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THESIS

THE DRONE COURT AND DUE PROCESS

by

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December 2016

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THE DRONE COURT AND DUE PROCESS

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ABSTRACT

In the aftermath of 9/11, the U.S. Congress passed the Authorized Use of Military Force (AUMF), which established the authority of the president to use force to protect the United States from threats against the homeland. This authority allowed the president to use drones, even against U.S. citizens on foreign soil who have been deemed terrorists and placed on the kill list. The current process lacks procedural due process. These flaws have prompted critics to argue that a drone court should be created to address this concern. This thesis explores the issue of the drone court and asks, if one were created, what form should it take? How should it look? The thesis employs a policy options analysis to review three possible judicial forums for hearing these cases: the Foreign Surveillance Court (FISC), Guiora and Brand's hypothetical Operational Security Court (OSC), and the Combatant Status Review Tribunal (CSRT). Five criteria were evaluated: oversight of the executive branch, transparency, timeliness, judges and legal representation, and legal/procedural review. The OSC had the best evaluation because it supported procedural due process. However, policies will need to be implemented to ensure that OSC legal procedures are timely.

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LIST OF ACRONYMS AND ABBREVIATIONS

AUMF	Authorization for Use of Military Force
CSRT	Combatant Status Review Tribunal
DOD	Department of Defense
DOJ	Department of Justice
EO	executive order
FISA	Foreign Intelligence Surveillance Act
FISC	Foreign Intelligence Surveillance Court
NSA	National Security Agency
OSC	Operational Security Court
POA	policy options analysis
POW	prisoner of war
TSP	Terrorist Surveillance Program

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EXECUTIVE SUMMARY

In the aftermath of 9/11, the U.S. Congress passed the Authorized Use of Military Force (AUMF), which established the authority of the president to use “all necessary and appropriate force” to protect the United States from threats against the homeland.¹ The implementation of the AUMF broadened the president’s authority to use drones, even against U.S. citizens on foreign soil who have been deemed terrorists and placed on the “kill list.” While there is no official court proceeding, there is a non-judicial body that determines who is placed on the kill list.² The non-judicial body consists of an interagency group selected by the military—not a military or civilian court—that reviews intelligence on the accused’s involvement in terrorist activities against the United States. Neither the accused nor a representative of the accused receives notification of the hearing to present evidence for the defense. By the time the military reviews the case, the accused has already been designated as a terrorist and placed on the kill list, which means that he or she can be executed by a drone attack at any time. There are critics who argue that the current process lacks procedural safeguards and that a drone court should be created to address these due process challenges.³

To address this problem, this thesis proposes a hypothetical drone court to ensure that due process is implemented. If a drone court were created, what form should it take? How should it look? The drone court proposed in this thesis would consist of federal judges who weigh the evidence presented by government attorneys.⁴ The court would allow technically versed judges to make determinations concerning the sufficiency of evidence that exists *before* a decision is made to target a U.S. citizen. Unlike the military review, the drone court would have an established procedure for legal review.

¹ *Authorization for the Use of Military Force*, Public Law 107-40, 115 Stat 224 (2001), 1–2.

² Martin S. Flaherty, “The Constitution Follows the Drone: Targeted Killings, Legal Constraints, and Judicial Safeguards,” *Harvard Journal of Law and Public Policy* 38, no. 1 (2016): 39.

³ Deborah Pearlstein, *Enhancing Due Process in Targeted Killing* (Washington, DC: American Constitution Society, 2013), 2, https://www.acslaw.org/sites/default/files/Pearlstein_-_Due_Process_in_Targeted_Killing.pdf.

⁴ “Weight of Evidence Law and Legal Definition,” USLegal, accessed December 8, 2016, <http://definitions.uslegal.com/w/weight-of-evidence/>.

