DUE PROCESS AND SURVIVING AMERICA'S KILL LIST: HOW THE COURTS AND CONGRESS CAN END THE EXECUTIVE BRANCH'S ENCROACHMENT ON CIVIL LIBERTIES IN THE WAR ON TERROR

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ABSTRACT: *The U.S. government's unfettered use of targeted killing in the modern war on terror has led to the erosion of U.S. citizens' civil liberties abroad. The executive branch currently has the power to nominate U.S. citizens to the Kill List, the colloquial name for the "Disposition Matrix," without any meaningful due process or judicial review. The courts have so far refused to check the executive branch's unrestrained power in the national security realm, but a recent decision in the pending D.C. District Court case Zaidan v. Trump indicates the judicial branch's increased willingness to step in and vindicate due process rights. This Note will explore the constitutional implications of designating U.S. citizens to America's Kill List by a discussion of Zaidan v. Trump, and will ultimately suggest a short-term judicial solution to providing due process in the form of post-deprivation judicial review and a long-term legislative solution in the form of a specialized court established to review Kill List decisions.*

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> "The powers granted to the Executive and Congress to wage war and provide for national security does not give them *carte blanche* to deprive a U.S. citizen of his life without due process and without any judicial review."[1]

I. INTRODUCTION

What would you do, as an American citizen, if you reasonably believed that your nation wrongfully placed you on a "Kill List?" What could you do?

The executive branch's assumed power of judge, jury, and executioner in deciding whether to kill U.S. citizens abroad has so far been uncontested by the judicial branch. The Kill List, the colloquial name for the "Disposition Matrix," is a list of individuals deemed by senior executive branch members—often the President himself—to be subject to targeted killing or capture under the Authorization for the Use of Military Force (AUMF).[2]

The government has publicly disclosed that it conducts lethal strikes against individuals selected as a result of a process in which targets are identified by name or by using metadata and confirmed through a series of meetings and discussions among senior executive branch members.[3] In May 2013, President Obama issued guidelines for this process in his Presidential Policy Guidance (PPG) in the hopes of providing oversight over and accountability to the designation of individuals added to the Kill List.[4] Publicized in August 2016, this document outlines administrative procedures and policies.[5]

Thousands of men, women, and children have died as a result of the U.S. drone strike campaign in the Middle East.[6] Families of victims, including

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[1] Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56, 69 (D.D.C. 2014).

[2] JENNIFER K. ELSEA, CONG. RESEARCH SERV., LSB10167, U.S. DISTRICT COURT HOLDS U.S. CITIZEN CAN CHALLENGE HIS INCLUSION ON "KILL LIST" 1 (2018).

[3] *See* Complaint ¶ 18, Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56 (D.D.C. 2014) (No. 12CV01192), 2012 WL 3024212; *see generally* David Cole, *'We Kill People Based on Metadata'*, THE NEW YORK REVIEW (May 10, 2014, 10:12 AM), https://www.nybooks.com/daily/2014/05/10/we-kill-people-based-metadata/ [https://perma.cc/LG94-BVBD] (discussing how the NSA identifies potential terrorists using a sweeping collection of phone and Internet records—otherwise known as "metadata"—that only establishes who people call, when they call, and how long they talk, but not the contents of the conversation).

[4] Zaidan v. Trump, 317 F. Supp. 3d 8, 15 (D.D.C. 2018).

[5] *Id.* ("[The PPG] includes guidance on designating individuals based only on metadata (or without knowing their identities), as well as the 'necessary preconditions for taking lethal action.'").

[6] According to the Bureau of Investigative Journalism, which takes into account both official U.S. government and independent journalist reports, the U.S. killed 2000 people in drone and air strikes in 2016 alone. Jessica Purkiss & Jack Serle, *Obama's Covert Drone War in Numbers: Ten Times More Strikes than Bush*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Jan. 17, 2017), https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-

American citizens, have unsuccessfully sued the U.S. government for relief, with courts refusing all claims to review the targeted killing decision-making process.[7] Never before has a survivor of a U.S. drone strike come forth with a viable claim against the U.S.

Bilal Abdul Kareem is an American journalist who specializes in reporting on terrorism and conflict in the Middle East.[8] Due to the nature of his work, Mr. Kareem comes into regular contact with militants and terrorists in the Middle East and has reason to believe the Government[9] has placed him on America's Kill List. In 2016, Mr. Kareem survived five separate aerial attacks while reporting in the field.[10] Examining these attacks together, a person could reasonably infer that the U.S. specifically targeted Mr. Kareem. Mr. Kareem subsequently filed suit against the Government for injunctive relief. This suit embodies the modern tension between the executive branch's interest in maintaining power over national security concerns and the judicial branch's interest in protecting the Nation's constitutional values of due process.

This Note will explore the constitutional implications of designating U.S. citizens to America's Kill List by a discussion of Mr. Kareem's case, and will provide a solution that affords due process relief to U.S. citizens in similar situations. Part I of this Note provides a brief explanation of the domestic and international laws that enable and restrict the U.S. drone strike campaign. It also contains a discussion of pertinent U.S. case law aimed at holding the executive branch accountable for its use of drone strikes. Part II of this Note examines the factual and procedural background of *Zaidan v. Trump*. It explores how Mr. Kareem's claim has overcome the Government's initial motion to dismiss. Part III of this Note analyzes the importance and impact of Mr. Kareem's procedural victories with the D.C. District Court's denial of the Government's motion to dismiss before discussing potential, future obstacles. After concluding that Mr. Kareem and other similarly situated plaintiffs deserve to have their due process rights vindicated, Part IV of this Note offers possible judicial and legislative solutions that might provide due process in targeted killing.

II. PART I – LEGAL BACKGROUND

A. DOMESTIC AND INTERNATIONAL LIMITATIONS ON THE USE OF DRONE STRIKES

As counterterrorism historian Christopher J. Fuller notes, the U.S. targeted killing program has developed as a necessary evil in the world today:

> America's remote pursuit of its enemies is the realization of a long-held desire to pre-emptively neutralize foreign terrorist threats while avoiding the collateral damage of air strikes and the moral ambiguity of assassination. Seen in this light, the latest escalation is not an anomaly, but instead a deeply American response to a specific kind of national security threat.[11]

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ten-times-more-strikes-than-bush [https://perma.cc/4RV2-W2ZG]. The Bureau reports logged between 384 and 807 civilian casualties during President Obama's two terms. *Id.*

[7] *See, e.g.*, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8–9 (D.D.C. 2010).

[8] *Zaidan*, 317 F. Supp. 3d at 13.

[9] The term "Government" refers to the U.S. Government.

[10] *Id.*

[11] Christopher J. Fuller, *The Origins of the Drone Program*, LAWFARE (Feb. 18, 2018, 10:00 AM), https://www.lawfareblog.com/origins-drone-program [https://perma.cc/D63G-78KZ].

While the use of drones in the U.S. targeted killing campaign may be necessary to neutralize foreign terrorist threats, significant moral and legal implications follow suit.

President Obama struggled with the ethical implications of inevitable civilian casualties in drone strikes, which is why he took the role of personally overseeing the targeted killing campaign.[12] Despite his moral struggle, drone strikes increased during President Obama's time in office as the U.S. government continued to employ questionable legal justifications.[13]

Domestically, the U.S maintains that drone strikes against suspected terrorists are lawful under the September 2001 AUMF, which allows the president to use "all necessary and appropriate force" against nations, organizations, or persons who planned, committed, or aided the September 11th terrorist attacks.[14] Internationally, the U.S. argues that these strikes are lawful under the Law of Armed Conflict (LOAC) because the U.S. is engaged in a supra-geographic armed conflict with Al-Qaeda.[15] "If both [U.N.] Charter concerns and LOAC concerns are satisfied (and assuming no domestic law issues), the only remaining constraints are those derived from policy, diplomacy, and the like."[16]

The position that the U.S. may lawfully strike locations outside "areas of hostilities" of a borderless war is precarious.[17] While allies of the United States have mostly looked the other way as it has employed drone strikes in areas outside of Afghanistan, for example, human rights advocates have grown

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[12] *See* Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, THE NEW YORK TIMES (May 29, 2012), https://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html [https://perma.cc/RBA7-MUVG]. ("Mr. Obama has placed himself at the helm of a top secret 'nominations' process to designate terrorists for kill or capture. . . . When a rare opportunity for a drone strike at a top terrorist arises—but his family is with him—it is the president who has reserved to himself the final moral calculation.").

[13] Purkiss & Serle, *supra* note 6 ("There were ten times more air strikes in the covert war on terror during President Obama's presidency than under his predecessor, George W. Bush.").

[14] *See* John B. Bellinger III, *Will Drone Strikes Become Obama's Guantanamo?*, THE WASHINGTON POST (Oct. 2, 2011), https://www.washingtonpost.com/opinions/will-drone-strikes-become-obamas-guantanamo/2011/09/30/gIQA0ReIGL_print.html?noredirect=on [https://perma.cc/R46S-TTK9]; *see also* Jameel Jaffer, *Judicial Review of Targeted Killings*, 126 HARV. L. REV. F. 185, 185 (2013) ("The targeted killing program is predicated on sweeping constructions of the 2001 Authorization for Use of Military Force (AUMF) and the President's authority to use military force in national self-defense.").

[15] Robert Chesney, *"Areas of Active Hostilities" and Authority to Authorize Attacks Without White House Involvement*, LAWFARE (May 18, 2017, 10:50 AM), https://www.lawfareblog.com/areas-active-hostilities-and-authority-authorize-attacks-without-white-house-involvement [https://perma.cc/WJC4-FPQX]; *see also* Michael W. Lewis & Vincent J. Vitkowsky, *The Use of Drones and Targeted Killing in Counterterrorism*, 12 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 73, 73 (2011) ("[T]he U.S. defended the dronestrike as permissible under international law of armed conflict, broadly asserting that al Qaeda terrorists who continue to plot attacks may, in appropriate circumstances, be lawful subjects of armed attack without regard to their location.").

[16] Chesney, *supra* note 15.

