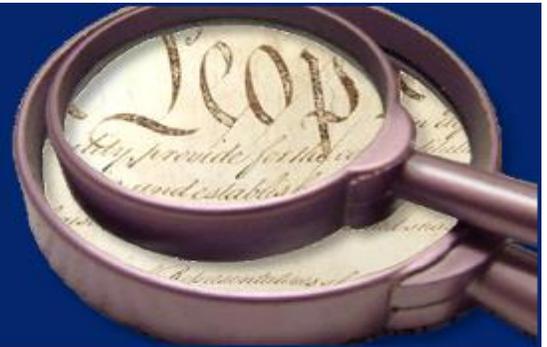




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Issue Brief

Enhancing Due Process in Targeted Killing

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Enhancing Due Process in Targeted Killing

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I. Introduction

The legality and wisdom of U.S. targeted killing¹ operations in areas outside of active hostilities has been the subject of vigorous debate for more than a decade.² While there is broad agreement that there are at least some circumstances in which targeted killing may be lawful – in an armed conflict, or in national self defense – there remains a world of dispute over *how* those operations can be conducted in a way that complies with domestic and international law. Among those requirements, at the least for U.S. citizens, the Fifth Amendment to the U.S. Constitution prohibits the government from depriving any “person” of “life, liberty, or property without due process of law.”³

Despite the relative clarity of the Fifth Amendment command, some argue that due process in any traditional sense cannot rationally apply in any national security-related use of force.⁴ It may be one thing to require giving notice and an opportunity to be heard before deprivations of life in peacetime, but giving an individual target advance notice that he is about to be attacked is anathema to effective warfare.⁵ Especially when the use of force is in response to an imminent threat – when time is of the essence – advance process would render ineffective even an otherwise lawful use of force. Because of such concerns, the United States (and every nation in the world) is party to the Geneva Conventions, treaties recognizing that different rules apply in war.⁶ Like the Due Process Clause, the Geneva regime – also known as the law of war or law of armed conflict (LOAC) – is concerned with legality and fairness, but it far more realistically accounts for such interests in these exceptional circumstances.

The due process inquiry may seem equally absurd to those who worry about the legitimacy of any lethal targeting. Much of the Supreme Court’s due process jurisprudence addresses the deprivation of property – involving a category of assets the loss of which may be far more readily compensated if the government’s seizure was in error. The Court’s due process cases involving the deprivation of liberty, likewise, rest at least implicitly on the possibility that

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¹ “Targeted Killing,” “targeting,” “drone operations” and “targeting operations” are terms that are used interchangeably in this Issue Brief and entail the use of lethal force by the U.S. government against targets in the interest of national security.

² See, e.g., Dana Priest, *CIA Killed U.S. Citizen in Yemen Missile Strike: Action's Legality, Effectiveness Questioned*, WASH. POST, Nov. 8, 2002, at A1; *New York Times Co. v. U.S. Dep't of Justice*, 915 F. Supp. 2d 508 (S.D.N.Y. 2013).

³ U.S. CONST. amend. V; see also *Boumediene v. Bush*, 553 U.S. 723, 743 (2008) (holding that the Constitution may apply extraterritorially even to non-citizens, and that its application depends on a set of factors).

⁴ See, e.g., Department of Justice White Paper, “Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” at 6, *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf [hereinafter DOJ Targeting White Paper]; see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting).

⁵ See, e.g., Wells Bennett, “Jeff Powell on Targeted Killing and Due Process,” LAWFARE BLOG (JUNE 21, 2013, 6:00 AM), <http://www.lawfareblog.com/2013/06/jeff-powell-on-targeted-killing-and-due-process/>.

⁶ See generally GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* (2010) (discussing Geneva regime).

any errors that occur may be remedied, substantially if not entirely, by a detainee's release.⁷ In some of those cases, the Court has recognized that an after-the-fact civil suit for damages may be all the process due when no pre-deprivation hearing could have made a difference, as in a death the state caused accidentally, or in exigent circumstances.⁸ But where, as in many targeting operations, the state deliberately plans in advance to deprive an individual of life, an act it undertakes elsewhere only in administering the death penalty, it regularly provides a set of procedures that dwarf those offered in any of the Court's standard due process cases.

Despite such important objections, it is worth taking seriously what procedural due process requires in targeted killing. Both the Supreme Court and the Executive Branch have now embraced due process to assess the legality of various U.S. uses of force against Al Qaeda and associates.⁹ As the Court has long recognized, U.S. citizens are protected by the Constitution wherever they are in the world.¹⁰ Even when they are deprived of their liberty in wartime, due process affords all "persons" a right to notice of the reasons for the deprivation, and an opportunity for their opposition to be heard once any exigency has passed.¹¹ Although the Supreme Court has never addressed whether the Constitution applies extraterritorially to non-citizens in the targeting context, as it does in other circumstances,¹² the U.S. decision to target U.S. citizen Anwar Al Awlaki in Yemen, and the suspected continued presence of other U.S. citizens in core Al Qaeda,¹³ make the issue indisputably salient.

Conversely, the argument that it is never possible to provide advance process in lethal targeting operations is false. The decision to target Al Awlaki, like many U.S. targeting operations, did not arise in exigent, or what may be called "dynamic," circumstances. Targets in the current environment are often identified, vetted, and reviewed over days or even months – more than enough time for some pre-targeting process to be followed.¹⁴ Notably, there may well be adequate time for deliberate process even when the legal justification for the U.S. use of force is the exercise of national self defense. Consider, for example, President Clinton's use of military force to target suspected Al Qaeda training camps in Afghanistan, and a pharmaceutical factory in Sudan, following the 1998 attacks on U.S. embassies in East Africa.

⁷ See, e.g., *Hamdi*, 542 U.S. at 538; *Kansas v. Hendricks*, 521 U.S. 346 (1997) (civil commitment of mentally ill sex offenders); *United States v. Salerno*, 481 U.S. 739 (1987) (pretrial detention of dangerous adults); *Schall v. Martin*, 467 U.S. 253 (1984) (pretrial detention of dangerous juveniles); *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment of mentally ill); *Humphrey v. Smith*, 336 U.S. 695 (1949) (court martial of American soldiers).

⁸ Cf. *County of Sacramento v. Lewis*, 523 U.S. 833, 840 & n.4 (1998) (expressing no view on whether denial of post-deprivation compensation for loss of life due to state negligence would violate procedural due process).

⁹ See *Hamdi*, 542 U.S. at 508; DOJ Targeting White Paper, *supra* note 4, at 5-9; see also President Barack Obama, Speech on Drone Policy at the National Defense University (May 23, 2013), available at <http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html?pagewanted=all> (“[I] do not believe it would be constitutional for the government to target and kill any U.S. citizen – with a drone, or a shotgun – without due process”) [hereinafter Obama NDU Speech].

¹⁰ *Reid v. Covert*, 354 U.S. 1, 6 (1957).

¹¹ *Hamdi*, 542 U.S. at 544; *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

¹² Cf. *Boumediene v. Bush*, 553 U.S. 723, 743 (2008).

¹³ See, e.g., Global al-Qaeda: Affiliates, Objectives, and Future Challenges: Hearing Before the H. Foreign Affairs Subcomm. on Terrorism, Nonproliferation, and Trade, 113th Cong. (2013) (statement of Seth G. Jones, Associate Director, Rand Corporation), available at <http://www.rand.org/pubs/testimonies/CT396-1.html>.

¹⁴ See *infra*, Part III.C.

Indeed, current military doctrine requires a relatively elaborate process in advance of all deliberate targeting operations – that is, operations with 24 hours or more lead time.¹⁵ That the military itself recognizes it has both the time and the interest in taking such steps already suggests that some advance process is possible. Moreover, military procedures provide an important starting point for assessing whether the process provided is constitutionally adequate. In holding that the United States was required to afford due process to a U.S. citizen seized on the Afghan battlefield, the Supreme Court recognized that due process requirements in wartime detention might be met by existing military procedures adopted for the purpose of implementing U.S. treaty obligations under the law of war.¹⁶ Before it is possible to dismiss the application of constitutional due process in targeting as either hopelessly impractical, or hopelessly inadequate, it is necessary to begin with a serious assessment of existing procedures.

