EXPANDING "PRACTICAL SOVEREIGNTY": PRE-DEPRIVATION DUE PROCESS SUITS FOR DRONE STRIKES ON NON-U.S. PERSONS*

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INTRODUCTION

It is now a matter of public knowledge that the U.S. government has operated, as part of its counterterrorism policy since September 11, 2001, a major program of extrajudicial targeted killings via unmanned aerial vehicles (i.e., "armed drones"). Undertaken by the U.S. military and the CIA pursuant to the 2001 Authorization for Use of Military Force ("AUMF"),[1] U.S. drone strikes have targeted members of Al Qaeda and their vaguely-defined "associates," including U.S. citizens, both overtly as an arm of U.S. troop occupations in Iraq and Afghanistan,[2] as well as covertly in the absence of U.S. troops in Pakistan, Yemen, and Somalia.[3]

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1. Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)) (authorizing the President "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").

2. *See, e.g.*, *U.S. Air Force Stops Reporting Data on Afghan Drone Strikes*, REUTERS (Mar. 10, 2013), http://www.reuters.com/article/2013/03/10/us-usa-afghanistan-drones-idUSBRE92903520130310.

3. *See, e.g.*, *Drone Strike Kills at Least Two in Somalia: Residents*, REUTERS (Oct. 28, 2013), http://www.reuters.com/article/2013/10/28/us-somalia-drone-idUSBRE99R0Q32013 1028.

The United States Supreme Court has not yet examined challenges to the legality of drone strikes under the United States Constitution or international law. A lower court dismissed a suit challenging the targeting of Anwar Al-Aulaqi, an American citizen, was dismissed in 2010 on grounds of standing and the political question doctrine.[4] A suit challenging his killing, as well as the killing of his teenage son and another U.S. citizen suspect, is currently pending.[5]

This absence of major judicial precedent has inspired a varied academic debate.[6] This Article attempts to contribute to that debate by sketching a framework for allowing suits challenging the non-battlefield targeting of non-U.S. persons (i.e., nonresident aliens not present on U.S. soil) to proceed on the merits in U.S. courts on grounds of constitutional due process, in light of the "functional approach" and the resultantly-expansive concept of U.S. sovereignty defined by the Supreme Court in *Boumediene v. Bush*.[7]

Part I of this Article explains why due process ought to be applied to drone strikes via *Boumediene*. Part II adapts *Boumediene*'s "practical sovereignty" inquiry to drone strikes on non-U.S. persons. Part III follows with a discussion and a rejection of typical separation of powers and secrecy-related arguments against providing due process through judicial proceedings. Finally, Part IV explains why judicial proceedings should take the form of civil suits as opposed to warrant process.

I. DUE PROCESS VIA *BOUMEDIENE*

As of yet, there is no Supreme Court precedent expressly granting constitutional due process rights to nonresident aliens deprived of life, liberty, or property by the U.S. government on foreign land,[8] even though the plain language of the Due Process Clause of the United States Constitution does provide broadly for the

4. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 35, 52 (D.D.C. 2010). The father of Anwar Al-Aulaqi, a terrorist suspect and U.S. citizen, brought the lawsuit to challenge Anwar's placement on a government kill list. *Id.* at 8, 10, 11.

5. *See* Complaint ¶ 3, Al-Aulaqi v. Panetta, 2012 WL 3024212 (D.D.C. July 18, 2012) (No. 12cv01192).

6. *See generally Targeted Killing Resources: A Bibliography*, LAWFARE, http://www.lawfareblog.com/wiki/the-lawfare-wiki-document-library/targeted-killing/targeted-killing-resouces-a-bibliography/ (last visited Nov. 6, 2013).

7. 553 U.S. 723 (2008).

8. *See* Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 32 (2006) (arguing that due process does not apply to nonresident aliens abroad).

protection of "persons" (and not narrowly for the protection of "the people" or "citizens").[9] In *Boumediene v. Bush*, however, the Supreme Court recognized a constitutional habeas corpus right for nonresident aliens detained by the United States in Guantanamo Bay, Cuba.[10] Based on a "functional approach," the Court reasoned that although the United States lacked formal (de jure) sovereignty over that territory, the U.S. government nonetheless exercised "complete jurisdiction and control," or functional (de facto or practical) sovereignty, over it.[11] This is in notable contrast with the U.S. government's degree of control over prisons in Germany during World War II, which was "neither absolute nor indefinite."[12]

There are differences between due process and habeas corpus. First of all, habeas corpus[13] is almost always narrower: it is primarily concerned with relieving government detainees by allowing them to challenge their detention (i.e., the deprivation of their liberty)—during the fact (as a rule) but also after the fact (as an exception). In contrast, due process is often also concerned with preventing before the fact, as well as compensating after the fact, deprivations of life or property as well as liberty.[14]

Second, in regards to judicial relief from detention in particular, habeas corpus is often thicker: it may require courts to question the substantive grounds for an individual's detention (including factual support and ultimate legal authority) at times when due process allows courts at most only to verify executive branch compliance with broad procedural standards in deciding to detain the individual.[15] In

9. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

10. *Boumediene*, 553 U.S. at 732.

11. *Id.* at 755.

12. *Id.* at 768. In other words, the Court rejected the view that formal considerations (specifically, the official national status of a territory) are necessarily dispositive in defining the application of the writ of habeas corpus and held that functional considerations (specifically, the actual or practical control of the territory) are also relevant. *See* Anthony J. Colangelo, *"De Facto Sovereignty": Boumediene and Beyond*, 77 GEO. WASH. L. REV. 623, 628, 663 (2009) (distinguishing "practical sovereignty," implying complete control, from "de facto sovereignty," implying complete control *and* complete jurisdiction—with jurisdiction being determined in *Boumediene* by the fact that "the only law at Guantanamo is U.S. law," consistent with a written agreement between the United States and Cuba).

13. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

14. *See id.*; U.S. CONST. amend. V.

15. *See* Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 125 (2012).

such instances, the writ of habeas corpus may well provide individual protection when due process rights do not.[16]

Arguably, the breadth of the Court's "functional approach" in *Boumediene* bore broader implications for foreign-land applications of the United States Constitution *as a whole*, including the Due Process Clause.[17] Indeed, prominent commentators have interpreted the case very broadly to suggest, with due regard to *Mathews v. Eldridge*,[18] that "[d]ue process is everywhere"[19] so long as it is not " 'impracticable or anomalous.' "[20] Accordingly, it might not be too extravagant to consider whether it is possible, if ever needed, to extend due process extraterritorially via the *narrower* language of *Boumediene*, including, notably, the standards of "indefinite" and "absolute" control that define "practical sovereignty."[21]

Moreover, there may be a special pragmatic justification for extending due process to targeted killings, in particular, if this is not an area where constitutional habeas corpus or any analog thereof can provide protection—given the importance of the private interest at stake.[22] Regarding the importance of this interest in life, it is worth noting that "[it] is the universal experience in the administration of criminal justice that those charged with capital offenses are granted special considerations"[23]—above and beyond the considerations ordinarily granted in cases of potential life imprisonment, in which, by

16. *Id.* at 126; *but see* Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause*, 96 VA. L. REV. 1361, 1365 (2010) (arguing that, in case of conflict, the Suspension Clause is superseded by the Due Process Clause, in large part because the former clause was adopted as part of the original constitutional text, whereas the latter clause was adopted as an amendment to that text).

17. *See Boumediene*, 553 U.S. at 755–56 ("The Court has discussed the issue of the Constitution's extraterritorial application on many occasions. These decisions undermine the Government's argument that, at least as applied to noncitizens, the Constitution necessarily stops where de jure sovereignty ends.").

18. 424 U.S. 319, 335 (1976) (establishing a cost-benefit balancing test to assess whether procedural protections are sufficient for due process in light of: (1) the importance of the private interest, (2) the importance of the government's interest, (3) the risk of error, and (4) the cost of additional procedural safeguards).

19. Richard Murphy & Afsheen J. Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 411 (2009).

20. *Id.* at 435 (quoting *Boumediene*, 553 U.S. at 759).

21. *Boumediene*, 553 U.S. at 754, 766–71. This Article addresses this possibility. *See infra* Part II.

22. Interestingly, federal habeas corpus *statutes* provide federal courts with the power to grant post-conviction review to state prisoners sentenced to death. *See* 28 U.S.C. §§ 2254–2255 (2006 & Supp. 2011).

23. Griffin v. Illinois, 351 U.S. 12, 28 (1956) (Burton & Minton, JJ., dissenting); *see also* Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam) (holding that the death penalty was unconstitutional as cruel and unusual punishment).

comparison, the "punishment is not irrevocable."[24] In light of this experience, it should seem at least problematic that alleged members of Al Qaeda or related terrorist organizations are systematically afforded greater process once captured and imprisoned than when targeted and killed. In other words, it seems odd that *Boumediene* and its forerunners[25] should provide at least *some* judicial protections to terrorist suspects who are captured and detained, whereas no protection exists for members of the *same* class of suspects who are targeted and killed instead.

Special circumstances might explain this inconsistency if, for instance, the extrajudicial targeting of terrorist suspects were conditioned on the practical infeasibility of judicial process in relevant cases. This is not the case, however, as evidenced by the amount of executive process that is already being provided[26] and also the fact that the executive may have turned to a policy centered on targeted killings precisely to avoid having to provide judicial process already deemed feasible by the Supreme Court.[27] Indeed, there is arguably at least some evidence that the targeted killing of terrorists became the default policy of the United States, in part, because of a desire to avoid what key policymakers perceived as inconvenient constraints in the legal framework placed upon detention and detainee treatment by the Supreme Court in *Boumediene* and related cases.[28] Armed drone technology also provides additional incentives for targeting over process by allowing the U.S. government to avoid

24. *Furman*, 408 U.S. at 290 (Brennan, J., concurring).

25. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006) (holding that the military commission established to try Hamdan violated the Constitution as a well as international law, because the commission was not specifically authorized by Congress and was inconsistent with the Uniform Code of Military Justice as well as the Geneva Convention); Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (holding "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 decisionmaker," as a matter of due process); Rasul v. Bush, 542 U.S. 466, 466 (2004) (holding that U.S. courts have statutory habeas corpus jurisdiction "to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay").

26. *See infra* Parts III, IV.

27. *See, e.g.*, David Ignatius, Op-Ed., *Our Default is Killing Terrorists by Drone Attack. Do You Care?*, WASH. POST (Dec. 2, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/01/AR2010120104458.html (quoting former CIA director Michael Hayden: "Have we made detention and interrogation so legally difficult and politically risky that our default option is to kill our adversaries rather than capture and interrogate them?"); Scott Shane, *Targeted Killing Comes to Define War on Terror*, N.Y. TIMES (Apr. 7, 2013), http://www.nytimes.com/2013/04/08/world/targeted-killing-comes-to-define-war-on-terror.html (establishing the policy shift from detentions to drones).

