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DEADLY DRONES, DUE PROCESS, AND THE FOURTH AMENDMENT

William Funk*

INTRODUCTION

On September 30, 2011, allegedly on the orders of President Barack Obama, an American drone fired a missile at a truck in the desert of Yemen, killing Anwar al-Awlaki and Samir Khan, two American citizens, as well as other al-Qaeda leaders, including Ibrahim al-Asiri, a top al-Qaeda bomb maker. Awlaki and Khan had been notorious propagandists on behalf of al-Qaeda, credited with drawing numerous recruits to jihad against the United States. Subsequently, the American Civil Liberties Union and *The New York Times* sought to obtain a copy of any legal opinion justifying that drone strike, but, not surprisingly, their request was denied and their Freedom of Information Act suits have not yet been successful.¹ Nevertheless, on February 4, 2013, NBC News posted a leaked Department of Justice “White Paper”² on the legality of drone targeting of U.S. citizens, and President Obama authorized members of the congressional intelligence committees to have access to the Office of Legal Counsel opinion justifying the use of drones to target and kill U.S. citizens who are senior operational leaders of al-Qaeda.³ That opinion remains classified at this time and unavailable to the public. On May 23, 2013, the President addressed an audience at the National Defense University⁴ where he described the administration’s counterterrorism policies, including its policies regarding the use of drones for targeted strikes against al-Qaeda leaders even if they are American citizens. Nevertheless, his speech did not address

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¹ See *N.Y. Times Co. v. U.S. Dep’t of Justice*, 915 F. Supp. 2d 508 (S.D.N.Y. 2013) (rejecting suit); *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013) (remanding to district court after rejecting the government’s *Glomar* denial).

² See DEP’T OF JUSTICE: WHITE PAPER: LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE (undated) [hereinafter WHITE PAPER], available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

³ See Michael D. Shear & Scott Shane, *Congress to See Memo Backing Drone Attacks on Americans*, N.Y. TIMES (Feb. 6, 2013), http://www.nytimes.com/2013/02/07/us/politics/obama-orders-release-of-drone-memos-to-lawmakers.html?pagewanted=all&_r=0.

⁴ Located at Fort McNair in Washington, D.C., the National Defense University is “America’s pre-eminent institution for national security and joint professional military education” *About Us*, NAT’L DEF. U. FOUND., <http://www.ndufoundation.org/page.aspx?pid=327> (last visited Dec. 12, 2013).

the legal justification for such strikes other than to say that the targeting of American citizens for death must comply with due process.⁵ Consequently, as of this writing, the White Paper is currently the best statement of the administration's legal case for drone strikes against U.S. citizens.

The White Paper raises a number of legal issues. Among these are whether the President has the authority to order such killings; whether various criminal statutes or the Executive Order banning assassination would prohibit such operations; and whether the operations would violate international law. This Article, however, will only address the questions: whether, and if so how, the Fourth Amendment⁶ and the Due Process Clause of the Fifth Amendment⁷ would constrain these operations.

The Article will begin by describing the operations in question and the procedures the administration has put in place to authorize them and relate the arguments contained in the White Paper regarding the requirements of due process and the Fourth Amendment. The Article will then critically assess those arguments and raise some additional ones. Ultimately, the Article concludes that whether or not due process and the Fourth Amendment require any changes to the procedures, the constitutionality of any drone strikes targeted against U.S. citizens would be better assured if the administration instituted additional procedures designed to assure the reliability of the information upon which it acts. Moreover, the institution of such recommended procedures should not impede the effectiveness of the drone program, much less require its termination.

I. THE PROGRAM

The use of drones by the military and the Central Intelligence Agency (CIA) has been much in the news. Initially designed for surveillance, drones, particularly the Predator drone, have increasingly been used for targeted strikes against ground targets using air-to-surface missiles. While their predominant use has been against "military"⁸ targets within Afghanistan and Pakistan, they have also been widely used for targeted killing away from the battlefield and its immediate environs. The first report of a drone strike killing a U.S. citizen was in 2002, when Kemal Darwish was killed by a Hellfire missile fired from a Predator drone in Yemen that killed six persons.⁹ While

⁵ See Barack Obama, Pres. of the U.S., Remarks by the President at the National Defense University (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [hereinafter Remarks by the President].

⁶ U.S. CONST. amend. IV.

⁷ U.S. CONST. amend. V.

⁸ The word "military" is in quotation marks because these targets involve suspected combatants in the war in Afghanistan, rather than persons simply connected to al-Qaeda in some leadership position.

⁹ See Philip Smucker, *The Intrigue of the Drone Strike*, CHRISTIAN SC. MONITOR (Nov. 12, 2002), <http://www.csmonitor.com/2002/1112/p01s02-wome.html>.

the target was Qaed Salim Sinan al-Harethi, the alleged ringleader of the plot to bomb the *U.S.S. Cole*, Darwish was wanted at the time as a suspect for allegedly recruiting the “Lackawanna Six,” six Yemeni-Americans convicted of providing material support to al-Qaeda. The first and only targeting of a U.S. citizen involved al-Awlaki, but his son, also an American citizen, was also killed by a drone a few weeks later, although it is unlikely that he was the target.¹⁰ Nevertheless, with the War on Terror showing no signs of ending and with al-Qaeda’s active recruitment of American Muslims, more Americans are likely to be in the cross-hairs in the future, although the total number is also likely to remain small.

Under the program described in the White Paper, the administration will target a U.S. citizen in a foreign country for lethal attack by a drone missile if the person is a “senior operational leader of al-Qa’ida or an associated force”; if an “informe[d] high-level official of the U.S. government determine[s] that the targeted individual poses an imminent threat of violent attack against the United States”; if capture of the person is “infeasible”; and the attack would be consistent with “applicable law of war principles.”¹¹ The White Paper does not define who an “informed; high-level official” would be.¹² Inasmuch as drone strikes currently may be carried out either by the CIA or the Defense Department, one might imagine that the high-level official would be a high-level official in one or the other agency, but we know that the President himself authorized the strike against al-Awlaki.¹³ Other sources describe the processes for targeting that differ somewhat between the CIA and the Defense Department, but which can only be described as highly bureaucratic.¹⁴

The White Paper does not elaborate on who qualifies as a “senior operational leader of al-Qa’ida,” and it does not identify what may be “associated force[s].”¹⁵ Again, other administration sources suggest that an “associated force” has two characteristics: “(1) it is an organized, armed group that has entered the fight alongside al Qaeda, and (2) it is a cobelligerent with al Qaeda in hostilities against the United States or its coalition partners.”¹⁶

The White Paper does explain its understanding of what an imminent threat is.¹⁷ Somewhat contrary to the normal meaning of “imminent,” the White Paper states that an imminent threat does not mean “clear evidence that a specific attack on U.S. persons

¹⁰ See Charlie Savage & Peter Baker, *Obama, in a Shift, to Limit Targets of Drone Strikes*, N.Y. TIMES (May 22, 2013), <http://www.nytimes.com/2013/05/23/us/us-acknowledges-killing-4-americans-in-drone-strikes.html?pagewanted=all>.

¹¹ WHITE PAPER, *supra* note 2, at 1.

¹² *Id.*

¹³ See Remarks by the President, *supra* note 5.

¹⁴ See Richard Murphy & Afsheen John Radsan, *Notice and an Opportunity to be Heard Before the President Kills You*, 48 WAKE FOREST L. REV. (forthcoming).

¹⁵ WHITE PAPER, *supra* note 2, at 1.

¹⁶ Jeh C. Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration*, 31 YALE L. & POL’Y REV. 141, 146 (2012).

