

NOTE

THERE'S AN APP FOR THAT: IMPLICATIONS OF ARMED DRONE ATTACKS AND PERSONALITY STRIKES BY THE UNITED STATES AGAINST NON-CITIZENS, 2004–2012

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I. INTRODUCTION

The technological sophistication of U.S. military and intelligence capabilities is undeniable. United States military strategy has evolved rapidly since the increase in asymmetric warfare, and there have been technological leaps that allow boots-on-the-ground tactical advantages in real-time combat situations.¹ Nowhere are these advances more evident than in the futuristic employment of unmanned aerial vehicles (UAVs), or drones. Incredible examples of what a little ingenuity and political clout can do for battlefield technology, awkward looking UAVs have changed the way the world thinks about intelligence gathering, target acquisition, and payload “distribution.” Perhaps the “least well-kept secret in the history of secrecy,”² drones will have far reaching implications for the way nations wage war and the way in which they live in peace.³

Targeted killings, by either military raids or drone attacks, have become hot topics in recent years because of high profile killings of top al-Qaeda and Taliban officials. Qaed Salim Sinan al-Harethi, a high level al-Qaeda official, well known for his participation in the USS Cole attacks, was killed in October 2010;⁴ Baitullah Mehsud, a leader of the Tehrik-i-Taliban,⁵ was killed in a drone

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1. See generally P.W. SINGER, *WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE 21ST CENTURY* 19–41, 109–21 (2009).

2. Rachel Martin, *An Open Secret: Drone Warfare in Pakistan*, NPR (Sept. 6, 2011, 3:45PM), <http://www.npr.org/2011/09/06/140216985/an-open-secret-drone-warfare-in-pakistan> (quoting Peter Bergen, director of the National Security Studies Program at the New America Foundation).

3. For information on how you can own your very own iPhone-controlled drone see Kyle Vanhemert, *iPhone-Controlled Parrot Drone Is a Lot Cooler Than Its Name Suggests*, GIZMODO (Jan. 5, 2010, 9:00 PM), <http://gizmodo.com/5441029/iphone+controlled-parrot-drone-is-a-lot-cooler-than-its-name-suggests>.

4. *American Among Yemen Militants Killed*, CBSNEWS.COM (Oct. 12, 2010, 3:23 PM), http://www.cbsnews.com/2100-500164_162-528782.html. One of the other five killed in this attack was an American named Ahmed Hijazi, aka Jalel. *Id.*

strike in South Waziristan in August 2009;⁶ Saleh Ali Saleh Nabhan, an al-Qaeda militant responsible for attacks on Israelis in Kenya, was killed by a U.S. military raid in September 2009;⁷ Hussein al-Yemeni (an al-Qaeda “planner”) was killed by a drone in March 2010;⁸ Osama bin Laden was killed during a raid in May 2011;⁹ and Ilyas Kashmiri, an al-Qaeda commander believed to be responsible for the 2008 Mumbai attack, was killed by a drone strike in June 2011.¹⁰ These are just a few notable characters in the list of al-Qaeda and Taliban members that have been targeted and killed by drone strikes or raids.¹¹

Given the increased media coverage, there is growing concern from the international and domestic political and legal communities regarding the implications of international targeted killing and the use of armed Predator drones. Beyond concerns for the collateral damage that drone attacks and targeted killings cause,¹² the legal framework upon which decision makers rely when using them needs to be critically analyzed.

5. SYED SALEEM SHAHZAD, *INSIDE AL-QAEDA AND THE TALIBAN: BEYOND BIN LADEN AND 9/11* 81 (2011).

The early chapters of this book gave an early account of how al-Qaeda motivated the tribal youth to raise pro Taliban [Therik-i-Taliban] militants, but the purpose of al-Qaeda strategy was not to pull in an unruly crowd. In the tribal areas, it hunted for natural leaders like Nek Muhammad, Baitullah Mehsud, Abdula Mehsud, and Hakeemullah Mehsud, to infuse into them the spirit of al-Qaeda ideology and the strategies to be employed in the future. The selected leaders were required to raise adherents themselves.

Id.

6. Declan Walsh, *Air Strike Kills Taliban Leader Baitullah Mehsud*, *GUARDIAN* (Aug. 7, 2009, 4:31 AM), <http://www.guardian.co.uk/world/2009/aug/07/baitullah-mehsud-dead-taliban-pakistan>; *Obituary: Baitullah Mehsud*, *BBC NEWS* (Aug. 25, 2009, 3:33 PM), http://news.bbc.co.uk/2/hi/south_asia/7163626.stm (“The Pakistani Taliban have confirmed that their leader Baitullah Mehsud was killed in an American missile strike in August 2009. He was one of the most wanted militants in the country.”).

7. Jeffery Gettleman & Eric Schmitt, *American Raid in Somalia Kills Qaeda Militant*, *N.Y. TIMES*, Sept. 15, 2009, at A1.

8. *US Drone Strike in Pakistan “Killed Key Al-Qaeda Man,”* *BBC NEWS* (Mar. 18, 2010, 4:31 PM), <http://news.bbc.co.uk/2/hi/8573652.stm>.

9. Peter Baker, Helene Cooper & Mark Mazzetti, *Bin Laden Is Dead, Obama Says*, *N.Y. TIMES*, May 2, 2011, at A1.

10. *Ilyas Kashmiri Dead: Al Qaeda Commander Killed in Pakistan in U.S. Drone Strike, Official Says*, *HUFFINGTON POST* (Aug. 4, 2011, 6:12 AM), http://www.huffingtonpost.com/2011/06/04/ilyas-kashmiri-dead-killed_n_871281.html.

11. See *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004–2012*, *NEW AM. FOUND.*, <http://counterterrorism.newamerica.net/drones> (last visited Dec. 14, 2012); Colin S. Owens, *The New American Way of War: Drones and Counterterrorism*, http://www.newamericanwayofwar.org/Drone_Site/Welcome.html (last visited Dec. 12, 2012).

12. See Leila Hudson, Colin S. Owens & Matt Flannes, *Drone Warfare: Blowback from the New American Way of War*, *MIDDLE E. POL’Y*, Fall 2011, at 122, 125.

Defining relevant vocabulary is necessary to develop a framework for analysis. Before attempting to answer the difficult questions associated with targeted killing, this Note will provide some background information in Part II on the difficulties of defining “terrorism,” the history and development of the Predator drone, and comparison of internationally prohibited assassination with (allegedly) lawful targeted killing. Following explanation of these concepts, Part III will compare the standards of selection for targeted killing in Israel with those employed by the United States. Finally, given these concepts, Part IV will analyze who qualifies as a legitimate target.

A general understanding of these key terms creates the foundation for an overview of the legal area. The focus in Part III is on the U.S. perspective on targeted killing and assassination, the various executive orders on assassination, and the relevant U.S. code sections. Once the historical and legal framework of the United States is clear, the analysis will shift to relevant international conventions and covenants on armed conflict and peacetime diplomacy. Because Israel has the most specific and publicly known policy on targeted killing, its policies and law will be emphasized. Finally, Part IV will suggest a standard of selection for choosing targets and seek to find the role of the courts in a targeted killing.

II. DEFINITIONS

A. Terrorism vs. Terrorism: An Obstacle in Counter-Terror Policy

The most crucial element in fighting a “Global War on Terror,” now known as “Overseas Contingency Operations,”¹³ is defining the thing being fought. Regrettably, international institutions, domestic governmental organizations, and the military remain unable to develop a coherent, shared definition. Defining terrorism, or a terrorist act, is central to determining a lawful target for a targeted killing or a drone strike. Consensus is key because different organizations are required to make these determinations at different stages of the operation.¹⁴ Unfortunately, since the 9/11 attacks in the United States, the United Nations has struggled to create an international convention on terrorism,¹⁵ though several conventions and regional agreements address significant aspects of what

13. Scott Wilson & Al Kamen, “Global War On Terror” Is Given a New Name; Bush’s Phrase Is Out, Pentagon Says, WASH. POST, Mar. 25, 2009, at A4.

14. In fact, there has been tension between other countries, the U.S. Department of State, and the CIA, when coordinating attacks already. See Jo Becker & Scott Shane, Secret “Kill List” Proves a Test of Obama’s Principles and Will, N.Y. TIMES, May 29, 2012, at A1.

15. See Press Conference by Executive Director of Counter-Terrorism Committee Executive Directorate, U.N., (Dec. 1, 2010), http://www.un.org/News/briefings/docs/2010/101201_CTED.doc.htm (statements by Mike Smith).

may constitute terrorism, a bombing or a hostage-taking scenario.¹⁶ Yet, the United Nations negotiations remain stagnant in the development of a unifying convention.¹⁷ Without a definition of terrorism recognized by the international community, how can the international community unite to fight it?¹⁸

This Note will focus on definitions developed by the U.S. Central Intelligence Agency (CIA), the U.S. Department of Defense, and the government of Israel. In the United States, one federal statute defines terrorism and associated concepts as follows:

As used in this section—

- (1) the term “international terrorism” means terrorism involving citizens or the territory of more than 1 country;
- (2) the term “terrorism” means premeditated, politically motivated violence perpetrated against noncombatant targets by sub national groups or clandestine agents;
- (3) the term “terrorist group” means any group practicing, or which has significant subgroups which practice, international terrorism;
- (4) the terms “territory” and “territory of the country” mean the land, waters, and airspace of the country; and
- (5) the terms “terrorist sanctuary” and “sanctuary” mean an area in the territory of the country—
 - (A) that is used by a terrorist or terrorist organization—
 - (i) to carry out terrorist activities, including training, fundraising, financing, and recruitment; or
 - (ii) as a transit point¹⁹

The CIA relies on this definition.²⁰

16. See, e.g., Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167; International Convention against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205; International Convention for the Suppression of Terrorist Bombings, December 15, 1997, 2149 U.N.T.S. 256; International Convention for the Suppression of the Financing of Terrorism, December 9, 1999, 2178 U.N.T.S. 197.

17. For more discussion regarding the United Nations’ trouble and reluctance defining terrorism, see Ben Saul, *Definition of “Terrorism” in the UN Security Council: 1985–2004*, 4 CHINESE J. OF INT’L L., 141–66 (2005).