28. *See* Ignatius, *supra* note 27.

the political and strategic costs and risks of troop deployment and abuse allegations associated with capture and detention.[29] Notably, because these new incentives for targeted killing logically entail disincentives for capture and detention, the U.S. government's claim that it targets suspects only when capture is infeasible should seem less persuasive.[30]

Nonetheless, the very fact that the choice between capture and killing may have been one of convenience helps highlight the fact that there is a certain degree of functional overlap between the two policies. In other words, there is clearly a degree to which detention and targeted killings serve the same narrow counterterrorism purpose. Likewise, as I explore further in Part II, there is a similar functional overlap between drone strikes and detention under the complete territorial control of troops (as in Guantanamo Bay). This overlap provides an additional dimension for extending by analogy *Boumediene*'s functional analysis of sovereignty (or "practical sovereignty") to drone strikes.

II. ADAPTING *BOUMEDIENE*'S "PRACTICAL SOVEREIGNTY"

The *Boumediene* Court suggested that "practical sovereignty" can be defined as "the objective degree of control the Nation asserts over foreign territory"[31]—and that control is complete when it is both "indefinite" and "absolute."[32] On this basis, I argue that armed drones may, upon reaching a certain frequency and intensity of operational activity, give a country such as the United States *some* measure of "practical sovereignty" (or a functional equivalent thereof) over foreign territories such as Northwest Pakistan.

29. *See* Daniel Brunstetter & Megan Braun, *The Implications of Drones on the Just War Tradition*, 25 ETHICS & INT'L AFF. 337, 339 (2011).

30. *See* Shane, *supra* note 27. A recently-leaked Department of Justice white paper explicitly describes the infeasibility of capture as a pre-condition to the targeted killing of U.S. citizens. *See* U.S. DEP'T OF JUSTICE, 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 8 (2013) [hereinafter DEP'T OF JUSTICE WHITE PAPER], *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (laying out the executive's legal standards for using lethal force against persons such as Anwar Al-Aulaqi). However, the relevant passage stands out remarkably from the rest of the paper in its combination of brevity and vagueness.

31. Boumediene v. Bush, 553 U.S. 723, 754 (2008).

32. *Id.* at 768–69. The Court contrasted the United States' control over its naval station in Guantanamo Bay with its control over prisons in post-war Germany, finding that, in the latter case, United States control was neither absolute (because control was effectively shared among the Allied Forces, with no intention of displacing all German institutions) nor indefinite (because Allies had not planned a long-term occupation). *See id.* at 766–71.

Specifically, armed drones may provide a form of control that is both indefinite as well as absolute. The control is indefinite because of the nature of the terrorist threat and the central role armed drones are now set to play in U.S. counterterrorism policy. The control is absolute because of the nature of drone technology and the powerful physical and psychological impact of frequent drone strikes, combined with the inability of governments such as Pakistan's to give practical meaning to their formal sovereignty in the relevant territories. These governments either defer completely to, or fail to preempt or punish, the United States for what looks like violations of the latter. In short, there may well be narrow grounds upon which to extend due process to drone strikes via *Boumediene* in the absence of any constitutional habeas (or analog thereof) for targeted killings.

It seems possible to apply *Boumediene*'s "indefiniteness" standard to what was formerly known as the "War on Terror" in general, and to the current use of armed drones in particular. Although President Obama has called for an eventual repeal of the AUMF—which does not limit the duration of the authority that it gives the President to capture or kill those deemed responsible for the September 11 attacks[33]—the global conflict against Al Qaeda and its "associates" continues with no end in sight, especially in places like Pakistan and Yemen, where the United States has conducted several drone strikes in recent months.[34] The common notion that the threat posed by Al Qaeda is indefinite remains plausible.[35] As the United States continues to treat Al Qaeda as an indefinite threat, the central role now played by armed drones in U.S. counterterrorism policy could arguably satisfy *Boumediene*'s functional "indefiniteness" standard *if* drone strikes can be described as a form or functional equivalent of territorial control.

33. *See* 50 U.S.C. § 1541 note (2006); Ari Shapiro, *Why Obama Wants to Change the Key Law in Terrorism Fight*, NPR (May 29, 2013), http://www.npr.org/blogs/itsallpolitics/2013/05/29/187059276/why-obama-wants-to-change-the-key-law-in-the-terrorism-fight.

34. *See* Mark Mazzeti & Mark Landler, *Despite Administration Promises, Few Signs of Change in Drone Wars*, N.Y. TIMES (Aug. 2, 2013), http://www.nytimes.com/2013/08/03/us/politics/drone-war-rages-on-even-as-administration-talks-about-ending-it.html (reporting that drone strikes remain frequent in spite of recent official announcements that might suggest otherwise).

35. *See, e.g.*, BENJAMIN WITTES, LAW AND THE LONG WAR 49–50 (2008) (describing the conflict against Al Qaeda and associated organizations as a conflict with no definite end); David Cole, *In Case of Emergency*, N.Y. REV. ON BOOKS, July 13, 2006, at 40 (reviewing BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM (2006)) (describing the terrorist threat as "a long-term condition").

On this issue, the obvious first response might be that, just as detentions typically involve sustained, direct personal contact in a way that targeted killings typically do not,[36] land invasions also involve forms of territorial control that the operation of remotely operated aerial vehicles clearly could not. Nevertheless, current U.S. policy practices already demonstrate that drone strikes can function as cheaper substitutes for land invasions.[37]

In fact, it might not be too exaggerated for at least some of the populations impacted by U.S. drone strikes—such as those of Northwest Pakistan, for instance—to describe the machines as instruments of a new form of "[f]oreign occupation by remote control."[38] Indeed, in that region, between 2004 and 2012, hundreds of drone strikes killed between 2,562 and 3,325 people and injured between 1,228 and 1,362 people while inhibiting countless others from carrying out their "day-to-day activities and important community functions."[39] The machines hovered "twenty-four hours a day over [the territory], striking homes, vehicles, and public spaces without warning" and created an atmosphere where "even in the areas where strikes were less frequent, the people living there still feared for their lives."[40] Armed drones have given the United States the power to monitor the people of Northwest Pakistan daily and constantly, and to take lives at will—powers which, together, traditionally belong exclusively to sovereigns and occupying powers.[41] Under these

36. *See* Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1427 (2008).

