

RESPONSE

Targeted Killing and Judicial Review

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ABSTRACT

In Drones: The Power to Kill, former Attorney General Alberto Gonzales argues for increased oversight and accountability for targeted killing operations undertaken by the U.S. Government against its own citizens. Modeled on the procedures adopted by the government for the detention of terrorism suspects after, and in light of, the Supreme Court's decision in Hamdi v. Rumsfeld, these mechanisms would include at least some form of limited ex ante judicial review. This Response offers a detailed series of critiques of the means by which Judge Gonzales proposes to achieve increased oversight and accountability. More fundamentally, though, it argues that the buried lede of Judge Gonzales's article is the view that U.S. courts are not categorically incompetent to review the legality of uses of military force. Thus, Judge Gonzales has penned a defense of judicial review of targeted killings that is far more robust than it might appear at first blush, because it both underscores why the target's citizenship is irrelevant to the underlying judicial competency question and clarifies that debates over the scope and timing of such judicial review should take place on policy—rather than constitutional—terms. To that end, the Response closes by offering an alternative proposal to maximize vigorous and efficient judicial oversight of targeted killing operations.

INTRODUCTION

Given his controversial role in shaping and defending U.S. counterterrorism policies during his tenure as White House Counsel and Attorney General under the George W. Bush Administration,¹ there is more

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than a little irony to an article by Alberto Gonzales that calls for increased external oversight of the Obama Administration's use of targeted killings.² Rather than catalogue the article's many hypocrisies, however, my goal in this Response is to take Judge Gonzales's arguments at face value, which I summarize in Part I, and flesh out some of their (perhaps surprising) implications, the focus of Part II.

After all, inasmuch as Judge Gonzales believes that there are cases where some quasi-judicial review of targeted killing decisions is appropriate, if not necessary,³ his article offers a powerful counterweight to the oft-invoked claim that such review is beyond the competence of neutral magistrates.⁴ What is more, if judges do not lack the competence to undertake such review of at least some issues in cases where U.S. citizens are concerned, one can rightly ask why the ability of courts to review the questions raised in these cases—as opposed to their answers to those questions on the merits—could, or should, turn on the citizenship of the individual whose life is at stake.

Thus, while the goal of Judge Gonzales's article appears to be to demonstrate how the targeted killing program can be placed on firmer legal footing going forward,⁵ my thesis is that, in the process of doing so, Judge Gonzales has penned a defense of judicial review of targeted killings that is far more robust than it might appear at first blush. Although we disagree on how to make such review meaningful—I offer my own suggestions in Part III—the larger point is our common cause on this far more fundamental principle: that, in appropriate cases, even targeted killing operations can be subjected to at least some judicial scrutiny.

¹ For two especially compelling discussions on the role of the Bush Administration's lawyers, including then-Attorney General Gonzales, in shaping the government's counterterrorism policies, see HAROLD H. BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR* (2009) and David Luban, *Tales of Terror: Lessons for Lawyers from the 'War on Terrorism,'* in REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS 56 (Kieran Tranter et al. eds., 2010).

² See Alberto R. Gonzales, *Drones: The Power To Kill*, 82 GEO. WASH. L. REV. 1, 46–58 (2013). I have catalogued elsewhere the extent to which the legal defenses that emerged during the first years after the September 11 attacks focused on claims that the government's more controversial counterterrorism policies were unreviewable as much as, if not at the expense of, claims that they were lawful. See, e.g., Stephen I. Vladeck, *The Unreviewable Executive: Kiyemba, Maqaleh, and the Obama Administration*, 26 CONST. COMMENT. 603, 614–15 (2010).

³ See Gonzales, *supra* note 2, at 52–58.

⁴ See, e.g., Jeh Charles Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration*, 31 YALE L. & POL'Y REV. 141, 148 (2012) (“I agree with Judge Bates of the federal district court in Washington, who ruled in 2010 that the judicial branch of government is simply not equipped to become involved in targeting decisions.”).

⁵ See Gonzales, *supra* note 2, at 46.

I. JUDGE GONZALES AND JUDICIAL REVIEW

As Judge Gonzales explains, his article's prescriptions are motivated by a combination of the uptick in the use of drones to conduct targeted killings of terrorism suspects overseas and his belief that, "[e]ventually, a judge may elect to consider the constitutionality of the President's actions with respect to [the use of drones against] American citizens."⁶ On this point, at least, Judge Gonzales may well be correct—one federal judge is already considering such arguments in the context of a damages action brought by the parents of Anwar al-Aulaqi,⁷ and media reports suggest the government's position that such claims are categorically nonjusticiable has been met with fairly substantial skepticism thus far.⁸

To that end, Judge Gonzales proposes increased external oversight, at least with respect to the President's initial determination that a U.S. citizen should be placed on the so-called "kill list" and thereby subject to a targeted killing operation if appropriate circumstances were to arise.⁹ Such increased oversight is not necessarily intended to circumscribe the government's authority in this regard so much as it is to *legitimize* it—to provide the same kind of legal validation of the underlying merits that some have suggested the Guantánamo Bay habeas litigation has provided for U.S. detention policy.¹⁰

Whatever its motives, such increased oversight would have a host of elements. First, Judge Gonzales proposes that Congress "should codify the definition of enemy combatant in connection with the drone program,"¹¹ looking to the definition provided by Attorney General Eric Holder's May 22, 2013 letter to Senator Patrick Leahy as a model.¹² Second, Congress

⁶ *Id.*

⁷ See Complaint at 3, *Al-Aulaqi v. Panetta*, No. 12-cv-01192-RMC (D.D.C. July 18, 2012). A prior effort purporting to challenge Al-Aulaqi's designation as one against whom lethal force could be used was dismissed based upon a host of justiciability concerns. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 8, 54 (D.D.C. 2010).

