THE ROAD MOST TRAVEL: IS THE EXECUTIVE'S GROWING PREEMINENCE MAKING AMERICA MORE LIKE THE AUTHORITARIAN REGIMES IT FIGHTS SO HARD AGAINST?

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> "An elective despotism was not the government we fought for; but one which should not only be founded on true free principles, but in which the powers of government should be so divided and balanced among several bodies of

> magistracy, as that no one could transcend their legal limits without being effectually checked and restrained by the others."[1]

I. INTRODUCTION

Since September 11, 2001, the Executive Branch of the United States government has continued to accumulate power beyond that which is granted under the U.S. Constitution. This Article examines how the Executive derived this additional power through the use of the National Security Agency's (NSA) secret surveillance program, the indefinite detention of terror suspects, and the implementation of a "kill list" that allows Americans and non-Americans alike to be targeted and killed without any judicial determination of guilt or innocence.

Moreover, this article contends that Congress and the Judiciary have allowed the Executive to amass this power, but not through legal channels such as constitutional amendments or law changes. Rather, Congress and the Judiciary have condoned the Executive's unconstitutional power accumulation by not only remaining idle and refusing to challenge this taking, but by preventing other American citizens from challenging the Executive by refusing to grant standing in numerous lawsuits. As a result, this article contends, the notion of separation of powers that has served as the foundation for America's democracy is rapidly eroding; without a check from the other branches of government on this growing executive power, America is becoming less of a democracy and more of an authoritarian regime in which an elite few rule as they see fit.

To be sure, the Executive Branch of the United States is strong, and must be so. As Commander in Chief of the U.S. military, America's president is tasked with taking the lead in defending the nation. Since September 11, 2001, the Executive Branch has effectively done so in a variety of areas.

For example, from some accounts it appears that America has crippled al-Qaeda's core.[2] Over the past thirteen years, the U.S. has killed several high-

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1. THE FEDERALIST NO.48 (James Madison).

2. Audrey Kurth Cronin, *Why Drones Fail*, THE ATLANTIC, July/August 2013, at 45.

ranking al-Qaeda members, including Osama bin Laden.[3] These results are a credit to both the Bush and the Obama administrations. They have undertaken the task of making America safe (or at least safer) from Islamist extremist terrorist attacks. In his 2012 report to Congress, Director of National Intelligence James Clapper predicted that, within the next three years, the core of al-Qaeda would be primarily of "symbolic importance to the global jihadist movement."[4]

Yet, three years later, America remains far from eliminating the threat of violent terrorist extremism. Despite fourteen years of war, thousands of deaths, billions of dollars spent, and numerous lost liberties and freedoms, violent jihadism thrives worldwide.[5] As one commentator notes: "[t]he pandemonium [from uprisings] in Syria, Libya, and Egypt, are like a hothouse for al-Qaeda, which is thriving there just as it has in Somalia and Afghanistan."[6] The attacks at home have not ceased either, as demonstrated so vividly by the Boston Marathon bombing in April 2013.[7] Moreover, the recent takeover over in Iraq by jihadist extremists[8] is another example that, despite U.S. efforts to curb the core al-Qaeda, jihadism and terrorist threats are as rampant as ever.

What has been accomplished, then? What will be the lasting legacy of the War on Terror?[9] There is no single answer to this question, but if the Executive continues on its current path, one legacy will be the indefinite curtailing of the rights and liberties of Americans. This article tracks the Executive Branch's increase in power since that horrific day in September. Through this

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3. *Id. See also* Christopher Dickey, Ron Moreau, & Sami Yousafzai, *A Decade on the Lam*, NEWSWEEK, May 16, 2011, at 35 ("Every time he named a 'No. 3' who had to communicate with the outside world, that shortened the guy's lifespan"). Notably, the operational leader of al Qaeda from the beginning, Dr. Ayman al Zawahiri, has never been captured. The last time America seemingly got close was 2005. *See* Andrew Romano and Daniel Klaidman, *Commander in Chief*, NEWSWEEK, May 16, 2011, at 27.

4. Cronin, *supra* note 2.

5. *See* Bruce Riedel, *The Coming of al Qaeda 3.0*, THE DAILY BEAST (Aug. 7, 2013), http://www.thedailybeast.com/articles/2013/08/06/the-coming-of-al-qaeda-3-0.html.

6. *Id.*

7. John Eligon & Michael Cooper, *Blasts at Boston Marathon Kill 3 and Injure 100*, N.Y. TIMES (Apr. 15, 2013), http://www.nytimes.com/2013/04/16/us/explosions-reported-at-site-of-boston-marathon.html.

8. Raed Omari, *ISIS: Rapid Transformation from Militia to State*, AL ARIBYA NEWS (Jul. 27, 2014), http://english.alarabiya.net/en/views/news/middle-east/2014/07/27/ISIS-Rapid-transformation-from-militia-to-state.html.

9. A pessimist might question the very idea of a legacy for the War on Terror, for doing so presumes an ending.

examination comes the sobering realization that America is becoming less of a democracy and more of an authoritarian regime.

At first blush, this statement may appear unreasonable. America certainly is democratic in many ways, from the voting process to the court system to Congress passing laws. However, America has never been a true democracy in the sense of one person, one vote, for every office. It is a democratic republic founded on the constitutional principle of the separation of powers. The Founding Fathers created a democratic republic, in part, to avoid the kingdom from which they fled. No monarch, no single ruler would ever have total power over the people.[10] Different branches would share the powers of governing the nation.[11] Such was the foundation for America's constitutionally based democratic republic.

Yet, since the Cold War and the militarization of America,[12] one branch has continued to gain power, arguably more than was ever contemplated: the Executive. The advent of a standing army and the desire to suppress communism worldwide led to the Executive making more decisions on its own, without consulting Congress and certainly without a formal declaration of war.[13] However, since September 11, 2001, the Executive has usurped another level of power and control over the American people, one far beyond what is provided in the U.S. Constitution. For example, in 2014 the president negotiated the release of Sergeant Bowe Bergdahl without notifying Congress in advance, as required by law.[14]

When the Executive picks and chooses whether to follow the Constitution, the democratic notion of separation of powers erodes. A concentration of power is accumulating rapidly in one branch, the branch with the guns and the weapons, making America more closely resemble the authoritarian regimes it fights so hard to extinguish.

Thus, this article begins by exploring the increase in the Executive's power through its initial response to 9/11, which was to implement the NSA's surveillance program. The NSA surveillance—or "spying" program—

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10. *See* THE FEDERALIST No. 48, *supra* note 1 (James Madison).

11. *See* U.S. CONST. art.I, § 1.

12. *See* PAUL KENNEDY, THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000 (1987).

13. *See* Jane E. Stromseth, *Understanding Constitutional War Power Today: Why Methodology Matters,* 106 YALE L.J. 845, 872 (1996) (quoting Dick Cheney: "[I]n the more than 200 times that U.S. military force has been committed over the history of the Nation, there are only five occasions in which the Congress of the United States voted a prior declaration of war.").

14. Tom Cohen, *Was Bergdahl Swap Legal? Depends on Who You Ask*, CNN (Jun. 3, 2014), http://www.cnn.com/2014/06/03/politics/bergdahl-swap-legality/.

infamously leaked by Edward Snowden illustrates how the Executive Branch has spied on Americans for years, without their knowledge or consent. Regardless of whether some type of surveillance program is necessary, the problem for democracy is that neither Congress nor the Supreme Court provides an effective check for the spying program. While secretly spying on Americans, the Executive also simultaneously began indefinitely detaining terror suspects, many of whom were captured in Afghanistan by local forces. This article explains how, when the Supreme Court ordered the Executive to stop, it simply refused.

Finally, this article examines the Executive's targeted killing of alleged terror suspects. Once President Obama took office, the Executive accelerated the targeted killing of people, often destroying them remotely with predator drones. To effectuate this plan, the president formulated a "kill list" comprising people, including Americans, targeted for death by the Executive Branch without trial or judicial due process. Combined, the NSA surveillance program, the indefinite detention of terror suspects, and the targeted killing of Americans without trial provide the Executive with far more power than contemplated by the Constitution.

II. DEMOCRACY AND AUTHORITARIANISM

Before explaining this newfound Executive power and highlighting how it moves America away from democracy and towards authoritarianism, it is instructive to have a working definition of democracy and authoritarianism. Democracy is "a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections."[15] A true democracy would be, as described earlier, a one-person, one-vote system of majority rule. With its electoral college and concern for states' rights, the U.S. elected to forgo a true democracy in lieu of a republic. More specifically, the U.S. selected a democratic republic, a sort of hybrid between a pure democracy and a republic, in which the powers of sovereignty are vested in the people and are exercised by the people, either directly or through their chosen representatives.[16] In short, though America does not have a true democracy, it holds itself out to be a champion of democracy and operates a democratic form of government.[17]

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15. *Democracy*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/democracy (last visited June 21, 2014).

16. *See In re* Duncan, 139 U.S. 449, 461–62 (1891).

17. Zachary A. Goldfarb, *Obama Vows to Defend Freedom in Europe, Support Democratic Movements Worldwide*, WASHINGTON POST, June 4, 2014,

America, however, may be transforming into more of an authoritarian regime than a democratic republic. Authoritarian regimes favor "a concentration of power in a leader or an elite not constitutionally responsible to the people."[18] As will be shown throughout this article, that is precisely what has taken place in America since 9/11, as an elite few people in the Executive Branch operate unchecked by the people.

To be clear, this article is not about blaming the Executive Branch. It is commonly remarked that what people in power want most is more power.[19] It is naïve to believe those in Congress and/or the Judiciary would not like more power and influence. Therefore, it should not be surprising that the Executive would like more power and influence as well. The difference is that we, as Americans, have allowed the Executive Branch to accumulate immense power far beyond its constitutional parameters, and we excuse it from answering to Congress or adhering to the mandates of the Supreme Court. Because of this transformation of power, is the U.S., as Thomas Jefferson warned, slowly becoming a nation of "elective despotism?"[20] Regardless of how one feels about what is happening in this regard, the goal of this article is to shed light on the situation and encourage honest discourse.

III. THE SPYING GAME

One key way in which the Executive has been usurping power beyond what is granted to it in the Constitution is through the implementation of the NSA surveillance program. The NSA "coordinates, directs, and performs highly specialized activities to protect U.S. information systems and produce foreign intelligence information."[21] The NSA is governed under, and reports

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http://www.washingtonpost.com/world/europe/obama-vows-to-defend-freedom-in-europe-support-democratic-movements-worldwide/2014/06/04/7a290b1a-ebd4-11e3-b98c-72cef4a00499_story.html; Richard W. Stevenson, *Bush Says Patience Is Needed as Nations Build a Democracy*, N.Y. TIMES, May 19, 2005, http://www.nytimes.com/2005/05/19/ politics/19prexy.html ("The president said promoting democracy was in the national interest because it would 'isolate and defeat the forces of terror, and ensure a peaceful future for our citizens.'").

18. *Authoritarian*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/authoritarian (last visited June 21, 2014).

19. Erika Anderson, *Abraham Lincoln: 10 Quotes to Help You Lead Today*, FORBES (Dec. 17, 2012), http://www.forbes.com/sites/erikaandersen/2012/12/17/abraham-lincoln-10-quotes-to-help-you-lead-today/.

20. THE FEDERALIST No. 48, *supra* note 1 (James Madison).

21. *Members of the IC*, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, http://www.dni.gov/index.php/intelligence-community/members-of-the-ic (last visited Apr. 16, 2015).

to, the Executive Branch.[22] The Executive essentially controls the activities of the NSA.

In June 2013, a former Central Intelligence Agency (CIA) analyst, Edward Snowden, leaked numerous classified NSA documents detailing an elaborate spying program on citizens across the United States.[23] The leaked NSA documents sketch an outline of a massive surveillance system that "vacuums up billions of Americans' e-mail messages and other private correspondence."[24] In particular, the NSA directed Verizon, one of the largest telephone providers in the world, to hand over all of its telephone data to the NSA on an "ongoing daily basis."[25] One document prepared by the NSA's Special Source Operations directorate, for instance, explains that the agency "processed its one-trillionth metadata record" by December 2012.[26] President Barack Obama defended the practice of spying on Americans by claiming, "You can't have 100 percent security, and also then have 100 percent privacy and zero inconvenience."[27] Is that truly the issue, though? Are Americans asking for 100 percent security with an expectation of 100 percent privacy and zero inconvenience? The true issue is not all or nothing, but rather a question of being involved in the decision-making process of who may be spied on and why. Americans still have little clue how the NSA surveillance program actually operates, as it remains highly secretive. Perhaps some secretiveness is necessary for national security. However, the Executive should answer to someone in a democracy. Congress took note of this, and has taken steps, explained here below, to seemingly help legitimize the entire NSA surveillance process.

