DUE PROCESS AND JUDICIAL REVIEW OF GOVERNMENT KILL LISTS

*Richard W. Murphy**

"How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to defendants, judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death?"[1]

"What constitutional right is more essential than the right to due process before the government may take a life?"[2]

I. INTRODUCTION

For two decades, the United States has carried out targeted killings of specifically-identified persons, largely as part of its conflict with al Qaeda and associated forces.[3] To do so, the government must create "kill lists" identifying its targets.[4] This prac-

* AT&T Professor of Law, Texas Tech University School of Law. My thanks to participants at the Administrative Law Discussion Forum at Université de Lyon in June 2019 and to Afsheen Radsan and Bryan Camp for their helpful comments and critiques.

1. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8 (D.D.C. 2010) [hereinafter *Al-Aulaqi I*] (Bates, J.) (dismissing on a variety of justiciability grounds a suit brought by Nasser Al-Aulaqi to enjoin the killing of his son, Anwar Al-Aulaqi).

2. Kareem v. Haspel, 412 F. Supp. 3d 52, 55 (D.D.C. 2019) (Collyer, J.) (granting motion to dismiss based on state secrets privilege), *vacated and remanded by* 986 F.3d 859, 862 (D.C. Cir. 2021) (dismissing for lack of constitutional standing).

3. *See, e.g.*, Elad D. Gil, *Institutional Choice and Targeted Killing: A Comparative Perspective*, 94 TUL. L. REV. 711, 730-35 (2020) (discussing use of targeted killing from the Clinton through the Trump Administrations).

4. For discussion of public information regarding preparation of kill lists*, see, e.g.*, Elena Chachko, *Administrative National Security,* 108 GEO. L.J. 1063, 1082-85 (2020) (describing complex interagency processes for nominating and vetting targets, and how these processes evolved from the Obama to the Trump Administrations); Gregory S. McNeal, *Targeted Killing and Accountability,* 102 GEO. L.J. 681, 702-29 (2014) (providing a detailed account of bureaucratic processes for developing kill lists); Charlie Savage, *Trump's Secret Rules for Drone Strikes Outside War Zones Are Disclosed*, N.Y. TIMES, May 1, 2021 (updated May 6, 2021), https://www.nytimes.com /2021/05/01/us/politics/trump-drone-strike-rules.html (discussing Trump

tice raises a host of hotly debated legal, policy, and ethical issues.[5] One contentious issue revolves around whether the government's procedures for placing an American citizen on a kill list satisfy the constitutional requirements of due process.[6]

In two notable cases brought in the district court for the District of Columbia, plaintiffs have invoked due process (as well as other legal theories) to try to force the government to take an American citizen off of a kill list.[7] Rather than reach the merits, every judge involved in these two cases has instead dismissed based on one or more threshold grounds. Over a decade ago, in *Al-*

Administration rules governing drone strikes outside of conventional war zones disclosed and suspended by Biden Administration).

5. For a sampling of the scholarly discussion, *see, e.g.,* William Funk, *Deadly Drones, Due Process*, *and the Fourth Amendment*, 22 WM. & MARY BILL RTS. J. 311, 335 (2013) (concluding that "the Due Process Clause and 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"); Alberto R. Gonzales, *Drones: The Power To Kill*, 82 GEO. WASH. L. REV. 1, 52-58 (2013) (proposing a system for review by neutral decisionmakers of decisions to designate American citizens as enemy combatants); Jameel Jaffer, *Judicial Review of Targeted Killings*, 126 HARV. L. REV. FOR. 185, 186-87 (2013) (arguing for *ex post* review of targeted killings via *Bivens* actions); McNeal, *supra* note 4 (providing a comprehensive review of procedures and standards for targeted killings by the United States and offering proposals to enhance accountability); Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 435-37 (2009) (contending drone strikes against non-citizens located outside the United States implicate due process under the U.S. Constitution); Stephen I. Vladeck, *Targeted Killing and Judicial Review*, 82 GEO. WASH. L. REV. ARGUENDO 11, 18 (2014) (arguing for *ex post* review of targeted killings).

6. *See, e.g.*, Joshua Andresen, *Due Process of War in the Age of Drones*, 41 YALE J. INT'L L. 155, 157 (2016) (arguing for a system of *ex post* review of drone strikes); Nathan S. Chapman, *Due Process of War,* 94 NOTRE DAME L. REV. 639, 706 (2018) (providing historical analysis of application of due process in war and suggesting "a targeted killing may not be subject to due process, but perhaps being put on a kill list is"); Jonathan G. D'Errico, *Executive Power, Drone Executions, and the Due Process Rights of American Citizens,* 87 FORDHAM L. REV. 1185, 1185-86 (2018) (arguing for a "narrowly tailored" scheme for *ex ante* review for targeted killings); Martin S. Flaherty, *The Constitution Follows the Drone: Targeted Killings, Legal Constraints, and Judicial Safeguards*, 38 HARV. J.L. & PUB. POL'Y 21, 42 (2015) (contending that due process may require *ex ante* judicial review of targeting decisions in non-exigent circumstances); Richard Murphy & Afsheen John Radsan, *Notice and an Opportunity to be Heard Before the President Kills You*, 48 WAKE FOREST L. REV. 829, 834-35 (2013) (suggesting that due process requires publication of targetable persons and a system of administrative adjudication to vet targets).

7. *See Kareem*, 986 F.3d at 862 (dismissing for lack of constitutional standing); Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (dismissing a suit brought by Nasser Al-Aulaqi to enjoin the killing of his son, Anwar Al-Aulaqi, on a variety of justiciability grounds) [*Al-Aulaqi I*].

Aulaqi v. Obama (*Al-Aulaqi I*), Judge Bates held that the political question doctrine required dismissal of a lawsuit brought by Nasser al-Aulaqi to try to stop the government from killing his son, Anwar.[8] More recently, in litigation that began as *Zaidan v. Trump*[9] but ended as *Kareem v. Haspel*,[10] Judge Collyer rejected the government's arguments that the political question doctrine and a lack of standing required dismissal of a due process claim brought by Bilal Abdul Kareem to challenge his purported placement on a kill list.[11] Later in the litigation, however, she dismissed after concluding that the case could not proceed without evidence protected by the state-secrets privilege.[12] On appeal, the D.C. Circuit agreed that dismissal was in order but switched legal theories, holding that Kareem lacked constitutional standing.[13]

It is alarming to think that Executive Branch authorities can target American citizens for death as part of a counter-terrorism campaign without an outside check. Over the years, a number of

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8. *Al-Aulaqi I*, 727 F. Supp. 2d at 46-48 (applying political question doctrine to dismiss suit brought by Nasser Al-Aulaqi to enjoin the killing of his son, Anwar Al-Aulaqi). *See also* Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56, 74 (D.D.C. 2014) [hereinafter *Al-Aulaqi II*] (Collyer, J.) (holding that plaintiffs who brought *Bivens* claim in connection with targeted killing of Anwar Al-Aulaqi had pleaded justiciable procedural and substantive due process claims but dismissing because "special factors" blocked application of *Bivens*). For an important application of the political question doctrine to justify dismissal of non-constitutional claims relating to targeted killing, see *Jaber v. United States*, 861 F.3d 241, 246-47 (D.C. Cir. 2017) (relying heavily on *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (en banc), to hold that the political question doctrine barred a claim seeking declaratory judgment that targeted killing of noncitizens violated international law and the Torture Victim Protection Act because their resolution would require the court to second guess an executive determination to use lethal force abroad). *But cf. Jaber*, 861 F.3d at 252 (Brown, J., concurring) (agreeing that *El-Shifa* controlled, but adding that its approach, though sensible as applied to one-off situations, "seems a wholly inadequate response" to a systemic program of targeted killing).

9. Zaidan v. Trump, 317 F. Supp. 3d 8, 26-28 (D.D.C. 2018).

10. Kareem v. Haspel, 412 F. Supp. 3d 52, 55 (D.D.C. 2019), *vacated and remanded by*, 986 F.3d. 859, 862 (D.C. Cir. 2021).

11. *Zaidan*, 317 F. Supp. 3d at 26-28 (dismissing claims of Zaidan but declining to dismiss those of Kareem). For informative discussion of Judge Collyer's *Zaidan* opinion, see especially Robert Chesney, *Judicial Review of Decisions to Kill American Citizens Under the AUMF: The Most Important Case You Missed Last Week*, LAWFARE: HARD NATIONAL SECURITY CHOICES (June 18, 2018, 2:34 PM), https://www.lawfareblog.com/judicial-review-decisions-kill-american-citizens-under-aumf-most-important-case-you-missed-last-week.

12. *Kareem*, 412 F. Supp. 3d at 55, *vacated and remanded by*, 986 F.3d. 859, 862 (D.C. Cir. 2021).

13. *Kareem*, 986 F.3d at 862.

commentators have proposed systemic reforms to address this problem, but many of these would require legislative action that may never come.[14] This Article proposes an incremental, small-bore response that courts could, if a suitable occasion arises, adopt of their own accord.[15] More specifically, this Article submits that national security and separation-of-powers concerns need not, contrary to the district court decisions in *Al-Aulaqi I* and *Kareem*, require outright dismissal of an American citizen's due process claim that the government has illegally placed him on a kill list. Instead, unless some other threshold issue (e.g., standing) requires dismissal, due process principles may require courts to conduct limited but independent review of such placements.

A primary inspiration for this suggestion comes from the Supreme Court's seminal war-on-terror case, *Hamdi v. Rumsfeld*, in which the controlling plurality held that an American citizen had a due process right to notice and an opportunity to be heard before a neutral decisionmaker to challenge his continued detention as an enemy combatant.[16] The plurality also acknowledged, however, that application of these core requirements of due process to military detentions requires suitable limitations.[17] If due process, suitably tailored, can apply to detention of enemy combatants, it should also apply, suitably tailored, to non-exigent military decisions to kill particular American citizens as enemy combatants.

In resolving such claims, courts can both provide ample protection to national security concerns while at the same time

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14. For more systemic proposals, *see* D'Errico, *supra* note 6, at 1213-16 (proposing that Congress legislate a scheme for *ex ante* review by courts of targeted killing); Flaherty, *supra* note 6, at 41-42 (suggesting that FISC-style courts conduct *ex ante* review of non-exigent placements on kill lists); Funk, *supra* note 5, at 334-35 (recommending review of target selections by the Foreign Intelligence Surveillance Court); Gonzales, *supra* note 5, at 46-58 (proposing legislative reforms requiring notification to Congress and administrative adjudications to review targeting); McNeal, *supra* note 4, at 790 (proposing, among a series of other reforms, that Congress establish an independent review board for targeted killings within the executive branch); Vladeck, *supra* note 5, at 24 (arguing that Congress should create an express cause of action for *ex post* reviews of targeted killings with exclusive jurisdiction conferred on the U.S. District Court for the District of Columbia).

