# Bouncing the Executive's Blank Check: Judicial Review and the Targeting of Citizens

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## I. INTRODUCTION

The U.S. government has afforded more judicial protection to those whom it seeks to wiretap than to those whom it seeks to kill—at least in the case of Anwar al-Awlaki. Al-Awlaki, a Muslim cleric, was born in New Mexico and never renounced his U.S. citizenship.[1] He was recently targeted in a lethal operation without any public constitutional or statutory process.[2] The Obama administration has since refused to release a secret memo that allegedly spelled out the legal rationale for this unprecedented strike, leaving little to be known about how the executive approved al-Awlaki as a legitimate target or what type of process, if any, he was given.[3] While defenders of an unfettered executive targeted killing program will argue for the *sui generis* nature of this case—given that al-Awlaki was both a noted leader within Al Qaeda in the Arabian Peninsula (AQAP) and an American citizen—there is a growing trend of individuals born or raised in the United States joining terror groups. This development, documented by, among others, the Council on Foreign Relations, the RAND Corporation, and the Bipartisan Policy Center, signals a growth in terror targets holding U.S. citizenship and, as the case law will bear out, a corresponding increase in the gap between current law and U.S. targeting policy.[4]

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[1] Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 7, 2010, at A12.

[2] *Id.*; Mark Mazzetti et al., *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1.

[3] Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1.

[4] *See, e.g.*, TONI JOHNSON, THREAT OF HOMEGROWN ISLAMIST TERRORISM (2010), *available at* http://www.cfr.org/terrorism/threat-homegrown-islamist-terrorism/p11509 (last updated Sept. 30, 2011) ("The number of terror incidents involving Islamic radicals who are U.S. citizens has seen an uptick in recent years."); BRIAN MICHAEL JENKINS, WOULD-BE WARRIORS: INCIDENTS OF JIHADIST TERRORIST RADICALIZATION IN THE UNITED STATES SINCE SEPTEMBER 11, 2001, vii (2010) ("Although the numbers are small, the 13 [domestic radicalization plots] in 2009 did indicate a marked increase in radicalization leading to criminal activity, up from an average of about four cases a year from 2002 to 2008. In 2009, there was also a marked increase in the number of individuals involved."); PETER BERGEN & BRUCE HOFFMAN, BIPARTISAN POLICY CTR., ASSESSING THE TERRORIST THREAT 14 (2010) ("*A key shift in the threat to the homeland since around the time President Barack Obama took office is the increasing 'Americanization' of the leadership of al-Qaeda and aligned groups, and the larger numbers of Americans attaching themselves to these groups*."); *see also Homegrown Terrorists Pose Growing Threat*, ASSOCIATED PRESS (Mar. 17, 2010), http://www.msnbc.msn.

The academic literature has dealt extensively with the legality of targeting foreign leaders.[5] However, the literature has not yet specifically addressed the domestic legal challenges of and the rights afforded to a U.S. citizen being targeted by the U.S. government extraterritorially. Importantly, this Article will not question the overall legality of drone strike operations, the legality of strikes beyond the "hot battlefields," or the government's assertion that these targeted killings do not constitute illegal assassinations, which are prohibited by Executive Order 12333.[6] Instead, it will focus exclusively on the process afforded to U.S. citizens in targeting operations.

After analyzing the relevant case law in Section II, this Article will argue that even in wartime, the President does not have a "blank check" when it comes to the rights of citizens.[7] The Supreme Court has afforded a basic level of inter-branch process to citizens, even those operating outside the United States. As illustrated in *Hamdi v. Rumsfeld*[8] and *Boumediene v. Bush*,[9] the Supreme Court has also avoided formalistic determinations of the process due to citizens and non-citizens alike in the post-9/11 era.

Despite this, the executive branch is currently operating under a publicly lawless regime when it comes to the targeted killing of citizens. The decision to target an individual is made, in its entirety, within the executive branch, which has been less than forthcoming about the procedures used or the criteria considered in these determinations.[10] Recently, Attorney General

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com/id/35906534/ns/us_news-security/. *But see* CHARLES KURZMAN, MUSLIM-AMERICAN TERRORISM IN THE DECADE SINCE 9/11, 2 (2012) ("[T]he rate of radicalization [among Muslim Americans] is far less than many feared in the aftermath of 9/11.").

[5] *See, e.g.*, Chris A. Anderson, *Assassination, Lawful Homicide, and the Butcher of Baghdad*, 13 HAMLINE J. PUB. L. & POL'Y 291 (1992); Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609 (1992); William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667 (2003).

[6] *See* Exec. Order No. 12,333, 46 Fed. Reg. 59,941, at 200 (Dec. 4, 1981) ("No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.").

[7] Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion) ("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.") (citation omitted).

[8] *Id.*

[9] 553 U.S. 723 (2008).

[10] Attorney General Holder recently offered only vague generalities:

> Let me be clear: an operation using lethal force in a foreign country, targeted against a U.S. citizen who is a senior operational leader of al Qaeda or associated forces, and who is actively engaged in planning to kill Americans, would be lawful *at least in the following circumstances*: First, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles.

Attorney General Eric Holder, Speech at Northwestern University School of Law (Mar. 5, 2012) (emphasis added) (transcript available at http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html).

Eric Holder agreed that such executive determinations must be subject to "robust oversight," but then declared only that the executive branch "regularly informs the appropriate members of Congress about our counterterrorism activities."[11] However, "informing" is quite different from "oversight" and there is no indication that members of Congress could object or intervene in any way if they deemed the executive's determination legally erroneous. Instead of adjudicating in this realm, the judicial branch—in a case brought by al-Awlaki's father in the United States—has thus far elected to defer to the political branches on this matter by invoking standing and political question doctrines.[12] We are thus left with an executive claiming carte blanche authority to designate any U.S. citizen a terrorist and duly execute him or her.

Section III will argue that the current targeting regime, as it relates to citizens, is problematic as both a constitutional and policy matter. The Section concludes by making the case for a judicial solution to this problem.

The normative crux of this Article, put forth in Section IV, calls for the creation of a circumscribed court to adjudicate, ex ante, the legality of targeting operations in specific cases where there is prior knowledge that the target is a U.S. citizen. The executive would also be required to certify the legality of the killing after the attack, including the infeasibility of capture. This inter-branch process would ensure that these individuals indeed pose a threat to the United States and that targeting is a last resort. An emergency procedure would allow the government to bypass this court in certain controlled situations, but would prescribe a robust post hoc review.

