JUDGING ALLEGED TERRORISTS: APPLYING THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE TO LETHAL DELIBERATE TARGETING

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> *The sentence of a dispassionate judge would have inflicted severe punishment on the authors of the crime; and the merit of Botheric might contribute to exasperate the grief and indignation of his master. The fiery and choleric temper of Theodosius was impatient of the dilatory forms of a judicial [i]nquiry; and he hastily resolved, that the blood of his lieutenant should be expiated by the blood of the guilty people . . . . The punishment of a Roman city was blindly committed to the undistinguishing sword of the Barbarians; and the hostile preparations were concerted with the dark and perfidious artifice of an illegal conspiracy.*[1]

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> *It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.*[2]

I. Introduction

Theodosius I, the last emperor of the unified Roman Empire, reigned in the latter half of the fourth century from the palace at Constantinople.[3] He was one of the few Roman emperors given the appellation "the Great."[4] During his reign, the Empire extended from modern-day Turkey all the way west into Spain; and from the British Isles in the north, all the way to northern Africa.[5] In the Greek provinces, several hundred miles from the capital, was a large metropolis named Thessalonica, so beautiful that the Emperor himself resided there frequently and for long periods.[6]

Thessalonica "had been protected from the dangers of the Gothic War by strong fortifications and a numerous garrison."[7] Botheric, a Roman general of Barbarian ancestry, served the Empire at Thessalonica.[8] Against the wishes of the multitudes of Thessalonica, Botheric ordered a popular circus charioteer imprisoned for a salacious affair with one of his own slaves.[9] "[E]mbittered by some previous disputes," a mob arose, murdered Botheric and some of his staff, and dragged their "mangled bodies" through the streets of the city.[10]

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[1] EDWARD GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE, VOLUME THE THIRD 56 (David Wormersly ed., Penguin Classics 1995) (1781).

[2] United States v. Robel, 389 U.S. 258, 264 (1967) (referring specifically to freedom of association in the First Amendment; however, this comment could just as easily apply to Fifth Amendment Due Process).

[3] *See, e.g.*, Adolf Lippold, Theodosius I, http://www.britannica.com/biography/Theodosius-I (last visited Feb 16, 2016).

[4] *See, e.g.*, New World Encyclopedia, http://www.newworldencyclopedia.org/entry/Theodosius_I (last visited Feb 16, 2016).

[5] *Id.*

[6] GIBBON, *supra* note 1, at 57.

[7] *Id.* at 56.

[8] *Id.*

[9] *Id.*

[10] *Id.*

Theodosius, upon hearing of this outrage against his beloved general, ordered the destruction of Thessalonica.[11] His soldiers marched to the city, and in a ruse, invited the population to games at the circus.[12] Unable to resist the lure of the games, the masses swelled the arena.[13] Upon the "assembly," the soldiers began the unbridled massacre of the people.[14] "The apology of the assassins, that they were obliged to produce the prescribed number of heads, serves only to increase, by an appearance of order and design, the horrors of the massacre, which was executed by the commands of Theodosius."[15]

It is unknown how many perished at the command of the emperor that day, though various writers have estimated the number to be 7000 or perhaps greater than 15,000.[16] It is not clear how many of those actually guilty of Botheric's murder escaped, or how many of those innocent were punished with a violent death. It is also unclear whether Theodosius, aggrieved by the loss of a beloved general and the seeming betrayal at the hands of his own subjects, could even tell the difference between the guilty and the innocent. The emperor would have no judicial process determine the difference, and indeed there was no constitution or co-equal branch of the Roman government to restrain his whim.[17] By executive decree, Theodosius condemned his people to the very barbarism that Rome had for so long stood against.

The Founders of the United States of America created a government by Constitution to avoid the sort of executive abuses exhibited by Theodosius and countless other monarchs throughout history.[18] After all, they had just fought a bloody revolutionary war sparked by monarchical abuses, which they had memorialized in the Declaration of Independence.[19] After the ratification of the original Constitution, they proposed, and the states ratified, ten amendments to further clarify the limits of the federal government's power.[20] Nowhere is killing by

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[11] *Id.*
[12] *Id.*
[13] *Id.* at 57.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* at 56.
[18] *See* U.S. CONST.
[19] THE DECLARATION OF INDEPENDENCE (U.S. 1776).
[20] H.R.J. Res. 1, 1st Cong. (1789) (enacted). Despite its title, the language of the Bill of Rights focuses its mandates on the conduct of the government, rather than on the rights of persons.

executive whim so clearly confronted as in the Fifth Amendment, which mandates that the federal government provide due process before depriving any person of life.[21]

The Fifth Amendment's Due Process Clause requires a judicial hearing for non-uniformed alien combatants subject to lethal deliberate targeting during armed conflict.[22] This article discusses this complicated issue, and its multiple sub-issues: (1) defining deliberate targeting and considering whether it poses a constitutional problem; (2) considering whether the Fifth Amendment applies to alien combatants outside of the United States; and (3) applying the Fifth Amendment to deliberate targeting. The first step is to define deliberate targeting and to consider whether there is a problem at all.

II. The Deliberate Targeting Process and Its Problems

A major component of the executive's war power is the ability to select a target, figure out where that target will be at a particular time, and strike that target from a distance.[23] Advancements in intelligence-gathering techniques overseas have allowed the government to pinpoint the location of persons with amazing geographic and temporal accuracy.[24] Advancements in aerial and munitions technology have allowed the government to kill threats to our national security from a considerable distance via missiles fired from unmanned aerial vehicles.[25] The Department of Defense (DoD) has developed a robust targeting process for selection and execution of missions.[26] However, it carries great opportunity for error and/or abuse, and correspondingly little opportunity for restraint if left unchecked by the judiciary.[27]

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[21] *See* U.S. CONST. amend. V.

[22] An analysis of the application of international law to deliberate targeting is beyond the scope of this paper.

[23] *See* U.S. CONST. art. II, § 2

[24] *See, e.g.*, Karl Tate, *How Unmanned Drone Aircraft Work*, LIVE SCIENCE (June 27, 2013), http://www. livescience.com/37815-how-unmanned-drone-aircraft-work-info graphic.html.

[25] *Id.*

[26] JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING (31 Jan., 2013) [hereinafter JP 3-60].

[27] *Id.*

A. Deliberate Targeting Defined

While the Chairman of the Joint Chiefs of Staff's Joint Targeting Publication[28] does not directly define the term "deliberate targeting," its meaning can be gleaned from the context in which the publication discusses it: it is planned[29] and manages planned targets.[30] Targeting "normally supports the joint force's *future plans* effort,"[31] it tends to focus on operations twenty-four to seventy-two hours out,[32] it is contrasted with dynamic targeting,[33] and it may even begin prior to the commencement of hostilities.[34] The U.S. Army Field Manual on the Targeting Process adds that "[d]eliberate targeting prosecutes planned targets."[35] These targets are known to exist in an operational area and have actions scheduled against them."[36] Deliberate targeting, as its name implies, is neither immediate nor emergent.

While the current deliberate targeting process includes some measure of vetting and legal review,[37] it does not include due process for the targeted individual in any meaningful sense of the term. While the Joint Targeting Publication directs the staff judge advocate to provide legal advice on "domestic laws," terms such as "notice," "hearing," "due process," and "judicial" do not even appear.[38] The primary constitutional weakness of the targeting process thus emerges: all persons who execute each phase of the process answer to the commander and thus are dis-incentivized from taking a detached and neutral view of the evidence. From an operational perspective, deliberate targeting is one effective tool the President can use to wage armed conflict against the enemies of the

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[28] *Id.*
[29] *Id.* GL-8.
[30] *Id.* at II-2.
[31] *Id.* x (emphasis in original).
[32] *Id.* at III-12.
[33] *Id.* x.
[34] *Id.* at I-11.
[35] U.S. DEP'T OF ARMY, FIELD MANUAL 3-60, THE TARGETING PROCESS para. 1-10–1-12 (26 Nov. 2010).
[36] *Id.*
[37] *Id.*
[38] JP 3-60, *supra* note 14, x.

nation. However, the erratic nature of the asymmetric conflict waged against al-Qaeda became the soil that sprouted controversy.[39]

B. Controversy Arises

Deliberate targeting did not seem to cause a due process controversy until the Central Intelligence Agency (CIA) and Department of Defense (DoD) targeted a U.S. citizen, Anwar al-Aulaqi, with a deliberate lethal strike.[40] The federal government had accused al-Aulaqi of playing "a key role in setting the strategic direction for al-Qaeda in the Arabian Peninsula (AQAP)."[41] Nasser al-Aulaqi, father and personal representative of the estate of Anwar al-Aulaqi, sued several federal government officials for violating the Fifth and Fourteenth Amendments by targeting Anwar al-Aulaqi.[42] The U.S. District Court for the District of Columbia, addressing the question of "whether federal officials can be held personally liable for their roles in drone strikes abroad that target and kill U.S. citizens," granted the government's pre-trial motion to dismiss for a variety of reasons, including lack of standing on the part of the party bringing suit and the court's reluctance to encroach upon the war-making powers of the executive and legislature.[43] Consequently, there was no opportunity for trial on the merits or appellate review. While the court ultimately concluded that al-Aulaqi was in fact a member of AQAP, the court only reached this conclusion more than two years after the government killed al-Aulaqi.[44]

Nassar al-Aulaqi had originally brought suit against the federal government in 2010, in the U.S. District Court for the District of Columbia, as "next friend" of Anwar al-Aulaqi.[45] The court granted the government's motion to dismiss, finding that Nassar al-Aulaqi lacked standing to bring suit and deciding "that at least some of the issues raised

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[39] Complaint, Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56 (D.D.C. 2014) (No. 1:12-cv-01192-RMC) [hereinafter Complaint].

[40] *American Drone Deaths Highlight Controversy*, NBC NEWS (Feb. 5, 2013, 3:10 PM), http://usnews.nbcnews.com/_news/2013/02/05/16856963-american-drone-deaths-highlight-controversy?lite.

