

# Targeted Killing and Accountability

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*This Article is a comprehensive examination of the United States' practice of targeted killings. It is based in part on field research, interviews, and previously unexamined government documents. The Article fills a gap in the literature, which to date lacks sustained scholarly analysis of the accountability mechanisms associated with the targeted killing process. The Article (1) provides the first qualitative empirical accounting of the targeted killing process, beginning with the creation of kill lists and extending through the execution of targeted strikes, and (2) provides a robust analytical framework for assessing the accountability mechanisms associated with those processes.*

*The Article begins by reporting the results of a case study that reviewed hundreds of pages of military policy memoranda, disclosures of government policies through Freedom of Information Act (FOIA) requests by NGOs, filings in court documents, public statements by military and intelligence officials, and descriptive accounts reported by the press and depicted in nonfiction books. These findings were supplemented by observing and reviewing aspects of the official training for individuals involved in targeted killings and by conducting confidential interviews with members of the military, special operations, and intelligence community involved in the targeted killing process. These research techniques resulted in a richly detailed depiction of the targeted killing process, the first of its kind to appear in any single publication.*

*After explaining how targeted killings are conducted, the Article shifts from the descriptive to the normative, setting out an analytical framework drawn from the governance literature that assesses accountability along two dimensions, creating four accountability mechanisms. After setting forth the analyti-*

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*cal framework, the Article then applies it to the targeted killing program. The Article concludes with accountability reforms that could be implemented based on the specified framework.*

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## INTRODUCTION

When the United States government kills people on traditional and non-traditional battlefields—and it does so on a near daily basis—bureaucrats play a key role in the killings. Bureaucrats help create lists of people to be killed, and sometimes bureaucrats themselves carry out the killings. The process is called targeted killing, and it involves bombs and missiles dropped from Unmanned Aerial Vehicles (UAVs)<sup>1</sup> by members of the military or civilians employed by the Central Intelligence Agency (CIA).<sup>2</sup> Some of the killings are sanctioned directly by the President of the United States, while others are authorized at a much lower level of government, deep within the military or intelligence bureaucracies of the Executive Branch. No matter which agency pulls the trigger, bureaucrats—far removed from public scrutiny and oftentimes outside the reach of courts—are essential to the success of the program. This Article explores America’s killer bureaucracy, describing America’s targeted killing program in rich detail and analyzing the profound accountability issues raised when bureaucrats kill.<sup>3</sup>

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1. Also referred to as “drones” or “remotely piloted aircrafts.”

2. There are a variety of definitions of targeted killing. *See, e.g.*, Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 14th Sess., ¶ 1, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (defining a targeted killing as the “intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator”); Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in *LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM* 347 (Benjamin Wittes ed., Brookings Institution Press 2009) (defining a targeted killing as a “targeting of a specific individual to be killed, increasingly often by means of high technology, remote-controlled Predator drone aircraft wielding missiles from a stand-off position”); Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 *HARV. NAT’L SEC. J.* 145, 147 (2010) (defining targeted killing as “the deliberate assassination of a known terrorist outside the country’s territory (even in a friendly nation’s territory), usually (but not exclusively) by an airstrike”); Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 *CASE W. RES. J. INT’L L.* 319, 322 (2004) (defining targeted killing as a “deliberate decision to order the death of a Palestinian terrorist”).

3. A few notes on terminology. This Article focuses on targeted killings launched from aerial platforms. For the purposes of this Article, my definition of a targeted killing “is: a planned air strike against an identified, named individual or individuals.” Oftentimes, such strikes are conducted by unmanned aerial vehicles or remotely piloted aircraft, colloquially referred to as drones. I will use the term “drones” because that is the term that is most frequently used by commentators, although it is disfavored by members of the military and others. Also, though targeted killings are oftentimes conducted by drones, they may also be conducted by manned aircraft, cruise missiles, or special operators. Regardless of how the targeted killing is conducted, the important definitional point is that this Article is focused on planned missions against *named* individuals. Accordingly, my focus does not include all air strikes. That means, except where noted, I am not focused on “signature strikes” because, by definition, those strikes are not against named individuals—they are against individuals who have a

America's bureaucrats kill with amazing efficiency.<sup>4</sup> They wield the nation's strengths in technology, surveillance, and reconnaissance and leverage those strengths through multiple levels of specialized analysis. Dozens, perhaps hundreds, of people make incremental contributions to a well-oiled killing machine, ensuring that by the time a target shows up in the cross hairs of an operator, the operator can rest assured that the target is worth killing.<sup>5</sup> In fact, the operator sits at the tip of a long analytical spear, with analysis that is so robust that he and the bureaucrats assisting him can focus most of their attention on preventing incidental harm to nearby civilians and civilian property (referred to as "collateral damage"). Napoleon remarked that "*c'est la soupe qui fait le soldat*," which translates as "an army marches on its stomach."<sup>6</sup> Today's armies can only fight after a hefty helping of bureaucratic analysis.

The first documented targeted killing occurred in 2002 in Yemen,<sup>7</sup> but the scholarly literature was slow to catch on because other counterterrorism practices—such as torture and the detention of suspected terrorists held in Guantanamo Bay, Cuba—captured the attention of the legal academy.<sup>8</sup> More recently, commentators have begun to focus on the targeted killing program, perhaps because "[b]y his third year in office, Obama had approved the killings of twice as many suspected terrorists as had ever been imprisoned at Guantánamo Bay,"<sup>9</sup> and the killings have continued into his second term.

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certain intelligence signature. It also means that I will not focus on all drone strikes, because some drone strikes are against unnamed individuals who may be targetable, not because they are on a list, but because their conduct or status renders them a lawful target. With that said, some portions of the Article, such as how kill lists are made, will have relevance to kill/capture missions conducted by special operations forces.

4. Cf. DAVID H. ROSENBLOOM, ROBERT S. KRAVCHUCK & RICHARD M. CLERKIN, PUBLIC ADMINISTRATION: UNDERSTANDING MANAGEMENT, POLITICS, AND LAW IN THE PUBLIC SECTOR 330 (7th ed. 2009) (writing that efficiency can be "calculated by the inputs used to produce outputs. The less input per output, the greater the efficiency").

5. Because members of the military and members of the intelligence community both employ armed forces in targeted killings, this Article uses the term "operator."

6. *An Army Marches on Its Stomach*, OXFORD DICTIONARIES, <http://www.oxforddictionaries.com/definition/english/an-army-marches-on-its-stomach> (last visited Sept. 23, 2013).

7. See Blum & Heymann, *supra* note 2, at 150 ("The first publicly known targeted killing of terrorists outside a theater of active war under the most recent presidential finding was in Yemen in November 2002, when a Predator (unmanned and remotely operated) drone was launched at a car carrying Al-Harethi, suspected of the *USS Cole* bombing, along with four others, one of whom was an American citizen. The attack in Yemen was executed with the approval of the government of Yemen, thereby eliminating some of the international legal difficulties associated with employing force in another country's territory."); see also Doyle McManus, *A U.S. License to Kill*, L.A. TIMES, Jan. 11, 2003, <http://articles.latimes.com/2003/jan/11/world/fg-predator11>.

8. There were a few notable exceptions. See, e.g., JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 53–63 (2006); William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667 (2003); Guiora, *supra* note 2.

9. DANIEL KLAIDMAN, KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY 117–18 (2012).

killing process. The Article makes two major contributions: (1) it provides the first comprehensive scholarly account of the targeted killing process, from the creation of kill lists through the execution of targeted strikes; and (2) it provides a robust analytical framework for assessing the accountability mechanisms associated with those processes.

Discussing and analyzing the notion of accountability and the practice of targeted killings raises problems at the theoretical and empirical levels. Theoretically, accountability is a protean concept,<sup>10</sup> with scholars using ill-defined definitions with multiple, oftentimes competing meanings. At times the term accountability is a stand-in for mechanisms with instrumental value, important for what it can achieve as a tool. At others, it is a proxy for various intrinsic values within the political environment—valued for their own sake, rather than for what they can accomplish. When commentators criticize targeted killings on the basis of accountability (or its lack thereof), they frequently refer to targeted killings as “unaccountable” but fail to specify what they mean by accountability.<sup>11</sup>

The literature is far from clear on what metrics are used to assess accountability. Commentators might be focusing on instrumental concerns and finding that accountability mechanisms are insufficient—that is to say, that accountability mechanisms may be failing because they cannot control actors, induce appropriate behavior, or bring about the results that critics desire. Or perhaps commentators are directing their criticism at the failure of accountability mechanisms on a more intrinsic level, as represented by values such as democratic legitimacy or just and equitable treatment. Deeper still, commentators may be expressing a general dissatisfaction with the state of the world itself. In this way, their criticism may be understood as highlighting dissatisfaction with broader notions of executive power or unconstrained American hegemony. That state of the world, in their view, may have led to targeted killing as the means to an unjust end. Frequently, critics will raise all of these concerns in haphazard fashion, criticizing targeted killings on both instrumental and intrinsic grounds without

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10. See Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115 (Michael W. Dowdle ed., 2006).

11. See, e.g., Akbar Nasir Khan, *The US' Policy of Targeted Killings by Drones in Pakistan*, 11 ISLAMABAD POL'Y RES. INST. J. 21 (2011); Joshua Foust, *Unaccountable Killing Machines: The True Cost of U.S. Drones*, ATLANTIC, Dec. 30, 2011, <http://www.theatlantic.com/international/archive/2011/12/unaccountable-killing-machines-the-true-cost-of-us-drones/250661/>; Conor Friedersdorf, *Obama's Execution of the Drone War Should Terrify Even Drone Defenders*, ATLANTIC, July 12, 2012, <http://www.theatlantic.com/politics/archive/2012/07/obamas-execution-of-the-drone-war-should-terrify-even-drone-defenders/259704/>; Clive Stafford Smith, *The Civilian Victims of the CIA's Drone War*, GUARDIAN, Aug. 11, 2011, <http://www.guardian.co.uk/commentisfree/cifamerica/2011/aug/11/civilian-victims-cia-drones>. But see JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 xi (2012) (describing in detail the various actors who hold the Executive Branch accountable, stating, “[T]he story, the one I tell in this book, is a remarkable and unnoticed revolution in wartime presidential accountability,” and listing “Congress, the courts, and the press” as tools to counteract the President).

differentiating between the two critiques. With such blurred definitions of accountability, it is difficult to engage in an analysis of targeted killings without specifying a more precise definition of accountability.

Overcoming the problem of theory specification is a necessary precondition for any analysis that claims to criticize targeted killings on the basis of accountability. This problem of theory specification is not insurmountable; it has merely been neglected in prior writing about targeted killings. Accordingly, this Article addresses this challenge by specifying a theoretical framework for analyzing the accountability issues associated with targeted killings, focusing on four mechanisms of accountability: bureaucratic, legal, professional, and political. I do not claim that this accountability framework is all-encompassing, but it does provide clarity in definitions, ease of replicability, and grounding in the social science and governance literature.

However, before we can discuss theory, we need to know something about what we are analyzing. What empirical condition in the world are we using theory to critique? This brings us to the second challenge (and deficiency) in scholarly discourse surrounding targeted killings—United States practices are shrouded in secrecy and largely inaccessible to scholarly inquiry. As a result, an entire body of academic literature and policy commentary has been based on an incomplete understanding of how the United States conducts targeted killings. Although recent accounts in the popular press and works of nonfiction have lifted the veil of secrecy surrounding targeted killings, they have done so in a disjointed fashion and fail to specifically grapple with the heavily bureaucratized steps followed by the United States government. Those steps—oftentimes embedded in policy memoranda, rules of engagement, and other internal government directives—are not readily accessible through traditional means of legal research and therefore have been neglected by legal scholars. Moreover, much of the government's practices are classified and shielded from public view, despite multiple attempts by nongovernmental organizations (NGOs) and journalists to access or even identify the existence of relevant information.<sup>12</sup> In short, secrecy and opacity abound.

As a result of this opacity, commentators have lacked a descriptive foundation from which to analyze U.S. operations. Their writings have focused on readily hypothesized issues such as whether (based on evidence developed after the fact) a target was a lawful military objective,<sup>13</sup> whether the individual

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12. See, e.g., *N.Y. Times Co. v. U.S. Dep't of Justice*, 915 F. Supp. 2d 508, 515 (S.D.N.Y. 2013); *Am. Civil Liberties Union v. Dep't of Justice*, 808 F. Supp. 2d 280, 283–84 (D.D.C. 2011); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 8–9 (D.D.C. 2010).

13. See, e.g., Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, in *SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LETHAL FORCE* 263 (Simon Bronitt ed., 2012), available at <http://ssrn.com/abstract=1501144> (briefly discussing the targeted killing of Baitullah Mehsud).



should have been targeted,<sup>14</sup> whether targeting by certain platforms is illegal or immoral,<sup>15</sup> and a host of other concerns.<sup>16</sup> Typically, commentators will set up these threshold (and important) issues related to aspects of the process of targeted killing and use the identified concerns as a vehicle for discussing various abstract issues of legality and policy; the critiques span fields ranging from executive power, to international humanitarian law, to just war theory and law and philosophy. Most of these analyses focus on individual actors at any stage of the targeted killing process, but none paint a comprehensive picture of the killing process prior to analyzing it. Thus, though some critics may focus on the capabilities of drone pilots, or intelligence analysts, for example, they frequently fail to focus on the issues of accountability raised by the dozens of other bureaucratic processes that are essential to the success of the targeted killing program. Because scholarly descriptions of the targeted killing process are incomplete, scholarly prescriptions have been similarly incomplete.

To overcome the lack of empirical evidence that plagues theoretical discourse regarding targeted killings, I conducted field research using proven qualitative research techniques employed by case study researchers.<sup>17</sup> The results of that research are contained in Parts II and III of this Article, which explain how targeted killings are conducted. Part II addresses how kill lists are made and Part III addresses how targeted killings are executed. The case study began with a review of hundreds of pages of military policy memoranda, disclosures of government policies through Freedom of Information Act (FOIA) requests by NGOs and filings in court documents, public statements by military and intelligence officials, and descriptive accounts reported by the press and depicted in nonfiction books. I supplemented these findings by observing and reviewing aspects of the official training for individuals involved in targeted killings and by conducting confidential interviews with members of the military, special operations, and intelligence community who are involved in the targeted killing process. An earlier version of this Article included citations to the confidential

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14. Robert Chesney, *Who May Be Killed?: Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT'L HUMANITARIAN L. 3 (2010), available at <http://ssrn.com/abstract=1754223>.

15. O'Connell, *supra* note 13.

16. See, e.g., MICAH ZENKO, COUNCIL ON FOREIGN RELATIONS, REFORMING U.S. DRONE STRIKE POLICIES (2013), available at <http://www.cfr.org/wars-and-warfare/reforming-us-drone-strike-policies/p29736> (questioning who is a legitimate target and when is it appropriate to strike); STANFORD INT'L HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC & GLOBAL JUSTICE CLINIC AT NYU SCH. OF LAW, LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN (2012) [hereinafter STANFORD & NYU REPORT], available at <http://www.livingunderdrones.org/report/> (raising concerns that drone strikes are counterproductive to U.S. security); Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SEC. J. 283 (2011) (discussing that a lack of accountability for targeted killings prevents the United States from being able to fulfill its international law obligations); O'Connell, *supra* note 13; Andrew Burt & Alex Wagner, Note, *Blurred Lines: An Argument for a More Robust Legal Framework Governing the CIA Drone Program*, 38 YALE J. INT'L L. ONLINE 1 (2012) (raising concerns that targeting by civilians makes them illegal combatants).

17. See Appendix A for a complete explanation of the methodology followed.



interviews; however, every piece of information gathered in an interview has been substantiated by either a publicly available source, or a direct quote from an interview has been provided to provide narrative detail to support an assertion or observation. These research techniques resulted in a richly detailed depiction of the targeted killing process, the first of its kind to appear in any single publication. As such, these sections are quite lengthy, but the description is essential to legal theory because it is impossible to accurately criticize, on accountability grounds, a process for which no empirical account exists.

After explaining how targeted killings are conducted, I turn my attention from the descriptive to the normative. In Part IV, I set forth an analytical framework for assessing accountability. That framework, drawn from the governance literature, assesses accountability along two dimensions. The first dimension looks at the source of control and can be characterized as external to the bureaucracy (exogenous) or internal to the bureaucracy (endogenous). The second dimension looks at the degree of control the mechanism exerts over the bureaucracy and can be characterized as either high or low. Those dimensions explain the four mechanisms of accountability (legal, political, bureaucratic, and professional) that I contend are relevant to analyzing accountability in the targeted killing program. After setting forth the analytical framework, I apply it to the targeted killing program, taking account of what I have described in Parts II and III. In Part V, I turn my attention to accountability reforms that could be implemented based on the framework specified in Part IV.

This Article is an admittedly ambitious exercise. The problem of theory specification was surmountable, but the problem of gathering necessary empirical evidence was a daunting one. The claims I make in Parts II and III of the Article are my best representation of the process based on the evidence that I was able to gather over nearly two years of field research. As new developments occur, there is no doubt that more will be learned about the targeted killing process, and scholars will need to build on these findings. Nonetheless, the descriptive parts of this Article are likely the most comprehensive to appear in any scholarly publication. As for the theoretical and normative part of the Article, the accountability framework I explain in Part IV has applicability to a wide swath of governmental activity, not just national-security-related activities. Accordingly, it should serve as an enduring framework for legal scholars analyzing the mechanisms of accountability associated with government action.<sup>18</sup> Similarly, the reform recommendations, although premised upon the empirical conditions described in Parts II and III, can also serve to illustrate how the described accountability framework might be applied to other governmental activity. In short, this Article helps scholars understand an opaque and

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18. It has seen success in the governance literature. According to a Google Scholar search, Romzek and Dubnick's seminal article has been cited 603 times. GOOGLE, [http://scholar.google.com/scholar?hl=en&as\\_sdt=0,5&q=romzek+and+dubnick+accountability+in+the+public+sector](http://scholar.google.com/scholar?hl=en&as_sdt=0,5&q=romzek+and+dubnick+accountability+in+the+public+sector) (last visited Jan. 29, 2014).

controversial process, provides a framework and associated lexicon for assessing accountability in any governmental process, and demonstrates how that framework can be applied to generate reform recommendations for some of the most difficult legal and policy problems scholars and policymakers analyze.

### I. THE LEGAL BASIS FOR TARGETED KILLINGS

Before unpacking the process of creating kill lists and conducting targeted killings, we must begin more broadly by briefly discussing the U.S. government's asserted legal basis for targeted killings. Importantly, because this Article focuses on the process of targeted killing and the accountability mechanisms associated with it, this Article does not assess the *propriety* of the U.S. government's asserted legal basis for targeted killings. Thus, this section's purpose is modest: to set forth the government's asserted operative legal principles applicable to targeted killings and to provide the background necessary to understand the targeted killing process as it will be described in subsequent sections of the Article.

When addressing the legal basis for targeted killings, it is necessary to focus on two distinct sources of law: domestic legal authority and international legal authority. Domestically, targeted killings are based on a presidential decision that killing terrorists is one way to achieve America's national security objectives. The domestic legal authorities enabling the President to make these determinations are his constitutional authority as commander in chief,<sup>19</sup> the Authorization for Use of Military Force passed after the September 11th attacks,<sup>20</sup> and the National Security Act of 1947, which in part empowers the President to authorize covert action.<sup>21</sup>

As a matter of international law, targeted killings are justifiable under *jus ad bellum* principles of self-defense with the consent of the host state, or, where consent is lacking, the unwillingness or inability of the host state to control nonstate actors within its borders. Targeted killings are also justifiable, according to the United States, when they are conducted in locations where the host state considers itself involved in a non-international armed conflict (NIAC), and the U.S. government's targeted killing operations are conducted as part of that NIAC at the invitation of the host state (a so-called internationalized NIAC). In all operations, the U.S. government argues that it complies with "the law of armed conflict."<sup>22</sup>

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19. See U.S. CONST. art. II, § 2, cl. 1.

20. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

21. National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified as amended at 50 U.S.C. § 3001 (2006)). (See discussion *infra* accompanying notes 36–42).

22. According to the U.S. Army International and Operational Law Department, the Law of Armed Conflict (LOAC) is defined as "customary and treaty law applicable to the conduct of warfare on land and to relationships between belligerents and neutral States." U.S. ARMY INT'L & OPERATIONAL L. DEP'T, LAW OF ARMED CONFLICT DESKBOOK 8 (2012). LOAC "requires that belligerents refrain from employing

## A. DOMESTIC LEGAL FOUNDATION

As a threshold matter, both the Bush and Obama Administrations have invoked, through the legal memoranda issued by the U.S. Department of Justice Office of Legal Counsel, various analyses that claim that the President has the power under Article II of the Constitution to use force even without congressional approval.<sup>23</sup> Thus, both Administrations believe the President has some residuum of inherent constitutional authority to defend the United States against attacks, irrespective of whether Congress speaks to the matter. However, the U.S. government need not rely solely on the President's inherent powers because after the September 11th attacks, the U.S. Congress passed an Authorization for Use of Military Force (AUMF), which authorized the President to use all necessary and appropriate force against those individuals he deemed responsible for the September 11th attacks. An AUMF is generally considered to be equivalent to a declaration of war, at least for purposes of authorizing military force.<sup>24</sup> Although the AUMF seemed by its text to define the enemy as the Afghan Taliban and the specific organizations responsible for the September 11th attacks, that textual interpretation was immediately challenged by the Bush Administration. In a speech to Congress in September 2001, President Bush noted that the U.S. government was involved in a "war on terrorism" that would target all terrorist organizations of global significance that could threaten America.<sup>25</sup> Moreover, it has been the consistent position of the Obama Administration that the U.S. government is engaged in armed conflict with al Qaeda, the Taliban, and *associated forces*.<sup>26</sup> "The executive branch has long argued that . . . the AUMF implicitly includes authority to use force against any entities that

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any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry." *Id.*

23. See, e.g., Authority to Use Military Force in Libya, 35 Op. O.L.C. 2 (2011), <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>; Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., & Robert J. Delahunty, Special Counsel, to Alberto R. Gonzales, Counsel to the President, & William J. Haynes, II, Gen. Counsel, Dep't of Def. (Oct. 23, 2001), <http://www.justice.gov/olc/docs/memomilitaryforcecombatus10232001.pdf>.

24. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2057 (2005) ("Many war powers scholars argue that the President is constitutionally required to obtain some form of congressional authorization before initiating significant offensive military operations. These scholars frequently tie this requirement to Congress's constitutional power to 'declare War.' Nevertheless, they do not typically argue that Congress's authorization must take the form of a formal declaration of war. Instead, they accept that an authorization to use force is an adequate mechanism for Congress to 'constitutionally manifest its understanding and approval for a presidential determination to make war.'" (internal citations omitted)).

25. President George W. Bush, Address to Congress (Sept. 20, 2001), [http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress\\_092001.html](http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html) ("Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."); see also ERIC SCHMITT & THOM SHANKER, COUNTERSTRIKE: THE UNTOLD STORY OF AMERICA'S SECRET CAMPAIGN AGAINST AL QAEDA 25–26 (2011) (describing the Bush Administration's struggle to define the focus of the war on terror).

26. See Dep't of Justice White Paper, Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or an Associated Force (Nov. 8, 2011) [hereinafter DOJ White Paper]; see also *Khan v. Obama*, 655 F.3d 20, 21 (D.C. Cir. 2011) (concluding

emerge as cobelligerents of al Qaeda or the Afghan Taliban—a status the executive branch refers to as becoming an ‘associated force.’”<sup>27</sup> Indeed, “[t]he Obama Administration has continued this approach, both in litigation and in its National Strategy for Counterterrorism.”<sup>28</sup> Furthermore, some contend that the recent enactment of the National Defense Authorization Act (NDAA) of 2012, which authorized the detention of “associated forces,” indicates that Congress has “expressly embraced” the general idea advanced by both the Bush and Obama Administrations.<sup>29</sup>

Although the AUMF, the NDAA, and interpretations of them provided statutory authority to engage al Qaeda, the Taliban, and associated forces on a global basis, the most substantial expansion of that authority as a matter of Executive Branch practice was the al Qaeda Network Executive Order of 2003. Pursuant to that Order, the military’s Joint Special Operations Command (JSOC) “was ordered to undertake a global campaign against al Qaeda, subject to a matrix specifying particular types of operations that could be conducted in various countries without need to go to the Secretary of Defense or even the President to obtain specific additional authorization.”<sup>30</sup> The Order laid out the rules of the road for JSOC to carry out an array of operations against al Qaeda ranging from intelligence-gathering to killing.

As reported by Eric Schmitt and Mark Mazzetti, “[w]here in the past the Pentagon needed to get approval for missions,” from the White House, presumably, “on a case-by-case basis, which could take days when there were only hours to act, the new order specified a way for Pentagon planners to get the green light for a mission far more quickly.”<sup>31</sup> According to Dana Priest and William Arkin, the al Qaeda Network Executive Order authorized operations in fifteen countries and provided standing authority to employ lethal force against al Qaeda targets without the need to seek permission from higher authorities in the chain of command.<sup>32</sup> “The rules were more restrictive with respect to Somalia—a failed state with a friendly but largely powerless transi-

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that Hezb-i-Islami Gulbuddin, which provided limited support to al Qaeda, qualifies as an “associated force” of al Qaeda).

27. Robert M. Chesney, *Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, 112 MICH. L. REV. 163, 199 (2013).

28. *Id.*

29. *Id.* at 200.

30. Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT’L SEC. L. & POL’Y 539, 574 (2012).

31. Eric Schmitt & Mark Mazzetti, *Secret Order Lets U.S. Raid Al Qaeda*, N.Y. TIMES, Nov. 9, 2008, <http://www.nytimes.com/2008/11/10/washington/10military.html?pagewanted=all>.

32. See DANA PRIEST & WILLIAM M. ARKIN, TOP SECRET AMERICA: THE RISE OF THE NEW AMERICAN SECURITY STATE 236–37 (2011). Priest and Arkin note that JSOC had varying rules of engagement depending on the country in which they were conducting operations. See *id.* For instance, JSOC could take lethal action in Iraq and Afghanistan without additional approval. *Id.* However, in countries such as “Algeria, Iran, Malaysia, Mali, Nigeria, Pakistan, the Philippines, Somalia, and Syria—JSOC forces would, in most cases, need at least tacit approval from the country involved, and a sign-off from some higher authority in its chain of command.” *Id.*

tional government—where lethal operations require approval from the Secretary of Defense.”<sup>33</sup> For al Qaeda targets in locations “involving far greater geopolitical risks—such as Pakistan and Syria—approval had to come from the President himself.”<sup>34</sup>

In addition to military actions authorized under the AUMF, the U.S. government also relies on covert action to pursue its counterterrorism goals. Statutory authority for covert action had its origins in Section 102(d)(5) of the National Security Act of 1947. The Act explained that “it shall be the duty of the Agency, under the direction of the National Security Council . . . (5) to perform such other functions and duties . . . as the National Security Council may from time to time direct.”<sup>35</sup> That provision has since been amended and recodified, and now states that “[t]he Director of the Central Intelligence Agency shall . . . perform such other functions and duties related to intelligence affecting the national security as the President or the Director of National Intelligence may direct.”<sup>36</sup> Since its inception, the Executive Branch has construed this “fifth function” to include the authority to engage in covert action.<sup>37</sup> Subsequent Administrations relied on the fifth function to task the CIA with covert actions including high-intensity paramilitary operations.<sup>38</sup> For example, in 1986 President Reagan signed a counterterrorism finding, authorizing the CIA to pursue (albeit on a limited basis) members of terrorist groups.<sup>39</sup> “[M]ost covert operations require presidential approval in the form of a ‘Finding’”<sup>40</sup>; these are created through an extensive bureaucratic process within the Executive Branch, terminating with “a presidential determination that an activity ‘is necessary to support identifiable foreign policy objectives’ and ‘is important to the national security of the United States.’”<sup>41</sup>

Since September 11th, the CIA has enjoyed “exceptional authorities” to both kill and detain al Qaeda targets worldwide.<sup>42</sup> President Bush reportedly signed an order on September 17, 2001, “that formally modified [President] Reagan’s 1986 counterterrorism finding and superseded the interim modifications” made

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33. Chesney, *supra* note 30, at 575.

34. *Id.*

35. National Security Act of 1947, Pub. L. N. 80-253, 61 Stat. 495 § 102(d).

36. 50 U.S.C. § 3036(d)(4) (2012).

37. See W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW 118 (1992) (“With little dissent, this language was soon understood to authorize the executive to conduct covert action.”); see also Memorandum from Sidney W. Souers, Exec. Sec’y, to the Members of the Nat’l Sec. Council, Enclosure 5 (Directive to Roscoe H. Hillenkoetter, Dir. of Cent. Intelligence) (Dec. 9, 1947) (directing the CIA to conduct covert psychological operations to counteract Soviet and Soviet-inspired activities that constituted a threat to world peace and security).

38. See, e.g., NAT’L SEC. COUNCIL DIRECTIVE, DOCUMENT 250 NSC 5412, COVERT OPERATIONS (undated), available at <http://history.state.gov/historicaldocuments/frus1950-55Intel/d250>.

39. Chesney, *supra* note 30, at 553.

40. REISMAN & BAKER, *supra* note 37, at 120.

41. *Id.*

42. Chesney, *supra* note 30, at 563.

between 1986 and 2001.<sup>43</sup> According to Bob Woodward, the covert action authorities President Bush extended to the Agency after September 11th “would give the CIA the broadest and most lethal authority in its history, . . . a secret global war on terror.”<sup>44</sup> In short, the CIA was authorized “to *kill or capture* [al] Qaeda militants around the globe.”<sup>45</sup> Since 2001, the CIA and the military’s Joint Special Operations Command (JSOC) have cooperated on operations, shifting from “stand-alone operations to hybrid operations in which JSOC units would operate under CIA authority.”<sup>46</sup> Such operations provide enhanced domestic law flexibility for the United States. For example, in Yemen, U.S. military strikes have been conducted with the permission of the Yemeni government; however, because the “CIA operates under different legal restrictions,” the U.S. government has the ability to “carry out strikes even if Yemeni President Ali Abdullah Saleh . . . reverses his past approval of military strikes or cedes power to a government opposed to them.”<sup>47</sup>

Taken together, the domestic legal authorities suggest that there are two broad categories of targets under domestic law: those authorized for lethal action under the AUMF, and those authorized for lethal action under a covert action finding. Although these targets may overlap in part, depending on the particulars of the 2001 covert action finding, some may be targetable by the CIA based on the fact that killing those persons advances a foreign policy objective of the United States and is important to national security. An example of such a killing might be an individual who is not a member of al Qaeda or associated forces, but who is nevertheless a threat to an essential American ally whose support is needed in the conflict against al Qaeda (such as Pakistan or Yemen). The fact that the individual is not a member of al Qaeda or associated forces means that the individual does not fall within the authority of the AUMF and therefore may only be targeted as a domestic law matter pursuant to a covert action finding.

#### B. INTERNATIONAL LEGAL FOUNDATION

The authorities briefly detailed above set forth the domestic legal authority for U.S. operations against al Qaeda and associated forces, but how are U.S.

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43. *Id.*

44. *Id.* (quoting BOB WOODWARD, *BUSH AT WAR* 76, 78 (2002)).

45. *Id.* at 563 & n.120 (quoting Schmitt & Mazzetti, *supra* note 31); *see also id.* (citing Joby Warrick, *CIA Assassin Program Was Nearing New Phase: Panetta Pulled Plug After Training Was Proposed*, WASH. POST, July 16, 2009, at A1 (“A secret document known as a ‘presidential finding’ was signed by President George W. Bush that same month, granting the agency broad authority to use deadly force against bin Laden as well as other senior members of al-Qaeda and other terrorist groups.”)).

46. *Id.* at 624 (citing Julian Barnes & Adam Entous, *Yemen Covert Role Pushed: Foiled Bomb Plot Heightens Talk of Putting Elite U.S. Squads in CIA Hands*, WALL ST. J., Nov. 1, 2010, <http://online.wsj.com/article/SB10001424052748704477904575586634028056268.html>).

47. Siobhan Gorman & Adam Entous, *CIA Plans Yemen Drone Strikes: Covert Program Would Be a Major Expansion of U.S. Efforts to Kill Members of al Qaeda Branch*, WALL ST. J., June 14, 2011, <http://online.wsj.com/article/SB10001424052702303848104576384051572679110.html>.



actions justified under the *jus ad bellum*,<sup>48</sup> and how are they characterized under the *jus in bello*?<sup>49</sup>

### 1. *Jus ad bellum* Justification

Article 2(4) of the United Nations Charter prohibits “the threat or use of force against the territorial integrity or political independence of any state.”<sup>50</sup> Because most of the people on kill lists will be located in the territory of another state, Article 2(4)’s prohibitions will prohibit targeted killings unless one of two recognized exceptions to the prohibition are satisfied. The two exceptions to the prohibition are (1) authorization of force by the United Nations Security Council,<sup>51</sup> and (2) exercise of the “inherent right of . . . self-defense” articulated in Article 51 of the United Nations Charter.<sup>52</sup> Within this framework, the U.S. government claims that it is acting within the bounds of the nation’s “inherent right to national self-defense recognized in international law” as articulated in Article 51 of the U.N. Charter.<sup>53</sup> The United States contends that Article 51 was the basis for the U.S. response to the September 11th attacks and that this legal authority continues to apply today.<sup>54</sup>

Even if the United States sees itself as acting within the bounds of Article 51, there nevertheless may be issues related to whether nations have consented to U.S. operations on their territory. More pointedly, if nations such as Pakistan or Yemen believe that the United States is conducting strikes within their territory without their consent, those states may claim that their sovereignty has been violated and could respond under international law with like force.<sup>55</sup> However, if the United States obtained the consent of the nations in which it plans to operate, that consent would satisfy a customary international law exception to

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48. Law on the use of force.

49. Law in war.

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

51. U.N. Charter articles 39–42 allow for the U.N. Security Council to make decisions regarding appropriate measures such as the use of force in order to maintain or restore international peace and security, or to put an end to a threat to peace, a breach of the peace, or an act of aggression.

52. Article 51 states:

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

U.N. Charter art. 51.

53. DOJ White Paper, *supra* note 26, at 2.

54. *See id.*; Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Address to the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010).

55. *See generally* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE (1988); CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE (2008); NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS (2010).

the prohibition on the use of force. Absent such consent, the U.S. government claims the authority to use force if “the host nation is unable or unwilling to suppress the threat posed by the individual targeted.”<sup>56</sup>

With regard to consent, there is evidence to suggest that at least Yemen and Pakistan have consented to strikes within their countries.<sup>57</sup> First, operations within a nation’s air space without its consent would be a violation of U.S. policy and a violation of that state’s sovereignty.<sup>58</sup> Second, the public record reveals evidence, or at least claims, of consent. For example, the Obama Administration claims that when it conducts strikes it does so “in full consent and cooperation with our partners internationally.”<sup>59</sup> David Sanger wrote in his book *Confront and Conceal* that in 2008 Pakistan’s Prime Minister Yousuf Raza Gilani reportedly told U.S. Ambassador Anne Patterson, “I don’t care if they [conduct drone strikes] as long as they get the right people.”<sup>60</sup> Over the years, the Pakistani military and intelligence services have allowed the United States to house UAVs on airfields in Pakistan, have given authorization to carry out strikes in designated “kill boxes” inside the Federally Administered Tribal Areas (FATA), and have directly assisted in identifying targets by providing actionable intelligence to the CIA and U.S. military.<sup>61</sup> In fact, the United States and

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56. DOJ White Paper, *supra* note 26, at 5. The unwilling or unable standard, however, is controversial and has been the subject of heated debate amongst international law experts. See generally Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT’L L. 483 (2012); Kevin Jon Heller, Ashley Deeks’ Problematic Defense of the “Unwilling or Unable” Test, OPINIO JURIS (Dec. 15, 2011), <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/>.

57. See Gregory S. McNeal, *Are Targeted Killings Unlawful?: A Case Study in Empirical Claims Without Empirical Evidence*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 326 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012); Michael Hirsh & Kristin Roberts, *What’s in the Secret Drone Memos*, NAT’L J., Feb. 22, 2013, <http://www.nationaljournal.com/nationalsecurity/what-s-in-the-secret-drone-memos-20130222> (describing how “[a] senator who sits on the Intelligence Committee and has read some of the memos also said that the still-unreleased memos contain secret protocols with the governments of Yemen and Pakistan on how targeted killings should be conducted. Information about these pacts, however, were not in the OLC opinions the senator has been allowed to see.”). Adam Entous describes an American diplomat’s experience having a meeting with Pakistani members of parliament whose message was that the strikes “cause terrible damage and must stop.” Adam Entous, *Special Report: How the White House Learned to Love the Drone*, REUTERS, May 18, 2010, <http://www.reuters.com/article/2010/05/18/us-pakistan-drones-idUSTRE64H5SL20100518>. Then, in the middle of the meeting, one of the MPs slipped him a note that read: “The people in the tribal areas support the drones. They cause very little collateral damage. But we cannot say so publicly for reasons you understand.” *Id.*

58. See U.S. AIR FORCE JUDGE ADVOCATE GENERAL’S SCHOOL, AIR FORCE OPERATIONS & THE LAW: A GUIDE FOR AIR, SPACE & CYBER FORCES 30, 72 (2d ed. 2009).

59. Interview with John Brennan, Deputy Nat’l Sec. Advisor for Homeland Sec. and Counterterrorism, *John Brennan Talks War on Terror*, FOX NEWS SUNDAY WITH CHRIS WALLACE (Apr. 29, 2012), available at <http://www.foxnews.com/on-air/fox-news-sunday/2012/04/29/john-brennan-talks-war-terror-joel-and-victoria-osteens-message-hope/#p/v/1612276166001>.

60. DAVID E. SANGER, CONFRONT AND CONCEAL: OBAMA’S SECRET WARS AND SURPRISING USE OF AMERICAN POWER 259 (2012).

61. Entous, *supra* note 57. Entous reports that U.S. officials attribute much of the success of UAV strikes to cooperation with the Pakistani military and ISI. *Id.* Entous quotes a U.S. official, who states that in providing human intelligence (HUMINT), “[y]ou need guys on the ground to tell you who they

Pakistan even launched a joint program in 2009 where “Pakistani officers [were given] significant control over routes, targets and decisions to fire weapons.”<sup>62</sup> The *New York Times* reported in 2012 that some individuals in Pakistan who have aided the United States in striking targets “have been hired through Pakistani military intelligence officials who are identified by name, directly contradicting the Pakistan government’s official stance that it vehemently opposes the drone strikes.”<sup>63</sup> Other reports suggest that where the United States has not received explicit consent, they believe U.S. operations are justified due to “tacit consent.” Specifically, the U.S. government believes that because Pakistan has not said “no” to U.S. strikes, the strikes are permissible:

About once a month, the Central Intelligence Agency sends a fax to a general at Pakistan’s intelligence service outlining broad areas where the U.S. intends to conduct strikes with drone aircraft, according to U.S. officials. The Pakistanis, who in public oppose the program, don’t respond. On this basis, plus the fact that Pakistan continues to clear airspace in the targeted areas, the U.S. government concludes it has tacit consent to conduct strikes within the borders of a sovereign nation . . . .<sup>64</sup>

Granted, “lawyers at the State Department, including top legal adviser Harold Koh, believe this rationale veers near the edge of what can be considered permission”; the concern is that “[c]onducting drone strikes in a country against its will could be seen as an act of war.”<sup>65</sup> The notion of consent is one that is hotly debated by opponents of targeted killings. The Bureau of Investigative Journalism reports that Pakistan “categorically rejects” the claim that it tacitly allows drone strikes in its territory,<sup>66</sup> and in the *New York Times* article discussed above, an official with Pakistani intelligence “said any suggestion of Pakistani cooperation was ‘hogwash.’”<sup>67</sup> However, Pakistani protests have been

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(the targets) are and that isn’t coming from some white guy running around the FATA. That’s coming from the Pakistanis.” *Id.* According to Entous, these officials concede that “[t]he truth is the CIA would not be able to find the militants in many cases without the help of Pakistan’s spies and informants.” *Id.* Other U.S. officials noted that the help goes way beyond supplying HUMINT and that “Pakistani agents are sometimes present at U.S. bases, and are increasingly involved in target selection and strike coordination.” *Id.*

62. Julian E. Barnes & Greg Miller, *Pakistan Gets a Say in Drone Attacks on Militants*, L.A. TIMES, May 13, 2009, <http://articles.latimes.com/2009/may/13/world/fg-predator13>.