37. *See supra* Part I.

38. Colum Lynch, *Exclusive: Foreign Occupation by Remote Control*, FOREIGN POL'Y (June 10, 2010), http://turtlebay.foreignpolicy.com/posts/2010/06/10/exclusive_foreign_occupation_by_remote_control (describing plans to monitor the Gaza border using remote cameras).

39. INTERNATIONAL HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC AT STANFORD LAW SCHOOL & GLOBAL JUSTICE CLINIC AT NYU SCHOOL OF LAW, LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN vi, 95 (2012) [hereinafter LIVING UNDER DRONES], *available at* http://www.livingunderdrones.org/wp-content/uploads/2013/10/Stanford-NYU-Living-Under-Drones.pdf.

40. *Id.* at vii, 80.

41. *See, e.g.*, NEVE GORDON, ISRAEL'S OCCUPATION 54 (2008) ("[T]he threat of death . . . [is] the paradigmatic manifestation of forms of control operating under the sway of sovereign power . . . ."); Kevin Stenson, *Surveillance and Sovereignty*, *in* SURVEILLANCE AND GOVERNANCE: CRIME CONTROL AND BEYOND 279, 286 (Mathieu Deflem ed., 2008) ("[S]urveillance is essential to sovereign power . . . ."); PETER M. R. STIRK, THE POLITICS OF MILITARY OCCUPATION 166 (2009) ("The approximation of the occupier to a sovereign has been evident not only in the powers which many have assumed but sometimes even in the manner in which they have been treated by other international actors.").

circumstances, it should not seem unreasonable, from an expanded functional perspective, to argue that the United States may have *in effect* achieved by remote control what it could otherwise achieve only by "absolute" control over the territory. Additionally, drones have arguably achieved more than traditional forms of absolute control considering that remote control has the following benefits: (1) avoiding exposing the agents of control to the danger of personal contact and (2) avoiding the instability of battle without sacrificing the ultimate goal of eliminating suspected terrorists while otherwise constraining their potential supporters.[42] As such, the operation of armed drones may meet *Boumediene*'s "indefinite" and "absolute" control standards.

Critics may object to the application of *Boumediene* to drone strikes on several grounds. First, in the case of Pakistan, it may be argued that the United States does not have "complete" control over Northwest Pakistan because the United States presumably shares control of that territory with the government of Pakistan. Second, even if complete control were established, *Boumediene* may not apply because the case was decided not so much on grounds of "practical sovereignty" as on the basis of a distinct standard of "de facto sovereignty," a concept distinguished by the presence not of "complete control," but of "complete jurisdiction."[43] There are crucial differences between Guantanamo Bay (the territory at issue in *Boumediene*) and Northwest Pakistan. Cuba's national government has not only long given up any practical control of Guantanamo but also officially transferred "complete jurisdiction and control" over the territory to the United States, pursuant to an explicit agreement.[44] By contrast, Pakistan's national government has explicitly given up neither its jurisdiction over Northwest Pakistan nor its intent to give practical effect to its formal sovereignty over the territory.

Control may also be brought into question by reports that Pakistani officials may have consented to U.S. strikes on Northwest Pakistan.[45] Some could argue this indicates the Pakistani

42. *See, e.g.*, David Deptula, *Retired Lt. Gen. Deptula: Drones Best Weapons We've Got for Accuracy, Control, Oversight; Critics Don't Get It*, BREAKING DEF. (Feb. 15, 2013), http://breakingdefense.com/2013/02/15/retired-gen-deputula-drones-best-weapons-weve-got-for-accurac (observing, notably, that "the drones' ability to fly over one spot for a very long time . . . is simply not available to other types of weapons," and that "they allow [the United States] to project power without projecting vulnerability").

43. Colangelo, *supra* note 12, at 656–57.

44. Boumediene v. Bush, 553 U.S. 723, 753 (2008).

45. *See* Dawood Ahmed, *Rethinking Anti-Drone Legal Strategies: Questioning Pakistani and Yemeni "Consent,"* YALE J. INT'L AFF. (June 11, 2013),

government's intent to assert control over its territory, with the help of the United States as its ally.[46] This interpretation would certainly seem at least vaguely consistent with the United States' claim that it limits its drone strikes to places where host governments either consent to the strikes or prove "unwilling or unable" to suppress the threat the United States perceives.[47]

Rather than an assertion of control, Pakistani officials' alleged consent to U.S. strikes could instead be interpreted as further evidence of their government's inability to give practical effect to its formal sovereignty over Northwest Pakistan.[48] Moreover, the consent may be seen as an implied waiver of its jurisdiction over that territory.[49] In addition, the U.S. government's claim that it subordinates drone strike decisions to the consent of host governments rings hollow, because it still implies that U.S. forces hold ultimate discretion either way—reserving the right to attack with or without host government consent.[50] There is no serious doubt that the main function of U.S. drone strikes is not to assist Pakistan in

http://yalejournal.org/2013/06/11/rethinking-anti-drone-legal-strategies-questioning-pakistani-and-yemeni-consent. *But see* Howard LaFranchi, *US Drone Strikes: There's 'No Wink and Nod' from Pakistan, Ambassador Says*, CHRISTIAN SCI. MONITOR (Feb. 5, 2013), http://www.csmonitor.com/USA/Politics/monitor_breakfast/2013/0205/US-drone-strikes-There-s-no-wink-and-nod-from-Pakistan-ambassador-says (reporting that Pakistani officials continue publicly to deny any consent).