[17] Under the International Humanitarian Law (IHL), "targeted killing is only lawful when the target is a 'combatant' or 'fighter' or, in the case of a civilian, only for such time as the person 'directly participates in hostilities.'" Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SEC. J. 283, 301 (2011) (footnotes omitted). Broadly speaking, the U.S. position is that any strikes against terrorist targets are lawful under the IHL because the U.S. is in an "armed conflict" with nonstate terrorist actor groups such as the Islamic State or Al-Qaeda. *See* Lynn E. Davis et al., *Clarifying the Rules for Targeted Killing: An Analytical Framework for Policies Involving Long-Range Armed Drones*, RAND.ORG (2016), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1610/RAND_RR1610.pdf [https://perma.cc/X5XU-5TZJ].

increasingly uncomfortable.[18] In 2010, the United Nations Human Rights Council released a report cautioning that drone strikes may violate international humanitarian and human rights laws and could constitute war crimes.[19] In the wake of the killing of Anwar Al-Aulaqi—a U.S. Citizen—American human rights advocates such as the ACLU have vigorously condemned the use of drone strikes outside of conflict zones as a violation of both U.S. and international law.[20]

While President Obama took steps to create some semblance of accountability by adopting the PPG in 2013, President Trump has largely eroded that framework. The PPG is an array of policy-based restrictions for the use of drone-based targeted killing outside "areas of active hostilities," which namely refer to the war zones of Afghanistan, Iraq, and Syria.[21] "[T]he idea was to limit the use of lethal force in such locations to circumstances involving imminent threats to U.S. lives, where capture is not a feasible alternative, and it is near certain there will be no collateral damage at all."[22]

Actions taken in countries outside "areas of active hostilities," such as Pakistan, must meet these more stringent guidelines to provide a more acceptable approach to the international community.[23] President Trump, however, relaxed these constraints in 2017 by designating additional areas of active hostilities, such as in Yemen.[24] Moreover, President Trump amended the PPG's targeting procedures, "reduc[ing] the required level of confidence that the intended target was present in a strike zone from 'near certainty' to 'reasonable certainty,' . . . further lowering constraints on attacks."[25] These shifts in policy have been accompanied by a stark increase in drone strikes, as the Trump administration engaged in 2,243 drone strikes during President Trump's first two years in office, compared to 1,878 drone strikes being carried out during President Obama's entire eight years in office.[26]

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[18] Bellinger, *supra* note 14.

[19] *Id.* (citing Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Study on Targeted Killings*, U.N. Doc. GE.10–13753 (May 28, 2010)).

[20] Bellinger, *supra* note 14 (citing Suzanne Ito, *ACLU Lens: American Citizen Anwar Al-Aulaqi Killed Without Judicial Process*, ACLU (Sept. 30, 2011), https://www.aclu.org/blog/national-security/targeted-killing/aclu-lens-american-citizen-anwar-al-aulaqi-killed-without?redirect=blog/national-security/aclu-lens-american-citizen-anwar-al-aulaqi-killed-without-judicial-process [https://perma.cc/CXN7-W9XP]).

[21] Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, THE WASHINGTON POST (Aug. 6, 2016), https://www.washingtonpost.com/world/national-security/newly-declassified-document-sheds-light-on-how-president-approves-drone-strikes/2016/08/06/f424fe50-5be0-11e6-831d-0324760ca856_story.html?utm_term=.e01d7195df6c [https://perma.cc/9EJH-66QZ].

[22] Chesney, *supra* note 15.

[23] *Id.* ("Put another way, the idea was to eschew the full range of authority that LOAC would permit, in favor of a more constrained approach. This policy choice made it possible for the Obama administration to argue that there was little or no gap in practical terms between the U.S. position (i.e., that there is a borderless armed conflict) and the position of those who reject that view.").

[24] *See* Quinta Jurecic, *'Why Did You Wait?': Moral Emptiness and Drone Strikes*, LAWFARE (Apr. 9, 2018, 9:30 AM), https://www.lawfareblog.com/why-did-you-wait-moral-emptiness-and-drone-strikes [https://perma.cc/AQH4-GGNC].

[25] Charlie Savage, *Will Congress Ever Limit the Forever-Expanding 9/11 War?*, N.Y. TIMES (Oct. 28, 2017), https://www.nytimes.com/2017/10/28/us/politics/aumf-congress-niger.html [https://perma.cc/K4WW-QEL5].

[26] *Trump Revokes Obama Rule on Reporting Drone Strike Deaths*, BBC NEWS (Mar. 7, 2019), https://www.bbc.com/news/world-us-canada-47480207 [https://perma.cc/7XBH-UA3K].

The process itself for designating suspected terrorists to the Kill List is hardly reassuring. Designations to the Kill List—including those of American citizens—may be based solely on a collection of that person's phone calls and Internet use.[27] As General Michael Hayden, former director of the NSA and the CIA, quipped in May 2014, "[w]e kill people based on metadata."[28] Even if the government follows the procedures outlined in the PPG, it may still wrongfully target innocent individuals. For example, journalists that necessarily communicate with terrorists may be wrongfully identified as threats, as this Note will examine below with the cases of Mr. Zaidan and Mr. Kareem.

B. U.S. CASELAW: PRIOR ATTEMPTS TO HOLD THE EXECUTIVE BRANCH ACCOUNTABLE

1. INITIAL LAWSUIT (*AL-AULAQI I*)

The federal courts first explored whether federal officials can be held personally liable for their authorization of drone strikes against U.S. citizens abroad in *Al-Aulaqi v. Obama* (hereinafter *Al-Aulaqi I*). Anwar Al-Aulaqi, a U.S.-Yemeni citizen and terrorist leader of Al-Qaeda, was killed in September 2011 by a drone strike in Yemen.[29] Following reports of Anwar Al-Aulaqi's influence on the 2009 Fort Hood Texas terrorist attack and the "Underwear Bomber" of 2009, multiple media outlets suggested that the U.S. government had placed Mr. Al-Aulaqi on the Kill List.[30]

More than a year before the U.S. actually killed Anwar Al-Aulaqi, his father, Nasser Al-Aulaqi, brought suit on behalf of his son against the U.S. government requesting both a declaration setting forth the standard under which the U.S. could select individuals for targeted killing as well as an injunction prohibiting the U.S. government from killing his son.[31] Judge Bates of the D.C. District Court dismissed the case, reasoning Nasser Al-Aulaqi lacked standing to bring his son's constitutional claims and that the issues raised were non-justiciable political questions.[32]

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[27] Cole, *supra* note 3 ("[M]etadata absolutely tells you everything about somebody's life. If you have enough metadata, you don't really need content." (quoting NSA General Counsel Stewart Baker)).

[28] *Id.* (asserting that the U.S. government kills people based on metadata at a debate on the proposed bipartisan reform of the USA Freedom Act, a bill to rein in NSA spying on Americans).

[29] Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56, 60 (D.D.C. 2014).

[30] *Id.* at 59–63 (footnotes omitted) (citations omitted) ("Government officials told reporters that Anwar Al-Aulaqi had 'cast his lot' with terrorist groups, encouraged others to engage in terrorist activity, and 'played a key role in setting the strategic direction' for AQAP . . . Upon hearing rumors that the United States had placed Anwar Al-Aulaqi on a kill list, Nasser Al-Aulaqi filed suit on behalf of his son against the President, CIA Director, and Secretary of Defense in their official capacities.").

[31] Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8 (D.D.C. 2010) ("Plaintiff seeks an injunction prohibiting defendants from intentionally killing Anwar Al-Aulaqi 'unless he presents 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.'").

[32] The Government moved to dismiss the complaint on standing grounds and under assertion of the "military and state secrets" privilege. *Id* at 52–53. The court agreed with the Government, however, that the case could be resolved without addressing the privilege. *Id.* Nasser Al-Aulaqi did not have standing to bring his son's claim because he "failed to provide an explanation for his son's inability to appear on his own behalf, which is fatal to plaintiff's attempt to establish 'next friend' standing." *Id.* at 17. Additionally, the issues were non-justiciable political questions because they required judicial determination as to the propriety of a military attack. *Id.* at 47. The court analogized the case to *El-Shifa v. United States*, in which the D.C. Circuit dismissed a claim brought by owners of Sudanese pharmaceutical plant that was destroyed by an American cruise missile. *Id.* at 46–47 ("Here, plaintiff

2. SUBSEQUENT LAWSUIT (*AL-AULAQI II*)

Nasser Al-Aulaqi brought suit again in 2012—after his son was killed—in *Al-Aulaqi v. Panetta* (hereafter *Al-Aulaqi II*). By this time, the Administration had already informed a congressional oversight committee that it approved the use of lethal force against Anwar Al-Aulaqi.[33] Nasser Al-Aulaqi sought to hold the Secretary of Defense, the commanders of the Joint Special Operations Command, and the Director of the CIA individually liable for monetary damages based on a *Bivens* claim, which "permits a damages action against a federal officer for a violation of a plaintiff's clearly-established constitutional rights."[34]

Mr. Nasser claimed that his son was deprived of his procedural due process rights because the U.S. executed him without charge, indictment, or prosecution. Mr. Nasser also claimed his son was deprived of his substantive due process rights because his death occurred "both outside of armed conflict and at a time when he did not present a concrete, specific, and imminent threat to the United States."[35]

Judge Collyer found it plausible the U.S. deprived Anwar Al-Aulaqi of procedural and substantive due process rights and that the "Political Question Doctrine"[36] did not bar the due process claims.[37] However, Judge Collyer found that the cased failed under the *Bivens* framework, [38] which does not permit suit when "special factors counsel hesitation"[39]—in this case, separation of powers,

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asks this Court to do exactly what the D.C. Circuit forbid in El-Shifa — assess the merits of the President's (alleged) decision to launch an attack on a foreign target." (citing El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1365 (Fed. Cir. 2004))).