[41] Complaint, *supra note* 39, at 10.

[42] *See generally id.*

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

[44] *Id.*

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

were non-justiciable political questions."[46] Thus, there was no proper judicial inquiry into his status prior to the strike.

Perhaps more alarming is that the judiciary had plenty of time to inquire into the targeting of Anwar al-Aulaqi.[47]

> In late 2009 or early 2010, Anwar al-Aulaqi, an American citizen, was added to "kill lists" maintained by the Central Intelligence Agency (CIA) and the Joint Special Operations Command (JSOC), a component of the Department of Defense (DoD). On September 30, 2011, unmanned CIA and JSOC drones fired missiles at Anwar al-Aulaqi and his vehicle, killing him and at least three other people, including Samir Khan, another American citizen.[48]

Al-Aulaqi was on the kill list for well over a year before the CIA and JSOC killed him.[49] However, there is no evidence that they ever submitted their cause to any court for judicial review. Indeed, Nasser al-Aulaqi filed suit on August 30, 2010, in an attempt to prevent the killing.[50] While the court cited to "lack of judicially manageable standards,"[51] the court ultimately decided to "exercise its equitable discretion not to grant the relief sought."[52]

The court did consider Fifth Amendment Due Process, but primarily within the context of declining to find that al-Aulaqi's father could assert his standing as Next Friend to ask for due process for his son.[53] The court next reached the due process question in the context of whether it could intrude upon the powers of the executive, and concluded that judicially limiting the scope of deliberating targeting would too far intrude upon the executive's war-making power.[54] However, the court's reluctance to do so does not necessarily imply or establish that such a practice is generally

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[46] *See Al-Aulaqi*, 35 F. Supp. 3d at 56.
[47] Complaint, *supra* note 39, at 2.
[48] *Id.*
[49] *Id.*
[50] *Al-Aulaqi*, 727 F. Supp. at 1.
[51] *Id.* at 41. The court did not cite either Goldberg v. Kelly, 397 U.S. 254 (1970) or Mathews v. Eldridge, 424 U.S. 319 (1976).
[52] *Id.* at 42 (internal citations omitted).
[53] *Id.* at 28.
[54] *Id.* at 50-51 (internal citations omitted).

constitutional. Indeed, the Fifth Amendment was designed to protect against unrestrained executive action, to prevent the sorts of abuses—whether intentional or not—engaged in by Theodosius I or George III.[55]

Some have argued that targeted killing is a broad abuse of executive power generally.[56] However, merely appealing against dystopian futures lacks a framework for how and why deliberate targeting might become a vehicle for abuse of executive power, and fails to provide a solution. In looking at due process, one can analyze the problem and revise the targeting process to comply with the Constitution.

One may ask why any of this matters. It is unsettling to consider that the federal government, elected by the people, and beholden to the Constitution, might target the wrong individuals. But, consider the words of one journalist, "[g]overnment is made of people, and some people are creepy, petty, incompetent, or dangerous."[57] The Founders built the Fifth Amendment into the Constitution as protection against petty, incompetent, and dangerous people who wielded vast governmental power.[58] Having defined deliberate targeting and identified the controversy arising from its use, whether the Fifth Amendment Due Process Clause is applicable to deliberate targeting must now be considered.

III. The Boundaries of Fifth Amendment Due Process

The Constitution creates a government of enumerated powers, and focuses its language on the conduct of the government.[59] Enumerated rights are not created by the Constitution, but merely guaranteed by specific restraints on the government's conduct.[60]

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[55] *See* U.S. CONST. amend. V.

[56] Michael Ratner, Anwar al-Awlaki's Extrajudicial Murder, THE GUARDIAN (Sept. 30, 2011, 1:50 PM), http://www.theguardian.com/commentisfree/cifamerica/2011/sep/30/anwar-awlaki-extrajudicial-murder.

[57] Scott Shackford, *3 Reasons the 'Nothing to Hide' Crowd Should Be Worried About Government Surveillance*, REASON (June 12, 2013), http://reason.com/archives/2013/06/12/three-reasons-the-nothing-to-hide-crowd.

[58] *See* U.S. CONST. amend. V.

[59] *See* U.S. CONST. art. I, § 8; U.S. CONST. amend. X.

[60] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). *See also* United States v. Cruikshank, 92 U.S. 542, 553 (1875) ("[The right to keep and bear arms] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence."); District of Columbia v. Heller, 554 U.S. 570, 592, 619-20 (2008)

The Declaration of Independence, the founding document of the United States, forcefully sets forth as policy and reason for rebellion the idea that rights are neither created by government, nor dependent on government.[61] Rather, governments are created to protect these rights.[62] One may conclude that the Founders were clear in the language of the Fifth Amendment that these restraints applied to the government's conduct relative to all persons. The due process protection applies to non-citizens, and it applies when the federal government acts outside the territorial jurisdiction of the United States.[63] It applies during times of armed conflict, and it even applies to non-citizens who are the subjects of deprivations by the federal government outside the territory of the United States during armed conflict.[64] The government cannot hide from it, or deny it, as it springs from the very source that authorizes the government any action at all. However, one must define due process before assessing whether it applies to deliberate targeting.

A. Due Process Defined

Due process requires notice of a proceeding against the accused, and a meaningful opportunity to be heard by a neutral decision-maker.[65] The Fifth Amendment reads, in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . nor be deprived of life, liberty, or property, without due process of law . . . .[66]

(referencing constitutional language again, thus affirming the endurance of the principle that rights exist outside of the Constitution's framework).

[61] *Id.*

[62] *Id.*

[63] *See infra* subsections A–F.

[64] *Id*.

[65] *See e.g*., Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602, 617 (1993) ("Due process requires a 'neutral and detached judge in the first instance . . . .'").

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

The Framers did not define "due process" in the original text of the Constitution.[67] Eventually, the Supreme Court clarified the term in case law.[68] In 1884, when considering how to interpret the Due Process Clause of the Fourteenth Amendment, the Court touched on the meaning of the nearly identical language of the Fifth Amendment's Due Process clause:

> Due process of law in the [Fifth Amendment] refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law.[69]

As subsequent Courts developed new case law, the definition of due process took shape. The Court held in 1891 "that law in its regular course of *administration through courts of justice* is due process."[70] Later, the Court held "[t]he essential elements of due process of law are notice and opportunity to *defend*. In determining whether such rights were denied we are governed by the substance of things and not by mere form."[71] "The fundamental requisite of due process of law is the opportunity to be heard. And it is to this end, of course, that summons or equivalent notice is employed."[72]

Alluding to Congress and the President, and then later English courts, Justice Frankfurter observed, "This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society."[73] Later in the same opinion, Justice Frankfurter, almost prophetically, crystallized the importance of the opportunity to be heard when he stated, "[t]he heart of the matter is that democracy implies respect for the elementary rights of

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[67] Perhaps the Framers thought they did not need to. The Framers did define terms they seemed to think necessary. *See, e.g.*, "Treason," U.S. CONST. art. III, § 3, Cl 1.
[68] Hurtado v. California, 110 U.S. 516, 535 (1884).
[69] *Id. See also id.* at 547 (Harlan, J., dissenting) (apparently including a grand jury indictment in capital cases, the right to remain silent, and the prohibition against double jeopardy as inherent in due process).
[70] Leeper v. Texas, 139 U.S. 462, 468 (1891) (emphasis added). *See also* Iowa C. R. Co. v. Iowa, 160 U.S. 389, 393 (1896).
[71] Simon v. Craft, 182 U.S. 427, 436 (1901) (emphasis added) (citing Louisville & N. R. Co. v. Schmidt, 177 U.S. 230 (1900)).
[72] Grannis v. Ordean, 234 U.S. 385, 394 (1914) (internal citations omitted).
[73] Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one–sided determination of facts decisive of rights."[74] The *Armstrong* v. *Manzo* Court acknowledged, "A fundamental requirement of due process is 'the opportunity to be heard,'" and added, "It is an opportunity which must be granted at a meaningful time and in a meaningful manner."[75] The *Ward* Court required "a neutral and detached judge in the first instance."[76]

Imagine if, in a criminal trial, the defense were not allowed a case-in-chief, had no opportunity to present its own evidence, no opportunity to cross-examine the prosecution's witnesses, and no opportunity to address the jury at the close of evidence. Then imagine the jury reaches a verdict of guilty and imposes a sentence of death. This procedure would undoubtedly violate the Constitution's guarantee of due process. The Fifth Amendment Due Process Clause exists to prevent this from happening, though this seems not far distant from what happened in the al-Aulaqi matter.[77] With due process defined, an assessment of the Due Process Clause's application to deliberate targeting must proceed with "first principles"[78] of constitutional interpretation.

B. First Principles

A core principle of American constitutional law is that the federal government may only exert action that is authorized by the Constitution.[79] The United States Supreme Court, speaking through the late Chief Justice William Rehnquist, once began an analysis of a statute by saying, "We start with first principles. The Constitution creates a Federal Government of enumerated powers."[80] This principle of American government is so well-settled that the Court spoke similarly, and forebodingly, through the late Chief Justice John Marshall a mere thirty-one years after the ratification of the Constitution itself.[81]

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[74] *Id.* at 170.
[75] Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (citing *Grannis*, 234 U.S. at 394).
[76] Ward v. Monroeville, 409 U.S. 57, 62 (1972).
[77] *See* Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56 (D.D.C. 2014).
[78] *See* United States v. Lopez, 514 U.S. 549, 552 (1995).
[79] *See* U.S. CONST. amend. X.
[80] Lopez, 514 U.S. at 552.
[81] McCulloch v. Md., 17 U.S. (4 Wheat.) 316, 405 (1819).