A. FISA and the Dawn of Increased Surveillance

FISA stands for the Foreign Intelligence Services Act, created by Congress in 1978 in the wake of Watergate "as a check against wiretapping

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22. *Frequently Asked Questions*, NATIONAL SECURITY AGENCY, https://www.nsa.gov/about/faqs/oversight.shtml (last updated Jan. 13, 2011).
23. *Edward Snowden: Leaks that Exposed US Spy Programme*, BBC NEWS (Jul. 1, 2013), http://www.bbc. co.uk/news/world-us-canada-23123964.
24. Declan McCullagh, *Facebook's Outmoded Web Crypto Opens Door to NSA Spying*, CNET NEWS (Jun. 18, 2013, 10:54 AM), http://news.cnet.com/8301-13578_3-57591560-38/facebooks-outmoded-web-crypto-opens-door-to-nsa-spying/.
25. *Snowden: Leaks That Exposed US Spy Programme*, *supra* note 23.
26. McCullagh, *supra* note 24.
27. *Barack Obama Defends US Surveillance Tactics*, BBC NEWS (Jun.8, 2013), http://www.bbc.com/news/world-us-canada-22820711.

abuses by the government."[28] FISA governs all domestic electronic gathering of foreign intelligence[29] and reviews all requests for domestic surveillance.[30] Any request for surveillance must be approved by the Attorney General and certified by the Assistant to the President for National Security Affairs.[31] This request certification process is subjected to much public scrutiny. FISA mandates ex ante judicial authorization, which incorporates a system of checks and balances on the Executive's power over national security and surveillance. The primary concept behind this is the Fourth Amendment's requirement for a warrant based on probable cause. The core value of FISA defines "foreign intelligence information" to cover activities by foreign powers or their agents concerning "actual or potential attack or other grave hostile acts," "sabotage or international terrorism," or "clandestine intelligence activities."[32]

An eleven-member "FISA court" convened as a proposed check on this NSA spying program.[33] Until September 11, 2001, the FISA court was primarily concerned with approving (or disapproving) federal wiretaps on a case-by-case basis.[34] However, after September 11, 2001, members of the Bush administration had a problem. They wanted to spy on Americans by tracking their phone calls and e-mails, but they knew FISA did not authorize such programs. Nevertheless, the Bush administration, "under a secret wiretapping program that circumvented the FISA court, authorized the NSA to collect metadata and in some cases listen in on foreign calls to or from the United States."[35] The program is referred to as the Terrorist Surveillance

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28. Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. TIMES (July 6, 2013), http://www.nytimes.com/2013/07/07/us/in-secret-court-vastly-broadens-powers-of-nsa.html?pagewanted=all.

29. Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 et seq.; s*ee also* United States v. Rosen, 447 F. Supp. 2d 538, 543 (E.D. Va. 2006) (describing FISA's purpose and operation).

30 *Id.*

31 *Id.*

32 *Id.* at 546.

33. Lichtblau, *supra* note 28.

34. *Id.*

35. *Id.* Some people, such as the author of the New York Times article quoted herein, believe this program began shortly after September 11, 2001. Others believe differently, and point to evidence that Bush and Cheney wanted to spy on Americans well before September 11 in an effort "[t]o collect blackmail material and other information that can be used to control influential citizens." Kevin Barrett, *Snowden's Revelations Just Tip of NSA Spy Scandal Iceberg*, PRESSTV (June 28, 2013), http://www.presstv.ir/detail/2013/06/28/311159/snowdens-revelations-tip-of-iceberg/. There is also an ongoing lawsuit to that end. *See id.*

Program.[36] "President Bush authorized the surveillance program shortly after 9/11, allowing NSA officials to bypass the courts and intercept electronic communications" of American citizens.[37]

The NSA continued its clandestine spying on American citizens for the next six-plus years.[38] The Executive Branch, alone, made the decision to implement a nationwide spying program that circumvented the law.[39] There was no extensive congressional debate preceding its introduction, nor was there media coverage or national debate. The Executive Branch green-lighted what is perhaps the most comprehensive spying program by Americans on Americans in our history, told no one it was doing so, and did not seek permission from any other branch of government. Far from resembling a democracy, the first six years of the NSA surveillance program embodied an authoritarian regime in which the Executive Branch alone determined the scope of the spying program, independent of any real check on its power. In 2007, however, the FISA court attempted to take on a greater role in policing NSA surveillance.

B. Ex Post Facto Congressional Approval

If Congress approves of something after the fact, does that justify its existence, if not constitutionally, at least practically? Because, in 2007, the NSA surveillance program's essential elements apparently became lawful because of "greater involvement by the FISA court."[40] Facially, this would seem to satisfy the basic tenets of checks and balances fundamental to American democracy. True, the Executive's spying program existed in secret for years, but it was eventually vetted and ratified by Congress.[41] However, in order to determine whether after-the-fact ratification passes constitutional muster, one must consider the constitutional requirements.

Unfortunately, deciphering how to allocate the powers between the branches concerning national security remains notoriously difficult, in part, because "[n]owhere does the Constitution use the words 'foreign affairs' or

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36. Paul Elias, *Federal Judge Rules Bush Program Illegally Wiretapped Americans*, HUFFINGTON POST (May 31, 2010), http://www.huffingtonpost.com/2010/03/31/alharamain-islamic-founda_n_520548.html.
37. *Id.*
38. *Id.*; Lichtblau, *supra* note 28.
39. Elias, *supra* note 36.
40. Lichtblau, *supra* note 28.
41. *Id.*

'national security.'"[42] In its first three Articles, the Constitution expressly divides "foreign affairs" powers amongst the three branches of government, "with *Congress*, not the president, being granted the dominant role."[43] The belief that Congress has the dominant role is not shared by all, with an equal number of scholars and legal theorists believing the Executive has the dominant role in national security law and foreign affairs.[44] The goal here, however, is not to revisit that debate. Instead, the goal is to move beyond that discussion and to explain how the NSA spying program reflects a government more like an authoritarian regime. But if one concedes, *arguendo*, that Congress' ratification of the NSA spying program makes it compliant (on some level) with the tenets of the Constitution,[45] how does the program reflect a move towards a more authoritarian regime?

Through further analysis, one finds that Congress' FISA court solution does not establish a valid check on executive power. First, the FISA court comprises eleven justices, each of whom serves a seven-year term.[46] All current judges were appointed to the special court by Chief Justice John G. Roberts Jr.[47] This method raises concerns about the democratic process. These eleven judges, unlike the Supreme Court justices, were not vetted and brought before Congress for ratification. They were simply appointed by one Supreme Court justice to decide important constitutional issues, such as the scope of the Fourth Amendment and the limits/expectations of privacy.[48]

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42. Harold Koh, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 67 (1990).

43. *Id.* at 75. Mr. Koh wrote this before he was chosen by President Barack Obama as legal advisor for the U.S. State Department.

44. *See* Stromseth, *supra* note 13. Others do not find it so confusing and difficult, and believe that the roles of the Executive and Congress are actually pretty clear and distinct with respect to national security. "The problem with a shared powers paradigm is not that it is inaccurate to note that more than one department often must act to complete a major policy initiative, but that it may promote a blurring of the generally distinct roles of each department in this process." JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW 792 (2005).

45. Under the analysis outlined by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952), one could argue that the President would be at the apogee of his powers if he had the approval of Congress *before* starting such a spying program for national security reasons. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952).His power would be "at its maximum" because he would be operating under "all [authority] he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635.

46. Lichtblau, *supra* note 28.

47. *Id.*

48. *Id.*

Second, unlike almost any other court, "the FISA court hears from only one side in the case—the government."[49] One need not be a constitutional law professor or political science scholar to realize that if only one side of an argument is heard, the chance for a fair examination of both sides diminishes. The government routinely seeks trillions of records about American citizens including, but not limited to, phone and e-mail records.[50] One wonders how the FISA court considers both sides if only one side is being argued. The fear, of course, is that the two outcomes, to grant or deny the government's request, are not accorded equal weight. Under such a scenario, one might suspect a disproportionate number of granted requests by the government.

And unfortunately, that appears to be the case. As of the writing of this article, nearly every NSA surveillance request ever submitted to the FISA court with regard to spying on Americans has been granted.[51] In 2012, the FISA court granted every single government request and issued nearly 1,800 surveillance orders pursuant to those requests.[52] That equates to nearly five orders each day for the entire year. According to the FISA court, no request from *any* intelligence agency was denied.[53] This makes it difficult to argue that congressional authorization of the FISA court to oversee the Executive's spying program is not little more than a talisman, creating a mirage of a democratic process that in reality is cloaked in secrecy, with only a few people in charge. If the FISA court is the supposed watchdog of the privacy interests of Americans, but only the government gets to present its case and every single government request for spying is granted, where is the check? Nothing about the aforementioned process comports with constitutional notions of checks and balances, regardless of congressional approval.

In addition, the FISA court's findings are almost "never made public."[54] The people are not afforded a chance to review the breadth of a surveillance request, which 100 percent of the time results in a surveillance order. The NSA obtains everything it seeks and reports to no one outside of the Executive Branch.

To be fair, one can imagine the dangers in making every request or order public. Undoubtedly, there is sensitive information in these orders that could do harm if made public (though the protections afforded by *in camera* review and attorney-client privilege could help to assuage those concerns). But when absolutely no information is shared, the potential for abuse is too high. What is

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49. *Id.*
50. McCullagh, *supra* note 24.
51. Lichtblau, *supra* note 28.
52. *Id.*
53. *Id.*
54. *Id.*

stopping the government from succumbing to private interests and corporate donors who want your private information? Americans would never know if the Executive began selling their private information to the highest bidder. When asked why he leaked the NSA documents, Edward Snowden emphasized that the American people need to know, "[t]he NSA has built an infrastructure that allows it to intercept almost everything . . . the vast majority of human communications are automatically ingested without targeting . . . I can get your emails, passwords, phone records, credit cards."[55]

Finally, a Court of Review was empanelled to hear appeals of these surveillance orders.[56] At first glance, this appears to be a limited, but necessary, check on the scope and power of a secret court. If, for some reason, one finds out that he or she is being secretly monitored, this would seem to be a meaningful way to challenge the NSA's surveillance program. In reality, however, like the existence of the FISA court, this serves as no check at all on the Executive Branch's spying capabilities. To date, there have only been a handful of appeals in the FISA court's history, with no one's appeal ever being granted certiorari by the Supreme Court.[57] Exact specifics of the FISA court's decision making process and procedures remain unknown, in part because it operates in relative secrecy. Moreover, since the NSA operates in secret, the biggest problem remains the difficulty of one learning they are being spied upon in the first place. Furthermore, even if one finds out his information is comprised, it would only be ex post facto. The damage would already be done because the person's private information would already be tracked and recorded by the NSA for use in unknown ways. Thus, in practice, the FISA court's appeals process offers virtually no constitutional check on the Executive's spying power.

In sum, congressional approval of the FISA court, over six years into the NSA's surveillance program, does little to provide a constitutional check or balance to the Executive's broad spying power. Essentially, the Executive can spy on whomever it wants to, with no opposition, because only the government is allowed to put forth a case before the FISA court.[58] The entire program is antithetical to a democratic process.[59] The only other branch of government

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55. Ewan MacAskill*, Edward Snowden, NSA Files Source: If They Want To Get You, In Time They Will*, THE GUARDIAN (June 9, 2013), http://www.guardian.co.uk/world/2013/jun/09/nsa-whistleblower-edward-snowden-why.

56. Lichtblau, *supra* note 28.

57. *Id.*

58. *See id.*

59. Professor Geoffrey R. Stone, who teaches constitutional law at the University of Chicago, has expressed concern that the FISA court is developing a body of law

left to possibly check the Executive's spying power is the Supreme Court.