[33] Al-Aulaqi v. Panetta, 35 F. Supp. 3d. at 64 (citation omitted) ("Attorney General Holder assured Senator Leahy that the decision to target Anwar Al-Aulaqi with lethal force was 'subjected to an exceptionally rigorous interagency legal review' and an 'extensive policy review' . . . Attorney General Holder also stated that the Executive Branch informed Congress of the planned drone assault in advance.").

[34] *Id*. at 74. A successful *Bivens* claim requires a constitutional injury for which damages are the appropriate remedy. Jordan M. Emily, Note, *The Essence of Civil Liberty: Legitimacy and Judicial Oversight for the Targeted Killing of an American Citizen Through the Bivens Claim*, 47 U. MEM. L. REV. 887, 896 (2017). Damages are the appropriate remedy when there is no alternative remedy available to the plaintiff and no special factors counsel hesitation in granting relief. *Id*.

[35] *Panetta*, 35 F. Supp. 3d at 74.

[36] The "Political Question Doctrine" refers to the judicial branch's refusal to review actions made by the executive branch that are committed to its discretion. This doctrine stems from the judicial branches' understanding that the executive branch must be able to make certain political decisions that are not subject to the undermining effect of judicial review. *See* J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 102 (1988).

[37] *Panetta*, 35 F. Supp. 3d 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." (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

[38] *Panetta*, 35 F. Supp. 3d at 75–80. The Supreme Court has only extended the *Bivens* analysis in two contexts. *Id*. at 74; *see also* Carlson v. Green, 446 U.S. 14 (1980) (permitting federal prisoner to seek Bivens remedy for violation of Eighth Amendment); Davis v. Passman, 442 U.S. 228 (1979) (permitting former Congressional staffer to seek Bivens remedy for gender discrimination in violation of Fifth Amendment).

[39] Whether or not a plaintiff can proceed on a *Bivens* action that claims deprivation of life without due process based on the overseas killing by U.S. officials of a U.S. citizen deemed to be an active enemy was an issue of first impression. However, the court analogized the case to "cases in which circuit courts have barred *Bivens* actions to remedy deprivations of liberty without due process arising from military detention and alleged abuse of U.S. citizens." *Panetta*, 35 F. Supp. 3d at 74–75. The

national security, and the risk of interfering with military decisions. The court dismissed Nasser Al-Aulaqi's lawsuit once again.[40]

In the ruling, however, Judge Collyer recognized that her holding regarding the Political Question Doctrine was directly at odds with Judge Bates's decision in *Al-Aulaqi I*. Judge Collyer pointed out that while both cases alleged the U.S. violated Anwar Al-Aulaqi's Fifth Amendment rights, the issue was raised more directly and acutely at this point in the case overseen by Judge Collyer because the U.S. had by then killed Nasser Al-Aulaqi's son.[41]

The first complaint failed to pass the Political Question Doctrine because it required broad consideration of "the issues of separation of powers, competence of the Judicial Branch to review military decisions, whether there were judicially discoverable and manageable standards for reviewing the nature of the security threat, and whether the use of lethal force was justified."[42] The second complaint passed because it narrowed this analysis to whether one or more of these same issues prevent Nasser Al-Aulaqi from seeking a *Bivens* claim against individual U.S. officials.[43]

II. PART II: *ZAIDAN V. TRUMP*

A. FACTUAL BACKGROUND

In March 2017, two journalists specializing on conflicts in the Middle East sued President Trump, the Director of the CIA, the Secretary of the Department of Defense, the Secretary of the Department of Homeland Security, the Attorney General, and the Director of National Intelligence, as well as each respective agency, claiming they wrongfully placed the two reporters on the Kill List solely due to their occupations.[44]

Ahmad Muaffaq Zaidan and Bilal Abdul Kareem claim "[t]heir travel, communications, social media content and contacts, related data and metadata have been input into 'algorithms' used by the United States to identify terrorists."[45] The two reporters averred they had never been involved in any terrorist attack and never harbored or supported any person or organization involved in a terrorist attack; instead, they claimed to have been targeted simply because of U.S. metadata algorithms.[46] The men asked only for a declaration that their inclusion on the Kill List is unlawful and unconstitutional, and for an injunction requiring the Government to remove them from that list.[47] They did not ask for money damages, unlike in *Al-Aulaqi II*.

Ahmad Muaffaq Zaidan is a well-respected Syrian and Pakistani journalist who has reported for decades on the conflicts in the Middle East, Pakistan and Afghanistan, and now serves as Al Jazeera's Islamabad Bureau

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main case that the court in *Al-Aulaqi v. Panetta* relies on is *Doe v. Rumsfeld*, in which the D.C. Circuit held that "special factors counseled hesitation and forestalled a *Bivens* lawsuit brought by a civilian government contractor who was subjected to military detention in Iraq." *See id*. (citing Doe v. Rumsfeld, 683 F.3d 390 (D.C. Cir. 2012)).

[40] Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8–9 (D.D.C. 2010).

[41] *Panetta*, 35 F. Supp. 3d. at 70 n.21.

[42] *Id*.

[43] *Id*.

[44] Zaidan v. Trump, 317 F. Supp. 3d 8, 13 (D.D.C. 2018).

[45] Complaint ¶ 1, *Zaidan*, 317 F. Supp. 3d 8 (No. 1:17-cv-00581), 2017 WL 1177615.

[46] *Id*.

[47] *Id*. ¶ 2.

Chief.[48] As a journalist reporting on terrorism, Mr. Zaidan has frequently communicated with sources who have connections with terrorists and their associates. Mr. Zaidan has traveled extensively in countries and regions in which terrorists are active, and he has posted works and phrases associated with terrorism on his social media accounts.[49] Notably, Mr. Zaidan interviewed leaders of Al-Qaeda and the Taliban, including Osama Bin Laden.[50]

Bilal Abdul Kareem, born Darrell Lamont Phelps in Michigan, is an American journalist who relocated to the Middle East to report on terrorism.[51] Mr. Kareem has reported for numerous well-respected media outlets and news organizations including Al Jazeera, CNN, and BBC.[52] Currently, Mr. Kareem reports for On the Ground Network ("OGN"), an independent news channel that posts interviews with rebel fighters on social media outlets.[53] Mr. Kareem and OGN's goal is to provide independent, investigative journalistic coverage and access to the views of anti-Assad rebels in Syria.[54] Consequently, Mr. Kareem regularly interacts with local militants while using a variety of technological equipment including cellphones, satellite phones, and handheld transceivers.[55]

In 2015, Mr. Zaidan discovered that the U.S. government had identified him as a member of Al-Qaeda and the Muslim Brotherhood.[56] His membership was alleged in a top-secret document leaked by Edward Snowden called "SKYNET: Applying Advanced Cloud-based Behavior Analytics," which details U.S. intelligence efforts to track Al-Qaeda couriers by analyzing metadata.[57]

In 2016, Mr. Kareem became highly suspicious that the U.S. was targeting him for death after surviving five near-miss aerial assaults in Syria, four of which occurred in the same month.[58] The first attack occurred as Mr. Kareem was returning to his OGN office.[59] Mr. Kareem and crew ran inside

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[48] *Id*. ¶ 25.

[49] *Id*. ¶ 26.

[50] *Id*. ¶ 28.

[51] Matt Taibbi, *How to Survive America's Kill List*, ROLLING STONE (July 19, 2018), https://www.rollingstone.com/politics/politics-features/how-to-survive-americas-kill-list-699334/ [https://perma.cc/699V-S2JM].

[52] Complaint ¶ 44, *Zaidan*, 317 F. Supp. 3d 8 (No. 1:17-cv-00581), 2017 WL 1177615.

[53] *Id*. ¶ 45.

[54] *Id*.

[55] *Id*.

[56] Cora Currier, Glenn Greenwald & Andrew Fishman, *U.S. Government Designated Prominent Al Jazeera Journalist as "Member of Al Qaeda"*, THE INTERCEPT (May 8, 2015, 3:27 AM), https://theintercept.com/2015/05/08/u-s-government-designated-prominent-al-jazeera-journalist-al-qaeda-member-put-watch-list/ [https://perma.cc/B34D-UH8P].

[57] *Id*. The document explains how the government uses metadata to identify potential terrorist targets:

> The program, the slides tell us, is based on the assumption that the behaviour of terrorists differs significantly from that of ordinary citizens with respect to some of these properties. However, as The Intercept's exposé last year made clear, the highest rated target according to this machine learning program was Ahmad Zaidan, Al-Jazeera's long-time bureau chief in Islamabad.

Christian Grothoff & J.M. Porup, *The NSA's SKYNET Program May Be Killing Thousands of Innocent People*, ARS TECHNICA (Feb. 2, 2016, 12:35 AM), https://arstechnica.com/information-technology/2016/02/the-nsas-skynet-program-may-be-killing-thousands-of-innocent-people/ [https://perma.cc/KS2M-ML6R] (explaining the SKYNET documents that Edward Snowden leaked).

[58] *Id*. ¶ 52.

