

# DRONES: A PROPOSAL FOR NEW POLICY INCLUSIVE OF INDEPENDENT JUDICIAL OVERSIGHT

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## I. INTRODUCTION

“The drone wars are here,” reported an article in the *Huffington Post*, while describing an arms race involving the United States and other countries, such as Israel and China, in their efforts to develop and acquire various drone technologies.<sup>1</sup> And Leon Panetta, former Central Intelligence Agency (“CIA”) Director, famously boasted that drones were “the only game in town.”<sup>2</sup> Drones, or unmanned aerial vehicles,<sup>3</sup> have been increasingly used by the United States, and other countries to conduct anti-terrorism operations overseas.<sup>4</sup> The United States has

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1. David Wood, *American Drones Ignite New Arms Race From Gaza to Iran to China*, WORLD POST (Nov. 27, 2012, 3:01 PM), [http://www.huffingtonpost.com/2012/11/27/american-drones\\_n\\_2199193.html](http://www.huffingtonpost.com/2012/11/27/american-drones_n_2199193.html).

2. *U.S. Air Strikes in Pakistan Called 'Very Effective'*, CNN.COM, <http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes> (last updated May 18, 2009).

3. The United States Department of Defense defines unmanned aerial vehicles as:
- [a] powered, aerial vehicle that does not carry a human operator, uses aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or nonlethal payload. Ballistic or semiballistic vehicles, cruise missiles, and artillery projectiles are not considered unmanned aerial vehicles.

JOINT CHIEFS OF STAFF, DEP'T OF DEF., JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 571 (2009).

4. For the purposes of this Article, the more commonly used term “drone” is used to refer to “unmanned aerial vehicles.” In addition, this Article focuses on legal issues pertaining to the covert CIA conducted use of drones. Moreover, while drones can be used for both surveillance and lethal targeting operations, the focus of this Article will be on the latter, more controversial utilization of drones.

used smaller drones for surveillance and target acquisition missions, as well as larger drones equipped with Hellfire missiles to conduct targeted killings.<sup>5</sup> In the aftermath of the terrorist attacks of September 11, 2001 (“September 11”), President George W. Bush authorized dozens of drone strikes against terrorist suspects, and President Barack Obama continued this practice and expanded the scope of the United States’s use of drones.<sup>6</sup> According to investigative reports, President Obama has authorized a total of 362 drone strikes in Pakistan alone during his presidency, compared to fifty-one strikes authorized by President Bush.<sup>7</sup> Drone strikes have been conducted in traditional theaters of war, such as Afghanistan, Iraq, and Libya. Drone strikes have also been conducted in countries where the United States is not waging an armed conflict against state actors, but where terrorism suspects have been found, such as Pakistan, Somalia, and Yemen.<sup>8</sup> In the latter set of countries, drones are used in counter-terrorism operations; they are operated by the CIA, and the contours of any drone policy in this paradigm remain vague.<sup>9</sup>

The CIA refused to acknowledge the existence of the drone program itself until recently.<sup>10</sup> Even after the Agency and

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5. P.W. Singer, *Military Robots and the Laws of War*, 23 NEW ATLANTIS 25, 37–38 (2009).

6. According to one commentator, “[u]nder Obama, drone strikes have become too frequent, too unilateral, and too much associated with the heavy-handed use of American power.” David Rohde, *How Obama’s Drone War is Backfiring*, REUTERS (Mar. 1, 2012), <http://blogs.reuters.com/david-rohde/2012/03/01/how-obamas-drone-war-is-backfiring>.

7. *Get the Data: Drone Wars*, BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/category/projects/drones/drones-graphs> (last visited Mar 23, 2015). According to the Bureau of Investigative Journalism, between 2004 and 2015, the United States conducted a total of 414 strikes in Pakistan, a total of 90 to 109 confirmed strikes and a possible 73 to 89 additional strikes in Yemen, and a total of 9 to 13 confirmed strikes in Somalia. *Id.*

8. Ashley S. Boyle, *Contextualizing the Drones Debate*, AM. SEC. PROJECT (Aug. 2012), <http://americansecurityproject.org/ASP%20Reports/Ref%200079%20-%20Contextualizing%20the%20Drones%20Debate.pdf>.

9. Jane Mayer, *The Predator War: What are the Risks of the C.I.A.’s Covert Drone Program?*, NEW YORKER, Oct. 26, 2009, <http://www.newyorker.com/magazine/2009/10/26/the-predator-war>.

10. The American Civil Liberties Union (“ACLU”) filed a Freedom of Information Act request in January 2010 with the Department of Defense, the Department of Justice (including the Office of Legal Counsel), the Department of State, and the CIA, asking for information regarding the legal and factual basis for the government’s use of predator drones to conduct “targeted killings” overseas. See AM. CIV. LIBERTIES UNION, *Predator Drones FOIA*, available at <https://www.aclu.org/national-security/predator-drones-foia>.

the Obama administration admitted that drones are used in covert operations in places such as Pakistan and Yemen, unanswered questions remain regarding the official targeting policy, the intelligence information that forms the core of a targeting decision, and any appropriate oversight both before and after each strike. But what if the CIA is wrong about a significant number of its targets, and the American public simply does not know that the CIA is wrong? The executive branch's approach to this issue has been to argue that the American public needs to trust the President on national security issues—in this case, trusting the President implies that he forms the judge, jury, and executioner regarding terrorism suspects who may be targeted via drone strikes.

The use of drones poses complex legal questions, and the application of existing international law to such questions has been difficult. We need to continue to apply international law to the use of drones across national borders. At the same time, we also need a new comprehensive policy, which would both embrace international law limitations on the use of drones and develop policy guidelines. These policy guidelines would ensure that the executive branch's decision to use lethal force through drone strikes is reached pursuant to clear and well-defined targeting practices and overseen prospectively by an appropriate independent judicial body.

This Article proposes new policy guidelines for the use of drones abroad and advocates for the creation of a “drone court” comprised of federal judges, who would provide independent oversight over the Executive's decisions to use lethal force against presumed terrorist suspects overseas. In Section II, this Article analyzes relevant international and domestic law on the use of

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“The CIA denied the request by refusing to confirm or deny whether the CIA drone strike program exist[ed].” *Id.* The ACLU filed a second lawsuit against the CIA in June 2010, “arguing that the CIA’s response was not lawful because the CIA Director and other officials had already publicly acknowledged the existence of the CIA’s drone program.” *Id.* The District Court ruled in favor of the CIA, and the ACLU appealed to the D.C. Circuit Court of Appeals. *Id.*

[I]n March 2013, the appellate court reversed the lower court’s decision [ ], ruling that the CIA could no longer deny its interest in the program. The D.C. Circuit Court of Appeals remanded the case to the district court, where the CIA will have to release documents that respond to the ACLU’s request or legally justify withholding them.

*Id.*

force via drone strikes. Section III describes existing United States's policy on the use of drones to target terrorist suspects. Section IV proposes a new policy that is mindful of international and domestic/constitutional legal obligations of the United States and considers the need to impose independent judicial oversight over the executive branch's targeting decisions. Lastly, this Article concludes that the existence of prospective judicial review against the executive branch's decision to launch each particular strike is crucial in order to ensure that the drone program does not violate American domestic and international legal obligations.

## II. THE EXISTING LAW ON DRONES: INTERNATIONAL AND DOMESTIC NORMS RELEVANT TO THE USE OF DRONES

The United States's use of targeted killings via drone strikes against terrorism suspects located abroad raises important and difficult questions under international law, as well as under the United States Constitution and relevant federal statutes. These questions, as it will be discussed in this section, are virtually impossible to answer because of the lack of transparency that has shrouded the executive branch's targeting decisions.

### A. *International Law*

The United States, when and if it launches lethal attacks via drones, uses deadly force on the territory of other sovereign nations. International law contains norms and prohibitions on a state's use of force against another state. Such norms, which pertain both to a state's ability to legally initiate the use of force against other states, as well as a state's legally authorized means of waging warfare, will be described in the sections below, on *jus ad bellum* and *jus in bello*. The applicability of international human rights law will also be addressed.

#### i. *Jus Ad Bellum*: Drones in Self-Defense?

Article 2(4) of the United Nations Charter imposes, on all member states, a general ban on the use of force, by prohibiting states from using force against the territorial integrity or political independence of any other states.<sup>11</sup> This general ban on the use of

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

force applies to any use of military force, including the use of drones; moreover, this general ban is subject to only two exceptions, which include situations where the Security Council authorizes the use of force against a particular state, and self-defense.<sup>12</sup> The United States has been using drones in multiple countries without Security Council involvement or authorization; thus, the only manner in which the United States can justify its use of force in these instances is through self-defense. The United States has argued that the terrorist attack on September 11 was an act of war, and that, accordingly, it is entitled to respond in self-defense against the terrorist groups responsible for this attack, anywhere that such terrorist groups may be found.<sup>13</sup>

Article 51 of the United Nations Charter authorizes any state which is under an “armed attack” to use force in response, under the paradigm of self-defense.<sup>14</sup> International law is presently unclear as to what constitutes an armed attack, and whether attacks by a non-state actor, such as a terrorist group, can constitute an armed attack and trigger a self-defense response by the attacked state.<sup>15</sup> A traditional view of international law would require an armed attack of significant scope and magnitude committed by a state actor against a victim state, in order for the victim state to be able to assert its right of self-defense.<sup>16</sup> The International Court of Justice (“ICJ”) has held in the infamous Nicaragua case that only “grave forms of the use of force” trigger a State’s right to use self-defense under the United Nations

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12. Laurie R. Blank, *Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications*, 38 WM. MITCHELL L. REV. 1655, 1662 (2012).

13. See, e.g., Exec. Order No. 13239, 66 Fed. Reg. 241 (Dec. 12, 2001); Military Order, 66 Fed. Reg. 22 (Nov. 13, 2001); Exec. Order No. 1324, 66 Fed. Reg. 221 (Nov. 9, 2001); Ryan Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT’L L. & POL’Y 101, 107–08 (2011); President Barack Obama, Remarks at the National Defense University (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [hereinafter Obama NDU Speech].