18. Press Release, U.N. General Assembly, Agreed Definition of Term “Terrorism” Said to be Needed for Consensus on Completing Comprehensive Convention Against It, U.N. Press Release GA/L/3276 (July 10, 2005), <http://www.un.org/News/Press/docs/2005/gal3276.doc.htm>.

19. 22 U.S.C. § 2656f(d) (West, Westlaw 2010).

20. NAT’L COUNTERTERRORISM CTR., 2011 REPORT ON TERRORISM at v (2012), available at http://www.nctc.gov/2011_NCTC_Annual_Report_Final.pdf; *Terrorism*

The Department of Defense defines terrorism as “[t]he unlawful use of violence or threat of violence to instill fear and coerce governments or societies. Terrorism is often motivated by religious, political, or other ideological beliefs and committed in the pursuit of goals that are usually political.”²¹ Ultimately, a standard for approving a target for a targeted killing will rest on these definitions.

There are certain complications when it comes to the Israeli definition of terrorism. Israel’s Prevention of Terrorism Ordinance provides that terrorism is an activity that includes “acts of violence calculated to cause death or injury to a person or to threats of such acts of violence.”²² Because of its vagueness, this definition promotes a “know it when you see it” approach to identifying terrorism and terrorist activities.

B. Armed Drones

President Obama has increasingly employed what his administration refers to as a “scalpel” approach to eliminating terrorist suspects.²³ The scalpel is the use of the Predator and Reaper drones.²⁴ In 2000, the Predator became the first armed drone²⁵ and the Reaper is the successor to the Predator, with greater altitude, endurance, and airspeed capacities.²⁶ The Predator class alone encompasses several weapons-platform systems, but the drones this Note focuses on are the MQ-1 and MQ-9 Predator systems.²⁷

The Defense Advanced Research Projects Agency (DARPA) started experimenting with Remotely Piloted Vehicles (RPV) and UAV technology at the

FAQs, CENT. INTELLIGENCE AGENCY (July 13, 2012, 3:29 PM), <https://www.cia.gov/news-information/cia-the-war-on-terrorism/terrorism-faqs.html>.

21. DIR. FOR JOINT FORCE DEV., DEP’T OF DEFENSE, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 311 (as amended, Nov. 15, 2012), *available at* http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf.

22. Prevention of Terrorism Ordinance No. 33, 5708-1948, para. 1, 1 LSI 46 (1948) (Isr.), *available at* http://www.mfa.gov.il/MFA/MFAArchive/1900_1949/Prevention+of+Terrorism+Ordinance+No+33+of+5708-19.htm (last visited Dec. 14, 2012).

23. Scott Shane, Mark Mazzetti, & Robert F. Worth, *Secret Assault on Terrorism Widens on Two Continents*, N.Y. TIMES, Aug. 15, 2010, at A1.

24. GEN. ATOMICS AERONAUTICAL, MQ-1 PREDATOR: PERSISTENT ISR AND STRIKE (2012) [hereinafter MQ-1], *available at* http://www.ga-asi.com/products/aircraft/pdf/MQ-1_Predator.pdf; GEN. ATOMICS AERONAUTICAL, MQ-9 REAPER/PREDATOR B: PERSISTENT MULTI-MISSION ISR (2012) [hereinafter MQ-9] *available at* http://www.ga-asi.com/products/aircraft/pdf/Predator_B.pdf.

25. Brian Glyn Williams, *The CIA’s Covert Predator Drone War in Pakistan, 2004–2010: The History of an Assassination Campaign*, 33 STUDIES IN CONFLICT & TERRORISM 871, 872 (2010).

26. *See* MQ-1, *supra* note 24; MQ-9, *supra* note 24.

27. *See Aircraft Platforms*, GEN. ATOMICS AERONAUTICAL, <http://www.ga-asi.com/products/aircraft/index.php> (last visited Dec. 11, 2012). General Atomics markets unmanned aerial vehicles as “unmanned aircraft systems.”

behest of the Department of Defense as early as the 1960s.²⁸ However, it was not until a bankruptcy,²⁹ budget constraints, and operational failures of other drones that DARPA began to really focus on the Predator.³⁰ Initially desired as an intelligence-gathering tool, the Predator was able to linger over a target for a maximum of twenty-four hours up to five hundred miles from its base, at altitudes up to twenty-five thousand feet.³¹ The Predator's first test flight was six months after the medium altitude endurance program was initiated,³² and the first deployment occurred just a year later in Bosnia.³³ It was hailed as a success.³⁴

Not surprisingly, the idea of arming the Predator took hold among military and CIA officials, which sparked debate over its legality, lethality, and efficacy.³⁵ Cofer Black, former director of the CIA's Counterterrorist Center, was perhaps the biggest proponent of armed drones and actively encouraged the Air Force to begin testing Predators armed with missiles.³⁶ Despite growing enthusiasm for the idea, technical issues were still unresolved, there were conflicting ideas over the purpose and place of drones in the fight against al-Qaeda and the Taliban, and as a result the Predator remained exclusively an intelligence tool for a while. These issues remained unresolved until 9/11, but given the atmosphere after that catastrophe, and the resolution of technical issues, approval was quickly granted to arm the Predators, and both Predators and their missiles reached their overseas location on September 16, 2001.³⁷

28. RICHARD H. VAN ATTA ET AL., TRANSFORMATION AND TRANSITION: DARPA'S ROLE IN FOSTERING AN EMERGING REVOLUTION IN MILITARY AFFAIRS, VOLUME 2: DETAILED ASSESSMENTS VI-6 (2003), available at www.darpa.mil/WorkArea/DownloadAsset.aspx?id=2687.

29. *Id.* at VI-19, VI-22, VI-28 n.103 (of Leading Systems Incorporated, a major developer of UAV projects).

30. *Id.* at VI-19, VI-21.

31. STEVE COLL, GHOST WARS 523 (2004).

32. VAN ATTA ET AL., *supra* note 28, at VI-28. In 1993, a "three-tier approach" was put forth by the Joint Requirements Oversight Council (JROC) in order to reach the delineated surveillance goals of the "warfighting commanders in chief" (CINCs); the three tiers included: Tier I: Quick Reaction Capability, Tier II: Medium Altitude Endurance, and Tier III: "Full Satisfaction" of the Mission Needs Statement. *Id.* at VI-23 to 24.

33. *Id.* at VI-28.

34. *Id.* at S-9.

35. See Coll, *supra* note 31, at 543-45.

36. See *id.* at 543-44.

37. George Tenet, Director, Cent. Intelligence Agency, Written Statement for the Record of the Director of Central Intelligence Before the National Commission on Terrorist Attacks Upon the United States March 24, 2004 at 16 (2004) available at http://govinfo.library.unt.edu/911/hearings/hearing8/tenet_statement.pdf.

C. Armed Conflict and Armed Attacks

Critics and proponents of the drone program alike agree that members of al-Qaeda, the Taliban, and other terrorist groups have engaged in armed attacks against the United States. Article 51 of the United Nations Charter and Congress's Authorization for Use of Military Force (AUMF)³⁸ authorize the United States to attack those persons, organizations, and terrorist nations.³⁹ However, the drone program has blurred the traditional, black and white lines of conflict. The territoriality of conflict has had to be re-imagined as Article 2, paragraph 4 of the United Nations Charter no longer fits the needs of the United States because the CIA is performing armed drone attacks within allied states and territories, in which the U.S. military is not actively engaged.⁴⁰ This raises questions of state sovereignty, cooperation, and mutual respect for geographic political boundaries. However, it is generally agreed that "nothing in the language of Article 51 restricts the right to engage in self-defense actions to circumstances of armed attacks by a 'state.'"⁴¹ Accepting this analysis of the United Nations Charter and international conflict law, it is likely safe to presume the United States (at least in the present administration's opinion) has not violated these principles of international law and that the drone program proceeds on this basis.

38. Authorization for Use of Military Force, S. J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

39. U.N. Charter art. 51; see MARY ELLEN O'CONNELL, DRONES UNDER INTERNATIONAL LAW 4 (2010).

40. U.N. Charter art. 2, para. 4 states, "All Members shall refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

41. Jordan J. Paust, *Self-defense Targetings of Non-state Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. OF TRANSNAT'L L. & POL'Y 237, 241 (2010); see *id.* at 238.

The word "state" does not appear as a limit in Article 51, although it appears elsewhere in the United Nations Charter, especially in Article 2(4) with respect to restrictions on the right of member states to use armed force against the territorial integrity or political independence of another state. It is evident, therefore, that the drafters knew how to use the word "state" as a limitation and chose not to do so with respect to armed attacks and the "inherent right" of self-defense addressed in Article 51 of the Charter. Importantly, despite a self-imposed blindness among a minority of state-oriented positivists, it is widely known that there have been and are many actors in the international legal process other than the state.

Id. at 241 n.5.

D. Assassination and Targeted Killing: Difficult Definitions in the Laws of Armed Conflict

Often treated as interchangeable terms, the definitions of “assassination” and “targeted killing” will continue to shape the discussion of targeted killing in modern conflict. “Targeted killing” refers to personality strikes on identifiable terrorist leaders.⁴² Academics, jurists, international figures, and military officials alike have struggled to create a meaningful distinction between the two without appearing to have a political agenda. With this in mind, defining “assassination” remains perhaps one of the most controversial aspects of the assassination/targeted killing debate. The United States and the international community have had trouble defining this term because doing so inevitably requires assumptions and judgment calls that would make any official uncomfortable. “Political assassination,” “head-of-state,” “de facto head-of-state,” “lawful killing”: all are terms that have plagued those who have sought to give the term assassination a definition that is both meaningfully specific, yet broad enough to cover enough situations.⁴³ In this section, the traditional definition of assassination (stated below) will guide the discussion.