It is this targeting of U.S. citizens that has opened a dialogue to discuss the viability of establishing a drone court.⁵ This approach provides a novel opportunity to explore innovative processes and methodologies that will help strengthen the current procedure or assist in creating a new one. The alternative will explore the need to ensure constitutional procedural safeguards are in place so U.S. citizens are afforded procedural due process. However, the drone court argument is not without its critics; Steven Groves, for instance, asserts that the United States has a right to self-defense even, if a U.S. citizen is the target.⁶

This thesis reviewed three models that could be used, in whole or in part, to create a drone court with the authority to decide who is eligible for fatal drone strike targeting. This thesis used a policy options analysis to evaluate criteria important to the foundation of the drone-court system, and to address the constitutional issues surrounding presidential and judicial authority.⁷ The five criteria selected were the executive branch, transparency, timeliness, judges and legal representation, and legal/procedural review.

One drone court model proposal was a court similar to the Foreign Intelligence Surveillance (FISC).⁸ Another proposal was a hypothetical drone court created by Amos N. Guiora and Jeffrey S. Brand called the Operational Security Court (OSC), composed of current sitting Article III district and circuit judges, and established to protect operational security and the rights of those targeted.⁹ In addition, a Combatant Status Review Tribunal (CSRT) was examined, in which a tribunal reviews the case and

⁵ Mark Hosenball, "Support Grows for U.S. 'Drone Court' to Review Lethal Strikes," Reuters, February 8, 2013, <http://www.reuters.com/article/us-usa-drones-idUSBRE91800B20130209>.

⁶ Steven Groves, "Drone Strikes: The Legality of U.S. Targeting Terrorists abroad," The Heritage Foundation, April 10, 2013, <http://www.heritage.org/research/reports/2013/04/drone-strikes-the-legality-of-us-targeting-terrorists-abroad>.

⁷ Anna Mulrine, "Would a US 'Drone Court' to Authorize Drone Strikes be a Good Idea?" *Christian Science Monitor*, May 24, 2013, <http://www.csmonitor.com/USA/Politics/DC-Decoder/2013/0524/Would-a-US-drone-court-to-authorize-drone-strikes-be-a-good-idea-video>.

⁸ Foreign Intelligence Surveillance Court (FISC) and Foreign Intelligence Surveillance Act (FISA) are the same and used interchangeably.

⁹ Amos N. Guiora and Jeffrey S. Brand, *Establishment of a Drone Court: A Necessary Restraint on Executive Power* (Salt Lake City: University of Utah College of Law, 2014), 21, <http://ssrn.com/abstract=2526372>.

determines the enemy combatant status of the detainees.¹⁰ FISC and CSRT, the two existing forums, were analyzed to determine if the organizational structures and procedures would be viable for a drone court. The OSC hypothetical court's organizational structures and procedures were also analyzed to determine the likelihood that it, too, could make a viable drone court.

After analyzing the three options, the OSC had the best evaluation; this type of court would allow the target to have an advocate and would provide judicial oversight of the executive branch's targeting before the execution of drone strikes. This hypothetical court structure would be staffed with federal court judges who are well versed in federal law processes and procedures, and constitutional law. These skills would be critical due to the potential constitutional issues brought before a drone court. The FISC and CSRT both lacked operational transparency, and neither allowed for an advocate for the target.

While the OSC would have established processes and procedures to make it a strong and practicable drone court, the model would need some modifications—for instance, policies would need to be implemented to ensure that OSC legal procedures are timely (including a specific timeline in which the attorney comes aboard to represent the target, and a timeline for when the judges convene for a hearing). Even though the OSC is the closest forum for consideration as a drone court, it will need to be modified through the implementation of policies. The suggested modifications would ensure that procedural due process for U.S. citizens is implemented, the integrity of the Constitution preserved, and that a court has been established to ensure procedural safeguards are in place.

¹⁰ Alberto Gonzales, "Drones: The Power to Kill," *George Washington Law Review* 82, no. 1 (2013), <http://www.gwlr.org/gonzales/>.