15. For other proposals that courts could implement without legislative intervention, *see*, *e.g.*, Andresen, *supra* note 6, 157 (contending that courts already have authority to issue declaratory judgments reviewing targeted killings *ex post*); Jaffer, *supra* note 5, at 186-87 (arguing for *ex post* review via *Bivens* actions).

16. Hamdi v. Rumsfeld, 542 U.S. 507, 533-34 (2004) (O'Connor, J.) (plurality opinion).

17. *Id.*

providing at least some of the benefits of review by a neutral decisionmaker. For instance, a court might accommodate the political question doctrine's ban on undue second-guessing of military or national security judgments by applying a deferential standard of review that checks whether a challenged targeting decision was legal and had reasonable evidentiary support.[18] A court might protect sensitive national security information by reviewing any evidence covered by the state-secrets privilege in confidential, *ex parte* proceedings and by redacting any such information from its public orders.[19] Applying this approach, absent government consent, a reviewing court might never inform the plaintiff whether he had ever been on a kill list, been removed from one, or remained on one. The plaintiff's remedy, in effect, would be limited to obtaining review by a neutral decisionmaker in the form of the court itself.[20]

Viewed from one angle, this proposal for a truncated form of due process might seem insignificant for several reasons. Absent a sea-change in the law to extend due process protections to aliens abroad, it offers no protection to the overwhelming majority of targets who are not American citizens.[21] Moreover, it extends only a severely diminished form of due process to this tiny group. It does not require that the government take affirmative steps to

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18. For discussion of why deferential review should satisfy the concerns of the political question doctrine, *see infra* Part III.C.

19. *Cf.* Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CAL. L. REV. 991, 1012-15 (2018) (describing innovative use of *in camera* review by courts to preserve secrecy in national security cases). *But cf.* Qassim v. Trump, 927 F.3d 522, 528 (D.C. Cir. 2019) (remanding to district court to determine whether Guantanamo detainee had due process right that he or his counsel be able to review classified information).

20. For another suggestion that judicial proceedings that are in some sense secret could boost the reliability and constitutionality of targeting of American citizens, see especially Funk, *supra* note 5, at 334 (suggesting use of the Foreign Intelligence Surveillance Court to review target selection).

21. The Supreme Court recently confirmed the morally and textually dubious proposition that constitutional protections do not protect aliens outside U.S. controlled territories. *See* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2086 (2020) (characterizing as "long settled" that "foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution"). *But see id.* at 2099 (Breyer, J., dissenting) (contending that "the majority's blanket assertion about the extraterritorial reach of our Constitution does not reflect the current state of the law"; noting that "this Court has studiously avoided establishing an absolute rule that forecloses that protection in all circumstances"). *See also* Flaherty, *supra* 6, at 34-37 (contending that due process principles should apply to targeted killing regardless of citizenship or location; pointedly observing, "[t]he text of the Due Process Clause makes no distinction as to either citizenship or geography").

notify a person of their placement on a kill list.[22] As such, the proposal can benefit only those persons who determine without official notice that they have likely been targeted. The proposal also severely diminishes the due process requirement of a fair opportunity to be heard by depriving a plaintiff of a chance to respond to secret evidence.[23]

Viewed from another angle, however, this project may provide a helpful proof of a worthwhile concept: There is at least limited space for courts to apply due process principles to targeted killing without unconstitutionally encroaching into the domain of national security. If the right occasion in a suitable case arrives, courts practicably can and should, without waiting for more systemic legislative or executive reforms that may never come, fashion and apply due process protections in the context of kill lists.[24]

II. HOW DUE PROCESS CLAIMS FOR KILL LISTS HAVE BEEN DISMISSED

To provide context for later discussion, this part examines how courts have resolved due process claims brought in *Al-Aulaqi I*,[25] *Kareem*,[26] and related litigation. Although each claim failed on one or more threshold grounds, this unanimity of outcome masks notable disagreement among the judges regarding application of these threshold grounds.

A. AL-AULAQI I—THE POLITICAL QUESTION DOCTRINE BARRED A DUE PROCESS CLAIM.

On September 30, 2011, the United States fired a missile from a drone to kill Anwar Al-Aulaqi, an American-Yemeni citizen and a leader of al-Qaeda of the Arabian Peninsula (AQAP).[27]

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22. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (describing "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" as a "fundamental requirement of due process").

23. *Cf.* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (describing "the opportunity to be heard" as "[t]he fundamental requirement of due process").

24. *See generally* Sinnar, *supra* note 19 (describing and critiquing procedural adjustments courts have made to accommodate secrecy concerns in national security cases).

25. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8 (D.D.C. 2010) [*Al-Aulaqi I*].

26. Kareem v. Haspel, 412 F. Supp. 3d 52, 55 (D.D.C. 2019), *vacated and remanded by*, 986 F.3d 859 (D.C. Cir. 2021).

27. Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56, 58 (D.D.C. 2014) [*Al-Aulaqi II*]. For a survey of legal issues raised by the targeted killing of Anwar al-Aulaqi, *see* Robert

Before this strike occurred, Al-Aulaqi's father, Nasser Al-Aulaqi, sued to try to block it.[28] The suit claimed that, in the absence of an armed conflict, the placement of Anwar Al-Aulaqi on a kill list violated his Fourth and Fifth Amendment rights as well as his rights under treaties and customary international law protected by the Alien Tort Statute.[29] As remedies, the suit sought a declaration that, outside an armed conflict, the Constitution bars the targeted killing of United States citizens, "except in circumstances in which they present a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat."[30] In addition, the suit sought a preliminary injunction barring the United States from intentionally killing Anwar Al-Aulaqi unless all of these conditions governing the use of lethal force outside of armed conflicts were satisfied.[31]

After extensive discussion of other threshold grounds for dismissal of Nasser Al-Aulaqi's claims,[32] Judge Bates turned to the problem of whether they were justiciable under the political question doctrine. To frame the discussion, he quoted the six factors that the Supreme Court identified in *Baker v. Carr* as bearing on its application:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made;

Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT'L HUMANITARIAN L. 3 (2010).

28. *Al-Aulaqi I*, 727 F. Supp. 2d 1.

29. *Id.* at 12 (citing 28 U.S.C. § 1350).

30. *Id.* (citing Complaint, Prayer for Relief (a) & ¶ 6, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-1469)).

31. *Id.* The suit also sought an order requiring the United States to disclose its standards for placing people on kill lists. *Id.*

32. *Id.* 14-35 (rejecting Nasser Al-Aulaqi's efforts to invoke next-friend or third-party standing to press claims based on injury to his son); *id.* at 35-43 (dismissing Alien Tort Statute (ATS) claims because Nasser Al-Aulaqi had not alleged a tort covered by the ATS and the United States had not clearly waived sovereign immunity).

> or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[33]

After listing these factors, Judge Bates conceded that they have been subject to "scathing" academic criticism and that "the category of political questions is more amenable to description by infinite itemization than by generalization."[34] This lack of conceptual clarity should not obscure, however, that "national security, military matters and foreign relations are quintessential sources of political questions."[35] That said, he conceded that "claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs."[36] A court applying the political question doctrine must therefore decide whether an issue touching on national security falls on the policy or law side of this fuzzy dichotomy.

Although Judge Bates ultimately tallied four of the *Baker* factors favoring dismissal,[37] the crux of his analysis was that Al-Aulaqi's suit raised "complex policy questions" rather than legal questions within the competence and authority of the court.[38] It seems fair to say that Nasser Al-Aulaqi's framing of the suit invited this conclusion by emphasizing that the laws governing civilian law enforcement rather than laws of armed conflict should control the United States government's efforts to capture or kill Anwar Al-Aulaqi.[39] Determining the existence and scope of an armed conflict obviously raises important and difficult questions of policy that are likely to be outside the competence—not to mention the comfort zone—of a federal judge.

Judge Bates categorically declared, "any post hoc judicial assessment as to the propriety of the Executive's decision to employ

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33. *Id.* at 44 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

34. *Id.* at 45 (quoting Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 933 (D.C.Cir.1988) (internal quotation marks and citations omitted)).

35. *Id.* (quoting El-Shifa Pharm. Indus. Co. v. United States, 607 F.2d 836, 841 (D.C. Cir. 2010) (en banc) (internal quotation marks omitted)).

36. *Al-Aulaqi I*, 727 F. Supp. 2d at 45-46 (quoting Schneider v. Kissinger, 412 F.3d 190, 198 (D.C. Cir. 2005)).

37. Judge Bates focused in particular on *Baker* factor two, the lack of judicially manageable standards, *id.* at 47, but also concluded that factor one, textual commitment to other branches, factor four, the need to preserve respect for other branches, and factor six, avoiding the embarrassment of multifarious pronouncements, all favored dismissal. *Id.* at 47-48.

38. *Id.* at 46.

39. *Id.*

military force abroad 'would be anathema to . . . separation of powers' principles."[40] For precedential support for this broad proposition, Judge Bates relied heavily on *El-Shifa Pharmaceutical Industrial Co. v. United States*, in which the plaintiffs sought damages after a missile strike ordered by President Clinton destroyed their pharmaceutical plant, which the United States had concluded was associated with al Qaeda and involved in the manufacture of chemical weapons.[41] Sitting en banc, the D.C. Circuit held that the political question doctrine barred this lawsuit, observing that "[i]n military matters . . . the courts lack the competence to assess the strategic decision to deploy force or to create standards to determine whether the use of force was justified or well-founded."[42] Adding an explanation point to its analysis, the D.C. Circuit declared, "[i]f the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target."[43] Judge Bates characterized Nasser Al-Aulaqi's suit as seeking precisely the sort of judicial intervention that *El-Shifa* proscribed.[44]

El-Shifa's categorical bar on judicial second-guessing of military decisions is difficult to square with the Supreme Court's foundational decision in *Hamdi v. Rumsfeld*, in which the Court rejected the contention that national security and separation-of-powers concerns blocked application of due process principles to military decisions to detain American citizens as enemy combatants.[45] Judge Bates addressed this tension by distinguishing *Hamdi* on two grounds. First, he invoked the initial *Baker* factor, noting that "military determinations are textually committed to the political branches."[46] Habeas corpus claims such as Hamdi's,

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40. *Id.* at 48 (quoting *El-Shifa* , 607 F.2d at 844).

41. *Id.* at 46 (discussing *El-Shifa,* 607 F.3d at 838).

42. *El-Shifa*, 607 F.3d at 844.

43. *Id.*

44. *Al-Aulaqi I*, 727 F. Supp. 2d at 46 (characterizing plaintiff's claims as "pos[ing] precisely the types of complex policy questions that the D.C. Circuit has historically held non-justiciable under the political question doctrine").