After laying out the court's procedures, Section V will evaluate the al-Awlaki killing under this proposed judicial framework. Section VI will next respond to potential criticisms of this level of judicial oversight—both from the military and intelligence establishment and the civil libertarian community.

Throughout, this Article will emphasize that only through a flexible judicial solution—a solution that is sensitive to both due process and national security concerns—can the practice of targeting citizens remain a lawful tool in the ongoing confrontation with global terrorism.

## II. A Review of the Protections Afforded to Citizens Abroad

On a basic level, the Constitution prohibits extrajudicial killings without any process. Under the Fourth Amendment, the government would need to establish that apprehension was either impossible or would threaten significant danger to law enforcement officials or others.[13] Similarly, the Due

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[11] *Id.*

[12] *See, e.g.*, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (ruling that al-Awlaki's father lacked standing to bring constitutional claims as his son's "next friend").

[13] *See, e.g.*, Idaho v. Horiuchi, 253 F.3d 359, 367 (9th Cir. 2001), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001) ("Law enforcement agents may use deadly force only if they reasona-

Process Clause of the Fifth Amendment protects "any person" from being "deprived of life, liberty, or property, without due process of law."[14] In the criminal law framework, one would be hard pressed to find cases where courts have allowed premeditated killing without a stringent danger and imminence standard.[15] But the Constitution is never to be observed in a vacuum. The existence of an ongoing war against a globally decentralized and often unidentifiable threat poses unique challenges to applying this law enforcement framework to targeted killings abroad.[16] However, two important developments in the case law suggest additional protections for citizen targets: (1) in the post-9/11 context, the Supreme Court has adopted a functional approach to assessing the process due to enemy combatants; and (2) citizenship, even if the combatant is abroad, has weighed heavily in favor of additional process.

### *A Functional Approach to Due Process*

Far from giving the executive an unfettered national security mandate, the Supreme Court has continuously entered the fray and opined on the level of process due to enemy combatants by using a distinctly functional analysis. The cases of *Hamdi v. Rumsfeld* and *Boumediene v. Bush* epitomize this reasoned approach to assessing due process.

In *Hamdi*, the Court was faced with a habeas corpus petition filed on behalf of a U.S. citizen detained while allegedly taking up arms with the Taliban in Afghanistan.[17] Justice O'Connor, writing for the plurality, explicitly rejected the notion that Hamdi's citizenship should preclude his detainment as an enemy combatant during wartime.[18] The opinion, however, laid the foundation for the use of a balancing test to determine the process due to citizens in national security decisions.[19] Specifically, the Court used a func-

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bly believe that killing a suspect is necessary to prevent him from causing immediate physical harm to the agents or others, or to keep him from escaping to an area where he is likely to cause physical harm in the future. Even then, deadly force may not be deployed until the suspect has been given a warning and an opportunity to surrender, unless giving a warning will materially increase the risk of bodily injury or escape.") (citation omitted).

[14] U.S. CONST. amend. V.

[15] *See*, *e.g.*, Tennessee v. Garner, 471 U.S. 1, 11 (1985) (holding that when the suspect imposes no immediate or lethal threat, firing at him to affect an arrest is only constitutional if "the officer has probable cause to believe that the suspect poses a threat of serious physical harm").

[16] *See* Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 677 (2004) ("Although the boundaries between 'war' and 'nonwar,' and between 'national security' and 'domestic issues,' have been eroding for some time, September 11 and its aftermath have highlighted the increasing incoherence and irrelevance of these traditional legal categories."); *see also* Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SEC. J. 145, 167 (2010) ("Targeted killing operations display more clearly than any other counterterrorism tactic the tension between labeling terrorism a *crime* and labeling it an *act of war*.").

[17] Hamdi v. Rumsfeld, 542 U.S. 507, 510–511 (2004) (plurality opinion).

[18] *Id.* at 509.

[19] *Id.* at 535.

tional due process balancing approach to determine which procedures were necessary in the case of the detainment of an American citizen.[20] Using this framework, Justice O'Connor held that due process required Hamdi to have a meaningful opportunity to challenge his enemy combatant status.[21] She forcefully asserted that Hamdi was entitled to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[22] But O'Connor also demonstrated significant flexibility by allowing a rebuttable presumption in favor of the government's evidence and allowing the government to admit hearsay in certain circumstances.[23]

Similarly, in the landmark case of *Boumediene v. Bush*, the Court adopted a pragmatic and functional approach to safeguarding individual liberty while simultaneously recognizing legitimate security concerns.[24] In his opinion for the Court, Justice Kennedy rejected any formalistic understanding of the extraterritorial reach of the Constitution.[25] Instead, he applied a flexible balancing test approach to determine whether non-citizen detainees being held in Guantánamo Bay, Cuba, were entitled to habeas corpus relief.[26] According to Justice Kennedy, this pragmatic approach requires a broad, fact-intensive inquiry into the "practical difficulties" of enforcing a constitutional right outside the United States.[27] Justice Kennedy listed three criteria that he deemed most relevant in determining the reach of the Suspension Clause to Guantánamo detainees: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.[28] Kennedy called for sensible rules that would allow the government to function within the rule of law while also acknowledging the national security concerns inherent in any habeas analysis. In establishing what Professor Gerald Neuman labeled the right to "global due process,"[29] Justice Kennedy fashioned a contextual balancing test for wartime process determinations.

The *Hamdi* and *Boumediene* opinions affirm the rejection of bright line formalism in favor of a functional constitutional approach to wartime extraterritorial due process analysis. While these cases dealt with the detention of a citizen, the argument for flexibility is even stronger in the context of the

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[20] *Id.* at 533–34.
[21] *Id.* at 535.
[22] *Id.* at 533 (citation omitted).
[23] *Id.* at 533–34.
[24] Boumediene v. Bush, 553 U.S. 723, 732 (2008).
[25] *Id.* at 770–71.
[26] *Id.*
[27] *Id.* at 759.
[28] *Id.* at 766.
[29] Gerald L. Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365 (2009).

targeted killing of a citizen. For in the latter situation, the damage is fatal, and thus irreversible.[30]

*Citizenship Guarantees Additional Process*

Within this functional analysis, the Supreme Court has weighted citizenship heavily, even in cases arising outside the United States. Historically, the Supreme Court has been reluctant to provide citizens who cast their lot alongside America's enemies with additional protections.[31] However, in the post-9/11 context, the Court has taken U.S. citizenship seriously in assessing the rights of individuals either captured or detained outside U.S. territory.