> This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which it [sic] enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.[82]

While Chief Justice Rehnquist cited to the Constitution itself for his opinion, Chief Justice Marshall cited to no authority.[83] Justice Marshall implied that the doctrine of enumerated powers was so widely accepted that no one seriously questioned it at the time.[84]

The seeds of this first principle took root in the Declaration of Independence, which declared the political philosophy upon which the Constitution was based:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .[85]

Clearly, the Framers intended a government whose only authority manifested from those over whom it governed, via the Constitution, and from no other source.[86] Further, they clearly intended that the rights of the

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[82] *Id.*

[83] *Id.*; Lopez, 514 U.S. at 552.

[84] Even Chief Justice Taney, in his infamous *Dred Scott* opinion, recognized this principle of American government: "Certain specified powers, enumerated in the Constitution, have been conferred upon [the government]; and neither the legislative, executive, nor judicial departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution." Scott v. Sandford, 60 U.S. (19 How.) 393, 401 (1857). *See also* Reid v. Covert, 354 U.S. 1, 5-6 (1957) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.").

[85] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[86] *Id.*

people did not come from the government.[87] These rights existed independently of, and before, the creation of government.[88] Put another way, one's rights did not depend upon one's citizenship, but rather upon one's humanity.

Although the first ten amendments to the Constitution are often referred to as the Bill of Rights, the preamble to the Congressional Joint Resolution proposing the first amendments to the Constitution makes clear that this is not a list of rights the government grants to the people.[89]

> T[he] Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, *in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added*: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.[90]

By its own language, the so-called Bill of Rights intended to prevent "misconstruction or abuse of" the Constitution's powers, not to list the rights of the people.[91] The Ninth Amendment removes all reasonable doubt on this point, stating, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[92]

The Constitution and its amendments merely authorize the government certain and specific powers, and provide specific restrictions on those powers.[93] It may not exercise any authority not specifically granted to it by the Constitution, and may only act when so authorized.[94] Though the Constitution recognizes rights of different categories of people, the Fifth Amendment specifically applies to persons,[95] who must now be defined.

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87 *Id.*
88 *Id.*
89 H.R.J. Res. 1, 1st Cong. (1789) (enacted).
90 *Id.* (emphasis added).
91 *Id.*
92 U.S. CONST. amend. IX.
93 *See* U.S. CONST. art. I, § 8; U.S. CONST. amend. X.
94 *Id.*
95 *See* U.S. CONST. amend. V.

C. Who Is a Person?

The Fifth Amendment curiously uses the unqualified term "person," rather than "citizen" or even "the people," when referring to the subjects of government actions.[96] Although the Founders used these three terms at various points throughout the text of the Constitution, they are not interchangeable, as they mean different things.[97] The Founders specifically chose those terms to use in the places in which they used them, for a specific intended effect.[98] The Court has long taken the view that the plain, ordinary meaning of the text ought to be the most accurate.[99] They also decided that they should not supply text where Congress had not.[100] Applying this view to the text of the Fifth Amendment yields the conclusion that "persons" protect by the Fifth Amendment includes a broader class than citizens and resident aliens.[101]

1. Constitutional Construction

The Supreme Court determined how it ought to interpret the text of the Constitution,[102] which can guide how one actually looks at the text. The long-standing rule of construction is that the Court views the text in its ordinary, plain meaning, as the Founders intended to create a document that the voters could understand.[103] As recently at 2008, the Supreme Court cited to an 1824 case for this seemingly minor, yet well-established point on constitutional interpretation.[104]

> In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that

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96 U.S. CONST. amend. V.
97 *See e.g.*, District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008).
98 *Id.*
99 *See infra* subsection 1.
100 *See e.g.*, FTC v. Simplicity Pattern Co., 360 U.S. 55, 67 (1959).
101 *See infra* subsections 1–2.
102 *See e.g.*, *Heller*, 554 U.S. at 576–77.
103 *Id.*
104 *Id.*

> would not have been known to ordinary citizens in the founding generation.[105]

The Court implied that the text does not contain hidden meanings, or even legal jargon that might differ from everyday ordinary meanings.[106] "In the first place, the words of statutes . . . should be interpreted where possible in their ordinary, everyday senses."[107] One divines the will of the Founders from reading what they wrote, and concludes that what they wrote is in fact what they chose to write.[108] They could have used other words, other terms, and yet chose not to.[109]

> The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions; and wherever the legislature adopts such language in order to define and promulgate their action or their will, the just conclusion from such a course must be, that they not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large.[110]

The Court essentially found that Congress intentionally chose the language it used, specifically so that it has meaning for the general public—those to whom it would apply.[111]

Along this line of thinking, the Court stated simply in (serendipitously-named) *FTC v. Simplicity Pattern Company*, "[w]e cannot supply what Congress has studiously omitted."[112] Therefore,

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[105] *Id.* (internal citations omitted) (citing United States v. Sprague, 282 U.S. 716, 731 (1931) and Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 188 (1824)).

[106] *Id.*

[107] Crane v. Comm'r, 331 U.S. 1, 6 (1947) (citing Old Colony R. Co. v. Commissioner, 284 U.S. 552, 560 (1932)); *See also* Malat v. Riddell, 383 U.S. 569, 571 (1966) (citing Crane, adding, "As we have often said . . .").

[108] *See e.g.*, Maillard v. Lawrence, 57 U.S. (16 How.) 251, 261 (1854).

[109] *Id.*

[110] *Id. See also* Old Colony R. Co. v. Commissioner, 284 U.S. 552, 560 (1932).

[111] *Id.*

[112] FTC v. Simplicity Pattern Co., 360 U.S. 55, 67 (1959). *See also* United States v. Sprague, 282 U.S. 716, 731 (1931) (asserting that terms in the Constitution were written to be understood in a "normal and ordinary" meaning instead of a technical meaning). *Id.*

absent other clues in the actual text, one must read what is present, without reading in to the text words and phrases that are not present:

> In construing statutes, words are to be given their natural, plain, ordinary and commonly understood meaning unless it is clear that some other meaning was intended, and where Congress has carefully employed a term in one place and excluded it in another, it should not be implied where excluded.[113]

"And the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."[114] The Fifth Amendment uses the term "person," instead of "citizen" or "the people," and it means something different from those two latter terms.[115] The Founders must have intended this term, and therefore this term must be defined.

2. Rights of Persons

A person is, quite plainly, any human.[116] The text of the Fifth Amendment suggests it means any human subject to action by the federal government.[117] As demonstrated below, it covers a class much broader than merely "citizen" or "the people."[118] Consider the infamous Three-Fifths Representation Clause,[119] in which slave populations were calculated at three-fifths of their actual numbers for purposes of congressional representation.[120]

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[113] Pena-Cabanillas v. United States, 394 F.2d 785, 789 (9th Cir. 1968) (internal citations omitted).
[114] Lynch v. Alworth-Stephens Co., 294 F. 190, 194 (8th Cir. 1923). *See also* Lynch v. Alworth-Stephens Co., 267 U.S. 364, 370 (1925) (agreeing with the Circuit Court's articulation); *Old Colony R. Co.*, 284 U.S. 552, 560 (1932).
[115] *See* U.S. CONST. amend. V.
[116] *See e.g.*, U.S. CONST. art. I, § 2, cl. 3.
[117] *See* U.S. CONST. amend. V.
[118] *See e.g.*, Sugarman v. Dougall, 413 U.S. 634, 652 (1973). (Rehnquist, J., dissenting) (emphasis added) (discussing the term "person" in the Fourteenth Amendment, but arguably could just as easily apply to the same term in the Fifth Amendment).
[119] U.S. CONST. art. I, § 2, cl. 3.
[120] *Id.*

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free *Persons*, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other *Persons*.[121]

The Founders used the same noun ("person") to refer to both free persons and slaves, and thus declared that slaves, although not citizens, were in fact still "persons."[122] The Founders did not appear to grant citizenship to slaves by fiat in this section, so they must not have intended the terms "person" and "citizen" to be synonymous.[123] The fugitive slave provision of the Constitution corroborates this use of the term:

> No *Person* held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[124]

"Person" is used again, clearly in reference to a slave.[125] Justice McLean, in his dissenting opinion in *Scott v. Sanford*, reached a similar conclusion: "In the provision respecting the slave trade, in fixing the ratio of representation, and providing for the reclamation of fugitives from labor, slaves were referred to as persons, and in no other respect are they considered in the Constitution."[126] The Constitution clearly and specifically refers to non-citizens as persons.[127]

Some years later, in a far less controversial case, the Supreme Court declared unlawful the deportation of an alien without a hearing.[128] Although the majority did not reach the constitutional question of the

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121 *Id.* (emphasis added).
122 *Id.*
123 *Id.*
124 U.S. CONST. art. IV § 2, cl. 3 (emphasis added).
125 *Id.*
126 Scott v. Sandford, 60 U.S. (19 How.) 393, 537 (1857) (McLean, J., dissenting).
127 *Id.*
128 Bridges v. Wixon, 326 U.S. 135 (1945).

application of the Fifth Amendment,[129] Justice Murphy discussed its application to aliens in his concurring opinion when he stated,

> [O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. *None of these provisions acknowledges any distinction between citizens and resident aliens*. They extend their inalienable privileges to all "persons" and guard against any encroachment on those rights by federal or state authority.[130]

Per Justice Murphy, the due process clause of the Fifth Amendment does not distinguish "between citizens and resident aliens."[131] However, he failed to explain how the Fifth Amendment distinguishes between resident aliens and non-resident aliens, while simultaneously implying that it does.[132] He then concluded that the Fifth Amendment's "inalienable privileges" extended "to all 'persons,'" which runs counter to the distinction he made previously.[133]

In *Sugarman v. Dougall*,[134] the Supreme Court considered the meaning of "person" within the 14th Amendment's Equal Protection Clause, which added a jurisdictional qualifier to the term, when it stated,[135] "[i]t is established, of course, that an alien is entitled to the shelter of the Equal Protection Clause."[136] In his dissent, Justice Rehnquist illuminated the Constitution's distinction between citizens and non-citizens:

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[129] *Id.* at 157.