45. Hamdi v. Rumsfeld, 542 U.S. 507, 536-37 (2004) (plurality opinion). *See also id.* at 553-54 (Souter, J., concurring in part; joined by Justice Ginsburg) (joining the plurality to produce a judgment; indicating that Hamdi was entitled to at least as much in the way of due process protections as the plurality had prescribed). *Cf.* Boumediene v. Bush, 553 U.S. 723, 732 (2008) (holding that aliens held in indefinite detention at Guantanamo had constitutional right to habeas proceedings).

46. *Al-Aulaqi I*, 727 F. Supp. 2d at 48 (citing Schneider v. Kissinger, 412 F.3d 190, 194-95 (D.C. Cir. 2005)).

by contrast, are textually committed to the judiciary as indicated by the Constitution's Suspension Clause.[47]

Second, Judge Bates focused on the functional problem of judicial competence. In his view, Nasser Al-Aulaqi's requested relief, which sought "to prevent future U.S. military action in the name of national security against specifically contemplated targets," demanded a type of decision-making far beyond judicial competence and practice.[48] Resolution of habeas claims as in *Hamdi*, by contrast, lies within judicial expertise given that such claims focus on whether "the United States has unjustly deprived an American citizen of liberty through acts it has already taken."[49]

B. *AL-AULAQI II*—THE POLITICAL QUESTION DOCTRINE DID NOT BAR A DUE PROCESS CLAIM SEEKING DAMAGES, BUT "SPECIAL FACTORS" DID.

The drone strike that killed Anwar Al-Aulaqi also killed Samir Khan, another American citizen.[50] Two weeks later, a second drone strike killed Anwar Al-Aulaqi's sixteen-year-old son, Abdulrahman Al-Aulaqi.[51] Nasser Al-Aulaqi and Sarah Khan (mother of Samir Khan) sued various governmental officials in their personal capacities for violating the decedents' constitutional rights. More specifically, the plaintiffs contended that the defendants violated: (a) the decedents' rights to substantive and procedural due process under the Fifth Amendment; (b) the decedents' right to be free from unreasonable seizure under the Fourth Amendment; and (c) in Anwar Al-Aulaqi's case, the Bill of Attainder.[52] They sought damages for these violations via the *Bivens* cause of action.[53]

Judge Collyer rejected the government's contention that the political question doctrine required dismissal of the plaintiffs' due

47. *Id.* at 49-50 (citing *Boumediene*, 553 U.S. at 745; *El-Shifa*, 607 F.3d at 848-49).

48. *Id.* at 50.

49. *Id.* (D.D.C. 2010) (quoting Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 65 (D.D.C. 2004)).

50. Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56, 58 (D.D.C. 2014) [*Al-Aulaqi II*].

51. *Id.*

52. *Id.* at 66.

53. *Id. See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (recognizing that a plaintiff can sue a federal official for monetary damages for violation of certain constitutional rights).

process claims.[54] Like Judge Bates in *Al-Aulaqi I,* her analysis emphasized the basic dichotomy that, whereas determinations of law are for the judicial branch, the political question doctrine blocks judicial review of "policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."[55] Unlike Judge Bates,[56] however, she determined that the plaintiffs' claims fell on the law side of this justiciability divide.[57]

To support this conclusion, Judge Collyer relied on *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, in which the D.C. Circuit emphasized that "the Supreme Court has repeatedly found that claims based on [due process] rights are justiciable, even if they implicate foreign policy decisions."[58] In *U.S. Citizens,* the plaintiffs had contended that the United States' funding of the Contras deprived the plaintiffs "of liberty and property without due process of law because they were threatened by the war in Nicaragua and they were intended targets of the Contras."[59] The D.C. Circuit concluded that this claim was justiciable because "[t]he Executive's power to conduct foreign relations free from the unwarranted supervision of the Judiciary cannot give the Executive *carte blanche* to trample the most fundamental liberty and property rights of this country's citizenry."[60] The "same reasoning" required the conclusion that national security did not give political branch authorities "*carte blanche* to deprive a U.S. citizen of his life without due process and without any judicial review."[61]

Judge Collyer distinguished *El-Shifa*, the key D.C. Circuit case on which Judge Bates heavily relied for the proposition that the political question doctrine bars any judicial assessment of executive decisions to attack foreign targets,[62] on the ground that

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54. *Al-Aulaqi II*, 35 F. Supp. 3d at 70.

55. *Id.* at 68-69 (quoting Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986)).

56. *Al-Aulaqi I*, 727 F. Supp. 2d at 46.

57. *Al-Aulaqi II*, 35 F. Supp. 3d at 69.

58. *Id.* (alteration in original) (quoting Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 935 (D.C. Cir. 1988)).

59. *Id.* (citing *Comm. of U.S. Citizens Living in Nicaragua*, 859 F.2d at 935).

60. *Id.* (alteration and emphasis in original) (quoting *Comm. of U.S. Citizens Living in Nicaragua*, 859 F.2d at 935).

61. *Id.*

62. *See Al-Aulaqi I*, 727 F. Supp. 2d at 45.

the Sudanese plaintiffs in that case had not asserted any cognizable due process rights.[63] She did not otherwise elaborate, however, on why this distinction should matter to her application of the political question doctrine.

Judge Collyer's discussion of Judge Bates's own political question analysis in *Al-Aulaqi I* was similarly thin. In a footnote, she explained that, whereas Nasser Al-Aulaqi had sought prospective relief to block the killing of his son, the actual killing of Anwar Al-Aulaqi "raise[d] the issue" of whether the government had violated his due process rights "more directly and acutely."[64]

After rejecting the government's political question defense, Judge Collyer determined that the plaintiffs had stated due process claims sufficient to survive a motion to dismiss for failure to state a claim.[65] She nonetheless dismissed these claims on the ground that the plaintiffs could not invoke the *Bivens* remedy, which allows plaintiffs to recover monetary damages from government officials for violations of a small set of constitutional violations.[66] Judge Collyer explained that extending the *Bivens* remedy to targeted killing would be improper because it "would require the Court to examine national security policy and the military chain of command as well as operational combat decisions regarding the designation of targets and how best to counter threats to the United States."[67] The resulting judicial interference would intrude on war-making powers assigned to the political branches and hinder the ability of the national security apparatus "to act decisively and without hesitation in defense of U.S. interests."[68]

In short, Judge Collyer justified dismissal of the plaintiffs' due process claims in *Al-Aulaqi II* by invoking the same type of

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63. *Al-Aulaqi II*, 35 F. Supp. 3d at 70 ("*El-Shifa* is distinguishable from this case in key respects—the *El-Shifa* plaintiffs were not U.S. citizens and there was no allegation that they had a substantial connection to the United States that might have given rise to cognizable Fifth Amendment rights.").

64. *Id.* at 70 n.21.

65. *Id.* at 74 ("The Court does not opine that Anwar Al-Aulaqi was entitled to notice and a predeprivation hearing, or that his Estate was entitled to a postdeprivation hearing, or that the drone killing of Anwar Al-Aulaqi 'shocks the conscience.' The Court merely holds that the Complaint states a 'plausible' procedural and substantive due process claim on behalf of Anwar Al-Aulaqi.").

66. *Id.*

67. *Id.* at 79 (citing Doe v. Rumsfeld, 683 F.3d 390, 396 (D.C. Cir. 2012)).

68. *Id.* at 74 (citing *Doe,* 683 F.3d at 395).

separation-of-powers and national security concerns that had motivated Judge Bates to dismiss based on the political question doctrine in *Al-Aulaqi I*. She did, however, find a different doctrinal basis for these concerns.

C. THE *KAREEM* LITIGATION—A DUE PROCESS CLAIM SURVIVES THE POLITICAL QUESTION DOCTRINE, BUT NOT THE STATE-SECRETS PRIVILEGE OR STANDING.

1. THE DISTRICT COURT HELD THAT *KAREEM*'S ALLEGATIONS WERE SUFFICIENT FOR STANDING.

The result of *Al-Aulaqi II* left open the possibility that Judge Collyer might be willing to reach the merits of a due process claim relating to targeted killing that sought injunctive or declaratory relief rather than using *Bivens* to seek monetary relief. This possibility became more than academic after two journalists who reported on conflicts in the Middle East, Zaidan (a citizen of Syria and Pakistan) and Kareem (an American citizen), brought suit in Judge Collyer's court to challenge their alleged placements on a kill list.[69] In addition to various non-constitutional claims,[70] Zaidan and Kareem alleged that their due process rights, as well as their rights to free speech under the First Amendment, had been violated.[71]

The government sought dismissal of both plaintiffs' claims for lack of constitutional standing. Under the *Twombly/Iqbal* framework, a court considering a motion to dismiss should accept all well-pleaded factual allegations as true, ignore allegations that amount to mere legal conclusions, and then determine whether the allegations that are left indicate that the plaintiff

69. Zaidan v. Trump, 317 F. Supp. 3d 8, 13-14 (D.D.C. 2018).

70. *Id.* at 15 (alleging violations of an executive order barring assassinations, Exec. Order No. 12333, 3 C.F.R. § 1.3(b) (1981); statutory prohibition on war crimes, 18 U.S.C. § 2441; statutory bar on conspiracy to murder abroad, 18 U.S.C. § 956(a)(1); limits set by the Authorization for Use of Military Force, 50 U.S.C. § 1541; Article 6 of the International Covenant on Civil and Political Rights; and the Presidential Policy Guidance set forth in Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (May 22, 2013)).

71. *Zaidan*, 317 F. Supp. 3d at 15. Kareem, the American citizen, also claimed that his placement on a kill list violated his Fourth Amendment right to be free from unreasonable seizure. *Id.*

has stated a "plausible" claim for relief.[72] Plausibility demands something less than probability but more than mere conceivability.[73]

Applying *Twombly/Iqbal*, the court dismissed Zaidan's claims for lack of standing on the ground that his allegations did not raise a plausible inference that the United States had caused him injury by targeting him.[74]

Kareem's allegations, by contrast, were sufficient to survive the motion to dismiss.[75] Especially pertinent allegations included:

- High-ranking government officials, including Presidents Obama and Trump, were, on "information and belief," involved in placement of the plaintiff onto a kill list.[76]
- The process for target selection used algorithms that rely on information concerning potential targets' travel, communications, social media, metadata, etc. Application of this process to Kareem led the United States to incorrectly identify him as a terrorist and place him on a kill list.[77]
- Over a three-month period, Kareem was nearly killed by five missile strikes, which, "on information and belief," were targeted at him.[78] Of special note, in the third of these attacks, a drone-launched Hellfire missile destroyed a vehicle used by Kareem and his staff. Kareem "only survived because he was wearing a bullet-proof press vest."[79]

The government argued that the obvious explanation for the five near-misses was that Kareem worked as "a journalist reporting from a dangerous and active battlefield."[80] The court conceded that this explanation was plausible. Nonetheless, Kareem's ex-

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72. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

73. *Ashcroft*, 556 U.S. at 678 (observing that the plausibility standard does not require probability but does require something more than "sheer possibility").