*Hamdi* and *Boumediene* are also instructive on this point. In assessing the process due to Yasser Hamdi, Justice O'Connor "reaffirm[ed] . . . the fundamental nature of a *citizen's* right to be free from involuntary confinement by his own government without due process of law."[32] Hamdi's citizenship did not end the inquiry for Justice O'Connor, but informed her balancing approach to assessing what type of process he was ultimately due. This holding explicitly affirms the proposition that due process, although in an adapted form, must be provided to citizens captured on the battlefield.

Similarly, in *Boumediene*, Justice Kennedy stressed the importance of citizenship in assessing constitutional rights extraterritorially in wartime, asserting a vision of the Constitution following the passport. Justice Kennedy affirmed the importance of citizenship by listing it as the first factor to consider when determining the reach of the Suspension Clause to Guantánamo detainees. According to the *Boumediene* Court, "the common thread" that links all these prior cases together is the "idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[33] Critical among these objective factors is the citizenship of the individual being harmed.

The relevance of these precedents to the targeting of citizens is clear: the constitutional right to due process is alive and well—regardless of geographic location. We now turn to what type of process is due.

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[30] Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (plurality opinion).

[31] *See Ex parte* Quirin, 317 U.S. 1 (1942). In deciding whether a U.S. military tribunal had jurisdiction over German saboteurs captured in the United States during World War II, Chief Justice Harlan Stone confronted the issue of whether one of the saboteurs, Herbert Hans Haupt, should receive additional protection due to his American citizenship. Stone rejected the argument that citizenship should afford Haupt an Article III trial. While Stone's opinion seems to suggest that a U.S. citizen would receive no additional process during an ongoing war if classified as an "enemy belligerent," it is important to note that, in contrast to citizens like al-Awlaki, the German saboteurs did receive judicial process in the form of their military trials.

[32] *Hamdi*, 542 U.S. at 531 (emphasis added).

[33] *Boumediene*, 553 U.S. at 727.

## III. Bring in the Courts: Bringing Judicial Legitimacy to Targeted Killings

The function of this Article is not to argue that targeted killing should be removed from the toolbox of American military options. Targeted killing as a military tactic is here to stay.[34] Targeting strikes have robust bipartisan political support and have become an increasingly relied upon weapon as the United States decreases its presence in Iraq and Afghanistan.[35] The argument being asserted here, therefore, is that in light of the protections the Constitution affords U.S. citizens, there must be a degree of inter-branch process when the government targets such individuals.

The current intra-executive process afforded to U.S. citizens is not only unlawful, but also dangerous.[36] Justice O'Connor acknowledged the danger inherent in exclusively intra-branch process in *Hamdi* when she asserted that an interrogator is not a neutral decision-maker as the "even purportedly fair adjudicators are disqualified by their interest in the controversy."[37] In rejecting the government's argument that a "separation of powers" analysis mandates a heavily circumscribed role for the courts in these circumstances, Justice O'Connor contended that, in times of conflict, the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake."[38] Similarly, Justice Kennedy was unequivocal in *Boumediene* about the right of courts to enforce the Constitution even in times of war. Quoting Chief Justice Marshall in *Marbury v. Madison*,[39] Kennedy argued that holding "that the political branches may switch the constitution on or off at will would lead to a regime in which they, not this Court, say 'what the law is.' "[40] This sentiment is very relevant to our targeted killing analysis: in the realm of targeted killing, where the deprivation is of one's life, the absence of any "neutral decision-maker" outside the executive branch is a clear violation of due process guaranteed by the Constitution.

Justices O'Connor and Kennedy are pointing to a dangerous institutional tension inherent in any intra-executive process regime. Targeting decisions are no different; indeed, the goal of those charged with targeting citizens like al-Awlaki is not to strike a delicate balance between security

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[34] *See* Peter Bergen & Katherine Tiedemann, New Am. Found., The Year of the Drone: An Analysis of the U.S. Drone Strikes in Pakistan 2004–2010, at 6 (2010), *available at* http://www.newamerica.net/publications/policy/the_year_of_the_drone ("Despite the controversy, drone strikes are likely to remain a critical tool for the United States to disrupt al Qaeda and Taliban operations and leadership structures.").

[35] *Id.*

[36] Both the European Court of Human Rights and the Supreme Court of Israel have addressed forms of targeted killing. *See* McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) ¶¶ 157–64 (1995); HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Israel, slip op. at ¶¶ 40, 54 (2005) (Isr.).

[37] *Hamdi*, 542 U.S. at 538 (citations omitted) (internal quotation marks omitted).

[38] *Id.* at 536 (citations omitted).

[39] 5 U.S. 137, 177 (1803).

[40] Boumediene v. Bush, 553 U.S. 723, 727 (2008).

and liberty but rather, quite single-mindedly, to prevent attacks on the United States.[41] In describing the precarious nature of covert actions, James Baker, a distinguished military judge, noted, "the twin necessities of secrecy and speed may pull as they do against the competing interests of deliberate review, dissent, and informed accountable decision-making."[42] While Judge Baker concluded that these risks "magnify the importance of a meaningful process of ongoing executive appraisal," he overlooked the institutional tension, seized upon by Justices O'Connor and Kennedy, which would preclude the type of process that he was advocating.[43]

Although there may be a role for Congress in such instances, a legislative warrant for specific cases would likely be cumbersome, carry significant security risks, and may violate the spirit of the Bill of Attainder Clause, which prohibits the legislature from performing judicial or executive functions. The current inter-branch process for covert actions, in which the President must make a finding and notify the leaders of Congress and the intelligence committees, is entirely ex post and also has not been proven to provide a meaningful check on executive power.[44] Moreover, most politicians are unqualified to make the necessary legal judgments that these situations require.

Solutions calling for the expatriation of citizens deemed to be terrorists are fraught with judicial complications and set very dangerous precedents for citizenship revocation.[45] Any post-deprivation process, such as a *Bivens*-style action, for a targeted attack would also be problematic.[46] Government officials charged with carrying out these attacks might be hesitant to do so if there were a threat of prosecution. Moreover, post-deprivation process for a target would be effectively meaningless in the wake of a successful attack.

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[41] *See* Alan Dershowitz, *Tortured Reasoning*, *in* TORTURE: A COLLECTION 257 (Sanford Levinson ed., 2004).