⁸ See Scott Shane, *Judge Challenges White House Claims on Authority in Drone Killings*, N.Y. TIMES, July 20, 2013, at A8; Raffaella Wakeman & Jane Chong, *A Recap of Friday's Oral Arguments in Al-Aulaqi v. Panetta*, LAWFARE (July 19, 2013, 7:22 PM), <http://www.lawfareblog.com/2013/07/a-recap-of-fridays-oral-arguments-in-al-aulaqi-v-panetta/>.

⁹ See, e.g., Gonzales, *supra* note 2, at 3 ("The first [decision point] is the decision to designate an American as an enemy combatant for purposes of the kill list. The second is the decision to execute a kill order. This Article will focus solely on the first decision point.").

¹⁰ See generally JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012).

¹¹ Gonzales, *supra* note 2, at 50.

¹² See Letter from Eric H. Holder, Attorney Gen., to Senator Patrick J. Leahy,

should require notification of the President's determination that a U.S. citizen has been placed on the "kill list," including the identity of the U.S. citizen and the reasons why he or she has been so designated, "within a specified period" following the designation.¹³ Third, legislation should also require the President to reaffirm the designation "immediately before executing the order to kill an American target."¹⁴ Fourth, the President should also have to report to Congress if, and when, a U.S. citizen is the subject of a successful targeted killing operation, including "information regarding the circumstances of the kill, and the President's confirmation of his determination that the conditions [for proceeding with the operation] had been satisfied."¹⁵

Yet, as Judge Gonzales himself recognizes, "[a]lthough the[se] standards and reporting requirements . . . would provide some check on the exercise of presidential power, the actual decision to designate an American citizen as an enemy combatant would still be solely in the hands of the President."¹⁶ To remedy that shortcoming, Judge Gonzales also endorses a limited form of external review before an ostensibly neutral magistrate.¹⁷ Although his article explores the possibility of having such review conducted by a new "national security court,"¹⁸ or by the extant Foreign Intelligence Surveillance Court ("FISC"),¹⁹ Judge Gonzales ultimately settles on the idea that the Combatant Status Review Tribunals ("CSRTs"), which were created to provide status determinations to the Guantánamo detainees, could be resuscitated²⁰ to provide a quasi-judicial

Chairman, Senate Comm. on the Judiciary (May 22, 2013) [hereinafter Holder Letter], available at <http://i2.cdn.turner.com/cnn/2013/images/05/22/holder-letter-5-22-13.pdf>.

¹³ Gonzales, *supra* note 2, at 50–51.

¹⁴ *Id.* at 51.

¹⁵ *Id.* at 51.

¹⁶ *Id.* at 52.

¹⁷ *Id.* ("Congress should also require that a neutral third party, such as an independent Executive Branch board, a military tribunal, or an Article III judge, be involved in the decision to designate a citizen as an enemy combatant.").

¹⁸ See *id.* at 54. For contrasting views on the use of "national security courts" in terrorism cases, compare, e.g., GLENN SULMASY, *THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR* 4–8 (2009) (endorsing proposals for a specialized "national security court" to handle certain high-profile terrorism cases), with Stephen I. Vladeck, *The Case Against National Security Courts*, 45 WILLAMETTE L. REV. 505, 524 (2009) ("The idea that national security courts are a proper third way for dealing with [terrorism cases] presupposes that the purported defects in the current system are ones that cannot adequately be remedied within the confines of the current system, and yet *can* be remedied in hybrid tribunals without violating the Constitution.").

¹⁹ See Gonzales, *supra* note 2, at 55–57.

²⁰ As I have explained elsewhere, in *Bismullah v. Gates*, 551 F.3d 1068, 1072–74 (D.C. Cir. 2009), the District of Columbia Circuit held (incorrectly, in my view) that the

process that would balance the President's secrecy concerns with the need for some kind of external oversight.²¹

In his words, “[w]hile having an Article III judge determine whether an American is an enemy combatant according to standards established by Congress is substantially more process than an American target currently receives today, we must still ask whether this is sufficient due process when a life hangs in the balance.”²² Judge Gonzales explains that CSRTs, unlike the FISC, “would appear to satisfy the requirements under *Hamdi*, and substantially satisfy the requirements under *Boumediene*.”²³ Thus, “if Congress determines that a potential American target should be entitled to present his case before a neutral decisionmaker, then perhaps the use of a military panel such as CSRTs would be a better alternative.”²⁴ So framed, Judge Gonzales's endorsement of a CSRT-like process for “kill list” determinations appears to reflect his conclusion that such adversarial proceedings provide the maximal way to balance the needs of the government in such cases with the rights of the potential targets.²⁵

If Judge Gonzales's goal is to provide for meaningful external oversight to vindicate the rights of potential citizen targets, while simultaneously seeking to minimize interference with the Executive Branch's constitutional prerogatives, his proposal is rather baffling in at least three respects. First, insofar as Judge Gonzales's proposal prefers situating judicial review before reconstituted CSRTs rather than the existing FISC, his concern appears to be that such reliance on the FISC would require “expanding” its powers to encompass adversarial proceedings, which would be “fundamentally inconsistent with the procedures long used by FISC judges in the surveillance context.”²⁶ In fact, that bridge has already been crossed. Although the FISC previously only entertained *ex parte* applications from the government, in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“USA PATRIOT Act”),²⁷

Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723, 767 (2008), which concluded that the CSRTs were an inadequate substitute for habeas corpus, abnegated the entire CSRT process. See Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1456 n.30 (2011).