14. U.N. Charter, *supra* note 11 at art. 51.

15. Because many scholars have already grappled with the parameters of self-defense in response to terrorist attacks, this Article discusses only some of the main viewpoints on this complex issue. See, e.g., YORAM DINSTEIN, *WAR AGGRESSION AND SELF-DEFENCE* 175–82 (4th ed. 2005); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?*, 16 EUR. J. INT’L L. 171, 203 (2005); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y 237 (2010); Michael N. Schmitt, *Responding to Transnational Terrorism Under the Jus Ad Bellum: A Normative Framework*, 56 NAVAL L. REV. 1 (2008).

16. Blank, *supra* note 12, at 1663.

Charter.<sup>17</sup> This case has been interpreted to require a particularly high bar regarding what constitutes an armed attack. Some scholars, including United Nations Special Rapporteur Philip Alston, have similarly argued that armed attacks which give rise to the right of self-defense are limited to “massive armed aggression” that “imperils . . . life or government,” and that individual acts, such as the al-Qaeda attack of September 11 against the United States, do not constitute an “armed attack” under the United Nations Charter.<sup>18</sup> Finally, a more recent ICJ case limits the concept of “armed attack” to actions by state actors, which would also exclude any acts by non-state actors, such as al-Qaeda, from constituting an armed attack triggering the United States’s right of self-defense.<sup>19</sup>

However, recent scholarship has questioned this type of inflexible reading of Article 51 because it is neither “natural nor realistic.”<sup>20</sup> First, Article 51 does not state that the right of self-defense is only available when an armed attack is launched by a state actor.<sup>21</sup> Additionally, three different ICJ judges, Koojimans, Higgins, and Simma, have questioned whether armed attacks are limited to state actors.<sup>22</sup> “In an era where non-state groups project military-scale power, the better view is that non-state actors, such as al Qaeda, can carry out armed attacks.”<sup>23</sup> In a different ICJ case subsequent to the Nicaragua case, the so-called Oil Platforms case, the Court also made it clear that an individual act of violence

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17. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 191 (June 27), available at [http://www.worldcourts.com/icj/eng/decisions/1986.06.27\\_military\\_paramilitary.htm](http://www.worldcourts.com/icj/eng/decisions/1986.06.27_military_paramilitary.htm) [hereinafter Nicaragua Case].

18. See Andrew C. Orr, *Unmanned, Unprecedented, and Unresolved: The Statute of American Drone Strikes in Pakistan Under International Law*, 44 CORNELL INT’L L.J. 729, 737 (2011). See also, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings, ¶ 41, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter Study on Targeted Killings].

19. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 207, para. 139 (July 9, 2014) (separate opinion of Judge Higgins), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&case=131&p3=4>; Nicaragua Case, *supra* note 17, at para. 103.

20. Orr, *supra* note 18, at 739.

21. U.N. Charter, *supra* note 11, at art. 51, para. 1.

22. Orr, *supra* note 18, at 739.

23. *Id.*

could be sufficient to constitute an armed attack.<sup>24</sup> Customary international law can also be interpreted as accepting that an “armed attack” may be carried out by a non-state actor. The famous *Caroline* paradigm, cited by many as evidence of customary international law on self-defense, does not limit states to using self-defense against state actors only, and the case itself involved non-state actors and hostilities.<sup>25</sup> Finally, some scholars have argued that the international community’s acquiescence to the United States’s use of military force in Afghanistan following September 11 supports the proposition that attacks by non-state actors can trigger a state’s right to self-defense under Article 51.<sup>26</sup>

The Obama administration has embraced the latter view: that the United States’s right of self-defense applies against terrorist non-state actors, if such non-state actors operate out of states which are allowing such terrorist activity to continue within their territories. John Brennan, Assistant to President Obama on Homeland Security and Counterterrorism, has argued that international law does not prohibit the use of deadly force against an active enemy “when the country involved consents or is unable or unwilling to take action against the threat.”<sup>27</sup> In a speech delivered at Harvard Law School, John Brennan stated that:

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24. Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Advisory Opinions and Orders, 2003 I.C.J. 189, ¶ 72 (Nov. 6, 2003).

25. Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 50 (2002) (explaining that the *Caroline* incident supports the necessary use of force in self-defense against a non-state actor); see Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), in 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 217, 412 (1906) (describing the necessity required before a state may act in self-defense against a non-state actor); see also Blank, *supra* note 12, at 1662–63 (describing the *Caroline* incident).

26. MALCOM N. SHAW, INTERNATIONAL LAW 1137 (6th ed. 2008); see also Michael P. Scharf, *Seizing the “Grotian Moment” Accelerated Formation of Customary International Law In the Time of Fundamental Change*, 43 CORNELL INT. L.J. 1 (2010) (arguing that post-9/11 the law of self-defense rapidly evolved to embrace the concept of self-defensive war against non-state actors); Milena Sterio, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 39 DENVER J. INT’L L. & POL’Y 209, 217–18 (2011).

27. Remarks of John O. Brennan, “Strengthening our Security by Adhering to our Values and Laws”, THE WHITE HOUSE (Sept. 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> [hereinafter Brennan Speech]; see also Peter Bergen, *Civilian Casualties Plummet in Drone Strikes*, CNN, <http://www.cnn.com/2012/07/13/opinion/bergen-civilian-casualties/index.html> (last updated July 14, 2012, 12:20 PM).

The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to 'hot' battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa'ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time. And as President Obama has stated on numerous occasions, we reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.<sup>28</sup>

According to this view, the battlefield against terrorism suspects knows no geographic boundaries, and drone strikes may be carried out both within a recognized theater of active armed conflict, such as Afghanistan and Iraq, but also in countries which either consent to drone strikes or appear unwilling or unable to combat non-state terrorist actors, such as Pakistan (consent), Somalia, and Yemen. "U.S. officials have argued that the fight with [Authorization for Use of Military Force Against Terrorist Attacks] enemies is global, not confined to the territory of one country."<sup>29</sup> According to the legal rationale advanced by then Legal Advisor to the State Department, Harold Koh, deciding "whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to . . . the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses."<sup>30</sup> This rationale would arguably exclude the possibility of conducting drone strikes in countries which are able and willing to combat terrorist threats, but would allow the United States to use lethal force in self-defense, in the territory of countries which are not engaged in any armed conflict against the

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28. Brennan Speech, *supra* note 27.

29. Vogel, *supra* note 13, at 130.

30. Harold Koh, Legal Adviser U.S. Dep't of State, Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), *available at* <http://www.state.gov/s/1/releases/remarks/139119.htm>.



United States but which harbor al-Qaeda and Taliban associates. It is uncertain whether the United States would, under this rationale, choose to conduct drone strikes in “neutral states,” such as Kenya, the Philippines, and Saudi Arabia, which do appear willing and capable to combat terrorist groups within their borders, in a scenario where high-level terrorist suspects were located in these countries. What is unquestionable is that the United States believes that because it is engaged in an armed conflict of a global nature, the law of armed conflict applies in each instance, regardless of the location of each drone strike.<sup>31</sup> It can be argued, therefore, that under the current view of the Obama administration, the location of a drone strike matters, but is not prohibitive. Location matters because drone strikes cannot be carried out in countries which have not consented or which are able and willing to combat terrorist threats. Location is not prohibitive because drone strikes can be carried out in any country which has not consented, but which is not able or willing to combat terrorist threats.

Some scholars have defended this view, because modern-day conflicts oppose state versus non-state actors, who often do not have a strict territorial nexus to any particular state, thus interjecting a layer of complexity into the definition of a battle field. “Once we are outside the belligerent-neutral framework that defined the traditional battlespace, determining the parameters of the contemporary battlefield or zone of combat becomes significantly more complicated.”<sup>32</sup> Others, however, have been critical, arguing that:

the United States is engaged in armed conflict in Afghanistan. To lawfully resort to military force elsewhere requires that the country where the United States is attacking has first attacked the United States (such as Afghanistan in 2001), the U.N. Security Council has authorized the resort to

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31. *Id.* See also Harold Koh, *The Lawfulness of the U.S. Operation Against Osama bin Laden*, OPINIO JURIS (May 19, 2011, 6:00 AM) (defending the legal status of the lethal raid on Osama Bin Laden’s Abbottabad compound on May 2, 2011); Robert Haddick, *This Week at War: Send in the Lawyers?*, FOREIGN POLICY, May 13, 2011, available at <http://foreignpolicy.com/2011/05/13/this-week-at-war-send-in-the-lawyers>.

32. Laurie R. Blank, *After “Top Gun:” How Drone Strikes Impact the Law of War*, 33 U. PA. J. INT’L L. 675, 711 (2012).

force (Libya in 2011) or a government in effective control credibly requests assistance in a civil war (Afghanistan since 2002).<sup>33</sup>

According to this view, the battlefield where the United States could legally engage in military operations can lie in Afghanistan, only pursuant to the self-defense rationale, and in Libya, pursuant to Security Council authorization. The battlefield may not lie in places such as Pakistan, Somalia, or Yemen, because the United States is not engaged in armed conflict in those places. The U.S. government's position, on the contrary, has consistently been that the battlefield follows al-Qaeda, Taliban, and associated forces members, and that, accordingly, the United States can launch a strike anywhere that such persons may be found.<sup>34</sup>

While the United Nations has largely stayed out of this "war," the United States's position finds limited support in some United Nations documents. The United Nations General Assembly Resolution 2625 states that "every state has the duty to refrain from . . . [a]cquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force."<sup>35</sup> In addition, Alston has argued:

A targeted killing conducted by one State in the territory of a second State does not violate the second States' sovereignty [where] . . . the first, targeting State has a right under international law to use force in self-defence [*sic*] under Article 51 of the UN Charter, [and] the second State is unwilling or unable to stop armed attacks against the first State launched from its territory.<sup>36</sup>

If one accepts the argument that the United States can lawfully exercise its right of self-defense under Article 51 of the United Nations Charter against a non-state actor, such as a terrorist organization, then the United States could use force on

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33. Mary Ellen O'Connell, *When Are Drone Killings Legal?*, CNN (Aug. 16, 2012), available at <http://www.cnn.com/2012/08/15/opinion/oconnell-targeted-killing>.

