### Plan

#### The United States Federal Government should grant limited jurisdiction to a federal court that prohibits uninhabited aerial vehicle targeted killings of individual United States citizens when, after being afforded notice and opportunity as well as defense from an independent public advocate, it is proven that the target is not a senior member of Al Qaeda or associated force.

### Advantage

#### The Advantage is Due process

#### Scenario 1 is rights

#### Despite due process reforms for detention, lack of protection for targeted killing combined with sole executive authority will collapse overall rights protections

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From 2001 to 2004, the constitutional order of the United States was severely tested. In Hamdi v. Rumsfeld, n408 the Supreme Court held that the writ of habeas corpus extended to a United States citizen held at Guantanamo Bay. n409 Eight of the nine Justices agreed that the executive branch did not have the power to hold a citizen indefinitely, without access to basic due process protections enforceable in open court. n410 This case was properly seen as a watershed, a rejection of theories of executive detention that were incompatible with the basic tenets of our common law tradition. n411 However, the clear right to habeas corpus is only slightly over three hundred years old - the right not to be killed without due process of law is twice as old and considerably more fundamental. As Blackstone made clear, habeas corpus was originally necessary because it was a prophylactic protection for Magna Carta's right not to be killed. n412 To turn a blind eye to executive death warrants would be to trample upon numerous principles the Framers believed so important as to put into a document that outlines the parameters of the state itself. It would also trample upon principles that predate the Bill of Rights: the balance of powers, the constraints on arbitrary executive action, and the specific requirements of additional due process for those accused of crimes amounting to treason. It would also make a mockery of their [\*1271] comprehensive view of due process, which precluded the use of military justice against civilians. It would allow a return to the very features of royalist justice that they and their forbearers detested, such as allowing the executive the power of judgment and denying the courts the power to intervene - this was the hallmark of the detested Star Chamber, which was abolished on these grounds in 1641. n413 What is perhaps most perplexing about this current crossroads is that there seems to be very little discussion of the importance of this case within the legal profession in general, and in particular among the scholars and lawyers who had opposed the legal framework for the indefinite detention of the detainees at Guantanamo Bay. It is difficult to understand why so much determined opposition should emerge to the withholding of the rights of habeas corpus from American citizens (which led to the decision in Hamdi), n414 while the administration's decision to issue executive death warrants has led to so little. Apart from the decision of the ACLU and the CCR to litigate the case on behalf of Nasser Al-Aulaqi, there has been very little action taken within the legal community to publicize the Obama Administration's decision to use the targeted killing program to assassinate an American citizen. n415 As the discussion of the targeted killing program after Al-Awlaki's extrajudicial execution reveals, American militants like Anwar al-Awlaki are placed on a kill or capture list by a secretive panel of senior government officials, which then informs the president of its decisions ... . There is no public record of the operations or decisions of the panel, which is a subset of the White House's National Security Council ... . Neither is there any law establishing its existence or setting out the rules by which it is supposed to operate. n416 [\*1272] Not only is there no law addressing the due process rights of Americans with respect to targeted killing, but no law on this subject can be made. The executive branch has prevented the judiciary from addressing the killing of citizens by asserting that the courts do not have jurisdiction over these cases because they present political questions. Since the judiciary may not adjudicate the claims of those about to be killed, the prevailing law of the land now comes in the form of secret memoranda created by the executive's Office of Legal Counsel ("OLC"). n417 The executive branch now has the final say on the constitutionality of its decision to kill an American citizen, since it asserts that no court has jurisdiction to review its opinion. This is executive privilege beyond James I's wildest dreams. While the administration insists that the OLC memorandum did not formulate general criteria for deciding whether Americans accused (impliedly, but not formally) of treason may be tortured or killed, n418 its version of events is actually worse than the alternative. The administration advances the position that a citizen suspected of treason may be killed after a singular determination within the executive branch that this would not violate the citizen's due process rights. "If that's true, then the Obama Administration is playing legal Calvinball, making decisions based on individual cases, rather than consistent legal criteria." n419 Unfortunately, this has been confirmed to be true: the recommendations for targeted killings are reportedly made on a case-by-case basis by "a grim debating society" of "more than 100 members of the government's sprawling national security apparatus," who provide no indication of using legal principles when determining such issues as which sort of "facilitators" of terrorism should be marked for death. n420 This sort of Star Chamber is precisely what the rule of law was designed to protect us against. After months of silence, Attorney General of the United States Eric Holder traced out the rationale for the targeted killing of an American citizen. n421 Rebutting this article's thesis, he argued: Some have argued that the president is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of Al Qaeda or associated forces... . [\*1273] This is simply not accurate. "Due process" and "judicial process" are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process. n422 Given the Obama Administration's decision not to release the OLC memorandum or even acknowledge that they did in fact kill Al-Awlaki, n423 this will likely be the most comprehensive description of the legal case for targeted killings the American people ever receive. Its arrogance is stunning. Attorney General Holder appears to rely implicitly on a Court decision holding that those having their social security benefits terminated are not entitled to a hearing in advance in support of another proposition. Namely, that some unspecified degree of procedural fairness apportioned in secret within the executive branch is all that is required before an American citizen can be killed. The Constitution, and a tradition of resistance to arbitrary executive power that it reaffirmed that extends back to the Magna Carta, is being held for naught - on the basis of a holding from an administrative law case wrenched forcibly out of context. With this flimsy justification, the administration rationalizes the creation of a new Star Chamber, newly empowered to administer capital punishment in secret and unchallengeable proceedings. Should this pass unchallenged, this may herald the end of the rule of law in America.

#### That spills over -- it’s the knockout blow for rights guarantees

Blum and Heymann 10 (Gabriella, Assistant Professor of Law – Harvard Law School, and Philip, Professor of Law – Harvard Law School, “Law and Policy of Targeted Killing,” Harvard National Security Journal, 1 Harv. Nat'l Sec. J. 145, Lexis)

As we have shown, targeted killings may be justified even without declaring an all-out "war" on terrorism. A war paradigm is overbroad in the sense that it allows the targeting of any member of a terrorist organization. For the United States, it has had no geographical limits. When any suspected metmber of a hostile terrorist organization--regardless of function, role, or degree of contribution to the terrorist effort--might be targeted anywhere around the world without any due process guarantees or monitoring procedures, targeted killings run grave risks of doing both short-term and lasting harm. In contrast, a peacetime paradigm that enumerates specific exceptions for the use of force in self-defense is more legitimate, more narrowly tailored to the situation, offers potentially greater guarantees for the rule of law. It is, however, harder to justify targeted killing operations under a law enforcement paradigm when the tactic is used as a continuous and systematic practice rather than as an exceptional measure. Justifying targeted killings under a law enforcement paradigm also threatens to erode the international rules that govern peacetime international relations as well as the human rights guarantees that governments owe their own citizens.

#### New legal framework key to effective norms – clear, national standards bridge the gap

Mutua 7 (Makau, SUNY Distinguished Professor, Professor of Law, Floyd H. & Hilda L. Hurst Faculty Scholar, and Director of the Human Rights Center – Buffalo Law School, “Standard Setting in Human Rights: Critique and Prognosis,” Human Rights Quarterly, Vol. 29, http://www.law.buffalo.edu/content/dam/law/restricted-assets/pdf/faculty/mutuaM/journals/hrq2907.pdf)

Even with historic conceptual and institutional breakthroughs, a lot remains to be done to secure human dignity. Although human rights standards have been set in virtually all areas that touch on human dignity, normative gaps and weaknesses still exist in many areas. New normative frameworks are needed in some areas, while in others they must be elaborated and strengthened. Standard setting is a dynamic process that must respond to a rapidly changing globe and challenges that come with the emergence of new problems and conditions. The argument that the era of standard setting is over is not only mistaken, but dangerous.

The setting of human rights standards is not a static process. The conditions of humanity that human rights standards seek to safeguard and promote are evolving concepts. New conditions of oppression and powerlessness are forever being discovered, and new challenges are constantly emerging. For example, the gay rights movement and the campaign for the rights of people with disabilities were unthinkable just a few decades ago. The current US war on terror has similarly thrown up new obstacles to established norms. There is no doubt that these and many other issues require a normative response. The struggle for and definition of human freedom and development is a continuous and evolutionary process. These issues require unceasing vigilance, revision, re-evaluation, deepening, and re-definition. Broad norms and standards must be unpacked, broken down, elucidated, revised, and may even need to be rejected and replaced by new and different standards. The scope, reach, and content of norms must be comprehensible to their beneficiaries, as well as to those who bear the responsibility for their implementation. Vacuous, rhetorical, and vague standards accomplish little.

To be effective, standards must have a clear path for their implementation and enforcement. This is an area of weakness. Institutions that are responsible for the promotion and protection of human rights standards—states and IGOs—are largely perceived by NGOs as reluctant, unwilling, unable, or ineffectual actors. They are seen as interested mostly in blunting the bite of human rights to safeguard state sovereignty. The effect of human rights must be translated at the national level, so municipal institutions that safeguard basic rights are critical to enforcement. Judiciaries, national human rights institutions, bar associations, NGOs, police and security apparatuses, and legislatures must be in the frontline to entrench, deepen, promote, and protect human rights. However, only human rights NGOs among these institutions can usually be relied on to advance the human rights agenda with vigor, honesty, and a healthy disinterest. Human rights norms must be internalized by states in their legal and political orders to be effective.