²¹ Gonzales, *supra* note 2, at 52–54, 56–57.

²² *Id.* at 56.

²³ *Id.* at 53–54.

²⁴ *Id.* at 56–57.

²⁵ See *id.* at 52–54.

²⁶ *Id.* at 56.

²⁷ USA PATRIOT Act of 2001, Pub. L. No. 107-56, sec. 215, § 501, 115 Stat. 272, 287 (codified as amended at 50 U.S.C. § 1861 (2006)).

the Protect America Act of 2007,²⁸ and the FISA Amendments Act of 2008,²⁹ Congress progressively and dramatically expanded the scope and potential volume of adversarial proceedings before the FISC by authorizing the recipients of production orders or surveillance directives not only to challenge the underlying order on a range of substantive and procedural grounds, but also to appeal to the Foreign Intelligence Surveillance Act (“FISA”) Court of Review if they lost.³⁰ To that end, one of the most significant judicial decisions to emerge from the FISA process—the Court of Review’s 2008 decision in *In re Directives*³¹—was only possible because of such adversarial processes. In that case, an Internet service provider (which we now know to have been Yahoo!)³² challenged directives issued under the Protect America Act,³³ and then appealed an adverse decision by the FISC to the Court of Review.³⁴ Although the Court of Review affirmed the FISC on appeal,³⁵ it was only able to do so because of the adversarial process that the 2007 statute had provided.

Indeed, these adversarial procedures have become so ingrained in FISA³⁶—the legislation that established and authorized the FISC and governs its proceedings—that recent calls for reform of the FISC, including some from former FISC judges, have argued for even *more* adversarial process.³⁷ Simply put, Judge Gonzales’s argument for locating judicial

²⁸ Protect America Act of 2007, Pub. L. No. 110-55, sec. 2, § 105B, 121 Stat. 552, 554–55, *repealed by* FISA Amendments Act of 2008, Pub. L. No. 110-261, § 101, 122 Stat. 2436, 2437.

²⁹ FISA Amendments Act of 2008, Pub. L. No. 110-261, sec. 101, § 702, 122 Stat. 2436, 2441–46 (codified at 50 U.S.C. § 1881a (Supp. II 2008)).

³⁰ For the current version of these statutes, see 50 U.S.C. §§ 1861(f), 1881a(h)(4) (Supp. V 2012).

³¹ *In re Directives* [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act (*In re Directives*), 551 F.3d 1004, 1004 (FISA Ct. Rev. 2008) (upholding central provisions of the Protect America Act because of, inter alia, a foreign intelligence surveillance exception to the Fourth Amendment’s Warrant Clause).

³² Claire Cain Miller, *Secret Ruling Put Tech Firms In Data Bind*, N.Y. TIMES, June 14, 2013, at A1.

³³ *In re Directives*, 551 F.3d at 1006 (“Among other things, those [directives] . . . authorized the United States to direct communications service providers to assist it in acquiring foreign intelligence when those acquisitions targeted third persons (such as the service provider’s customers) reasonably believed to be located outside the United States.”).

³⁴ *Id.*

³⁵ *Id.* at 1016.

³⁶ Foreign Intelligence Surveillance Act of 1978, 50 USC §§ 1801–1871 (2006).

³⁷ See, e.g., James G. Carr, Op-Ed., *A Better Secret Court*, N.Y. TIMES, July 23, 2013, at A21; see also Stephen Vladeck, *It’s Time to Fix the FISA Court (the Way Congress Intended)*, MSNBC, Aug. 1, 2013, <http://tv.msnbc.com/2013/08/01/its-time-to-fix-the-fisa-court-the-way-congress-intended/>.

review in a CSRT-like process, rather than in an Article III court like the FISC, is based on a fundamental misunderstanding of the current structure of FISA.

Second, although the fact that the FISC *can* (and already does) handle adversarial proceedings does not by itself militate against Judge Gonzales's argument for a CSRT-like process, the latter approach is also likely to suffer from many of the same weaknesses that were well documented in the Guantánamo habeas litigation context. In one comprehensive study of the Guantánamo CSRTs, for example, the authors concluded that:

While the procedures promised detainees an opportunity to present evidence in the form of witnesses and documents, in reality the only evidence permitted in the vast majority of cases was the testimony of the detainee. In most cases the tribunals returned decisions on the same day and among the 102 records reviewed for this Report, the ultimate decision was always unanimous, and almost all detainees reviewed were ultimately found to be enemy combatants. In its attempt to replace habeas corpus, the government instead created this no-hearing process.³⁸

Furthermore, although its analysis came in a distinct context—that is, whether the CSRTs were a constitutionally adequate substitute for habeas corpus—Justice Kennedy's opinion for the Supreme Court in *Boumediene v. Bush*³⁹ devoted twelve pages to highlighting the myriad shortcomings of the CSRT review scheme.⁴⁰ The Court in *Boumediene* also concluded that even the statutory appeal of CSRT decisions to the Article III District of Columbia Circuit provided by the Detainee Treatment Act of 2005⁴¹ was not sufficient to remedy the CSRTs' shortcomings.⁴² Judge Gonzales's proposal, tellingly, does not include any such Article III oversight.⁴³ Again, if the goal is to maximize *both* the government's interests and the rights of the putative target, judicial review, rather than the CSRTs, is far more likely to strike the appropriate balance.