[130] *Bridges*, 326 U.S. at 161 (Murphy, J., concurring) (emphasis added) (internal citations omitted).

[131] *Id.*

[132] *Id.*

[133] This arguable contradiction in Justice Murphy's reasoning can be reconciled by considering that the Fifth Amendment places a mandate on the conduct of the government, rather than conferring rights upon persons.

[134] Sugarman v. Dougall, 413 U.S. 634 (1973).

[135] "No State shall . . . deny to *any person within its jurisdiction* the equal protection of the laws." U.S. CONST. amend. XIV, § 1, cl. 2–3 (emphasis added).

[136] *Sugarman*, 413 U.S. at 641. *See also* Graham v. Richardson, 403 U.S. 365, 371 (1971); Truax v. Raich, 239 U.S. 33, 39 (1915); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

> [T]he Constitution itself recognizes a basic difference between citizens and aliens. That distinction is constitutionally important in no less than [eleven] instances in a political document noted for its brevity. Representatives and Senators must be citizens. Congress has the authority "to establish an uniform Rule of Naturalization" by which aliens can become citizen members of our society; the judicial authority of the federal courts extends to suits involving citizens of the United States "and foreign States, Citizens or Subjects," because somehow the parties are "different," a distinction further made by the *Eleventh Amendment*; the *Fifteenth*, *Nineteenth*, *Twenty-Fourth*, and *Twenty-Sixth Amendments* are relevant only to "citizens." The President must not only be a citizen but "a natural born Citizen."[137]

Although the thrust of Justice Rehnquist's dissent seemed to be that aliens should not have the same rights and opportunities for employment as citizens, he made a salient point on the Constitution's textual distinction between "citizens" and others.[138] He elucidated this point further into his dissent, while discussing the Court's view of the Equal Protection Clause of the 14th Amendment:

> The language of that Amendment carefully distinguishes between "persons" who, whether by birth or naturalization, had achieved a certain status, *and "persons" in general*. That a "citizen" was considered by Congress to be a rationally distinct subclass of all "persons" is obvious from the language of the Amendment.[139]

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[137] *Sugarman*, 413 U.S. at 651-52 (Rehnquist, J., dissenting) (emphasis in original) (internal citations omitted). *See also* Fletcher v. Haas, 851 F. Supp. 2d 287, 295 (D. Mass. 2012) (including aliens in "the people" for purposes of the Second Amendment, and noting "[t]here is only one constitutional right that is exclusive to citizens: the right to hold federal public office"); District of Columbia v. Heller, 554 U.S. 570, 580 (2008) (holding "in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset"). "The People," therefore, is arguably a broader class than merely "citizens," and "persons" is arguably a broader class still than "the people."

[138] *Id.*

[139] *Sugarman*, 413 U.S. at 652 (Rehnquist, J., dissenting) (emphasis added).

The Equal Protection Clause of the 14th Amendment, by its own language, demands that each state "provide any person within its jurisdiction the equal protection of the laws,"[140] and distinguishes persons within the jurisdiction of the States from persons generally.[141] The future Chief Justice merely elucidated that the Constitution considered citizens a subset of persons in general, that although they may overlap, they are distinct.[142]

The Due Process Clause of the Fifth Amendment includes no jurisdictional qualifier when it uses the term "person."[143] Justice Rehnquist wrote at length about the substantive difference between citizens and aliens and why this matters.[144]

> Native-born citizens can be expected to be familiar with the social and political institutions of our society; with the society and political mores that affect how we react and interact with other citizens. Naturalized citizens have also demonstrated their willingness to adjust to our patterns of living and attitudes, and have demonstrated a basic understanding of our institutions, system of government, history, and traditions. It is not irrational to assume that aliens as a class are not familiar with how we as individuals treat others and how we expect "government" to treat us.[145]

Justice Rehnquist argued against extending to aliens the same rights as citizens, and his arguments are rational when considering who ought to determine the composition of the government.[146] However, while aliens might not know how Americans "expect 'government' to treat us," the government at all times ought to know how to treat others.[147] The government cannot hide behind alien ignorance of American institutions as a shield for failure to comply with Constitutional mandates. Hence, one

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[140] U.S. CONST. amend. XIV, § 2, cl. 4.
[141] Thus, the term "person," without the 14th Amendment's jurisdictional qualifier, must mean something different from "persons" with the jurisdictional qualifier. Therefore, "person," without the jurisdictional qualifier, must not include a jurisdictional requirement.
[142] *Sugarman*, supra note 139.
[143] U.S. CONST. amend. V.
[144] *Sugarman*, 413 U.S. at 661-62 (Rehnquist, J., dissenting).
[145] *Id.*
[146] *Id.*
[147] *Id.*

may infer from the future Chief Justice's dissent that the term "person," absent any such jurisdictional qualifier as that supplied by the Equal Protection Clause, includes not only aliens per se, but specifically non-resident aliens.[148]

The application of Fifth Amendment personhood does not stop at mere aliens. The Supreme Court has found that "persons" includes illegal aliens.[149]

> *[A]ll persons* within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth Amendments], and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law.[150]

The Court concluded that "person" includes illegal aliens, and that legislation that declared their crime "infamous" and punished them without due process, was outside of Congress's constitutional authority.

In the present day, few crimes are more infamous than terrorism. Congress has decreed criminal penalties for various acts of terrorism ranging from a term of imprisonment, to the death penalty.[151] One federal appeals judge, speaking at the James Madison Lecture of the New York University School of Law in 2012, summarized the Court's jurisprudence on the application of the Fifth Amendment to aliens.[152]

> Today, an alien's right to the full panoply of constitutional criminal trial protections is essentially beyond dispute,

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[148] This view seems consistent with the majority's view that the "any person within its jurisdiction" language of the Equal Protection clause includes resident aliens. *Sugarman*, 413 U.S. at 641.

[149] *See e.g.*, Wong Wing v. United States, 163 U.S. 228, 238 (1896). *See also* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to 'deprive' any 'person . . . of . . . liberty . . . without due process of law.'").

[150] Wong Wing, 163 U.S. at 238 (1896) (emphasis added).

[151] 18 U.S.C. § 2332b. The death penalty would certainly invoke the capital offense provision of the Fifth Amendment.

[152] The Honorable Karen Nelson Moore, *Madison Lecture: Aliens and the Constitution*, 88 N.Y.U. L. REV. 3, 825 (2013).

> despite the fact that the Supreme Court has not explicitly held that aliens are entitled to each of the specific underlying rights, such as the right to a speedy trial.[153]

Put another way, an alien is entitled to full due process. As demonstrated above, the Founders intended that constitutional personhood specifically included non-citizens.[154] Further, the Supreme Court has subsequently interpreted the term "person" to include non-resident aliens.[155] Since the Supreme Court has determined that "person" means *all* persons, the question arises whether the Fifth Amendment applies outside of the geographic confines of the United States.

D. The Long Arm of the Supreme Law

The Fifth Amendment's mandate for due process, before taking life, applies at any geographical point at which the federal government chooses to act, even if that point lies outside the political and legal boundaries of the United States and its territories.[156] Or, as one former state judge wrote, "the Constitution . . . governs the government wherever it goes."[157]

The Department of Justice (DoJ) somewhat conceded this point when it stated, "The Department assumes that the rights afforded by the Fifth Amendment's Due Process Clause . . . attach to a U.S. citizen even while he is abroad."[158] However, a proper analysis of the application of the Fifth Amendment's Due Process Clause demonstrates that it applies abroad to everyone who is the subject of U.S. government action, not just U.S. citizens.

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153 *Id.* (citations omitted).
154 *See e.g.*, *Wong Wing*, supra note 150.
155 *See Wong Wing*, 163 U.S. at 237-38.
156 U.S. CONST. amend. V.
157 Andrew Napolitano, *All Torture is Criminal Under All Circumstances*, REASON (Dec. 11, 2014), http://reason .com/archives/2014/12/11/cia-and-its-torturers.
158 Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qai'da or An Associated Force* 5 (Nov. 8, 2011), http://www.lawfareblog.com/wp-content/uploads/2013/02/020413_DOJ_White_Paper.pdf [hereinafter DoJ White Paper]. The Department of Justice (DoJ) cites to Reid v. Covert, 354 U.S. 1, 5-6 (1957) for its assertion. (DoJ White Paper at 5). The Department of Justice's analysis of the application of the Fourth Amendment to lethal, deliberate targeting is beyond the scope of this article.

The Department of Justice cites to *Reid v. Covert*,[159] where the Supreme Court considered the application of Fifth Amendment Due Process to U.S. citizens accompanying members of the military abroad.[160] The *Reid* Court is clear about two things: the Constitution does not lose its effect merely because the action at issue is outside of the United States, and the concept of legal extra–territoriality is fundamental to the nature of government itself.[161]

> When the Government reaches out to punish a citizen who is abroad, the shield which the *Bill of Rights* and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government.[162]

As an example of how this principle is as "old as government," the Court mentioned the Biblical Paul, invoking his citizenship as a Roman, in order to enjoy the rights of Roman citizenship.[163] In using the example of Rome, a nation not known for recognizing the concept of natural rights of non-citizens, the Court seemed to say that extra-territoriality is not so much an issue of rights as it is an issue of the government's authority to act at all.[164]

The *Reid* Court corroborated this view when considering the extra-territorial application of a different section of the Constitution, not included in the Bill of Rights.[165]

> The language of Art[icle] III, § 2 manifests that constitutional protections for the individual *were designed to restrict the United States Government when it acts* outside of this country, as well as here at home. After declaring that all criminal trials must be by jury, the section states that when a crime is "not committed within

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[159] Reid v. Covert, 354 U.S. 1 (1957) (holding that Fifth Amendment protections extended to spouses of servicemembers stationed in foreign countries.).

[160] The *Reid* Court did not consider the application of the Fifth Amendment to non-citizens abroad, because this issue was not presented by the parties.