46. *Cf.* Dina Temple-Raston, *U.S. Drones Navigate Murky Legal Path in Pakistan*, NPR (Oct. 6, 2012), http://www.npr.org/2012/10/06/162395399/u-s-drones-navigate-murky-legal-path-in-pakistan ("[T]he U.S. was helping Pakistan fight its fires: al-Qaida and its associated groups, individuals who threatened both the U.S. and Pakistan"); *see also* ASSOCIATED PRESS, *Clinton Faces Pakistani Anger at Drone Attacks* (Oct. 30, 2009), http://www.foxnews.com/politics/2009/10/30/clinton-faces-pakistani-anger-drone-attacks/ (reporting that, when asked about U.S. drone strikes in Pakistan during an interview with Pakistani journalists, former Secretary of State Clinton "would say only that 'there is a war going on,' and the Obama administration is committed to helping Pakistan defeat the insurgents and terrorists who threaten the stability of a nuclear-armed nation").

47. *See, e.g.*, Jack Goldsmith, *Fire When Ready*, FOREIGN POL'Y (Mar. 19, 2012), http://www.foreignpolicy.com/articles/2012/03/19/fire_when_ready.

48. *Cf. Pakistan's Tribal Areas: A Wild Frontier*, ECONOMIST, Sept. 20 –26, 2008, at 55, 56, *available at* http://www.economist.com/node/12267391.

49. We could borrow, adapt, and expand on the notion of an implied waiver of jurisdiction from sovereign immunity law, for instance. *See, e.g.*, Schooner Exchange v. Mcfaddon, 11 U.S. (7 Cranch) 116, 136, 145–46 (1812); Lori Fisler Damrosch, *Changing the International Law of Sovereign Immunity Through National Decisions*, 44 VAND. J. TRANSNAT'L L. 1185, 1187 (2011) (explaining that the Supreme Court in Schooner "emphasized that the absolute territorial sovereignty of each state 'is susceptible of no limitation not imposed by itself' and treated comity as the basis for finding an implied waiver of jurisdiction when a foreign prince or public armed ship enters the territory with the consent of the territorial sovereign").

50. *See* Rosa Brooks, *Death by Loophole*, FOREIGN POL'Y (Feb. 5, 2013), http://www.foreignpolicy.com/articles/2013/02/05/death_by_loophole.

asserting control of its territory, but rather to serve U.S. counterterrorism policy goals.[51]

In the alternative, we could take Pakistani officials' present public statements[52] in good faith and dismiss reports of their past consent, especially on account of the consent's lack of explicit public and official character. Doing so would then provide a basis for arguing that, because the United States disregards Pakistan's sovereignty and jurisdiction when it conducts drone operations over the country's territory, the U.S. government should be estopped from invoking Pakistan's sovereignty and jurisdiction as bars to the United States being treated as a "practical sovereign" for the consequences of its operations in Northwest Pakistan.[53] On a related note, allowing Pakistani citizens to seek redress in U.S. courts might undermine the notion that Pakistan's government represents the ultimate authority over what happens on its own territory. However, this speculation ought to be of lesser concern than the fact that U.S. drone strikes have already significantly undermined the authority of Pakistan's national government vis-à-vis its population—as it seems either unwilling or powerless to control the actions of the United States and remedy public anger over the attacks.[54]

In sum, it is not unreasonable to interpret U.S. drone strikes in Northwest Pakistan as acts of "practical sovereignty." This can be done in two ways. First, the consent of Pakistan's government confirms the country's inability to control its territory (against Al Qaeda) and its willingness to yield jurisdiction to the United States. Alternatively, that the United States' disregarded Pakistan's lack of consent confirms Pakistan's inability or unwillingness to control its territory against, and deny jurisdiction to, the United States. On this

51. *See, e.g.*, Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES (May 29, 2012), http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html ("The purpose of these actions is to mitigate threats to U.S. persons' lives"); *see also Clinton Faces Pakistani Anger at Drone Attacks*, *supra* note 46 (quoting a Pakistani journalist who replied to former Secretary of State Clinton's statements about U.S. operations in Pakistan: "It is not our war[.] It is your war.").

52. *See* LaFranchi, *supra* note 45.

53. *See* DEP'T OF JUSTICE WHITE PAPER, *supra* note 30, at 8; Greg McNeal, *Updated: Six Key Points Regarding the DOJ Targeted Killing White Paper*, FORBES (Feb. 5, 2013), http://www.forbes.com/sites/gregorymcneal/2013/02/05/six-key-points-regarding-the-doj-targeted-killing-white-paper ("Regarding whether drone strikes violate a nation's sovereignty, the white paper consistently references the concept of consent.").

54. *See, e.g.*, Malou Innocent, *What Obama Should Do in Pakistan*, HUFFINGTON POST (Jan. 23, 2009), http://www.huffingtonpost.com/malou-innocent/what-obama-should-do-in-p_b_160515.html.

last point in particular, we should remember that the Pakistani government is, after all, heavily—financially and otherwise—dependent upon the U.S. government.[55]

The situation in Northwest Pakistan, unlike that in Guantanamo Bay, does not involve an explicit transfer or claim of complete jurisdiction (to and by the United States), and thus no distinct case of de facto jurisdiction exists. However, the *Boumediene* Court's opinion suggests that "practical sovereignty" could provide independent grounds for applying the United States Constitution outside the United States.[56]

Under these circumstances, frequent and intense[57] campaigns of U.S. drone strikes in under-governed territories such as Northwest Pakistan could justify extending constitutional due process to their population, given the importance of the private interest at stake. This theory may apply not only to targeted individuals, but also to members of any local class of potential collateral victims.[58] These victims would at least include those whose exposure to a past pattern of drone strikes creates a "realistic likelihood" of future harm,[59] especially in light of the precedent of so-called "signature" drone strikes, which target " 'groups of men who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren't known.' "[60]

The resulting framework—regardless of its specific form—would no doubt be unprecedented. However, perhaps this should not be too

55. *See, e.g.*, Claire Provost, *Sixty Years of US Aid to Pakistan: Get the Data*, THE GUARDIAN (July 11, 2011), http://www.theguardian.com/global-development/poverty-matters/2011/jul/11/us-aid-to-pakistan.