63. Declan Walsh, *Drone War Spurs Militants to Deadly Reprisals*, N.Y. TIMES, Dec. 29, 2012, <http://www.nytimes.com/2012/12/30/world/asia/drone-war-in-pakistan-spurs-militants-to-deadly-reprisals.html>.

64. Adam Entous, Siobhan Gorman & Evan Perez, *U.S. Unease Over Drone Strikes: Obama Administration Charts Delicate Legal Path Defending Controversial Weapons*, WALL ST. J., Sept. 26, 2012, <http://online.wsj.com/article/SB10000872396390444100404577641520858011452.html>.

65. *Id.*

66. Chris Woods, *Pakistan ‘Categorically Rejects’ Claim that It Tacitly Allows US Drone Strikes*, BUREAU INVESTIGATIVE JOURNALISM, Sept. 28, 2012, <http://www.thebureauinvestigates.com/2012/09/28/pakistan-categorically-rejects-claim-that-it-tacitly-allows-us-drone-strikes/>.

67. Walsh, *supra* note 63.

further undermined by a recent *Washington Post* report that discovered that “[d]espite repeatedly denouncing the CIA’s drone campaign, top officials in Pakistan’s government have for years secretly endorsed the program and routinely received classified briefings on strikes and casualty counts, according to top-secret CIA documents and Pakistani diplomatic memos.”<sup>68</sup> The article describes “Pakistan’s tacit approval of the drone program” as “one of the more poorly kept national security secrets in Washington and Islamabad.”<sup>69</sup> The files on which the article was based showed the “explicit nature of a secret arrangement struck between the two countries at a time when neither was willing to publicly acknowledge the existence of the drone program.”<sup>70</sup> In addition, “[t]he documents detailed at least 65 strikes in Pakistan and were described as ‘talking points’ for CIA briefings, which occurred with such regularity that they became a matter of diplomatic routine.”<sup>71</sup>

In light of this evidence, the protests of the Pakistani government and targeted killing opponents lack credibility, at least on the sovereignty point. Pakistan has not exercised its rights under international law to prevent strikes by asking the United States to stop, nor has it intercepted American aircraft, targeted U.S. operators on the ground, or lodged a formal protest with the United Nations Security Council. The Pakistani government’s failure to take action is surprising if the strikes are truly without consent, are a violation of Pakistani sovereignty, and are akin to acts of war. With regard to Yemen, the question of consent is far clearer because Yemeni officials have gone on the record specifically noting their approval of U.S. strikes.<sup>72</sup>

## 2. *Jus in bello* Characterization

The U.S. government sees itself as being involved in two types of conflicts. The first, a transnational non-international armed conflict, is one in which there are no geographic limitations on the scope of the conflict. The second is a traditional non-international armed conflict in which a U.S. ally is fighting an insurgent group within its borders, and the United States is a participant in that non-international armed conflict.

The transnational non-international armed conflict concept is contested in international law, yet has been wholly subscribed to by the United States. It is supported by a substantial degree of cross-party consensus; for instance, it was

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68. Greg Miller & Bob Woodward, *Secret Memos Reveal Explicit Nature of U.S., Pakistan Agreement on Drones*, WASH. POST., Oct. 23, 2013, [http://www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e\\_story.html](http://www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e_story.html).

69. *Id.*

70. *Id.*

71. *Id.*

72. See Scott Shane, *Yemen’s Leader Praises U.S. Drone Strikes*, N.Y. TIMES, Sept. 29, 2012, <http://www.nytimes.com/2012/09/29/world/middleeast/yemens-leader-president-hadi-praises-us-drone-strikes.html>.

adopted by the U.S. Supreme Court in *Hamdan*,<sup>73</sup> and has been endorsed in a series of speeches by Obama Administration officials.<sup>74</sup> As one of those officials, John Brennan, noted, “The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to ‘hot’ battlefields like Afghanistan.”<sup>75</sup> But Brennan acknowledged that “[o]thers in the international community—including some of our closest allies and partners—take a different view of the geographic scope of the conflict, limiting it only to the ‘hot’ battlefields.”<sup>76</sup>

The second view, which sees the possibility of a non-international armed conflict in which the United States is a participant, is an important and oftentimes overlooked concept. The implications of the concept are that some targets may find their way onto kill lists, not because they are directly within the scope of a statute such as the AUMF, but instead because they pose a threat to an American ally and supporting that ally is within the national security and foreign policy interests of the United States.<sup>77</sup> For example, the government may argue that there is an armed conflict between Yemen and insurgent forces. Strikes against those insurgent forces are not part of some broader transnational non-international armed conflict, but are instead “an American intervention into that non-international armed conflict on the side of the Yemeni government, thus internationalizing the previously non-international armed conflict.”<sup>78</sup> This may make matters inherently confusing, raising questions as to whether this categorization counts as one armed conflict within Yemen (Yemen and the United States versus insurgents) or two armed conflicts (Yemen and the United States versus insurgents, plus United States versus al Qaeda and associated forces in a transnational non-international armed conflict). Regardless, the point is that the United States would have ample flexibility to claim authority for conducting strikes against individuals in Yemen.<sup>79</sup>

The two ways of characterizing America’s conflict with al Qaeda allow the

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73. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 631 (2006).

74. See Chesney, *supra* note 27, at 211.

75. John O. Brennan, Deputy Nat’l Sec. Advisor for Homeland Sec. and Counterterrorism, Remarks at Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

76. *Id.*

77. Paraphrasing the requirements of a covert action finding, as described *supra* section II.A.

78. Jens David Ohlin, *How to Count Armed Conflicts*, LIEBERCODE (July 27, 2012, 8:09 AM), <http://www.liebercode.org/2012/07/how-to-count-armed-conflicts.html>; see also Daniel Klaidman, *John Brennan, Obama’s CIA Chief Nominee, Could Restrain the Agency*, DAILY BEAST (Feb. 5, 2013, 12:00 AM), <http://www.thedailybeast.com/newsweek/2013/02/04/john-brennan-obama-s-cia-chief-nominee-could-restrain-the-agency.html> (“[I]n the spring of 2012, with Yemen falling into chaos and AQAP gaining more and more territory, Yemeni officials—with whom [John] Brennan had close ties going back to his days as a CIA station chief in the region—beseeched Brennan to help. The Yemeni Army was collapsing under the brutal assault; soldiers were being crucified and beheaded by the jihadis. By April 2012, Brennan and Obama finally relented and permitted signature strikes in the country.”).

79. See Ohlin, *supra* note 78.

U.S. government substantial flexibility in its kill-list creation and targeted killing process. The United States can claim either that it is involved in a transnational non-international armed conflict with al Qaeda and associated forces, or, where that argument fails, that “the level of violence in a given state has risen to a level constituting a noninternational armed conflict, quite apart from whether there also exists a borderless armed conflict with al Qaeda or its successors.”<sup>80</sup> Yemen is a perfect example of a conflict that seems to fit squarely within that analysis.<sup>81</sup> Importantly, as an accountability matter, U.S. participation in another state’s armed conflict and the characterization of that armed conflict are quintessential foreign policy concerns that both the Congress and courts are reticent to disturb.<sup>82</sup> Furthermore, such matters are the kind that the state in question would likely want to keep secret, suggesting legal justifications premised on this second theory will rarely find their way into the public domain.<sup>83</sup>

### C. CATEGORIES OF TARGETS

In light of the legal justifications specified above, persons added to kill lists may fall into three categories: (1) targets who fall within the AUMF and its associated forces interpretations;<sup>84</sup> (2) targets who fall within the terms of a covert action finding;<sup>85</sup> and (3) targets from an ally’s non-international armed conflict in which the United States is a participant.<sup>86</sup> Importantly, there is no public evidence to suggest that the United States has engaged targets that fall outside the bounds of the AUMF or a covert action finding.<sup>87</sup> These theoretical categories will oftentimes overlap; however, there may be circumstances in which a target rests exclusively within one category. How to categorize a particular target will depend on detailed legal, factual, and diplomatic analysis conducted on a case-by-case basis. That analysis is the subject of Part II of this Article.

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80. Chesney, *supra* note 27, at 210; *see also* Ohlin, *supra* note 78.

81. *See* Chesney, *supra* note 27, at 210 & n.193 (citing Ohlin, *supra* note 78).

82. *Cf.* Haig v. Agee, 453 U.S. 280, 292 (1981) (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 45 (D.D.C. 2010).

83. This may be one reason that the U.S. government is so reluctant to release the various legal opinions related to targeted killing. *Cf.* Greg McNeal, *Six Key Points Regarding the DOJ Targeted Killing White Paper*, FORBES, Feb. 5, 2013, <http://www.forbes.com/sites/gregorymcneal/2013/02/05/six-key-points-regarding-the-doj-targeted-killing-white-paper/>.

84. Hereinafter, “AUMF targets.”

85. Hereinafter, “covert action targets.”

86. Hereinafter, “ally targets.”

87. A purely constitutional argument that would fall outside both the AUMF and a covert action finding would be that the President has inherent power as the commander in chief to repel attacks against the United States. *Cf.* *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863) (“If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be ‘unilateral.’” (emphasis omitted)).



## II. IT TAKES A BUREAUCRACY TO MAKE A KILL LIST

Having briefly described the U.S. government's asserted legal and policy rationales underlying the targeted killing process, this Part narrows the analytical focus from broad legal and policy considerations to law in action and applies these legal principles to the kill-list-creation process. Specifically, this section will detail how America's vast national security bureaucracy implements the nation's national security strategy explained in Part I. This description is necessary because any scholarly discussion of targeted killing or the accountability mechanisms associated with targeted killings must grapple with the process that precedes the killings.

It is not surprising that the creation of kill lists is a matter of popular debate and scholarly commentary. Since World War I, military and civilian personnel have compiled target lists for bombing.<sup>88</sup> And since the inception of airpower, various theorists have argued over what type of target is proper.<sup>89</sup> Thus, though controversy over targeting decisions is not new, the levels of precision and accuracy possible in modern air strikes are new. New technology has created an expectation about accuracy and has led to the politicization of air-delivered weapons.<sup>90</sup> Concomitantly, as the accuracy of weapons has increased, the demand for intelligence and for accountability with regard to intelligence-based decisions has also increased dramatically.<sup>91</sup>

It is in this context that the U.S. government has created kill lists.<sup>92</sup> Because killing the wrong person may lead to serious consequences, these lists are vetted through an elaborate bureaucratic process that allows for verification of intelligence information before a person is added to a kill list.<sup>93</sup> Although most

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88. See John Glock, *The Evolution of Targeting*, in AIR FORCE PAMPHLET 14-210, USAF INTELLIGENCE TARGETING GUIDE 130–31 (1998).

89. Cf. RICHARD A. HAND, WHO SHOULD CALL THE SHOTS?: RESOLVING FRICTION IN THE TARGETING PROCESS 7 (2012) (“Debates concerning the desirability of particular targets are . . . plentiful. From the inception of airpower, its theorists have differentiated their ideas with varying evaluations about what type of target is proper, often without sufficient thought devoted to the second[-] and third-order effects of striking them.” (emphasis omitted)).

90. See *id.* at 4 (citing PHILLIP S. MEILINGER, U.S. AIR FORCE HISTORY AND MUSEUMS PROGRAM, 10 PROPOSITIONS REGARDING AIR POWER 27 (1995)).

91. Cf. *id.* at 34 (“As the accuracy of weapons increased, the demand for intelligence increased dramatically.”).

92. See Greg Miller, *Under Obama, an Emerging Global Apparatus for Drone Killing*, WASH. POST, Dec. 27, 2011, [http://articles.washingtonpost.com/2011-12-27/national/35285416\\_1\\_drone-program-drone-campaign-lethal-operations](http://articles.washingtonpost.com/2011-12-27/national/35285416_1_drone-program-drone-campaign-lethal-operations) (noting that CIA and JSOC “maintain separate kill lists that overlap but don’t match”). *But see* Alston, *supra* note 16, at 285 (“In Afghanistan alone it appears that there are at least six different kill/capture lists, with a total of thousands of names on them.”).

93. Note that killing people this way is different from killing them through dynamic targeting or through signature strikes. This Article is focused solely on “kill list strikes,” also known as personality strikes, not signature strikes. See Greg Miller, *White House Approves Broader Yemen Drone Campaign*, WASH. POST, Apr. 25, 2012, [http://articles.washingtonpost.com/2012-04-25/world/35452363\\_1\\_signature-strikes-drone-strikes-qaeda](http://articles.washingtonpost.com/2012-04-25/world/35452363_1_signature-strikes-drone-strikes-qaeda) (defining signature strikes as those aimed at groups of individuals “based solely on their intelligence ‘signatures’—patterns of behavior that are detected through signals intercepts, human sources and aerial surveillance . . . that indicate the presence of an important operative or

commentators know that the names of individuals to be killed are placed on a list and are aware that many people have been killed, no scholar has discussed in detail the vetting process involved in selecting an individual for placement on a kill list.<sup>94</sup> This section will draw from nontraditional sources to describe a heavily contested area of law and policy that, at its core, rests on judgments about how to apply the law described in Part I to difficult factual circumstances. As such, before accountability can be discussed, it is necessary to set forth a thorough depiction of the processes by which the law of targeted killings is applied to facts. Those processes start with the creation of kill lists.

#### A. HOW KILL LISTS ARE MADE

The U.S. government's decision that killing terrorists is one way of achieving some of the nation's counterterrorism goals raises a host of questions. Who specifically should be killed? If multiple people are to be killed, how can the military and the CIA sort out the key targets from the less important targets? How does the United States ensure that killing someone will have an impact on the terrorist organization?<sup>95</sup> What about the political and diplomatic consequences that might flow from a targeted killing?<sup>96</sup> Who approves adding names to a kill list and by what criteria? The United States addresses these questions in a heavily bureaucratized target-development process. Obama Administration

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a plot against U.S. interests"). Signature strikes were first introduced in July 2008 at the end of the Bush Administration, yet it was the Obama Administration that fully embraced the use of signature strikes after agency officials noted their success in killing high-value targets. The *Wall Street Journal* notes that the majority of CIA drone strikes are, in fact, signature strikes. Adam Entous, Siobhan Gorman & Julian E. Barnes, *U.S. Tightens Drone Rules*, WALL ST. J., Nov. 4, 2011, <http://online.wsj.com/article/SB10001424052970204621904577013982672973836.html>. Supporters of signature strikes note that they frequently kill senior militants. In fact, the *Wall Street Journal* cites a U.S. counterterrorism official who maintains that signature strikes have claimed "[t]wice as many wanted terrorists" than the number claimed by personality strikes. *Id.* Because little is known about signature strike targeting practices, it follows that the nature and extent of presidential approval over these strikes remains somewhat of a mystery. However, there seems to be a growing consensus that the President's role is almost nonexistent regarding signature strikes in Pakistan. *Id.* According to a senior U.S. official, "[t]he CIA has had freedom to decide who to target and when to strike. The White House usually is notified immediately after signature strikes take place, not beforehand . . ." *Id.*

94. Nor have they grappled with issues such as the specific procedures followed when a strike is conducted, whether those procedures are documented, and whether and how harm to civilians is minimized—a task I undertake in Part III.

95. See Memorandum from Donald Rumsfeld, Sec'y of Def., to Gen. Dick Myers, Paul Wolfowitz, Gen. Peter Pace, & Doug Feith on Global War on Terrorism (Oct. 16, 2003), <http://usatoday30.usatoday.com/news/washington/executive/rumsfeld-memo.htm>. In the now-declassified memo, Secretary Rumsfeld famously asked, "Are we capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training and deploying against us?" *Id.*

96. See Kathy Gannon, Kimberly Dozier & Sebastian Abbot, *Timing of U.S. Drone Strike Questioned*, ASSOCIATED PRESS, Aug. 2, 2011, <http://news.yahoo.com/ap-exclusive-timing-us-drone-strike-questioned-161145779.html> (recounting an incident in March 2011 when the former Ambassador to Pakistan, Cameron Munter, objected to a strike when political tensions between the United States and Pakistan were particularly high; then-acting CIA Director Leon Panetta apparently dismissed the objection and the strike was carried out).

counterterrorism advisor and CIA Director John Brennan described the process as committed to:

ensuring the individual is a legitimate target under the law; determining whether the individual poses a significant threat to U.S. interests; determining that capture is not feasible; being mindful of the important checks on our ability to act unilaterally in foreign territories; having that high degree of confidence, both in the identity of the target and that innocent civilians will not be harmed; and, of course, engaging in additional review if the al-Qaida terrorist is a U.S. citizen.<sup>97</sup>

Brennan further argued that it was the rigor of the process that ensured accountability in the policy.<sup>98</sup> Though he refrained from going into great detail about the bureaucratic process of reviewing individuals who are both legitimate and necessary targets of lethal force, he gave assurances that the Administration would “continue to strengthen and refine these standards and processes.”<sup>99</sup> Although news reports suggested that the process was further refined and formalized,<sup>100</sup> a singular account of the process does not yet exist. Nevertheless, it is possible to construct a somewhat comprehensive depiction of the process based on the publicly available record.

The kill-list-creation process for the military is more transparent than the process followed by the CIA; however, the possible distinctions between the agencies may no longer matter because recent public statements by current and former government officials suggest that targeting procedures followed by the military are also followed by the intelligence community with one unified process existing at the final levels of approval.<sup>101</sup> In fact, according to at least

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97. John O. Brennan, Deputy Nat'l Sec. Advisor for Homeland Sec. and Counterterrorism, Address at the Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012), <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>.

98. *Id.*

99. *Id.*

100. Mark Mazzetti & Mark Landler, *Despite Administration Promises, Few Signs of Change in Drone Wars*, N.Y. TIMES, Aug. 2, 2013, [http://www.nytimes.com/2013/08/03/us/politics/drone-war-rages-on-even-as-administration-talks-about-ending-it.html?\\_r=0](http://www.nytimes.com/2013/08/03/us/politics/drone-war-rages-on-even-as-administration-talks-about-ending-it.html?_r=0) (“In late May, administration officials said that the bulk of drone operations would shift to the Pentagon from the C.I.A. But the C.I.A. continues to run America's secret air war in Pakistan, where Mr. Kerry's comments underscored the administration's haphazard approach to discussing these issues publicly.”)

101. Chesney, *supra* note 27, at 208 (“[I]n some contexts it may be more accurate to speak of JSOC and CIA capacities collectively rather than as wholly independent institutions.”); Chesney, *supra* note 30, at 578–80; *see also* Ambassador Henry A. Crumpton, Keynote Address at Texas International Law Journal Symposium (Feb. 10, 2011) (discussing relationship between CIA and the military's JAG attorneys). On transparency, consider the fact that the military's targeting doctrine is contained in military field manuals. *See, e.g.*, JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-60: JOINT TARGETING D-1, (2007) [hereinafter JP 3-60]; *see also* Human Rights Watch, *US: Move Drone Strike Program to Military Transfer from CIA Could Improve Transparency, Accountability* (Mar. 21, 2013), <http://www.hrw.org/news/2013/03/21/us-move-drone-strike-program-military> (“A reported plan to transfer the United States targeted killing program from the Central Intelligence Agency to the Defense

one account, much of the work of the CIA and the military's JSOC is completely integrated: "JSOC people [work] with CIA, and CIA people with JSOC. They have access to each other's system."<sup>102</sup> Defense Secretary Gates even issued an order (distinct from the al Qaeda Network Executive Order described in section I.A) "that specifically directed the military to plan a series of operations, in cooperation with the [CIA], on the Qaeda network and other militant groups linked to it in Pakistan."<sup>103</sup> Others have noted that the CIA and JSOC are, by and large, an integrated operation in the level of targeting and sharing of information about targets.<sup>104</sup> Furthermore, interviews I conducted with members of the intelligence community have confirmed that the military and intelligence community follow similar procedures for adding individuals to kill lists and seeking approval of these additions. With that background in mind, the next section sets forth the available public information and describes the target-development process.

### 1. Developing Names for the List

The process of developing names for the list is initially delimited by the categories of individuals who may be targeted. Those limits are established by the law of armed conflict, which prohibits the targeting of civilians except those who are members of an organized armed group and those who are directly participating in hostilities.<sup>105</sup> Because direct participation in hostilities is a fleeting, time-delimited categorization,<sup>106</sup> the only criteria by which an indi-

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Department could improve transparency and accountability, though a number of other concerns with the program would remain.").

102. Chesney, *supra* note 30, at 578 n.199 (quoting Azmat Khan, *JSOC Using Captured Militants to Analyze Intel*, PBS FRONTLINE, Sept. 6, 2011, <http://www.pbs.org/wgbh/pages/frontline/afghanistan-pakistan/jsoc-using-captured-militants-to-analyze-intel>).

103. Schmitt & Mazzetti, *supra* note 31.

104. *See* Chesney, *supra* note 30, at 578.

105. For international armed conflicts, see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) arts. 51.1, 51.3, 57, June 8, 1977, 1125 U.N.T.S. 3, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079> [hereinafter AP I]. For non-international armed conflicts, see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), arts. 1.2, 13.3, June 8, 1977, 1125 U.N.T.S. 609, available at <http://treaties.un.org/untc/Pages/doc/Publication/UNTS/Volume%201125/volume-1125-I-17513-English.pdf> [hereinafter AP II]. The AP I provisions relevant to attacks are generally considered to restate customary international law norms. *See, e.g.*, 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 51 (2005), available at [http://www.icrc.org/customary-ihl/eng/print/v1\\_cha\\_chapter5\\_rule15](http://www.icrc.org/customary-ihl/eng/print/v1_cha_chapter5_rule15) (last visited Jan. 29, 2014) ("State practice establishes [the rule regarding precautions in attack is] a norm of customary international law applicable in both international and non-international armed conflicts."); *see also* Rule 22. *Principle of Precautions Against the Effects of Attacks*, ICRC.ORG, [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter6\\_rule22](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter6_rule22) (last visited Jan. 29, 2014).

106. Additional Protocol I, Article 51.3 states that "[c]ivilians shall enjoy the protection afforded by this Section [protection from attack], unless and for such time as they take a direct part in hostilities." AP I, *supra* note 105; *see also* Int'l Comm. Of the Red Cross, *Interpretive Guidance on the Notion of*

vidual would likely be added to a kill list would be if they fall into the category “members of an organized armed group.” The term “organized armed group” and its interpretation are the subject of international debate, as discussed in sections II.A.1 and II.A.2. There are some plausible circumstances under which individuals might be added to a kill list, despite their nonmembership in a group. For example, consider an individual who is known to plant IEDs but does so on a per-IED basis, for pay, or on an irregular schedule. That person, a contractor of sorts, would not be a member of an organized armed group, yet one can see why the United States would want to add his name to a kill list. Moreover, because the United States likely disagrees with the temporal dimension (for instance, the definition of “for such time as”) of participation as articulated in the DPH study, killing this named person under this view would also not be unlawful.<sup>107</sup> Though seemingly simple, the term “members of an organized armed group” is subject to extensive debate.<sup>108</sup>

First, what counts as an “organized armed group”? As was discussed in section I.B.2, the Executive Branch, relying on the *Hamdan* case, the AUMF,

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*Direct Participation in Hostilities Under International Humanitarian Law*, 90 INT’L REV. RED CROSS 872, 991 (2008) [hereinafter DPH Study] (providing recommendations concerning the interpretation of international humanitarian law related to direct participation in hostilities).

107. For further discussion of the temporal dimension of participation, see Bill Boothby, “*And for Such Time As*”: *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 741 (2010). Under international law, civilians are only protected from attack “unless and for such time as they take a direct part in hostilities.” *Id.* at 742. Boothby analyzes the temporal dimension of direct participation, seeking to answer “what does the term ‘for such time as’ mean in terms of the periods of time when the protection is lost?” *Id.* He argues that:

There are three main grounds on which the ICRC’s analysis in the Interpretive Guidance can be criticized. First, in deciding what actions constitute direct participation, the ICRC interprets the concepts of preparation, deployment, and return too restrictively. Second, by limiting continuous loss of protection to members of organized armed groups with a continuous combat function, the ICRC gives regularly participating civilians a privileged, unbalanced, and unjustified status of protection in comparison to members of the opposing armed forces, who are continuously targetable. Third, at customary law there is no revolving door of protection and thus the ICRC’s interpretation of the word “participates” in the treaty rule excessively narrows the notion of DPH by inappropriately excluding the notion of continuous participation.

*Id.* at 743.

108. Additional Protocol II is the only treaty that focuses exclusively on non-international armed conflict. By its terms, it applies only when armed groups are under “responsible command” and “exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” AP II, *supra* note 105, art. 1.1. However, most law governing attacks during a non-international armed conflict is customary. *See, e.g.*, Michael N. Schmitt, *Unmanned Combat Aircraft Systems and International Humanitarian Law: Simplifying the Oft Benighted Debate*, 30 B.U. INT’L L.J. 595, 606 n.39 (2012) (citing PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIV., COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2010), available at <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf>; MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, INT’L INST. OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY (2006); and HENCKAERTS ET AL., INT’L COMM. OF THE RED CROSS, *supra* note 105).

and the NDAA, asserts that the United States is involved in a non-international armed conflict with al Qaeda and associated forces. Setting aside the debate regarding the classification of the conflict does not resolve all issues because the law-of-armed-conflict question with regard to organization (and thereby the question of what counts as associated forces) is a continuously evolving concept.<sup>109</sup> This is a critical point because the legal questions flow into the policy questions about who can be added to kill lists and who should be added to lists. Thus, as a threshold matter, we must recognize that the task of saying which groups and persons should be understood as comprising the enemy likely cannot be accomplished by using anything other than broad laws, with details left to bureaucrats to flesh out and implement.<sup>110</sup> Moreover, as groups evolve, associate, and disassociate with one another over time, the most operational flexibility can be maintained by keeping threats broadly defined.

For example, at one time it may have been unclear whether Somalia's al Shabaab was a force sufficiently organized and associated with al Qaeda so as to render it targetable under the law of armed conflict. However, after the killing of Osama bin Laden, that question was easier to resolve because al Shabaab vowed allegiance to al Qaeda and issued al Qaeda a public message stating: "We await your instructions and we will act according to what you see in the coming stage to be in the interests of jihad and the Muslim Ummah."<sup>111</sup>

Second, even assuming that a group is sufficiently affiliated, as a matter of law, which members of an organized armed group are targetable? Many in the international community reject the idea that members of an organized armed group are always targetable based merely on their membership in that group. Rather, they believe that for members of an organized armed group to be always targetable requires them to have a "continuous combat function." That term, as described by the ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (DPH study), refers to those individuals whose "continuous function" within the group "involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities."<sup>112</sup> The United States and many international law experts do not subscribe to the DPH study's continuous combat function interpretation because it creates different standards

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109. See INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 512 (1987) [hereinafter ICRC COMMENTARY] (explaining that although the term "organized" is flexible, "this should be interpreted in the sense that the fighting should have a collective character, be conducted under proper control and according to rules, as opposed to individuals operating in isolation with no corresponding preparation or training").

110. For further discussion of the difficulties of identifying the enemy, see Chesney, *supra* note 27, at 181 ("[W]ith nonstate actors it may be exceedingly difficult to distinguish which groups should be understood as jointly comprising a single entity, which are distinct yet mutually engaged in the conflict, and which might be sympathetic with or supportive of a party to the conflict without actually being a party to the conflict.").

111. Bill Roggio, *Somalia's Shabaab Vows Allegiance to New al Qaeda emir Zawahiri*, LONG WAR J. (June 17, 2011), [http://www.longwarjournal.org/archives/2011/06/somalias\\_shabaab\\_vow.php](http://www.longwarjournal.org/archives/2011/06/somalias_shabaab_vow.php).

112. DPH Study, *supra* note 106, at 1007.



for members of regular armed forces, who are always targetable based on their membership, and members of organized armed groups, only some of whom are always targetable based on their membership.<sup>113</sup> Under the American approach, all that is needed to target an individual is “sufficiently reliable information that [the person] is a member of the organized armed group,” such as the Taliban, al Qaeda, or associated forces; however, under the ICRC interpretation, the United States would also need to know that person’s function before attacking him.<sup>114</sup> This is an important and fundamental distinction for any debate about accountability for targeted killings. The United States claims the authority to target persons who are members of organized armed groups, based merely on their membership status; in so doing, the United States is not just considering planners or commanders as potential targets, but all members of enemy groups.<sup>115</sup> This may mean that an outside observer who does not interpret the law as the United States does may see the killing of a person who was placed on a kill list as an unlawful killing. Thus, any debate about accountability requires that participants clearly specify what law they are applying to any given factual circumstance.

Although law delimits the categories of persons who can be killed, in practice, developing kill lists looks far beyond law to questions about the identity of a particular target and the accuracy and currency of the supporting intelligence.<sup>116</sup> After intelligence is reviewed, a validation step revisits the initial legal determination to ensure that attacking an individual is lawful under the law of armed conflict or a particular covert action finding or executive directive.<sup>117</sup> In explaining the compliance steps that the CIA would follow were it to carry out a targeted killing, CIA General Counsel Stephen Preston stated:

First, we would make sure all actions taken comply with the terms dictated by the President in the applicable Finding, which would likely contain specific limitations and conditions governing the use of force. We would also make sure all actions taken comply with any applicable Executive Order provisions, such as the prohibition against assassination in Twelve-Triple-Three. Beyond Presidential directives, the National Security Act of 1947 provides, . . . “[a] Finding may not authorize any action that would violate the Constitution or any statute of the United States.” This crucial provision would be strictly applied in carrying out our hypothetical program.

In addition, the Agency would have to discharge its obligation under the

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113. For one such critique, see generally Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT’L L. & POL. 697, 699 (2010) (arguing the DPH study fails “to fully appreciate the operational complexity of modern warfare”).

114. Schmitt, *supra* note 108, at 612.

115. *Id.*

116. See JP 3-60, *supra* note 101.

117. Stephen W. Preston, Gen. Counsel, Cent. Intelligence Agency, Remarks at Harvard Law School (Apr. 10, 2012), <https://www.cia.gov/news-information/speeches-testimony/2012-speeches-testimony/cia-general-counsel-harvard.html>.

congressional notification provisions of the National Security Act to keep the intelligence oversight committees of Congress “fully and currently informed” of its activities. Picture a system of notifications and briefings—some verbal, others written; some periodic, others event-specific; some at a staff level, others for members.

That leaves Compliance in Execution with reference to International Law Principles.

Here, the Agency would implement its authorities in a manner consistent with the four basic principles in the law of armed conflict governing the use of force: Necessity, Distinction, Proportionality, and Humanity. Great care would be taken in the planning and execution of actions to satisfy these four principles and, in the process, to minimize civilian casualties.

So there you have it: four boxes, each carefully considered with reference to the contemplated activity. That is how an Agency program involving the use of lethal force would be structured so as to ensure that it satisfies applicable U.S. and international law.<sup>118</sup>

The process also includes bureaucratic analysis aimed at determining both the short- and long-term costs and benefits of striking a particular target, with an eye toward both strategic and tactical considerations.<sup>119</sup>

The kill-list-creation process is complex and time intensive, usually involving dozens of analysts from different agencies. The goal of the process is to ensure that any person whose name appears on a kill list has been identified, vetted, and validated. Only then may they be nominated for placement on a kill list, with approval for nominations resting at the highest levels of government—oftentimes requiring the approval of the President of the United States.<sup>120</sup> The particular targets that receive presidential review are those with the most heightened levels of policy concern, such as strikes with potential negative diplomatic fallout or a high risk of collateral casualties; these, of course, are also the targets that will generally raise the most difficult questions under the law of armed conflict.<sup>121</sup>

To develop targets, bureaucrats leverage intelligence analysis from experts spread across the government’s civilian and military agencies. For targeted killings, target development is a systematic examination of enemy organizations and their members. Analysts are not simply looking to create a kill list based on

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118. *Id.*

119. See JP 3-60, *supra* note 101, at I-8 (noting the distinction between “[s]trategic and operational effects [which] focus on larger aspects of various systems, while tactical-level effects typically are associated with results of offensive and defensive tactical actions, often involving weapons employment”).

120. Bill Webster, *The Process Behind Targeted Killing*, WASH. POST, Oct. 23, 2012, [http://www.washingtonpost.com/world/national-security/the-process-behind-targeted-killing/2012/10/23/4420644c-1d26-11e2-ba31-3083ca97c314\\_graphic.html](http://www.washingtonpost.com/world/national-security/the-process-behind-targeted-killing/2012/10/23/4420644c-1d26-11e2-ba31-3083ca97c314_graphic.html) (noting that the National Security Council “culls the rosters [of targeted persons] to individuals who will be targeted with the president’s approval”).

121. Cf. James E. Baker, *When Lawyers Advise Presidents in Wartime: Kosovo and the Law of Armed Conflict*, 55 NAVAL WAR COLL. REV. 11, 18 (2002) (describing the President’s role in target assessment during the Kosovo campaign).

membership; rather, they act in accordance with a doctrine known as effects-based targeting.<sup>122</sup> Roughly summarized, effects-based targeting begins with the identification of certain strategic objectives, which lead to targeting decisions based on how engaging those targets will impact the enemy's decision-making process and activities.<sup>123</sup> Notably, the focus is not merely on the direct and immediate military advantage that will flow from the destruction of the target, but also on longer term impacts.<sup>124</sup> The process is open-ended and recursive.<sup>125</sup> After national security bureaucrats identify enemy groups and individuals within enemy groups, they examine how the killing of specific individuals will affect the enemy organization, looking beyond the immediate death of the individual to broader network effects.<sup>126</sup>

The killing of Anwar al Aulqi is a helpful example that can illustrate the relationship between the concepts of targeting individuals, targeting groups, and seeking to achieve effects beyond the immediate killing of an individual.<sup>127</sup> Al Aulqi was alleged to be a member of the Yemeni-based group, al Qaeda on the Arabian Peninsula (AQAP). As discussed in Part I, the AUMF empowered the President to take action against those individuals deemed responsible for the September 11th attacks, a legal standard that has since morphed into "al Qaeda and associated forces." In targeting al Aulqi, the threshold legal question was whether AQAP itself could be lawfully targeted. That question turned on whether AQAP was sufficiently tied to the "core" al Qaeda described in the AUMF, or whether the U.S. government would need to rely on the broader "associated forces" argument.<sup>128</sup> The issue was in part legal and in part opera-

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122. See T. W. Beagle, *Effects-Based Targeting: Another Empty Promise?* 5 (June 2000) (unpublished master thesis, School of Advanced Airpower Studies) (on file with the author) ("[E]ffects-based targeting is identifying and engaging an adversary's key capabilities in the most efficient manner to produce a specific effect consistent with the commander's objectives.").

123. See *id.*

124. Cf. Baker, *supra* note 121, at 22.

125. See JP 3-60, *supra* note 101, at D-2. For example, for physical targets, a target system might be the enemy resupply network, and individual target components might be the storage depot, vehicles used to transport the supplies, and personnel guarding the supplies.

126. See John Hardy & Paul Lushenko, *The High Value of Targeting: A Conceptual Model for Using HVT Against a Networked Enemy*, 12 DEF. STUD. 413, 414-17 (2012).

127. For more about the operation to kill Anwar Al Aulqi, see MARK MAZZETTI, *THE WAY OF THE KNIFE: THE CIA, A SECRET ARMY, AND A WAR AT THE ENDS OF THE EARTH* 302-12 (2013); Mark Mazzetti, Charlie Savage & Scott Shane, *How a U.S. Citizen Came to Be in America's Cross Hairs*, N.Y. TIMES, Mar. 9, 2013, <http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html>.

128. For further discussion, see Robert Chesney, Jack Goldsmith, Matthew Waxman & Benjamin Wittes, *A Statutory Framework for Next-Generation Terrorist Threats*, HOOVER INSTITUTION (2013), available at <http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf> (discussing why the AUMF is becoming increasingly obsolete and exploring ways to update statutory authority for combating al Qaeda and other terrorist groups); Chesney *supra* note 27, at 199-201 (discussing legal issues arising from the "associated force" argument); see also Julian E. Barnes & Evan Perez, *Terror Fight Shifts to Africa: U.S. Considers Seeking Congressional Backing for Operations Against Extremists*, WALL ST. J., Dec. 6, 2012, <http://online.wsj.com/article/SB10001424127887323316804578163724113421726.html> (noting that the Obama

tional. The legal question looked to whether there was authority to attack AQAP members; the operational question looked to whether striking this particular individual would actually harm AQAP or al Qaeda more broadly. If harming AQAP would harm al Qaeda, then AQAP was a group that the United States would want to disrupt and defeat. If harming AQAP would have no effect on core al Qaeda, then the associated forces definition was the only way in which striking AQAP members would be lawful.

Within the national security bureaucracy, government lawyers would have to answer the threshold relationship question. However, as specialists in law rather than terrorist organizations, these lawyers would also need to rely on the assessments made by other bureaucrats (perhaps political appointees or even elected officials) with regard to the relationship between AQAP and core al Qaeda. If this issue was resolved in the affirmative, and it was determined that AQAP was sufficiently tied to al Qaeda to render it targetable, the analyst would turn to the next question—who within AQAP should be targeted to have the desired effect on AQAP, and ultimately on al Qaeda proper? Although a single individual may be significant because of his status as a member of an organized armed group, to the analyst, the target's importance is not merely his membership, but more crucially his relationship to the broader operational system.

Thus, though some commentators argued that Anwar al Aulaki had a limited direct impact on the United States, that he was a mere recruiter or propagandist,<sup>129</sup> they failed to recognize that an analyst inside the national security

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Administration is considering asking Congress to expand the AUMF to include al Qaeda franchises and affiliated groups in North Africa); Robert Chesney, *AQAP Is Not Beyond the AUMF: A Response to Ackerman*, *LAWFARE* (Apr. 24, 2012, 10:12 AM), <http://www.lawfareblog.com/2012/04/aqap-is-not-beyond-the-aumf-a-response-to-ackerman/> (arguing that AQAP is a lawful target under the AUMF because it is “Part-and-Parcel of Core Al Qaeda” or, alternatively, falls within the statute’s cobelligerent or “associated force” terminology); Steve Coll, *Name Calling*, *NEW YORKER*, Mar. 4, 2013, [http://www.newyorker.com/talk/comment/2013/03/04/130304taco\\_talk\\_coll](http://www.newyorker.com/talk/comment/2013/03/04/130304taco_talk_coll) (discussing the importance of distinguishing al Qaeda central from groups like AQIM); Jack Goldsmith, *What the Government’s Al-Aulaki Brief Reveals*, *LAWFARE* (Sept. 26, 2010, 8:10 AM), <http://www.lawfareblog.com/2010/09/what-the-government’s-al-aulaki-brief-reveals/> (discussing the government’s theories for bringing AQAP under AUMF).