³⁸ Mark Denbeaux et al., *No-Hearing Hearings: An Analysis of the Proceedings of the Combatant Status Review Tribunals at Guantánamo*, 41 SETON HALL L. REV. 1231, 1267 (2011).

³⁹ *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁴⁰ *Id.* at 781–92.

⁴¹ Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1005(e)(2), 119 Stat. 2680, 2742 (codified as amended at 10 U.S.C. § 801 note (2012)).

⁴² See *Boumediene*, 553 U.S. at 767; see also Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2111–12 (2009).

⁴³ See generally Gonzales, *supra* note 2.

Third, and more generally, regardless of the forum in which to locate such review, it is hardly clear how *ex ante* review, as opposed to *ex post* review, is more desirable for protecting either the government's interests *or* those of the putative target in these cases. After all, it seems obvious that *ex ante* review is far more likely to interfere with the President's ability (and responsibility) to act in self-defense to protect the United States from potentially imminent terrorist attacks, as compared to retrospective review.⁴⁴ Insofar as imminence or infeasibility of capture may in some cases be inextricably intertwined with the legality of a particular use of lethal force,⁴⁵ it necessarily follows that the presence of such conditions cannot typically be adjudicated *in advance* of using such force. Thus, we would never try to decide whether a law enforcement officer is legally entitled to use lethal force to protect himself or others before he actually does so. The answer, as the Supreme Court has repeatedly stressed, would depend entirely on the actual circumstances, necessarily weighed in hindsight.⁴⁶

To be sure, as Judge Gonzales argues, "the Administration already employs a designation process that takes months to complete,"⁴⁷ and so *ex ante* review of that process would not necessarily interfere with the President's ability to act expeditiously. But even if that were true as a general matter, there would always be cases in which the President may need to use force to protect the United States from imminent attack—cases in which such review would have to be highly truncated, if not altogether forsworn. And even if such an emergency exception⁴⁸ did not end up swallowing Judge Gonzales's rule, which it almost surely would, *ex ante*

⁴⁴ There is also a serious potential Article III jurisdiction issue insofar as *ex ante* review would necessarily be *ex parte*, and, unlike applications for search and surveillance warrants, not ancillary to some future hypothetical criminal proceeding. As a result, such proceedings may lack the adverse character necessary to establish a case or controversy for Article III purposes. See Steve Vladeck, *Why a "Drone Court" Won't Work—But Nominal Damages Might . . .*, LAWFARE (Feb. 10, 2013, 5:12 PM), <http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work/> [hereinafter Vladeck, *Why a "Drone Court" Won't Work*]; see also Marty Lederman & Steve Vladeck, *The Constitutionality of a FISA "Special Advocate,"* JUST SECURITY (Nov. 4, 2013, 1:34 PM), <http://justsecurity.org/2013/11/04/fisa-special-advocate-constitution/>.

⁴⁵ See, e.g., U.S. DEP'T OF JUSTICE, 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 (2011), available at <http://www.fas.org/irp/eprint/doj-lethal.pdf>.

⁴⁶ See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985).

⁴⁷ Gonzales, *supra* note 2, at 54.

⁴⁸ See *id.* at 57 ("If the circumstances of war do not permit sufficient time to conduct a CSRT hearing or the completion of a FISA application as the case may be, the legislation should recognize the President's authority to act, followed by a full reporting to Congress.").

review would still be unable to answer fundamental questions about whether the operation was consistent with the government's use-of-force authority.

From the perspective of individual rights as well, ex ante review can never provide a holistic and comprehensive assessment of the legality of the use of lethal force against a U.S. citizen. All ex ante review can aspire to achieve is review of the *procedures* pursuant to which the President has determined that, once appropriate circumstances are present, lethal force can be used against that citizen. Perhaps that is enough for Judge Gonzales, but it would mean that such review could never encompass whether those circumstances were in fact present, or whether the means pursuant to which force was used were themselves lawful. On ex ante review, such substantive questions will almost always be hypothetical, at best. Imminence may never be apparent until the moment before an operation is carried out, and ex ante review cannot assess whether the methods and means used by the government to carry out the operation comported with the relevant rules of domestic and international law; after all, it is not as if courts today are in a position to tell ahead of time whether a police officer's use of lethal force in a hypothetical future case will be lawful. Thus, insofar as the Supreme Court has held that the wholly procedural determination that *would be* possible to undertake ex ante was insufficient to justify the *detention* of non-U.S. citizens held outside of the United States,⁴⁹ one can rightly question whether it could ever be sufficient to justify the use of lethal force against a U.S. citizen.

II. CITIZENSHIP AND JUDICIAL REVIEW

Lest my criticisms of Judge Gonzales's proposal be taken in the wrong light, there is a far larger upside to his article, which is the recognition that, in at least some cases, review of targeted killings by a neutral magistrate is appropriate, if not necessary.⁵⁰ If anything, this principle has only become that much more salient as the United States engages in the lethal use of force against individuals (and in countries) with increasingly distant connections to al Qaeda and the September 11 attacks.⁵¹ This is especially evident as the Obama Administration has resisted calls to publicly disclose the list of organizations deemed to be "associated forces"⁵² of al Qaeda,

⁴⁹ See *Boumediene v. Bush*, 553 U.S. 723, 783–91 (2008).

⁵⁰ See Gonzales, *supra* note 2, at 52–58.

⁵¹ See, e.g., Jennifer Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT'L SEC. J. 115, 121–22 (2014).