Finally, even if one believes the Constitution does not directly apply, any government agency must pursue some kind of process before engaging in lethal targeting operations – from deciding who and what to target, to assessing whether the person or facility struck was in fact the intended subject. The Court’s framework for analyzing the adequacy of process afforded provides a useful, logical structure for any evaluation of U.S. drone operations: assessing whether targeting processes serve both the government’s interests and those of the individual, and whether alterations in existing procedures may help minimize error. Highlighting those interests and risks of error, due process analysis provides a method for understanding not only how to conduct targeting operations lawfully, but also how to make them more effective policy.

This Issue Brief examines the procedural requirements of the Due Process Clause when the United States uses lethal force in areas outside of active hostilities abroad. After a brief primer on the constitutional law of procedural due process, the Issue Brief explores how that law applies in deliberate targeting of planned targets. The category of deliberate targeting, explained below, is recognized in military targeting doctrine; in legal terms, it may arise either whether the U.S. use of force is in connection with an ongoing armed conflict,¹⁷ or in the exercise of national self defense.¹⁸ Applying the framework set forth by the Court in *Mathews v. Eldridge*,¹⁹ and adopted in *Hamdi v. Rumsfeld*,²⁰ the Issue Brief reviews military targeting doctrine, and considers whether due process might require additional or enhanced procedures. Among the Issue Brief’s conclusions: (1) it advances constitutional due process to provide clear and public notice of those particular nations or organizations with which the United States considers itself at war; (2) the inclusion of an opposition advocate – a military professional tasked with advancing arguments in opposition to any targeting decision – may reduce the risk of error in deliberate targeting settings; (3) the recently released “U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the U.S. and Areas of Active Hostilities,” announcing that targeters must possess a “near certainty that the terrorist target is present,” brings the burden of proof for deliberate targeting in these settings more in line with constitutional due process than

¹⁵ JOINT PUBLICATION 3-60: JOINT TARGETING, Jan. 31, 2013, at x, *accessed through* <http://blogs.cfr.org/zenko/2013/08/05/jp360-joint-targeting-and-us-targeted-killings/> (last visited Aug. 21, 2013) [hereinafter JP3-60].

¹⁶ *Hamdi*, 542 U.S. at 544 (opinion of O’Connor, J.).

¹⁷ *See, e.g.*, Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

¹⁸ *See, e.g.*, Prize Cases, 67 U.S. 635 (1863).

¹⁹ 424 U.S. 319, 333 (1976).

²⁰ 542 U.S. 507 (2004).

existing military doctrine; (4) where adequate pre-deprivation process is not possible (as in exigent circumstances), a post-deprivation hearing is required.

A final caveat. This Issue Brief is not intended to address the centrally important threshold issue of when the United States may lawfully engage in lethal targeting. There are serious questions about the nature of the present armed conflict against Al Qaeda and associated groups, as the United States defines it.²¹ There are likewise serious questions under U.S. and international law about how ‘imminent’ a threat must be before the Executive may use lethal force in national self defense,²² and about what role lethal targeting should play in U.S. counterterrorism strategy generally.²³ This Issue Brief does not address any of those issues. Rather, it assumes that targeted killing can be lawful under some circumstances. We have faced wars and actual and imminent attacks in the past; we will face them again. This Issue Brief is intended to help advance our thinking on what process should be followed in targeting decisions when we do.

II. A Primer on Procedural Due Process

When Americans think about what rights accompany “due process of law,” it is commonly the U.S. criminal trial process that comes to mind – with its rich array of rights to public trial by jury, assistance of counsel, to call and confront witnesses, and to be protected against self-incrimination, among others.²⁴ Yet while the Due Process Clause has functioned to enrich the already robust set of procedural rights to which criminal defendants are entitled under other constitutional provisions,²⁵ “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.”²⁶ Whether the deprivation is of the property interest at stake in the seizure of assets, or the loss of liberty from commitment of the mentally ill, the Constitution requires procedures to ensure fundamental fairness.²⁷

Yet while the Court has long recognized the guarantee of at least some process surrounding losses of life, liberty or property, exactly how much process is “due” has depended substantially on the circumstance. Critically, *judicial* process is always an option, but is “neither a

²¹ See, e.g., International Committee of the Red Cross, “International Law and the Challenges of Contemporary Armed Conflicts,” Oct. 2011, pp. 10-11, available at <http://www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm>.

²² Compare, e.g., THOMAS FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS (2009), with Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors*, 106 AM. J. INT’L L. 769 (2012) (describing contrasting theories of self defense).

²³ Compare, e.g., Daniel Byman, “Why Drones Work: The Case for Washington’s Weapon of Choice,” FOREIGN AFFAIRS, July/Aug. 2013, <http://www.foreignaffairs.com/articles/139453/daniel-byman/why-drones-work?page=show>, with Audrey Kurth Cronin, “Why Drones Fail,” FOREIGN AFFAIRS, July/Aug. 2013 (debating the policy wisdom of targeted strikes).

²⁴ See, e.g., U.S. CONST. amend. VI (affording defendants a “right to a speedy and public trial, by an impartial jury . . . , to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel”).

²⁵ See, e.g., *Ake v. Oklahoma*, 470 U.S. 68 (1985) (due process requires appointment of psychiatrist where defendant’s sanity at the time of the offense is significant factor at trial).

²⁶ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

²⁷ *Id.* As Justice Frankfurter put it: “[D]emocracy implies respect for the elementary rights of 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.”

required, nor even the most effective, method of decisionmaking in all circumstances.”²⁸ Recognizing the rapid growth of executive branch administrative agencies in adjudicating rights over the past century, the Court has instead established a set of minimum requirements to be followed by any government actor affecting a deprivation: the person facing the loss must have “notice of the case against him and opportunity to meet it,”²⁹ in “a meaningful time and in a meaningful manner.”³⁰ Beyond these two essential elements, all other features – including the timing and content of notice and the formality of the hearing – may be flexible, depending on “the competing interests involved.”³¹

The understanding that what process was due would depend on a balancing of interests under the circumstances crystallized in the 1976 case, *Mathews v. Eldridge*, in which the Court determined how much process was due before an individual could be deprived of property.³²

[D]ue 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.³³

Notably, the *Mathews* test assesses not only the absolute value of the interests at stake on either side – including the degree of the deprivation at issue – but also whether deprivation decisions could be made relatively more accurate if existing procedures were changed or enhanced.

A wide variety of procedures have been found to satisfy constitutional due process under this standard. In *Hamdi v. Rumsfeld*,³⁴ for instance, the Court applied *Mathews* to determine what process was due U.S. citizen Yaser Hamdi, detained while allegedly operating with the Taliban in Afghanistan. Recognizing that even Hamdi was entitled to “notice of the factual basis for his classification [as an ‘enemy combatant’], and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker,”³⁵ a plurality of the Court embraced the parties’ shared

²⁸ *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (citing *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940)).

²⁹ *McGrath*, 341 U.S. at 171-172 (Frankfurter, J., concurring).

³⁰ *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

³¹ *Goss v. Lopez*, 419 U.S. 565, 579-80 (1975) (temporary school suspension) (“There need be no delay between the time ‘notice’ is given and the time of the hearing.”).

³² *Mathews*, 424 U.S. at 334 (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”).

³³ *Id.* at 335; *see also id.* at 341.

³⁴ 542 U.S. 507 (2004).