¹⁷ WHITE PAPER, *supra* note 2, at 7.

and interests will take place in the immediate future.”¹⁸ It cites to a 2004 speech by Lord Goldsmith, the Attorney General of the United Kingdom, before the House of Lords explaining Her Majesty’s interpretation of Article 51 of the United Nations Charter.¹⁹ That Article recognizes a nation’s right of self-defense in response to an armed attack, but he explained that this right is not limited to when an armed attack has already occurred.²⁰ It includes “the right to use force in anticipation of an imminent armed attack.”²¹ Moreover, the “concept of what constitutes an ‘imminent’ armed attack will develop to meet new circumstances and new threats.”²² “[T]he right of self-defence [exists] and . . . force might, in certain circumstances, be used in self-defence against those who plan and perpetrate such acts and against those harbouring them, if that is necessary to avert further such terrorist acts.”²³ This suggests that the “imminent threat of violent attack”²⁴ includes the current planning of violent attacks in the future. The White Paper confirms this, saying that “an individual poses an ‘imminent threat’ of violent attack against the United States where he is an operational leader of al-Qaeda or an associated force and is personally and continually involved in planning terrorist attacks against the United States.”²⁵ In addition, if the person has “recently been involved in activities posing an imminent threat of violent attack against the United States, and there is no evidence suggesting that he has renounced or abandoned such activities,” then his actions would support the conclusion that he poses an imminent threat.²⁶

Finally, the White Paper explains that capture would not be feasible “if it could not be physically effectuated during the relevant window of opportunity or if the relevant country were to decline to consent to a capture operation.”²⁷ The White Paper continues that “[f]easibility would be a highly fact-specific and potentially time-sensitive inquiry,” which might include consideration of the risk to U.S. personnel in a potential capture operation.²⁸ President Obama in his speech at the National Defense University described “some of these places—such as parts of Somalia and Yemen—[are where] the state only has the most tenuous reach into the territory. In other cases, the state lacks the capacity or will to take action.”²⁹

¹⁸ *Id.*

¹⁹ *Id.* (citation omitted).

²⁰ See 660 PARL. DEB., H.L. (5th ser.) (2004) 370 (U.K.) (referring to the testimony of Attorney-General Lord Goldsmith), available at <http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm>.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ WHITE PAPER, *supra* note 2, at 1.

²⁵ *Id.* at 8.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Remarks by the President, *supra* note 5.

II. THE ADMINISTRATION'S LEGAL ARGUMENTS

The White Paper assumes that “the rights afforded by [the] Fifth Amendment’s Due Process Clause, as well as the Fourth Amendment, attach to a U.S. citizen even while he is abroad,”³⁰ citing *Reid v. Covert*,³¹ *United States v. Verdugo-Urquidez*,³² and *In re Terrorist Bombings of U.S. Embassies in East Africa*.³³ With respect to due process, the White Paper refers to the invocation by the plurality opinion in *Hamdi v. Rumsfeld*³⁴ of the balancing test in *Mathews v. Eldridge*.³⁵ In *Hamdi*, the plurality described that test as involving the “weighing [of] ‘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.”³⁶ The White Paper concedes that “[a]n individual’s interest in avoiding erroneous deprivation of his life is ‘uniquely compelling.’”³⁷ On the other hand, the White Paper asserts that “the government’s interest in waging war, protecting its citizens, and removing the threat posed by members of enemy forces is also compelling.”³⁸ From this the White Paper concludes that “[i]n these circumstances, the ‘realities’ of the conflict and the weight of the government’s interest in protecting its citizens from an imminent attack are such that the Constitution would not require the government to provide further process” than the White Paper describes.³⁹ Again, it quotes from the plurality opinion in *Hamdi* to distinguish the process due for actions “on the battlefield” from those in which the United States detains persons in areas subject to the jurisdiction of U.S. courts.⁴⁰ And finally, the White Paper once more quotes from the plurality opinion in *Hamdi* for the proposition that courts should “accord[] the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of war, and . . . the scope of that discretion necessarily is wide.”⁴¹

With respect to the Fourth Amendment, if one assumes that killing a person is a “seizure” within the meaning of that amendment, the White Paper asserts that “the intrusion on any Fourth Amendment interests would be outweighed by the ‘importance of the governmental interests [that] justify the intrusion.’”⁴² Drawing on the case of

³⁰ WHITE PAPER, *supra* note 2, at 5.

³¹ 354 U.S. 1, 5–6 (1957) (plurality opinion).

³² 494 U.S. 259, 269–70 (1990).

³³ 552 F.3d 157, 170 n.7 (2d Cir. 2008).

³⁴ 542 U.S. 507, 529 (2004).

³⁵ WHITE PAPER, *supra* note 2, at 5–6; 424 U.S. 319 (1976).

³⁶ *Hamdi*, 542 U.S. at 529 (quoting *Mathews*, 424 U.S. at 335).

³⁷ WHITE PAPER, *supra* note 2, at 6 (quoting *Ake v. Oklahoma*, 470 U.S. 68, 178 (1985)).

³⁸ *Id.* (citing *Hamdi*, 542 U.S. at 531).

³⁹ *Id.*

⁴⁰ *Id.* at 7 (citing *Hamdi*, 542 U.S. at 534).

⁴¹ *Id.* (quoting *Hamdi*, 542 U.S. at 535).

⁴² *Id.* at 9 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

*Tennessee v. Garner*⁴³ and *Scott v. Harris*,⁴⁴ the White Paper argues that even in domestic law enforcement it is not unconstitutionally unreasonable to prevent escape by using deadly force where the suspect poses a threat of serious physical harm.⁴⁵ Consequently, abroad and under the circumstances outlined in the White Paper, the use of lethal force would likewise not violate the Fourth Amendment.⁴⁶

III. ASSESSING THE ADMINISTRATION'S ARGUMENTS

A. *Constitutional Rights Abroad*

The administration's assumption that "the rights afforded by the Fifth Amendment's Due Process Clause, as well as the Fourth Amendment, attach to a U.S. citizen even while he is abroad" is not as obvious as one might think.⁴⁷ Certainly the Supreme Court has never so held. This is not to say that these amendments and other provisions of the Bill of Rights necessarily cease to exist outside the United States, but it does mean, for example, that what is "reasonable" under the Fourth Amendment and what is "due" process under the Fifth Amendment may be affected by the fact that the search or seizure or deprivation of life, liberty, or property occurs outside the sovereign jurisdiction of the United States. The White Paper cites to *Reid v. Covert*,⁴⁸ but *Reid's* message is unclear. As Justice Harlan wrote in *Reid v. Covert*:

I do not think that it can be said that these safeguards of the Constitution are never operative without the United States, regardless of the particular circumstances. On the other hand, I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world. . . . The proposition is, of course, not that the Constitution "does not apply" overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place. In other words, it seems to me that . . . there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.⁴⁹

⁴³ 471 U.S. 1 (1985).

⁴⁴ 550 U.S. 372 (2007).

⁴⁵ WHITE PAPER, *supra* note 2, at 9.

⁴⁶ *Id.*

⁴⁷ *Id.* at 5.

⁴⁸ 354 U.S. 1 (1957).

⁴⁹ *Id.* at 74 (Harlan, J., concurring).

Justice Harlan’s opinion, of course, was not the opinion of the Court, but neither was the opinion of Justice Black, who appeared to take a more categorical approach, stating that:

At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. . . . When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.⁵⁰

However, this statement must be read in context. In *Reid*, two wives accompanying their servicemen husbands abroad, one in Japan and one in England, were accused of murdering their husbands.⁵¹ The status of forces agreements between the United States and these countries provided that both military personnel and their accompanying dependents accused of crimes in those countries would not be tried under those nations’ law but under American law by a military tribunal.⁵² The issue was whether a U.S. citizen, not a member of the military, could be tried by military tribunal simply because the crime occurred in a foreign land.⁵³ The Court held she could not, but there was no majority opinion.⁵⁴ The plurality opinion, written by Justice Black, distinguished the so-called *Insular Cases*,⁵⁵ which had held that jury trials were not required in unincorporated territories despite the language of Article III, Section Two,⁵⁶ and the Sixth Amendment.⁵⁷ Those cases, he wrote, “involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship.”⁵⁸ Moreover, he also distinguished *Madsen v. Kinsella*,⁵⁹ which also involved a trial by a military tribunal of a serviceman’s wife accused of murdering her husband, but in *Madsen*, the Court, with but one dissenter, found no constitutional problem with trial

⁵⁰ *Id.* at 5–6 (plurality opinion).

⁵¹ *Id.* at 3–4.

⁵² *Id.*

⁵³ *Id.* at 4–5.

⁵⁴ *Id.*

⁵⁵ See *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901).

⁵⁶ U.S. CONST. art. III, § 2 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .”).

⁵⁷ U.S. CONST. amend. VI (“In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury . . .”); *Balzac*, 258 U.S. at 313; *Dorr*, 195 U.S. at 149; *Mankichi*, 190 U.S. at 218; *Downes*, 182 U.S. at 287.

⁵⁸ *Reid*, 354 U.S. at 14.

⁵⁹ 343 U.S. 341 (1952).

by military tribunal.⁶⁰ In *Madsen*, however, the murder and trial had occurred in Germany while it was technically under military occupation, although in 1949 long after the cessation of hostilities.⁶¹ Justice Black indicated that in an area under military occupation the commander may utilize a military commission to try anyone in the area.⁶² In other words, despite Justice Black's seemingly categorical statement as to the applicability of the Bill of Rights abroad, his opinion recognized at least two different justifications for dispensing with at least one of those rights—the right to a jury trial.