[42] James E. Baker, *Covert Action: United States Law in Substance, Process, and Practice*, *in* OXFORD HANDBOOK OF NATIONAL SECURITY INTELLIGENCE 587, 597–98 (Locke K. Johnson ed., 2010).

[43] *See id.*

[44] The President is required by 50 U.S.C. § 413(a)(1) to "ensure that the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States." However, under 50 U.S.C. § 413b(c)(2), the President may elect to report instead to the "Gang of Eight" when he thinks "it is essential to limit access" for information about a covert action. This group consists of the House and Senate leadership as well as the leadership of the House and Senate intelligence committees. There is no vote and all the individuals are sworn to secrecy.

[45] The Constitution prohibits the government from denationalizing citizens without consent. Justice Warren, in *Trop v. Dulles*, 356 U.S. 86, 92–93 (1958), stated, "[T]he deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship . . . his fundamental right of citizenship is secure."

[46] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (allowing plaintiff to seek damages from officials who, he claimed, had violated his Fourth Amendment rights).

Rather, as recognized by the Founders in the Fourth Amendment, balancing the needs of security against the imperatives of liberty is a traditional role for judges to play. Two scholars of national security law recently highlighted the value of judicial inclusion in targeting decisions: "Judicial control of targeted killing could increase the accuracy of target selection, reducing the danger of mistaken or illegal destruction of lives, limbs, and property. Independent judges who double-check targeting decisions could catch errors and cause executive officials to avoid making them in the first place."[47] Judges are both knowledgeable in the law and accustomed to dealing with sensitive security considerations. These qualifications make them ideal candidates to ensure that the executive exercises constitutional restraint when targeting citizens.

Reforming the decision-making process for executing American citizens to allow for judicial oversight would restore the separation of powers framework envisioned by the Founders and increase democratic legitimacy by placing these determinations on steadier constitutional ground. For those fearful of judicial encroachment on executive war-making powers, there is a strong argument that this will actually strengthen the President and empower him to take decisive action without worrying about the judicial consequences. As Justice Kennedy put it, "the exercise of [executive] powers is vindicated, not eroded, when confirmed by the Judicial Branch."[48] Now, we will turn to what this judicial involvement would look like.

## IV. Citizen Targeting Review Court (CTRC)

While the current intra-executive process afforded to U.S. citizens falls short of the process envisioned by the Constitution, it is highly impracticable to provide a traditional criminal trial for a suspected terrorist operating in Yemen or Pakistan. Instead, this Article advocates for the creation of a specialized court to adjudicate these claims ex ante when the government has identified a citizen in advance for lethal targeting.[49]

The creation of the Citizen Targeting Review Court (CTRC) would anchor targeted killings within the rule of law.[50] The CTRC would conduct a similar type of functional analysis as that conducted by the Supreme Court in *Hamdi* and *Boumediene*, but one that is adapted to balance the delicate

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[47] *See* Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 Cardozo L. Rev. 405, 438 (2009).

[48] Boumediene v. Bush, 553 U.S. 723, 797 (2008).

[49] Therefore, in a case where the government has no reason to know that an individual it is targeting is a citizen, it would not have to make its case before the CTRC.

[50] This type of court would likely need to be created by Congress, either through an expansion of FISA or a new statute entirely. The U.S. Constitution vests Congress with the authority "[t]o constitute Tribunals inferior to the supreme Court." U.S. Const. art. I, § 8. This power is further articulated in Article III, where judicial powers are vested in "such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1.

security and liberty concerns of targeted killing determinations. At the core of this model is the fact that there will be a "neutral decisionmaker" overseeing this process—the CTRC Judge—a requirement emphasized by Justice O'Connor in *Hamdi*.[51]

The federal system "already ha[s] specialized courts . . . for particularly complex issues requiring unique knowledge, including bankruptcy, patents, copyrights, tax, and international trade."[52] The most relevant model for the CTRC would be the Foreign Intelligence Surveillance Court (FISC), which was created by the Foreign Intelligence Surveillance Act (FISA) to provide a statutory framework for the use of electronic surveillance in the context of foreign intelligence gathering.[53]

The government must come before the FISC, which is comprised of federal judges, and seek approval for electronic surveillance, physical searches, pen registers, trap and trace devices, or orders for production of tangible things anywhere within the United States under FISA.[54] Proceedings before the FISC are ex parte and non-adversarial. The court hears evidence presented solely by the Department of Justice. The FISC is structured so as to operate "as expeditiously as possible" given the time sensitivity of surveillance operations.[55]

### *CTRC Procedures*

The CTRC would function in a similar manner to the FISC, thereby providing the targeted killing analysis with neutral and detached oversight. Were the executive branch to target a citizen, it would need to present its reasoning to a CTRC judge. This judge would be a Senate-confirmed Article III judge with prior national security expertise to appreciate the military concerns brought about by this added level of process. The CTRC judges would issue opinions to establish standards and to guide future decisions. Barring opposition from the executive branch, redacted versions of these opinions would be released to the public. The CTRC, like the FISC, would place the judge at the core of the model. The CTRC judge single-handedly stands in the way of unchecked executive power to target citizens. Therefore, it is vital that the CTRC not be just a rubber stamp for executive action,

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[51] Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (plurality opinion).

[52] HARVEY RISHIKOF, PROGRESSIVE POLICY INST., A FEDERAL TERRORISM COURT 2 (2007).

[53] 50 U.S.C. § 1801 (2006); *see also* Op-Ed., *Lethal Force Under Law*, N.Y. TIMES, Oct. 10, 2010, at WK7 ("The government could establish a court like the Foreign Intelligence Surveillance Court, which authorizes wiretaps on foreign agents inside the United States. Before it adds people to its target list and begins tracking them, the government could take its evidence to this court behind closed doors—along with proof of its compliance with international law—and get the equivalent of a judicial warrant in a timely and efficient way.").

[54] ELIZABETH B. BAZAN, CONG. RESEARCH SERV., THE FOREIGN INTELLIGENCE SURVEILLANCE ACT: AN OVERVIEW OF SELECTED ISSUES 11 (2008).

[55] *Id.* at 7.

a charge that has been levied on the FISC in light of its high approval rate.[56] A high approval rate alone, however, does not demonstrate excessive judicial acquiescence, for the mere existence of this mechanism of oversight would serve to filter out weaker requests from executive officials.