74. *Zaidan*, 317 F. Supp. 3d at 16-18.

75. *Id.* at 19.

76. Complaint at ¶¶ 5-8, 10, 12, 14-16, Zaidan v. Trump, 317 F. Supp. 3d 8 (D.D.C., March 30, 2017) (No. 1:17-cv-00581).

77. *Id.* at ¶¶ 1 & 45.

78. *Id.* at ¶ 52.

79. *Id.* at ¶ 49.

80. *Zaidan*, 317 F. Supp. 3d at 20 (quoting Defendants' Motion To Dismiss at 8).

planation—that the U.S. government was trying to kill him—was also "plausible" given his allegations regarding the government's campaign of "targeted drone strikes," that he has "been the near victim of a military strike on five occasions," and that "he is a journalist who is often in contact with rebel or terrorist organizations."[81] The court also took special note that the defendants conceded at oral argument that Kareem "specifies that at least one of the strikes was from a Hellfire missile of the kind used by the U.S. without identifying the other weapons to the contrary."[82]

2. THE DISTRICT COURT HELD THAT *KAREEM*'S CONSTITUTIONAL CLAIMS SURVIVED THE POLITICAL QUESTION DOCTRINE.

Turning to the political question doctrine, Judge Collyer began her analysis by distinguishing *Al-Aulaqi I* on the ground that Judge Bates had construed the complaint in that case as requiring him "to determine the facts and judge the legitimacy of military decisions made thousands of miles away."[83] By contrast, the alleged decision to place Kareem on a kill list, if it had actually occurred, had taken place according to specified procedures in or around Washington, D.C.[84] Review of this bureaucratic decision, unlike review of the particulars of a military strike thousands of miles away, did not call for a "non-judicial feat."[85]

After drawing this distinction, Judge Collyer held that the political question doctrine nonetheless barred Kareem's non-constitutional claims because, in the final analysis, resolving them would require the court "to delve into the propriety or merit of the decision to place Mr. Kareem on the Kill List."[86] Judge Collyer explained that the court could not engage in this type of exercise given the D.C. Circuit's instruction in *El-Shifa* that the political question doctrine bars courts from second-guessing the wisdom of military actions.[87]

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81. *Id.*

82. *Id.*

83. *Id.* at 24.

84. *Id.* at 25.

85. *Id.*

86. *Id.* at 26.

87. *Id.* (quoting El-Shifa Pharm. Indus. v. United States, 607 F.3d 836, 842 (D.C. Cir. 2010) (en banc) (barring review of "claims requiring [courts] to decide whether taking military action was wise—a policy choice and value determination

Judge Collyer also held, however, that the political question doctrine did not require dismissal of Kareem's constitutional claims, which she characterized as boiling down to the proposition that he had been "deprived of his constitutional rights when Defendants designated him for the Kill List and deprived him of a prior opportunity to be heard."[88] To support her conclusion, the judge reiterated that the Supreme Court has found due process claims justiciable even if they touch on foreign policy, and she stressed the importance of due process protections for the life interest.[89] She also observed that the Supreme Court's *Hamdi* decision, which applied due process principles to the detention of an American citizen as an enemy combatant, supported the justiciability of a constitutional claim bearing on whether to kill an American citizen as an enemy combatant.[90]

Judge Collyer distinguished *El-Shifa* on the ground that Kareem's constitutional claims, unlike the non-constitutional ones, did not seek forbidden second-guessing of military judgments.[91] Rather, according Judge Collyer, Kareem sought "his birthright instead: a timely assertion of his due process rights under the Constitution to be heard before he might be included on the Kill List and his First Amendment rights to free speech before he might be targeted for lethal action due to his profession."[92]

3. BUT THE DISTRICT COURT DISMISSED BASED ON THE STATE-SECRETS PRIVILEGE.

Judge Collyer never reached the merits of Kareem's "plausible" due process claim because she granted the government's sub-

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constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch") (alteration in original)).

88. *Id.*

89. *Id.* at 26-27 (citing, *inter alia*, Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 935 (D.C. Cir. 1988)).

90. *Id.* at 26-27 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004)). Judge Collyer also relied on a D.C. Circuit opinion that applied *Hamdi*'s due process principles in a case where a citizen-detainee sought to block transfer from the U.S. to a foreign country. *Id.* (quoting Doe v. Mattis, 889 F.3d 745, 759 (D.C. Cir. 2018) (noting that a citizen "must have a meaningful opportunity to challenge the factual basis for his designation as an enemy combatant")).

91. *Id.*

92. *Id.* at 28. *But see* Chesney, *supra* note 11 (noting that the logic of the principle that the political question doctrine bars any questioning of a military judgment to place a person on a kill-capture list would seem to doom not just claims based on statutes or executive orders but constitutional claims as well).

sequent motion to dismiss based on the state-secrets privilege.[93] The government can use this absolute privilege to block disclosure of information in litigation where "there is a reasonable danger" that the disclosure "will expose military matters which, in the interest of national security, should not be divulged."[94] Judge Collyer concluded that the government had demonstrated that answering Kareem's discovery requests, which sought information concerning target-selection procedures as well as whether the government had targeted and attempted to kill him, would pose a danger to national security.[95]

Application of the state-secrets privilege requires dismissal where: "(1) disclosure is necessary for the plaintiff to make its *prima facie* case; (2) disclosure is necessary for the defendant to defend itself; or (3) further litigation would present an unjustifiable risk of disclosure."[96] In three short paragraphs, the court concluded that all three of these factors demanded dismissal of Kareem's case. The key point of this analysis was that, without access to privileged information, Kareem could not "establish whether he was targeted by lethal force or what information was considered in reaching the alleged decision to target him,"[97] and he therefore could prove neither standing nor a prima facie case.

Thus, although the political question doctrine did not block Kareem from asserting his "birthright" of due process, the government's need to keep secret whether it was trying to kill him did.

4. THE D.C. CIRCUIT SWITCHED THE GROUND OF DISMISSAL TO STANDING.

On appeal, a D.C. Circuit panel, in a unanimous opinion, vacated and remanded with instructions to dismiss for lack of

93. Kareem v. Haspel, 412 F. Supp. 3d 52, 55 (D.D.C. 2019) (Collyer, J.), *vacated and remanded by*, 986 F.3d. 859 (D.C. Cir. 2021). *Cf.* Richard D. Rosen, *Drones and the U.S. Courts*, 37 WM. MITCHELL L. REV. 5280, 5292 (2011) (citing state-secrets privilege as one of several doctrines likely to doom efforts to challenge targeted killings in U.S. courts).

94. *Kareem*, 412 F. Supp. 3d at 56 (quoting United States v. Reynolds, 345 U.S. 1, 10 (1953)).

95. *Id.* at 57-58 (quoting Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1204 (9th Cir. 2007)).

96. *Id.* at 61 (citing Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1087 (9th Cir. 2010)).

97. *Id.* at 61-62.

standing.[98] In this court's view, Kareem's "standing theory [did] not cross the line from conceivable to plausible."[99] His complaint therefore failed to meet the plausibility requirement of the *Twombly/Iqbal* framework.[100]

In one important sense, the D.C. Circuit's disagreement with Judge Collyer on this point is beyond meaningful critique because the line between "conceivable" and "plausible" claims for relief is fuzzy and to some degree subjective.[101] That said, the panel seems to have bent over backwards to get rid of Kareem's case for lack of standing.

Again, the *Twombly/Iqbal* framework instructs a court to accept all "well-pleaded factual allegations" in a complaint as true before assessing plausibility.[102] As set forth above,[103] Kareem repeatedly alleged that the United States government had targeted him. Accepting these allegations as true would have required the court to accept Kareem's theory of injury and to reject the government's motion to dismiss for lack of standing.

The court might have avoided this disposition by characterizing Kareem's express allegations of targeting as mere "legal conclusions" that should be ignored.[104] Rather than do so, the court instead seized on the point that these allegations were made "on information and belief."[105] The court explained that, although such pleadings are allowed where defendants control "necessary information," they must "be accompanied by a statement of the facts upon which the allegations are based."[106] To support this contention, the court largely relied on precedents applying the heightened pleading requirements for fraud allegations of Fed. R.

98. Kareem v. Haspel, 986 F.3d. 859, 862 (D.C. Cir. 2021).

99. *Id.* at 861-62.

100. *Id.* at 869.

101. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (observing that "[d]etermining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense").

102. *See id.* at 678; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

103. *See supra* notes 76-79 (summarizing Kareem's allegations bearing on targeting).

104. *Cf. Ashcroft*, 556 U.S. at 678.

105. *Kareem*, 986 F.3d. at 866.

106. *Id.*

Civ. P. 9(b).[107] The court did not explain why the stricter pleading requirements of Rule 9(b) should have any significance for the standard *Twombly/Iqbal* pleading requirements applicable to Kareem's complaint.[108]

Putting to one side any strain on precedent, the court effectively stripped the allegations made "on information and belief" out of the complaint. After doing so, it turned to whether Kareem's other relevant allegations, which most notably included the allegations concerning the five missile strikes, raised a plausible inference that he had been targeted by the United States. The court concluded that they did not, largely on the ground that the five strikes occurred in "major battlefields" in a vicious civil war with many competing factions and several nations that could have been responsible.[109]

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107. *See id.* (citing Kowal v. MCI Commc'ns Corp., 16 F.3d 1271, 1279 n.3 (D.C. Cir. 1994) (explaining that "standards for pleadings on information and belief must be construed consistent with the purposes of Rule 9(b)") (citing *In re* Craftmatic Sec. Litig., 890 F.2d 628, 645-46 (3d Cir. 1989) (holding that "even under a non-restrictive application of the rule, pleaders must allege that the necessary information lies within defendants' control, and their allegations must be accompanied by a statement of the facts upon which the allegations are based" to show that the allegation is not "baseless")). For further support of its disposal of Kareem's allegations made "on information and belief," the court did include an additional "see also" citation to one precedent that did not arise in a Rule 9(b) context. *Kareem*, 986 F.3d. at 866 (citing Tooley v. Napolitano, 586 F.3d 1006, 1007-08, 1010 (D.C. Cir. 2009)). In *Tooley*, however, the court did not discount the plaintiff's allegations merely because they were made on information and belief. Instead, it dismissed the plaintiff's claims as "patently insubstantial," alleging a "particular combination of sloth, fanaticism, inanity and technical genius" so absurd as to be "not realistically distinguishable from allegations of 'little green men' of the sort that Justice Souter recognized in *Iqbal* as properly dismissed on the pleadings." *Tooley,* 586 F.3d at 1009-10 (citing *Iqbal*, 556 U.S. 662, 696 (2009)). Whatever else might be said about Kareem's pleadings relating to targeting, they did not fall into the "little green men" category of the fantastical.