#### Intra executive standards aren’t enough --- creates a double standard that impacts global perception – external oversight key

Zimmerman, 13 [Evan, Citing Zenko of CFR, Jane Dao of the NYT, Kristin Roberts of the Atlantic, etc. “Secrecy and the Obama Drone Program: a Violation of the Fifth Amendment”, April 22, 2013 http://uculr.com/articles/2013/4/22/secrecy-and-the-obama-drone-program-a-violation-of-the-fifth-amendment]

Notwithstanding the ease with which the Administration authorized the killing of al-Awlaki, the Administration has a clear understanding that the primary impediment to lawfully killing Americans is the due process clause of the Fifth Amendment of the US Constitution, which states that, “no person shall…be deprived of life, liberty, or property, without due process of law.”[19] DOJ “assumes that the rights afforded by the Fifth Amendment’s Due Process Clause…attach to a US citizen even while he is abroad.”[20] However, such a protection does not make a US citizen immune from a lethal operation if he is an enemy combatant.[21] Rather, the Administration believes it must weigh the “private interest that will be affected by the official action” against the government’s asserted interest,[22] including “the burdens the government would face in providing process.”[23] The person in question has, indeed, a very weighty, in fact “uniquely compelling,” private interest: his life.[24] However, the Administration says that its war and accordant duty to defend the lives of innocent US citizens is also compelling, maybe even more so in this context than the accused’s own life.[25] Perhaps to satisfy such Fifth Amendment concerns, the DOJ White Paper states that there are three conditions that a targeted killing of a US citizen must fulfill before death may be considered: (a) an “informed, high-level”[26] US official must believe that there is an “imminent threat of violent attack”[27] against the US; (b) capture, which is a “fact-specific, and potentially time-sensitive, question,”[28] must be infeasible, and (c) the operation to kill must be conducted in “a manner consistent with applicable law of war principles.”[29] To be killed, targets must present an “imminent threat,” the first condition.[30] Traditionally, an “imminent threat” means an attack of some sort is about to happen. However, the Administration maintains that al-Qaida “does not behave like a traditional military,”[31] meaning that this conflict is not a traditional war. Specifically, “the Constitution does not require the President to delay action until some theoretical end-stage of planning—when the precise time, place, and manner of an attack become clear,”[32] according to the Administration. So, in accordance with this unconventional war, there is a similarly unconventional definition of “imminent.” DOJ maintains that an “imminent threat” does not require the US “to have clear evidence that a specific attack on US persons and interests will take place in the immediate future,”[33] leading one to question what standard of evidence is required at all. To justify itself, the Administration agrees with the Supreme Court that there must be “the greatest respect and consideration of judgments of military authorities in matters relating to the actual prosecution of war, and…the scope of that discretion is necessarily wide.”[34] DOJ states that it is not required to refrain from action until “preparations for an attack are concluded” because that would not allow the US “sufficient time to defend itself.”[35] Furthermore, for the US to lawfully defend itself, it must demonstrate that the people it defends against are legitimate targets and that the modes of defense are legitimate, which DOJ attempts to root in the traditional laws of war. The US is in armed conflict with al-Qaida and associated forces,[36] making its members legitimate targets of the US military and conduct with them subject to national self-defense laws.[37] Congress designated as enemy combatants those who aid al-Qaida and its associated forces, prompting the Administration to cite the public authority justification[38] when targeting their members.[39] The Administration believes that, as it has the right to detain US citizens who are enemy combatants,[40] it may similarly use lethal force as an “important incident of war,”[41] against those citizens.[42] Although the Administration believes it may only unilaterally conduct a drone strike in a place where al-Qaida is believed to have a “significant and organized presence,”[43] it also believes that there is little geographical limitation of its scope to target al-Qaida militants.[44] Furthermore, although the DOJ White Paper only addresses US citizens in foreign countries, public statements of DOJ suggest that they believe there would also be lawful circumstances in which US citizens on American soil could be killed.[45] The Administration recognizes that its powers are not unlimited, and that even powers granted to it by Congress may not have unlimited scope.[46] However, it believes that these killings are within the bounds of proper executive authority. Even more, under the Administration’s position, there is no mode for the public to police the propriety and legality of targeted killings by drones, as DOJ believes there is no proper forum for any case that would be brought against the government for its use of the drone program.[47] In effect, the only form of checks and balances here is to trust the US government not to overstep its authority. IV. Criticism of Official Policy The US has indicated that it believes that it may lawfully take out a citizen with a drone. What might a citizen do to trigger this? It is difficult to say, as the government’s asserted justifications are secret and, it claims, broad. If someone is wrongfully killed by a drone, how can his or her family[48] know that they have standing to sue the US government if the program is mostly secret?[49] There is great confusion surrounding the administration of US drone strikes, and the government has provided no adequate guidance. Since the US has kept its policies governing the drone program secret, the policy of targeted killings of US citizens is also secret. Such secrecy makes it so that no one can defend himself against the authorization of a drone strike or sue for restitution if accidentally killed. Secrecy is not the only impediment to the public’s understanding of the drone program; more obfuscation arises from the Administration’s own clear contradictions of its own policies. For example, Eric Holder’s letter to Rand Paul indicates that the Administration believes that it is possible legally to take out a US citizen with a drone on US soil, notwithstanding the DOJ White Paper’s requirement that US citizens only be targeted if they are, (a) on foreign soil, and are (b) senior leaders, (c) of al-Qaida. Why? We do not know, rendering the law impermissibly unclear. Furthermore, the Administration has already broken from its own standards. The only US citizen killed who was a senior leader of al-Qaida is Anwar al-Awlaki. An American subordinate of his—who was, in fact, dismissed as collateral damage, and never considered a senior leader publicly—was killed. A few weeks later, al-Awlaki’s son was also killed despite no indication that he was even involved in any terrorism group. The Administration has clearly conducted drone strikes that violate their own stated legal framework for proper and lawful targeted killings. Compounding the issue, the Administration’s rules are built on shaky ground. Hamdi v. Rumsfeld, a case that is crucial foundation for the legal positions taken within the DOJ White Paper, refers to the capture and detainment of a US citizen in combat, not assassination from a distance at a time potentially far removed from the time of attack. Hamdi admits that “while the full protections…may prove unworkable and inappropriate” in combat, “threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen’s core right to challenge meaningfully the Government’s case and to be heard by an impartial adjudicator.”[50] The right to an impartial adjudicator implies the right to a place and time to be heard, as well as the right to construct and present a case that has a “meaningful” possibility of success. In sum, Hamdi demands that due process of law be maintained outside of the combat setting, which by definition is where targeted killings occur. These rights have been violated with the way that targeted killings have been carried out so far. The Administration maintains that the killing of al-Awlaki’s son was collateral damage rather than the result of an authorized strike specifically against him. But this still means that, as a result, his family is now eligible to sue for restitution.[51] How would al-Awlaki’s son’s family be granted damages from the impartial adjudicator Hamdi calls for if the program that killed him is secret?[52] How could they prove that he was not a legitimate target if the criteria for targeted killings are unknown, or at least not clearly defined? They may not, perhaps most clearly because of DOJ’s position that there is no proper forum for such a trial.[53] Additionally, the secrecy of the program - and the fact that the government maintains that any decisions regarding targeted killing may only be reached through the its own “internal deliberations”[54] - ensures that, before they are killed, targets are impeded in their efforts to collect facts about their case and therefore wage a “meaningful” defense against the government’s accusations. Both of these situations directly violate the right to a robust defense before an impartial adjudicator called for in Hamdi, presenting serious constitutional issues relating to the Fifth Amendment. It is simply incorrect to compare the power to capture someone from the battlefield[55] with the right to be tried before one is killed, considering the right to an impartial adjudicator in a non- combat situation[56] and the highly compelling—in fact, paramount—interest a person has in saving his own life from imposition by the government.[57] The government may cite its own compelling interests and the power to strike secretly, but that is not mutually exclusive from a system with an acceptable level of disclosure. The exact manner and time at which they strike may remain secret, and may conform with the laws of war, but US citizens are entitled to know what they did to be targeted, to contest their targeting in some way, and for their families to pursue just compensation—and be awarded it—if they are wrongfully killed. This is only possible if the families know how and why their kin was killed, and what laws were broken. V. Conclusion and Summary A person has a clear right to due process. It would go too far to suggest that this implies that a person is absolutely free from being killed by the government. However, it is clear that a person has the right to defend himself in court, which requires that the charges against him be made known and the laws that he has broken publicized. The secrecy of the drone program does not allow Americans these protections that the Fifth Amendment requires. There are alternatives to a fully public trial—at the very least, a person is entitled to a military tribunal, if not a grand jury, for a capital offense. Being in a state of war does not allow the government to cease following the rule of law, but merely means some of its conduct becomes governed by the laws of war instead. Wartime perhaps permits targeted persons to be tried in absentia, for which there is some precedent,[58] represented by a public defender or his family and their private attorney.[59] If there truly is no “proper forum” in existence, Congress has the power to establish a court[60] with special jurisdiction over these matters. If the US government is concerned about speed,[61] it may establish special courts with a high, but not absolute, level of secrecy that try these cases with special speed.[62] If the government is worried that a publicized drone program will harm the United States’ image, secrecy is doing so already**,** causing speculation that the U.S. has secret agreements with other governments.[63] This further engenders suspicion of America, particularly in countries where citizens only have state-owned media and assume such information is vetted and condoned by the Administration.[64] If the government is concerned that such actions will slow down the U.S., it already has. Rand Paul recently stopped Senate business with a 13-hour filibuster of the architect of the drone program, John Brennan’s, nomination to Director of the CIA in order to force Eric Holder to say whether the Administration would target U.S. citizens on American soil. Holder was forced to respond, thereby delaying other DOJ business. There may be more such delays in the future as dissent, already present,[65] grows. The secrecy of the drone program is harming US citizens and their right to defend themselves and their families’ rights to just compensation if the accused are unjustly harmed. The issue is not that drones as a new technology are inherently problematic, but that they are used as a proxy targeted killing program, the secrecy of which is leveraged to sidestep the provision of Fifth Amendment rights. Americans do not know whether they are targeted, or what they can be targeted for. Due process of law requires these protections, especially when one’s life is at stake. Secrecy prevents these protections from being provided, a clear violation of the Fifth Amendment. There is a distinction between secrecy provided for the purpose of national security and an unacceptable lack of oversight. And it is clear that, with its drone policy, the Administration has not afforded the public the necessary information, rights, and protections it deserves.

#### Prior, judicial oversight ensures informed and impartial decision-making – vital to due process

Adelsberg 12 (Samuel, J.D. – Yale Law School, “Bouncing the Executive's Blank Check: Judicial Review and the Targeting of Citizens,” Harvard Law & Policy Review, Summer, 6 Harv. L. & Pol'y Rev. 437, Lexis)

The relevance of these precedents to the targeting of citizens is clear: the constitutional right to due process is alive and well--regardless of geographic location. We now turn to what type of process is due.

III. BRING IN THE COURTS: BRINGING JUDICIAL LEGITIMACY TO TARGETED KILLINGS

The function of this Article is not to argue that targeted killing should be removed from the toolbox of American military options. Targeted killing as a military tactic is here to stay. n34 Targeting strikes have robust bipartisan political support and have become an increasingly relied upon weapon as the United States decreases its presence in Iraq and Afghanistan. n35 The argument being asserted here, therefore, is that in light of the protections the Constitution affords U.S. citizens, there must be a degree of inter-branch process when the government targets such individuals.

