

January 2014

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Recommended Citation

White, Benjamin S. (2014) "Al-Aulaqi v. Obama: Must Eliminating Dangerous Terrorists Entail Accepting Dangerous Political Doctrines?," *Liberty University Law Review*: Vol. 8: Iss. 2, Article 4.

Available at: http://digitalcommons.liberty.edu/lu_law_review/vol8/iss2/4

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NOTE

AL-AULAQI V. OBAMA: MUST ELIMINATING DANGEROUS TERRORISTS ENTAIL ACCEPTING DANGEROUS POLITICAL DOCTRINES?

Benjamin S. White[†]

I. INTRODUCTION

“How sharper than a serpent’s tooth it is, to have a thankless child!”¹ Without a doubt, these words from King Lear ring in the ears of a father who, in spite of tremendous and thankless efforts, has lost his son. This Note addresses the story of a father and a son who found themselves, like King Lear and his children, on opposing sides of the ideological spectrum. The father is Nasser Al-Aulaqi—law abiding American citizen, Fulbright Scholar, and academic.² The son is Anwar Al-Aulaqi—Muslim Imam, international terrorist, and senior member of Al-Qaeda in the Arabian Peninsula (AQAP).³ Even these very brief descriptions may give some indication of the ideological differences separating the father from his son. Perhaps, if no other characters had been introduced into this King Lear-like “play,” the divide between father and son might not have become so apparent, or so public. The United States Government, another actor on the stage, significantly complicates this family dynamic. A father who might have been content to simply leave his son alone was forced to become his advocate before the U.S. Government. The father’s fight to save the life of his son began in 2010, after the U.S. Treasury Department’s Office of

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1. WILLIAM SHAKESPEARE, King Lear act 1, sc. 4. In King Lear, the King’s children engage in constant deceits and trickery toward their father and each other. The children plot alternatively to kill their father and each other as they become increasingly jealous. In the end, the evil plans of the children are thwarted, and all who engaged in them meet with untimely ends. The strain is more than the King can bear, and he leaves the throne to his one faithful son.

2. *Anwar al-Awlaki*, CHRISTIAN SCIENCE MONITOR (Aug. 31, 2010), <http://www.csmonitor.com/USA/Justice/2010/0831/Anwar-al-Awlaki-ACLU-wants-militant-cleric-taken-off-US-kill-list>.

3. WASHINGTON POST (Dec. 25, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/24/AR2009122400536.html>.

Foreign Assets Control (OFAC)⁴ labeled Anwar Al-Aulaqi a “Specially Designated Global Terrorist” (SDGT).⁵

Al-Aulaqi was born in New Mexico in 1971.⁶ He spent most of his early years in the United States; he attended college at Colorado State University and eventually received a master’s degree from San Diego State University.⁷ After college, he became an Imam⁸ at Rabat Mosque in San Diego, California, and later at Dar al Hijra Mosque in Falls Church, Virginia.⁹ Anwar was investigated by the FBI in 1999 and 2000, when the Bureau became aware that he had contacted Omar Abdel Rahman, known as “the blind sheik.”¹⁰ The investigation was later dropped due to insufficient evidence.¹¹ After September 11, however, the government re-opened its investigation because it discovered that Anwar had close connections with terrorists.¹² Federal investigators questioned Anwar regarding the attacks of September 11, 2001, and issued a felony arrest warrant.¹³ He narrowly avoided arrest in 2002, and was permitted to leave the United States when

4. United States Department of the Treasury, Office of Foreign Assets Control, <http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx>.

5. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 10 (2010). This designation was made on July 16, 2010. *Id.*

6. *Id.*

7. *Id.*

8. An “Imam” holds a position of leadership in the Islamic community, usually as the worship leader of a mosque, but often fulfills a position of political leadership as well. In the United States, an Imam often functions as a representative of the local Muslim community.

9. 911 Commission Report, Appendix A, http://govinfo.library.unt.edu/911/report/911Report_App.pdf (last visited March 3, 2013).

10. *How Anwar Awlaki Got Away*, ABC NEWS (Nov. 30, 2009), <http://abcnews.go.com/Blotter/FtHoodInvestigation/anwar-awlaki/story?id=9200720&page=1#.UIw7zcXoQk4>. Omar Abdel Raman is an Egyptian Cleric who was convicted for crimes related to the bombing of the World Trade Center in 1993. *Sheik Sentenced to Life in Prison in Bombing Plot*, NEW YORK TIMES (Jan. 18, 1996), <http://www.nytimes.com/1996/01/18/nyregion/sheik-sentenced-to-life-in-prison-in-bombing-plot.html>. Rahman was a charismatic leader who frequently denounced his home country, the United States, and Israel, for their opposition to the religion of Islam. *Id.* He was convicted on various conspiracy charges, and was sentenced to life in prison on January 17, 1996. *Id.*

11. *How Anwar Awlaki Got Away*, *supra* note 10.

12. *Id.*

13. ANTI-DEFAMATION LEAGUE: ANWAR AL-AWLAKI PROFILE (updated Nov. 2011), http://www.adl.org/main_Terrorism/anwar_al-awlaki.htm; *How Anwar Awlaki Got Away*, *supra* note 10. This warrant was issued not for terrorist activity, but for passport fraud committed by Anwar in the early 1990s when he applied for an F-1 federal student visa. *Id.*

authorities abruptly rescinded his arrest warrant.¹⁴ The facts surrounding the rescinding of his arrest warrant have not been explained.¹⁵ The action both astonished and infuriated agents who had worked long and hard to obtain the warrant for Anwar's arrest.¹⁶ After leaving the country, Anwar eventually settled in Yemen.¹⁷

Beginning in 2009, Anwar began taking on an operational role in AQAP—Al-Qaeda in the Arabian Peninsula.¹⁸ This operational role included facilitating the operations of terrorist training camps in Yemen and participating in the training of several high profile terrorists.¹⁹ There is evidence that Anwar instructed Umar Farouk Abdulmutallab, who tried to detonate a bomb on a Detroit-bound airliner on Christmas Day 2009.²⁰ Other evidence connects Anwar with another domestic terrorist, Nidal Malik Hasan, who carried out a mass shooting in November 2009 at Fort Hood Texas.²¹ The evidence indicates that Anwar and Hasan may have exchanged as many as eighteen emails prior to the shooting.²² Anwar made numerous public statements praising the actions of Abdulmutallab and Hasan, in which he referred to the two men as “his students” and encouraged others to take similar actions.²³ Anwar remained consistently belligerent about his betrayal of his country. In an interview broadcast in May 2010 by AQAP, he insisted that he “will never surrender,” even stating, “I have no intention of turning myself in to [the Americans]. If they want me, let them search for me.”²⁴

14. *Id.* The FBI and customs officials detained Anwar when he landed on a flight from Saudi Arabia to New York. *Id.* After a few hours, officials confirmed that the arrest warrant had been revoked, and Anwar was released. *Id.*

15. *How Anwar Awlaki Got Away*, *supra* note 10. The U.S. Attorney's Office in Denver, which was responsible for rescinding the warrant declined to comment on why this action was taken. *Id.*

16. *Id.*

17. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 10 (2010).

18. *Id.*

19. *Id.*

20. *Id.*

21. Nidal Malik Hasan, *NEW YORK TIMES* (Sept. 7, 2012), http://topics.nytimes.com/top/reference/timestopics/people/h/nidal_malik_hasan/index.html. Hasan, an Army psychiatrist, killed thirteen people and wounded 32 in the shooting at Fort Hood, Texas on November 5, 2009. *Id.*

22. *Al-Aulaqi*, 727 F. Supp. 2d at 10.

23. *Id.*

24. *Id.* at 11.

Anti-terrorism officials became increasingly concerned that Anwar might influence English-speaking audiences.²⁵ Anwar's familiarity with the psyche and attitudes of people in the West was a key concern for the administration.²⁶ In spite of the evidence against him, the United States did not, either before or after the decision handed down in *Al-Aulaqi v. Obama*,²⁷ publicly charge Anwar with any crime.²⁸ At the time of the *Aulaqi* decision, the Government would neither confirm nor deny whether it had placed Anwar on a "kill list."²⁹ Anwar had made clear, however, that he had no intention of making himself available for criminal prosecution in the United States.³⁰

On July 16, 2010, Anwar was labeled an SDGT³¹ on the grounds that he was "acting for or on the behalf of . . . AQAP," and that he was "providing financial, material or technological support for, or other services to or in support of, acts of terrorism."³² Now enters Nasser Al-Aulaqi, father/advocate extraordinaire. Nasser's work to save his son began in earnest after the SDGT designation.³³ According to Nasser, in addition to this designation, the government placed his son on a "kill list" maintained by the CIA and Joint Special Operations Command (JSOC).³⁴ He claimed that placement on the executive kill list took place after a "closed executive process" determined that "secret criteria" had been satisfied.³⁵ This methodology, alleged Nasser, violated the Due Process Clause.³⁶

25. *Id.*

26. *Id.*

27. *Id.* at 1. *Al-Aulaqi* was a civil case, not a criminal case. *Id.* The case was brought by Anwar's father Nasser Al-Aulaqi in an attempt to prevent the government from targeting his son for assassination without due process. *Id.*

28. *Id.* at 10.

29. *Id.* at 11. The "kill list," according to Nasser, gave the executive branch the power to unilaterally target Anwar for assassination. *Id.*

30. *Id.*

31. *Id.* at 10.

32. *Id.* (quoting Designation of Anwar Al-Alaqui Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594, 75 Fed. Reg. 43233 (July 16, 2010)).

33. *Id.* at 11. This gave Nasser at least some grounds for his claim that Anwar was a target of the CIA and JSOC.

34. *Id.*

35. *Id.*

36. *Id.* at 12. The Due Process Clause states: "[N]or [shall any person] be deprived of life, liberty, or property without due process of law. . . ." U.S. CONST. amend. V.