To help ensure that the CTRC does not become a rubber stamp, an expert bar of federal and military defense counsel should be formed to represent the interests of the citizen being targeted. These individuals would be approved by the Chief Justice of the Supreme Court, much like the judges on the FISC, and would have relevant experience either as former military lawyers, court martial judges, or attorneys with detainee litigation experience. These lawyers would be appointed to represent the targeted citizens as guardians *ad litem*, a procedure normally reserved for the representation of minors or incompetents. Although there would be no client consultation or instructions, the lawyers would proceed with the assumption that the targeted citizen prefers life. These attorneys would need to be approved for security clearance and would be given access to the government's intelligence. The government would be required to turn over to the accused's defense attorney any exculpatory intelligence regarding the targeted citizen.

While there would be a judge, and perhaps a defense lawyer, this would not be a traditional trial. First, notice or an adversarial hearing before a neutral decision-maker to a suspected terrorist operating in Yemen would be impractical at best and dangerous at worst. While there would be value to allowing a suspected terrorist to turn himself in, notice that one has been slated for targeted killing may undermine the government's ability to pursue its objectives.[57] In the civil and criminal context, courts have acknowledged that notice is a malleable concept that must be adapted to different contexts on a case-by-case basis.[58] Similarly, in the law of war context, notice is not a necessary precondition to a legitimate resort to self-defense.

Moreover, even with actual notice, a terrorist, such as Anwar al-Awlaki, is not likely to turn himself in upon hearing that the government is targeting him. It is well known that the government has aggressively used drones to target terrorists over the past few years, yet there are few cases of

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[56] In 2009, for example, the FISC approved 1320 out of 1329 government requests for electronic surveillance. *See* FISA ANN. REP. (2009), *available at* http://www.fas.org/irp/agency/doj/fisa/2009rept.pdf.

[57] At least one commentator has called for a public announcement of a trial. *See* David Husband, Note, *The Targeted Killing of Al-Awlaki,* HARV. NAT'L SECURITY J. (Nov. 26, 2011), http://harvardnsj.org/2011/11/the-targeted-killing-of-al-awlaki/ ("The fact that a trial is occurring must be publically announced, including the name of the individual who is considered for targeting."). However, this would serve to endanger the operation.

[58] *See, e.g.*, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (holding that the government must provide only "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action."); *see also* Gary Lawson et al., *"Oh Lord, Please Don't Let Me Be Misunderstood!"*: *Rediscovering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 NOTRE DAME L. REV. 1, 14 (2005) (concluding, based on an extensive historical survey of centuries of case law, that the basis of procedural due process is "a search for what procedures are fair under the circumstances of each particular case").

terrorists turning themselves in.[59] While some may argue that public notice would allow others to challenge the targeting determination on the targeted citizen's behalf, this would not serve as much of a protection, as traditional Article III courts would likely defer to the executive in such cases on standing or non-justiciability grounds.[60]

A major drawback to the CTRC is that this lack of notice leaves room for error. A government mistake could involve either the identity of the individual or the individual's affiliation with a given organization. This is a real possibility, and one that should not be ignored. The best way to deal with this situation, however, is not to tip off a potentially dangerous terrorist as to the government's intentions. Rather, by creating rigorous ex parte protections on the back end, the government can ensure that this individual should indeed be targeted. Finally, while the lack of notice does leave some room for error, the CTRC is a significant improvement when compared to the current system.

### *General Targeting Phase*

These protections would include two separate phases of judicial CTRC oversight: the General Targeting Phase (GTP) and the Situational Targeting Phase (STP). The GTP acts as a gatekeeper. A CTRC judge must approve an individual as a threshold question in the targeting analysis. The STP focuses on the circumstances of the attack itself. It consists of a report submitted by the General Counsel of the CIA or the Department of Defense, depending on which agency launched the strike, to the CTRC after the attack to ensure that the circumstances during the actual attack allowed for legal targeting. Except in the case of an emergency, which will be addressed below, an operation targeting a citizen would only be legal after a CTRC judge ruled in the government's favor in both the GTP and STP.

The GTP is a threshold hearing to establish that this individual poses an ongoing threat to the United States, thus meriting such drastic action. This is not a general "kill list" that allows an individual to be targeted at any place at any time.[61] As such, little needs to be known about the individual's whereabouts or about the opportunity for capture at this phase, so long as the government is able to demonstrate the danger that this individual poses to national security. The government must demonstrate that (1) the citizen target either is "part of" or provided "substantial support" to al-Qaeda, the Taliban, or associated forces; (2) the citizen target is operational and actively

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[59] One such case did occur after the raid that killed Osama Bin Laden. *See* Glen Carey, *Saudi Al-Qaeda Militant Surrenders to Authorities*, *SPA Reports*, BLOOMBERG NEWS (May 4, 2011), http://www.bloomberg.com/news/2011-05-04/saudi-al-qaeda-militant-surrenders-to-authorities-spa-reports.html.

[60] *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 15 (D.D.C. 2010) (ruling that al-Aulaqi's father lacked standing to bring constitutional claims as his son's "next friend").

[61] *See, e.g.*, Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 312 (1967) (noting that "opposition to general searches is a fundamental of our heritage and of the history of Anglo-Saxon legal principles").

engaged in planning, commanding, or carrying out attacks on the United States; and (3) the threat posed by the citizen target's action is imminent.[62]

The first factor limits the CTRC's jurisdiction to cases where Congress recognizes the need for non-criminal law enforcement mechanisms. It establishes whether the target satisfies the nexus requirement of the Authorization for Use of Military Force (AUMF), the Congressional authorization to pursue the individuals, organizations, and nations responsible for the 9/11 attacks.[63] The CTRC judge will analyze whether the target's organization falls under the AUMF,[64] as well as whether the target's affiliation with that organization is sufficient to be covered by the legislation.[65] In making this determination, the CTRC judge would rely upon the D.C. Circuit case law that addresses these questions.

To satisfy the second requirement, the government must convince the CTRC judge that the individual is actively engaged in terrorist activity intended to harm the United States. Importantly, the imminence requirement of the third factor is not defined exclusively by immediacy.[66] Rather, an individual operationally planning to harm the United States in the near future would satisfy the imminence requirement. This requirement could also be satisfied by a finding that the individual was the operational leader of a group that sought to attack the United States whenever it could, even if there is no proof that the target is involved in planning an attack at the time of the targeting.