⁵² See Holder Letter, *supra* note 12, at 2 (defining enemy combatants as any "U.S. citizen who is a senior operational leader of al-Qa'ida or its *associated forces*, and who is

which are subject to the use of military force under the September 2001 Authorization for Use of Military Force (“AUMF”),⁵³ or even the names of those countries where such force has been used.⁵⁴

Although reasonable people can certainly disagree over *how* to design Pareto optimal external oversight, those differences tend to be matters of degree, rather than kind.⁵⁵ The more systematic objections to judicial review in this context are usually structural: neutral magistrates simply are not competent to resolve challenges to the government’s power to use military force in any case, and so, in legal terms, the political question doctrine forecloses such review.⁵⁶ If, like me, Judge Gonzales does not believe that the Constitution itself categorically precludes such external supervision of the President’s military decisions,⁵⁷ then the animating

actively engaged in planning to kill Americans” (emphasis added)).

⁵³ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

⁵⁴ See Cora Currier, *Who Are We at War with? That’s Classified*, PROPUBLICA (July 26, 2013, 9:13 AM), <http://www.propublica.org/article/who-are-we-at-war-with-thats-classified>; see also Jack Goldsmith, *DOD’s Weak Rationale for Keeping Enemy Identities Secret*, LAWFARE (July 26, 2013, 11:07 AM), <http://www.lawfareblog.com/2013/07/dods-weak-rationale-for-keeping-enemy-identities-secret/>.

⁵⁵ See, e.g., Jameel Jaffer, *Targeted Killing and the Courts: A Response to Alan Dershowitz*, 37 WM. MITCHELL L. REV. 5315, 5318–19 (2011) (“[T]he courts should play a role in overseeing the targeted killing program. They should do this by articulating the legal standards under which the government can permissibly use lethal force against individuals who have not been charged with crimes, and by reviewing, after lethal force has been used, whether the government has complied with the legal standards.”); Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killings of Terrorists*, 31 CARDOZO L. REV. 405, 440 (2009) (“[T]argeted killings should be subject to some form of judicial review in civil proceedings initiated by private parties. The vehicle for this review . . . might take the form of a *Bivens*-style action in which the plaintiff . . . claims that the attack was unconstitutional either because it violated the Fifth Amendment on a ‘shock the conscience’ theory or because it constituted excessive force under the Fourth Amendment.”); Mike Dreyfuss, Note, *My Fellow Americans, We Are Going to Kill You: The Legality of Targeting and Killing U.S. Citizens Abroad*, 65 VAND. L. REV. 249, 289 (2012) (“[T]he U.S. citizen is entitled to a neutral decisionmaking process. This need not take the form of a trial in an Article III court. Rather, the executive can create a neutral decisionmaking body within an agency for purposes of determining whether a U.S. citizen will be killed. This function could be served admirably by the JAG Corps or a similar organization within the executive branch.” (footnotes omitted)).

⁵⁶ See, e.g., *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 46–52 (D.D.C. 2010); see also *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1361–62 (Fed. Cir. 2004) (holding that the President’s determination that particular property is “enemy property” subject to the use of military force presents a nonjusticiable political question).

⁵⁷ For an exhaustive exegesis of this issue, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121

premise of the debate over how to incorporate meaningful checks and balances into U.S. targeted killing operations shifts from a conversation grounded in law to one grounded in policy and prudential considerations.

One of the most significant consequences of this shift pertains to the role citizenship plays in the conversation. For obvious reasons, an overwhelming majority of American discussions of targeted killings to date have focused on cases in which U.S. citizens are the targets, even though, so far as is publicly known, there has been exactly one instance in which a U.S. citizen was specifically targeted for the use of lethal force.⁵⁸ Contrast this fact with reports that suggest as many as 4700 non-U.S. citizens have been killed by drone strikes overseas.⁵⁹ And although many appear to share Judge Gonzales's view that external oversight, including perhaps judicial review, might be appropriate in some cases,⁶⁰ that view has typically been limited—as it is for Judge Gonzales—to the vanishingly small set of cases in which a U.S. citizen is the target.⁶¹

But if such external oversight of the President's use of military force is permissible where it is directed against U.S. citizens, why would that change if, instead, the targets are non-U.S. citizens, including those who lack substantial voluntary connections to the United States? Without question, there are significant and often material differences between the statutory and constitutional rights enjoyed by U.S. citizens as compared to non-U.S. citizens overseas.⁶² In addition, there are a host of statutes that

HARV. L. REV. 941 (2008).

⁵⁸ Media reports suggest that as many as four U.S. citizens have been killed in drone strikes, but in only one of those cases did the citizen appear to have been the target of the operation. See, e.g., Charlie Savage & Peter Baker, *Obama, in a Shift, to Limit Targets of Drone Strikes*, N.Y. TIMES, May 23, 2013, at A1.

⁵⁹ See Conor Friedersdorf, *Senator Graham: America Has Killed 4,700 People with Drones*, ATLANTIC (Feb. 22, 2013, 6:00 AM), <http://www.theatlantic.com/politics/archive/2013/02/senator-graham-america-has-killed-4-700-people-with-drones/273405/>.

⁶⁰ See, e.g., Editorial, *Too Much Power for a President*, N.Y. TIMES, May 31, 2012, at A28 (“President Obama should . . . allow an outside court to review the evidence before placing Americans on a kill list.”).

⁶¹ See, e.g., Ryan Patrick Alford, *The Rule of Law at the Crossroads: Consequences of Targeted Killings of Citizens*, 2011 UTAH L. REV. 1203, 1207 (“[I]f the courts uphold a decision declaring that the president's powers are so broad as to preclude any judicial determination of whether [targeted killings of U.S. citizens are] prohibited by the Due Process Clause, we stand to lose the benefits of a seven-hundred year old tradition of resistance to arbitrary power.”).