C. Supreme Court Enables

In 2013 a group of Americans filed a lawsuit challenging the NSA surveillance program despite lacking an appeals process for FISA court rulings. In this lawsuit, *Clapper v. Amnesty International USA*, the plaintiffs ultimately lost their claims for both a declaration that FISA-court-approved surveillance is unconstitutional and an injunction to stop further surveillance.[60] The Supreme Court's decision was not based on merit, however; the plaintiffs lost for lack of Article III standing.[61]

To establish Article III standing in federal court, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling."[62] Thus, any group trying to sue for a declaration that the surveillance program is unconstitutional must present some case for imminent harm or a "certainly impending" injury.[63] In *Clapper*, the plaintiffs were U.S. citizens who frequently dealt with foreigners because of their jobs.[64] Plaintiffs felt that such frequent international contact greatly increased the likelihood that their communications were monitored without their knowledge or approval in violation of the Fourth Amendment.[65] The Court stressed, however, that "[a]llegations of possible future injury" are not sufficient, and that plaintiffs must show they are being improperly monitored and harmed by it.[66]

> Respondents, however, have set forth no specific facts demonstrating that the communications of their foreign contacts will be targeted. Moreover, because (FISA) at most authorizes—but does not mandate or direct—the surveillance that respondents fear, respondents' allegations are necessarily conjectural. (citation omitted) Simply put, respondents can only speculate as to how the Attorney General and the Director of National Intelligence will

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without input from the public. *Id.* According to Professor Stone, "the whole notion [of an adversarial system] is missing in this process." *Id.*

60. Clapper v. Amnesty Int'l USA, 133 S.Ct. 1138, 1140 (2013).
61. *Id.*
62. Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149 (2010).
63. *Clapper*, 133 S.Ct. at 1143.
64. *Id*. at 1157 (including journalist, attorney, and human rights researcher).
65. *Id*. at 1144-45, 1150.
66. *Id*. at 1147 (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

> exercise their discretion in determining which communications to target.[67]

The Supreme Court denied the American plaintiffs standing for several reasons. "First, it is speculative whether the Government will imminently target communications to which respondents are parties."[68] Facially, the previous sentence is correct. The plaintiffs do not have facts to show they will be monitored without their permission in the imminent future. Perhaps the more salient question, however, is why they did not have such facts. The answer is problematic and troubling. The plaintiffs lack sufficient facts to show imminent harm because the NSA's surveillance program, authorized by the FISA courts, is shrouded in secrecy. It is virtually, if not totally, impossible for a person to (legally) gain facts proving he or she is certain to be spied upon by the government in the near future. If the spying program is wholly secret, and imminent harm is a requirement for standing to challenge the program, how can anyone ever challenge it? Allowing the Executive autonomy over a secret program effectively insulates it from any legal challenge. As the Court explains, the "respondents have no actual knowledge of the Government's . . . targeting practices."[69]

Short of a Snowden-like illegal taking of top-secret information, it is unclear how anyone would ever gain access to such knowledge. Therefore, without illegally obtaining information, it appears no one will ever be able to challenge the Executive and its spying program. As a result, the Supreme Court's decision in *Clapper* is an example of how the Executive remains insulated from outside interference, enabling it to secretly operate with immense and unchecked power by failing to provide a path to challenge the Executive's actions.

Moreover, utilizing respondents' lack of proof of the government's specific targeting practices as a foundation, the Court continues to build on reasons why the NSA is insulated from legal action. For example, the Court notes that "even if respondents could demonstrate that the targeting of their foreign contacts is imminent, [respondents] can only speculate as to whether the Government will seek to use § 1881a-authorized surveillance."[70] In other words, the plaintiffs cannot also show that the government intends to use the FISA-authorized NSA spying program to survey and review their communications, as opposed to some other less intrusive method.

Still, the Court maintains that even if the government wants to monitor the

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67. *Id*. at 1149.
68. *Id*. at 1148.
69. *Id.*
70. *Clapper*, 133 S.Ct. at 1149.

plaintiffs' communications, this does not mean the FISA court will authorize it. Yet, as noted earlier, the FISA court granted every single government request in 2012 and acts as little more than a rubber stamp for NSA surveillance. What more could the plaintiffs possibly do to show that the government's FISA request will likely be granted? With such a high bar to establish standing to challenge Executive surveillance, all plaintiffs will likely fail. As such, *Clapper* paves a virtually unachievable path to standing so long as the NSA surveillance program is allowed to operate in secrecy.

Consequently, both Congress and the Judiciary have played roles in allowing the Executive Branch to wield excessive power in the area of surveillance. Congress, through a restructured FISA Court, has dangerously added an air of seeming credibility to these searches, because now there is something to point to, some judicial body that the government can claim is a check on executive power, when in fact it has shown to be anything but. Similarly, the Supreme Court enabled the Executive by allowing it to operate the NSA surveillance program in secret, and then denying challengers' standing because they cannot provide facts showing their harm is imminent. Subsequently, the Executive Branch continues to have the ability to operate the NSA surveillance program virtually free from reproach.

D. Resulting Harm

Is the Executive's expanded ability to spy on Americans, and Americans' seeming inability to challenge it, harmful? Such spying may be necessary to protect the nation from credible terrorist threats. Moreover, if people have nothing to hide, then what is the harm?

First, one potential harm is if (and when) the Executive wants to further expand its powers, and, in secret, unilaterally take away other rights or privileges. By granting the Executive unchecked power for its NSA surveillance program, a dangerous precedent is set where the Executive may have incentive to take additional power in other areas by falsely claiming it is for national security. It may really be for political or personal gain, or to push another agenda to improperly shape American policy, but if it's under the guise of national security, a precedent is being set where the Executive is beyond reproach. Thus, not having a watchdog over the NSA and the Executive can lead to a host of abuses we have yet to realize.

Second, aspects of the NSA surveillance program may be unconstitutional. The Fourth Amendment of the Constitution provides that people be free from unwarranted searches and seizures. The concept of tracking phone calls, email communications and Internet traffic to see if someone is behaving suspiciously would appear to violate this. It is not "we have a target, let's start monitoring them." Instead, it's "let's monitor *everyone*,

to *see* if there are any targets." Conjointly, any unconstitutional components will continue to remain unnoticed if no one is ever able to challenge the Executive.

Finally, lacking a check on executive power dilutes America's version of democracy. The Executive is often supposed to, if not expected to, operate as the unilateral figure in international relations.[71] That is not in dispute, but even as the appropriate central figure in international relations, the Executive was never intended to operate in an unconstitutional manner without reproach. The separation of powers, so vital to a democratic republic, is severely undermined when one branch possesses seemingly limitless powers. If America continues to allow the branch in charge of the military and the spying agencies to be effectively unchecked by the other branches, this much more closely resembles an authoritarian regime than any form of democracy. The NSA surveillance program represents a step towards the type of "elective despotism" that the Founding Fathers fought hard to guard against when they formed the United States of America.[72]

The aforementioned dangers highlight the problems with the Executive's newfound and unchecked secret and growing power to spy on Americans. The NSA surveillance program, however, is not the only way the Executive has usurped power without being stopped by Congress or the Judiciary in the War on Terror.

IV. INDEFINITE DETENTION, INDEFINITELY

The judiciary's duty "must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."[73]Indefinite military detention of terror suspects is another example of how the Executive expanded its powers. Since the War on Terror began over twelve years ago, much has been written about the legality of the U.S. indefinitely detaining terror suspects.[74] The discussion usually revolves around two main issues: 1) the nationality of the detainee (i.e. foreigner or U.S. citizen) and 2) where the individual was

71. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("In this vast external realm, with its important, complicated, delicate, and manifold problems, the President alone has the power to speak or listen as a representative of the nation.").

72. THE FEDERALIST No.48, *supra* note 1 (James Madison).

73. THE FEDERALIST No. 78 (Alexander Hamilton).

74. *See* Sarah Erickson-Muschko, *Beyond Individual Status: The Clear Statement Rule and the Scope of the AUMF Detention Authority in the United States*, 101 GEO. L.J. 1399, 1400-01 (2013).

captured (i.e. on foreign or American soil). To be sure, these are important concerns, but this article focuses on the broader picture and whether the program aligns with the tenets of democracy.[75] In particular, what laws govern the Executive Branch's detention program, if any? Does the program resemble one of a democratic republic or is it more representative of an authoritarian regime?

A. The National Defense Authorization Act of 2012

The scope of the Executive's authority to detain terror suspects, American or otherwise, came into question when the National Defense Authorization Act of 2012 (NDAA) passed in 2013.[76] This Act attempted to codify who can be detained in the War on Terror and the reasons for such detention. Unfortunately, the NDAA failed to do either, creating more confusion than clarity. In part because of this confusion, a lawsuit was brought by several prominent journalists and scholars, people who covered, wrote about, and dealt with terrorists fighting in the War on Terror.[77] They sued the President for an injunction to prevent the Executive from detaining American citizens in military prison for being suspected terrorists—or associating with terrorist groups—under the NDAA.[78]

Before delving into the merits of the lawsuit and its ultimate resolution, examining potential consequences for these plaintiffs is instructive. In *Hedges*, the plaintiffs feared being detained by the military for associating with those connected to terrorism. They feared that doing stories on radical jihadists and setting up dialogue that included Taliban members might count as associating with terrorist groups. The following section describes the military commissions process, in an effort to highlight precisely what these plaintiffs feared.

B. Current State of Detention Law

Shortly after the U.S. invaded Afghanistan in October 2001, it began

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75. In addition to being morally and ethically just, adherence to international law and the laws of war are vital to the long-term success and viability of America as a major power. This article is not attempting to minimize the importance of such international laws in any way. I teach National Security Law and constantly remind students of the value to America of legitimacy in the eyes of the world.

76. National Defense Authorization Act, Pub. L. No. 112-81, 125 Stat. 1298 (2011) [hereinafter NDAA].

77. *See* Hedges v. Obama, 890 F. Supp.2d 424 (S.D.N.Y. 2012), *vacated*, 724 F.3d 170 (2d. Cir. 2013).

78. *Id.*

taking prisoners, many of whom were transferred to Guantanamo Bay.[79] In 2004, the Supreme Court held that U.S. civilian courts have jurisdiction to hear habeas corpus petitions from alien detainees held by the U.S. military at Guantanamo Bay.[80] Later that same year, in *Hamdi v. Rumsfeld*, the Supreme Court held that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker."[81]

Up until that point, many prisoners in Guantanamo Bay were held indefinitely without trial, without access to lawyers, and without being charged with any crime. This appeared to have happened when Yaser Hamdi, an American citizen, was captured in Afghanistan in the fall of 2001.[82] Hamdi was not appointed counsel and was held indefinitely without formal charges or proceedings.[83] The government's defense for the indefinite detention of Hamdi and other detainees stemmed from the traditional laws of war. During wartime, a country may detain prisoners until the cessation of the war.[84] But, as the *Hamdi* Court noted, "it is a clearly established principle of the law of war that detention may last no longer than active hostilities."[85] Therein lies the difficulty—what if the war being waged has no end in sight? America's War on Terror has no visible end, as evidenced in part by the fact that radical

79. *See, e.g.,* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466, 481-84 (2004).
80. *Rasul*, 542 U.S. at 481-84.
81. *Hamdi*, 542 U.S. at 509.
82. *Id*. at 510.
83. *Id*. at 510-13.
84 *Id*. at 520-21.
85. *Id.* at 520. *See also* Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities"). *See also* Hague Convention on Laws and Customs of War on Land art. 2, July 29, 1899, 32 Stat. 1817 (directing cessation as soon as possible after "conclusion of peace"); Hague Convention on Laws and Customs of War on Land art. 20, Oct. 18, 1907, 36 Stat. 2301 (following "conclusion of peace"); Geneva Convention Relative to the Treatment of Prisoners of War art. 75, July 27, 1929, 47 Stat. 2055 (stating repatriation should be accomplished with the least possible delay after conclusion of peace); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 510-511 (2003) ("[prisoners of war] can be detained during an armed conflict, but the detaining country must release and repatriate them 'without delay after the cessation of active hostilities,' unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences" (citing Geneva Convention arts. 118, 85, 99, 119, 129, 6 U.S.T., at 3384, 3392, 3406, 3418)).

jihadist attacks persist on American soil long after the 2011 death of Al-Qaeda leader Osama bin Laden.[86] If the war proceeds indefinitely, does that mean prisoners can be held indefinitely as well? In *Hamdi*, the government argued yes: "the detention of enemy combatants during World War II was just as 'indefinite' while that war was being fought."[87]

The Supreme Court disagreed, however, noting that "[w]e recognize that the national security underpinnings of the 'war on terror,' although crucially important, are broad and malleable."[88] The Court also remarked that the position the government took "suggests that Hamdi's detention could last for the rest of his life."[89] In light of this, the Court held that, before the military can indefinitely detain terror suspects such as Hamdi, they must have a meaningful opportunity to rebut the government's claim that they are, in fact, an enemy of the U.S.[90] The nature and duration of the punishment is too severe to simply take the military's word for it.[91]

Thus, until 2004, the Executive Branch of the U.S. government detained terror suspects, U.S. citizens and foreigners alike, without trial or any formal charges, with the goal of detaining them indefinitely. This is an astonishing overreach of power, but it would be a mistake to categorize the Executive as bloodthirsty and reckless. It is often difficult to find actual evidence and proof that people are involved in terrorism. This is particularly true if suspects are apprehended by local forces overseas, as is often the case in Afghanistan and Pakistan. Furthermore, in fighting a global war on terror, a seemingly prudent goal for the U.S. is to bring in all potential suspects for interrogation. Thus, these problems in verifying stories and information have caused some to perceive indefinite detention as the only way to effectively fight the war.[92]

Despite inherent difficulties in such an undertaking, the Court felt that the

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86. *See* Ryan T. Williams, *Did bin Laden's Death Really Make America Safer?*, S.D. UNION TRIBUNE, May 5, 2011, http://www.utsandiego.com/news/2011/may/05/did-bin-ladens-death-really-make-america-safer/.