The current intra-executive process afforded to U.S. citizens is not only unlawful, but also dangerous. n36 Justice O'Connor acknowledged the danger inherent in exclusively intra-branch process in Hamdi when she asserted that an interrogator is not a neutral decision-maker as the "even purportedly fair adjudicators are disqualified by their interest in the controversy." n37 In rejecting the government's argument that a "separation of powers" analysis mandates a heavily circumscribed role for the courts in these circumstances, Justice O'Connor contended that, in times of conflict, the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake." n38 Similarly, Justice Kennedy was unequivocal in Boumediene about the right of courts to enforce the Constitution even in times of war. Quoting Chief Justice Marshall in Marbury v. Madison, n39 Kennedy argued that holding "that the political branches may switch the constitution on or off at will would lead to a regime in which they, not this Court, say 'what the law is.'" n40 This sentiment is very relevant to our targeted killing analysis: in the realm of targeted killing, where the deprivation is of one's life, the absence of any "neutral decision-maker" outside the executive branch is a clear violation of due process guaranteed by the Constitution.

Justices O'Connor and Kennedy are pointing to a dangerous institutional tension inherent in any intra-executive process regime. Targeting decisions are no different; indeed, the goal of those charged with targeting citizens like al-Awlaki is not to strike a delicate balance between security [\*444] and liberty but rather, quite single-mindedly, to prevent attacks on the United States. n41 In describing the precarious nature of covert actions, James Baker, a distinguished military judge, noted, "the twin necessities of secrecy and speed may pull as they do against the competing interests of deliberate review, dissent, and informed accountable decision-making." n42 While Judge Baker concluded that these risks "magnify the importance of a meaningful process of ongoing executive appraisal," he overlooked the institutional tension, seized upon by Justices O'Connor and Kennedy, which would preclude the type of process that he was advocating. n43

Although there may be a role for Congress in such instances, a legislative warrant for specific cases would likely be cumbersome, carry significant security risks, and may violate the spirit of the Bill of Attainder Clause, which prohibits the legislature from performing judicial or executive functions. The current inter-branch process for covert actions, in which the President must make a finding and notify the leaders of Congress and the intelligence committees, is entirely ex post and also has not been proven to provide a meaningful check on executive power. n44 Moreover, most politicians are unqualified to make the necessary legal judgments that these situations require.

Solutions calling for the expatriation of citizens deemed to be terrorists are fraught with judicial complications and set very dangerous precedents for citizenship revocation. n45 Any post-deprivation process, such as a Bivens-style action, for a targeted attack would also be problematic. n46 Government officials charged with carrying out these attacks might be hesitant to do so if there were a threat of prosecution. Moreover, post-deprivation process for a target would be effectively meaningless in the wake of a successful attack.

 [\*445] Rather, as recognized by the Founders in the Fourth Amendment, balancing the needs of security against the imperatives of liberty is a traditional role for judges to play. Two scholars of national security law recently highlighted the value of judicial inclusion in targeting decisions: "Judicial control of targeted killing could increase the accuracy of target selection, reducing the danger of mistaken or illegal destruction of lives, limbs, and property. Independent judges who double-check targeting decisions could catch errors and cause executive officials to avoid making them in the first place." n47 Judges are both knowledgeable in the law and accustomed to dealing with sensitive security considerations. These qualifications make them ideal candidates to ensure that the executive exercises constitutional restraint when targeting citizens.

Reforming the decision-making process for executing American citizens to allow for judicial oversight would restore the separation of powers framework envisioned by the Founders and increase democratic legitimacy by placing these determinations on steadier constitutional ground. For those fearful of judicial encroachment on executive war-making powers, there is a strong argument that this will actually strengthen the President and empower him to take decisive action without worrying about the judicial consequences. As Justice Kennedy put it, "the exercise of [executive] powers is vindicated, not eroded, when confirmed by the Judicial Branch." n48 Now, we will turn to what this judicial involvement would look like.

#### That’s key to economic leadership and to prevent democratic backsliding

Khodorkovsky, 11 [Mikhail, once Russia’s Richest Man, was arrested in 2003 after speaking out against the growing power of then-president Vladimir Putin. He was tried and sentenced to nine years for alleged tax evasion. A second trial last year on new charges, widely viewed as a sham, brought him an additional 14 years.Stop Coddling My Country’s Rulers, http://mag.newsweek.com/2011/09/25/khodorkovsky-america-is-weakening-on-human-rights.html]

If America can still be said to lead the world today, then its leadership is first and foremost a moral one. Millions of people around the world still look to the United States as a lighthouse of freedom. In large part, America’s economic might follows from that moral leadership. People believe in the dollar because they believe in America’s economic model. But they also believe in the values that the U.S. has created at home and promotes in the international arena: political competition, free elections, an independent media and judiciary. Of course, President Obama has to deal with hard realities—one of the hardest being that global economic growth has increased competition for resources, particularly energy resources. And it’s also clear that in times of economic crisis there is a huge temptation to make friends with countries rich in such resources, however obnoxious their regimes, rather than make war against them or antagonize them. But the moral hazard in this kind of appeasement is far greater than its short-term advantages. By ignoring its basic values to make friends with dictators, America risks losing its moral capital—capital that is by no means limitless. If the U.S. fails to live up to the values of its own democracy, faith in the American Dream—that everyone is entitled to a fair chance, a fair say, and a fair hearing—will crumble. Just as important, faith in the fact that democracy is the world’s most successful and effective system of government will crumble, too. There is another way. Return ideals to their rightful, central place in politics, and deal with economic questions in the way that smart, honorable men and women have decided them in times past—through the power of intellect. To take a simple, concrete example, if the U.S. spent as much on saving energy and developing alternative energies as, say, Israel or Germany do, then its dependence on imported oil would be a thing of the past. Politicians seem to shy away from those kinds of farsighted policies because they might lose elections. But is there any doubt that America would be the long-term winner for achieving energy independence? That wouldn’t be a good thing only for America. Regimes in, say, Russia, would have to actually get down to some serious political and economic modernization rather than just paying lip service to reform in nice-sounding but ultimately empty speeches. The time to make a decision is approaching: will America be moral, or merely pragmatic? It’s a crucial decision. For America to turn its back on defending human rights around the world is not just wrong. It’s dangerous. One might say as dangerous as its continued dependence on imported energy. America’s economic might is dependent on its moral leadership: to lose one is to lose the other. If that happens it will be America, not Russia, that will turn out to have been the real loser of the Cold War. And those of us who continue to believe in and fight for the ideals of freedom will find ourselves fighting an even lonelier battle.

#### Effective democratic consolidation solves global war

Halperin 11 (Morton H., Senior Advisor – Open Society Institute and Senior Vice President of the Center for American Progress, “Unconventional Wisdom – Democracy is Still Worth Fighting For”, Foreign Policy, January / February, <http://www.foreignpolicy.com/articles/2011/01/02/unconventional_wisdom?page=0,11>)

As the United States struggles to wind down two wars and recover from a humbling financial crisis, realism is enjoying a renaissance. Afghanistan and Iraq bear scant resemblance to the democracies we were promised. The Treasury is broke. And America has a president, Barack Obama, who once compared his foreign-policy philosophy to the realism of theologian Reinhold Niebuhr: "There's serious evil in the world, and hardship and pain," Obama said during his 2008 campaign. "And we should be humble and modest in our belief we can eliminate those things." But one can take such words of wisdom to the extreme-as realists like former Secretary of State Henry Kissinger and writer Robert Kaplan sometimes do, arguing that the United States can't afford the risks inherent in supporting democracy and human rights around the world. Others, such as cultural historian Jacques Barzun, go even further, saying that America can't export democracy at all, "because it is not an ideology but a wayward historical development." Taken too far, such realist absolutism can be just as dangerous, and wrong, as neoconservative hubris. For there is one thing the neocons get right: As I argue in *The Democracy Advantage*, democratic governments are more likely than autocratic regimes to engage in conduct that advances U.S. interests and avoids situations that pose a threat to peace and security. Democratic states are more likely to develop and to avoid famines and economic collapse. They are also less likely to become failed states or suffer a civil war. Democratic states are also more likely to cooperate in dealing with security issues, such as terrorism and proliferation of weapons of mass destruction. As the bloody aftermath of the Iraq invasion painfully shows, democracy cannot be imposed from the outside by force or coercion. It must come from the people of a nation working to get on the path of democracy and then adopting the policies necessary to remain on that path. But we should be careful about overlearning the lessons of Iraq. In fact, the outside world can make an enormous difference in whether such efforts succeed. There are numerous examples-starting with Spain and Portugal and spreading to Eastern Europe, Latin America, and Asia-in which the struggle to establish democracy and advance human rights received critical support from multilateral bodies, including the United Nations, as well as from regional organizations, democratic governments, and private groups. It is very much in America's interest to provide such assistance now to new democracies, such as Indonesia, Liberia, and Nepal, and to stand with those advocating democracy in countries such as Belarus, Burma, and China. It will still be true that the United States will sometimes need to work with a nondemocratic regime to secure an immediate objective, such as use of a military base to support the U.S. mission in Afghanistan, or in the case of Russia, to sign an arms-control treaty. None of that, however, should come at the expense of speaking out in support of those struggling for their rights. Nor should we doubt that America would be more secure if they succeed.

#### Failure to shore up rights protections reverberates globally and causes anti US backlash

Ghitis, 12 [“On human rights, U.S. must lead — or no one will”, Frida,a world affairs columnist at the World Politics Review, author and consultant. She started her career at CNN, where she worked initially as a show producer, http://www.miamiherald.com/2012/08/06/2930361/on-human-rights-us-must-lead-or.html]

Read more here: http://www.miamiherald.com/2012/08/06/2930361/on-human-rights-us-must-lead-or.html#storylink=cpy

