT'L L. 157, 171 (2009) (noting that many IHRL instruments "explicitly term some of the rights of criminal defendants as 'due process rights'"). These "due process" protections required under IHRL, however, should not be confused with those ultimately proposed in this Article. More to the point, operating within the IHRL framework would dictate that most persons now subject to U.S. drone attacks should instead be captured and prosecuted in the U.S. criminal justice system. In calling for application of American due process principles prior to initiating drone strikes, though, the author, as explained more fully below, is not suggesting here that the U.S. government must go this distance to legitimize them. *See infra* Part IV.

66. *See, e.g.*, Kenneth Roth, *The Law of War in the War on Terror: Washington's Abuse of "Enemy Combatants,"* 83 FOREIGN AFF. 1 (2004) ("[The state] can use lethal force only if necessary to meet an imminent threat of death or serious bodily injury. Once a suspect is detained, he or she must be charged and tried. These requirements—what one can call 'law-enforcement rules'—are codified in international human rights law.").

before a competent and independent court and, if convicted, sentenced by the court to a punishment provided by law."[67]

Under IHRL, most targeted killings via drone would thus be viewed as especially suspect, and likely outright unlawful.[68] While, admittedly, some strikes might be sanctioned as efforts to prevent a target from carrying out a serious and imminent threat, as noted above, many drone victims are targeted based on their prior conduct.[69] If those individuals do not pose an immediate threat of death or serious injury at the time of a drone assault, IHRL suggests that attacking them constitutes arbitrary deprivation of life.[70] Rather than such capricious action, IHRL instead dictates that these persons be apprehended and subjected to prosecution "in accordance with such procedure as are established by [relevant] law."[71] There is no indication, however, that the United States makes any attempt to apprehend targets before carrying out drone strikes against them.[72] As one commentator has fittingly noted, "[i]t is not . . .

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67. Kretzmer, *supra* note 6, at 178; *see also* Robert J. Delahunty & John C. Yoo, *What is the Role of International Human Rights Law in the War on Terror?*, 59 DEPAUL L. REV. 803, 844-45 (2010) (arguing that, under IHRL, "the U.S. military would have had an obligation to arrest al-Harethi [the principal target of the 2002 Yemen strike mentioned at the outset], even at some risk to its own personnel"); Johannes van Aggelen, *The Consequences of Unlawful Preemption and the Legal Duty to Protect the Human Rights of its Victims*, 42 CASE W. RES. J. INT'L L. 21, 59 (2009) (emphasizing that IHRL dictates that individuals have access to a tribunal that is "independent of the executive and legislative branches of government"); Ralph Wilde, *Legal 'Black Hole'? Extraterritorial State Action and international Treaty Law on Civil and Political Rights*, 26 MICH. J. INT'L L. 739, 776 (2005) (noting that the "right to a fair trial in Article 9 of the ICCPR is key as far as the prosecution of alleged terrorists").

68. *See* Ben-Naftali & Michaeli, *supra* note 63, at 286 ("The jurisprudence of human rights bodies suggests that specific and pinpointed killing, even of a person whose employment of terrorist means has been undisputed, cannot be considered legal.").

69. *See supra* Part II.B.2.

70. *See, e.g.*, Ben-Naftali & Michaeli, *supra* note 63, at 286 ("[I]n a specific case where concrete information points to an operation aimed at attacking the civilian population that is already underway, and cannot be prevented by any other available means, it is reasonable to assume that the killing of the perpetrators of the operation would be justified [under IHRL]."); Radsan & Murphy, *supra* note 7, at 1208 ("Human rights law would not, however, permit targeting this person if he were unarmed and far away from any armed hostilities.").

71. ICCPR, *supra* note 61, art. 9, §1.

72. While this is arguably due solely to the fact that U.S. officials have consistently declined to apply IHRL in this specific context, it is also worth noting that relevant IHRL treaties, conventions, and protocols have generally received less than wholehearted U.S. endorsement. *See, e.g.*, Medellin v. Texas, 552 U.S. 491, 504 (2008) (holding that while a U.S. international commitment may constitute "an *international* law obligation on the part of the United States . . . not all international law obligations automatically constitute binding federal law enforceable in United States courts"); Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 94 (2007) (arguing that "the American legal and political system failed" in its response to the war on terror principally as a result of "the longstanding refusal of the United States to incorporate international human rights law into its legal system"); David Weissbrodt, *United*

possible to attempt to arrest someone using an unmanned drone."[73] Likewise, there are currently no judicial proceedings associated with these strikes to imbue them with legitimacy under IHRL.

But despite the many reasons to think IHRL may be applicable, numerous commentators have expressed that its limitations make it difficult—if not impossible—to impose upon the war on terror.[74] For one thing, some suggest that IHRL can only be "understood as applying to a State's actions within its own territory," against its own citizens.[75] Under this limited perspective, IHRL is therefore inapplicable to the drone strikes at issue here, since they are carried out by the United States in the territory of other states.[76] Perhaps more importantly, U.S. officials have suggested that IHRL does not apply because the war on terror is not a criminal enterprise at all, but rather, a war.[77] Thus, by the

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States Ratification of the Human Rights Covenants, 63 MINN. L. REV. 35, 68 (1978) (intimating that by making international instruments non-self-executing, U.S. officials intend "to diminish substantially the impact of the treaties in the United States").

73. Mary Ellen O'Connell, *To Kill or Capture Suspects in the Global War on Terror*, 35 CASE W. RES. J. INT'L L. 325, 330 (2003) (emphasis added).

74. *See, e.g.*, Delahunty & Yoo, *supra* note 67, at 846 ("The conditions of armed conflict—especially, of course, when the life of the nation is at stake—permit and indeed require the state to practice violence on a scale, of a lethality, and with an intentionality that make it wholly different from the violence that the state may inflict when performing its common policing functions."); Maj. Michelle A. Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict*, 194 MIL. L. REV. 1, 4 (2007) (arguing that application of IHRL to the war on terror would "unnecessarily restrict warfighters to a point never envisioned by those who framed and ratified the major instruments designed to regulate warfare," that "[i]t could make winning wars nearly unachievable," and that it "could serve to unnecessarily prolong armed conflict, and thereby increase the evils of war that it purports to eradicate"); Kretzmer, *supra* note 6, at 179 ("The problem with the law-enforcement model in the context of transnational terror is that one of its fundamental premises is invalid: that the suspected perpetrator is within the jurisdiction of the law-enforcement authorities in the victim state, so that an arrest can be effected."); Roy S. Schöndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT'L L. & POL. 1, 59-60 (2004) ("Some states (and scholars) dispute the application of international human rights law to situations of armed conflicts for various reasons. For instance, they reject the extraterritorial application of international human rights law, or they claim that international human rights law applies only between a state and its citizens.").