34. See Koh, *supra* note 30; Koh, *supra* note 31; Haddick, *supra* note 31.

35. G.A. Res. 2625(XXV), U.N. Doc. A/RES/25/2625 (Oct. 24, 1970).

36. Study on Targeted Killings, *supra* note 18, ¶ 41.

the territory of any nation which may be harboring such terrorist groups, by being unwilling or unable to stop their harmful activity against the United States.<sup>37</sup> Under this rationale, one would have to focus on each country where drone strikes are currently conducted. For example, one could conclude that drone strikes are legal in Yemen and Somalia, but illegal in Pakistan. And, in order to fully assess whether any nation is unwilling or unable to combat terrorism within its borders, one would need access to intelligence information and other relevant data about each state where targeting operations are proposed. The CIA has not shared any such data thus far and it is very difficult to determine whether drone operations are justified under the “unwilling or unable” standard in each nation in which they have been used. Thus, it is difficult to assess the validity of the United States’s self-defense argument, because of its lack of geographic constraints. While the self-defense argument could be valid in some places where the CIA conducts drone strikes, it could be perfectly invalid in others.

Even if one accepts the argument that the United States can lawfully exercise its right of self-defense against terrorist suspects pursuant to Article 51, any exercise of self-defense must comply with the *jus ad bellum* requirements of necessity and proportionality. Under *jus ad bellum*, the initial use of force must be necessary and proportionate to the campaign’s objective.<sup>38</sup> “The requirement of necessity addresses whether there are adequate non-forceful options to deter or defeat the attack,” and “[t]he requirement of proportionality in *jus ad bellum* measures the extent of the use of force against the overall military goals, such as fending off an attack or subordinating the enemy.”<sup>39</sup> The

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37. It should be noted that some scholars have recently argued that there exists an additional paradigm of “self-defense targeting,” which stands for the proposition that the traditional *jus ad bellum* right of self-defense creates sufficient authority “for the use of military force to target a threat without relying in either the law of armed conflict or human rights law for regulating authority.” Blank, *supra* note 12, at 1668 (describing the argument made by Kenneth Anderson); see Kenneth Anderson, *Future Challenges Essay: Targeted Killing and Drone Warfare: How We Came to Debate Whether There is a ‘Legal Geography of War’*, HOOVER INST. (JUNE 14, 2010), [http://www.hoover.org/sites/default/files/research/docs/futurechallenges\\_anderson.pdf](http://www.hoover.org/sites/default/files/research/docs/futurechallenges_anderson.pdf). However, it is beyond the scope of this Article to assess the validity of the self-defense targeting paradigm.

38. THE OXFORD HANDBOOK OF WAR 102–04 (Julian Lindley-French & Yves Boyer eds., 2012).

39. See Blank, *supra* note 12, at 1665. It should be noted that the requirements of necessity and proportionality for the purposes of self-defense can be traced back to the *Caroline* incident, described above. See Orr, *supra* note 18, at 740–41.

necessity requirement within the paradigm of targeted strikes, used against a terrorist group which poses a threat to American national security, can be further subdivided into two prongs: imminence and alternatives. First, an imminent threat is a “clear and present danger” which unless addressed can cause harm to civilians.<sup>40</sup> Moreover, the targeting state must ask itself whether targeting a terrorist suspect is necessary because the host state is unable or unwilling to act against the threat which the terrorist poses, and also whether targeting such a suspect would advance the goal of preventing further attacks.<sup>41</sup> Second, the targeting state must demonstrate the lack of alternative to the use of lethal force as a way of deterring the threat posed by the terrorist suspect. Thus, “the targeting of suspected terrorists must be restricted to cases in which there is credible evidence that the targeted persons are actively involved in planning or preparing further terrorist attacks against the victim state and no other operational means of stopping those attacks are available.”<sup>42</sup>

It is difficult to assess whether these requirements of *jus ad bellum* have been respected during CIA-led covert drone operations, because of the inherent secrecy of such operations. One would need information about the specificity of each proposed strike, such as whether the targeted individual posed an imminent threat, whether the individual was planning future attacks against the United States, whether other means of stopping the individual were available, and what the CIA’s definition of “imminence” may look like, etc.

We can ask these questions, but unless the government is forced to share specific information regarding particular drone strikes, pursuant to a well-defined policy encompassing appropriate oversight, such questions will remain unanswered. In order to appropriately apply *jus ad bellum* to the ongoing drone strike regime, we need to encourage the government to develop a robust policy on strikes, to share the policy with the public, and to submit to judicial oversight before each strike is conducted; the

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40. See Amos N. Guiora, *The Importance of a Criteria-Based Reasoning in Targeted Killing Decisions*, in TARGETED KILLINGS: LAW & MORALITY IN AN ASYMMETRICAL WORLD 532–34 (Claire Finkelstein et al. eds., 2012).

41. Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT’L HUMANITARIAN L. 3, 27 (2010).

42. Kretzmer, *supra* note 15, at 203.

latter would ensure that all the relevant requirements of *jus ad bellum* are respected in each targeting decision.

ii. The Legality of Drone Strikes Under  
International Humanitarian Law or *Jus in Bello*

In the view of the Bush and Obama administrations, the terrorist attacks of September 11 constituted an act of war against the United States by a non-state terrorist actor.<sup>43</sup> Accordingly, the Bush and Obama administrations have characterized the conflict with al-Qaeda, Taliban, and other associated forces as an armed conflict.<sup>44</sup> This characterization is relevant, because it dictates the applicability of the law of armed conflict as *lex specialis*.

Law of armed conflict, otherwise known as *jus in bello* or international humanitarian law, governs the conduct of states as well as non-state actors during armed conflict. Its primary purpose is to minimize suffering during war time by protecting categories of individuals not participating in hostilities and by limiting the methods of warfare.<sup>45</sup> Three main principles of law of armed conflict—relevant for the purposes of determining the legality of targeted strikes—include the principles of distinction, proportionality, and precautions.

The principle of distinction requires that any party to an armed conflict distinguish between those who participate in the conflict and those who do not; only the former can be lawfully targeted. The obligation to distinguish between participants to an armed conflict and nonparticipants is one of the core principles of the law of armed conflict; it applies to both international and domestic armed conflict, and it is enshrined in both treaty and in customary international law.<sup>46</sup> In order for a targeting state to

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43. See *infra* Part III for a detailed description of statements by Obama administration officials, and the President himself declaring that the United States is engaged in an armed conflict against specific terrorist groups and their associates.

44. Obama NDU Speech, *supra* note 13.

45. Blank, *supra* note 12, at 1661.

46. Prosecutor v. Tadic, Case No. IT-94-I-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 110 (Oct. 2, 1995) (emphasizing the need “for measures to ensure the better protection of human rights in armed conflict of all types”) (emphasis added); see also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 79 (July 8) (holding that distinction is one of the “intransgressible principles of international customary law”). The principle of distinction is set forth in Article 48 of Additional Protocol I to the Geneva Conventions (“the Parties

respect the principle of distinction, it must first identify a legitimate target. “A lawful attack must be directed at a legitimate target: either a combatant, member of an organized armed group, a civilian directly participating in hostilities, or a military objective.”<sup>47</sup> In non-international armed conflicts, individuals who are members of an organized non-state armed group are legitimate targets of attacks at all times.<sup>48</sup> In addition, civilians who directly participate in hostilities can also be legitimately targeted during the time that they engage in such hostilities.<sup>49</sup> While scholars, courts and commentators have struggled to define the exact parameters of “direct participation” for determining when and under which circumstances civilians may be targeted during armed conflict, almost all agree that civilians lose their protected status under the law of armed conflict if they choose to engage in the conflict itself.<sup>50</sup>

The U.S. government has argued that it is engaged in a non-international armed conflict with al-Qaeda, the Taliban, and associated forces, and that almost any member of al-Qaeda, the Taliban, or associated forces is targetable. The United States’s approach to defining lawful targets has been described as “any military aged male in a kill zone is properly determined to be targetable.”<sup>51</sup> Former CIA Director, Michael Hayden, admitted

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to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”), and its purpose in Article 51 of Additional Protocol I (“[t]he civilian population as such, as well as individual civilians, shall not be the object of attack”). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted by Conference June 8, 1977, 1125 U.N.T.S. 3, art. 48 [hereinafter AP I]; AP I, art. 51.

47. Blank, *supra* note 12, at 1671.

48. *Id.*

49. AP I, *supra* note 46, at art. 51(3).

50. See, e.g., HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel 26 [2005] (Isr.); Prosecutor v. Tadic, Case, No. IT-94-1-A, Appeals Judgment, para. 616 (July 15, 1999); Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT’L L. 1025 (2004); see also Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT’L L. 519, 522–36 (2005) (stating those who directly participate in conflict may be targeted); see also K.W. Watkin, *Combatants, Unprivileged Belligerents and Conflict in the 21st Century*, 1 ISR. DEF. FORCES L. REV. 69 (2003).

51. Gabor Rona, *The Last Word (for now) on Targeted Killings: Rona Responds to Lewis*, OPINIO JURIS (Aug. 3, 2012, 11:00 AM), <http://opiniojuris.org/2012/08/03/the-lastword-for-now-on-targeted-killings-rona-responds-to-lewis>.

that no other governments in the world, except for Afghanistan and maybe Israel, would agree with this rationale.<sup>52</sup> Thus, it is questionable whether the United States's aggressive targeting practices comply with the principle of distinction.

The second principle of the law of armed conflict is the principle of proportionality, which requires that parties “refrain from attacks in which the expected civilian casualties will be excessive in relation to the anticipated military advantage gained.”<sup>53</sup> This principle is derived from two ideas: first, that the means of attacking the enemy should never be limited, and second, that the legal requirement of non-targeting civilians, described above, does not entail a total prohibition on civilian casualties.<sup>54</sup> Instead, each military commander is directed to assess the military advantage to be gained from a lawful military operation in relation to the likely number of civilian casualties. The principle of proportionality thus encompasses and balances the ideas of military necessity and humanity.<sup>55</sup> The proportionality analysis is to be conducted prospectively by a military commander; it serves as a guideline to ensure that commanders refrain from types of attacks which will cause excessive civilian suffering and deaths. Like the principle of distinction, the principle of proportionality is espoused by both treaty and customary international law.<sup>56</sup>

The third principle of the law of armed conflict is precautions.<sup>57</sup> Scholars have argued that in addition to the

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52. See Bergen, *supra* note 27.