Now, in an unexpected turn of events, Washington’s harshest critics are asking the United States to take an even greater role in world affairs, but to do it for the sake of protecting human rights across the globe. Whoever wins the presidential elections, President Obama or Mitt Romney, human-rights activists, including Amnesty International and the ACLU, are imploring him to move decisively to the forefront of world affairs and take a firm stand in order to prevent genocide, human rights abuses and terrorism. The goal is morally defensible — what could be more important than preventing genocide — but it is also one with strategic benefits for the United States. It turns out the alternative to American leadership is no leadership at all, or not much of one. Often that means conflicts that spiral out of control with disastrous consequences, as we have seen time and time again. America’s relative power has declined significantly, especially in the last half-decade of economic weakness. The powers whose rise has paralleled the American decline, such as China, have shown no inclination to lift a finger in defense of human rights or for the prevention of conflicts that could devastate civilian populations. As far as China, and still Russia, are concerned, conflicts are a problem only in that they interfere with trade or with strategic alliances. But the greatest threat, in their view, is a world that gives itself the right to tell other countries to respect freedoms, because they might later come calling in places like Tibet. As the United States’ ability to shape events diminished, it sought to rely more on international organizations and multilateral partnerships. But time and time again it has become clear that, as Bill Clinton’s Secretary of State Madeleine Albright put it back in the days of the war in Bosnia, America is “the indispensable nation.” Back then, Albright was arguing that the United States should step in and stop the slaughter in the Balkans. The massacres ended rather quickly after U.S. fighter planes started slicing across the sky. In many quarters, American military power is viewed with suspicion. And that’s understandable. But even on the left, among those who care deeply about the suffering of human beings of all nationalities regardless of who their tormentors are, the view that the United States is indispensable is growing. They don’t want to see American soldiers marching across the globe, but they want to see America prevent and solve conflicts and lead the international community to a consensus that human-rights matter. Amnesty International and the ACLU joined in a group of 22 well-known organizations and individuals who recently released a detailed study of the human-rights challenges facing the world — and the American president. They listed the top 10, along with a plaintive appeal that whoever sits in the Oval Office next year should embrace America’s leadership position. They didn’t call for the United States to act alone and didn’t necessarily call for military intervention of any kind, but they noted that “U.S. leadership is critical to effectively address international human-rights issues.” They recommended 10 policies, beginning with the need to “Prioritize U.S. leadership on international norms and universality of human rights.” Not everyone will agree with their second policy recommendation, that America “Act to prevent genocide and mass atrocities,” or the next one, that Washington “Pursue policies that protect people from the threat of terrorism . . . ” Ideally, American actions to prevent genocide and human-rights abuses would not require military action. Making them a priority would enlist international support and help countries everywhere internalize rules of behavior, and send a message that violating them could have consequences. For that, however, there really must be consequences. That includes international condemnation, economic sanctions and, as a final resort, the use of force. The authors of the human-rights paper correctly argue that a policy with a strong focus on human rights makes sense strategically. It’s an argument others, including Albright, have made many times before. When the United States stands for the dignity of individuals against the worst abuses of tyrants, it strengthens its moral core and it becomes a magnet for international support. Doing this is not always easy. It can create enormous practical dilemmas. Still, both Romney and Obama would do well to listen to this group’s advice.

#### The impact is global war

William W. Burke-White 4, Lecturer in Public and International Affairs and Senior Special Assistant to the Dean, Woodrow Wilson School of Public and International Affairs, Princeton University, Spring 2004, Harvard Human Rights Journal, 17 Harv. Hum. Rts. J. 249, p. 279-280

This Article presents a strategic--as opposed to ideological or normative--argument that the promotion of human rights should be given a more prominent place in U.S. foreign policy. It does so by suggesting a correlation between the domestic human rights practices of states and their propensity to engage in aggressive international conduct. Among the chief threats to U.S. national security are acts of aggression by other states. Aggressive acts of war may directly endanger the United States, as did the Japanese bombing of Pearl Harbor in 1941, or they may require U.S. military action overseas, as in Kuwait fifty years later. Evidence from the post-Cold War period [\*250] indicates that states that systematically abuse their own citizens' human rights are also those most likely to engage in aggression. To the degree that improvements in various states' human rights records decrease the likelihood of aggressive war, a foreign policy informed by human rights can significantly enhance U.S. and global security.¶ Since 1990, a state's domestic human rights policy appears to be a telling indicator of that state's propensity to engage in international aggression. A central element of U.S. foreign policy has long been the preservation of peace and the prevention of such acts of aggression. n2 If the correlation discussed herein is accurate, it provides U.S. policymakers with a powerful new tool to enhance national security through the promotion of human rights. A strategic linkage between national security and human rights would result in a number of important policy modifications. First, it changes the prioritization of those countries U.S. policymakers have identified as presenting the greatest concern. Second, it alters some of the policy prescriptions for such states. Third, it offers states a means of signaling benign international intent through the improvement of their domestic human rights records. Fourth, it provides a way for a current government to prevent future governments from aggressive international behavior through the institutionalization of human rights protections. Fifth, it addresses the particular threat of human rights abusing states obtaining weapons of mass destruction (WMD). Finally, it offers a mechanism for U.S.-U.N. cooperation on human rights issues.

#### Leadership solves extinction

Zhang and Shi 11 Yuhan Zhang is a researcher at the Carnegie Endowment for International Peace, Washington, D.C.; Lin Shi is from Columbia University. She also serves as an independent consultant for the Eurasia Group and a consultant for the World Bank in Washington, D.C., 1/22, “America’s decline: A harbinger of conflict and rivalry”, http://www.eastasiaforum.org/2011/01/22/americas-decline-a-harbinger-of-conflict-and-rivalry/

This does not necessarily mean that the US is in systemic decline, but it encompasses a trend that appears to be negative and perhaps alarming. Although the US still possesses incomparable military prowess and its economy remains the world’s largest, the once seemingly indomitable chasm that separated America from anyone else is narrowing. Thus, the global distribution of power is shifting, and the inevitable result will be a world that is less peaceful, liberal and prosperous, burdened by a dearth of effective conflict regulation. Over the past two decades, no other state has had the ability to seriously challenge the US military. Under these circumstances, motivated by both opportunity and fear, many actors have bandwagoned with US hegemony and accepted a subordinate role. Canada, most of Western Europe, India, Japan, South Korea, Australia, Singapore and the Philippines have all joined the US, creating a status quo that has tended to mute great power conflicts. However, as the hegemony that drew these powers together withers, so will the pulling power behind the US alliance. The result will be an international order where power is more diffuse, American interests and influence can be more readily challenged, and conflicts or wars may be harder to avoid. As history attests, power decline and redistribution result in military confrontation. For example, in the late 19th century America’s emergence as a regional power saw it launch its first overseas war of conquest towards Spain. By the turn of the 20th century, accompanying the increase in US power and waning of British power, the American Navy had begun to challenge the notion that Britain ‘rules the waves.’ Such a notion would eventually see the US attain the status of sole guardians of the Western Hemisphere’s security to become the order-creating Leviathan shaping the international system with democracy and rule of law. Defining this US-centred system are three key characteristics: enforcement of property rights, constraints on the actions of powerful individuals and groups and some degree of equal opportunities for broad segments of society. As a result of such political stability, free markets, liberal trade and flexible financial mechanisms have appeared. And, with this, many countries have sought opportunities to enter this system, proliferating stable and cooperative relations. However, what will happen to these advances as America’s influence declines? Given that America’s authority, although sullied at times, has benefited people across much of Latin America, Central and Eastern Europe, the Balkans, as well as parts of Africa and, quite extensively, Asia, the answer to this question could affect global society in a profoundly detrimental way. Public imagination and academia have anticipated that a post-hegemonic world would return to the problems of the 1930s: regional blocs, trade conflicts and strategic rivalry. Furthermore, multilateral institutions such as the IMF, the World Bank or the WTO might give way to regional organisations. For example, Europe and East Asia would each step forward to fill the vacuum left by Washington’s withering leadership to pursue their own visions of regional political and economic orders. Free markets would become more politicised — and, well, less free — and major powers would compete for supremacy. Additionally, such power plays have historically possessed a zero-sum element. In the late 1960s and 1970s, US economic power declined relative to the rise of the Japanese and Western European economies, with the US dollar also becoming less attractive. And, as American power eroded, so did international regimes (such as the Bretton Woods System in 1973). A world without American hegemony is one where great power wars re-emerge, the liberal international system is supplanted by an authoritarian one, and trade protectionism devolves into restrictive, anti-globalisation barriers. This, at least, is one possibility we can forecast in a future that will inevitably be devoid of unrivalled US primacy.

#### Scenario 2 is legal crisis

#### Obama’s white paper claimed due process for citizens, but executive implementation creates a legal disaster that wrecks due process – providing notice and opportunity is key

Feldman 13 (Noah, Professor of Constitutional and International Law – Harvard University, “Obama’s Drone Attack on Your Due Process,” Bloomberg, 2-8, <http://www.bloomberg.com/news/2013-02-08/obama-s-drone-attack-on-your-due-process.html>)

\*gender modified

The biggest problem with the recently disclosed Obama administration white paper defending the drone killing of radical clerk Anwar al-Awlaki isn’t its secrecy or its creative redefinition of the words “imminent threat.” It is the revolutionary and shocking transformation of the meaning of due process.

Fortunately, as seen during John Brennan’s confirmation hearing for Central Intelligence Agency director, Congress is starting to notice.

Due process is the oldest and most essential component of the rule of law. It goes back to the Magna Carta, when the barons insisted that King John agree not to kill anyone or take property without following legal procedures.

What they meant -- and what has been considered the essence of due process since -- is that the accused must be notified of the charges against him and have the opportunity to have his[\*/her\*] case heard by an impartial decision maker. If you get due process, you can’t complain about the punishment that follows. If you don’t get that opportunity, you’ve been the victim of arbitrary power.

Are U.S. enemies entitled to due process? Well, no -- not if they are arrayed against the country on the battlefield. In war, you don’t try the enemy. You kill him, preferably before he kills you. And if some of the Japanese troops at Guadalcanal had held U.S. citizenship, it wouldn’t have suddenly given them due process rights. If Awlaki was an enemy fighting on the battlefield, he wouldn’t have deserved due process while the fight was on. Off it, he should legally be like any other U.S. citizen, innocent until proven guilty.

Generous Idea

Yet, despite claiming that the Awlaki killing was justified because he was an operational leader of al-Qaeda, and thus in some sense an enemy on the battlefield, the white paper still assumes that due process applies to U.S. citizens abroad who adhere to the enemy. On the surface, this sounds plausible and even generous: Why not consider the possibility that a U.S. citizen abroad has some rights against being killed out of the blue?

In fact, though, applying due process analysis to Awlaki produces a legal disaster. The problem is, once you consider due process, you have to give it some meaning -- and the meaning you choose will cast a long shadow over what the term means everywhere else.

The white paper uses two Supreme Court cases to assess what process is due to an American about to be killed by a drone. The first, Mathews v. Eldridge, is a 1976 case in which the court held that the elaborate administrative processes necessary after a person lost his Social Security disability benefits were constitutionally acceptable even though there was no evidentiary hearing before the benefits were terminated. In that case, the court said that the process due could be determined by balancing the individual’s interest against the government’s.

The other case was 2004’s Hamdi v. Rumsfeld, where the court held that a detained enemy combatant -- in custody, not on the battlefield -- must receive “notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision- maker.”

Astonishingly, the white paper follows its summary of these decisions with the bald assertion that a citizen outside U.S. territory can be killed if a high-level official determines that he poses an imminent threat, it would be unfeasible to capture him and the laws of war would otherwise permit the killing.

Never Explained

The non sequitur is breathtaking. Awlaki wouldn’t receive notice, the opportunity to be heard or a hearing before a decision maker. In other words, he would receive none of the components of traditional due process -- not even one. How the absence of due process could be magically transformed into its satisfaction is never stated or explained. All we get is the assertion that a target’s interest in life must be “balanced against” the government’s interest in protecting other Americans. On this theory, no due process would be due to those accused of murder, because their lives would have to be balanced against the government’s interest in protecting their potential victims.