75. Fisher, *supra* note 6, at 719; *see also* Hansen, *supra* note 74, at 3 ("[H]uman rights law historically has governed the relationship of a state and its own citizens. It is premised upon the notion that citizens hold individual rights, which often may be enforced against the state."); Schöndorf, *supra* note 74, at 59-60; David P. Stewart, *Human Rights, Terrorism and International Law*, 50 VILL. L. REV. 685, 696-97 (2005) (noting that IHRL governs the relationship between "a government and the individuals it governs").

76. *See* Fisher, *supra* note 6, at 722.

77. *See* Delahunty & Yoo, *supra* note 67, at 843 (observing that the United States operates under the premise that "the entire legal regime of international humanitarian law replaces the entire regime of human rights law during armed conflict"); Margaret L. Satterthwaite, *De-Torturing the Logic: The Contribution of Cat General Comment 2 to the Debate Over Extraordinary Rendition*, 11 N.Y. CITY L. REV. 281, 289-90 (2008) (recounting,

very nature of the conflict, the procedural safeguards inherent in IHRL are simply inapplicable. As former Secretary of Defense Donald Rumsfeld observed:

> [Americans] have a tendency to think of the court of law where you want evidence beyond a reasonable doubt. You want to be able to be certain that you know [a person is guilty] before anyone's punished. My point is, [the war on terror] isn't punishment. We've got the wrong model in our minds if we're thinking about punishment. We're not. This isn't retaliation or retribution.[78]

Instead, the U.S. position is that drone assaults are legitimately carried out against enemy combatants engaged in warfare with the United States.[79] Given this contrary viewpoint, and in light of the other limitations of IHRL noted above, this regime has not been adopted by U.S. officials as the appropriate lens through which to view the legitimacy of drone strikes.

B. *International Humanitarian Law and Drone Strikes*

Advocates of applying international humanitarian law to targeted killings suggest it can fill the void left by IHRL. "IHL is a compilation of treaties, case law, and customary international law that seeks to prevent unjustified death, destruction, and suffering in war."[80] Under IHL, states are granted "broad authority to kill opposing combatants as well as civilians who are directly taking part in hostilities" against them.[81] While still providing certain protections to these individuals, IHL grants a state broader authority than IHRL to respond to such belligerent parties. At the same time, "[p]ersons taking no active part in the hostilities" are shielded altogether under IHL from "violence to

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though ultimately rejecting, the U.S. government's assertion that "since humanitarian law operates as lex specialis" during an armed conflict, or, in other words, the more specific law, it ousts IHRL from application); Press Release, Dep't of Defense, Secretary Rumsfeld's Media Roundtable with the BBC and Voice of America (Sept. 13, 2002) [hereinafter Dep't of Defense], http://www.defense.gov/transcripts/transcript.aspx?transcript id=3652.

78. *See* Dep't of Defense, *supra* note 77.

79. *See, e.g.*, Roth, *supra* note 66, at 3 (noting that the United States has declared war on al-Qaeda, and that, in contrast to IHRL, "an enemy combatant can be shot without warning" under IHL).

80. Radsan & Murphy, *supra* note 7, at 1209.

81. Murphy & Radsan, *supra* note 7, at 409. IHL prohibits targeting of civilians during warfare, "unless and for such time as they take a direct part in hostilities." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I), art. 51.3, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

life."[82]

IHL has been used to both justify and condemn drone strikes. In deeming the fight against al-Qaeda a *war* on terror, for example, U.S. officials sought to imbue the attacks with the legitimacy IHL provides to actors engaged in more conventional conflict.[83] And although al-Qaeda terrorists do not neatly qualify as legitimate targets within the strictures of IHL,[84] the Bush Administration's classification of the organization's members as "enemy combatants" arguably exposes them to legal targeting.[85] Scholars have asserted, however, that the term

82. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.S.T. 135 [hereinafter Geneva Conventions].

83. *See* Jeffrey F. Addicott, *Efficacy of the Obama Policies to Combat Al-Qa'eda, the Taliban, and Associated Forces—the First Year*, 30 PACE L. REV. 340, 345 (2010) ("[U]nlike the so-called 'War on Poverty' or 'War on Drugs,' the 'War on Terror' was never designed to be a metaphor, but rather a label for a real war waged under the law of armed conflict."); Ved P. Nanda, *Introductory Essay: International Law Implications of the United States' "War on Terror"*, 37 DENV. J. INT'L L. & POL'Y 513, 513 (2009) (acknowledging use of the phrase war on terror "notwithstanding heavy criticism that instead of using it as a metaphor, as in the 'war on poverty' or the 'war on drugs,' terminology which has primarily served a rhetorical purpose, the US views the struggle against al Qaeda . . . as a real war"); Roth, *supra* note 66, at 2 ("By literalizing its 'war' on terror, the Bush administration has broken down the distinction between what is permissible in times of peace and what can be condoned during a war.").

84. IHL protects civilians who are not taking direct part in the hostilities—"including members of armed forces who have laid down their arms"—from "violence to life." Geneva Conventions, *supra* note 82, art. 3. Even granting, then, that all al-Qaeda members were at least, at some point, combatants, is not dispositive as to whether they continue to be legitimate targets. Indeed, the sporadic nature of their engagement in the war on terror arguably makes them subject to the exclusionary provisions related to those persons who have laid down their arms, thereby granting them the protections afforded to civilians. *See* Anthony Clark Arend, *Who's Afraid of the Geneva Conventions? Treaty Interpretation in the Wake of* Hamdan v. Rumsfeld, 22 AM. U. INT'L L. REV. 709, 715 (2007) (noting that even if al-Qaeda terrorists "were not entitled to the full range of protections as [lawful combatants] Article 3 might seem to provide some minimal rights"). As for labeling al-Qaeda members "combatants" in the first place, the challenge rests in the definition of the phrase within the Geneva Conventions. Specifically, the Conventions note that, as relevant, combatants are: (1) "[m]embers of the armed forces of a Party to the conflict;" (2) "[m]embers of other militias and . . . volunteer corps . . . belonging to a Party to the conflict" who also are "commanded by a person responsible for his subordinates," wear distinctive insignia, "carry arms openly," and operate "in accordance with the laws and customs of war;" (3) "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized" by the opposing belligerent; or (4) "[i]nhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms." Geneva Conventions, *supra* note 82, art. 4. These provisions, drafted with conventional warfare in mind, fail to account for the fact that the war on terror is being waged not against a state, but rather an organization. *See also infra* notes 91-96 and accompanying text.

85. *See* David Mortlock, *Definite Detention: The Scope of the President's Authority to Detain Enemy Combatants*, 4 HARV. L. & POL'Y REV. 375, 375 n.4 (2010) ("[T]he label 'enemy combatant' refers to those individuals that the government may attack and detain, regardless of whether they directly participate in combat. Enemy combatants contrast with civilians, whom enemy states may not target until they take up arms.").