[59] *Id*. ¶ 47.

upon hearing an aircraft approach.[60] The strike hit the OGN building but Mr. Kareem and team were safe in an underground studio.[61] The second strike occurred as Mr. Kareem was filming in the streets of Hariyataan.[62] Mr. Kareem and crew noticed the buzzing of drones before a strike behind them.[63] The third strike narrowly missed Mr. Kareem in an area called Khantounam; he survived only because he was wearing a bulletproof vest.[64] The OGN building was struck again in the fourth strike, killing a woman, her ten-year-old daughter, and an elderly man.[65] On the fifth and final strike, Mr. Kareem escaped with shrapnel injuries from a missile explosion only yards away from an OGN vehicle in which he and his crew were traveling.[66]

B. THE IMMEDIATE LAWSUIT

Messrs. Zaidan and Kareem alleged that the Government violated the Administrative Procedure Act (APA) by adding their names to the Kill List because neither individual met the preconditions listed in the PPG.[67] Sovereign immunity may be waived under the APA in connection with non-monetary claims challenging agency actions.[68]

The two journalists asserted that the Government violated the APA in five joint counts, arguing that the inclusion of their names on the Kill List: (1) was arbitrary, capricious, and an abuse of discretion; (2) was not in accord with law because it violated domestic and international law;[69] (3) exceeded the Defendant's statutory authority given to the Executive pursuant to the AUMF;[70] (4) violated the Plaintiffs' due process rights because the Government did not provide them notice or an opportunity to challenge their inclusion; and (5) violated the First Amendment because it "ha[d] the effect of restricting and inhibiting their exercise of free speech and their ability to function as journalists entitled to freedom of the press."[71] A sixth count applied only to Mr. Kareem's case and alleged that his inclusion on the Kill List "violated the Fourth and Fifth

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[60] *Id*.
[61] *Id*.
[62] *Id*. ¶ 48.
[63] *Id*. ¶ 49.
[64] *Id*.
[65] *Id*. ¶ 50.
[66] *Id*. ¶ 51.
[67] 5 U.S.C. § 551; *Zaidan*, 317 F. Supp. 3d at 15.
[68] 5 U.S.C. § 702 (waiving the government's sovereign immunity from suit for individuals "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."); Robert Chesney, *Judicial Review of Decisions to Kill American Citizens Under the AUMF: The Most Important Case You Missed Last Week*, LAWFARE (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 [https://perma.cc/3LBR-JRXR]; *see also* Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673 (2010) (discussing the importance and impact of the APA and, more specifically, the provision in the APA that exempts "military authority exercised in the field in time of war.").
[69] The Plaintiffs allege that their inclusion on the Kill List was illegal because it "(1) 'violates the prohibition on conspiring to or assassinating any person abroad contained in Executive Order 12,333'; (2) 'violates the prohibition against war crimes contained in 18 U.S.C. § 2441 because it constitutes a grave breach of common article 3 of the Geneva Conventions as specified in 18 U.S.C. § 2441(c)(3)'; (3) 'violates Article 6 of the International Covenant on Civil and Political Rights'; and (4) 'violates 18 U.S.C. § 956(a)(1).'" 317 F. Supp. 3d at 15.
[70] 107 P.L. 40, 115 Stat. 224.
[71] *Zaidan*, 317 F. Supp. 3d at 15.

Amendments because it constituted an illegal seizure and '[sought] to deprive [Mr. Kareem] of life without due process of law.'"[72] Mr. Zaidan's case did not survive the Government's initial motion to dismiss.

The Government advanced three arguments to support its motion: (1) the court lacked subject-matter jurisdiction "because Plaintiffs [had] not alleged sufficient facts to establish that they [had] standing to bring their lawsuit;" (2) the court lacked subject-matter jurisdiction because Plaintiffs raised a political question that would require the court "to probe into sensitive and complex national security decisions;" and (3) under Rule 12(b)(6), the Plaintiffs "[had] not pled sufficient facts to establish that the alleged unlawful actions [had] even occurred."[73]

Despite its assumption that all plausible factual allegations were true,[74] the court found Mr. Zaidan lacked standing to sue because he failed to adequately link SKYNET to the Kill List.[75] Just because the Government identified Mr. Zaidan as a potential terrorist does not necessarily mean that the U.S. targeted him for death. Mr. Kareem's case, on the other hand, *did* survive the Government's motion to dismiss.

1. STANDING

The court found that assuming all factual allegations in Mr. Kareem's claim were true, he not only pled injury-in-fact, but causation and redressability as well. Mr. Kareem's horrific recounting of his five near-miss aerial assaults—at least one of which included the use of a drone and American Hellfire missiles—was sufficient evidence making it "more than a sheer possibility" that he had been a target on the U.S. Kill List.[76] Mr. Kareem's case had redressability in the form of "an injunction or order from this court requiring, at the least, that the United States review and consider his evidence before it directs lethal force against him."[77] Thus, under the same inquiry, Mr. Kareem's case defeated part of the Government's first argument in support of dismissal (standing) as well as its third argument (failure to state a claim).

2. SOVEREIGN IMMUNITY

Mr. Kareem also proved that the court did have subject-matter jurisdiction despite the doctrine of sovereign immunity. Although Judge Collyer dismissed all claims against President Trump because he is not an agency within the meaning of the APA, she allowed claims against each agency and agency head to move forward.[78]

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[72] *Id.*

[73] *Id.* at 17.

[74] *Id.* at 15 ("In the present posture of the case, the Court must accept all plausible factual allegations in the Complaint as true."). This included accepting the *SKYNET* document as true. *Id.*

[75] *Id.* at 19 ("[W]hile Mr. Zaidan would not need to plead with certainty or have actual proof that his name is on a Kill List, his current allegations would require the Court to find that it is plausible that every individual whose name is on the SKYNET list of potential terrorists is also on a Kill List, for which there is no evidence of fact or logic.").

[76] *Id.* at 20–21. Moreover, it was plausible that the strikes were the direct result of Defendant's placing of Mr. Kareem on the Kill List, rather than just by some action of another group or faction in Syria. *See id.* The Government conceded that placement on the Kill List would "itself constitute harm or demonstrate a substantial risk of future harm." *Id.* at 18.

[77] *Id.* "Defendants make no arguments regarding redressability and thus the matter is conceded." *Id.*

[78] *Id.* at 21–23.

The Government further contended "that all of Mr. Kareem's claims must be dismissed because 'military authority exercised in the field in time of war or in occupied territory' is exempt from the definition of agency action in the APA."[79] Mr. Kareem successfully argued, however, that the issue is the very decision to place Mr. Kareem on the Kill List, and, according to the PPG, this decision was discussed, debated, and decided by executives in Washington, D.C.—not in the field during wartime.[80] Under the facts as alleged, Mr. Kareem successfully achieved a valid sovereign immunity waiver under the APA.[81]

3. THE POLITICAL QUESTION DOCTRINE

Mr. Kareem successfully defeated the Government's final argument, that the court did not have subject-matter jurisdiction under the Political Question Doctrine, pertaining to those counts which concern due process and the opportunity to be heard.

The argument that agency action was arbitrary, capricious, and an abuse of discretion under the PPG failed because the court found that the PPG does not provide a judicially manageable standard to analyze agency actions.[82] That agency action was not in accord with law or statutory authority was likewise unpersuasive because the court would have to make a policy choice and value determination on whether military action was wise—something committed to the executive branch (and historians).[83]

The argument that Mr. Kareem was deprived of his constitutional rights when Defendants designated him for the Kill List without notice or prior opportunity to be heard, however, did survive the political question inquiry.[84] Judge Collyer quipped, "[t]hese are weighty matters of law and fact but constitutional questions are the bread and butter of the federal judiciary."[85] With viable constitutional claims, Mr. Kareem's case is pending in the D.C. District Court.

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[79] *Id*. at 22 (citing 5 U.S.C. § 701(b)(1)(G)).

[80] *Zaidan*, 317 F. Supp. 3d at 22.

[81] *Id*. at 22–23 ("[W]hile execution of such a decision would be an exercise of military authority in the field, the Complaint plausibly argues that the decision itself was made by authorities who were not 'in the field' as required for the APA exemption to apply." On a subtler point, Judge Collyer also addresses the Defendant's failure to identify the war in which the US was engaged in for the purposes of the phrase. *Id*. ("Defendants insist that the APA does not apply due to this 'time of war,' while from the latter, Defendants assert that the United States has such a limited military presence in Syria it is not plausible the attacks against Mr. Kareem were the result of U.S. action. Of course, a non-traditional war can be a 'time of war; exempt from APA coverage, but Defendants fail to identify the war at issue.").

[82] *Id*. at 25 ("[T]he Presidential Policy Guidance provides no test or standard that must be satisfied before the government may add an individual (known or unknown) to the Kill List; it only specifies the steps and processes that the relevant defense agencies must complete.").

[83] *Id*. at 26. The court followed the functional approach to the political question doctrine adopted by the D.C. circuit in *El-Shifa*. *Id*. ("[T]he Circuit distinguishes between 'claims requiring [courts] to decide whether taking military action was wise—a policy choice and value determination constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch' and 'claims presenting purely legal issues such as whether the government had legal authority to act.'" (citing El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 842, (D.C. Cir. 2010) (en banc))).

[84] The Government relied on the analysis in *El-Shifa* to contend that Mr. Kareem's due process claims were non-justiciable, but the court distinguished the cases by pointing out that *El-Shifa* did not involve U.S. citizens or any allegation that there is a substantial connection to the U.S. that might give rise to cognizable constitutional rights. *Id*. at 26–29 (citing *El-Shifa*, 607 F.3d at 836).

[85] *Zaidan*, 317 F. Supp. 3d at 29.

III. PART III: IMPLICATIONS OF *ZAIDAN V. TRUMP*

A. DISTINGUISHING *ZAIDAN* FROM *AL-AULAQI II*

Zaidan can be distinguished from the *Al-Aulaqi* cases in two main ways. The first is geographical: "Judge Bates read the complaint in *Al-Aulaqi I* as asking him to determine the facts and judge the legitimacy of military decisions made thousands of miles away, which is not the case here."[86] This distinction seems strained at first, considering that Plaintiffs in both cases are challenging the decision to place a person on the Kill List. Judge Collyer, however, further distinguishes the cases by pointing out that *Al-Aulaqi II* occurred before the development of the PPG.[87]

Judge Collyer reiterates that Nasser Al-Aulaqi's first case failed to pass the Political Question Doctrine because it challenged an executive decision-making process unknown at that time; such would require the judicial branch to pry too far into the Executive's domain. Recall too that in addition to a request for an injunction ordering the U.S. government to refrain from killing his son, Nasser Al-Aulaqi asked the Government to define the standard by which it could designate individuals to the Kill List.

Today, we know precisely how the executive branch decides whether or not to place a person on the Kill List. Having made the process public, the executive branch established a manageable standard which the judicial branch can enforce. The release of this process proved that the disposition decision was made in Washington D.C. by defense agencies, rather than by the military, and thousands of miles away from a war zone.

The second point is procedural, that Mr. Kareem is not using a *Bivens* claim. In *Al-Aulaqi II*, Judge Collyer noted that Nasser Al-Aulaqi's second claim passed the Political Question Doctrine because the issue had become more acute—both with Anwar Al-Aulaqi's death and with a narrower *Bivens* claim. Nasser Al-Aulaqi's second claim ultimately failed, however, because it attempted to extend *Bivens* "beyond its grasp" by asking judges to evaluate the constitutionality of military decisions made during war.[88]

Bilal Abdul Kareem's claim, on the other hand, "asks for no such nonjudicial feat; rather, it alleges that placement on the Kill List occurs only after nomination by a defense agency principal and agreement by other such principals, with prior notice to the President."[89]

The main distinction seems to be that in *Al-Aulaqi II*, the decision to kill Anwar Al-Aulaqi could not be conceptually separated from the field of war; now that the procedural process behind the Kill List is public knowledge it can be subject to judicial scrutiny.

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[86] *Id*. at 24.

[87] *Id*. at 29.

[88] *Id*. at 24–25. The holding in *Al-Aulaqi II*—that *Bivens* could not be extended to a targeted killing case—is subject to debate and beyond the scope of this Note. *See* Emily, *supra* note 34 (arguing that *Bivens* does provide a proper framework to achieve judicial oversight of the Executive's use of targeted killing); *see also* Jaffer, *supra* note 14 (discussing the advantages of using a *Bivens* model as a framework for providing judicial review over targeted killings).

[89] *Id*.

B. PROCEDURAL VICTORIES

As discussed above,[90] Mr. Kareem has overcome three major procedural obstacles to survive the Government's motion to dismiss: (1) demonstrating standing; (2) obtaining a valid waiver of sovereign immunity; and (3) overcoming the Political Question Doctrine. These are substantial procedural victories to provide judicial oversight over the executive branch's decision to kill U.S. citizens.

1. DEMONSTRATING STANDING

In any claim in which a U.S. citizen challenges a purported placement on the Kill List, the plaintiff must first establish standing.[91] This feat seems nearly impossible in that most such plaintiffs possess no actual notice that he or she is on that morbid register. Mr. Kareem has proven that it is possible for a targeted strike survivor to establish injury-in-fact, causation, and redressability without actually seeing the Kill List or otherwise having actual knowledge of its contents.[92] Fundamentally, Mr. Kareem has proven there is a point at which a judge will conclude a surviving plaintiff's history is suspicious enough to demonstrate that he or she been targeted to die.

Equally as important, Judge Collyer agreed that a court can well redress this injury in the form of an injunction ordering the government to stop targeting the plaintiff—proving there is indeed the possibility of relief for U.S. citizens in similar situations as Mr. Kareem.[93] Judges should be able to order these injunctions on the Kill List, in theory, but practical questions remain, as will be discussed below.

2. OBTAINING A VALID WAIVER OF SOVEREIGN IMMUNITY

Mr. Kareem has proven that similar claims can move forward despite the doctrine of sovereign immunity. Judge Collyer refused to apply the APA as a blanket waiver of immunity over all military decisions. Instead, she distinguished wartime decisions made in the field of war from bureaucratic decisions made by executives in Washington, D.C. This distinction is made possible by the public revelation of the administrative procedure behind the Kill

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[90] *See* discussion *supra* Part II.B.1–3

[91] U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority [and] to Controversies . . . .").

[92] "Standing requires (1) the plaintiff to have suffered an injury in fact that is both (a) concrete and particularized and (b) actual or imminent, as opposed to conjectural or hypothetical; (2) the injury must be traceable to the defendants' actions; and (3) the injury must be redressable by a favorable decision of the court." Zaidan v. Trump, 317 F. Supp. 3d 8, 17 (D.D.C. 2018) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–62 (1992)). Having actual notice of placement on the Kill List would help establish each of these requirements because the plaintiff would know they are being targeted for death (i.e. an injury in fact), the plaintiff could trace any injury or potential injury resulting from a targeted strike to the Government's placement of plaintiff on the Kill List, and this injury could be redressed by a court ordered injunction against any further targeted action. On the other hand, as we have seen with Mr. Zaidan, proving these elements can be very difficult without actual notice. It appears to be the rare case, such as Mr. Kareem's, where a plaintiff has enough circumstantial evidence to prove they have been targeted in U.S. strikes.

[93] *Zaidan*, 317 F. Supp. 3d at 21.

List.[94] Because this decision is made by governmental officials in the Nation's capital, rather than military officers out in the field of battle, the judicial branch may be able to review it.

This distinction is vastly important because it denotes a move away from the unfettered power of the executive branch in making military decisions—including the ability to kill American citizens without any due process whatsoever—towards a more restrained approach, wherein like decisions may be subject to judicial review.

3. OVERCOMING THE POLITICAL QUESTION DOCTRINE

To overcome the Political Question Doctrine is equally as substantial. Doing so has important implications for the continued protection of all Americans' due process rights—a responsibility which the founders explicitly entrusted to the judicial branch. The executive branch has used the Political Question Doctrine as a catch-all defense when military decisions are challenged, arguing that the judicial branch is "ill-equipped to rule" even in cases implicating due process concerns.[95]

This argument may have worked in the past, effectively taking away U.S. citizens' fundamental due process rights, but it fails with the release of the PPG. The judicial branch now has judicially discoverable and manageable standards to evaluate due process claims of U.S. citizens targeted for death by their government, thereby promising increased legitimacy of the executive branch's actions.[96]

C. POTENTIAL FUTURE OBSTACLES

Of course, the Government may appeal or assert other legal rationales to defeat Mr. Kareem's claim.

1. ATTACKING THE MEANING OF MILITARY DECISIONS

The Government may attack Judge Collyer's reasoning that the Kill List determination was not made "in the field in time of war."[97] While it is true that the military decisions were indeed made in the comforts of the National

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[94] *Id*. at 23 ("The Presidential Policy Guidance supports his argument that the relevant decisions are made far from the field of battle. Mr. Kareem complains of an alleged decision to authorize a lethal strike against him and not a decision in the field to attempt to carry out that authorization.").

[95] *Id*.

[96] As noted above, Judge Collyer dismissed Mr. Kareem's Count One—that agency action was arbitrary and capricious, and an abuse of discretion—ruling that the PPG did not provide judicially manageable standards to evaluate whether an agency abused its discretion. *Supra* discussion Part II.B.3; *see Zaidan*, 317 F. Supp. 3d at 25. Requesting a court to examine whether defense agencies complied with the process set out in the PPG is fundamentally different from requesting a court to evaluate a *due process* claim, which involves examining whether a U.S. citizen was deprived of their right to be heard. *See Zaidan* 317 F. Supp. 3d at 29 (holding that Mr. Kareem's claim that defense agencies abused their discretion was a non-justiciable political question, but that Mr. Kareem's constitutional due process claims were justiciable and "the bread and butter of the federal judiciary.").

[97] *See* Chesney, *supra* note 68. At the time Congress passed the APA, interpretation of the phrase "in the field" was understood to reach more broadly to any place where military operations are being conducted, but interpretations have changed over the years from more narrow interpretations before World War I to more broad interpretations after the World Wars. Kovacs, *supra* note 68, at 712–17. Interpretation of the phrase "time of war" has also changed over time, and it is widely accepted to not be limited to formal declarations of war. *See id.* at 717–20. Interpretations are still hot for debate because the Supreme Court has not yet given a definitive interpretation of the military authority exception. *Id*. at 728.

capital, rather than in the Middle East, the decisions seem field-related.[98] The Government may argue that just because technology enables an administration to make decisions from Washington, D.C. the militaristic nature and combat-relevance of the decision is the same.[99] Given the grave due process concerns implicated in the current case, it would not be surprising if a higher court confirmed Judge Collyer's formalist interpretation to rein in the power of the executive branch.[100]

2. THE STATE SECRETS PRIVILEGE

The Government may argue that the state secrets privilege cloaks any and all information about the Kill List decision-making process.[101] "The state secrets privilege, when properly invoked, permits the Government to block the release of any information in a lawsuit that, if disclosed, would cause harm to national security."[102]

The privilege does not necessarily mandate outright dismissal but instead allows for the exclusion of evidence on national security grounds.[103] The Government could invoke this privilege to exclude sensitive evidence regarding the alleged decision to place Mr. Kareem on the Kill List, and, if such evidence is central, request an outright dismissal.[104]

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[98] Chesney, *supra* note 68.

[99] *Id.* The Government would essentially argue for a broad interpretation of the military authority exception in line with contemporary meanings of the phrases "in the field" and "time of war" at the time those phrases were adopted by Congress in 1946. Kovacs, *supra* note 68, at 725.

[100] A formalist interpretation, such as Judge Collyer's, may be argued to be more in line with what a modern reader would presume the plain language of the statute to mean. Kovacs, *supra* note 68, at 725. ("[A] court might limit its analysis to the plain language and official legislative history of the APA.").

[101] Chesney, *supra* note 68. The Government did invoke the state secrets privilege in *Al-Aulaqi I* and *Al-Aulaqi II*; however, the cases were both resolved on other grounds. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 53 (D.D.C. 2010) ("But defendants also correctly and forcefully observe that this Court need not, and should not, reach their claim of state secrets privilege because the case can be resolved on the other grounds they have presented.); Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56, 80 (D.D.C. 2014) ("Under binding D.C. Circuit precedent, this Court finds that special factors preclude the implication of a Bivens remedy here. Because it reaches this conclusion, the Court does not address additional claims or defenses.").

[102] *Background on the State Secrets Privilege*, ACLU, https://www.aclu.org/other/background-state-secrets-privilege [https://perma.cc/6CS3-EFPK]. The state secrets privilege developed at common law as a recognition that the Executive's constitutional authority is broadest in the realm of military and foreign affairs. David L. Applegate, *State Secrets Privilege in the United States–The Price of Security*, CBA REC. 32, 33 (2009). The states secrets privilege operates under the principle that "military, diplomatic, or intelligence matters that in the interests of national security should not be divulged are privileged." *See id.* (discussing the principles of the state secrets privileged enunciated in El Masri v. United States, 479 F.3d 296, 307–08 (4th Cir. 2007)).

[103] Robert Loeb & Emma Kohse, *Trump's DOJ to Assert State Secrets Privilege in* Salim v. Mitchell, LAWFARE (Feb. 24, 2017), https://www.lawfareblog.com/trumps-doj-assert-state-secrets-privilege-salim-v-mitchell [https://perma.cc/9DDS-NN7M]. The state secrets privilege may necessitate outright dismissal "if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure." Applegate, *supra* note 102, at 33; *see also* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 53 ("Contemporary state secrets doctrine encompasses two applications of this principle. One completely bars adjudication of claims premised on state secrets (the 'Totten bar'); the other is an evidentiary privilege ('the Reynolds privilege') that excludes privileged evidence from the case and may result in dismissal of the claims." (quoting Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1077 (9th Cir. 2010)).

[104] In *Al-Aulaqi I*, the Government did not go so far as to request outright dismissal, but instead only argued that certain evidence should be privileged. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 53 ("Here, defendants do not argue that the very subject matter of this case is itself a 'state secret.'") The evidence the Government argued was privileged "include[d] information needed to address

The state secrets privilege is a vast power that, in some cases, clearly allows the executive branch to bypass a judicial check.[105] But because the Kill List procedures have been made public, it is not clear that invoking this privilege is either necessary or proper.[106] The information Mr. Kareem requires is only whether or not he is on the Kill List; he may need no more details about the decision-making process than is already made public. Mr. Kareem only need prove he is not a terrorist and should not be on the Kill List. Still, the Government may invoke this privilege by arguing that Mr. Kareem would necessarily access top-secret confidential information. The remedy does exist, however, of an *in camera* review.[107]

3. ARGUING DUE PROCESS WAS GIVEN

Wrongful placement on the Kill List may constitute both procedural and substantive violations of a U.S. citizen's due process rights.[108] Procedural due process addresses the fairness in the manner in which a governmental action deprives an individual of "life, liberty, or property,"[109] focusing not on what was deprived but on how the government deprived it.[110] Mr. Kareem plausibly alleges the U.S. government violated his Fifth Amendment procedural rights by placing him on the Kill List without notice and opportunity for hearing.[111]

Substantive due process focuses on whether the actual official conduct is an arbitrary abuse of power that "shocks the conscience" and unjustifiable by any governmental interest.[112] The Constitution places such a high value on life and liberty that a wrongful attack on an innocent citizen's life is just such an action that shocks the conscience. However, after 9/11, the government

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whether or not, or under what circumstances, the United States may target [terrorist organizations and leaders] . . . including any criteria governing the use of lethal force." *Id.*

[105] Loeb & Kohse, *supra* note 103.

[106] Both courts and the Government are aware of the suffocating power of the state secrets privilege and are wary of its use. *See* Mohamed v. Jeppesen Dataplan, 614 F.2d 1070, 1080 ("To ensure that the privilege is invoked no more often or extensively than necessary, *Reynolds* held that '[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.'" (quoting United States v. Reynolds, 345 U.S. 1, 7–8 (1953))); *see also* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 53–54 ("Indeed, last year the Attorney General promulgated a policy confirming that the state secrets privilege will only be invoked in limited circumstances involving a significant risk of harm to national security and after detailed procedures are followed (including personal approval of the Attorney General).").

[107] 35A C.J.S. *Federal Civil Procedure* § 717 n.2 (2018) ("Assessment of a claim of a state secrets privilege may require in camera ex parte examination by the judge.").

[108] The Supreme Court held that U.S. citizens are afforded the same constitutional rights abroad as they would in U.S. territory in the landmark case *Reid v. Covert*, 354 U.S. 1, 74 (1957) ("When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.").

[109] U.S. CONST. amend. V.

[110] 16C C.J.S. *Constitutional Law* § 1863.

[111] "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)). Not only does placement on a kill list potentially deprive an individual of life, but it also risks deprivation of liberty. Wrongful placement on the Kill List implicates two categories of liberty interest: the individual's right to travel (because the individual fears an attack) and the individual's liberty interest in his or her reputation (because the individual has been designated a suspected terrorist threat). *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 634–35 nn.1–2 (8th ed. 2017).

[112] 16C C.J.S. *Constitutional Law* § 1863.

possesses a strong and compelling interest in combating terrorism and justifying extreme measures.

The Government may argue that the very process by which Mr. Kareem was evaluated and identified for the Kill List was due process in itself, and no more was required. Caselaw supports the notion that "due process is flexible and calls for such procedural protections as the particular situation demands."[113] The protections already afforded to Mr. Kareem include scrutiny and debate by high-level government officials of extensive metadata (among other information gathered by intelligence officials) to create a profile of suspected terrorists confident enough to nominate a target to the Disposition Matrix.[114] The Government may contend it has an interest in reducing the process available to suspected terrorists because it is impractical to provide notice and hearing to them. The exigencies of combating terrorism require the Government to act efficiently and protect intelligence sources that help identify threats. Requiring notice and opportunity for hearing would necessarily divert time and resources in satisfying procedural rights and may even amplify specific threats.[115]

While these arguments are appealing, they lose luster considering the D.C. Circuit and Supreme Court's increasing willingness to extend notice and opportunity in other war on terror cases *vis-a-vis* habeas corpus of detainees.[116] Judge Collyer explicitly recognized the usefulness of habeas corpus caselaw because "constitutional norms were extended to U.S. citizens abroad despite the context of war-making."[117] If the substantial elements of due process are required when the Government deprives the liberty of a U.S. citizen suspected of terrorism, it is logical the same elements are needed for the Government to deprive the life of a citizen.[118] The analogy between habeas corpus cases regarding citizen-detainees and targeted killing in the war on terror is further analyzed in Part IV: Solution.

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[113] Morrisey v. Brewer, 408 U.S. 471, 481 (1972). *Compare* Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (holding that welfare recipients must be given an opportunity for a pre-termination hearing to confront and cross-examine witnesses relied on by the Department of Social Services) *with* Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (holding that a pre-termination evidentiary hearing is not required prior to termination of disability benefits by the Social Security Administration).

[114] *See* Cole, *supra* note 3; *see also* Zaidan v. Trump, 317 F. Supp. 3d 8, 22 (D.D.C. 2018).

[115] Benjamin McKelvey, Note, *Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power*, 44 VAND. J. TRANSNAT'L L. 1353, 1370 (2011).

[116] The Court first extended procedural due process protections to enemy combatants in *Hamdi v. Rumsfeld*, holding that a "citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004). More recently, the D.C. Circuit extended these same protections to a citizen in a foreign country opposing transfer from U.S. custody to another nation's custody. Doe v. Mattis, 889 F.3d 745, 748 (D.C. Cir. 2018) ([T]here must be an opportunity for the citizen to contest the factual determination that he is an enemy combatant fighting on behalf of that enemy.").

[117] Zaidan v. Trump, 317 F. Supp. 3d 8, 29 (D.D.C. 2018). Judge Collyer also recognized that the difference between the cases are notable, mostly because Mr. Kareem is not in U.S. custody. *Id.* "Now that he has made it to a U.S. court, however, his constitutional rights as a citizen must be recognized." *Id.*

[118] McKelvey, *supra* note 115, at 1371–72 ("If elements of are required when the government deprives an American of liberty, is it not logical to conclude that the government must also satisfy when depriving an American of life? This is a natural extension of the Hamdi holding, especially because a deprivation of life must be treated more seriously and carefully than a deprivation of liberty.").

D. TAKEAWAYS FROM *ZAIDAN V. TRUMP*

What we ought to take away from *Zaidan* is the increasing unwillingness of the judicial branch to allow the executive branch unlimited power to deprive U.S. citizens of life without due process or judicial review.

When faced with the potentially innocent Mr. Kareem, Judge Collyer decided that Mr. Kareem's interest in life and due process trumped the executive branch's interest in making national security decisions freely.[119] The court's decision was enabled by the publicly disclosed PPG which President Obama formulated to create more accountability in the executive branch's targeted killing campaign, and now provides judicially discoverable and manageable standards for the executive branch's Kill List procedures.

Judge Collyer's denial of the Government's motion to dismiss may give Mr. Kareem the opportunity to seek the information necessary for him to prove he is on the Kill List.[120] Though, the Government will most likely fight tooth and nail to deny Mr. Kareem the ability to search classified government records, such would give Mr. Kareem the opportunity to search for validating information in discovery, which would be a substantial step towards upholding the Constitution's promise of due process.

If the court grants Mr. Kareem the opportunity to prove the Government indeed placed him on the Kill List, he would still need to show this inclusion was wrongful.[121] In the rare cases that U.S. citizens may provide enough facts to prove a reasonable belief the Government wrongfully placed them on the Kill List, those citizens deserve to be heard. And if a decision to place a U.S. citizen on the Kill List is erroneous, courts must require the Government to remove the U.S. citizen from it. *Zaidan* is a prime example of a potentially egregious mistake made by the U.S. government which may have cost the life of an innocent U.S citizen.

Judicial review would provide an avenue for relief of similarly situated plaintiffs who believe the government has wrongfully targeted them for death. While the government needs to be empowered with the ability to take action against suspected terrorists, judicial review is needed to clarify the limits on the government's legal authority, supply a degree of legitimacy to actions taken within those limits, and to encourage executive officials to observe them.[122] The next part of this Note discusses how either the judicial branch or the legislative branch may provide judicial oversight upon the targeted killing process to protect U.S. citizens' due process rights.

IV. PART IV: SOLUTION

The survival of Mr. Kareem's due process claim leaves wide-open two questions which the judicial branch must eventually resolve. What does due process look like for U.S. citizens who believe their government wrongfully placed them on the U.S. Kill List? How can courts protect due process rights

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[119] *Id.* at 27 ("Due process is not merely an old and dusty procedural obligation required by Robert's Rules. Instead, it is a living, breathing concept that protects U.S. persons from over-reaching government action even, perhaps, on an occasion of war.") (footnote omitted).

[120] ELSEA, *supra* note 2, at 3.

[121] Zaidan v. Trump, 317 F. Supp. 3d 8, 28 (D.D.C. 2018) ("As a U.S. citizen, he seeks to clarify his status and profession to Defendants and, thereby, assert his right to due process and a prior opportunity to be heard.").

[122] Jaffer, *supra* note 14.

through judicial review while simultaneously respecting the executive branch's power over national security concerns?

A. THE COURT SHOULD ADOPT A *MATHEWS*-STYLE JUDICIAL BALANCING TEST

The Supreme Court has already laid the foundation for due process oversight in similar habeas corpus cases in the war on terror. By analogizing targeted killing cases to habeas corpus caselaw, the court can adopt a model of judicial control similar to that adopted in *Hamdi v. Rumsfeld* and *Boumediene v. Bush*.[123] These important opinions used administrative law principles to limit executive authority to detain persons as enemy combatants.[124] By analogy, if due process controls whom the executive may declare "enemy combatants" and detain, then due process should control whom they may designate as "terrorists" and subsequent attack.[125]

In *Hamdi*, petitioner Yaser Hamdi, an American citizen whom the Government classified as an "enemy combatant" for allegedly taking up arms with the Taliban, was captured in Afghanistan and subsequently detained within a naval brig in Charleston, S.C.[126] The Government wished to classify Mr. Hamdi as an enemy combatant to justify holding him indefinitely, without formal charges and proceedings, until it determined that access to counsel or further process was warranted.[127] Mr. Hamdi's father filed a habeas petition on his son's behalf under 28 U.S.C. § 2241,[128] alleging violations of the Fifth and Fourteenth Amendments.[129] The Court held that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[130]

In reaching this decision, the Court balanced the legitimate but competing concerns of Mr. Hamdi's interest in due process against the Government's ability to make wartime decisions by applying a test articulated in *Mathews v. Eldridge*.[131] The test in *Mathews* weighs private interest affected by official action as against the Government's asserted interest, including the function involved and the burden the Government would face in providing greater process.[132] This calculus then contemplates "a judicious balancing of these concerns, through an analysis of 'the risk of an erroneous deprivation' of the private interest if the process were reduced and the 'probable value, if any, of additional or substitute procedural safeguards.'"[133] The Court in *Hamdi*

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[123] Hamdi v. Rumsfeld, 542 U.S. 507, 507 (2004); Boumediene v. Bush, 553 U.S. 723, 723 (2008).

[124] Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, CARDOZO L. REV. 405, 409–10 (2009).

[125] *Id.*

[126] *Hamdi*, 542 U.S. at 507.

[127] *Id.* at 510.

[128] This statute delineates who must be granted a writ of habeas corpus by a U.S. federal judge. 28 U.S.C. § 2241.

[129] *Hamdi*, 542 U.S. at 507.

[130] *Id.* at 533. The Supreme Court has accepted the *Mathews* test as a "general approach" for testing challenged procedures under a due process claim. Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1362 (2012) (citing Parham v. J.R., 442 U.S. 584, 599 (1979)).

[131] *Id.* at 528–29 (citing Mathews v. Eldridge, 424 U.S. 319, 319 (1976)).

[132] *Id.*

[133] *Id.* (quoting *Mathews*, 424 U.S. at 319).

ultimately determined that the risk of erroneous deprivation of a detainee's liberty was unacceptably high, outweighing any benefit to national security by refusing a post-deprivation hearing.[134]

In 2004, the military responded to *Hamdi* and another habeas case, *Rasul v. Bush*, which extended the statutory right of habeas corpus to Guantanamo detainees,[135] by granting these detainees hearings called Combatant Status Review Tribunals (CSRTs).[136] CSRTs consist of three neutral commissioned officers of the U.S. Armed Forces.[137] Each detainee is appointed a "personal representative"—a military officer typically, not a lawyer—who could review all evidence and share unclassified portions with the detainee.[138] The detainee has the right to testify at the CSRT, introduce any relevant documentary evidence, and call witnesses if "reasonably available."[139] CSRTs use the preponderance of evidence standard of proof and the government enjoys a rebuttable presumption of evidence in its favor.[140] "The government's position has been that, once the CSRT determines that a particular detainee is an 'enemy combatant,' the detainee can be held indefinitely -- without trial - as part of the 'war on terror.'"[141]

Congress later passed the Detainee Treatment Act of 2005 (DTA) as an attempt to circumscribe habeas review of Guantanamo detainees, but in *Hamdan v. Rumsfeld*, the Court held that DTA's limits on habeas did not apply to petitions pending at the time of the statute's enactment.[142] Congress responded again by passing the Military Commissions Act of 2006 (MCA), which clarifies DTA's limits on habeas had retroactive effect and reiterated that the DTA governed review of CSRT proceedings.[143]

In *Boumediene*, petitioners were aliens detained at Guantanamo Bay after being captured in Afghanistan or elsewhere abroad, and designated enemy combatants by CSRTs.[144] Petitioners claimed that they had a constitutional right to habeas corpus despite provisions in the recently enacted DTA and MCA.[145] The Court held the CSRT procedures in the DTA and MCA did not provide an adequate and effective substitute for habeas corpus—thus insufficient due process—even though the detainees were located overseas and not U.S. citizens.[146]

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[134] *See id.* at 532.

[135] Rasul v. Bush, 542 U.S. 466, 466 (2004).

[136] Murphy & Radsan, *supra* note 124, at 429; *see also* Daniel M. Gluck & Joseph Harrington, *Boumediene v. Bush: Executive Power and the Writ of Habeas Corpus*, 12-OCT Haw. B.J. 4, 5 (2008) (discussing the DOD's establishment of CSRTs in 2004 as administrative proceedings to determine whether detainees were enemy combatants).

[137] Robert A. Peal, Note, *Combatant Status Review Tribunals and the Unique Nature of the War on Terror*, 58 VAND. L. REV. 1629, 1651–53 (2005).

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] Gluck & Harrington, *supra* note 136, at 5 (citing *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 447 (D.D.C. 2005)).

[142] Murphy & Radsan, *supra* note 124, at 429.

[143] *Id.* (citing Hamdan v. Rumsfeld, 548 U.S. 557, 574–76 (2006)).

[144] Boumediene v. Bush, 553 U.S. 723, 723 (2008).

[145] *See id.* at 732–33.

[146] *Id.*; *see also* VED P. NANDA ET AL., 3 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 14A:25 (March 2019 Update) ("Justice Kennedy's analysis of the CSRT procedures was that there was too great a risk of error. Justice Kennedy concluded this portion of his analysis by stating

Once more, the Court reached this decision based on a *Mathews*-style balancing test that found unacceptable the risk of error in the tribunal's findings of fact due to detainee's limited means to find or present evidence, lack of assistance of counsel, and lack of awareness of the most critical allegations relied upon to order the detainee's detention.[147] The courts should apply a similar, *Mathews*-style balancing test in targeted killing cases. This balancing test would take into account plaintiffs' compelling interest in life, weighed against the government's interest in national security decisions without restraint. The calculus would be nearly identical to habeas review and should come out the same way—requiring greater due process for U.S. citizens but not necessarily an opportunity for a pre-deprivation hearing.

In *Hamdi* and *Boumediene*, the Court recognized that due process does not always demand notice and an opportunity to be heard before a deprivation occurs.[148] The nature of war and the pressing concerns of national security do not always allow for a pre-deprivation judicial review. Similarly, it would be absurd to require the government to give every suspected terrorist notice and a hearing before targeting him or her for death. Yet by analogy to *Hamdi*, if ex post review is required to vindicate a detainee's due process rights, ex post review should be required upon a target's sentence of death.

After *Boumediene*, the establishment of an administrative tribunal similar to CSRT will not provide sufficient ex post review. Nor is it practical considering the top-secret nature of the Kill List. Instead, individuals challenging their alleged inclusion on the Kill List must be afforded the opportunity for civil proceedings in federal court. If a plaintiff plausibly alleges he or she is wrongfully included on the Kill List, the court would make a determination via in camera submissions. After this determination, the case would either be dismissed or allowed to move forward. The plaintiff could then challenge the factual basis for classification as a suspected terrorist, with the remedy being an injunction.

Of course, there are important differences between habeas corpus and targeted killing cases. Judge Collyer recognized a crucial difference between Mr. Kareem's case and habeas corpus cases: Mr. Kareem is not in U.S. custody.[149] The argument for providing due process protections to detainees is stronger because there is no doubt that the government has deprived them of their liberty. But in cases where the plaintiff has filed a successful suit against the government plausibly alleging a violation of his or her due process rights but is not in U.S. custody, analogously to Mr. Kareem, that plaintiff should have the opportunity to be heard. In cases like Mr. Kareem's, where the plaintiff can point to wrongful physical attacks, there has been a clear and tangible deprivation of liberty similar to the deprivation of those detained.

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that the habeas court must have the means to conduct a meaningful review and grant a meaningful remedy.").

[147] *Boumediene*, 553 U.S. at 729 ("At the CSRT stage the detainee has limited means to find or present evidence to challenge the Government's case, does not have the assistance of counsel, and may not be aware of the most critical allegations that the Government relied upon to order his detention. His opportunity to confront witnesses is likely to be more theoretical than real, given that there are no limits on the admission of hearsay. The Court therefore agrees with petitioners that there is considerable risk of error in the tribunal's findings of fact."); *see also* Murphy & Radsan, *supra* note 124, at 434–35.

[148] *See id.* at 439–40.

[149] Zaidan v. Trump, 317 F. Supp. 3d 8, 29 (D.D.C. 2018).