[161] *Reid*, 354 U.S. at 6.

[162] *Id*.

[163] *Id.*

[164] *Id. See generally* Gibbon, *supra* note 1.

[165] *Reid*, 354 U.S. at 7–8.

> any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." If this language is permitted to have its obvious meaning, § 2 is applicable to criminal trials outside of the States as a group without regard to where the offense is committed or the trial held.[166]

The Court therefore confirmed that constitutional mandates are really about restricting the federal government's power, and also that the Founders intended that extra-territoriality not be a concern when discussing restraints on that power.[167]

The Court also addressed the notion that only fundamental rights are protected abroad.[168]

> This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States. While it has been suggested that only those constitutional rights which are "fundamental" protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou shalt nots" which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.[169]

The Court confirmed two important points: (1) mere urgency of a fundamental right is not material to its extra-territorial application, and (2) "fundamental protections" are all restraints on the government's power that attach from the very source of its power.[170]

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[166] *Id.* (emphasis added) ("The *Fifth* and *Sixth Amendments*, like Article. III, § 2, are also all-inclusive with their sweeping references to 'no person' and to 'all criminal prosecutions.'") (citing 3 MADISON PAPERS 1441 (Gilpin ed. 1841)) ("According to Madison, the section was intended 'to provide for trial by jury of offences committed out of any State.'").

[167] *Id.*

[168] *Reid*, 354 U.S. at 8–9.

[169] *Id.*

[170] *Id.*

In *Balzac v. Porto Rico*,[171] thirty-five years earlier than *Reid*, the Court crystallized the issue of extra-territoriality.[172]

> [T]he real issue in the *Insular Cases*[173] was not whether the Constitution extended to the Philippines or Porto [sic] Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.[174]

Thus, the essential question is not whether constitutionally guaranteed rights extend to territory outside of the United States, but whether the Constitution guides and restrains the government's hand, wherever it acts.

Referring back to the *Insular Cases*, the Court more recently, in *Boumediene v. Bush*,[175] declared that neither Congress nor the President may determine when or whether extra-territoriality applies.[176]

> The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." . . . To hold the political branches have the power to switch the Constitution on or off at will . . . [leads] to a regime in which Congress and the President, not this Court, say "what the law is."[177]

The point is not that the Constitution applies extra-territorially, but applies to government actors who operate extra-territorially.[178] Congress

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171 Balzac v. Porto Rico, 258 U.S. 298 (1922).
172 *Id.* at 312.
173 *See* Boumediene v. Bush, 553 U.S. 723, 757 (2008) (The *Insular Cases* were several cases wherein the Supreme Court held, *inter alia*, "that the Constitution has independent force in" territories outside of the States, and that force is "not contingent upon acts of legislative grace.")
174 *Balzac*, 258 U.S. at 312. *See also Boumediene*, 553 U.S. at 758.
175 *Boumediene*, 553 U.S at 128.
176 *Id*. at 765.
177 *Id*. (citing Murphy v. Ramsey, 114 U.S. 15, 44 (1885) and Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 177 (1803)).
178 *Boumediene*, 553 U.S. at 765.

and the President risk violating separation of powers and subverting constitutional law by asserting otherwise. Congress and the President may not exercise authorities in places where the very document granting those authorities does not apply.[179] While applicable extraterritorially, now comes the question of whether Fifth Amendment due process has its full force and effect during times of armed conflict.

E. Fifth Amendment Not Suspended During Armed Conflict

The Fifth Amendment Due Process Clause has full force and effect during armed conflict.[180] There is no war exception to this clause.[181] Congress and the President have historically been accorded broad latitude in their war-making powers, indeed so much latitude that "it has been possible to leave the outer boundaries of war powers undefined."[182] However, the Constitution does not grant the power to read-in a war-time exception to the Due Process Clause, and the Court went to so far as to declare of the Constitution that "[n]o doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."[183] Indeed, "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."[184]

In 1866, shortly after the end of the Civil War, the Supreme Court asserted that trying civilians by court-martial was unconstitutional while civilian courts were still open and operating.[185] They had occasion to consider the application of martial law generally.[186]

> If, in foreign invasion or civil war, the courts are actually closed, then, on the theater of active military operations, where war really prevails, as no power is left but the

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179 *Boumediene*, 553 U.S. at 765.
180 *See, e.g.*, *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2 (1866). S*ee also* Reid v. Covert, 354 U.S. 1, 35 n.62, 77 S. Ct. 1222, 1240 (1957) ("Even during time of war the Constitution must be observed.").
181 *See* U.S. CONST. amend. V.
182 *Id*. at 797–98.
183 *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866).
184 Sterling v. Constantin, 287 U.S. 378, 401 (1932).
185 Ex parte *Milligan*, 71 U.S. (4 Wall.) at 127.
186 *Id.*

> military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.[187]

American courts certainly were not closed during the direst times of the Civil War,[188] and have never been since.[189] Indeed, even during America's recent wars in Afghanistan and Iraq, the Army tried full criminal cases with judges, jury-analogous panels, and defense counsel in the theaters of war.[190] Hence, there has been no cause to consider suspending due process at any time since the Court announced this principle, nor is there likely to be any such cause in the foreseeable future.

Congress may suspend the writ of habeas corpus during times of rebellion or invasion,[191] but there is no similar wartime exception to the Due Process Clause of the Fifth Amendment.[192] However, even during the Civil War, when the threat to public safety was perhaps more dire than at any other time since, the Court also recognized that the only safeguard of liberty that the federal government may suspend at any time is the writ of habeas corpus, and only because the text of the Constitution expressly authorizes such suspension.[193]

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[187] *Id.* at 127. S*ee also Boumediene*, 553 U.S. at 794.

[188] *See, e.g.*, Ex parte *Milligan*, 71 U.S. (4 Wall.) at 122.

[189] *See e.g.*, Justia, U.S. Supreme Court Opinions by Year, https://supreme.justia.com/cases/federal/us/. It appears the Supreme Court has rendered an opinion in every year since its inception.

[190] *See, e.g.*, Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, *in* ARMY LAW., Sept. 2010.

[191] U.S. CONST. art. I, § 9, cl. 2. The language of this clause does seem not authorize Congress to suspend habeas corpus when the United States invades another country.

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

[193] Ex Parte *Milligan*, 17 U.S. at 125; s*ee also* Home Bldg. & Loan Assoc. v. Blaisdell, 290 U.S. 398, 426 (1934).

> Thus, the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.

Indeed, the Fifth Amendment does contain a limited wartime exception, but only with regard to suspending the grand jury requirement for members of the militia "when in actual service in time of War or public danger."[194] The *Milligan* Court's opinion is clear that the phrase "when in actual service in time of War or public danger" applies specifically to those members of the militia who are in actual service, and not to imply that grand juries are generally suspended during times of war or actual danger.[195] There is no similar exception—or indeed any exception at all—in the Due Process Clause.[196]

Shortly after World War I, the Supreme Court considered the application of the Fifth Amendment to a Congressional Act prohibiting alcohol during a "war emergency."[197]

> The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations; but the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power.[198]

The Court implies that the Fifth Amendment has just as much force against the federal government's war powers in time of war as the Fourteenth Amendment does against the States' police powers in times of peace.[199] Indeed, the *Hamilton* Court did not announce any wartime exception to the Fifth Amendment.[200]

Id. See also Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

[194] U.S. CONST. amend. V cl. 1.

[195] *See* Ex Parte *Milligan,* 71 U.S. at 122-23 (The right of indictment by Grand Jury "is preserved to every one [sic] accused of crime who is not attached to the [A]rmy, or [N]avy, or militia in actual service.").

[196] U.S. CONST. amend. V cl. 3.

[197] Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146 (1919).

[198] *Hamilton*, 251 U.S. at 156 (internal citations omitted) (citing *inter alia*, *Ex parte Milligan*, 71 U.S. at 121-27); s*ee also Hamilton*, 251 U.S. at 164 (holding the Eighteenth Amendment, prohibiting manufacture and sale of alcohol and in effect at the time, "is binding not only in times of peace, but in war"). The Eighteenth Amendment, like the Fifth Amendment Due Process Clause, lacks an express wartime exception. *See* U.S. CONST. amend. XVIII.

[199] *Id.*

[200] Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146 (1919).

In 1931, as the seeds of World War I were just starting to sprout into something far more terrible, the Supreme Court had occasion to consider the particulars of the Amendment language of Article V of the Constitution.[201]

> The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase affecting the exercise of discretion by the Congress in choosing one or the other alternative mode of ratification is persuasive evidence that no qualification was intended.[202]

One could easily imagine this observation to encompass the Fifth Amendment as well, since the Bill of Rights was drawn by virtually the same men, with the same meticulous care.[203] The lack of a wartime exception to the Due Process clause persuasively evidences that no such exception was intended. At least, the *Reid* Court seemed to think so.[204]

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. *But we have no authority, or inclination, to read exceptions into it which are not there*.[205]

The Framers seemed to know that some exceptions were reasonable, for the proper function of government, and included those they believed

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[201] United States v. Sprague, 282 U.S. 716, 732 (1931).
[202] *Id.* (referring specifically to the language of Article V, though it could just as easily apply to the Fifth Amendment).
[203] *Id. See also* U.S. CONST. amend. V cl. 3.
[204] *Reid*, 354 U.S. at 14.
[205] *Id.* (emphasis added).

were necessary.[206] They could have included additional exceptions beyond the grand jury exception, but chose not to.[207] No branch of the government may make an exception by fiat.[208]

Although the Court affords significant latitude to Congress and the President during a time of war, that latitude is limited by the Constitution, and the Constitution contains no provision for the suspension of due process during war.[209] Had the founders intended war powers to be unlimited, no doubt they would have made this clear in the text of the Constitution. Indeed, then, any future leader with the power to make war could easily undo the entire Constitutional structure by making a war without end.