87. *Hamdi*, 542 U.S. at 520.

88. *Id.*

89. *Id*.

90. *See id*. at 509, 520-22.

91. *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 202, 225 (2000) (noting "it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty. The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.").

92. Michael Mukasey, *Text of Prepared Remarks, by Attorney General Michael B. Mukasey*, AMERICAN ENTERPRISE INSTITUTE (July 21, 2008), http://www.scotusblog.com/wp/wp-content/uploads/2008/07/ag-speech-at-aei-july-21-2008.doc.

government should at least allow a person the chance at defending the unilateral determination by the U.S. State Department that he or she is an enemy of America. The *Hamdi* decision is also a reminder that, until 2004-2005, the U.S. government detained terror suspects with impunity, often in wretched conditions where they were subject to torture.[93]

The due process clause of the Fifth Amendment states: "[N]or shall any person ... be deprived of life, liberty, or property, without due process of law ...."[94] Furthermore, due process is afforded to all persons in the United States (of which Guantanamo Bay qualifies as a part), not just U.S. citizens.[95] Consequently, pre-*Hamdi*, the Executive Branch arguably violated the due process rights of almost everyone detained at Guantanamo Bay.

The excessive taking of power, however, does not necessarily signal the decline of democracy. One branch overreaching, especially in the name of national security, does not mean the system is broken. After all, in the case of *Hamdi*, the judicial branch stepped in and attempted to correct the injustice.[96] It ordered the Executive to adhere to the constitutional rights granted to all U.S. persons. To say this is undemocratic would be axiomatic, as in many ways the Court's decision represents democracy at its finest—checks and balances working to perfection. This is precisely what a representative democracy should want when one branch of government attempts to overreach. As opposed to some false hope of perfection, a process of checks and balances should be in place to cure inevitable imperfections.

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93. *See* Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES (Nov. 30, 2004), http://www.nytimes.com/2004/11/30/politics/30gitmo.html?pagewanted=all&_r=0; Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. POST (Jan. 14, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/ AR2009011303372.html?hpid=topnews (reporting that Susan Crawford, top administration official in charge of Guantánamo war-crimes prosecutions, concluded that a Guantánamo detainee, Mohammed al-Qahtani had been tortured).

94. U.S. CONST. amend V. *See also* Zadvydas v. Davis, 533 U.S. 678, 690(2001) ("The Fifth Amendment's Due Process Clause forbids the Government to 'depriv[e]' any 'person ... of ... liberty ... without due process of law.' Freedom from imprisonment—from government custody, detention, or other forms of physical restraint--lies at the heart of the liberty that Clause protects.") (alterations in original); Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("We have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty.") (quoting United States v. Salerno, 481 U.S. 739, 750 (1987)).

95. *See, e.g.*, *Zadvydas*, 533 U.S. at 693 ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

96. *See Hamdi*, 542 U.S. at 509, 520-22.

The problems arise when an overreaching branch refuses to be "checked." Democracy only thrives if the Executive adheres to the Supreme Court's rulings. Unfortunately, as will be explained below, here the Executive failed to comply with the demands of the Supreme Court. The Executive did so not by overt defiance, but rather through more insidious means, feigning adherence, while continuing the indefinite detention practices.

i. Guantanamo Bay, post Rasul *and* Hamdi*: The Executive Strikes Back*

In response to the *Rasul* and *Hamdi* decisions, which ordered the government to give detainees a meaningful opportunity to challenge their status as enemy combatants, the Executive created Combatant Status Review Tribunals (CSRTs). CSRTs are special hearings, held before three officers in the military, who together determine whether a detainee is an enemy combatant. If he is, in fact, an enemy of America, then he may be detained. On the surface, this appeared to be precisely what the Court demanded. The officers were not judges, but there were three of them, seemingly to guard against bias from any one.[97] Thus, the CSRTs were the Executive's response to the mandate of the Supreme Court to provide "a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."[98]

Unfortunately for the detainees—and for American democracy—the CSRTs did not, and do not, satisfy the Court's mandate in any meaningful way. The initial rounds of CSRT hearings were held in 2004 and 2005.[99] Out of the 600 prisoners, almost 95 percent were immediately found to be properly classified as enemy combatants by the CSRTs.[100] While it is plausible that many of the detainees were in fact enemy combatants, 95 percent seems suspiciously high in a nebulously defined war on terror where many detainees were not captured actively fighting in the field of battle. Deeper probing reveals the 95 percent enemy combatant designation is explained by a number of disturbing factors.

First, and foremost, the detainees did not get lawyers.[101] Each detainee was assigned a "personal representative" whose job was to assist the detainee with the proceedings of the CSRT.[102] This could have been a positive development, as the personal representatives were usually bilingual and

97. *See*, THE GUANTANAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW 149 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009).
98. *Hamdi*, 542 U.S. at 509.
99. THE GUANTANAMO LAWYERS, *supra* note 97.
100. *Id.*
101. *Id.*
102. *Id.*

translated the proceedings to the detainees.[103] However, the personal representatives were not lawyers.[104] They were "functionaries of the tribunals" and did not act as the detainees' advocates.[105] The personal representatives did not make arguments on behalf of the detainees and sometimes "even made statements contrary to the prisoners' interests."[106] Moreover, the CSRT regulations expressly state that "no confidential relationship exists between the detainee and the Personal Representative."[107] In short, this is not what the *Hamdi* Court had in mind when it required that detainees be given a meaningful opportunity to challenge their detention.

Second, almost everything about the CSRT hearings was shrouded in secrecy. To some degree, this is undoubtedly necessary. Presumably, some of the information presented and discussed during the CSRTs was confidential and may have the potential to harm national security. Making the hearings public could undermine a fundamental goal of keeping Americans safe. The CSRT hearings, however, were secretive in ways that could actually harm the detainee and affect his or her ability to obtain a fair status determination. For example, none of the identities of the officers making the determinations was made known to the public.[108] The location of the hearings, both then and now, is a secret.[109] Nor were the identities of the personal representatives disclosed, so the detainees never knew who was translating for them.[110] Without knowing where they were, whom they were up against, and who was "representing" them, the detainees were on grossly unequal footing throughout the process, highlighting a complete lack of due process.[111]

Finally, and perhaps most troubling, nothing was "meaningful" about the actual determination process itself. The CSRT regulations make clear that the "[t]ribunal is not bound by the rules of evidence such as would apply in a court of law."[112] As noted earlier, considering the difficulty in obtaining witnesses and evidence (sometimes four or five years old) from Afghanistan, the desire to give the government some leeway regarding the standard rules of procedure

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103. *Id.*
104. *Id.*
105. THE GUANTANAMO LAWYERS, *supra* note 97.
106. *Id.*
107. *Id.*
108. *Id.*
109. *See id.*
110. *See id.*, at 149-150.
111. Representing is in quotes because the personal representatives were so in title only. As explained above, in reality the detainees had no one representing them or advocating on their behalf against the government.
112. THE GUANTANAMO LAWYERS, *supra* note 97, at 150.

makes sense. However, this was rendered meaningless by the fact that the detainees were not present when any evidence (if there was any) was presented.[113] Leeway is one thing, but a complete inability to challenge the evidence against oneself, or present any exculpatory evidence, is quite another.

Furthermore, the proceedings were divided into two parts and the detainees were allowed to attend only the first portion of the proceedings.[114] Only allowing detainees access to a portion of the proceedings fundamentally biases the process. It is also important to remember the stakes—the detainees are not suspected of misdemeanor theft here. The detainees are fighting to avoid indefinite military detention, a permanent loss of personal liberty. The stakes are too high not to have a meaningful opportunity to challenge their detention.[115] Moreover, during the first part of the proceedings, in which the detainees were allowed to be present, the allegations against them were read and the detainees were asked to respond.[116] That is all. The government produced no evidence in support of the allegations and no witnesses were called, nor *allowed* to be called, when the detainee was present.[117] All of the government's evidence and witnesses were presented in the second portion of the proceedings, after the detainee left.[118] To compound matters, during the second portion of the proceedings, the portion the detainees could not attend, the tribunals were allowed to consider evidence obtained through torture.[119]

ii. Lt. Stephen E. Abraham and Do-Over Tribunals

Another factor deserves special attention, as it potentially illuminates the true motive of the Executive after it lost the Court battle in *Hamdi*. Earlier it was noted that nearly 95 percent of detainees were found to be enemy combatants by the CSRTs.[120] This percentage is misleading. In reality, almost every single detainee at Guantanamo Bay was eventually found to be an enemy combatant.[121] The 5 percent who were not found to be enemy combatants the first time around were retried, sometimes multiple times, until they were, in

113. *Id.*
114. *Id.*
115. *See Hamdi*, 542 U.S. at 509.
116. THE GUANTANAMO LAWYERS, *supra* note 97, at 150.
117. *Id.*
118. *See id.*at 149-51.
119. *Id.* at 150.
120. *Id.* at 149.
121. *Id.*

fact, found to be enemy combatants.[122]

Stephen Abraham had twenty-two years' experience as a military intelligence officer when he was asked to be the head officer for a CSRT.[123] His tribunal concluded that one particular detainee was not an enemy combatant. It did so, in part, because "what were purported to be specific statements of fact [from the government] lacked even the most fundamental hallmarks of objectively credible evidence."[124] After his panel's CSRT determination, Abraham remarked "the response from my superior officers was that I had done something wrong."[125] Abraham found out two months later that the same detainee was retried in front of a different CSRT. This panel concluded the detainee was an enemy combatant on the same paucity of evidence.[126] It was then that Abraham concluded: "The CSRT process was little more than an effort to ratify the prior exercise of power to detain individuals in the 'war on terror' while paying lip service to the Supreme Court's mandate that the detainees were entitled to a fair hearing."[127] In short, the CSRT process left detainees with no opportunity to confront witnesses or view documentary evidence, much less present exculpatory evidence.[128] There was not a lack of "meaningful" opportunity—there was *no* opportunity at all. This falls perilously below the standard set by the Court in *Hamdi*[129] and is a prime example of the Executive's defiance of the system of checks and balances that help form the basis of American democracy.

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122. *See* THE GUANTANAMO LAWYERS, *supra* note 97, at 151-54. For example, Mr. Abdul Hamid Al-Ghizzawi was never found guilty of any crime. After four years of detention in Guantanamo Bay without charge, he went before a CSRT in 2005 where it was determined he was not an enemy combatant. *Id.* at 151. Six weeks later, the government tried him before a different set of officials in another CSRT and they found him guilty on new evidence. Denbeaux and Hafetz explain:

> I have seen the classified transcripts of the CSRT hearings and I know that no new information surfaced. The only new factor in the do-over tribunal was a new (and more compliant) panel of military judges. The new panel took the same information as the first panel, classified it as secret, and claimed it was new evidence . . . The same pattern was repeated in other cases.

Id. at 152.

123. *Id.* at 151-54.

124. *Id.* at 153.

125. *Id.*

126. *Id.*

127. *Id.* at 153-54.

128. THE GUANTANAMO LAWYERS, *supra* note 97, at 150.

129. *Hamdi*, 542 U.S. at 509.

This blatant defiance also crystallizes the concern on the part of the aforementioned plaintiffs in *Hedges*. Is that what could happen to that group of journalists and activists if the government suspected them of aiding a group associated with terrorism? What if those journalists and activists did not aid terrorism at all? There would be no meaningful opportunity for them to challenge their detention because the CSRT would find them enemy combatants and they would be placed in military prison, indefinitely, without charges filed.