108. *Cf.* Park v. Thompson, 851 F.3d 910, 928 (9th Cir. 2017) (quoting Arista Record LLC v. Doe, 604 F.3d 110, 120 (2d Cir. 2010) (observing, "[t]he *Twombly* plausibility standard . . . does not prevent a plaintiff from 'pleading facts alleged "upon information and belief"' where the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible") (internal citations omitted)).

109. *Kareem*, 986 F.3d. at 867-69. The court added that the strongest indication in Kareem's complaint of targeting by the United States was his allegation that the third airstrike had come from a "drone-launched Hellfire missile." *Id.* at 867. The court discounted this allegation, however, because Kareem had during the appellate proceedings "apparently retreated from the assertion" that this strike had been made by a Hellfire missile. *Id.* at 868. His opening brief asserted that the strike came from "*what appeared to be* a Hellfire missile," and his reply brief explained that he "believed" the strike came from a Hellfire missile "because of its strength and the

III. A LITTLE DUE PROCESS FOR KILL LISTS

As we have seen, an American citizen bringing a due process challenge to his purported placement on a kill list must run a gauntlet of threshold issues including constitutional standing, the political question doctrine, and the state-secrets privilege.[110] As the D.C. Circuit's disposition in *Kareem* shows, the first of these grounds, constitutional standing, poses a major barrier, but the possibility that a plaintiff might overcome it is not totally academic. For instance, although in *Al-Aulaqi I* Judge Bates ruled that Nasser Al-Aulaqi lacked constitutional standing to challenge targeting of his son,[111] the circumstances of the case strongly suggest that Anwar Al-Aulaqi, had he chosen to bring suit himself, could have alleged facts sufficient to indicate that the United States had targeted him for death.[112] Also, recall that Kareem's allegations regarding targeting persuaded Judge Collyer to reject a motion to dismiss for lack of standing.[113] Presumably, there are other members of the federal bench who would have reached the same conclusion on the issue of whether Kareem's allegations raised a plausible inference of targeting. Of course, the D.C. Circuit's reversal on the issue demonstrates that other judges may prove more demanding when applying the fuzzy *Twombly/Iqbal* plausibility standard in this context.[114]

The possibility that a plaintiff's due process claim of illegal targeting might survive a standing objection naturally raises the question of whether it could also survive application of the political question doctrine and the state-secrets privilege. To justify an

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damage it caused." *Id.* In light of these statements, the court regarded Kareem's allegation of a Hellfire strike as "nothing more than a conclusory assertion made on an equivocal factual basis." *Id.*

110. *Cf.* Jaber v. United States, 861 F.3d 241, 250 (D.C. Cir. 2017) (Brown, J., concurring) (observing that, in the United States, in contrast to other liberal democracies, "strict standing requirements, the political question doctrine, and the state secrets privilege confer such deference to the Executive in the foreign relations arena that the Judiciary has no part to play").

111. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 28 (D.D.C. 2010) (concluding that killing of Anwar Al-Aulaqi would not cause cognizable injury to Nasser Al-Aulaqi because he did not have a legally protected interest in preserving his relationship with an adult son) [*Al-Aulaqi I*].

112. *See id.* at 10-11 (noting Anwar Al-Aulaqi's official designation as a "Specially Designated Global Terrorist," as well as press reports based on unidentified military and intelligence sources that he had been placed on kill lists by the CIA and Joint Special Operations Command).

113. Zaidan v. Trump, 317 F. Supp. 3d 8, 20 (D.D.C. 2018).

114. *Kareem*, 986 F.3d. at 862.

affirmative answer to this question, the balance of this Article, drawing its chief inspiration from *Hamdi v. Rumsfeld,*[115] explains how a carefully limited form of judicial review could avoid the national security and separation-of-powers concerns that underlie these two doctrines as well as why due process should demand such review.

A. *HAMDI* AND DUE PROCESS FOR DETENTION OF ENEMY COMBATANTS

Hamdi revolved around determining the procedures that should apply to challenges to the continued detention of American citizens as "enemy combatants" in the war-on-terror.[116] "Enemy combatants," for this purpose, are persons who are "part of or supporting forces hostile to the United States or coalition partners" and are "engaged in an armed conflict against the United States."[117]

Yaser Hamdi was born in Louisiana, raised in Saudi Arabia, and by 2001, residing in Afghanistan.[118] During 2001, members of the Northern Alliance, an anti-Taliban coalition, captured Hamdi and turned him over to the United States military. After detaining and interrogating Hamdi in Afghanistan, the military transferred him to the United States naval base at Guantanamo Bay, where he was held without criminal charges as an "enemy combatant." After learning of Hamdi's American citizenship, the military transferred him to naval brigs in the United States. Hamdi's father sought a writ of habeas corpus for his son's release.

At the district court, the only evidentiary support the Government mustered for Hamdi's detention was a declaration submitted by Michael Mobbs, a Defense Department official, who averred that, based on review of relevant records, he was "familiar with the facts and circumstances related to the capture of . . . Hamdi and his detention by U.S. military forces."[119] The Mobbs Declaration stated that Hamdi had "affiliated with a Taliban mil-

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

116. *Id.* at 509 (O'Connor, J., plurality).

117. *Id.* at 526 (stating definition of "enemy combatant" that the Court had accepted as within congressional authorization).

118. For the Supreme Court's discussion of the factual circumstances set forth in the balance of this paragraph, *see id.* at 510-12.

119. *Id.* at 512 (quoting declaration of Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy [hereinafter "Mobbs Declaration"]).

itary unit and received weapons training" and that, after his unit had surrendered during battle to Northern Alliance forces, Hamdi had turned over a Kalashnikov rifle to them.[120] The declaration also stated that a series of United States military screening teams had concluded that Hamdi qualified as an "enemy combatant."[121]

The Supreme Court, after concluding that the Government had statutory authority to hold American citizens as enemy combatants,[122] faced the problem of determining "what process is constitutionally due to a citizen who disputes his enemy-combatant status."[123] Hamdi insisted that due process demanded that "he receive a hearing in which he may challenge the Mobbs Declaration and adduce his own counterevidence."[124]

The Government countered that "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making" required that courts avoid any individualized review of detainee claims questioning the factual basis for detention.[125] The Government's fallback position was that, if the courts were to conduct any such individualized review at all, they should confine themselves to determining whether "some evidence" submitted by the government supported detention.[126] This standard is satisfied where there is "'any evidence in the record that could support the conclusion.'"[127] As applied to Hamdi's habeas petition, a court would assume everything in the Mobbs Declaration was true and determine whether it provided a legitimate basis for holding Hamdi as an enemy combatant.[128]

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120. *Id.* at 513 (quoting Mobbs Declaration).

121. Hamdi v. Rumsfeld, 542 U.S. 507, 513 (2004) (O'Connor, J., plurality).

122. *See id.*at 516-17 (concluding government had statutory authority to detain Hamdi as an enemy combatant under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. §1541 note)); *id.* at 579 (Thomas, J., dissenting) (stating that the government had constitutional and statutory authority to detain Hamdi as an enemy combatant).

123. *Id.* at 524.

124. *Id.* at 528.

125. *Id.* at 527 (alteration in original) (quoting government's briefing). The government conceded that courts could properly determine "whether legal authorization exists for the broader detention scheme." *Id.*

126. *Id.*

127. Hamdi v. Rumsfeld, 542 U.S. 507, 527 (2004) (O'Connor, J., plurality) (quoting Superintendent, Mass. Corr. Inst. at Walpole v. Hill, 472 U.S. 445, 455-57 (1985)).

128. *Id.* at 527-28.

Justice O'Connor's controlling plurality opinion "reject[ed] the Government's assertion that separation of powers principles mandated a heavily circumscribed role for the courts in such circumstances."[129] She added that, even during wartime, "the United States Constitution . . . most assuredly envisions a role for all three branches when individual liberties are at stake."[130] She also noted that the "Great Writ of habeas corpus," in the absence of congressional suspension, authorized the courts to serve "as an important judicial check on the Executive's discretion in the realm of detentions."[131]

To determine more precisely what role the courts should play in reviewing determinations of "enemy combatant" status, the controlling plurality applied the *Mathews v. Eldridge* balancing test.[132] *Mathews* famously instructs courts, when determining whether due process demands additional procedural protections than the government has supplied, to consider:

> 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 the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[133]

Hamdi, of course, had a strong, even "elemental," private interest in his freedom.[134] The government has strong interests in preventing enemy combatants from returning to the field and

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129. *Id.* at 535-36 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)).

130. *Id.* (citing Mistretta v. United States, 488 U.S. 361, 380 (1989)).

131. *Id.* at 536.

132. *Id.* at 529 (O'Connor, J., four-justice plurality). *See also id.* at 553-54 (Souter, J., concurring in part) (explaining that, although Justices Souter and Ginsburg had determined that the government lacked statutory authority to detain Hamdi as an enemy combatant, the two Justices nonetheless joined the plurality's due process analysis, albeit with reservations, "to give practical effect to the conclusions of eight Members of the Court rejecting the Government's position").

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

134. Hamdi v. Rumsfeld, 542 U.S. 507, 529-30 (2004) (O'Connor, J., plurality). (noting that Hamdi asserted "the most elemental of liberty interests—the interest in being free from physical detention by one's own government").

maintaining efficient military operations free from litigation burdens.[135]

After recognizing these countervailing interests, Justice O'Connor concluded that the government's minimalist procedural approach, which required accepting the truth of its evidence and gave detainees no chance to respond,[136] failed the *Mathews* balancing test because it carried an unacceptably high risk of error that additional process could reduce at acceptable cost.[137] To the contrary, Hamdi was constitutionally entitled to "receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[138]

Justice O'Connor was quick to add, however, that application of these core protections of due process could be "tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[139] As examples of such tailoring, she noted that, although Hamdi must have a fair opportunity to rebut the government's evidence, hearsay could nonetheless "be accepted as the most reliable available evidence from the Government in such a proceeding."[140] She added that due process would permit application of a rebuttable presumption favoring the Government's evidence.[141] Taking this approach, "once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria."[142] Continuing in this same flexible spirit, Justice O'Connor also recognized that an "appropriately authorized and properly constituted military tribunal" might be able to provide the required "neutral decisionmaker" for de-

135. *Id.* at 531-32 (adverting to government interests in ensuring that enemy combatants do not return to the battlefield, avoiding "the practical difficulties that would accompany a trial-like process," and in avoiding "intru[sion] on the sensitive secrets of national defense").

136. *See id.* at 527-28.

137. *Id.* at 531-32.

138. *See id.* at 533 (citations omitted).

139. *Id.*

140. Hamdi v. Rumsfeld, 542 U.S. 507, 533-34 (2004) (O'Connor, J., plurality).

141. *Id.* at 534.