#### Obama relies on internal review to legally say targeted killing meets due process – external review prevents manipulation of the law that weakens it in other areas

Powell 13 (Jeff, Professor of Law – Duke University School of Law, Former Member – Justice Department’s Office of Legal Counsel, Former Deputy Assistant Attorney, “Jeff Powell on Targeted Killing and Due Process,” Lawfare Blog, 6-21, <http://www.lawfareblog.com/2013/06/jeff-powell-on-targeted-killing-and-due-process/>)

There is much to admire in the speech President Barack Obama gave on May 23rd in which he gave us his views on “lethal, targeted action” against high ranking members of al-Qaeda and its allies, above all his acknowledgment that the “laws constrain the power of the President, even during wartime.” For all his speech’s virtues, however, Mr. Obama’s comments about one legal issue, due process, should disturb us deeply. In discussing his insistence “on strong oversight of all lethal action,” the President stated, “for the record,” that he “do[es] not believe it would be constitutional for the government to target and kill any U.S. citizen – with a drone, or a shotgun – without due process.” Mr. Obama had just referred to the killing of Anwar Awlaki, whose death was “the one instance when we targeted an American citizen,” and he plainly was not confessing constitutional error. There is no serious doubt, then, that the President thinks that the US government deprived Mr. Awlaki of his life with due process. Unfortunately, Mr. Obama’s discussion of that issue is fundamentally flawed in two ways: first, in his assumption that due process applies at all, and second, in his belief that the administration’s procedures satisfy due process.

The President’s blanket assertion that our government must always provide due process before killing a citizen may seem self-evident – after all, the Fifth Amendment demands that no person (not citizen!) shall be deprived of life, liberty or property without due process of law — but Mr. Obama was wrong nonetheless. Due process requires fairness in government’s dealings with those it governs; it simply does not apply to military decisions, in hostilities that Congress has authorized, about attacking members of enemy forces who are not under American control. Mr. Obama was not justifying the killing of Mr. Awlaki as an extrajudicial execution but as the elimination of a particular enemy officer in the field as an act of war. The Constitution imposes other constraints on presidential action in a time of war, but due process has no role in what the Supreme Court’s 2004 decision in Hamdi v. Rumsfeld termed “the Executive in its exchanges …with enemy organizations in times of conflict.”

If there is no constitutional due process requirement at all, why does it matter that Mr. Obama assumes that there is? Is there any real harm in putting forth a standard for meeting a burden that doesn’t exist? There is, because the President’s reasoning may undercut the meaning of due process in other circumstances where the constitutional requirement does apply.

From comments he and other officials have made, and from the Justice Department “White Paper” that was leaked earlier this year, what he had in mind seems clear: it is the “strong oversight” over targeting decisions that the President himself has mandated that he and his advisors believe satisfies the Constitution. The White Paper lays out the argument: the executive branch itself has provided a targeted US citizen due process because only high-level members of al-Qaeda and its allies are targeted, the decision to use lethal force is made by an “informed, high-level official of the U.S. government,” that official must determine that the potential target poses an “imminent threat of violent attack,” and it must not be feasible to capture the individual without excessive risk to the lives of American personnel or vital American interests. As the President put it, Mr. Awlaki “was continuously trying to kill people” as part of his role in al-Qaeda, and although Mr. Obama “would have detained and prosecuted Awlaki if we captured him before he carried out a plot … we couldn’t.”

I have no objection to the procedures that the White Paper outlines: indeed they are roughly the sort of careful decisionmaking that I would hope my government would employ in such a grave matter. (Whether our current practices of targeted killing are a wise or even moral policy overall is another question.) Nor am I criticizing the determination that Mr. Awlaki met the White Paper’s targeting criteria: I have no reason or inclination to doubt the President’s view of the facts. But the White Paper’s claim that these laudable procedures amount to due process is quite indefensible.

The White Paper (correctly) invoked the Hamdi v. Rumsfeld decision for the due process analysis that applies in the war against al-Qaeda, but its understanding of the Constitution’s requirements could hardly be more at odds with the discussion of “the central meaning of procedural due process” in Justice Sandra Day O’Connor’s lead opinion: “Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner,” and they must be heard by a “neutral and detached judge.” “These essential constitutional promises may not be eroded,” Justice O’Connor concluded, but the White Paper – and I think we can assume the President as well – apparently find these promises inapplicable in the context of targeted killings.

It takes only a moment’s reflection to see that the President’s laudable procedures for imposing “strong oversight” over targeting decisions are worlds apart from Hamdi’s “essential constitutional promises” – indeed, it is hard to imagine how a military decision about attacking an enemy combatant could be otherwise. Of course the White Paper does not propose that potential targets be given notice of the government’s possible interest in killing them. Of course it does not contemplate, much less require, that a targeted individual be heard at any time or in any manner as to why the government is mistaken about his identity or activities. Of course it does not provide for a neutral and detached decisionmaker to resolve any factual uncertainty: the ultimate decisionmaker here is the President in his capacity as commander in chief, who (we should hope) is not in the least neutral or detached in carrying out his responsibility for national security. Calling the executive’s own procedures the due process that is meant to check arbitrary executive decisions isn’t merely an erosion of the “essential constitutional promises” but their wholesale repudiation. If Mr. Awlaki was entitled to due process, then his killing violated the Constitution.

Since due process doesn’t apply to a US military decision, in a situation of actual and authorized hostilities, to attack a member of the enemy’s forces who is a legitimate target under the law of war, the Constitution was not in fact violated. But my concern here is to identify the patent error in the White Paper’s and the President’s thinking about due process, because that error is likely to confuse our thinking about the wisdom and morality of targeted killing. The decision to kill a known, identified human being is a brutal one, the action of doing so is ugly to think about, even apart from the fact that sometimes other people die (as Mr. Obama acknowledged with sorrow). This brutality and ugliness are part of the grim reality of war. When we pretend to ourselves that our procedures for making such decisions satisfies the constitutional requirements of due process, we cast a veil of civility and even humanity over something that is inherently violent and dehumanizing.

I am not a pacifist, and I accept that the brutality of war is sometimes unavoidable. But the law’s antiseptic language about the weighing and balancing of interests according to “the traditional due process analysis” that supplies the legal “framework for assessing the process due a U.S. citizen” (I quote from the White Paper) masks, in a deeply misleading fashion, the brutality, the terror and the violence of war – even if we are right to conclude that we should take lethal action against our enemies. It serves no good purpose for the President and his advisors, or for any of us as citizens, to pretend that targeted killing is or can be anything other than the brutality it is.

The problem with the President’s constitutional error is not limited to its power to confuse our thinking about the reality of targeted killing. Once a legal argument gains legitimacy in the courts, or among executive officials, or in public discussion, it tends to expand beyond its original boundaries – the intellectual habits of lawyers and the traditional legalism of American public debate make this almost inevitable. By dint of repetition if nothing else, the claim that the executive’s own internal cogitations can amount to constitutional due process threatens to acquire the sort of legitimacy that will tempt future lawyers, and future Presidents, to apply it in other contexts. During World War Two, Justice Robert Jackson rejected the government’s argument that it was constitutional to intern US citizens purely on the basis of their Japanese ancestry because the decision rested on the executive’s claim of military necessity. Jackson didn’t propose that the courts interfere with the military’s actions, but he vigorously objected to anyone rationalizing the decision as constitutional. Accept that conclusion, Jackson wrote, and “[t]he principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.” The same worry applies to the President’s rewriting of what due process requires. Neither Mr. Obama nor anyone else can foresee or prevent future claims that we must turn the idea of due process on its head because of some perceived need to do so. The President and his advisors should rethink the White Paper’s faulty reasoning, and we should all keep in view the difference between “the essential constitutional promises” due process embodies, and the modes of military decision that our government employs in waging war.

#### Independently – culminates in misuse of surveillance drones in Mexico

Sager and Schneider 13 (Josh and Dan, Writers – The Boston Occupier, “America’s Dangerous Drone Precedent: A Secret and Unaccountable Program of Targeted Killings,” Progressive Cynic, 1-29, <http://theprogressivecynic.com/2013/01/29/americas-dangerous-drone-precedent-a-secret-and-unaccountable-program-of-targeted-killings/>)

In addition to their use as a tool in extrajudicial assassination, drones are quickly becoming a hot-ticket item for government agencies that want to conduct surveillance. U.S. Customs and Border Protection currently operates nine drones, using them for border and drug trafficking surveillance; Homeland Security has used them to support FEMA during disaster relief operations; and the Seattle Police Department recently caused a stir when the Mayor and City Council found out that they were operating a pair of surveillance drones.

Support for laissez-faire regulation of this new industry is likely to find a home in the new Congress. Changes between the 112th and 113th sessions haven’t done much to alter the makeup of the House Unmanned Systems Caucus, a bipartisan group of Representatives that collectively received over $8 million in campaign donations from drone manufacturers during the 2012 elections. In early 2012, the “drone caucus” was instrumental in shaping the Federal Aviation Administration Authorization Act (FAAAA), a law passed annually to approve funding for the FAA. This year’s FAAAA contained a special section addressing unmanned aerial vehicles, and specifically requests that both representatives of the aviation and drone industries have a say in crafting how drones are deployed within the country.

This kind of private-public partnership strengthens as the use of drones for surveillance and war around the world increases, and will surely have a strong influence over which countries will have access to this technology, and will set the terms for how it is used. A September study released by NYU and Stanford pointed out the dangers in allowing drone use to spread without a legal framework for their sale and use.

When it comes to them being as a tool of war, researchers ominously noted that:

“US practices may also facilitate recourse to lethal force around the globe by establishing dangerous precedents for other governments. As drone manufacturers and officials successfully reduce export control barriers, and as more countries develop lethal drone technologies, these risks increase.”

Three months into the Afghanistan War, Ali Qaed Sinan al-Harithi and five others (including a U.S. citizen) became the first six fatalities of the U.S. drone program. Not in Afghanistan, however, but in Yemen. In 2001, the U.S. justified the strikes similarly to how Israel, during the First Intifada, justified its own “targeted killing” program. The U.S. said that because Harithi could not possibly be arrested, and was alleged to be a member of al-Qaeda, it was legal to kill him because the U.S. was “at war” with terrorism and this conflict justified ignoring the sovereignty of another state.

Without the constraint of an enforceable international law, there may be too few barriers in place to stop other nations from exploiting the same loopholes that the U.S. has to kill members of groups they deem ‘terrorists’—say, Mexican drug cartels or the Free Syrian Army—but their own citizens, as well. Seen in this light, the assassinations of Harithi, Awlaki, and thousands of others are not mere casualties of short-term war; they are the first dead in new breed of globalized warfare, bound only by feasibility and the size of one’s defense budget.