53. Blank, *supra* note 12, at 1673.

54. *Id.*

55. *Id.*

56. The principle of proportionality can be found in three separate provisions of Additional Protocol I. Article 51 prohibits any “attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” AP I, *supra* note 46, art. 51. The same language appears again in Articles 57(2)(a)(iii) and 57(2)(b), which also refer to precautions. In addition, courts and scholars have concluded that the principle of proportionality is a well-accepted norm of customary international law. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 587 (July 8); Michael N. Schmitt, *Fault Lines in the Law of Attack*, in TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 277, 292 (Susan Breau & Agnieszka Jachec-Neale eds., 2006); Yoram Dinstein, *The Laws of Air, Missile and Nuclear Warfare*, 27 ISR. Y.B. HUM. RTS. 1, 7 (1997).

57. Article 57(1) of Additional Protocol I states that, “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.” AP I, *supra* note 46, at art. 57(1).

obligation of state parties to an armed conflict to properly identify military objectives and to respect the principle of proportionality, such state parties have an increased duty to take precautionary measures to protect civilians. “Precautions are, understandably, a critical component of the law’s efforts to protect civilians and are of particular importance in densely populated areas or areas where civilians are at risk from the consequences of military operations.”<sup>58</sup> Various precautionary methods include: ensuring that targets are military objectives in every instance; choosing means and methods of attack with the aim of minimizing incidental civilian losses and damage; launching attacks at night, when the civilian population is less likely to be in public places; refraining from any disproportionate attack; and warning civilians of attacks in advance, whenever circumstances so permit.<sup>59</sup>

It is extremely difficult to assess whether CIA-led drone strikes satisfy these fundamental principles of *jus in bello*. All *jus in bello* inquiries are highly fact specific. It may be that most, if not all, drone strikes satisfy the requirements of distinction, proportionality, and precautions, but unless and until the CIA releases more factual information regarding specific drone operations, it will remain impossible to draw any legal conclusions regarding the United States’s targeting operations’ compliance with *jus in bello*. As argued above, developing a robust policy on drone strikes, which would require the government to submit detailed information regarding each particular strike for judicial review, and which would ensure that targeting decisions are reached pursuant to adequate legal standards, would be an important step in ensuring that the American drone policy complies with the fundamental requirements of *jus in bello*.

### iii. International Human Rights Law

An additional inquiry relevant for determining the legality of targeted strikes under international law is which legal regime applies to the use of force by the targeting state against the targeted individual. If the targeted strike occurs within an armed conflict, then the law of armed conflict determines the legality of

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58. Blank, *supra* note 12, at 1674.

59. *See id.* at 1674–75.



each targeted strike.<sup>60</sup> As discussed above, both the Bush and the Obama administrations have consistently claimed that the United States is engaged in an armed conflict against al-Qaeda and the Taliban.<sup>61</sup> Moreover, the United States has consistently argued that the law of armed conflict, as *lex specialis*, applies to the ongoing war against al-Qaeda, the Taliban, and associated forces, and that the law of armed conflict displaces other potentially applicable legal frameworks, such as international human rights law. However, to the extent that the United States uses targeted strikes outside of armed conflict, then international human rights law and the principles governing the use of force in law enforcement apply.<sup>62</sup> Because international human rights law provides that every human being has the right to life, and that the use of lethal force by state authorities against an individual can be justified only under limited circumstances, when such use of force is absolutely necessary,<sup>63</sup> it follows that “the use of lethal force against suspected terrorists outside of armed conflict can therefore only be used when absolutely necessary to protect potential victims of terrorist acts.”<sup>64</sup>

The definition of “absolute necessity” for the purposes of determining when lethal force may be used against individual terrorist suspects by targeting states remains somewhat uncertain. It is beyond the scope of this Article to examine the scope of “necessity” under human rights law; instead, this Article will underline the importance of determining the applicable legal regime for each targeting operation. It may be that the United States is actively engaged in an armed conflict against al-Qaeda

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60. *Legal Analysis*, STAN. INT’L HUM. RTS. & CONFLICT RESOL. CLINIC, [http://www.livigunderdrones.org/report-legality/#\\_ftn22](http://www.livigunderdrones.org/report-legality/#_ftn22) (last visited March 1, 2015) [hereinafter CONFLICT RESOL. CLINIC].

61. Milena Sterio, *The United States’ Use of Drones in the War on Terror: The (Il)legality of Targeted Killings Under International Law*, 45 CASE W. RES. J. INT’L L. 197, 202 (2012).

62. CONFLICT RESOL. CLINIC, *supra* note 60.

63. See, e.g., International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, art. 6 (Dec. 16, 1966) (stating that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”); see also Convention for the Protection of Human Rights and Fundamental Freedoms art. 2(2), opened for signature Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) (establishing the right to life and stating that any “[d]eprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence . . .”).

64. Blank, *supra* note 12, at 1668.

and the Taliban in Pakistan and Afghanistan, and that drone strikes in these countries should be analyzed under *jus in bello*. It may be, however, that the United States is not engaged in an armed conflict in Yemen and Somalia, and that drone operations conducted in these countries should be analyzed under international human rights law. One could thus conclude that drone operations in the former set of countries are lawful, but that those conducted in the latter set of countries are not. Because of the lack of available information regarding ongoing drone operations, it is very difficult to determine whether the armed conflict against al-Qaeda, the Taliban, and any associated forces is ongoing in all states where the United States has utilized lethal drone strikes. Developing a drone policy, which would include appropriate judicial oversight before targeting decisions are authorized, would ensure that only operations that comply with *jus in bello*, if conducted within the context of armed conflict, would take place.

### *B. Domestic Law*

In addition to examining whether drone strikes are legal under international law, it is important to determine whether this type of use of force is legal under domestic law, including the United States Constitution and relevant federal statutes.

Scholars have made various arguments regarding the constitutionality of the CIA drone program. Jamie Kleidman has argued that the United States Constitution authorizes covert action, of the type conducted via drone strikes.<sup>65</sup> Kleidman reaches this argument after analyzing several provisions of the Constitution which relate to military and foreign affairs and “evidence[s] the framers’ intent to create a strong national government and country that was less susceptible to outside attacks.”<sup>66</sup> Kleidman concludes that drone attacks, because they are conducted to prevent future al-Qaeda attacks against our country and because they are employed as part of the United States’s inherent right of self-defense “fall under the types of activities the framers thought would be necessary to protect the

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65. Jamie L. Kleidman, *The Constitutionality of the Predator Drone Program*, 4 ICL J., 359, 361–62 (2010).

66. *Id.* at 362.

U.S.”<sup>67</sup> Additionally, Kleidman argues that the early history of covert actions evidences further belief that the United States has the authority to engage in such actions. Because the Predator drone program is a covert action, and because covert actions are constitutional, according to Kleidman, the drone program itself must be constitutional.<sup>68</sup>

Kleidman further argues that both the legislative and the executive branches have concurrent authority over the authorization of covert actions, such as drone strikes. Congress has the power to issue letters of marque and reprisal, which are “commissions by Congress that grant private individuals permission to use force against foreign nations.”<sup>69</sup> Although Congress has not formally issued any letters of marque and reprisal since the 1800s, the United States has continued to use covert paramilitary force, at times led by the CIA, in order to advance foreign policy interests abroad.<sup>70</sup> Although Kleidman herself acknowledges the distinction between letters of marque and reprisal clause and covert drone strikes, she argues that the framers must have been “aware of incidents short of war that would require the use of force, and delegated the authority to authorize such force to Congress.”<sup>71</sup> Congress also has authority to declare war; this according to Kleidman encompasses all kinds of war, whether declared or not. If a covert action takes place as part of an ongoing war, the power to “declare war” clause is relevant and “evidences the [F]ramers['] intent that Congress should be involved to some degree any time the U.S. decides to engage in some use of force.”<sup>72</sup>

In addition, the Constitution provides that the President serves as commander in chief of the armed forces, and is the nation’s sole organ in foreign affairs.<sup>73</sup> Although scholars have debated whether the President has the ability to deploy troops and engage in military operations without specific Congressional approval, it is undisputed that the President has authority to direct

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67. *Id.*

68. *Id.* at 363–64.

69. *Id.* at 366.

70. *Id.*

71. *Id.* at 367.

72. *Id.* at 368.

73. *Id.*

operations on the battlefield.<sup>74</sup> To the extent that covert drone operations are congressionally authorized via statute, and used as part of the so-called “War on Terror,” Kleidman argues that the President has authority to order drone strikes.<sup>75</sup> Additionally, Kleidman argues that history and past precedent support the argument that the President has some constitutional independent authority to conduct covert actions, such as drone strikes.

Throughout history Presidents have continued to claim authority to introduce troops into limited hostilities and engage in covert action . . . the President maintains plenary, exclusive, and inherent authority in matters of foreign relations and national security, and thus executive power in this realm is not necessarily limited to those powers enumerated in the constitution.<sup>76</sup>

While Kleidman may be correct that the use of drones as a covert action is constitutionally permissible, this conclusion on its own should not prevent the public from asking questions about the drone program itself. It is not enough to simply conclude that the CIA is best suited to engage in this type of lethal operations; that conclusion would presume that the CIA’s constitutional authority to conduct covert drone strikes knows no limits. This is simply not true. Each drone strike must comport with relevant domestic statutes and international law rules, as discussed above. In order to know whether each drone strike has satisfied such domestic and international law rules, more information should be available and shared by the CIA, preferably before an independent judicial organ, which could decide in each instance of a proposed targeting operation whether the operation can be legally justified, under international law, the Constitution, and any relevant federal statutes. While everyone would agree that the need for secrecy is implicit in covert operations, and that the CIA could not possibly release all intelligence information, the CIA could release more general information about the legal and policy guidelines that it follows as a general matter. Concluding that the Constitution

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74. *Id.* at 369.

75. *Id.*

76. *Id.* at 370.

authorizes the CIA to conduct covert actions does not support the argument that the CIA can secretly conduct drone operations anywhere in the world without having to answer questions to anyone. Requiring approval for specific targeting operations from an independent judicial body would ensure that the CIA conducted such operations within a solid legal and policy framework.