It is important to recognize one glaring oversight many have made when looking to the United States for clarification of what “assassination” is. Heavy reliance is placed on President Reagan’s Executive Order 12,333 and its prohibition of assassination.⁴⁴ While it is generally accepted that the order bans assassination, its shortcoming lies in never defining what it bans: assassination. Taken in context, however, the order amended President Ford’s Executive Order 11,905 and President Carter’s Executive Order 12,036, banning “political” assassination, and indirect U.S. involvement in assassinations, respectively.⁴⁵ Consequently, in the United States it is fair to say that assassination by the U.S. government is the deliberate killing of a political or governmental figure using treacherous means.⁴⁶ There remains debate about the limitation imposed by the requirement of an official target, however, this Note presumes that assassination is not simply murder by government.

42. Adam Entous, Siobhan Gorman & Julian E. Barnes, *U.S. Tightens Drone Rules*, WALL ST. J., Nov. 4, 2011, at A1. This article outlines the difference between “personality” strikes and “signature” strikes, two types of targeted killings. Personality strikes target known terrorist leaders, often referred to as high-value targets. *Id.* Signature strikes target groups of men whose identities are not known but who are believed to be terrorists or associates of terrorists. *Id.*

43. William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 669–71 (2003).

44. Exec. Order No. 12,333, United States Intelligence Activities, 46 Fed. Reg. 59,941 at 59,952 § 2.11 (1981).

45. Banks & Raven-Hansen, *supra* note 43, at 717, 740.

46. *See id.* at 671, 677, 723–24.

The international community proscribes the use of assassination by a state, though perhaps not as explicitly as the aforementioned executive orders.⁴⁷ The United Nations Charter requires that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁴⁸ Article 51 states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁴⁹

Israel, like the United States, follows this customary international law approach⁵⁰ and prohibits the use of assassination.⁵¹ Essentially, there is one question the Israeli government asks when distinguishing assassination from targeted killing: Is Israel at war or in an armed conflict, where Article 51 applies?⁵² Colonel Daniel Reisner’s statements as head of the international law

47. See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 28 U.S.T. 1975, 13 I.L.M. 43 (adopted by the U.N. General Assembly, Dec. 14, 1973, entered into force for the United States, Feb. 20, 1977); AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES: STATE ASSASSINATIONS AND OTHER UNLAWFUL KILLINGS (2001).

48. U.N. Charter art. 2, para. 4.

49. U.N. Charter art. 51.

50. Asem Khalil, *Is Israel Obligated to Implement International Law?*, INT’L POLITICS J., 38–41, 41 (Apr. 2004) http://birzeit.academia.edu/AsemKhalil/Papers/116573/Is_Israel_Obligated_to_Implement_International_Law.

51. Based on the de facto prohibition on assassination by the United States, attempts by the international community to create binding treaties and conventions regarding the prohibition of assassination, and the negative moral and legal implications of assassination, some scholars argue that it has become part of our customary (binding without codification) international law. Article 38(l)(b) of the Statute of the International Court of Justice describes International custom as “evidence of a general practice accepted as law.” 59 Stat. 1031, T.S. No. 993 (June 26, 1945). Norms of customary international law bind all states regardless of a ratifying instrument. “[E]ven if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence.” *Nicaragua v. United States*, 1986 I.C.J. 14, para. 178 (1986).

52. Steven R. David, *Israel’s Policy of Targeted Killing*, 17 ETHICS & INT’L AFFAIRS 111, 114 (2003).

branch of the Israeli Army's legal division are a helpful starting point for determining how the Israeli government defines assassination. He claims "[i]nternational law actually only recognizes two situations: peace or war" and then describes the difficulties Israel has had defining its conflict with Palestine as war when Israel does not recognize Palestine as a legitimate state with a legitimate military.⁵³ Because traditional views on assassination include the assumption that it occurs against a figure located in a state with which one is not at war, choosing to define the Israel-Palestine conflict as more war than peace clears the first threshold question about assassination as an operation during wartime.⁵⁴ Essentially, both the United States and Israel remain firm that a targeted killing operation (as defined below) falls squarely outside of the technicalities of assassination.

This does not discount the difficulty in distinguishing unlawful assassination from allegedly lawful targeted killing.⁵⁵ Because of these difficult distinctions, the United States, rather than starting from the ground up, uses a different threshold question: What is the legal framework in which the United States is working?⁵⁶ If the United States is actively engaged in armed conflict then "the law of armed conflict applies, and targeted killing of individuals is lawful, although killing by treacherous means . . . is not."⁵⁷ By using this initial determination, the United States removes itself from the traditional checks on non-executive level decision-making.

Perhaps the most helpful description of targeted killing was in an addendum to a United Nations Human Rights Council report that described it as lethal force "intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator."⁵⁸ The international community still struggles with the question of whether targeted killing is ever a legitimate tool in an international conflict.⁵⁹ In the traditional "wartime" paradigm, it would be indisputably lawful to target and attack a member of the enemy forces (ignoring the trouble with declaring war on a

53. Tim Weiner, *The Nation: Terminator; Making Rules in the World Between War and Peace*, N.Y. TIMES, Aug. 19, 2001, sec. 4, at 1.

54. David, *supra* note 52, at 113.

55. STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 376 (4th ed. 2007) "'Targeted killing' was not a term of art in human rights law or international humanitarian law prior to the September 11th attacks."

56. William C. Banks, THE PREDATOR 7 (2003) *available at* <http://www.law.syr.edu/Pdfs/0predator-final.pdf>.

57. *Id.*

58. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Addendum: Study on Targeted Killings* para. 9, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter *Study on Targeted Killings*]; see also NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 4–5 (2008).

59. See David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171, 173–74 (2005); see also David Statman, *Targeted Killing*, 5 THEORETICAL INQUIRIES IN L. 179–96 (2004) (suggesting a philosophical defense of targeted killing in wars against terror).

transnational organization rather than a territorial state).⁶⁰ However, some argue that because of the target's affiliation with a transnational terrorist organization, the targets should be treated as criminals subject to a criminal law-enforcement model.⁶¹

Because of difficulties differentiating assassination from targeted killing, targeted killing remains controversial.⁶² Two countries that use targeted killing as a tool in their war against terror, Israel and the United States, reject the criminal law-enforcement model and rely on self-defense reasoning.⁶³ Israel has the most specific, delineated policy towards targeted killing.⁶⁴ Since opening the book on its targeted killing policy, Israel has asserted several reasons why targeted killing is not tantamount to assassination and is legally defensible in the Israel-Palestine conflict.⁶⁵ Tacit assassination and targeted killings have arguably been a part of Israel's foreign security policy for decades; it was not until September 2000 that Israel openly declared targeted killing to be part of its defense policy in the fight against terrorism.⁶⁶

Specifically, there are "three conditions under which targeted killing can take place."⁶⁷ Israel must (1) appeal without success to the Palestinian Authority (PA) for the target's arrest; (2) determine that arrest would be impossible without the aid of the PA; and (3) the targeted killing must be "done to prevent an imminent or future terrorist attack—not for revenge or retribution."⁶⁸

It is important to look at the process the Israeli government follows in determining whether these conditions are present. First, there must be actionable intelligence against the proposed target.⁶⁹ This information must identify "the

60. See Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT'L L. 241 (2003); Annie Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1 (2002).

61. For discussion of this question see Fitzpatrick, *supra* note 60, at 243, 248–49 (2003); Slaughter & Burke-White, *supra* note 60, 9–11 (2002). Implications of the law-enforcement model versus the armed conflict model are discussed in Part III below.

62. See generally Kretzmer, *supra* note 59 (considering targeted killing as execution of criminals or as national self-defense).

63. Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) (transcript available at www.state.gov/s/1/releases/remarks/139119.htm). Both countries maintain that terrorists and their supporters threaten national security and sovereignty.

64. David, *supra* note 52, at 114.

65. Gideon Alon & Amos Harel, *IDF Lawyers Set "Conditions" for Assassination Policy*, HAARETZ, (Feb. 4, 2002, 12:00 AM), <http://www.haaretz.com/print-edition/news/idf-lawyers-set-conditions-for-assassination-policy-1.53911>.

66. David, *supra* note 52, at 116.

67. *Id.* at 115.

68. *Id.*

69. See GABRIELLA BLUM & PHILIP B. HEYMANN, *LAW, OUTLAWS, AND TERRORISTS: LESSONS FROM THE WAR ON TERRORISM* 75 (2010).

target as a person actively involved in acts of terrorism,”⁷⁰ a plan of attack (which should include time, place, means), an assessment of the danger of collateral damage, presumably including a proportionality type analysis,⁷¹ and a reflection on potential political fallout.⁷² Though there is no external review process, the complete plan must be approved by a “top-level political official.”⁷³ One difference between the United States and Israel is Israel’s burgeoning case law on the subject; U.S. courts have not begun to explore the judicial role in targeted killing.⁷⁴ Skirting around the distinction between civilian and enemy combatant, Israeli courts have sought to “relax the meaning [for] such times as civilians take direct part in hostilities” by removing civilian immunity when a civilian crosses into the vaguely described realm of “taking part in hostilities.”⁷⁵ The courts also identified a special group of persons as “unlawful combatants,” who realistically could be targeted at any time.⁷⁶

The United States, based on Article 51 self-defense, the AUMF, and the U.S. Supreme Court’s interpretation of these texts, is likely justifying the use of targeted killing and drone attacks as a legitimate means of attack because of its on-going conflicts with terrorists and terrorist organizations. Essentially, some perceive these acts as permissible because:

With respect to permissible conduct engaged in during self-defense, measures of legitimate self-defense can include the targeting of what would be lawful military targets during war, like the head of a non-state entity (such as Usama bin Laden) or the head of a state directly participating in ongoing processes of armed attack on the United States Such lawful targetings

70. *Id.* “The stated Israel policy is that only members of a terrorist organization who are actively involved in an ongoing and direct manner in launching, planning, preparing, or executing terrorist attacks are lawful targets. In addition, targeted killing operations will not be carried out where there is a reasonable possibility of capturing the terrorist alive.” *Id.*

71. *See infra* note 103.

72. *Id.*

73. *Id.*

74. H CJ 769/02 Pub. Comm. Against Torture in *Isr. v. Israel*, 60(2) PD 459, paras. 33–39 [2006] (Isr.); Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 *CARDOZO L. REV.* 405, 409–11, 419 (2009); *see also* David, *supra* note 52, at 114–16.

75. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, *CUSTOMARY IHL, Rule 6, Civilians’ Loss of Protection From Attack*, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule6 (last visited Jan. 28, 2013).

76. H CJ 769/02 Pub. Comm. Against Torture in *Isr. v. Israel*, 60(2) PD 459, paras. 11, 16 [2006] (Isr.). “We will not adopt a position on whether this third category [unlawful combatants] should be recognized. . . . We do not think that we have been presented with sufficient information that allows us to say that this third category has been recognized, as of the present, in customary international law.” *Id.* para. 28. *See generally* Murphy & Radsan, *supra* note 74, at 414–22 for more discussion of the civilian versus enemy combatant distinction and how the United States and Israel have addressed it.

in self-defense would not be “assassinations” which, in times of armed conflict, are considered to be “treacherous acts” and war crimes.

Furthermore . . . [since] targeted killing of certain persons is clearly lawful under the laws of war, during war the selective killing of persons who are taking a direct part in armed hostilities, including enemy combatants, unprivileged combatants, and their civilian leaders (and thus, excluding captured persons of any status), would not be impermissible “assassination.”⁷⁷

Indeed, the U.S. Supreme Court has determined that the United States is engaged in a non-international armed conflict with those persons described, as seen below, in the AUMF.

III. OVERVIEW AND ANALYSIS OF FOREIGN AND DOMESTIC LAW

A. Article 51 of the UN Charter and the Authorization of the Use of Military Force

As discussed above, executive orders and international norms and agreements must be carefully analyzed when creating a justification for targeted killings and the use of armed drones. Article 51 of the U.N. Charter is essentially the international legal basis for justification of targeted killing, both in active and non-active combat zones. It expressly allows nations to resort to force if they are acting in self-defense.⁷⁸ The on-going conflict between the United States and terrorist organizations worldwide has forced a reformatting of the more black and white aspects of war.

77. Paust, *supra* note 41, at 261–62.

78. U.N. Charter art. 51.

It is important to realize that ‘self-defense’ is a term of art in international law. The reference in Article 51 to self-defense is the right of the victim state to use significant offensive military force on the territory of a state legally responsible for the attack. The [International Court of Justice] has made it clear that the armed attack that gives rise to this right of self-defense must be an attack that involves a significant amount of force—it must be more than a mere frontier incident, such as sporadic rocket fire across a border.

The AUMF, approved by Congress on September 18, 2001, specifically allows the President to use armed forces to seek out and use “all necessary and appropriate force” against those involved in the 9/11 attacks and “to prevent any future acts of international terrorism against the United States.”⁷⁹ This language gives the United States an extremely broad scope of force to be used in the Overseas Contingency Operations. This is important because Article 51 does not provide any territorial, national, or ideological restrictions as to who may be targeted in self-defense.⁸⁰ These two domestic and international provisions appear to remove some of the sovereignty concerns implicated in the use of armed drones and targeted killings in a state where the United States is not actively engaged. It remains unclear if the United States must gain permission from the nation-state in which its target resides in order to launch a strike.⁸¹

B. The Law Enforcement Paradigm

Because the use and legality of U.S. targeted killing and drone programs are highly dependent on the type of conflict in which the United States is engaged, this Note addresses the two types of conflict in which it is permissible to use force generally: for law enforcement purposes during times of “peace” and for military operations in times of “war.” According to Rasdan and Murphy, writers on the subject of targeted killing and its legal ramifications, “[h]uman rights law controls civil law enforcement, sharply limiting state authority to kill . . . to situations where the target poses an imminent risk of death or serious injury to others,” whereas international humanitarian law “controls killing in an armed conflict and grants broad authority to kill opposing combatants.”⁸² Even this statement is controversial. According to UN Special Rapporteur Philip Alston, “human rights law and IHL [international humanitarian law] apply coextensively and simultaneously unless there is a conflict between them.”⁸³ The debate is fierce

79. Authorization for Use of Military Force, S. J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

80. U.N. Charter art. 51.

81. Given the current debate in the United States about the efficacy, morality, and legality of drone use, it is unlikely politicians and security officials would concede any control over their use to a nation with a less than stellar track record at managing terrorist threats. See Ken Dilanian, *CIA Cuts Off Drone Strikes in Pakistan; The Undeclared Halt in Targeting Militants Aims to Repair Ties Strained by Deadly Incidents*, L.A. TIMES, Dec. 24, 2011, at A1 (“Pakistan’s government wants a say in drone targeting But the Obama administration has refused, citing cases in which targets escaped after intelligence was shared with Pakistan.”).

82. John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing*, 2011 U. ILL. L. REV. 1201, 1208 (2011).

83. *Study on Targeted Killings*, supra note 58, para. 29 n.53 (citing E/CN.4/2005/7 paras. 46–53; A/HRC/4/20 paras. 18–19; A/HRC/11/2/Add.5 paras. 71–73, 83; A/HRC/4/20/Add.1 at 342–58; E/CN.4/2006/53/Add.1 at 264–65; A/HRC/4/20/Add.1 at 358–61). “In situations that do not involve the conduct of hostilities—e.g., law

among scholars studying conflict and the use of drones. While many claim the law enforcement model cannot meet the demands terrorism has put on the international community, many others claim this is an “erroneous” and harmful belief that ignores valid objections to the use of lethal force in targeting operations.⁸⁴ Alston explains “it may be legal for law enforcement personnel to shoot to kill based on the imminence of the threat, but the goal of the operation, from its inception, should not be to kill.”⁸⁵ He therefore asserts that because targeted killing operations are devised with the ultimate goal of using lethal force, they are to be distinguished from law enforcement operations, since such operations may not have killing as their goal.⁸⁶

Many questions remain. It appears the United States is not, and should not be, relying on the law enforcement model to justify its targeted killing operation if it wants the existing program to be lawful in the eyes of the international and domestic legal communities. However, if the United States were to confine itself to a law enforcement model, it is possible the more controversial aspects of its targeted killing program would dissipate, and fewer, and more discriminating, attacks would be carried out.

enforcement operations during non-international armed conflict—the *lex generalis* of human rights law would apply.” *Id.*

84. See, e.g., Banks, *supra* note 56, at 4 (“It has often been said that the September 11 terrorist attacks changed everything. However broad and deep the changes wrought by the cataclysmic attacks, the U.S. clearly reacted by changing long-standing tenets of its counter terrorism strategy. Where law enforcement and intelligence gathering were the primary instruments of U.S. policy against terrorism outside any designated battlefield, after September 11 the concept of theater of war itself was shelved in the war on terrorism.”); MELZER, *supra* note 58, at xiii (2008) (“Any State-sponsored targeted killing other than those directed against legitimate military targets during the conduct of hostilities must be governed by the international normative paradigm of law enforcement. . . . [T]he international *lex lata* provides a clear, and satisfactory, regulatory framework for State-sponsored targeted killings”); O’Connell, *supra* note 39, at 5 (“Terrorist attacks are generally treated as criminal acts and not as the kind of armed attacks that can give rise to the right of self-defense.”); Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT’L L. 628, 634–35 (2003) (“The UN Security Council affirmed the right of self-defense in response to the September 11th terrorist attacks, but some members seem to view the problem of terrorism as primarily a law enforcement issue. Preventing and defending against terrorist attacks certainly requires law enforcement . . . on a global scale, but it may also require . . . use of military force.”).

85. *Study on Targeted Killings*, *supra* note 58, at 5.

86. *Id.*

C. Military Operations

International humanitarian law (IHL) addresses military operations and their effect on targeted populations.⁸⁷ The law of armed conflict is also critical when analyzing the legality of an action in a time of armed conflict.⁸⁸ Alston asserts that for purposes of international law there are four different types of armed conflict:

- (i) international armed conflict;
- (ii) non-international armed conflict meeting the threshold of Common Article 3 to the Geneva Conventions;
- (iii) non-international armed conflict meeting the threshold of both Common Article 3 to the Geneva Conventions and Additional Protocol II to the Geneva Conventions;
- (iv) violence that does not rise to the level of an armed conflict, but is instead isolated and sporadic, and for which human rights law determines the legality of the use of lethal force.⁸⁹

Because targeted killing operations are not between two states, but between a state and non-state actors, these criteria, according to Alston, do not apply. Alston also provides a list of indicators for the existence of a non-international armed conflict against a non-state armed group:⁹⁰ (1) the non-state armed group needs to be identifiable as such based on objective and verifiable criteria,⁹¹ (2) a minimum

87. Radsan & Murphy, *supra* note 82, at 1208.

IHL is a compilation of treaties, case law, and customary international law that seeks to prevent unjustified death, destruction, and suffering in war. Ideas about limiting the horrors of war are as old as humanity itself . . . For IHL to apply, an ‘armed conflict,’ which is something more than sporadic violence, must exist. Armed conflicts can be either ‘international’ or ‘noninternational.’ The former governs wars among nation-states.

Id. at 1209.

88. The bedrock for IHL and the law of armed conflict is arguably the Geneva Conventions and the 1907 and 1988 Hague Conventions. For a concise introduction to IHL see ADVISORY SERV. ON INT’L HUMANITARIAN LAW, INT’L COMM. OF THE RED CROSS, WHAT IS INTERNATIONAL HUMANITARIAN LAW? (2004), *available at* http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.

89. *Study on Targeted Killings*, *supra* note 58, para. 50.

90. *Id.* at para. 52.

91. *Id.* “This is necessary for IHL to apply meaningfully, and so that States may comply with their obligation to distinguish between lawful targets and civilians. The criteria include:

- Minimal level of organization of the group such that armed forces are able to identify an adversary ([Geneva Convention (GC)] Art.

threshold determination of intensity and duration of violence,⁹² and (3) it needs to be determined whether the violence is intra-state or transnational.⁹³

Regardless of these arguments, however, the Obama administration asserts that it is “firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing conflicts.”⁹⁴ Based on the 9/11 attacks, and ongoing hostilities toward the United States, the Obama administration remains steadfast in its belief that it is engaged in an armed conflict with terrorist groups.⁹⁵

3; [Additional Protocol (AP)] II).