Nasser Al-Aulaqi sued President Barack Obama, Secretary of Defense Robert Gates, and Central Intelligence Agency (CIA) Director Leon Panetta.³⁷ The suit was on his behalf and on behalf of his son Anwar.³⁸ Nasser's purpose in bringing the suit was simple—to prevent the United States government from killing his son.³⁹ Nasser sought to enjoin all of the defendants from targeting Anwar for assassination “unless [Anwar] presents a concrete, specific, and imminent threat . . . and there are no means other than lethal force that could reasonably be employed to neutralize the threat.”⁴⁰ In his father's opinion, Anwar apparently did not present such a threat.

On December 7, 2010, the United States District Court in the District of Columbia rejected Nasser's requests in *Al-Aulaqi v. Obama*.⁴¹ The court granted the Government's motion to dismiss the case⁴² and held that the political question doctrine made the issue of executive kill-lists non-justiciable.⁴³ Nasser lost his legal battle for his son's life and chose not to appeal his case.⁴⁴ Nasser's greatest loss, however, came several months later.

On September 30, 2011, two unmanned Predator drones flew over the Yemen countryside, as a convoy traveled below.⁴⁵ Seconds later, Hellfire missiles launched by the drones screamed toward the vehicles in the convoy.⁴⁶ Anwar and three others died in the attack.⁴⁷ The Government's

37. *Al-Aulaqi*, 727 F. Supp. 2d at 1.

38. *Id.*

39. *Id.* at 8.

40. *Id.* (quoting Compl., Prayer for Relief (a)).

41. *Id.* at 54.

42. *Id.* at 9.

43. *Id.* at 43. This appeal to the political question doctrine is the main focus of this Note. The political question doctrine was improperly applied to allow the executive unprecedented latitude in decision-making. Consider: judicial approval is required in order to subject a U.S. citizen living overseas to electronic surveillance. *Id.* at 8. No judicial approval is required, however, when the executive determines that a U.S. citizen living overseas should be assassinated. *Id.* The discrepancy between these standards is clearly evident, and this Note will demonstrate that it is the result of improper application of the political question doctrine.

44. Subsequent to Anwar's death, Nasser filed another lawsuit, *Al-Aulaqi v. Panetta*, challenging the targeted killing itself. *Al-Aulaqi v. Panetta: Lawsuit Challenging Targeted Killings*, ACLU, <https://www.aclu.org/national-security/al-aulaqi-v-panetta> (last visited Oct. 26, 2013).

45. *Two U.S.-Born Terrorists Killed in CIA-Led Drone Strike*, FOX NEWS (Sept. 30, 2011), <http://www.foxnews.com/politics/2011/09/30/us-born-terror-boss-anwar-al-awlaki-killed/>.

46. *Id.*

quest to eliminate a dangerous terrorist was successfully completed, and a father's quest to save his son had ended, but hardly successfully. Like King Lear's quest to leave an inheritance for his children, Nasser Al-Aulaqi's quest was crushed.

The U.S. Government hailed the killing of Anwar Al-Aulaqi as a significant "milestone" in the effort to defeat Al-Qaeda and its affiliates around the world.⁴⁸ Anwar had become an increasingly vital part of AQAP, and, without a doubt, his death was a blow to Al-Qaeda and other terrorist organizations due to his unique understanding of Western and American culture.⁴⁹ Before examining the application of the political question doctrine, this Note will briefly describe the court's decision in *Al-Aulaqi v. Obama*.

II. BACKGROUND

A. *Al-Aulaqi v. Obama*

Nasser Al-Aulaqi brought his suit against the Obama administration because, according to Nasser, Anwar was "hiding under threat of death and [could not] access counsel or the courts to assert his constitutional rights without disclosing his whereabouts and exposing himself to possible attack by [the United States]."⁵⁰ This was in spite of the fact that Anwar did not try to vindicate his own constitutional rights—nor did he intend to do so.⁵¹ Nasser alleged that the United States government's policy of authorizing the killing of U.S. citizens outside of armed conflict violated Anwar's constitutional rights.⁵² Nasser's claim argued against the use of force "in circumstances in which [those targeted] do not present concrete, specific, and imminent threats to life or physical safety, and where there are means other than lethal force that could reasonably be employed to neutralize any such threat."⁵³

47. *Id.*

48. *Id.*

49. *Id.*

50. *Al-Aulaqi*, 727 F. Supp. 2d at 12 (quoting Compl. ¶ 6).

51. *Id.* at 10.

52. *Id.* at 12.

53. *Id.* (quoting Compl. ¶¶ 27–28).

1. Procedural Issues

Nasser sought declarative and injunctive relief.⁵⁴ He requested declarations that (1) the targeted killing of U.S. citizens outside of armed conflict, or within the exception of a “concrete, specific, and imminent threat,” is a violation of the Constitution,⁵⁵ and that (2) outside of armed conflict, “treaty and customary international law prohibit the targeted killing of all individuals—regardless of citizenship—except in those same, limited circumstances.⁵⁶ Nasser also requested injunctions (1) prohibiting the U.S. Government from intentionally killing Anwar, unless he presented a concrete, specific, and imminent threat, and there existed no other reasonable means of neutralizing the threat,⁵⁷ and (2) requiring the administration to disclose the criteria used to determine whether an American citizen will be targeted for assassination.⁵⁸

According to Nasser, the requested relief was necessary because the administration’s policies violated Fourth Amendment protections against unreasonable seizures,⁵⁹ Fifth Amendment Due Process protections,⁶⁰ and the Alien Tort Statute.⁶¹ Nasser also alleged that the government’s refusal to disclose the criteria by which it selects citizens for targeted killing is a violation of the notice requirement of the Fifth Amendment.⁶²

2. The Ruling

The court dismissed Nasser’s case⁶³ after hearing nearly three hours of oral argument from counsel.⁶⁴ The court held that Nasser lacked standing to bring suit⁶⁵ and failed to state a claim under the Alien Tort Statute⁶⁶ and also

54. *Id.* at 12.

55. *Id.* (quoting Compl. ¶¶ 21, 23).

56. *Id.* at 12 (quoting Compl. ¶ 6).

57. *Id.*

58. *Id.*

59. “The right of the people to be secure in their persons, houses, papers and effects shall not be violated” U.S. CONST. amend. IV.

60. U.S. CONST. amend. V.

61. *Al-Aulaqi*, 727 F. Supp. 2d at 12.

62. *Id.*

63. *Id.* at 54.

64. *Id.* at 13.

65. *Id.* at 35.

66. *Id.* at 35.

held that the issue was non-justiciable under the political question doctrine.⁶⁷

a. Standing

Nasser claimed that he had standing both as a third party and as Anwar's "next friend."⁶⁸ The court spent a large portion of the sixty-four pages of the decision analyzing and rejecting both of Nasser's theories of standing.⁶⁹ Two prerequisites must be met in order to qualify for standing as a "next friend."⁷⁰ First, the person seeking this status must provide an adequate explanation why the real party in interest cannot appear on his own behalf.⁷¹ Second, the next friend must be truly dedicated to the best interests of the real party in interest.⁷² There were several reasons why Nasser did not satisfy these requirements. The "inability to appear" prerequisite was not met because the court held that Anwar's unwillingness to appear before the court was not the same as an inability to do so.⁷³ The court observed that there was nothing preventing Anwar from presenting himself at the U.S. Embassy in Yemen, whereupon he would be accorded his constitutional rights.⁷⁴ The "best interests" prerequisite was not met due to Nasser's questionable ability to represent Anwar's "best interests," seeing that Anwar evidently had no desire to vindicate his constitutional rights.⁷⁵ The court held that Nasser could not be allowed to speculate about what was in Anwar's best interests.⁷⁶

Nasser also failed to meet the requirements for third party standing.⁷⁷ To satisfy these requirements, the litigant must meet three criteria: (1) the litigant must show that he *himself* has suffered a concrete injury sufficient to satisfy the "case-or-controversy" requirement; (2) that he is a close relation to the third party; and (3) that the third party's ability to protect his own

67. *Id.* at 52.

68. *Id.* at 15.

69. *Id.* at 14-35.

70. *Id.* at 16.

71. *Id.* at 16 (citing *Whitmore v. Arkansas*, 495 U.S. 149 at 163 (1990)).

72. *Id.* at 16.

73. *Id.* at 17.

74. *Id.*

75. *Id.* at 20.

76. *Id.*

77. *Id.* at 24.

interests is somehow hindered.⁷⁸ The court held that Nasser could not show that a parent “suffers an injury in fact when his adult son is threatened with a future extra-judicial killing”⁷⁹ and thus failed to meet the requirements for third party standing. Nasser’s case failed to meet the requirements for either type of standing.⁸⁰

b. The Alien Tort Statute

The Alien Tort Statute (ATS)⁸¹ was passed as part of the Judiciary Act of 1789.⁸² The ATS was intended to provide jurisdiction for a set of actions recognized at common law as “torts in violation of the law of nations.”⁸³ The court held that Nasser had to show both that the threat of a future killing of his son was a legally cognizable tort in violation of international law norms and that the United States had waived immunity for that type of claim.⁸⁴ In the opinion of the court neither element was satisfied.⁸⁵ The court held that the potential for a future extra-judicial killing was not a cognizable tort for the purpose of the statute.⁸⁶ Nasser also failed to show that the United States had waived its sovereign immunity for such claims.⁸⁷

c. The political question doctrine⁸⁸

“[E]ven if plaintiff has standing to bring his constitutional claims or states a cognizable claim under the ATS, his claims should still be dismissed

78. *Id.* at 23.

79. *Id.* at 25, n.6.

80. *Id.* at 35.

81. 28 U.S.C.A. § 1350 (1948).

82. *Al-Aulaqi*, 727 F. Supp. 2d at 35.

83. *Id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004)).

84. *Id.*

85. *Id.*

86. *Id.* at 37.

87. *Id.* at 35.