The next issue to be examined under domestic law is whether drone strikes are lawful in light of federal law, other than the Constitution. The Bush and the Obama administrations have both cited the Authorization for Use of Military Force (“AUMF”), a Congressional statute passed in the wake of September 11 terrorist attacks on the United States, which authorizes the use of force against leaders of al-Qaeda forces, to target or to kill enemies, as justification for the use of drones against terrorist suspects.<sup>77</sup> The argument that drone strikes are specifically authorized through the AUMF goes as follows: because members of al-Qaeda and the Taliban can constitute a continuing threat to the safety of the United States, eliminating such continuing threat via drone strikes is a means to prevent future acts of international terrorism.<sup>78</sup> The AUMF specifically authorizes the President to do this, and this expansive reading of the AUMF would place almost no limitations on the President’s authority to wage the so-called War on Terror.<sup>79</sup> While the Obama administration no longer uses the term “War on Terror,” it has interpreted the AUMF in virtually the same way as the Bush administration.<sup>80</sup>

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77. The AUMF authorizes the President to “use all necessary and appropriate force against those nations, organizations, or persons” that he determines in some way aided the attacks of 9/11, in order to prevent any future acts of international terrorism against the United States.” Authorization to Use Military Force, S. J. Res. 23, 107th Cong. (2001) (enacted), § 2(a); Pub. L. No. 107–40, § 2(a), 115 Stat. 224, 224 (2001); *see also* Vogel, *supra* note 13, at 107–08 (noting that the Bush and Obama Administrations have cited the AUMF as justification for the use of drones against terrorist suspects).

78. Vogel, *supra* note 13, at 108.

79. *Id.* (noting that War on Terror was a term coined by the Bush administration, to describe the conflict, which the United States entered as of September 11, 2001, against those responsible for the terrorist attacks of September 11, 2001, and while the AUMF does not use the term War on Terror, it does provide the President with authority to use force against “nations, organizations, or person” which the President determined “planned, authorized, committed, or aided” the terrorist attacks of September 11, as well as those who “harbored such organizations or persons” and the AUMF contemplates a global war against specific terrorist groups, such as al-Qaeda, the Taliban and associated forces).

80. *Id.*

Many scholars have disagreed with this type of expansive interpretation of the AUMF.<sup>81</sup> Moreover, this rationale invites a host of legitimate questions regarding the localization of ongoing drone strikes. For example, how do we know that drone strikes conducted presently are truly linked to al-Qaeda forces responsible for the attacks of September 11 (because only those targets are contemplated through the AUMF)? What is the link between current terrorism suspects targeted through CIA drone operations and al-Qaeda and Taliban leaders present and engaged in the conflict back in 2001? And why does this conflict have no geographic boundaries? Accepting the AUMF as authorization for the use of lethal force by the United States against those responsible for the attacks of September 11 does not amount to accepting the AUMF as a perpetual statutory authorization to use deadly force through covert operations throughout the world against suspects who may have only circumstantial ties to the masterminds of September 11. Because most lethal drone strikes are conducted through covert CIA operations, we do not know whether suspects targeted today are those covered by the AUMF. If the CIA were required to seek authorization for each prospective lethal strike before a judicial body, it would have to release precise intelligence information regarding the identity and terrorist affiliation of each targeted individual, which would in turn ensure that only those with solid ties to al-Qaeda and Taliban organizations were in fact targeted.

### III. THE EXISTING UNITED STATES'S POLICY ON DRONES

Various high-level officials in the Obama administration and President Obama himself have offered rationales justifying the United States's use of drones to conduct targeted killings. Such speeches, as discussed below, provide evidence of the United States's existing policy on drone strikes, and insight into why the Administration believes that such policy is legal under domestic and international law.

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81. See, e.g., Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009* in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt, ed.) (forthcoming).

### A. Harold Koh Speech

In a much-commented-upon speech delivered at the American Society of International Law Annual Meeting in 2010, Harold Koh, then Legal Advisor to the State Department, justified the use of drones, arguing that “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.”<sup>82</sup> Koh relied both on the AUMF and on international law in his remarks. Koh argued that the United States engages in targeted strikes in accordance with the laws of war or *jus in bello*, respecting principles such as distinction and proportionality to ensure that the targets are legitimate and that collateral damage is minimized.<sup>83</sup> Koh offered four different reasons to support the legality of targeted strikes. First, Koh argued that United States’s drone targets have been legitimate because they are belligerent members of an enemy group in a war against the United States.<sup>84</sup> Second, Koh argued that drones can constitute appropriate instruments for such missions, so long as their use conforms to the laws of war.<sup>85</sup> Third, Koh emphasized that enemy targets are always selected through robust procedures, and that because of this, they require no other legal process.<sup>86</sup> Finally, Koh argued that targeting high level belligerent leaders via drone strikes does not violate domestic law banning assassinations.<sup>87</sup>

### B. John Brennan Speech

In a speech delivered at Harvard Law School, John Brennan, Assistant to the President on Homeland Security and Counterterrorism, argued that international law does not prohibit the use of deadly force against an active enemy “when the country involved consents or is unable or unwilling to take action against the threat.”<sup>88</sup> Brennan argued that the United States does not

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82. See Koh, *supra* note 30.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Address at the Woodrow Wilson International Center for Scholars in Washington, D.C. (Apr. 30, 2012).

believe that its authority to use force against terrorist groups is limited to traditional geographically defined battlefields.<sup>89</sup> Instead, Brennan explained that the United States's position was that it had legal authority, under international law, to use force against al-Qaeda and its associated forces wherever such forces may be, without doing a separate self-defense analysis each time.<sup>90</sup>

### C. Eric Holder Speech

Attorney General Eric Holder confirmed the above-discussed view of targeted killings, in a 2012 speech, which followed the confirmation of a targeted killing via a CIA-operated drone strike of a U.S. citizen, Anwar al-Awlaki, on September 30, 2011 in Yemen.<sup>91</sup> Al-Awlaki had been accused of holding prominent roles within the ranks of al-Qaeda and had been placed on a "hit list," authorized by President Obama.<sup>92</sup> His assassination marked the first time in history that an American citizen had been targeted abroad without any judicial involvement or proceedings in determining the guilt of such a citizen.

Attorney General Holder argued that targeted killings of American citizens are legal if the targeted citizen is located abroad, if she is a senior operational leader of al-Qaeda or associated forces, if she is actively engaged in planning to kill Americans, if she poses an imminent threat of violent attack against the United States government and cannot be captured, and if the targeted strike is conducted in a manner consistent with applicable law of war principles.<sup>93</sup> Following Attorney General Holder's remarks, the Department of Justice published a White Paper entitled "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force," in which it confirmed this approach by concluding that:

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89. *Id.*

90. *Id.*

91. *Al Qaeda's Anwar al-Awlaki Killed in Yemen*, CBSNEWS (Sept. 30, 2011, 3:18 PM), [http://www.cbsnews.com/2100-202\\_162-20113732.html](http://www.cbsnews.com/2100-202_162-20113732.html).

92. Michael W. Lewis & Vincent J. Vitkovsky, *The Use of Drones and Targeted Killing in Counterterrorism*, 12 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 73, 75 (2011).

93. See Joe Palazzolo, *Key Excerpts from Holder's Speech on Targeted Killing*, WALL ST. J. (Mar. 5, 2012, 5:13 PM), <http://blogs.wsj.com/law/2012/03/05/key-experts-from-holders-speech-on-targeted-killing>.



[I]t would be lawful for the United States to conduct a lethal operation outside the United States against a U.S. citizen who is a senior, operational leader of al-Qa'ida or an associated force of al-Qa'ida without violating the Constitution or the federal statutes discussed in this white paper under the following conditions: (1) an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States; (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and (3) the operation is conducted in a manner consistent with the four fundamental principles of the laws of war governing the use of force.<sup>94</sup>

#### *D. President Obama Speech*

Last but not least, President Obama himself addressed the use of targeted strikes, in a speech delivered at National Defense University on May 23, 2013.<sup>95</sup> President Obama emphasized that war against terrorists is different than traditional warfare, and that the United States continues to be threatened by terrorists. However, President Obama distanced himself from the Bush-era War on Terror policy, by stating that “[b]eyond Afghanistan, we must define our effort not as a boundless ‘global war on terror,’ but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America.”<sup>96</sup> Instead, President Obama argued that the United States was engaged in a war with al-Qaeda, the Taliban, and their associated forces.<sup>97</sup> In the President’s view, American actions, in using drones to conduct targeted killings, are legal under both domestic and

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94. DEP’T OF JUST., *Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or an Associated Force* 1, 16, available at [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_D\\_OJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_D_OJ_White_Paper.pdf) (last visited March 1, 2015) [hereinafter DOJ White Paper].

95. Obama NDU Speech, *supra* note 13.

96. *Id.*

97. *Id.*

international law, and the war “is a just war—a war waged proportionally, in last resort, and in self-defense.”<sup>98</sup>

President Obama next attempted to alleviate concerns about the drone program’s lack of transparency. He announced that his Administration had developed a framework that would govern the use of force against terrorists, and that this framework, “insisting upon clear guidelines, oversight and accountability,” had been codified in Presidential Policy Guidance, signed by President Obama on May 22, 2013.<sup>99</sup> President Obama also emphasized that drone strikes are not undertaken as a punitive measure, but instead as lethal actions against “terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat.”<sup>100</sup> In addition, President Obama highlighted that the risk to civilian injury by drone strikes would be minimized because “before any strike is taken, there must be near-certainty that no civilians will be killed or injured—the highest standard we can set.”<sup>101</sup> Next, President Obama acknowledged the lack of transparency which had accompanied covert drone operations and which had shielded the American government from any real scrutiny.<sup>102</sup> To remedy this issue, President Obama announced stronger oversight of all lethal operations: he announced that his Administration had begun briefing appropriate Congressional committees on all strikes conducted outside of Iraq and Afghanistan, the traditional theaters of war, and he confirmed that such committees had been briefed on the targeting of a United States citizen, Anwar Awlaki.<sup>103</sup> President Obama confirmed the policy of targeting United States’s citizens, already announced by Attorney General Eric Holder, only in exceptional circumstances by stating:

But when a U.S. citizen goes abroad to wage war against America and is actively plotting to kill U.S. citizens, and when neither the United States, nor

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

our partners are in a position to capture him before he carries out a plot, his citizenship should no more serve as a shield than a sniper shooting down on an innocent crowd should be protected from a SWAT team.<sup>104</sup>

Finally, President Obama announced that his administration would review proposals to extend appropriate oversight of lethal operations conducted outside traditional war theaters, beyond reporting to Congress. President Obama acknowledged that such oversight would be politically, constitutionally, and bureaucratically challenging, but he pledged to engage Congress in exploring these options.<sup>105</sup>

Following President Obama's speech in which he referenced a newly developed Presidential Policy Guidance on the use of drones, this Guidance was published under the title "U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities."<sup>106</sup> The Guidance is a brief, three-page document, which codifies and confirms most of the arguments advanced by President Obama in his May 23, 2013 speech.<sup>107</sup> The Guidance states that for any lethal operation, there must be a legal basis, and that lethal strikes will only be conducted if the target poses a continuing imminent threat to American citizens.<sup>108</sup> The Guidance also states that for every strike, five conditions must be met:

- 1) Near certainty that the terrorist target is present;
- 2) Near certainty that non-combatants will not be injured or killed;
- 3) An assessment that capture is not feasible at the time of the operation;

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104. *Id.*

105. *Id.*

106. *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, WHITEHOUSE.GOV (2013), [http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23\\_fact\\_sheet\\_on\\_ppg.pdf](http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf) [hereinafter Guidance].