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[62] This court would not adjudicate on macro issues that are traditionally left to the political branches, such as defining the type of conflict and deciding which system of law governs that conflict. Nor will it make assessments as to whether an attack complies with the international legal obligations of the United States.

[63] Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001) ("[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.").

[64] Borrowing from the detention context, the U.S. District Court for the District of Columbia has agreed with the government that the "President also has the authority to detain persons who were part of Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act in aid of such enemy armed forces." Anam v. Obama, 653 F. Supp. 2d 62, 64 (D.D.C. 2009) (citation omitted).

[65] *See, e.g.*, Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010) (stating that operating within al-Qaeda's formal command structure is sufficient but not necessary to show that the individual is part of the organization); Al Kandari v. United States, 744 F. Supp. 2d 11, 22 (D.D.C. 2010) ("[P]roof that an individual actually fought for or on behalf of al Qaeda or the Taliban, while sufficient, is not required to demonstrate that an individual is 'part of' such enemy forces.").

[66] The Obama administration apparently adopted similar "imminence" standards. *See* John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011) ("We are finding increasing recognition in the international community that a more flexible understanding of 'imminence' may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts.").

The hearing for the GTP would involve government attorneys making the case for the targeting in front of a CTRC judge in just the same way in which government attorneys present their evidence to FISC. The CTRC judge would oversee this adjudication to assess the individual's involvement in terrorist activities and to gauge the nature of the danger he poses to the country's national security. The evidence would consist of intelligence in the form of affidavits, exhibits, documentary material, and demonstrative evidence. Since CTRC judges are not equipped to analyze intelligence reports, the government should receive the benefit of the doubt in evidentiary rulings.

The government's strong evidentiary advantage is counterbalanced by its high burden of proof. The most fitting standard for this type of adjudication would be the "beyond a reasonable doubt" standard in criminal law. A high standard is necessary, for this proceeding would involve the life of a citizen. The permanence of the act, coupled with the ex parte nature of the proceedings, both call for added process. While in *Hamdi*, Justice O'Connor allowed for a presumption in favor of the government in habeas proceedings, these aforementioned factors necessitate a high burden of proof.[67] Thus, using its evidentiary advantages, the government, in order to pass the GTP, must prove beyond a reasonable doubt that the targeted individual is a member of an AUMF-covered group and is operationally involved in planning an imminent attack against the United States.

*Situational Targeting Phase*

Once the CTRC judge approves an individual in the GTP, that individual is considered a legitimate target. However, the CTRC must also approve the targeted individual in the Situational Targeting Phase (STP) to establish the legality of the operation. The crucial difference between the GTP and the STP is that the latter is conducted post facto. After an attack, the General Counsel of either the CIA or the Department of Defense, depending on which agency initiated the attack, must submit a report to the CTRC (1) detailing evidence that the individual targeted was still operational at the time of the attack; and (2) affirming that capture was not an option. If it is clear that the government launched an illegal strike, the CTRC judge can recommend internal discipline or, in cases of blatant disregard for the standards for targeting, referral to the Department of Justice for criminal proceedings.

The STP factors are all "situational" in that they must be assessed at the time of the targeting. This phase must be post facto, because real-time judicial oversight in the form of an Article III judge making the ultimate decision would be a significant encroachment on the executive's ability to execute a war as Commander in Chief, in addition to being logistically problematic. A post facto report to the CTRC would ensure that these situational

[67] Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004) (plurality opinion).

factors are met while preserving the executive's ability to adequately protect national security.

The first factor requires the government to demonstrate that the individual is still operational. This factor is particularly important in light of the fluid nature of terrorism and terrorist organizations. According to Gabriella Blum and Phillip Heymann, "[j]oining a terrorist organization does not necessarily have a[n] . . . on/off switch; individuals might join the organization or support it in some ways or for some time, but then go back to their ordinary business without any ritual marking their joining or departing."[68] Demonstrating that an individual is still operational is not an easy task in the fog of war. However, approval by the CTRC judge in the GTP does not provide an unfettered kill warrant. As such, the government must, at the very least, make a showing that the target is still seeking to carry out attacks on the United States. The government can satisfy its burden by demonstrating such things as a pattern of terrorist behavior, sustained and knowing association with other known militants, or established connections to ongoing plots to attack the United States.

The second factor involves the feasibility of capture. This is a particularly complex issue, for technically almost every individual *can* be captured if the military truly wants to capture him. Thus, the feasibility of capture depends on how much the military is willing to sacrifice for that capture based upon how risky the operation would be. This is a question that requires deference to the military. The standard for the military should be low: would a capture operation place even one soldier in serious mortal danger? If so, targeting would be legitimate. The CTRC judge should take the military assessment of the risks of a capture operation at face value, for this is an exclusively tactical analysis that should not be in the hands of a judicial authority. This factor is not meant to provide a judicial veto over the power of the executive to protect Americans, but is meant to ensure that the military or the CIA has made a good faith effort to target an American citizen only when it has no other viable options.

### *Emergency Targeting Mechanism*

Although most targeting operations involve long periods of surveillance before engagement, there may be certain situations in which the government cannot afford to wait until the CTRC judge approves a citizen target in the GTP. In these emergency situations, there will be a mechanism for the government to protect national security while respecting the rule of law and the additional process offered to U.S. citizens.

This mechanism is modeled after the emergency orders provision in the FISA statute.[69] Similar to the FISA emergency order provision, there must be certain safeguards to ensure that the exception does not swallow the rule

[68] Blum & Heymann, *supra* note 16, at 147.
[69] *See* 50 U.S.C. § 1805(e) (2006).

and that this procedure is only used in very specific and circumscribed situations. In order for the CIA or the military to execute an attack without ex ante CTRC approval, the Attorney General must authorize the operation. The Attorney General can only authorize this operation if he or she (1) reasonably determines that an emergency situation exists with respect to the individual being targeted; (2) reasonably determines that the factual basis for the issuance of an order exists, in that the target would have been approved through the GTP; (3) informs a CTRC judge at the time of such authorization that the decision has been made to target this U.S. citizen; and (4) reports back to the CTRC judge within seven days with the justification for the operation.[70] Moreover, the Inspector General of the CIA or the military, depending on which authority oversaw the strike, must produce a post hoc report investigating the basis for the attack and the legitimacy thereof.[71] The Inspectors General, like the CTRC judge in the STP, can recommend internal discipline or, in cases of blatant disregard for the standards for targeting, referral to the Department of Justice for criminal proceedings. While these officials are no substitute for an ex ante judicial proceeding, they do have a significant degree of independence. This mechanism, combined with the mandatory STP report submitted to the CTRC, will ensure that the United States can respond to serious time-sensitive threats posed by its own citizens, while also respecting the rights and process afforded to those citizens.