There are two aspects of Justice Black's opinion that are notable and relevant to the issue of drones. First, in distinguishing *Reid* from the *Insular Cases* and *Madsen*, he iterated the source of the claimed governmental authority. He said, "[H]ere the basis for governmental power is American citizenship."⁶³ That is, the only basis upon which the United States could act to deprive the defendant of her liberty was that she was an American citizen; it had no other justification to assert jurisdiction over her. In the *Insular Cases*, the source of authority was the power to make law for territories, which only incidentally would apply to U.S. citizens who happened to be present there.⁶⁴ In *Madsen*, it was the authority to govern an area of military occupation, which again only incidentally would apply to U.S. citizens who happened to be there.⁶⁵ The targeting of drones against high-level members of al-Qaeda would seem to have more in common with the latter cases than *Reid*. Whatever the source of authority is for targeting drones against such persons,⁶⁶ it does not arise from our authority over our own citizens. Rather, if the person targeted is a U.S. citizen, that would be merely incidental to an otherwise lawful targeting.

The other aspect of Justice Black's opinion that is relevant is its recognition that there were no extenuating circumstances requiring an exception from an otherwise existing constitutional right. The crimes and trials in *Reid* occurred during peacetime in friendly countries, and no one could claim that Japan or England would care whether we tried the wives by military tribunals or civilian juries. In short, while there might be some minor inconvenience involved in moving the trials to some place in the United States, this was not a justification for eliminating the right to such a trial. In a later case, dealing with non-capital trials of military dependents abroad, the Court reiterated the lack of any extenuating circumstances that might affect the applicability of the right.⁶⁷

⁶⁰ *Id.* at 362.

⁶¹ *Id.* at 343–45.

⁶² *Reid*, 354 U.S. at 35 n.63.

⁶³ *Id.* at 14.

⁶⁴ *Id.* at 13.

⁶⁵ *Madsen v. Kinsella*, 343 U.S. 341, 362 (1952).

⁶⁶ The White Paper argues that the lawful basis for the drone strikes generally derives from the President's constitutional authority to protect the nation and the Authorization for Use of Military Force passed by Congress. WHITE PAPER, *supra* note 2, at 1.

⁶⁷ See *Kinsella v. U.S. ex rel. Singleton*, 361 U.S. 234, 249 (1960).

With respect to the drone targeting, there are a number of extenuating circumstances that might affect the applicability of constitutional rights to U.S. citizens abroad. While the use of drones outside the field of battle in a conventional sense may not provide the same extenuating circumstances as their use on the field of battle, their use in parts of the world where it is difficult and exceedingly dangerous for U.S. forces, much less conventional law enforcement, to go raises similar concerns.

Reid and the cases it refers to all involve the question of the right to a trial by jury protected by both Article III and the Sixth Amendment.⁶⁸ In each of those cases the person received some sort of trial, just not a trial by jury. Drone targeting with the intent to kill a U.S. citizen does not involve any sort of trial. Even if *Reid* and the subsequent cases expanding upon its limited decision might not require a trial by jury before such targeting, there remains the question whether due process would require something more than simply a decision by an “informed, high-level official of the U.S. government.”⁶⁹ Even the *Insular Cases*, perhaps the broadest statements concerning the freedom of the government to act abroad unconstrained by all the particulars of the Bill of Rights, drew the line at what they called “fundamental rights.”⁷⁰ As the Court stated in *Balzac v. Porto Rico*:

The Constitution . . . contains grants of power and limitations which in the nature of things are not always and everywhere applicable, and the real issue in the *Insular Cases* was not whether the Constitution extended to the [unincorporated territories] . . . , but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements. The guaranties of certain fundamental personal rights declared in the Constitution, as, for instance that no person could be deprived of life, liberty or property without due process of law, had from the beginning full application⁷¹

Nothing the Supreme Court has said since then has suggested the contrary.⁷²

The White Paper also cites *United States v. Verdugo-Urquidez*,⁷³ which involved Fourth Amendment rights, but that case merely references *Reid* and indeed takes pains

⁶⁸ See *supra* notes 59–65 and accompanying text.

⁶⁹ WHITE PAPER, *supra* note 2, at 1.

⁷⁰ *Reid v. Covert*, 354 U.S. 1, 8–9 (1957) (citing *Dorr v. United States*, 195 U.S. 138, 144–48 (1904)).

⁷¹ 258 U.S. 298, 312–13 (1922).

⁷² See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 639 (2008) (holding that Guantanamo Bay detainees enjoy the “freedom from unlawful restraint as a fundamental precept of liberty . . .” despite the fact that Guantanamo is outside sovereign U.S. territory); *Reid*, 354 U.S. at 8–9 (“[I]t has been suggested that only those constitutional rights which are ‘fundamental’ protect Americans abroad . . .”).

⁷³ 494 U.S. 259 (1990).

to stress that the plurality's statement of the extent of constitutional rights abroad was not the holding of the Court.⁷⁴ Rather, the Court said: "What we know of the history of the drafting of the Fourth Amendment . . . suggests that its purpose was to restrict searches and seizures which might be conducted by the United States in domestic matters."⁷⁵ Nevertheless, four Justices in concurring or dissenting opinions did indicate their belief that the Fourth Amendment's restriction to reasonable searches applies abroad.⁷⁶ While the Supreme Court has never directly held that the Fourth Amendment applies abroad, every circuit to have considered the issue, like *In re Terrorist Bombings of U.S. Embassies in East Africa*,⁷⁷ the last case cited by the White Paper for the proposition that the rights afforded by the Fourth Amendment apply abroad, has held that it does.⁷⁸ These courts, however, have not required a prior judicial warrant, instead requiring only that the search be reasonable.⁷⁹

To summarize, despite the frequent citation of *Reid v. Covert* for the proposition that constitutional rights apply to U.S. citizens abroad,⁸⁰ the Court did not so hold. The split decision there was limited to the right to have a jury trial under the circumstances involved, and those circumstances have only been slightly enlarged over time. Nevertheless, there is strong support in the case law, even if no direct holding by the Supreme Court, that fundamental due process would apply abroad before the government could take the life, liberty, or property of an American citizen. Similarly with respect to the Fourth Amendment, the Court has never held that the Fourth Amendment applies abroad, and indeed has suggested that the warrant requirement does not apply abroad.⁸¹ Nonetheless, the basic requirement that a search or seizure be "reasonable" has been held by a number of lower courts to apply to government actions abroad against American citizens.

B. Due Process Clause

The issue is probably not whether the Due Process Clause applies to a citizen abroad, but rather to what extent the Due Process Clause applies in the particular circumstance of a drone strike. The White Paper addresses the due process question through the lens of the Court's *Mathews v. Eldridge*⁸² balancing test. While that test was established in the consideration of a run-of-the-mill administrative law case, which might give pause to its applicability regarding the requisite procedures to authorize a

⁷⁴ See *id.* at 269–70.

⁷⁵ *Id.* at 266.

⁷⁶ *Id.* at 276, 279.

⁷⁷ 552 F.3d 157, 170 n.7 (2d Cir. 2008).

⁷⁸ See *United States v. Conroy*, 589 F.2d 1258, 1264 (5th Cir. 1979); *United States v. Rose*, 570 F.2d 1358, 1362 (9th Cir. 1978); *United States v. Toscanino*, 500 F.2d 267, 280–81 (2d Cir. 1974).

⁷⁹ See *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d at 167.

⁸⁰ See, e.g., *Conroy*, 589 F.2d at 1264.

⁸¹ See *Verdugo-Urquidez*, 494 U.S. at 259, 278 (Kennedy, J., concurring).

⁸² 424 U.S. 319, 335 (1976).

military drone strike, a plurality of the Supreme Court did use that test in the context of the procedures applicable to the indefinite detention of U.S. citizens believed to be enemy combatants.⁸³ As the administration concedes, the private interest of the individual target for killing is at the zenith; there can be no higher private interest. The administration responds, however, by saying that the government's interest "in waging war, protecting its citizens, and removing the threat posed by members of enemy forces"⁸⁴ is also at the highest level. But to phrase the government's interest in that way is somewhat disingenuous. That is, killing the particular individual involved, even assuming he is as dangerous as the government believes, only removes the threat posed by that individual. At best it marginally affects that protection from and threat posed by the enemy generally. The same could be said for domestic terrorists or murderous criminals. That is, one could say that the government interest in protecting its citizens from domestic terrorists or murderous individuals in the United States is also of the highest order, but no one would suggest a shoot-to-kill order directed against a person identified by a senior administration official as such a person in the United States would be justified. Nevertheless, it must be accepted that the government's interest in disabling foreign terrorists leaders associated with al-Qaeda is substantial.