"[e]nemy combatant did not and does not exist under international law," and that the Bush Administration's approach unjustifiably conflates the distinctions between, and commensurate protections afforded to, lawful and unlawful targets.[86] Beyond flatly rejecting this argument, U.S. officials have also responded by shifting focus to the civilian nature of al-Qaeda terrorists, and essentially adopted a broad interpretation of who constitutes a civilian "taking direct part in hostilities."[87] In other words, since the conflict between al-Qaeda terrorists and the United States is protracted, and because the terrorists themselves are usually repeat actors, the United States has deemed such persons legitimate *civilian* targets who are, in fact, taking direct part in the war on terror.[88]

In short, the U.S. government's ultimate perspective is that al-Qaeda operatives represent legitimate targets of drone strikes under IHL—either because they are combatants in the war on terror, or because they are civilians taking direct part in related hostilities against the United States. Conversely, critics of this position argue that drone strikes are not legitimate since their targets qualify as neither combatants, nor civilians taking direct part in hostilities. While this debate does not theoretically render IHL's application inherently inappropriate, the practical reality is that in the face of such a deep divide between these two approaches—each with justifiable arguments not easily dismissed—IHL fails to adequately govern U.S. behavior.[89]

Beyond these arguments, however, there are even more fundamental (though related) problems with applying IHL to the war on terror's drone strikes. Paramount among these is the fact that the al-Qaeda

86. Peter Jan Honigsberg, *Chasing "Enemy Combatants" and Circumventing International Law: A License for Sanctioned Abuse*, 12 UCLA J. INT'L L. & FOREIGN AFF. 1, 4 (2007) (noting also that "[p]rior to 9/11, there were only two universally recognized categories of combatants: lawful and unlawful"); *see also* Muneer I. Ahmad, *Resisting Guantanamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1730-31 (2009) ("International humanitarian law distinguishes between lawful and unlawful belligerents . . . [but the] Bush Administration's use of 'enemy combatant' at times conflated both categories, and at other times seemed to create a third."); Fisher, *supra* note 6, at 723-25.

87. *See* Fisher, *supra* note 6, at 724-25. This argument was made all the easier given the fact that there is no consensus regarding how much civilians have to participate in order to qualify as those "taking direct part in hostilities." *See id.* (discussing the existence of both a narrow and broad interpretation).

88. *See id.* Alternatively, some scholars have suggested that the classification of these individuals by the U.S. government as unlawful or enemy combatants represents an effort to develop a new, distinct legal category of legitimate targets. *See* Ahmad, *supra* note 86, at 1731; Murphy & Radsan, *supra* note 7, at 420.

89. Admittedly, the need for a new approach such as the one presented in this article might not exist if the international community grappled with and resolved the issues at the center of this debate. In the absence of such remedial action, however, and with no evidence of it on the horizon, these different perspectives appear so intractable that they render IHL impotent in this context.

network is transnational in nature and consists of a disorganized command structure.[90] IHL has traditionally only been viewed as a regime governing non-international conflicts—a phrase typically understood to be intrastate civil wars—or warfare between states.[91] This presents obvious difficulties in application to the war on terror since the conflict is clearly not a civil war, nor does al-Qaeda constitute a state. Indeed, the Bush Administration exploited this challenge in concluding that the war on terror "fell into neither category [governed by IHL] and was therefore not subject to the Geneva Conventions."[92] Though this argument was subsequently rejected by the U.S. Supreme Court,[93] the Court's vexing characterization of the war on terror as a non-international conflict of international scope has not resolved the matter.[94] Indeed, in summarizing the remaining challenge, one scholar has noted that "[t]he inevitable complication of a politically declared but legally undeclared war is the blurring of the distinction between enemy combatants and other non-state actors . . . . The question is, what factual showing will demonstrate that they had warlike intentions against us and who sees that evidence before any action is taken?"[95] The fact that this question remains unanswered has allowed U.S. officials to act in the void with impunity "to categorize suspected terrorists as combatants and then kill them off without a shred of process."[96] Until this uncertainty within IHL is addressed, the regime cannot adequately address the challenges related to drone strikes.

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90. *See, e.g.*, Paul J. Smith, *Transnational Terrorism and the al Qaeda Model: Confronting New Realities*, PARAMETERS, Summer 2002, at 34 (explaining that al-Qaeda "emerged as the ultimate transnational terror organization" because the organization was not "geographically constrained within a particular territory, or financially tied to a particular state," and because it was able to "establish[] and maintain[] a multinational presence in more than 50 countries").

91. Radsan & Murphy, *supra* note 7, at 1209-10; *see also* Kretzmer, *supra* note 6, at 189.

92. Radsan & Murphy, *supra* note 7, at 1210; *see also* David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 727 (2009) (explaining that "[t]he Bush administration took a maximalist position from the start" by claiming that al Qaeda operatives "were not protected by the Geneva Conventions"); Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281, 306 (2008) ("[A]lleged members of al Qaeda, whether rounded up in Afghanistan or elsewhere, were considered members of a rogue, stateless international terrorist organization that did not obey the laws of war, and, thus, were 'unlawful combatants' not protected by the Geneva Conventions."); Roberto Iraola, *Enemy Combatants, the Courts, and the Constitution*, 56 OKLA. L. REV. 565, 579-80 (2003) (noting the position of the Bush Administration that "[m]embers of al Qaeda's terrorist network . . . are not covered by the Geneva Conventions because that network was not a party to the signed accords").

93. *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

94. *See id.* at 625-31.

95. Risen & Johnston, *supra* note 43, at A1 (quoting Harold H. Koh, then professor of international law at Yale University and current State Department Legal Adviser).

96. Murphy & Radsan, *supra* note 7, at 409.

C. *A Post-Deprivation American Due Process Approach to Drone Strikes*

To address this failing, some commentators have suggested that drone strikes can only be legitimized by applying American due process principles.[97] This approach rests on the Fifth Amendment to the U.S. Constitution, which provides, in relevant part, that the U.S. government shall not deprive any person of life "without due process of law."[98] The more direct impetus for the theory, however, sprang from remarks made by Justice Clarence Thomas in his *Hamdi v. Rumsfeld* dissent.[99] In *Hamdi*, a plurality of the Court essentially held that U.S. citizens detained by the government have the right to both notice as to the basis for detention, and a meaningful opportunity to challenge their detention before a neutral decision-maker.[100] In dissent, Justice Thomas discussed the aforementioned 2002 drone strike in Yemen and suggested that the plurality's opinion, taken to its extreme, would require that U.S. officials give targets of such attacks notice and an opportunity to respond before they are killed.[101] Although this assertion was submitted as an attempt "to mount a reductio ad absurdum attack on his colleagues' efforts . . . to impose due process"[102] on government actions related to terrorists, some scholars have contended that, contrary to Justice Thomas's view, due process principles do not "break down when applied to the extreme case of targeted killing."[103]

The idea that American due process principles ought to be applied to U.S. drone killings constitutes a significant contribution to the debate