107. *Id.*

108. *Id.*

- 4) An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and
- 5) An assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons.<sup>109</sup>

The Guidance concludes that because drone operations are always carried out on the territory of foreign nations, the United States conducts such operations while respecting the sovereignty of territorial nations where targets may be found and while abiding by law of armed conflict principles.<sup>110</sup> The Guidance also addresses the oversight issue. It provides that each targeting operation will be reviewed by key officials at relevant governmental departments and agencies, which may reach the ultimate decision to approve the use of deadly force via a drone strike.<sup>111</sup>

These decisions will be informed by a broad analysis of an intended target's current and past role in plots threatening U.S. persons; relevant intelligence information the individual could provide; and the potential impact of the operation on ongoing terrorism plotting, on the capabilities of terrorist organizations, on U.S. foreign relations, and on U.S. intelligence collection.<sup>112</sup> Such analysis will inform consideration of whether the individual meets both the legal and policy standards for the operation.<sup>113</sup>

The Guidance also provides more specific considerations in the case when the targeted individual is an American citizen. In that instance, "the Department of Justice will conduct an additional legal analysis to ensure that such action may be conducted against the individual consistent with the Constitution and laws of the United States."<sup>114</sup> Finally, the Guidance confirms the ongoing existence of congressional oversight, by stating that Members of the Congress will be regularly provided with updates

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

identifying any individuals against whom lethal force has been approved, and that the appropriate congressional committees will be notified whenever a counterterrorism operation covered by the Guidance has been conducted.<sup>115</sup>

#### IV. PROPOSAL FOR NEW POLICY GUIDELINES ON DRONES, INCLUDING JUDICIAL OVERSIGHT

“The first step in creating an effective counterterrorism operation is analyzing the threat, including the nature of the threat, who poses it and when it is likely to be carried out. It is crucial to assess the imminence of any threat, which significantly impacts the operational and legal choices made in response.”<sup>116</sup> Despite the aforementioned policy statements by President Obama and other Administration officials, many have criticized the United States’s approach to the use of drones by highlighting the lack of precision and specificity in the announced policy guidelines. The sections below critically assess the announced policy, and discuss the possibility of developing more comprehensive policy guidelines, as well as appropriate judicial oversight of all targeting operations.

##### *A. The U.S. Policy on Targeting: A Critical Appraisal*

The DOJ White Paper, discussed above, announced the U.S. policy regarding the targeting of American citizens. The policy requires that “an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States.”<sup>117</sup> And the above-mentioned Guidance, which contains U.S. policy regarding the use of force against non-Americans, including via targeted killings through drone strikes, imposes a requirement of “near certainty” that a terrorist target is present and that the person’s activities pose an ongoing imminent threat to the United States’s safety.<sup>118</sup> However, it is unclear, from either policy, how a

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115. *Id.*

116. Amos N. Guiora, *Drone Strikes: What the U.S. Could Learn from Israel [Blowback]*, L.A. TIMES (Sept. 29, 2011, 7:51 AM), <http://opinion.latimes.com/opinionla/2011/09/drone-strikes-us-learn-israel-blowback.html>.

117. DOJ White Paper, *supra* note 94, at 16.

118. Guidance, *supra* note 106, at 2.

terrorist target is identified and what process the Administration uses to assess which individuals are terrorist suspects who should be targeted. Professor Amos Gioura has criticized the Administration's approach by arguing that "[t]he Obama administration's articulation that mere "likelihood" of membership in a terrorist organization justifies defining a target as legitimate is highly problematic" and that "[d]eciding to authorize a legitimate drone strike depends on a process that analyzes the nature, identity and imminence of the threat. Trying to make a targeting decision in the absence of narrow criteria and specific guidelines highlights the concerns [L.A.] The Times' editorial correctly raised."<sup>119</sup> Professor Gioura proposed a criteria-based process, under which extensive intelligence would be gathered and thoroughly analyzed, in order to determine which information is "actionable" and warrants a response, through a targeted strike in some instances.<sup>120</sup> The criteria proposed by Professor Guiora include the following:

- 1) A target must have made significant steps directly contributing to a planned act of terrorism.
- 2) An individual cannot be a legitimate target unless intelligence action indicates involvement in future acts of terrorism.
- 3) Before a hit is authorized, it must be determined that the individual is still involved and has not proactively disassociated from the original plan.
- 4) The individual's contribution to the planned attack must extend beyond mere passive support.
- 5) Every effort must be made to minimize collateral damage. However, the willful endangerment by the non-state actor of its own civilian population need not be a deterrent from implementing an authorized act of preventative self-defense.
- 6) Verbal threats alone are insufficient to categorize an individual as a legitimate target.<sup>121</sup>

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119. Guiora, *supra* note 116.

120. *Id.*

121. *Id.*

Second, the above-described policies on targeting American and non-American citizens present an expansive view of the requirement of “imminence.” The DOJ White Paper argued that imminence does not “require . . . clear evidence [of] a specific attack . . . in the immediate future” and that al-Qaeda’s “continually plotting attacks” satisfies any requirement that a threat be “imminent.”<sup>122</sup> Attorney General Holder similarly argued the following regarding the legal definition of imminence. “The evaluation of whether an individual presents an ‘imminent threat’ incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States.”<sup>123</sup>

Professor Guiora has criticized this approach: “The recently released U.S. Department of Justice (DOJ) ‘white paper’ regarding the Obama administration’s drone policy defines ‘imminence’ so expansively there need not be clear evidence of a specific attack to justify the killing of an individual, including U.S. citizens.”<sup>124</sup> According to Professor Guiora, the criteria-based approach would first ensure that appropriate targets are identified and based on “reliable, material, and probative” intelligence information. In addition, the executive branch would have to demonstrate that the target poses a threat justifying a deadly attack at that moment, with no other alternatives in sight, under a strict scrutiny test.<sup>125</sup> Professor Guiora suggests that a special drone court would be the most appropriate venue where the administration could, *ex parte*, present intelligence information to support its request for authorization of a targeted strike.

Rather than relying on the executive branch to make decisions in a ‘closed world’ devoid of oversight and review, the intelligence information justifying the proposed action must be submitted to a court that would ascertain the information’s admissibility. The discussion before the court

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122. DOJ White Paper, *supra* note 94, at 7.

123. Palazzolo, *supra* note 93.

124. Amos Guiora, *Drone Policy: A Proposal Moving Forward*, JURIST (Mar. 4, 2013, 9:15 AM), <http://jurist.org/forum/2013/03/amos-guiora-drone-policy.php>.

125. *Id.*

would necessarily be conducted *ex parte*; however, the process of preparing and submitting available intelligence information to a court would significantly contribute to minimizing operational error that otherwise would occur.<sup>126</sup>

The idea of establishing a drone court to review proposed targeted strikes is discussed in more detail below.

Third, the DOJ White Paper and the Guidance contemplate that targeted strikes will be conducted only when other alternatives, such as capture, are not feasible.<sup>127</sup> While most would agree with this approach, under the current policy it is unclear how and based on what type of intelligence information this determination is reached in each instance. This question is closely linked to the imminence requirement described above. The more imminent the nature of a terrorist threat against the United States is, the less likely that alternatives to a targeted strike would be available. When faced with a truly imminent threat, it is very likely that the United States would launch a lethal drone operation as opposed to attempting to capture a terrorist suspect. However, so long as the administration is able to adopt a broad view of “imminence” and not required to justify this view before any relevant oversight body, such as a judicial board or court, the administration’s claim that other alternatives were not viable cannot be tested. Thus, there is a need for appropriate judicial or other oversight before a targeting operation is launched, where the administration would have to demonstrate, under clear standards, why it believes that a specific terrorist suspect poses an imminent threat and why options other than a targeted strike are not available. This approach “creates a process seeking to objectify counterterrorism by establishing standards for determining the

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126. *Id.* It should be noted that Professor Guiora first advocated that the Foreign Intelligence Surveillance Court would be the most appropriate judicial body for oversight of targeting decisions. *Id.* Professor Guiora subsequently moved away from this argument, and has most recently advocated for the creation of a new specialized “drone” court within the judicial branch. See Amos N. Guiora & Jeffrey S. Brand, *Establishment of a Drone Court: A Necessary Restraint on Executive Power*, in *THE LEGITIMACY OF DRONES: LEGALITY, MORALITY AND EFFICACY OFUCAVS FOR COUNTERTERRORISM* (2015). Professor Guiora’s basic argument, however, has remained the same—that judicial oversight is necessary over the executive branch’s targeting decisions, prior to the conduct of each particular strike.

127. DOJ White Paper, *supra* note 94, at 8; Guidance, *supra* note 106, at 2.



reliability of intelligence information that is the backbone of targeted killing decision-making.”<sup>128</sup>

Next, the aforementioned policies consider the issue of collateral damage caused by drone strikes. The DOJ White Paper specifies that any use of force by the United States should comply with the four relevant principles of laws of war (necessity, proportionality, distinction, and humanity), whereas the Guidance states that for every proposed targeted strike, the decision-maker must have “near certainty that non-combatants will not be injured or killed.”<sup>129</sup> The most critical question with respect to the issue of collateral damage is to properly distinguish the terrorist suspects themselves from those who live around them and who may not be engaged in any type of terrorist activity. If we are not certain who our targets are or how and why we are targeting certain individuals, we cannot determine the extent of collateral damage caused by drone strikes. If it turns out that the target was improperly identified, this may entail the designation of the targeted individual as collateral damage. The U.S. Government has proudly claimed that drone strikes cause zero collateral damage, while human rights organizations, such as Amnesty International and Human Rights Watch, have claimed that hundreds of civilians have died as collateral damage, as a result of American drone strikes.<sup>130</sup> Professor Guiora has argued that any targeting decision made by the executive branch needs to adequately consider the “extent of the anticipated collateral damage.”<sup>131</sup> This can only be measured if strict guidelines exist, which require the executive branch to appropriately label targets and non-targets, using reliable intelligence information. Professor

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128. Guiora, *supra* note 124.