129. There is substantial evidence to the contrary. *See, e.g., Nomination of John O. Brennan to Be Director of the Central Intelligence Agency: Hearing Before the S. Select Comm. on Intelligence*, 113th Cong. 126–28 (2013) [hereinafter *Brennan Nomination Hearing*]. Brennan stated that al Aulaki “was, in fact, part of the operational effort that is known as al-Qa’ida in the Arabian Peninsula and had key responsibilities in that regard” and went on to affirm that al Aulaki was connected to specific terrorist plots set to take place within U.S. borders. *Id.* at 74; *see also Nine Years After 9/11: Confronting the Terrorist Threat to the Homeland: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 111th Cong. (2010) (statement of Sen. Joseph I. Lieberman) (“[A]n increasing number of Americans are now actually in leadership positions in international terrorist groups. Most notable is Anwar al-Awlaki, who, through his writings and audiotapes, has inspired several plots against the West over the last 5 years; and in the case of the Christmas Day attack, apparently played a direct operational role.”); Thomas Joscelyn, *Awlaki’s Emails to Terror Plotter Show Operational Role*, *LONG WAR J.*, Mar. 2, 2011, [http://www.longwarjournal.org/archives/2011/03/anwar\\_al\\_awlakis\\_ema.php](http://www.longwarjournal.org/archives/2011/03/anwar_al_awlakis_ema.php) (discussing Aulaki’s ability to “inspire others to commit acts of terrorism”).

bureaucracy could have determined that al Aulqi was nevertheless important to AQAP, irrespective of the direct and immediate impact his killing would have had on national security. As targeting experts have noted:

The constant removal of leadership impedes consistent guidance and coherent strategic communication, which weakens and delegitimizes leadership. Replacement leaders may be found quickly, but often lack the skills, experience, and relationships of their predecessors. Meanwhile, the network's capacity to plan, supply, and stage attacks is diminished due to an increased impetus for defensive measures and due to poor guidance from leaders to operatives. . . . [Removal of leadership] can induce power struggles and confuse organizational direction. . . . [and can] increase the transaction costs of maintaining organizational cohesion by forcing leaders to undertake enhanced defensive measures and restrict their movements to avoid detection. This diverts time and resources from offensive operations to precautionary measures.<sup>130</sup>

Because al Aulqi was important to AQAP, and because his death could contribute to degrading or defeating AQAP (which furthers America's broader counterterrorism goals), al Aulqi was nominated as a target, added to multiple lists, and ultimately killed in a strike "carried out by Joint Special Operations Command, under the direction of the CIA."<sup>131</sup>

Despite the controversy over al Aulqi's placement on a kill list and subsequent killing, his case was an easier one than others because at least some facts existed to suggest he was a senior member (akin to an individual with a continuous combat function).<sup>132</sup> But what about lower level "foot soldiers," couriers, or mere members of enemy groups? Though under the U.S. view all members of an organized armed group may be placed on a kill list, not all of them will be. Rather, only those individuals who are of sufficient value to the enemy organization will be placed on a list. But what low-level people are worth adding to a kill list? Bomb makers? Couriers? As various organizations have reported, it is not just high-profile individuals like al Aulqi who may find themselves the target of an attack; other individuals, deemed low-level or insignificant by outside commentators, have also found themselves the subject of attacks.<sup>133</sup> This is the case because the effects sought by killing are not merely the immediate effects of eliminating a person, but also the second- and

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130. Hardy & Lushenko, *supra* note 126, at 421–22 (internal citations omitted).

131. Jennifer Griffin & Justin Fishel, *Two U.S.-Born Terrorists Killed in CIA-Led Drone Strike*, Fox News, Sept. 30, 2011, <http://www.foxnews.com/politics/2011/09/30/us-born-terror-boss-anwar-al-awlaki-killed/>.

132. See *supra* note 106 and accompanying text.

133. See STANFORD & NYU REPORT, *supra* note 16; Adam Entous, *Drones Kill Low-Level Militants, Few Civilians: U.S.*, REUTERS, May 3, 2010, <http://www.reuters.com/article/2010/05/03/us-pakistan-usa-drones-idUSTRE6424WI20100503> (stating that statistics provided by U.S. officials show that most of "500 killed [in strikes]—more than 90 percent by some measure—are lower-level fighters"); Entous, *supra* note 57 ("An analysis of data provided to Reuters by U.S. government sources shows that the

third-order effects such as pressuring, desynchronizing, and debilitating the effectiveness of terrorist networks.<sup>134</sup> Although killing Anwar al Aulqi, Osama bin Laden, or other high-ranking individuals may be an obvious policy choice, what about the propriety of killing low-level operatives?<sup>135</sup> That is the subject of the next section.

## 2. Who Is Worth Killing?

Though law and morality require that the right people get killed, the task of determining who are the right people is one left, at least initially, to bureaucrats.<sup>136</sup> Resolving who should be killed is a difficult task because, at the organizational level, it may be unclear which groups are sufficiently associated with al Qaeda or the Taliban to come within the scope of the various legal authorities discussed in Part I and section II.A.<sup>137</sup> Moreover, as will be dis-

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CIA has killed around 12 times more low-level fighters than mid-to-high-level al Qaeda and Taliban leaders since the drone strikes intensified in the summer of 2008.”)

134. See Hardy & Lushenko, *supra* note 126, at 420–22; see also Peter Neumann, Ryan Evans & Raffaello Pantucci, *Locating Al Qaeda's Center of Gravity: The Role of Middle Managers*, 34 *STUD. CONFLICT & TERRORISM* 825 (2011).

135. For several discussions of this issue, see *Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearing Before the Subcomm. on Nat'l Sec. & Foreign Affairs of the H. Comm. on Oversight & Gov't Reform*, 111th Cong. (2010) (statement of Mary Ellen O'Connell); Alston, *supra* note 16; Adil Ahmad Haque, *Killing in the Fog of War*, 86 *S. CAL. L. REV.* 63 (2012); O'Connell, *supra* note 13.

136. See Chesney et al., *supra* note 128, at 13–14 (discussing the importance of governmental accountability when conducting overseas counterterrorism operations). For further discussion, see generally ROBERT D. BEHN, *RETHINKING DEMOCRATIC ACCOUNTABILITY* (2001). The fact that accountability starts with these bureaucrats supports the notion raised by Behn that when everyone is accountable to an extent and there are so many hands involved, no one is accountable. It allows the President or senior Administration officials to place the blame on the frontline operator. *But cf.* Interview by Terry Gross with Scott Shane, N.Y. Times Nat'l Sec. Correspondent, *The Sticky Questions Surrounding Drones and Kill Lists*, NAT'L PUBLIC RADIO (Feb. 12, 2013), <http://www.npr.org/2013/02/12/171719082/the-sticky-questions-surrounding-drones-and-kill-lists> [hereinafter Interview with Scott Shane]. Shane says:

You usually think of this stuff as being distanced from the president . . . maybe the president [being] given as they used to say plausible deniability or at least . . . his hands kept clean of the details of this kind of thing. But he insisted on being very involved, and that has all kinds of I suppose political reverberations both good for him and perhaps bad for him.

*Id.*

137. On these challenges, see Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 *B.C. L. REV.* 769, 789 n.111 (2011). Chesney highlights the challenge and debate over determining which groups are sufficiently tied to the AUMF to allow for the detention of their members; an analogous concern presents itself in the targeting context. *Id.* Chesney states:

The level of consensus with respect to the objects of the AUMF, even at this group/organizational level, should not be overstated. There is ample room for disagreement regarding the degree of institutional affiliation with al Qaeda or the Taliban that is necessary for other, arguably distinct, entities to be deemed subject to the AUMF as well. There are numerous entities in the Af-Pak theater, for example, that are engaged to varying degrees in hostilities against the United States or the Afghan government, yet do not constitute subsidiaries of either al Qaeda or the Taliban.

*Id.*



cussed below, because al Qaeda and associated forces are more akin to social networks than hierarchical organizations, the question of who within an organization is worth killing is also difficult to assess from outside government.<sup>138</sup> Nonetheless, by understanding the process bureaucrats follow for determining who may be killed, we can begin to answer some of the questions that scholars have raised regarding the wisdom of targeted killings.

For example, it is the job of national security bureaucrats to ask whether killing someone will be effective at disrupting organizations. It is also their job to ask whether the right people are being killed,<sup>139</sup> and whether there will be blowback or other repercussions from a targeting decision. When scholars question whether targeted killings are effective, and whether the targeted killing policy is the right one,<sup>140</sup> they are asking questions which could in part be answered by looking at the bureaucratic procedures associated with killing particular individuals whose names and activities are otherwise unknown to those outside the bureaucracy. Thus, it is the procedures for deciding who is worth killing that lie at the heart of the accountability debate. When scholars wonder if the United States is achieving short-term goals while losing the long

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138. *See id.* Chesney further notes the changing nature of terrorist groups and their networks of affiliates, with changing leadership structures and declarations of allegiance:

The Haqqani Network provides an example, as might the Tehrik-i-Taliban Pakistan (not to be confused with the original Afghan Taliban commanded by Mullah Omar, now best referred to as the Quetta Shura Taliban). Arguments can be made that AUMF-based authority extends to such groups as co-belligerents of al Qaeda and the Taliban, but the AUMF itself does not speak to the issue. Similarly, consider the al Qaeda “affiliate” scenario represented by the Algerian extremist group once known as the *Groupe Salafiste pour la prédication et le combat* (“GSPC,” or the Salafist Group for Preaching and Combat). Its activities are primarily directed toward the Algerian government, but Osama bin Laden may have provided funding or otherwise assisted when the GSPC originally broke off from the *Groupe islamique armé* in the 1990s. The GSPC leadership declared allegiance to bin Laden in 2003, and in 2006 it changed its name to al Qaeda in the Islamic Maghreb (“AQIM”) after Ayman al-Zawahiri formally announced its affiliation. When, precisely, in light of all this, did AQIM become sufficiently linked to al Qaeda to be considered within the scope of the AUMF, if ever? The AUMF itself does not provide guidance.

*Id.* (internal citations omitted).

139. Haque, *supra* note 135, at 69.

140. *See* Peter M. Cullen, *The Role of Targeted Killing in the Campaign Against Terror*, JOINT FORCE Q., Jan. 2008, at 22; Matt Frankel, *The ABCs of HVT: Key Lessons from High Value Targeting Campaigns Against Insurgents and Terrorists*, 34 STUD. CONFLICT & TERRORISM 17 (2011); Hardy & Lushenko, *supra* note 126; David A. Jaeger & Zahra Siddique, *Are Drone Strikes Effective in Afghanistan and Pakistan? On the Dynamics of Violence Between the United States and the Taliban*, INST. FOR STUDY LABOR, DISCUSSION PAPER No. 6262 (2011); Micah Zenko, *Reforming U.S. Drone Strike Policies*, COUNCIL ON FOREIGN RELS., SPECIAL REPORT No. 65 (2013); Luke A. Olney, *Lethal Targeting Abroad: Exploring Long-Term Effectiveness of Armed Drone Strikes in Overseas Contingency Operations* (Apr. 14, 2011) (unpublished master’s thesis, Georgetown University), available at <http://repository.library.georgetown.edu/bitstream/handle/10822/553552/olneyLuke.pdf>; *Do Drone Attacks Do More Harm than Good?*, N.Y. TIMES (Sept. 25, 2012), <http://www.nytimes.com/roomfordebate/2012/09/25/do-drone-attacks-do-more-harm-than-good/>; Nick Hopkins, *US Drone Attacks ‘Counter-productive’, Former Obama Security Adviser Claims*, GUARDIAN (Jan. 7, 2013), <http://www.guardian.co.uk/world/2013/jan/07/obama-adviser-criticises-drone-policy>.

war,<sup>141</sup> they should recognize that to best answer that question, transparency is necessary regarding the bureaucrat's process of assessing whether the deaths of those persons on a kill list will further national strategic interests. In short, the determination of whether targeted killings are effective is an analysis performed by national security bureaucrats, and assessing how well they do so is the central issue in the accountability debate.

Inside the bureaucracy, analysts approach the question "who is worth killing?" by viewing enemy organizations as systems and social networks. Bureaucrats initially consider two variables when determining whether an individual is worthy of nomination to a kill list. First, they consider whether the individual is critical to the group of which he is a member; this is the most important determination.<sup>142</sup> Second, they assess the "physical susceptibility" of a target to attack.<sup>143</sup> Physical characteristics are only one part of this susceptibility analysis; also relevant are the location of the target, its mobility, and any countermeasures the target may employ.<sup>144</sup> In the context of targeted killing, typical countermeasures employed by terrorists and insurgents are failing to wear uniforms, hiding amongst the civilian population (passive human shielding),<sup>145</sup> and active human shielding,<sup>146</sup> among other techniques.<sup>147</sup> These vulnerability factors are important for the analyst to identify and document at this stage because they will come up as questions in later stages of the target approval

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141. See, e.g., Stephanie Carvin, *The Trouble with Targeted Killing*, 21 SEC. STUD. 529, 529 (2012) (arguing that there is insufficient data on whether targeted killing is an effective counterterrorism strategy); Kevin Jon Heller, *Legality Is Not Morality*, OPINIO JURIS (Dec. 31, 2012), <http://opiniojuris.org/2012/12/31/legality-is-not-morality/> (arguing that targeted strikes are immoral and ineffective). *But cf.* Interview with Scott Shane, *supra* note 136 ("I think the role of the White House—the role that President Obama assigned to the White House—was, and to himself, was really one of restraining the agencies, double-checking the agencies, making sure that at this sort of broader strategic, political level, that there was good judgment being exercised, that you weren't taking a shot in a very marginal situation or for a marginal gain and risking a big backlash that would put the United States in a worse position.").

142. See U.S. DEP'T OF THE ARMY, FM 34–36: SPECIAL OPERATIONS FORCES INTELLIGENCE AND ELECTRONIC WARFARE OPERATIONS app. D, D-1 ("Criticality means target value. This is the primary consideration in targeting. A target is critical when its destruction or damage has a significant impact on military, political, or economic operations.").

143. See JP 3-60, *supra* note 101, at D-4.

144. See *id.* at D-5 ("Countermeasures mean an adversary's ability to counteract the potential disruptive activity of the friendly system through active and passive means.").

145. The most famous example of this is Osama bin Laden's hideout in Abbottabad, Pakistan, a moderately populated city in the heart of Pakistan. In addition, the compound was located less than one mile from the Pakistani Military Academy.

146. Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?*, 16 EMORY INT'L L. REV. 445, 456 (2002) ("Terrorists . . . not only situate themselves and operate among the civilian population, but they do so with the improper purpose of using those civilians as a means of achieving immunity from attack by the democratic state.").

147. See *The Al-Qaida Papers—Drones*, ASSOCIATED PRESS, Feb. 21, 2013, [http://hosted.ap.org/specials/interactives/\\_international/\\_pdfs/al-qaida-papers-drones.pdf](http://hosted.ap.org/specials/interactives/_international/_pdfs/al-qaida-papers-drones.pdf) (providing a translated al Qaeda document listing other countermeasures al Qaeda members can employ to counter drones).

process.<sup>148</sup> Of course, these factors can change, as human targets are inherently mobile. Over time, however, intelligence can develop about a target's pattern of life in a way that reveals when the target is most vulnerable to attack. Though vulnerability factors are considered, it is rare that a lack of vulnerability will prevent a target from making it to a nomination list for consideration; rather, it is more likely to affect the prioritization of the target, require additional intelligence assets to monitor the target, alter how the target may be attacked,<sup>149</sup> and may even determine which government agency is responsible for attacking the target.<sup>150</sup>

Criticality, the initial consideration in the “who is worth killing?” equation is a measure of the individual's contribution to the enemy group.<sup>151</sup> There are four factors that are important to a criticality analysis. The first factor, value, “measures the [individual's] importance to the [group's] ability to conduct operations.”<sup>152</sup> “This value measurement may reflect relative military, economic, political, psychological, informational, environmental, cultural, or geographic importance. Psychological significance assigned to a system reflects the thought processes of the adversary.”<sup>153</sup> Second is the concept of depth; and third, the related factor of recuperation. In a targeted killing, depth refers to the time between the elimination of a target and its impact on the enemy system, and recuperation is a measurement of the time and cost required for a system to regain its functional capability after being disrupted.<sup>154</sup> The final factor an analyst considers is capacity, which looks at current output and maximum output based upon continuous operation over a twenty-four-hour day.<sup>155</sup> Taken together, these concepts all relate to the effect that attacking a target will have

148. See discussion *infra* sections III.A.2, III.A.4, III.B.3.

149. See Daniel Byman & Benjamin Wittes, *How Obama Decides Your Fate if He Thinks You're a Terrorist*, ATLANTIC, Jan. 3, 2013, <http://www.theatlantic.com/international/archive/2013/01/how-obama-decides-your-fate-if-he-thinks-youre-a-terrorist/266419/>; Greg Miller, *Plan for Hunting Terrorists Signals U.S. Intends to Keep Adding Names to Kill Lists*, WASH. POST, Oct. 23, 2012, [http://articles.washingtonpost.com/2012-10-23/world/35500278\\_1\\_drone-campaign-obama-administration-matrix](http://articles.washingtonpost.com/2012-10-23/world/35500278_1_drone-campaign-obama-administration-matrix).

150. For example, if a target is known to operate in the borderlands between Afghanistan and Pakistan, that fact will raise issues as to whether the military or CIA will attack the target because the CIA is responsible for targets in Pakistan, while the military is responsible for targets in Afghanistan. See Gordon Lubold & Shane Harris, *The CIA, Not the Pentagon, Will Keep Running Obama's Drone War*, FOREIGN POL'Y, Nov. 5, 2013, [http://killerapps.foreignpolicy.com/posts/2013/11/05/cia\\_pentagon\\_drone\\_war\\_control](http://killerapps.foreignpolicy.com/posts/2013/11/05/cia_pentagon_drone_war_control) (“The military also cannot conduct overt, hostile action in Pakistan, where the drones have been most active and are practically the only means the United States has to attack terrorists and militants in remote regions.”).

151. Cf. JP 3-60, *supra* note 101, at D-2 (“Criticality measures a component's contribution to a target system's larger function and its relative importance among the components of the system.”). Thinking about targeting this way reveals that enemy groups can be understood as and analogized to target systems.

152. This is an adaptation of the value definition in JP 3-60, *supra* note 101, at D-2.

153. *Id.*

154. The military uses the terms “depth” and “recuperation” to refer to elements of industrial production. I have adapted those definitions and applied them to the context of targeted killing.

155. See JP 3-60, *supra* note 101, at D-4.

on the enemy group's war-making or war-fighting capability.<sup>156</sup> It is important to note that these operative principles mean that an individual may be critical to an organization, despite being a low-level individual.

A hypothetical can help illustrate these concepts. Suppose an analyst would like to place a bomb maker on a kill list. That bomb maker's criticality will be measured by the four factors outlined above (value, depth, recuperation, capacity). The value of the bomb maker will be determined by analyzing how killing him will impact the group's ability to conduct operations.<sup>157</sup> The amount the enemy's operations are disrupted by the particular targeted killing will depend on the depth of the enemy's bomb-making roster. So, if this bomb maker was one of ten similarly skilled bomb makers, an analyst might note that this organization is deep on bomb-making talent and the disruption in short-run bomb-making capacity will be brief. However, just because the target is quickly replaced by another bomb maker currently on the roster does not mean that the enemy organization has not suffered.<sup>158</sup> The long-term effects on the organization will require an estimate of how long it will take the enemy to regain its functional capability—in this example, how long it will take the organization to go from nine bomb makers back to the ten they started with. It may be that bomb makers take a long time to train, or prospective bomb makers may be deterred by the frequent killing of their kind. All of these factors will be considered by an analyst making a determination about the criticality of a target.

Though it may be clear that killing a bomb maker can create a gap in an enemy organization that may be harder to fill, removing other individuals may similarly pressure or disrupt terrorist organizations. As CIA director Michael Hayden stated in 2008:

By making a safe haven feel less safe, we keep Al Qaeda guessing. We make them doubt their allies; question their methods, their plans, even their priorities . . . . [W]e force them to spend more time and resources on self-preservation, and that distracts them, at least partially and at least for a time, from laying the groundwork for the next attack.<sup>159</sup>

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156. Cf. U.S. AIR FORCE, PAMPHLET 14-210: USAF INTELLIGENCE TARGETING GUIDE 18 (1998) [hereinafter AIR FORCE PAMPHLET 14-210] ("The target system concept is important because almost all targeting is based on targeting systems. A target is composed of components, and components are composed of elements. A single target may be significant because of its own characteristics, but often its importance lies in its relationship to other targets. Usually the effect of a strike or attack mission upon an enemy can be determined only by analyzing the target in the overall enemy's target system.").

157. This will involve specifically noting the capacity of the group to conduct operations based on this individual's contributions and the expected degradation in that capacity if that individual is eliminated.

158. For discussion on this aspect of targeted killing and its corresponding effectiveness, see McNeal, *supra* note 57, at 345 (citing BOAZ GANOR, THE COUNTER-TERRORISM PUZZLE: A GUIDE FOR DECISION MAKERS (2007)).

159. Peter Bergen & Katherine Tiedemann, *The Drone War*, NEW REPUBLIC, June 3, 2009, <http://www.newrepublic.com/article/the-drone-war#>.

This becomes obvious when one considers that national security bureaucrats will look beyond criticality and vulnerability and also engage in network-based analysis. Network-based analysis looks at terrorist groups as nodes connected by links and assesses how components of that “terrorist network operate together and independently of one another.”<sup>160</sup> Contrary to popular critiques of the targeting process that liken it to a “haphazardly prosecuted assassination program,” in reality modern targeting involves applying pressure to various nodes and links within networks to disrupt and degrade their functionality.<sup>161</sup>

To effectively pursue a network-based approach, bureaucrats rely in part on what is known as “pattern of life analysis,” which involves “connecting the relationships between places and people by tracking their patterns of life.”<sup>162</sup> This analysis draws on the interrelationships among groups “to determine the degree and points of their interdependence,” it assesses how activities are linked and looks to “determine the most effective way to influence or affect the enemy systems.”<sup>163</sup> While the enemy moves from point to point, reconnaissance or surveillance tracks and notes every location and person visited. Connections between the target, the sites they visit, and the persons they interact with are documented, built into a network diagram, and further analyzed.<sup>164</sup> Through this process links and nodes in the enemy’s network emerge.<sup>165</sup> The analysis charts the “social, economic and political networks that underpin and support clandestine networks,”<sup>166</sup> identifying key decision makers and those who support or influence them indirectly.<sup>167</sup> This may mean that analysts will track logistics and money trails, they may identify key facilitators and nonleadership persons of interests, and they will exploit human and signals intelligence combined with computerized knowledge integration that generates and cross-references thousands of data points to construct a comprehensive picture of the enemy network.<sup>168</sup> According to an Army targeting field manual:

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160. Hardy & Lushenko, *supra* note 126, at 414. See generally Steve Ressler, *Social Network Analysis as an Approach to Combat Terrorism: Past, Present, and Future Research*, HOMELAND SEC. AFF., July 2006, at 2, available at <http://www.hsaj.org/?download&mode=dl&h&w&drm=resources%2Fvolume%2Fissue%2Fpdfs%2F&f=2.2.8.pdf&altf=2.2.8.pdf>; Glenn A. Henke, *How Terrorist Groups Survive: A Dynamic Network Analysis Approach to the Resilience of Terrorist Organizations* (May 21, 2009) (unpublished degree monograph, School of Advanced Military Studies, United States Army Command and General Staff College), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA507988>.

161. Hardy & Lushenko, *supra* note 126, at 414.

162. U.S. DEP’T OF THE ARMY, FIELD MANUAL NO. 3-60: THE TARGETING PROCESS B-3 (2010) [hereinafter FM 3-60] (referred to as “life pattern analysis” in FM 3-60).

163. AIR FORCE PAMPHLET 14-210, *supra* note 156, at 42.

164. FM 3-60, *supra* note 162.

165. *Id.* (“Connections between those sites and persons to the target are built, and nodes in the enemy’s network emerge.”).

166. Hardy & Lushenko, *supra* note 126, at 417.

167. *Id.* at 417, 419–22.

168. PAUL M. SALMON, NEVILLE A. STANTON, GUY H. WALKER & DANIEL P. JENKINS, *DISTRIBUTED SITUATIONAL AWARENESS: THEORY, MEASUREMENT AND APPLICATION TO TEAMWORK* (2009); CHAD C. SERENA, *A REVOLUTION IN MILITARY ADAPTATION: THE US ARMY IN THE IRAQ WAR 115–17* (2011); Hardy &

This analysis has the effect of taking a shadowy foe and revealing his physical infrastructure for things such as funding, meetings, headquarters, media outlets, and weapons supply points. As a result, the network becomes more visible and vulnerable, thus negating the enemy's asymmetric advantage of denying a target. Nodal analysis uses the initial start point to generate additional start points that develop even more lines of operation into the enemy's network. The payoff of this analysis is huge but requires patience to allow the network's picture to develop over a long term and accept the accompanying risk of potentially losing the prey.<sup>169</sup>

As Professor John Hardy and U.S. Army Officer Paul Lushenko note, viewing targeting in this way demonstrates how seemingly low-level individuals such as couriers and other "middle-men" in decentralized networks such as al Qaeda are oftentimes critical to the successful functioning of the enemy organization.<sup>170</sup> They explain how targeting these individuals can "destabilize clandestine networks by compromising large sections of the organization, distancing operatives from direct guidance, and impeding organizational communication and function."<sup>171</sup> Moreover, because clandestine networks rely on social relationships to manage the trade-off between maintaining secrecy and security, attacking key nodes can have a detrimental impact on the enemy's ability to conduct their operations.<sup>172</sup> Thus, though some individuals may seem insignificant to the outside observer, when considered by a bureaucrat relying on network-based analytical techniques, the elimination of a seemingly low-level individual might have an important impact on an enemy organization. Because terrorist networks rely on secrecy in communication, individuals within those networks may forge strong ties that remain dormant for the purposes of operational security.<sup>173</sup> This means that social ties that appear inactive or weak to a casual observer such as an NGO, human rights worker, journalist, or even a target's family members may in fact be strong ties within the network.<sup>174</sup> Furthermore, because terrorist

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Lushenko, *supra* note 126, at 418; Paul Lushenko, "Partnership 'Till It Hurts': The Use of Fusion Cells to Establish Unity of Effort Between SOF (Yin) and Conventional Forces (Yang), *SMALL WARS J.*, May 2010, <http://smallwarsjournal.com/blog/journal/docs-temp/438-lushenko.pdf>.

169. FM 3-60, *supra* note 162, at B-4.

170. See Hardy & Lushenko, *supra* note 126, at 416-17.

171. *Id.* at 417.

172. See Carlo Morselli, Cynthia Giguère & Katia Petit, *The Efficiency/Security Trade-Off in Criminal Networks*, 29 *SOC. NETWORKS* 143, 151-52 (2007); Jacob N. Shapiro, *The Terrorist's Challenge: Security, Efficiency, and Control* (Apr. 26, 2007) (unpublished manuscript), <http://igcc3.ucsd.edu/research/security/DACOR/presentations/Shapiro.pdf>.

173. See Hardy & Lushenko, *supra* note 126, at 419; see also PETER L. BERGEN, *MANHUNT: THE TEN-YEAR SEARCH FOR BIN LADEN FROM 9/11 TO ABBOTTABAD* 129 (2012) (noting that when Abu Ahmed al-Kuwaiti "and his family visited other family members in Pakistan, they lied about where they were living, saying they lived in Peshawar. They also lied to neighbors about who they were, what they were doing, and where they were going").

174. Cf. Mark S. Granovetter, *The Strength of Weak Ties*, 78 *AM. J. SOC.* 1360 (1973) (noting how weak ties in a social network are "indispensable to individuals' opportunities and to their integration into communities"); Hardy & Lushenko, *supra* note 126, at 419; Valdis E. Krebs, *Mapping Networks of*



networks oftentimes “rely on powerful social connections between highly charismatic leaders to function,” disrupting those lines of communication can significantly impact those networks.<sup>175</sup>

Although al Qaeda has relied heavily on social hierarchy and key individuals to inspire action at lower levels,<sup>176</sup> it can best be understood as a decentralized social network. Such social networks have hubs and nodes that can be targeted with strikes to achieve several different ends: harassing and straining the network, leveraging the deaths of middlemen to disable it, and desynchronizing it by targeting decision makers and figureheads to alienate operatives and leaders.<sup>177</sup> Of course, networks are notably resistant to the loss of any one node, so the focus of targeting is to identify the critical person whose removal will cause the most damage and to remove enough critical nodes simultaneously that the network cannot reroute linkages.<sup>178</sup> For example, Osama bin Laden’s courier, Abu Ahmed al-Kuwaiti, was bin Laden’s sole means of communicating with the rest of al Qaeda. By tracking al-Kuwaiti, analysts could determine the links and nodes in bin Laden’s network. Moreover, if the government had chosen to kill al-Kuwaiti, a mere courier, it would have prevented bin Laden from leading his organization, desynchronizing the network until bin Laden could find a trustworthy replacement. Finding such a replacement would have been a difficult task considering that al Kuwaiti lived with bin Laden and was his trusted courier for years.<sup>179</sup> Similarly the example of the U.S. experience in Iraq is instructive:

Al-Qaeda in Iraq task organized itself across a range of operational and support specialties that required the services of “facilitators, financiers, computer specialists, or bomb-makers”. Attacking these leverage points enables

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*Terrorist Cells*, 24 CONNECTIONS 43, 49–51 (2002) (demonstrating the challenges of mapping a terrorist network given their inherently dynamic nature); Roy Lindelauf, Peter Borm & Herbert Hamers, *On Heterogeneous, Covert Networks*, in MATHEMATICAL METHODS IN COUNTERTERRORISM, 215, 218–19 (Nasrullah Memon et al. eds., 2009) (noting how terrorist Abu Musab al Suri (Mustafa Setmariam Nasar) criticized hierarchical network structures, arguing in favor of “small autonomous cells with limited strategic guidance”; even if such an ideal is achieved, “it is known that in reality there still exist weak bonds between local groups and experienced jihadists or Al Qaeda operatives, such was the case for instance in the Madrid and London attacks”); Roy Lindelauf, Peter Borm & Herbert Hamers, *The Influence of Secrecy on the Communication Structure of Covert Networks*, 31 SOC. NETWORKS 126, 127 (2009).

175. Hardy & Lushenko, *supra* note 126, at 417.

176. FAWAZ A. GERGES, *THE RISE AND FALL OF AL-QAEDA* 29–31 (2011); Rohan Gunaratna & Aviv Oreg, *Al Qaeda’s Organizational Structure and Its Evolution*, 33 STUD. CONFLICT & TERRORISM 1043 (2010).

177. See Hardy & Lushenko, *supra* note 126, at 420–22.

178. See FM 3-60, *supra* note 162, at B-4.

179. Of course, sometimes intelligence gained from continuing to monitor a target is more significant than killing or capturing the target—a point recognized in targeting doctrine. FM 3-60, *supra* note 162, at B-4 (“An action against one target may reduce the chance of success against a more important target.”). As we now know, the U.S. government decided that killing bin Laden was more important than disrupting his network’s operations, but the example nevertheless demonstrates the potential value of an otherwise low-level courier.

[attackers] to attempt to destroy a clandestine network's functionality; to damage the network "so badly that it cannot perform any function or be restored to a usable condition without being entirely rebuilt." This deprofessionalizes the network and imposes additional recruitment and training costs that further diminish operational capacity.<sup>180</sup>

As these examples demonstrate, sometimes targeting even low-level operatives can make a contribution to the American war effort against al Qaeda and associated forces. Of course, there are legal consequences associated with this dispersal of al Qaeda and associated forces into a network and to the manner in which the U.S. government determines if individuals are sufficiently tied to groups with whom the United States sees itself at war. Perhaps one of the biggest challenges is that, to an external observer, it is not clear what criteria apply to identify an individual or a group as an associated force.<sup>181</sup> As one NGO critic has stated, "It's difficult to see how any killings carried out in 2012 can be justified as in response to [the attacks that took place] in 2001 . . . . Some states seem to want to invent new laws to justify new practices."<sup>182</sup> However, just because it is difficult for a worker at an NGO to see the relationship, it does not mean that the relationship does not exist. Nevertheless, the legal challenges have not been lost on the Obama Administration, as Daniel Klaidman noted:

[President Obama] understood that in the shadow wars, far from conventional battlefields, the United States was operating further out on the margins of the law. Ten years after 9/11, the military was taking the fight to terrorist groups that didn't exist when Congress granted George Bush authority to go to war against al-Qaeda and the Taliban. Complicated questions about which groups and individuals were covered . . . were left to the lawyers. Their finely grained distinctions and hair-splitting legal arguments could mean the difference between who would be killed and who would be spared.<sup>183</sup>

Accountability for these "finely grained" legal distinctions is bound up in bureaucratic analysis that is not readily susceptible to external review. These distinctions rely on thousands of data points, spread across geographic regions and social relationships, making them inherently complex and opaque. Accordingly, the propriety of adding an individual to a kill list will be bound up in the analyst's assessment of these targeting factors and the reliability of the intelligence information underlying the assessment. How well that information is documented, how closely that information is scrutinized, and by whom will be key factors in any assessment of whether targeted killings are accountable.

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180. Hardy & Lushenko, *supra* note 126, at 421 (emphasis omitted) (footnotes omitted).

181. See Chesney, *supra* note 27, at 199–200.

182. Owen Bowcott, *Drone Strikes Threaten 50 Years of International Law, Says UN Rapporteur*, GUARDIAN, June 21, 2012, <http://www.theguardian.com/world/2012/jun/21/drone-strikes-international-law-un>.

183. KLIDMAN, *supra* note 9, at 205.

### 3. The Accountability Paper Trail

As the concepts above demonstrate, there are multiple incremental questions that must be asked to determine whether an individual can be lawfully targeted. That process involves the creation of an extensive paper and electronic trail. As analysts develop lists of targets, they create target folders containing detailed analysis on the target (intelligence reports, modeling, simulation products). Bureaucrats identify requirements for additional intelligence, file requests for legal opinions or have legal counsel sign off on lists, and create briefing materials about targets, uploading this information to secure databases. The process is formalized and documented, which lends itself to various mechanisms of accountability.<sup>184</sup>

In current practice, the analytical steps described in sections II.A.1 and II.A.2 are documented in target folders that serve as repositories of information about potential targets.<sup>185</sup> “These folders contain target information, which includes validation data and approval messages along with any identified potential collateral damage concerns or collateral effects associated with the target.”<sup>186</sup> Contrary to the claims of critics who worry about stale or out-of-date intelligence,<sup>187</sup> target folders are continuously updated to reflect the most recent information regarding a target’s status, and the compiled data are independently reviewed by personnel not responsible for its collection. The independent review is designed to ensure mistakes do not proliferate throughout the targeting process.<sup>188</sup> Across various agencies, this information is now maintained in what are known as Electronic Targeting Folders (ETFs) within a database. The database has evolved and is now colloquially referred to as the “disposition matrix.” The information in a related database, sometimes referred to as “the playbook,” lays out procedures on how to proceed in selecting and targeting suspects drawn from the disposition matrix.<sup>189</sup> The disposition matrix, or just

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184. See discussion *infra* Part IV.

185. JP 3-60, *supra* note 101, at D-5.

186. *Id.*

187. See, e.g., Scott Kariya & Paula Kaufman, *New Technology Transforms Tactics in Afghanistan*, 39 IEEE SPECTRUM 30, 33 (2002) (discussing the possibility that outdated intelligence could lead to unnecessary casualties). *Contra* *Inside the CIA’s “Kill List,”* PBS FRONTLINE, Sept. 6, 2011, <http://www.pbs.org/wgbh/pages/frontline/iraq-war-on-terror/topsecretamerica/inside-the-cias-kill-list/> (recounting how former CIA general counsel, John Rizzo, and other agency “lawyers would deny the [Counterterrorism Center] a request, usually for relying on old and possibly outdated information”; moreover, “[e]very name on the list had to be reviewed by the lawyers every six months, and some people were taken off it because the information became outdated”).

188. See JP 3-60, *supra* note 101, at D-5.

189. Karen DeYoung, *A CIA Veteran Transforms U.S. Counterterrorism Policy*, WASH. POST, Oct. 24, 2012, [http://articles.washingtonpost.com/2012-10-24/world/35499428\\_1\\_drone-strikes-brennan-obama-administration](http://articles.washingtonpost.com/2012-10-24/world/35499428_1_drone-strikes-brennan-obama-administration); see also Greg Miller, Ellen Nakashima & Karen DeYoung, *CIA Drone Strikes Will Get Pass in Counterterrorism ‘Playbook,’ Officials Say*, WASH. POST, Jan. 19, 2013, [http://articles.washingtonpost.com/2013-01-19/world/36474007\\_1\\_drone-strikes-cia-director-playbook](http://articles.washingtonpost.com/2013-01-19/world/36474007_1_drone-strikes-cia-director-playbook) (noting that, notwithstanding the ways in which CIA and JSOC have integrated to carry out targeted killings, the CIA’s targeting in Pakistan will be exempt from protocols set forth in the playbook, while JSOC operations and targeted killings outside Pakistan will be regulated by the playbook).

“matrix” for short, seems to be a multidimensional database that goes well beyond just names and corresponding intelligence to include many of the variables discussed in Part III. For example, journalists have quoted officials who claim that the matrix “was developed by the NCTC . . . to augment [CIA’s and JSOC’s] separate but overlapping kill lists.”<sup>190</sup> The matrix adds significant background information and contingency planning. Officials describe the matrix as a “continually evolving database” said to include:

biographies, locations, known associates and affiliated organizations . . . strategies for taking targets down, including extradition requests, capture operations and drone patrols.

. . . .

The database is meant to map out contingencies, creating an operational menu that spells out each agency’s role in case a suspect surfaces in an unexpected spot. . . . [and contains] plans, including which U.S. naval vessels are in the vicinity and which charges the Justice Department should prepare.<sup>191</sup>

The system is still just “a database in development”; what it seems to represent is a tool that allows analysts to consider additional factors beyond merely adding a name to a kill list.<sup>192</sup> These ETFs contain a record of the approvals,<sup>193</sup> changes in intelligence, collateral concerns, anticipated benefits of attacking the target, and other information as it becomes available. That information includes human intelligence reports referencing the target, signals intelligence referencing the target, imagery and floor plans of likely locations of the target, a diagram showing the social and communications links of the target as derived from human and signals intelligence,<sup>194</sup> and previous operations against the target.<sup>195</sup> Also documented are intelligence gaps that will form the basis of additional intelligence requirements.<sup>196</sup> Analysts can request additional pieces of information that they believe are needed to complete target development, and those requests will also be documented.<sup>197</sup> Developing targets and documenting information about them is time and resource intensive, requiring extensive bureaucratic cooperation within subagencies inside the Department of Defense and within the civilian intelligence agencies.

190. Miller, *supra* note 149.

191. *Id.*

192. *Id.*

193. See discussion *infra* section II.A.4, section II.B.

194. See social network analysis discussion above.

195. FM 3-60, *supra* note 162, at D-14.

196. JP 3-60, *supra* note 101, at D-6. (“During target development, intelligence gaps will be identified and form the basis of additional intelligence requirements. These requirements must be articulated as early in the targeting process as possible in order to support continued target development and other assessments.”).

197. *Id.* at J-2.

#### 4. Vetting and Validating Names for the Kill Lists

Target vetting is the process by which the government integrates the opinions of subject-matter experts from throughout the intelligence community.<sup>198</sup> The United States has developed a formal voting process that allows members of agencies from across the government to comment on the validity of the target intelligence and any concerns related to targeting an individual. At a minimum, the vetting considers the following factors: target identification, significance, collateral-damage estimates, location issues, impact on the enemy, environmental concerns, and intelligence gain/loss concerns.<sup>199</sup> An important part of the analysis also includes assessing the “impact of not conducting operations against the target.”<sup>200</sup> Vetting occurs at multiple points in the kill-list-creation process, as targets are progressively refined within particular agencies and at interagency meetings.

A validation step follows the vetting step. It is intended to ensure that all proposed targets meet the objectives and criteria outlined in strategic guidance.<sup>201</sup> The term “strategic” is a reference to national-level objectives—the assessment is not just whether the strike will succeed tactically (that is, whether it will eliminate the targeted individual), but also whether it advances broader national policy goals.<sup>202</sup> Accordingly, at this stage there is also a reassessment of whether the killing will comport with domestic legal authorities such as the AUMF or a particular covert action finding.<sup>203</sup> At this stage, participants will also resolve whether the agency that will be tasked with the strike has the authority to do so.<sup>204</sup> Individuals participating at this stage analyze the mix of military, political, diplomatic, informational, and economic consequences that flow from killing an individual. Other questions addressed at this stage are whether killing an individual will comply with the law of armed conflict, and rules of engagement (including theater-specific rules of engagement). Further bolstering the evidence that these are the key questions that the U.S. government asks is the clearly articulated target-validation considerations found in military doctrine (and there is little evidence to suggest they are not considered in current operations). Some of the questions asked are:

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198. *Id.* at D-6 to D-7.

199. *Id.* at D-7.

200. *Id.*

201. *See id.* at I-1 (“[T]actical actions should be tied to operational and strategic outcomes, so that the whole operation, from the tactical engagements up to national objectives, forms a logical chain of cause and effect.”).

202. *See id.*; *see also supra* text accompanying note 119.

203. JP 3-60, *supra* note 101, at III-10, E-2; KLADMAN, *supra* note 9, at 217; Brennan, *supra* note 97; *cf.* Eric Holder, Att’y Gen., Dep’t of Justice, Address at Northwestern University School of Law (Mar. 5, 2012); Jeh C. Johnson, Gen. Counsel, Dep’t of Def., Address at Yale Law School: National Security Law, Lawyers, and Lawyering in the Obama Administration (Feb. 22, 2012); Koh, *supra* note 54.

