

Article

**(Start to) Look Out Below!: Creating a Court to Review  
Targeted Attacks on United States Citizens**

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## **(Start to) Look Out Below!: Creating a Court to Review Targeted Attacks on United States Citizens**

Daniel Bower\*

### **Introduction**

"Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."<sup>1</sup>

On March 22, 2013, Attorney General Eric H. Holder Jr. wrote a letter to the members of Congress acknowledging that four American citizens have been killed through the use of targeted killing procedures since the War on Terror began.<sup>2</sup> The legality of the targeting killing procedures used by the United States has

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<sup>1</sup> Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004).

<sup>2</sup> N.Y. TIMES, *Holder Letter on Counterterror Strikes Against U.S. Citizens*, May 22, 2013, [http://www.nytimes.com/interactive/2013/05/23/us/politics/23holder-drone-lettter.html?\\_r=1&](http://www.nytimes.com/interactive/2013/05/23/us/politics/23holder-drone-lettter.html?_r=1&).

recently come to the forefront of political discussions around the world. “At the heart of the debate are questions relating to Executive powers during wartime” and “whether and to what extent the CIA, an intelligence agency that functions in secret with far less public and Congressional oversight than the armed forces, should be conducting operations using lethal force.”<sup>3</sup> In addition, concerns have arisen regarding “the criteria for targeting and killing individuals, including U.S. citizens, the existence of substantive or procedural safeguards to ensure accuracy and legitimacy of killings, and the existence of accountability mechanisms.”<sup>4</sup>

After acknowledging the existence of a targeted killing program on numerous occasions, the Obama administration received increased pressure from members of Congress to explain its stance and legal rationale behind its decision to target and kill American citizens.<sup>5</sup> “Targeted killing” refers to premeditated acts of lethal force employed by states to kill specific individuals who are not in custody, and often, difficult to get into custody.<sup>6</sup> Drone-based targeting killing, which is a common way to conduct these operations, “refers to the use of ‘drones,’ or unmanned aerial vehicles that are remotely piloted or run autonomously, to remotely launch missile strikes for targeted killing.”<sup>7</sup>

This article will not focus on the legality of targeted killings in either domestic or international law. That is an entirely separate

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<sup>3</sup> Brief for the Bureau of Investigative Journalism et. al. as Amici Curiae Supporting Plaintiffs at 4, *Am. Civil Liberties Union v. Central Intelligence Agency*, No. 11-5320 (D.C. Cir. Mar. 22, 2012), 2012 WL 978169 [hereinafter *Brief of Amici Curiae*].

<sup>4</sup> *Id.* at 5-6.

<sup>5</sup> Michael D. Shear and Scott Shane, *Congress to See Memo Backing Drone Attacks on Americans*, N.Y. TIMES, Feb. 6, 2013, [http://www.nytimes.com/2013/02/07/us/politics/obama-orders-release-of-drone-memos-to-lawmakers.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/02/07/us/politics/obama-orders-release-of-drone-memos-to-lawmakers.html?pagewanted=all&_r=0).

<sup>6</sup> *Brief of Amici Curiae*, *supra* note 3, at 8.

<sup>7</sup> *Id.*

topic. This article assumes that in general, the use of targeted killing is legal. The focus of this article will be advocating for implementation of a review process to ensure the legitimacy of Government-sanctioned targeted killings of specific individuals.

The thesis of this article is that the United States Congress can and should pass legislation implementing *post facto* review of targeted killing decisions in order to create a safeguard against unquestioned, Government-sanctioned attacks on American citizens. For purposes of this article, the court that would hear these cases is titled the "Targeted Attack Review Court" or "TARC".

This article can be used as a starting point for legislators wishing to implement a review process for the Government's targeted killing program. It will focus on what procedures would make the TARC most effective and most likely to find support with members of Congress, defense officials, and U.S. courts.

### **I. Opponents and Supporters of the TARC**

The CIA and other intelligence and defense officials will likely not support such legislation. Very few people want their decisions questioned, and that is precisely the aim of the TARC.

However, the creation of a TARC already has potential support in Congress. Senator Dianne Feinstein of California, head of the Senate Intelligence Committee, stated that she would consider proposals to create a court overseeing targeted killing procedures, analogous to the Foreign Intelligence Surveillance Court.<sup>8</sup> The TARC would also likely see support from Senator Rand Paul, who engaged in a widely publicized filibuster on March 6, 2013

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<sup>8</sup> Mark Mazzetti and Scott Shane, *Drones Are Focus as C.I.A. Nominee Goes Before Senators*, N.Y. TIMES, Feb. 7, 2013, <http://www.nytimes.com/2013/02/08/us/politics/senate-panel-will-question-brennan-on-targeted-killings.html?pagewanted=all>.

concerning the ambiguities of the Obama administration's drone policy.<sup>9</sup>

Other Libertarian Congressman, as well as many Democrats and Socially Liberal Republicans, would likely support this proposed legislation as well, especially since favorable public opinion on the Government's antiterrorism efforts is quickly diminishing. For the first time in American history, the People no longer believe that the Government is properly balancing security and individual rights.<sup>10</sup>

## II. Foundational Material

### A. *Recent Developments in Targeted Killing Strategy*

In February 2013, President Obama acknowledged the existence of America's targeted killing program while discussing the death of a U.S. citizen, Anwar al-Awlaki.<sup>11</sup> Anwar al-Awlaki was the first U.S. Citizen to be placed on a list of suspected terrorists that the CIA had authorized to kill.<sup>12</sup> What is even more disconcerting is that President

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<sup>9</sup> Sadia Ahsanuddin, *Rand Paul filibusters the domestic drone*, AL JAZEERA, Mar. 12, 2013, <http://www.aljazeera.com/indepth/opinion/2013/03/201339114442314519.html>.

<sup>10</sup> WASHINGTON POST, *Washington Post Poll*, [http://www.washingtonpost.com/wp-srv/politics/polls/postpoll\\_20130418.html](http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_20130418.html) (last visited Mar. 16, 2014). In an April 2013 survey of 588 adults, when asked what worried them more, 41% of people feared the Government would not go far enough in investigating alleged terrorists, while 48% of people said they feared the Government would go too far in compromising Constitutional rights while investigating alleged terrorists.

<sup>11</sup> Mazzetti, *supra* note 8.

<sup>12</sup> Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 6, 2010, <http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.htm>

Obama approved that decision; the President of the United States approved the decision to kill a U.S. citizen without his guilt being proven beyond a reasonable doubt in a court of law.<sup>13</sup>

Anwar al-Awlaki was what the Government deemed a radical cleric, who was killed in a September 30, 2011 drone strike in Yemen.<sup>14</sup>

“During his presidential campaign, Republican Rep. Ron Paul criticized the killing of Anwar al-Awlaki, saying: ‘Al-Awlaki was born here, he is an American citizen. He was never tried or charged for any crimes. No one knows if he killed anybody. ... But if the American people accept this blindly and casually that we now have an accepted practice of the president assassinating people who he thinks are bad guys, I think it's sad.’”<sup>15</sup>

However, what really made the story of Anwar al-Awlaki's death a headline was that the drone strike ordered just weeks later caused death of his 16 year-old son: Abdulrahman al-Awlaki.<sup>16</sup> A

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1; Tom Leonard, *Barack Obama orders killing of US cleric Anwar al-Awlaki*, THE TELEGRAPH, April 7, 2010, <http://www.telegraph.co.uk/news/worldnews/barackobama/7564581/Barack-Obama-orders-killing-of-US-cleric-Anwar-al-Awlaki.html>.