⁶² See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990) (“[C]onstitutional decisions of this Court expressly according differing protection to aliens than to citizens [are] based on our conclusion that the particular provisions in question were not intended to extend to aliens in the same degree as to citizens.”).

make it relatively easier for the government to subject non-U.S. citizen terrorism suspects to military detention or trial by military commission, and relatively more difficult for those same individuals to challenge the government's policies in federal court.⁶³ But the principal objection to judicial review of the use of military force has historically not been based on the absence of potentially meritorious claims, but has rather been grounded in judicial competence: the subject matter and the nature of the factual and legal questions raised in cases challenging the government's use of military force are simply beyond the judicial ken.⁶⁴ As federal district court Judge Bates has explained, it is difficult to see why citizenship would somehow give courts greater power to entertain suits "which seek to prevent future U.S. military action in the name of national security against specifically contemplated targets by the imposition of judicially-prescribed legal standards."⁶⁵ If the question is whether the military acted lawfully, the answer may well depend upon the citizenship of the target. If, however, the question is whether the courts are even in a position to review the military's conduct, that is another matter altogether.

At a more general level, this understanding dovetails with a deeper premise that, insofar as the political question doctrine is a structural jurisdictional limit on the power of federal courts, it is difficult to understand why such a limit should depend upon the citizenship of the party invoking it. As Judge Higginbotham of the Fifth Circuit has explained, "[s]ubject matter jurisdiction is best understood as a structural right, for 'it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign.'"⁶⁶ Thus:

[C]itizenship, whether of a particular state or country, plays an entirely obvious role in the federal jurisdiction contemplated by Article III. As first-year law students learn chapter and verse, fully four of the nine heads of federal jurisdiction prescribed by Article III, Section 2, Clause 1, are keyed to the citizenship of the

⁶³ See, e.g., 10 U.S.C. § 948c (2012) ("Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter."); 28 U.S.C. § 2241(e)(2) (2012) ("[N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.").

⁶⁴ See, e.g., *supra* note 4.

⁶⁵ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 50 (D.D.C. 2010).

⁶⁶ *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 228 (5th Cir. 1998) (en banc) (Higginbotham, J., dissenting) (quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)), *rev'd*, 526 U.S. 574 (1999).

parties. But it hardly follows from the role citizenship plays in the availability of federal jurisdiction in Section 2 of Article III that citizenship should also factor into the substantive limits on the “judicial Power of the United States.”⁶⁷

Without meaning to belabor the point, the key is to understand that judicial competence is a binary proposition—either courts lack the ability meaningfully to resolve specific issues pertaining to the legality of uses of lethal force by the U.S. Government, or they do not. Whether the subject of such force is a U.S. citizen is immaterial to the ability of courts to decide whether that force was lawful, even if it is material to the answer. And so, whereas reasonable people may disagree as to whether courts are ever in a position to entertain such claims, accepting that there are *any* circumstances in which they can is, in effect, accepting that they are competent to review those circumstances *as a general matter*. To me, that is the single most important point readers should take away from Judge Gonzales’s article. The question then becomes whether there might be *other* reasons to only allow such review in cases where the target is a U.S. citizen.⁶⁸ Again, though, that is a policy consideration, not a legal one.

III. HOW TO PROVIDE MEANINGFUL REVIEW OF TARGETED KILLINGS

Once one accepts that neutral magistrates are competent to resolve certain issues in suits challenging targeted killings, the focus should shift to how such oversight can best be designed to maximize both the government’s interests in secrecy and expediency and the individual rights of the putative targets. I offered my critiques of Judge Gonzales’s proposal above. Although I have expressed my own views on this subject before,⁶⁹ the following briefly lays out some of the key elements I consider necessary to any such regime.

⁶⁷ Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 GEO. L.J. 1497, 1544–45 (2007) (footnote omitted).

⁶⁸ For example, some might argue that non-U.S. citizens attacked outside of the territorial United States have no rights that they can vindicate under U.S. law. But even if that is true as a constitutional matter, it belies the extent to which the government might act in violation of a statute or a duly enacted treaty. Cf. Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165, 1223 (explaining how detainees in habeas cases can prevail even if they have no “rights” because the government still must show that the detention is itself lawful).

⁶⁹ See *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. 58–69 (2013) (statement of Stephen I. Vladeck, Professor of Law, Associate Dean for Scholarship, American University Washington College of Law).

As noted above,⁷⁰ such review is best provided after the fact, rather than *ex ante*, in a similar manner as the wrongful death actions recognized by virtually every jurisdiction.⁷¹ After-the-fact review avoids the serious logistical, prudential, and potentially constitutional concerns that *ex ante* review would raise because it does not stop the government from acting at its own discretion, and it allows for more comprehensive consideration of the issues “removed from the pressures of the moment and with the benefit of the dispassionate distance on which judicial review must rely.”⁷²

Such review should be predicated on an express cause of action created by Congress. In designing such a remedy, Congress can borrow from the model created by FISA, which has provided since its inception that “[a]n aggrieved person, other than [one who is properly subject to surveillance under FISA], who has been subjected to an electronic surveillance . . . shall have a cause of action against any person who committed such violation.”⁷³ An express cause of action would clarify Congress’s intent that such suits should be allowed to go forward, and it would also support arguments against otherwise available common law privileges and immunities.