## V. The Al-Awlaki Attack and the CTRC

On September 30, 2011, hellfire missiles fired from a CIA drone ended a two-year manhunt for Anwar al-Awlaki. Al-Awlaki was not the only citizen killed in the attack. Samir Khan, the editor of al-Qaeda's English-language Internet magazine that inspired terrorists with catchy titles such as "Make a Bomb in the Kitchen of Your Mom," was also killed in the strike.[72] This Section will evaluate this attack under the CTRC model.

The government would first need to make the case that Al Qaeda in the Arabian Peninsula (AQAP), al-Awlaki's organization, is either part of al Qaeda or its associated forces. There has been much debate on this topic, but there is some consensus that AQAP is either "part-and-parcel of al Qaeda" or "an affiliated but independent franchise" of the group.[73] The government would then present evidence to the CTRC regarding al-Awlaki's operational role within AQAP, not just his role as a propagandist. Evidence

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[70] *Id.*

[71] Radsan and Murphy proposed a similar mechanism. The main difference is that the authors there called for the CIA Inspector General to be the only form of "independent" process instead of a last resort in an emergency situation. Murphy & Radsan, *supra* note 47, at 448.

[72] Mazzetti et al., *supra* note 2, at 1.

[73] Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, *in* 13 Yearbook of International Humanitarian Law 3 (M.N. Schmitt et al. eds., 2010).

as to his connection to Major Nidal Malik Hasan, the Fort Hood shooter, and Umar Farouk Abdulmutallab, the 'underwear bomber' who attempted to detonate a U.S. passenger jet en route to Detroit, would be brought before the CTRC judge.[74] Other evidence that would help establish al-Awlaki's ongoing operational role may include a declaration filed by the government in connection with the aforementioned domestic lawsuit asserting that: "Anwar al-Aulaqi . . . is playing a key role in setting the strategic direction for AQAP. [A]l-Aulaqi has also recruited individuals to join AQAP, facilitated training at camps in Yemen in support of acts of terrorism, and helped focus AQAP's attention on planning attacks on US interests."[75] With the government's evidentiary advantage and al-Awlaki's extensive terrorism résumé, a CTRC judge would likely find al-Awlaki operational beyond a reasonable doubt. Under the expanded understanding of imminence, these past actions, combined with his ongoing role within the AQAP hierarchy, a group dedicated to inflicting harm on the United States, would also have satisfied the third factor in the GTP analysis.

In contrast to al-Awlaki, a CTRC judge would likely not have approved a strike on Samir Khan in the GTP, without additional non-public information that would establish his operational role within AQAP. Being a magazine editor is distinct from having an operational role. In fact, a federal grand jury—convened to consider evidence against Khan more than a year before the strike—refused to return an indictment, casting further doubt on his operational role.[76]

While al-Awlaki would have likely been approved in the GTP, the killing would only be legal if the CTRC approved his targeting in the STP as well. The STP ensures that the attack was legal given the actual circumstances at the time of the strike. The General Counsel of the CIA would have to submit a post facto report to the CTRC (1) detailing the evidence that the individual targeted was still operational at the time of the attack; and (2) affirming that capture was not an option. This attack would only be legal if the CTRC approved this report.

The government could have satisfied the first factor by demonstrating that al-Awlaki was involved in ongoing plots and that he continued to knowingly associate with other known militants. His continued involvement is suggested by the fact that al-Qaeda's chief bomb maker was killed in the

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[74] Mazzetti et al., *supra* note 2, at 1.

[75] Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss at 6, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-1469), 2010 WL 3863135.

[76] *See* Dina Temple-Raston, *Grand Jury Focuses on N.C. Man Tied to Jihad Magazine*, Nat'l Pub. Radio (Aug. 18, 2010), http://www.npr.org/templates/story/story.php?storyId=129263809; Suzanne Kelly, *Samir Khan: Proud to Be an American Traitor*, Cnn (Sept. 30, 2011), http://articles.cnn.com/2011-09-30/middleeast/world_meast_analysis-yemen-samir-khan_1_samir-khan-aqap-inspire-magazine?_s=PM:MIDDLEEAST.

same strike.[77] The government would likely have been able to meet the second factor as well. A capture operation in Yemen, a country known both for its lawlessness and tribal loyalties,[78] would have involved serious danger to American soldiers. Corroboration of the infeasibility of the mission from military personnel would strengthen the government's argument. All in all, the attack on al-Awlaki would probably have met the CTRC's requirements, while a strike aimed exclusively at Samir Khan would likely not have met these requirements.

## VI. Responding to Potential Criticism of the CTRC

Naturally, a proposal calling for the creation of a new judicial body to oversee specific executive targeted killings would likely raise concerns both from the national security community and from the civil libertarian community. This section will attempt to preempt and address some of these concerns.

### *National Security Concerns*

A major concern for the military and intelligence community would likely be the effect of the CTRC on operational freedom of movement. Assessing the effect on targeting operations is difficult, as little is known publicly about the current procedures used for targeting individuals.[79] For the military and the CIA, every indication, both from press and government accounts, suggests that there are very rigorous controls on the targeting process, though intra-executive in nature.[80] For example, according to one press account, an individual can only become a military target when his enemy status is confirmed by "two verifiable human sources" and "substantial additional evidence."[81] Moreover, according to publicly released documents, before every operation, the military undergoes a "Joint Targeting Cycle" which requires (1) identification of the military objective of an operation, (2) target development and prioritization, (3) capabilities analysis, (4) commander's decision and force assignment, (5) mission planning and force exe-

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[77] *Top Al Qaeda Bombmaker Dead in Drone Strike*, CBS News (Sept.30, 2011), http://www.cbsnews.com/stories/2011/09/30/national/main20114215.shtml?tag=contentBody;storyMediaBox.

[78] Mazzetti et al., *supra* note 2, at 1.

[79] *See* Tara McKelvey, *Inside the Killing Machine*, Newsweek (Feb. 13, 2011), http://www.newsweek.com/2011/02/13/inside-the-killing-machine.html (interviewing former Acting General Counsel of the CIA, John Rizzo, on the procedures governing CIA targeting strikes).