<sup>13</sup> Shane, *supra* note 12; Leonard, *supra* note 12.

<sup>14</sup> BBC NEWS, *Islamist cleric Anwar al-Awlaki killed in Yemen*, Sept. 30, 2011, <http://www.bbc.co.uk/news/world-middle-east-15121879>.

<sup>15</sup> Andrew Rafferty, *American drone deaths highlight controversy*, NBC NEWS, Feb. 5, 2013, [http://usnews.nbcnews.com/\\_news/2013/02/05/16856963-american-drone-deaths-highlight-controversy?lite](http://usnews.nbcnews.com/_news/2013/02/05/16856963-american-drone-deaths-highlight-controversy?lite).

<sup>16</sup> Sabrina Siddiqui, *Obama ‘Surprised,’ ‘Upset’ When Anwar Al-Awlaki’s Teenage Son Was Killed By U.S. Drone Strike*, THE HUFFINGTON POST, April 24, 2013, <http://www.huffpost.com>.

strike that a White House official deemed “a mistake, a bad mistake.”<sup>17</sup> Abdulrahman was also an American citizen, and had no ties to any terrorist organizations.<sup>18</sup> His family alleged that he was targeted simply because he was the son of Anwar al-Awlaki.<sup>19</sup>

Sources have stated that the Government has many “kill lists” filled with counterterrorism targets, one of which is maintained by the CIA.<sup>20</sup> The CIA and other agency analysts prepare this “kill list.”<sup>21</sup> CIA lawyers then determine whether or not to place someone on the “kill list” based on whether or not that person poses a direct threat to the United States.<sup>22</sup> The CIA then gives the final approval for a strike.<sup>23</sup> The Government conducts strikes on both specific known individuals, and on unknown targets believed to be terror suspects.<sup>24</sup>

What is truly astonishing is that “[b]etween 1,990 and 3,308 people are reported to have been killed in the drone strikes in Pakistan since 2004, the vast majority of them during the Obama terms.”<sup>25</sup> Although most Americans like to believe that these

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[huffingtonpost.com/2013/04/23/obama-anwar-al-awlaki-son\\_n\\_3141688.html](http://huffingtonpost.com/2013/04/23/obama-anwar-al-awlaki-son_n_3141688.html).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Brief of Amici Curiae, *supra* note 3, at 23; Ken Dilanian, *U.S. Put New Restrictions on CIA Drone Strikes in Pakistan*, L.A. TIMES, Nov. 7, 2011, <http://articles.latimes.com/2011/nov/07/world/la-fg-cia-drones-20111108>.

<sup>21</sup> Brief of Amici Curiae *supra* note 3, at 24.

<sup>22</sup> *Id.* at 25.

<sup>23</sup> *Id.* at 24.

<sup>24</sup> Dilanian, *supra* note 20.

<sup>25</sup> RT NEWS, *Leaked report: Nearly half of US drone strikes in Pakistan not against al-Qaeda*, April 12, 2013, <http://rt.com/news/drones-us-al-qaeda-militants-649/>.

operations are focused exclusively on high-level suspects and that there are no civilian casualties, this is not the case.<sup>26</sup>

In the 12-month period up to 2011, forty-three out of ninety-five reported drone strikes were not aimed at al-Qaeda at all.<sup>27</sup> While 265 out of 482 people killed during targeted attacks were defined by the Government as 'extremists', only six of the men killed, less than two percent, were senior al-Qaeda leaders."<sup>28</sup>

Some of those killed "appear to have been simply errors, with the victims branded as terrorists only after the fact."<sup>29</sup> And even more alarming, is that documents "show that drone operators weren't always certain who they were killing."<sup>30</sup> These shocking statistics are why the TARC is necessary in today's War on Terror.

Moreover, while the focus of the TARC is on protecting the lives of U.S. citizens, the TARC's deterrence goals relating to "shooting before aiming" may save the lives of a number of individuals who are not U.S. citizens. Thus, the protection of potentially innocent U.S. lives may have a spillover effect that protects citizens of nations in which the Government conducts targeted attacks.

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<sup>26</sup> Conor Friedersdorf, *New Evidence That Team Obama Misled Us About the Drones*, THE ATLANTIC, Apr. 10, 2013, <http://www.theatlantic.com/politics/archive/2013/04/new-evidence-that-team-obama-misled-us-about-the-drone-war/274839/> (stating that a review of classified documents demonstrates that "al-Qaeda members were a minority of people killed by drones, and killing senior al-Qaeda leaders was rare.").

<sup>27</sup> RT NEWS, *supra* note 25.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Friedersdorf, *supra* note 26.

### *B. The Implications of the DOJ White Paper*

On February 4, 2013, NBC News released a Department of Justice White Paper, titled: "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."<sup>31</sup> The document explains the legal basis for the Government's targeted killing program.<sup>32</sup> "The memo was given confidentially to members of the Senate Intelligence and Judiciary committees by the administration last June," according to a statement released by Sen. Dianne Feinstein.<sup>33</sup> It is important to keep in mind that the memo is a policy paper, not an official legal document.<sup>34</sup> The assertion being made in the White Paper is that the:

"United States would be able to use lethal force against a U.S. citizen, who is located outside the United States and is an operational leader continually planning attacks against U.S. persons and interests, in at least the following circumstances: (1) where 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) where a capture operation would be infeasible and where those conducting the operation

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<sup>31</sup> Michael Isikoff, *Justice Department memo reveals legal case for drone strikes on Americans*, NBC NEWS, Feb. 4, 2013, [http://openchannel.nbcnews.com/\\_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite](http://openchannel.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite).

<sup>32</sup> *Id.*

<sup>33</sup> Pam Benson, *Memo backs U.S. using lethal force against Americans overseas*, CNN, Feb. 6 2013, <http://www.cnn.com/2013/02/05/us/lethal-force-memo/index.html>.

<sup>34</sup> *Id.*

continue to monitor whether capture becomes feasible; and (3) where such an operation would be conducted consistent with applicable law of war principles.”<sup>35</sup>

Moreover, the framework discussed in the DOJ White Paper is remarkably similar to President Obama’s stance on the issue.