88. Though the two previous sections of the opinion encompass a vastly larger portion of Judge Bates’s analysis, it is the use of the political question doctrine on which this Note will focus. This is not to minimize the importance of the preceding issues. By comparison, however, the portion of the opinion focused on the political question is of greater relevance than the previous two. The political question doctrine has never before been used to justify the extra-judicial killing of a U.S. citizen. The closest analogy has been cases where property has been destroyed by the U.S. government. *E.g.*, *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 837–38 (D.C. Cir. 2010) (holding that the political question doctrine barred judicial review of the President’s decision to destroy a Sudanese pharmaceutical plant on evidence that it was linked to terrorism). The use of the doctrine in this manner is reason for pause, to say the least.

because they raise non-justiciable political questions.”⁸⁹ This is what the court concluded regarding the unilateral decision of the executive branch to target an American citizen for assassination. Traditionally, non-justiciable political questions are those questions that are excluded from judicial intervention because of the separation of powers enumerated in the Constitution.⁹⁰ The political question doctrine evolved to exclude from judicial review “those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”⁹¹ The precise contours of the doctrine remain “murky and unsettled.”⁹² Historically, the doctrine has been invoked in matters concerning national security, military matters, and foreign relations.⁹³ Such cases have been labeled “quintessential sources of political questions.”⁹⁴ “Matters related to foreign policy and national security are rarely proper subjects for judicial intervention.”⁹⁵ The D.C. Circuit explained in *El-Shifa*⁹⁶ that cases involving foreign policy and national security raise issues that “frequently turn on standards that defy judicial application.”⁹⁷ In this case, the court held that “[i]f the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President’s decision to launch an attack on a foreign target.”⁹⁸ The court claimed that, “just as in *El-Shifa*, any judicial determination as to the propriety of a military attack on Anwar Al-Aulaqi ‘would require this court to elucidate the standards that are to guide a president when he evaluates the veracity of military intelligence.’”⁹⁹ As this Note will discuss, the court’s

89. *Al-Aulaqi*, 727 F. Supp. 2d at 44, 52.

90. *Id.* (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

91. *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986).

92. *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008) (citations omitted).

93. *Al-Aulaqi*, 727 F. Supp. 2d at 45.

94. *Bacoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006).

95. *Haig v. Agee*, 453 U.S. 280, 292 (1981).

96. *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010).

97. *Id.* at 841 (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

98. *Al-Aulaqi*, 727 F. Supp. 2d at 47 (quoting *El-Shifa*, 607 F.3d at 844). The court glosses over the fact that the target in *El-Shifa* was a pharmaceutical manufacturing facility, and not a U.S. citizen. The two are qualitatively different. Pharmaceutical facilities are not specifically recognized in the Constitution as deserving of due process—United States citizens are.

99. *Id.* The court appears to create a straw-man argument, thereby overstating its case. The court would not be required to *elucidate* a standard, but simply *apply* that which already

analysis represents a break from the traditional view of the doctrine. The necessities of modern warfare are not such that traditional constitutional liberties must be suspended. To use the political question doctrine in this manner is to misunderstand its purpose, as its history demonstrates.

III. THE HISTORY OF THE POLITICAL QUESTION DOCTRINE

A. *The Origin of the Doctrine*

“Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”¹⁰⁰ The political question doctrine, invoked by the *Aulaqi* court, found its origin in *Marbury v. Madison*. *Marbury* established the principle that certain questions are by their nature outside the jurisdiction of the courts. “The province of the court is . . . not to enquire how the executive, or executive officers, perform duties in which they have a discretion.”¹⁰¹ The “question” at issue in *Marbury* was, of course, whether the Court could issue a writ of mandamus to compel the executive to fulfill his duty of granting a commission.¹⁰² For many years after *Marbury*, the doctrine was applied in diverse circumstances. In *Luther v. Borden*,¹⁰³ the Court affirmed the political question doctrine and explained the proper mode of redress for such questions.¹⁰⁴ “If it be asked what redress have the people if wronged in these matters . . . they have the same as in all other political matters . . . the ballot boxes, [and appeal] to the legislature or executive.”¹⁰⁵ In *Luther*, the Court determined that it was not for the judiciary to determine which of the two governments that claimed authority over the State of Rhode Island was

appears in the Constitution. “No person shall be . . . deprived of life . . . without due process of law.” U.S. CONST. amend. V.

100. *Marbury v. Madison*, 5 U.S. 137, 170 (1803).

101. *Id.* This quotation, without the ellipses, reads: “The province of the court is, *solely*, to decide the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.” *Id.* (emphasis added). This quotation prompts a question: If the executive or executive officer’s exercise of discretion violates the rights of an individual, what is the individual’s recourse? The decision in *Marbury* is based on the idea that there are principles of law that are superior to, and trump all other law.

102. *Id.* at 138.

103. *Luther v. Borden*, 48 U.S. 1 (1849).

104. *Id.* at 42 (holding that enforcement of the Guarantee Clause is left to Congress and the Executive).

105. *Id.* at 55 (Woodbury, J., dissenting).

the legitimate one.¹⁰⁶ The Court noted that because the Constitution placed the power to recognize the validity of a state government in Congress, such a decision by the Court would be “entirely inconsistent” with its constitutional and statutory grant of power.¹⁰⁷ The President of the United States exercised his congressionally vested power by recognizing the charter government as the valid one.¹⁰⁸ In light of these facts, the Court held that the issues involved could not be settled in a judicial proceeding.¹⁰⁹ The Court further expanded on the doctrine in *Coleman v. Miller*,¹¹⁰ which noted that dominant considerations in determining whether the doctrine applies include “the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination”¹¹¹ Even cases like *Coleman*, however, failed to lay out a clear standard or some clear list of factors for judicial consideration.

B. *Baker v. Carr and the Enunciation of the Doctrine*

The political question doctrine remained somewhat amorphous until 1961 when the Supreme Court decided *Baker v. Carr*.¹¹² In *Baker*, Tennessee residents brought a civil action for a declaration that a state apportionment

106. *Id.* at 42. The *Luther* case arose when Luther’s house was broken into and searched by agents of one of the two purported governments of the State of Rhode Island. *Id.* at 1. After the Revolution, the State’s charter government remained in place, and no new constitution was adopted. *Id.* The charter government retained control unchallenged until 1843, when a new constitution was framed and adopted (ostensibly by a majority of Rhode Island citizens). *Id.* The charter government declared martial law, and Luther’s home was invaded by officers of the charter government because he was labeled an “insurrectionist” as a supporter of the new government. *Id.* The Court declined to decide not only the question of which government was the valid one, but also the question of whether the majority vote claimed by the new government was valid. *Id.* at 2.

107. *Id.* Like *Marbury*, *Luther* appeals to “general principles of law” in order to explain precisely *why* the Court did not have jurisdiction. “[T]he American people adopted principles more especially adapted to their condition. They can be traced through the Confederation and the present Constitution” *Id.* at 30 (Webster, J., concurring). The judiciary was excluded from judgment on Rhode Island’s government based on principles of government that are extra-Constitutional, such as the principle that the people are the ultimate source of political power.

108. *Id.*

109. *Id.*

110. *Coleman v. Miller*, 307 U.S. 433 (1939).

111. *Id.* at 454.

112. *Baker v. Carr*, 369 U.S. 186 (1962).

statute was an unconstitutional deprivation of equal protection of the laws, for an injunction, and for other relief.¹¹³ The plaintiffs argued that the statute debased the value of their votes.¹¹⁴ The District Court dismissed the case for lack of subject matter jurisdiction, failure to state a claim upon which relief could be granted, and lack of standing.¹¹⁵ The Supreme Court disagreed on all counts.¹¹⁶ The Court reversed the ruling and remanded the decision back to the District Court, after giving the first ever in-depth analysis of the political question doctrine.¹¹⁷ Even the Court acknowledged early in its opinion that “the attributes of the doctrine . . . in various settings, diverge, combine, appear, and disappear in seeming disorderliness.”¹¹⁸ The Court noted that its precedent neither singly nor collectively supported a conclusion that this particular case was non-justiciable.¹¹⁹ The Court made clear, however, that it did not hold the question justiciable on the basis of the Guarantee Clause.¹²⁰ Rather, the Court found that the claim was justiciable because the plaintiffs had alleged a denial of equal protection and were entitled to a decision on these grounds.¹²¹

The *Baker* Court introduced a clear formulation of the factors that determine what constitutes a political question. Each political question has one or more of these factors that identify it as “essentially a function of the

113. *Id.* at 194–95.

114. *Id.* at 188.

115. *Id.*

116. *Id.* at 197–98.

117. *Id.* at 188.

118. *Id.* at 210.

119. *Id.*

120. *Id.* at 223. Since *Luther*, the Court has refused to resort to the Guarantee Clause as a source of standards for invalidating state action. *Id.* This is in spite of the fact that until *Baker*, the Guarantee Clause was the only clause of the Constitution that had been invoked for this purpose. *Id.* The Court cites a plethora of cases brought on Guarantee Clause grounds and held non-justiciable. See *Taylor v. Beckham*, 178 U.S. 548, 580 (1900) (holding that Kentucky’s resolution of its contested gubernatorial race was non-justiciable, in spite of the guarantee clause challenge); *Pac. States Tel. & T. Co. v. Oregon*, 223 U.S. 118, 151 (holding nonjusticiable the claim that a ballot initiative and referendum had negated republican government). The Court also notes that the Guarantee Clause cannot be used to nullify Congressional action that is inconsistent with the Clause. *Baker*, 369 U.S. at 224. In summary, the Court in *Baker* outright rejected the use of the Guarantee Clause to overcome the political question doctrine.

121. *Baker*, 369 U.S. at 237.

separation of powers.”¹²² At least one of the following is prominent on the surface of any case involving a political question: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving [the question]; (3) the impossibility of deciding [the question] without an initial policy determination of a kind clearly for non-judicial discretion; (4) the impossibility of a court’s undertaking independent resolution without expressing a lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹²³ “Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question’s presence.”¹²⁴ The Court made clear that this doctrine was one of “political questions,” not “political cases.”¹²⁵ “The Courts cannot reject . . . a bona-fide controversy as to whether some action denominated ‘political’ exceeds constitutional authority.”¹²⁶ It is important to note the “necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.”¹²⁷ The formulation of the political question doctrine found in *Baker v. Carr* has remained substantially intact. Since *Baker*, nearly every decision involving a political question has referenced and applied the six factors.¹²⁸

122. *Id.* at 217.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *See, e.g.*, *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010); *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005); *People’s Mojahadin Org. of Iran v. U.S. Dept. of State*, 182 F.3d 17 (D.C. Cir. 1999); *DKT Mem’l Fund, Ltd. v. Agency for Internal Dev.*, 810 F.2d 1236 (D.C. Cir. 1987); *Orlando v. Laird*, 443 F.2d 1039, 1044 (2nd Cir. 1971). The first two factors are the most commonly applied, and analysis often goes no further. The first two bear the greatest relevance to the most frequent subject of political question doctrine cases, namely matters of national security and foreign policy.