Further to that end, because review would be after the fact, such an action should be for damages, and, unlike FISA, should therefore contain an express waiver of the United States’ sovereign immunity to ensure that money damages will actually be available in such cases⁷⁴—not so much to make the victim’s heirs whole, but to provide a meaningful deterrent for future government officers. Thus, although many will disagree with this particular aspect of my proposal, I suspect that such a cause of action could serve its purpose even if it only provided for *nominal* damages, insofar as such nominal damages still establish forward-looking principles of liability.⁷⁵

Although no special jurisdictional provisions should be necessary (e.g.,

⁷⁰ See *supra* text accompanying notes 44–49.

⁷¹ See Jameel Jaffer, Reaction, *Judicial Review of Targeted Killings*, 126 HARV. L. REV. F. 185, 187 (2013), http://www.harvardlawreview.org/media/pdf/forvol126_jaffer.pdf (“The courts quite commonly adjudicate wrongful death claims . . . brought by family members of individuals killed by law enforcement agents.”).

⁷² Vladeck, *Why a “Drone Court” Won’t Work*, *supra* note 44.

⁷³ 50 U.S.C. § 1810 (2006).

⁷⁴ See, e.g., *Al-Haramain Islamic Found., Inc. v. Obama*, 705 F.3d 845, 850–55 (9th Cir. 2012) (holding that Congress did not waive the United States’ sovereign immunity in FISA’s damages provision, 50 U.S.C. § 1810).

⁷⁵ See generally James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1631–39 (2011) (summarizing the pros and cons of a nominal-damages regime).

FISA does not require civil suits under FISA to be brought before the FISC),⁷⁶ Congress could confer exclusive jurisdiction over such suits upon the U.S. District Court for the District of Columbia.⁷⁷ This jurisdictional exclusivity would ensure that such cases were brought before federal judges with substantial and sustained experience handling high-profile (and often highly sensitive) national security cases.

Borrowing from the model of the Federal Tort Claims Act (“FTCA”),⁷⁸ as amended by the Federal Employees Liability Reform and Tort Compensation Act of 1988 (“Westfall Act”),⁷⁹ Congress can immunize potential officer-defendants by substituting the United States as the defendant on any claims arising under this cause of action in which the officer-defendant was acting within the scope of his employment.⁸⁰ As is the case under the Westfall Act, such a move would also necessarily moot application of official immunity doctrines because it would confer absolute immunity upon the officer-defendants,⁸¹ and the United States may not invoke official immunity as a party. As under the Westfall Act, substitution would reinforce the idea that the goal is not to punish individual officers, but to establish the liability of the federal government writ large.

As under the FTCA, Congress could bar jury trials in such cases, requiring instead that all factual and legal determinations be made by the presiding judge.⁸² Again, such a move would help to ensure that these suits could be heard expeditiously and with due regard for the government’s secrecy concerns.

On that note, with regard to secrecy, Congress could look to both FISA⁸³ and the provisions of the 1996 immigration laws establishing the Alien Terrorist Removal Court (“ATRC”)⁸⁴ as models for how to allow for

⁷⁶ See 50 U.S.C. § 1810.

⁷⁷ Cf. 42 U.S.C. § 19731(b) (2006) (conferring exclusive jurisdiction upon the District Court for the District of Columbia in certain cases arising under the Voting Rights Act of 1965).

⁷⁸ Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.).

⁷⁹ See Federal Employees Liability Reform and Tort Compensation Act of 1988 (“Westfall Act”), Pub. L. No. 100-694, 102 Stat. 4563 (codified in scattered sections of 28 U.S.C.).

⁸⁰ See 28 U.S.C. § 2679(b), (d) (2006).

⁸¹ See *Springer v. Bryant*, 897 F.2d 1085, 1086 (11th Cir. 1990) (“The purpose of the [Westfall Act] is to create absolute immunity for federal employees who, within the scope of their employment, commit common law torts.”).

⁸² See 28 U.S.C. § 2402.

⁸³ See, e.g., 50 U.S.C. §§ 1861(f), 1881a(h)(4) (Supp. IV 2011).

⁸⁴ See 8 U.S.C. § 1534(e) (2012). In particular, § 1534(e)(3)(F) creates special

judicial proceedings that are both adversarial and largely secret. In this respect, both FISA and the ATRC contemplate litigation between the government and security-cleared counsel without regard to the state secrets privilege, which Congress could otherwise abrogate.⁸⁵

Finally, on the merits, Congress could punt. Rather than identifying specific circumstances in which the government may permissibly use lethal force, Congress could borrow from general cause-of-action statutes like the federal habeas statute or 42 U.S.C. § 1983 and authorize relief so long as the plaintiff can demonstrate that the use of lethal force was in violation of the Constitution, laws, or treaties of the United States.⁸⁶ So construed, this proposal would not change the substantive law of targeted killings; it would merely provide a judicial remedy for violations of already existing federal law.

Without question, the remedy I am proposing suffers from many flaws, and it is at best a least-worst solution. After all, “[it is] obvious, but should be said anyway, that in a case in which the government *does* act unlawfully, no amount of damages will make the victim (or his heirs) whole.”⁸⁷ And “[it is] also inevitable that, like much of the Guantánamo litigation, most of these suits would be resolved under extraordinary secrecy, and so there would be far less *public* accountability for targeted killings than, ideally, we might want.”⁸⁸ Of course, these concerns are no less applicable to Judge Gonzales’s proposal.