C. Challenges to the NDAA

Fearing this, in 2012 the plaintiffs in *Hedges*, a group of journalists and activists, filed a lawsuit challenging a specific section of the NDAA. They asserted "that Section 1021 is constitutionally infirm, violating both their free speech and associational rights guaranteed by the First Amendment as well as due process rights guaranteed by the Fifth Amendment of the United States Constitution."[130] The government asserted that the NDAA is simply an affirmation of the Authorization of Military Force (AUMF), and that, "§ 1021 of the NDAA does nothing new; and therefore, since the type of activities in which plaintiffs are engaged were not subject to legal action under the AUMF, there is no reasonable basis for plaintiffs to assert that § 1021 could suddenly subject them to governmental action now."[131]

The United States District Court of the Southern District of New York investigated this claim for validity. Congress passed the AUMF in direct response to the terrorist events on September 11, 2001. The AUMF provides that

> the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[132]

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130. Hedges v. Obama, No. 12 CIV. 331(KBF), 2012 WL 1721124, at * 1 (S.D.N.Y. May 16, 2012), *order clarified by,* No. 12 CIV. 331(KBF), 2012 WL 2044565 (S.D.N.Y. June 6, 2012).

131. *Id.*

132. Authorization for Use of Military Force, Pub.L. No. 107-40, 115 Stat. 224 (2001).

Further, § 1021 states the following relevant portions:

> (a) In General. Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the [AUMF] includes the authority of the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war.
> (b) Covered Persons. A covered person under this section is any person as follows...
> (2) A person who was part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.
> (c) Disposition Under the Law of War. The disposition of a person under the law of war as described in subsection (a) may include the following:
> (1) Detention under the law of war without trial until the end of hostilities authorized by the [AUMF]....
> (4) Transfer to the custody or control of the person's country of origin, any other foreign country or any other foreign entity.
> (d) Construction. Nothing in this section is intended to limit or expand the authority of the President or the scope of the [AUMF].
> (e) Authorities. Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens...."[133]

Whether these two sections say the same thing is open to interpretation, but the crux of the issue for the plaintiffs was the meaning of "substantially supported" "associated forces" under § 1021. How substantial does the support have to be and what does support mean? Does this mean giving money and if so, how much? Would a tweet of encouragement suffice? Regarding the associated forces, which ones officially associate with al-Qaeda?[134]

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133. *Hedges*, 2012 WL 1721124, at *3–4, (citing National Defense Authorization Act for Fiscal Year 2012, Pub. .L. No. 112–81, § 1021 125 Stat. 1298, 1308 (2011)).
134. For example, one plaintiff, journalist Christopher Hedges:

Specifically, what does it mean to associate with al-Qaeda and does such an association require knowledge or intent?[135] These are some of the questions raised by the NDAA.

The court in *Hedges* posed similar questions to the government. The following is from the transcript at oral argument:

> "The Court then asked: Give me an example. Tell me what it means to substantially support associated forces.
> Government: I'm not in a position to give specific examples.
> Court: Give me one.
> Government: I'm not in a position to give one specific example. Tr. 226.
> The Court then asked: What does 'directly supported' mean?
> Government: We have not said anything about that in our brief.
> Court: What do you think it means?
> Government: ... Your Honor, we had focused so much on the phrase that was challenged by the plaintiffs,

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> testified that he has read § 1021 of the NDAA. Tr. 160. Hedges testified that he is also familiar with the provisions of the AUMF and has a specific understanding as to what they mean. Tr. 165 ('enemy combatants on foreign soil that are engaged in direct hostilities with the United States and are linked directly with those who carried out the attacks of 9/11'). He does not, however, understand that § 1021 is entirely co-extensive and goes no further than the AUMF. Tr. 165. Indeed, he testified that he reads § 1021 as 'radically different' from the AUMF. Tr. 166. In that regard, Hedges is unclear as to the meaning of what constitutes 'associated forces' in § 1021, see Tr. 168, nor does he understand what the phrases 'engaged in hostilities,' 'covered person,' or 'substantially supported' means as used in § 1021, Tr. 162–63.

Id. at *7.

135. In a previous detention case, the government argued "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities" is aiding al-Qaeda or associated forces as an enemy combatant. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) *vacated sub nom*, Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *rev'd,* 553 U.S. 723 (2008).

> 'substantial support' that I have not thought through exactly and we have not come to a position on what 'direct support' and what that means. Tr. 229–230.
>
> The Court then asked: "Assume you were just an American citizen and you're reading the statute and you wanted to make sure you do not run afoul of it because you are a diligent U.S. citizen wanting to stay on the right side of § 1021, and you read the phrase 'directly supported'. What does that mean to you?"
> Government: Again it has to be taken in the context of armed conflict informed by the laws of war.
> Court: That's fine. Tell me what that means?
> The Government then returned to the Laws of War and finally stated, "I cannot offer a specific example. I don't have a specific example."[136]

The Executive thus had no precise answer for what it means to substantially support the war or terrorism.

Moreover, and most importantly for the purposes of this Article, many plaintiffs testified that they suffered harm as a result of the uncertainty and fear of running afoul of § 1021. For example, plaintiff Hedges testified that "since the passage of § 1021, he has altered his associational and speech activities with respect to some of the organizations upon which he previously reported due to his concern that those activities might bring him within the ambit of § 1021, thereby subjecting him to indefinite military detention."[137] The court in *Hedges* noted the importance of standing, especially after *Clapper*, in which the plaintiffs were not allowed to challenge the NSA surveillance program because they failed to present some case for imminent harm or a "certainly impending" injury.[138] However, in *Hedges,* the trial court went through each plaintiff and showed how each had suffered harm, directly in response to the passing of § 1021.[139]

Thus, the trial court in *Hedges* found the plaintiffs had standing to challenge the NDAA, because they had suffered harm. In sum, "these plaintiffs have standing precisely because their 'undisputed testimony clearly establishes that they are suffering injuries in fact, and because [the Court] finds those injuries are causally connected to [§ 1021]—because they are taken in

136. *Hedges*, 2012 WL 1721124, at *13-14.
137. *Id.* at *8.
138. *Clapper*, 133 S.Ct. at 1143.
139. *See Hedges*, 2012 WL 1721124, at *15-18.

anticipation of future government action that is reasonably likely to occur.'"[140]

Thus, the plaintiffs in *Hedges* won. They received a temporary injunction as to § 1021 of the NDAA with the Court holding, "plaintiffs have shown a likelihood of success on the merits regarding their constitutional claim and it therefore has a responsibility to ensure that the public's constitutional rights are protected."[141] Their victory, however, was short-lived, because the appellate court was going to find the plaintiffs lacked standing.

D. Lack of Standing (Again)

In July 2013, the government appealed the district court ruling and won.[142] The Second Circuit held that,

> the American citizen plaintiffs lack standing because Section 1021 says nothing at all about the President's authority to detain American citizens . . . [and] the non-citizen plaintiffs also have failed to establish standing because they have not shown a sufficient threat that the government will detain them under Section 1021. Accordingly, we do not address the merits of plaintiffs' constitutional claims.[143]

In some ways, the court is correct. It is true that § 1021 does not explicitly state that it applies to American citizens. It actually fails to state either way. That is part of plaintiffs' arguments; they are uncertain who can be detained under § 1021 and under what criteria.

The ambiguity of § 1021 was not lost on its congressional drafters. Despite intense debate, Congress was unable to decide whether it applied to U.S. citizens or whether it applied to all persons, citizens or otherwise, apprehended on U.S. soil.[144] Senator Dianne Feinstein thus proposed a clarifying amendment that would make it illegal to indefinitely detain American citizens without a trial. "The authority described in this section for the [military] to detain a person does not include the authority to detain a citizen of the United States without trial until the end of the hostilities."[145]

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140. *Id.* at *18 (citing Amnesty Int'l v. Clapper*,* 638 F.3d 118, 140 (2d. Cir. 2011), *rev'd*, *Clapper*, 133 S. Ct. 1138).
141. *Id.* at *28.
142. *See* Hedges v. Obama, 724 F.3d 170 (2d Cir. 2013).
143. *Id.* at 174.
144. Erickson-Muschko, *supra* note 74, at 1400.
145. *Hedges*, 724 F.3d at 185 (citations omitted).

Nevertheless, her proposed amendment was rejected.[146] This may have been in part because of political pressure applied by the Executive. President Obama threatened numerous times to veto the NDAA in 2012 if it contained provisions limiting executive power when it pertained to detaining terror suspects.[147] To avoid such a veto, Congress removed several provisions that would have limited the Executive's immense detaining power.[148]

Such political pressure is common, and it underscores how the Executive can sometimes dominate the other branches of government. Because of her failed efforts to clarify the meaning and scope of § 1021, Senator Dianne Feinstein proposed a second "compromise amendment."[149] It reads: "Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States."[150] The "compromise amendment" was introduced because many in

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146. *See* S. Amdt. 1126, 112th Cong. (2011), *available at* http://www.congress.gov/amendment/112th-congress/senate-amendment/1126/text (seeking to prohibit the long-term military detention of U.S. citizens without trial rejected by a vote of 45-55).

147. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2012, Pub.L. No. 112-81, § 1036, 125 Stat. 1298, 1563 (2011) (substituting a new system of review for the system established by Exec. Order No. 135673 C.F.R. 227 (2011)); *id.* at § 1039 (preventing the Executive from transferring detainees to the United States for trial, imprisonment, or release if exonerated); *id.* at § 1040 (restricting transfers of detainees to foreign countries). The White House officially objected and threatened a veto if those provisions were included in the final bill. Monica Eppinger, *Reality Check: Detention in the War on Terror*, 62 CATH. U. L. REV. 325, 326 n.1 (2013); OFFICE OF MGMT. & BUDGET, STATEMENT OF ADMINISTRATION POLICY: H.R. 4310 -- NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2013 2 (2012) ("If the final bill presented to the President includes these provisions that challenge critical [E]xecutive Branch authority, the President's senior advisors would recommend a veto.").

148. Congress removed some provisions, including Sections 1036 and 1039, and amended others so as to not curtail Executive authority. When President Obama signed the final bill, he simultaneously issued a signing statement expressing the administration's "serious reservations" to remaining provisions regarding detainee treatment. *Statement on Signing the National Defense Authorization Act for Fiscal Year 2012*, 2011 DAILY COMP. PRES. DOC. 201100978 (Dec. 31, 2011), http://www.gpo.gov/fdsys/pkg/DCPD-201100978/pdf/DCPD-201100978.pdf (explaining that the President signed the bill in order to appropriate funds for military operations "despite having serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists").

149. *Hedges*, 724 F.3d at 185.

150. *Id.*

Congress believed that § 1021 changed existing law and authorized the U.S. to detain Americans indefinitely, without charge, in military prison.[151] On the contrary, other senators believed it did not change existing law in any way, and whatever the AUMF meant, it was still presently good law.[152] Senator Lindsey Graham best sums up this latter viewpoint:

> It is not unfair to make an American citizen account for the fact that they decided to help al-Qaida to kill us all and hold them as long as it takes to find intelligence about what may be coming next…and when they say 'I want my lawyer,' you tell them: 'Shut up. You don't get a lawyer.'[153]

Thus, Senator Feinstein came up with a second compromise amendment: "our purpose in the second amendment, number 1456, is essentially to declare a truce, to provide that . . . this bill does not change existing law, whichever side's view is the correct one . . . this bill does not endorse either side's interpretation, but leaves it to the courts to decide."[154]

Remarkably, in conjunction with this amendment, President Obama issued a signing statement, explaining his understanding of § 1021. He declared that § 1021 "breaks no new ground and is unnecessary."[155] The President also stated that his administration "'will not authorize the indefinite military detention without trial of American citizens' and 'will interpret section § 1021 in a manner that ensures that any detention it authorizes complies with the

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151. *See id.*

152. *See id.*

153. Chris McGreal, *Military Given Go-Ahead to Detain U.S. Terror Suspects Without Trial*, THE GUARDIAN (Dec. 14, 2011) http://www.theguardian.com/world/2011/dec/15/americans-face-guantanamo-detention-obama. Of the many assumptions this statement makes, one of the gravest is the assumption that you lose your rights on the *accusation* that you are helping enemy forces. "If joining an enemy force causes one to be deprived of due process rights . . . then a long line of Supreme Court cases must be overturned." Melanie J. Foreman*, When Targeted Killing is Not Permissible: An Evaluation of Targeted Killing Under the Laws of War and Morality*, 15 U. PA. J. CONST. L. 921, 952 (2013).

154. *Hedges*, 724 F.3d at 185. This is illustrative of how Congress and the Judiciary are failing to reign in the Executive, as Congress passes a law with an Amendment specifically leaving it up to the courts to decide, and then the courts pass on deciding it.

155. *Id.* at 186.