- Capability of the group to apply the Geneva Conventions (i.e., adequate command structure, and separation of military and political command) (GC Art. 3; AP II).
- Engagement of the group in collective, armed, anti-government action (GC Art. 3).
- For a conflict involving a State, the State uses its regular military forces against the group (GC Art. 3).
- Admission of the conflict against the group to the agenda of the UN Security Council or the General Assembly (GC Art. 3).

Id.

92. *Id.*

To meet the minimum threshold, violence must be:

- Beyond the level of intensity of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature (AP II).
- Protracted armed violence among non-state armed groups or between a non-state armed group and a State;[sic]
- If an isolated incident, the incident itself should be of a high degree of intensity, with a high level of organization on the part of the non-state armed group.

Id. (internal punctuation omitted) (citations omitted).

93. *Id.*

The territorial confines can be:

- Restricted to the territory of a State and between the State’s own armed forces and the non-state group (AP II); or
- A transnational conflict, i.e., one that crosses State borders (GC Art. 3). This does not mean, however, that there is no territorial nexus requirement.

Id. (citations omitted).

94. See Koh, *supra* note 63.

95. See *id.* See also The Daily Conversation, *Obama Addresses Drone Strikes During “Hangout,”* pt. 10, at 10:41 (Jan. 30, 2012), <http://www.youtube.com/watch?v=2rPMPMqOjKY>.

D. Standard of Selection for Targeted Killing and Drone Strikes: the United States and Israel

A common issue associated with the assessment of the legitimacy of targeted killing under the Israeli policy is determining what sorts of activities qualify a target as “engaged in acts of terrorism.”⁹⁶ Without a clear definition of what terrorism actually is, this sort of generalization is unsafe. Membership in a terrorist organization, publication of propaganda in favor of such an organization, its activities, or its goals, and fundraising all have been described as terrorist activity.⁹⁷ Further, aiding the infrastructure of a terrorist organization and delivering a speech on behalf of either a terrorist organization or a person who supports a terrorist organization are both participation in terrorist activities.⁹⁸ It follows that those who perform any of these activities would meet the threshold test of the targeted killing protocol by being involved in terrorist activities according to Israeli law. It bears repeating that the vagueness of the ordinance is problematic.

After first determining that a target has been engaging in terrorist activities, the next requirement is that the terrorist have formed an actual plan of attack. If the terrorist cannot be apprehended, human or signal intelligence is required to assess the threat posed by the planned attack.⁹⁹ From the information gleaned from the intelligence, the imminence of the threat would be analyzed and that will weigh heavily on the decision to target the terrorist. The last few levels of analysis Israel goes through in determining if a targeted killing is warranted are essentially political and ethical. The collateral damage assessment, fallout, and approval are all meant to satisfy legal and proportionality problems.¹⁰⁰

Though there are flaws with this protocol, it must be praised for its relative transparency. In the United States, there are no publicly acknowledged standards for targeting and killing an individual abroad. The Obama administration continues to affirm that its targeted killing and drone programs fall within international and domestic law norms,¹⁰¹ and that it is consistent with the principles of distinction¹⁰² and proportionality.¹⁰³ Al-Qaeda has not abandoned its

96. BLUM & HEYMANN, *supra* note 69, at 75 (“The stated Israel policy is that only members of a terrorist organization who are actively involved in an ongoing and direct manner in launching, planning, preparing, or executing terrorist attacks are lawful targets. In addition, targeted killing operations will not be carried out where there is a reasonable possibility of capturing the terrorist alive.”).

97. See Prevention of Terrorism Ordinance No. 33, 5708-1948, paras. 1–4, *available at* http://www.mfa.gov.il/MFA/MFAArchive/1900_1949/Prevention+of+Terrorism+Ordinance+No+33+of+5708-19.htm (last visited Dec. 14, 2012).

98. *See id.*

99. David, *supra* note 52, at 115.

100. *See id.* at 111–26.

101. *See* Koh, *supra* note 63.

102. The principle of distinction prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military

intent to attack and fight the United States.¹⁰⁴ “Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks.”¹⁰⁵ This statement is illuminating for several reasons: it shows that (1) the Obama administration continues to assert that conflicts with terrorist groups fall within traditional armed conflict norms, (2) unmanned drones will be employed at the Executive’s discretion, (3) the Obama administration relies on traditional international war theory to justify these attacks as self-defense, and (4) top level al-Qaeda officials are fair game. Notably omitted is a standard for determining what a top level al-Qaeda official is, and whether there are any additional legitimate and lawful targets. Also omitted is a concrete imminent threat timeline, arguably necessary under international law and outlined by the Israeli policy. Hints of a “hit list” or “list of terrorists” have been discussed since targeted killing emerged in Overseas Contingency Operations,¹⁰⁶ but the Obama administration remains tight-lipped on how a suspect would get on this list (in the

advantage anticipated. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51, para. 5(b), June 8, 1977, 1125 U.N.T.S. 3.

103. Proportionality in the law of armed conflict requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the target of the attack. See Jim Garamone, *Directive Aimed at Minimizing Civilian Casualties*, Am. Forces Press Serv., Dep’t of Def. (Sept. 16, 2008), <http://www.defense.gov/news/newsparticle.aspx?id=51201>.

We emphasize the use of proportionality when we have to use lethal force in an area We have measured procedures we use when we drop any ordnance. We have certain constraints on collateral damage that are reviewed before any ordnance is dropped, and we have positive identification of the target, and we have procedures for control on the ground of the targeting. We have a very measured approach to it. . . . [But] you are not going to be accurate all the time There are going to be cases in an insurgency where you are fighting an enemy who does not wear a uniform, who mixes in with the population. There are going to be times when there will be unintended consequences.

Id. (reporting remarks by Army General David D. McKiernan, discussing proportionality when dealing with insurgency and counterinsurgency tactics).

104. See Eric Schmitt, *Pakistan Deaths Shift Power in Terrorism Network*, N.Y. TIMES, June 8, 2012, at A8.

105. Koh, *supra* note 63.

106. See Tara Mckelvey, *Inside the Killing Machine*, NEWSWEEK, Feb. 21, 2011, at 34; Bush Announces “Most Wanted Terrorist List,” CNN (Oct. 10, 2001), http://articles.cnn.com/2001-10-10/politics/inv.most.wanted_1_embassy-bombings-egyptian-islamic-jihad-terrorist-list?_s=PM:ALLPOLITICS.

name of national security) and what exactly it means once a person is on the list.¹⁰⁷

Though the standards for target selection and “lists,” if any, remain largely cloaked by national security, it is possible to piece together a general view of what takes place during the targeting process. John A. Rizzo, a former CIA attorney, has spoken about the policy behind the targeted killing and drone program.¹⁰⁸ Rizzo describes targeted killing operations and target selection, which he compares to a “hit list.”¹⁰⁹ According to Rizzo, before the CIA takes part in a targeted killing (likely using a drone), a team of CIA lawyers creates a report, asserting that the target is a grave threat to the United States, which is then analyzed by more senior CIA lawyers, and finally the general counsel must sign off.¹¹⁰

While helpful, Rizzo’s narrative of the process is not the official word of the U.S. government and therefore should be used carefully. What can be ascertained from this, and other writings and interviews, is that the CIA has some sort of checklist it uses when determining who is a lawful target.¹¹¹ Officially, during counterterrorism meetings where strikes are discussed, President Obama reviews the identities and alleged crimes of the targets before signing off on a kill order.¹¹² It is important to remember, however, that signature strikes and personality strikes differ, and President Obama and his administration have remained relatively quiet regarding personality strikes and relevant procedures.¹¹³

E. The Detainee Cases: Judicial Restraint on Executive Power and the Rights of Enemy Combatants, with Implications on Drone Warfare.

Though there is scant case law on the subject of the legality of targeted killings via armed drones, the U.S. Supreme Court and some federal district courts have discussed several legal issues that weigh on the legitimacy of these attacks.¹¹⁴ The due process rights of those involved in the ongoing Overseas Contingency Operations, secured through the Guantanamo detainee decisions,

107. Press Release, Am. Civil Liberties Union, Obama Administration Reportedly Authorizes Targeted Killing of U.S. Citizen (Apr. 7, 2010), *available at* <http://www.aclu.org/national-security/obama-administration-reportedly-authorizes-targeted-killing-us-citizen>.

108. *See* Mckelvey, *supra* note 106, at 34.

109. *Id.*

110. *Id.*

111. *See* Radsan & Murphy, *supra* note 52, at 1217.

112. Becker & Shane, *supra* note 14, at A1.

113. Signature strikes target individuals or groups that match certain criteria, e.g. men that are of military age, perhaps traveling together in a vehicle, perhaps with weapons, and do not require confirmation of the identity of the target. *See id.* Personality strikes target specific, known individuals. *See id.*

114. *See, e.g.,* Boumediene v. Bush, 553 U.S. 723 (2008); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Ali v. Rumsfeld, 649 F.3d 762 (2011).

should weigh on the Executive's decision to use lethal targeting. Below is a discussion of some of the key detainee cases, which create the legal framework for individual due process in the Overseas Contingency Operations.

1. *Hamdi v. Rumsfeld*

Hamdi v. Rumsfeld stands for the principle that an American citizen, detained in the War on Terror, retains the due process right to contest the factual basis of his detention.¹¹⁵ The habeas corpus petition was brought by Hamdi's father as his next friend (personal representative) after Hamdi was turned over to U.S. military forces in Afghanistan.¹¹⁶ Hamdi was detained and interrogated in Afghanistan and ultimately transferred to Guantanamo Bay.¹¹⁷ Several months later, after determining he was an American citizen, the military transferred him to a naval brig.¹¹⁸ The government's evidence against Hamdi, derived from his post-detention interviews and his association with the Taliban, was presented in an affidavit by Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy.¹¹⁹

The Supreme Court was faced with the question of "whether the Executive has the authority to detain citizens who qualify as 'enemy combatants.'"¹²⁰ The government asserted that no congressional authorization was necessary to legitimize such a detention, but the Court did not reach that question because the Court agreed with the alternative argument that the AUMF authorized Hamdi's detention.¹²¹ Because the AUMF authorizes "all necessary and appropriate force" against those associated with the 9/11 attacks, the detention of members of al-Qaeda falls squarely within the government's authority, due to the organization's involvement in the attacks and its continued hostility against the United States.¹²² The Court found that Congress had authorized detention in the circumstances presented in Hamdi's case, but Hamdi objected that the AUMF had not authorized indefinite or perpetual detention,¹²³ and that he was due a meaningful and timely hearing.¹²⁴ The government countered by stating that since it is undisputed that Hamdi was detained in a combat zone no hearing for further factfinding was needed, and that national security interests far outweighed Hamdi's interest in a hearing.¹²⁵

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

116. *Id.* at 511.