#### And, US-Mexico surveillance drones destroy relations

News 7-24 (Mexico’s News Service, “US, Mexico talk bilateral security,” 7-24, <http://www.thenews.com.mx/index.php?option=com_content&view=article&id=12173&Itemid=276>)

Delegates from Mexico and the U.S. met near the countries’ border on Tuesday to discuss security and immigration issues. Mexican Interior Secretary Miguel Ángel Osorio Chong held talks with counterpart Janet Napolitano at the U.S.-Mexico Binational Meeting in Tamaulipas.

 The meeting took place behind closed doors, and delegates did not share details on any outcomes. Osorio Chong said in his twitter account prior to the meeting that the Mexico and the U.S. “share a vision of a dynamic and secure border, implicating a shared responsibility.” Border security has been hotly discussed in both countries since the U.S. Senate passed an immigration reform bill that would see border security tightened and the estimated 11 million undocumented immigrants living in the U.S. given a path to citizenship.

 Mexico’s relationship with the U.S. has been under the spotlight after former President Felipe Calderón was accused of allowing U.S. agencies conduct surveillance operations in Mexico, causing uproar among the Mexican public. President Enrique Peña Nieto said that if found to be true, the operations would have been “totally unacceptable.” The U.S. is also known to have flown surveillance drones over Mexico in the fight against organized crime.

#### The impact is the escalation of transitional challenges

Selee and Wilson, 12- Andrew Selee is Vice President for Programs and Senior Advisor to the Mexico Institute and Christopher Wilson is an associate with the Mexico Institute, (Andrew and Christopher, Wilson Center, November 2012, [http://www.wilsoncenter.org/sites/default/files/a\_new\_agenda\_with\_mexico.pdf)](http://www.wilsoncenter.org/sites/default/files/a_new_agenda_with_mexico.pdf%29//sawyer)

The depth of economic ties with Mexico, together with declines in illegal immigration and organized crime violence in Mexico, Open up an opportunity for U.S. policymakers to deepen the economic relationship with Mexico and to engage Mexico more on major global issues. Security cooperation, especially strengthening institutions for rule of law and disrupting money laundering, will remain important to the relationship, and there are clear opportunities to reform the U.S. legal immigration system over the next few years, which would have important implications for the relationship with Mexico. The strongest engagement, going forward, is likely to be on the economic issues that can help create jobs for people on both sides of the border, and on the shared global challenges that both countries face. Few countries will shape America’s future as much as Mexico. The two countries share a 2,000 mile border, and Mexico is the second largest destination for U.S. exports and third source of oil for the U.S. market. A quarter of all U.S. immigrants are from Mexico, and one in ten Americans are of Mexican descent. Joint security challenges, including both terrorist threats and the violent operations of drug cartels, have forced the two governments to work more closely than ever. What’s more, cooperation has now extended to a range of other global issues, from climate change to economic stability. Nonetheless, the landscape of U.S.-Mexico relations is changing. and organized crime violence, which has driven much of the recent cooperation, is finally declining. Violence will remain a critical issue, but economic issues—bilateral and global—have risen to the fore as both countries struggle to emerge from the global slowdown. Trade has increased dramatically, connecting the manufacturing base of the two countries as never before, so that gains in one country benefit the other. To keep pace with these changes, U.S. policymakers will need to deepen the agenda with Mexico to give greater emphasis to economic issues, including ways to spur job creation, and they will have opportunities to strengthen cooperation on global issues. Security cooperation will remain critical, and determined but nuanced followthrough to dismantle the operations of criminal groups on both sides of the border will be needed to continue the drop in violence. With less illegal immigration, it will be easier to address legal migration in new ways. However, economic issues are likely to dominate the bilateral agenda for the first time in over a decade. Strengthening economic ties and creating Jobs In most trading relationships, the U.S. simply buys or sells finished goods to another country. However, with its neighbors, Mexico and Canada, the U.S. actually co-manufactures products. Indeed, roughly 40 percent of all content in Mexican exports to the United States originates in the United States. The comparable figures with China, Brazil, and India are four, three, and two percent respectively. Only Canada, at 25 percent, is similar. With the economies of North America deeply linked, growth in one country benefits the others, and lowering the transaction costs of goods crossing the common borders among these three countries helps put money in the pockets of both workers and consumers. Improving border ports of entry is critical to achieving this and will require moderate investments in infrastructure and staffing, as well as the use of new risk management techniques and the expansion of pre-inspection and trusted shipper programs to speed up border crossing times. Transportation costs could be further lowered — and competitiveness further strengthened — by pursuing an Open Skies agreement and making permanent the cross-border trucking pilot program. While these are generally seen as border issues, the benefits accrue to all U.S. states that depend on exports and joint manufacturing with Mexico, including Michigan, Ohio, Nebraska, Iowa, South Dakota, New Hampshire, and Georgia, to name just a few. Mexico also has both abundant oil reserves and one of the largest stocks of shale gas in the world. The country will probably pursue a major energy reform over the next couple years that could spur oil and gas production, which has been declining over the past decade. If that happens, it is certain to detonate a cycle of investment in the Mexican economy, could significantly contribute to North American energy security, and may open a space for North American discussions about deepened energy cooperation Reinforcing Security cooperation Organized crime groups based in Mexico supply most of the cocaine, heroin, and methamphetamines, and some of the marijuana, to U.S. consumers, who, in return, send six to nine billion dollars to Mexico each year that fuels the violence associated with this trade. The U.S. and Mexican governments have significantly improved intelligence sharing, which has helped weaken many of these criminal networks and disrupt some of their financial flows. At the same time, the congressionally funded Merida Initiative, which has provided $1.6 billion to Mexico for national and public security since 2008, has been successfully strengthening the Mexican government’s capacity and rule of law institutions. These efforts appear to be yielding some success as violence has dropped noticeably since mid-2011. Going forward, the two countries will need to do more to disrupt the southbound flows of illegal money and weapons that supply the criminal groups, strengthen communities under the stress of violence, and improve the performance of police, prosecutors, and courts in Mexico. In many ways, Mexico has been successful at turning a national security threat into a public security threat, but the country now requires significant investment to create an effective and accountable criminal justice system and to slow the flow of illegal funds from the U.S. that undermine these efforts. As Mexico’s security crisis begins to recede, the two countries will also have to do far more to strengthen the governments of Central America, which now face a rising tide of violence as organized crime groups move southward. Mexico is also a U.S. ally in deterring terrorist threats and promoting robust democracy in the Western Hemisphere, and there will be numerous opportunities to strengthen the already active collaboration as growing economic opportunities reshape the region’s political and social landscape managing Legal migration flows Since 2007, the number of Mexican migrants illegally entering the United States has dropped to historically low levels, with a net outflow of unauthorized immigrants from the U.S. over the past three years. The drop is partially because of the weak U.S. economy, but it also has to do with more effective U.S. border enforcement and better economic opportunities in Mexico. This shift offers the potential for both countries to explore new approaches to migration for the first time in a decade In the United States, policymakers have an opportunity to look specifically at how to reform the legal immigration system. Almost all sides agree that the current immigration system, originally developed in the 1960s, fails to address the realities of a twenty-first century economy. A renewed discussion on this issue could focus on how to restructure the U.S. visa system to bring in the kinds of workers and entrepreneurs the United States needs to compete globally in the future. This includes both high-skilled and lowerskilled workers, who fill important gaps in the U.S. economy. Policymakers should consider whether those already in the United States, who have set down roots and are contributing effectively to the economy and their communities, might also be able to apply through a restructured visa system. Mexican policymakers, on the other hand, have huge opportunities to consolidate Mexico’s burgeoning middle class in those communities where out-migration has been a feature of life so as to make sure that people no longer need to leave the country to get ahead. There are a number of ambitious efforts, including some led by Mexican migrants that can serve as models for this. Mexican policymakers could also facilitate U.S. reform efforts by indicating how they could help cooperate with a new U.S. visa system if the U.S. Congress moves forward on a legal immigration reform. Addressing Major Global Issues With Mexico Over the past few years, the U.S. and Mexican governments have expanded beyond the bilateral agenda to work closely together on global issues, from climate change to international trade and the economic crisis. The U.S. government should continue to take advantage of the opportunities this creates for joint problem-solving. Mexico’s active participation in the G-20, which it hosted in 2012, and in the U.N. Framework on Climate Change, which it hosted in 2010, have helped spur this collaboration, and the recent accession of Mexico into the Trans-Pacific Partnership negotiations provides one obvious avenue to continue it. The two countries also coordinate more extensively than ever before on diplomatic issues, ranging from the breakdown of democratic order in Honduras to Iran’s nuclear ambitions. Mexico is likely to play an increasingly active role on global economic and environmental issues, areas where the country has significant experience, and through cooperative efforts the U.S. can take advantage of Mexico’s role as a bridge between the developed and developing worlds, and between North America and Latin America. The bilateral agenda will remain critically important —and the increasingly deep integration of the two economies and societies means that efforts on trade, security, and migration will remain vital for the future of both countries. In addition, the maturation of the bilateral relationship means that it may one day resemble that between the United States and Canada, in which global issues can be as important as the strictly bilateral issues. A balanced and wide-ranging U.S.-Mexico agenda—one that seeks creative and collaborative approaches on topics ranging from local gangs to global terrorist networks and from regional supply chains to international finance—promises significant mutually beneficial results in the coming years. Key Recommendations Work together with Mexico and Canada to strengthen regional competitiveness and to grow North American exports to the world. Economic issues can drive the next phase in deepening U.S.-Mexico cooperation. Investments in trusted shipper programs, pre-inspection programs, and enhanced border infrastructure will be crucial. Deepen support for Mexico’s criminal justice institutions, and strengthen U.S. antimoney laundering efforts in order to combat organized crime and violence. Reform the legal immigration system to ensure U.S. labor needs are met for both high-skilled and low-skilled workers, and incorporate those who are already contributing to the U.S. economy and their communities. Engage Mexico more actively on hemispheric and extra-hemispheric foreign policy issues, ranging from terrorism to international trade and finance, as Mexico’s role as a global power grows.