C. *Modern Applications of the Doctrine*

Since the decision in *Baker v. Carr*, the political question doctrine has been applied to a variety of subjects related primarily to national security and foreign relations. In *Orlando v. Laird*,¹²⁹ the Second Circuit applied the doctrine to a claim challenging the constitutionality of the Vietnam War.¹³⁰ In *Orlando*, two enlistees in the United States Army, Berk and Orlando, filed actions against the Secretary of Defense, the Secretary of the Army, and the commanding officers who signed their deployment orders.¹³¹ Berk and Orlando sought an injunction preventing the enforcement of those orders.¹³² These soldiers contended that these executive officers had exceeded their constitutional authority by deploying them to fight in a war that had not been properly authorized by Congress.¹³³ The soldiers requested, in the alternative, that the court rule that, because the President requested that Congress accelerate appropriations and conscriptions after military action was underway, the decision made by Congress was not made freely but was compelled by necessity.¹³⁴ The court noted that the war-declaring power constitutionally delegated to Congress does indeed express a discoverable and manageable standard for the judiciary to apply regarding a declaration of war.¹³⁵ Thus, consideration of the constitutionality of the war was not entirely foreclosed by the political question doctrine. The court held, however, that judicial scrutiny only properly extended to imposing on Congress the duty of mutual participation in the prosecution of war.¹³⁶ There was an abundance of evidence, the court held, that the war was being prosecuted with mutual participation of Congress and the Executive.¹³⁷

129. *Orlando v. Laird*, 443 F.2d 1039.

130. *Id.* at 1043.

131. *Id.* at 1040.

132. *Id.*

133. *Id.* The Vietnam War was never authorized by a Congressional declaration of war. After the Gulf of Tonkin incident (when a North Vietnamese ship purportedly fired on a United States Navy vessel, the U.S.S. *Maddox*), Congress passed the "Joint Resolution to Promote the Maintenance of Internal Peace and Security in Southeast Asia," commonly known as the "Tonkin Gulf Resolution." *Id.* at 1041. The government acted on the belief that this congressional authorization was sufficient to justify military action in Southeast Asia. *Id.*

134. *Id.*

135. *Id.* at 1042. The need for a "judicially discoverable and manageable standard" is the second criteria from *Baker*, and the lack of such a standard is perhaps the most frequent cause for invocation of the doctrine.

136. *Id.*

137. *Id.*

Nevertheless, the court went on to explain that the choice between an explicit declaration of war and war-implementing legislation as a medium of expressing congressional consent was indeed a political question demonstrably committed to the legislature.¹³⁸ The court held that it could use its power to ensure that the basic requirements of the Constitution were followed, but it could not second-guess the manner in which Congress and the Executive chose to manage the interplay between the branches.¹³⁹

Two years later, the Second Circuit was faced with a similar case, *DaCosta v. Laird*,¹⁴⁰ in which the plaintiff challenged a specific executive action ordering the mining of North Vietnam ports and harbors and the continuation of airstrikes in that country.¹⁴¹ Unlike Orlando, DaCosta acknowledged that the war itself was authorized by Congress but argued that the President's "unilateral escalation" of the war was not justified without additional authorization.¹⁴² The court dismissed this argument, reasoning that Congress, by not cutting off appropriations for the war, had taken a position that was outside of the judiciary's power to alter.¹⁴³ The court appealed to the lack of judicially "discoverable and manageable standards" to justify its decision, noting that "[j]udges, deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions . . . cannot reasonably or appropriately determine whether a specific military operation constitutes an 'escalation' of the war or is merely a new tactical approach within a continuing strategic plan."¹⁴⁴ These two cases are excellent expressions of the political question doctrine. From these cases, it is evident that the doctrine does not abrogate judicial duty to uphold the Constitution. In other words, no branch of government can use the doctrine as a shield against judicial examination of unconstitutional acts.¹⁴⁵

The principle that the political question doctrine does not inhibit the judiciary's role of upholding the Constitution was further illuminated in

138. *Id.* at 1043.

139. *Id.*

140. *DaCosta v. Laird*, 471 F.2d 1146 (2nd Cir. 1973).

141. *Id.* at 1146.

142. *Id.* at 1154 (internal quotation marks omitted).

143. *Id.* at 1157.

144. *Id.* at 1155.

145. It is the author's contention that this is what the court has allowed the executive to do in *Al-Aulaqi*.

DKT Memorial Fund, Ltd. v. Agency for Internal Development.¹⁴⁶ In *DKT Memorial Fund*, two non-government organizations (“NGOs”) challenged the legality of a U.S. government policy that prohibited the United States from contributing funds to foreign NGOs that perform or promote abortions in other nations.¹⁴⁷ The NGOs sought a declaratory judgment that the policy was a violation of, among other things, their rights under the First and Fifth Amendments.¹⁴⁸ The court held that a challenge to the government’s foreign policy decision in this context did not present a political question and was therefore justiciable.¹⁴⁹ “Appellants do not seek to litigate the political and social wisdom of [the government’s] foreign policy. They challenge the *legality* of [the implementation] of the Policy.”¹⁵⁰ The court further noted that: “[W]hereas attacks on foreign policymaking are nonjusticiable, claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs.”¹⁵¹ This is a principle that this Note will examine later—precedent demonstrates that the political question doctrine was never intended to obstruct the efforts of individuals to vindicate their constitutional rights.

Two more recent applications of the doctrine will demonstrate a developing trend in its use as a means of providing greater executive latitude in prosecuting the war on terror. In *People’s Mojahadin Organization of Iran v. U.S. Department of State*,¹⁵² the D.C. Circuit Court of Appeals dealt with two organizations that sued the Department of State to protest their classification as terrorist organizations.¹⁵³ Congress had granted the Secretary of State the authority to make such designations.¹⁵⁴

146. *DKT Mem’l. Fund, Ltd. v. Agency for Internal Dev.*, 810 F.2d 1236 (D.C. Cir. 1987).

147. *Id.* at 1237.

148. *Id.* at 1237–38.

149. *Id.* at 1238.

150. *Id.* (emphasis added).

151. *Id.* (citing *Population Inst. v. McPherson*, 797 F.2d 1062, 1068–70 (D.C. Cir. 1986)).

152. *People’s Mojahadin Org. of Iran v. U.S. Dept. of State*, 182 F.3d 17 (D.C. Cir. 1999).

153. *Id.* at 18–19.

154. This authority was granted by 8 U.S.C.A. § 1189, the “Antiterrorism and Effective Death Penalty Act.” This legislation gave the Secretary of State the authority to make findings (on whatever evidence was available) that a foreign organization was engaged in terrorist activities and was a threat to the national security of the United States. *People’s Mojahadin*, 182 F.3d at 19 (citing 8 U.S.C.A. § 1189(a)(2)(A)(i)(2004)). Ironically, given the court’s decision, the statute specifically provided not only for congressional review of the Secretary’s designations, but judicial review as well. *Id.* (citing 8 U.S.C.A. §

The court remarked that the statute involved was unique, both procedurally and substantively, in that it allowed for no adversarial hearing and no presentation of what courts and agencies ordinarily refer to as “evidence.”¹⁵⁵ In spite of the unique statutory provisions and unconventional administrative processes, the court concluded that the question of whether a particular organization threatens the security of the United States is non-justiciable.¹⁵⁶ The court reasoned that the Secretary’s decision was based on the quality of the information she received, and the court had no way of making a determination about such information.¹⁵⁷ Even more recently, the doctrine was applied specifically to covert operations in other nations.¹⁵⁸ In *Schneider v. Kissinger*, decided in 2005, the D.C. Circuit ruled on the claims of Rene and Raul Schneider, sons of the deceased Chilean General Rene Schneider.¹⁵⁹ General Schneider was killed in a coup in 1970, a coup allegedly carried out with the direct support of the CIA.¹⁶⁰ In its application of the *Baker* factors, the court found that it could not undertake to analyze the government’s use of covert operations without “defin[ing] a standard for the government’s use of covert operations in conjunction with political turmoil in another country.”¹⁶¹ The court further noted that “[t]here are no [judicially] discoverable and manageable standards for the resolution of such a claim.”¹⁶²

In analyzing these cases, two principles warrant attention. First, when observing the use of the doctrine, it is easy to see what the Supreme Court recognized in *Davis v. Bandemer*¹⁶³ when it noted the danger of “transform[ing] the narrow categories of ‘political questions’ that *Baker v. Carr* carefully defined into an ad hoc litmus test of [a court’s] reactions to

1189(b)(2)(2004)). The evidence on which the determination was to be made could consist of information from any source, compiled in an “administrative record.” *Id.*

155. *Id.*

156. *Id.* at 23.

157. *Id.* at 25. The method for the classification in this case is nearly identical to that analyzed in *Al-Aulaqi*. One major difference is the effect that the classification could have on its subject. In *People’s Mojahadin*, the result of the classification was the freezing of assets, the punishment of those who offer support to the group, and other similar penalties. *Id.* In *Al-Aulaqi*, the result was assassination.

158. *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005).

159. *Id.* at 191.

160. *Id.* at 192.

161. *Id.* at 197.