204. *Cf.* KLADMAN, *supra* note 9, at 211, 213 (describing how Department of Defense General Counsel Jeh Johnson examined the Department’s lethal authorities for strikes, concluding that some targets were no longer covered by the AUMF).

- Is attacking the target lawful? What are the law of war and rules of engagement considerations?
- Does the target contribute to the adversary's capability and will to wage war?
- Is the target (still) operational? Is it (still) a viable element of a target system? Where is the target located?
- Will striking the target arouse political or cultural "sensitivities"?
- How will striking the target affect public opinion (enemy, friendly, and neutral)?
- What is the relative potential for collateral damage or collateral effects, to include casualties?
- What psychological impact will operations against the target have on the adversary, friendly forces, or multinational partners?
- What would be the impact of not conducting operations against the target?<sup>205</sup>

As the preceding criteria highlight, many of the concerns that critics say should be weighed in the targeted killing process are considered prior to nominating a target for inclusion on a kill list.<sup>206</sup> For example, bureaucrats in the kill-list-development process will weigh whether striking a particular individual will improve world standing and whether the strike is worth it in terms of weakening the adversary's power.<sup>207</sup> They will analyze the possibility that a strike will adversely affect diplomatic relations, and they will consider whether there would be an intelligence loss that outweighs the value of the target.<sup>208</sup> During this process, the intelligence community may also make an estimate regarding the likely success of achieving objectives associated with the strike, such as degraded enemy leadership or diminished capacity to conduct certain types of attacks. Importantly, they will also consider the risk of blowback, such

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205. This bulleted list is drawn from FM 3-60, *supra* note 162, at 2-14 to 2-15.

206. *See, e.g.*, Alston, *supra* note 16; Burt & Wagner, *supra* note 16; O'Connell, *supra* note 13.

207. This conclusion runs contrary to inferences drawn in critiques such as Frankel, *supra* note 140; Jenna Jordan, *When Heads Roll: Assessing the Effectiveness of Leader Decapitation*, 18 SEC. STUD. 719 (2009); William Mayborn, *Creating More Turmoil: Why UAV Strikes Will Be Counterproductive in Yemen*, 6 J. ON TERRORISM & SEC. ANALYSIS 1 (2011); O'Connell, *supra* note 13; David Kilcullen & Andrew McDonald Exum, *Death from Above, Outrage down Below*, N.Y. TIMES, May 16, 2009, [http://www.nytimes.com/2009/05/17/opinion/17exum.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/05/17/opinion/17exum.html?pagewanted=all&_r=0); Robert Pape, *The True Worth of Air Power*, FOREIGN AFF., Mar./Apr. 2004, at 116; Letter from the Members of the Yemen Policy Initiative to President Barack Obama, Atlantic Council & Project on Middle East Democracy (June 25, 2012), <http://pomed.org/wordpress/wp-content/uploads/2012/06/Yemen-Policy-Initiative-Letter-to-Obama-6-25-12.pdf>.

208. This conclusion runs contrary to inferences drawn in critiques such as Marc A. Thiessen, *Dead Terrorists Tell No Tales: Is Barack Obama Killing Too Many Bad Guys Before the U.S. Can Interrogate Them?*, FOREIGN POL'Y, Feb. 8, 2010, [http://www.foreignpolicy.com/articles/2010/02/08/dead\\_terrorists\\_tell\\_no\\_tales](http://www.foreignpolicy.com/articles/2010/02/08/dead_terrorists_tell_no_tales); John Yoo, *Obama, Drones, and Thomas Aquinas*, WALL ST. J., June 7, 2012, <http://online.wsj.com/article/SB10001424052702303665904577452271794312802.html>.



as creating more terrorists as a result of the killing.<sup>209</sup>

Evaluating the cases of three individuals considered for the kill list can help illustrate these concepts. The first target was Sheikh Mohamed Mukhtar Abdirahman, a leader of al Shabaab, the Somali terrorist group with ties to al Qaeda. The second case is that of the second in command of al Shabaab, and the third is Sheikh Mukhtar Robow, the third in command of al Shabaab. Daniel Klaidman described the vetting and validation of Abdirahman as a kill-list target.<sup>210</sup> During this process, State Department Legal Adviser Harold Koh and Department of Defense General Counsel Jeh Johnson agreed that Abdirahman and his second in command were targetable, due in part to intelligence that indicated that both had sworn an oath of allegiance to al Qaeda and favored striking the United States.<sup>211</sup> However, Koh and Johnson disagreed about the targeting of Robow, who previously led al Shabaab.<sup>212</sup> The source of disagreement was a mix of military, diplomatic, and political considerations. Specifically, Koh's reading of the intelligence led him to believe that there were credible indications that Robow was opposed to attacking America or other Western interests, and Koh was concerned about the "message it would send 'if we killed the leader of the faction who was advocating *against* targeting Americans.'"<sup>213</sup> Were this merely a political or policy concern, Koh's objections could have been overruled in a vote, and the target could have been nominated to the approval authority (in this case someone at the White House) for a strike. However, according to Klaidman, Koh did not merely state his objection as a policy one; rather he noted, "The State Department legal adviser, for the record, believes this killing would be unlawful," and Robow was removed from the targeting list.<sup>214</sup> This event occurred deep within the bureaucracy, in a secret meeting of Senate-confirmed political appointees, raising questions about how accountable such a secret process can be. However, Klaidman noted the unspoken concern of many who participated in the targeting debates—leaks or possibly even a high-profile resignation: "If word leaked that Robow was killed against the explicit advice of the State Department, it could cause a scandal. Additionally, some in the administration had feared that Koh might resign on principle . . . ."<sup>215</sup>

Many of the concerns raised by critics are already considered within the

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209. This conclusion runs contrary to inferences drawn in critiques such as Michael J. Boyle, *The Costs and Consequences of Drone Warfare*, 89 INT'L AFF. 1 (2013); Leila Hudson, Colin S. Owens & Matt Flannes, *Drone Warfare: Blowback from the New American Way of War*, 18 MIDDLE EAST POL'Y 122 (2011). *But cf.* Interview with Scott Shane, *supra* note 136 ("Whether the net impact of killing three al-Qaeda guys was worth the obvious backlash and the elimination of people who are actually on the side of the U.S. in this fight is a very good question.").

210. KLAIDMAN, *supra* note 9, at 221.

211. *Id.*

212. *Id.* at 221–22.

213. *Id.* at 222.

214. *Id.* at 222–23.

215. *Id.*

kill-list-creation process.<sup>216</sup> Perhaps critics are expressing doubt about whether the concerns listed above are being attributed sufficient weight or are debated thoroughly enough. That concern has less to do with a lack of accountability than it does with policy choices and how to hold those making policy choices accountable. Thus, a critical component of accountability is to resolve who makes the ultimate decision to add a name to a kill list. That decision is addressed in the final steps known as voting and nominating.

##### 5. Voting on and Nominating Names to the List

The Koh–Johnson debate detailed above highlights how the vetting and validation factors, once they are analyzed and documented, are debated by those higher in the bureaucracy. Following this debate, participants in the kill-list-creation process vote on whether a name should be nominated for inclusion on a kill list. In the Obama Administration, this debate and voting process has been referred to colloquially as Terror Tuesday.<sup>217</sup> At this stage, information from the ETFs are reduced to more manageable summaries of information; in current practice they are Powerpoint slides that display a color picture of the target and physical characteristics such as height and weight.<sup>218</sup> The slide also lists information such as the individual’s rank in the organization, professional expertise, family ties, and links to individual attacks.<sup>219</sup> In addition, slides include specific intelligence to support the individual’s nomination with an explanation of the source of the intelligence.<sup>220</sup> Other data may include a map of the area where the target has been operating, a personal history of the target, patterns of life for the target, cellphone number of the target, and even the vehicle the target is known to travel in. The slides have been colloquially referred to as “baseball cards,”<sup>221</sup> a term the military has adopted in written

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216. For examples of concerns raised, see Bergen & Tiedemann, *supra* note 159; Kilcullen & Exum, *supra* note 207; Qamar Zaman, *Condemning Drone Strikes: Former US Envoy Advises Pakistanis to Stand up to Govt*, EXPRESS TRIB., Oct. 1, 2012, <http://tribune.com.pk/story/445070/condemning-drone-strikes-former-us-envoy-advises-pakistanis-to-stand-up-to-govt/>.

217. KLAIMAN, *supra* note 9, at 107, 261; Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES, May 29, 2012, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all>. Interestingly, in the Vietnam War, targets were approved by the President at what became known as Tuesday luncheons. It seems Tuesdays are a bad day for America’s enemies. See HAND, *supra* note 89, at 35–36 (citing MARK CLODFELTER, *THE LIMITS OF AIRPOWER: THE AMERICAN BOMBING OF NORTH VIETNAM* 88 (1989)).

218. KLAIMAN, *supra* note 9, at 200.

219. *Id.*

220. *Id.*

221. *Id.*; Interview with Scott Shane, *supra* note 136. Shane describes the intelligence within, circulation of, and debate over the baseball cards, stating:

[I]t’s essentially: Here’s what the guy’s name is, here’s his age, here’s his background, here’s what we know about him, here’s why we think he’s a dangerous terrorist. And then it’s all kicked around on this secret—but fairly open within the government—process where an agency, perhaps on the periphery of this, like the State Department, can say, ‘You know, we think that guy is not important enough to kill,’ or, ‘We have different information. We don’t think he’s that bad,’ or, ‘We think if you took a shot at him it would disrupt our relations with

doctrine.<sup>222</sup>

Although the formal process has evolved throughout the Bush and Obama Administrations, the expectation that senior bureaucrats will vote on whether names should be formally approved for killing has remained an enduring feature. Participants in the process may vote to concur, concur with comment, not concur, or abstain from voting.<sup>223</sup> Those individuals who abstain “do so primarily because they do not have independent information or have not made an independent assessment” of the target.<sup>224</sup> Unanimity is not always required; rather, abstentions, nonconcurrence, and concurrence with comments are indicators of greater operational and strategic risk which the President or other approval authority will take note of when reviewing the target for final approval.<sup>225</sup> According to press reports, some substantial number of “nominations go to the White House, where by his own insistence and guided by Mr. Brennan, Mr. Obama must approve any name.”<sup>226</sup>

To summarize, what does the current kill-list process look like? According to news reports, sometime in April 2012, the vetting processes for adding names to both CIA and JSOC kill lists were revamped so that the President’s counterterrorism adviser and his staff have “greater input earlier in the process, before [senior officials] mak[e] the final recommendation to President Barack Obama.”<sup>227</sup> The goal of the Obama Administration’s reforms was to formalize the approval process as a matter of Executive Branch practice and to bring a sense of clarity to the system for the Obama Administration and for future administrations.<sup>228</sup> As such, much of the interagency vetting and validating is now centralized through the National Counterterrorism Center (NCTC). Furthermore, the President’s counterterrorism adviser now chairs the NSC deputies

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such and such a country, and we don’t think it’s worth it.’ There’s really kind of a debate which ends up with either a name on the list or a name not on the list.

Interview with Scott Shane, *supra* note 136. For a modified version of a baseball card provided to this author, see Gregory McNeal, *Kill-List Baseball Cards and the Targeting Paper Trail*, *LAWFARE* (Feb. 26, 2013, 6:51PM), <http://www.lawfareblog.com/2013/02/kill-list-baseball-cards-and-the-targeting-paper-trail/>.

222. See FM 3-60, *supra* note 162, at D-14.

223. JP 3-60, *supra* note 101, at D-6.

224. *Id.* at D-6 to D-7.

225. Cf. FM 3-60, *supra* note 162, at D-7; KLADMAN, *supra* note 9, at 208–10, 221–23, 254; Baker, *supra* note 121.

226. Becker & Shane, *supra* note 217 (describing President Obama as “the liberal law professor who campaigned against the Iraq war and torture, and then insisted on approving every new name on an expanding ‘kill list’” and quoting National Security Advisor Thomas E. Donilon, who maintains that the President “is determined that he will make these decisions about how far and wide these operations go”). *But see* Greg McNeal, *Obama’s Kill List Story a Self Serving Campaign Piece Built from Selective Leaks*, *FORBES*, June 8, 2012, <http://www.forbes.com/sites/gregorymcneal/2012/06/08/obama-kill-list-leaks/>.

227. Kimberly Dozier, *Who Will Drones Target? Who in the US Will Decide?*, *ASSOCIATED PRESS*, May 21, 2012, [http://www.salon.com/2012/05/21/who\\_will\\_drones\\_target\\_who\\_in\\_the\\_us\\_will\\_decide/](http://www.salon.com/2012/05/21/who_will_drones_target_who_in_the_us_will_decide/).

228. *Id.*; Miller, *supra* note 149.

meetings that shape the final product for presidential approval.<sup>229</sup>

Based on this information, we can sketch a general picture of the kill-list-approval process.<sup>230</sup> First, military and intelligence officials from various agencies compile data and make recommendations based on internal vetting and validation standards.<sup>231</sup> Second, those recommendations go through the NCTC, which further vets and validates rosters of names and other variables that are further tailored to meet White House standards for lethal targeting.<sup>232</sup> Third, the President's designee (currently the counterterrorism adviser) convenes an NSC deputies meeting to get input from senior officials, including top lawyers from the appropriate agencies and departments, such as the CIA, FBI, DOD, State Department, and NCTC.<sup>233</sup> At this step is where the State Department's Legal Adviser (previously Harold Koh) and the Department of Defense General Counsel (previously Jeh Johnson), along with other top lawyers, would have an opportunity to weigh in with legal opinions on behalf of their respective departments.<sup>234</sup> Objections to a strike from top lawyers might prevent the decision from climbing further up the ladder absent more deliberation.<sup>235</sup> In practice, an objection from one of these key attorneys almost certainly causes the President's designee in the NSC process to hesitate before seeking final

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229. Miller, *supra* note 149; DeYoung, *supra* note 189.

230. *The Process Behind Targeted Killing*, WASH. POST, Oct. 23, 2012, [http://www.washingtonpost.com/world/national-security/the-process-behind-targeted-killing/2012/10/23/4420644c-1d26-11e2-ba31-3083ca97c314\\_graphic.html](http://www.washingtonpost.com/world/national-security/the-process-behind-targeted-killing/2012/10/23/4420644c-1d26-11e2-ba31-3083ca97c314_graphic.html). Decisions to launch signature strikes are made under this same general framework and the process is "compressed but not skipped" when there is "compelling intelligence and a narrow window in which to strike." Miller, *supra* note 149.

231. Interview by Neal Conan with Daniel Klaidman, NATIONAL PUBLIC RADIO (June 6, 2012), <http://www.npr.org/2012/06/06/154443665/how-the-president-decides-to-make-drone-strikes> [hereinafter Klaidman Interview]; Miller, *supra* note 149; *The Process Behind Targeted Killing*, *supra* note 230; KLAIMAN, *supra* note 9, at 200.

232. Miller, *supra* note 149; *The Process Behind Targeted Killing*, *supra* note 230.

233. Miller, *supra* note 149; *The Process Behind Targeted Killing*, *supra* note 230; Interview with Scott Shane, *supra* note 136 ("As far as we're able to tell in this very secretive process, there's one process for the military, which is quite interesting because it can involve as many as 100 people watching on video monitors in multiple agencies, and somebody presents a set of possible targets . . .").

234. KLAIMAN, *supra* note 9, at 208–10. Klaidman describes how Koh and Johnson clashed with one another in their outlooks on how best to fight al Qaeda and the legal parameters of doing so. *Id.* Klaidman asserts that Koh and Johnson:

fought a pitched battle over legal authorities in the war on al-Qaeda. Like Johnson, Koh had no problem going after al-Qaeda's most senior members. But things got murkier when the military wanted to kill or capture members of other terrorist groups whose connections to AQ were unclear. Johnson took a more hawkish position . . . The two men battled each other openly in meetings and by circulating rival secret memos pushing their respective positions with the policymakers.

*Id.*; see also *id.* at 218, 221–22 (briefly discussing the proliferation of lawyers in the national security establishment and recounting how the "Koh–Johnson rivalry was reignited during a secure conference call in the fall of 2010"); Klaidman Interview, *supra* note 231.

235. KLAIMAN, *supra* note 9, at 221–23 (recounting how Koh's objection to targeting an al Shabaab commander, Sheikh Mukhtar Robow, essentially froze the decision at the NSC level and led to the removal of Robow's name from the targeting list).

approval from the President. Finally, if the NSC gives approval, the President's counterterrorism advisor shapes the product of the NSC's deliberations and seeks final approval from the President.<sup>236</sup> At this stage, targets are evaluated again to ensure that target information is complete and accurate, targets relate to objectives, the selection rationale is clear and detailed, and collateral damage concerns are highlighted.<sup>237</sup> By this point in the bureaucratic process, just as in prior conflicts like Kosovo,<sup>238</sup> there will be few targeting proposals that will reach the approval authority (usually the President) that are clearly prohibited under the law of armed conflict. Rather, most decisions at this point will be judgment calls regarding the application of law to facts, or intelligence and analytic judgments regarding facts and expected outcomes.<sup>239</sup>

#### B. IMPLICATIONS FOR THE ACCOUNTABILITY DEBATE

Despite the details provided in the description of the process above, there are still a substantial number of unanswered questions germane to the accountability debate. What does it mean when sources claim that the President authorizes every strike in Yemen and Somalia? Does this mean that the President signs off on each strike in these countries in real time? Or that presidential authorization for personality strikes exists because he has approved names added to kill lists, while leaving the strike decisions to the DCIA or military commanders? The available information taken as a whole, as well as common sense judgments, point towards the latter conclusion, but there has been no definitive statement by the U.S. government on this point.

The President cannot give preapproved authorization for targets when the identities of the targets are not yet known, as is the case with signature strikes. Therefore, statements by Administration officials that the President authorizes every strike in Yemen and Somalia seem dubious.<sup>240</sup> It is in this context that the President's own words are quite telling. When asked, "do you personally decide

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236. Miller, *supra* note 149; *The Process Behind Targeted Killings*, *supra* note 230; see also KLAIDMAN, *supra* note 9, at 52–53. Kladman describes how "Brennan and Cartwright would find themselves pulling the president out of state dinners or tracking him down on a secure phone to discuss a proposed strike." KLAIDMAN, *supra* note 9, at 52–53. Kladman also recounts instances where Brennan and Cartwright would meet with the President to discuss a strike and the President "'was willing to change his mind,' in the words of one military source, occasionally even 'widening the aperture' based on new intelligence or the recommendations of his field commanders." *Id.* at 52. Essentially, "[t]he three men were making life-and-death decisions, picking targets, rejecting or accepting names put forward by the military." *Id.* at 252–53; see also *id.* at 252–56 (recounting that Brennan was not comfortable with a particular strike that would target AQAP members based on what had been proposed in a meeting led by Joint Chief Chairman Adm. Mullen and that Brennan "would not take the recommendation to the president until a higher-level deputies meeting could vet the plan;" the strike was ultimately authorized, but only after four names, as opposed to the original eleven, were added to the "pre-vetted list 'for Direct Action'").

237. See KLAIDMAN, *supra* note 9, at 235–41.

238. See James E. Baker, *The Role of the Lawyer in War*, 4 CHI. J. INT'L L. 407, 426 (2003).

239. See *id.*

240. See Becker & Shane, *supra* note 217.

who is targeted?,” the President would only say that he is “ultimately responsible” for the strikes.<sup>241</sup> When pressed further and asked specifically, “Sir, do you personally approve the targets?,”<sup>242</sup> the President delicately replied, “as commander in chief, ultimately I’m responsible for the process that we’ve set up.”<sup>243</sup> The President therefore may be responsible for the process, but does that make him accountable for incorrect kill-list nominations? What about improperly conducted strikes once the lists are transmitted to the field? What roles do the President and other officials play after approving names? Those issues are addressed in Part III, the execution of a targeted killing.

### III. EXECUTING A TARGETED KILLING

Part I discussed the broad legal and policy determinations that lead to the creation of kill lists, and Part II narrowed the focus to the bureaucratic and political vetting of those lists. Part III turns to the legal and policy considerations that inform the kinetic implementation of the targeted killing policy. When it comes time to eliminate a person on the kill list, the United States has developed an extensive pre-execution set of policies, doctrine, and practices designed to ensure that a target is in fact the person on the kill list. Similarly, once that target is correctly identified, an elaborate process exists for estimating and mitigating the incidental harm to nearby civilians and civilian objects (so-called collateral damage) that might flow from attacking the kill-list target. Discussing the mixture of law and policy applicable to the execution of a targeted killing is critical because, in most contemporary operations, the policy guidelines, special instructions, and rules of engagement are so restrictive that legal issues will rarely be the determinative factor in a strike.<sup>244</sup> Rather, policy

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241. Jessica Yellin, *Interview with Barack Obama, President of the United States*, BUREAU INVESTIGATIVE JOURNALISM, Sept. 5, 2012, <http://www.thebureauinvestigates.com/2012/09/06/obamas-five-rules-for-covert-drone-strikes/>.

242. *Id.*

243. *Id.*

244. For example, according to the Joint Civilian Casualty Study, since June 2009, almost all strikes in Afghanistan are now “preplanned operations.” Sarah Sewell & Larry Lewis, Joint Civilian Casualty Study (Aug. 31, 2010) (on file with author) [hereinafter Joint CIVCAS Study] (stating that pursuant to the 2009 ISAF tactical directive, “[u]nits were directed to look for all tactical alternatives, including withdrawal, when considering airstrikes on compounds, and airstrikes were only to be considered on compounds in self-defense when forces were receiving effective fire and had no alternative to save the lives of Coalition forces”). This means that all air-to-ground operations in Afghanistan went through a rigorous pre-strike execution analysis unless troops were in an emergency situation requiring close air support (CAS) or close combat attack (CCA). In both CAS and CCA in Afghanistan, the pilot may not deploy a weapon without ground commander direction, usually through a JTAC. The pilot’s only discretion is to elect to not release a weapon. Air Force leaders repeatedly emphasize to their pilots that they will never be disciplined for returning to base with all of their bombs on their plane, meaning that Air Force leadership will support the decision of pilots to not employ a weapon even if it is direct contravention of the ground commander and even if it means a high value target will go free. Specifically, commanders have stated, “if you come back with your bombs, I will back you up.” Such statements gave aircrews confidence that they had “top cover if they decided not to engage because they perceived risks of civilian casualties.” NATO/ISAF, *Unclassified Tactical Directive*, July 7, 2009,



instruments will often prohibit attacks against persons that would clearly qualify as lawful targets under the law of armed conflict, and those instructions will place such a low threshold for acceptable collateral damage that attacks are usually prohibited before an operation could ever inflict “excessive” harm to civilians.<sup>245</sup> As will be discussed in the end of this Part, where policy instruments differ as to strike authority or “acceptable collateral damage” (for instance, strikes in Pakistan versus Afghanistan), we see a difference in the number of reported civilian casualties per strike, suggesting that policy instruments can have a significant impact on the conduct of targeted killings.

This Part discusses the law of targeted killings and how it is implemented through policy guidance. It begins by discussing how individuals on the list are found and tracked and explains the process of target validation and collateral damage mitigation. Section III.A concludes by discussing steps taken to minimize harm to collateral persons and objects and discusses pre-established approval authority for certain types of strikes. This Part concludes in section III.B with a discussion of some of the potential accountability shortfalls in the execution process, citing performance data from Afghanistan and Pakistan.

In addition to process, this section provides specific details and statistics I gathered through fieldwork, reporting on the performance of targeted killings in recent operations in the CENTCOM theater of operations. Those statistics are compared to the statistics gathered by NGOs examining operations in Pakistan. Comparing the statistics provides insight into the targeted killing process and serves as a vehicle for greater understanding of how accountability processes may reduce harm to civilians.

This section draws exclusively from evidence about the military’s target-execution process. However, field interviews I conducted—plus the existing public record—all indicate that the CIA process mirrors the military’s process, although in a more truncated fashion.<sup>246</sup> The connections and convergence between CIA and military operations are notable because, as Robert Chesney has written, “the CIA’s current structure for conducting drone strikes in Pakistan involves a fleet of thirty Predators and Reapers commanded by the CIA but flown—in the sense of hands-on-the-joystick—by Air Force personnel working from a military base in the United States.”<sup>247</sup> Moreover, the public record indicates that the CIA applies the international law principles of necessity,

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[http://www.nato.int/isaf/docu/official\\_texts/Tactical\\_Directive\\_090706.pdf](http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf); NATO/ISAF, *General Petraeus Issues Updated Tactical Directive: Emphasizes “Disciplined Use of Force,”* Aug. 1, 2010, <http://www.isaf.nato.int/article/isaf-releases/general-petraeus-issues-updated-tactical-directive-emphasizes-disciplined-use-of-force.html>; NATO/ISAF, *COMISAF’s Tactical Directive*, Nov. 30, 2011, [http://www.isaf.nato.int/images/docs/20111105%20nuc%20tactical%20directive%20revision%204%20\(releaseable%20version\)%20r.pdf](http://www.isaf.nato.int/images/docs/20111105%20nuc%20tactical%20directive%20revision%204%20(releaseable%20version)%20r.pdf); see also Schmitt, *supra* note 108, at 618.

245. See Schmitt, *supra* note 108, at 618.

246. “Truncated” here refers to the number of additional layers of approval authority, not a limitation on the number of pre-execution steps taken by attackers.

247. Chesney, *supra* note 30, at 580 (emphasis omitted) (citing Greg Miller & Julia Tate, *CIA Shifts Focus to Killing Targets*, WASH. POST, Sept 1, 2011).

distinction, and proportionality. For example, State Department Legal Adviser Howard Koh, in a March 2010 speech, stated: “[T]here are obviously limits to what I can say publicly. . . . [but] it is the considered view of this Administration . . . that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law . . . .”<sup>248</sup> Also, many aspects of the process described in this section are aided by computerized programs, and there is evidence to suggest that the CIA has capabilities similar to the targeting and collateral damage estimation capabilities of the military, on which this Part is largely based.<sup>249</sup> This section contributes to the existing literature by providing a qualitative empirical account that explains for the first time in scholarly literature the process of collateral damage estimation and mitigation as practiced by the United States.<sup>250</sup> Where the intelligence community process departs from the military process, I note the important differences. Despite a focus on military procedures, intelligence officials I interviewed confirmed that the process described here closely tracks the process followed by all actors in the U.S. government.

Targeted killings directed at individuals on killlists are, by their nature, pre-planned, because they are strikes against designated targets who have been vetted through the kill-list process described in Part II above. Accordingly, in the sections below I use the terms “pre-planned” or “planned strikes or operations” interchangeably with the term “targeted killing”.

#### A. THE LAW OF ARMED CONFLICT IN THE CONTEXT OF TARGETED KILLING

As was discussed in Part I, the United States sees itself as involved in an armed conflict with the Taliban, al Qaeda, and associated forces. That armed conflict is better seen as a series of distinct armed conflicts in different parts of the world. In some instances, the United States is a participant in another state’s non-international armed conflict; in others, the United States sees itself involved

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248. Koh, *supra* note 54. Journalists in the audience seemed to believe this was a defense of the CIA’s program. See, e.g., Adam Serwer, *Did Harold Koh Also Provide Legal Justification for Targeted Killings of Americans Suspected of Terrorism?*, AM. PROSPECT, Apr. 12, 2010, <http://prospect.org/article/did-koh-also-provide-legal-justification-targeted-killings-americans-suspected-terrorism>. Other reports support the idea that the CIA complies with the law of armed conflict. See, e.g., JOBY WARRICK, *THE TRIPLE AGENT: THE AL-QAEDA MOLE WHO INFILTRATED THE CIA* (2011); Tara Mckelvey, *Inside the Killing Machine*, NEWSWEEK, Feb. 13, 2011, <http://mag.newsweek.com/2011/02/13/inside-the-killing-machine.html>.

249. See U.S. Special Operations Command, *Intelligence Related Training*, May 22, 2007, [https://www.fbo.gov/index?s=opportunity&mode=form&id=199a7d1ccd0015fa19535fb0eed7af48&tab=core&\\_cview=0](https://www.fbo.gov/index?s=opportunity&mode=form&id=199a7d1ccd0015fa19535fb0eed7af48&tab=core&_cview=0) (showing job posting seeking trainers to educate Special Operations Forces on how to work with CIA targeteers: “The first objective is to increase SOCOM knowledge of CIA culture. The second objective is to increase SOCOMs effectiveness when working with CIA targeteers on counterterrorism (CT) intelligence support and mission planning.”).

250. Though this section will be especially useful for those seeking to understand how collateral damage is estimated in targeted killing operations, the section’s relevance is not limited to the context of targeted killings because collateral damage estimation takes place in strikes that would not be considered targeted killings, such as air strikes against facilities, unnamed individuals who are directly participating in hostilities, uniformed combatants, and others.

in a global non-international armed conflict. The U.S. Supreme Court adopted this position in *Hamdan v. Rumsfeld*,<sup>251</sup> and the Justice Department has affirmed it in litigation regarding attacks against al Qaeda members.<sup>252</sup> Irrespective of which characterization governs in any particular instance, the U.S. government claims to conduct all of its targeted killing operations in accordance with the law of armed conflict.<sup>253</sup>

During any military operation, the law of armed conflict requires states to refrain from mounting indiscriminate attacks; this is a customary law norm articulated in Article 51(4) of AP I.<sup>254</sup> The general principles of targeting most relevant to a discussion of targeted killings are (1) distinction, (2) precautions, and (3) proportionality.

### 1. Distinction and Positive Identification

The first step in any targeted killing is the most important.<sup>255</sup> The attacker must ensure that he can positively identify, with reasonable certainty, that the person he wants to kill is a legitimate military target.<sup>256</sup> In other words, the attacker must verify that the person being targeted is the person who is on the kill list. This obligation derives from the principle of distinction found in Article 48 of Additional Protocol I, which prohibits direct attacks on civilians or civilian objects.<sup>257</sup> The basic rule expressed is that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>258</sup> However, in both international and non-international armed conflicts, there are two categories of civilians who may be lawfully attacked: those who are members of an organized

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251. See 548 U.S. 557, 631–32 (2006).

252. See, e.g., Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum in Support of Defendant’s Motion to Dismiss at 32–34, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

253. See Koh, *supra* note 54. The term “law of armed conflict,” as used here, is synonymous with the terms *jus belli*, *jus in bello*, international law of armed conflict, or international humanitarian law.

254. API, *supra* note 105, art. 51; see also Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT’L SEC. J. 45, 56 (2010) (discussing the law of armed conflict’s role in “minimiz[ing] suffering in war by protecting persons not participating in hostilities and by restricting the means and methods of warfare”).

255. In its policy documents, the U.S. military refers to this first step as Collateral Damage Estimation (CDE) Level 1. There are five CDE levels forming the technical framework known as Collateral Damage Methodology (CDM). CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3160.01, NO-STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY, D-A-7 to D-A-35 (Feb. 13, 2009), available at [https://www.aclu.org/files/dronefoia/dod/drone\\_dod\\_3160\\_01.pdf](https://www.aclu.org/files/dronefoia/dod/drone_dod_3160_01.pdf) [hereinafter CJCSI 3160.01].

256. Declaration of Jonathan Manes, Exh. A: The Joint Targeting Definitions and Process at 26, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) [hereinafter Declaration of Jonathan Manes]; U.S. JOINT FORCES COMMAND [USJFCOM], JOINT FIRES AND TARGETING HANDBOOK III-77 (Oct. 19, 2007) [hereinafter JFTH].

257. API, *supra* note 105, art. 48.

258. *Id.*

armed group and those who are directly participating in hostilities.<sup>259</sup> Individuals who are targeted because they are on a kill list will almost always fall into the members of an organized armed group category.<sup>260</sup>

Article 57 also states a precautionary rule of “constant care,” and in 57(2)(a)(i) it requires that attackers “[d]o everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects.”<sup>261</sup> The term “feasible” means this is a duty that must take into account all circumstances at the time. Certainty is not required because compliance would be impossible.<sup>262</sup> These legal obligations mean that when targeting a person on a kill list, the attacker needs to make a determination, based on the available intelligence, whether the person being targeted is the right person and determine whether collateral harm to civilians is expected.<sup>263</sup> This requires finding, fixing, tracking, and targeting a person to ensure that person is in fact the one on a kill list.<sup>264</sup>

To do this, attackers will draw on some of the same analytical techniques described in Part II. For example, pattern of life analysis, which was used to identify critical links and nodes in a terrorist network to add names to a kill list, is also used prior to executing a targeted killing to minimize collateral harm. At this stage of the targeted killing process, intelligence-collection efforts will be used to find, fix, track, and target an individual on the kill-list. Though it may seem that the process is limited by the optics of an unmanned aerial vehicle and its remote pilot acting alone,<sup>265</sup> in reality, multiple sources of intelligence will be used to corroborate information about a potential target.

Signals intelligence, for example, can locate a target, but may not be able to discern who it is. An airborne sensor with full motion video can track, but not necessarily identify, the target. Human intelligence can provide intent, but may

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259. For international armed conflicts, see AP I, *supra* note 105, arts. 51.1, 51.3. For non-international armed conflicts, see AP II, *supra* note 105, art. 13.3.

260. The term “organized armed group” and its interpretation are the subject of international debate, as discussed in sections II.A.1 and II.A.2.

261. API, *supra* note 105, art. 57(2)(a)(i).

262. *But see* Int’l Comm. of the Red Cross, *Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, para. 2195 (1987), available at <http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=50FB5579FB098FAAC12563CD0051DD7C> (“Thus the identification of the objective, particularly when it is located at a great distance, should be carried out with great care. Admittedly, those who plan or decide upon such an attack will base their decision on information given them, and they cannot be expected to have personal knowledge of the objective to be attacked and of its exact nature. However, this does not detract from their responsibility, and in case of doubt, even if there is only slight doubt, they must call for additional information and if need be give orders for further reconnaissance . . .”).

263. Thus, one possible source of accidental killings that we should not neglect is mistakes made while attempting to comply with the principle of distinction—for example, targeting a group of persons believed to be directly participating in hostilities who turn out to be civilians not directly participating in hostilities.

264. FM 3-60, *supra* note 162, at A-1.

265. *Cf.* Elisabeth Bumiller, *A Day Job Waiting for a Kill Shot a World Away*, N.Y. TIMES, July 29, 2012, <http://www.nytimes.com/2012/07/30/us/drone-pilots-waiting-for-a-kill-shot-7000-miles-away.html>.

not be able to fix a target to a precise location. In combination, however, these sources can “focus the spotlight on foes that are hidden in the general population, so they can be captured or killed.”<sup>266</sup>

Finding a target in this context means that the intelligence community will conduct collection activities that initially view every person as a potential target.<sup>267</sup> That may sound controversial, but through this process, some entities will immediately be identified as not targetable (those who are clearly civilians, for example), and others will be clearly identified as a target (for example, those directly participating in hostilities). A large remaining group will “display some characteristics of a target, but need more analysis to categorize them properly.”<sup>268</sup>

Once found, fixing a target involves actions to determine the probable future location of the target, as well as positive identification of the target as one “worthy of engagement.”<sup>269</sup> For purposes of targeted killing, that means identification of the target as one that is on the kill list. Fixing the target requires reconnaissance and surveillance capabilities and will draw upon continued pattern of life analysis. The target will be tracked, and its activity and movements will be monitored.<sup>270</sup> While being tracked, persistent collection can reveal the life patterns of the targeted individual, such as “overnight locations, daily routes, visitations, and trustworthy associates . . . . As the details are filled in, it becomes possible to anticipate where the [target] is most likely to spend time or visit.”<sup>271</sup> At some point in time, the attacker is able to determine a specific location at which the target will be located—in other words, to fix the target. Once satisfied that the fix is valid, the attacker may choose to engage the target, matching available weapons against the target’s characteristics.<sup>272</sup>

As previously mentioned, distinction is a fundamental principle of the law of armed conflict and requires that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>273</sup> The term the U.S. military uses in targeting is “positive identification,” which requires that attackers know with reasonable certainty that “a functionally and geospatially defined object of attack is a legitimate military target” under the law of armed conflict.<sup>274</sup> The functional and geospatial requirements in current policies closely track Protocol I

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266. FM 3-60, *supra* note 162, at B-3.

267. *See id.* at A-1.

268. *Id.* at A-2.

269. *Id.* at A-9.

270. *Id.* at A-3.

271. *Id.* at B-18.

272. *Id.* at A-3.

273. AP I, *supra* note 105, art. 48.

274. Declaration of Jonathan Manes, *supra* note 256, at 26 (emphasis omitted); *see also* CJCSI 3160.01, *supra* note 255, at A-6 (“It is an inherent responsibility of all commanders, observers, air battle managers, weapons directors, attack controllers, weapons systems operators, intelligence analysts, and targeting personnel to . . . [e]stablish positive identification . . . .”); JFTH, *supra* note 256, at

Article 52(2), which defines military objectives as “those objects which by their nature, location, purpose or use make an effective contribution to the military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>275</sup> This definition includes enemy personnel as legitimate military objects and therefore legitimate targets.<sup>276</sup>

The task of positively identifying a target requires attackers to focus principally on the identity of the target. This is an intelligence-heavy task that relies on the collective effort of the intelligence community, both military and civilian, to vet and ensure the validity of the target in accordance with International Humanitarian Law (IHL), and the Rules of Engagement (ROE) for the military.<sup>277</sup> In the case of the CIA, steps must be taken to ensure that striking the target comports with the particular covert action finding authorizing the strike and any limitations accompanying that finding.<sup>278</sup>

Before engaging in an operation, military personnel must inform a commander (or “strike approval authority”) of the assumptions and uncertainties associated with information provided for the operation, including the time sensitive nature of any intelligence relied upon.<sup>279</sup> This temporal aspect sug-

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III-59 (“[T]arget validation reviews whether attacking the target would be in compliance with LOAC . . .”).

275. API, *supra* note 105, art. 52(2).

276. See, e.g., ICRC COMMENTARY, *supra* note 109, at 1951, 2017; Joseph Holland, *Military Objective and Collateral Damage: Their Relationship and Dynamics*, 7 Y.B. INT’L HUMANITARIAN L. 35, 40 (2004) (noting that the definition does so by widely accepted implication, not by text).

277. Declaration of Jonathan Manes, *supra* note 256, at 9; see also CJCSI 3160.01, *supra* note 255, at D-A-7, D-A-9.

278. Cf. Mckelvey, *supra* note 248 (quoting Henry Crumpton, who explains how CIA attorneys would help those responsible for targeting “understand international law and cross-border issues, and . . . would interpret specific language of the presidential directive”); Preston, *supra* note 117.