129. DOJ White Paper, *supra* note 94, at 8; Guidance, *supra* note 106, at 2.

130. See Scott Shane, *C.I.A. Is Disputed on Civilian Toll in Drone Strikes*, N.Y. TIMES (Aug. 11, 2011), [http://www.nytimes.com/2011/08/12/world/asia/12drones.html?page-wanted=all&\\_r=0](http://www.nytimes.com/2011/08/12/world/asia/12drones.html?page-wanted=all&_r=0) (arguing that while government officials have claimed zero civilian casualties caused by drone attacks in Pakistan from May 2010 to May 2011, other news organizations have disputed this account and claimed that multiple civilians have died as a result of drone strikes); see also Nate Rawlings, *Amnesty International and Human Rights Watch Blast U.S. Drone Strikes*, TIME (Oct. 22, 2013), <http://world.time.com/2013/10/22/amnesty-international-and-human-rights-watch-blast-u-s-drone-strikes> (reporting on two reports, one by Amnesty International and the other by Human Rights Watch, about United States’ drone strikes in Pakistan and in Yemen, respectively; both of these reports concluded that American drone strikes had likely killed several hundred civilians).

131. Guiora, *supra* note 116.

Guiora has argued that in order to ensure that the executive branch is making such determinations lawfully, judicial oversight is necessary over executive action, because “[w]hat constitutes imminence, feasibility of capture, and consistency with national and international norms is, as *Marbury v. Madison* taught us centuries ago, the province of the judiciary, not the unfettered discretion of the executive branch.”<sup>132</sup>

This leads to, perhaps, the most critical concern about the announced Administration policy on the use of drones—the lack of any oversight regarding targeting decisions. The section below analyzes different proposals regarding the establishment of a “drone court,” which would hear requests for approval of a prospective targeting decision.

*B. The Need for Judicial Oversight Over Drone Operations: A “Drone” Court?*

In his 2013 speech at the National Defense University, President Obama claimed that his administration would review proposals to establish some form of oversight of lethal operations conducted outside traditional war theaters.<sup>133</sup> It should be noted that the Guidance suggests that congressional oversight over the drone program already exists, because members of Congress and relevant congressional committees are routinely updated about approved targeting operations.<sup>134</sup> That kind of congressional oversight is insufficient because it does not require the executive branch to obtain congressional approval *before* a targeting operation, but merely obliges the Executive to inform Congress about decisions that have already been made within the executive branch. There is a necessity to establish a prospective oversight mechanism, through an adversarial process through which the executive branch could obtain approval prior to conducting lethal targeting operations.

Some scholars have proposed that federal judges review targeting decisions, similar to how the so-called Foreign Intelligence Surveillance Court (“FISC”) reviews executive branch requests to engage in foreign intelligence surveillance, or

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132. Guiora & Brand, *supra* note 126, at 15.

133. Obama NDU Speech, *supra* note 13.

134. Guidance, *supra* note 106.

wiretapping.<sup>135</sup> The Court, along with the Foreign Intelligence Surveillance Court of Review, was established through the Foreign Intelligence Surveillance Act of 1978.<sup>136</sup> FISC judges are selected among existing Article III federal judges by the executive branch, and they serve seven-year terms on this court.<sup>137</sup> Similar to how FISC judges review executive branch requests for wiretapping, they could, according to some, review requests to conduct lethal targeting operations.<sup>138</sup> Other scholars, however, have criticized the FISC as a “rubber-stamp” of the executive branch, which controls the flow of information to a court shrouded in secrecy and non-adversarial in nature thereby precluding the search for credible and reliable facts on which to base intelligence decisions.”<sup>139</sup> According to Guiora and Jeffrey Brand, FISC judges have approved a staggering 99.9 percent of requests for surveillance by the Executive Branch, which in itself evidences the conclusion that they do not provide independent oversight because they always side with the President.<sup>140</sup> In addition, the FISC approval process does not entail an adversarial process (FISC judges are presented with select information by the executive branch and sit in *ex parte* hearings). As a federal judge who resigned from a FISC in 2005 explained, “a judge needs to hear both sides of a case.”<sup>141</sup>

Two different proposals have recently been flaunted as alternatives to the FISC model as appropriate oversight of

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135. Glenn Greenwald, *The Bad Joke Called ‘the FISA Court’ Shows How a ‘Drone Court’ Would Work*, THE GUARDIAN (May 3, 2013, 11:28 AM), <http://www.theguardian.com/mentisfree/2013/may/03/fisa-court-rubber-stamp-drones>; Jane Harman, *Harman: Drone Courts Can Work*, CNN (Feb. 19, 2013, 12:01 AM), <http://security.blogs.cnn.com/2013/02/19/harman-drone-courts-can-work>; S. Shane, *Debating a Court to Vet Drone Strikes*, N.Y. TIMES (Feb. 8, 2013), [http://www.nytimes.com/2013/02/09/world/a-court-to-vet-kill-lists.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/02/09/world/a-court-to-vet-kill-lists.html?pagewanted=all&_r=0).

136. Guiora & Brand, *supra* note 126, at 16.

137. *Id.* at 20.

138. *Id.* at 16.

139. *Id.* at 17.

140. *Id.*

141. *Former Judge Admits Flaws with Secret FISA Court*, CBSNEWS (July 9, 2013, 11:09 AM), <http://www.cbsnews.com/news/former-judge-admits-flaws-with-secret-fisa-court>; *see also* Stephen Braun, *Former Judge Admits Flaws in Secret Court*, YAHOO! NEWS (July 9, 2013, 3:25 PM), <http://www.news.yahoo.com/former-judge-admits-flaws-secret-court-145541583.html> (noting that former federal district court judge James Robertson, who served on a FISC court from 2002 to 2005, expressed the viewpoint that the FISC process is flawed because the government does not have an adversary).

executive targeting decisions. Professor Neal Katyal recently proposed the establishment of a national security court within the executive branch.<sup>142</sup> The court would be staffed with national security experts and it would provide an adversarial mechanism toward determining whether to launch each individual strike (lawyers would argue on both sides of the targeting decision).<sup>143</sup> The final decision would be reached by a panel of the president's most senior national security advisers, who would preferably issue decisions in writing.<sup>144</sup> Those decisions would later be given to the Congressional intelligence committees for review.<sup>145</sup> Most importantly, the president would be able to overrule this court, and take whatever action he thought appropriate, but would have to explain himself afterward to Congress. "A national security court inside the executive branch may not be a perfect solution, but it is a better way to balance the demands of secrecy and speed with those of liberty and justice."<sup>146</sup> Professor Katyal's proposed model specifically rejects the notion that federal judges can provide adequate oversight over targeting decisions.

They [federal judges] lack national security expertise, they are not accustomed to ruling on lightning-fast timetables, they are used to being in absolute control, their primary work is on domestic matters and they usually rule on matters after the fact, not beforehand. Even the questions placed before the FISA Court aren't comparable to what a drone court would face; they involve more traditional constitutional issues—not rapidly developing questions about whether to target an individual for assassination by a drone strike.<sup>147</sup>

Professors Guiora and Brand advocate for the establishment of a drone court, outside of the executive branch

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142. Neal Katyal, *Who Will Mind the Drones?*, N.Y. TIMES (Feb. 20, 2013), <http://www.nytimes.com/2013/02/21/opinion/an-executive-branch-drone-court.html>.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

and staffed with federal judges.<sup>148</sup> According to Guiora and Brand, twenty-four sitting Article III federal judges (twelve district court and twelve appellate court judges) should be selected randomly to serve on the newly-established drone court, or “Operational Security Court.”<sup>149</sup> The judges should be selected from diverse geographic areas, should hear cases in different geographic circuits, and continue to hear a minimum level of other federal cases in addition to their drone court duties.<sup>150</sup> The Drone Court would have a trial level, where cases would be originally filed before a panel of three out of the twelve district court judges; appeals would be heard by an appellate panel consisting of three out of the twelve appellate level judges.<sup>151</sup> The decision of the appellate panel would be final, except in cases where eight of the twelve appellate judges agreed that an en banc review by all twelve appellate judges was necessary.<sup>152</sup> Final appeals could be filed to the United States Supreme Court.<sup>153</sup> In order to ensure that the drone court is properly assisted on questions dealing with complex military issues, the Court would have an office specifically staffed with senior military advisors, who could answer questions regarding the military necessities of each proposed drone strike.<sup>154</sup>

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148. Guiora & Brand, *supra* note 126, at 25. It should be noted that another scholar, Michael Epstein, had also proposed the establishment of a similar drone court in a paper written in 2011. Michael R. Epstein, *Targeted Killing Court: Why the United States Needs to Adopt International Legal Standards for Targeted Killings and How to Do So in a Domestic Court* 1, 68 (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1809854](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809854) (submitting in partial fulfillment of the requirements of the King Scholar Program Michigan State University College of Law under the direction of Professor Bruce W. Bean, Spring 2011). Epstein proposed that a “Targeted Killing Review” or “TKR” court be established, composed of eleven federal district court judges appointed by the Chief Justice. *Id.* The Government would be obliged to present precise evidence to the TKR court regarding specific targets sought, and to obtain a warrant authorizing the government to carry out the specific targeted strike.

In order to be approved, the application made by the Federal Officer must meet the probable cause standard to believe that the target is an unlawful combatant under the statute. Further, it allows the judges to ‘consider past activities of the target, as well as facts and circumstances relating to current or future activities of the target,’ as well as the means to be used.

*Id.* at 69.