142. *Id.*

termining enemy combatant status.[143] In the absence of such a tribunal, however, "a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved."[144]

After sketching this "basic process," Justice O'Connor explained why it was unlikely that it would "have the dire impact on the central functions of warmaking that the Government forecasts."[145] This process would not apply to initial captures but instead to decisions made at relative leisure "to *continue* to hold those who have been seized."[146] The government maintains documentation regarding grounds for detention in its ordinary course, and a "knowledgeable affiant" should be able "to summarize these records to an independent tribunal" with minimal burden.[147] Moreover, the process should "meddle[ ] little, if at all, in the strategy or conduct of war" given that its focus would be on whether the detainee's own actions justified categorization as an "enemy combatant" who had joined or supported armed forces actively opposed to the United States.[148]

B. TRANSPOSING *HAMDI* TO KILL LISTS TO FIND A DUE PROCESS RIGHT TO JUDICIAL REVIEW

In *Hamdi,* the Court determined that due process demanded a flexible but meaningful form of independent review of military detention of American citizens as enemy combatants because the Court concluded that, on balance, such review would enhance protection of detainees' private interests without imposing unacceptable costs on national security.[149] This conclusion naturally suggests that a similar due process cost/benefit analysis should apply when determining the procedures that should govern placement of American citizens on a kill list as enemy combat-

143. *Id.* at 538. In the aftermath of *Hamdi*, the government instituted Combat Status Review Tribunals (CSRTs) to provide the independent review function identified by Justice O'Connor. The Supreme Court ruled that these CSRTs failed to provide a constitutionally sufficient substitute for habeas proceedings in Boumediene v. Bush, 553 U.S. 723, 789 (2008).

144. *Hamdi*, 542 U.S. at 538.

145. *Id.* at 534.

146. Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004) (O'Connor, J., plurality).

147. *Id.*

148. *See id.* at 535.

149. *Id.* at 532-35.

ants. As explained below, a very conservative, pro-government approach to striking this balance suggests that, at the very least, American citizens who sue to challenge their purported placement on a kill list should have a due process right to limited but independent review by a court.

Application of the *Mathews* balancing test is an exercise in judgment rather than math—with the judgments of five Justices ultimately controlling in those cases that make their way to the Supreme Court.[150] To narrow and clarify the judgments potentially at issue, let us stipulate to two preliminary determinations that weigh heavily toward protection of national security interests. First, although pre-deprivation notice is typically a fundamental requirement of due process,[151] the government need not provide such notice to targeted persons because doing so would cause excessive damage to national security. Such notice would presumably inspire targets to take greater precautions to prevent the United States from killing them.[152] Public identification of targets might also expose sources and methods of intelligence.[153]

Second, although due process requires a fair opportunity to be heard,[154] the government need not share "secret" evidence

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150. *See* Gary Lawson, Katharine Ferguson & Guillermo A. Montero, *"Oh Lord, Please Don't Let Me Be Misunderstood!" Rediscovering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 NOTRE DAME L. REV. 1, 5 (2005) (explaining that the *Mathews* three-factor test, rather than providing a "decision making algorithm," instead serves "the more modest, but nonetheless important, ambition of providing a framework or structure for discussion of the issues arising in . . . due process law").

151. *See, e.g.*, Zinernon v. Burch, 494 U.S. 113, 127-28 (1990) (noting that the Court "usually has held that the Constitution requires some kind of a hearing before the State deprives a person of liberty or property" but adding that, "[i]n some circumstances, . . . the Court has held that a statutory provision for a postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process").

152. Kareem v. Haspel, 412 F. Supp. 3d 52, 58 (D.D.C. 2019) (Collyer, J.) (noting declarations from high level officials discussing these risks), *vacated and remanded by* 986 F.3d. 859, 862 (D.C. Cir. 2021).

153. *Id.* (citing Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1204 (9th Cir. 2007)), *vacated and remanded by* 986 F.3d 859 (2021). *But see* Murphy & Radsan, *supra* note 6, at 834 (suggesting that, subject to precautions to protect security concerns, due process should require the government to post lists of targetable persons).

154. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965), as describing "the opportunity to be heard" as "[t]he fundamental requirement of due process"). *Cf.* Brief of Former State & Federal Prosecutors as Amici Curiae in Support of Appellant and Urging Reversal at 2, Kareem v. Haspel, 986 F.3d 859 (D.C. Cir. March 16, 2020) (No. 19-5328) (contending

supporting its targeting decisions with targets themselves because doing so would run even more obvious risks of exposing sources and methods of intelligence.[155] This concession may be more severe than protection of national security strictly requires given that in some contexts the government has allowed opposing counsel with a suitable security clearance to review classified information without divulging it to their client.[156] On a closely related point, the issue of whether due process requires that Guantanamo detainees or their counsel have access to classified information is currently being litigated.[157]

While the preceding concessions should greatly lessen if not eliminate national security and separation-of-powers concerns, they still leave room for a court to apply a third core element of due process, the right to a neutral decisionmaker.[158] This aspect of due process has deep roots in the dictum that "no man should be judge of his own cause."[159] It also finds expression in case law

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that "the due process clause will not allow the government to murder a citizen without first granting him an opportunity to see and rebut the evidence against him in a competent court") (capitalization altered).

155. *Cf. Kareem*, 412 F. Supp. 3d at 58-59 (rejecting argument that Kareem's due process right to life should overcome state-secrets privilege), *vacated and remanded by* 986 F.3d. 859 (D.C. Cir. 2021).

156. *See* Sinnar, *supra* note 19, at 1017 (observing that cleared counsel in the Guantanamo detainee litigation may review classified information but not divulge it to their clients; also noting Second Circuit authority, *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 93, 122 (2d Cir. 2008), that allows a defendant's lawyer, but not the defendant, to review classified information in some criminal cases involving application of the Classified Information Procedures Act (CIPA); adding, however, that "the potential for counsel to obtain classified information in civil cases remains unclear"). *See also* Kashem v. Barr, 941 F.3d 358, 380 (9th Cir. 2019) (noting that the government can mitigate the unfairness of relying on classified information by disclosing evidence to cleared counsel or providing summaries).

157. Qassim v. Trump, 927 F.3d 522, 528 (D.C. Cir. 2019) (remanding to district court to determine whether Guantanamo detainee had due process right that he or his counsel be able to review classified information). *Cf.* Boumediene v. Bush, 553 U.S. 723, 783-84 (2008) (indicating that Combat Status Review Tribunals (CSRTs) that the government created to provide independent review of detentions at Guantanamo were constitutionally inadequate in part due to detainees' inability to review classified information).

158. Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (O'Connor, J., plurality) (referencing Hamdi's right to review by a neutral decisionmaker). *See also* Ward v. Vill. of Monroeville, 409 U.S. 57, 61-62 (1972) (holding due process requires "a neutral and detached judge").

159. *See, e.g.,* Fredrick Schauer, *Judicial Supremacy and the Modest Constitution,* 92 CAL. L. REV. 1045, 1057 (2004) (observing that this principle "pervades our principles of institutional design"). *See also* Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 876 (2009) (declaring, "[i]t is axiomatic that '[a] fair trial in a fair

holding that officials should not function as prosecutors and adjudicators in the same case.[160] Along these lines, Justice O'Connor's controlling opinion in *Hamdi* recognized, "[a]n interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker."[161]

Of course, if the government does not notify a person that he has been placed on a kill list, he may never think to try to use official government mechanisms to contest this placement. As both *Kareem* and *Al-Aulaqi I* demonstrate, however, even without official notice, some people may be in a position to infer that they have been targeted and to sue in federal court to challenge this decision.[162] In that case, the court itself could, as *Hamdi* suggests, serve as a neutral decisionmaker to review whether sufficient grounds exist for targeting the plaintiff.[163]

A procedure for such review might run something like the following: A plaintiff sues the government for violating his due process rights by placing him on a kill list. The government, we might expect, would respond with a motion to dismiss for lack of standing. If this motion proves unsuccessful, the plaintiff moves for summary judgment, submitting any evidence in his possession indicating he should not be a target. The government would both oppose the plaintiff's motion and move for summary judgment in its own right. To protect national security interests, it would claim the state-secrets privilege for any sufficiently sensitive evi-

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tribunal is a basic requirement of due process'") (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)); Tumey v. Ohio, 273 U.S. 510, 522 (1927) (noting "general rule" that "interest in the controversy to be decided" disqualifies judicial or quasi-judicial officers); THE FEDERALIST NO. 10 (James Madison) (J. Cooke ed., 1961) (observing, "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity").

160. Williams v. Pennsylvania, 136 S. Ct. 1899, 1905 (2016) (holding that "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case"). *But see* Withrow v. Larkin, 421 U.S. 35, 58 (1975) (holding that "combination of investigative and adjudicative functions does not, without more, constitute a due process violation").

161. *Hamdi*, 542 U.S. at 537.

162. *See* Kareem v. Haspel, 986 F.3d. 859, 862 (D.C. Cir. 2021) (dismissing for lack of constitutional standing suit of journalist who claimed that United States had illegally targeted him); Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 1 (D.D.C. 2010) (Bates, J.) (dismissing on a variety of justiciability grounds a suit brought by Nasser Al-Aulaqi to enjoin the targeted killing of his son, Anwar Al-Aulaqi) [*Al-Aulaqi I*].

163. *See Hamdi*, 542 U.S. at 538.

dence that it submits in support of its opposition.[164] The court would review privileged evidence *in camera*, without sharing it with the plaintiff.[165]

In support of its position, the government might submit evidence showing either that the plaintiff is not on a kill list, or if the plaintiff is on one, why he belongs there. Where the government asserts that the plaintiff is not on a kill list and the plaintiff has no direct evidence to the contrary, summary judgment for the government would be in order. If the plaintiff is on a kill list, then, assuming the absence of prior review of this decision by an independent decisionmaker, the court would grant summary judgment on the issue of whether the plaintiff's due process rights have been violated. As a remedy, the court would itself play the role that due process demands,[166] reviewing the evidence to determine if the government had a sufficient basis for its targeting decision. To steer clear of excessive second-guessing of military judgments that might violate the political question doctrine, the factual element of this review would be limited to determining whether the government's targeting decision has reasonable support in the record.[167] If the government's decision has reasonable support, the court would leave it unaltered; if it lacks reasonable support, then the court would order the plaintiff's removal from the kill list.

In any event, the court, although it would inform the plaintiff of the issuance of a final order, would never reveal to the plaintiff whether he was ever on a kill list or remained on one. Instead, the plaintiff would need to settle for the knowledge that

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164. *See* Andresen, *supra* note 6, 181-82 (extolling capacity of courts to handle highly classified information without breaching confidentiality).

165. *Cf.* Sinnar, *supra* note 19, at 1012-15 (describing innovative use of *in camera* review by courts to preserve secrecy in national security cases).