279. Cf. JUDGE ADVOCATE GENERAL’S SCHOOL, AIR FORCE OPERATIONS AND THE LAW: A GUIDE FOR AIR, SPACE, AND CYBER FORCES 254 (2d ed. 2009), available at <http://www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf> (“Time sensitivity is different. Many targets may be fleeting; many may be critical to operations. Those that are both present one of the biggest targeting challenges faced by the joint force. Advances in surveillance technology and weaponry make it possible in some instances to detect, track, and engage high-priority targets in real time, or to thwart emerging enemy actions before they become dangerous to the joint force. Joint doctrine calls the targets prosecuted in this manner ‘time-sensitive targets’ (TST): ‘those targets requiring immediate response because they pose (or will soon pose) a danger to friendly forces or are highly lucrative, fleeting targets of opportunity.’ The prosecution of TSTs is a special form of dynamic targeting. The CFC provides specific guidance and priorities for TSTs within the operational area. Examples might include a weapon of mass destruction (WMD)-capable combat vessel that was just detected approaching the joint force; a sought-after enemy national leader whose location was just identified; an enemy aircraft detected approaching friendly high-value assets, or an intermediate range ballistic missile launch. The CFC designates TSTs. However, there may be other targets requiring ‘time-sensitive’ treatment, which are of concern primarily to the CFC’s component commanders (vital to their schemes of maneuver or immediately threatening their forces, for instance) that the CFC may not deem to be TSTs. These targets are prosecuted using the same dynamic targeting methodology as TSTs, even though they may not be designated as such and even though their prosecution may be tasked and tracked by different elements in the combined air and space operations center (CAOC). Nevertheless, the time sensitivity of a target does NOT obviate the need for LOAC analysis. All the principles of aerial targeting—necessity,



gests that “there are some situations in which certain previously legal targets can cease to be valid military objectives. Targets and target lists must be re-examined periodically to ensure those objects have retained the characteristics that rendered them lawful military objectives initially.”<sup>280</sup>

In contemporary operations, the government has repeatedly emphasized that its planned target lists are frequently updated and vetted against the most up-to-date intelligence.<sup>281</sup> This vetting is likely aimed at ensuring that individuals targeted are still members of an organized armed group.<sup>282</sup> Moreover, in targeted killing operations that utilize UAVs, the intelligence supporting the attack will oftentimes come from the same UAV combat platform (Predators or Reapers) that may ultimately serve as the launch vehicle for weapons used in the targeted killing operation.<sup>283</sup> Government officials even claim they have diverted missiles off target *after* launching but *before* impact in an effort to avoid harm to collateral persons within the blast radius of a weapon.<sup>284</sup>

To further illustrate the point, prior to the targeting operation that killed al Aulqi, the government suggested that if he chose to renounce his membership in al Qaeda, he would cease to be on the U.S. target list (likely because he would no longer have the status of a member of an organized armed group and, if he truly renounced his affiliation with al Qaeda, he could not be directly participating in hostilities).<sup>285</sup> This statement illustrates the dynamic nature of the positive identification process as practiced by the U.S. military.<sup>286</sup> The CIA’s process, extensively reviewed by operational lawyers who are oftentimes forwardly deployed in theaters of conflict and co-located with drone operators, would similarly require positive identification and a reassessment of available intelligence prior to a strike.<sup>287</sup> Of course, if al Aulqi chose to surrender, he

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proportionality, minimizing collateral damage—must still be considered when TSTs are analyzed.”); Brennan, *supra* note 97 (remarking how UAVs are particularly useful “because of time, when windows of opportunity can close quickly and there may be just minutes to act”).

280. See Holland, *supra* note 276, at 41.

281. See Declaration of Jonathan Manes, *supra* note 256; Nick Davies, *Afghanistan War Logs: Task Force 373—Special Forces Hunting Top Taliban*, GUARDIAN, July 25, 2007, <http://www.guardian.co.uk/world/2010/jul/25/task-force-373-secret-afghanistan-taliban>.

282. For a discussion of membership- or status-based targeted, see DPH Study, *supra* note 106.

283. UAVs allow for the real-time broadcast of imagery. This imagery may also be referred to as “battlefield information,” which is distinguishable from intelligence in that it has not been subject to analysis.

284. See KLAIMAN, *supra* note 9, at 120 (“[A] missile was fired at a militant only to be diverted at the last minute when a noncombatant suddenly appeared in range. The operators called the trick ‘going cold.’”)

285. See DOJ White Paper, *supra* note 26, at 8 (“[W]here the al-Qa’ida member in question has recently been involved in activities posing an imminent threat of violent attack against the United States, and there is no evidence suggesting that he has renounced or abandoned such activities, that member’s involvement in al-Qa’ida’s continuing terrorist campaign against the United States would support the conclusion that the member poses an imminent threat.”).

286. Declaration of Jonathan Manes, *supra* note 256; see also Chesney, *supra* note 14.

287. See *Inside the CIA’s “Kill List,” supra* note 187.

would automatically be rendered *hors de combat*<sup>288</sup> and could not be targeted—though most experts seem to agree that one cannot surrender to an aircraft.<sup>289</sup>

Taken together, what this means is that if positive identification of a target fails, and the target is no longer a lawful one, no operation will take place.<sup>290</sup> Moreover, a potential target is presumed to be a civilian until proven otherwise—hence the requirement of positive identification in U.S. operations.<sup>291</sup> The military objective requirement of the law of armed conflict as implemented in U.S. practice reflects the fact that the drafters of these standards intended them to be a binding set of rules that could simultaneously guide decision making in warfare when “bright line rule[s]” and “fixed borderlines” between civilian and military objectives may be murky.<sup>292</sup> The burden is on military commanders to “exercise discretion and caution”; however, the standards by which those commanders are judged are “reasonableness and honesty” in the exercise of those responsibilities.<sup>293</sup>

Thus, positive identification of a target as a lawful one is a threshold test for any targeted killing operation. If the target is not positively identified as a member of an organized armed group, no operation will take place.<sup>294</sup> Importantly, at this threshold stage, questions of collateral damage are not assessed—that comes later in the process. With that said, the importance of the positive identification step and its relationship to collateral damage cannot be overstated—“failed positive identification” is the leading cause of harm to civilians in U.S. military operations that employed the Collateral Damage Methodology, which will be discussed further below.<sup>295</sup> Specifically, interviewees told me that in military operations in Afghanistan and Iraq, when collateral damage did occur, 70% of the time it was attributable to failed—that is, mistaken—identification.<sup>296</sup>

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288. See, e.g., JEAN-MARIE HENCKAERTS ET AL., *supra* note 105, Rule 47, at 203 (“A person *hors de combat* is: (a) anyone who is in the power of an adverse party; (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or (c) anyone who clearly expresses an intention to surrender . . .”).

289. See generally IAN HENDERSON, *THE CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I* (2009).

290. Declaration of Jonathan Manes, *supra* note 256, at 19; CJCSI 3160.01, *supra* note 255, at 145.

291. See AP I, *supra* note 105, art. 52(3).

292. Holland, *supra* note 276, at 42.

293. *Id.*; see also MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTION OF 1949*, at 326 (1982). For a discussion of how to measure reasonableness, see generally Geoffrey S. Corn, *Targeting, Command Judgment, and a Proposed Quantum of Information Component: A Fourth Amendment Lesson in Contextual Reasonableness*, 77 BROOK. L. REV. 437 (2012).

294. Declaration of Jonathan Manes, *supra* note 256, at 26, 28–29; CJCSI 3160.01, *supra* note 255.

295. See JP 3-60, *supra* note 101, at E-3, G-1; Gregory S. McNeal, *The Bin Laden Aftermath: Why Obama Chose SEALs, Not Drones*, FOREIGN POL’Y (May 5, 2011), [http://afpak.foreignpolicy.com/posts/2011/05/05/the\\_bin\\_laden\\_aftermath\\_why\\_obama\\_chose\\_seals\\_not\\_drones](http://afpak.foreignpolicy.com/posts/2011/05/05/the_bin_laden_aftermath_why_obama_chose_seals_not_drones).

296. McNeal, *supra* note 57, at 331. The remaining 22% were attributable to weapons malfunction and 8% were attributable to proportionality balancing—that is, a decision that anticipated military advantage outweighed collateral damage. *Id.*

## 2. Identifying Potential Harm to Civilians

Once a target has been positively identified as a lawful one, the next issue that attackers in U.S. operations will address is whether there are “protected or collateral objects, civilian or noncombatant personnel, involuntary human shields, or significant environmental concerns within the effects range of the weapon” used to attack the target.<sup>297</sup> In simplified terms, this means that the military commander and his subordinates place a point on a map representing the target, draw an effects radius around that target, and assess what known collateral concerns exist within that radius. However, this simplified description fails to account for the fact that military commanders may have a variety of weapons systems at their disposal, such as large versus small bombs, missiles, or other aircraft with different weapons. The weapon they choose will change the effects radius, and thus will affect their estimate of likely collateral damage. As a corollary, a decision to use a different weapon than initially planned may eliminate any likelihood of collateral damage, obviating the need for proportionality balancing. The availability of different weapons systems is a distinct advantage that the U.S. military may have over the CIA when conducting targeted killings. Because the opportunity to strike an individual on a kill list will oftentimes be fleeting, we can speculate that in some circumstances the CIA may need to conduct a strike that will inflict lawful (that is, proportional) harm to civilians, whereas the military could have used a weapon that would have eliminated the likelihood of civilian harm altogether.

*a. Pattern of Life Surveillance Redux.* The same pattern of life analysis techniques described in sections II.A and III.A.1 will also aid attackers in identifying potential harm to civilians. For example, “[i]t is very common . . . for an operations center to monitor a targeted individual in a populated area for many hours, waiting to attack until he or she is no longer near civilians or civilian objects.”<sup>298</sup> The targeting of Baz Mohammed Faizan, a Taliban leader, provides a helpful illustration regarding the procedures that must precede a strike on a kill-list target. Faizan, at the time he was targeted, was the sixth-most-important person on the military’s kill list for Afghanistan.<sup>299</sup> After “days of twenty-four-hour” pattern of life surveillance and analysis, a special operations team was nearly certain that they had located him.<sup>300</sup> However, before striking him, a series of additional criteria had to be satisfied. As William M. Arkin, who observed the 2008 strike, recounted:

[I]f the target didn’t move, if positive ID could be established, if the visual chain of custody could be sustained, and permission could be obtained, and if

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297. Declaration of Jonathan Manes, *supra* note 256, at 17 (emphasis omitted).

298. Schmitt, *supra* note 108, at 615.

299. See PRIEST & ARKIN, *supra* note 32, at 213, 218.

300. *Id.* at 213.

the collateral damage estimate was accepted up the chain, well, then an air strike would be mounted.<sup>301</sup>

Even if Faizan were positively identified, that positive ID would require a second independent source, such as a telephone intercept by the NSA or a human source, to confirm the identity of the target as Faizan.<sup>302</sup> Furthermore, it would have to be demonstrated that Faizan had been tracked in a “near-perfect, unbroken chain of custody—from first identification all the way to the attack, 24/7.”<sup>303</sup> If he was even momentarily lost by disappearing into a crowd or by slipping from view under trees,<sup>304</sup> “the entire [positive identification] process would have to be restarted, or the strike would be called off.”<sup>305</sup> Approval of the Faizan strike required sign off by the in-theater commander in Kabul and the director of operations at Central Command in Tampa, Florida.<sup>306</sup> All of these procedures were intended to avoid killing civilians, but also slowed down the operation and jeopardized the success of the mission. These procedures are not required by law, but rather are dictated by policy, showing the power of sublegal rules. Moreover, as an accountability matter, the observations and surveillance detailed above are viewed by dozens of people. For example, Predator video feeds are broadcast in real time to viewers in command centers around the world, to ground forces, to other air units, to the unit being supported on the ground, to special operations teams, and to analysts assigned to monitor every mission, among others.<sup>307</sup>

*b. The Collateral Damage Methodology.* As was alluded to above, collateral damage estimates are an important part of the targeting process. In U.S. targeted killing operations, the U.S. military implements its law-of-armed-conflict obligations by employing a multistep process known as the “collateral damage methodology.”<sup>308</sup> The intelligence community follows a similar pre-execution methodology that differs only in that it truncates the steps in the process into a sequence of questions (a nonsubstantive difference), requires a different approval authority for strikes and has a different threshold of harm that triggers higher level review.<sup>309</sup>

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301. *Id.* (emphasis omitted).

302. *Id.* at 216–17.

303. *Id.* at 216.

304. Interestingly, in al Qaeda’s twenty-two steps for avoiding drone detection, they recommend to their members that they “hide under thick trees because they are the best cover against the planes.” See *The Al-Qaida Papers—Drones*, *supra* note 147.

305. PRIEST & ARKIN, *supra* note 32, at 217.

306. *Id.*

307. *Id.* at 215.

308. Hereinafter “CDM,” “the methodology,” or “methodology.”

309. Russell Brandom, *Why the CIA Isn’t Handing Over Its Drone Assassins to the Military*, VERGE, Nov. 7, 2013, <http://www.theverge.com/2013/11/7/5073412/why-activists-want-the-pentagon-to-control-americas-drones-and-why> (“The answer lies in the strange protocol of drone strikes, where the CIA faces fewer checks and less accountability than the Pentagon. President Obama signs off on every

The CDM is grounded in scientific evidence derived from research, experiments, history, and battlefield intelligence, and is designed to adapt to time-critical events.<sup>310</sup> The CDM takes into account every conventional weapon in the U.S. inventory and is a tool that assists attacking forces in mitigating unintended or incidental damage or injury to civilians, property, and the environment.<sup>311</sup> The methodology assists attackers in assessing proportionality and in weighing risks to collateral objects.<sup>312</sup> The CDM is the technical term used by the U.S. military and is a binding obligation per orders issued by the Chairman of the Joint Chiefs of Staff.<sup>313</sup> Some technical aspects of the CDM have been automated through software that allows an individual to predict the anticipated effects of a weapon on certain targets. One such software package is known as FAST-CD.<sup>314</sup> FAST-CD is also used by the CIA for estimating weapons effects; however, the CIA's collateral damage mitigation process does not involve the same number of formalized steps as the military's process, which is explained in detail below. Although the CIA's process is more truncated, the truncation does not affect the accuracy of the collateral damage analysis; it merely removes interim layers of decision making and accountability, allowing for swifter decisions in the execution of an attack.

The CDM and the weapons-effect data contained in FAST-CD are based on empirical data gathered in field tests, probability, historical observations from weapons employed on the battlefield, and physics-based computerized models for collateral damage estimates.<sup>315</sup> Despite this science-based approach, the

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Pentagon drone strike, but many CIA strikes are planned with no consultation with the White House, and little to no input from anyone outside the agency. Similarly, the military is bound by international law, at least officially, while the CIA gives itself a freer rein. At every step, the CIA program faces fewer checks on its power." (citation omitted)); *see also infra* section III.B (discussing performance data).

310. CJCSI 3160.01, *supra* note 255, at D-2.

311. *See id.*

312. *See id.* at D-2 to D-5; JFTH, *supra* note 256, at III-77 ("CJCSM 3160.01A codifies the joint standards and methods for estimating collateral damage potential, provides mitigation techniques, assists commanders with weighing collateral risk against military necessity, and assessing proportionality within the framework of the military decision-making process.").

313. CJCSI 3160.01, *supra* note 255. As the previous note points out, CJCSM 3160.01A codifies standards, making the CDM a mandatory process all joint staff, services, combatant commands, Department of Defense combat support agencies, and joint activities must comply with.

314. *Id.* at GL-1 (defining FAST-CD as Fast Assessment Strike Tool-Collateral Damage).

315. *Id.* at D-1 ("The CDM is a balance of science and art that produces the best judgment of potential damage to collateral concerns. As a science, the CDM uses a mix of empirical data, probability, historical observations, and complex modeling for CDE assessments. However, the science is inherently limited by the quantity and reliability of collected and analyzed weapons effects data and target information. Furthermore, the science of the CDM cannot always account for the dynamics of the operational environment."); *see also* WALTER J. BOYNE, OPERATION IRAQI FREEDOM: WHAT WENT RIGHT, WHAT WENT WRONG, AND WHY 149 (2003) (describing FAST-CD as a software tool that "examines the target, its surrounding terrain, the direction and angle of attack, and the characteristics of the munitions proposed for the strike. . . . The FAST-CD program then generates a 'probable damage field' (described as something that looks like insects hitting a car windshield at high speed) for the attack. . . . If it looks like collateral damage will result, the analysts using FAST-CD recommend against hitting the target or

methodology is limited in some important respects. The data are drawn in part from experiments conducted by the Department of Defense and in part from battlefield information, and are thus limited by the quantity and reliability of the information collected.<sup>316</sup> Moreover, the CDM relies in part on intelligence about targets, which is also limited by the quantity and reliability of the information provided.

For example, one component of the methodology takes account of the physical attributes of buildings within a target area; that information will be inherently limited by the information available to the military and intelligence communities regarding the building's structural characteristics, building materials, and so on.<sup>317</sup> The CDM is also limited in that it cannot take account of changes in the operational environment, the reliability of intelligence data, or the particular weapon's reliability.<sup>318</sup> Naturally, the methodology is only applicable when it is followed. For example, the methodology is inapplicable if the military's Rules of Engagement (ROE) for a military operation allow for targeting decisions without use of the CDM<sup>319</sup> or if policy guidance within an intelligence agency allow for the circumvention of the CDE process. Examples of circumstances under which an attacker may be permitted to forego the CDM include situations where troops face fleeting and time-sensitive targets.<sup>320</sup> Choosing to not follow the CDM does not obviate the attacking party's responsibility to assess precautions, or engage in proportionality analysis; it merely makes the process less formal.

U.S. forces assessing collateral concerns within the effects range of their weapons rely on frequently updated reference tables<sup>321</sup> developed by inter-agency working groups. These working groups focus on the effectiveness of weapons, their effects radii, their impact on different structures, weapon accuracy and failure rates, and weaponeering solutions that can alter these effects, such as delayed fuses, changes in ordnance, angle of attack or delivery, and

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else provide suggestions for alternate routes, times, points of impact, weapons, or fusing that will result in less (and, if possible, no) collateral damage.”).

316. Notably, unlike other scientific tests conducted by government agencies and used in policy-making, DoD tests are exempt from review under the military and foreign affairs exemption to the Administrative Procedure Act, a point I address below.

317. CJCSI 3160.01, *supra* note 255, at D-A-2, D-A-22, D-C-1. This fact suggests that as operations in an area extend over a longer period of time, the amount of collateral damage per operation may decline as the intelligence community gathers more detailed information about the area of operations.

318. *Id.* at D-1, D-4, D-5, D-A-1, D-A-23.

319. *Id.* at B-7.

320. See Stephen Soldz, *U.S. Iraq Rules of Engagement Leaked*, DISSIDENT VOICE, Feb. 6, 2008, <http://dissentvoice.org/2008/02/us-iraq-rules-of-engagement-leaked-raises-question-about-rumsfeld-authorizing-war-crimes/> (linking to the 2003 Iraq Rules of Engagement that define troops in contact, preplanned, fleeting, and time-sensitive targets).

321. In military parlance these are known as Collateral Effects Radius (CER) tables. The tables are classified Secret.



others.<sup>322</sup> The data are subjected to physics-based computer modeling and are supplemented by weapons-testing data and direct combat observations.<sup>323</sup> These data are sometimes referred to as “munitions technical data” and are updated at least every six months based on new tests and battlefield reports.<sup>324</sup> Once updated, the data are distributed electronically to the field for use in targeted killing operations.<sup>325</sup> The technical weapons data developed by the U.S. government are supplemented by regularly updated population density tables that aid attackers in predicting the likely number of collateral concerns in a given area surrounding a target. The population data are detailed enough to take into account changes in the population of a specified location based upon the time of day, holidays, religious events, and other variables which may alter the population density.<sup>326</sup> This suggests that over time, as the military gathers more information about an area of operations, the population density data will become more accurate.

Relying on this data in targeted killings, U.S. forces identify expected risks to collateral concerns by developing what is known as a “collateral hazard area” around a target based on the collateral effects radius of a weapon.<sup>327</sup> This area is based on the effects radius for a given weapon. Weapon effects include blast, fragmentation, and debris, each of which can be mitigated in different ways.<sup>328</sup> In simplified terms, this involves placing an overlay onto a map (or computer generated map) to predict the effects radius of a weapon; because bombs do not explode in a circular fashion, the overlay reflects this fact and appears like a bug smashed on a windshield and is colloquially referred to as a “bug splat.” Contrary to the claims of uninformed critics, “bug splat” does not refer to civilian casualties, it merely refers to a planning overlay.<sup>329</sup>

As noted above, if at this point in the methodology the attackers do not anticipate a risk to collateral objects, the strike can go forward. This is allowed

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322. CJCSI 3160.01, *supra* note 255, at A-2 (“The JTCG/ME is a joint organization chartered under the auspices of the Services’ logistics commands. It directs working groups that focus on specific aspects of weaponeering, weapon effects, and collateral damage.”).

323. Declaration of Jonathan Manes, *supra* note 256, at 20.

324. *Id.* at 16.

325. CJCSI 3160.01, *supra* note 255, at D-A-5 to D-A-6.

326. *See id.* at D-A-8, D-A-31, D-A-33, D-A-34, D-D-1.

327. Declaration of Jonathan Manes, *supra* note 256, at 31. Regarding collateral effects radii, see *supra* section III.A.1 and accompanying text.

328. CJCSI 3160.01, *supra* note 255, at D-A-2, D-A-3, D-A-5, D-A-25, D-A-26, D-A-27, D-C-1.

329. *See, e.g.*, Muhammad Idrees Ahmad, *Fighting Back Against the CIA Drone War*, NATION, July 31, 2011, <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/International/31-Jul-2011/Fighting-back-against-the-CIA-drone-war> (defining “bug splat” incorrectly as “the splotch of blood, bones, and viscera that marks the site of a successful drone strike. To those manning the consoles in Nevada, it signifies suspected militants who have just been neutralised; to those on the ground, in most cases, it represents a family that has been shattered, a home destroyed.”). This is completely incorrect. *See* McNeal, *supra* note 57, at 337 (“A ‘bug splat’ refers to the shape of the planning tool used as an overlay to predict a collateral effects radius. This sounds highly technical, but one need not complete military training to know this fact; one only needs to Google the words ‘bug splat’ and ‘drone’ to find a *Washington Post* article explaining the term.”).

because proportionality “requires that there be an acceptable relationship between the military advantage anticipated from a military action and the expected incidental harm to civilians and civilian property.”<sup>330</sup> If no incidental harm is expected, the attacking force has no need to weigh the expected military advantage against anticipated harm because there is no proportionality issue. In making this judgment, the standard to be applied is not certainty, but one based on reasonableness in light of the information available to the commander.<sup>331</sup> Specifically, the law expects that decision makers “will have to make a good faith, honest and competent decision as a ‘reasonable military commander.’”<sup>332</sup>

The law of armed conflict recognizes that commanders have a range of responsibilities that include achieving a military mission and ensuring protection of humanitarian concerns; as such, the law employs a subjective standard, which is widely recognized by commentators.<sup>333</sup> Protocol I specifically recognizes this subjectivity by making a targeting operation qualify as a grave breach only “when committed willfully . . . and causing death or serious injury to body or health”; for example, “[l]aunching an attack . . . in the knowledge that such attack will cause excessive loss of life, injury to civilians, or damage to civilian objects” constitutes a “grave breach.”<sup>334</sup> International criminal law recognizes this subjective standard by affording the ICC jurisdiction over excessive incidental civilian losses only where the damage is “clearly excessive in relation to the concrete and direct overall military advantage anticipated.”<sup>335</sup> Moreover, the ICC’s draft text Elements of the Crimes for the war crime of excessive incidental death, injury, or damage requires that “[t]he perpetrator *knew* that the attack would cause’ the prohibited degree of loss, i.e., clearly excessive collateral damage.”<sup>336</sup>

Commentators analyzing targeted killings generally discuss positive identification and then turn their attention to the question of proportionality and balancing of collateral harm against military advantage. This Part of the Article differs from the general approach followed by commentators because, in the actual practice of modern operations, there are a series of scientifically grounded steps

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330. Holland, *supra* note 276, at 46; *see also* William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT’L L. 539, 545 (1997) (describing the proportionality principle as “requiring a constant weighing of military and humanitarian values”).

331. *See* Declaration of Jonathan Manes, *supra* note 256.

332. FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA, § A, para. 28(a)–(c), *available at* <http://www.icty.org/sid/10052> (noting that military commanders are obligated to “take all practicable precautions . . . with a view to avoiding or . . . minimizing incidental civilian casualties or civilian property damage”); Holland, *supra* note 276, at 48.

333. *See* A.P.V. ROGERS, LAW ON THE BATTLEFIELD 57–58 (1996); Yoram Dinstein, *The Laws of Air, Missile and Nuclear Warfare*, 27 ISR. Y.B. HUM. RTS. 1, 7–8 (1997); Holland, *supra* note 276, at 49.

334. API, *supra* note 105, art. 85(3).

335. Rome Statute art. 8(b)(iv), July 1, 2002, 2187 U.N.T.S. 90.

336. Holland, *supra* note 276, at 49 (quoting U.N. PREPARATORY COMMISSION FOR THE INTERNATIONAL CRIMINAL COURT, REPORT OF THE COMMISSION FOR THE INTERNATIONAL CRIMINAL COURT, Addendum, Part II, Finalized Draft Text of the Elements of Crimes Art. 8(2)(b)(iv), Nov. 2, 2000).

that attackers undertake prior to engaging in any proportionality balancing. The following sections will discuss these steps and the underlying logic behind them.

### 3. Assessing Feasible Precautions

If the attacker has identified a lawful target and has also identified that harm to civilians is likely to result from an attack on the lawful target, the attacker's analysis is not over. Rather, the next step would be to assess feasible precautions, which U.S. policy refers to as collateral damage minimization. Precautions are codified in Article 57 of API, which requires the attacker to "[t]ake all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."<sup>337</sup> This obligation is an ongoing one that requires the attacker to cancel or suspend an attack if "it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to" violate the rule of proportionality.<sup>338</sup>

If an attacker realizes that there is a possibility of collateral damage resulting from an operation, he or she will not immediately begin a proportionality analysis under the law of armed conflict. Rather, in most U.S. targeted killings, attackers employ a series of mitigation techniques intended to ensure with a high degree of certainty that there will not be an unacceptable probability of damage or injury to collateral persons or objects. This mitigation process involves a series of steps "based on a progressively refined analysis of available intelligence, weapon type and effect, the physical environment, target characteristics, and delivery scenarios" keyed to risk thresholds established by the Secretary of Defense and the President.<sup>339</sup> These steps are intended to ensure that there is a less than 10% probability<sup>340</sup> of serious or lethal wounds to standing personnel within the effects radius of the weapon.<sup>341</sup>

Perhaps the simplest way to understand the mitigation process is to think of it as a series of tests based on risk. These tests are implemented in five levels known as CDE Levels. The first, CDE Level 1, was discussed in section III.A.1. At each subsequent level, if it is determined that collateral concerns are not within the collateral hazard area for a given weapon system, an operation can be commenced. If, however, collateral concerns are within the collateral hazard area, U.S. policy dictates that no operation can be conducted without first employing the available mitigation techniques detailed in the next level of analysis. At the highest level of analysis, CDE Level 5, attackers have ex-

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337. API, *supra* note 105, art. 57(2)(a)(ii).

338. *Id.* art. 57(2)(b).

339. CJCSI 3160.01, *supra* note 255, at D-A-1.

340. *Id.* at D-C-1.

341. Declaration of Jonathan Manes, *supra* note 256, at 41.

hausted potential mitigation techniques, meaning that no technical options exist to prevent harm to civilians short of not conducting a strike. At that point, for military targeted killing operations, only a general, the Secretary of Defense, or the President can authorize a strike, and only after conducting a proportionality analysis.<sup>342</sup> For strikes conducted by the CIA, either the President or the Director of the CIA must make the proportionality decision.

*a. Mitigating Damage to Collateral Concerns Through Weapon Selection.* If personnel involved in an operation determine that the weapon system and method of employment initially selected for an operation may result in collateral damage, they must analyze whether they can still accomplish their mission while also mitigating the “damage to those collateral concerns by attacking the target with a different weapon or with a different method of engagement.”<sup>343</sup> This mitigation obligation is mandated by Article 57(2)(a)(ii) of AP I, which requires that forces “[t]ake all feasible precautions in the . . . means and methods of attack” to avoid or minimize incidental damage to civilian objects.<sup>344</sup>

In practice, this is a highly technical step in which trained targeting and weaponeering personnel rely on data about the target size and the expected impact area of air-to-surface unguided munitions to determine whether specific unguided weapon systems can achieve a desired effect on the target while reducing the risks of collateral damage.

The degree of certainty the CDM process achieves with regard to weapons effectiveness is a 90% degree of certainty in theory, and a 99% degree of certainty in practice. The explanation of this 90% scientific limitation is fascinating, complex, and representative of the science behind the development of the CDM. In developing the CDM, all weapon-effects and delivery-error data are stated in terms of probabilities based on continuously collected battlefield data and tests. This author interviewed one of the creators of the CDM who explained that the military used complex mathematical models as the baseline for all calculations in both weaponeering and collateral effects estimation.

According to the interviewee, there are currently no methods available to estimate the full extent of possible errors or weapon effects because there are too many variables that could arise in a combat environment. For instance, there are sixteen separate factors that affect the errors associated with any warhead delivery. It is impossible to predict the exact variables within each of these sixteen factors for every weapon’s delivery in a combat environment; therefore, the military determines what are the most likely variables across all sixteen factors based on the training the pilots have received and what the military has witnessed in combat. The military then uses worst-case-scenario variables for the most likely factors, which embeds a conservative output into the process of

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342. *Id.* at 38.

343. *Id.* at 17.

344. AP I, *supra* note 105, art. 57(2)(a)(ii); *see also* INT’L & OPERATIONAL LAW DEP’T, U.S. ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, OPERATIONAL LAW HANDBOOK 352 n.101 (2010).

CDM—a larger error estimate than what would normally be seen in combat. In practice, the military is witnessing that within the radius drawn, 85% of the time warheads are hitting within the first quarter of the radius, meaning the rest of the radius is acting as a safety buffer within an already conservative estimate. These estimates are accurately described as conservative because although one can know with 100% probability the effect of a weapon at the point of impact (that is, how blast, fragmentation, and debris will affect a person standing at the point of impact), but it is impossible to know with certainty at what point that effect turns to a 0% probability. This is because there are countless variables that affect the fragmentation and debris flight pattern and blast impulse shaping, such as target type and composition, terrain, impact angle, velocity of the warhead at the point of detonation, fusing, slope of terrain, surrounding structures, and more.

Thus, the military has established worst-case options to determine the range to effect for a given probability. In any bombing scenario, the primary weapon effect against personnel is fragmentation from a blast-fragmentation warhead, which most of the warheads in the U.S. inventory are. The designers of the CDM estimated the variables of impact angle and velocity for each warhead on flat earth against no target, the scenario that would create the widest blast and fragmentation impact radius, and then computed the maximum fragmentation pattern for each set of angle and velocity for a 10% probability of a kill. Blast and fragmentation patterns are not normally distributed, meaning that blast and fragmentation do not distribute equally in all directions. Knowing this, the designers of the CDM selected the longest observed weapons effect for each warhead and used that as the Weapons Effectiveness Index for that warhead. Therefore, when the U.S. military's CDM is described as accounting for 90% of the weapon effect, it is in fact accounting for the longest possible fragmentation beam-spray in the most effective weapon-delivery scenario. In every case, this maximum beam-spray is significantly longer than all of the other beam-sprays in the 360-degree circle because blast and fragmentation patterns are not normally distributed. Thus in actuality, the CDM is accounting for approximately 99% of the total weapon effect portion of the collateral effects radius of a weapon. The interviewee stated, "I have been tracking all of the operational data from the field for the past eleven years and we have never killed or gravely wounded a non-combatant when the warhead detonated within the target effect radius and was positively identified."<sup>345</sup>

Attackers will start by analyzing whether unguided munitions can kill a targeted person without inflicting harm to collateral persons and objects. However, because air-to-surface unguided munitions are prone to error and present higher risks of collateral damage as compared to precision-guided munitions, an

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345. For a more in depth discussion of the math and science behind these estimations, see generally M.P. Jarnagin Jr., & A.R. DiDonato, *Damage to a Circular Target by a Gaussian Distributed Warhead With Uniformly Distributed Bomblets*, 14 OPERATIONS RES. 1014 (1966).

attacker choosing to employ unguided weapons must engage in further mitigation and collateral damage analysis.<sup>346</sup>

If after conducting its analysis, the attacker realizes that the use of unguided munitions is expected to impact collateral concerns, an attacker may instead choose to use precision-guided munitions as a mitigation technique. In practice, this is a likely scenario because the personnel targeted are frequently co-located near collateral concerns and, in military parlance, personnel are point (rather than area) targets, which are most appropriately engaged with precision-guided munitions.<sup>347</sup> At this stage, if the use of precision-guided munitions will ensure that no collateral objects are located within the collateral hazard area, the targeted killing operation can commence, subject to any exceptions imposed by data about weapons limitations under certain circumstances such as weather conditions, method of deployment, and others. If, however, collateral objects are identified within the collateral hazard area, further mitigation and analysis is required under CDE Level 3.

*b. Mitigating Damage to Collateral Concerns Through Weaponeering.* The third level of mitigation analysis employed by U.S. forces in military operations involves configuring the method of weapon employment, a process referred to as weaponeering.<sup>348</sup> This step involves questions about fusing combinations that can mitigate the risk of collateral damage while still achieving the desired effect on a target.<sup>349</sup> The dominant hazard that concerns U.S. forces in this stage is how fragmentation and debris can harm collateral persons.<sup>350</sup> As an example, this step may involve configuring weapons systems so they detonate either in the air or below the ground (depending on the target location and location of collateral concerns). This mitigation technique can minimize the expected risk to collateral persons and is based on scientific studies and historical evidence of weapons usage and effects. However, the elevated risk of mission failure due to weaponeering solutions is a realistic consideration. Specifically, in targeted killing operations, where targets are frequently engaged while on the move, delayed fusing options and other weaponeering restrictions increase the possibility that a weapon fails to kill a target.<sup>351</sup> There is a dynamic relationship between collateral damage and military advantage: the two factors are always balanced against one another, with an attacking party having to constantly consider that using a certain weapon may minimize harm to collateral persons

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346. See Declaration of Jonathan Manes, *supra* note 256, at 33.

347. See CJCSI 3160.01, *supra* note 255, at D-A-16 (detailing the nature of “point” targets).

348. *Id.* at D-A-2, D-A-17–18.

349. Fusing refers to configuring a weapon so that the bomb explodes in the air, when it impacts with the ground, or on a delay so that it detonates underground.

350. Declaration of Jonathan Manes, *supra* note 256, at 41.

351. See Reza Jan, *Drone Kills Top Taliban Commander Maulvi Nazir*, AM. ENTERPRISE INST. CRITICAL THREATS, Jan. 4, 2013, <http://www.criticalthreats.org/pakistan/jan-drone-kills-top-taliban-commander-maulvi-nazir-january-4-2013> (describing how the now-deceased Taliban leader Maulvi Nazir is said to have survived two prior targeted strikes before he was killed on January 2, 2013).



while increasing the chance that the kill-list target escapes.

If the mitigation techniques in the prior three steps are expected to fail, U.S. forces will engage in a refined process of weaponeering intended to reduce the remaining potential for collateral damage. The principal hazard that is likely unmitigated at this stage is the risk of blast impact and blunt trauma injury to personnel. At this stage, U.S. forces will use weaponeering solutions other than fusing, such as delivery heading restrictions (approaching from a different direction so that if a bomb goes off target it will impact in a way less likely to harm civilians),<sup>352</sup> shielding,<sup>353</sup> warhead burial, proximity fuses and aimpoint offset.<sup>354</sup> Each of these solutions is expected to alter the collateral hazard area for a given weapon, minimizing the risk to collateral concerns.<sup>355</sup> Because the principle concern at this stage is the hazard presented by blast impact to structures and blast-induced trauma to personnel, the United States relies heavily on intelligence to appropriately characterize the type of shielding structures and terrain density in a target area. Attackers also rely on intelligence to determine the nature of collateral structures within the collateral hazard area, including the strength of structures. The guiding principle is to plan an operation with an eye towards the impact the targeted killing will have on the weakest structure within the collateral hazard area, taking account of shielding and weaponeering solutions.<sup>356</sup> Proceeding in this manner creates a conservative estimate.<sup>357</sup>

As the preceding discussion highlights, this step relies heavily on intelligence

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352. See Declaration of Jonathan Manes, *supra* note 256, at 40.

353. Shielding can include detonation in combatant- or target-occupied structures, use of terrain or vegetation to shield the blast and debris, and other techniques.

354. See Declaration of Jonathan Manes, *supra* note 256, at 41. For examples of mitigation techniques and their effects, see *id.* at 40.

355. CJCSI 3160.01, *supra* note 255, at D-C-1, D-A-26. The solutions employed by the United States at this phase are expected to result in a less than 1% probability of partial structural damage from bomb blast to noncombatant structures, and further assumes that noncombatant personnel will be located in or will seek cover in noncombatant structures, affording them protection from fragmentation. This assumption relies on bomb damage assessment data and after action reports that demonstrate that noncombatants seek cover within noncombatant structures, and certain fusing options and shielding techniques can ensure with a better than 90% certainty that noncombatants will have enough time to seek such cover. An operative assumption made by the United States at this stage is that noncombatants will seek cover from bomb blast and debris in noncombatant structures, and the United States further assumes that the structure will aid in mitigating expected damage to noncombatant personnel.

356. CJCSI 3160.01, *supra* note 255, at D-A-24.

357. Interview with military targeting expert (“We can’t predict weapons effects with 100% certainty, but we get pretty damn close. In every estimate we make, we do it on the conservative side, thus the 90% statistic is misleading because we make a series of conservative estimates that when mathematically combined err heavily on the side of caution. For example, the blast pattern for many weapons is like a butterfly, not a circle, but we assume it’s circular. Certain rounds don’t have a high density of fragments in all directions, but our assumptions are built around not being able to predict what direction the fragments will eject at, so we assume they will eject in every direction, even though we know as a scientific fact that they won’t. We never estimate low, and we never hope for the best-case scenario. We plan for the worst. Our AAR and BDA data shows that when the methodology is followed we are operating with a less than 1% risk to collateral concerns, not the less than 10% that we predict from.”); see CJCSI 3160.01, *supra* note 255, at D-A-24.

and the identification of objects or personnel that can be seen, sensed, or known through various sources and methods. If the mitigation techniques in this step are expected to result in harm to collateral persons or objects, mitigation has failed and the operation cannot be undertaken without the approval of and proportionality assessment made by a predetermined approval authority.

#### 4. Proportionality Analysis and Approval Authority

When all reasonable and known mitigation techniques detailed above have been exhausted and collateral damage appears unavoidable, or environmental concerns or dual-use targets are factors, final authorization for strikes are entrusted to a predetermined approval authority. That individual will make a “proportionality assessment.” Proportionality is codified in Article 51 and Article 57 of Additional Protocol I, which prohibit an attack that “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>358</sup> There is no preset body-count comparison that will automatically allow a strike to occur; rather, each strike must be assessed on a case-by-case basis. “Multiple civilian casualties may not be excessive when attacking a senior leader of the enemy forces, but even a single civilian casualty may be excessive if the enemy soldiers killed are of little importance or pose no threat.”<sup>359</sup> Moreover, the law requires judgments to be made based on *expected* loss of civilian life and *anticipated* military advantage, demonstrating that proportionality is assessed *ex ante*, not *ex post*. Thus, what becomes important as an accountability matter is who makes the proportionality judgment, what information that person was provided before making the judgment, and whether that judgment was reasonable based on the circumstances and available information.<sup>360</sup>

Depending on the theater of operations and the agency conducting the operation, pre-established guidelines will specify who the approval authority is, which will vary from theater to theater and agency to agency. For instance, attacks in a counterinsurgency campaign, where the support of the local population is critical, will typically require higher levels of approval than attacks in conflicts where decisive military defeat is the primary objective.<sup>361</sup> Thus, depending on a host of variables, the approval authority for targeted killings may be a General Officer, the Director of the CIA, the Secretary of Defense, or even the President. For example, in U.S. military operations in Afghanistan, if

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358. API, *supra* note 105, arts. 51.5(b), 57.2(a)(iii), 57.2(b).

359. Schmitt, *supra* note 108, at 616.

360. For a discussion of the information available to those authorizing strikes, see *supra* sections III.A.1–3.

361. *Cf.* Schmitt, *supra* note 108, at 600.

the amount of unavoidable collateral damage is low,<sup>362</sup> the President has delegated decision-making authority to generals.<sup>363</sup> If, however, the expected collateral damage is high, authorization is reserved for the President or the Secretary of Defense.<sup>364</sup>

For military strikes, the particular individual who will make the judgment is determined by whether the number of noncombatant civilian casualties exceeds a predetermined threshold known as the Non-Combatant Casualty Cut-Off Value (NCV). That value is established by the President or the Secretary of Defense and is contained in the Rules of Engagement, a classified theater- and conflict-specific set of guidelines for armed forces. Though the ROE are always classified, a recent version of the Iraq ROE from 2003 is now in the public domain, which provides us some insight into the strike-approval process, as will be discussed below.<sup>365</sup> The main questions addressed at this final stage of the CDM are (1) how many civilians and noncombatants will be injured or killed by the attack, and (2) whether the collateral effects are excessive in relation to the anticipated military advantage (in other words, a proportionality analysis).