162. *Id.*

163. *Davis v. Bandemer*, 478 U.S. 109 (1986).

the desirability of and need for judicial application of constitutional or statutory standards to a given type of claim.”¹⁶⁴ There can be little doubt that there are properly justiciable issues that are not simple or convenient for the judiciary to manage. In situations like those we have analyzed, the decisions made by the court have the potential to conflict with decisions of another branch of government. As *Baker* noted, one of the factors that the courts must take into account is the “impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government.”¹⁶⁵ Here we see a dilemma: the courts cannot use the doctrine as a cover for neglecting their function of upholding the Constitution, nor can the executive branch use the doctrine as a “get out of court free” card, thereby avoiding a proper level of judicial scrutiny. The political question doctrine should be used by the judiciary to police its own jurisdiction but cannot be used as an excuse to simply stand by when the executive and legislative branches violate procedural safeguards guaranteed in the Constitution.¹⁶⁶ If the role of the judiciary, like each of the other branches of government, is to uphold the Constitution, what result when one branch of government is not upholding the Constitution, or is at the very least in a constitutional “grey area?”

Second, though the doctrine rightfully holds a respected place in American Constitutional law, it has never been used to justify judicial non-intervention in a constitutional issue like the one at stake in *Al-Aulaqi*—an American citizen’s right to due process before he is deprived of life, liberty, or property.¹⁶⁷ Protecting the right at question in *Al-Aulaqi*, the right to be charged, tried, and convicted before execution, is perhaps the foremost role of the judiciary. Has the judiciary abandoned this function, or is it simply adapting to the necessities of the modern technological warfare? Regardless of the necessities of modern warfare, there are some constitutional protections that cannot be allowed to fall by the wayside. Alexander Hamilton observed, “Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. . . . To be more safe[, the people], at length,

164. *Id.* at 126.

165. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

166. “[D]eference rests on reason, not habit. . . . (A) Court is not at liberty to shut its eyes to an obvious mistake.” *Baker*, 369 U.S. at 213–14 (quoting *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547–48 (1924)).

167. U.S. CONST. amend. V.

become willing to run the risk of being less free.”¹⁶⁸ Justice Scalia, commenting on this passage, remarked, “The Founders warned us about the risk, and equipped us with a Constitution designed to deal with it.”¹⁶⁹

IV. THE WAR ON TERROR

The war on terror has created novel military and intelligence dilemmas. These dilemmas have resulted in a war that is being fought in an increasingly large constitutional grey area.¹⁷⁰ There are several reasons for this, most obvious being the unique nature of the enemies the United States faces in this war on terror. Terrorists, who are increasingly difficult to identify and locate, have an increasingly potent ability to cause death and devastation to thousands, perhaps millions, of people. Advances in weapons and communications technology have made each individual terrorist a potentially vital part of the terror network.¹⁷¹ Even a single highly skilled computer programmer has the potential ability to wreak havoc on entire governments.¹⁷² Conventional methods of warfare, based in a time when each individual soldier was more or less a dispensable part of an overall structure, are ineffective at combating this threat. The government has taken this into account and has adapted to meet the changing threat. The approach to warfare adopted by the United States has become increasingly unconventional, particularized, and tailored to the amorphous nature of the enemy.¹⁷³ Concomitant to this approach has been an unprecedented and

168. THE FEDERALIST NO. 8 (Alexander Hamilton).

169. *Hamdi v. Rumsfeld*, 542 U.S. 507, 579 (2004) (Scalia, J. dissenting).

170. These conundrums have resulted in a vast increase of Federal power, such as presidential war-making powers, domestic surveillance, and detention and interrogation of suspects.

171. *Criminals and Terrorists in a Borderless, Technological Arms Race*, FORBES MAGAZINE (July 14, 2012), <http://www.forbes.com/sites/singularity/2012/07/14/criminals-and-terrorists-in-a-borderless-technological-arms-race/>.

172. *F.B.I. Director Warns Congress About Terrorist Hacking*, THE NEW YORK TIMES (March 7, 2012), <http://www.nytimes.com/2012/03/08/us/fbi-director-warns-about-terrorist-hacking.html>.

173. There is a certain irony in the fact that it is precisely the *indiscriminate* nature of the manner in which terrorists make war that makes highly *discriminate, particularized* response a necessity. One individual or group can target thousands, demanding a government response against individuals who are often acting outside of any established government. In order to avoid collateral damage, the government response is often specifically targeted at an individual or small group.

unfortunate potential for public acceptance of improper restrictions on freedom.¹⁷⁴

The Supreme Court has noted that rules of constitutional law should be adopted only with great caution when they could “inhibit the flexibility of the political branches of government to respond to changing world conditions.”¹⁷⁵ The Court has also recognized that “an area concerning foreign affairs that has been uniformly found appropriate for judicial review is the protection of individual or constitutional rights from government action.”¹⁷⁶ “This protection of the individual unquestionably extends to cases involving the United States Government action taken against our own citizens abroad.”¹⁷⁷ Here we see the crux of the issue presented in *Al-Aulaqi v. Obama*: to what extent can or should necessity or the need for “flexibility” be allowed to dictate policy? Perhaps more fundamentally, should circumstances dictate how we view and interpret the Constitution? This question must control our analysis of the political question doctrine. The next subsections will examine the doctrine in light of these questions as it has been applied during the war on terror.

A. *Indefinite Detention*¹⁷⁸

“[T]he political question doctrine does not preclude judicial review of prolonged Executive detention predicated on an enemy combatant determination because the Constitution specifically contemplates a judicial

174. Public acceptance of restrictions on freedom begins slowly, as we limit the freedoms of *others*, in this case terrorists. Without a clear *constitutional* basis for limiting the freedom of anyone, necessity will cause us, as Alexander Hamilton noted, to allow restrictions for the sake ensuring our safety. The erosion of freedom often begins by limiting the rights of those perceived as a threat. After the people begin to tolerate infringements on the rights of those who are considered a threat, all that is required for further erosion is the redefinition of who constitutes a “threat.”

175. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

176. *Flynn v. Shultz*, 748 F.2d 1186, 1191 (1984) (citing *Mathews*, 426 U.S. at 81–82, 96).

177. *Id.* (citing *Reid v. Covert*, 354 U.S. 1, 5 (1957)).

178. Indefinite detention has been analyzed primarily under the Suspension Clause (U.S. CONST. art. 1, § 9, cl. 2) not under the political question doctrine. Courts properly view the issue of detention as being specifically committed to the judicial branch. See *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Political question receives little explicit discussion in these cases. Implicitly, however, there is significant overlap between political question analysis, and the determination of whether the judicial branch can overrule both Executive and Legislative claims of autonomy on this issue.

role in this area.”¹⁷⁹ “The [Suspension] Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.”¹⁸⁰ In *Boumediene v. Bush*, the Supreme Court was presented with the claim of alien terrorists who were detained at Guantanamo Bay, Cuba,¹⁸¹ after being captured abroad and designated enemy combatants by a “Combatant Status Review Tribunal” (“CSRT”).¹⁸² The detainees sought a writ of habeas corpus.¹⁸³ The question before the Supreme Court was whether aliens at Guantanamo were entitled to the constitutional privilege of habeas corpus, in spite of a congressional decision to the contrary.¹⁸⁴ In 2005, Congress passed the Detainee Treatment Act (“DTA”), which provided procedures for review of a detainee’s status.¹⁸⁵ Specifically, § 1005(e) of the DTA amended 28 U.S.C. § 2241 to establish that “no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.”¹⁸⁶ The Court held that this provision did not apply to cases (like that in *Boumediene*) pending when the DTA was enacted.¹⁸⁷ Congress responded by again amending § 2241 to disallow any habeas petitions from Guantanamo.¹⁸⁸ The Court held that this constituted an unconstitutional suspension of the writ,¹⁸⁹ and that art. I, § 9, cl. 2 of the Constitution (the “Suspension Clause”) has full effect at Guantanamo Bay.¹⁹⁰ Congress did not purport to formally suspend the writ, and the Court held that, without a

179. *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 848 (D.C. Cir. 2010) (citing *Boumediene*, 553 U.S. at 745 (2008)).

180. *Boumediene*, 553 U.S. at 745.

181. Because the United States Naval Base at Guantanamo Bay is outside of the sovereign territory of the United States, lower courts held that they did not have jurisdiction over claims originating there. See *Rasul v. Bush*, 215 F. Supp.2d 55 (2002); *Al Odah v. United States*, 321 F.3d 1134 (2003). When *Rasul* was appealed, the Supreme Court held that U.S. courts have jurisdiction over Guantanamo Bay, reading 28 U.S.C. § 2241 to extend statutory habeas corpus jurisdiction to Guantanamo. See *Rasul v. Bush*, 542 U.S. 466, 473 (2004).

182. *Boumediene*, 553 U.S. at 723, 732.

183. *Id.* at 732.

184. *Id.* at 732–33.

185. *Id.*

186. *Id.* at 735 (quoting 119 Stat. 2742).

187. *Id.*

188. *Id.*

189. *Id.* at 732.

190. *Id.* at 771.

formal suspension, Congress could not deny the privilege of habeas corpus to detainees.¹⁹¹ The Court noted that indefinite imprisonment, even on reasonable suspicion, was simply not an available option of treatment for those accused of aiding the enemy.¹⁹²

The Court held that it could not “impose a *de facto* suspension by abstaining from [the] controversy,” noting that “abstention is not appropriate in cases . . . in which the legal challenge ‘turn[s] on the status of the persons as to whom the military asserted its power.’”¹⁹³ After first determining that the Court could not abstain from involvement in the controversy (implicitly recognizing the absence of a political question), the Court examined the government’s next argument: that Congress had provided adequate substitute procedures for habeas corpus and, thus, was in compliance with the Suspension Clause.¹⁹⁴ Even though the Court of Appeals did not see fit to address this issue in earlier proceedings, the Supreme Court found the circumstances to be of an “exceptional” nature sufficient to warrant a departure from its general rule of declining to address issues left unresolved in the lower courts.¹⁹⁵ The Court observed the historical reticence of Congress regarding suspensions of the writ.¹⁹⁶ Unlike any previous modifications of the Suspension Clause, the statutes in question in *Boumediene* did not attempt to merely streamline habeas review but attempted to *circumscribe it entirely*.¹⁹⁷ The Court concluded that it would not “endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus.”¹⁹⁸ We do consider it “uncontroversial, however, that habeas privilege entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to

191. *Id.*

192. *Id.* (citing to *Hamdi v. Rumsfeld*, 542 U.S. 507, 654 (2004)).