Constitution, the laws of war, and all other applicable law.'"[156] The fact that the President issued a signing statement in itself is not remarkable. What *is* remarkable is what it states, or rather, what it fails to state. The whole issue surrounding § 1021 is, "To whom does it apply?" Do these plaintiffs have standing to challenge its applicability because of a legitimate fear of being detained? The President's signing statement states § 1021 adds nothing new, but yet *he* promises not to detain American citizens indefinitely without trial. This administration promises not to, but such a statement implies that the President believes the Executive has that power. For whatever reason, he is reluctant to explicitly say so. One does not promise to refrain from detaining people indefinitely if one feels a lack of power to do so in the first place. The President implies he can detain American citizens indefinitely without trial under the NDAA and/or the AUMF.

If there was any initial ambiguity under the AUMF whether Americans can be detained by the military without charge, the President's signing statement and passage of the NDAA seems to have clarified the issue. An amendment proposing there be no detention of Americans was promptly shut down. Instead, we are given an implied ability to do just that: detain Americans on suspicion of assisting or associating with terrorist groups or associated forces, without defining what that means. Therefore, after reading the NDAA, in conjunction with the President's signing statement, one can imagine the plaintiffs in *Hedges* feeling weary of their vulnerability to be detained. Yet, when the trial court asked the government to provide just one example of the kind of conduct that would subject anyone to this type of military detention, it failed to provide any.[157]

It is against this backdrop that the Second Circuit found the plaintiffs in *Hedges* lacked standing to sue the Executive.

> Plaintiffs appear to contend that . . . the wording of Section1021(e) seems to "assume" that citizens may be detained if they have substantially supported al-Qaeda and that Hedges and O'Brien therefore have standing to challenge it. We disagree. There is nothing in Section 1021 that makes any assumptions about the government's authority to detain citizens under the AUMF. Rather, Section 1021(e) quite specifically makes clear that the section should not be construed to affect in any way existing law or authorities relating to citizen detention,

156. *Id.*
157. *Hedges*, 2012 WL 1721124, at *13-14.

whatever those authorities may provide.[158]

The court's statement is true, § 1021 does not state one way or the other, and that last phrase is key: "whatever those authorities may provide."[159] Therein lies the problem, however: the court claims § 1021 does not speak to detention law, but then it likewise refuses to clearly explain the scope of detention law. How, then, are these or any other plaintiffs supposed to know when it appears existing law is undecided on this topic? In essence, the court (like the Executive) is saying that § 1021 adds nothing new to existing law so you lack standing to sue . . . while simultaneously refusing to provide clarity about the existing law. The Second Circuit spends time going through *Hamdi v. Rumsfeld* and some other detention cases,[160] but it fails to answer the question that Congress specifically teed up for it to answer when it amended the NDAA, leaving it "to the courts to decide."[161]

In other words, Congress cannot decide who could be detained and for what, and it therefore specifically leaves it up to the courts to decide. But then the court refuses to hear the case for lack of standing, because the plaintiffs have failed to show for sure that they are subject to detention. But the reason the plaintiffs cannot show for certain they are likely to be detained is because the law is unclear regarding detention. It's less like a maze and more like a big circle; the harder you try to advance your argument the quicker you come back to the place you were before. Thus, the plaintiffs in *Hedges* had their case dismissed. The court said: "[w]e conclude that plaintiffs lack standing . . . because they have not shown a sufficient threat that the government will detain them under Section 1021. Accordingly, we do not address the merits of plaintiffs' constitutional claims."[162]

In sum, the Second Circuit's decision that the plaintiffs in *Hedges* lack standing effectively insulates the Executive from any challenges to the indefinite detention of anyone, citizen or otherwise, and for any definition of "substantially supported" or "associated forces" it chooses to adopt.[163] By this example it seems likely that no one will ever have standing, or will ever be able to show an "imminent threat" of detention, because the law is unclear. And Congress, the Executive, and the Judiciary refuse to clarify it.

The defeat at the appellate level resulted in the plaintiffs in *Hedges* filing a writ of certiorari to the Supreme Court. One might imagine the Court being

158. *Hedges*, 724 F.3d at 193 (emphasis added).
159. *Id.*
160. *See id.* at 174-182.
161. *Id.* at 185.
162. *Id.* at 173-74.
163. *Id.* at 179.

eager to hear such a challenge, especially after Congress specifically left it to the courts to decide, but on April 28, 2014, the Supreme Court denied the plaintiffs' petition for certiorari and refused to hear the case.[164] The Second Circuit decision stands and the plaintiffs are no closer to knowing whether they can be detained indefinitely or for what kind of activity. All that Americans have is the promise from the Obama Administration that it will not choose to exercise such power on them.[165] This may bring comfort to some in the short-term, but one wonders what will happen when the succeeding administrations take over. In refusing to hear the case, the Supreme Court passed on an excellent opportunity to clarify the law on indefinite military detention in the War on Terror.

Once again, Congress and the Judiciary chose not to check the Executive. They allowed the Executive Branch to avoid defining the scope of its powers to detain terror suspects, leaving the Executive with immense wiggle room to operate as each successive administration deems fit. Again, perhaps this is necessary and a good decision giving the Executive unchecked and unspecified power to combat the War on Terror. Yet, such value judgments miss the point. The point is that the other branches of government are not stopping the Executive from garnering far more power than was granted to it under the Constitution. By refusing to define the scope and legal specifics of indefinite military detention, the Executive can effectively detain whomever it chooses without charge and without any meaningful check from the other branches of government. This is not a democratic or a constitutional separation of powers, but rather a significant leap toward an authoritarian regime.

Arguably, the Executive took an even bigger leap away from democracy with the implementation of the "kill list."

V. THE "KILL LIST"

> It is forbidden to kill; therefore all murderers are punished unless they kill in large numbers and to the sound of trumpets.[166]

The Executive Branch admits it has a list of individuals it is trying to kill.[167] The list includes Americans who the Executive claims are terrorists.

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164. Hedges v. Obama, 134 S. Ct. 1936 (2014).

165. *Hedges*, 724 F.3d at 186.

166. Voltaire, Rights, *in* QUESTIONS SUR L'ENCYCLOPÉDIE (1771).

167. Katrina vanden Heuvel, *Obama's 'Kill List' is Unchecked Presidential Power*, N.Y. TIMES (June 12, 2012), http://www.washingtonpost.com/opinions/obamas-kill-list-is-unchecked-presidential-power/2012/06/11/gJQAHw05WV_story.html.

But that is where the transparency ends. The concluding section of this Article examines the "kill list" and the continued failure to check the Executive's usurpation of power.

A. What is the "Kill List"?

"Within the War on Terror, it is no secret that the United States is engaged in a practice known as targeted killing."[168] Currently, America utilizes predator drones, usually remotely operated by Central Intelligence Agency (CIA) officials, which kill people they deem as threats to Americans.[169] For the purposes of this Article, the term "kill list" does not refer to individuals being killed on the battlefield of war in a firefight, but rather the "premeditated killing by a state of a specifically identified person not in its custody."[170] For several reasons, it is this specific type of targeted killing that raises concerns pertaining to due process and democracy, especially when it involves American citizens.

First, it remains a mystery how one ends up on the "kill list." Since the list is kept secret, it is also virtually impossible to know whether someone is targeted for death unless the government publically declares so. Furthermore, what recourse do "kill list"ees have once they are added to it? How many Americans are currently on the "kill list" and why? Unfortunately, the legal questions surrounding the "kill list" have remained unanswered for many years. The mystery is due in large part to the Executive's reluctance—and outright refusal—to explain how anyone, including Americans, end up targeted for death on the "kill list".

B. Executive Justifications for the "Kill List"

America is presently fighting an asymmetric war against an ever-changing, mobile adversary. The Executive claims it needs utmost flexibility to fight the adversary in the most effective way possible. Employing the controversial predator drone program enables the Executive to remotely kill suspected terrorists, American and other, by pushing a few buttons in almost

168. Foreman, *supra* note 153, at 922.
169. *Id.*
170. *Id.* at 923 (citing Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 406 (2009)). Even the name of this article assumes "kill list" victims are terrorists. It is important to remember they are suspects, often deemed terrorists by only a handful of people in the White House.

any geographic coordinate in the world.[171] Critics argue, however, that utilizing predator drones removes "potentially messy questions of surrender."[172] Thus, rather than being utilized as a "last resort" option, as the government claims, their lethal efficiency steered President Obama to execute more predator drone strikes during his first year in office than George W. Bush authorized in his eight years as President.[173] In summary, because the killings are premeditated and do not have to be perpetrated on the field of battle, some argue that "this makes it no less than a hit list."[174]

As such, the legality of the Executive's "kill list" has been fundamentally questioned in the media.[175] For reasons unknown, the Executive routinely refused to provide a legal justification for the "kill list." A memorandum from the White House's Office of Legal Counsel (OLC) that attempted to legally explain the "kill list" was, however, leaked to the press.[176] In addition, a group of New York Times journalists filed a lawsuit under the Freedom of Information Act (FOIA), and though the Executive fought to avoid explaining the legal rationale behind the entire "kill list" process, on June 23, 2014, the Second Circuit ordered the OLC and the Department of Defense (DOD) to

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171. Charles Allen, then Deputy General Counsel for International Affairs at the Department of Defense under President George W. Bush, argued that the United States can lawfully target "[a]l Qaeda and other international terrorists around the world and those who support such terrorists without warning." Ryan T. Williams, *Dangerous Precedent: America's Illegal War in Afghanistan*, 33 U. PA. J. INT'L L. 563, 575 (2011) (quoting Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 64 U. PITT. L. REV. 889, 904 (2002)). *See also* Rodrique Tremblay, *The 'Real Obama' is Bent on Killing Innocent People with Remote-Controlled Drones,* GLOBALRESEARCH (June 11, 2013), http://www.globalresearch.ca/the-real-obamas-bent-on-killing-innocent-people-with-remote-controlled-drones/5338543.

172. Tara McKelvey, *Inside the Killing Machine*, NEWSWEEK (Feb. 13, 2011, 10:00 AM), http://www.newsweek.com/inside-killing-machine-68771 (quoting Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law, in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346-400 (Benjamin Wittes ed., 2009)).

173. Nicholas Schmidle, *Getting Bin Laden*, THE NEW YORKER, Aug. 8, 2011, at 35, 37.

174. Foreman, *supra* note 153, at 923.

175. Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principals and Will*, N.Y. TIMES (May 29, 2012), http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=3&_r=0.

176. Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES (Oct. 8, 2011), http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all&_r=0 [hereinafter Savage, Secret U.S. Memo].

provide to the public its legal justification for the "kill list."[177] In July 2014, the Executive responded by reluctantly releasing a heavily redacted 2010 memo detailing justifications for the killing of an American citizen. Thus, between the OLC leaked memos and the recent court-ordered OLC Memo, Americans have gained some insight about how the Executive explains the legality of the "kill list".

Ultimately, however, the constitutionality of the "kill list" extends beyond the scope of this article. The larger issue for the continued perseverance of American democracy is whether the constitutionality of the "kill list" can be effectively challenged through a court of law or an act of Congress, and not just by some questions in the media. Is a legitimate constitutional challenge—the kind of challenge provided for in a representative democracy—plausible?

The advent of drones and the increased communications technology have given the Executive a new unbridled ability to kill Americans, seemingly without any judicial interference, anywhere in the world. And though the constitutionality of the "kill list" will not be argued here, examining how the Executive has dealt with some of the major concerns regarding the "kill list" will help illustrate its thought process and overall power. In particular, a brief analysis of due process concerns and the imminence requirement highlight the Executive's growing autonomy.

i. Due Process Concerns

One of the most obvious concerns with an Executive "kill list" is due process, as there is no trial, opportunity to confront witnesses or present evidence, etc. Facially, it appears the Executive is usurping the role of the Judiciary, as it plays judge, jury and (literally) executioner. According to the Supreme Court and the Bill of Rights, American citizens are afforded due process rights throughout the world.[178] The Due Process Clause of the Fifth Amendment provides that, "No person shall be...deprived of life, liberty, or property, without due process of law."[179] The mere existence of a Presidential "kill list" seems to violate the Fifth Amendment, as Americans are targeted and killed by the Executive Branch without any judicial decision or due process of the law.