### Solvency

#### SOLVENCY!

#### Unchecked targeted killing is the largest violation of due process --- external review key

McKelvey, 11 (Benjamin, JD Candidate, Senior Editorial Board – Vanderbilt Journal of Transnational Law, “Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power,” Vanderbilt Journal of Transnational Law, November, 44 VAND. J. TRANSNAT'L L. 1353, <http://www.vanderbilt.edu/jotl/2012/06/due-process-rights-and-the-targeted-killing-of-suspected-terrorists-the-unconstitutional-scope-of-executive-killing-power/>)

IV. CHALLENGING THE CONSTITUTIONALITY OF TARGETED KILLING: A CLEAR VIOLATION OF DUE PROCESS The President’s supposed authority to conduct targeted killings of Americans is highly questionable.119 Moreover, the DOJ’s argument that targeted killing is a political question within executive discretion inaccurately portrays the judiciary’s power to review broader questions of law.120 Yet in addition to these compelling objections to the legal underpinnings of targeted killing authority, targeted killing likely violates existing law as well.121 Targeted killing is a unilateral government execution that completely circumvents traditional notions of law enforcement and violates even minimum notions of established due process.122 A. How Due Process Rights Are Determined Despite the fact that Aulaqi was hiding in Yemen, the Fifth Amendment still protected him. The Supreme Court has held that Americans enjoy the same constitutional protections abroad as in American territory, unless the application of the Bill of Rights would prove “impracticable and anomalous.”123 The rationale for this principle is that although Americans are not completely without constitutional protections abroad, it may not always be feasible to ensure all of these protections.124 The application of the Bill of Rights abroad must take into account “the particular circumstances, the practical necessities, and the possible alternatives” of the situation at hand.125 Analyzing Aulaqi’s Fifth Amendment rights is especially complex given the many political, economic, and security problems in Yemen at the time of his killing.126 The Fifth Amendment provides, in part, that no American may be “deprived of life, liberty, or property, without due process of law.”127 The case of Anwar al-Aulaqi implicates procedural due process because the plaintiff’s complaint alleges that the government is attempting to deprive Aulaqi of life without any formal presentation of the charges against him or an opportunity to protest these charges at a hearing before an impartial judge.128 The Supreme Court uses a balancing test for determining the level of due process in different contexts.129 This balancing test has three factors: the private interest that will be affected by a deprivation, the risk of an erroneous deprivation by the procedural method in question, and the government interests involved.130 Aulaqi’s case represents a collision of the first and third factors.131 The deprivation in question was Aulaqi’s life, the most serious deprivation in law.132 In the case of judicial error or procedural shortfall, property can be returned and liberty can be restored, but the deprivation of life is permanent. However, the government’s interest in protecting American citizens from the unrelenting threat of terrorism is also compelling.133 The exigencies involved in combating terrorism require decisive action and safeguards for intelligence sources that help identify threats.134 Under such extraordinary circumstances, the time and resources involved in satisfying procedural due process rights might also serve to inadvertently amplify specific threats of terrorism.135 The purpose of the Fifth Amendment, however, is to provide protections for citizens, not to increase the power of government or to ease the burden of government agencies under exigent circumstances.136 Given this constitutional purpose and the unique importance of life as a civil liberty, it is clear that Aulaqi is owed at least the minimum form of due process protection. B. A Comparative Perspective: The Due Process Rights of Detainees The position that minimum due process protections are required in Aulaqi is a natural extension of the holding in Hamdi v. Rumsfeld. In Hamdi, the Supreme Court held that the government may not indefinitely detain a citizen without providing some form of procedural due process.137 Yaser Hamdi was an American captured in Afghanistan in 2001 and turned over to U.S. authorities during the invasion of Afghanistan.138 He was initially held at the detention facility in Guantanamo Bay, but was transferred to military holding brigs in Virginia and South Carolina after the military learned that he was an American.139 Originally, President George W. Bush claimed the authority to hold Hamdi as an enemy combatant caught within a theatre of war.140 As an enemy combatant, Hamdi was not entitled to any procedural rights such as the right to an attorney or access to a federal court.141 However, the Eastern District of Virginia granted next-friend standing to his father, and that court subsequently found the evidence against Hamdi insufficient to support his detention.142 The Fourth Circuit reversed, citing the broad wartime powers designated to the president under Article II of the Constitution and the infringement on executive power that would occur if judicial review proceeded in this case.143 Hamdi’s father appealed the reversal of the Fourth Circuit and the Supreme Court granted certiori.144 Although the Court did not reach a majority opinion in its decision, a plurality of Justices agreed that the Executive Branch does not have the power to detain an American citizen indefinitely without providing some basic due process protections.145 A majority of Justices agreed that Hamdi had the right to challenge his detention.146 Because it is a plurality opinion, the extent of the due process protections required in a federal detention scenario is unclear.147 But the basic principle of Hamdi is that the Executive does not have the authority to detain an American citizen without some form of due process.148 If elements of due process are required when the government deprives an American of liberty, is it not logical to conclude that the government must also satisfy due process 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.149 Not only is the Hamdi holding a natural theoretical cousin of Aulaqi, but the legal analysis is also similar. In its brief in response to the Aulaqi complaint, the DOJ made several arguments that echo the overturned Fourth Circuit’s arguments in Hamdi: judicial review represents an infringement on textually committed executive authority and litigating this issue would involve the disclosure of sensitive intelligence that would threaten national security.150 Hamdi was an American citizen, and the government detained him due to allegations that he was fighting for the Taliban in Afghanistan.151 Similarly, Aulaqi was an American citizen accused of providing leadership and spiritual counsel to al-Qaeda terrorists.152 He was therefore considered a high-risk threat to national security, and the DOJ claims that the authority to kill Aulaqi is a nonjusticiable political question protected by the state secrets privilege.153 Because the Supreme Court held that Hamdi’s deprivation of liberty merited due process, it is a natural extension of this holding to find that the government also owes Aulaqi basic due process.However, there are important factual distinctions between Hamdi and Aulaqi to balance against the similarities. Although both cases fit the general category of due process rights in the context of national security concerns, the circumstances of the Hamdi holding limit its application to Aulaqi.154 Hamdi was captured in a theatre of war and originally accused of aiding the Taliban in hostilities against the United States.155 But once he was moved to holding brigs within the United States, Hamdi was fully secured under government control.156 Therefore, at the time of the Supreme Court’s decision, Hamdi was not an imminent threat to national security and was completely subject to government authority.157 The same cannot be said of Aulaqi. As an alleged high-value terrorist target hiding in Yemen, a known staging ground for al-Qaeda operations, Aulaqi was not under government control.158 Assuming that the government’s allegations against him were true, Aulaqi posed an imminent threat to national security.159 These are important factual distinctions that may render the Hamdi opinion inapplicable to the Aulaqi case. The lack of government control over Aulaqi and the potential for an imminent threat to national security may serve as government interests that trump Aulaqi’s due process rights. The exigencies of the Aulaqi situation are important distinctions that may render the Hamdi analysis inapplicable. However, even if the Hamdi holding is not directly controlling in the Aulaqi context, it is still highly relevant to the analysis. After Hamdi, it is clear that very serious constitutional rights are implicated, and perhaps violated, when the president authorizes the targeted killing of an American without any independent judicial review of that decision or of the criteria involved.160 As demonstrated in Aulaqi, it is equally clear that litigating this issue in federal court is an ineffective ex post mechanism for ensuring basic due process protections.161 Yet the result in Aulaqi is unsatisfactory and potentially very dangerous. Given the constitutional protections guaranteed by the Supreme Court in Hamdi, it is important to clarify the law of targeted killing and ensure basic safeguards against the abuse of this power.

#### A special court that determines the eligibility of US is key to effectively check presidential backsliding – due process will collapse absent the plan

Weinberger 13 (Dr. Seth, Associate Professor in the Department of Politics & Government – University of Puget Sound, “Enemies Among Us: The Targeted Killing of American Members of al Qaeda and the Need for Congressional Leadership,” Global Security Studies Review, 5-7, <https://blogs.commons.georgetown.edu/globalsecuritystudiesreview/2013/05/07/enemies-among-us-the-targeted-killing-of-american-members-of-al-qaeda-and-the-need-for-congressional-leadership/>)

On September 30, 2011, an American drone fired on and destroyed a convoy of members of al Qaeda in the Arabian Peninsula (AQAP). The target of the strike was Anwar al-Awlaki, a U.S. citizen born in New Mexico in 1971, accused of being a propagandist and operational leader for AQAP. The targeted killing of an American citizen raises a simple yet extremely discomfiting problem: Should the President of the United States be able to order an American citizen to be killed without trial, without any external review process, and without appeal?

In June 2010, John Brennan, then Deputy National Security Adviser for Homeland Security and Counterterrorism and current CIA director, stated that “there are dozens of U.S. persons [who have joined international terrorist organizations] who are in different parts of the world and they are very concerning to us.”[1] The issue was made even more salient on February 4, 2013, when an unclassified U.S. Justice Department (DOJ) white paper was released which laid out the legal justification for the targeted killing of “a U.S. citizen who is a senior operational leader of al Qaeda or an associated force.”[2]

The release of the targeted killing white paper unleashed a barrage of criticism of the policy. One author called the brief “a disaster” and asserted that “the Obama administration…wants to justify…assassinating citizens without specific and credible evidence of imminent violence.”[3] Another warned that “what’s so terrifying about this white paper is that it’s unconstitutional, not in the sense that it violates any particular tenet of the American Constitution, but in that it doesn’t respect the premise of there being a Constitution in the first place.”[4] Yet another claims that “[the white paper] is every bit as chilling as the Bush Office of Legal Counsel (OLC) torture memos in how its clinical, legalistic tone completely sanitizes the radical and dangerous power it purports to authorize.”[5] A few voices defended the policy, arguing, for example, that “once you take up arms against the United States, you become an enemy combatant, thereby forfeiting the privileges of citizens and the protections of the Constitution,”[6] and that “American presidents…have lawfully deployed military force against citizens in insurrection, rebellion, or war against the United States from the beginning of the nation.”[7]

However, focusing on the question of whether and when the president can order the targeted killing of an American citizen who has joined al Qaeda – as did almost all of the analyses of the DOJ white paper – not only misses the more important question involved but also obscures the best avenue to a potential solution. Instead of asking whether the president ought to be able to order the killing of American members of al Qaeda, we should instead be asking whether the president should be allowed to determine when an American citizen can be considered to be a senior operational member of al Qaeda, and if so, by what process?