“The administration has said that strikes by the CIA’s missile-firing Predator and Reaper drones are authorized only against ‘specific senior operational leaders of al Qaida and associated forces’ involved in the Sept. 11, 2001, terror attacks who are plotting ‘imminent’ violent attacks on Americans. ‘It has to be a threat that is serious and not speculative,’ President Barack Obama said in a Sept. 6, 2012, interview with CNN. ‘It has to be a situation in which we can’t capture the individual before they move forward on some sort of operational plot against the United States.’”<sup>36</sup>

The other important aspect of the White Paper is the legal foundation discussed in the 16-page memo.<sup>37</sup> First, the memo states that: “in defined circumstances, a targeted killing of a U.S. citizen who has joined al-Qa’ida or its associated forces would be lawful under U.S. and international law.”<sup>38</sup> Second, the memo disclaims any liability for a targeted killing pursuant to either Title 18 or the assassination ban.<sup>39</sup> Third, “[w]ere the target of a lethal operation a U.S. citizen who may have rights under the Due Process Clause and

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<sup>35</sup> Isikoff, *supra* note 31, at 6 of the White Paper.

<sup>36</sup> Friedersdorf, *supra* note 26.

<sup>37</sup> Isikoff, *supra* note 31, at 1-2 of the White Paper.

<sup>38</sup> *Id.* at 1 of the White Paper.

<sup>39</sup> *Id.*

the Fourth Amendment, that individual's citizenship would not immunize him from a lethal operation."<sup>40</sup>

Again, the purpose of this article is not to debate the legality of targeting a U.S. citizen. The reference to the DOJ White Paper is simply to add further foundation to the relevance of the topic at issue, especially since the Obama administration has taken a remarkably similar stance. Assuming it is true that it is legal to target and kill a U.S. citizen engaged with a terrorist organization in an attempt to attack the United States, then there must be some sort of review of the decision to target those individuals.

### *C. The Legality of Targeted Killing Under International Law*

As stated above, this article is not meant to analyze the legality of targeting killing. The purpose of this article is strictly to focus on what can be done to minimize the loss of innocent lives, given that the procedure exists. Regardless, a brief examination of the legality of targeted attacks under international law is relevant for foundational purposes.

Pursuant to the Geneva Conventions Common Article 2 international armed conflicts, both lawful and unlawful combatants may be targeted.<sup>41</sup> And, under Common Article 3 non-international armed conflicts, individuals may be targeted if they are positively identified armed individuals taking active part in hostilities.<sup>42</sup> However, Additional Protocol I, Article 51.3, which is generally considered customary international law, appears to prohibit targeted

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<sup>40</sup> *Id.* at 2 of the White Paper (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004)).

<sup>41</sup> International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, art. 2, Aug. 12 1949, 75 U.N.T.S. 31.

<sup>42</sup> *Id.* at art. 3.

killing in international armed conflicts until a civilian takes direct part in hostilities.<sup>43</sup>

It is evident that the issue of the legality of targeted killing procedures is yet to be resolved. What is important to remember is that for the purpose of this article, the use of targeted killings in general is presumed to be legal, but each individual attack may not be legal.

### III. Comparison To Similar Foreign Legislation

Other States already support similar legislation:

“[The Israeli Supreme Court] has developed limits on targeted killing through a mix of IHL and human rights law. These limits include: (1) independent, *ex post* investigation by executive authorities ‘regarding the precision of the identification of the target and the circumstances of the attack,’ and, even more remarkable from a U.S. perspective; (2) independent judicial review of those executive investigations.”<sup>44</sup>

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<sup>43</sup> International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, art. 51.3, June 8, 1977, 1125 U.N.T.S. 3. However, the United States is not a party to Additional Protocol I, so it is not bound by its terms.

<sup>44</sup> Richard Murphy & Afsheen John Radsan, *Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing*, U. ILL. L. REV. 1201, 1233 (2011) (citing HCJ 769/02, Pub. Comm. Against Torture in Isr. v. Gov't of Isr. (PCATI) [Dec. 11, 2005], slip op. [hereinafter PCATI], which at paragraph 40 requires objective, *ex post* executive review, and at paragraph 54 requires judicial review of *ex post* executive review in "appropriate cases").

The Israeli Supreme Court relied on two European Court of Human Rights cases in making these determinations.<sup>45</sup>

The ECHR stated that there should be an official investigation when individuals have been killed by the State in order to determine whether deadly force was justified, and if it was not, to hold those involved responsible.<sup>46</sup> The Israel Supreme Court also recognized that *ex post* executive review by the judiciary was necessary in this context, with deference given to military officials acting in their official capacity.<sup>47</sup> Finally, when it comes to who reviews targeted killing decisions, “[t]he Israelis rely on a mix of executive and judicial actors.”<sup>48</sup>

These cases add further support to the feasibility of the implementation of the TARC. The goals and standards discussed above are strikingly similar to those of the TARC and will be discussed at length in the rest of the article.

#### IV. Comparison to Enacted Domestic Law

##### A. Comparing the FISC to the TARC

The United States’ creation of the Foreign Intelligence Surveillance Court (FISC) through the Foreign Intelligence Surveillance Act (FISA) is comparable to the creation of the TARC. In enacting FISA in 1978,

“Congress authorized judges of the Foreign Intelligence Surveillance Court (FISC) to approve

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<sup>45</sup> *Id.* (citing *McCann v. United Kingdom*, 21 Eur. H.R. Rep. 97, ¶¶ 161-63 (1995) and *McKerr v. United Kingdom*, 34 Eur. H.R. Rep. 553, 559 (2001)).

<sup>46</sup> *Id.* at 1234 (citing *McCann*, 21 Eur. H.R. Rep. at 161).

<sup>47</sup> *Id.* (citing PCATI, *supra* note 44, at ¶¶ 56-57).

<sup>48</sup> *Id.* at 1236.

electronic surveillance for foreign intelligence purposes if there is probable cause to believe ‘that the target of the electronic surveillance is a foreign power or an agent of a foreign power’ and that each of the specific ‘facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power.’”<sup>49</sup>

After September 11th, President Bush authorized the NSA to conduct warrantless wiretapping of communications where one party was located outside the U.S. and a participant was reasonably believed to be a member or agent of al-Qaeda or an affiliated terrorist organization.<sup>50</sup> “[T]he FISC issued orders authorizing the Government to target international communications into or out of the United States where there was probable cause to believe that one participant to the communication was a member or agent of al-Qaeda or an associated terrorist organization.”<sup>51</sup>

FISC approval is contingent upon the Government showing that “minimization” procedures are in place.<sup>52</sup> This means that the invasiveness of the inquiry is limited to the relevant parties. This “minimization” requirement is a key aspect for the TARC to take into account. Targeted killings should not be used to destroy entire towns and cities.

There are a few additional key comparisons that can be drawn between the FISC and the TARC. First, and possibly most importantly, is that FISA and FISC have continually been held constitutional. All courts that have considered the issue, both before

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<sup>49</sup> Clapper v. Amnesty Int’l, USA, 133 U.S. 1138, 1143 (2013).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1144.

<sup>52</sup> *Id.* at 1145.

and after the enactment of the PATRIOT Act, have rejected constitutional challenges.<sup>53</sup>

Second, proceedings in the TARC, like the FISC, would be held *in camera*.<sup>54</sup> In order for the TARC to have a realistic chance of being supported and implemented, the *in camera* aspect would likely be a requirement. National security is always a major concern in this area of the law. Implementing the *in camera* requirement respects the deference given to the Government in the area of national security, while at the same time implementing accountability for the targeted killing of a U.S. citizen.