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97. *See id.*

98. U.S. CONST. amend. V. It is important to highlight that the author recognizes that there is considerable debate as to whether the Constitution applies extraterritorially in this context to either U.S. citizens or, especially, foreign nationals. While acknowledging the merits of each side of this debate, this article submits that, given the dearth of legal authority elsewhere, certain constitutional principles at least *should* apply where the deprivation is as great as that rendered by a drone assault against an identified terrorist. As other commentators have aptly noted, "[i]t is repulsive to suggest, whether for Guantanamo detainees or for [drone] targets, that the government may hurt people arbitrarily just because they are non-resident aliens." Murphy & Radsan, *supra* note 7, at 435. The focus here, in other words, is not on whether the Constitution is *in fact* applicable to these strikes, but rather that in the absence of clear legal guidance, U.S. decision-makers should be governed by the values undergirding the Constitution as they develop policies and rules of engagement related to drone strikes. Moreover, it is clear, after the attack against U.S.-citizen Anwar al-Awlaki that American's are being targeted with drones. *See* Mazzetti, et al., *supra* note 5, at A1.

99. *See* Murphy & Radsan, *supra* note 7, at 410; *see also* Hamdi v. Rumsfeld 542 U.S. 507, 596-97 (2004) (Thomas, J. dissenting).

100. *Hamdi*, 542 U.S. at 533 (majority opinion).

101. *Id.* at 596-97 (Thomas, J., dissenting).

102. Murphy & Radsan, *supra* note 7, at 410.

103. *Id.*

surrounding the legitimacy of their use. Because consensus has yet to emerge as to the applicability of either IHRL or IHL, state actors currently appear to feel empowered to use drones with impunity against purported terrorist targets.[104] By offering American due process principles as guideposts for drone assaults, however, these proponents have opened another avenue of analysis ultimately highlighting the impropriety of unfettered use of drones by the executive.

As important as this proposal is, however, it has thus far been limited to *post-deprivation* analysis. Indeed, its proponents posit only that the Supreme Court's due process approach in war on terror cases "suggests a sound model for judicial control of targeted killings under which courts, applying duly deferential standards, might—on rare occasions—determine the legality of attacks *after* they occur."[105] With obvious inconsistency, though advocates of this position have called on the executive to develop post-strike procedures to ensure the legitimacy of drone attacks,[106] they are willing to concede that "pre-deprivation procedures would be impracticable."[107] In other words, they suggest that due process only affords a post-deprivation right, after a drone attack, "to some form of judicial review [such as a *Bivens*-type action] in civil proceedings initiated by private parties."[108]

Though it is true that "[t]he CIA, before firing a missile, need not and should not invite [a terrorist] or his lawyer to a hearing to contest whether he is, in fact, a committed member of al Qaeda,"[109] there is no apparent basis for suggesting outright that due process principles completely break down in the face of a proposal for *some other type* of pre-strike protections. Indeed, as the next Part argues, the Court's precedents suggest quite the contrary. Even more, as advocates of the ex post position note, an important aspect of their proposal is that it calls for U.S. officials to act in a manner consistent with American values.[110] Surely if these values dictate the necessity of a review *after* the U.S.

104. *See* Radsan & Murphy, *supra* note 7, at 1218 ("[T]he Obama administration's statement about [drone strike] standards and procedures boils down to a few words—Trust us: We are good at target identification, and we try very hard to do a good job."); *see also* Fisher, *supra* note 6, at 717.

105. Murphy & Radsan, *supra* note 7, at 437 (emphasis added).

106. *See id.* at 410.

107. *Id.* at 439. In a more recent article, these scholars do suggest that, under an IHL regime, the principle of precaution would ensure "that attackers take all feasible measures to ensure that they attack only legitimate targets." Radsan & Murphy, *supra* note 7, at 1230. Obviously this argument rests, though, on application of IHL to drone strikes, rather than application of American due process principles. As discussed above, there are legitimate arguments that IHL is inapplicable in the present context. *See supra* Part III.B.

108. Murphy & Radsan, *supra* note 7, at 440.

109. *Id.* at 445-46.

110. *See id.* at 411.

government kills a terrorist, they also offer guidance in determining which individuals to target in the first place.

IV. FINDING GUIDANCE IN AMERICAN DUE PROCESS PRINCIPLES

Accordingly, this Part offers a new approach to legitimizing drone strikes; namely, that of applying American due process principles to attacks against known terrorists before a deprivation occurs. Because this may seem odd to some observers, it is important to properly frame this proposal. This approach accepts, for instance, that military exigencies make pre-deprivation process impractical in cases where drone surveillance intercepts ongoing combat-related activity. Because these cases likely fit more readily into the IHL framework anyway, they are not the subject of the current focus. Instead, this proposal explores the procedural safeguards necessary before strikes are conducted against those persons discussed in Part II whom U.S. officials are stalking with drones, and whose targeting does not seem to fit neatly within IHL or IHRL. Arguably, by applying American due process principles to drone strikes carried out against these identified terrorists, U.S. officials could imbue the attacks with much needed legitimacy.

While perhaps obvious, it also bears emphasis at the outset that the only process required for these strikes is that which is "due." As outlined above, however, properly characterizing what degree of process that is has been precisely the challenge presented by drone attacks. This Part argues that the Supreme Court has offered signals as to the procedural safeguards that may be due those individuals whom the United States wishes to target with a drone. Specifically, it posits that though *Hamdi v. Rumsfeld* and *Boumediene v. Bush* do not signal a mandate for full-scale criminal proceedings before a drone assault is undertaken, these cases do suggest that the executive may be required to afford *some* level of *ex ante* process to ensure their legitimacy. With that in mind, this Part concludes by offering observations about what those procedural safeguards may be.

A. *The Process that is "Due"*

Although the legality of drone strikes has not been directly addressed in American courts,[111] two terrorism-related cases do offer insight into the procedures that may be required to sustain their legitimacy. Specifically, while *Hamdi* and *Boumediene* centered on questions

111. Though one such case has been brought in federal district court, the court dismissed the case on jurisdictional grounds. *See generally* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.C. Cir. 2010). This suit was brought by the father of Anwar al-Awlaki prior to his son's death.

related to detaining alleged terrorists, the underlying issues in these cases are strikingly similar to concerns surrounding the drone program's legitimacy. At the base of each of these matters rests the challenges associated with balancing the substantial interest of national security against the propriety of governmental limitation—or indeed extinguishment—of an individual's fundamental rights.