Given the importance of estimating noncombatant injuries resulting from targeted killing operations, U.S. policy repeatedly emphasizes the fact that casualty estimation is not a science and is influenced by demographic and cultural factors such as socialized cultural norms for day and night activities within a region.<sup>366</sup> As such, attackers base their casualty estimates on pattern of life analysis as described in earlier sections of this Article. They also analyze three key factors: the affected area of collateral concerns, estimated population density of the effected collateral concerns, and a casualty factor.<sup>367</sup> A key decision-making tool in this process is the Population Density Reference Table.<sup>368</sup> This standardized form lists data from the intelligence community and other sources and methods and allows for estimates of the population density per 1000 square feet during day, night, and special events for any given collateral structure based on its functionality (examples include residential structures of varying types, stores, warehouses, indoor and outdoor theaters, and so on).<sup>369</sup>

The data from the Population Density Reference Table, the identified unshielded collateral concerns within the collateral hazard area, and episodic changes in population density for each unshielded collateral concern are entered

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362. "Low" is a relative term. In this example, it refers to collateral damage that meets certain requirements as determined by the National Command Authority; the details and restrictions, as determined by the NCA, are published in the Rules of Engagement.

363. See Schmitt, *supra* note 108, at 600.

364. Declaration of Jonathan Manes, *supra* note 256, at 38.

365. The 2003 Iraq Rules of Engagement were published by WikiLeaks and have been heavily scrutinized by the media and bloggers. See, e.g., Soldz, *supra* note 320.

366. Declaration of Jonathan Manes, *supra* note 256, at 35.

367. *Id.*

368. *Id.* at 37.

369. See *id.*

into a Casualty Estimate Worksheet.<sup>370</sup> A casualty factor is assigned to each collateral concern; this casualty factor is a weighting factor (1.0 or 0.25) that accounts for the proximity of the collateral concern from the target point.<sup>371</sup> After all of these variables are calculated, the estimated number of casualties are compared to the Non-Combatant Casualty Cut-Off Value.<sup>372</sup> If the estimate is below the NCV, a specified lower level approval authority may authorize the operation. If the estimate exceeds the NCV, a process known as Sensitive Target Approval and Review (STAR) is triggered.<sup>373</sup> The STAR Process is for targets whose engagement presents the potential for damage or injury to noncombatant property and persons; negative political consequences; or other significant effects estimated to exceed predetermined criteria, thus presenting an unacceptable strategic risk.<sup>374</sup> Once the STAR analysis is completed, the Secretary of Defense or President must approve STAR targets.<sup>375</sup> A similar process exists for CIA targets that present a high risk of civilian casualties or political fallout.<sup>376</sup>

A few examples can illustrate these concepts. In Iraq, as of 2003, high-collateral-damage targets were defined as those that “if struck . . . are estimated to result in significant collateral effects on noncombatant persons and structures, including . . . [n]on-combatant casualties estimated at 30 or greater . . . [or] . . . [t]argets in close proximity to known human shields.”<sup>377</sup> Thus, if after mitigation, a commander in Iraq expected a strike to cause thirty or more civilian casualties, the strike would have to be briefed through the STAR process and authorized by the Secretary of Defense. If the collateral damage estimate was less than thirty, the target would be defined as a low-collateral-damage target and, in most circumstances,<sup>378</sup> would require approval by either the Commander of Multinational Forces Iraq<sup>379</sup> or a Division Commander.<sup>380</sup> Notably, Iraq in 2003 was not a counterinsurgency operation, whereas, since at least 2009, operations in Afghanistan are being conducted pursuant to counterinsurgency doctrine.<sup>381</sup> Thus, in Afghanistan, as of 2009, forces employed an NCV

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370. *See id.* at 19.

371. *See id.* at 36.

372. Set by the National Command Authority.

373. Declaration of Jonathan Manes, *supra* note 256, at 19.

374. *Id.* at 38.

375. *Id.*

376. *Cf.* KLAIMAN, *supra* note 9, at 41 (recounting President Obama’s concern about “what assurances [he had] that there [were no] women and children” in a target area).

377. *See* Soldz, *supra* note 320 (quoting the Rules of Engagement for U.S. troops in Iraq as published by WikiLeaks).

378. The Rules of Engagement in Iraq made complex and significant distinctions between types of targets and approval authority. These distinctions ranged from facilities with significant cultural or political value to individuals such as former regime members to members of specified terrorist groups.

379. Usually an officer holding the rank of General (four star).

380. Usually an officer holding the rank of Major General (two star). The Rules of Engagement may allow for delegation of this authority depending on the weapons used and circumstances.

381. In 2008 the NCV in Afghanistan was thirty-five, which “triggered the external approval process, which included almost any strike within an urban area”; that process went “all the way up to the secretary of defense to get approval to strike.” PRIEST & ARKIN, *supra* note 32, at 214.

of 1 for preplanned operations.<sup>382</sup> This NCV of 1 reflects the strategic importance of minimizing collateral damage in counterinsurgency operations, and an NCV of 1 would indicate that if a strike were expected to result in even one civilian casualty, it would need to be approved by the National Command Authority.<sup>383</sup> As an accountability matter, the importance of the NCV as a decisional tool cannot be overstated. First, the contrast between Iraq and Afghanistan illustrates the variable nature of accountability mechanisms. “[T]he rules for Iraq were that all strikes (except STAR targets) could be approved by commanders on the ground, for Afghanistan [as of 2008], the Central Command in Tampa acted as the approval authority.”<sup>384</sup> After 2009, approval authority for likely civilian casualties in Afghanistan was elevated to the highest levels of government.<sup>385</sup> Second, as illustrated above, the NCV ties anticipated casualties of a certain amount to specific decision makers, making those individuals responsible for the strategic and political considerations associated with harm to civilians. The story is the same for the CIA and JSOC, though each has its own chain of command and approval authority criteria.<sup>386</sup> These differences in approval authority and some aspects of the process may have an impact on whether collateral damage occurs, a possibility that is explored in the next section.

#### B. ACCOUNTABILITY PROBLEMS AND OPPORTUNITIES

Section III.A described the process associated with executing a targeted killing. In light of that process, how has the U.S. government actually performed? Section III.B.1, below, presents CENTCOM data regarding the military’s performance in targeted killing strikes. In section III.B.2, I present the data gathered by the Bureau of Investigative Journalism and the New America Foundation regarding strikes in Pakistan. Presenting these two different sources of data related to two different theaters of operation allows us to explore, in section III.B.3, the potential explanations for alleged differences in the U.S. government’s performance, and allows us to address some possible accountabil-

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382. Pamela Constable, *NATO Hopes to Undercut Taliban with ‘Surge’ of Projects*, WASH. POST, Sept. 27, 2008, [http://articles.washingtonpost.com/2008-09-27/world/36787154\\_1\\_nato-forces-insurgents-richard-blanchette](http://articles.washingtonpost.com/2008-09-27/world/36787154_1_nato-forces-insurgents-richard-blanchette) (quoting Brig. Gen. Richard Blanchette, chief spokesman for NATO forces stating, “[i]f there is the likelihood of even one civilian casualty, [NATO] will not strike, not even if we think Osama bin Laden is down there”). This quote may be an overstatement. A more accurate statement is probably that NATO will not strike *until* proportionality balancing is undertaken and a final decision is made by the President or the Secretary of Defense. See also Noor Khan, *U.S. Coalition Airstrikes Kill, Wound Civilians in Southern Afghanistan, Official Says*, ASSOCIATED PRESS, June 30, 2007, <http://www.nydailynews.com/news/world/u-s-airstrikes-kill-wound-civilians-southern-afghanistan-article-1.224856> (quoting Maj. John Thomas, spokesman for NATO’s International Security Assistance Force, stating NATO forces “would not fire on positions if it knew there were civilians nearby”). For a lengthier discussion of these concepts, see McNeal, *supra* note 295.

383. Declaration of Jonathan Manes, *supra* note 256, at 15, 17–20.

384. PRIEST & ARKIN, *supra* note 32, at 215.

385. See Joint CIVCAS Study, *supra* note 244.

386. See *id.*

ity gaps in the execution of targeted killings.

### 1. Military Performance in CENTCOM Theater of Operations

As discussed above, the U.S. military follows a series of scientifically grounded mitigation steps designed to ensure that the probability of collateral damage from a preplanned operation is below 10%. In operations in the CENTCOM theater, the mitigation steps have resulted in a collateral damage rate of less than 1% in preplanned operations.<sup>387</sup> Specifically, less than 1% of preplanned operations that followed the collateral-damage-estimation process resulted in collateral damage. When collateral damage has occurred, 70% of the time it was due to failed “positive identification” of a target. 22% of the time it was attributable to weapons malfunction, and a mere 8% of the time it was attributable to proportionality balancing; that is, a conscious decision that anticipated military advantage outweighed collateral damage.<sup>388</sup> Furthermore, according to public statements made by U.S. government officials, the President or the Secretary of Defense must approve any preplanned ISAF strike where one or more civilian casualty is expected, thus ensuring high levels of political accountability.

### 2. CIA Performance in Pakistan

In light of the statistics provided above, how has the United States performed in Pakistan? The British Bureau of Investigative Journalism analyzed reports by “government, military and intelligence officials, and by credible media, academic and other sources.”<sup>389</sup> It claims that there were 381 known CIA drone strikes in Pakistan between 2004 and 2014 (to date).<sup>390</sup> Those strikes are alleged

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387. According to the DoD, Joint Doctrine Division, “preplanned” air support includes air support in accordance with a program, planned in advance of operations. See FM 3-60, *supra* note 162, at 1–5 (stating that preplanned operations involve deliberate targeting where specified targets “are known to exist in an operational area and have actions scheduled against them. Examples range from targets on target lists in the applicable plan or order, targets detected in sufficient time to be placed in the joint air tasking cycle, mission type orders, or fire support plans.”).

388. See McNeal, *supra* note 57, at 331.

389. *Obama 2012 Pakistan Strikes*, BUREAU INVESTIGATIVE JOURNALISM, Jan. 11, 2012, <http://www.thebureauinvestigates.com/2012/01/11/obama-2012-strikes/>. Rosa Brooks did much of the groundbreaking legwork to analyze drone strikes. See, e.g., Rosa Brooks, *Hate Obama’s Drone War?*, FOREIGN POL’Y, Feb. 14, 2013, [http://www.foreignpolicy.com/articles/2013/02/14/hate\\_obamas\\_drone\\_war](http://www.foreignpolicy.com/articles/2013/02/14/hate_obamas_drone_war) [hereinafter Brooks, *Hate Obama’s Drone War?*]; Rosa Brooks, *Death by Loophole*, FOREIGN POLICY, Feb. 5, 2013, [http://www.foreignpolicy.com/articles/2013/02/05/death\\_by\\_loophole](http://www.foreignpolicy.com/articles/2013/02/05/death_by_loophole) [hereinafter Brooks, *Death by Loophole*]; Rosa Brooks, *Drones in Our Time*, FOREIGN POL’Y, Jan. 23, 2013, [http://www.foreignpolicy.com/articles/2013/01/23/drones\\_in\\_our\\_time](http://www.foreignpolicy.com/articles/2013/01/23/drones_in_our_time) [hereinafter Brooks, *Drones in Our Time*]; Rosa Brooks, *Take Two Drones and Call Me in the Morning*, FOREIGN POL’Y, Sept. 12, 2012, [http://www.foreignpolicy.com/articles/2012/09/12/take\\_two\\_drones\\_and\\_call\\_me\\_in\\_the\\_morning](http://www.foreignpolicy.com/articles/2012/09/12/take_two_drones_and_call_me_in_the_morning) [hereinafter Brooks, *Take Two Drones*]; Rosa Brooks, *What’s Not Wrong with Drones?*, FOREIGN POL’Y, Sept. 5, 2012, [http://www.foreignpolicy.com/articles/2012/09/05/whats\\_not\\_wrong\\_with\\_drones](http://www.foreignpolicy.com/articles/2012/09/05/whats_not_wrong_with_drones) [hereinafter Brooks, *What’s Not Wrong With Drones?*].

390. *Casualty Estimates: CIA Drone Strikes in Pakistan 2004–2013*, BUREAU INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/>.



to have killed between 2,537 and 3,646 people, of whom between 416 and 951 were allegedly civilians.<sup>391</sup> The New American Foundation came up with slightly lower numbers over the same time period, finding that between 2,080 and 3,428 people were killed by strikes in Pakistan, with between 258 and 307 alleged to be civilians, with a further 199 to 334 of unknown status.<sup>392</sup> Taken together, these statistics suggest that on average each drone strike seems to have killed between 0.8 and 2.5 civilians, with somewhere between 8% and 47% of strikes inflicting civilian casualties.

### 3. Explaining the Differences

If accurate, these data suggest that strikes in Pakistan are much more likely to inflict harm to civilians than military strikes elsewhere in CENTCOM's theater of operations. Assuming that the military, the Bureau of Investigative Journalism, and the New America Foundation all have an interest in producing accurate numbers and do not have ill motives, what explains the differences in performance?<sup>393</sup> Some other variables must be at play given the dramatic differences in the data presented.

First, there is the possibility of errors in the collection of data. In Pakistan, for example, Georgetown's Christine Fair has noted that arguments based on Pakistan casualty data "would be . . . damning . . . if the data weren't simply bogus."<sup>394</sup> She points out that "[t]he only publicly available civilian casualty figures for drone strikes in Pakistan come from their targets: the Pakistani Taliban, which report the alleged numbers to the Pakistani press, which dutifully publishes the fiction."<sup>395</sup> On the other side of the ledger, the Bureau of Investigative Journalism has cataloged extensive information through interviews and on scene reporting suggesting that U.S. claims of low or no civilian casualties are simply false.<sup>396</sup> Specifically addressing the efforts of the Bureau of Investigative Journalism to gather strike data, Fair stated:

One of the most enduring questions about the U.S. drone program in Pakistan is the suspicions about the massive loss of innocent lives. Indeed, many organizations from the New America Foundation, the Long War Journal of the Foundation for the Defense of Democracies, the Bureau of Investigative Journalism among others have all sought to track drone strikes and their

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391. *Id.*; see also Rosa Brooks, *What's Not Wrong With Drones?*, *supra* note 389 (citing different studies of drone strikes).

392. *Drone Wars Pakistan: Analysis*, NEW AM. FOUND. (2013), available at <http://counterterrorism.newamerica.net/drones>.

393. Which is not to suggest any of these groups lack ill motives, but that such motives would be difficult to prove and therefore must be set aside for the purposes of discussion.

394. C. Christine Fair, *Drone Wars*, FOREIGN POL'Y, May 28, 2010.

395. *Id.*

396. See Chris Woods, *U.S. Claims of 'No Civilian Deaths' Are Untrue*, BUREAU INVESTIGATIVE JOURNALISM, July 18, 2011, <http://www.thebureauinvestigates.com/2011/07/18/washingtons-untrue-claims-no-civilian-deaths-in-pakistan-drone-strikes/>.

outcomes. As well-intended as these efforts may be, the data are most certainly deeply flawed.<sup>397</sup>

In a similar vein, a U.S. counterterrorism official stated:

One of the loudest voices claiming all these civilian casualties is a Pakistani lawyer who's pushing a lawsuit to stop operations against some of the most dangerous terrorists on the planet. . . . His evidence, if you can call it that, comes from a press release. His publicity is designed to put targets on the backs of Americans serving in Pakistan and Afghanistan. His agenda is crystal clear.<sup>398</sup>

As an accountability matter, one of the most obvious challenges to the public debate over targeted killings is the lack of agreement about even the number of persons killed. Nevertheless, assuming for argument's sake that the contested data are true allows for some theorizing as to what might cause differences in performance.

First, it is possible that the differences in strategy between Afghanistan and Pakistan are a significant factor. Specifically, Afghanistan has been fought as a counterinsurgency since at least 2009. A central tenet of counterinsurgency doctrine is winning the support of the local population.<sup>399</sup> In that strategic context, it is highly likely that any civilian casualties, no matter how high the value of a particular target, may cause the civilian population to turn against the counterinsurgents. On the other hand, operations in Pakistan have been conducted as a counterterrorism campaign.<sup>400</sup> In such a campaign, winning hearts and minds is not a central component of the overall strategy. Therefore, an attacker weighing anticipated military advantage against the anticipated harm to civilians may not be considering the military advantage that will flow from winning over (or failing to win over) the population.<sup>401</sup> In fact, one of my interviewees stated, "[w]e simply don't follow the NCV for Afghanistan COIN on the other side of the border, so while process is similar, the substance of the proportionality analysis is different."<sup>402</sup>

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397. Christine Fair, *Drones, Spies, Terrorists and Second Class Citizenship in Pakistan—A Review Essay*, 25 *SMALL WARS AND INSURGENCIES* (forthcoming 2014) (manuscript at 15), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2353447](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2353447).

398. Pam Benson & Elise Labott, *U.S. Denies Report Alleging Drone Strikes Kill 160 Kids in Pakistan*, CNN WORLD, Aug. 12, 2011, <http://www.cnn.com/2011/WORLD/asiapcf/08/12/pakistan.us.drone.strikes/index.html>.

399. See Gregory S. McNeal, *New Approaches to Reducing and Mitigating Harm to Civilians*, in *SHAPING A GLOBAL LEGAL FRAMEWORK FOR COUNTERINSURGENCY: NEW DIRECTIONS IN ASYMMETRIC WARFARE* 127, 127–28 (William C. Banks ed., 2012).

400. See BOB WOODWARD, *OBAMA'S WARS* 80 (2010).

401. Michael J. Boyle, *Do Counterterrorism and Counterinsurgency Go Together?*, 86 *INT'L AFF.* 333 (2010); William B. Ostlund, *Irregular Warfare: Counterterrorism Forces in Support of Counterinsurgency Operations*, *LAND WARFARE PAPERS* (2012); Gary Anderson, *Counterinsurgency vs. Counterterrorism*, *SMALL WARS J.*, Feb. 24, 2010, <http://smallwarsjournal.com/blog/journal/docs-temp/375-anderson.pdf>.

402. Interview with intelligence community attorney; see also McNeal, *supra* note 399.

A second reason for the alleged differences in performance may be attributable to different groups using different definitions. For example, civilians who willingly attempt to shield military objectives from attack (human shields) are viewed by the United States as directly participating in hostilities, and therefore the United States would not count their deaths as collateral damage.<sup>403</sup> However, independent observers such as the Bureau of Investigative Journalism and those following the ICRC's DPH Study (such as the Stanford & NYU Report) might count these human shields as civilian casualties.<sup>404</sup> In short, the United States and other independent groups may simply be using different terms.

Third, although U.S. policy requires battle damage assessments (BDA) after a strike, those BDAs do not have to be conducted if operational circumstances require the aircraft elsewhere. Beyond conducting a BDA from an aircraft, attackers might also conduct a BDA by going directly to the site where the strike occurred. However, doing this in Pakistan would be far more difficult than in Afghanistan.<sup>405</sup> In fact, in Afghanistan, U.S. forces have found that partnering with local forces and tribal leaders can help mitigate civilian casualties and respond effectively when they do occur.<sup>406</sup> Data even suggest that “[c]oalition forces have a reduced rate of civilian casualties during operations where they are partnered with Afghan National Security Forces (ANSF).”<sup>407</sup> Furthermore, U.S. forces have also claimed that partnering with local leaders allowed them “to better gauge the veracity of [civilian casualty] claims when conducting Battle Damage Assessments.”<sup>408</sup> Such partnerships, while possible in Afghanistan's counterinsurgency environment, are not possible in Pakistan given the local population's hostility toward the United States and the Pakistani government, further explaining variability in Pakistani data and perhaps helping to explain the differences across countries. Of course, problems with battle damage assessments are not new; they are just particularly important in the debate over targeted killings because the numbers are so important and so disputed.<sup>409</sup>

Finally, the U.S. government and outside observers may simply be using different benchmarks to measure success. For example, the United States believes that measuring success in targeting requires two stages of analysis.

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403. See Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 31 (2010).

404. See DPH Study, *supra* note 106, at 1025 (“The fact that some civilians voluntarily and deliberately abuse their legal entitlement to protection against direct attack in order to shield military objectives does not, without more, entail the loss of their protection and their liability to direct attack independently of the shielded objective.”); see also STANFORD & NYU REPORT, *supra* note 16; *Obama 2012 Pakistan Strikes*, *supra* note 389 (using similar terminology).

405. See McNeal, *supra* note 57, at 334 (discussing why it is difficult to conduct on-site BDAs).

406. McNeal, *supra* note 399, at 136.

407. *Id.* (quoting Joint CIVCAS Study, *supra* note 244, at 10).

408. *Id.*

409. Cf. HAND, *supra* note 89, at 59 (citing General Wesley Clark's description of battle damage assessment lag during World War II: “Even if a bomb hit its target, there was a delay of several hours or even days to confirm that it had been functionally destroyed. It was therefore difficult to convey to Allied political leaders a clear sense of the battle damage results.” (quoting WESLEY CLARK, *WAGING MODERN WAR* 225 (2001))).

First, it looks to the immediate question of whether the person killed was actually the target on the kill list and whether the killing impacted patterns of enemy activity. Second, it looks at the longer term impact on local attitudes towards the United States, public perception of actions, changes in the quality or quantity of information being provided to U.S. forces by individuals or groups, and changes in the local political situation.<sup>410</sup> Disputes regarding the first benchmark can be resolved only with accurate data about who is killed. However, disputes about the second benchmark are bound up in bureaucratic analysis that is not readily subject to external review or mechanisms of accountability. Those mechanisms are the subject of the next Part.

#### IV. ACCOUNTABILITY IN THE TARGETED KILLING PROCESS

Having set forth the legal and policy justifications for targeted killings and the bureaucratic processes associated with creating kill lists and executing targeted killings, this Article now turns to accountability. This Part proposes four mechanisms of accountability that are relevant to the targeted killing process: legal, political, bureaucratic, and professional. It describes these mechanisms in section IV.A and applies them to the targeted killing process in the subsequent sections.

##### A. MECHANISMS OF ACCOUNTABILITY AND CONTROL IN TARGETED KILLINGS

As discussed above, the targeted killing process involves countless bureaucrats making incremental decisions that ultimately lead to the killing of individuals on a target list. Critics contend that these bureaucrats and their political superiors are unaccountable. I argue that these critiques are misplaced because they fail to credit the extensive forms of bureaucratic, legal, political, and professional accountability that exist within the targeted killing process. This section explores each of these accountability mechanisms, defining and applying them to this process.

When assessing accountability measures, it is important to analyze the source from which a particular form of accountability can exercise control over a bureaucracy's actions, as well as the degree of control each form of accountability can have over bureaucratic action.<sup>411</sup> Drawing on theories of accountability and governance from the public administration literature, I contend that the source of control over bureaucrats involved in the targeted killing process can be defined as internal (endogenous) or external (exogenous), and the degree of control can be loosely characterized as high or low.<sup>412</sup> These variables can be applied to four general mechanisms of accountability: (1) legal; (2) bureau-

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410. FM 3-60, *supra* note 162, at B-7.

411. See WILLIAM T. GORMLEY JR. & STEVEN J. BALLA, BUREAUCRACY AND DEMOCRACY: ACCOUNTABILITY AND PERFORMANCE 10–11 (2004).

412. Barbara S. Romzek & Melvin J. Dubnick, *Accountability in the Public Sector: Lessons from the Challenger Tragedy*, 47 PUB. ADMIN. REV. 227, 228–29 (1987).

cratic; (3) professional; and (4) political accountability.<sup>413</sup> Taken together, these mechanisms of accountability amount to “law-like” institutional procedures that can discipline the discretion of bureaucrats involved in the targeted killing process—even if the shadow of judicial oversight over the process is relatively slight.<sup>414</sup>

Having set forth the four mechanisms of accountability, I will briefly describe them here and then apply them to the targeted killing process in subsequent sections. In regard to: (1) legal accountability, the conduct of bureaucrats is managed through a binding relationship, defined by legal obligations, with effective control emanating (mostly) from outside the Executive Branch; (2) bureaucratic accountability, “expectations are managed through a hierarchical arrangement based on supervisory relationships,” and this accountability mechanism effectuates control from within the Executive Branch; (3) professional accountability, the system relies on “deference to expertise” and uses internal structures and processes to produce “low levels of control”; and finally (4) political accountability, where the “system promotes responsiveness to constituents as the central means of managing multiple expectations” with control that is external and limited.<sup>415</sup>

These concepts were graphically illustrated by Romzek and Dubnik.<sup>416</sup> I have adapted their illustration for the purposes of this Article and applied it to the targeted killing context (illustrated in the table below).

SOURCE OF CONTROL OVER BUREAUCRATIC ACTION			
		Endogenous (internal)	Exogenous (external)
DEGREE OF CONTROL OVER BUREAUCRATIC ACTION	High	Bureaucratic Accountability (e.g., DoD Regulations, UCMJ, ROE, IG at CIA, Formal evaluations, assignments and performance reviews)	Legal Accountability (Article III Courts, International Tribunals, CIA IG referral to DOJ NSD, UCMJ)
	Low	Professional Accountability (Informal reprimands, poor evaluations, shunning)	Political Accountability (Congressional oversight, interest groups, NGO monitors, IGO monitors)

413. *Id.*

414. Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. REV. 1521, 1588 (2013).

415. GORMLEY & BALLA, *supra* note 411, at 10 (quoting Romzek & Dubnik, *supra* note 412, at 230).

416. Romzek & Dubnik, *supra* note 412, at 229.

The upper right quadrant shows how legal accountability imposes a high degree of control over bureaucratic action, with the source of that control resting outside the bureaucracy. Typically, legal accountability in the United States is thought of as criminal or civil penalties, or injunctive relief adjudicated through Article III courts. In the case of the CIA, such accountability would take place through an Inspector General referral to the Department of Justice for prosecution. In the case of the military, such accountability would take place through the court-martial process, with soldiers having the right to appeal their case to an Article III court.<sup>417</sup> There is also the possibility, albeit remote, of a prosecution by an international tribunal; however, the likelihood of an American ever being prosecuted before an international tribunal is fairly low because the United States is not a signatory to the Rome Statute and can exercise its veto power against a UN Security Council referral.<sup>418</sup> This illustration, like all conceptual frameworks, has limitations. For example, though as a general matter legal accountability may impose a high degree of control over typical bureaucratic action, in the case of national security related matters, various standing doctrines may mean that legal accountability through Article III courts will be a nullity,<sup>419</sup> and jurisdictional limits may ensure that legal accountability from war crimes tribunals may similarly have limited impact.<sup>420</sup> Nevertheless, when triggered, legal accountability imposes a high degree of externally based control over the targeted killing process—in short, when U.S. courts order the Executive Branch to act, the Executive Branch almost always complies.<sup>421</sup>

The sources of control in bureaucratic accountability (upper left quadrant) are measures endogenous to the bureaucracy, and these measures provide a high degree of control over bureaucratic actions. Parts I–III of this Article set forth in

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417. See R. CHUCK MASON, CONG. RESEARCH SERV., R41739 MILITARY JUSTICE: COURTS-MARTIAL, AN OVERVIEW 5, 8–9 (2013), available at <http://www.fas.org/sgp/crs/natsec/R41739.pdf>.

418. Cf. David Kaye, *Don't Fear the International Criminal Court*, FOREIGN POL'Y, Feb. 22, 2006, [http://www.foreignpolicy.com/articles/2006/02/21/dont\\_fear\\_the\\_international\\_criminal\\_court](http://www.foreignpolicy.com/articles/2006/02/21/dont_fear_the_international_criminal_court) (explaining that ICC Prosecutor Moreno-Ocampo “found a reasonable basis to believe that some coalition forces had engaged in the willful killing of civilians and inhumane treatment of detainees. But this was hardly a surprise given that the United States and UK have acknowledged these crimes and have been prosecuting perpetrators. . . . The ICC was never meant to replace national justice systems. Instead, it is a last resort for heinous crimes that states cannot or will not prosecute.”).

419. See discussion *infra* section IV.B on *al Aulqi v. Obama* litigation; see also John C. Dehn & Kevin Jon Heller, Debate, *Targeted Killing: The Case of Anwar Al-Aulqi*, 159 U. PA. L. REV. PEN-NUMBRA 175 (2011), <http://www.pennumbra.com/debates/pdfs/TargetedKilling.pdf>; Gregory S. McNeal, *The Federal Protective Power and Targeted Killing of U.S. Citizens*, CATO UNBOUND, June 10, 2011, <http://www.cato-unbound.org/2011/06/10/gregory-s-mcneal/federal-protective-power-targeted-killing-us-citizens>; Gregory S. McNeal, *A President's Duty, Not a Judge's*, N.Y. TIMES (Feb. 6, 2013, 12:50 PM), <http://www.nytimes.com/roomfordebate/2013/02/05/what-standards-must-be-met-for-the-us-to-kill-an-american-citizen/military-targets-are-entrusted-to-the-president>.

420. See Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 28–29 (2001); see also Al Goodman, *Prosecutor: Drop Case Against Bush Officials*, CNN EUROPE, Apr. 16, 2009, <http://www.cnn.com/2009/WORLD/europe/04/16/spain.guantanamo/>; Kaye, *supra* note 418.

421. For a famous example of one of the rare times the Executive Branch has expressly ignored a court order, see *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).



extensive detail the mechanisms of bureaucratic accountability in the targeted killing process. Those mechanisms amount to the mass of regulations, rules of engagement, doctrine, TTPs (tactics, techniques, and procedures), formal processes, performance reviews, and other internal measures that control the day-to-day behavior of bureaucrats. Professional accountability is an endogenous source of control, whereas political accountability is exogenous. However, both have a high degree of control over bureaucratic action. Bureaucratic mechanisms of accountability rest on the assumption that individuals within organizations comply with organizational rules lest they suffer sanctions.

These two examples highlight another challenge with this framework that is important to note up front. Sometimes it is difficult to know how to define a mechanism of accountability. For example, the Uniform Code of Military Justice (UCMJ) is the military's internal form of legal discipline, yet discipline meted out through the UCMJ carries the full force of law, with those found guilty of violations facing prison or even the death penalty. From the perspective of the service member, the penalties have all the trappings of legal accountability. Moreover, judgments rendered within the military justice system are appealable to Article III courts. However, those who see the virtue of legal accountability flowing primarily from the fact that it is externally imposed may not view UCMJ action as legal accountability, but rather as bureaucratic accountability because it is internal to the military bureaucracy.

Similarly, reprimands and shunning are a form of professional accountability (lower left quadrant). They are internally imposed and are perceived as exercising a low degree of control over bureaucratic action. However, when reprimands are formalized through evaluations and assignments, they may constitute bureaucratic responsibility. Furthermore, political accountability (lower right quadrant) is externally imposed and perceived as exercising a low degree of control over bureaucratic action; yet when politicians exercise their constitutional powers to cut off funding for certain operations or subpoena individuals to testify before Congress, they exercise a high degree of control that begins to look like legal accountability, rather than political accountability.

Thus, in a few areas, mechanisms of accountability may straddle the boundaries of source of control or degree of control. As with any conceptual framework, decisions made regarding definitions can be partially subjective. My goal in setting forth this framework is not to quibble about the box in which a particular accountability mechanism should be placed, but to illustrate the manner in which these accountability mechanisms exercise control over the bureaucracy. In practice, the distinctions between the source and degree of control may not always be borne out, but as a general matter, the framework helps illustrate the differing mechanisms of accountability in the targeted killing process. Disagreement over where to situate a particular mechanism merely highlights that some mechanisms of accountability may have mixed sources of control and variable degrees of control depending on the context. Further, it illustrates how some observers may believe that the importance of certain mechanisms of accountabil-

ity lie in their source of control, while others may believe the importance rests in the degree of control. These differences of opinion are defining features of the accountability debates surrounding targeted killings. Highlighting them as a source of tension is a necessary precondition for scholarly discourse about targeted killings.

Importantly, there is normative content associated with the accountability mechanisms imposed on the targeted killing process. Thus, whether a particular accountability mechanism exercises internal or external control can have significant consequences. For example, in 1986 the National Aeronautics and Space Administration (NASA) chose to elevate political accountability over professional accountability, succumbing to political pressure to launch the space shuttle over the technical judgments of the agency.<sup>422</sup> The Challenger exploded after takeoff, killing all on board.<sup>423</sup> In another example, in the build-up to the 2003 Iraq War, Army Chief of Staff General Shinseki advised the Secretary of Defense that more troops would be required to effectively counter ethnic tension and a likely insurgency after the initial invasion and offered that same judgment in testimony before Congress; however, his recommendations were ignored, with dramatic consequences, largely because they were not politically palatable.<sup>424</sup> As a corollary, many human rights groups have vigorously criticized the U.S. military and intelligence community's targeting practices.<sup>425</sup> These groups can be characterized as exogenous actors with a low degree of control over agency action (placing them in the lower right hand corner of the chart where they exercise political accountability). Much of their criticism focuses on their disbelief in the adequacy of internal accountability mechanisms

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422. GORMLEY & BALLA, *supra* note 411, at 11.

423. *Id.*

424. *Department of Defense Authorization for Appropriations for Fiscal Year 2004: Hearing Before the S. Comm. on Armed Servs.*, 108th Cong. 241 (2003). When asked by Senator Levin about "the Army's force requirement for an occupation of Iraq following a successful completion of the war," General Shinseki answered that, "something on the order of several hundred thousand soldiers, is probably a figure that would be required." *Id.*; see also BOB WOODWARD, *PLAN OF ATTACK* 119 (2004) (stating that General Shinseki "expressed concern about the logistical support for a massive invasion of a country the size of Iraq . . . Wolfowitz and the policy crowd thought war with Iraq would be relatively easy, one chief said."); Thom Shanker, *New Strategy Vindicates Ex-Army Chief Shinseki*, N.Y. TIMES, Jan. 12, 2007, <http://www.nytimes.com/2007/01/12/washington/12shinseki.html> (noting that "the president's new strategy, with its explicit acknowledgment that not enough troops had been sent to Iraq to establish control, was a vindication for General Shinseki" and further noting how Shinseki's "comments brought to a boil long-simmering tensions with Mr. Rumsfeld, who had been scrubbing the war plans to reduce the number of invading troops. And they were politically explosive, coming less than a month before the start of the war, which proponents were saying confidently would be anything but a quagmire.").

425. See Adam Entous, Evan Perez & Siobhan Gorman, *Drone Program Attacked by Human-Rights Groups*, WALL ST. J., Dec. 9, 2011, <http://online.wsj.com/article/SB10001424052970204319004577086841225927590.html>; see also *Drone Strikes*, REPRIEVE.ORG, <http://www.repriev.org.uk/investigations/drones/>; *ACLU Targeted Killing FOIA – Brief*, ACLU, July 28, 2012, <http://www.aclu.org/national-security/aclu-targeted-killing-foia-brief>; *ACLU Video: Targeted Killing*, ACLU, Aug. 30, 2010, <http://www.aclu.org/national-security/aclu-video-targeted-killing>.

(the left side of the chart).<sup>426</sup> Their normative position is that the only adequate mechanisms of accountability are external mechanisms with high levels of control over bureaucratic action, specifically legal accountability through judicial oversight.<sup>427</sup> These groups value the independence of external review and its degree of control, so they are unlikely to believe that the UCMJ is an effective form of legal accountability. Regardless of one's normative views regarding what mechanism of accountability applies in any given context, none of the mechanisms of accountability, taken alone, is sufficient to provide an effective accountability regime. However, in combination, various mechanisms acting simultaneously provide a robust framework of overlapping accountability. Examples of the mechanisms in action are the subject of sections IV.B–E below.

#### B. LEGAL ACCOUNTABILITY AND TARGETED KILLINGS

Perhaps the most frequent critique of targeted killing is that the process is unaccountable because the killings are beyond the reach of courts, making Executive Branch officials “judge, jury and executioner.”<sup>428</sup> To assess the adequacy of legal accountability, it is necessary to first specify what we mean when discussing the term. I posit that legal accountability assumes a relationship “between a controlling party outside the agency and members of the organization,” with the outside party having the power to impose sanctions.<sup>429</sup>

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426. See Robert Chesney, *Drone Strikes, the UN Special Rapporteur Investigation, and the Duty to Investigate*, LAWFARE (Jan. 25, 2013, 11:14 AM), <http://www.lawfareblog.com/2013/01/drone-strikes-the-un-special-rapporteur-investigation-and-the-duty-to-investigate/>; Katie Haas, *ACLU Briefs German Parliamentarians on U.S. Targeted Killing Program*, ACLU: BLOG OF RIGHTS (Feb. 28, 2013, 3:37 PM), <http://www.aclu.org/blog/national-security-human-rights/aclu-briefs-german-parliamentarians-us-targeted-killing-program> (citing ACLU attorney, Steven Watt, who stated before a German parliamentary hearing that “[t]ransparency and accountability are the hallmarks by which the lawfulness and legitimacy of any state’s action may be determined, and by those measurements alone, the United States’ targeted-killing program has been, and remains, a complete failure”); STANFORD & NYU REPORT, *supra* note 16; *Drone Strikes*, *supra* note 425.

427. See Noa Yachot, *ACLU Court Filing Argues for Judicial Review of U.S. Targeted Killings of Americans*, ACLU: BLOG OF RIGHTS (Feb. 6, 2013, 11:54 AM), <http://www.aclu.org/blog/national-security/aclu-court-filing-argues-judicial-review-us-targeted-killings-americans> (noting that Plaintiff’s Opposition to Motion to Dismiss filed by ACLU in *Al-Aulaqi v. Panetta* states, “‘Defendants’ argument that the Judiciary should turn a blind eye to the Executive’s extrajudicial killing of American citizens misunderstands both the individual rights guaranteed by the Constitution and the courts’ constitutional duty to safeguard those rights from encroachment’”).

428. *Rights Groups File Lawsuit to Allow Challenge to Targeted Killing Without Due Process*, ACLU, Aug. 3, 2010, <http://www.aclu.org/national-security/rights-groups-file-lawsuit-allow-challenge-targeted-killing-without-due-process> (quoting Vince Warren, Exec. Dir. of the Ctr. for Constitutional Rights, as stating, “President Obama is claiming the power to act as judge, jury and executioner while suspending any semblance of due process”); Bob Powell, *ACLU Lawyer Calls Obama “Judge, Jury, and Executioner” Over Drone Attacks on American Citizens*, CNN iREPORT, Feb. 17, 2013, <http://ireport.cnn.com/docs/DOC-928301> (Nate Wessler, a lawyer with the ACLU’s National Security Project, said that President Obama and Administration officials were acting as “judge, jury, and executioner” in carrying out targeted killings).

429. Romzek & Dubnick, *supra* note 412, at 228.

As discussed above, my assumption is that the legal accountability relationship is derived from exogenous sources that exercise a high degree of control and scrutiny over the bureaucracy.<sup>430</sup> This means that external actors (that is, those not responsible for any particular targeted killing decision) will have an independent basis for scrutinizing the performance of the bureaucracy.

Thus, legal mechanisms of accountability over targeted killings could in theory include a court reviewing administrative practices or decisions, a legislative committee exercising its oversight function (a form of legal and political accountability), a commander whose subordinate carried out a strike, or (in some circumstances) an international tribunal seeking to investigate alleged violations of international law. The binding legal nature of the scrutiny associated with legal accountability mechanisms would mean that bureaucrats have little choice about whether to respond to inquiries and orders from these external actors.<sup>431</sup> Upon close inspection, however, legal accountability in the context of targeted killings is far less influential than this theoretical template suggests. In practice, judicial review is largely nonexistent for targeted killings, review of administrative practices is foreclosed by the terms of the APA, legislative oversight is extensive but opaque, and international tribunals are legally and practically foreclosed from investigating the conduct of American forces. The next sections will address each of these shortcomings in the legal accountability mechanisms for targeted killing.

### 1. Judicial Review of Targeting Decisions: Al Aulaqi and El-Shifa

Critics have long lamented the lack of judicial scrutiny associated with the targeting decisions made by the United States. Two recent cases illustrate how standing doctrine has all but foreclosed judicial review of targeting decisions. The most recent case to deal with the U.S. government's targeted killing program is *Al-Aulaqi v. Obama*.<sup>432</sup> *Al-Aulaqi*, however, was preceded by *El-Shifa Pharmaceuticals Industries Co. v. United States*,<sup>433</sup> which was decided in 2010 but had its factual origins during the Clinton Administration.<sup>434</sup>

On August 20, 1998, President Clinton ordered simultaneous missile strikes against two targets believed to be associated with Osama bin Laden and al

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430. Beryl A. Radin, *Does Performance Measurement Actually Improve Accountability?*, in ACCOUNTABLE GOVERNANCE: PROMISES AND PROBLEMS 100 (Melvin J. Dubnick & H. George Frederickson eds., 2011).