FISA provides the Foreign Intelligence Surveillance Court with jurisdiction to entertain *ex parte* executive applications for electronic surveillance.<sup>55</sup> However, the TARC courts would not be *ex parte*. In the TARC, neither the plaintiff, nor his or her witnesses, would be permitted to be present. Witnesses would only be allowed to provide affidavits advocating for the victim. For national security reasons, only advocates for the Government, Government witnesses, and the plaintiffs' advocates would be permitted to enter the hearing

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<sup>53</sup> *United States v. Abu-Jihaad*, 630 F.3d 103, 120 (2d Cir. 2010), *cert. denied*. The court clarified that only one district court has held FISA unconstitutional. However, that decision was vacated by the Ninth Circuit in *Mayfield v. United States*, 599 F.3d 964 (9th Cir. 2010); *see United States v. Duka*, 671 F.3d 329, 337 (3rd Cir. 2011) (“Aligning with all of the other courts of appeals that have considered this issue, however, we reject defendants’ constitutional challenge.”). These challenges focus on due process violations and will be examined in greater depth in the *CONCERNS REGARDING THE RIGHT TO DUE PROCESS* section of this article.

<sup>54</sup> 50 U.S.C.A. § 1803 (West Supp. 2010).

<sup>55</sup> *Abu-Jihaad*, 630 F.3d at 117.

challenging the Government's decision. This strikes a fair balance between adequate representation and national security concerns.<sup>56</sup>

### *B. Criticisms of FISA*

A major criticism of FISA is that Government officials have a tendency to abuse the Act in certain high-profile cases.<sup>57</sup> Since its enactment, there have been accusations that FISA protocols were not properly followed in many cases.<sup>58</sup> Moreover, there is evidence that FISA has been increasingly used to target non-terrorists.<sup>59</sup>

This is another reason *ex ante* review may not be the most appropriate option for the TARC. If the Government requires permission from the TARC before acting, evidence may be more likely to be fabricated in order to gain approval to strike. If the TARC had an *ex ante* review system similar to FISC, it would allow the Government to avoid sanctions as long as the Government could establish that it followed proper procedure; there would be no substantive analysis. This is not an appropriate measure.

Just because the Government follows a checklist does not mean that the actions of the Government are reasonable. The possibility of abuse in this area of the law is too great to not review the reasonableness of targeted attacks against United States citizens after they occur. Just as FISA has allowed the Government to violate the rights of the innocent, so has the Government's unchecked decision-making power in the targeted killing of United States

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<sup>56</sup> "Fair balance" as used here is what a United States court would likely decide was a fair balance, although human rights advocates may likely disagree.

<sup>57</sup> Christopher P. Banks, *Security and Freedom After September 11: The Institutional Limits and Ethical Costs of Terrorism Prosecutions*, 13 PUB. INTEGRITY 5, 15 (2011).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 17.

citizens. This is why the TARC must review the Government's decisions *post facto*.

Another major criticism of FISA is that when the Government attempts to procure FISA warrants, the process is too inefficient to be truly effective due to internal legal, bureaucratic, and procedural problems.<sup>60</sup> This is yet another reason *ex ante* review is not appropriate for the TARC. In times of war there may be moments when the Government must act with supreme expediency. Requiring approval to attack a major threat could seriously threaten the Government's ability to defend the Nation. The Government must be able to act when it deems appropriate, but it must know that targeted attack decisions may be reviewed. While the decision to attack in the first place seems like the appropriate place to review this process, it is not the most realistic.

## V. The Implementation of the TARC

Now that a sufficient foundation has been laid, the article will now discuss the specific policies and procedures related to the implementation of the Targeted Attack Review Court.

### A. *The Limited Scope of the TARC'S Authority*

The scope of the TARC would be limited. The public policy implications of such a court are obvious. In many cases, the constitutional rights of U.S. citizens may directly conflict with the Government's need for deference to act as protectors of national security.

The TARC is meant to act as a deterrent factor to those officials who have the ability to order targeted killings. As of right now there are little or no deterrents to ordering targeted attacks. Because there is no risk of the loss of American soldiers' lives, and no risk that officials will be held accountable for their decisions, it is

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<sup>60</sup> *Id.*

much easier to order an attack than what basic human rights demand. If nothing else, the presence of the TARC is a reason to pause and ensure that enough evidence has been gathered to order an attack. Soldiers can be courts-martialled for their decision to pull the trigger in battle; there is no reason that a Government official's decision to push the kill button should not be reviewed as well.

The TARC would not be established in order to force the Government to obtain permission before it orders an attack on an individual. The TARC would be solely responsible for hearing grievances *post facto* on behalf of those who are targeted by the U.S. Government. It would be tasked with deciding whether the actions of those officials who ordered the targeted killing were reasonable in light of the surrounding circumstances. The TARC would not be created in order to take power away from the military and intelligence agencies to conduct the actions they deem essential. The TARC's only responsibility would be to determine whether or not the decision to attack was appropriate at the time the decision was made. And the liability decision would be strictly based on whether the decision at the time was reasonable.

Finally, the TARC would only hear cases regarding attacks on American citizens, whether on United States or foreign soil. Legally and politically, there are a multitude of obvious problems and issues that arise when hearing the disputes of non-citizens, the most crucial being that in most circumstances they would not be subject to the protections of the United States Constitution.

These limitations have been placed on the TARC in order to minimize the controversial nature of the proposed legislation. After-the-fact review of the targeted killing of citizens is a much easier sell to the Government and to Congress than requiring approval of every single targeted attack decision regardless of who is being targeted.

### *B. Who Judges the Targeted Attack Decisions*

The question of who would hear cases in the TARC is a key issue in this process. Ideally, the TARC would consist of a mix of

retired intelligence professionals, military personnel, and federal judges. The goal of this process is that the individuals who sit on the TARC would have a wealth of experience and as little stake in the outcome of the case as possible. For this reason, everyone on the TARC should be retired from the career that qualifies him or her to hold a position on the TARC. The TARC would consist of a mix of retired federal court judges, military generals, and professionals from the CIA, FBI, JSOC, etc. The TARC would have a rotating five-member review committee. There would always be at least one member sitting on the TARC from each of the professions listed above: one judge, one military general, and one defense professional. These officials would be appointed by the President and confirmed by the Senate, the same way federal court judges are appointed.<sup>61</sup>

### *C. Who Represents the Plaintiff*

Another major decision that must be made is who will represent the plaintiff in the TARC. Again, because of national security concerns, the plaintiffs and their witnesses will not be permitted in TARC hearings; only the victims' advocates will be permitted in TARC hearings.

Appropriate advocates for the victim are necessary in order for hearings to be fair. The most logical choice would be a JAG officer. This will obviously require a lot of cooperation between the military and government agencies, but JAG officers will be the best advocates for the victims of targeted attacks. JAG officers are trained in handling sensitive information. They are aware of the classified nature of information associated with military tribunals. They risk dishonorable discharge for disobeying the rules of military justice and for revealing classified information if assigned to the TARC. They are attorneys devoted to justice and the rights and freedoms associated with being a United States citizen.