193. *Id.*

194. *Id.* at 771–72.

195. *Id.* at 772.

196. *Id.* at 773–74. The Court noted several exceptions to the usual hesitance to suspend the writ, such as Title I of the Antiterrorist and Effective Death Penalty Act of 1996 (AEDPA) § 106, which restricts the ability of prisoners to bring successive habeas corpus claims. *Id.* at 774. These provisions were upheld by the Supreme Court. *Id.* (quoting *Felker v. Turpin*, 518 U.S. 651, 662–64 (1996)). The *Boumediene* Court observed, however, that the substituted procedures in *Felker* were not a substantial departure from the common law, but simply codified the longstanding “abuse-of-the-writ” doctrine. *Id.*

197. *Id.* at 776.

198. *Id.* at 779.

‘the erroneous application or interpretation’ of relevant law.”¹⁹⁹ The Court further noted that “the habeas court must have the power to order the conditional release of an individual unlawfully detained.”²⁰⁰ Common law habeas corpus “was, above all, an adaptable remedy [the] precise application and scope [of which] changed depending upon the circumstances.”²⁰¹

Most relevant to the analysis of extra-judicial assassination, the *Boumediene* Court noted that “[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing.”²⁰² Because “these dynamics [of a disinterested judicial hearing or trial] are not inherent in executive detention orders or executive review procedures,” the courts must have authority to conduct a meaningful review of both the cause for detention and the executive’s power to detain.²⁰³ *Boumediene* held that, subject to certain factors, even non-citizen enemy combatants are protected by the Suspension Clause and have the right of habeas corpus.²⁰⁴

The Court has rightly gone to great lengths to protect the right of habeas corpus enshrined in the Constitution, overruling the policy decisions of both Congress and the President in the process.²⁰⁵ In *Hamdan v. Rumsfeld*,²⁰⁶ the Court explained that even though the president had determined that it was impractical to apply the same standard to military commissions as to United States courts, simply appealing to the danger of international terrorism was insufficient to justify a departure from the

199. *Id.* at 728–29.

200. *Id.* at 729.

201. *Id.* at 779.

202. *Id.* at 783.

203. *Id.* The Court found that in order to determine the necessary scope of review, it could assess the CSRT review process and the mechanism through which the designation as enemy combatants becomes final. *Id.*

204. *Id.* at 766. The Court established the relevance of “at least three” factors in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee, and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ. *Id.*

205. *Id.* at 795 (holding 28 U.S.C. § 2241(e) unconstitutional); *Hamdan v. Rumsfeld*, 548 U.S. 557, 623–25 (2006) (holding that policies established under the Detainee Treatment Act of 1996, and specific policy determinations made by the President violated the Uniform Code of Military Justice and the Geneva Conventions).

206. *Hamdan*, 548 U.S. 557.

ordinary process.²⁰⁷ After examining *Boumediene* and *Hamdan*, the comparison between the rights afforded to a non-citizen enemy combatant and those of a citizen designated a terrorist is striking. Lakhdar Boumediene, as a non-citizen terrorist, was entitled to have his case heard by a disinterested judge or jury in order for the administration to continue his detention.²⁰⁸ Anwar Al-Aulaqi, as an American citizen living in Yemen, was never charged with a crime but was targeted for assassination and killed with *no judicial recourse*.²⁰⁹ At the very least, this discrepancy is concerning. Can it really be that a non-citizen detainee is entitled to greater procedural safeguards than a United States citizen living overseas who has never been charged with a crime?

B. *Destruction of Property*

“Whether the circumstances warrant a military attack on a foreign target is a ‘substantive political judgment . . . entrusted expressly to the coordinate branches of government.’”²¹⁰ “[T]he political question doctrine does not permit us to mimic the constitutional role of the political branches by guessing how they would have conducted the nation’s foreign policy had they been better informed.”²¹¹ In *El-Shifa*, the United States Court of Appeals for the District of Columbia was presented with the claim of the owners of a Sudanese pharmaceutical plant.²¹² The owners claimed that their plant had been destroyed unjustifiably, because the plant had no connection to terrorists.²¹³ In a letter to Congress, President Clinton reported that the strikes “were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities” and “were intended to prevent and deter additional attacks by a

207. *Id.* at 623.

208. *Boumediene*, 553 U.S. at 783.

209. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 44 (2010).

210. *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 845 (D.C. Cir. 2010) (quoting *Gilligan v. Morgan*, 413 U.S. 1 (1973)).

211. *Id.*

212. *Id.* at 837.

213. *Id.* The missile strike on the pharmaceutical plant was undertaken simultaneously with a similar attack on a terrorist training camp in Afghanistan. *Id.* at 838. These strikes were carried out on August 20, 1998 in response to the bombing of United States embassies in Kenya and Tanzania by Osama bin Laden’s network two weeks previous. *Id.* The factory in Sudan was believed to be associated with the bin Laden network and involved in the manufacture of chemical weapons material. *Id.*

clearly identified terrorist threat.”²¹⁴ According to the plaintiff, the press quickly debunked the President’s claim that the plant was manufacturing chemical weapons or associated with Osama bin Laden.²¹⁵ Because of this, the plaintiffs pursued a lawsuit in order to recover their losses.²¹⁶ The plaintiffs alleged that the justifications for the attack were “based on false premises and were offered with reckless disregard of the truth based upon grossly incomplete research and unreasonable analysis of inconclusive intelligence.”²¹⁷ Within days, administration officials began retracting or revising their statements regarding the extent and strength of the evidence connecting the plant with Osama bin Laden.²¹⁸ The plaintiffs brought suit after the CIA rejected their requests for compensation.²¹⁹

The Court held that it was not “a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security.”²²⁰ The court distinguished, however, between claims that require the court to “decide whether taking military action was ‘wise’-‘a policy choice’” and “claims presenting purely legal issues such as whether the government had legal authority to act.”²²¹ The *El-Shifa* court pointed out that a plaintiff cannot “clear the political question bar simply by ‘recasting [such] foreign policy and national security questions in tort terms.’”²²² The plaintiff’s comparison of their case to *Boumediene* and *Hamdi* did not convince the court that the issues involved were similar. *Boumediene* and *Hamdi* were justiciable, the court held, “because the Constitution specifically contemplates a judicial role in th[e] area [of detainee’s rights].”²²³ The court noted that, “while the presence of constitutionally protected liberties could require us to address limits on the foreign policy and national security powers assigned to the political

214. *Id.* at 838.

215. *Id.* at 839.

216. *Id.* The amount claimed by the owners was \$50 million as just compensation under the Takings Clause of the Constitution. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 842.

221. *Id.*

222. *Id.* at 842–43 (quoting *Schneider*, 412 F.3d at 197 (explaining that courts could not determine whether taking military action was “wrongful” as an element of a wrongful death claim)).

223. *Id.* at 848.

branches,” the plaintiffs could “point to no . . . constitutional commitment to the courts for review of a military decision to launch a missile at a foreign target.”²²⁴ The plaintiffs were unable to recover for the destruction of their factory.²²⁵

Though both the right to property and the right to life are enshrined in the Fifth Amendment, they are not on an entirely equal plane.²²⁶ Indeed, one is a prerequisite for the other. Blackstone referred to property as the “third absolute right,” behind the right to life and liberty.²²⁷ If Blackstone is correct, it follows that the right to life is deserving of a greater level of protection than that extended to property rights in *El-Shifa*. The writers of our Constitution, being well-acquainted with Blackstone, protected the right to life with greater specificity than the right to property.²²⁸ The *El-Shifa* court held that the presence of a constitutionally protected liberty could require courts to address limits on the foreign policy and national security powers assigned to the political branches.²²⁹ Is there no constitutionally protected liberty applicable to the assassination of a United States citizen who was never charged with a crime? In Judge Bates’s decision in *Al-Aulaqi v. Obama*, he poses the question: “[h]ow is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that . . . judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death?”²³⁰ How, indeed?

C. *The Necessity of the Political Question Doctrine in the War on Terror*

The political question doctrine, as it relates to the war on terror, serves a vital purpose. The *Al-Aulaqi* court explained, as have many other courts

224. *Id.* at 849.

225. *Id.* at 859.

226. Luigi Marco Bassani, *Life, Liberty, and . . . : Jefferson on Property Rights*, 18.1 JOURNAL OF LIBERTARIAN STUDIES 31, 58 (2004) (discussing Thomas Jefferson’s view that the right to property was secondary to the right to life), http://mises.org/journals/jls/18_1/18_1_2.pdf.

227. *Id.*

228. The right to life (and concomitantly, to liberty) is protected by a plethora of procedural safeguards in the Fourth, Fifth, and Sixth Amendments. By comparison, the right to property is protected by the broader assurances of Due Process of law, and just compensation.

229. *El-Shifa*, 607 F.3d at 849.

230. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 8 (2010).

applying the political question doctrine to battlefield situations, that the judiciary is “institutionally ill-equipped to ‘assess the nature of battlefield decisions.’”²³¹ In particular regarding the use of covert operations, the judiciary is ill equipped to define a standard for their use.²³² This assessment is especially relevant to the war on terror, due to the unique nature of the enemy the United States faces. Terrorists blend in with local populations and constantly shift their bases of operation, making secrecy a key component of any efforts to eradicate terrorism.²³³ The Founders recognized the need for executive latitude in protecting the nation. This power “ought to exist without limitation . . . [b]ecause it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.”²³⁴ “Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks.”²³⁵ The executive is particularly suited to prosecute the war on terror because “[d]ecision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number.”²³⁶ The Supreme Court has long recognized and respected this function of the executive, noting that the president has the authority “to employ [the Nation’s Armed Forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy.”²³⁷ The Court has also recognized that “[s]ecrecy in respect of information gathered by [confidential sources] may be highly necessary, and the premature disclosure of it productive of harmful results,”²³⁸ and that it would be “intolerable that courts . . . should review and perhaps nullify actions of the Executive taken on information properly held secret.”²³⁹ There can be little

231. *Id.* at 45 (citing *DaCosta v. Laird*, 471 F.2d 1146, 1155 (2nd Cir. 1973)).