Unlike Judge Gonzales’s proposal, however, the cause of action

procedures for access and challenges to the government’s use of classified information in cases where it sought to use such information to effect the removal of a lawful permanent resident alien believed to be a terrorist. As under FISA, the animating principle is that the court appoints a security-cleared lawyer who is allowed to access the government’s classified evidence, and who may challenge the veracity of that evidence. *Id.* § 1534(e)(3)(F)(i). The appointed lawyer, however, may not disclose the contents of that evidence to anyone not authorized to see it, including uncleared counsel and the adverse private party. *Id.* § 1534(e)(3)(F)(ii).

⁸⁵ For the argument that FISA itself abrogated the state secrets privilege in suits brought under 50 U.S.C. § 1810, see *In re Nat’l Sec. Agency Telecomm. Records Litig.*, 700 F. Supp. 2d 1182 (N.D. Cal. 2010). Although there is some debate over whether the state secrets privilege is a constitutionally grounded privilege that cannot be abrogated by statute, or a common law evidentiary privilege that can be so superseded, the run of authority supports the latter conclusion. See, e.g., *United States v. El-Mezain*, 664 F.3d 467, 520 (5th Cir. 2011); *United States v. Abu-Jihaad*, 630 F.3d 102, 140–41 (2d Cir. 2010).

⁸⁶ See 28 U.S.C. § 2241(c)(3) (authorizing issuance of a writ of habeas corpus upon a showing that the prisoner “is in custody in violation of the Constitution or laws or treaties of the United States”); 42 U.S.C. § 1983 (2006) (imposing liability upon state officers for “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws”).

⁸⁷ Vladeck, *Why a “Drone Court” Won’t Work*, *supra* note 44.

⁸⁸ *Id.*

sketched out above would represent an unprecedented degree of judicial review of military operations, an area into which, their competence notwithstanding, the federal courts have long resisted intervening. Thus, whereas some may well criticize the above proposal on the ground that it does not go nearly far enough to constrain the government's use of lethal force, others may find in it a dramatic and unwarranted expansion of the role of the federal courts during wartime. Indeed, although such judicial review may seem a necessary evil when targeted killing operations are carried out against U.S. citizens or away from zones of active and ongoing combat operations, it may seem equally difficult to fathom as applied to more conventional uses of force on more conventional battlefields. Thus, those who are inclined to agree with Judge Gonzales that *some* additional judicial oversight is necessary may nevertheless find the above proposal unnecessary as a matter of policy, even if permissible and plausible as a matter of law.

But the daylight between the review contemplated by Judge Gonzales and the regime described above belies our far larger agreement—a point most cogently articulated by Justice Kennedy toward the end of his opinion for the *Boumediene* Court. As he explained, “[b]ecause our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined.”⁸⁹ But, Kennedy continued, “[i]f, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.”⁹⁰ Ultimately, if one shares Judge Gonzales’s concerns that neither internal Executive Branch checks and balances nor external congressional oversight will always be sufficient to confine uses of military force by the Executive Branch to the law, then a cause of action along the lines of the one I have sketched out above may well be the best way to both create the necessary accountability and not unduly handcuff the Commander in Chief during wartime. At the very least, it provides a firmer foundation from which one can depart in crafting a more satisfying legal regime.

CONCLUSION

To be sure, I suspect that Judge Gonzales will agree with little of what I have written here. After all, whereas Judge Gonzales’s article proposes fairly minimalist *ex ante* review of a procedural designation by a quasi-independent arbiter in a process with no real track record of success, my proposal would herald a rather dramatic shift in the ability of courts to

⁸⁹ *Boumediene v. Bush*, 553 U.S. 723, 797–98 (2008).

⁹⁰ *Id.* at 798.

oversee the Executive Branch in a realm where the President has historically functioned with virtually zero judicial oversight. And there are reasons for both supporters and opponents of the status quo to deeply fear such review. As Justice Jackson warned in his dissenting opinion in *Korematsu v. United States*,⁹¹ courts are not well suited to resolve claims of military necessity, and so they may well commit a far graver sin to the rule of law in upholding patently unlawful uses of military force during wartime than those that resulted from such uses of force on their own. Indeed, that is precisely what happened in *Korematsu*.⁹²

In one sense, this point underscores the central downside of Judge Gonzales's view—that increased oversight mechanisms will put targeted killings on firmer legal footing because the President will be able to claim that such operations have the blessing of all three branches of government. As *Korematsu* suggests, there is no guarantee that courts will get these cases “right,” and there is every reason to dread the consequences if, and when, they get them “wrong.”⁹³

But as the United States increasingly moves toward a paradigm in which the use of force is based upon individualized determinations made thousands of miles away from any battlefield utilizing secret and otherwise unreviewable criteria—and where the force itself is often deployed in parts of the world where there is no active fighting—such potential judicial missteps become a risk increasingly worth taking. This is so not because the goal should be to *legitimize* such conduct, as Judge Gonzales argues, but rather because it may be the least-worst way to ensure that something more than the constitutional and moral sensibilities of the incumbent Commander in Chief circumscribes the United States' use of lethal force, whether against its own citizens or others.

⁹¹ See *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (“A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the [unlawful] principle [undergirding the military's actions].”).

⁹² See generally Stephen I. Vladeck, *Justice Jackson, the Memory of Internment, and the Rule of Law After the Bush Administration*, in *WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION* 183 (Austin Sarat & Nasser Hussain eds., 2010) (summarizing Justice Jackson's understanding of the difference between unlawful military conduct during wartime and legal opinions *upholding* such conduct).

⁹³ See *Korematsu*, 323 U.S. at 245–46 (Jackson, J., dissenting).