431. For example, in *American Civil Liberties Union v. Department of Justice*, a district court ordered the Department of Justice and CIA to respond to a FOIA request but agreed that disclosure could not be ordered in the case due to the FOIA exemption regarding classified information. 808 F. Supp. 2d 280 (D.D.C. 2011). This case was ultimately reversed and remanded on different grounds, perhaps highlighting the limited efficacy of judicial accountability, as will be discussed in the next Part below. See *Am. Civil Liberties Union v. C.I.A.*, 710 F.3d 422 (D.C. Cir. 2013).

432. 727 F. Supp. 2d 1 (D.D.C. 2010).

433. 607 F.3d 836 (D.C. Cir. 2010).

434. See William J. Clinton, Pres. of the United States, Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan (Aug. 20, 1998), <http://www.presidency.ucsb.edu/ws/?pid=54799>.

Qaeda.<sup>435</sup> The President ordered the strikes because he believed that al Qaeda and bin Laden were responsible for the August 7, 1998 attacks on the U.S. embassies in Kenya and Tanzania.<sup>436</sup> In justifying the targeting decision, President Clinton informed Congress that the missile strikes “were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities.”<sup>437</sup> The next day, in a radio address to the nation, President Clinton expanded upon the rationale for the targeting of these facilities, explaining that the strikes were intended to disrupt bin Laden’s terrorist network and destroy its infrastructure in Sudan and Afghanistan.<sup>438</sup> Despite the stated rationale for attacking the pharmaceutical plant, within days of the attack “the press debunked the President’s assertions that the plant was involved with chemical weapons and associated with bin Laden.”<sup>439</sup> As information emerged about the Administration’s errors in targeting, “senior administration and intelligence officials backpedaled, issuing . . . ‘revised’ or ‘new justifications’ for the strike and conceding that any relationship between bin Laden and the plant was ‘indirect.’”<sup>440</sup> As a result of these targeting mistakes, the El-Shifa Pharmaceutical Industries Company, the owner of the plant, and Salah El Din Ahmed Mohammed Idris, the principal owner of El-Shifa, filed suit, alleging that striking the plant was a mistake and seeking \$50 million as just compensation under the Constitution’s Takings Clause. That suit was dismissed on the ground that “the enemy target of military force” has no right to compensation for “the destruction of property designated by the President as enemy war-making property.”<sup>441</sup> The U.S. Court of Appeals for the Federal Circuit affirmed, holding that the plaintiff’s takings claim raised a nonjusticiable political question,<sup>442</sup> and the Supreme Court denied certiorari.<sup>443</sup> Despite a factual record that indicated that the strike on the pharmaceutical factory was an improper targeting decision, the plaintiffs were denied redress for the destruction of their property under the Takings Clause. Judicial accountability for improper targeting decisions seemed dead on arrival.

The plaintiffs, however, were undeterred. After the CIA denied their requests for a retraction of the allegations that the plaintiffs were involved in terrorism and denied their requests for compensation for the plant’s destruction, the plaintiffs brought a negligence suit against the government seeking \$50 million

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435. *Id.*

436. *Id.*; see also *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 838.

437. Letter from William J. Clinton, Pres. of the United States, to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1464, 1464 (Aug. 21, 1998).

438. William J. Clinton, The President’s Radio Address, 2 PUB. PAPERS 1464, 1465 (Aug. 22, 1998).

439. *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 839.

440. *Id.*

441. *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 774 (2003).

442. *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1361–70 (Fed. Cir. 2004).

443. *El-Shifa Pharm. Indus. Co. v. United States*, 545 U.S. 1139 (2005).

in damages for the botched investigation that tied the plant to al Qaeda.<sup>444</sup> They also pursued a claim under the law of nations seeking a judicial declaration that the United States violated international law by not compensating them for the destruction of their property, and another claim for defamation.<sup>445</sup> The district court granted the government's motion to dismiss the complaint for lack of subject-matter jurisdiction based on sovereign immunity; the court further noted that the complaint "likely present[ed] a nonjusticiable political question."<sup>446</sup> The plaintiffs then lost their appeal to a divided panel of the D.C. Circuit,<sup>447</sup> but the case was subsequently reheard en banc.<sup>448</sup>

The en banc court cited the political question doctrine and held the plaintiffs' claims nonjusticiable.<sup>449</sup> Its reasoning amounted to a declaration that legal accountability is inappropriate for targeting decisions, which, by their nature, are political questions beyond the power of the courts to resolve.<sup>450</sup> The court explained that the "political question doctrine is 'essentially a function of the separation of powers,' and 'excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.'"<sup>451</sup> Thus, despite a call for legal accountability for the government's improper targeting decision, the court declared that "courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security."<sup>452</sup> While addressing the question of whether the government had the legal authority to act might be an appropriate mechanism of legal accountability, the court noted that the judiciary has "declined to adjudicate claims seeking only a 'determination[] whether the alleged conduct *should* have occurred."<sup>453</sup> Furthermore, citing reasons of institutional competence, the court declined to exercise legal accountability for targeting decisions stating, "In military matters in particular, the courts lack the competence to assess the strategic decision to deploy force or to create standards to determine whether the use of force was justified or well-founded."<sup>454</sup> The court elaborated:

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444. *El-Shifa Pharm. Indus. Co. v. United States*, 402 F. Supp. 2d 267, 269–70 (D.D.C. 2005).

445. *Id.*

446. *Id.* at 270–73, 276.

447. *El-Shifa Pharm. Indus. Co. v. United States*, 559 F.3d 578 (D.C. Cir. 2009).

448. *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (en banc).

449. *Id.* at 838.

450. *See generally* *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (establishing the principle that some questions are political in nature and beyond judicial scrutiny).

451. *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 840 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)).

452. *Id.* at 842.

453. *Id.* (alteration in original) (quoting *Harbury v. Hayden*, 522 F.3d 413, 420 (D.C. Cir. 2008)).

454. *Id.* at 844.



The case at hand involves the decision to launch a military strike abroad. Conducting the “discriminating analysis of the particular question posed” by the claims the plaintiffs press on appeal, we conclude that both raise nonjusticiable political questions. The law-of-nations claim asks the court to decide whether the United States’ attack on the plant was “mistaken and not justified.” The defamation claim similarly requires us to determine the factual validity of the government’s stated reasons for the strike. If the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President’s decision to launch an attack on a foreign target . . . .<sup>455</sup>

In short, targeting decisions are not an appropriate subject for legal accountability mechanisms, at least in the eyes of the D.C. Circuit in this particular case. This form of judicial deference to the expert judgments of the bureaucrats making targeting decisions and their political superiors was echoed in the 2010 case of *Al-Aulaqi v. Obama*.<sup>456</sup> In *Al-Aulaqi*, the court faced a direct challenge to the government’s decision to place an American citizen on a kill list. The plaintiff, al Aulqi’s father, lost his case on standing grounds, lacking either next friend standing or third party standing, and because his suit failed to state a claim under international law.<sup>457</sup> With regard to the political question doctrine, the court noted that national security matters are “quintessential sources of political questions” and stated:

Judicial resolution of the “particular questions” posed by plaintiff in this case would require this Court to decide: (1) the precise nature and extent of Anwar Al-Aulaqi’s affiliation with AQAP; (2) whether AQAP and al Qaeda are so closely linked that the defendants’ targeted killing of Anwar Al-Aulaqi in Yemen would come within the United States’s current armed conflict with al Qaeda; (3) whether (assuming plaintiff’s proffered legal standard applies) Anwar Al-Aulaqi’s alleged terrorist activity renders him a “concrete, specific, and imminent threat to life or physical safety,”; and (4) whether there are “means short of lethal force” that the United States could “reasonably” employ to address any threat that Anwar Al-Aulaqi poses to U.S. national security interests. Such determinations, in turn, would require this Court, in defendants’ view, to understand and assess “the capabilities of the [alleged] terrorist operative to carry out a threatened attack, what response would be sufficient to address that threat, possible diplomatic considerations that may bear on such responses, the vulnerability of potential targets that the [alleged] terrorist[] may strike, the availability of military and nonmilitary options, and the risks to military and nonmilitary personnel in attempting application of non-lethal force.” Viewed through these prisms, it becomes clear that plaintiff’s claims pose precisely the types of complex policy questions that the

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455. *Id.* (internal citations omitted).

456. *See Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 9 (D.D.C. 2010).

457. *See id.* at 12, 23, 28, 40.

D.C. Circuit has historically held non-justiciable under the political question doctrine.<sup>458</sup>

The court went on further to note that although it was unnecessary to resolve the possibility that the state secrets privilege would foreclose judicial resolution of al Aulqi's case because there were other grounds for dismissal, if the court were to reach the state secrets issue, al Aulqi's case would likely fail on those grounds as well. Despite losing the initial *Al-Aulqi* case, the ACLU and the Center for Constitutional Rights filed new lawsuits in the form of a wrongful death action after drone strikes killed al Aulqi, his teenage son, and Samir Khan, another American.<sup>459</sup>

In this context, it seems possible that when this new suit comes before the Court of Appeals or the Supreme Court, subsequent developments, leaks, and other information about the targeted killing process may have "had a sufficiently unsettling impact so as to give considerable pause to some judges or justices—potentially enough to tip the scales against the continued application of those threshold avoidance doctrines."<sup>460</sup> For the time being though, the courts in *Al-Aulqi* and *El-Shifa* relied on a substantial number of precedents to make clear that legal accountability, at least through injunctive relief, is largely foreclosed when it comes to targeting decisions. Rather, such issues are entrusted to the political branches, and the appropriate form of accountability in targeting cases is found in the halls of Congress or the corridors of the Executive Branch.

## 2. APA Foreign Affairs Exception

The military and intelligence bureaucracies stand in contrast to other public bureaucracies in that other bureaucracies are legally accountable to the public through the Administrative Procedure Act (APA), which subjects agency policies to public comment and scrutiny. When, for example, NASA formulates a new policy designed to regulate the use of deadly force by NASA security force personnel, that policy is subject to notice and comment rulemaking.<sup>461</sup> However, when the U.S. military crafts a policy to govern the likelihood of collateral damage resulting from U.S. military operations, that policy is not subject to the same public notice and comment processes. In general, there are good reasons

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458. *Id.* at 45–46 (alteration in original) (internal citations omitted).

459. See Complaint, *Al-Aulqi v. Panetta*, No. 12-1192, 2012 WL 3024212 (July 18, 2012).

460. Chesney, *supra* note 27, at 218.

461. See NASA Security and Protective Services Enforcement, 78 Fed. Reg. 5122-01 (proposed Jan. 24, 2013) (to be codified at 14 CFR §§ 1203a, 1203b, 1204) (proposing a rule subject to public comment that would make "nonsubstantive changes to NASA regulations to clarify the procedures for establishing controlled/secure areas and to revise the definitions for these areas and the process for granting access to these areas, as well as denying or revoking access to such areas. Arrest powers and authority of NASA security force personnel are also updated and clarified to include the carrying of weapons and the use of such weapons should a circumstance require it.")

for this.<sup>462</sup> First, the APA specifically exempts military activity.<sup>463</sup> Second, the type of national security activity the military engages in, specifically the commander in chief's decision making regarding targets, raises serious separation of powers and classified information concerns.<sup>464</sup> Third, as the courts in *El-Shifa* acknowledged, courts oftentimes lack judicial competence to evaluate highly technical military decisions. However, not all matters are beyond the competence of judges. For example, courts frequently review challenges to FDA decisions involving highly complex chemical formulations.<sup>465</sup> Thus, presumably courts would also be capable of reviewing challenges to the procedures the military uses to test weapons effects, how the military chooses to place those weapons effects in collateral effects tables, and how frequently FAST-CD is updated.

### 3. International Legal Investigations

Although the ICC does not have the ability to investigate U.S. forces directly, it nevertheless can impose an accountability check on the United States by investigating American allies who are signatories to the Rome Statute.<sup>466</sup> For example, the UN Special Rapporteur on Counter-Terrorism and Human Rights announced that he is investigating the United Kingdom based on allegations "that drone strikes and other forms of remote targeted killing have caused disproportionate civilian casualties."<sup>467</sup> Also, NGOs have sued the British Government Communications Headquarters (GCHQ), which is akin to the U.S. National Security Agency, contending that the British government is liable for

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462. See generally Arthur Earl Bonfield, *Military and Foreign Affairs Function Rule-Making Under the APA*, 71 MICH. L. REV. 221 (1972); Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673 (2010).

463. 5 U.S.C. § 553(a) (2012) ("[The notice-and-comment requirement] applies . . . except to the extent that there is involved . . . a military or foreign affairs function of the United States . . .").

464. Regarding such presidential determinations, see *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (holding that "[o]ut of respect for the separation of powers and the unique constitutional position of the President, . . . [w]e would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion."). In this instance, those statutory duties would be conducting military operations pursuant to the AUMF or a covert action finding.

465. See, e.g., *Cumberland Pharm., Inc. v. Mylan Institutional LLC*, No. 12-3846, 2012 WL 6567922, at \*1 (N.D. Ill. Dec. 14, 2012) (reviewing a patent related "to novel acetylcysteine compositions in solution, comprising acetylcysteine and which are substantially free of metal chelating agents, such as EDTA").

466. See Leigh Day & Co., *High Court Challenge to Hague over UK Complicity in CIA Drone Attacks*, Mar. 12, 2012, <http://www.leighday.co.uk/News/2012/March-2012/High-Court-Challenge-to-Hague-over-UK-complicity-i> (arguing that British "GCHQ officers may be guilty of conduct ancillary to crimes against humanity and/or war crimes, both of which are statutory offences under the International Criminal Court Act 2001"); see also Chesney, *supra* note 27, at 218 n.221 (citing Entous, Perez & Gorman, *supra* note 425, for its description of "plans by human-rights groups to mount 'a broad-based campaign that will include legal challenges in courts in Pakistan, Europe, and the U.S.'").

467. Dapo Akande, *The UK's Use of Drones in Afghanistan and Its Definition of "Civilians,"* EUR. J. OF INT'L L.: TALK! (Jan. 31, 2013), <http://www.ejiltalk.org/the-uks-use-of-drones-in-afghanistan-and-its-definition-of-civilians/>.

war crimes for providing intelligence that supported U.S. targeted killing operations.<sup>468</sup> That case was similarly stopped in U.K. courts on what amounted to political question grounds.<sup>469</sup> Nevertheless, these legal efforts demonstrate that the United States may find itself held accountable politically through the threat and cost of allies having to respond to legal challenges.<sup>470</sup> And because the United Kingdom is a signatory to the Rome Statute, the results of various investigations may produce evidence that places the actions of the British government within the scope of the ICC's jurisdiction, imposing a legal cost on allies and a political cost on the United States.<sup>471</sup> Thus, as *Al-Aulaqi* and *El-Shifa* suggested, political accountability is the mechanism of recourse in matters involving armed conflict, and the courts should not intervene.<sup>472</sup>

#### 4. Criminal Prosecution of Military and CIA Personnel

Although no American has been prosecuted for participating in drone strikes, the specter of criminal prosecution remains present. For example, a member of the military might be prosecuted pursuant to the UCMJ, and CIA personnel may face trial in a civilian court. "Incidents in Iraq and Afghanistan involving members of the armed forces and private contractors illustrate how [civilian prosecution or court-martial proceedings] can occur from time to time, as individuals are prosecuted for allegedly killing civilians or prisoners."<sup>473</sup> Title 18 of the U.S. Code, at § 2441, establishes jurisdiction over war crimes committed by or against members of the U.S. armed forces or U.S. nationals.<sup>474</sup> War

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468. See Mark Townsend, *GCHQ Civilian Staff Face War Crimes Charge over Drone Strikes in Pakistan*, GUARDIAN, Mar. 10, 2012, <http://www.guardian.co.uk/world/2012/mar/11/gchq-staff-war-crimes-drones>.

469. See Tom Coghlan, *High Court Blocks Challenge on GCHQ Role in Drone Strikes*, TIMES, Dec. 21, 2012, <http://www.thetimes.co.uk/tto/news/uk/defence/article3638389.ece> ("Lord Justice Moses and Mr Justice Simon agreed with lawyers for the Foreign Secretary, Wiliam Hague, who argued that the case was a matter for Parliament that was 'unarguable' in the courts and actually a veiled attempt to persuade them to adjudicate on the legality of US drone strikes.").

470. For example, there exists the possibility of domestic liability through lawsuits in Pakistani or Yemeni courts, or lawsuits based on nationality where, for instance, a British citizen might be inadvertently killed in a drone strike and his survivors might sue in British courts. There also exists the possibility of universal jurisdiction, and finally the nonlegal political investigations led by the Human Rights Commission and Committee. Those forms of quasi-legal accountability may exert a form of influence over U.S. policy, although they will be less powerful than direct lawsuits in U.S. courts. (With thanks to David Kaye for this line of thinking.)

471. Subject to limitations on that jurisdiction as spelled out in Article 17 of the Rome Statute.

472. A further example of these overlapping mechanisms can be found in the 1999 Kosovo intervention. There, the International Criminal Tribunal for the Former Yugoslavia investigated U.S. actions. The review "concluded that NATO military operations were indeed lawful, but the very fact that it was carried out served notice that doing the right thing, and doing it well and carefully, will not necessarily immunize actors from international legal scrutiny under the law of armed conflict." Baker, *supra* note 121, at 21.

473. Chesney, *supra* note 27, at 216 (citing William Yardley, *American Soldier Is Convicted of Killing Afghan Civilians for Sport*, N.Y. TIMES, Nov. 10, 2011, at A16; Timothy Williams, *Iraqis Angered as Blackwater Charges Are Dropped*, N.Y. TIMES, Jan. 1, 2010, <http://www.nytimes.com/2010/01/02/us/02blackwater.html>).

474. 18 U.S.C. § 2441(a) (2012).

crimes are defined as any conduct:

- (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
- (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
- (3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or
- (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.<sup>475</sup>

Thus, 18 U.S.C. § 2441 references and incorporates various aspects of international humanitarian law into domestic law and makes violations of those laws a violation of U.S. criminal law. Similarly, Article 18 of the UCMJ allows for the exercise of jurisdiction over “any person who by the law of war is subject to trial by a military tribunal.”<sup>476</sup> Other sources of authority for prosecuting citizens involved in wrongful targeting decisions may include the punitive articles of the UCMJ.<sup>477</sup> The CIA is not exempt from these prohibitions because the Agency’s Inspector General “must report certain types of wrongdoing to the Department of Justice.”<sup>478</sup> Furthermore, because CIA personnel do not enjoy combatant immunity, they could be prosecuted in the criminal courts of other nations for their involvement in targeted killing operations.<sup>479</sup>

#### C. POLITICAL ACCOUNTABILITY AND TARGETED KILLINGS

Section IV.B established the ways in which legal accountability mechanisms might function to make the targeted killing process accountable. Political accountability can fill the gaps left by legal accountability. In fact, when judicial review was foreclosed, or when international legal investigations were conducted (even if they failed), political accountability was the next mechanism of accountability identified in that section. Political accountability mechanisms exist where the “system promotes responsiveness to constituents as the central means of managing the multiple expectations” with control that is external and

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475. *Id.* § 2441(c)(1)–(4).

476. 10 U.S.C. § 818 (2012).

477. *Id.* § 918 (codifying Article 118 of the UCMJ, which deals with murder).

478. Ryan M. Check & Afsheen John Radsan, *One Lantern in the Darkest Night: The CIA’s Inspector General*, 4 J. NAT’L SEC. L. & POL’Y 247, 258 (2010).

479. See Morris Davis, *Combatant Immunity and the Death of Anwar al-Awlaqi*, JURIST, Oct. 17, 2011, <http://jurist.org/forum/2011/10/morris-davis-anwar-al-awlaqi.php>.

limited.<sup>480</sup> Constituents in this sense might mean a responsive electorate demanding change or information, or it might mean international allies pushing for action by threatening to leave an alliance over wrongdoing or allegations of wrongdoing. Political accountability is oftentimes triggered by watchdog groups, NGOs, journalists, and other external observers.<sup>481</sup>

### 1. Congressional Oversight

Congressional oversight of Executive Branch activities is believed to be a core constitutional duty.<sup>482</sup> Arthur Schlesinger wrote that this duty, although not written into the Constitution, existed because “[t]he power to make laws implied the power to see whether they were faithfully executed.”<sup>483</sup> Founding-era actions support this view, with Congress conducting in 1792 its first oversight investigation into America’s military campaign against Indians on the frontier.<sup>484</sup> In 1885, future president Woodrow Wilson, at the time an academic, wrote that Congressional oversight was just as important as lawmaking.<sup>485</sup> Oversight is a form of accountability, but what exactly is oversight? Moreover, how can we know what “good” oversight is?

Amy Zegart argues that defining good oversight is difficult for three reasons.<sup>486</sup> First, she argues, “oversight is embedded in politics and intertwined with policy advocacy on behalf of constituents and groups and their interests.”<sup>487</sup> Second, “many agencies are designed with contradictory missions that naturally pull them in different directions as the power of contending interest

480. Romzek & Dubnick, *supra* note 412, at 230; *see also* GORMLEY & BALLA, *supra* note 411, at 11 (citing Romzek & Dubnick, *supra* note 412).

481. *See* JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 217–20 (2012) (describing the role of the press and other organizations in holding the executive accountable for wartime actions).

482. *See, e.g.*, Neal Devins, *Congress, Civil Liberties, and the War on Terrorism*, 11 WM. & MARY BILL RTS. J. 1139, 1144–45 (2003); Brian D. Feinstein, *Avoiding Oversight: Legislator Preferences & Congressional Monitoring of the Administrative State*, 8 J.L. ECON. & POL’Y 1, 26–27 (2011); Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Reform*, 65 WASH. & LEE L. REV. 1239, 1315 (2008); Christopher M. Ford, *Intelligence Demands in a Democratic State: Congressional Intelligence Oversight*, 81 TUL. L. REV. 721, 728–29 (2007); Jacob K. Javits & Gary J. Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 460 (1977); Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1062–63 (2007); Charles E. Schumer, *Under Attack: Congressional Power in the Twenty-First Century*, 1 HARV. L. & POL’Y REV. 3, 4 (2007); Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1078–79 (2001); David Everett Colton, Note, *Speaking Truth to Power: Intelligence Oversight in an Imperfect World*, 137 U. PA. L. REV. 571, 588–89 (1988).

483. Arthur M. Schlesinger, Jr., *Introduction* to 1 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792–1974, at xix (Arthur M. Schlesinger, Jr. & Roger Bruns eds., 1975).

484. *See* LOUIS FISHER, CONG. RESEARCH SERV., RL31836, *CONGRESSIONAL INVESTIGATIONS: SUBPOENAS AND CONTEMPT POWER* 2–3 (2003).

485. *See* WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* 297 (1885).

486. Amy Zegart, *The Domestic Politics of Irrational Intelligence Oversight*, 126 POL. SCI. Q. 1, 4 (2011).

487. *Id.*



groups waxes and wanes.”<sup>488</sup> Third, “good oversight is hard to recognize because many important oversight activities are simply invisible or impossible to gauge.”<sup>489</sup> In a particularly salient example, Zegart notes:

Telephone calls, e-mails, and other informal staff oversight activities happen all the time, but cannot be counted in data sets or measured in other systematic ways. Even more important, the very *possibility* that an agency’s action might trigger a future congressional hearing (what some intelligence officials refer to as “the threat of the green felt table”) or some other sort of congressional response can dissuade the executive branch officials from undertaking the proposed action in the first place. This kind of anticipatory oversight can be potent. But from the outside, it looks like no oversight at all.<sup>490</sup>

If oversight of targeted killings is a form of political accountability, it may be one that is difficult to see from the outside. This fact is borne out by Senator Dianne Feinstein’s release of details regarding congressional oversight of the targeted killing program. Those details were largely unknown and impossible to gauge until political pressure prompted her to issue a statement. In that statement she noted:

The committee has devoted significant time and attention to targeted killings by drones. The committee receives notifications with key details of each strike shortly after it occurs, and the committee holds regular briefings and hearings on these operations—reviewing the strikes, examining their effectiveness as a counterterrorism tool, verifying the care taken to avoid deaths to non-combatants and understanding the intelligence collection and analysis that underpins these operations. In addition, the committee staff has held 35 monthly, in-depth oversight meetings with government officials to review strike records (including video footage) and question every aspect of the program.<sup>491</sup>

Many governance scholars have offered theories about how oversight works across policy issues. The problem with many of these theories is that they do not apply well to the intelligence world.<sup>492</sup> As Lee Hamilton, former vice chairman of the 9/11 commission, noted:

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488. *Id.*

489. *Id.* at 5.

490. *Id.*; see also Barry Weingast & Mark Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 792 (1983) (cautioning “against equating the absence of active monitoring with congressional ineffectualness in controlling bureaucratic agencies”).

491. Press Release, Senator Dianne Feinstein, Feinstein Statement on Intelligence Committee Oversight of Targeted Killings (Feb. 13, 2013), <http://www.feinstein.senate.gov/public/index.cfm/2013/2/feinstein-statement-on-intelligence-committee-oversight-of-targeted-killings>.

492. Zegart, *supra* note 486, at 7.

If you're the chairman of a committee that works in the unclassified world, you get a lot of help—a lot of reporters bring issues to your attention, trade associates write reports, citizens speak up, watchdog groups do studies . . . . Not so in the classified world. The world of intelligence is vast . . . . If you're on the outside world of intelligence, you know nothing about it other than what the executive branch decides to tell you. The Intelligence Committees are completely on their own.<sup>493</sup>

Thus, in the world of intelligence, “increased secrecy has impacted upon the legislative and judiciary branches’ ability to oversee and review intelligence activities.”<sup>494</sup> Much like legal oversight, political oversight has some significant limitations. The reason for this is straightforward—the Legislature and Judiciary have an expertise problem.<sup>495</sup> The Executive Branch simply knows more about how it conducts targeted killings than the Legislature that oversees it. This expertise advantage allows the Executive Branch to shield certain activities from oversight because Congress is comparatively disadvantaged and lacks the knowledge necessary to ask the right questions.<sup>496</sup> Congressional rules limiting a member’s term on an Intelligence Committee to eight years further limits the development of expertise.<sup>497</sup>

Beyond the problem of expertise is the fact that members of congressional intelligence committees lack the same budgetary power that other congressional committees possess. This makes it more difficult for these members to threaten to cut off funding when the Executive Branch withholds information from the committee or engages in other malfeasance. For example, the Senate Select Committee on Intelligence oversees intelligence activities. If the committee was concerned about a particular targeted killing practice, such as the criteria used to add someone to a kill list, the committee could not threaten with any real teeth to cut off funds until more information was provided about the kill-list criteria; intelligence appropriations are handled by the Senate Appropriations Subcommit-

493. *Congressional Oversight of Intelligence Activities: Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. 11 (2007) (statement of Lee Hamilton).

494. Damien Van Puyvelde, *Intelligence Accountability and the Role of Public Interest Groups in the United States*, 28 INTELLIGENCE AND NAT’L SECURITY 139, 147 (2012) (citing PHILIP B. HEYMANN, TERRORISM, FREEDOM AND SECURITY: WINNING WITHOUT WAR 155–56 (2003); Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931 (2007); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 133 (2006)).

495. As Max Weber noted, “[t]he ‘political master’ finds himself in the position of the ‘dilettante’ who stands opposite the ‘expert,’ facing the trained official who stands within the management of administration.” Max Weber, *Bureacracy*, in *ECONOMY AND SOCIETY* (1922), reprinted in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 232 (H.H. Gerth & C. Wright Mills eds., trans., 1946).

496. Zegart, *supra* note 486, at 9 (“Because bureaucrats have a natural informational advantage, congressional overseers must find ways to narrow the gap. The more Congress knows about an agency’s policy domain, the better questions it can ask, the more it can monitor agency performance, and the more it can hold the agency accountable.”).

497. *Id.* at 11 (citing 150 Cong. Rec. S10639 (daily ed. Oct. 7, 2004) (statement of Sen. Robert Graham)).

tee on Defense, and there is little membership overlap between the two committees. Members of the Intelligence Committee overseeing targeted killings would need to enlist the support of members of the Appropriations Subcommittee to cut off funds. Here again, secrecy poses a problem because intelligence budgets are classified. Members of Congress serving on either the intelligence committees or the defense appropriations committees can access the budget, but even their security-cleared staff and other Members of Congress cannot.<sup>498</sup> Therefore, Intelligence Committee Members themselves would need to contact just the appropriators (not their staff). When contacting them, the Intelligence Committee Members would not be able to disclose to the appropriators any details about classified activities other than the general line items in the budget that relate to those activities. Thus, the intelligence overseers would need to convince other members to cut off funds based on generalized concerns, rather than any specific details. Given these limitations, when it comes time to threaten to cut off funding for some Executive Branch malfeasance, it is not surprising that the Executive Branch might choose to delay or even ignore a congressional request. The threat is an idle one because only a handful of Members will be able to find out the information necessary to make a credible threat, they will not be able to share that information publicly, and they will not be able to share it with other Members to build broader congressional support for withholding funds associated with the inappropriate activity. In short, diffused authority combined with secrecy may allow the Executive Branch to dodge accountability.

There may be a deeper problem with congressional oversight of targeted killings. There is no large constituency that is impacted by the targeted killing program.<sup>499</sup> More pointedly, are the issues in the targeted killing policy important enough for any individual Member of Congress to take steps to change the policy? Will a Member lose his seat over a failure to provide greater due process protections or more reliable targeting information in the kill-list-creation process? Or is it more likely that he will lose his seat if he champions the cause of potential targets, and one of those targets is not struck but subsequently carries out an attack? That is the political calculus facing policymakers, and in that calculus, it seems difficult to justify changing targeting absent some clear benefit to national security or some clear political gain in a congressman's home district. Moreover, even if individual policymakers agree that the policy should be changed, they may face substantial hurdles in their attempts to convince congressional leaders who drive the legislative agenda that the policy should be overhauled.<sup>500</sup>

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498. *Id.* at 19.

499. Cf. Gregory S. McNeal, *The Status Quo Bias and Counterterrorism Detention*, 101 J. CRIM. L. & CRIMINOLOGY 855, 882–83 (2012).

500. Cf. FRANK R. BAUMGARTNER ET AL., *LOBBYING & POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* 43 (2009) (“Even if policy makers recognize that the policy is imperfect or the result of an error, . . . it may still be a hard sell to convince others, especially those in leadership positions, that the

## 2. Presidential Politics

If congressional oversight does not work, what about the Executive Branch's response to political pressure? This mechanism requires an assumption that the people care enough about targeted killings to hold the President accountable. However, that is a big assumption. When asked what issues matter to them, American voters consistently rank domestic issues higher than foreign policy issues and have done so since the Cold War.<sup>501</sup>

Despite this lack of interest, some evidence exists to suggest that Presidents do care about how their activities may be viewed by the public. For example, during the war in Kosovo, the possibility of civilian casualties from any given airstrike was seen as both a legal and political constraint.<sup>502</sup> Due to this fact, some individual target decisions were deemed to have strategic policy implications that only the President could resolve.<sup>503</sup> Moreover, even in the absence of effective legal constraints of the type described in section IV.B, and even without evidence of public concern over matters of foreign policy, the President is still constrained by politics and public opinion.<sup>504</sup> “[T]he president needs both popularity, in order to obtain political support for his policies, and credibility, in order to persuade others that his factual and causal assertions are true and his intentions are benevolent.”<sup>505</sup> But the need for political support goes beyond this, because the President may require support for the idea that the policy is legal more than he needs support for the policy itself. In other words, the public may be indifferent regarding the program, or it may lack knowledge about whether the targeted killing policy is a good thing, but if the public is convinced by commentary, protests, or news stories that the program is illegal, it can sharply resist it and make it hard for the President to sustain the

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current policy is working so badly that it must be overhauled. This threshold effect means that the vast majority of policies do not change at all. . . . [F]or most issues most of the time, individual policy makers fight an uphill battle to reframe their issues.”)

501. Zegart, *supra* note 486, at 11 nn.43–44 (citing GABRIEL A. ALMOND, *THE AMERICAN PEOPLE AND FOREIGN POLICY* (1950); BARRY HUGHES, *THE DOMESTIC CONTEXT OF AMERICAN FOREIGN POLICY* (1978); *PUBLIC OPINION AND FOREIGN POLICY: AN OPERATION FORMULATION* (James N. Rosenau ed., 1961); John A. Aldrich, John L. Sullivan & Eugene Borgida, *Foreign Affairs and Issue Voting: Do Presidential Candidates “Waltz Before a Blind Audience?”*, 83 *AM. POL. SCI. R.* 123 (1989)); Paul C. Light & Celinda Lake, *The Election: Candidates, Strategies, and Decision*, in *THE ELECTIONS OF 1984*, at 83 (Michael Nelson ed., 1985); Zegart also notes that some scholars have taken on the view that voters care little about foreign policy issues. Zegart, *supra* note 486, at 11 n.43 (citing John A. Aldrich et al., *supra*).

502. *See* Baker, *supra* note 121.

503. *Cf. id.* at 19.

504. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 12 (2010) (citing Kenneth R. Mayer, *Going Alone: The Presidential Power of Unilateral Action*, in *THE OXFORD HANDBOOK OF THE AMERICAN PRESIDENCY* 449–50 (George C. Edwards III & William G. Howell eds., 2009)).

505. *Id.* at 13.

policy.<sup>506</sup>

As mentioned above, as precision has increased, so too has the expectation that civilian casualties will be low or nonexistent.<sup>507</sup> Given these expectations, Presidents have oftentimes felt compelled to involve themselves in targeting decisions. This involvement brings with it enhanced political accountability. It allows for greater public awareness of military operations and creates direct responsibility for results tied to the commander in chief's immediate involvement in the decision-making process.<sup>508</sup> Successes and failures are imputed directly to the President.

Moreover, there are functional reasons that may support greater presidential involvement. As Baker observed:

Presidential command is the fastest method I have observed for fusing disparate interagency information and views into an analytic process of decision. This is particularly important in a war on terror where pop-up targets will emerge for moments and strike decisions must be taken in difficult geopolitical contexts with imperfect information. The President is best situated to rapidly gather facts, obtain cabinet-level views, and decide.<sup>509</sup>

Presidential decision making brings to light public recognition that the military and intelligence communities are implementing rather than making policy. Moreover, when the President chooses to nominate people to assist him in making targeted killing decisions, the nomination process provides a mechanism of political accountability over the Executive Branch. This was aptly demonstrated by President Obama's nomination of John Brennan to head the CIA.<sup>510</sup> Given Brennan's outsized role as an adviser to the President in the supervision of targeted killings, his nomination provided an opportunity to hold the President politically accountable by allowing senators to openly question him about the targeted killing process,<sup>511</sup> and by allowing interest groups and other commentators to suggest questions that should be asked of him.<sup>512</sup>

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506. I thank Rick Pildes for this specific insight. For more on these ideas, see generally Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381 (2012) (reviewing POSNER & VERMEULE, *supra* note 504).

507. HAND, *supra* note 89.

508. Cf. Baker, *supra* note 238, at 418–19.

509. *Id.* at 419.

510. See Klaidman, *supra* note 78.

511. See *Brennan Nomination Hearing*, *supra* note 129.

512. See, e.g., Sara Murray & Jeffrey Sparshott, *A Battle Brews over CIA Pick*, WALL ST. J., Feb. 26, 2013, <http://online.wsj.com/article/SB10001424127887323699704578326611979265182.html>; Mary Ellen O'Connell, *The Questions Brennan Can't Dodge*, N.Y. TIMES, Feb. 7, 2013, <http://www.nytimes.com/2013/02/07/opinion/the-questions-brennan-cant-dodge.html>; Shaun Waterman & Stephen Dinan, *Senate Intelligence Hearing on Brennan's CIA Nomination Halted by Protesters*, WASH. TIMES, Feb. 7, 2013, <http://www.washingtontimes.com/news/2013/feb/7/senate-intelligence-hearing-halted-protesters/>; Matthew Harwood, *Brennan Confirmation Hearing: Time to Focus on Torture and Killing*, ACLU: BLOG OF RIGHTS (Jan. 16, 2013, 9:09AM), <http://www.aclu.org/blog/human-rights-national-security/brennan-confirmation-hearing-time-focus-torture-and-killing>; Letter from ACLU et. al. to

However, none of the examples described answer the question of secrecy and how it can stifle political accountability. Just as secrecy has the potential to hinder accountability, it may also undermine Executive power by damaging Executive Branch credibility. Though some arguments can be made to suggest that the Executive Branch has too great an ability to hide relevant information from courts or the Legislature, few have recognized the credibility costs associated with such decisions.<sup>513</sup> One scholarly attempt to describe the credibility problem is the agency approach adopted by Posner and Vermeule, who write:

The president is the agent and the public is the principal. The public cares about national security but also cares about civil liberties and the well-being of potential targets of the war on terror; its optimal policy trades off these factors. However, the public cannot directly choose the policy; instead, it delegates that power to the government and, in particular, the president. The president knows the range of options available, their likely effects, their expected costs and benefits—thanks to the resources and expertise of the executive branch—and so, if he is well-motivated, he will choose the best measures available.<sup>514</sup>

Understanding the political accountability challenge in this way has a lot of explanatory purchase. It demonstrates that the President requires credibility to act, and to signal his commitment to what the public is interested in, he will need to choose the best measures available to maintain their support. Stated differently, no “president can accomplish his goals if the public does not trust him. This concern with reputation may put a far greater check on the President’s actions than do the reactions of the other branches.”<sup>515</sup> Therefore, choosing the best targeted killing measures is a form of self-binding,<sup>516</sup> and exposing information about those measures may come through selective leaks about the targeted killing process,<sup>517</sup> greater transparency through speeches,<sup>518</sup> or demonstrated successes.<sup>519</sup>

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Dianne Feinstein and Saxby Chambliss, United States Sens., Upcoming Confirmation Hearing of John Brennan to be Director of the Central Intelligence Agency (Feb. 5, 2013), [https://www.aclu.org/files/assets/coalition\\_letter\\_on\\_brennan\\_nomination\\_final.pdf](https://www.aclu.org/files/assets/coalition_letter_on_brennan_nomination_final.pdf).

513. POSNER & VERMEULE, *supra* note 504, at 123.

514. *Id.* at 130.

515. *Id.* at 133.

516. *Id.* at 137 (“Legal theory has often discussed self-binding by ‘government’ or government officials. In constitutional theory, it is often suggested that constitutions represent an attempt by ‘the people’ to bind ‘themselves’ against their own future decision-making pathologies, or relatedly, that constitutional prohibitions represent mechanisms by which governments commit themselves not to expropriate investments or to exploit their populations.”).

517. McNeal, *supra* note 226.

518. See, e.g., Brennan, *supra* note 97; Holder, *supra* note 203; Johnson, *supra* note 203; Koh, *supra* note 54.

519. An example of this is the bin Laden raid and the associated media frenzy.



### 3. International Political Constraints

Other political constraints from outside the United States may also impose costs on the conduct of targeted killings, and those costs may serve as a form of accountability. For example, in current operations, targeted killings that affect foreign governments, such as through domestic public opinion in Pakistan, or alliances, such as the case of United Kingdom support to targeting, all have associated with them higher political costs, and will receive greater scrutiny from more politically accountable actors such as the President, the Secretary of State, or the Secretary of Defense.<sup>520</sup> This fact is clear from the ROE discussion in Part III above, where it was demonstrated that counterinsurgency operations, with their attendant political and strategic focus on winning hearts and minds, were conducted in a way that was more cognizant of civilian casualties than major combat operations during the invasion of Iraq. It was also demonstrated in Kosovo, where Baker observed, “[T]he nature of a target within an ongoing conflict (for example, across international boundaries) or method of engagement may sufficiently alter the legal context so as to warrant specific presidential approval.”<sup>521</sup>

Furthermore, other international political constraints can impose accountability on the targeting process. For example, if Pakistan wanted to credibly protest the U.S. conduct of targeted killings, it could do so through formal mechanisms such as a complaint at the U.N. General Assembly,<sup>522</sup> a petition to the U.N. Security Council to have the matter of strikes in their country added to the Security Council’s agenda,<sup>523</sup> or a formal complaint with the U.N. Human Rights Committee.<sup>524</sup> Moreover, another international political mechanism can be seen in the form of restrictions on the rights of U.S. aircraft to fly over the territory of nations while en route to targeted killing operations.<sup>525</sup> Sovereign states can constrain U.S. intelligence and military activities because, “[t]hrough not sexy and little reported, deploying CIA drones or special operations forces requires constant behind-the-scenes diplomacy: with very rare exceptions—like the bin Laden raid—the U.S. military follows the rules of the world’s other 194 sovereign, independent states.”<sup>526</sup> This can also be seen in the actual conduct of

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520. Cf. Baker, *supra* note 121, at 19.