F. But Whither Alien Combatants?

Synthesizing the arguments and Court holdings previously discussed, and placed in the context of more recent Supreme Court decisions, one may conclude that the Fifth Amendment Due Process Clause applies to alien combatants outside the territory of the United States, who are subject to deprivations of life by the federal government.

The Supreme Court, in *Hamdi v. Rumsfeld*,[210] considered whether due process ought to apply to a natural-born citizen who left the United Stated as a child, and was later detained in Afghanistan while armed, and allegedly conceding his status as an enemy combatant.[211] The Court held "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 . . . . These essential constitutional promises may not be eroded."[212]

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206 *See, e.g.*, U.S. CONST. amend. V cl. 1.
207 *Id.*
208 *See e.g.*, Boumediene v. Bush, 553 U.S. 723, 757 (2008).
209 *See generally* U.S. CONST.
210 Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
211 *Id.*
212 *Id.* at 533 (citing Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985)) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'"); *see also* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); *Concrete Pipe & Products of Cal., Inc.*, 508 U.S. at 617 ("Due process requires a 'neutral

When the government alleged that it could consider Hamdi a combatant, and thus subject to indefinite detention on the basis of an uncontestable hearsay affidavit, the Court concluded, "Plainly, the 'process' Hamdi has received is not that to which he is entitled under the Due Process Clause."[213] Although Hamdi was a U.S. citizen, the government apparently treated him as though he was an alien, deemed him an enemy combatant, and apparently considered his citizenship irrelevant.[214] The United States seemed now estopped from arguing that the Due Process Clause only protects citizens.[215] Regardless, the Court had now applied Fifth Amendment Due Process to an alleged enemy combatant.[216]

The Supreme Court considered a similar issue in 2008.[217] While not directly considering the issue of Fifth Amendment Due Process, non-citizen detainees at Guantanamo Bay sought habeas corpus relief.[218] Congress previously passed a statue barring the federal courts from considering habeas petitions by detainees at Guantanamo.[219]

> In deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, i.e., petitioners' designation by the Executive Branch as enemy combatants, or their physical location . . . . The Government contends that noncitizens designated as enemy combatants and detained in territory located

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and detached judge in the first instance . . . .'"); Ward v. Monroeville, 409 U.S. 57, 61–62 (1972).

213 *Id*. at 538.

214 *Id*. at 509, 559 (Scalia, J, dissenting) (Although alien combatants historically were held indefinitely until the end of hostilities, citizens who have historically taken up arms against their own nation are tried as traitors.) There was no indication that the government intended to bring a charge of treason against Hamdi, or otherwise consider him different from an alien combatant in any other way. In fact, the whole case came about because Hamdi challenged the government's characterization of him as an enemy combatant, not an appeal stemming from a charge of treason. *Id.*

215 *Id.* If citizenship is not relevant for constitutional war powers, why would it be relevant for constitutional due process?

216 *Id.* at 533.

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

218 *Id.*

219 *Id.* at 736.

> outside our Nation's borders have no constitutional rights and no privilege of habeas corpus. Petitioners contend they do have cognizable constitutional rights and that Congress, in seeking to eliminate recourse to habeas corpus as a means to assert those rights, acted in violation of the Suspension Clause.[220]

Interestingly, and importantly, the Court recognized that while none of the petitioners were citizens of the United States, neither were any citizens "of a nation now at war with the United States."[221] The Court noted that they all denied association with al-Qaeda, though their detainee review boards determined they were all enemy combatants.[222] While this does not equate to extension of Fifth Amendment protections to such individuals, the Court's summary is striking in its application of a constitutional privilege to alien combatants located outside of the United States.[223]. The *Boumediene* Court, after conducting an analysis of the British common law history of the writ, ultimately held that the writ ran to alien combatants held at Guantanamo Bay.[224]

While that fact alone is important to the current analysis, what distinguishes Fifth Amendment Due Process from habeas corpus is the dissimilar lack of ambiguity in to whom the Due Process Clause applies.[225] Where the habeas corpus clause does not state expressly who may avail themselves of the writ, the Due Process Clause, as demonstrated above, expressly applies to all persons.[226] Further, as noted above, while Congress may suspend habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it,"[227] the Due Process Clause grants Congress no such suspension authority under any circumstances.[228] Thus, the Due Process Clause's mandate is much broader and farther-reaching than is that of the Habeas Corpus Clause.

One argument against affording constitutional protections to alien combatants holds that the rights protected by Constitution do not apply to

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220 *Id.* at 739.
221 *Id.* at 734.
222 *Id.*
223 *Id.* at 771.
224 *Id*. at 771.
225 *See* U.S. CONST. art. I, § 9, cl. 2; U.S. CONST. amend. V.
226 *Id.*
227 U.S. CONST. art. I, § 9, cl. 2.
228 *See* U.S. CONST. amend. V cl 3.

aliens outside of the United States.[229] This view is not supported by either the Constitution's own language, or the philosophical foundation laid by the Declaration of Independence.[230] Despite its name, the Bill of Rights does not create rights for citizens.[231] Rather, it clarifies and restricts various government powers.[232] Therefore, this argument against foreign application is vain and must be discarded.

Another argument appeals to the great exigencies of war.[233] The *Reid* Court discards this argument as well.[234]

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.[235]

Wartime exigency as an excuse for suspending due process deteriorates the very thing the war was meant to protect.[236]

Shortly after World War II, the Supreme Court considered the habeas corpus petition of a Japanese general, whom the United States had tried and convicted of war crimes in the Pacific Theater.[237] In considering whether the Fifth Amendment's Due Process Clause restrains the federal government's hand against a non–resident alien–belligerent who engaged in armed aggression against the United States, at least one Supreme Court Justice thought it applied.[238]

> The answer is plain. The Fifth Amendment guarantee of due process of law applies to "any person" who is accused of a crime by the Federal Government or any of its

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229 *See e.g.*, *Boumedeine*, 553 U.S. at 841 (Scalia, J., dissenting).
230 See U.S. CONST.; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
231 H.R.J. Res. 1, 1st Cong. (1789) (enacted).
232 *Id.*
233 *See e.g.*, *Reid*, 354 U.S. at 14.
234 *Id.*
235 *Id.*
236 *Id.*
237 In re *Yamashita*, 327 U.S. 1 (1946).
238 *Id.* at 26–27 (Murphy, J., dissenting).

> agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.[239]

If the Fifth Amendment Due Process Clause has any meaning at all, then it must mean what it says. By its own language, it must apply to enemy combatants who are subject to deliberate deprivations by the federal government. Now that it is clear that Fifth Amendment due process applies to deliberate targeting, consideration must be given to what the Fifth Amendment requires of it.

IV. The Fifth Amendment Applied to Deliberate Targeting

The Fifth Amendment demands that the government provide due process to subjects of deliberate targeting. This premise necessarily entails legal analysis of particular government actions to ensure compliance with the Fifth Amendment's mandate. The Department of Justice (DoJ), while attempting to incorporate constitutional interpretation into their analysis of deliberate targeting, fatally errs in its basic understanding of the Constitution. The DoJ mistakenly believes that the Fifth Amendment

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[239] *Id.*

applies only to citizens, and not foreigners.[240] Substantial compliance with the Due Process Clause requires a neutral magistrate, and a meaningful opportunity to rebut the government's allegations.[241] The DoJ's solution provides neither. These considerations must call into question whether the DoJ's procedure is sufficient.

A. A Critique of the Department of Justice's Analysis

When considering the legality of a particular instance of lethal deliberate targeting, the DoJ applies the wrong test, misconstrues the text of the Fifth Amendment, disregards other relevant case law, and thus reaches an erroneous conclusion.

1. The Department of Justice Announces Its Method

In a memorandum (Baron Memorandum) dated July 16, 2010, and signed by David J. Baron, Acting Assistant Attorney General,[242] the DoJ appealed to the Supreme Court's balancing test in *Matthews v. Eldridge*[243] to conclude that such a targeted killing does not violate the Fifth Amendment due process mandate.[244] Much of Mr. Baron's Fifth Amendment analysis is redacted in the publicly available version of the memo, and thus much of his analysis appears to be missing.[245] However, he assesses that "a decision-maker could reasonably decide that the threat posed by al-Aulaqi's activities to United States persons is 'continued' and 'imminent.'"[246] Mr. Baron seems to think that his analysis satisfies the Fifth Amendment due process clause.

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[240] *See e.g.*, David J. Baron, *Memorandum for the Attorney General Regarding Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Alauki*, 38 (July 16, 2010), https://www.aclu.org/sites/default/files/assets/2014-06-23_barron-memorandum.pdf [hereinafter Baron Memorandum]. DoJ asserts "*Because* al-Aulaqi is a U.S. citizen, the Fifth Amendment's Due Process Clause . . . likely protects him in some respects . . . ." *Id.* (emphasis added) Why assert that due process applies because he is a citizen, unless they believe that is the triggering mechanism for its application?

[241] *See e.g.*, *Ward*, 409 U.S. at 62.

[242] Baron Memorandum, *supra* note 240.

[243] Mathews v. Eldridge, 424 U.S. 319 (1976).

[244] Baron Memorandum, *supra* note 240, at 39.

[245] *Id.* at 38–40.

[246] *Id.*.

In 2011, the DoJ issued a separate opinion on the matter in an unsigned white paper (DoJ White Paper), and concluded that killing al-Aulaqi was legal.[247] The paper seems to conclude that all the process due is:

> (1) an informed, high level official of the U.S. government has determined that the targeted individual poses an immediate threat of violent attack against the United States; (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and (3) the operation would be conducted in a manner consistent with applicable law of war principles.[248]

U.S. Attorney General Eric Holder wrote a letter to Senator Patrick Leahy (AG Letter), in which he advised of the same three-pronged test. [249]

> Such considerations allow for the use of lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-Qa'ida or its associated forces, and who is actively engaged in planning to kill Americans, in the following circumstances: (1) the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; (2) capture is not feasible; and (3) the operation would be conducted in a manner consistent with applicable law of war principles.[250]

The Department of Justice appears to invent these three prongs out of whole cloth, tacking it onto their *Matthews* analysis.[251] Additionally, the test fails to define the term "high level official."[252] It further neglects to identify the nature, quality, amount, and legal sufficiency of the information required to make said official "informed" enough to make a

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[247] DoJ White Paper, *supra* note 158.
[248] *Id.* at 1.
[249] Letter from Eric H. Holder, Jr., Att'y Gen. of the U.S., to Patrick Leahy, U.S. Sen. (May 22, 2013) (on file with author) [hereinafter AG Letter].
[250] *Id.*
[251] DoJ White Paper, *supra* note 158, at 6.
[252] *Id.* at 1.

determination that another individual ought to be targeted.[253] Consequently, the risk for error and/or abuse is extreme.