1. *Hamdi v. Rumsfeld*

In *Hamdi*, the Supreme Court was required to determine the degree of process due Yaser Hamdi, a U.S. citizen who had been detained by the U.S. government after being classified as an enemy combatant.[112] The Northern Alliance, a coalition partner of the United States, had seized Hamdi in Afghanistan and turned him over to American forces shortly after the commencement of the war on terror.[113] In light of his status as an enemy combatant, the U.S. government claimed that Hamdi could be held indefinitely without formal charges or proceedings.[114] While Hamdi himself did not have the necessary judicial access to challenge his detention, his father, as next friend, filed a petition for a writ of habeas corpus.[115] Among other allegations, the suit asserted that the United States had violated Hamdi's due process rights by detaining him without charge or an impartial hearing.[116] For its part, the government asserted "security and intelligence interests,"[117] and contended that Hamdi's status as an enemy combatant presented sufficient cause to warrant his continued detention.[118]

It is most significant that, in addressing Hamdi's due process claim, the plurality relied on a balancing test introduced in *Mathews v. Eldridge*.[119] In *Mathews*, the Court established that the degree of process due in a given situation depends on consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and

112. Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004).
113. *Id.* at 510.
114. *Id.* at 510-11.
115. *Id.* at 511.
116. *Id.*
117. *Id.* at 512.
118. *Id.* at 510.
119. *Id.* at 528-29 (relying on Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976)).

> the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[120]

As applied in *Hamdi*, the *Mathews* balancing test required a weighing of the "'most elemental of liberty interests—the interest in being free from physical detention by one's own government,'"[121] against the "weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States."[122] Ultimately, the Court struck a relatively moderate balance, recognizing that while due process requires notice and a meaningful opportunity to be heard, "the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[123]

Whether or not U.S. officials immediately recognized the subsequent role the *Mathews* factors would play in the war on terror, in relying on them, the *Hamdi* Court significantly affected future U.S. policies and procedures. The most striking example of this affect came on July 7, 2004—just days after the Court's decision—when the Department of Defense (DoD) issued an order establishing Combatant Status Review Tribunals (CSRTs).[124]

Incorporated into the CSRT scheme were the minimal procedural safeguards *Hamdi* had deemed necessary to protect the private liberty interests of the detainees and to ensure against the erroneous deprivation of those liberties. Specifically, CSRTs were "to determine, in a fact-based proceeding, whether the individuals detained by the Department of Defense at the U.S. Naval Base Guantanamo Bay, Cuba, [were] properly classified as enemy combatants."[125] As part of these proceedings, each detainee was permitted "the opportunity to contest" his designation as an enemy combatant.[126] To facilitate this process, CSRTs provided each detainee:

> the assistance of a Personal Representative; an interpreter if necessary; an opportunity to review unclassified information relating to the basis for his detention; the opportunity to appear

120. *Mathews*, 424 U.S. at 335.

121. *Hamdi*, 542 U.S. at 529 (relying on Foucha v. Louisiana, 504 U.S. 71 (1992)).

122. *Id.* at 531.

123. *Id.* at 533.

124. Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretary of the Navy (July 7, 2004) (http://www.defense.gov/news/Jul2004/d20040707review.pdf) [hereinafter Wolfowitz Memo].

125. *Id.*

126. *Id.*

> personally to present reasonably available information relevant to why he should not be classified as an enemy combatant; the opportunity to question witnesses testifying at the Tribunal; and, to the extent they are reasonably available, the opportunity to call witnesses on his behalf.[127]

But for all the protection a CSRT was designed to provide, several of its features also served as reminders that the *Mathews* due process analysis permitted an accounting of the government's interests. In this regard, there are three features of the CSRTs worth highlighting.

First, these tribunals were essentially designed to be non-adversarial.[128] Though each detainee was, in fact, assigned a "Personal Representative," DoD procedures explicitly established that these individuals were neither lawyers nor advocates for those in U.S. custody.[129] Indeed, Personal Representatives were expressly required by relevant governing documents to inform detainees that they were *not* acting in the capacity of a personal attorney.[130] The duties of these representatives were instead limited to "explaining the nature of the CSRT process to the detainee . . . including the detainee's opportunity to make a personal appearance before the Tribunal," facilitating requests for interpreters, and generally assisting detainees in presenting evidence they wished to submit to the tribunal.[131]

Second, in response to the *Hamdi* Court's language that "the Constitution would not be offended by a presumption in favor of the Government's evidence,"[132] DoD directives implemented a very lax evidentiary standard for CSRTs.[133] The tribunal was free, for example, "to consider any information it deem[ed] relevant and helpful to a resolution of the issue before it," including hearsay evidence.[134] Moreover, the government's evidence was entitled to a presumption of validity before the tribunal.[135]

Finally, in order to classify a detainee as an enemy combatant—essentially deeming him eligible for indefinite detention—the tribunals only had to determine that a preponderance of the evidence warranted such a finding.[136] In other words, not only were the evidentiary standards less stringent than what would ordinarily be required in a

127. *Id.*
128. *See id.*
129. *See id.*
130. *Id.*
131. *Id.*
132. Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004).
133. *See generally* Wolfowitz Memo, *supra* note 124.
134. *Id.*
135. *Id.*
136. *Id.*

criminal proceeding, so too was the standard of proof.

Regardless of their precise contours, though, it is important for present purposes to underscore that the CSRTs utilized in the aftermath of *Hamdi* were clearly an example of how the *Mathews* due process standard could be practically applied in the context of the war on terror. On one hand, the procedural mechanisms of the tribunals served to protect the private interests of the detainees by giving them notice of the claims against them and an opportunity to prevent erroneous deprivations by contesting those charges. On the other hand, in recognition of the significant governmental interest in national security, as well as the practical reality that the United States was still at war, CSRTs did not go the full distance of providing all of the protections required in an ordinary criminal proceeding.

2. *Boumediene v. Bush*

While the Supreme Court has yet to squarely address whether CSRTs incorporate sufficient procedural safeguards to fully satisfy due process,[137] in resolving related matters, the *Boumediene* Court certainly signaled the continuing relevance of the *Mathews* standard. The primary question at issue in *Boumediene* was whether foreign nationals detained at Guantanamo Bay, Cuba have a right to habeas review of decisions reached by CSRTs.[138] In examining this issue, one of the Court's most important conclusions was that "there is considerable risk of error in the tribunal's findings of fact" regarding the combatant status of detainees.[139] This potential exists not only because of the tribunal's lowered standard of proof and evidence, but also because detainees are often unaware of the most damaging evidence against them—specifically, that which is classified.[140] Accordingly, the Court ultimately held that foreign nationals detained at Guantanamo Bay must have a constitutional right to habeas review, since this is the only way they can possibly "correct errors that occur[] during the CSRT proceedings."[141]

Unlike *Hamdi*, *Boumediene* did not *expressly* elucidate or apply the *Mathews* factors in reaching the merits of the case. Nevertheless, an analysis of *Boumediene* makes clear that the *Mathews* framework ultimately drove the Court to its decision.

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137. Indeed, in *Boumediene,* the Court specifically withheld opinion on the issue. Boumediene v. Bush, 553 U.S. 723, 785 (2008) ("[W]e make no judgment as to whether the CSRTs, as currently constituted, satisfy due process.").