³⁵ *Id.* at 533. Just as the Court has recognized the role of experts elsewhere in administrative law, *see, e.g.*, *Parham v. J.R.*, 442 U.S. 584, 607 (1979) (in commitment of mentally ill, “[d]ue process has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer”), an “appropriately authorized and properly constituted military tribunal” in Hamdi’s case could afford sufficient neutrality as a decision-maker. Where a decision turns in substantial part on a professional assessment, a member of the profession can suffice as a decision-maker, provided “he or she is free to evaluate independently” conditions based on established professional procedures and techniques. *Parham*, 442 U.S. at 607-08 (noting “that all sources of information that are traditionally relied on by physicians and behavioral specialists should be consulted”).

view that whatever process was due was required not amidst the exigencies of initial capture “on the battlefield,” but when “the determination is made to *continue* to hold those who have been seized.”³⁶ Most critical was the airing of opposition: “Any process in which the Executive’s factual assertions go wholly unchallenged or are simply presumed correct without any opportunity ... to demonstrate otherwise falls constitutionally short.”³⁷

III. Due Process in Lethal Targeting

This part considers how the *Mathews* test applies in lethal targeting, taking each *Mathews* factor in turn: (1) the individual interest at stake; (2) the government interest; and (3) the risk of error in current procedures, and the likelihood that additional procedures will reduce it.

A. Individual Interest

The individual interests at stake in lethal targeting are enormous. As the Department of Justice (DOJ) White Paper put it: “No private interest is more substantial” than life.³⁸ Despite this, *Mathews* doctrine would suggest that it is necessary to distinguish between two categories of people who might be killed in a targeted strike: individuals who are the intentional object of targeting, and those not the intentional objects of targeting. For individuals who are deliberate targets, there is a personal and acute interest in not being killed or injured. As noted, the only other setting in which the government may deprive individuals of their lives in a non-exigent setting follows criminal conviction and sentencing to death – a circumstance to which fully half of the Bill of Rights is devoted in establishing process constraints on the government’s power.³⁹

A second category of individuals are civilians who are killed while not the subject of attack – collateral damage in military doctrine. The United States has acknowledged at least three U.S. citizens who were not specifically targeted have been killed by U.S. drone operations.⁴⁰ While these individuals suffer precisely the same magnitude of deprivation as those intentionally targeted, the Court has at times held since *Mathews* that while injuries caused by willful government misconduct, or perhaps even “recklessness or gross negligence,” may constitute a “deprivation” within the meaning of the Due Process Clause, injuries resulting from mere negligence or a “lack of due care” on the state’s part are not “deprivations” in the same sense.⁴¹ As the Court has reasoned, because no form of pre-deprivation process could address the risk that a state agent would act negligently, some form of *post-deprivation* “process” in that context may be sufficient to satisfy constitutional requirements.⁴² Thus, one might argue, collateral victims of strikes who suffer injury as the result of simple negligence are entitled to no more as a matter of procedural due process than, for example, a post-deprivation civil action for damages.

³⁶ *Hamdi*, 542 U.S. at 534.

³⁷ *Id.* at 537.

³⁸ DOJ Targeting White Paper, *supra* note 4, at 2.

³⁹ See U.S. CONST. amends. I (public trial), IV, V, VI, VIII. Because many of those protections are not textually applicable in this setting, and because it is not the standard the Court has adopted – *Mathews* remains the focus here.

⁴⁰ Letter from Att’y Gen. Eric Holder to Sen. Patrick J. Leahy (May 22, 2013), *available at* <http://www.justice.gov/slideshow/AG-letter-5-22-13.pdf>.

⁴¹ See, e.g., *Daniels v. Williams*, 474 U.S. 327, 333-34 (1986) (“[L]ack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process....”).

⁴² *Parratt v. Taylor*, 451 U.S. 527 (1981).

This Issue Brief rejects the view that no “deprivation” is affected in due process terms in the context of collateral targeting deaths. As discussed below, there are important questions as to whether changes in existing targeting procedures can minimize risks of collateral losses. But the notion that certain objective losses of property or even life do not count as “deprivations” in a constitutional sense because the government did not fully intend to cause the loss has been, at best, a doctrinal fiction. From the individual victim’s point of view, the interest in life and the nature of the deprivation are indistinguishable from those of the deliberate target.

More to the point, because the law of war does not prohibit states from inflicting some collateral damage in war fighting, it cannot be assumed that collateral deaths are necessarily *unintentional*, in the sense that the no-deprivation cases contemplate. Our treaty obligations – as enforced through U.S. implementing regulations – require only that targeting not “be expected to cause incidental loss of civilian life, injury to civilians . . . excessive in relation to the concrete and direct military advantage anticipated.”⁴³ It may often be that while a commander ordering a targeted strike does not *wish* to kill civilians, he orders the strike in full knowledge that the deaths of civilians are a near certain result, concluding the strike is justified because those deaths are not “excessive” compared to the advantage gained. In other words, the United States might lawfully – and intentionally – decide to attack a site or group of individuals in an armed conflict, even though it can predict at least some civilians are likely to die.⁴⁴

That some civilian deaths may be in this sense lawful does not, however, obviate the application of due process. To the extent LOAC targeting results in “erroneous” civilian deaths, i.e. killing more civilians than the military reasonably expected it would intentionally kill, or killing civilians it erroneously believed were targetable combatants – it may be possible to enhance pre-deprivation procedures that help minimize the risk of such errors. None of this is to suggest that procedures to avoid error in target selection and in collateral damage assessments need be identical. On the contrary, military doctrine recognizes that there are distinct inquiries – and distinct procedures – involved in first selecting whom to target, and in then examining whether and how to minimize any “collateral” costs of that targeting decision.⁴⁵ But to the extent the Constitution permits any differences in the treatment of different kinds of individual losses, it is because they involve different kinds of error and potential procedural fixes, not because there is a qualitative difference in the kind of deprivation at stake.

B. Government Interest

The government likewise can claim interests of surpassing importance in targeting where it is lawfully engaged in an ongoing armed conflict, or where it seeks to defend the nation against

⁴³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Int’l Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, Art. 51 [hereinafter Additional Protocol I]; *see also* Chairman of the Joint Chiefs of Staff Instruction, CJCSI 3160.01, D-A-7, Feb. 13, 2009, *available at* http://www.aclu.org/files/dronefoia/dod/drone_dod_3160_01.pdf [hereinafter CJCSI 3160.01].

⁴⁴ *See* United States Naval War College, “Collateral Damage Estimate Briefing,” YouTube (Oct. 23, 2012), <http://www.youtube.com/watch?v=AvdXJV-N56A> (describing “conscious decision” as one of the causes of collateral damage, in which a commander conducts proportionality analysis required by law of war and concludes anticipated level of collateral injury is legally and politically tolerable) [hereinafter Naval War College Briefing].

⁴⁵ *See infra*, Part III.C.

an armed attack. In the DOJ White Paper’s appropriate characterization, “the government’s interest in waging war, protecting its citizens, and removing the threat posed by members of enemy forces is ... compelling.”⁴⁶ Yet as a matter of law and policy, the government’s interests are both broader and narrower than just these. As the Court has recognized repeatedly, government interests are multi-layered and complex, reflecting society’s interests at large. Thus, for example, while the government has a compelling interest in ensuring that those who commit crimes are punished, its interest in “prevailing at trial...is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases.”⁴⁷

Here too, the interests in “waging war” and “removing threats” are not unqualified. They are matched by aligned interests in fighting war effectively, in avoiding error, and in complying with the international legal obligations the government has recognized constrain its use of force – all interests reflected in many of the government’s own statements of policy and practice. Department of Defense (DOD) guidelines instruct that all members of DOD components must comply with the law of war in all operations.⁴⁸ Targeters and planners are required to “understand and be able to apply the basic principles of international law as they relate to targeting,”⁴⁹ and judge advocates must be “immediately available and should be consulted at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations... [to] prevent possible violations of international or domestic law.”⁵⁰ This interest in law compliance emerges not only to avoid legal liability, but also to secure support of foreign allies, on whose cooperation U.S. policy depends, and to avoid antagonizing foreign enemies. The U.S. Army Counterinsurgency Field Manual, for example, emphasizes that “it is vital for commanders to adopt appropriate and measured levels of force and apply that force precisely so that it accomplishes the mission without causing unnecessary loss of life or suffering,” lest force undermine critical local population support.⁵¹ In all events, military doctrine recognizes that devoting limited resources to the wrong targets is costly in absolute terms and in opportunities lost.⁵² In assessing any “fiscal and administrative burdens on government that the additional procedural requirement would entail,”⁵³ thorough analysis requires considering

⁴⁶ DOJ Targeting White Paper, *supra* note 4, at 6.