[80] *Id.*; *see also* Harold Koh, Legal Adviser to the U.S. State Dep't, Remarks to the American Society of International Law (Mar. 25, 2010) ("Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise.").

[81] James Risen, *Drug Chieftains Tied to Taliban Are U.S. Targets*, N.Y. Times, Aug. 10, 2009, at A1.

cution, and (6) assessment.[82] Before an attack, the military must "engage the intelligence community (IC) and other organizations' subject-matter experts (SMEs) to establish a reasonable level of confidence in a candidate target's functional characterization based on a review of the supporting intelligence"[83] and perform a collateral damage assessment.[84]

Although not as public, the CIA apparently also has robust internal targeting procedures. Former CIA Director Leon Panetta apparently approved each strike, "sometimes reversing his decision or reauthorizing a target if the situation on the ground change[d]."[85] According to one journalistic account, "[a] look at the bureaucracy behind the operations reveals that it is multilayered and methodical, run by a corps of civil servants who carry out their duties in a professional manner."[86] Lawyers draft cables based on available intelligence to justify targeting an individual. These cables are known to be "legalistic and carefully argued, often running up to five pages."[87]

The purpose of surveying the known targeting procedures is to demonstrate that there is already a rigorous intra-executive process in place, and therefore much of the information required for CTRC approval is already being accumulated. Many, if not most, targeting operations involve long-term efforts to locate specific individuals. For example, al-Awlaki was initially approved for targeted killing in April 2010, but was not killed until nearly a year and half later. There is already a list of prioritized targets, known as the Joint Integrated Prioritized Target List (JIPTL), who "can be captured or killed at any time."[88] Any citizen on that list could be put through the GTP with hearings before the CTRC.

The CTRC would be a novel structure—one that the military and the CIA would likely and understandably perceive as a judicial impediment to their mission of protecting national security. This Article does not make the claim that the CTRC would have no operational effect. Rather, it will and it should. That effect will force the military and the CIA to think carefully before targeting U.S. citizens. However, the operational effect can and will be mitigated to protect national security. For those operations where the time horizon is more condensed—in such a way as to make formal GTP hearings before the CTRC impossible—there is the emergency mechanism. Importantly, independent judicial review over targeting, while novel in the American context, has already been implemented in Israel, a country that

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[82] U.S. JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT DOCTRINE FOR TARGETING II-3–10 (2007), *available at* http://www.bits.de/NRANEU/others/jp-doctrine/jp3_60(02).pdf.

[83] *Id.* at II-7.

[84] *Id.* at II-10.

[85] Peter Finn & Joby Warrick, *Under Panetta, a More Aggressive CIA*, WASH. POST, Mar. 21, 2010, at A8.

[86] McKelvey, *supra* note 79, at 2.

[87] *Id.*

[88] Risen, *supra* note 81, at 1.

faces serious security exigencies as well.[89] While the CTRC may present certain operational challenges, the value of American citizenship is worth the cost in operational efficiency. Due process guarantees more than classified memos exchanged between executive branch lawyers. It guarantees a substantive check on the executive branch before it targets one of its own citizens.

*Civil Libertarian Concerns*

On the other hand, civil libertarians may remain unconvinced that the CTRC adequately fills the existing due process void. One potential civil libertarian concern may be that establishing a court to review targeted killings will further legitimize and institutionalize a program that some critics believe to be illegal. While analyzing the legality of the general targeting program is beyond the scope of this Article, this criticism overlooks a clear policy reality: targeted killings—of both citizens and non-citizens—are here to stay.[90] As such, the alternative to the creation of the CTRC is not the cessation of targeted killings, but the continuation of an entirely intra-executive process for these targeting decisions. While the creation of the CTRC would most certainly institutionalize targeted killings, it would also regulate them and provide an important degree of process.

Another potential concern from the civil libertarian perspective is that the CTRC would unintentionally produce more targeted killings of American citizens abroad. This concern has little merit. The United States is already targeting citizens abroad, as evidenced by the al-Awlaki attack. The creation of the CTRC would insert an additional step—a "speed bump"—into the targeting calculus that will ensure that government lawyers think hard before taking such action against a citizen. Any subsequent increase in the number of citizens targeted would be less a function of the CTRC's added due process than of a continuing overall rise in the number of citizens joining terrorism groups, as documented by numerous studies.[91]

The existence of this trend also counters the possible criticism that establishing a judicial body, such as the CTRC, would be a labor-intensive response unwarranted by the rare incidence of extraterritorial enemy combatants possessing U.S. citizenship. As the number of citizens joining jihadist organizations increases, so does the need for a CTRC. Moreover, there is a strong argument that even one citizen deliberately targeted without a meaningful structural check is enough to justify serious inter-branch oversight. The CTRC would stand as an institutional reminder for future com-

[89] *See* HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Israel, slip op. at ¶ 462 (2005) (Isr.) (concluding that targeted killing could be conducted legally if subject to procedural and substantive controls including independent judicial review).

[90] BERGEN & TIEDEMANN, *supra* note 34, at 1.

[91] *See, e.g.*, JOHNSON, *supra* note 4, at 2.

manders in chief that the decision to kill an American citizen is too important to be made by one branch alone.

The preceding civil libertarian critiques are not inconsequential, but they are also not entirely convincing. Fundamentally, the creation of the CTRC would provide more process to individuals being targeted by their government—a significant improvement from the civil libertarian perspective, as compared to the status quo.

## VII. Conclusion

The decision we are faced with is normative: Should we give one branch of our government the power to target citizens without any outside accountability, or should we require a basic level of judicial process before taking such drastic action? This Article argues for the latter. As Judge James Baker noted, "In substance and process, the law reflects America's values. These values directly contribute to security to the extent they guide a meaningful and accountable decision-making process."[92] This decision-making process, as it currently exists, is outside the realm of law and not consistent with our values. While some may argue that a court that only adjudicates targeted killings would taint the entire judicial system, it is important to keep in mind the alternative—an executive branch with a blank check to target U.S. citizens without any outside process.[93] In the habeas case law analyzed, petitioners were given a basic level of process and the question was whether that process was sufficient. In the case of targeted killings, the question is more fundamental: Are American citizens slated for death given any meaningful process? Justice O'Connor's and Justice Kennedy's opinions in *Hamdi* and *Boumediene* indicate a rejection of bright-line formalism in favor of molding due process concerns to security limitations. The creation of a CTRC would do just that.

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[92] Baker, *supra* note 42, at 605.
[93] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion).