HAS THE 'WAR ON TERROR' PUT DUE PROCESS ON THE STAND? WHY THE ECJ'S APPROACH IN *KADI II* SHOULD BE USED ACROSS THE ATLANTIC

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The European Court of Justice (ECJ) struck a balance between due process rights and national security in the Kadi II case. Applying the ECJ's analysis to a case recently decided by the D.C. District Court – the Zaidan case – illustrates that a more rights-protective approach can be attained in US courts too. First, this article will explore due process in Europe via the four different versions of the Kadi case. Then, it will take an in-depth look at the Zaidan case. The article concludes by arguing that the D.C. Circuit Court of Appeals should adopt a stance on due process similar to that taken by the ECJ in the Kadi II case – which served to uphold the rule of law in Europe by making the actions of public officials reviewable before EU courts in the counter-terrorism context. By exercising a more 'muscular' attitude towards the other branches of government's counter-terrorism measures, the US judiciary might use this case to start a new line of precedent distinct from prior US cases with respect to US citizens' constitutional rights in the post 9/11 counter-terrorism paradigm.

1 INTRODUCTION

Two journalists recently brought a case before the D.C. District Court alleging that the US government has placed their names on the kill list without giving them any prior notice or an opportunity to challenge their inclusion therein.[2] One of those journalists is an American citizen. The allegation has put the meaning of due process, the US military's fight against terrorism, and the scope of national security measures to the test. On appeal, the D.C. Circuit Court should take the case as an opportunity to reaffirm the Constitution of the United States' protection of due process and uphold the rule of law by making actions of public officials reviewable before the courts, particularly when fundamental rights are under threat. The *Kadi II* case – in which the highest European Court upheld the ability of an EU citizen to challenge their inclusion on a terrorism blacklist – provides an effective *modus operandi* for this analysis. By illustrating what form a more rights-protective compromise between "the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the persons concerned"[3] would take in the US, the *Kadi II* case exemplifies an equilibrium between security and due process. Furthermore, the more rights-friendly approach of the ECJ is particularly applicable in *Zaidan v. Trump* given the grave liberty interest at stake – the journalist's life.

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

[3] Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, *Commission v Kadi* EU:C:2013:518.

2 EU COURTS, DUE PROCESS, AND TERRORISM

2.1 THE KADI SAGA

The discussion of due process as it relates to terrorism has largely played out in the European Union via the so-called 'Kadi Saga'.[4] Mr. Yassin Kadi founded an organization which acted as a charity and part of Osama bin Laden's fundraising network in the 1990s.[5] After 9/11, Mr. Kadi was placed on a terrorism blacklist by the United Nations Security Council (UNSC) and his assets were frozen.[6] Security Council Resolution 1267 was transposed into EU legislation pursuant to Council Regulation (EC) No 881/2002 which allowed for Mr. Kadi to challenge the regulation (after exhausting domestic remedies) in EU courts. In 2005, the General Court of the European Union found that they could not review the EU Regulation since such a review would entail an evaluation of the UNSC measure.[7] The General Court simply looked at whether the UNSC had respected *jus cogens* norms of international law; ultimately, the Court found that the UNSC had met this minimum requirement and therefore ruled that Mr. Kadi's inclusion on the blacklist was legal.[8]

On appeal, the European Court of Justice rejected the approach taken by the General Court. The ECJ decided that it could review the legality of the EU Regulation—though this was not equivalent to reviewing a Security Council measure's legality – because fundamental rights "form the very basis of Union's legal order."[9] Upon reviewing the case, the ECJ found in 2008 that Kadi's right to be heard, right to effective judicial review and right to property had been infringed because he had not been informed of the grounds for why he was on the list and therefore had never been able to seek judicial review.[10] Following the judgment, the Security Council began publishing a 'summary of reasons' for inclusion on the terrorist blacklist. Thereafter, Kadi was provided an opportunity to be heard before the Commission again froze his assets.[11]

In 2010, the General Court heard Kadi's next challenge to Regulation No. 881/2002, which was newly amended to comply with the ECJ's 2008 ruling. The General Court in *Kadi II* found that the summary of reasons was not sufficient to vindicate Kadi's rights of defense.[12] A summary of reasons was not adequate to effectively allow for a challenge of the allegations made against him, in part because there was effectively no real possibility of altering the UNSC's finding.[13] The Court came to this conclusion despite the fact that the Security Council had created an independent Ombudsperson in 2009 who would, if the petitioner was refused removal from the blacklist, state the reasons why – provided they were

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[4] See Koen Lenaerts, 'The Kadi Saga and the Rule of Law within the EU' (2014) 67 SMU L. Rev. 707.
[5] Douglass Cantwell, 'A Tale of Two Kadi's Kadi II, Kadi v. Geithner & U.S. Counterterrorism Finance Efforts' (2015) Columbia J Transnat'l L.
[6] ibid.
[7] Case T-315/01, *Kadi v Council* EU:T:2005:332; See Juliane Kokott & Christoph Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' (2012) 23 Eur. J. Int. L. 1015, 1025.
[8] ibid.
[9] Joined Cases C-402/05 P and C-415/05 P, *Commission v Kadi* EU:C:2008:461, para. 207.
[10] ibid.
[11] ibid.
[12] Case T-85/09, *Commission v Kadi* [2010] EU:T:2010:418.
[13] ibid.

not confidential.[14] The role of the Ombudsperson was ostensibly "to guarantee fair proceedings and transparent standards to analyse information on the individuals concerned consistently and objectively."[15] Although the office of the Ombudsperson might be considered a "quasi-judicial role… her role has not attained the quality of a court of law."[16] Therefore, Mr. Kadi's due process rights were vindicated neither by the summary of reasons nor the creation of the office of the Ombudsperson.

On appeal, the ECJ in 2013 upheld the ruling of the General Court in finding that "the procedures provided for Kadi to appeal his listing by the United Nations in Europe were insufficient to meet European Union standards."[17] While the ruling was hugely debated for its confirmation of the General Court's evaluation of the place of EU law in the international legal order,[18] due process was also a large part of the decision and it is that aspect of the decision that will be explored further for its relevance to the *Zaidan* case.

2.2 DUE PROCESS AND KADI II

The European Court of Justice's counter-terrorism due process standard in the *Kadi II* decision includes three elements: a procedural notice and hearing requirement, an evidentiary burden shift and a balancing between national security and the 'rights of defense.' Together, these three elements establish a minimum standard for due process, but also establish a powerful role for the EU courts in setting the "maximum" amount of due process required. The ECJ's decision clarifies what these elements include.

In order to meet the first element, the person who has been subject to a deprivation must have access to both the decision taken against them and the reasons underpinning that decision.[19] This baseline requirement is meant to allow the person who has been subject to a deprivation to determine the reasons relied upon in the decision taken against them. The ECJ in *Kadi II* upheld the General Court's ruling that "(t)he principle of effective judicial protection had been infringed… since Mr Kadi was afforded no proper access to the information and evidence used against him."[20] In essence, the ECJ must have enough information to make sure that the decision was taken with "a sufficiently solid factual basis."[21] As such, the ECJ makes it clear that a verification by the EU Courts can include a review of the factual allegations included in the 'summary of reasons' given to the person on the terrorism blacklist upon which their listing is based. The result being that the EU Courts, when reviewing a counter-terrorism decision taken by another branch of the EU quasi-federal government, must find that at least one of the reasons relied upon in the blacklist placement is substantiated.[22]

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[14] Ibid, para 128.
[15] Kokott (n 6) 1021.
[16] ibid.
[17] Cantwell (n 4) 659.
[18] See generally, Joris Larik, 'If The Legal Orders Don't Fit, You Must Acquit': Kadi II And The Supremacy Of The Un Charter,' European Law Blog (September 2013), https://europeanlawblog.eu/2013/09/13/if-the-legal-orders-dont-fit-you-must-acquit-kadi-ii-and-the-supremacy-of-the-un-charter/.
[19] *Commission v Kadi* (n 2), para 100.
[20] ibid, para 44.
[21] ibid, para 119.
[22] ibid.

In the second element, the ECJ clarifies that the 'rights of defense' places the burden of producing evidence confirming the claims against the persons subject to a deprivation on the accuser.[23] This means that, once the prospective terrorist brings a challenge to their listing, the burden shifts to the authority which has taken an adverse decision against the individual to establish that the reasons relied upon are well-founded.[24] It is not the duty of the individual making the challenge to produce evidence in the negative that they should not be listed. To this end, the EU Courts can request that authority to produce information or evidence that is necessary to make this finding, even if that information is confidential.[25]

Third, the ECJ provides for a limitation on the rights of defense by holding that there must be a balance struck between security interests and fundamental rights. Importantly though, the ECJ makes it clear that this balancing act is the job of the Court, not the authority which has taken an adverse decision against an EU citizen. The balancing act includes four elements. First, the ECJ held that if the authority deems that it cannot comply with the EU Court's request for access to evidence and information, then it is "the duty of those Courts to base their decision solely on the material which has been disclosed to them."[26] Second, the Court found that if the evidence or information that is disclosed by the authority is "insufficient to allow a finding that a reason is well founded, the Courts of the European Union shall disregard that reason as a possible basis for the contested decision to list or maintain a listing."[27] Third, the ECJ stated that it can assess whether a "failure to disclose confidential information to the person concerned and his consequential inability to submit his observations on them are such as to affect the probative value of the confidential evidence."[28] Finally, the ECJ held that in the event that the reasons for not disclosing information to the accused before the Courts are valid, then it is nonetheless "necessary to strike an appropriate balance between the requirements attached to the right to effective judicial protection, in particular respect for the principle of an adversarial process, and those flowing from the security of the European Union."[29] Therefore, the Kadi II judgment introduces a model under which the courts still have an important role to play in upholding due process for those listed as terrorists, even when security interests and confidential information are at play.

3 ZAIDAN V. TRUMP: NEW FACTS NECESSITATE NEW APPROACHES

3.1 OVERVIEW OF CASE

The novel factual scenario presented in a recent case before the D.C. District Court has ushered in a debate over the US counter-terrorism regime's relationships with due process.[30]

[23] ibid, para 121.
[24] ibid.
[25] ibid, para 120.
[26] ibid, para 123.
[27] ibid.
[28] ibid, para 129.
[29] ibid, para 128.
[30] *Zaidan v. Trump*, 317 F.Supp3d 8 (D.D.C. 2018).

Two journalists—Mr. Kareem and Mr. Zaidan—brought a suit against the President and various heads of US executive branch agencies including the Central Intelligence Agency (CIA), the Department of Defense (DOD), and the Department of Justice (DOJ), among others, alleging that their names are on a list of individuals that the US has labeled as terrorists and can be killed. Because Mr. Kareem is an American citizen and Mr. Zaidan is not, his case offers a different analysis with respect to his constitutional due process rights. The analysis will therefore focus solely on Mr. Kareem.

Mr. Kareem states that he is a journalist for various news organizations including the BBC, CNN and al-Jazeera.[31] He alleges that he has no association with Al-Qaida or the Taliban or any other terrorist organization.[32] However, by virtue of Mr. Kareem's line of work, he has extensively investigated and reported on terrorism on the ground in the Middle East. During a three month period in 2016, Mr. Kareem contends that he was subject to 5 near-miss aerial strikes while he was reporting in Syria.[33] In one event, the strike hit the exact location where Mr. Kareem was set to have an interview; he is still alive because he had climbed a nearby hill to get a viewpoint.[34] In another, a vehicle in which Mr. Kareem was traveling was destroyed by a drone-fired hellfire missile of the type used by the US military; it was only because he was sitting in a nearby vehicle at the time of the strike that he was not killed.[35] The other three incidents are equally as astonishing. As a result of these incidents, Mr. Kareem alleges that he was the intended target of these attacks and he is on the US government's kill list.[36]

The so-called kill list certainly exists.[37] Former President Barack Obama issued a Presidential Policy Guidance in 2013 which outlined guidelines and accountability for inclusion of individuals on the list.[38] Part of this guidance also includes information on how an individual might be put on the list using only metadata.[39] It also includes the necessary preconditions for taking lethal action. Mr. Kareem alleges that the Defendants violated the Administrative Procedure Act by adding his name to the kill list despite the fact that he does not meet the conditions in the Presidential Policy Guidance.[40] Specifically, Mr. Kareem brings forward six counts. Of those, two deal with due process. First, Mr. Kareem argues that his due process has been violated because he was given no notice or opportunity to challenge his inclusion on the kill list. Second, he argues that inclusion on such a list is an illegal seizure and "seeks to deprive him of life without due process of law."[41] The other claims range from a grave breech of common article 3 of the Geneva Conventions constituting a war crime, to an excess of the authority of the Executive pursuant to the Authorization to Use Military Force (AUMF), to a violation of the first amendment by

[31] ibid, 11.
[32] ibid.
[33] ibid.
[34] ibid.
[35] ibid.
[36] ibid.
[37] See generally, Gregory S. McNeal, 'Targeted Killing and Accountability' (2014) 102 Georgetown LJ 681-794.
[38] *Zaidan v. Trump* (n 1).
[39] ibid, 10.
[40] ibid.
[41] ibid, 15.

effect.[42] Importantly, the US takes a broad approach under international humanitarian law with respect to targeted killings, taking the position that "all that is needed to target an individual is sufficiently reliable information that the person is a member of the organized armed group (Taliban, al Qaeda, associated forces)."[43] However, by Mr. Kareem's account – which the government has not responded to – he has no connection to any armed group falling within the purview of the AUMF.

3.2 GOVERNMENT'S FIRST MOTION TO DISMISS: THE CONSTITUTIONAL DUE PROCESS ASPECTS ARE JUSTICIABLE

The US government filed a 12(b)(6) motion to dismiss, arguing that Syria is a war zone where forces from multiple countries are fighting.[44] Thus, the government argues that Mr. Kareem has done nothing other than show that he is a journalist reporting from a dangerous place. The D.C. District Court found that the evidence Mr. Kareem brought forward made it more than "a sheer possibility" that he was on the kill list.[45] In other words, while he could have been targeted by Syria for reporting on anti-Assad work, he could just as plausibly have been targeted by the US. Next, the Court did not accept the government's sovereign immunity defense because the government "fail(ed) to demonstrate at this point that the challenged action took place in the field in time of war."[46] Finally, the Court rejected the government's political question doctrine claim and distinguished the case from *al-Aulaqi I* and *II* – in which a US citizen was targeted and killed as a member of Al-Qaeda with no trial–in three important ways. First, whereas al-Aulaqi was very far from the forum which would have heard his case, Mr. Kareem has come before the forum himself; much of the relevant information is in fact in the United States.[47] Second, in *al-Aulaqi II*, the case was dropped because the judge (the same one hearing Mr. Zaidan's case) refused to extend the *Bivens* liability theory into new territory.[48] Here, Mr. Zaidan's case is not based on a *Bivens* theory of liability. Finally, unlike al-Aulaki's case, there has been no allegation or information of Mr. Zaidan being involved in terrorist activity.

3.3 DUE PROCESS: LOFTY RHETORIC OR MUSCULAR JUDICIAL REVIEW?

The D.C. District Court's treatment of the due process issues seemed robust in the first ruling on the motion to dismiss. Citing *Comm. of U.S. Citizens Living in Nicaragua*, the Court points out the fact that due process rights are justiciable even if they implicate foreign policy decisions.[49] The Court emphasized the grave nature of the liberty interest here, Mr. Kareem's life, in its discussion of both government accountability as well as securing individual

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[42] ibid.
[43] Gregory McNeal, *How to Make A Kill-List,* Lawfare, February 25, 2013, https://www.lawfareblog.com/how-make-kill-list.
[44] *Zaidan v. Trump* (n 1).
[45] ibid.
[46] ibid. This case could bring to the fore one of the biggest questions surrounding the anti-terrorism conflicts: what is the exact nature of the conflict?
[47] ibid, 28.
[48] ibid, 25. In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), SCOTUS ruled that, under federal law, individuals can sue federal officials for Fourth Amendment violations and obtain damages.
[49] ibid, 29.

liberties. The Court proclaimed, "Due Process is not merely an old and dusty procedural obligation required by Robert's Rules. Instead, it is a living, breathing concept that protects U.S. persons from overreaching government action even, perhaps, on an occasion of war."[50] These are strong words coming from the bench, regardless of one's take on prior anti-terrorism due process court cases in the United States.

At the same time, the Court's extensive citation of *Hamdi*[51] is somewhat troubling. *Hamdi* was used in conjunction with *Mathews v. Eldridge*[52] extensively in the DOJ's Memo on the government's authority to use lethal force against al-Aulaki, also a US citizen.[53] Thus, the D.C. District Court cited a wide array of cases that have come before the US Supreme Court and the D.C. Circuit dealing with due process and terrorism. The key question then, having cited various precedent, is what now exactly is the US judiciary's stance? Is it, as Italian legal scholar Federico Fabbrini has argued, back to strong institutional balancing after *Boumedienne*,[54] or was the US judiciary's due process stance in the counter-terrorism realm always deferential and vague as argued by US legal scholar Jules Lobels?[55] Moreover, have the most recent cases like *Doe v. Mathis*[56] changed the standard to be applied to the unique facts in *Zaidan*, where a US citizen has allegedly been placed on a kill list in the context of simply fulfilling his work duties? In the ruling on the first motion to dismiss, the Court seems to be reaching for whatever it can grasp hold of as its due process alarm bells ring. In saying, "now that he has made it to a U.S. court…his constitutional rights as a citizen must be recognized…constitutional questions are the bread and butter of the federal judiciary"[57], the D.C. District court seems to be standing up to the Executive branch in the tripartite balance that makes up the US federal government.

3.4 SECOND RULING ON THE MOTION TO DISMISS—MILITARY AND STATE SECRETS PRIVILEGE

On January 30th, 2019, the government filed a motion to dismiss claiming the state secrets privilege.[58] The government claims that because the case "directly implicate(s) classified national security information pertaining to military and intelligence activities… it is apparent that litigating any aspect of this case requires the disclosure of highly sensitive national security information concerning alleged military and intelligence actions overseas."[59] The government argues that four types of evidence would come out from such a case: whether

[50] ibid, 28.
[51] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
[52] *Mathews v. Eldridge*, 424 U.S. 319 (1976).
[53] Office of Legal Counsel, Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to the Contemplated Lethal Operation Against Shayk Anwar al-Aulaki, (online, July 16, 2010), https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf
[54] See, Federico Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* 51, 75 (Oxford University Press 2014).
[55] See, Jules Lobel, 'The rhetoric and reality of judicial review of counter-terrorism actions: the United States Experience,' in *Critical Debates On Counter-Terrorist Judicial Review* (Fergal F. Davis & Fiona de Londras, 2014) see also, David Jenkins, 'When Good Cases Go Bad: the unintended consequences of rights friendly judgments,' in *Critical Debates On Counter-Terrorist Judicial Review* (Fergal F. Davis & Fiona de Londras, 2014).
[56] *Doe v. Mattis*, 889 F. 3d 745 (2018).
[57] *Zaidan v. Trump* (n 1), 29.
[58] ibid, 1:17 WL 852542, Defendant's Memo in Support of Motion to Dismiss, Document 24-1 (2019).
[59] ibid.

the US lethally targets people outside the US, the DOD's use of lethal targeting in ongoing operations in Syria, whether Mr. Kareem has been designated for the use of lethal force, and whether the government has information about Mr. Kareem.[60] On September 24th, 2019, the D.C. District Court upheld the motion to dismiss, citing the "utmost deference" standard courts apply when evaluating a claim of government claim of state secrets.[61] The case has been appealed and will be heard before the D.C. Circuit Court of Appeals in the coming months.[62]

The state secrets privilege "performs a function of constitutional significance" by allowing the Executive "to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities."[63] In 2005, several scholars conducted a study and claimed that there had never been a case "where courts have forced the government to disclose agency-held classified information in any case in which the privilege has been asserted."[64] However, "like antiterrorist agencies, courts need information if they are to do their job properly."[65] The *Zaidan* case provides a factual scenario worthy of breaking that streak. On appeal, the D.C. Circuit Court should uphold Mr. Kareem's due process rights, thereby establishing a new precedent – distinguished from prior terrorism due process cases – which reigns in the state secrets doctrine and reasserts a more 'muscular role'[66] of the judiciary in assuring US citizens' due process rights in the 'war on terror'. Taking stock of the *Kadi II* case in Europe would provide guidance to the D.C. Circuit on how to do this while balancing the need for confidentiality in the security realm.

4 APPLICATION OF KADI II'S DUE PROCESS ANALYSIS IN THE D.C. DISTRICT COURT

4.1 WHY IS *KADI II* PERTINENT TO THE *ZAIDAN* CASE?

The ECJ's treatment of due process in *Kadi II* is pertinent to Mr. Kareem's case for four reasons. First, there has been no case like that of Mr. Kareem yet in the United States; while Kadi's case was different in some respects, a European perspective on asset freezing is illuminating on the due process questions related to terrorist lists. Second, because there is no adequate precedent in the US, there is a danger of addressing the issue using attempts to balance the process due with factual scenarios inapplicable here. For example, *Hamdi* was mentioned some six times in the DOJ's Office of Legal Counsel memo on the legality of using lethal force against a US citizen despite the fact that that case dealt with detention in Guantanamo and entailed a different liberty interest as well as a different territorial analysis.[67] While the alleged inclusion of Mr. Zaidan on the kill list presents a different liberty interest

[60] ibid 3.
[61] Zaidan *v.* Trump, Civil Action No. 2017-0581 (D.D.C. 2019)
[62] Notice of Appeal [1817468] 'seeking review of a decision by the U.S. District Court in' 1:17-cv-00581-RMC, docketed. 19-5328 on November 25, 2019.
[63] *El- Masri v. United States*, 479 F.3d 296, 303 (4th Cir. 2007).
[64] Roger Douglass, *Law, Liberty and the Pursuit of Terrorism* 102 (University of Michigan Press 2014).
[65] ibid 102.
[66] The term 'judicial muscularity' is not author's own. See, Fiona de Londras, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (2010) 30 Oxf. J. Leg. Stud. 19, 47.
[67] See n 52.

to Mr. Kadi's property deprivation, the fact remains that they were both subject to deprivations, resulting from their alleged inclusion on a list, by government entities. The due process analysis with respect to that listing is therefore analogous. Third, the state secrets doctrine has come under intense legal fire post 9/11.[68] In Europe, the conversation that occurred from 2005-2013 surrounding the series of Kadi cases is particularly didactic in the US context because of its more recent application of the balancing of security and fundamental rights. Whereas the applicable standard in the US still dates back to 1953,[69] the 'Kadi saga' took place post 9/11. Finally, the ECJ's treatment of due process rights in the context of terrorism blacklists was stronger than that seen in US District Courts,[70] an approach which is in fact more apt in Mr. Kareem's case given the more grave liberty interest – Mr. Kareem's life – at stake.

4.2 WHAT PROCESS IS DUE?

As outlined in section four above, *Kadi II* presented a three-pronged analysis of due process: the baseline right of access and reasons, an evidentiary burden shift and finally a judicial balancing of liberty and security. However, it is important to note that Mr. Kareem's starting point is slightly different than that of Mr. Kadi. While Mr. Kadi had *for sure* been subject to a deprivation, *ie* his placement on the asset freeze list, Mr. Kareem has alleged a deprivation based on his own provided evidence. Nonetheless, according to the European Court of Justice, due process has already kicked in. In *Kadi II*, the Court required disclosure so that an individual can be *in a position* to defend their rights and to decide whether there is reason to bring an action at all. The procedural requirement of due process can be seen with two lenses: the right to obtain information and the right to impart information.[71] In other words, there is a notice requirement and a hearing requirement.[72] In Mr. Kareem's case, he has forced the first requirement by utilizing the second requirement. By coming to the Court and utilizing his right to be heard, he has put the issue of his right to notice to the test.

Article 41 of the EU Charter of Fundamental Rights elucidates what the right to good administration entails. In that article, "the right of every person to have access to their file" is framed as a baseline right, which can be tempered when there is a need for "respecting the legitimate interests of confidentiality."[73] Thus, access to information comes first and confidentiality comes second. The US does not have a similar article; however, the principle case concerning access to information that allegedly includes state secrets is *Reynolds*[74] – in which the widows of three civilians sued the federal government after a military plane,

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[68] See eg D.A. Jeremy Telman, 'Our Very Privileged Executive: Why the Judiciary Can (and Should) Fix the State Secrets Privilege' (2007) 80 Temp. L Rev. 499; George (n 73); Lyons (n 75).
[69] *United States v. Reynolds*, 345 U.S. 1 (1953).
[70] See Cantwell (n 4).
[71] See, Jens Hillebrand Pohl, 'The Right To Be Heard In European Union Law And The International Minimum Standard —Due Process, Transparency And The Rule Of Law,' CERiM Online Paper Series (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3192858.
[72] ibid.
[73] Charter of Fundamental Rights of the European Union, (2000/C 364/01), accessed from, http://www.europarl.europa.eu/charter/pdf/text_en.pdf.
[74] 345 U.S. 1 (1953), outlining "a common law evidentiary procedure that permits the government to withhold evidence from discovery in civil cases if its revelation would threaten the nation's security." Beth George, 'An Administrative Law Approach to Reforming the State Secrets Privilege' (2009) 84 NYU L. Rev. 1692, 1724.

supposedly carrying secret electronic equipment, crashed.[75] The *Reynolds* case in fact found an equilibrium between access and confidentiality not vastly unlike that protected by Article 41 of the EU Charter. "The standards of Reynolds…achieve a balance that allows claims to be adjudicated, and not be dismissed at the outset, while still protecting state secrets."[76] However, as cogently illustrated by US scholar Carrie Newton Lyons, since the *Reynolds* decision, lower courts have deviated from the *Reynolds* standard. Circuit courts have started using an "utmost deference" standard towards the government's invocation of the privilege, which was in fact never mentioned in *Reynolds.*[77] Moreover, a 4th Circuit decision branched off further from the Supreme Court's *Reynold's* decision by holding that some "secrets are so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matter"[78]; therefore the case must be *entirely* thrown out. On the contrary, *Reynolds* allowed the case to go forward, but without the excluded information. These two standards are exactly what the D.C. District Court used to dismiss Mr. Kareem's case. Thus, the D.C. District Court's second ruling, granting the motion to dismiss on state secrets grounds, is not only a departure from the applicable US Supreme Court jurisprudence in *Reynolds,* but also stands in stark contrast to the more rights-friendly approach to good administration outlined in Article 41 and clarified in Kadi, which frames access to information as a minimum floor to be balanced against the necessity for certain information to remain confidential.

The second prong of *Kadi II's* due process discussion related to the evidentiary burden. *Kadi II* held that once an individual subject to a deprivation has challenged their listing, the burden then shifts to the entity which has placed them on the list to bring forward evidence establishing the reasons relied upon in the listing. Importantly, the burden shift in Mr. Kareem's case has already happened because Mr. Kareem has brought the challenge. While he may or may not be listed on the kill list, he has already been subject to a deprivation in needing to bring his claim – thereby spending resources and time to protect his alleged listing in addition to feasibly halting his reporting work – to put himself in a position to defend his rights. In other words, by showing up before a Court in the US, Mr. Kareem is pressing the government to either arrest him if it believes he is involved in criminal terrorist activity and undergo the full judicial process involved therein, or, contest the challenge with arguments that there was either no deprivation involved (*ie* he is not on the kill list) or that the deprivation was justified.

In the D.C. District Court's ruling, however, the Court primarily focused on *Mr. Kareem's* arguments for why the State Secret's doctrine should not apply. Essentially, the Court applied the wrong burden standard under the *Kadi II* framework. The burden must be on the party with access to the information to prove that the reasons relied upon are justified; none of the arguments the government mentioned would pass muster. First, access to the information would not allow Mr. Kareem to "evade attack or capture."[79] He has already shown up before the Court willingly. If the government has information relating to his

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[75] ibid.
[76] Carrie Newton Lyons, 'The State Secrets Privilege: Expanding Its Scope Through Government Misuse' (2007) 11 Lewis & Clark L. Rev. 99.
[77] ibid 109; *Halkin v. Helms,* 598 F.2d 1, 9 (D.C. Cir. 1978)
[78] ibid 110; *Fitzgerald v. Penthouse Int'l*, Ltd., 776 F.2d 1236, 1240 (4th Cir. 1985).
[79] (n 61) 6.

alleged terrorist involvement, they can arrest him and press criminal charges. Second, it is well-known that the kill list already exists.[80] Therefore, disclosure of whether Mr. Kareem is on the list will not, on its own, harm national security efforts. Finally, the Presidential Policy Guidance from 2013 already publicly stated how individuals would be targeted for lethal and non-lethal force.[81] Thus, the government's final argument does not hold water because such information is known; even if it would harm national security, the case could still move forward while keeping that information confidential. As *Reynolds* held, "the decision to rule out the documents is the decision of the judge, and it is the judge who controls the trial – not the Executive."[82] Crucially, not only is the D.C. District Court's analysis against the more rights-protective burden-shifting standard outlined in *Kadi II*, it also shoots wide of the mark set by *Reynolds* in which the Supreme Court clarified that once a showing of strong necessity is made, the Court must balance that showing with the appropriateness of the government's invocation of the privilege. Satisfying these two requirements outlined in *Kadi II* – the notice and hearing requirement and the burden shift away from the party which brought the claim – would go a long way towards vindicating Mr. Kareem's baseline due process rights. The Court's remaining task is a balancing act between information that must remain confidential to preserve national security and the need to uphold constitutional guarantees of due process.

4.3 THE BALANCING ACT: STATE SECRETS AND PRESERVING CONFIDENTIAL SECURITY MATTERS

The balancing approach adopted by the ECJ in *Kadi II* is similar to the approach normatively postulated by US Supreme Court Justice Breyer.[83] It demonstrates that the need to protect state secrets, which are central to national security, and the need to protect constitutional guarantees of the rule of law are not mutually exclusive. Moreover, because "the federal judiciary is *supreme* in the exposition of the law of the Constitution"[84], courts do not need to defer entirely in the state secrets realm to the other branches of government. Similarly, as stated by Koen Lenaerts in the EU, "considerations relating to international peace and security may not, as such, render decisions imposing restrictive measures upon named persons and entities immune from judicial review. Those considerations are not "political questions" outside the scope of such review."[85] Rather, EU Courts must perform their function of guarantors of the rule of law as outlined in Article 19 TEU.[86] A balancing act, particularly in a case like Mr. Kareem's, is achievable. *Kadi II* provides a due process model which is effective in the context of a US citizen alleging placement on the kill list because the judgement delineates *how* courts can achieve the balance between security and due process rights. This analysis will assert that the D.C. Circuit Court, on appeal, should adopt an

[80] (n 36).
[81] (n 1).
[82] (n 73) 103.
[83] Stephen Breyer, 'Making Our Democracy Work: The Yale Lectures' 120 Yale LJ 1999 (2011), arguing "The courts should not simply abdicate authority to the President, but neither can they remain oblivious to the fact that the Constitution grants to the President and to Congress, not to the courts, the power and the duty to protect the nation's security. Here I believe the courts should require *accountability while pragmatically balancing* the important competing constitutional interests at stake."
[84] *Cooper v. Aaron,* 358 U.S. 1, 18 (1958); ibid.
[85] (n 3) 715.
[86] ibid.

approach akin to *Kadi II* for *Zaidan v. Trump* and therefore establish that approach as a precedent for balancing due process and national security interests in future situations.

In *Kadi II*, recognizing that overriding considerations might bar the release of certain information or evidence, the judgment affirmed that it is still the Court's duty to guarantee respect for procedural rights. In this vein, the task of the ECJ is to utilize 'techniques of accommodation' regarding both the nature and sources of information sought.[87] Courts have a number of resources at their disposal to ensure confidentiality. While the United States system of discovery is unique in the world for both its breadth and control by the parties[88], this does not mean that judges cannot play a more active role under the Federal Rules of Civil Procedure to protect confidentiality in the courtroom. For example, US Courts can name special masters over discovery in complex cases[89] or use counsel with security-clearances.[90] In short, courts have options at their disposal to preserve confidentiality in exceptional circumstances.

Kadi II ruled that in the event that confidential information cannot be released, the Court can still rule on the case. The Court must simply base their decision only on the material which it has before it.[91] A similar standard could be used in the US. In the event that all but a very small portion of the information remains confidential as state secrets, the US judiciary can still make a ruling based on the information which is deemed not a threat to national security. This allows the judiciary to uphold the due process clause in the fifth and fourteenth amendments while not releasing information fundamental to security. Such an approach necessarily makes the government think carefully about what information is vital to state security and what information the Court needs to undertake a balancing analysis. A piecemeal approach of granting, for example, injunctive relief in individual cases where too little information is available would clarify where the evidentiary line is without harming national security. In Mr. Kareem's case, in the absence of any information from the government, the court could have enjoined the government from including Mr. Kareem on the kill list in the negative until the government puts Mr. Kareem *in a position* to defend his rights. Importantly, this would still be an incredibly narrow ruling that would not give rise to heaps of new litigation. Where an American citizen has presented plausible facts on which an alleged attempted capital deprivation has taken place on numerous occasions, a court has a role to play in ensuring that the executive has not unnecessarily deprived the individual of their constitutional rights.

Under *Kadi's* due process standard, the D.C. District Court could have also disregarded reasons for Mr. Kareem's inclusion on the kill list if they were not well-founded. This raises the evidentiary requirement and means that Mr. Kareem's placement on the kill list, if he even is on the kill list, must be bolstered by reasons that are justifiable. This prevents the government from depriving citizens of rights by making claims without any information to back up such assertions. *Kadi II's* balance between security and due process means that when the government fails to disclose information behind a reason for the listing, the accused's

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87 (n 12).
88 Howard M. Erichson, 'Court Ordered Confidentiality in Discovery Symposium: Secrecy in Litigation' (2006) 81 Chi.-Kent L. Rev. 357.
89 ibid 365.
90 Douglass (n 61).
91 *Commission v Kadi,* (n 2) para 123.

corresponding *right to respond* to allegations made against him can be considered by the court in assessing the reason for the listing. Therefore, Mr. Kareem's due process rights are not fully met once he has access to whether he is included on the list and the reasons for such inclusion. Courts can still exercise review by basing their decision on information available, by deciding whether the reasons are well-founded, and by making extrapolations from the government's failure to disclose information about the probative value of the evidence. In that respect, the *Kadi II* case provides a model in which courts, even if they must preclude information to respect security interests, can still uphold the rights of defense and respect for the adversarial process.

Such a balancing act, while difficult, is a necessary part of the judiciary's role. As the D.C. Circuit has stated, "the Executive's power to conduct foreign relations free from the unwarranted supervision of the Judiciary cannot give the Executive *carte blanche* to trample the most fundamental liberty and property rights of this country's citizenry."[92] Courts are the best suited to balance competing fundamental interests. The European Court of Justice has balanced competing fundamental rights with fundamental freedoms in a number of cases.[93] In those cases, the Court balanced the rights to allow them to exist alongside each other, sometimes in competition, but never to the other's complete dearth. It is time that courts in the US began to follow suit and contribute to an effective 'war on terror' that does not continually put due process on the stand.

5 CONCLUSION

Counter-terrorism measures and state security do not fundamentally need to change the way the law operates. In the United States, constitutionally protected due process rights have tended to yield to the Executive's Article II powers. The degree to which US Courts have unquestioningly accepted state secrets claims in the security realm lends credence to this trend. However, in Europe, the debate which occurred between 2005 and 2013 under the four versions of the Kadi case led to a different conclusion. Balancing due process rights with recognized security interests in the context of terrorist lists can be achieved without compromising the integrity of either security or fundamental rights. In the US, the fact that Mr. Kareem is a US citizen and allegedly has no connection to any terrorist organization presents a rare factual scenario under which the US courts should look towards the *Kadi II* model for guidance on how to balance due process concerns with the protection of security. Under this model, the D.C. District Court should have upheld the baseline administrative due process element of access to whether Mr. Kareem was on the kill list and, if so, the reasons behind his listing. As Mr. Kareem has brought the case challenging his listing, the burden to provide evidence confirming or denying the alleged deprivation shifts to the government. Finally, the D.C. Circuit Court should apply a balancing analysis similar to that in *Kadi II*, thereby establishing a narrow but important precedent for future terrorism cases under which US citizens can vindicate their due process rights while balancing important national security interests.

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[92] *Ramirez de Arellano v. Weinberger,* 745 F.2d 1500 (1984).

[93] See *eg* Sacha Garben, 'The constitutional (im)balance between "the market" and "the social" in the European Union' (2017) 23 Eur. Const. L. Rev. 61.

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