In the *Mathews* balancing test, the most important component is the one that mediates between the private interest and the government interest by assessing the adequacy of the existing procedures to guard against the risk of error in the government determination and the probable value of additional procedural safeguards to reduce that risk.⁸⁵ The White Paper does not even acknowledge this component of the *Mathews* test, although it repeats language from the plurality opinion in *Hamdi* to the effect that in the circumstances of war the risk of erroneous deprivation in the absence of sufficient process is very real.⁸⁶ The White Paper's sole response is that "the realities of combat" must also be considered in assessing the burdens the government would face in providing greater process to the target of a proposed drone strike and that these realities "are such that the Constitution would not require the government to provide further process to such a U.S. citizen before using lethal force."⁸⁷ However, the only "process" identified in the White Paper is that "an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States"⁸⁸ This, of course, is no process at all; it is a conclusion. We have some information concerning the process that precedes that conclusion.⁸⁹ Clearly, the decision is not made lightly, and it is based on all available information, including most likely information from confidential sources and/or

⁸³ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 529–34 (2004).

⁸⁴ WHITE PAPER, *supra* note 2, at 6.

⁸⁵ See *Hamdi*, 542 U.S. at 529.

⁸⁶ WHITE PAPER, *supra* note 2, at 6 (quoting *Hamdi*, 542 U.S. at 529 (plurality opinion) ("It is beyond question that substantial interests lie on both sides of the scale in this case.")).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See Murphy & Radsan, *supra* note 14, at 11–12.

electronic surveillance. Nevertheless, as the White Paper recognizes in quoting from *Hamdi*, in the circumstances of war, especially a war carried out by clandestine organizations hiding from the public, the risk of error in determining that a particular person is “a senior operational leader of al-Qa’ida or an associated force” who “poses an imminent threat” is “very real.”⁹⁰ Inasmuch as the Court in *Hamdi*, merely to detain a person, required process beyond the determination of some official of the U.S. government that the person was an enemy combatant, it would seem that some process beyond what seems contemplated in the White Paper would be required in order to target a person for death.

There is one wrinkle, unidentified but perhaps alluded to in the White Paper.⁹¹ In *every* case raising questions regarding what process is due the person whose life, liberty, or property is involved, the person is available for purposes of some sort of proceeding to protect his interests. Simply none of the cases involve a situation where the person is not only not available but affirmatively avoiding being present. Rather, when a person is shot, seized, or injured in an attempt to bring the person under government control, it is the Fourth Amendment that is claimed to have been violated, not the Fifth Amendment’s Due Process Clause.⁹² On the other hand, I have not been able to find any case in which a court has said that the Due Process Clause is simply not implicated when the person involved is not available for a proceeding. In *Hamdi*, the plurality states that “[t]he parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized.”⁹³ However, this statement does not by its terms say that initial captures do not require *any* due process, only that they do not require the process identified by the Court as necessary for indefinite detention. Moreover, it is highly unlikely that ordinary captures on the battlefield, including *Hamdi*’s own, would involve the knowing and intentional capture of a U.S. citizen. Rather, like *Hamdi*, the citizenship of the captive would become known only later, and the law is clear that non-citizens on the foreign battlefield do not enjoy any rights under the Constitution.⁹⁴ Nevertheless, even if it were known beforehand that

⁹⁰ WHITE PAPER, *supra* note 2, at 1, 6 (quoting *Hamdi*, 542 U.S. at 530).

⁹¹ *See id.* at 7 (quoting *Hamdi*, 542 U.S. at 534 (“The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to continue to hold those who have been seized.”)).

⁹² *See, e.g.*, *Scott v. Harris*, 550 U.S. 372, 374 (2007) (involving police utilizing potentially deadly force to apprehend a fleeing speeder); *Graham v. Connor*, 490 U.S. 386, 394 (1989) (discussing a claim of excessive use of force by police in arresting subject); *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (involving circumstance in which police shot and killed a fleeing burglary suspect); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881–82 (1975) (involving temporary detention of persons in automobile); *Terrell v. Smith*, 668 F.3d 1244, 1251 (11th Cir. 2012) (considering situation in which police shoot and kill person attempting to flee in car); *see also* DEP’T OF JUSTICE, OFFICE OF PROF’L RESPONSIBILITY, RUBY RIDGE TASK FORCE REPORT 4–5 (June 10, 1994) (assessing constitutionality of FBI sniper’s shooting to kill).

⁹³ 542 U.S. 507, 534 (2004).

⁹⁴ *See Johnson v. Eisentrager*, 339 U.S. 763, 775 (1950).

a particular combatant on the battlefield was a U.S. citizen, it is inconceivable that some sort of prior due process proceeding would be required in order to capture him. After all, no due process proceeding is required before seizing an American citizen in the United States.⁹⁵ Again, the issue would be the constitutionality of the seizure under the Fourth Amendment.

The above may suggest that a due process analysis is simply inapplicable with respect to a drone strike against a U.S. citizen and that the only issue is whether the strike violates the Fourth Amendment. However, there is general language in some cases that if the seizure (or detention) is for the purposes of punishment, then due process applies.⁹⁶ Popular reporting of drone strikes on U.S. citizens suggests that the government is imposing a death penalty on someone without a trial.⁹⁷ The White Paper states that a necessary precondition to use of a drone strike against an American citizen is that capture is infeasible.⁹⁸ This indicates that the drone strike is in lieu of capture, which would be preferred, and consequently suggests that the strike is not intended to be punishment. President Obama was more explicit: “America does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate, and prosecute America does not take strikes to punish individuals”⁹⁹

The capture of Ahmed Abdulkadir Warsame off the coast of Yemen in 2011, his prosecution and guilty plea in federal court,¹⁰⁰ and the recent capture of Sulaiman Abu

⁹⁵ See *Terry v. Ohio*, 392 U.S. 1, 20 (1967) (holding that an officer needs only reasonable suspicion to conduct a seizure).

⁹⁶ See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (considering a challenge to the conditions of pretrial detention).

⁹⁷ See, e.g., Mark Mazzetti et al., *How a U.S. Citizen Came to Be in America’s Cross Hairs*, N.Y. TIMES (Mar. 9, 2013), http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html?pagewanted=all&_r=0 (claiming the U.S. government had carried out the deliberate killing of an American citizen as a wartime enemy and without a trial); Erin McClam, ‘Judge, Jury and Executioner’: Legal Experts Fear Implications of White House Drone Memo, NBC NEWS, http://usnews.nbcnews.com/_news/2013/02/05/16855539-judge-jury-and-executioner-legal-experts-fear-implications-of-white-house-drone-memo?lite (last visited Dec. 12, 2013) (suggesting White House is acting as judge, jury, and executioner). Senator Angus King stated at confirmation hearings for John Brennan as Director of the Central Intelligence Agency: “Having the executive being the prosecutor, the judge, the jury and the executioner, all in one, is very contrary to the traditions and the laws of this country.” Editorial, *A Court for Targeted Killings*, N.Y. TIMES (Feb. 13, 2013), <http://www.nytimes.com/2013/02/14/opinion/a-special-court-is-needed-to-review-targeted-killings.html>.

⁹⁸ WHITE PAPER, *supra* note 2, at 1.

⁹⁹ Remarks by the President, *supra* note 5.

¹⁰⁰ See Press Release, U.S. Attorney’s Office, S.D.N.Y., Guilty Plea Unsealed in New York Involving Ahmed Warsame (Mar. 25, 2013), available at <http://www.fbi.gov/newyork/press-releases/2013/guilty-plea-unsealed-in-new-york-involving-ahmed-warsame-a-senior-terrorist-leader-and-liaison-between-al-shabaab-and-al-qaeda-in-the-arabian-peninsula-for-providing-material-support-to-both-terrorist-organizations>.

Ghaith in Jordan and his extradition to the United States for trial are significant evidence for the truth of this assertion.¹⁰¹ Thus, absent an intent to punish, drone strikes may well be viewed as simply not subject to due process concerns but rather are appropriately viewed as seizures, the constitutional protection for which arises from the Fourth Amendment rather than the Due Process Clause of the Fifth Amendment. Nevertheless, sometimes popular perceptions become a framing device, so it is not inconceivable that the strikes could be judged to be punitive and thus requiring analysis under the Due Process Clause.