Why is the question of determining who is a member of al Qaeda more important than the question of whether the president can kill American senior operational members of al Qaeda? As made clear by the World War II-era case Ex Parte Quirin, American citizens who join the armed forces of an enemy of the United States during wartime forfeit many of their basic constitutional protections and can be, as was the American citizen involved in the case, tried by military tribunal and executed under the laws of war.[8] The 2004 case of Hamdi v. Rumsfeld built on the Quirin case, finding that not only were at least some of the president’s war powers activated by congressional passage of the Authorization for the Use of Military Force (AUMF) in 2001, but that, as is normal under the laws of war, American citizens seized on the battlefield can be detained until the end of the conflict.[9]

However, the Hamdi decision also illustrates why the question of who is and is not a member of al Qaeda is the more critical question. The U.S. Supreme Court’s decision in Hamdi contained language vital for understanding the issue. The Court acknowledged that while enemy soldiers seized on the battlefield during a “normal” war do not receive an opportunity to challenge their detention, the exigencies of the war in Afghanistan against the Taliban dictate that “the circumstances surrounding Hamdi’s seizure cannot in any way be characterized as ‘undisputed’.”[10] Furthermore, because “‘the risk of erroneous deprivation’ of [Hamdi’s] liberty is unacceptably high” and as the case dealt with “the most elemental of liberty interests – the interest in being free from physical detention by one’s own government,” the Court decided that the traditional rules of war needed adjusting for the armed conflict against the Taliban.[11] Thus, the Court ruled 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 decision maker.”[12] In essence, the Court ruled that the armed conflict with the Taliban sufficiently resembled traditional conflict as to allow for the indefinite military detention of enemy combatants, but that the difficulties involved in determining who is and is not an enemy combatant (for example, fighters in the Taliban neither wore uniforms nor carried identification) warranted an alteration in the normal application of the president’s war powers where American citizens are concerned.

The laws of war were designed to govern ‘traditional’ wars, in which the armies of states met on the battlefield and in which soldiers wore uniforms clearly identifying themselves as combatants. The lack of clarity that prompted the ruling in Hamdi comes from the inherent ambiguities in a low-intensity war against a non-state actor that is not limited to a specific battlefield. These ambiguities are magnified in the conflict against al Qaeda. Not only do al Qaeda’s members not wear uniforms or carry identification cards, but, given the decentralized nature of the organization, it is not even clear what exactly constitutes membership. It might be possible that one can become a “member” of al Qaeda simply by declaring or even believing oneself to be a member. In short, we should be much less confident in our judgments about who is and who is not a member of al Qaeda.

Several examples illustrate the problems caused by this ambiguity over membership in al Qaeda. First, consider Major Nidal Hassan, who stands accused of 13 counts of murder and 32 counts of attempted murder in the shootings at Ft. Hood, Texas. While Hasan had been in communication with Anwar al-Awlaki, he was ultimately court martialed rather than tried as a terrorist. This decision troubled terrorism scholar Bruce Hoffman, who argued that while he “used to argue it was only terrorism if it were part of some identifiable, organized conspiracy… this new strategy of al-Qaeda is to empower and motivate individuals to commit acts of violence completely outside any terrorist chain of command.”[13]

Next is the case of al Shabaab, an Islamist insurgent movement dedicated to bringing Sharia to Somalia. In February 2012, leaders of al Shabaab officially pledged allegiance to al Qaeda, a pledge that was enthusiastically accepted by Ayman al-Zawahiri, who succeeded Osama bin Laden as the formal head of al Qaeda.[14] Since the 2012 National Defense Authorization Act (NDAA) expanded the scope of the 2001 AUMF to include “associated groups,” al Shabaab is now a legitimate target for American forces. This poses several problems. First, a number of Somali-American citizens have joined al Shabaab, mostly for religious and nationalistic reasons related to the domestic political situation in Somalia.[15] Second, al Shabaab has largely confined its activities to inside Somalia, with the exceptions of a bombing in Uganda and a grenade attack in Kenya, attacks almost certainly intended to convince Uganda and Kenya to withdraw their respective troops from Somalia.[16] Third, many members have splintered-off from the main body of al Shabaab in the wake of the union with al Qaeda, apparently to keep their struggle focused on Somalia rather than the global jihad.[17] There seems to be little evidence, other than the formal affiliation, that al Shabaab has taken any actions against American citizens or interests or that al Shabaab is in any way other than name a part of the global terrorist movement.

And yet, under the 2012 NDAA, a Somali-American who becomes a senior operational leader of al Shabaab in order to liberate and Islamize Somalia is the legal equivalent of Anwar al-Awlaki and is therefore eligible for being targeted for death. Is this the enemy as envisioned by Congress and defined in the 2001 AUMF?

These examples call attention to several vital questions surrounding the Obama Administration’s use of targeted killing against American citizens. Is every group that is somehow connected to al Qaeda the “enemy” in this conflict, regardless of the threat it poses to American national interests or its involvement in global jihad? What kind of connection – formal, operational, or ideological – is sufficient justification for including an affiliated group under the scope of the 2001 AUMF and 2012 NDAA? Exactly what actions make an individual a member of al Qaeda? Given these serious questions about what constitutes involvement with al Qaeda, it is dangerous for decisions about the eligibility of American citizens for targeted killing to be made without legislative definition or judicial process or review.

The Obama Administration would likely claim that such decisions are a fundamental incident of war and therefore part of the president’s war powers that were activated by the 2001 AUMF. And under the current legal regime, the President’s use of drones to eliminate American senior operational members of al Qaeda is indeed legal.

But legal is not the same thing as prudent. Simply because a course of action is permitted does not mean it should be taken. For a number of reasons, perhaps most importantly because it is increasingly unclear what constitutes being a senior operational member of al Qaeda, we should be skeptical of allowing the Executive Branch to judge these decisions on its own. Without effective checks or definition, there can be little doubt that the bar for defining membership in al Qaeda and eligibility for targeting will move downwards, allowing more Americans to be targeted without due process. And in the absence of additional congressional actions to limit the president’s ability to make such determinations, that is exactly the situation that exists.

But how could such checks or definitions be imposed? The President’s likely defense – that under the 2001 AUMF, only the Executive Branch can determine questions of al Qaeda membership – is a strong one. Here we must return to the Hamdi decision. By focusing attention and criticism on the power to target American members of al Qaeda rather than on the power to determine eligibility for being targeted, most analysts and pundits have missed the importance of the Hamdi decision for suggesting a solution to the problem of targeted killings.

By giving Yasir Hamdi a status hearing to determine his eligibility for indefinite military detention without trial, the Supreme Court interfered with the traditional war powers of the president and altered the standard applications of the rules of war. The Court argued, as mentioned earlier, that as the prospect of indefinite detention involves the “most elemental of liberty interests,” “striking the proper constitutional balance…is of great importance to the Nation during this period of ongoing combat.”[18] What is true for an American citizen detained on the battlefield and assigned for indefinite detention is undoubtedly true for an American citizen who has been targeted for death by a U.S. drone strike. Surely, the right not to be killed by a Hellfire missile ordered by one’s own government without due process must be as elemental of a liberty interest, if not more so, as “the interest in being free from physical detention.”[19]

Furthermore, while the Court did add a hearing into the process for military detention, it still permitted the U.S. government to assign an American citizen to indefinite detention. It did so even while acknowledging that, given the undefined nature of the conflict against the Taliban, which the U.S. government might not consider won for two generations or more, “Hamdi’s detention could last for the rest of his life.”[20] The justification given for leaving the basic structure of military detention in place was the determination that conflict between the U.S. and the Taliban resembles the traditional conflicts for which the laws of war were created. However, the Court warned that “if the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, [the long-standing law of war principles] unravel.”[21] It seems reasonable that a conflict like the one with al Qaeda –in which drones are used to target American citizens who have been identified as senior operational leaders of decentralized affiliates of an already decentralized non-state terrorist organization – presents circumstances unlike traditional wars in which enemies were readily identifiable by their uniforms, identification cards, and adherence to a clearly visible military and political chain of command.

From the logic of the Hamdi decision, it follows that adjustments or adaptations to the traditional war powers of the president to target American citizens believed to be members of the armed forces of the enemy might be both justifiable and allowable. What options or procedures could be put into place? Two options stand out. First, Congress could attempt to identify the positive criteria for membership in al Qaeda, the nature of the relationships between al Qaeda and its various affiliates, and, more specifically, the definition of a senior operational leader. While this would undoubtedly be a difficult task, there is precedent for such efforts by the Legislative Branch. The laws surrounding conspiracy must define at what point constitutionally-protected free speech switches to the illegal preparation for criminal activity.

But once again, what is possible is not always the best course of action. Given the diffuse nature of global terrorist networks and the flexible nature of the battlefield, trusting an a priori assessment to accurately account for all possibilities and to do so in a timely manner is likely a bad idea. A better option would be the creation of a special national security court, along the lines of the courts that hear federal requests for warrantless wiretapping in accordance with the Foreign Intelligence Surveillance Act (FISA). Such a court could be created and empowered by Congress to hear presidential requests to designate an American citizen as a senior operational leader of either al Qaeda or of an affiliated group as defined under the 2001 AUMF and the 2012 NDAA.

#### Limited and external review is key – allows for extensive processes that can’t be overridden by the president

Somin 13 (Ilya, Professor of Law – George Mason University School of Law, Hearing on “Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing,” United States Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights, 4-23, <http://www.judiciary.senate.gov/pdf/04-23-13SominTestimony.pdf>)

One partial solution to the problem of target selection would be to require officials to get advance authorization for targeting a United States citizen from a specialized court, similar to the FISA Court, which authorizes intelligence surveillance warrants for spying on suspected foreign agents in the United States. The specialized court could act faster than ordinary courts do and without warning the potential target, yet still serve as a check on unilateral executive power. In the present conflict, there are relatively few terrorist leaders who are American citizens. Given that reality, we might even be able to have more extensive judicial process than exists under FISA.

Professor Amos Guiora of the University of Utah, a leading expert on legal regulation of counterterrorism operations with extensive experience in the Israeli military, has developed a proposal for a FISA-like oversight court that deserves serious consideration by this subcommittee, and Congress more generally.22 The idea of a drone strike oversight court has also been endorsed by former Secretary of Defense Robert Gates, who served in that position in both the Obama and George W. Bush administrations. Gates emphasizes that “some check on the president’s ability to do this has merit as we look to the long-term future,” so that the president would not have the unilateral power of “being able to execute” an American citizen.23

We might even consider developing a system of judicial approval for targeted strikes aimed at non-citizens. The latter process might have to be more streamlined than that for citizens, given the larger number of targets it would have to consider. But it is possible that it could act quickly enough to avoid compromising operations, while simultaneously acting as a check on abusive or reckless targeting. However, the issue of judicial review for strikes against non-citizens is necessarily more difficult than a court that only covers relatively rare cases directed at Americans.

Alternatively, one can envision some kind of more extensive due process within the executive branch itself, as advocated by Neal Katyal of the Georgetown University Law Center.24 But any internal executive process has the flaw that it could always be overridden

 by the president, and possibly other high-ranking executive branch officials. Moreover, lower level executive officials might be reluctant to veto drone strikes supported by their superiors, either out of careerist concerns, or because administration officials are naturally likely to share the ideological and policy priorities of the president. An external check on targeting reduces such risks. External review might also enhance the credibility of the target-selection process with informed opinion both in the United States and abroad.