The Department of Justice memoranda appear to be *the* legal basis upon which the federal government conducts these operations. As the memoranda specifically address the issue of targeting a citizen, they are unhelpful to determine if the DoJ would apply the *Matthews* test when targeting non-citizens. The *Matthews* test must now be explained, and thought given to its applicability.

2. Matthews *Is the Wrong Test*

The Baron Memorandum and the DoJ White Paper cite *Matthews v. Eldridge* for their Due Process analysis.[254] The *Matthews* Court, while considering the lawfulness of termination of Social Security disability benefits prior to an evidentiary hearing,[255] announced its balancing test as follows:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[256]

The *Matthews* Court acknowledged, "Only in *Goldberg*[257] has the Court held that due process requires an evidentiary hearing prior to a *temporary* deprivation,"[258] and ultimately announced:

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253 *Id.*
254 Baron Memorandum, *supra* note 240, at 39; DoJ White Paper, *supra* note 158, at 2, 6.
255 *Mathews*, 424 U.S. at 326.
256 *Id.* at 334-45 (citing *Goldberg*, 397 U.S. at 263–71).
257 Goldberg v. Kelly, 397 U.S. 254 (1970).
258 *Mathews*, 424 U.S. at 340 (emphasis added).

> Procedural due process rules are shaped by the risk of error inherent in the truthfinding [sic] process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker [sic], is substantially less in this context than in *Goldberg*.[259]

The Department of Justice contemplates permanent deprivation of life through targeting.[260] By the *Matthews* Court's own analysis, it seems reasonable that an evidentiary hearing for deliberate lethal targeting would have more potential value than *Goldberg*, let alone *Matthews*.[261] It appears the *Matthews* Court points to the *Goldberg* analysis when contemplating any substantial deprivation.[262]

In *Goldberg*, the Supreme Court considered whether a state may discontinue welfare benefits (specifically, Aid to Families with Dependent Children, or AFDC) without an evidentiary hearing.[263] Quoting the District Court's ruling, the Court concluded,

> [T]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal.[264]

The Court ordered "that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process."[265] It explained the urgency of the subject matter by stating,

> For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. . . . [T]ermination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he

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259 *Id.* at 344–45.
260 *See e.g.*, Baron Memorandum, *supra* note 240.
261 *Mathews*, 424 U.S. at 344–45.
262 *Id.*
263 *Goldberg*, 397 U.S. at 266.
264 *Id.* (internal citation omitted).
265 *Id.* at 264.

> waits. Since he lacks independent resources, his situation becomes immediately desperate.[266]

The *Goldberg* Court held that because welfare was essential to sustaining life, only an evidentiary hearing prior to termination of benefits satisfies due process.[267] It seems obvious to observe that *not shooting someone with a missile* would be likewise essential to sustaining life. The *Goldberg* Court was cognizant of the "sustaining life" threshold for a judicial hearing.[268]

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.[269]

The *Matthews* Court distinguished its case from that of *Goldberg* in two critical ways. First, the type of public benefits at issue in *Matthews* was not of the type that is likely to "deprive an eligible recipient of the very means by which to live while he waits."[270] Second, the administrative procedures in *Matthews* provided "the disability recipient's representative full access to all information relied upon by the state agency."[271]

Deliberate targeting is a means by which to deprive an individual of life itself. Further, the government does not present the person being targeted or his/her representative with access to information relied upon to make the targeting determination.[272] For these reasons, when considering lethal deliberate targeting, the *Matthews* Court appears to point to the *Goldberg* Court for more applicable guidance.[273] There is arguably no more grievous loss than of one's own life. Once lost, it can be neither reversed nor compensated for. Accordingly, when contemplating permanent deprivation of life, a pre-deprivation judicial hearing must be

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[266] *Id.* (emphasis in original).
[267] *Id.* at 261.
[268] *Id.* at 264.
[269] *Id.* at 262–63 (internal citations omitted).
[270] *Matthews*, 424 U.S. at 340 (citing *Goldberg*, 397 U.S. at 264).
[271] *Id.* at 345–46.
[272] See JP 3–60, *supra* note 26.
[273] *Mathews*, 424 U.S. at 344–45.

mandatory. Because the DoJ chose the wrong test, they necessarily reached an erroneous conclusion.

3. The Department of Justice's Erroneous Conclusion

One can perhaps understand why the DoJ chose the *Matthews* test. In 2004, the Supreme Court announced a preference for it as the go-to balancing test for due process.[274]

> The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law," is the test that we articulated in *Mathews v. Eldridge*.[275]

However, the *Hamdi* Court analyzed the question of detention, not lethal deliberate targeting, and certainly not any permanent deprivation (their quote of all three rights enumerated in the Due Process Clause notwithstanding).[276] This makes the *Hamdi* Court's seeming support for the DoJ's approach somewhat problematic. Further review of the *Hamdi* case only appears to undermine the DoJ's approach to lethal deliberate targeting.

The Government in *Hamdi* proposed that any due process inquiry terminate with a mere affidavit.[277] This affidavit would be filed by a government official alleging knowledge of the status of the detainee, without the detainee having an opportunity to challenge that status.[278] The *Hamdi* Court conducted a *Matthews* balancing test and held:

> With due recognition of these competing concerns, we believe that neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance when a United States citizen is detained in the

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[274] *Hamdi*, 542 U.S. at 528–29.
[275] *Id.* (2004) (internal citations omitted).
[276] *Id.*
[277] *Hamdi*, 542 U.S. at 512–14.
[278] *Id.*

> United States as an enemy combatant. That is, "the risk of an erroneous deprivation" of a detainee's liberty interest is unacceptably high under the Government's proposed rule . . . .[279]

The Department of Justice essentially tries the same circumvention of due process with their proposed balancing of interests in deliberate targeting when they refer to "an informed, high level official of the U.S. government" who has "determined that the targeted individual poses an immediate threat of violent attack against the United States."[280] The only apparent difference is, instead of detaining someone, they contemplate killing them.[281] Further, they ignore the holding of the *Hamdi* Court, which conducted a *Matthews* balancing test and concluded that a hearing in front of a neutral decision maker was required.[282]

Even if the *Matthews* analysis is the correct one, as the DoJ asserts,[283] they err in arriving at who ought to perform the balancing test. The executive has every incentive to invariably conclude that its decision complies with *Matthews*. The person in the executive role is not detached from his/her desired end state, and thus cannot be unbiased in his/her balancing of the government's interests versus the interests of his/her intended target. The executive has no organic incentive to permit the targeted individual to present evidence in his/her own defense, cross-examine the executive's witnesses, or otherwise contest the executive's case in any meaningful way, because the executive is simply not neutral regarding the outcome. This is the very antithesis of due process. "[O]ne is entitled as a matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average person as a judge that might lead that person not to hold the balance nice, clear, and true . . . ."[284] Further, even the *Matthews* Court concluded that a hearing is essential to due process, as it only ruled on the question of whether benefits could be terminated *before* review, not *without* review.[285]

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[279] *Id.* at 532-33 (citing *Matthews*, 424 U.S. at 335).
[280] DoJ White Paper, *supra* note 158, at 1.
[281] *Id.*; Baron Memorandum, *supra* note 240.
[282] *Hamdi*, 542 U.S. at 533; *see also id.* at 530 (asserting "the importance to organized society that procedural due process be observed," and emphasizing that "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions") (quoting Carey v. Piphus, 435 U.S. 247, 266 (1978)).
[283] Baron Memorandum, *supra* note 240, at 39; DoJ White Paper, *supra* note 158, at 2, 6.
[284] Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 605 (1993); *see also Hamdi*, 542 U.S. at 538.
[285] *Mathews*, 424 U.S. at 333.

> This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Eldridge agrees that the review procedures available to a claimant before the initial determination of ineligibility becomes final would be adequate if disability benefits were not terminated until after the evidentiary hearing stage of the administrative process.* The dispute centers upon what process is due prior to the initial termination of benefits, pending review.[286]

The *Goldberg* test solves these problems, and is arguably mandatory given the gravity of permanent deprivation of life. Although the DoJ should have applied the *Goldberg* test, the Court's guidance in *Hamdi* implies that even a *Matthews* analysis should result in a judicial hearing. Thus, the DoJ reached an erroneous conclusion primarily by failing to apply the *Goldberg* test, and secondarily by applying the *Matthews* test incorrectly. As the DoJ's test fails the Fifth Amendment's mandate, it must be replaced by more robust due process.

B. Expeditionary Judicial Due Process

The Fifth Amendment clearly requires notice and a hearing before the government may deliberately deprive a person of life.[287] The hearing must take place before a neutral decision maker, and the person must have a meaningful opportunity to rebut the government's assertions before the deprivation occurs.[288]

War admittedly presents obstacles to affording due process to individuals alleged to be enemies of the state, not the least of which is

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[286] *Id.* (emphasis added) (internal citations omitted).
[287] U.S. CONST. amend. V; *Simon*, 182 U.S. at 436.
[288] *Concrete Pipe & Products of Cal., Inc.*, 508 U.S. at 617; *Ward*, 409 U.S. at 62.

popular opinion as to who might deserve process. What some may see as "giving the terrorists what they deserve," others might see as a struggle for the very soul of the nation.[289]

> It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.[290]

During a conventional, declared war, Congress provides notice to the opposing state through a public declaration of war.[291] Individual actors of the enemy state publicly and openly admit their part in the war by wear of the enemy uniform, and by acting as part of enemy formations.[292] Enemy status is evident and admitted to by the person. No further due process analysis is required, as the purpose of due process—to use evidence to find the truth—is fulfilled by such public declarations.