C. *The Fourth Amendment*

As discussed above, the applicability of the Fourth Amendment to citizens abroad is not well established, but the body of lower court case law supports a finding that it does apply to searches and seizures abroad of U.S. citizens.¹⁰² The extent of its protection, however, is less clear. The Fourth Amendment ensures “[t]he right of the people to be secure in their persons” against “unreasonable . . . seizures” and requires that warrants shall only issue upon probable cause.¹⁰³ In *Tennessee v. Garner*,¹⁰⁴ the Supreme Court decided that the use of deadly force against a fleeing felon was a “seizure” within the meaning of the Fourth Amendment.¹⁰⁵ The White Paper cites to *Garner* in support of its targeting drone strikes against American citizens because the Court there said that an officer could use deadly force to prevent escape of a suspect where there is “probable cause to believe that the suspect poses a threat of serious physical harm.”¹⁰⁶ This was a limitation on the common-law rule that deadly force could be used to prevent the escape of any fleeing felon.¹⁰⁷ The *Garner* Court focused on the Amendment’s requirement that the seizure be “reasonable” to assess whether the use of deadly force in the particular circumstances was constitutional. There, where the fleeing suspect was concededly not perceived to be dangerous to the pursuing officers or the public, the Court held the use of deadly force was unreasonable.¹⁰⁸ Rather, the Court held that “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to

¹⁰¹ See Marc Santora & William K. Rashbaum, *Bin Laden Relative Pleads Not Guilty in Terrorism Case*, N.Y. TIMES (Mar. 8, 2013), <http://www.nytimes.com/2013/03/09/nyregion/sulaiman-abu-ghaith-bin-ladens-son-in-law-charged-in-new-york.html>.

¹⁰² See *United States v. Conroy*, 589 F.2d 1258, 1264 (5th Cir. 1979); *United States v. Rose*, 570 F.2d 1358, 1362 (9th Cir. 1978); *United States v. Toscanino*, 500 F.2d 267, 280–81 (2d Cir. 1974).

¹⁰³ U.S. CONST. amend. IV.

¹⁰⁴ 471 U.S. 1, 7 (1985).

¹⁰⁵ *Id.*

¹⁰⁶ WHITE PAPER, *supra* note 2, at 9 (citing *Garner*, 471 U.S. at 11).

¹⁰⁷ See *Garner*, 471 U.S. at 12–15.

¹⁰⁸ *Id.* at 11, 21 (“Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.”).

prevent escape by using deadly force.”¹⁰⁹ Because two of the conditions for drone targeting are that the citizen poses an “imminent” threat of violent attack and it is infeasible to capture the person, the White Paper argues that the targeting falls within the requirements of *Garner*. The White Paper also cites *Scott v. Harris*.¹¹⁰ In that case the Court upheld the constitutionality of the police ramming a speeding automobile that would not pull over when pursued by the police with flashing lights and sirens.¹¹¹ The Court posed the question: “Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist’s flight from endangering the lives of innocent bystanders?”¹¹² The answer was, yes, he may. In *Scott*, the underlying crime (speeding) was itself neither a felony nor inherently a threat to the physical safety of others, but the actions taken by the person to avoid seizure caused a significant risk to others.¹¹³ Those actions justified the use of potentially lethal force. The facts in *Scott* are far removed from the drone targeting case, but the Court’s willingness to look at the situation in context, rather than subject to some rigid doctrinal rule, as well as to allow the police some leeway in making the decision as to the dangerousness of the person’s actions, are both supportive of the administration’s conclusion that the Fourth Amendment does not preclude targeting American citizens for drone attacks under the listed conditions.

The White Paper, however, does not cite to *Graham v. Connor*,¹¹⁴ decided subsequent to *Garner*, which is the case establishing the current “test” for assessing the reasonableness of a seizure, and the test used in *Scott*.¹¹⁵ In *Graham*, the Court established what it calls the “objective reasonableness” standard.¹¹⁶ There, the Court described it thus: “Determining whether the force used to effect a particular seizure is ‘reasonable’ under the Fourth Amendment requires a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.”¹¹⁷ In addition, the Court suggested that:

[I]ts proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.¹¹⁸

¹⁰⁹ *Id.* at 11.

¹¹⁰ 550 U.S. 372 (2007).

¹¹¹ *Id.* at 381, 384.

¹¹² *Id.* at 374.

¹¹³ *Id.* at 375, 380.

¹¹⁴ 490 U.S. 386 (1989).

¹¹⁵ *Id.* at 388.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 396 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

¹¹⁸ *Id.*

The White Paper's failure to cite *Graham*, however, does not diminish its Fourth Amendment argument. As the *Scott* Court made clear, "*Garner* was simply an application of [*Graham*'s] 'reasonableness' test . . . to the use of a particular type of force in a particular situation."¹¹⁹ Moreover, in *Scott*, the Court clarified that there is no "magical on/off switch that triggers rigid preconditions" for when "deadly force" may be used, and it explained the requirement of the subject posing a threat of serious physical harm to others.¹²⁰ This could be satisfied "when the suspect is known to have 'committed a crime involving the infliction or threatened infliction of serious physical harm,' so that *his mere being at large poses an inherent danger to society.*"¹²¹

These cases, therefore, do provide substantial support for the administration's argument that drone targeting of U.S. citizens subject to the requirements described in the White Paper is not a violation of the Fourth Amendment, but rather is consistent with Supreme Court decisions regarding when deadly force may be used to "seize" a person. There is, however, one major distinction between the *Garner* and *Scott* cases and the situation involving the drone targeting. In *Garner*, the suspect was seen fleeing from a burglary,¹²² in *Scott*, the suspect was seen speeding and then fled from the police.¹²³ That is, there was no question that the person against whom the potentially deadly force was used was indeed the person who committed the crime.¹²⁴ The use of deadly force is in lieu of arrest, so, as the Court has said, there must be at least "probable cause" to arrest the person against whom the deadly force is used.¹²⁵ Where the officer observes the commission of a crime and observes the threat to physical safety the perpetrator creates, in the exigencies of the situation the officer has the necessary probable cause and can act upon it.¹²⁶ Otherwise, however, the probable cause to justify an arrest would need to be determined by a neutral magistrate. Once a warrant has been issued for the suspect's arrest, and if the crime for which the warrant was issued is sufficiently heinous that "his mere being at large poses an inherent danger to society,"¹²⁷ then in attempting to arrest him deadly force might be used to prevent his escape.

The decision that a U.S. citizen meets the requirements to be targeted for a drone strike is not done under exigent circumstances. All evidence suggests that it is a decision that is made only after careful study.¹²⁸ In the domestic context, it is inconceivable that police officials could have meetings and decide that a person has committed a particular crime and that any police officer may therefore use deadly force to apprehend

¹¹⁹ *Scott v. Harris*, 550 U.S. 372, 382 (2006).

¹²⁰ *Id.*

¹²¹ *Id.* at 382 n.9 (emphasis added) (citations omitted).

¹²² *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

¹²³ *Scott*, 550 U.S. at 374–75.

¹²⁴ *See also* *Brosseau v. Haugen*, 543 U.S. 194, 194–95 (2004) (per curiam) (involving a felon fleeing in car).

¹²⁵ *See, e.g., Graham v. Connor*, 490 U.S. 386, 396 (1989).

¹²⁶ *See id.*

¹²⁷ *Scott*, 550 U.S. at 382 n.9.

¹²⁸ *Mazzetti et al., supra* note 97.

the person. The question, therefore, is why targeting a U.S. citizen for a drone strike does not require an arrest warrant based on alleged crimes that would make the person merely “being at large” to pose “an inherent danger to society.”¹²⁹

One answer to that question might be that there is no magistrate with jurisdiction to issue an arrest warrant applicable in another nation. There is strong support for such an answer in the Court’s decision in *United States v. Verdugo-Urquidez*.¹³⁰ In that case the issue was whether evidence obtained from a search of a non-citizen’s home in Mexico should be suppressed because it was obtained in violation of the Fourth Amendment.¹³¹ The Court’s opinion held that non-citizens are not protected by the Fourth Amendment abroad, but the majority in passing stated that a search warrant issued by a magistrate in the United States “would be a dead letter outside the United States.”¹³² Justice Kennedy, concurring, was more explicit, saying “the Fourth Amendment’s warrant requirement should not apply in Mexico.”¹³³ Justice Stevens, also concurring, agreed: “I do not believe the Warrant Clause has any application to searches of noncitizens’ homes in foreign jurisdictions because American magistrates have no power to authorize such searches.”¹³⁴ Even Justice Blackmun in dissent agreed on this point: “[A]n American magistrate’s lack of power to authorize a search abroad renders the Warrant Clause inapplicable to the search of a noncitizen’s residence outside this country.”¹³⁵

Although in *Verdugo-Urquidez* the warrant at issue was a search warrant, the same conclusion should apply to an arrest warrant. The Fourth Amendment does not distinguish between search warrants and arrest warrants; it refers only to one warrant.¹³⁶ If an American magistrate lacks any power to issue a search warrant applicable abroad, then the magistrate would likewise lack any power to issue an arrest warrant applicable abroad.¹³⁷ It is true that these statements regarding the ability to obtain a warrant occurred in the context of a case involving a non-citizen, but the Justices’ statements as to the magistrate’s authority relied on the place where the search would take place not the citizenship of the person to be searched.¹³⁸ The only court of appeals case to

¹²⁹ *Scott*, 550 U.S. at 382 n.9.