117. *Id.* at 510.

118. *Id.*

119. *See id.* at 512–13.

120. *Hamdi*, 542 U.S. at 516.

121. *Id.* at 516–17.

122. *Id.* at 513; Authorization for Use of Military Force, S. J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

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

124. *Id.* at 524.

125. *Id.* at 526, 531–32.

The Court recognized that “[s]triking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat” and highlighted serious concerns on both sides.¹²⁶ Applying the *Mathews v. Eldridge* balancing test, the Court considered whether Hamdi’s interest in not being deprived of “life, liberty or property, without the due process of law”¹²⁷ outweighed the government’s “weighty and sensitive” interest in not allowing enemy combatants to return to battle.¹²⁸ The government and court below suggested certain processes intended to satisfy Hamdi’s interest in due process, but the Court found the “risk of erroneous deprivation of a detainee’s liberty” very real.¹²⁹ Instead, the Court tried to strike a fair balance between citizen-detainee liberty interests and the government’s national security interests.¹³⁰ The Court found that in a hearing in which there was a rebuttable presumption in favor of the government, the flexibility required for contingencies in ongoing military would be respected, that it is “unlikely that this basic process [would] have the dire impact on the central functions of warmaking that the government forecasts.”¹³¹

This analysis sheds light on the U.S. policy towards targeted killing. Though *Hamdi*’s scope is limited,¹³² it is not an impossible logical leap to extend these kinds of due process rights to those who are faced with, or are victims of, drone attacks. Nevertheless, there is a practical difference between an enemy combatant or terrorist detained on the battlefield and one who is subject to a targeted killing operation. The detainee has already been subjected to interrogation, and the government has likely culled any intelligence it can get. The detainee has been neutralized and separated from the battlefield and his or her unit. In contrast, the target of a drone strike will not be in the hands of military personnel and his fate will be determined from miles away.

However, now that the U.S. Supreme Court has determined that one of these classes has due process rights, granting some sort of process for targets of a drone strike does not seem far outside the realm of possibility. Though the target has yet to be deprived of any liberty interest, once killed he has been deprived of life at the hands of a government decision maker. Once an enemy combatant is in the government’s custody he suddenly, through loss of liberty, has constitutional protections and due process rights, it could be argued that some sort of process or judicial review of government action is required for the target—at least a citizen-target—of a drone strike.

126. *Id.* at 532.

127. *Id.* at 529 (quoting U.S. CONST. amend. V).

128. *Hamdi*, 542 U.S. at 531.

129. *See id.* at 534.

130. *Id.* at 532.

131. *Id.* at 534.

132. *Id.* at 533.

2. Hamdan v. Rumsfeld

In 2006, in *Hamdan v. Rumsfeld*, the Supreme Court examined the Detainee Treatment Act of 2005,¹³³ and held that the Act did not retroactively deprive the Court of jurisdiction over habeas corpus appeals by alien detainees.¹³⁴ Salim Hamdan, a Yemeni national, was captured and turned over to U.S. forces in Afghanistan.¹³⁵ He was then transferred to Guantanamo Bay, where the President deemed him “eligible for trial by military commission for then-unspecified crimes.”¹³⁶ After filing a habeas corpus petition in federal district court, Hamdan received a hearing in front of a military commission.¹³⁷ However, before the commission rendered a ruling, the district court stayed the proceedings, concluding that “the President’s authority to establish military commissions extends only to offenders or offenses triable by military commission under the law of war, that the law of war includes the Geneva Convention,” and that “Hamdan is entitled” to such protections.¹³⁸ The Court ultimately found that the military commission “exceeds the bounds Congress has placed on the President’s authority,” and was therefore unauthorized.¹³⁹ Ultimately, this case further opened the door for alien detainee due process rights. The next case further expanded habeas protections.

3. Boumediene v. Bush

Boumediene v. Bush holds that alien detainees at Guantanamo Bay have the right to prompt habeas corpus hearings.¹⁴⁰ Though in large part this case is an exercise in practicality and functionality,¹⁴¹ it also represents a move towards judicial oversight of the executive and military spheres. Brought by aliens

133. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 239; see *Hamdan v. Rumsfeld*, 548 U.S. 557, 572–74 (2006).

134. *Hamdan*, 548 U.S. at 575, 584. See generally THE OATH (Laura Poitras et al. 2010) (providing background on Hamdan’s relationship with Osama bin Laden, his capture and interrogation, and his release).

135. *Hamdan*, 548 U.S. at 566.

136. *Id.*

137. *Id.* at 570–71.

138. *Id.* at 571 (internal citations and punctuation omitted).

139. *Id.* at 653.

140. *Boumediene v. Bush*, 553 U.S. 723, 732 (2008). In response to *Hamdi*, Congress passed the Detainee Treatment Act, hoping to circumscribe any more problems with enemy combatant detention. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 239 (2005). When holes were found in the Act in *Hamdan*, Congress passed the Military Commissions Act, which clarified “that the [Detainee Treatment Act’s] limits on habeas had retroactive effect and reiterated that the DTA governed review of [Combatant Status Review Tribunals].” Murphy & Radsan, *supra* note 74, at 430; see Military Commissions Act of 2006, § 7, Pub. L. 109-366, 120 Stat. 2600, 2635–36 (amending 28 U.S.C. § 2241(e) (Supp. 2007)).

141. *Boumediene*, 553 U.S. at 764.

detained at Guantanamo Bay after they were captured abroad and deemed enemy combatants, the petitioners were denied habeas relief by the district court, which dismissed for want of jurisdiction “because the [Guantanamo Bay] naval station is outside the sovereign territory of the United States.”¹⁴² This led the Supreme Court to discuss the constitutional rights, in particular that of habeas corpus, of “non-citizens designated as enemy combatants and detained in territory located outside our Nation’s borders.”¹⁴³

Justice Kennedy, writing for a 5-4 majority, declared the MCA restrictions on the habeas writ an unconstitutional suspension of the writ of habeas corpus and found that Guantanamo detainees were entitled to the constitutional protection of the writ.¹⁴⁴ The Court reached this result after a lengthy historical review of the writ in which Justice Kennedy explored the writ’s history from England through the Framers’ drafting of the Constitution and ultimately into nineteenth-century jurisprudence.¹⁴⁵ Also weighing heavily on the decision was the fear of one branch of government usurping another branch’s power;¹⁴⁶ as such, the Court held that the constitutional right of habeas corpus extends to non-citizen detainees and that the processes provided by the MCA were insufficient.¹⁴⁷ Next, the Court analyzed the *Insular Cases* and addressed “whether the Constitution, by its own force, applies in any territory that is not a State.”¹⁴⁸ This shifted the Court’s focus to an extraterritorial application of the Constitution.¹⁴⁹ In the early twentieth century, the acquisition of Puerto Rico, Guam, and the Philippines forced the United States to consider the reach of the Constitution.¹⁵⁰ The Court determined that in territory where the United States exercises de facto control, persons over whom it exercises control possess constitutional rights.¹⁵¹

The holdings in *Boumediene* will be an important tool for the government in advancing the legality of drone warfare and proliferation. Again, the idea of advancing constitutional rights for non-citizens may become a factor in the President’s legal analysis when it determines a lethal strike. These rights may also be extended should a target wish to challenge his place on the secret target list. This case may also help the President retain control over its most sensitive operations because the Court continues to respect the delicate balance between national security issues, pragmatism, and constitutional rights. Although the holdings in *Boumediene* may not have much use in the pre-strike assessment described below, this case opens up the possibility of bringing suit after an attack for which the United States may be accountable.

142. *Id.* at 734.

143. *Id.* at 739; see Murphy & Radsan, *supra* note 74, at 430.

144. *Boumediene*, 553 U.S. at 792.

145. *Id.* at 739–46.

146. *Id.* at 764–66.

147. *Id.* at 732.

148. *Id.* at 756.

149. *Boumediene*, 553 U.S. at 756–64.

150. *Id.* at 756.

151. *Id.* at 772.

F. The Legality and Morality of U.S. Targeting Practices

*U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.*¹⁵²

*Kill the seniors. Collateral damage worries you Americans. It does not worry me.*¹⁵³

The Obama administration remains relatively silent on the application of international and domestic laws to its targeting practice, however Harold Koh, the State Department Legal Advisor, outlined the Obama administration's views on current conflicts.¹⁵⁴ Most importantly, Koh reaffirmed the administration's position that the United States remains engaged in an armed conflict with al-Qaeda, the Taliban, and their supporters.¹⁵⁵ The Executive, and other branches, assert that under the AUMF and Article 51's self-defense authorization, the United States has lawfully been engaged with terrorist organizations.¹⁵⁶ The AUMF authorized the President to "use all necessary and appropriate force" against nations, organizations, and individuals that the President determines "planned, authorized, committed, or aided" the 9/11 attacks.¹⁵⁷ It also allows preemptive action to prevent further international terrorism against the United States.¹⁵⁸ The AUMF appears not to have been intended as a restraint on when and where the President may use force against terrorists. But the AUMF also made clear that it would not limit the reach of the War Powers Resolution.¹⁵⁹ Enacted in 1973, the War Powers Resolution is a check on the President's war powers.¹⁶⁰

Koh alluded to the standards used when targeting individuals abroad. Similar to the Israeli policy, the United States determines whether an individual

152. Koh, *supra* note 63.

153. See Peter Bergen & Katherine Tiedemann, *The Effects of the U.S. Drone Program in Pakistan*, FOREIGN AFF., July/Aug. 2011, at 12, 16 (quoting Pakistani president Asif Ali Zardari); see also *Collateral Damage Worries You Americans, Not Me: Zardari*, THE NATION (Sept. 25, 2010), <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/Politics/25-Sep-2010/Collateral-damage-worries-you-Americans-not-me-Zardari>.

154. Koh, *supra* note 63.

155. *Id.*

156. Authorization for Use of Military Force, S. J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

157. *Id.* § 2(a).

158. See *id.*

159. *Id.* § 2(b)(2).

160. War Powers Resolution, 50 U.S.C. §§ 1541–1548 (1973). This resolution requires the President, whenever possible, to consult with Congress before sending U.S. armed forces into a conflict, 50 U.S.C. § 1542, and, absent congressional approval, to withdraw forces deployed within sixty days. 50 U.S.C. § 1544(b).

will be targeted in a specific location by looking at the “imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses.”¹⁶¹ Distinction and proportionality are also considered when planning an attack.¹⁶² Notably, Koh failed to answer any questions about the details of the application of these standards, or who considers them when selecting a target. The public is still unaware of who weighs these factors in deciding a target.

G. Arguments Made by Proponents of the Drone Program

The drone program is a fixture in the Obama administration’s fight against terror¹⁶³ and the moral and legal defense the administration offers serves as an indication that these attacks will continue.¹⁶⁴ Further, proponents of the drone program argue their use reduces risk to U.S. service members, decreases American weariness at foreign intervention, and minimizes civilian casualties during attacks and missions.

First, because asymmetric warfare has increased, the United States has sought out creative ways to fight terrorists, insurgents, and asymmetric wars more generally.¹⁶⁵ Despite controversy surrounding the drone program, it allows surveillance and lethal missions without putting U.S. troops in harm’s way.¹⁶⁶ This is an almost incontrovertible positive factor when considering American public support for a new and technologically incredible program.¹⁶⁷ Due to the lingering Overseas Contingency Operations, Americans are eager for some good news, and this program can deliver. Drone operators are on the front lines of a new and more sophisticated type of war and the information their surveillance missions provide can prove invaluable to service members on the ground.¹⁶⁸ This dual benefit weighs heavily in favor of drone proliferation. Drones can be

161. Koh, *supra* note 63.

162. *See supra* notes 102–103 and accompanying text.

163. Hudson, Owens & Flannes, *supra* note 12. Indeed, drones featured in a romantic-comedy-action film. Official Trailer: THIS MEANS WAR (Twentieth Century Fox 2012), <http://www.youtube.com/watch?v=oleuD8479uM>.

164. For more discussion on drone attack rates *see* Hudson, Owens & Flannes, *supra* note 12, at 124–25; Owens, *supra* note 11; The Year of the Drone, *supra* note 11.

165. *See generally* JEFFERY RECORD, BEATING GOLIATH: WHY INSURGENCIES WIN (2007).

166. For more information on drone capabilities, *see* <http://www.ga-asi.com/products/aircraft/index.php>.

167. The classified nature of drone and other military operations does not allow for much speculation about individual successes of drone technology as surveillance tools. The better-known targeted killing missions in remote regions allow the conclusion that drones were able to go where it would have been unfeasible to send troops.

168. Andrew Callam, *Drone Wars: Armed Unmanned Aerial Vehicles*, 18 INT’L AFF. REV. (Winter 2010), <http://www.iar-gwu.org/node/144>.

deployed to survey and attack where it would otherwise be impractical for troops, and a single pilot, to venture.¹⁶⁹

However, the analysis of this benefit must be separated between the two organizations employing drones: the military and the CIA.¹⁷⁰ Drones are used for surveillance and killing by both organizations but usually with different purposes in mind.¹⁷¹ The military has focused its drones primarily on tactical support of ground forces,¹⁷² either by providing information about enemy tactics or eliminating combatants entrenched in defended positions.¹⁷³ The CIA uses drones to eliminate specific targets in remote areas in which conventional U.S. military action would be impossible.¹⁷⁴

During Operation Southern Watch, the military used drones to police no-fly zones in Iraq and they were eventually used to target Iraqi radar systems during the second Iraq War.¹⁷⁵ In Operation Enduring Freedom, the military has expanded its use of armed drones to provide air support to ground operations and to act as “killer scouts.”¹⁷⁶ By providing immediate battle damage assessment, drones enable commanders to determine if further action is necessary, and provide a new perspective on the field.¹⁷⁷ In Operation Iraqi Freedom, the armed drone retained and expanded its roles targeting anti-aircraft vehicles, performing as a decoy revealing enemy positions, and aiding in a rescue mission.¹⁷⁸ Based on these successes, military leaders maintain the value of drones.¹⁷⁹ The CIA’s use

169. *Id.*

170. *Id.*

171. *Id.*

172. The military employs three types of drone, with varying capabilities:

The MQ-1 Predator, the MQ-1C Sky Warrior, and the MQ-9 Reaper, all three built by General Atomics. . . . The Army’s Sky Warrior is a slightly larger version of the Predator that can fly slightly higher, loiter for a shorter amount of time, and carry two more missiles than the Predator. The Reaper, also known as the Predator B, is the largest and most powerful of the three drone models. The Reaper can fly at twice the altitude and speed of the Predator and can carry eight Hellfire missiles or four missiles and two laser-guided bombs. It also carries an improved camera and software package that can ‘recognize and categorize humans and human-made objects,’ such as improvised explosive devices. Although the Defense Department’s 2011 budget doubles spending on the Reaper, the Predator will remain the primary UAV in use.

Id.

173. Callam, *supra* note 168.

174. *Id.*

175. Elizabeth Bone & Christopher Bolkcom, CONG. RESEARCH. SERV., RL31872, UNMANNED AERIAL VEHICLES: BACKGROUND AND ISSUES FOR CONGRESS 23 (2003).

176. See Russell Parker, *The Predator’s War: UAVs Take Center Stage in the War on Terrorism*, AIRMAN (Dec. 1, 2002).

177. *Id.*

178. Bone & Bolkcom, *supra* note 175, at 24.

179. See Bergen & Tiedemann, *supra* note 153, at 13.

of drones facilitates U.S. attacks in environments where it is deemed too dangerous for ground troops to have a physical presence.¹⁸⁰ The ability to protect American lives, keep military costs down, and damage terrorist infrastructure and leadership is central to proponents' view of this program.

Second, the American public has grown tired of drawn-out conflicts and foreign intervention, and the drone program offers a more palatable form of foreign involvement.¹⁸¹ President Obama claims that "it is time to focus on nation-building here at home" and, presumably, the drone program allows the government to operate without deployment of ground troops to areas in which intervention is deemed necessary, be it for humanitarian or military purposes.¹⁸² Lethal operations, surveillance for U.S. military operations, and less costly intervention all become possible when robots are the actual tools. With a weary electorate, the Executive can maintain a presence abroad militarily, while remaining able to argue that its full focus is on protecting and growing our nation at home.

Third, proponents of drone use also argue that this technology can "ensure both that the best intelligence is available for planning operations, and that civilian casualties are minimized in carrying out such operations."¹⁸³ This is by far the most complex argument (made by both critics and proponents of the program) regarding drone efficacy and collateral damage. Because most civilian casualty reports are based on media and informant reports, the difficulty of defining an allegedly lawful target and a civilian becomes paramount.¹⁸⁴ Officials maintain that the drones' ability to linger above a target for days and observe a "pattern of life," means that the pilot or operator can study their target, identify civilians in the area, and, if necessary, change the plan.¹⁸⁵ According to the New America Foundation, whose study is based on media sources, the civilian casualty estimate since 2004 is approximately twenty percent and in 2012, approximately ten percent.¹⁸⁶ The military and CIA share the opinion that though it is highly improbable that no civilians have been killed, "our coverage has improved so much since the beginning of this program, it really defies logic that now we would start missing all these alleged noncombatant casualties."¹⁸⁷

180. See Callam, *supra* note 168.

181. See Lexington's Notebook, *War weariness: Mars in the descendant*, ECONOMIST (June 22, 2011, 10:35 PM), <http://www.economist.com/blogs/lexington/2011/06/war-weariness>.

182. See David S. Cloud & Christi Parsons, *33,000 Troops to Come Home: Obama, Citing Afghan Successes, Says It Is Time to Rethink Foreign Wars and Focus on Rebuilding at Home*, L.A. TIMES, Jun. 23, 2011, at A1.

183. See, e.g., Koh, *supra* note 63.

184. See *Out of the Blue: Drones in Pakistan*, ECONOMIST, Jul. 30, 2011, at 36; Scott Shane & Pir Zubair Shah, *C.I.A. Is Disputed on Civilian Toll in Drone Strikes*, N.Y. TIMES, Aug. 12, 2011, at A1.

185. See Shane & Shah, *supra* note 184, at A1.

186. The Year of the Drone, *supra* note 10.

187. See Shane & Shah, *supra* note 184, at A1.

IV. RECOMMENDATIONS

*It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.*¹⁸⁸

Because of staunch political and military support for the drone program, it is unlikely that these attacks will diminish in the near future. If that is indeed the case, it is more important than ever that the Executive, in conjunction with Congress and the judiciary, set out clear standards for these lethal operations. The nation has faced these difficult questions before and “[i]n keeping with the purpose and the pragmatism of *Mathews v. Eldridge*, this investigation should be as thorough, independent, and public as possible without damage to national security.”¹⁸⁹ Specifically, a heightened and public standard of review is needed for the CIA drone program as the military operates within its own chain of command. There should be an open standard of selection that clearly delineates why an individual becomes a target, how long they may be targeted, and who reviews the information about the target. Though these standards are likely to remain classified based on national security concerns, there has been success in integrating national security cases into the judicial process; for example, in the Guantanamo detainee cases.¹⁹⁰ A federal court or panel should also be created, similar to Foreign Intelligence Surveillance Courts that will aid in the targeting process and issue a warrant for a strike.¹⁹¹

A. The Standard for a Lethal Targeting Operation

Because of the U.S. commitment to the rule of law, any lethal program not operated by a military branch should be subject to a more public and judicially overseen review. The CIA needs to define exactly who they are searching for; whether it is the “anyone who aids and abets” terrorism level of involvement or a mere scintilla of suspicion. By defining whom they are targeting, a level of credence will be lent to the program. Further, the United States should take a page out of Israel’s playbook and declare that there must be actionable intelligence against the proposed target that identifies “the target as a person actively involved in acts of terrorism.”¹⁹² There must be an actual plan of attack (time, place, means) in place by that individual that is known through the

188. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

189. Murphy & Radsan, *supra* note 74, at 449.

190. *See, e.g., Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

191. *See* Murphy & Radsan, *supra* note 74, at 449.