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<sup>61</sup> U.S. CONST. art. II, § 2, cl. 2.

More importantly, they are trained to analyze “compliance with law-of-war rules such as discrimination, proportionality, and necessity. Judge advocates now sit in targeting centers and provide real-time advice about the legality of attacking various targets.”<sup>62</sup> They have the expertise to represent victims that civilian attorneys do not possess.

There are individuals who would likely have reservations about using JAG officers to represent the victims of targeted attacks for fear of the increasing militarization of the review process. However, any fear that using JAG officers would cause a conflict of interest is easily refuted. JAG officers represent both the Government and its soldiers in military tribunals on a daily basis. If these officers can defend soldiers against Government actions, it seems they could fairly and adequately represent the victims of allegedly wrongful targeted attacks. Furthermore, the expertise that JAG officers can provide in their representation of victims is unparalleled in the private sector.

Another alternative is using high-level Government attorneys, such as Assistant U.S. Attorneys or Federal Defenders. Using these attorneys would quell some of the concerns regarding over-militarization. However, using these attorneys would still require bringing civilians into the review process. It is unlikely that Government defense officials or members of Congress would support such a process. The same national security concerns that keep plaintiffs and their witnesses from being present at FISC hearings are also present here: civilians should not have access to classified information. Thus, civilian attorneys should not be permitted to represent the victims of targeted attacks.

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<sup>62</sup> Nathan Alexander Sales, *Self-Restraint and National Security*, 6 J. NATL. SEC. L. & POL'Y 227, 252 (2012).

#### *D. When A Claim Becomes Actionable*

If a “kill list” exists, why is there not a review of that list? Obviously a large issue in this area of the law is that even if there is a review of a targeted attack, it may be too little too late if fatalities have occurred. The assertion that there should be a review of individuals put on a targeted “kill list” seems only logical from a human rights perspective.

But again, the TARC is not meant to interfere with military operations; it is only meant to confirm that Government actions comply with international and domestic law. While one way to approach the issue is to review the decision to attack in the first place, this is likely not a realistic proposition. The need for immediate action during wartime will likely prevent a review of the decision to attack prior to the attack occurring. Again, the case law makes it clear that the Government is given wide latitude from which to operate and hold its veil of secrecy in the context of combating terrorism.<sup>63</sup> While this may not sit well with many people, it is a line that United States courts have been very fearful of crossing.

In addition, part of the appeal of *post facto* review is that once the alleged threat has been eliminated, the Government’s national security concern is somewhat diminished. Thus, the Government will have a harder time arguing that based on the special

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<sup>63</sup> In re Nat’l Sec. Agency Telecomm. Records Litig., 671 F.3d 881, 903 (9th Cir. 2011) (citing People’s Mojahedin Org. of Iran v. Dep’t of State, 327 F.3d 1238, 1241-42 (D.C. Cir. 2003) (permitting reliance upon secret evidence in designating a group as a terrorist organization); Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 164 (D.C. Cir. 2003) (using classified information in *in camera* and *ex parte* proceedings to prove that a group is a terrorist organization did not violate due process); Global Relief Found. Inc. v. O’Neill, 315 F.3d 748, 754 (7th Cir. 2002) (statute not unconstitutional because it authorizes the use of classified evidence that may be considered *ex parte* by the district court).

circumstances of war it is not able to provide more specific information regarding each attack.

Furthermore, one must continue to keep United States law and its procedures in mind. In order for a U.S. court to hear a challenge to a TARC decision, Article III standing would have to be established, as it must with every claim brought in federal court. "To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling."<sup>64</sup> And, "threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient."<sup>65</sup>

The *Clapper* case, which deals with a FISC decision, provides a great parallel to a potential TARC case. It is obvious that there is a significantly different set of concerns when it comes to placing a wiretap on a person's communication devices, and placing someone's name on a targeted killed list. Although the *Clapper* case is not a perfect parallel, the arguments and holdings are quite comparable. While different standards may be more appropriate based on the fact that a person's life is being put in serious jeopardy, the Article III standards that would allow a case to be brought based on the fact that a person's name was placed on a "kill list" have yet to be articulated in a United States court.<sup>66</sup> As a result, it is difficult to make assumptions about how a United States court would rule on

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<sup>64</sup> *Clapper v. Amnesty Int'l USA*, 133 U.S. 1138, 1147 (2013) (emphasis in original).

<sup>65</sup> *Id.*

<sup>66</sup> The father of Anwar al-Awlaki brought a comparable suit, but it was dismissed because the court found that he did not have standing to assert his son's constitutional rights. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 14-35 (D.D.C. 2010). However, should an individual actually be killed by a targeted attack, a family member, on behalf of the estate, could meet the Article III standing requirement. See *Al-Aulaqi v. Panetta*, 2014 WL 1352452 at 10 (D.D.C. April 4, 2014).

such an issue. Thus, the *Clapper* case will be used as a comparator because it provides the most solid legal basis for predicting the holdings of United States courts on the Article III standing of victims of targeted attacks.

*Clapper* involved Section 702 of FISA, which allows the Attorney General and the Director of National Intelligence to acquire foreign intelligence information by jointly authorizing the surveillance of individuals who are not lawful United States residents and are reasonably believed to be located outside the United States.<sup>67</sup> The challengers were United States citizens whose work allegedly involved engaging in international communications with individuals whom they believed would be potential targets of surveillance under Section 702 of FISA.<sup>68</sup>

The Supreme Court denied the citizens' challenge based on three key, and relevant, arguments. "First, it is speculative whether the Government will imminently target communications to which respondents are parties."<sup>69</sup> Second, even if it could be demonstrated that the targeting of foreign contacts is imminent, it is mere speculation that the Government will use FISA authorized surveillance, rather than other methods, to do so.<sup>70</sup> Third, it is unclear whether the Government would succeed in acquiring the communications.<sup>71</sup>

These reasons exemplify why the TARC should not provide approval, and should merely be used as a system of review: because any challenges to the decision could not be heard in federal court due to a lack of standing.

First, just because a person is on a "kill list" does not mean that an attack is *imminent*. An attack could occur tomorrow, or ten

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<sup>67</sup> *Clapper*, 133 U.S. at 1142.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1148.

<sup>70</sup> *Id.* at 1149.

<sup>71</sup> *Id.* at 1150.

years from today, the latter unlikely to be considered *imminent*. Second, even if a name was placed on a “kill list”, there is no way to know whether the Government will use a targeted attack procedure to complete the operation, or a clearly legal specialized alternative, such as sending in a SEAL team, the Army Rangers, etc. Finally, there is no way of knowing whether a targeted attack would be successful. And without an injury, there is no Article III standing.

Although it seems illogical that placing a person’s name on a “kill list” should not be subject to judicial review, the claim is likely to be held to lack Article III standing. As a result, a review of a TARC decision should only be done after an attack has been conducted.