⁴⁷ *See, e.g., Ake v. Oklahoma*, 470 U.S. 68, 79 (1985) (“[A] State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained. We therefore conclude that the governmental interest in denying Ake the assistance of a psychiatrist is not substantial, in light of the compelling interest of both the State and the individual in accurate dispositions.”); *see also, e.g., Morrissey v. Brewer*, 408 U.S. 471, 483–84 (1972) (public interest includes not revoking parole “because of erroneous information or ... an erroneous evaluation of the need to revoke parole”).

⁴⁸ *See, e.g., Department of Defense Directive No. 2311.01E*, May 9, 2006, *available at* <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf> [hereinafter DODD 2311.01E].

⁴⁹ *See, e.g., JP 3-60*, *supra* note 15, at App. A-1.

⁵⁰ *Id.* at A-7.

⁵¹ DEPARTMENT OF THE ARMY, FIELD MANUAL 3-24, at 1-142 (Dec. 2006); *see also id.* at 1-150 (“The more force applied, the greater the chance of collateral damage ... Using substantial force also increases the opportunity for insurgent propaganda to portray lethal military activities as brutal.”); *id.* at 1-141 (“An operation that kills five insurgents is counterproductive if collateral damage leads to the recruitment of fifty more insurgents.”).

⁵² *See, e.g., JP 3-60*, *supra* note 15, at II-13 (collateral damage estimation goal is to “maximize the employment efficiency of forces through application of enough force to create the desired effects while minimizing collateral damage and waste of resources”). For more on the costs of drones and support operations, *see* JOSHUA FOUST & ASHLEY S. BOYLE, AMERICAN SECURITY PROJECT, THE STRATEGIC CONTEXT OF LETHAL DRONES (2012).

⁵³ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

whether the cost of any additional procedures might offset cost savings achieved in avoiding erroneous strikes.

C. Risks of Error and Value of Procedural Change

The third *Mathews* factor – requiring consideration of “the risk of an erroneous deprivation through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards” – is in many respects the most complex to evaluate.⁵⁴ What is the risk in targeting operations that an individual may be deprived of life “erroneously”? One challenge is purely informational. The military has long struggled to gather meaningful data on whether and why a targeting error has occurred. While a bomb damage assessment is the final, required step in all military targeting operations,⁵⁵ and the United States has also typically conducted strategic bombing surveys in past conflicts to assess the impact of aerial bombing campaigns, data supporting those efforts are often substantially incomplete.⁵⁶ The total destruction of a building, for instance, may be observable at a distance, but smaller targets, or different kinds of damage, may be identified after the fact only through the use of more proximate collection methods that may not be available. While technological advancements, particularly those associated with the ability of unmanned aircraft to hover over targets for extended periods, may address some of these problems, official damage assessments in the current conflict remain classified. The unofficial counts of civilian deaths in drone attacks that do exist suffer from some of the same problems of incomplete information, or information of uncertain reliability.⁵⁷

The public focus on civilian deaths associated with U.S. drone operations also obscures a set of conceptual issues in assessing risks and identifying potentially beneficial procedural correctives. Statistics estimating the raw number or rates of civilian casualties obscure the many different kinds of decision-making errors that may lead to civilian injury. One set of potential errors attends the decision about which individuals should be the targets of lethal force in the first instance. For example, if a man identified as John Smith is “erroneously” killed in a drone strike, his death may have been “erroneous” because the government was wrong (as a matter of law or fact) in deciding that John Smith was an appropriate target of attack. Alternatively, the man’s death may have been “erroneous” because although the government was right that John Smith was an appropriate target, the government realizes after the strike that the person the drone ultimately hit was not, in fact, John Smith. Either of these types of errors might be called “positive identification” errors, or PID errors. Unclassified reports by military targeting experts suggest these kinds of errors account for the substantial majority of “erroneous” strikes.⁵⁸

⁵⁴ *Id.*

⁵⁵ JP 3-60, *supra* note 15, at D-5.

⁵⁶ *See, e.g.,* THOMAS KEANEY & ELIOT COHEN, U.S. DEPT. OF THE AIR FORCE, GULF WAR AIR POWER SURVEY SUMMARY REPORT 138 (1993) (“Few assertions about the Gulf War could command as much agreement as the inadequacy of bomb damage assessment.”).

⁵⁷ *See* STANFORD LAW SCHOOL INTERNATIONAL HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC, NYU SCHOOL OF LAW GLOBAL JUSTICE CLINIC, LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM U.S. DRONE PRACTICES IN PAKISTAN 32-53(2012) (critiquing methodologies of existing estimates).

⁵⁸ *See* Naval War College Briefing, *supra* note 44 (describing targets identified as lawful military targets “in error”); *see also* CJCSI 3160.01, *supra* note 43, at D-A-7 (“Recent operational feedback indicate that most collateral damage incidents result from target misidentification.”); Gregory S. McNeal, *Targeted Killing and Accountability*, 101 GEORGETOWN L. J. (forthcoming 2013) (“When collateral damage did occur [in Iraq and Afghanistan], 70% of the time it was attributable to failed (e.g. mistaken) identification. The remaining 22% were attributable to weapons

Whether it is possible to minimize such PID errors should be a significant focus of due process analysis. It is precisely this kind of objective risk of error that due process is designed to remedy. It was the kind of risk the Supreme Court identified as of concern in Hamdi's case - the possibility that he was not an "enemy combatant" as a matter of law or fact, as the government alleged but was, for example, a humanitarian aid worker mistakenly detained.⁵⁹

PID errors are not, however, the only reason an innocent person may be killed by a drone strike. Another set of errors are what might be called technical in nature: a malfunction of the targeting weapon, an error involving target mapping or guidance, a last-second decision by a victim to enter the target zone without the knowledge of targeters or after the weapon has been fired, or errors involving standing U.S. estimates of objects potentially subject to collateral damage (the composition, purpose, or size of buildings in an area, the population density of a given neighborhood). Deaths that result from such 'technical' errors are obviously no less tragic, and it may be that more can be prevented by continued improvements in weapons technology, mapping, social and cultural intelligence, and more. But military targeting experts also suggest technical errors account for a small proportion of collateral deaths.⁶⁰ More important here, it seems unlikely that any decision-making process *at the targeting stage* will help address them.

Finally, as noted above, it is also possible that an innocent victim's death was the product of "conscious decision."⁶¹ That is, a calculation by the government that even though it could predict in advance that the strike would likely result in, for example, a child's death, the attack that killed her was, as the law of war provides, not "excessive in relation to the expected military advantage gained."⁶² While it is surely possible that some form of proportionality "error" may occur, it is a mistake to view all collateral deaths that are the result of such a proportionality calculation as "erroneous" in the *Mathews* sense. Judgments about the relative value of the "military advantage gained" through the destruction of a target are both substantive in nature, and subjectively dependent on the defined policy goal to be achieved. These policy goals should be publicly known and debated. But they are in this respect distinct from the objective type of error that procedural corrections may be able to remedy.

As the foregoing should suggest, the answer to the question – which, if any, substitute procedures might help avoid erroneous targeting – depends centrally on which kind of error, if any, produced the result. While technical errors and proportionality errors occur, they are both

malfunction and a mere 8% were attributable to proportionality balancing—e.g. a decision that anticipated military advantage outweighed collateral damage.”) (based on a small set of interviews conducted).

⁵⁹ Hamdi v. Rumsfeld, 542 U.S. 507, 530 (2004) (opinion of O'Connor, J.) (“Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property”) (internal quotations omitted); *see also, e.g.*, Parham v. J.R., 442 U.S. 584 (1979).

⁶⁰ *See* Naval War College Briefing, *supra* note 44.