232. *Id.*

233. See CENTRAL INTELLIGENCE AGENCY, NATIONAL STRATEGY FOR COMBATING TERRORISM (February, 2003) https://www.cia.gov/news-information/cia-the-war-on-terrorism/Counter_Terrorism_Strategy.pdf.

234. *Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (2004) (quoting THE FEDERALIST NO. 23, (Alexander Hamilton)).

235. *Id.* (quoting THE FEDERALIST NO. 70, (Alexander Hamilton)).

236. *Id.* at 581.

237. *Fleming v. Page*, 50 U.S. 603, 615 (1850).

238. *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1972).

239. *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

doubt that the political question doctrine is particularly applicable to the war on terror. It is vital that the executive be free from judicial review of the implementation of the specific strategies and tactics that he believes necessary to defend the nation against this peculiar threat. Nevertheless, as the Supreme Court has noted, when the doctrine is invoked as a judicial “reaction . . . to the desirability of . . . judicial application of constitutional or statutory standards to a given type of claim,” the court has abused the doctrine.²⁴⁰

D. *The Unconstitutional Expansion of the Scope of the Political Question Doctrine in the War on Terror*

The *Al-Aulaqi* court noted that “this Court does not hold that the Executive possesses ‘unreviewable authority to order the assassination of any American whom he labels an enemy of the state.’”²⁴¹ Somewhat enigmatically, the court continued: “[r]ather the court only concludes that it lacks the capacity to determine whether a specific individual in hiding overseas . . . presents such a threat to national security that the United States may authorize the use of lethal force against him.”²⁴² The *Al-Aulaqi* court “readily acknowledges,” however, that it is a “drastic measure” for the United States to employ lethal force against one of its own citizens abroad.²⁴³ It seems that the court made the following mystifying distinction: though there are instances when the power of the executive to terminate an American citizen could be reviewed, the “drastic measure” of the use of lethal force against an American claimed to be a national security threat hiding overseas is not such an instance. The court has created a meaningless distinction. When a citizen has been assassinated, the court’s assurance that there are certain instances in which he would have been entitled to due process before being targeted by his own government is hardly comforting. Given that neither the *Al-Aulaqi* court nor the executive branch was willing to illuminate the criteria it used to make the decision to target a citizen, the hypothetical distinction is meaningless. Additionally, in a case where a “specific individual in hiding overseas . . . presents . . . a threat to national security,”²⁴⁴ there is nothing to motivate the executive branch to work

240. *Davis v. Bandemer*, 478 U.S. 109, 126 (1986).

241. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 52 (2010).

242. *Id.*

243. *Id.*

244. *Id.*

through the traditional channels required to authorize capturing, detaining, or even monitoring a suspected terrorist when, without any further ado, it can order that individual targeted for assassination.²⁴⁵

The *Al-Aulaqi* court noted that the plaintiff was asking the court to do exactly what the *El-Shifa* court prohibited: assess the merits of the President's decision to launch an attack on a foreign target.²⁴⁶ The court cavalierly dismissed the fact that the foreign target in this case "happens to be" a U.S. citizen, holding that this fact was irrelevant in the context of the *El-Shifa* rationale.²⁴⁷ The court similarly dismissed "the mere fact" that the target of military action was an individual rather than enemy property.²⁴⁸ The court's out-of-hand dismissal of these relevant facts is not consistent with the Supreme Court's analysis of similar scenarios. In *Flynn v. Shultz*,²⁴⁹ the Court noted that "[judicial] protection of the individual unquestionably extends to cases involving United States Government action taken against our own citizens abroad"²⁵⁰ and that judicial review for the protection of the individual has been "uniformly found appropriate."²⁵¹ Not only does the citizenship status of the targeted individual distinguish him from prior case law that applies the political question doctrine, it indicates that the situation requires a different framework of analysis than that applied to detainees, non-citizen terrorists, or destruction of property.²⁵²

The political question doctrine was applied incorrectly in the case of *Al-Aulaqi v. Obama*. The traditional *Baker* criteria to which the court appealed—the constitutional commitment of the issue to another branch and the lack of judicially manageable standards—are not applicable to the issue of extra-judicial assassination of United States citizens. There are two major reasons why the use of the political question doctrine was improper in this case. The first major reason is that the court either selectively applies or entirely avoids relevant political question doctrine precedent. The second

245. The *Al-Aulaqi* court queried how it could be that there more procedural safeguards when the United States targets an individual overseas for surveillance than when an individual is targeted for assassination. *Id.* at 8. The court appears content to leave this question unanswered.

246. *Id.* at 47.

247. *Id.*

248. *Id.* at 48.

249. *Flynn v. Shultz*, 748 F.2d 1186 (1984).

250. *Id.* at 1191 (citing *Reid v. Covert*, 354 U.S. 1 (1984)).

251. *Id.* (citing *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976)).

252. The relevant framework for dealing with an issue of the right to life of an American citizen is committed to the judicial branch in the form of the Fifth Amendment.

major reason is that the application is inconsistent with the origin and historical purpose of the political question doctrine.²⁵³ Regarding the first reason, there are four ways in which the *Al-Aulaqi* decision incorrectly applies judicial precedent regarding the political question doctrine.

First, the political question doctrine does not preclude judicial review of extra-judicial assassination because there is a “specifically contemplated judicial role in this area.”²⁵⁴ The Fifth Amendment’s declaration that “[n]o person shall be . . . deprived of life . . . without due process of law” is strong evidence that the Founders intended that the judiciary should intervene when a citizen is faced with execution.²⁵⁵ Historically, the Due Process Clause “has been applied to [any] deliberate decisions of government officials to deprive a person of life, liberty, or property.”²⁵⁶ This is the very purpose of the Due Process requirement—to require that the government “follow appropriate procedures when its agents decide to ‘deprive any person of life, liberty, or property.’”²⁵⁷ The *Al-Aulaqi* court abdicated this essential judicial role in its decision. The court used the words “due process” exactly ten times in an opinion that spanned sixty-four pages and included near thirty-thousand words.²⁵⁸ Of these references, four are used to simply list the allegations in Nasser’s complaint.²⁵⁹ Five of the references are to procedural due process in the context of Nasser’s standing, or lack thereof, as a third party or next friend.²⁶⁰ The one remaining reference appears in a citation parenthetical.²⁶¹ Even though Nasser’s allegations contained specific reference to the rights guaranteed by the Due Process Clause,²⁶² the court did not find it necessary to discuss those rights. The due process clause “serves to prevent governmental power from being used for purposes of oppression,” specifically by “barring certain government actions regardless of the fairness of the procedures used to implement

253. See *supra* Part III.A.

254. *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 848 (D.C. Cir. 2010).

255. U.S. CONST. Am. V.

256. *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (discussing the Due Process Clause of the Fourteenth Amendment).

257. *Id.*

258. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 1–64 (2010).

259. *Id.* at 12, 15.

260. *Id.* at 26–28.

261. *Id.* at 50.

262. *Id.* at 12 (citing Compl. ¶¶ 27–28, 30).

them.”²⁶³ The Clause is rendered defunct, however, when a court omits any discussion of it. The Supreme Court has said that “history reflects the traditional and common-sense notion that the Due Process Clause . . . ‘was intended to secure the individual from the arbitrary exercise of the powers of government.’”²⁶⁴ If this is true, then by ignoring the clause, the *Al-Aulaqi* court neglected both tradition and common sense.

Second, like the decision of the *Boumediene* Court regarding detention, when a person is sentenced to death by executive order, rather than by an impartial magistrate, “the need for collateral review is most pressing.”²⁶⁵ The *Al-Aulaqi* court noticed this concern, asking rhetorically whether the executive could “order the assassination of a U.S. citizen without first affording him any judicial process.”²⁶⁶ Since the beginning of the war on terror, the Executive branch has insisted, at least implicitly, that it does indeed have this power. “[No] statute . . . can place any limits on the President’s determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make.”²⁶⁷ “In the exercise of his plenary power to use military force, the President’s decisions are for him alone *and are unreviewable*.”²⁶⁸ More recently, the Department of Justice has published the criteria it uses to determine whether a U.S. citizen is a “lawful” target.²⁶⁹ The threat posed by a U.S. citizen must be “imminent,” capture must be “infeasible,” and the operation must abide by the “four fundamental principles” of the laws of war governing the use of force.²⁷⁰ There is no guarantee, however, besides

263. *Daniels v. Williams*, 474 U.S. 327, 331–32 (1986).

264. *Id.* at 331 (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)).

265. *Boumediene v. Bush*, 553 U.S. 723, 783 (2008).

266. *Al-Aulaqi*, 727 F. Supp. 2d. at 9.

267. John C. Yoo, Deputy Assistant Atty. General, *Memorandum: The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001), <http://www.justice.gov/olc/warpowers925.htm>.

268. *Id.* at n.32 (emphasis added).

269. U.S. DEP’T OF JUSTICE WHITE PAPER, *LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS AN OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE* 16 (Feb. 2013) [Hereinafter DOJ White Paper], available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

270. *Id.* at 16. The DOJ criteria amount to an exercise in absurdity, due to the extent to which the white paper redefines terms such as “imminent.” The DOJ makes clear that “imminent” *does not* mean “that a specific attack on U.S. persons and interests will take place in the immediate future.” *Id.* at 7. Indeed, what constitutes an “imminent threat” will

that which can be inferred from executive good faith, that these criteria will be followed. The need for secrecy in combating the threat of terrorism can scarcely be overstated. But necessity alone does not justify an unlawful expansion of executive power. It is possible to find a middle ground between these two interests. This has been demonstrated by the determination of Congress, in other contexts, to ensure that the judicial role in protecting liberty withstands seemingly inexorable executive war power.²⁷¹ In the case of extra-judicial assassinations, however, the DOJ has clearly stated its opinion that “there exists no appropriate judicial forum to evaluate these constitutional considerations.”²⁷² The need for collateral review in such a situation is indeed most pressing.