521. Baker, *supra* note 238, at 414.

522. See GRAY, *supra* note 55, at 27; LUBELL, *supra* note 55; Gregory J. Kerwin, Note, *The Role of the United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876.

523. For example, Switzerland brought petition (signed by fifty-two countries) to the U.N. Security Council calling for the ICC to investigate war crimes in Syria. Rita Emch, *Swiss Ask For Syrian War Crimes Prosecution*, SWISS BROADCASTING CO., Jan. 15, 2013, [http://www.swissinfo.ch/eng/politics/Swiss\\_ask\\_for\\_Syrian\\_war\\_crimes\\_prosecution.html?cid=34727344](http://www.swissinfo.ch/eng/politics/Swiss_ask_for_Syrian_war_crimes_prosecution.html?cid=34727344).

524. For examples, see Jack Donnelly, *International Human Rights: A Regime Analysis* 40 INT’L ORG. 599 (1986); Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999).

525. Micah Zenko, *Flyover Country: Why the United States Can’t Just Drone Algeria*, FOREIGN POL’Y, Jan. 22, 2013, available at [http://www.foreignpolicy.com/articles/2013/01/22/flyover\\_country](http://www.foreignpolicy.com/articles/2013/01/22/flyover_country).

526. *Id.*

military operations. For example, during the 1991 Gulf War, the United States lawfully targeted Iraqi troops as they fled on what became known as the “highway of death.”<sup>527</sup> The images of destruction broadcast on the news caused a rift in the coalition. Rather than lose coalition partners, the United States chose to stop engaging fleeing Iraq troops, even though those troops were lawful targets.<sup>528</sup> The U.S. government has similarly noted the importance of international public opinion, even highlighting its importance in its own military manuals. For example, the Army’s Civilian Casualty Mitigation manual states civilian casualties “lead to ill will among the host-nation population and political pressure that can limit freedom of action of military forces. If Army units fail to protect civilians, for whatever reason, the legitimacy of U.S. operations is likely to be questioned by the host nation and other partners.”<sup>529</sup> Describing the role international politics played during the Kosovo bombing campaign, James Baker wrote, “One source of pressure that I had not fully anticipated, however, was the extent of international legal scrutiny that U.S. actions received.”<sup>530</sup>

#### D. BUREAUCRATIC ACCOUNTABILITY AND TARGETED KILLINGS

Bureaucratic accountability exercises a high degree of control over bureaucratic action. It has the potential to seriously constrain how individuals in the targeted killing process behave. Because this process is “managed through a hierarchical arrangement based on supervisory relationships” it effectuates control from within the Executive Branch.<sup>531</sup> The internal nature of this control makes it more opaque and leads to questions about whether it can be truly effective.

Bureaucratic rules can create a form of accountability with political dimensions. For example, as described in Part III, ROE may have preset approval authorities, thus inserting political review into an otherwise intrabureaucratic process. Similarly, the various Executive Orders described in Part I “may specify an obligation to obtain approval from various officials—ranging from the President to the Secretary of Defense to combatant commanders—before certain operations may be conducted in certain locations.”<sup>532</sup> On this point, Eric Schmitt and Thom Shanker quote Defense Secretary Gates as stating:

It has been my practice since I took this job that I would not allow any kind of lethal action by U.S. military forces without first informing the president or getting his approval . . . I can’t imagine an American president who would

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527. JOHN E. MUELLER, POLICY AND OPINION IN THE GULF WAR 122 (1994).

528. *See id.* at 135.

529. U.S. DEP’T OF THE ARMY, FIELD MANUAL ATTP 3-37.31: CIVILIAN CASUALTY MITIGATION 1–5 (2012); *see also* McNeal, *supra* note 399, at 128–29.

530. Baker, *supra* note 121, at 20.

531. Romzek & Dubnick, *supra* note 412, at 230.

532. Chesney, *supra* note 30, at 605.

like to be surprised that his forces were carrying out an attack someplace around the world without him knowing about it. So I decided that we should change all of the ExOrds to make them conform in policy with my practice—that, in essence, before the use of military force, presidential approval would be sought.<sup>533</sup>

As this example points out, bureaucratic accountability in the form of orders or rules can impose political accountability and even legal accountability. One way of understanding the process of targeted killings is to think of the personnel and procedures as a public bureaucracy unto itself.<sup>534</sup> In this case, public bureaucracy is made up of key military and intelligence personnel, targeteers, weaponeers, and attorneys, all embedded within a hierarchy that ultimately reports to the President. In this way, public bureaucracy can be seen as being accountable to a variety of individuals throughout government and society. Members of the military are held accountable for violations of regulations through the UCMJ, enforced by leaders within the chain of command.<sup>535</sup> CIA personnel are similarly held accountable through their own internal regulations and the possibility of a referral to the Department of Justice for prosecution.<sup>536</sup> Those leaders with UCMJ authority (the authority to enforce judicial and nonjudicial sanctions on members of the military) are accountable up the chain of command with increasing levels of political accountability exercised by the Secretary of Defense and ultimately the commander in chief. Political accountability is also exercised by Congress through oversight tied to its constitutional authority to regulate the military under Article I, Section 8, of the Constitution.<sup>537</sup> Bureaucratic mechanisms of control also include performance reviews and assignments, both of which are important to career progression in the military and intelligence communities, and which will impose a high degree of control over personnel in the targeted killing process.<sup>538</sup>

Other forms of bureaucratic accountability include performance metrics. For example, section III.B.3 discussed BDA, which is used to determine whether a target was properly struck and whether harm to civilians ensued. With regard to network-based analytical techniques discussed in Part III and Part IV, the bureaucracy looks to four factors to measure whether it is achieving tactical

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533. SCHMITT & SHANKER, *supra* note 25, at 246.

534. For a comparable definition, see GORMLEY & BALLA, *supra* note 411, at 4 (defining a public bureaucracy as “an organization within the executive branch of government, whether at the federal, state, or local level”).

535. See Baker, *supra* note 238, at 410.

536. Check & Radsan, *supra* note 478, at 257–58.

537. Geoffrey S. Corn & Eric Talbot Jensen, *The Political Balance of Power over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress*, 44 Hous. L. Rev. 553, 565 (2007); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. Rev. 167, 175–76 (1996).

538. See, e.g., Nathan Alexander Sales, *Self Restraint and National Security*, 6 J. NAT'L SEC. L. & POL'Y 227, 268 (2010).

successes: disposition,<sup>539</sup> behavior,<sup>540</sup> offensive capabilities,<sup>541</sup> and expressed aims.<sup>542</sup> However, these measures are internal to the bureaucracy and tell us nothing about how the United States measures strategic success (that is, how it determines the overall success of the campaign beyond the deaths of targets or the disruption of networks).

Internal mechanisms of bureaucratic accountability can also help to control the targeted killing process. For example, bureaucratic work that terminates with the President as the ultimate decision maker is likely to “improve in rigor as it runs up the chain of decision . . . [and] a process culminating with the President is more likely to fuse multiple sources of information and perspective and do so in a timely manner.”<sup>543</sup> This fact suggests that the bureaucracy can bring regional knowledge to bear that others might not have.<sup>544</sup> However, bureaucratic processes also pose some risks. Bureaucracies are “ponderous organizations in search of consensus,” and “actions taken by such organizations often represent the lowest common denominator acceptable to all involved in the decision-making process and as a result, seldom entail much risk—an element essential for success in war.”<sup>545</sup> Furthermore, organizational theorists have highlighted how insular organizations like bureaucracies can develop interrelationships and “concurrence seeking” that can rise to a level where those within a group become blind to alternative (nongroup derived) courses of action, also known as “groupthink.”<sup>546</sup> To avoid groupthink, organizations need to implement practices that stress critical evaluation, impartiality, and open inquiry, including outside evaluation groups.<sup>547</sup> As the discussions in Parts II and III of this Article demonstrate, the dominant mechanism of accountability in the targeted killing process is bureaucratic procedure. Accordingly, the process may run the risk of becoming dominated by insular ways of thinking. There is some evidence to suggest this is the case. As Klaidman notes:

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539. Hardy & Lushenko, *supra* note 126, at 426 (“Disposition is the nature or character of a clandestine network. A network that is well organized and has a strong offensive posture is qualitatively distinct from one that is weakly organized, exhausted, and mainly defensive.”).

540. *Id.* (“Behavior refers to the type of actions taken by the clandestine network. At one end of the spectrum is primarily offensive action. At the other is activity that is primarily defensive or designed to allow the network to consolidate and reorganize.”).

541. *Id.* (“Offensive capabilities are a measure of the capacity of the network to function offensively against coalition forces. Lower offensive capabilities correlate with reduced operational function and a lower level of threat, while reduced defensive capabilities can impede internal organization. . . . Expressed aims are the stated objectives disseminated through a network’s terrorist or insurgent narrative. . . . When rhetoric deemphasizes violence or expresses more moderate objectives it can suggest that the organization may be lacking support or reaching exhaustion.”).

542. *Id.*

543. James E. Baker, *LBJ’s Ghost: A Contextual Approach to Targeting Decisions and the Commander in Chief*, 4 CHI. J. INT’L L. 407, 419 (2003).

544. *Cf.* Baker, *supra* note 121, at 16.

545. MICHAEL I. HANDEL, *MASTERS OF WAR: CLASSICAL STRATEGIC THOUGHT* 257 (2001).

546. *See, e.g.*, Irving L. Janis, *Groupthink: The Desperate Drive for Consensus at Any Cost*, in *CLASSICS OF ORGANIZATION THEORY* 185, 185–86 (Jay M. Shafritz et al. eds., 6th ed. 2005).

547. *Id.* at 191–92.

The military was a juggernaut. They had overwhelmed the session with their sheer numbers, their impenetrable jargon, and their ability to create an atmosphere of do-or-die urgency. How could anybody, let alone a humanitarian law professor, resist such powerful momentum? Koh was no wallflower when it came to expressing his views; normally he relished battling it out with his bureaucratic rivals. But on this occasion he'd felt powerless. Trying to stop a targeted killing "would be like pulling a lever to stop a massive freight train barreling down the tracks," he confided to a friend.<sup>548</sup>

This passage suggests that because the targeted killing process is so heavily bureaucratized, it may be difficult to stop it once it has begun—a symptom of groupthink. This has further implications for accountability because with so many people involved in the targeting process, the collectivity itself may have caused an error while the public has no individual to hold to account.<sup>549</sup>

#### E. PROFESSIONAL ACCOUNTABILITY

The final mechanism of accountability—professional accountability—relies on deference to expertise and uses internal structures and processes producing low levels of control. Professional accountability may come in the form of training and a code of ethics with which employees are expected to comply.<sup>550</sup> Ethical lapses, lapses in judgment, or more serious breaches that do not rise to the level of criminal matters may nevertheless hinder one's career. Moreover, the process of professionalization creates an organizational culture in which individuals are expected to behave in certain ways.<sup>551</sup> This may mean that within the targeted killing process, a particular individual's background or training may influence her views and judgment. As an example, a civilian civil servant analyst may have a different opinion than a contractor or a military officer when it comes to the propriety of targeting a particular individual.<sup>552</sup> Those differences may have nothing to do with factual analysis or analytical judgment; rather, they may be grounded in the process of professionalization

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548. KLAIMAN, *supra* note 9, at 202.

549. BEHN, *supra* note 136, at 67 (“‘When everyone in the collectivity or only the collectivity itself is responsible, citizens have no one to call to account.’ Thus, Thompson argues, ‘an approach that preserves a traditional notion of personal responsibility—with its advantages for democratic accountability—can accommodate many of the complexities of a political process in which many different officials contribute to policies and decisions.’”).

550. See ANDREW DELANO ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* 4 (1988); ELIOT FREIDSON, *PROFESSIONALISM, THE THIRD LOGIC: ON THE PRACTICE OF KNOWLEDGE*, 84, 213–20 (2001); Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUR. L.J. 456 (2007).

551. See generally Gregory S. McNeal, *Organizational Culture, Professional Ethics and Guantanamo*, 42 CASE W. RES. J. INT'L L. 125 (2009).

552. See David S. Cloud, *Civilian Contractors Playing Key Roles in U.S. Drone Operations*, L.A. TIMES, Dec. 29, 2011, <http://articles.latimes.com/2011/dec/29/world/la-fg-drones-civilians-20111230> (“A civilian ‘might be reluctant to make a definitive call, fearing liability or negative contractual action’ if he or she passed on incorrect information that was used to call an airstrike . . .”).

that individual went through prior to starting her job. In the case of soldiers, as General Charles Dunlap has noted, their process of professionalization has trained them to see law as part and parcel of their personal morality:

Military lawyers seem to conceive of the rule of law differently [than their civilian counterparts]. Instead of seeing law as a barrier to the exercise of their clients' power, these attorneys understand the law as a prerequisite to the meaningful exercise of power. Law allows our troops to engage in forceful, violent acts with relatively little hesitation or moral qualms. Law makes just wars possible by creating a well-defined legal space within which individual soldiers can act without resorting to their own personal moral codes.<sup>553</sup>

Another aspect of military culture is the recognized role of leaders in shaping the behavior of their subordinates. This leadership role is echoed in the literature on organizational culture, which posits that leaders play a role in establishing and changing organizational culture.<sup>554</sup> But this fact suggests that professional norms and an attitude of obedience might cause individuals to give in to pressure to conduct an unlawful targeting operation. In fact, "[s]tudies on conformity and obedience suggest that professionals, whom we would ordinarily describe as 'honest,' will often suppress their independent judgment in favor of a group's opinion or offer little resistance in the face of illegal or unethical demands."<sup>555</sup> So how can professional accountability serve as a useful mechanism here? It turns out that an important part of armed forces training and professionalization is the unambiguous right to resist following an unlawful order.<sup>556</sup>

As I have previously written:

subordinates may "discount their responsibility for their conduct . . . by shifting moral responsibility to the person issuing orders," military officers see themselves as the person responsible for issuing orders and are trained to resist orders which they believe are unlawful and to do so without equivocation; military officers do not enjoy the luxury of questioning whether (to paraphrase Model Rule 5.2) their superior reasonably resolved an arguable question of legality. Unlike an attorney who, facing ambiguous legal and ethical duties may frequently find that a supervisory lawyer's instructions are

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553. Charles J. Dunlap, Jr., *Voices from the Stars? America's Generals and Public Debates*, 28 A.B.A. NAT'L SEC. L. REP. 4, 10 (2006) (quoting Richard Schragger, *Cooler Heads: The Difference Between the President's Lawyers and the Military's*, SLATE, Sept. 20, 2006, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2006/09/cooler\\_heads.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2006/09/cooler_heads.html)).

554. See, e.g., Gerard George et al., *Organizing Culture: Leader Roles, Behaviors, and Reinforcement Mechanisms*, 13 J. BUS. & PSYCHOL. 545 (1999).

555. Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 453 (2007).

556. For a general discussion of this right with examples, see McNeal, *supra* note 551, at 146–48.



reasonable, military officers are trained to recognize that the defense of superior orders will not protect them from wrongdoing.<sup>557</sup>

Moreover, unlike the civilian contractor or the political appointee advising the President, those deeper within the bureaucracy who are in the military or civil service likely lack the financial self-interest or political ambitions that others in the process may have. Therefore, professional accountability is likely to serve as an effective mechanism to hold them to account. Of course, this means that professional accountability may not be effective at the most critical stage—the decision point—but at that stage, other mechanisms of accountability, such as legal and political accountability, exercise greater control over decisions.

#### F. ACCOUNTABILITY LESSONS

As the examples above highlight, there are multiple overlapping mechanisms of accountability operating to constrain the individuals within the targeted killing process. No single mechanism is effective on its own; however, when taken together, the myriad mechanisms at work create a complex scheme of accountable governance that exerts influence before, during, and after targeting decisions. Some mechanisms are more opaque than others, and some are only applicable in narrow circumstances, yet each complements the others, making for a potentially robust scheme of control. Still, as the discussion above highlights, some mechanisms of accountability could be improved. The next Part will discuss accountability reforms that can help improve the targeted killing process, making it perform better and in a more accountable fashion.

#### V. ACCOUNTABILITY REFORMS

In light of the preceding discussion, what reforms are plausible? This Part of the Article will outline six plausible reforms which could be implemented to enhance the accountability of the targeted killing program.

##### A. DEFEND THE PROCESS

Perhaps the most obvious way to add accountability to the targeted killing process is for someone in government to describe the process the way this Article has, and from there, defend the process. The task of describing the government's policies in detail should not fall to anonymous sources, confidential interviews, and selective leaks. The government's failure to defend policies is not a phenomenon that is unique to post-9/11 targeted killings. In fact, James Baker once noted:

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557. *Id.* at 147 (alteration in original) (internal citations omitted) (quoting Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from School Psychology*, 36 HOFSTRA L. REV. 451, 451–452 (2007)).

In my experience, the United States does a better job at incorporating intelligence into its targeting decisions than it does in using intelligence to explain those decisions after the fact. This in part reflects the inherent difficulty in articulating a basis for targets derived from ongoing intelligence sources and methods. Moreover, it is hard to pause during ongoing operations to work through issues of disclosure . . . . But articulation is an important part of the targeting process that must be incorporated into the decision cycle for that subset of targets raising the hardest issues . . . .<sup>558</sup>

Publicly defending the process is a natural fit for public-accountability mechanisms. It would provide information to voters and other external actors who can choose to exercise a degree of control over the process. However, a detailed public defense of the process would also bolster bureaucratic and professional accountability by demonstrating to those within government that they are involved in activities that their government is willing to publicly describe and defend (subject to the limits of necessary national security secrecy). However, the Executive Branch, while wanting to reveal information to defend the process, would have to balance the consideration that by revealing too much information, it could face legal accountability mechanisms that it would be unable to control.<sup>559</sup>

#### B. USE PERFORMANCE REPORTING TO ENCOURAGE GOOD BEHAVIOR

Another transparency-related reform that could engender greater accountability would be to report performance data. Specifically, the government could report the number of strikes the CIA and the Department of Defense conducted in a given time period. As discussed above, the law of armed conflict requires that any harm resulting from a strike may not be disproportionate when compared to the anticipated military advantage. From this standard, some variables for a performance metric become clear: (1) Was there collateral damage resulting from the military action? (2) If so, was the collateral damage excessive in relation to the military advantage anticipated? The first variable lends itself to tracking and reporting, subject to the difficulties of AAR and BDA. The second variable only arises if collateral damage occurred, and two subsidiary questions flow from this variable. First, was the collateral damage expected? If it was, then the commander must have engaged in some analysis as to whether the anticipated harm was proportional to the military advantage anticipated. Second, if the collateral damage was not expected, why not? Some causes of potentially unexpected collateral harm are intelligence failures, failure to follow procedures, changes in the operational circumstances, and inadequate procedures, among others.

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558. Baker, *supra* note 238, at 428.

559. On the notion of self-serving national security leaks, see generally David Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013).

Each of these variables can be tracked as part of an accountability and performance metric. For example, the data could include the collateral harm anticipated before a strike and the battle damage assessment after the fact. The data need not be reported on a strike-by-strike basis to be effective; aggregate data would prove quite useful. For example, in section III.B, I describe how CENTCOM data indicate that less than 1% of targeted killing operations resulted in harm to civilians, whereas outside observers estimate that 8% to 47% of CIA strikes in Pakistan inflicted harm to civilians. Imagine these data were official numbers published by the Department of Defense and CIA respectively. It is safe to assume that reports showing that the CIA was eight to forty-seven times more likely to inflict harm to civilians than the military would force a serious reexamination of CIA bureaucratic practices, extensive political oversight, professional embarrassment, and perhaps even judicial intervention. Moreover, the publication of such data could have the salutary effect of causing bureaucratic competition between the Department of Defense and CIA over which agency could be better at protecting civilians, a form of bureaucratic accountability mixed with professionalism.

Of course, there are costs associated with such reporting. The tracking requirements would be extensive and could impose an operational burden on attacking forces; however, an administrative burden is not a sufficient reason to not reform the process, especially when innocent lives are on the line. Another cost could be the possibility that revealing this type of information, however carefully the information is vetted for public release, could aid the enemy in developing countermeasures against American operations.

### C. PUBLISH TARGETING CRITERIA

Related to defending the process and using performance data, the U.S. government could publish the targeting criteria it follows. The criteria need not be comprehensive, but they could be sufficiently detailed as to give outside observers an idea about who the targets are and what they are alleged to have done to merit killing. As Robert Chesney has noted, “Congress could specify a statutory standard that the executive branch could then bring to bear in light of the latest intelligence, with frequent reporting to Congress as to the results of its determinations.”<sup>560</sup> What might the published standards entail? First, Congress could clarify the meaning of “associated forces,” described in Parts I and II. In the alternative, it could do away with the associated forces criteria altogether and instead name each organization against which force is authorized.<sup>561</sup> Such an approach would be similar to the one followed by the Office of Foreign

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560. Chesney, *supra* note 27, at 220; *see also id.* at 222–23 (“Congress could clarify that the LOAC rules are binding on all U.S. government entities, including the CIA. . . . Congress might entrench in statute the proposition that lethal force will not be used in a given location without the consent of the host government except in circumstances where the host government is unable or unwilling to take reasonable steps to suppress a threat.” (citations omitted)).

561. *Id.* at 220–21.

Assets Control when it designates financial supporters of terrorism for sanctions.<sup>562</sup>

The challenge with such a reporting and designation strategy is that it does not fit neatly into the network-based targeting strategy and current practices outlined in Parts I through III. If the United States is seeking to disrupt networks, then how can there be reporting that explains the network-based targeting techniques without revealing all of the links and nodes that have been identified by analysts? Furthermore, for individuals targeted at the request of an ally, the diplomatic secrecy challenges identified in Part I remain—there simply may be no way the United States can publicly reveal that it is targeting networks that are attacking allied governments. These problems are less apparent when identifying the broad networks the United States believes are directly attacking American interests; however, publication of actual names of targets will be nearly impossible (at least *ex ante*) under current targeting practices.

As was discussed above, the U.S. government and outside observers may simply be using different benchmarks to measure success. Some observers are looking to short-term gains from a killing, but others look to the long-term consequences of the targeted killing policy. Should all of these metrics and criteria be revealed? Hardly. However, the United States should articulate what strategic-level goals it hopes to achieve through its targeted killing program. Those goals certainly include disrupting specified networks. Articulating those goals, and the specific networks the United States is targeting, may place it on better diplomatic footing and would engender mechanisms of domestic political accountability.

#### D. PUBLISH DOLLAR COSTS

The public administration literature instructs that a proven accountability technique is publishing the costs associated with government activity. Targeted killings may be a worthwhile case for proving that publishing the financial costs of strikes can impose a mechanism of accountability. Unlike a traditional war—where the American people understand victories like the storming of the beaches at Normandy, the expulsion of Iraqi troops from Kuwait, or even (in a non-hot-war context) the fall of the Berlin wall—this conflict against non-state actors is much harder to assess. As such, the American people may understand the targeted killing of a key al Qaeda leader like Anwar al Aulahi, and they may be willing to pay any price to eliminate him. But what about less well-known targets such as Taliban leaders? Take the example of Abdul Qayam, a Taliban commander in Afghanistan's Zabul Province who was killed in an airstrike by a

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562. For a description of the designation process, see Gregory S. McNeal, *Cyber Embargo: Countering the Internet Jihad*, 39 CASE W. RES. J. INT'L L. 789, 810–12 (2006).

Navy strike fighter in October of 2011.<sup>563</sup> Do the American people even know who he is, let alone approve of the money spent to kill him? The Navy reportedly spends \$20,000 per hour on strikes like the one that killed Qayam, and sorties often last eight hours.<sup>564</sup> Though the American people may be generally supportive of targeted killings,<sup>565</sup> they are likely unaware of the financial costs associated with the killings. Publishing the aggregate cost and number of strikes would not reveal any classified information but would go a long way towards ensuring political accountability for the targeted killing program. Such an accountability reform might also appeal to individuals across the ideological spectrum, from progressives who are opposed to strikes on moral grounds to fiscal conservatives who may oppose the strikes on the basis of financial cost. In fact, according to the 9/11 Commission Report, during the 1990s, one of the most effective critiques of the cruise missile strikes against al Qaeda training camps was cost.<sup>566</sup> Specifically, some officials believed that “hitting inexpensive and rudimentary training camps with costly missiles would not do much good and might even help al Qaeda if the strikes failed to kill Bin Ladin.”<sup>567</sup>

E. ESTABLISH INDEPENDENT REVIEW BY A DEFENSE AND INTELLIGENCE REVIEW BOARD FOR TARGETED KILLINGS

The transparency-related accountability reforms specified above have the ability to expose wrongdoing; however, that is not the only goal of accountability. Accountability is also designed to *deter* wrongdoing. Transparency-oriented reforms can influence the behavior of all future public officials—to convince them to live up to public expectations.<sup>568</sup> The challenge associated with the reforms articulated above is a bias towards the status quo.<sup>569</sup> There are few incentives for elected officials to exercise greater oversight over targeted killings, and interest group advocacy is not as strong in matters of national security and foreign affairs as it is in domestic politics.<sup>570</sup>

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563. C. J. Chivers, *Afghan Conflict Losing Air Power as U.S. Pulls Out*, N.Y. TIMES, July 6, 2012, [http://www.nytimes.com/2012/07/07/world/asia/in-dwindling-afghan-war-air-power-has-become-a-way-of-life.html?\\_r=2&emc=eta1&](http://www.nytimes.com/2012/07/07/world/asia/in-dwindling-afghan-war-air-power-has-become-a-way-of-life.html?_r=2&emc=eta1&).

564. *Id.*

565. Seth McLaughlin, *Plurality Supports Targeted Killings of U.S.-Born Terrorists Living Outside the Country: Poll*, WASH. TIMES, June 5, 2013, <http://www.washingtontimes.com/blog/inside-politics/2013/jun/5/plurality-supports-targeted-killings-us-born-terro/> (“More people support than oppose the targeting and killing of Americans living in other countries who are suspected members of terrorist groups. A clear majority, meanwhile, supports the use of drone strikes to kill suspected members of Al Qaeda [sic] and other terrorist groups.”).

566. *See* NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 206, 211–13 (2004).

567. *Id.* at 196.

568. *See, e.g.*, BEHN, *supra* note 136, at 14.

569. *See generally* McNeal, *supra* note 499 (describing the status quo bias in policymaking).

570. *See supra* section IV.C.

To overcome the bias towards the status quo, Congress should consider creating an independent review board within the Executive Branch.<sup>571</sup> That review board should be composed of individuals selected by the minority and majority leadership of the House and Senate, ensuring bipartisan representation. The individuals on the review board should be drawn from the ranks of former intelligence and military officers to lend the board's report enhanced credibility. The board should be responsible for publishing an annual report analyzing how well the government's targeted killing program is performing. The goal would be a strategic assessment of costs and benefits, including the fiscal costs, potential blowback, collateral damage, and other details that are currently held deep within the files of the targeting bureaucracy.

Such a commission has the potential to be quite successful. As Posner and Vermeule have highlighted, bipartisan independent commissions can be established to review policies before and after the fact, and the President might gain credibility by binding himself to give the commission authority on some dimension.<sup>572</sup> A President might publicly promise to follow the recommendations of such a commission and give power to a commission to review the success of his policy choices after the fact.<sup>573</sup> These commissions can be successful because they signal the Executive's interest in maintaining credibility and winning the support of the public, and a willingness to make information available that could subject the Executive Branch to criticism. Legislators may prefer this solution because it allows them to claim they are holding the Executive Branch accountable while at the same time shifting the blame for poor accountability decisions to others. The commission could review the program in its entirety or could conduct audits on specified areas of the program.

The challenge associated with such an approach is the same challenge described in section IV.C. Will the agencies provide information to the commissioners? The dynamic here is a bit different, suggesting that agencies may cooperate. First, for the commission to be successful from the outset will require the President's public support. A failure on his part to do so may impose political costs on him by suggesting he has something to hide. That cost may be more than he wants to bear. Second, once the President publicly binds himself to the commission, he will need to ensure it is successful, or he will again suffer political costs. Those costs may turn into an ongoing political drama, drawing attention away from his other public policy objectives. Third, the commissioners themselves, once appointed, may operate as independent investigators who will have an interest in ensuring that they are not stonewalled. Moreover,

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571. Commentators have recently proposed similar reforms. *See, e.g.*, David Brooks, *Florence and the Drones*, N.Y. TIMES, Feb. 7, 2013, <http://www.nytimes.com/2013/02/08/opinion/brooks-florence-and-the-drones.html>; Neal K. Katyal, *Who Will Mind the Drones?*, N.Y. TIMES, Feb. 20, 2013, <http://www.nytimes.com/2013/02/21/opinion/an-executive-branch-drone-court.html>.

572. POSNER & VERMEULE, *supra* note 504, at 141.

573. *Id.*



because these members will be appointed by partisan leaders in Congress, the individuals chosen are likely to have impressive credentials, lending them a platform for lodging their critiques.

F. RECOGNIZE THE IMPRACTICAL NATURE OF EX POST JUDICIAL OVERSIGHT

The final mechanism of accountability is judicial review of wrongful targeting decisions. However, based on the description of network analysis and the actual process of kill-list creation provided in Part II, it is difficult to see how a court could meaningfully engage in an ex ante review of targeting decisions.<sup>574</sup> Being nonspecialists in targeting criteria, judges would need to hear from Executive Branch experts about why a particular target was chosen, what impact targeting that individual would have on the enemy in the short-run and long-run, and so on.<sup>575</sup> The experts' presentations would be nearly identical to the expert presentations currently being reviewed within the Executive Branch, with the exception that the judge has no familiarity with the issues.

Thus, the problems with ex ante review are numerous. First, if the process were to prove itself as too burdensome, the Executive Branch may decide to shift from kill-list strikes—the only type that could practically be reviewed ex ante—to signature strikes, potentially increasing harm to civilians.<sup>576</sup> Second, if a judge were to sign off on adding a name to a list, and the decision were improper, the Executive Branch could shield itself from blame by noting that the target was approved by a judge. Conversely, if a judge failed to approve a target, and that individual later attacked the United States or its interests, the Executive Branch could claim that it sought to target the individual, but the Judiciary would not allow it—laying blame for the attack at the feet of a judge with life tenure. Though judges cannot be voted out of office, they are nevertheless responsive to public opinion, and few would want to be blamed for an attack. Thus, a third failing presents itself: the possibility that Executive Branch expertise combined with politically aware judges (who have no interest in being involved in targeting decisions) may make for very deferential ex ante review process—something akin to a rubber stamp.<sup>577</sup> Finally, there is a question as to

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574. Cf. Jack Goldsmith, *Neal Katyal on a Drone “National Security Court” Within the Executive Branch*, LAWFARE, (Feb. 21, 2013, 8:49PM), <http://www.lawfareblog.com/2013/02/neal-katyal-on-a-drone-national-security-court-within-the-executive-branch/> (criticizing Neal Katyal's proposal to create an Article II “drone court” as an insufficient additional check beyond existing bureaucratic processes, though acknowledging that “Katyal makes many good points about why judges are not suited to such targeting decisions and why giving them that responsibility would fragment accountability for the drone strikes”). *But see* Katyal, *supra* note 571 (proposing a “‘national security court’ housed within the executive branch”).

575. For a full discussion of these issues, see Part II.

576. See Jens David Ohlin, *Would a Federal District Court for Drones Increase Collateral Damage?*, LIEBER CODE (Feb. 13, 2013), <http://www.liebercode.org/2013/02/would-federal-district-court-for-drones.html>.

577. See Robert Chesney, *A FISC for Drone Strikes? A Few Points to Consider . . .*, LAWFARE, <http://www.lawfareblog.com/2013/02/a-fisc-for-drone-strikes-a-few-points-to-consider/> (describing how judges want no part of targeting decisions and noting that “[a] core benefit to judicial review,

whether such an *ex ante* review process would even be constitutional, given Article III's case or controversy requirement.<sup>578</sup> As Stephen Vladeck has noted "'adversity' is one of the cornerstones of an Article III case or controversy, and it would be noticeably lacking in an *ex ante* drone court set up along the lines many have proposed, with *ex parte* government applications to a secret court for 'warrants' authorizing targeted killing operations."<sup>579</sup>

If *ex ante* review is practically foreclosed, what about the prospects for *ex post* review? It certainly seems more judicially manageable for a court to review a strike, and the details associated with that strike, after it occurs. However, many of the same questions of expertise will arise, particularly those related to the process the government follows for creating kill lists and determining whether a strike will successfully impact an enemy organization.<sup>580</sup> Assuming that a court could properly conduct such a review, who should be entitled to sue the government after the fact? Should lawsuits be limited to Americans killed or wounded in strikes? If so, why should the line be drawn based on citizenship? What about persons whose property is damaged, as it was in *El-Shifa*?<sup>581</sup> What about foreign governments whose property is damaged? As these questions indicate, how the lines are drawn for *ex post* review of targeting decisions presents a host of questions that raise serious separation of powers and diplomatic concerns—the exact foreign relations interests that have prompted courts to stay out of these types of decisions in the past. Those foreign relations concerns would not be remedied by even the best statutory framework for governing the review. Furthermore, what is to stop judicial review in other conflicts involving far more air strikes and far greater casualties? For example, a potential conflict on the Korean peninsula is estimated to cause “hundreds of

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presumably, is that judges might detect and reject weak evidentiary arguments for targeting particular persons. I wouldn't bet on that occurring often, however. Judges famously tend to defer to the executive branch when it comes to factual judgments on matters of military or national-security significance.” (emphasis omitted)). On the Executive Branch's national security expertise, see generally Gregory S. McNeal, *The Pre-NSC Origins of National Security Expertise*, 44 CONN. L. REV. 1585 (2012), which explains how America's contemporary security state—a massive bureaucracy staffed with military and civilian experts—is a dominant feature in current debates over national security policy, and highlights how few decisions regarding war and diplomacy are made without consulting Executive Branch experts.

578. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 101 (1968) (“[T]he dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.”).

579. *Drones and the War on Terror: When Can the U.S. Target Alleged American Terrorists Overseas?: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Stephen I. Vladeck, Professor of Law, American University Washington College of Law).

580. *But see id.* (“[I]f the Guantánamo litigation of the past five years has shown nothing else, it demonstrates that judges are also more than competent to resolve not just whether individual terrorism suspects are who the government says they are (and thus members of al Qaeda or one of its affiliates), but to do so using highly classified information in a manner that balances . . . the government's interest in secrecy with the detainee's ability to contest the evidence against him.”).

581. See *supra* discussion accompanying notes 433–55.

thousands of civilian deaths.”<sup>582</sup> Even assuming that only a small percentage of those deaths would be caused by American air strikes, this nonetheless demonstrates the impracticability of ex post judicial review in anything but a small category of U.S. airstrikes. Limiting the right of judicial review, based merely on potential caseload, raises questions as to the propriety of the right in the first place.

#### CONCLUSION

To date, scholars have lacked a thorough understanding of the U.S. government’s targeted killing practices. As such, their commentary is oftentimes premised on easily describable issues but fails to grapple with the multiple levels of intergovernmental accountability present in current practice. When dealing with the theoretical and normative issues associated with targeted killings, scholars have failed to specify what they mean when they aver that targeted killings are unaccountable. Both trends have impeded legal theory and constrained scholarly discourse on a matter of public import.

This Article is a necessary corrective to the public and scholarly debate. It has presented the complex web of bureaucratic, legal, professional, and political accountability mechanisms that exert influence over the targeted killing process. It has demonstrated that many of the critiques of targeted killings rest upon poorly conceived understandings of the process, unclear definitions, and unsubstantiated speculation. The Article’s reform recommendations, grounded in a deep understanding of the actual process, reflect an assumption that transparency, performance criteria, and politically grounded independent review can enhance the already robust accountability mechanisms embedded in current practice.

#### APPENDIX A: METHODOLOGY

The empirical/descriptive portions of this Article followed a qualitative case study methodology intended to describe the U.S. practice of targeted killing. Case study research “involves the study of an issue explored through one or more cases within a bounded system.”<sup>583</sup> The case study method of inquiry is a “rigorous and scientific means to study complex issues that do not lend themselves to classic experimental methods.”<sup>584</sup> Scientific case study research is best employed to draw lessons of “how” and “why” from contemporary issues.<sup>585</sup> Case studies are empirical inquiries into “a contemporary phenomenon within its real life context, especially when the boundaries between the phenomenon and context are not clearly evident.”<sup>586</sup>

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582. Scott Stossel, *North Korea: The War Game*, ATLANTIC, July 1, 2005, <http://www.theatlantic.com/magazine/archive/2005/07/north-korea-the-war-game/304029/>.

583. JOHN W. CRESWELL, *QUALITATIVE INQUIRY & RESEARCH DESIGN: CHOOSING AMONG FIVE APPROACHES* 73 (2d ed. 2007).

584. ROBERT K. YIN, *CASE STUDY RESEARCH: DESIGN AND METHODS* 2 (2d ed. 1994).

585. *Id.* at 13; Lisa M. Ellram, *The Use of the Case Study Method in Logistics Research*, 18 J. BUS. LOGISTICS 93, 93–94 (1996).

586. YIN, *supra* note 584, at 18.

In national security studies, documentary-based case study research is a dominant form of qualitative analysis, mainly due to the unwillingness of individuals within secretive organizations to reveal information about their organizations; nevertheless, some of the most significant contributions to the field of national security policy have flowed from case studies.<sup>587</sup>

Qualitative research and case studies are not without their critics. Some may contend that they are not as rigorous as experimental or quantitative research. Yin addresses this concern by noting that many social scientists misunderstand both the scientific nature of the case study method and the scientific nature of the case study product.<sup>588</sup> Although case study research is qualitative in nature, the volume of data collected must be categorized, summarized, and analyzed as any quantitative researcher would.<sup>589</sup>

Though case study research is not generally reducible to numbers, it does provide explanatory detail about human behavior and patterns of action.<sup>590</sup> Using proven case study tactics,<sup>591</sup> I have ensured construct validity, external validity, and reliability. Construct validity was ensured by using varied sources of evidence, including publicly available government documents, multiple open-ended interviews, and scholarly and press accounts of the collateral damage estimation and mitigation process. I began by collecting and reviewing publicly available documents and then summarized my initial tentative observations. I then tested these observations using triangulation techniques and multiple data sources to confirm or falsify my observations and test my research methods. Triangulation is the process by which a case study researcher provides confidence that findings are meaningful and reflect scientific truth.<sup>592</sup> This Article specifically employs the intrinsic case study methodology, wherein the focus is the case itself (that is, the U.S. practice of targeted killings).<sup>593</sup> I have specifically chosen this case because targeted killings are a heavily commented upon phenomenon without any reliable descriptive account in scholarly literature. This fact presents a unique and unusual circumstance and a prime opportunity for description to contribute to theory.

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587. For example, three of the most frequently cited case studies, Allison and Zelikow's *Essence of Decision*, Amy Zegart's *Flawed by Design: The Evolution of the CIA, JCS, and NSC* and *Spying Blind: The CIA and the Origins of 9/11*, were based on public documents supplemented by qualitative interviews; all three books followed a case study methodology. See generally GRAHAM ALLISON & PHILIP ZELIKOW, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (1999); AMY ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC* (1999); AMY ZEGART, *SPYING BLIND: THE CIA, THE FBI, AND THE ORIGINS OF 9/11* (2009).

588. Yin, *supra* note 584, at 12.

589. *Id.* at 309.

590. *Id.*; accord JOE R. FEAGIN ET AL., *A CASE STUDY FOR THE CASE STUDY* (1991).

591. Yin, *supra* note 584, at 33.

592. *Id.* at 91–93.

593. See ROBERT E. STAKE, *THE ART OF CASE STUDY RESEARCH* 4 (1995) (“Case study research is not sampling research. We do not study a case primarily to understand other cases. Our first obligation is to understand this one case. In intrinsic case study, the case is pre-selected.”)