⁶¹ *See id.*

⁶² CJCSI 3160.01, *supra* note 43, at Enclosure D (implementing Additional Protocol I, art. 51(5) (b) (indiscriminate attacks include an attack “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”)); *see also* Additional Protocol I, art. 52(2) (“Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”).

less frequent and less susceptible to redress through targeting stage procedures. The analysis that follows thus focuses on how process might reduce the risk of PID error, described above. As *Mathews* requires, the analysis begins with a description of existing procedures. It then considers how additional procedures might impact the risk of error and the interests at stake.

1. Existing Process for Deliberate Targets

- a. Process Sources and Methods

The description of the targeting process here is based on the doctrine set forth in DOD's *Joint Publication 3-60: Joint Targeting* (JP 3-60). Prepared under the auspices of the Chairman of the Joint Chiefs of Staff (CJCS), JP 3-60 is intended to provide detailed guidance on how to conduct the "planning, coordination, and execution of joint targeting" operations by the U.S. military. Together with instructions promulgated by the CJCS,⁶³ the manual sheds light on the stages of the targeting process from target selection to post-strike investigation. It is important to note, however, that, JP 3-60 is at best an approximate description of current targeting procedures. In addition to common differences between what rules say on paper and how they function in practice, it is unclear how these rules interact with announced White House guidelines regarding, for example, the degree of certainty required for assessing a target is present.⁶⁴ Even within the military, many CJCS instructions remain publicly unavailable. JP 3-60 is also not intended to, and does not, answer critical questions such as who may be targeted under the law of war.⁶⁵

JP 3-60 also distinguishes between deliberate targeting operations – involving planned targets and a non-exigent time frame (a day or more) – and dynamic operations – typically involving operations to be carried out within 24 hours, including against unanticipated targets of opportunity. Many of the highest profile U.S. targeting operations in recent years have been deliberate in nature. U.S. citizen Anwar Al Awlaki, for instance, was apparently placed on targeting lists a year or more before he was killed by a U.S. drone in Yemen.⁶⁶ Indeed, assembling and vetting lists of potential targets is hardly a new phenomenon; it has been a central feature of targeting doctrine in, at a minimum, an armed conflict setting. At the same time, the steps in the deliberate targeting process are also generally followed in dynamic targeting. Although processes may be substantially "compressed" in dynamic targeting,⁶⁷ there is always some form of positive identification process. LOAC requires under any circumstances that states distinguish between civilians and combatants, and target only combatants; indiscriminate

⁶³ For a listing of current CJCS directives, see http://www.dtic.mil/cjcs_directives/support/cjcs/cjcsi_comp.pdf.

⁶⁴ Press Release, The White House, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism> (requiring "near certainty that the terrorist target is present" before conducting lethal targeting) [hereinafter White House Fact Sheet].

⁶⁵ DOJ Targeting White Paper, *supra* note 4, at 16 (leaving undefined what counts as "direct participation in hostilities" rendering an individual targetable within the law of war).

⁶⁶ See, e.g., *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010) (The existence of such "lists" has been a central feature of public reporting on targeting operations based on anonymous official sources); See, e.g., DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* (2012).

⁶⁷ See, e.g., JP 3-60, *supra* note 15, at J-3 ("In a dynamic targeting environment, well-organized, and inclusive target vetting sessions are critically important due to compressed timelines").

targeting of civilians is a war crime.⁶⁸ While some procedural changes will prove infeasible if applied to more exigent circumstances, not all such adaptations will be.

As *Hamdi* suggests, military regulations implementing international law provide an important starting point for due process analysis.⁶⁹ If the military has determined it is feasible to adhere to *at least* this level of pre-deprivation process, then this process may provide a useful constitutional minimum to which any U.S. agency targeting authority must adhere. Examining the deliberate targeting process also demonstrates the substantial procedural architecture that already exists in U.S. operations, an architecture that performs many functions familiar to administrative procedure: information gathering, analysis, briefing, decision-making. It thus corrects what appears to be a common misapprehension about the possibility of any pre-deprivation process, and about the role the law already plays in day-to-day targeting decisions.

b. Current Procedures

The initial steps of the target development process below the policy level are opaque in manual descriptions, in part because suggestions may come from a wide range of government components.⁷⁰ Once a target is nominated by a combatant command, it becomes easier to describe a standardized process of vetting and validation.⁷¹ *Vetting* is conducted by an interagency group of military and intelligence officials,⁷² and assesses the accuracy of the intelligence supporting the placement of the target on a candidate list.⁷³ Drawing on target-related intelligence, operational, planning, and legal information collected and stored in an electronic target folder (ETF),⁷⁴ the interagency group verifies the candidate target's identification, his location, function, description, and significance.⁷⁵ The interagency vetting participants then vote on whether to move forward with a target, with votes recorded in the ETF.

The list produced by the interagency vetting group is then forwarded to a Joint Targeting Coordination Board (JTCCB) for target validation. *Validation* assesses whether the target meets command objectives, and whether the target is lawful under the law of war and existing rules of engagement. The JTCCB is typically chaired by a military commander, and includes military staff, other agencies and multinational partners that may be involved, subject matter experts in lethal

⁶⁸ See Additional Protocol I, *supra* note 43; JP 3-60, *supra* note 15, at A2.

⁶⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (opinion of O'Connor, J.) (“[M]ilitary regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention.”) (citing Headquarters Depts. of Army, Navy, Air Force, and Marine Corps, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, Army Regulation 190–8, ch. 1, § 1–6 (1997)).

⁷⁰ JP 3-60, *supra* note 15, at II-5 – II-10; *id.* at II-12 (“[It] is imperative that procedures be in place for additions or deletions to [target] lists and that those procedures are responsive and verifiable,” but not specifying procedures).

⁷¹ *Id.* at II-4.

⁷² Defense Department General Counsel, *Joint Targeting Cycle and Collateral Damage Estimation Methodology* (CDM), Nov. 10, 2009 (listing participants as including the initial combatant command nominator, as well as Armed Services Joint Staff Intelligence, Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, and National Geospatial-Intelligence Agency), available at http://www.aclu.org/files/dronefoia/dod/drone_dod_ACLU_DRONES_JOINT_STAFF_SLIDES_1-47.pdf [hereinafter DOD Joint Staff Slides].

⁷³ JP 3-60, *supra* note 15, at GL-15.

⁷⁴ *Id.* at II-11.

⁷⁵ DOD Joint Staff Slides, *supra* note 72.

and non-lethal targeting methods, and judge advocates – legal officers tasked with ensuring compliance with U.S. and international law and rules of engagement.

At both the vetting and validation stages, CJCS instructions require “all commanders, observers, air battle managers, weapons directors, attack controllers, weapons systems operators, intelligence analysts, and targeting personnel” to establish “positive identification” (PID) of each target.⁷⁶ Those responsible for PID have a duty to establish with “reasonable certainty that a functionally and geospatially defined object of attack is a legitimate military target in accordance with the Law of War and applicable Rules of Engagement.”⁷⁷ All core participants in the process – at the interagency level, at the JTCB, and through the chain of command – thus have independent obligations to conclude with reasonable certainty that the target is an appropriate one as a matter of fact and law. (Recently released White House guidelines setting forth procedures for counterterrorism operations outside areas of active hostilities suggest a higher degree of certainty required.⁷⁸ Those guidelines are discussed below.)

Also beginning with vetting and validation, CJCS instructions require the same actors to “identify potential collateral concerns” in targeting, applying a method known as collateral damage estimation (CDE). CDE is to ensure “application of enough force to create the desired effects while minimizing collateral damage and waste of resources.”⁷⁹ Personnel trained in CDE methodology⁸⁰ estimate any “unintended or incidental damage” likely to be caused “to persons or objects not the intended target and ... not lawful targets.”⁸¹ Recognizing the difference between those who may be properly targeted and not – a core principle of the law of war – is thus a central part of the function of CDE analysts.⁸²

From these findings, CDE analysts produce a numerical estimate of collateral casualties. This number is then used to conduct the proportionality determination the law of war requires – that is, whether the collateral effects of the proposed attack are “excessive in relation to the expected military advantage gained.”⁸³ The ‘expected military advantage gained’ by the destruction of the target is also expressed in numerical terms, in the form of a “non-combatant

⁷⁶ CJCSI 3160.01, *supra* note 43, at A6; see also JP 3-60, *supra* note 15, at II-21 (describing technical methods for establishing PID).