166. *See Hamdi*, 542 U.S. at 538 (indicating courts could provide neutral review to satisfy due process). For additional commentary suggesting due process requires *ex ante* review by courts of placements on kill lists, see, for example, D'Errico, *supra* note 6, at 1216 (proposing, that Congress adopt a "narrowly tailored" scheme for *ex ante* review by courts of targeted killing based on application of *Mathews* balancing test); Flaherty, *supra* note 6 (contending that due process may require *ex ante* judicial review of targeting decisions in non-exigent circumstances). *See also* Funk, *supra* note 5, at 334-35 (recommending that review of target selections by the Foreign Intelligence Surveillance Court would provide "substantial additional constitutional support" for the government's targeted killing program).

167. *See infra* Part III.C (contending that this standard of review should satisfy the political question doctrine's requirement that courts avoid interference with national security and military decisions charged to the political branches).

review by a neutral decisionmaker of the government's decision had occurred—whatever that decision may have been.

Whether due process demands that courts implement something like the preceding procedural experiment depends on application of the three-part *Mathews* balancing test.[168] The first *Mathews* step, assessing the plaintiff's private interest, could not be more straightforward: It is the "elemental" interest in staying alive.[169]

The second step, assessing the probable value of additional procedural safeguards to protection of the plaintiff's private interests, poses far greater difficulties.[170] In truth, it is hard to gauge with any specificity the degree to which independent judicial assessments would increase the accuracy of target selection. Such measurement problems are endemic to application of the *Mathews* balancing test, which, at bottom, requires courts to conduct a loose, intuitive cost-benefit analysis.[171] The secrecy enshrouding targeted killing programs naturally makes this inquiry more difficult.

Public reports regarding kill lists do indicate that, at least during the Obama administration, their development involved a complex, interagency process with multiple levels of review that involved more than one hundred officials.[172] President Obama himself participated in this process, reviewing cases involving American citizens or cases where there was disagreement among

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168. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976). *Cf. Hamdi*, 542 U.S. at 529-39 (applying *Mathews* balancing test to determine due process rights of American citizens held as enemy combatants).

169. *Cf. Hamdi*, 542 U.S. at 529 (describing Hamdi's interest in his freedom as "elemental").

170. *See* Flaherty, *supra* note 6, at 39 (observing, regarding application of the *Mathews* test to kill lists, that "[t]he real devil is in assessing the risk of erroneous deprivation of life and the probable value of additional or substitute safeguards").

171. *See* Cynthia R. Farina, *Conceiving Due Process,* 3 YALE J.L. & FEM. 189, 235-36 (1991) (noting that costs and benefits of additional procedure "cannot, realistically, be quantified" and this type of cost/benefit exercise tends to ignore or undervalue "soft" variables).

172. *See* Chachko, *supra* note 4, at 1082-85 (describing multi-layer interagency process for nominating and vetting targets involving, inter alia, the nominating agency, the Restricted Counterterrorism Security Group of the National Security Staff, the National Counterterrorism Center, National Security Council Deputies Committee, agency principals, and the President); McNeal, *supra* note 4, at 702-729 (discussing bureaucratic processes for developing kill lists).

the relevant agency principals.[173] The Trump administration abandoned this extensive interagency process, replacing it with a streamlined system that relied on "country plans" to govern operations, and, unlike his predecessor, President Trump did not involve himself in targeting decisions.[174] It is safe to assume that the Biden administration will shift back toward tighter procedural and substantive constraints on targeting.[175]

Confident quantification of the accuracy of these evolving executive procedures for targeting is impossible from the outside. As another simplifying assumption, however, accept for the sake of argument the premise that the officials involved in targeting, regardless of administration, are serious, competent people implementing a well-designed procedural scheme. The question then becomes whether, even given this assumption, we have reason to think that adding judicial review would improve protection of the private interest (i.e., life) at stake.

At the risk of substituting a premise for analysis, for obvious reasons of human psychology, due process doctrine presumes that independent, neutral review is a good thing that catches errors, limits the effects of bias, and inspires greater care among initial decisionmakers. Also, subjecting bureaucratic decisions to review by a fresh, structurally independent set of eyes can reduce bureaucratic groupthink and the momentum that can develop in support of a decision once it has been made.[176] Regarding this last

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173. Chachko, *supra* note 4, at 1082-84 (noting early reporting that the President "insisted on deciding every case himself unless there was near certainty that there would be no civilian casualties") (citing Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES (May 29, 2012), https://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?mtrref=www.google.com&gwh=C3D1D7793D8748A5FCB72FF9D9F501B5&gwt=pay&assetType=REGIWALL)).

174. *Id.* at 1085; Savage, *supra* note 4 (discussing Trump administration rules on targeted strikes outside conventional war zones disclosed and suspended by Biden administration).

175. *See* Savage, *supra* note 4 (noting that "[t]he Biden administration suspended the Trump-era rules on its first day in office and imposed an interim policy of requiring White House approval for proposed strikes outside of the war zones of Afghanistan, Iraq and Syria").

176. *See, e.g.,* Ronald J. Krotoszynksi, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 NOTRE DAME L. REV. 1021, 1065-68 (2014) (discussing the bureaucratic conditions that tend to promote groupthink as well as its pathologies; observing that federal courts' function of decentralized review combats groupthink); Murphy & Radsan, *supra* note 6, at 878 (discussing the potential for groupthink to affect review of targeted killings).

point on bureaucratic momentum, based on his experiences in the Obama administration, Harold Koh, Legal Adviser to the State Department, commented that blocking a targeted killing during the review process "would be like pulling a lever to stop a massive freight train barreling down the tracks."[177] Given this much, one can hazard that judicial review of targeting decisions would reduce the risk of false positives to some indeterminate degree. On a less utilitarian note, the existence of an outside check on target selection would also tend to enhance the legitimacy of the program.

The third *Mathews* step assesses the burdens that complying with additional procedure would impose on the government.[178] The costs of the suggested form of review should be extremely small in part because it would be extremely rare. First, under current doctrine, due process protections would not apply to the overwhelming majority of targets insofar as they are non-citizens outside the United States and lack substantial connections to it.[179] Second, targets who do in fact identify with groups violently opposed to the United States, such as al Qaeda, are extremely unlikely to wish to use the courts of their enemy.[180] Third, as the proposal does not contemplate publishing lists of targets, only those people like Kareem, who determine from other evidence that they may have been listed, might sue.[181] In short, the pool of plaintiffs would be limited to a very small handful of people very much like Kareem.

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177. DANIAL KLAIDMAN, KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY 202 (2012). *See also id.* at 210 (describing how Jeh Johnson, former General Counsel to the Defense Department and Secretary of the Department of Homeland Security, thought of the review process in terms of the same railroad metaphor as Koh—i.e., "it was like a one-hundred-car freight train hurtling down the tracks at eighty miles an hour. You would have to throw yourself on the tracks to try to stop it."); Flaherty, *supra* note 6, at 39 (citing Koh's experience as reason to think that the targeting process could be improved by outside checks).

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

179. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2086 (2020) (characterizing as "long settled" that "foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution").

180. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 33 (D.D.C. 2010) (noting Anwar Al-Aulaqi's condemnation of the American judicial system) [*Al-Aulaqi I*].

181. Of course, allowing plaintiffs such as Kareem to challenge their designation as targets in court offers no protection to persons who do not figure out for themselves that they may have been targeted. For more ambitious, systemic proposals *see supra* note 14.

The extremely rare cases such plaintiffs might bring would pose a risk of false negatives—i.e., the courts might remove legitimate, dangerous targets from a kill list. Note, however, that the possibility that a court might mistakenly order the release of a dangerous detainee did not stop the Supreme Court in *Hamdi* from requiring an independent process for review of detention of American citizens as enemy combatants.[182] The Court in *Hamdi* minimized this risk by indicating that the government could rely on hearsay and a rebuttable presumption in favor of its evidence to make its case for continued detention.[183] To minimize the burden on the government's interests, this Article's proposal is even more favorable to the government insofar as it instructs courts to apply a deferential standard of review to target-selection decisions, checking only whether they have a reasonable basis.

The nature of the *Mathews* framework often leaves reasonable observers with plenty of room to reach opposing conclusions regarding its application to novel contexts. That said, on balance, deferential judicial review of target selections, limited to protect government secrets, should improve accuracy and legitimacy to some indeterminate degree with minimal burden on the government's legitimate interests. If in the future an American citizen, like Kareem, sues the government to challenge his placement on a kill list, due process should require courts to provide such neutral and limited review rather than dismiss based on national security or separation-of-powers concerns.

C. BUT WHAT ABOUT THE POLITICAL QUESTION DOCTRINE?

In *Al-Aulaqi I* and *Kareem*, judges dismissed the plaintiffs' due process claims based on three threshold issues—constitutional standing,[184] the state-secrets privilege,[185] and the

182. Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004) (O'Connor, J., plurality). *Cf.* Boumediene v. Bush, 553 U.S. 723, 732 (2008) (extending protections of habeas review as a matter of constitutional law to aliens detained as enemy combatants at Guantanamo Bay).

183. *Hamdi*, 542 U.S. at 533-34.

184. Kareem v. Haspel, 986 F.3d. 859, 862 (D.C. Cir. 2021) (dismissing for lack of constitutional standing).

185. Kareem v. Haspel, 412 F. Supp. 3d 52, 55 (D.D.C. 2019) (Collyer, J.) (granting motion to dismiss based on state secrets privilege), *vacated and remanded by* 986 F.3d. at 862 (dismissing for lack of constitutional standing).

political question doctrine.[186] This Article does not attempt to find a solution to the difficulties posed by constitutional standing—for the present purpose, a plaintiff is either in a position to make allegations sufficient to satisfy a court's application of the fuzzy *Twombly/Iqbal* standard or he is not.[187]

This Article does, however, provide a straightforward solution to the state-secrets privilege problem—albeit by committing substantial violence to traditional expectations of due process. This privilege applies where "there is a reasonable danger" that the disclosure of information "will expose military matters which, in the interest of national security, should not be divulged."[188] The proposal avoids this danger by the simple expedient of declining to require the government to share any privileged information with anyone other than a federal judge.

Avoiding the constitutional standing issue and satisfying the state-secrets privilege still leaves the problem of the political question doctrine. This Article's proposal seeks to defuse this doctrine by requiring a reviewing court to apply a deferential, rationality standard of review to the issue of whether the government has provided a sufficient factual basis for placing the plaintiff on a kill list.[189] According to reasoning adopted by both Judge Bates in *Al-Aulaqi I* and Judge Collyer in *Zaidan,* however, this solution still allows excessive judicial interference with military and national security decisions. Both judges relied on the D.C. Circuit's en banc decision in *El-Shifa* for the proposition that the political question doctrine bars any second-guessing whatsoever of discretionary decisions to use lethal force abroad.[190] Along

186. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 46-48 (D.D.C. 2010) (Bates, J.) (dismissing based on political question doctrine suit brought by Nasser Al-Aulaqi to enjoin the killing of his son, Anwar Al-Aulaqi) [*Al-Aulaqi I*].