56. *See* Boumediene v. Bush, 553 U.S. 723, 754 (2008) ("Indeed, it is not altogether uncommon for a territory to be under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty, of another. This condition can occur when the territory is seized during war, as Guantanamo was during the Spanish-American War."); *see also* Colangelo, *supra* note 12, at 627–28 ("[I]nstead of judicially inquiring into U.S. 'practical sovereignty' over Guantanamo—as the Court just established it could do—the Court chose to 'take notice' of the 'fact' of U.S. de facto sovereignty . . . .").

57. This Article does not address in detail any general frequency or intensity threshold for "practical sovereignty." However, it anticipates that general factors or elements could be established and refined through the evolution of case law—as occurred, for example, in the development of personal jurisdiction jurisprudence based on "minimum contacts." *See, e.g.*, Calder v. Jones, 465 U.S. 783 (1984); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

58. These individuals could be organized as a class for purposes of litigation. *Cf.* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 686–88 (1973) (providing a class action standard).

59. *Cf.* Summers v. Earth Island Inst., 555 U.S. 488, 505 (2009) (Breyer, J., dissenting) (explaining the realistic likelihood standard).

60. LIVING UNDER DRONES, *supra* note 39, at 12–13 (citation omitted).

surprising, given the oft-repeated description of the "War on Terror" as a "new kind of war,"[61] requiring the kind of policy "flexibility"[62] at work in the United States' unprecedented campaigns of targeted killings outside traditional battlefields. Perhaps it is precisely under these circumstances that the flexibility of due process becomes most relevant.[63]

III. MAIN OBJECTIONS TO JUDICIAL REVIEW

Although the above arguments justify extending constitutional due process to non-U.S. persons targeted by drone strikes, they do not necessarily justify extending *judicial* due process. This is true especially when considering the Department of Justice's position that due process can be satisfied through review by "an informed, high-level official" taking place entirely inside the executive branch.[64] On related points, critics could raise objections to judicial review on traditional separation of powers grounds: the political question doctrine;[65] the need for judicial deference to the President's national security expertise; and the need for government secrecy.[66]

61. Donald H. Rumsfeld, *A New Kind of War*, N.Y. TIMES (Sept. 27, 2001), http://www.nytimes.com/2001/09/27/opinion/27RUMS.html.

62. JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 44 (2006).

63. Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.").

64. DEP'T OF JUSTICE WHITE PAPER, *supra* note 30, at 6; *see also* Josh Gerstein, *Eric Holder: Targeted Killings Legal, Constitutional*, POLITICO (Mar. 5, 2012), http://www.politico.com/news/stories/0312/73634.html (quoting Eric Holder: "Due process and judicial process are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, it does not guarantee judicial process.").

65. The political question doctrine is a policy of judicial self-restraint under which the Justices may not adjudicate issues thought to remain within the sole constitutional responsibility of the executive and legislative branches (i.e., the "political" branches). Such questions may include those over the conduct of foreign policy. *See, e.g.*, Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."); Jones v. United States, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government."). *But see* Boumediene v. Bush, 553 U.S. 723, 755 (2008) ("Were we to hold that the present cases turn on the political question doctrine, we would be required first to accept the Government's premise that *de jure* sovereignty is the touchstone of habeas corpus jurisdiction."); Baker v. Carr, 369 U.S. 186, 211 (1962) ("[I]t is error to suppose that every case or controversy which

One could argue that sufficient due process is already provided to drone targets under current circumstances by internal checks within the executive branch. These checks include input from different agencies, offices, and forums, including the Department of Justice, the Central Intelligence Agency's Inspector General, and the National Security Council, with sometimes competing perspectives.[67] However, the fact that armed drones decrease political costs traditionally triggered by the choice to enter war and place less American soldiers in harm's way[68] ought to be matched against an increase in legal costs (i.e., judicial constraints), considering that a decrease in political costs might automatically reduce the executive's political accountability and thus its incentives for self-restraint.[69] This is especially the case because Congress has seemed in recent decades to lack not only the ability to provide individual oversight, but also the willingness to provide general oversight to the executive on matters of national security.[70]

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touches foreign relations lies beyond judicial cognizance."); Colangelo, *supra* note 12, at 625 (explaining that the *Boumediene* Court distinguished questions of "de jure sovereignty," which are political questions, from questions of "practical sovereignty," which are "properly subject to judicial inquiry").

66. Targeted killings are often undertaken under the covert action statute. *See* 50 U.S.C. § 413(b) (2006 & Supp. V 2011). The government could also attempt to block judicial disclosure of relevant evidence under the state secrets privilege. *See* United States v. Reynolds, 345 U.S. 1, 9–10 (1953) ("Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case.").

67. *See* Stephen W. Preston, *CIA and the Rule of Law*, 6 J. NAT'L SECURITY L. & POL'Y 1, 4–5 (2012) (describing the organizational tools of intra-executive checks and balances); Nathan A. Sales, *Self-Restraint and National Security*, 6 J. NAT'L SECURITY L. & POL'Y 227, 233–35 (2012) (describing the diverse incentives for intra-executive checks and balances).