¹³⁰ 494 U.S. 259, 278 (1990).

¹³¹ *Id.* at 261.

¹³² *Id.* at 274.

¹³³ *Id.* at 278 (Kennedy, J., concurring).

¹³⁴ *Id.* at 279 (Stevens, J., concurring).

¹³⁵ *Id.* at 297 (Blackmun, J., dissenting).

¹³⁶ U.S. CONST. amend. IV.

¹³⁷ It might be argued that the authorization is simply authorization to American officials, over whom the magistrate presumably would have jurisdiction, to effect the arrest wherever it can be made, but in *Verdugo-Urquidez*, the issue was whether the American officials who participated in the search needed a search warrant. 494 U.S. at 261. If a magistrate could authorize American officials to make an arrest abroad, he could likewise authorize American officials to make a search abroad.

¹³⁸ *Id.* at 266–67.

assess whether a warrant requirement applies abroad as to American citizens is *In re Terrorist Bombings of U.S. Embassies in East Africa*.¹³⁹ It concluded, relying in large part on *Verdugo-Urquidez*, that there is no warrant requirement abroad.¹⁴⁰

If there is no warrant requirement abroad, the Fourth Amendment at most requires the seizure abroad to be “reasonable.” This conclusion, however, simply returns us to *Graham*’s “objective reasonableness” test, a test that is contextual, looking at all the facts and circumstances, or, as the Court put it in *Scott*, “we must still slosh our way through the factbound morass of ‘reasonableness.’”¹⁴¹

IV. UNCONSIDERED ARGUMENTS

If the Germans in World War II had fielded some military unit made up exclusively of volunteer, native-born Americans,¹⁴² no one would have imagined that on the field of battle they would have any constitutional rights. They would be enemy combatants subject to being shot on sight under the laws of war (although not if they had surrendered and been reduced to being prisoners), and nothing in the Constitution would have protected them. Anwar al-Awaki differed from these hypothetical soldiers in two ways. First, he was not on a traditional field of battle, and second, he was not in a nation’s military forces at war with the United States. The first difference is probably without significance. After all, the saboteurs in *Ex Parte Quirin*¹⁴³ were not in “the theatre or zone of active military operations,” but the Court found that fact irrelevant to their treatment as enemy belligerents.¹⁴⁴ Moreover, one of them was a naturalized American citizen, but again the Court found that fact irrelevant, saying that “[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.”¹⁴⁵ As a result, he was convicted by a military tribunal of having violated the laws of war, sentenced to death, and executed.¹⁴⁶ He and his confederates all had claimed certain rights under the U.S. Constitution, which were rejected on the basis that those rights were never intended to

¹³⁹ 552 F.3d 157, 159 (2d Cir. 2008).

¹⁴⁰ *See id.* An early district court case, *Berlin Democratic Club v. Rumsfeld*, held that the Fourth Amendment required a prior judicial warrant for electronic surveillance of American citizens in Germany. 410 F. Supp. 144 (D.D.C. 1976). *In re Terrorist Bombings of U.S. Embassies in East Africa* did not cite or address that case. *See* 552 F.3d 157 (2d Cir. 2008).

¹⁴¹ *Scott v. Harris*, 550 U.S. 372, 383 (2007).

¹⁴² Consider that the 442nd Regimental Combat Team was a unit of the U.S. Army in World War II made up almost exclusively of Japanese-Americans, who under Japanese law qualified for Japanese citizenship.

¹⁴³ 317 U.S. 1, 38 (1942).

¹⁴⁴ *See id.*

¹⁴⁵ *Id.* at 37–38.

¹⁴⁶ Marshall Thompson, Comment, *The Legality of Armed Drone Strikes Against U.S. Citizens Within the United States*, 2013 BYU L. REV. 153, 159–60.

protect enemy belligerents who violated the laws of war.¹⁴⁷ In short, an American citizen who is a member of a nation's military force at war with the United States is to be treated in the same manner as any other member of that nation's military force.

This brings us to the second difference between Anwar al-Awaki and our hypothetical American citizen in the American unit of the German army in World War II: Mr. al-Awaki was not a member of any nation's military force, nor was the United States at "war" in the same sense as it was in World War II. Today the struggle of radical Islam, exemplified by al-Qaeda, against the "West" and all it stands for, is typified by acts of terror against both military and civilian targets. These acts, which have been described by some as asymmetric warfare, might be treated simply as federal crimes, and there are a number of federal criminal statutes that can be brought to bear against such acts against American targets.¹⁴⁸ On the other hand, they could be considered acts of "war," properly responded to by military force.

When acts of terror occur domestically and without foreign support, our response is domestic law enforcement, as in the prosecution, conviction, and execution of Timothy McVeigh.¹⁴⁹ However, when acts of terror occur domestically but with foreign support or occur overseas but against American property or persons, we sometimes treat it as criminal conduct and sometimes as asymmetric warfare. For example, the "shoe bomber" was prosecuted in federal court and is serving a life sentence in a federal prison;¹⁵⁰ Sulaiman Abu Ghaith is being prosecuted in the United States for acts abroad constituting a conspiracy to kill Americans;¹⁵¹ and Wadih El-Hage was prosecuted in federal court and is serving a life sentence in federal prison for participation in the bombing of the American embassies in Kenya and Tanzania.¹⁵² Nevertheless, Khalid Sheikh Mohammed and four others are being tried as unlawful enemy combatants by military commission for their participation in the planning of 9/11 and other terrorist acts¹⁵³ and Abd al-Rahim al-Nashiri is being tried by military commission

¹⁴⁷ *Ex Parte Quirin*, 317 U.S. at 41, 45.

¹⁴⁸ See, e.g., Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 799–800 (2011).

¹⁴⁹ See generally Gregg W. Etter, Sr., *Prosecuting Domestic Terrorists in the American Court System: A Study of Three Cases*, 2008 J. INST. JUST. INT'L STUD. 99.

¹⁵⁰ See Pam Belluck, *Unrepentant Shoe Bomber Sentenced to Life*, N.Y. TIMES (Jan. 31, 2003), <http://www.nytimes.com/2003/01/31/national/31SHOE.html>.

¹⁵¹ See Benjamin Weiser, *Bin Laden's Son-in-Law Seeks a New Lawyer, but There's a Snag*, N.Y. TIMES (May 20, 2013), <http://www.nytimes.com/2013/05/21/nyregion/bin-ladens-son-in-law-asks-to-change-lawyers.html>.

¹⁵² See Press Release, U.S. Attorney's Office, S.D.N.Y., Wadih El Hage Resentenced to Life in Prison for His Role in the 1998 Bombings of the American Embassies in Kenya and Tanzania (Apr. 23, 2013), available at <http://www.justice.gov/usao/nys/pressreleases/April13/ElHagSentencingPR.php?print=1>.

¹⁵³ See *Khalid Sheikh Mohammed Fast Facts*, CNN (Feb. 13, 2013), <http://www.cnn.com/2013/02/03/world/meast/Khalid-sheikh-mohammed-fast-facts/index.html>. Initially, in the Bush administration, charges were brought against the defendants in a military commission, but President Obama directed that they be tried as criminals in federal court. Congress,

in Guantanamo for planning the attack on the *U.S.S. Cole*.¹⁵⁴ These varied responses do not clearly and unequivocally suggest that we treat terrorist acts sponsored by al-Qaeda and related organizations as in the nature of “war” or military conflict rather than simply as federal crimes.

The Obama administration has indicated its preference for arrest and criminal prosecution,¹⁵⁵ but the fact that not all cases have been so handled leaves open the possibility that some cases involve military action rather than law enforcement action.