Moreover, cases in which a plaintiff plausibly alleges their wrongful placement on the Kill List would be extremely rare. The government's legitimate interest in effectively combating terrorism would hardly be affected by these occasional civil proceedings. Indeed, Judge Collyer observed, "[n]ow that [Mr. Kareem] has made it to a U.S. court . . . his constitutional rights as a citizen must be recognized."[150]

B. CONGRESS SHOULD ESTABLISH A SPECIALIZED COURT TO REVIEW KILL LIST DECISIONS

One possible legislative solution to enact judicial oversight over targeted killing is the creation of so-called "death courts" to function similarly as the Foreign Intelligence Surveillance Court (FISC), which authorize electronic surveillance of foreign powers and agents under the Foreign Intelligence Surveillance Act of 1978 (FISA).[151]

The FISA establishes standards for obtaining court orders authorizing foreign intelligence electronic surveillance, and requires federal officers to first obtain the Attorney General's approval before submitting an application to one of the FISC judges.[152] FISC consists of seven U.S. District Court judges selected by the Chief Justice of the United States Supreme Court.[153] While the Supreme Court has yet to weigh in on the constitutional validity of the FISA, lower courts have consistently upheld the validity of the Act since its passing in 1978 and amendments of 2001, 2007, and 2008.[154]

Applications for electronic surveillance under the FISA must detail: (1) the target's identity; (2) information demonstrating that the target is a "foreign power" or an "agent of a foreign power"; (3) evidence that the foreign power or its agent is using or about to use the place where the surveillance will occur; (4) the type of surveillance to be used; (5) the minimization procedures to be employed; and (6) certification that the information sought is "foreign intelligence information."[155]

The initial enactment of the FISA required FISC judges to specifically find that the target is a foreign power or an agent thereof, but if the target is a U.S. citizen, that the target is not being considered an agent of a foreign power solely on the basis of activities protected by the First Amendment.[156] However, given enactment of the U.S. Patriot Act which loosened several requirements in response to the terrorist attacks of September 11, the FBI now needs only to

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[150] *Id.*

[151] 50 U.S.C.A. §§ 1801 et seq. Comparisons between the process of requiring judicial approval for foreign intelligence electronic surveillance and a potential process of requiring judicial approval for targeted killing have been raised by academics and judges alike. *See, e.g.*, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8–9 (D.D.C. 2010) ("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?"); Jaffer, *supra* note 14 (comparing a potential death court to the FISC).

[152] *Id.*

[153] 190 A.L.R. Fed. 385 § 2[a].

[154] Amanda DiPaolo & Karen Peterson, *Jackson's Zone of Twilight: How the Foreign Intelligence Surveillance Act Is Adjudicated in front of the Federal Courts*, 3 HOMELAND & NAT'L SECURITY L. REV. 33, 46, 65 (2015).

[155] 190 A.L.R. Fed. 385 § 2[a].

[156] *Id.*

specify that records are sought for an authorized investigation to prevent terrorism or clandestine intelligence.[157]

The FISA provides a structural legislative model that addresses substantive issues analogous to the constitutional problems of targeted killing.[158] Congress could, by enactment similar to the FISA, establish a court to approve decisions to place U.S. citizens on the Disposition Matrix. This court, perhaps coined the "U.S. Disposition Court," would similarly comprise a number of U.S. District Court judges (likely) selected by the Chief Justice of the U.S. Supreme Court.

Government officials would submit target applications, most likely approved by the Attorney General. These applications would have to fill a list of requirements, for example: (1) the target's identity; (2) information demonstrating that the target is a terrorist or has aided and abetted terrorism; (3) evidence that the target is an imminent threat to the U.S.; and (4) the minimization procedures to be employed. Once a target is approved for the Disposition Matrix, defense agencies would be authorized to take action when appropriate under the PPG.

Mr. Kareem and other similarly situated plaintiffs argue that their inclusion on the Kill List violates the Fourth and Fifth Amendments as an illegal seizure, and deprives them of life without due process of law.[159] The establishment of a Disposition Court similar to the FISA Court would address both of those Fourth and Fifth Amendment concerns.

The FISC provides the authorization of warrants within the meaning of the Fourth Amendment because "it provides for the interposition of independent judicial magistrates between the executive and the subject of the surveillance which the warrant requirement was designed to assure."[160] The FISA legislation has provided for the facilitation of effective crucial intelligence processes while protecting Americans' Fourth Amendment privacy rights.[161] Modeling the legislation for a Disposition Court after the FISA would similarly ensure that U.S. Citizens' are not subject to illegal seizure by requiring judges to sign off on any such nominations to the Kill List.

The establishment of a Disposition Court would address Fifth Amendment concerns by providing ex-ante review of targeted killing orders.[162] Ex ante review is especially attractive because the common law solutions discussed above may not provide adequate due process.

If we were to rely on the courts to promulgate due process standards by analogizing targeted killing cases to habeas corpus caselaw, the most due

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[157] *See id*. The Patriot Act also allows pen registers and trap and trace devices to be used against U.S. citizens and lawful permanent aliens and eliminates the need for a new FISA order every time the subject of the surveillance changes location, allowing for roving surveillance. *Id*.

[158] McKelvey, *supra* note 115, at 1379 ("FISA was passed to resolve concerns over civil liberties in the context of executive counterintelligence.").

[159] Zaidan v. Trump, 317 F. Supp. 3d 8, 15 (D.D.C. 2018).

[160] *See* United States v. Megahey, 553 F. Supp. 1180, 1190 (E.D.N.Y. 1982); *see also* J. Alexandra Bruce, *Is Uncle Sam Stalking You? Abandoning Warrantless Electronic Surveillance to Preclude Intrusive Government Searches*, 6 J.L. & CYBER WARFARE 51, 54–55 (2017) ("The FISA was drafted with the intention of structuring a procedure to enforce judicial oversight and maintain the limitations of the Fourth Amendment.").

[161] Bruce, *supra* note 160, at 65 ("Additionally, FISA has proven successful in prosecuting individuals discovered to be actively involved in carrying out acts of terrorism against the United States.").

[162] McKelvey, *supra* note 115, at 1380.

process the government would afford a targeted U.S. citizen is likely only a post-deprivation hearing to challenge their inclusion on the Kill List. While it is still, of course, absurd to require any sort of pre-deprivation notice to the targeted citizen, legislation that provides for ex-ante judicial review of targeted killing orders would interpose additional process when it would be most meaningful—the pre-killing stage.[163]

The passage of legislation to establish this framework would essentially require immense bipartisan political effort. The FISA, for example, was passed both in the wake of Watergate and at "a time of increased terrorist attacks against American citizens around the world and at home."[164] It was the product of a Senate committee conducting interviews with more than 800 officials and holding some 21 public and 200 executive meetings.[165] Committee research showed that the FBI and CIA conducted a massive amount of warrantless electronic surveillance with the justification that surveillance was necessary for national security.[166] Furthermore, in the wake of the Watergate scandal it would have been strongly against public opinion for President Carter to veto any bill restricting the government's intelligence surveillance abilities. A similar catalyst might be required for the passage of Disposition Court legislation: an egregious violation of due process or arbitrary abuse of discretion by the government, perhaps in the form of an unjust killing of an especially sympathetic U.S. citizen.

A crucial practical issue with potential death courts is that the process itself may take considerable time for a conclusion. If a target is indeed an imminent threat, the government might not have time to go through this procedural process. This could be addressed, however, by allowing exceptions from the process for extraordinary threats.

One policy issue is that the very existence of the Disposition Courts itself suggests that the government has authority to use lethal force against individuals who do not present imminent threats.[167] Considering the government is taking actions against these types of individuals anyways, having an additional layer of checks and balances would afford more due process protections to potentially innocent U.S. citizens.

V. CONCLUSION

Zaidan v. Trump exemplifies the contemporary issue of executive branch encroachment on U.S. citizens' civil liberties as that branch struggles for unrestrained power over national security matters. In this modern war on terror, the government certainly needs to act swiftly to protect the Nation and police against global terrorism. The government's power has grown unrestrained for too long, however, and the results are dangerous. The government can currently

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[163] *Id*. at 1380.

[164] TED GOTTFRIED, HOMELAND SECURITY VERSUS CONSTITUTIONAL RIGHTS, 22 (2003); *see also* Rebecca A. Copeland, *War on Terrorism or War on Constitutional Rights? Blurring the Lines of Intelligence Gathering in Post-September 11 America*, 35 TEX. TECH L. REV. 1, 13 (2004) ("Envisioned pursuant to post-Watergate concerns of the seemingly unlimited power of the Office of the President to engage in warrantless electronic surveillance, the FISA creates a statutory regime for conducting electronic surveillance within the territorial United States for foreign intelligence purposes." (footnotes omitted)).

[165] DiPaolo & Peterson, *supra* note 154, at 45.

[166] *Id*.

[167] *See* Jaffer, *supra* note 14.

kill its citizens abroad without any judicial review, all in the name of national security.

Courts have laid the foundation for due process in the war on terror through recent habeas corpus caselaw. Through a *Mathews*-style judicial balancing of interests between the government's mandate for national security against a detainees' interest in avoiding wrongful deprivation of liberty, the Court found these detainees deserved a post-deprivation hearing. The courts should apply a *Mathews*-style judicial balancing to targeted killing cases as well, with the government's interest in national security weighed against the plaintiff's interest in his or her very life.

While pre-termination hearings in targeted killing cases is most likely an impractical solution given the exigencies of combating global terrorism, a *Mathews*-style judicial balancing would show that plaintiffs who can plausibly argue the government has wrongfully included them on the Kill List should be afforded at least a post-deprivation hearing.

A legislative solution is also possible in the form of a "Disposition Court" modeled after the FISC. A Disposition Court would provide a check on the government's power by requiring the authorization of a federal judge before the government adds a U.S. citizen to the Disposition Matrix. The establishment of a Disposition Court is an especially attractive solution because it would satisfy Fourth and Fifth Amendment concerns in targeted killing cases by providing ex ante judicial review at the most critical stage—before the government kills.

This solution, while possible, is unlikely because it requires significant bipartisan legislation upon a highly contentious issue. However, a flagrant abuse of power or egregious mistake on the part of the executive branch could propel Congress into action.

With *Zaidan v. Trump* currently pending in the D.C. District Court, many outcomes are possible, but one thing remains certain—Americans' fundamental due process rights are diminishing in this modern war. This litigation will indicate whether the judicial branch is willing to step-in and uphold the Constitution's values.