192. BLUM & HEYMANN, *supra* note 69, at 75.

intelligence;¹⁹³ this will lessen the likelihood of opportunistic targeting that risks error and miscalculation. Further, an assessment of the distinction and proportionality of the attack should be tied into the decision to attack,¹⁹⁴ as well as a reflection on potential domestic political consequences¹⁹⁵ and foreign political blowback from an attack.¹⁹⁶ Then, supervisors should review a package of information about the proposed target and decide if the intelligence is good enough to continue up the chain of command. Due to the Executive's reassurances, a review process similar to this is already in place, however, without sacrificing national security interests this standard of selection should be made more public. Though the decision to attack terrorist organizations, and those providing material support, has already been made,¹⁹⁷ public support for the tactics used in the Overseas Contingency Operations should help guide the executive and legislative game plan.

B. The Role of the Courts in Targeted Killing Operations

The next level of review should be a statutorily created court that is the last stop on the targeted killing process. Though there may be some grumbling among judges and politicians about overextended courts and full dockets, national security concerns and the risk of lethal mistakes should outweigh reluctance to introduce an important check on targeted killing. The President, and perhaps Congress, could also be reluctant to allow courts into what they deem a core executive function.¹⁹⁸ Attorney General Eric Holder gave the public another piece of the Obama administration's targeted killing model when he claimed that the Constitution "guarantees due process, not judicial process" and that "due process

193. *Id.*

194. See Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT'L SEC. J. 45, 54–57 (2010).

195. See Paul Rogers, *Drone Warfare: Cost and Challenges*, OPENDEMOCRACY (Jun. 23, 2011), available at <http://www.opendemocracy.net/paul-rogers/drone-warfare-cost-and-challenge>.

196. Hudson, Owens & Flannes, *supra* note 12, at 123. Blowback is "the unintended consequences of policies not subjected to the scrutiny of the American public." *Id.*

197. See Authorization for Use of Military Force, S. J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

198. See U.S. CONST. art. II § 1; U.S. CONST. art. II § 2, cl. 1; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (discussing the three levels of presidential power); FEDERALIST No. 23 (Alexander Hamilton) (discussing the need for the federal government to possess the powers requisite to care for national defense, and observing:

[U]nless . . . the circumstances which may affect the public safety are reducible within certain determinate limits . . . it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defense and protection of the community, in any matter essential to its efficacy . . .).

takes into account the realities of combat.”¹⁹⁹ This signals to the public that the Obama administration will remain wary of any encroachment and that the imposition of judicial process on targeted killing would be fought.

However, these reviewing courts could develop in several ways. As suggested by Murphy and Radsan, a court mirroring the Foreign Intelligence Surveillance Court (FISC) is not outside the realm of possibility.²⁰⁰ Another option is the expansion of the jurisdiction of the current FISCs. The judges and staff already have the necessary security mechanisms in place to handle sensitive matters, and there would be less financial and political blowback from expanding an existing framework.

Perhaps the most complex suggestion is the creation of a new national security court to deal exclusively with cases having national security implications. Such a court could address not only drone strikes, but the whole plethora of emerging national security and terrorism related concerns. For example, Guantanamo detainee cases could be tried in the national security court rather than in a military commission, cases of trafficking, and materially supporting terrorist groups could be tried there instead of in Article III courts. A new national security court, though logistically far off, could be the judicial response to the legislative expansion of the homeland security field (e.g. the creation of the Department of Homeland Security). One of the most looming challenges to creating this kind of court, especially in the case of targeted killings and drone strikes, is the lack of judicial precedent on such matters.²⁰¹ Arguably, some of the preceding suggestions face logistical, political, and practical difficulties, but judicial action in such critical matters to U.S. national security is paramount.

Regardless of the type of judicial mechanism used to ensure the lawfulness of a targeted killing, the Chief Justice of the U.S. Supreme Court should designate district court judges from every region where CIA drone operators are stationed, with several in the District of Columbia. These judges will preside over courts with jurisdiction to “hear applications and grant orders,” whose job would be approving or rejecting targeted killing warrants.²⁰² The hearings will be held expeditiously and records will be kept according to security measures “established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence.”²⁰³

The application for an order approving a targeted killing will be submitted by a designated CIA official, or DOJ official in conjunction with the CIA investigative team, “in writing upon oath or affirmation” after review and

199. Eric Holder, Deputy Attorney Gen. of the U.S., Address at Northwestern University Law School (Mar. 5, 2012), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

200. Murphy & Radsan, *supra* note 74, at 449.

201. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

202. 50 U.S.C. § 1803(a)(1) (West, Westlaw 2012). These courts will be modeled after the Foreign Intelligence Surveillance Courts created by the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–1812 (West, Westlaw 2012).

203. 50 U.S.C. § 1803(c).

approval by the supervisor of the drone program at a given outpost.²⁰⁴ This application will include all necessary and pertinent information needed for the judge's decision.²⁰⁵ This information shall include who the target is (if known), what action or information led to this targeting, any informant information, imminent threat analysis, known links to terrorists or terrorist organization, and a distinction and proportionality analysis (if available).

These warrants could be made before locating a target. Once a suitable application has been assembled, the designated official may submit the application and receive a warrant that would be good for a specific period. If the target is not found within that period, a renewal request may be made by adding an addendum to the above described application with any new and pertinent information.²⁰⁶ An expedited process would also apply to newly acquired targets by which the CIA official could make an emergency application. Further, an authorization made by the President, through the Attorney General, could bypass this application process in appropriate exigent circumstances. There would also be a semi-annual report to Congress from CIA officials on targeted killing application procedures. An act creating this court would also address sanctions and liabilities, likely monetary fines or professional sanctions, of CIA and DOJ officials who do not comply with the procedures. Although any judicial action that encroaches on the Executive's autonomy in the national security realm will likely face pushback, judicial review is an important check on the Executive's power. To assuage the separation of powers issues that could arise in the creation of this court on targeted killing and drone strike operations, the legislative and judicial branches will have to ensure they are not unconstitutionally restricting the President's authority.

V. CONCLUSION

Simply put, this paper has created more questions than it has answered given the subject's cloaked and secret nature. However, it has also demonstrated that for the targeted killing and drone program to continue unchecked without a more public standard of target selection and judicial involvement is not prudent. While perhaps not in violation of international law or the AUMF, given that "nothing in the language of Article 51 restricts the right to engage in self-defense actions to circumstances of armed attacks by a 'state,'"²⁰⁷ the amorphous nature of terrorist networks will remain a problem for those who continue to rely on traditional war-fighting paradigms. Furthermore, a workable definition of "terrorism" is a necessity given the inter-state and inter-agency nature of this program and the United States' prohibition on the use of assassination. By

204. 50 U.S.C. §1804(a).

205. *See* 50 U.S.C. § 1804(a)(1)–(9).

206. Mckelvey, *supra* note 106. This court will reduce targets of opportunity for which the standard of review appears to be lower than for those targets the CIA has had on their watch list for longer periods of time.

207. Paust, *supra* note 41, at 241.

determining that terrorist leaders and their affiliates are not technically within E.O. 12,333's definition, the Administration is ignoring the possibility that eventually the United States may face the reality, however clichéd, that "one man's terrorist is another man's freedom fighter."²⁰⁸ Again, asymmetric warfare requires thinking outside the box of traditional wartime and law enforcement paradigms. Most importantly, this paper sought to find ways in which the United States could identify legitimate targets and a role for the judicial system in that process. A standard of selection should include at the very least: (1) a workable definition of terrorist/terrorism and a determination that the target fits that definition; (2) a determination that the target is engaged in terrorist acts; (3) that the target has an actual plan of attack in place determined through known intelligence; (4) an analysis of the distinction and proportionality of the attack; (5) the inability to capture the target; and (6) a blowback analysis. After this information has been compiled, it should be reviewed and sent up the chain of command. Without ignoring the realities of real-time, actionable intelligence, the information should then be reviewed by a statutorily created court. Though an undoubtedly complex solution, the creation of a court designed to deal with national security issues is the answer to pressing legal issues surrounding targeted killing.

President Obama's confirmation that drones are used in the Federally Administered Tribal Areas to go "after al-Qaeda suspects who are up in very tough terrain along the border between Afghanistan and Pakistan" and that "for us to be able to get them in another way would involve probably a lot more intrusive military action than the one we are already engaging in" ignites foreign sovereignty questions that remain unanswered.²⁰⁹ Does the United States require permission from a sovereign government before targeting a person in its territory? What if the United States fails to get that permission? What if the region in question does not have a functioning government? The United States faces an increasing number of threats worldwide and these international questions must be answered. An expert in the field, Peter Singer, analyzes the impact on the drone pilot, the autonomous weapons systems and their capacity, and the danger of going to war when it is too easy.²¹⁰ He discusses the morality of "good" wars and the fear that "without public debate and support and without risking troops, the decision to go to war becomes the act of a nation that doesn't give a damn."²¹¹ With so much unknown about the consequences of robotic warfare, is it responsible to expand its use? And finally, determining the real risk and cost to the foreign civilian population should be a top priority whenever lives may be lost. The risks that civilian populations may turn against the counter-insurgency efforts of the United States are too great to ignore the human concerns of technological advancement. Despite the importance of reflection on the meaning of those

208. See generally GERALD SEYMOUR, HARRY'S GAME (1975).

209. *Video Chat: Obama Addresses Drone Strikes With "Hangout,"* pt. 10, at 2:53–3:12 (Jan. 30, 2012), <http://www.youtube.com/watch?v=2rPMPMqOjKY>.

210. Singer, *supra* note 1, at 258.

211. *Id.*

advances, we remain woefully unprepared to answer moral and legal questions surrounding our advancements.