149. Guiora & Brand, *supra* note 126, at 25.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 26.

The Guiora and Brand drone court proposal envisions a modified adversarial process. In order to ensure that the proposed target's interests are adequately represented before the drone court, Guiora and Brand propose that attorneys be designated to represent targets *in absentia*, in an adversarial hearing before the Court's trial level panel.<sup>155</sup> In order for this model to function, the executive branch would have to share adequate intelligence information with the appointed "defense" attorneys, and such attorneys would have the opportunity to cross-examine executive branch witnesses and representatives.<sup>156</sup> In addition, "defense" attorneys would have access to military experts, provided by the Court, who could advise on questions regarding the government-provided intelligence reports.<sup>157</sup> The government would have to meet a heightened burden of proof under an operational strict scrutiny standard, based on the following principles:

The definition of target must be narrowly defined and applied; There must be a compelling state interest to kill the target; That compelling interest must include a showing that there is an imminent and significant threat to citizens of the United States or its allies; The definition of imminence must be narrowly defined and applied; and, Application of the principle of "alternatives" is essential; that is, the Executive must convince the Court that national security will be harmed if the individual is not killed which in turn suggests that the Executive must demonstrate that the target cannot be captured.<sup>158</sup>

The Guiora and Brand proposal suggests that the drone court hearings would not be open to the public, but that the drone court itself may have the need to conduct special in camera hearings, or other procedures, at the Court's discretion.<sup>159</sup> In addition, the Federal Rules of Evidence would apply to all Drone

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155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 27.

159. *Id.* at 28.

Court hearings.<sup>160</sup> The Court would entertain questions regarding the submitted intelligence information on each target, such as those regarding reliability, viability, reverence, and corroboration.<sup>161</sup> The Court would also entertain questions regarding the substantive allegation against the terrorist suspect, as well as the source of the allegation.<sup>162</sup>

Finally, Guiora and Brand maintain that the Drone Court should not stand in the way between the Executive and his ability to respond to a truly imminent threat.<sup>163</sup> They thus argue for the necessity of establishing a well-accepted definition of “imminence” under international law, which would rely upon a foundation of objective, demonstrable, and verifiable evidence.<sup>164</sup> In addition, they acknowledge that in a minimum number of situations, a threat may be so imminent that the Executive must be able to act unilaterally, without any Drone Court review.<sup>165</sup> In those instances, Guiora and Brand propose a two-step process.<sup>166</sup> First, the Executive would file with the Court, under seal, an affidavit explaining why he or she needed to act unilaterally, by describing the nature of the “imminent” threat and the evidence on which the belief was based.<sup>167</sup> Second, the Drone Court would conduct a post-strike review of the affidavit, to determine “whether the executive branch’s determination of its need to act unilaterally to eliminate an “imminent threat” was supported by the demonstrable, credible and reliable information that the modern history of the phrase and international law demand.”<sup>168</sup> If the Drone Court finds that the Executive action was unjustified, it would then issue a citation of contempt.<sup>169</sup> According to Guiora and Brand, this type of post-strike review may serve as a check on executive power, by imposing a level of transparency post-strike and by the possibility that the Court could publicize the number of instances in which it issued a contempt citation against the

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160. *Id.*

161. *Id.*

162. *Id.* at 29.

163. *Id.* at 30.

164. *Id.*

165. *Id.* at 32.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

President.<sup>170</sup> “We believe that the proposed Drone Court can make a significant contribution to the rule of law by serving as a proactive restraint on the Executive in the context of operational counterterrorism where its authority has historically been unchallenged.”<sup>171</sup>

*C. Why A “Drone” Court is an Excellent Idea:  
Transparency, Accountability, and Oversight*

Establishing a drone court is an excellent idea because lethal operations such as those conducted via drone strikes should not occur in a legal vacuum, without appropriate levels of transparency and accountability.

First, other countries’ experience with judicial review over lethal targeting operations could provide an excellent model for the United States and the proposed drone court. Judicial review over the legality of the Executive’s drone program has already taken place in Israel, another nation steadily engaged in counterterrorism operations using drone technology.<sup>172</sup> In 2006, the Israeli High Court of Justice issued a ruling regarding the legality of Israeli targeting operations.<sup>173</sup> The question before the court concerned the “policy of preventative strikes which cause the death of terrorists . . . who plan, launch, or commit terrorist attacks in Israel . . . against both civilians and soldiers. These strikes at times also harm innocent civilians.”<sup>174</sup> The Israeli High Court established that the applicable legal framework was international humanitarian law, because Israel and the Palestinians had been engaged in an armed conflict, and that

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170. *Id.*

171. *Id.* at 24.

172. It should be noted that Israel had publicly acknowledged that it carried out targeted killings, but has not publicly recognized that it does so via lethal drones. Epstein, *supra* note 148, at 45.

173. HCJ 769/02 Public Comm. Against Torture in Israel v. Gov’t of Israel [2005] (Isr.), available at [elyon1.court.gov.il/files\\_eng/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf) [hereinafter PCATI]. Prior to this case, Israel’s announced policy was to target a Palestinian terrorist who poses a serious threat or is in the process of carrying out a terrorist attack if (1) there is “criminal evidence and/or reliable, corroborated intelligence information clearly implicating him,” and (2) there is “no reasonable alternative to the targeted killing,” including the consideration that an attempt at arresting the terrorist will put an Israeli military or security unit in harm’s way. See Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT’L L. 319, 322 (2004).

174. See PCATI, *supra* note 173.



Palestinian terrorists were unlawful combatants (civilians performing the function of combatants).<sup>175</sup> The Court concluded that a targeted killing could comply with the principles of necessity and proportionality. “Ultimately, when an act of ‘targeted killing’ is carried out in accordance with the said qualifications and in the framework of the customary laws of international armed conflict as interpreted by this Court, it is not an arbitrary taking of life, rather a means intended to save human life.”<sup>176</sup>

The Court then laid out the applicable legal framework, which, if complied with, would guarantee that a targeted killing was carried out lawfully. First, a civilian can be targeted if she “take[s] part in hostilities . . . which by nature and objective are intended to cause damage to the army.”<sup>177</sup> Second, a targeted civilian must take direct part in such hostilities. The Court emphasized that whether a civilian took direct part in hostilities must be determined on a case-by-case basis, and that direct “should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take ‘a direct part.’ The same goes for the person who decided upon the act, and the person who planned it.”<sup>178</sup> Third, the direct participation in hostilities could only justify a targeted killing for such time as the individual takes a direct role in said hostilities.<sup>179</sup> The Court held that this must be determined on a case-by-case basis, and that an individual who has taken part in a single act regains his protection once that act is over, but that an individual who commits many attacks and lives at a terrorist stronghold would be considered to be taking part in hostilities between individual acts.<sup>180</sup>

The Court laid out a four-step process of review over targeted-killing decisions. First, the Israeli government carried the burden of demonstrating that it had a sufficient factual basis for determining the identity and “direct participation” of the target.<sup>181</sup> Second, in light of the principle of proportionality, an

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175. *Id.* at ¶¶ 16, 20, 25.

176. *Id.* (President D. Beinisch, concurring).

177. *Id.* at ¶ 33.

178. *Id.* at ¶ 37.

179. *Id.* at ¶ 39.

180. *Id.*

181. Epstein, *supra* note 148, at 58.

unlawful combatant could never be targeted “if a less harmful means can be employed.”<sup>182</sup> Third, after every targeted killing, an independent, retroactive investigation must be carried out “regarding the precision of the identification of the target and the circumstances of the attack upon him.”<sup>183</sup> Finally, the retroactive investigation must also analyze any collateral damage resulting in civilian deaths, and such collateral damage must meet the standard of proportionality.<sup>184</sup>

The Israeli High Court approach, where an independent judicial organ laid out a specific legal framework for the government to follow, in order to ensure that targeted killings were carried out in a lawful manner, could provide general guidance to the United States about the appropriateness of judicial involvement and oversight over targeting decisions. Because targeted killings involve the lethal use of force by a government against specific individuals, targeting decisions should always be subjected to strict scrutiny not just within the government/executive branch, but also from the exterior, by the judiciary.<sup>185</sup>

Second, the United States’s drone program has been led by the CIA and conducted covertly; complete secrecy in this context is unnecessary and prevents government accountability. The covert nature of the drone program has disabled us from analyzing the program’s lawfulness from both a domestic and international law perspective. And the announced drone policy, analyzed above, lacks rigor and sheds little light on how actual targeting decisions are undertaken. Many have criticized the U.S. government and have questioned the covert nature, lawfulness, and constitutionality of the American drone program. “The administration has claimed the power to carry out extrajudicial executions of Americans on the basis of evidence that is secret and is never seen by anyone. It’s hard to understand how that is consistent with the Constitution.”<sup>186</sup> Establishing a drone court would ensure that the program did not remain completely covert,

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182. *Id.*

183. *Id.*

184. *Id.* at 58–59 (citing PCATI, *supra* note 173, at ¶ 40).

185. See Epstein, *supra* note 148, at 61–71 (recommending a “targeted killing court”).

186. Rohde, *supra* note 6 (quoting Jameel Jaffer, Deputy Legal Director of the American Civil Liberties Union).

would force the government to share intelligence information with the court's judges, and would require judicial input and approval over targeting decisions. A drone court would allow the American public to "know that targeted killings carried out by the U.S. government are being closely scrutinized, and not swept under the rug."<sup>187</sup>

## V. CONCLUSION

The covert nature of CIA-run drone operations has precluded experts, scholars, judges, and the public at large from assessing the lawfulness of the American drone program, and of particular operations, under both domestic and international law. In addition, this Article has argued that the existing drone policy is insufficient because it is too imprecise, sheds little light on the government's decision process for determining the identity of appropriate targets, and does not expose the government to any judicial oversight. This Article recognizes that the CIA's primary goal and mission is to run covert operations, and that the release of information would, in many instances, jeopardize the success of prospective operations and put the lives of operators at risk. However, this Article argues that the CIA should be required to provide specific intelligence information about its targeting operations to a drone court, composed of federal judges and operating *ex parte*, whose approval would be necessary before each drone strike is launched. The establishment of a drone court would provide appropriate judicial oversight over targeting decisions and would impose both transparency and accountability on the U.S. government. "The distinguishing feature of a vibrant democracy is the ability to . . . demand that decisions that might compromise individual rights be subject to meaningful review consistent with the cherished values of our constitutional democracy . . . ." <sup>188</sup>

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187. Epstein, *supra* note 148, at 71.

188. Guiora & Brand, *supra* note 126, at 34–35.