⁷⁷ CJCSI 3160.01, *supra* note 43, at A6 (emphasis added).

⁷⁸ White House Fact Sheet, *supra* note 64.

⁷⁹ JP 3-60, *supra* note 15, at F-1.

⁸⁰ *Id.* at II-14.

⁸¹ DOD Joint Staff Slides, *supra* note 72.

⁸² Additional Protocol I, *supra* note 43. Military staff also examine whether collateral damage may be mitigated by a different method of engagement (including non-lethal force); and, relying in part on pre-existing classified population density tables, showing the average population density by day and night depending on the type of structure involved (residential structures, rail stations, manufacturing districts, etc.), see Naval War College Briefing, *supra* note 44, whether the composition, size or purpose of structures within the collateral effects radius, or the time of the strike, might limit anticipated collateral losses. *Id.* To be qualified as a CDE analyst, staff must complete a 40-hour course, including training in the applicable law of war; they must also master mission-specific rules of engagement and policies. CJCSI 3160.01, *supra* note 43, at D-E-1.

⁸³ DOD Joint Staff Slides, *supra* note 72; CJCSI 3160.01, *supra* note 43 (implementing Additional Protocol I, art. 51).

value” (NCV) – a subjective valuation selected by a commander or more senior policy official.⁸⁴ The proportionality calculation may thus be done quickly. If the NCV is greater than the CDE, then the target may be struck consistent with the law of war.

On completion of its validation process, the JTCB places the resulting names on a new targeting list. The candidate list is sent to the military component commander to approve or reject targets, and identify the method to be used for engagement (lethal or non-lethal). The commander bases his decision on “a comprehensive briefing” by a force planning team, which puts forward a recommended plan and explains the rationale behind the decisions, including collateral damage estimates. The component commander may then modify the plan, or may ask his superior for additional guidance or to modify the objective. Again, the commander is bound by the CJCS requirement that there be “reasonable certainty” both that the defined target is legitimate under the law of war and rules of engagement, and that there has been due diligence in the estimate of collateral damage. (Again, for operations outside areas of active hostilities, the White House appears to have adopted an additional standard in this regard, namely, that there be “*near-certainty* that no civilians will be killed or injured — the highest standard we can set.”⁸⁵)

If the component commander approves a plan, operations and intelligence staffs brief the plan to the Joint Forces Commander, likewise bound by the “reasonable certainty” requirement. In addition to reviewing PID and CDE findings provided by the briefers, the Joint Forces Commander is also charged with identifying and classifying targets as “sensitive.”⁸⁶ Sensitive targets are those estimated to have effects beyond those permitted under existing rules of engagement – for example, when the strike may produce a special environmental hazard (like a chemical weapons plume); when the estimated collateral damage exceeds a set threshold; or when the targeting may produce “adverse political ramifications” or “public sentiment.”⁸⁷ Finding that a target is “sensitive” in any of these respects triggers an additional process in which final review and approval must come from the President or Secretary of Defense.⁸⁸

With the final approval of the Joint Forces Commander or more senior authority if required, staff begins the planning and execution of the operation.⁸⁹ Among the final stages in execution is another PID check. Here called combat identification (CID), it is “the process of attaining an accurate characterization of detected objects in the operational environment to support an engagement decision.”⁹⁰ Operations personnel also carry out target validation again as a final step before engagement. Validation here includes confirmation again that the target meets command objectives, a final CDE analysis based on current information, and an assessment that the strike complies with the law of war and rules of engagement.⁹¹

⁸⁴ Strikes involving “sensitive” targets, such as those with a higher likelihood of civilian injury, or serious political consequences, must be approved by the President or the Secretary of Defense. DOD Joint Staff Slides, *supra* note 72 (citing classified instruction CJCSI 3122.06).

⁸⁵ Obama NDU Speech, *supra* note 9.

⁸⁶ CJCSI 3160.01, *supra* note 43, at D-4.

⁸⁷ *Id.* at GL-7.

⁸⁸ *Id.* (citing classified instruction CJCS 3122.06).

⁸⁹ JP 3-60, *supra* note 15, at II-19.

⁹⁰ *Id.* at II-21.

⁹¹ *Id.* at II-29.

2. Alternative Procedures

In determining whether the procedures just described satisfy constitutional due process, *Mathews* directs that we evaluate “the fairness and reliability of the existing pre-termination procedures, and the probable value, if any, of additional procedural safeguards.” There is much to commend in the JP 3-60 doctrine, including: the development of a record in the ETF supporting a targeting decision; the integration of legal personnel in multiple stages of review; and the obligation on all participants to establish a degree of certainty surrounding the facts and law supporting a decision to pursue a lethal strike. But by any *Mathews* measure of due process, JP 3-60 procedures fall short of the fundamental minimum: there is no notice to deliberate targets and no opportunity, pre or post-deprivation, for a potential target to be heard.⁹² This section considers whether there is any meaningful way to remedy these gaps with additional safeguards.

a. Notice

As the Court long ago recognized, the right to be heard “has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.”⁹³ Yet as with other aspects of procedural due process, the timing and content of notice has depended on how best to accommodate “the competing interests involved.”⁹⁴ Notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”⁹⁵ The Court has thus upheld, for example, constructive notice provisions, by which nonresidents of a jurisdiction, or those whose addresses were unknown, were given notice by publication.⁹⁶ Courts have likewise approved terrorist asset freezing laws that provide only post-deprivation notice to those whose assets are subject to forfeiture. As several courts have recognized, foreign terrorist organizations are not entitled to pre-deprivation process that would effectively afford them a chance to “spirit [otherwise seizable] assets out of the United States.”⁹⁷

The argument against pre-deprivation notice in an exigent setting is compelling. But it is far from clear that the same reasoning applies in the context of deliberate targeting. First, deprivation of assets and deprivation of life are categorically different losses. As the Seventh Circuit emphasized in the asset seizure context, if the seizure later proved unjustified under the law, wrongfully designated organizations were entitled to pursue a statutory remedy for just

⁹² *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

⁹³ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

⁹⁴ *Goss v. Lopez*, 419 U.S. 565, 579-80 (1975) (temporary school suspension) (“There need be no delay between the time ‘notice’ is given and the time of the hearing.”).

⁹⁵ *Dusenbery v. United States*, 534 U.S. 161, 168 (2002).

⁹⁶ *Mullane*, 339 U.S. at 320.

⁹⁷ *Global Relief Found. v. O’Neill*, 315 F.3d 748 (7th Cir. 2002) (“Nor does the Constitution entitle GRF to notice and a pre-seizure hearing, an opportunity that would allow any enemy to spirit assets out of the U.S.”). As the Seventh Circuit put it in that context, “postponement is acceptable in emergencies.” *O’Neill*, 315 F.3d at 754; *cf. Nat’l Council of Resistance of Iran v. U.S. Dep’t of State*, 251 F.3d 192 (D.C. Cir. 2001) (“The Secretary must afford to the entities under consideration notice that the designation [of foreign terrorist organization] is impending. Upon an adequate showing to the court, the Secretary may provide this notice after the designation where earlier notification would impinge upon [U.S.] security and other foreign policy goals.”).

compensation.⁹⁸ Put differently, post-deprivation process could afford targets a “meaningful” opportunity to contest the legality of the action, and remedy any wrongful loss.⁹⁹ As noted above, post-deprivation remedies are far less “meaningful” when the life is already lost.