68. *See, e.g.*, *Most Believe Political Leaders Put U.S. Troops at Risk Too Often*, RASMUSSEN REP. (Feb. 6, 2013), http://www.rasmussenreports.com/public_content /politics/general_politics/january_2013/most_believe_political_leaders_put_u_s_troops_at_ risk_too_often; Donald L. Robinson, *Who Has the Power to Put US Troops in Harm's Way? The War Powers Resolution*, CHRISTIAN SCI. MONITOR (Dec. 19, 2005), http://www.csmonitor.com/1995/1219/ 19182.html (analyzing the formal political significance of placing U.S. soldiers in harm's way).

69. *Cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 531 (2004) (plurality opinion) ("Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.").

70. *See* LOUIS FISHER, ON APPRECIATING CONGRESS: THE PEOPLE'S BRANCH 113–41 (2010) (arguing that Congress has for several decades displayed a "lack of confidence, willingness, and interest in defending" its institutional role); Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1624 (2009) ("Congress is not designed to make—indeed, is generally constitutionally foreclosed from

As to the issue of national security expertise, there is no doubt that the executive branch has greater national security expertise than the judiciary.[71] One way to accommodate this concern, in part, would be for Congress to heed calls for a new set of inferior courts with exclusive subject matter jurisdiction over relevant national security cases.[72] These cases would be subject to review by the non-specialized Supreme Court, but it bears noting that the Court's lack of subject matter expertise has not precluded its review of cases in far more specialized areas such as patent law.[73] Judicial review of drone strikes should not require a level of expertise from the judiciary beyond that which it has already displayed in *Boumediene* and other terrorism cases.[74] In addition, the contribution of judges as legal experts remains equally important. Judicial review can help make sure that drone strike policies do in fact adhere not only to the letter and spirit of the Constitution but also to their own terms.[75]

Finally, as to the issue of government secrecy (which ought to be relevant only if review takes the form of civil litigation), it should be understood not so much as a bar to judicial proceedings and review as a bar to public disclosure of evidence. One way to satisfy this concern would be (again) for Congress to heed calls for a new set of national security courts whose proceedings could be held in secret. However, generally-speaking, there is "no *structural* reason why review or monitoring cannot properly protect secret information through procedural rules or other sub-structural, 'soft' forms of regulation."[76]

making—decisions about individual cases."). *See generally* Norman J. Ornstein & Thomas E. Mann, *When Congress Checks Out*, FOREIGN AFF., Nov.–Dec., 2006, at 67 (revealing the collapse of national security oversight in recent years).

71. *See* PHILIP B. HEYMANN & JULIETTE N. KAYYEM, LONG-TERM LEGAL STRATEGY PROJECT FOR PRESERVING SECURITY AND DEMOCRATIC FREEDOMS IN THE WAR ON TERRORISM 9. *Cf.* ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 4 (2007) ("[T]he executive is the only organ of government with the resources, power, and flexibility to respond to threats to national security . . . .").

72. *See, e.g.*, Kevin E. Lunday & Harvey Rishikof, *Due Process is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 CAL. W. INT'L L.J. 87, 123–24 (2008).

73. *See, e.g.*, Ass'n for Molecular Pathology v. Myriad Genetics, 133 S. Ct. 2107, 2109 (2013) (holding that "a naturally occurring DNA segment is a product of nature and not patent eligible merely because it has been isolated").

74. *See, e.g.*, RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS, 2009 UPDATE AND RECENT DEVELOPMENTS 19–24 (2009).

75. This Article does not address the appropriate scope of judicial inquiry on substantive issues (such as the feasibility of capture, or the target's membership in Al Qaeda or any allied force).

76. Pearlstein, *supra* note 70, at 1617.

In ordinary judicial settings, such "soft" forms of review could include, for example, *in camera* review, which would allow judges to assess the need for secrecy on a case-by-case basis. Besides, the executive's blanket claim to secrecy on the subject of drone strikes has arguably been significantly diminished in light of recent public discussions of this topic by the President, the Attorney General, and other senior U.S. officials[77]—not to mention regular news coverage by U.S and international media.

IV. FORM OF JUDICIAL REVIEW: PRE-DEPRIVATION SUITS

The arguments above justify requiring constitutional judicial review for targeted killings of non-U.S. persons via drone strikes in foreign territories; however, they do not yet necessarily justify requiring *pre-deprivation* judicial review in the form of *civil suits* (brought by potential targets and victims, or their representatives, seeking injunctive relief). Here, critics could argue that pre-deprivation suits would be impracticable or anomalous. However, the argument that any form of pre-deprivation process would always be impracticable[78] seems particularly weak in the case of targeted killings via drone strikes, given the amount of pre-targeting executive process already being provided: according to U.S. officials, each strike tends to result from a long deliberate process of targeting and internal justification.[79] This means that, unlike traditional battlefield killings, they provide plenty of opportunities for pre-deprivation process—even in the absence of direct personal contact with targets.[80]

In those cases when the government can demonstrate the occurrence of an emergency precluded pre-deprivation review,[81] the

77. *See* S. Smithson, *Feinstein Veils Criticism of Obama over Drone Strikes*, WASH. TIMES (Jan. 31, 2012), http://www.washingtontimes.com/news/2012/jan/31/feinstein-veils-criticism-obama-over-drone-strikes; Nathan Freed Wessler, *The Government's Pseudo-Secrecy Snow Job on Targeted Killing*, ACLU (June 26, 2012), http://www.aclu.org/blog/national-security/governments-pseudo-secrecy-snow-job-targeted-killing.

78. This includes the U.S. government's claim that Al Qaeda poses an "imminent threat" to the United States. *See* DEP'T OF JUSTICE WHITE PAPER, *supra* note 30, at 1.