At the same time, every administration has justified the use of drone strikes as well as the detention of terrorists at Guantanamo under the Authorization of the Use of Military Force (AUMF),¹⁵⁶ which reads more like a declaration of “war” or an authorization under the War Powers Resolution¹⁵⁷ than as providing greater powers to apprehend federal criminals abroad. In *Hamdi*,¹⁵⁸ a majority of the Court held that actions pursuant to the AUMF justified the detention of persons (including U.S. citizens) as enemy combatants under the laws of war.¹⁵⁹ Moreover, two other Justices said the AUMF, “naturally speaks with some generality, but its focus is clear, and that is on the use of military power. It is fairly read to authorize the use of armies and weapons, whether against other armies or individual terrorists.”¹⁶⁰ Here, the evidence is more consistent, supporting the idea that actions against members of al-Qaeda and related groups is military in nature, not law enforcement in nature.

If, indeed, the drone strikes are military in nature, rather than law enforcement in nature, then arguments as to due process and the Fourth Amendment become virtual nullities. The Constitution places no barriers on the targeting and killing of enemy belligerents in “war,”¹⁶¹ whether or not they are American citizens. Indeed, in *Hamdi*, seven Justices appeared to agree that the only constitutional right Hamdi possessed as an American citizen was the right of due process in determining whether he was in fact an enemy belligerent.¹⁶² The logical consequence of this line of analysis is that

in effect, overruled that direction by forbidding any funds be used to transport the prisoners from Guantanamo. As a result, they are again being tried by military commission.

¹⁵⁴ See Peter Finn, *Capital Charges Brought Against Guantanamo Detainee Abd al-Rahim al-Nashiri in USS Cole Attack*, WASH. POST (Apr. 20, 2011), http://articles.washingtonpost.com/2011-04-20/world/35230489_1_nashiri-military-commission-military-justice.

¹⁵⁵ See Remarks by the President, *supra* note 5.

¹⁵⁶ Pub. L. No. 107-40, 115 Stat. 224 (2001).

¹⁵⁷ Pub. L. No. 93-148, 87 Stat. 555 (1973).

¹⁵⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹⁵⁹ *Id.* at 516–18 (O’Connor, J.); *id.* at 579 (Thomas, J., dissenting).

¹⁶⁰ *Id.* at 547 (Souter, J.) (emphasis added).

¹⁶¹ The Uniform Code of Military Justice, federal statutes, and international law may all impose some restrictions and conditions, but nothing in the Constitution would apply to such action.

¹⁶² *Hamdi*, 542 U.S. at 509 (O’Connor, J.); *id.* at 541 (Souter, J.) (stating that they would have held that as a matter of statutory interpretation the AUMF did not authorize detention at all); *id.* at 590 (Thomas, J., dissenting).

if a U.S. person is indeed an “enemy belligerent,” then he has no claim for protection under either the Due Process Clause or the Fourth Amendment even though he is not a member of a military force of a nation at “war” with the United States.

There is one more question that might be raised as to our hypothetical American in the German military unit or the American citizen working for al-Qaeda. Is he a citizen, or does he lose his citizenship by reason of his participation in the “war” against the United States? Under the Fourteenth Amendment, a person born in the United States and subject to the jurisdiction thereof automatically becomes a citizen.¹⁶³ Nevertheless, the Supreme Court has made clear that a native-born citizen may renounce his citizenship, but the renunciation must be voluntary.¹⁶⁴ Congress has by statute provided various ways in which the government can establish that a person has renounced his citizenship.¹⁶⁵ For purposes relevant here, a person may lose his citizenship by “entering, or serving in, the armed forces of a foreign state . . . engaged in hostilities against the United States,”¹⁶⁶ under circumstances in which it was voluntary and done with the subjective intent to renounce his citizenship.¹⁶⁷

In *Vance v. Terrazas*,¹⁶⁸ the Court made clear that the mere fact of voluntarily engaging in the expatriating act—here, perhaps, acting on behalf of al-Qaeda—did not prove the subjective intent to renounce U.S. citizenship, but *Terrazas* also made clear that subjective intent could be proved by “a fair inference from proved conduct.”¹⁶⁹ In *Terrazas*, the Court quoted positively from Justice Black’s concurring opinion in *Nishikawa v. Dulles*,¹⁷⁰ that the commission of the statutorily described expatriating acts “may be highly persuasive evidence in the particular case of a purpose to abandon citizenship,” but it cannot be conclusive evidence.¹⁷¹ Consequently, assuming that acts on behalf of al-Qaeda would constitute “serving in[] the armed forces of a foreign state . . . engaged in hostilities against the United States,” such acts could be strong evidence of an intent to voluntarily renounce American citizenship.¹⁷² While prior to *Terrrazas* there were a number of cases finding that service in a foreign military indeed constituted renunciation of citizenship, post-*Terrrazas* apparently there is only one, *United States v. Schiffer*.¹⁷³ In that case, as well as in *Breyer v. Meissner*,¹⁷⁴ in which the court found insufficient evidence of renunciation of citizenship,¹⁷⁵ there is language

¹⁶³ U.S. CONST. amend. XIV, § 1.

¹⁶⁴ See *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967).

¹⁶⁵ See 8 U.S.C. § 1481 (2006).

¹⁶⁶ § 1481(a)(3).

¹⁶⁷ See § 1481(a).

¹⁶⁸ 444 U.S. 252 (1980).

¹⁶⁹ *Id.* at 260.

¹⁷⁰ 356 U.S. 129, 139 (1958).

¹⁷¹ *Terrrazas*, 444 U.S. at 261.

¹⁷² § 1481(a)(3).

¹⁷³ 831 F. Supp. 1166 (E.D. Pa. 1993), *aff’d without opinion in* 31 F.3d 1175 (3d Cir. 1994).

¹⁷⁴ 214 F.3d 416 (3d Cir. 2000).

¹⁷⁵ *Id.* at 431.

suggesting that voluntary service in the foreign military, where such service involved an oath of allegiance to a foreign power, was sufficient evidence, in the absence of any countervailing evidence, to satisfy a finding of subjective intent to renounce U.S. citizenship.¹⁷⁶ Nevertheless, in *Breyer*, the appellate court found that there was insufficient evidence of voluntariness,¹⁷⁷ and the rule appears to be that “evidentiary ambiguities are not to be resolved against the citizen.”¹⁷⁸

Under the statute it is clear that the loss of citizenship occurs at the time of the expatriating act; it does not require an administrative or judicial determination to effect the loss of citizenship.¹⁷⁹ Thus, a high government official could determine that the target of the drone strike had voluntarily renounced his citizenship as provided in statute and act on that basis without any necessity of proving the conclusion in any court or administrative body. There is, however, a procedure by which a person whom the government has made a determination that the person is no longer a citizen can contest that fact and have it resolved in court.¹⁸⁰

For purposes here, there is the not insignificant question whether the statute’s language, “serving in [] the armed forces of a foreign state,”¹⁸¹ can be read to include high-ranking service in al-Qaeda. Given the uniform approach of the Court to construe strictly statutes providing for loss of citizenship, it seems doubtful whether this provision for loss of citizenship could be used to eliminate issues relating to targeting a U.S. citizen.

V. RECOMMENDATIONS

The above analyses suggest that there are supportable arguments to justify the constitutionality of the targeting of U.S. citizens as described in the White Paper. In particular, it seems that due process would not be applicable unless the targeting was for “punishment,” and there are facts supporting the claim that it is not done to punish the person. Judicial decisions strongly support the conclusion that the Fourth Amendment does not require any warrant for seizures abroad.¹⁸² Moreover, the doctrine allowing for the use of lethal force against those whose escape would cause a significant risk to human safety from physical violence can be invoked to justify the drone strikes envisioned in the White Paper. Finally, characterization of al-Qaeda leaders as enemy belligerents is consistent with how the United States sometimes treats them when it obtains custody of them. If they are enemy belligerents, then their citizenship should not matter in terms of the use of lethal force against them.

¹⁷⁶ *Id.*; *Schiffer*, 831 F. Supp. at 1194–95.

¹⁷⁷ *Breyer*, 214 F.3d at 431.

¹⁷⁸ *Nishikawa v. Dulles*, 356 U.S. 129, 136 (1958); *see also* *Bruni v. Dulles*, 235 F.2d 855, 856 (D.C. Cir. 1956) (“[F]actual doubts in expatriation cases are to be resolved in favor of citizenship.”).

¹⁷⁹ *See* 8 U.S.C. § 1481 (2006).

¹⁸⁰ *See* § 1503(a).

¹⁸¹ § 1481(a)(3).

¹⁸² *See supra* notes 133–34 and accompanying text.