Second, while there are circumstances in which a post-deprivation remedy may be the only possible mechanism for providing process to wrongful victims of lethal force, as noted below, not all forms of pre-deprivation notice run counter to government interests. There can be little doubt that Osama bin Laden, Anwar al Awlaki, and other key terrorist suspects knew well in advance of their deaths that the United States sought to capture or kill them. In bin Laden’s case, two U.S. Presidents, the Congress, and the courts had publicly named bin Laden and Al Qaeda’s leadership as part of an organization with which the United States was at war.¹⁰⁰ In some contrast, Awlaki appears to have become aware of his inclusion on a U.S. list of terrorist suspects to kill or capture through repeated, widely quoted government statements.¹⁰¹ Targets like bin Laden, Awlaki and others had *constructive* notice that they were sought by the United States. Whatever one’s view of the underlying legality of these particular actions, the U.S. government evidently determined that such notice *served* U.S. interests in those cases.

In this regard, it is possible to conceive of forms of notice in deliberate targeting that would enhance the fairness of pre-deprivation process without necessarily compromising government interests. For instance, if the U.S. justification for the lawful use of force is the existence of an armed conflict, it advances constitutional due process interests to provide clear and public notice of those particular nations or organizations with which the United States considers itself at war. Conversely, publication of only more generalized notice – for example, that the United States is engaged in an armed conflict against forces “associated with” named enemies – raises more substantial due process concerns.¹⁰² For the same reasons due process prohibits vagueness in other areas of law – that it is unfair to expect individuals to conform their conduct to the law or avoid its consequences if they do not know what the law is – it would be deeply problematic to deprive a U.S. citizen of life or liberty because he was, for example, a member of an organization against which the United States was only secretly at war.¹⁰³

⁹⁸ *O’Neill*, 315 F.3d at 754 (“Opportunity to obtain recompense under [existing federal statute] if the blocking turns out to be invalid, provides the private party with the very remedy that the Constitution names: just compensation.”).

⁹⁹ See *Parham v. J.R.*, 442 U.S. 584 (1979) (determination by neutral physician whether statutory admission standard is met required before confinement of child in mental hospital).

¹⁰⁰ See, e.g., President George W. Bush, Address to Joint Session of Congress (Sept. 21, 2001) (noting that “[o]ur war on terror begins with al Qaeda,” and demanding that Taliban government “[d]eliver to United States authorities all of the leaders of Al Qaeda who hide in your land”); President Barack Obama, Remarks on National Security (May 21, 2009) (“[W]e are indeed at war with al Qaeda and its affiliates.”); *Al-Bihani v. Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010) (citing AUMF), *reh’g denied en banc*, 619 F.3d 1 (2010).

¹⁰¹ See, e.g., *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010); Keith Johnson, *U.S. Seeks Cleric Backing Jihad*, WALL ST. J. (March 26, 2010), <http://online.wsj.com/article/SB10001424052748704094104575144122756537604.html> (quoting senior U.S. intelligence official as describing Awlaki as “considered al Qaeda,” and quoting CIA Director Leon Panetta that Awlaki is “someone that we’re looking for”).

¹⁰² See, e.g., Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, In re Guantanamo Bay Detainee Litigation, Misc. No. 08-442 (TFH) (D.D.C. Mar 13, 2009) (arguing that “the AUMF is not limited to persons captured on the battlefields of Afghanistan” nor to those “directly participating in hostilities,” but that “[u]nder a functional analysis, individuals who provide substantial support to al-Qaida forces in other parts of the world may properly be deemed part of al-Qaida itself”).

¹⁰³ Cf. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

If the U.S. justification for the use of force is the exercise of self defense, particularly in response to an armed attack,¹⁰⁴ constructive notice of this type may be equally valuable, so long as it does not “impinge upon the security” of the United States.¹⁰⁵ While courts have rightly recognized that there is no requirement of pre-deprivation notice when it would enable “asset flight” or would otherwise compromise government response in exigent circumstances,¹⁰⁶ they have also recognized that such circumstances, even in the context of national security, do not always exist. Thus, in rejecting the government’s argument that groups were not entitled to prior notice that they were being considered for designation as a “foreign terrorist organization” under the Antiterrorism and Effective Death Penalty Act, the D.C. Circuit emphasized that there had been no showing in that case that a minimal form pre-designation notice would interfere with the government’s legitimate foreign policy goals.¹⁰⁷ Such circumstances are equally imaginable in the U.S. government’s targeting operations. Indeed, as the government made clear in litigating about Awlaki’s then-prospective targeting, if Awlaki chose to appear peacefully to challenge the government’s reported position that he had orchestrated the attack on a Detroit-bound civilian airliner, he would be “under no danger of the U.S. government using lethal force against him.”¹⁰⁸

As such illustrations highlight, constructive notice may have the effect of reducing the risk of error in several respects. In self defense settings, such notice opens the possibility that nations, organizations or individuals within them identified as responsible for an attack against the United States might peacefully challenge the accuracy of such a finding. While it seems unlikely individuals actually intent on attacking the United States would avail themselves of such an opportunity, the prospect remains that those who have been wrongfully identified – those for whom targeting would be an error – would take advantage of any opportunity to protest.

In an armed conflict setting, broad public dissemination of the identity of the organizations subject to targeting can bring important clarity not only to the public at large (including those who may wish to take steps to protect themselves from collateral injury), but also to the large and diverse array of U.S. government, contract, and often allied multinational personnel engaged in targeting operations, all of whom share an obligation to verify the factual and legal propriety of striking a given target. As it stands, the process manuals and other guidance discussed here are silent on questions of who may be targeted, and the DOD manual setting forth U.S. policy on who is targetable in armed conflict remains incomplete. Different targeting lists are maintained by different U.S. agencies, even different branches of the armed services.¹⁰⁹ Indeed, in recent testimony before the Senate Armed Services Committee, the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict was uncertain whether there

¹⁰⁴ U.N. Charter art. 51.

¹⁰⁵ *Nat’l Council of Resistance of Iran v. U.S. Dep’t of State*, 251 F.3d 192 (D.C. Cir. 2001).

¹⁰⁶ *Al Haramain Islamic Found. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 985 (9th Cir. 2012).

¹⁰⁷ *Nat’l Council of Resistance of Iran*, 251 F. 3d at 208 (suggesting the State Department provide notice that: “We are considering designating you as a foreign terrorist organization, and in addition to classified information, we will be using the following summarized administrative record. You have the right to come forward with any other evidence you may have that you are not a foreign terrorist organization.”).

¹⁰⁸ *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1, 17 (D.D.C. 2010) (“Defendants have made clear – and indeed, both international and domestic law would require – that if Anwar Al-Aulaqi were to present himself in that manner, the United States would be ‘prohibit[ed] [from] using lethal force or other violence against him in such circumstances.’”) (internal citations omitted).

¹⁰⁹ Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES, May 29, 2012, at A1.

existed a formal list of organizations and entities the administration has determined to be co-belligerents of al Qaeda (and thus subject to targeting).¹¹⁰ While it is unclear when and why PID errors persist, it seems plausible that the more organizations and personnel are involved, and the less clarity there is on the scope of targeting operations, the more likely it is for first order PID errors to occur. That is, the more likely it is that targeters nominate or strike individuals who are not legitimate military targets in fact or law.¹¹¹

b. Opportunities to Be Heard

The Constitution requires some hearing before the government may deprive a person of liberty or property, so that the party opposing action may challenge the government's findings.¹¹² But the kind of hearing due process requires varies greatly depending on the circumstances. The role of neutral arbiter, for instance, need not in all instances be filled by a judicial officer, but may at times be performed by a professional expert, trained in the applicable technical and legal standards, so long as he or she is authorized to independently evaluate information, rely on established professional procedures, and decide freely and without fear of sanction for or against the course of action the government recommends.¹¹³ A formal evidentiary hearing is likewise not always required, particularly where there is meaningful post-deprivation relief available.¹¹⁴ What is indispensable to due process, however, is that there is some "opportunity to present reasons... why proposed action should *not* be taken."¹¹⁵ A pre-deprivation hearing is an essential "check against mistaken decisions."¹¹⁶

For individuals who are the object of deliberate targeting or those who are among collateral deaths resulting from PID errors, the weight of the individual interest at stake, the absence of any government interest in mistaken targeting, the risk of PID error, and the relative weakness of damages as compensation for an erroneous loss of life – all these suggest that a post-deprivation hearing alone is likely inadequate to satisfy due process. It is indeed difficult to conceive a theory of due process that would require a pre-deprivation hearing before depriving an individual of government benefits, for example, but not require any such hearing before depriving that individual of his life.¹¹⁷

What seems most acutely missing from the existing pre-deprivation process is a chance for the threatened individual to present the reasons why the proposed action should not be taken.