Third, “claims alleging non-compliance with the law are justiciable,” even though the review that the court undertakes may have an effect on foreign affairs.²⁷³ Petitioner in *Al-Aulaqi* specifically alleged that the administration’s policies deprived him of his rights under the Fifth Amendment, and that the administration was thereby in violation of the law.²⁷⁴ The *Al-Aulaqi* court held that Nasser’s claims “pose[d] precisely the type of complex policy questions that [the court] has historically held non-justiciable.”²⁷⁵ The court claimed that resolving the questions posed by Nasser would require the court to make detailed assessments regarding the

“develop to meet new circumstances and new threats.” *Id.* The determination of “imminence” must be made by a conveniently non-descript “informed, high-level official.” *Id.* at 8. The DOJ does recognize a need to abide by the four fundamental law of war principles governing the use of force: necessity, distinction, proportionality, and humanity. Eric Holder, U.S. Att’y General, Speech at Northwestern University School of Law (March 5, 2012) (transcript available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>). The administration equates this executive procedure with “due process,” which it distinguishes from “judicial process.” *Id.* The DOJ speaks in broad platitudes about “our laws and our values,” while subverting these same values, and replacing them with an amorphous and indistinct “process” that it claims will adequately protect the constitutional guarantee of due process. *Id.*

271. The FISA Courts were established by Congress to govern the process by which the executive branch conducts surveillance to acquire foreign intelligence, even prescribing criminal sanctions for violations of proper procedures. 50 U.S.C.A. § 1802, 1809 (2010). A discussion of the FISA Courts is beyond the scope of this Note, but their existence demonstrates that alternate procedures exist to protect the secrecy of national intelligence information, while providing a level of judicial due process.

272. DOJ White Paper, *supra* note 269, at 10.

273. DKT Mem’l Fund, Ltd. v. Agency for Internal Dev., 810 F.2d 1236, 1238 (D.C. Cir. 1987).

274. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 12 (2010).

275. *Id.* at 46.

precise nature and extent of military intelligence and tactics.²⁷⁶ The court has thus set up a false dilemma: either the executive's decision must stand or the court must "elucidate the . . . standards that are to guide a President when he evaluates . . . military intelligence."²⁷⁷ This false dichotomy neglects the well-established principle that "it is emphatically the province and duty of the [courts] to say what the law is. . . . [so] if a law be in opposition to the constitution . . . the court must determine which of these conflicting rules governs the case."²⁷⁸ Nasser has alleged a conflict between the "law" of the executive and the law of the Constitution.²⁷⁹ The court was not required to "elucidate" a standard but to simply declare that the executive was not acting in accordance with the Constitution. A court is not required to promulgate a correct standard when declaring that an executive procedure is unconstitutional. The court could have granted Nasser's injunction on the grounds that the administration's policy was not in accord with due process. As *Marbury* makes clear, upholding the Constitution, even against the co-equal branches of government is "the very essence of judicial duty."²⁸⁰

Fourth, the Supreme Court has "reject[ed] the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights."²⁸¹ The United States "can only act in accordance with all the limitations imposed by the Constitution."²⁸² The restrictions of the Fifth Amendment thus apply to American citizens no matter where they are located. Surprisingly, given that the government was seeking to kill a U.S. citizen who had never been charged with a crime, the *Al-Aulaqi* decision mentions the Fifth Amendment only nine times.²⁸³ Like its treatment of the Due Process Clause, the court did not find a discussion of the Fifth Amendment

276. *Id.* The court noted four particular questions that would require resolution if the court did not apply the political question doctrine: (1) the precise nature and extend of Anwar's affiliation with AQAP; (2) whether the link between AQAP and Al-Qaeda was sufficiently close as to bring AQAP into the current conflict between the U.S. and Al-Qaeda; (3) the extent of the threat posed by Anwar; and (4) whether there was any available means of addressing the threat short of lethal force. *Id.*

277. *Id.* at 47.

278. *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803).

279. *Al-Aulaqi*, 727 F. Supp. 2d at 8. Nasser alleged that "the President [and others] have unlawfully authorized the targeted killing." *Id.* (emphasis added).

280. *Marbury*, 5 U.S. at 178.

281. *Reid v. Covert*, 354 U.S. 1, 5 (1957).

282. *Id.* at 6.

283. *See Al-Aulaqi*, 727 F. Supp. 2d at 1-64.

necessary. The court's neglect of the Fifth Amendment is irreconcilable with the principle that "when the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land."²⁸⁴ The court further noted that "[t]his is not a novel concept. To the contrary, it is as old as government."²⁸⁵ If the administration had targeted an American citizen on American soil, the public outcry would likely be deafening. There is no *qualitative* difference between that scenario and the situation in *Al-Aulaqi* because the Supreme Court has clearly held that the Bill of Rights is not geographical in scope.²⁸⁶ The political question doctrine cannot shield the *Al-Aulaqi* court from its duty to analyze the administration's violation of this clear precedent.

The second major reason why the political question doctrine was incorrectly applied is that it was used in contravention of general principles of law. To understand why this is the case, one must understand the doctrine's origin. As discussed above,²⁸⁷ the origin of the political question doctrine is found in *Marbury v. Madison*, which established that "[t]he province of the court is . . . not to enquire how the executive . . . perform[s] duties in which [he] ha[s] a discretion."²⁸⁸ The long and storied political question doctrine jurisprudence was founded upon this principle inherent in the separation of powers.²⁸⁹ If the ellipses are removed from the quotation from *Marbury*, however, we see the expression of the political question doctrine contrasted with the paramount duty of the courts. "The province of the court, is, solely, to *decide on the rights of individuals*, not to enquire how the executive . . . perform[s] duties in which [he] ha[s] a discretion."²⁹⁰ The real issue, both in Anwar Al-Aulaqi's situation and in the current debate over the use of extra-judicial assassinations, is which of these two ideals will reign supreme—the discretion of the executive or the rights of the individual? The *Marbury* Court provides us with the answer. "If [an executive official] commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office

284. *Reid*, 354 U.S. at 6.

285. *Id.*

286. *Id.*

287. *See supra* Part III.A.

288. *Marbury v. Madison*, 5 U.S. 137, 170 (1803).

289. *Baker v. Carr*, 369 U.S. 186, 210 (1962).

290. *Marbury*, 5 U.S. at 170 (emphasis added).

alone exempts him from being . . . compelled to obey the judgment of the law.”²⁹¹ This Note argues that the assassination of an American citizen without due process is unconstitutional. If that proposition is correct, there is nothing that keeps the court from compelling the executive to obey the rule of law, in spite of its claim of discretion. “[W]hat is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim . . . not depending on executive discretion, but on . . . *the general principles of law?*”²⁹² The *Marbury* decision recognizes that there is a law superior to the executive, legislative, or judicial branches that they are each bound to obey, upon which individual rights depend. These “general principles of law” are inviolable and provide the basis of the rights established in the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are *Life, Liberty, and the pursuit of Happiness.*”²⁹³

Thus the question posed above is answered in favor of the latter choice—the rights of the individual are superior to the discretion of the executive. These rights are fundamental to civil liberty; indeed, “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”²⁹⁴ The *Al-Aulaqi* decision reversed this longstanding tradition, elevating the discretion of the executive as superior to the rights of the individual. Where do we go from here?

V. CONCLUSION

“Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. . . . To be more safe, [the people], at length, become willing to run the risk of being less free.”²⁹⁵ This is the basic dilemma when balancing the opposite sides of this issue. As noted previously, the realities of the war on terror demand a certain degree of executive latitude. At the same time, the

291. *Id.*

292. *Id.* (emphasis added).

293. THE DECLARATION OF INDEPENDENCE para.1 (U.S. 1776) (emphasis added).

294. *Marbury*, 5 U.S. at 163.

295. THE FEDERALIST NO. 8 (Alexander Hamilton).

amorphous nature of the enemy increases to a frightening extent the potential for abuses of this latitude.²⁹⁶ It appears that the American people are more inclined to elevate the need for safety over the need for constitutional adherence. This is perhaps most evident in the deafening lack of public outrage over the assassination of an American citizen without due process.²⁹⁷ The public seems blissfully unaware that the rationale that applies overseas today will likely be applied at home tomorrow. The public was more or less content to see a citizen terminated without due process, without ever having been charged with a crime, simply because he was located 15,000 miles from home. The remote nature of this constitutional harm should not cause the issue to fade from public consciousness. Americans must not be willing to accept geographical boundaries on the rights enshrined in the Constitution.

Justice Scalia, commenting on Hamilton's quote in the Federalist No. 8, remarked "The Founders warned us about the risk, and equipped us with a Constitution designed to deal with it."²⁹⁸ It is up to the people to insist upon adherence to the Constitution, even if the interests of public safety militate against adherence. Safety from the threat of terrorism is worthless if we obtain it by circumventing our best safeguard against tyranny. If we trade the freedom that is truly valuable for safety that is transient, we act no more wisely than the children of King Lear, and our venerable ancestors who bequeathed us our Republic may well exclaim: "How sharper than a serpent's tooth it is, to have a thankless child."²⁹⁹

296. The amorphous use of the word "terrorist" is an indication of how executive power, especially the power inherent in possessing the ability to classify someone as a "terrorist," could be readily abused.

297. *Al-Awlaki Assassination: Where is the Outrage?*, THE EXAMINER (Oct. 7, 2011), <http://www.examiner.com/article/al-awlaki-assassination-where-is-the-outrage>; *When Liberals Ignore Injustice*, SALON.COM (Feb. 5, 2013), http://www.salon.com/2013/02/05/when_liberals_ignore_injustice/.

298. *Hamdi v. Rumsfeld*, 542 U.S. 507, 579 (2004) (Scalia, J. dissenting).

299. WILLIAM SHAKESPEARE, *King Lear* act 1. sc. 4.