If the person attacked is still alive, or if he or she is killed, his or her family could then fulfill Article III standing requirements for sustaining an injury.<sup>72</sup> It is clear that a targeted attack could be fairly traceable to the Government and there would be an adequate civil remedy. Thus, the injury, causation, and redressability prongs would all be met. The victim or his or her family could then file a claim with the TARC, and proceedings would commence.

However, there is a problem with this system if the victim is killed and he or she has no surviving family or friends to bring a claim. Or, the victim’s family may not know that the victim was killed in a targeted attack, rather than in a more traditional military operation. In this case, automatic review of each targeted attack decision seems more appropriate. While it is impractical based on time, resources, and the sheer number of attacks, to hold a full hearing to review each and every targeted attack decision, there is a middle ground that may be appropriate.

The Government should be required to submit a brief report of each attack to the TARC. This has a similar deterrent effect as when law enforcement officers in the U.S. must submit to a review when they fire their weapon. The report could be brief, but at a minimum it should establish who was attacked, what their citizenship

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<sup>72</sup> See *Al-Aulaqi*, 2014 WL 1352452 at 10.

status was, why they were attacked, and what was done to confirm the identity and alleged wrongdoings of the individual.

If the TARC deems that the decision seemed reasonable, they would do nothing further. However, if the TARC sees flaws in the report, it could decide to hold a full review hearing. Thus, targeted attack decisions would be reviewed if: a victim brought a claim; someone brought a claim on behalf of a victim; or the TARC saw flaws in the Government's mandatory report. As a result, all decisions would be given at least some sort of review. This adds to the TARC's goal of deterrence and seems appropriate with human life at stake.

#### *E. Standard Of Review Used by the TARC*

The standard of review for the TARC should be the same as the standard of review for soldiers in courts-martial: was it justified? Article 118 of the Manual for Courts-Martial United States defines murder as the unlawful killing of a human being *without justification or excuse*.<sup>73</sup>

So what is proper justification or excuse? This is where the DOJ White Paper once again becomes important. If we assume that the DOJ correctly analyzes the legality of targeted killings, the TARC would have to decide if the 3-prong test laid out in the White Paper had been met.<sup>74</sup> There is a one-word addition that should be included in the test however. This addition would be adding the word

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<sup>73</sup> R.C.M. § 918. Art. 118.

<sup>74</sup> Isikoff, *supra* note 31, at 6 of the White Paper (“1) where 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) where a capture operation would be infeasible-and where those conducting the operation continue to monitor whether capture becomes feasible; and 3) where such an operation would be conducted consistent with applicable law of war principles.”).

*reasonable* into the first prong of this test. So the first factor would read: “Where an informed, high-level official of the U.S. government has *reasonably* determined that the targeted individual poses an imminent threat of violent attack against the United States.”<sup>75</sup>

If the TARC determines that the Government acted reasonably in light of the circumstances, the burden would then shift to the plaintiff to establish beyond a reasonable doubt that the attack was not reasonably justified. This is the standard used in criminal trials in the United States, as well as for military courts-martials, to establish guilt.<sup>76</sup> Again, the burden would be on the victim, not the Government, to prove beyond a reasonable doubt that the three-prong test had not been met. This standard gives the utmost deference possible to the Government to conduct its wartime operations, but still ensures some level of accountability. If the plaintiff established beyond a reasonable doubt that the Government did not act reasonably, he or she would be entitled to damages.

Comparing this standard with the standard of review in citizen-detainee cases provides support to the constitutionality of this standard.<sup>77</sup> The Supreme Court has held that “the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.”<sup>78</sup> Therefore, this standard seems the most appropriate, as well as the most likely standard to be approved by the Supreme Court.

#### *F. What Factors the TARC Should Consider*

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<sup>75</sup> *Id.* (emphasis added).

<sup>76</sup> R.C.M. § 851. Art. 51.

<sup>77</sup> This comparison will be analyzed under the *CONCERNS REGARDING THE RIGHT TO DUE PROCESS* section of this article.

<sup>78</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004).

The factors that the TARC should consider will be largely determined by the expertise of those who are appointed to review the targeted attack decisions. These appointees would be best able to determine whether or not the actions of the Government were reasonable in light of the surrounding circumstances.

What must be decided is how serious of a threat the individual allegedly posed, the likelihood that he or she could have been captured, and whether or not the Government complied with law of war principles. The DOJ White Paper is again relevant here. The DOJ White Paper framework provides a solid basis from which decisions could be reviewed, and it is an appropriate standard for the TARC to use in its future analysis.

Some of the specific factors the TARC should consider include: what evidence was gathered; the availability of evidence; whether more evidence could have been obtained; the reliability of the evidence that was gathered; and whether that evidence was, or could have been, corroborated.

More key issues to be decided are: where in the chain of command the accuracy of the decision-making process began to breakdown, and how far down, or up, the chain of command fault should lie? Who gathered evidence, if any? Who is responsible for poor intelligence and misreported or misinterpreted information? Should the penalty only be imposed on the final decision-maker or should his or her subordinates also be punished?

This is one of the points where the limits of lay opinion become obvious. While it is easy to speculate on what is reasonable from a computer chair, those with actual experience combating terrorism will best be able to determine when a decision needed to be made, what evidence was necessary to make that decision, and who should be held responsible. This degree of deference places a lot of faith in those who sit on the TARC. But in light of the fact that it will be extremely difficult for lay people to adequately answer these questions, deference to the TARC is the best alternative.

### *G. Penalties to be Imposed by the TARC*

If the TARC finds that a killing was not justified, what should happen? First and foremost victims or their families need to be compensated. A civil penalty should be imposed by the TARC if it finds that the Government unlawfully conducted a targeted attack against a U.S. citizen. This provision could be written into the legislation. If the TARC finds that the Government has unlawfully attacked a citizen, an automatic payment would be made to the victim or his or her family. The amount to be paid out for individual injuries would be determined by Congress. Victims who are not killed, but who the TARC determines to have been wrongfully attacked, would be paid an amount determined by the TARC on a case-by-case basis. This money would come from an account that the Government establishes. This requirement should also be mandated in the legislation.

When it comes to individual decision-makers, the justifications for imposing a criminal penalty are obvious: the Government has either just committed murder or attempted murder of a citizen. The person who ordered that decision committed that crime. However, putting a person in prison for committing what he or she believed to be an appropriate action in their duty to protect American lives seems both controversial, and possibly too extreme. As a result, criminal penalties should not be imposed by the TARC.

Civil penalties against individual actors would seem more appropriate. But, it is unlikely that individual Government officials would have sufficient funds to compensate victims. As a result, individual Government officials would not be required to pay out damages; payments would come exclusively from the above-mentioned account.<sup>79</sup>

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<sup>79</sup> This is similar to U.S. employment law where the company pays for damages arising out of an employee's mistake during the course of his or her employment.

The more appropriate punishment for individual actors would be demotion or termination from their Government position. Again, the appropriate punishment would be determined by the TARC. Termination is obviously a serious penalty, but in light of the responsibility entrusted to individuals to command United States war efforts, it may be appropriate. If a Government official makes a decision to end the life of a United States citizen that the TARC determines to be unreasonable, there is no reason to continue to trust that individual to make a similar decision in the future.