The Executive has responded to this apparent dilemma. When asked how the "kill list" comports with constitutional due process, President Obama responded that, "[f]or the record, I do not believe it would be constitutional for

177. N.Y. Times Co. v. U.S. Dep't of Justice, 756 F.3d 100 (2d Cir. 2014).
178. *See* Reid v. Covert, 354 U.S. 1, 5 (1957) (noting that the Bill of Rights constrains the actions of the government even against citizens abroad).
179. U.S. CONST. amend V.

the government to target and kill any U.S. citizen—with a drone or with a shotgun—without due process…nor should any president deploy armed drones over U.S. soil."[180] Upon a first reading, it appears President Obama is admitting the Executive is expanding its powers beyond those proscribed by the Constitution and admittedly violating the Fifth Amendment.[181] It would also appear that the President is correct—it is not constitutional to target and kill U.S. citizens without due process under the law. How he reconciles this paradoxical situation is explained below. But beforehand, a brief examination of two Supreme Court cases will provide background information about the purview of executive power over U.S. citizens during wartime.

ii. Ex Parte Milligan

The Supreme Court already considered the appropriate standard for reviewing war-related behavior, especially when those actions "touc[h] the sensitive area of rights specifically guaranteed by the Constitution."[182] In such cases, the Court held that the exercise of wartime authority necessitates "the greatest possible accommodation of the liberties of the citizen."[183] Thus, in wartime, citizens are to be afforded as many liberties as possible. That is the baseline—the default setting for wartime policy.

Considering that backdrop, two Supreme Court decisions emerged to help shape and define wartime treatment of U.S. citizens. The first is *Ex Parte Milligan*, a Civil War case about a civilian Indiana citizen who was subject to military jurisdiction. He was accused of belonging to the Southern Confederacy, an armed group, which conspired to commit hostile acts against the Union.[184] Milligan, a Southern sympathizer, was taken from his Indiana home by the military, placed in military custody, and sentenced to death by a military court.[185] The government believed that since it was wartime, and Milligan was thought to have aided the enemy, he could be subject to military discipline.[186] The Supreme Court disagreed, remarking that the laws of war "can never be applied to citizens in states which have upheld the authority of

180. Oliver Knox, *Amid Heckling, Obama Defends Drone Strikes, Vows to Close Guantanamo*, YAHOO NEWS (May 23, 2013), http://news.yahoo.com/blogs/ticket/questions-obama-drones-guantanamo-counter-terrorism-speech-141259101.html.
181. U.S. CONST. amend V.
182. *Ex Parte* Endo, 323 U.S. 283, 299 (1944).
183. *Id.* at 302.
184. *Ex parte* Milligan, 71 U.S. 2 (1866).
185. *See id.* at 107.
186. *Id.* at 120, 121 (meaning death in Milligan's case).

the government, and where the courts are open and their process unobstructed."[187] There was no urgency or national security emergency, despite the ongoing Civil War, that warranted military justice for someone who was not actively taking part in the hostilities at the time he was apprehended.

iii. Ex Parte Quirin

The second case is *Ex Parte Quirin*, which is sometimes referred to as the outlier case.[188] In *Quirin*, the Court authorized the Executive's actions of trying admitted unlawful enemy combatants captured on U.S. territory by military commission during World War II.[189] *Quirin* involved Nazi saboteurs, one of whom was an American citizen, who landed in Florida from a German submarine armed with explosives.[190] His intent was to wage war against America and sabotage its war efforts.[191] The Court distinguished *Milligan* by focusing on the status of the accused, rather than where he was captured.[192] In *Quirin*, the accused citizen *admitted* he was an unlawful enemy combatant guilty of all the charges thrust upon him.[193] Since there was admittedly no question of guilt, the Court was amenable to allowing the military to decide his fate. The Court's holding in *Quirin* is thus very narrow and limited to circumstances in which the alleged wrongdoers in wartime have admitted being unlawful enemy combatants at war with America.[194]

Despite the time gap, there are obvious parallels with the War on Terror. As in *Milligan* and *Quirin*, many of those detained and targeted for death by the U.S. military are accused of assisting the enemy, al-Qaeda, or forces associated with them. As such, arguments can be (and are) made for civilian courts or military justice for terror suspects, based the facts and circumstances of each case. But regardless of which path one prefers, civilian court (*Milligan*) or military court (*Quirin*), neither decision authorizes the military to kill

187. *Id.* at 121.
188. *Ex parte* Quirin, 317 U.S. 1, 28 (1942); Erickson-Muschko, *supra* note 74 at 1415.
189. *Quirin*, 317 U.S. at 28, 45-46.
190. *Id.* at 20-21.
191. *Id.*
192. Erickson-Muschko, *supra* note 74, at 1416.
193. *Quirin*, 317 U.S. at 45-46. *See* Erickson-Muschko, *supra* note 74 at 1416.
194. *Id.* at 1418 ("The Court has since expressed ambivalence with respect to *Quirin's* precedential value, and there are compelling arguments to read the decision as limited to its facts.")

American terror suspects without *some* form of a trial.[195] Nor does any other Supreme Court case or any law passed by Congress; thus, the Executive's "kill list" is not based on legal precedent.[196]

American citizens who have joined al-Qaeda may very well be guilty of treason, and as such, according to the Court in *Milligan* and *Quirin*, should be tried in *a* court, whether it be civilian (if their guilt and status are uncertain) or military (if they have conceded everything).[197] Premeditated execution of such persons violates their constitutional due process rights.[198] Therefore, when the President went on the record declaring, "I do not believe it would be constitutional for the government to target and kill any U.S. citizen . . . without due process,"[199] he was correct.

iv. The Executive's Due Process Explanation

Yet President Obama confidently claims that every American receives due process, despite the absence of the Judiciary in the premeditated targeted killing process, because of how the Executive defines due process. Those individuals on the "kill list" are getting a *form* of due process, the OLC claims, just not the one most people expect. Former Attorney General Eric Holder explained, "[S]ome have argued that the president is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of Al Qaeda or associated forces."[200] "This is simply not accurate. 'Due process' and 'judicial process' are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process."[201] Whether one agrees or not,

195. Even detainees receive CSRTs. Though they are in many ways inadequate, there is at least the appearance of adhering to the Constitution and the law as proscribed by the Court. Those on the kill list receive no trial of any kind.

196. *See* Michael Isikoff, *Justice Department Memo Reveals Legal Case for Drone Strikes on Americans,* NBC NEWS, (Feb. 4, 2013), http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite (citing *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force*, DEPARTMENT OF JUSTICE WHITE PAPER, (2013), *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

197. *See Quirin*, 317 U.S. at 45-46.

198. U.S. CONST. amend. V.

199. Knox, *supra* note 180.

200. Charlie Savage, *U.S. Law May Allow Killings, Holder Says*, N.Y. TIMES (Mar. 5, 2012), http://www.nytimes.com/2012/03/06/us/politics/holder-explains-threat-that-would-call-for-killing-without-trial.html?ref=world.

201. *Id.*

this is admittedly a clever response and an attempt to change the narrative. Under this logic, Americans are afforded due process, but such process need not come at the hands of the Judiciary. Members of the Executive Branch can (and do) decide, in secret, what they feel is sufficient due process for Americans before they are systematically targeted and killed.

Perhaps such deference to the Executive is necessary to effectively root out the worst of the worst. It is highly likely that there are dangerous individuals whose mere existence threatens the lives of Americans. Waiting until these dangerous individuals strike and kill Americans seems like a poor way to defend the nation. The White House's idea of due process, whether or not one agrees with it, circumvents the role of the Judiciary, siphoning the power to determine guilt or innocence to the Executive Branch. If members of the Executive feel a person needs to be targeted for death, shot on sight, they can legally make that happen. There is no appeals process for this Executive form of justice. As the saying goes, you cannot surrender to a predator drone.[202] Not everyone agrees with this interpretation of due process, as Senator Rand Paul remarked: I'm glad the President finally acknowledged that American citizens deserve some form of due process . . . [b]ut I still have concerns over whether flash cards and PowerPoint presentations represent due process; my preference would be to try accused U.S. citizens for treason in a court of law."[203]

Even assuming this form of due process, a form devoid of presenting exculpatory evidence, calling witnesses, cross-examination, etc., is a good idea, to be a democratic republic, the power to decide guilt or innocence of Americans cannot be usurped by the Executive Branch without some democratic process. Congress would need to pass a law or there would need to be a constitutional amendment. In other words, if the Executive wants to assume the role of the Judiciary in wartime, and to target and kill certain Americans without trial, Congress should pass a law or constitutional amendment to that effect. Allowing the Executive to assume the role of the Judiciary without either thing happening, while maintaining that people are still receiving due process, is misleading and nudges America further away from democratic governance.

v. Imminence Requirement

In addition to addressing the due process concerns, the Executive

202. *See* Jens David Ohlin, *Surrendering to the Drones*, LIEBER CODE (Dec. 6, 2011), http://www.liebercode.org/2011/12/surrendering-to-drones.html.
203. Knox, *supra* note 180.

promises to only execute people on the "kill list" if the danger they pose to the U.S. or Americans is "imminent."[204] This seems reasonable, especially in wartime. It is plausible that in some circumstances it is necessary to use deadly force — even against American citizens — to defend America. This is also not without some historical precedent. '"[I]t is not necessarily illegal, in wartime, to kill a citizen without a trial. Lincoln's Union Army did it repeatedly, of course, during the Civil War."'[205] Moreover, in America's democracy, it is the duty of the Executive to execute the war plan and, if necessary, use deadly force. That necessity would seem to come to fruition if a high-level government official learns that an individual poses an "imminent threat of violent attack" on the U.S. and "capture is infeasible."[206]

The law supports such a conclusion. According to the Caroline doctrine, a state need not wait until it is attacked in order to resort to force.[207] In short, the need to resort to force is justified if the danger presented is "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[208] If an American were threatening to attack America or her citizens, and such an attack was imminent, instant and overwhelming, then it would seem proper to resort to deadly force, if necessary, to stop them.

Though the imminence requirement appears palatable, a different reality has unfolded in practice. The Executive has redefined imminence in a way that enables it to execute anyone without evidence of an imminent threat. According to Webster's dictionary, imminent is defined as "happening very soon . . . ready to take place."[209] For the purposes of targeted killing, the

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204. *Id.*

205. David Cole, *Killing Citizens in Secret*, THE NEW YORK REVIEW OF BOOKS (Oct. 9, 2011, 11:15 PM) http://www.nybooks.com/blogs/nyrblog/2011/oct/09/killing-citizens-secret/ (reporting on the content of the Obama Administration's secret legal memorandum regarding the killing of Anwar al-Awaki).

206. Adam Serwer, *Obama Targeted Killing Document: If We Do It, It's Not Illegal*, MOTHER JONES (Feb. 5, 2013, 11:52 AM), http://www.motherjones.com/mojo/2013/02/obama-targeted-killing-white-paper-drone-strikes.

207. *See* Williams, *supra* note 171, at 575-76.

208. Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect its Citizens*, 15 TEMP. INT'L.& COMP. L.J. 195, 211 (2001) (quoting Robert F. Teplitz, *Taking Assassination Attempts Seriously: Did the United States Validate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush*, 280 CORNELL INT'L L J. 569,567 (1995) (noting that use of force in self-defense under this doctrine applies only to the rare case where the need for self-defense is immediate and there is no way to employ less harmful measures)).

209. *Imminent* MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/imminent

Justice Department declares that "'imminent' threat of violent attack against the United States . . . does not require clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future."[210] By redefining imminent threat to mean the threat does not have to happen in the immediate future, the Executive is neutering the essence of imminence. Through this definition of imminence, the Executive effectively removes the imminence requirement altogether. This allows for the possibility of killing anyone on sight whether or not he or she threatens immediate harm. The Executive's attempt to redefine the law has not gone unnoticed.[211] In sum, "[T]he White House has redefined 'imminent threat' to the point of meaninglessness."[212]

Defining imminence in a way that eliminates the immediacy requirement is especially troubling when one recalls the imminence requirement for standing to challenge the NSA surveillance program. As noted earlier, the plaintiffs in *Clapper* were not allowed to challenge the NSA surveillance program because they failed to present some case for imminent harm or a "certainly impending" injury.[213] Thus, when Americans try to challenge Executive power, imminence means imminence, as they must have a "certainly impending injury" in order to have standing.[214] However, when the Executive wants to kill Americans, imminence does not mean imminence, and as long as some harm may happen sometime in the future—that is sufficient.[215] This double standard is problematic, especially if one wants to maintain any type of democracy and separation of powers in America. Whenever there are different rules for different people, where the people in control of the military give different definitions of the exact same word, that nation no longer resembles a land of the people. Congress is supposed to make the laws and the Judiciary define them, not the Executive doing all of the above *sua sponte*.

C. Congressional Efforts to Reign in the Executive's "Kill List"

What has Congress' role been, then, in the implementation of the "kill

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210. Knox, *supra* note 180.