¹¹⁰ *To Receive Testimony on the Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force: Hearing Before The S. Comm. on Armed Services*, 113th Cong. (2013) available at <http://www.armed-services.senate.gov/hearings/event.cfm?eventid=df260f50b247719c4fa9f1e3daf7232>.

¹¹¹ *Cf., e.g.,* MAJ. GEN. GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 112–13, 118–19 (2004) ("DoD's development of multiple policies on interrogation operations for use in different theaters or operations confused Army and civilian Interrogators..."); LT. GEN. ANTHONY R. JONES, ARTICLE 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND THE 205TH MILITARY INTELLIGENCE BRIGADE 5 (2004) ("Confusion about what interrogation techniques were authorized resulted from the proliferation of guidance and information...").

¹¹² *See supra* note 35.

¹¹³ *Parham v. J.R.*, 442 U.S. 584 (1979).

¹¹⁴ *See supra* note 35.

¹¹⁵ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (emphasis added); *id.* at 533 ("pretermination hearing need not definitively resolve the propriety" of action, but is "an initial check against mistaken decisions").

¹¹⁶ *Id.* at 545 (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

¹¹⁷ *See Goldberg*, 397 U.S. at 261.

Elsewhere in law where the individual most affected cannot represent his own interests, courts commonly recognize the value of having another actor to fulfill that role.¹¹⁸ In this context, it is likewise possible to imagine an institutional role of opposition advocate, charged with conducting a simultaneous but independent evaluation of the factual and legal basis for the targeting decision, with a view to developing the best reasons why the strike should *not* be taken. To the extent such an actor engaged in early-targeting-cycle analyses – vetting or validation, or initial CDE analysis, for example – their participation would seem to add little to the government’s existing burden. It would shift or augment by one the allocation of responsibility among the substantial number of targeting personnel, including legal officers, already engaged.

At the same time, there is reason to expect that an officer charged with making the negative case could substantially reduce the risk of error inherent in such operations. Anecdotal evidence from recent U.S. counterterrorism experience suggests that the inclusion of an institutionally assigned “red team” to a decision-making process can sharpen analysis, particularly in the face of shifting and uncertain information.¹¹⁹ Such a mechanism is also consistent with longstanding findings of organization theorists, who have recognized the value of competitive internal decision-making mechanisms to identify and correct error.¹²⁰ Particularly if the layers of review built into the existing process are insufficiently independent from each other – if succeeding review layers rely on or defer to earlier determinations without verifying previous findings – an internal opposition advocate could help address organizational pathologies like this kind of shirking or logrolling, tendencies that can make even a tentative recommendation seem an irreversible judgment.¹²¹

Including an opposition advocate in the deliberate targeting process is unlikely to address all forms of error. To the extent late-stage combat identification is responsible for PID errors – that is, in the final CID and CDE checks before a strike is executed – it is less certain how such additional process is consistent with government interests in carrying out what may by then be time-sensitive operations. Opposition advocates are likewise unlikely to help limit the kind of technical errors that might lead to erroneous deaths in targeting. As noted above, these are the kinds of errors for which it seems unlikely any decision-making procedures *at the targeting stage* will help. It is for just such kinds of errors that the Court has recognized the due process significance of post-deprivation remedies. Whether erroneous deaths are caused by state negligence, or by the kind of mistakes that inevitably accompany some exigent circumstances, a formal, post-deprivation hearing, conducted in a civil or administrative setting by a neutral, independent arbiter, is a necessary component of due process in targeting.

¹¹⁸ See, e.g., *Whitmore v. Arkansas*, 495 U.S. 149 (1990) (“next friend” standing).

¹¹⁹ Michele L. Malvesti, Policy Considerations in Combating Terrorism: Decision-Making Under Conditions of Risk and Uncertainty, *Combating Terrorism at West Point Occasional Papers Series*, p. 7 (Jan. 2012), available at http://www.ctc.usma.edu/wp-content/uploads/2012/01/CTC_CTRisk_MM_040112.pdf (describing the utility of a CIA “red team” assessment of the evidence supporting the bin Laden raid).

¹²⁰ See, e.g., IRVING L. JANIS, *GROUPTHINK* 142–58 (2d ed. 1982); Todd R. La Porte, *Challenges of Assuring High Reliability When Facing Suicidal Terrorism*, in *SEEDS OF DISASTER, ROOTS OF RESPONSE: HOW PRIVATE ACTION CAN REDUCE PUBLIC VULNERABILITY* 99 (Philip E. Auerswald et al. eds., 2006).

¹²¹ See, e.g., Scott D. Sagan, *The Problem of Redundancy Problem: Why More Nuclear Security Forces May Produce Less Nuclear Security*, 24 *RISK ANALYSIS* 935, 939 (2004).

c. Burden of proof

A final feature of procedural due process is worth considering – what law calls the standard of proof required to “instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.”¹²² The law has generally tended to assign burdens of proof depending on the importance society places on the interests at stake: facts in a dispute between private parties for money damages need only be proven by a “preponderance of the evidence,” for example, while facts necessary to convict a defendant in a criminal case must be proven “beyond a reasonable doubt.”¹²³ Intermediate burdens – like a requirement of clear and convincing evidence – have been used to determine, for example, when a person may be deprived of liberty indefinitely because she is a danger to herself or others. Given “the uncertainties of psychiatric diagnosis,” courts reason, “requiring a state to prove mental illness ‘beyond a reasonable doubt’” imposes a burden the state cannot meet, erecting “an unreasonable barrier to needed medical treatment.”¹²⁴

CJCS instructions give targeting personnel the responsibility to establish to a “*reasonable certainty* that a functionally and geospatially defined object of attack is a legitimate military target in accordance with the Law of War and applicable Rules of Engagement.”¹²⁵ Is that standard of proof sufficient to satisfy due process in targeting outside areas of active hostilities? Even more than the individual interest at stake in avoiding erroneous commitment to a potential lifetime of indefinite detention, the weight of both individual and government interests in avoiding erroneous targeting, coupled with the recognized incidence of PID errors in such operations, suggests the preponderance of the evidence standard is too low in a deliberate targeting setting. While it is unclear what “reasonable certainty” demands, to the extent it is only the certainty that the identification is more likely than not, it falls short of due process requirements. At the same time, because armed conflict is often waged with information gaps difficult or impossible to bridge, requiring proof ‘beyond a reasonable doubt’ seems as unreasonable here as it was to the Court in evaluating civil commitment for dangerousness.

New White House guidelines require a “near certainty that the terrorist target is present,” as well as a “near certainty that non-combatants will not be injured or killed,” before conducting lethal targeting outside an area of active hostilities.¹²⁶ If this is intended to strengthen the “reasonable certainty” standard, bringing it in line with proof required before depriving individuals of their liberty, it is a step forward. If the foregoing analysis is correct, it is not only wise as a matter of policy, it is required to comply with due process under the U.S. Constitution.

IV. Conclusion

Profound disagreements about the legality and wisdom of U.S. targeting practices remain, but the pressing need for their resolution should not stand in the way of incremental improvements. In evaluating the targeting process, the public and individual interests are aligned; both favor identifying and implementing procedures that can reduce the risk of tragic error.

¹²² *Addington v. Texas*, 441 U.S. 418, 423 (1979) (internal quotations omitted).

¹²³ *See id.* at 423-24.

¹²⁴ *Id.* at 418.

¹²⁵ CJCSI 3160.01, *supra* note 43.

¹²⁶ White House Fact Sheet, *supra* note 64.