138. *Id.* at 732.

139. *Id.* at 785.

140. *Id.* at 783-84.

141. *Id.* at 786.

First, though the Court did not expressly engage in a thorough analysis of each *Mathews* factor, it *did* acknowledge the test as the governing standard for determining the adequacy of due process in any given context.[142] Additionally, efforts to weigh a detainee's private interest were also apparent in the opinion's lengthy analysis of the habeas process itself.[143] The fact that the Court was fundamentally relying on the first *Mathews* factor is reflected in its acknowledgement that "freedom from unlawful restraint [is] a fundamental precept of liberty," and that "protection for the privilege of habeas corpus was one of the few safeguards of [that] liberty."[144] Moreover, *Boumediene*'s repeated references to the potential for errors within the CSRT framework were an oblique reference to the *Mathews* factor requiring assessment of "the risk of an erroneous deprivation."[145] The fact that there is such a "considerable risk of error" associated with the tribunals weighed in favor of allowing detainees access to the greater procedural protections embodied in the habeas process.[146] Finally, while it was cognizant of the challenges of warfare, the Court also noted that the detainees at Guantanamo Bay have been removed from the battlefield.[147] This was an important fact in the Court's evaluation of the government's interest and the "administrative burdens that the additional or substitute procedural requirement would entail."[148] Given that the government has removed these detainees from an active combat zone, many of the burdens associated with the fog of war are removed, and they no longer stand as impediments to imposition of additional procedural safeguards.

Again, though, the Court was not dismissive of the government's substantial interest in national security or of the challenges associated with protecting individual liberties in the midst of war. This is evidenced most strikingly by the fact that the *Boumediene* Court explicitly declined to declare the procedural protections contained in the CSRTs insufficient.[149] Thus, while the Court did not believe the additional burden of habeas review was substantial enough to preclude its necessary application, it also did not indicate that the procedures contained in the CSRT were fundamentally flawed. Further, in limiting the case to detainees at Guantanamo Bay and not those still on the

142. The Court cited *Mathews* after expressing that "[t]he idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context." *Id.* at 781.

143. *See id.* at 739-52.

144. *Id.* at 739.

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

146. *Boumediene,* 553 U.S. at 785.

147. *Id.* at 770.

148. *Mathews*, 424 U.S. at 335.

149. *Boumendiene*, 553 U.S. at 785.

battlefield, the Court recognized that in other circumstances, the exigencies of war may indeed make added procedural protections impractical. "[P]roper deference can be accorded to *reasonable procedures* for screening . . . under lawful and proper conditions,"[150] and "a relevant consideration in determining the courts' role is whether there are *suitable alternative processes* in place to protect against the *arbitrary* exercise of governmental power."[151]

Ultimately, then, *Boumediene*, like *Hamdi*, clearly evidences the significance of the *Mathews* factors in assessing due process requirements in the midst of the war on terror. The Court's analysis in each of these cases makes plain that "the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process."[152]

B. *Extending* Hamdi *&* Boumediene *to Drone Strikes*

In the face of this required analysis, proponents of applying only *post-deprivation* American due process standards to drone assaults contend that it would be an "odd prospect [to hold] hearings where a terrorist gets to argue that he ought not be killed by a [drone] strike."[153] Taken to this extreme, pre-deprivation process would indeed be impractical—it is beyond argument to suggest, for example, that the U.S. government should be required to invite a terrorist to appear before an American tribunal to challenge whether the United States has authority to use a drone against him. However, as evidenced by *Hamdi* and *Boumediene*, American due process does not necessitate standard full-scale criminal proceedings of this ilk when the exigencies of war dictate that something less can be employed. The key, however, is that this lesser degree of process must ultimately still operate to prevent the "arbitrary exercise of governmental power."[154] The question then becomes what procedural framework is needed to ensure that the U.S. government does in fact avoid the *arbitrary* use of force with drone assaults.

150. *Id.* at 793-94 (emphasis added).
151. *Id.* at 794 (emphasis added).
152. Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (quoting *Mathews*, 424 U.S. at 335).
153. Murphy & Rasdan, *supra* note 7, at 440.
154. *Boumediene*, 553 U.S. at 794.

1. Fundamental *Mathews* Principles as Applied to Drone Strikes

If it can be said—as the *Hamdi* Court did—that detention results in the deprivation of a "most elemental of liberty interest"[155] then certainly the fact that a drone strike results in a deprivation of *life* should urge those engaging in one to exercise utmost caution.[156] In this regard, it might seem intuitive that whatever protections the *Hamdi* Court required must *necessarily* be enhanced in the context of drone strikes. However, as *Mathews* makes perfectly clear, the calculus of determining the required due process protections must *also* include an evaluation of the risks of erroneous deprivations, and the value and burdens of imposing additional procedural safeguards upon the government.[157]

If one assumes, for instance, that the risk of erroneously killing an individual with a drone is minimal or non-existent, and that additional procedural protections would prove unnecessarily burdensome, or add no value, then even the fundamental interest in preserving life might be overcome by the government's overwhelming need to eliminate targets posing a threat to national security. As discussed above,[158] however, there is significant reason to doubt these assumptions—there is ample evidence, in other words, to suggest that added procedural safeguards could be easily imposed in order to alleviate the risks of error associated with the current drone program.[159] In the face of this evidence, one might conversely assume then that an individual therefore deserves the full measure of protections provided by American due process principles. This argument also fails, however, given that such measures may impede governmental efforts to ensure the very continuity of the nation.[160] Clearly, then, the degree of process due lies somewhere between these two extremes. Though it may be difficult to apply the *Mathews* factors to drone assaults in a vacuum, the fact is that both

155. *Hamdi*, 542 U.S. at 529.

156. *See* Murphy & Radsan, *supra* note 7, at 409-10 ("If due process controls whom the executive may detain in the war on terror, then surely due process controls whom and how the executive may kill.").

157. Again, it is also important to recognize that the vast majority of drone targets are not U.S. citizens. That said, as discussed above, "it is not obvious [that] the citizenship of suspected terrorists should strongly affect the model for controlling targeted killings." Radsan & Murphy, *supra* note 7, at 1238; *see also supra* note 98.

158. *See supra* Part II.B.2.

159. If nothing else, for instance, this could take the form of added source verification before an individual is included on the JIPTL. *See supra* notes 46-61 and accompanying text.

160. *See Hamdi*, 542 U.S. at 531 (discussing the "weighty and sensitive governmental interests" at stake in the case; submitting that "the law of war and the realities of combat may render [government intrusions into personal liberties] necessary and appropriate;" and stating that "due process analysis need not blink at those realities").

Hamdi and *Boumediene* shed light on the process due before the commencement of such an attack.