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[289] *Hamdi*, 542 U.S. at 532.

[290] *Id.* (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164-165 (1963)).

> The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action.

Id. (citing United States v. Robel, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.")).

[291] *See* U.S. CONST. art. I, § 8, cl. 11. The United States has declared war eleven times. *Official Declarations of War by Congress*, http://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm (last visited Feb. 16, 2015). Presumably, all such resolutions were passed after public debate.

[292] *See* Geneva Convention Relative to the Treatment of Prisoners of War arts. 4, 27, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Article 4 defines "prisoners of war" and does not expressly indicate that members of the regular armed forces wear uniforms. *Id.* It does define the militia and other volunteer corps as having, *inter alia*, "a fixed distinctive sign recognizable at a distance." *Id.* Article 27 states, "Uniforms of enemy armed forces captured by the Detaining Power should, if suitable for the climate, be made available to clothe prisoners of war." *Id.* Juxtaposed to Article 4, it seems that the authors merely assumed that members of the regular armed forces of a nation would wear some distinctive uniform.

The advent of asymmetric war, which often lacks such public and open declarations, makes identifying enemies and potential allies much more difficult. This difficulty in identifying the enemy goes to the core of due process. Due process can help determine the enemy in the first place, so that innocents are not targeted out of negligence or willfulness. An environment in which the enemy is hard to determine is also most in need of due process, to protect the liberty of the innocent. Further, commanders can use due process to assist in that identification through compliance with the Fifth Amendment's mandate.

Congress ought to make a declaration of war against any state or transnational organization it wishes to engage in armed conflict.[293] While this would not provide perfect notice to all individuals who eventually are contemplated for targeting, this public declaration of intent would substantially comply with the notice component of due process. Additionally, forward-deployment to a theater of combat operations should not bar the application of due process. The Department of Defense's current practice of deploying military judges and military defense counsel to combat zones should ease compliance with the Fifth Amendment, as evidentiary hearings could take place in theater within close geographic and temporal proximity to deliberate targeting packages.

There are several ways to provide a judicial hearing. For example, Congress could empower these forward-deployed military judges to conduct evidentiary hearings as part of the deliberate targeting process. The judges could determine, based on evidence and argument of counsel, whether the proposed person is in fact who the government says s/he is. As military judges already have security clearances,[294] classified evidence should not hinder their deliberations. Military judges would be neutral arbiters of the facts because they obey a chain-of-command that is separate

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[293] As noted above, Congress has declared war eleven times. Official Declarations of War by Congress, *supra* note 292. The nation against whom the declaration was made was clearly named in each declaration. *Id.* By contrast, the Authorization for Use of Military Force (AUMF), dated September 18, 2001, does not name the enemy. Authorization for Use of Military Force PL 107–40, Sep. 18, 2001. Instead, it authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines" were involved in the September 11, 2001, attacks. *Id.* Arguably, this does not publically provide either notice of lethal force, or notice of whom it might be used against. The October 16, 2002, AUMF authorizing military force against Iraq likely provides sufficient notice of both lethal force and against whom it will be used. Authorization for Use of Military Force, PL 107-243, Oct. 16, 2002.

[294] U.S. DEP'T OF ARMY, REG. 601-100 APPOINTMENT OF COMMISSIONED AND WARRANT OFFICERS IN THE REGULAR ARMY para. 1-8 (21 Nov. 2006).

and distinct from operational commanders.[295] The military defense bar could appoint forward-deployed defense counsel to represent proposed targeted individuals *in absentia* during the evidentiary hearings. Although an *in absentia* hearing may not strictly comply with due process, requiring presence may be so unworkable as to prevent any due process at all. As military defense counsel also obey a separate and distinct chain-of-command from operational commanders,[296] they would be free to zealously represent their appointed clients and oppose the commanders' trial counsel during evidentiary hearings.

Similarly, in cases concerning unmanned drones piloted by individuals located within the continental United States, federal civilian courts could hold an evidentiary hearing. The federal defense bar could represent the proposed targeted individual *in absentia*. In this case, the Article III courts would be independent and neutral of the executive and its war goals. Alternatively, Congress could appoint special courts who specialize in armed conflict cases. They could take special care to protect classified information by holding closed hearings and vetting defense counsel security credentials.

Perhaps none of these examples perfectly comport with the Founders' vision of due process, and there may be other, better solutions as well. However, they preserve the most important element of due process: a meaningful opportunity to oppose the government's assertions. Therefore, they would satisfy both *Goldberg* and *Hamdi*, and come substantially and significantly closer to the Founders' ideals than the DoJ's non-adversarial, unilateral-executive paradigm.

V. Conclusion

Lethal, deliberate targeting is an important and powerful tool for the executive to use in the defense of the nation during times of armed conflict. As the federal government derives its war-making powers from the Constitution, these powers must also conform to the Constitution's restrictions. The Founders embedded the Fifth Amendment's Due Process Clause in those restrictions, intending to constrain possible abuse of the

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[295] *See, e.g.*, Dept. of Law, USMA, *Balancing Order and Justice: The Court-Martial Process* 8 (Apr. 2012), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/01-1_court_martial_process. authcheckdam.pdf.

[296] *Id.*

powers granted by the Constitution. The Fifth Amendment not only applies to deliberate targeting, it requires due process for alien combatants subject to lethal deliberate targeting during armed conflict.

The federal government may do only what the Constitution authorizes, and no more.[297] The Fifth Amendment mandates due process for all persons whom the government intends to deprive of life.[298] The Founders intended, and the Supreme Court has interpreted, that Fifth Amendment personhood includes non-citizens.[299] As the Constitution authorizes the federal government to act abroad, it also constrains the federal government when it does so. To separate the authority from its essential constraints is in vain and breaks the boundaries of rational thought.

Although the Fifth Amendment does contain a limited wartime exception to its grand jury requirement, there is no wartime exception to the Due Process Clause.[300] The lack of any such exception evidences the Founders' desire that no such exception exist. Indeed, the Supreme Court has not read any such exception into the language.

Perhaps no one has come as close to succinctly stating the Founders' political philosophy as the late Boston attorney and Democratic activist Moorfield Storey, when he "cautioned that 'power is always used to benefit him who wields it.'"[301] History has provided numerous exhibits of the veracity of this maxim, not the least of which was the Roman emperor Theodosius's massacre at Thessalonica.[302]

James Madison, Secretary of the Constitutional Convention and fourth President of the United States, wrote almost 1400 years after the massacre of Theodosius I, "[n]ot the less true is it, that the liberties of Rome proved the final victim to her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments."[303] Knowing full-well the danger of unchecked

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297 *See e.g.*, *McCulloch*, 17 U.S. (4 Wheat.) at 405.
298 U.S. CONST. amend. V cl 3.
299 *See supra* Section III C.
300 U.S. CONST. amend. V cl 3.
301 Damon Root, *The Party of Jefferson: What the Democrats can learn from a dead libertarian lawyer*, REASON (Dec. 2007), http://reason.com/archives/2007/11/27/the-party-of-jefferson.
302 *See* GIBBON, *supra* note 1.
303 James Madison, *The Federalist Papers Federalist No. 41* para. 3, http://thomas.loc.gov/home/histdox/fed_41.html (last visited May 7, 2015).

military power in the hands of the executive, the Founders decisively added the Bill of Rights to the Constitution to further clarify and restrict the authorities of government.[304]

The Department of Justice steadfastly maintains that the *Matthews* balancing test is appropriate to consider what process applies to deliberate targeting, and therefore no judicial inquiry is necessary.[305] However, the *Matthews* Court itself refers back to the *Goldberg* Court's mandate of judicial inquiry prior to a substantial deprivation.[306] Further, *Hamdi* strongly implies that even a *Matthews* analysis requires a neutral decision maker to conduct an evidentiary hearing.[307] The DoJ, therefore, has reached an erroneous conclusion that the executive may unilaterally determine how much process is due a person whom the government has targeted for a lethal strike.

Although some may argue that emergent crises must supersede seemingly antiquated notions of philosophical liberty, the Supreme Court sees danger in this view.[308] "Throughout history many transgressions by the military have been called 'slight' and have been justified as 'reasonable' in light of the 'uniqueness' of the times. We cannot close our eyes to the fact that today the peoples of many nations are ruled by the military."[309]

Finally, "The Founders envisioned the [A]rmy as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. Their fears were rooted in history. They knew that ancient republics had been overthrown by their military leaders."[310] Important as civilian leadership of the military is to that constitutional framework, no less important are the checks imposed on that civilian leadership by separation of powers. The Court has long been content to defer to Congress and the President in matters of defining the scope of their war powers.[311] However, if they cannot—or will not—confine themselves to the boundaries of the Constitution, the Court may have to do it for them.

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304 H.R.J. Res. 1, 1st Cong. (1789) (enacted).

305 *See* Baron Memorandum, *supra* note 240; DoJ White Paper, *supra* note 158; AG Letter, *supra* note 249.

306 *Mathews*, 424 U.S. at 340, 344–45.

307 *Hamdi*, 542 U.S. at 530, 533.

308 *See e.g.*, *Reid*, 354 U.S. at 40.

309 *Id.*

310 *Id.* at 23–24.

311 *See e.g.*, *Boumediene*, 553 U.S. at 797–98.

> Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.[312]

Relinquishing some oversight of war-making to the courts in the short term could prevent a much broader judicial curtailment of those powers in the long term. However, if Theodosius's example is any indication, no executive will likely make that trade voluntarily.

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312 *Id.*