Ultimately, the decision of who to punish, and exactly what sanctions should be imposed should be left to the TARC with great deference. Congress is in a position to collect data and offer a range of civil and/or criminal sanctions that the TARC can choose to impose. Or, Congress can leave the punishment decision up to the TARC on a case-by-case basis.

#### *H. Appeal Process for TARC Decisions*

The appeal process will also mimic the FISA appeal process. “Congress vested the Foreign Intelligence Surveillance Court of Review with jurisdiction to review any denials by the FISC of applications for electronic surveillance.”<sup>80</sup> Similarly, Congress can create a Targeted Attack Review Appeals Court (TARAC) to review the decisions of the TARC.<sup>81</sup>

Either those who are sanctioned, or the victims, could appeal TARC decisions to the TARAC. The TARAC would be staffed by a similar group of individuals as the TARC. It would have three members, the same number of individuals as the FISCR.<sup>82</sup> It would

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<sup>80</sup> *Clapper v. Amnesty Int'l USA*, 133 U.S. 1138, 1143 (2013).

<sup>81</sup> As a preliminary matter, the constitutionality of the act that creates the TARC can be challenged in federal district court. U.S. CONST., art. III, § 2, cl. 1.

<sup>82</sup> *United States v. Abu-Jihaad*, 630 F.3d 103, 119 (2d Cir. 2010), *cert. denied*.

be at the discretion of the TARAC whether to review a TARC decision. The TARAC would likely be sparingly used, as the FISCR has only convened twice since its creation.<sup>83</sup>

The decisions of the TARAC could be appealed to the Court of Appeals for the District of Columbia. Congress could give the district court original jurisdiction over the TARAC under Article III.<sup>84</sup> The court could “review any sealed evidence *in camera* to assure” just cause under the applicable standard.<sup>85</sup>

The D.C. Circuit would decide whether the decision was made under the appropriate standard, would reverse any decision made in error, and if necessary would remand for further proceedings. The appropriate standard of review for the appeal would be the “some evidence” standard. Although this would not be an appropriate standard of proof at the trial level, courts, including the Supreme Court, have utilized the “some evidence” standard in the past as a standard of review.<sup>86</sup> This standard has been primarily used “by courts examining an administrative record developed after an adversarial proceeding.”<sup>87</sup> Because the TARAC would require an adversarial hearing, this standard is appropriate. As long as there was “some evidence” that the TARC and TARAC could rely on, their decisions would be upheld. Again, this gives the utmost deference to the Government, while still preserving the right to appeal.

Final review would ultimately rest with the Supreme Court of the United States if it chooses to hear the case, always *in camera*.

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<sup>83</sup> *Id.*

<sup>84</sup> U.S. CONST. art. III, § 1.

<sup>85</sup> *In re National Sec. Agency Telecomm. Records Litigation*, 671 F.3d 881, 904 (9th Cir. 2011).

<sup>86</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004).

<sup>87</sup> *Id.*

## VI. Additional Clarifications

### A. Concerns Regarding the Right to Due Process

It is important to remember that because the TARC is limited to reviewing cases of American citizens, due process concerns arise. As discussed above, the DOJ in its White Paper stated that U.S. citizenship, the Fourth Amendment, and the Due Process Clause, do not prevent targeted killings from being lawful acts.<sup>88</sup> Whether United States courts agree with that sentiment or not has yet to be clearly decided.

The Supreme Court previously addressed a similar issue. In *Hamdi v. Rumsfeld*, the Court held in a plurality decision that although Congress authorized the indefinite detention of combatants in limited circumstances, “due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker.”<sup>89</sup> This is because even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status.<sup>90</sup> The plurality went on to hold that “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision-maker.”<sup>91</sup>

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<sup>88</sup> Isikoff, *supra* note 31, at 2 of the White Paper.

<sup>89</sup> *Hamdi*, 542 U.S. at 509. The Court also states at 528: “this Court consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive’s asserted justifications for that detention have basis in fact and warrant in law.”

<sup>90</sup> *Id.* at 524.

<sup>91</sup> *Id.* at 533.

The case law seems to make it clear that as an American citizen, those subjected to targeted attacks deserve a right to an impartial hearing. Even though the damage and/or the death may have occurred, it seems as though *ex ante* review would not be possible due to national security concerns, and thus this *post facto* review seems to be the only legitimate way to hear the claims of those who have been targeted.

A court will have to conduct a balancing test for procedural due process claims.<sup>92</sup> Judicial balancing must be done, the alternative being blind obedience to the Executive branch. Because, “the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen’s core rights to challenge meaningfully the Government’s case and to be heard by an impartial adjudicator.”<sup>93</sup>

When it comes to the Government’s efforts to combat terrorism, courts have consistently rejected defendants’ claims that *in camera* and *ex parte* proceedings violate the defendants’ Fifth Amendment right to due process.<sup>94</sup> “Due process is flexible and calls for such procedural protections as the particular situation

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<sup>92</sup> *In re Nat’l Sec. Agency Telecomm. Records Litig.*, 671 F.3d 881, 903 (9th Cir. 2011).

<sup>93</sup> *Hamdi*, 542 U.S. at 535.

<sup>94</sup> *In re Nat’l Sec. Agency Telecomm. Records Litig.*, 671 F.3d at 903 (9th Cir. 2011) (citing *People’s Mojahedin Org. of Iran v. Dep’t of State*, 327 F.3d 1238, 1241-42 (D.C. Cir. 2003) (permitting reliance upon secret evidence in designating a group as a terrorist organization); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (using classified information in *in camera* and *ex parte* proceedings to prove that a group is a terrorist organization did not violate due process); *Global Relief Found. Inc. v. O’Neill*, 315 F.3d 748, 754 (7th Cir. 2002) (statute not unconstitutional because it authorizes the use of classified evidence that may be considered *ex parte* by the district court).

demands.”<sup>95</sup> In *National Council of Resistance of Iran v. Department of State*, the D.C. Circuit upheld the constitutionality of congressionally approved *in camera* and *ex parte* proceedings under the Antiterrorism and Effective Death Penalty Act.<sup>96</sup>

Another U.S. court held that the “notice ‘need not disclose the classified information to be presented *in camera* and *ex parte* to the court under the [relevant statute]. This is within the privilege and the prerogative of the Executive, and we do not intend to compel a breach in the security which that branch is charged to protect.”<sup>97</sup> In light of congressionally and judicially approved *in camera* and *ex parte* proceedings, it is unlikely a court would find this portion of the TARC legislation unconstitutional.

### *B. Shifting Control of Targeted Killing Decisions*

In March of 2013, President Obama announced that he may be shifting the targeted killing program from the CIA to the Department of Defense (DOD).<sup>98</sup> This would actually be a significant step forward in terms of accountability and legality. The implementation and procedures of the TARC would not change

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<sup>95</sup> *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

<sup>96</sup> 251 F.3d 192, 209 (D.C. Cir. 2001).

<sup>97</sup> *In re Nat'l Sec. Agency Telecommunications Records Litig.*, 671 F.3d at 903 (citing *Nat'l Council of Resistance of Iran*, 251 F.3d at 208-09); *see also Hamdi*, 542 U.S. at 529 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976) in holding that “the process due in any given instance is determined by weighing ‘the private interest that will be affected by the official action’ against the Government’s asserted interest, ‘including the function involved’ and the burdens the Government would face in providing the greater process.”).

<sup>98</sup> Rafia Zakaria, *President Obama: The drones don't work, they just make it worse*, AL JAZEERA, Mar. 26, 2013, <http://www.aljazeera.com/indepth/opinion/2013/03/201332685936147309.html>.

however. In fact, TARC review would likely meet much less opposition and be a more fair proceeding if the DOD authorized the targeted killing decision instead of the CIA.

First of all, the President would have clear, ultimate authority over the consequences of targeted killings as Commander-in-Chief.<sup>99</sup> Second, the DOD cannot classify all operations as “covert.”<sup>100</sup> And finally, the program would be subject to oversight by other branches of the government.<sup>101</sup> Since the veil of secrecy would be easier to pull back if the DOD were responsible for the program, the TARC could come to conclusions based on significantly more information than it could if the program was still under CIA control. But whether the CIA or the DOD runs the targeted killing program, the TARC is still a necessary piece of America’s defense program in the minds of an ever-increasing number of people, both in the United States and abroad.

However, Congress has halted this change of control.<sup>102</sup> Both Senate and House appropriators have blocked funding measures aimed at transferring control of the CIA's stealth drone fleet to the Pentagon.<sup>103</sup> Some lawmakers, including Senate Intelligence Committee Chairwoman Dianne Feinstein, who was mentioned previously as a possible supporter of the TARC, have also objected to the shift of control to the Pentagon based on the CIA’s experience with using the drone fleet.<sup>104</sup>

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Kimberly Dozier, *Drone Attack Controversy: Obama Administration Wrestling With Whether To Target U.S. Terror Suspect*, HUFFINGTON POST, Feb. 10, 2013, [http://www.huffingtonpost.com/2014/02/10/drone-attack-controversy\\_n\\_4758546.html](http://www.huffingtonpost.com/2014/02/10/drone-attack-controversy_n_4758546.html)

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

It is clear that the CIA will retain control of the Government's targeted killing decisions for the foreseeable future. As a result, the creation of the TARC remains a priority in order to protect both the rights and lives of American citizens across the globe.

### VII. Criticisms of Targeted Attack Review

There are some legitimate critiques of the proposed TARC process. However, there are compelling concerns that outweigh those criticisms. The most serious concern is that the creation of a court to review targeted killing decisions would do more to "normalize" the targeted killing program than to restrain it.<sup>105</sup> It would show the Government that the American people approve of this extremely controversial procedure. However, the establishment of the TARC would not be a recognition by the American people that they approve of the targeted killing of United States citizens; rather, it is an acknowledgment of the reality that the Government uses this procedure and it needs to be regulated. The establishment of the TARC would be the first step in informing the Government that the American people do not trust the Government to effectively restrain itself in times of war one-hundred percent of the time.

Another criticism of creating a targeted killing review court is that U.S. courts can handle the claims, and thus the creation of a new court is unnecessary.<sup>106</sup> However, on April 4, 2014, Judge Rosemary Collyer granted a Motion to Dismiss on behalf of the Government in the District Court for the District of Columbia in a case in which the ACLU and the Center for Constitutional Rights represented the estates of three U.S. citizens whom the CIA and JSOC killed in

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<sup>105</sup> Jameel Jaffer, *Judicial Review of Targeted Killings*, 126 HARV. L. REV. F. 185, 185 (2013).

<sup>106</sup> *Id.* at 186.

Yemen in 2011.<sup>107</sup> In granting the Defendant's motion to dismiss, the court held that allowing the Plaintiffs to recover "against Defendants would hinder their ability in the future to act decisively and without hesitation in defense of U.S. interests."<sup>108</sup> But what is interesting about the court's decision is that it never explicitly stated that future plaintiffs would experience the same result. In fact, the court held that: "Whether Plaintiffs can claim damages against the United States is a decision for Congress and the Executive and not something to be granted by judicial implication."<sup>109</sup> Thus, at least one court seems to imply that if the TARC were to be created, future plaintiffs would be able to recover monetary damages if it is deemed that they are deprived of their due process rights as a result of a targeted killing.<sup>110</sup>

Critics of creating a new court believe that a traditional United States court has many advantages over the kind of review that would likely take place in a specialized court: the proceedings are adversarial rather than *ex parte*, and the hearings are open to the public.<sup>111</sup> The TARC would be an adversarial process, as there would be a JAG officer representing the plaintiff, but the open proceeding aspect is where this argument falls apart. This article has discussed at length the nearly unwavering deference given by courts to allow the Government significant latitude to claim a need for discretion in combating terrorism. It is unlikely that a U.S. court would permit national security secrets to become public during litigation.<sup>112</sup>

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<sup>107</sup> Al-Aulaqi v. Panetta, 2014 WL 1352452 at 18 (D.D.C. April 4, 2014).

<sup>108</sup> *Id.* at 17.

<sup>109</sup> *Id.* at 18.

<sup>110</sup> Assuming the legislation creating the TARC permitted monetary damages.

<sup>111</sup> Jaffer, *supra* note 105, at 186-87.

<sup>112</sup> See New York Times Co. v. U. S. Dep't of Justice, 915 F. Supp. 2d 508, 515-16 (S.D.N.Y. 2013) (U.S. District Court Judge Colleen McMahon held that although the Obama Administration has engaged

Another reason that some individuals believe that a separate court is unnecessary in this context is because federal courts frequently adjudicate wrongful death claims of citizens killed by law enforcement agents.<sup>113</sup> However, deciding whether a United States law enforcement official acted appropriately is vastly different from deciding whether a Government official acted reasonably in his or her counterterrorism efforts. That determination requires specialized expertise. While a former federal judge can help decide TARC claims, those with actual experience fighting terrorism must be included in the process in order to fairly judge those accused of acting unreasonably in their efforts to combat terrorism.

### Concluding Remarks

The TARC is a necessary component in the Government's counterterrorism strategy. It is clear that the TARC is needed in light of the recent developments in the War on Terror. Most importantly, this article has shown that the TARC could legally and effectively be implemented in the United States. This article was written with practicality in mind, and can hopefully be a blueprint for the creation of passable legislation by the United States Congress. If nothing else, it can serve as a springboard for discussion on what can be done to protect the rights of United States citizens during the continuing War on Terror. Ironically, the Attorney General perfectly encapsulated the theme of the TARC in his letter to members of Congress defending the Administration's drone policy when he quoted a portion of the following excerpt from the Supreme Court's decision in *Hamdi*:

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in public discussion on the use of targeted killing against its citizens, it has not waived its right to a FOIA exemption).

<sup>113</sup> Jaffer, *supra* note 105, at 187.

“We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”<sup>114</sup>

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<sup>114</sup> 542 U.S. at 536.