2. Signals Suggesting the Necessity of Procedural Protections Beyond Those Currently Present

First, though it was noted above that the calculus is not *solely* governed by the degree of deprivation, clearly the consequences of a drone attack impose the severest sanction a state can levy against an individual. Accordingly, one might expect the U.S. government—whether *actually* required to do so or not—to at least be *able* to show that no added protections are necessary or feasible in the target selection process.

Government officials might support this claim, for instance, with a showing that, when a drone is used, there is no risk of erroneously depriving someone of his or her life. However, as discussed above, there is considerable reason to question an assertion that *all* persons on the U.S. kill-list qualify as legitimate drone targets.[161] Further, even granting as much would not necessarily prove dispositive in light of the massive collateral damage caused by drone strikes.[162] For these "collateral victims," there is of course an easy argument that their deprivation would be "erroneous."

Perhaps more significantly, though, *Boumediene* held that, in the face of the relatively lesser deprivation of detention, *some* procedural protections were not enough.[163] In other words, habeas review was deemed necessary because the procedural protections that *were* embodied in the CSRTs were insufficient to prevent an erroneous determination of a detainee's combatant status. Sources likewise indicate that because the process for placing individuals on the JIPTL is subject to abuse, there is a significant risk of erroneously classifying listed individuals as legitimate targets.[164] Accordingly, the arguable lack of *any* procedural protections for drone targets certainly seems inconsistent with *Boumediene.*

Finally, it is also worth emphasizing the obvious fact that, unlike an erroneous *detention*—as was the concern in both *Hamdi* and *Boumediene*—there is clearly no mechanism to reverse an error in drone targeting. It is arguable, in fact, that the only reason the *Boumediene* Court did not make a determination as to the general sufficiency of the CSRTs themselves is that habeas review was an available alternative to correct any insufficiencies that might flow from the tribunal's

161. *See supra* Part II.B.2.
162. *See supra* notes 33, 37-41.
163. *Boumediene*, 553 U.S. at 785.
164. *See supra* notes 50-59.

proceedings. In contrast, it is obviously not possible to retroactively correct an erroneous determination about the legitimacy of a drone strike. This reality alone arguably provides a strong rationale for robust pre-strike review.

While it may then be admitted that there is some risk of erroneous deprivation in association with drone strikes, the U.S. government might also be able to rest its case for fewer procedural protections upon the argument that providing additional safeguards would simply be unnecessarily burdensome given the context of war. There are blatant signals, however, that this too would ultimately be unpersuasive. Most fundamentally, for example, the *Hamdi* Court succinctly asserted that "a state of war is not a blank check."[165] Indeed, the case was, in the end, a recognition of the fact that

> while the full protections that accompany challenges to [government action] in other settings may prove unworkable and inappropriate in the [war on terror] setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump [the] core right[] to challenge meaningfully the Government's case.[166]

Boumediene likewise signals that a simple connection to a "war on terror issue" is not enough to fully jettison due process analysis. There, the Court stressed, for example, the importance of the fact that the detainees before the Court had been removed from the battlefield.[167] This was significant because it signaled that, even within the war on terror itself, context matters—to the degree that the exigencies of war are mitigated, so too are the burdens upon the government in applying additional procedural protections.[168] While it is perhaps arguable that all drone victims are in fact on "a battlefield"—in the sense that the war on terror is global in nature—the fact that many individuals are hunted based on prior conduct rather than targeted in the midst of combat suggests that some degree of added protection is required.[169] Similarly, whereas activities on a battlefield might necessitate near-instantaneous decision making, some of the individuals on U.S. strike lists have evidently been identified as targets for years.[170] Again, then, *Boumediene* suggests that this fact necessitates a degree of process

165. Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

166. *Id.* at 535.

167. *Boumediene*, 553 U.S. at 770.

168. *Id.* at 793-94.

169. *See* Risen & Johnston, *supra* note 43, at A1.

170. *See id.* (indicating that some individuals have been targeted by the United States since at least 2002).

beyond that required in other combat situations.

3. Signals Suggesting Limitations on Procedural Protections

However, even in the face of signals seemingly suggesting that *some* procedural protections may be required, it is important to reemphasize that both *Hamdi* and *Boumediene* explicitly indicated that the full measure of American due process, as typically understood, is not necessarily required in all contexts of the war on terror. Instead, *Hamdi* declared that procedures "may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[171] Likewise, *Boumediene* held that the inquiry is based, in large part, on "whether there are suitable alternative processes in place to protect against the arbitrary exercise of governmental power."[172] Clearly then, the tailoring of required procedural protections is necessarily dependent on the circumstances. So, for example, in contrast to the detention-related scenarios in both *Hamdi* and *Boumediene*, it is important to remain mindful of the fact that drone targets are not in U.S. custody. This fact unavoidably limits, to some degree, the procedural protections that can in fact be provided before a drone strike. As the *Hamdi* Court aptly noted, though, "due process analysis need not blink at those realities," since more robust protections in other areas can overcome certain necessary limitations elsewhere.[173]

Finally, it is important to underscore that *Boumediene* also signaled that the judiciary may have only a very limited (if any) role in addressing the legitimacy of drone attacks. As applied in that case, the Court emphasized that "[i]n cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody."[174] Such a position recognizes the important—and in many ways exclusive—role of the executive in carrying out national security affairs in general, and war powers in particular, and can be easily extended to drones.[175]

171. *Hamdi*, 542 U.S. at 533.

172. *Boumediene*, 553 U.S. at 794.

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

174. *Id.*

175. *See, e.g., id.* ("[O]ur Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.")

4. CSRTs as a Framework for Governing the Use of Drones

Ultimately, then, the inquiry into whether more robust procedural protections are in order before the U.S. government engages in future drone attacks may rest on the *Boumediene* Court's signal that the answer depends on "whether there are suitable alternative processes in place."[176] Arguably, regarding drone strikes, these are lacking; but they do appear feasible. Indeed, in practically implementing the general principles outlined above in the context of a drone strike, the procedures of the CSRTs—foreshadowed in broad strokes by the *Hamdi* Court, and at least tacitly supported in *Boumediene*[177]—might offer a general framework under which the United States might operate in order to legitimize drone strikes.

In suggesting the possibility of creating a pre-strike review tribunal, there are several threshold matters to be addressed. Most fundamentally, while it may indeed be unreasonable for a terrorist *himself* to appear before a tribunal to challenge his status as a legitimate drone target, it does not appear unreasonable to require the executive to develop internal procedures affording a limited parallel. For example, given that the individuals listed on the U.S. strike list are subject to unlimited military force,[178] the government arguably ought to be required to prove before a tribunal that listed persons are in fact legitimate drone targets. As with CSRTs, it appears to make imminent sense that pre-strike reviews be conducted entirely within the executive. While one "could envision a system where the judiciary would review the discretion of the attacker"[179] to launch a drone strike, such a scheme ignores the realities of the war on terror and the role of the executive in commanding wartime military operations.[180] It would not appear prudent, for example, to force the government to publicly disclose its methods and sources in submitting evidentiary proof against a particular suspect. Moreover, as noted above, the *Boumediene* Court arguably signaled support for an intra-executive review process related to drone targeting

176. *Boumediene*, 553 U.S. at 794.