211. *See* Oliver Knox, *White House Defends Drone-War Killing of Americans*, YAHOO NEWS (Feb. 5 2013, 11:41 AM), http://news.yahoo.com/blogs/ticket/obama-memo-justifies-drone-war-killing-americans-164123578--politics.html.

212. Knox, *supra* note 180.

213. *Clapper*, 133 S.Ct. at 1143.

214. *Id.*

215. *See* Foreman, *supra* note 153 at 950, *citing* Cole, *supra* note 205. The Executive claims under its definition of imminence that a U.S. citizen may be targeted and killed regardless of whether he is "involved in any such attacks when he is targeted." *Id.*

list"? With the NSA surveillance program, Congress established the FISA courts in an effort to help check the Executive spying power. As previously discussed, the FISA courts in practice do no such thing, approving every request the government makes to spy. Regarding indefinite detention of terror suspects, Congress passed the NDAA of 2012 but could not agree on whether or not Americans could be detained, and under which circumstances. Congress specifically left it up to the judiciary to decide, and the judiciary refused. Thus, with respect to the "kill list," Congress continues to fail to curb the Executive's growing power. It has not explicitly condoned it nor passed any resolution against it. It remains silent. The effect of which, however, is the same. Congress allows the Executive to target and kill Americans around the globe with seeming impunity. Congress' inaction enables the branch with the military to make killing decisions on Americans without judicial due process, which aids in further pushing America away from democracy.

D. Judicial Challenges to the Constitutionality of the "Kill List"

Thus, can anyone effectively challenge the constitutionality of the "kill list"? Before exploring this critical question, it is important to note how rare it is that one would even know the contents of the "kill list." It is shrouded in secrecy and, like the NSA surveillance program, absent someone improperly leaking the list, it is virtually impossible to know who is on it. If one is unsure if he or she is on the "kill list," how will anyone ever be able to show "imminent harm" to garner standing to challenge it? Recently, one father found out, though only because his American son was so notorious, the Executive publicly admitted it was targeting him. This father's efforts represent the lone major challenge to the constitutionality of the "kill list".

Five years ago, a father found out that his American son was on the "kill list." He was understandably upset. His son, Anwar Al–Aulaqi, was born in New Mexico and later attended Colorado State University, where he studied engineering.[216] Anwar was also a premier proponent of jihad against the U.S.[217] In fact, there is almost universal, if not total, consensus that Anwar Al–Aulaqi was a dangerous individual who directly and/or indirectly threatened American lives.[218] As such, the father had an idea of why the Executive wanted

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216. Mark Mazzetti, Charlie Savage, et al., *How a U.S. Citizen Came to Be in America's Crosshairs*, N.Y. TIMES (Mar. 9, 2013), http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html?pagewanted=all&_r=0.

217. *Id.*

218. Greg Miller, *Legal Memo Backing Drone Strike that Killed American Anwar al-Awlaki is Released*, WASHINTON POST (June 23, 2014), http://www.washingtonpost

to execute his son, but he begged it to let the judicial process run its course first. After all, the father did have Supreme Court precedent on his side. *Ex Parte Milligan* and *Ex Parte Quirin,* both involved American citizens allegedly aiding the enemy in killing or planning to kill Americans during wartime. Both were not hunted down and executed on sight, but rather had to stand trial, first, before a court of law, because that is what the law requires.[219] As such, in 2010 the father filed a lawsuit against President Obama and CIA Director Leon Panetta in Washington D.C.'s federal district court, to stop them from hunting down his son and to remove him from the "kill list."[220]

The father knew of his son's teachings and infamous anti-American views.[221] Thus, even though he wanted his son off the "kill list," it came with a caveat, one that many fathers would think unimaginable. The father sought an "injunction prohibiting defendants from intentionally killing Anwar Al–Aulaqi 'unless he presents a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat.'"[222] He asked the Executive not to kill his son with the caveat that, if killing his son was a last resort and Anwar presented an imminent threat, then preemptively killing his son was alright. Despite this plea, the father lost his lawsuit for lack of standing.

E. Lack of Standing (Once Again)

The D.C. Court exclaimed: "[p]laintiff has failed to provide an adequate explanation for his son's inability to appear on his own behalf, which is fatal to plaintiff's attempt to establish . . . standing."[223] The logic of the argument is quite simple—the father is not suffering the immediate harm here, the son is. Thus, why not have his son Anwar bring the lawsuit? Anwar's father rebuffed that idea, noting his son was in hiding "under threat of death," where any attempt to access counsel or the courts would "expos[e] him[] to possible

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.com/world/national-security/legal-memo-backing-drone-strike-is-released/2014/06/23/1f48dd16-faec-11e3-8176-f2c941cf35f1_story.html (explaining al-Awlaki had "operational leadership roles" with al-Qaeda, continued to "plot attacks against Americans" such as the attempted bombing of a Detroit-bound airliner in 2009, and was found connected to the 2008 Fort Hood shooting).

219. *See Milligan*, 71 U.S. at 135; *Quirin*, 317 U.S. at 28.

220. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010).

221. *See Osama bin Laden's Ideology Remains Steadfast in Yemen,* CATHOLIC ONLINE (May 6, 2011), http://catholic.org/news/international/middle_east/story.php?id=41308.

222. *Al-Aulaqi*, 727 F. Supp. 2d at 8.

223. *Id.* at 17.

attack by Defendants."[224] The Court disagreed, however, as the government subsequently promised not to use "lethal force" against Anwar if he did turn himself in.[225] Though perhaps somewhat comforting, as the father did have the government's word, it was nonetheless the word of an Executive who had been hunting his son for years.

Regardless, even if Anwar did "surrender" to authorities, the government neglected to state exactly what would happen to him in custody. The father worried "that if his son were to seek judicial relief, he would not be detained as an ordinary federal prisoner, but instead would be subject to 'indefinite detention without charge.'"[226] As noted earlier, those subjected to indefinite military detention are often unable to file lawsuits or obtain access to lawyers, and thus Anwar may never be able to challenge the government in the manner that a normal federal prisoner would. The Court dismissed this concern as well, stating:

> [b]ecause Anwar Al–Aulaqi has not yet been detained, it is impossible to determine whether the nature of any such hypothetical detention would be more similar to that in *Padilla* and *Hamdi*, [in which detainees cannot challenge the government] or to the Guantanamo Bay cases in which detainees have been found capable of bringing suit on their own behalf.[227]

Basically, the Court said it's uncertain how and where Anwar would be detained and under what circumstances, but in order to have standing, he should just come on in and find out. For Americans on the "kill list," is the only option to submit to authorities and hope it all works out, despite knowing what Congress and the Judiciary have allowed the Executive to do in the way of indefinite detention? Faced with this Hobson's choice, the father went ahead as the plaintiff. Not surprisingly then, his lawsuit was dismissed for lack of standing.[228] Less than two years later, the government killed his son Anwar with a drone missile strike.[229]

Anwar was not the only man killed by that drone strike. Another American, Samir Kahn from North Carolina, was killed by mistake, with the government admitting "he was not a significant enough threat to warrant being

224. *Id.* at 12.
225. *Id.*
226. *Id.* at 18.
227. *Id.* at 19-20.
228. *Al-Aulaqi*, 727 F. Supp. 2d at 1-2.
229. Mazzetti, Savage, et al., *supra* note 216.

specifically targeted."[230] Initially Anwar's death was kept a secret, and as a result, a few weeks after he died Anwar's 16-year-old civilian son set off into the Yemeni desert "in search of his father," and another U.S. drone strike killed him as well.[231] This too was a mistake.[232] Within a month in 2011, the Executive Branch secretly killed three of its own citizens in Yemen, one of whom was a child.[233] None of them received any kind of trial and "[o]nly one had been killed on purpose."[234] In sum, the Executive's action highlights the perils of a war conducted behind a classified veil, relying on missile strikes rarely acknowledged by the American government and complex legal justifications drafted for only a small group of officials to read.[235]

In essence, like the NSA surveillance program and indefinite military detention, it remains almost impossible to effectively challenge the Executive's ability to target and kill Americans without a prior judicial determination of guilt or innocence.

F. Consequences of an Inability to Challenge the "Kill List"

The Executive claims no Court is needed—domestic or military—to determine the guilt of an American accused of treason or suspected of terrorism. The Executive Branch, alone,—and sometimes one lone individual—reserves the power to place Americans on the "kill list." The inability to effectively challenge this has wide ranging consequences beyond those currently on the "kill list."

First and foremost, non-regulation of a "kill list" without due process expands executive power to further encroach on the role of Congress (deciding what the law is) and the Judiciary (defining the law and internally determining guilt or innocence). Worse, this expansion is conducted with a remarkable lack of transparency, and with little to no effort on the parts of Congress or the Judiciary to check the Executive. The "kill list" involves the ultimate finality and, as such, deliberation beyond the White House is required. This is not to insinuate the judicial branch and Congress are likely to be more effective and accurate than the Executive. That is not the point. Former Yale Law School Professor Alexander Bickel explains: "[s]ingly, either the President or Congress can fall into bad errors . . . So they can together too, but that is

230. *Id.*
231. *Id.*
232. *See id.*
233. *Id.*
234. *Id.*
235. *Id.*

somewhat less likely."[236] More than one branch of government's perspective is inherently valuable, especially during wartime. As former Stanford Law School Dean John Hart Ely explains: "[t]he Constitutional strategy was to require more than one set of keys to open the Pandora's box of war."[237]

In addition, the fact that the lawsuit challenging the "kill list" was dismissed for lack of standing in a perverse way subtly legitimizes the Executive's actions. Justice Jackson wrote one of many powerful dissents in the *Korematsu* case, which is one of the most notorious decisions in American history.[238] In *Korematsu*, the Supreme Court held that it was not unconstitutional to relocate Japanese American citizens, uproot them from their homes, and place them in "internment camps" during World War II. The reasoning was simply because America was at war with Japan.[239] Justice Jackson warned that having the Court allow this, even tacitly or indirectly endorsing it, is far worse than if the Court had said nothing at all.

> [O]nce a judicial opinion rationalizes such an order to show that it conforms with the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.[240]

Having the Judiciary rebuff an attempt to sue on behalf of people on the "kill list," holding and explaining how they cannot have standing, further strengthens the validity and continued existence of the "kill list."

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236. Subcomm. on Arms Control Hearings on War Powers, Libya, and State-Sponsored Terrorism, *Int'l Security and Science of the House Comm. On Foreign Affairs*, 99 Cong., 2d Sess. 88 (1986) (quoted by J. Brian Atwood).

237. JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 9 (1993).

238. Korematsu v. United States, 323 U.S. 214, 242-248 (1944) (Jackson, J., dissenting).

239. *Id.* at 226 (Roberts, J., dissenting).

240. *Id.* at 246.

VI. CONCLUSION

Even proponents of the "kill list," such as Yale Law Professor Stephen Carter admit the U.S. government is assassinating people worldwide: "I am not arguing against a policy of assassination, but I do think we should call what we are doing by its proper name."[241] Public self-awareness would benefit America because it is not behaving as a limited democracy. Not only does Professor Carter's quote apply to the "kill list," but to all of the Executive's excessive power highlighted in this Article. America "should call what we are doing by its proper name" with respect to domestic spying, indefinite detention of terror suspects, and the premeditated killing of American citizens without a trial of any kind. At a minimum, Americans should admit this situation is the current reality, regardless of whether they accept the aforementioned as necessary, trust in the Executive and feel comfortable as it usurps great power beyond what is allowed by the Constitution. Only then can thoughtful discussions and debates about these issues begin.

It is also not too late. America has not completely succumbed to an absolute monarch rule, as many aspects of America maintain hallmarks of democracy.[242] The path the U.S. is traveling, however, leads away from the representative democratic principles established by the Founding Fathers. With the Executive's secrecy and increased power, it is the path opposite democracy, devoid of choice, unalienable rights, and executive accountability. It is the path to authoritarianism.

The concern is not simply that America's response to the War on Terror has rapidly eroded American democracy, but it is that Congress and the Judiciary, and indeed, "we the people," have allowed this to happen. Perhaps ultimately Americans are content with this erosion, but honest discourse about what is truly happening should be a priority before the country moves any closer to the "elective despotism" Jefferson warned about over 200 years ago.[243] After all, isn't this supposed to be a democracy?

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241. Stephen L. Carter, *The Burden of Victory*, NEWSWEEK (May 5, 2011), http://www.newsweek.com/burden-victory-67675.

242. *See* Jeffrey A. Winters, *Oligarchy and Democracy*, THE AM. INT. (Sept. 28, 2011), http://www.the-american-interest.com/articles/2011/09/28/oligarchy-and-democracy/.

243. THE FEDERALIST No. 48, *supra* note 1 (James Madison).