79. *See* Deptula, *supra* note 42 ("Drones allow us significantly greater control, oversight, and review before a shot is fired than occurs using manned aircraft or other operations conducted by soldiers, sailors, airmen or Marines."); Afsheen J. Radsan & Richard Murphy, *The Evolution of Law and Policy for CIA Targeted Killing*, 5 J. NAT'L SECURITY L. & POL'Y 439, 461 (2012); Benjamin McKelvey, Note, *Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power*, 44 VAND. J. TRANSNAT'L L. 1353, 1368 (2011).

80. *Compare* Waxman, *supra* note 36, at 1402, 1407, 1427.

81. The exigent circumstances exception to the Fourth Amendment warrant requirement for searches and seizures provides a distant analog. *See* Kentucky v. King, 131 S. Ct. 1849 (2011). However, this analogy is particularly limited by the inapplicability of

proper due process alternative to a pre-deprivation suit for injunctive relief would be a post-deprivation suit brought by "proper plaintiff[s]" (i.e., victim representatives) for damages.[82] But there ought to be no general bar to pre-deprivation review based on the argument that pre-deprivation suits would be anomalous considering "the odd prospect of holding hearings where a terrorist gets to argue that he ought not be killed by a Predator strike"[83] or otherwise conceptually inapposite since, by analogy, habeas corpus review begins only *post*-capture.[84] The "anomalous" argument fails to recognize that the "next friend" of any alleged terrorist could serve as a "proper plaintiff" in a pre-deprivation suit just as easily as in a post-deprivation suit.[85] Further, the critics' habeas analogy seems too contrived and fails to take into consideration the fact that targeted killings may cause irreparable injury in a way that detentions do not.[86] Instead, due process claims might be justified in arising earlier in the context of targeted killings given the importance of the interest at stake, precisely because of the absence of any constitutional habeas analog. This is a formally plausible proposition, considering that, in some regards, due process rights arguably supersede the limits of the habeas privilege so that, even when the kind of emergency that could justify a suspension of habeas arises, a due process pre-deprivation right to be heard might remain.[87]

Certainly, other practical obstacles might also remain under any litigation scenario, given, for example, the unlikelihood that a "villager from the mountains" of Northwest Pakistan would have the knowledge, the inclination, and the means (including a next friend, if necessary) to bring suit in U.S. courts.[88] However, these obstacles would militate only further in favor of facilitating due process by requiring public disclosure of potential target names and by relaxing standing requirements—thereby providing some degree of constructive notice and opportunity to be heard under circumstantial constraints.

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the exclusionary rule (checking abuses of the exception by barring the use of inappropriately obtained evidence), or its equivalent, to targeted killings.

82. Murphy & Radsan, *supra* note 19, at 410.

83. *Id.* at 440.

84. *See id.*

85. *See, e.g.*, Complaint at 2, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2012) (No. 10-1469) (pre-deprivation suit by the father of Anwar Al-Aulaqi, a terrorist suspect and U.S. citizen allegedly targeted—and later killed—by an armed drone).

86. *See supra* Part I.

87. *See* Redish & McNamara, *supra* note 16, at 1416.

88. *See, e.g.*, Murphy & Radsan, *supra* note 19, at 442.

In the alternative, some might prefer to avoid those obstacles by providing pre-deprivation judicial review *without* civil suits—which would depend (once again) on Congress heeding calls for a new set of national security courts that could provide some form of secret warrant process similar to the one currently preceding national security surveillance.[89] This form of process would not require the participation of targeted individuals, collateral victims, or their representatives. However, limiting due process to this option would be problematic because death is a uniquely irreparable injury, so that no actual drone strike victim could hope to dispute (legally or otherwise) the propriety of their death warrant after the fact—an option open to surveillance targets, in principle.[90] Indeed, arguably, civil suits would be significantly more effective at protecting the important private interest at stake, considering that they would allow the people most directly impacted by drone strikes to more directly assert their own legal rights in their own best interest. Therefore, generally-speaking, civil suits should be allowed, unless at least the government can prove that warrant process could be significantly more cost-effective.[91]

CONCLUSION

Armed drones—combining constant surveillance from a safe distance with selective use of nearly-instantaneous lethal force—can provide an unprecedented degree of control over areas of operation. Their use by the United States, in particular, especially in the under-governed territories of weaker client states such as Yemen and Pakistan (where drones have had a severe psychological impact on local populations), is unlikely to be significantly constrained by those territories' formal sovereigns. Moreover, the U.S. government's use of drones in the context of the "War on Terror" raises the possibility that the United States might continue to maintain some control over the relevant territories for the indefinite future.

89. *See* Scott Shane, *Debating a Court to Vet Drone Strikes*, N.Y. TIMES (Feb. 8, 2013), http://www.nytimes.com/2013/02/09/world/a-court-to-vet-kill-lists.html ("[I]n response to broad dissatisfaction with the hidden bureaucracy directing lethal drone strikes, there is an interest in applying the model of the Foreign Intelligence Surveillance Act court—created by Congress so that surveillance had to be justified to a federal judge—to the targeted killing of suspected terrorists, or at least of American suspects."); *see also* Lunday & Rishikof, *supra* note 72, at 123–24 (advocating for a National Security Court of Review).

90. *Compare supra* note 81.

91. This burden of proof would be framed in terms of the cost-benefit analysis provided under the prevailing Supreme Court due process test. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Defining relevant degrees of control by drone is—in general, but especially under the circumstances described above—admittedly a delicate question. However, this Article has tried to show that the exercise of answering the question ought not to be dismissed in advance, particularly because, adapted to general principles of due process, it might offer one of very few narrow jurisprudential avenues to judicial constraints on drone strikes against non-U.S. persons, under *Boumediene v. Bush*. Among other things, such judicial constraints might be required (on a very pragmatic reading of the United States Constitution), not just to maintain some consistency with the broad implications of *Boumediene*, but also to compensate for the fact that drones enable an unprecedented lack of political accountability in the government's use of force.