187. *Cf. supra* Part II.C.1 & 4 (discussing application of the *Twombly/Iqbal* standard by the district court and D.C. Circuit in *Zaidan/Kareem* litigation to the issue of standing).

188. *Kareem*, 412 F. Supp. 3d at 56 (quoting United States v. Reynolds, 345 U.S. 1, 10 (1953)), *vacated and remanded by* 986 F.3d. at 862 (dismissing for lack of constitutional standing).

189. *Cf.* John C. Dehn & Kevin Jon Heller, *Debate: Targeted Killing: The Case of Anwar Al-Aulaqi,* 159 U. PA. L. REV. PENN. 175, 181 (2011) (contending that the political question doctrine does not bar the courts from reviewing "the executive's determinations regarding who could be subjected to war measures," but that review of such determinations should be deferential).

190. *See* Zaidan v. Trump, 317 F. Supp. 3d 8, 26 (D.D.C. 2018) (quoting El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 842 (D.C. Cir. 2010) (en banc)); *Al-Aulaqi I*, 727 F. Supp. 2d at 45-51 (quoting and relying heavily on *El-Shifa*).

these lines, in *El-Shifa* itself, the en banc court categorically stated, "[i]f the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target."[191] Deferential judicial review limits but does not eliminate such second-guessing, and it therefore must still violate the political question doctrine.

The short response to this broad construction of *El-Shifa* is that it cannot be right.[192] Centuries of precedent demonstrate that courts can review the legality of particular military actions.[193] In 1804, for instance, the Supreme Court famously held in *Little v. Barreme* that Captain Little, though following presidential orders, could be held liable in damages for capturing a neutral vessel without statutory authorization.[194] This legal conclusion rested on the factual foundation of the district court's finding that Captain Little had not "produced sufficient proof" to permit the capture under the congressional authorization.[195] To provide an example from two centuries later, in 2008's *Boumediene v. Bush,* the Supreme Court held that alien detainees held at Guantanamo Bay as enemy combatants were entitled to habeas review to determine their status.[196] The notion that courts

191. *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 844. *See also* Jaber v. United States, 861 F.3d 241, 246 (D.C. Cir. 2017) (following *El-Shifa* and holding that nonconstitutional claims related to drone strike were blocked by political question doctrine).

192. *Cf. Jaber*, 861 F.3d at 252 (Brown, J., concurring) (contending that *El-Shifa*'s approach to the political question doctrine "seems a wholly inadequate response" to an institutionalized system of targeted killing).

193. *See* Andresen, *supra* note 6, 167-69 (explaining that ample precedent demonstrates that courts have the capacity to review not just whether legal authority existed for military action but also whether military action has been conducted in a lawful manner; observing "U.S. courts have for more than two centuries held the U.S. military accountable to the law of war"); Dehn & Heller, *supra* note 189, at 178 (noting that "the mere existence of a substantial body of Supreme Court precedent addressing such matters undermines broad claims that executive actions in armed conflict are inappropriate for judicial review"; adding that "jurisdiction has traditionally included the ability to review whether the executive has properly identified specific individuals or objects as being within the scope of congressionally authorized hostilities"); *id.* at 181 (observing that in the *Prize Cases*, 67 U.S. 635 (1862), the Supreme Court reviewed the legality of various captures).

194. Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804). *See* Andresen, *supra* note 6, 164-65 (discussing *Little* as a foundational example of judicial review of military actions).

195. *Little*, 6 U.S. (2 Cranch) at 172 (quoting lower court).

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

are totally incompetent to review the factual bases of military actions also flatly contradicts the War Crimes Act, which, by granting courts statutory authority to adjudicate war crimes, necessarily and obviously gives them the power to make factual determinations regarding whether a defendant has committed one.[197]

In addition to contradicting judicial and statutory precedent, *El-Shifa* rests on an untenable bright-line distinction between review of law as opposed to review of fact and policy. Consistent with centuries of precedent declaring that issues of law are for the courts, *El-Shifa* concedes that courts can review whether the executive had legal authority to take a military action without violating the political question doctrine.[198] If, however, executive actors are free to assert any factual or policy justifications they please for an action, no matter how unreasonable, then limits on legal discretion cannot have binding effect. Suppose the law provides that an executive actor has legal authority to take action *Y* provided fact *X* exists. If the executive actor has unconstrained power to declare that fact *X* exists, then it has unlimited authority to take action *Y*. The law responds to this problem in many contexts by treating the issue of rationality as, in effect, an issue of law. In civil procedure, for instance, a movant can obtain "judgment as a matter of law" by demonstrating that her opponent lacks sufficient evidentiary support for a reasonable trier to decide in her favor on a factual issue necessary for her case.[199] Similarly, although administrative law recognizes that factfinding and policymaking are tasks for agencies, it also instructs courts to vacate agency actions as arbitrary if they rest on irrational fact or policy determinations.[200] Pervasive principles governing judicial review indicate that the courts' task of reviewing

197. Pub. L. No. 104-192, 110 Stat. 2104 (1996) (codified at 18 U.S.C. §2441) (providing, *inter alia*, that "[w]hoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death"). *But see* Geoffrey S. Corn & Rachel E. Van Landingham, *Strengthening War Crimes Accountability*, 70 AM. U.L. REV. 309, 336 (2020) (observing that the War Crimes Act is "in complete desuetude" as the Department of Justice has not invoked it in prosecutions).

198. El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 842 (D.C. Cir. 2010) (en banc) (noting judicial authority to determine claims regarding legal issues "such as whether the government had legal authority to act").

199. FED. R. CIV. P. 50(a).

200. 5 U.S.C. § 706(2)(A) (instructing courts to vacate arbitrary agency actions).

for compliance with the law often requires review for factual rationality.

Most directly to the present point, *El-Shifa*'s approach to the political question doctrine contradicts *Hamdi v. Rumsfeld,* which admonished "that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[201] Although *Hamdi* never refers to the political question doctrine by name, it held that separation of powers does not bar courts from determining whether the government has sufficient evidentiary support for detaining an American citizen as an enemy combatant.[202] The parallels between review of detention decisions in *Hamdi* and review of placements onto kill lists are quite precise. Both require the government to make the same general sort of factual determination—i.e., that the detainee or target is an "enemy combatant" or proper object of military force. Neither requires split-second battlefield judgments. Instead, both detention decisions and kill-list placements must be run through bureaucratic processes that necessarily take time. If, as *Hamdi* teaches, the political question doctrine allows (and due process may require) courts to exercise independent judgment regarding detention of American citizens as enemy combatants,[203] then it should also allow at least limited review of placements of American citizens on kill lists.

In *Al-Aulaqi I,* Judge Bates recognized this tension between *El-Shifa* and *Hamdi* but concluded that the former should control the applicability of the political question doctrine to Nasser Al-Aulaqi's suit seeking to stop the government from killing his son.[204] This conclusion rested on two distinctions that Judge Bates drew between review of detentions and review of targeted killings. Neither of these distinctions, however, are persuasive as applied in the specific context of review of bureaucratic, non-exigent decisions to place American citizens on kill lists.

First, Judge Bates emphasized the first of *Baker*'s six factors governing application of the political question doctrine—i.e., whether an issue has been "textually committed" to a political

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201. Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (O'Connor, J., plurality) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 584 (1952)).

202. *Hamdi*, 542 U.S. at 535-36.

203. *See id.* at 535-38 (rejecting separation-of-powers objection and requiring review by a neutral decisionmaker).

204. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 49-50 (D.D.C. 2010) [*Al-Aulaqi I*].

branch by the Constitution.[205] To obtain judicial review, Hamdi had relied on habeas corpus, which is "textually committed" to the judicial branch via the Constitution's Suspensions Clause.[206] By contrast, targeted killings implicate the Constitution's textual commitment of executive and military powers to the president.[207] Hamdi's claim therefore fell within the accepted scope of judicial business, whereas Al-Aulaqi's claims implicated the authority of the political branches.[208]

This invocation of the first *Baker* factor is vulnerable to the criticism, emphasized by Judge Bates himself, that the *Baker* factors do not actually provide a coherent method for applying the political question doctrine.[209] It is also vulnerable to the charge that the Fifth Amendment might be said to textually commit due process determinations to the courts.

Second, Judge Bates sought to distinguish detentions and targeting in functional terms. He noted that resolution of a habeas petition such as Hamdi's "does not require expertise beyond the purview of the Judiciary" given that these petitions merely determine whether "the United States has unjustly deprived an American citizen of liberty through acts it has already taken."[210] By contrast, he contended that courts have no competence to assess claims that "seek to prevent future U.S. military action in the name of national security against specifically contemplated targets by the imposition of judicially-prescribed legal standards."[211]

This functionalist argument makes sense as applied to some of the extremely broad claims pressed in *Al-Aulaqi I*, in which Nasser Al-Aulaqi sought, among other relief, a judicial order de-

205. *Id.* at 50 (citing Baker v. Carr, 369 U.S., 186, 217 (1962)).

206. *Id.* at 49-50 (citing Boumediene v. Bush, 553 U.S. 723, 745 (2008), and El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 848-49 (D.C. Cir. 2010) (en banc)).

207. *Id.* at 50 (citing *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 849, and Schneider v. Kissinger, 412 F.3d 190, 194-96 (D.C. Cir. 2005)).

208. *Id.*

209. *Id.* at 45 ("Unfortunately, the *Baker* factors are much easier to enumerate than they are to apply, and it is perhaps for this reason that the political question doctrine 'continues to be the subject of scathing scholarly attack.'") (quoting Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1514 (D.C. Cir. 1984) (en banc), *vacated by,* 471 U.S. 1113 (1985)).

210. *Id.* at 50 (quoting Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 65 (D.D.C. 2004)).

211. *Id.*

claring that the laws of armed conflict do not apply to the United States' conflict with AQAP.[212] It is unpersuasive, however, where a plaintiff merely seeks a neutral determination of whether the government has a reasonable basis for targeting him. In such a case, the determinative issue, as in *Hamdi*, is essentially whether the government can properly treat a person as an enemy combatant. If courts are competent to conduct this inquiry in the context of detentions, it is difficult to see why they would not be competent to conduct it for placements onto kill lists.

IV. CONCLUSION

This Article proposes a procedural experiment that would enable courts to review placements on kill lists while protecting the national security and separation-of-powers concerns that motivate the state-secrets privilege and the political question doctrine. Under this proposal, a court would protect state secrets by denying the plaintiff any access to them, and it would guard against violation of the political question doctrine by limiting its factual review to determination of whether the government has a reasonable basis for its placement decision. This limited form of review would, in the name of protecting national security, severely diminish fundamental due process requirements of notice and an opportunity to be heard. It would also, however, provide a role for a third core element of due process, a neutral decisionmaker. Due process should demand at least this level of protection for the lives of American citizens that the government has targeted for death.

212. *See id.* at 46 (noting that resolving plaintiff's claims would require the court to determine whether armed conflict with al Qaeda extended to AQAP).