However, a recurring issue is the reliability of the information the government acts on and the conclusions the government draws from it. For example, if due process is implicated, the weakest link in the government's argument is the procedure (or lack thereof) for assessing whether the person targeted is the person the government believes him to be.¹⁸³ Similarly, one of the underpinnings of the justification for the use of lethal force against a fleeing suspect is the inherent reliability of the information the officer acts on—either as eyewitness of the serious crime, or of the fleeing person's possession of a weapon, or by the possession of a warrant for the arrest of the person for a specified serious crime. Again, the weakest part of the government's argument here is the reasonableness of its determination of the status of the target absent such inherent indications of reliability. Finally, the lawfulness of targeting the person as an enemy belligerent depends on the person indeed being an enemy belligerent, and again the procedure (or lack thereof) for making this determination puts this justification at risk.

It is not clear why the government should not make its arguments much stronger by instituting some procedure that would more greatly ensure the reliability of its determinations. Recently, the President indicated that he was amenable to some additional procedures and has asked his administration to explore various proposals.¹⁸⁴ He indicated two possible proposals: “the establishment of a special court to evaluate and authorize lethal action” and “the establishment of an independent oversight board in the executive branch.”¹⁸⁵ The first of these, he said, “has the benefit of bringing a third branch of government into the process, but raises serious constitutional issues about presidential and judicial authority.”¹⁸⁶ The second “avoids those problems, but may introduce a layer of bureaucracy into national security decisionmaking, without inspiring additional public confidence in the process.”¹⁸⁷

An “oversight” entity usually reviews something after the fact, rather than providing a prior authorization, and there is currently “oversight” by the House and Senate Intelligence Committees.¹⁸⁸ Moreover, even if its charge was to approve targets in advance, it is not clear how something within the executive branch would be “independent.”¹⁸⁹

¹⁸³ See, e.g., Murphy & Radsan, *supra* note 14 (describing in detail some of the problems of reliability raised by the existing bureaucratic procedure).

¹⁸⁴ See Remarks by the President, *supra* note 5.

¹⁸⁵ *Id.*; see also Scott Shane, *A Court to Vet Kill Lists*, N.Y. TIMES, Feb. 9, 2013, at A1 (“A drone court would face constitutional, political and practical obstacles, and might well prove unworkable, according to several legal scholars and terrorism experts.”).

¹⁸⁶ Remarks by the President, *supra* note 5.

¹⁸⁷ *Id.*

¹⁸⁸ See *id.*

¹⁸⁹ Murphy & Radsan, *supra* note 14, at 44–51. Murphy and Radsan propose a formal adjudication generally following the requirements of the Administrative Procedure Act, but with an administrative judge, not an “independent” administrative law judge, whose decisions would be subject to Presidential override. *Id.*; see also 5 U.S.C. §§ 554, 556–557 (2006).

On the other hand, the already existing Foreign Intelligence Surveillance Court¹⁹⁰ would seem to be a natural resource to use to review and approve the executive's determination of the appropriateness of the target. That court consists of eleven sitting district court judges publicly designated by the Chief Justice of the United States.¹⁹¹ The Foreign Intelligence Surveillance Act, as amended,¹⁹² is already used to authorize electronic surveillance and physical searches and seizures for foreign intelligence purposes in the United States.¹⁹³ In addition, it authorizes certain electronic surveillance for foreign intelligence purposes of non-U.S. persons abroad.¹⁹⁴ In other words, it is suitably secure to see evidence from highly classified sources. It would provide independent, neutral, judicial oversight to fulfill the same function as a magistrate who issues an arrest warrant.

Some have suggested that the Foreign Intelligence Surveillance Court is not a sufficient safeguard even of electronic surveillance and physical searches in light of its percentage approval rate of executive applications.¹⁹⁵ These criticisms ignore the fact that the approval rate may well reflect the care the executive takes before submitting an application—presumably a positive effect of having a prior, judicial approval requirement—as well as the fact that the percentage approval rate of all search and arrest warrants by ordinary magistrates is extraordinarily high.¹⁹⁶

The President and others have suggested that the use of a court, such as the Foreign Intelligence Surveillance Court, might raise constitutional issues about presidential and judicial authority.¹⁹⁷ It is difficult to see why in light of the now-three-decade history of the Foreign Intelligence Surveillance Court, whose creation some believed also raised constitutional issues.¹⁹⁸ Congress has over time extended that court's original jurisdiction from electronic surveillance in the United States for foreign intelligence

Although there are a number of practical problems involved in their proposal, it is not clear that such a prior approval mechanism would “inspir[e] additional public confidence,” even if it would add an additional safeguard as to reliability. Remarks by the President, *supra* note 5.

¹⁹⁰ See 50 U.S.C. § 1803 (2006).

¹⁹¹ *Id.*

¹⁹² Foreign Intelligence Surveillance Act, 50 U.S.C. § 1802 (2006).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See, e.g., Erika Eichelberger, *FISA Court Has Rejected .03 Percent of All Government Surveillance Requests*, MOTHER JONES (June 10, 2013, 10:30 AM), <http://www.motherjones.com/mojo/2013/06/fisa-court-nsa-spying-opinion-reject-request>.

¹⁹⁶ See, e.g., *Title III Wiretap Orders*, ELECTRONIC PRIVACY INFORMATION CENTER, http://epic.org/privacy/wiretap/stats/wiretap_stats.html (last visited Dec. 12, 2013).

¹⁹⁷ See *supra* notes 185–86.

¹⁹⁸ *Foreign Intelligence Electronic Surveillance Act: Hearings Before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence H.R.*, 95th Cong. 217, 221 (1978) (statement of Hon. Laurence Silberman) (“Now, although I am generally concerned about the growth of judicial power at the expense of both congressional and Presidential authority, I maintain that the administration’s bill, if passed, would be a particularly unfortunate addition to this trend.”).

purposes to physical searches for foreign intelligence purposes,¹⁹⁹ the use of pen registers for foreign intelligence purposes,²⁰⁰ access to certain business records for foreign intelligence and international terrorism investigations,²⁰¹ and electronic surveillance of certain foreigners abroad.²⁰² Congress could well follow this same template to extend the court's jurisdiction to approving the use of lethal force against an American citizen who is a senior operational leader of al-Qaeda or an associated force who poses an imminent or continuing threat of violent attack against the United States, where capture is infeasible. The court would be performing a traditional judicial function: determining the reasonableness of a seizure under the Fourth Amendment as a prior condition on that seizure taking place. In addition, such an extension would no more subject what had been a purely executive determination to prior judicial approval than did the original Foreign Intelligence Surveillance Act.²⁰³ As was the case there, even if the Constitution does not require prior judicial approval, it does not forbid it.

The use of the Foreign Intelligence Surveillance Court to approve drone targeting of U.S. citizens abroad should not interfere with achievement of the government's goals. There is no exigency involved in the targeting of U.S. citizens, even if there may be exigency once the target's location has been determined. The rare decision to target a U.S. citizen is made only after careful consideration and by a high official, just as is the case with searches and surveillances under the Foreign Intelligence Surveillance Act.

CONCLUSION

In short, it seems clear that the Due Process Clause and the Fourth Amendment do not pose any significant obstacles to the government's ability to use lethal force against leaders of al-Qaeda who are U.S. citizens. It may be that the government's program as it currently stands passes constitutional muster, but there are clearly substantial public concerns and possibly significant weaknesses in the government's justifications that undermine the program's constitutionality. Nevertheless, those weaknesses could be virtually eliminated by the addition of the use of the Foreign Intelligence Surveillance Court as an additional procedure to further assure the reliability of the government's determinations—a procedure already in place and functioning with respect to highly classified matters—a procedure that would do nothing to impede the program and would provide it substantial additional constitutional support.

¹⁹⁹ See Pub. L. 103-359, tit. 8, § 807, 108 Stat. 3443 (1994).

²⁰⁰ See Pub. L. 105-272, tit. 6, § 601, 112 Stat. 2404 (1998).

²⁰¹ See Pub. L. 105-272, tit. 6, § 602, 112 Stat. 2410 (1998).

²⁰² See Pub. L. 110-261, tit. 7, § 702, 122 Stat. 2437 (2008).

²⁰³ Prior to the enactment of FISA, electronic surveillance in the United States for foreign intelligence purposes was conducted under the President's asserted authority to approve such surveillances without judicial oversight. See *United States v. Humphrey*, 456 F. Supp. 51, 57 (E.D. Va. 1978) (describing pre-FISA history of electronic surveillance for foreign intelligence).