177. Again, though deemed insufficient under the circumstances of the case, the CSRTs were not completely rejected. *Id.* at 794-95.

178. *See* COMMITTEE REPORT, *supra* note 50, at 15.

179. Vincent-Joel Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801, 886 (2005).

180. *See* Radsan & Murphy, *supra* note 7, at 1237-38 ("The traditional control of judicial trial does not work for targeted killing; only the fanciful would propose a full judicial trial in which the government and the suspected terrorist make opening statements, admit evidence, and argue the suspect's fate to the jury. In the dawning age of the drone, a new model must be developed that recognizes that fighting terrorism can be as much war as it is law enforcement.").

methods.[181]

In order to ensure that the government is in fact meeting its burden of proof, however, the executive could appoint an ombudsman or personal representative with advocacy responsibilities for each potential drone target.[182] An *advocacy* role for such an individual—in contrast to the limited role of a CSRT Personal Representative—would be necessary in light of the absence during the proceeding of the suspect himself. To state it another way, given that the potential target would essentially be "tried" in absentia, these advocates would bear the responsibility of contesting the evidence of the government, and ensuring that the United States in fact met its burden of proving that it possessed enough evidence to warrant use of a drone against a particular individual. While this proceeding would obviously not afford the same protections as habeas review, the reality is that such review is plainly impossible if drones are to be used at all. A "drone tribunal" at least provides some level of review to correct potential errors in the target identification process.

One of the most difficult aspects of implementing a pre-strike review tribunal appears to be determining the standard of proof that would be required to legitimize the targeting of an individual. In addressing this issue, it is helpful to recall that CSRTs require only that the tribunal determine by a preponderance of the evidence that the individual warrants classification as an enemy combatant. Thus, in the context of combat-related *detentions*, preponderance of the evidence is arguably enough. In stark contrast, of course, is the fact that the U.S. criminal justice system requires proof beyond a reasonable doubt in order to impose the death penalty. That said, signals from both *Hamdi* and *Boumediene* suggest that the U.S. government would not necessarily be required to go this distance in the context of a drone strike.

In the end, because "allowing the [government] to kill based on a lesser standard means killing more bad guys, but also killing more good guys,"[183] a preponderance of the evidence standard seems to fall short. On the other hand, the reasonable doubt standard may "carr[y] too much baggage from criminal law . . . [and] inappropriately mix[] criminal justice with war."[184] To overcome this apparent impasse some scholars

181. *Boumediene*, 553 U.S. at 794.

182. Such a scheme may be subject to skepticism as simple sham representation. In some sense, however, this would not be entirely different than having a public defender advocate for a criminal defendant.

183. Radsan & Murphy, *supra* note 7, at 1229.

184. *Id.* at 1224. Even in light of this concern, there is perhaps an argument to be made that the evidentiary standard should require proof beyond a reasonable doubt. Such a contention finds some support, for example, in the fact that at least some terrorists have been diverted into the U.S. criminal justice system. *See* Scott Shane, *Beyond Guantánamo, a Web of Prisons*, N.Y. TIMES, Dec. 11, 2011, at A1.

are suggested that the best standard may be one requiring clear and convincing evidence.[185] Regardless of the precise linguistics, the point remains that drone attacks "are executions without any appeals in the courts."[186] Accordingly, the ultimate reality is that any type of "drone tribunal" should "impose a very high standard in identifying targets" and ensure that there is a "high level of certainty" before any drone attacks are undertaken.[187]

Admittedly, the eventual result of the proceedings discussed here would essentially be the imposition of a death warrant against those persons found to be legitimate drone targets. On this front, some have argued that the American people "*expect* [the] government to kill terrorists who cannot be captured and are members of groups willing (and demonstrably able) to kill thousands of civilians."[188] But while that may be true, the candor associated with the creation of a pre-strike tribunal may rightly be deemed discomforting and may likewise publicly expose too many of the messy details of war. The fact remains, however, that the United States has *already* accepted the operational reality of engaging in targeted killings, including those carried out via drones. Given this reality, and in the absence of a clearer legal framework, applying American due process principles before drone strikes would at least comport with the concomitant expectations of Americans that their government operates in a manner consistent with the nation's values.

> The criminal justice system . . . has absorbed the surge of terrorism cases since 2001 without calamity. . . . As of [October 1, 2011], the federal Bureau of Prisons reported that it was holding 362 people convicted in terrorism-related cases, 269 with what the bureau calls a connection to international terrorism — up from just 50 in 2000.

Id. Such figures demonstrate the willingness and ability of the government to successfully prosecute at least some terrorist suspects under a standard requiring proof beyond a reasonable doubt.

185. *See* Radsan & Murphy, *supra* note 7, at 1224.

186. *Id.*

187. *Id.*

188. *Id.* at 1237 (emphasis added); *see also* Press Release, American Soc'y of Int'l Law, U.S. State Dept. Adviser Lays Out Obama Administration Position on Engagement, "Law of 9/11" (Mar. 25, 2010), http://www.asil.org/pdfs/pressreleases/pr100325.pdf (quoting Harold H. Koh, State Dep't Legal Adviser as saying that "in this ongoing armed conflict [of the war on terror], the United States has the authority . . . and the *responsibility to its citizens*, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al Qaeda leaders who are planning attacks") (emphasis added).

V. CONCLUSION

The U.S. government's use of drones to carry out targeted killings has expanded exponentially as the war on terror has dragged on. Given the capabilities of these instruments and the declining public support for military deployments, there is no reason to believe this trend will abate. To the contrary, the most recent evidence indicates that the Obama Administration sees drones as valuable tools in the war on terror. In light of these circumstances, it is imperative that the U.S. government adopt procedures that enable it to operate in a manner consistent with its values and principles—for "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."[189]

Deprivation of life is clearly the heaviest sanction a state can levy. While various commentators have suggested that either international human rights law (IHRL) or international humanitarian law (IHL) can provide legitimacy to deprivations resulting from drone strikes, in light of their shortcomings in this context, these bodies of law have failed to generate consensus as to the legitimacy of drone killings. Though American due process may likewise independently fail to provide a wholly satisfactory answer as to the *legality* of drone strikes, its application at minimum provides another basis for ensuring their *legitimacy*. Though the precise mechanism for applying American due process principles *ex ante* is worthy of more debate, the observations discussed here suggest that *Hamdi* and *Boumediene* signal that whatever process is adopted must comply with the *Mathews* balancing test. Only with adequate acknowledgement of *both* individual liberties and national security interests can the United States convey that the American values at stake in the war on terror are truly worth preserving.

189. Hamdi v. Rumsfeld, 542 US 507, 532 (2004) (quoting United States v. Robel, 389 U.S. 258, 264 (1967)).