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I. INTRODUCTION

The first American targeted by a drone attack was radical Islamic cleric Anwar al-Awlaki, who was killed in 2011. The Department of Defense (DOD) focused on Anwar al-Awlaki as part of a military operation that targeted U.S. citizens suspected of terrorist activities.¹ An unintended consequence of these attacks was the confirmed deaths of three other U.S. citizens: Awlaki's son Abdulrahman-al-Awlaki; Samir Khan, a controversial journalist; and Dr. Warren Weinstein, an American hostage.² At no time was al-Awlaki or were any of three known American targets given the opportunity to be heard in court prior to their targeting.³ In the United States, even the most common criminals get some procedural legal review—whether the crime is a parking violation, shoplifting, or aggravated murder—to uphold the integrity of our judicial system. For example, most U.S. criminals must be found guilty beyond a reasonable doubt before they are subjected to punishment. In drone cases, however, no review is conducted in court before it is determined that a U.S. citizen will be subjected to a fatal drone strike.

On July 8, 2016, the Dallas Police Department used targeted killing to end a standoff with a violent gunman. It was the first time that such technology had been used by a domestic police force to kill a suspect.⁴ The suspect was killed by a MARCbot machine, “which was designed to tackle bombs such as [improvised explosive devices],

¹ Jennifer K. Elsea, *Legal Issues Related to the Lethal Targeting of U.S. Citizens Suspected of Terrorist Activities* (CRS Report No. 7-5700) (Washington, DC: Congressional Research Service, 2012), <https://www.fas.org/sgp/crs/natsec/target.pdf>.

² Peter Finn and Greg Miller, “Anwar al-Awlaki’s Family Speaks out against His, Son’s Deaths,” *Washington Post*, sec. National Security, October 17, 2011, <https://www.washingtonpost.com>; Robbie Brown and Kim Severson, “2nd American in Strike Waged Qaeda Media War,” September 30, 2011, *New York Times*; Adam Taylor, “The U.S. Keeps Killing Americans in Drone Strikes, Mostly by Accident,” *Washington Post*, April 23, 2015, <https://www.washingtonpost.com/blogs/worldviews/wp/2015/04/23/the-us-keeps-killing-americans-in-drone-strikes-mostly-by-accident>.

³ According to the Obama administration, only the Department of Defense can target and kill Americans suspected of conducting terrorism overseas. As a result, any other drone targeting is outside the scope of this thesis. See “White House Reportedly Struggling to Target U.S. citizens with Drone Attack,” Fox News, February 10, 2014, <http://www.foxnews.com/politics/2014/02/10/white-house-reportedly-struggling-to-target-us-citizen-with-drone-attack.html>.

⁴ James Rogers, “Dallas Police Used Bomb Robot to Kill Shooting Suspect,” Fox News Tech, July 8, 2016, <http://www.foxnews.com/tech/2016/07/08/dallas-police-used-bomb-robot-to-kill-shooting-suspect.html>.

and has been used as a weapon in Iraq.”⁵ This machine did its lethal work within the United States—in a parking garage in Dallas, where the gunman, who had already assassinated five police officers securing a peaceful protest, was refusing to negotiate or surrender.⁶ The robot, equipped with explosives, was deployed in response to the sniper attack against police and, in this context, it marked a logical and legal escalation of force necessary to protect the public.⁷ The incident also raised, albeit briefly, public safety concerns about an unmanned vehicle targeting and killing an American citizen. Dallas is a portent of things to come. Because no procedure for legal review has been established for those targeted by drones, as seen in Dallas, they, too, are a sign of things to come—sentencing without verdicts, trials, or even charges.

The current process for deciding who will be targeted in military operations is under the authority of the DOD.⁸ This means that a non-judicial body decides if someone is subject to a drone strike. The determination is made by an interagency group selected by the military—not a military or civilian court—which reviews intelligence on the accused’s involvement in terrorist activities against the United States. Neither the accused nor a representative of the accused receives notification of the hearing nor is given an opportunity to appear before this group to present evidence for the defense. By the time the military reviews the case, the accused has already been designated a suspected terrorist and placed on the “kill list,” which means that he or she can be executed by a drone attack at any time. Two dozen security officials meet weekly with members of the executive branch to assess who will be placed on the list.⁹ With little public information about this process, however, it is unclear if this military group could later overturn the initial decision to place someone on the kill list or recommend that an individual not be placed on the list at all. Arguably, the formality of the military review creates the

⁵ Ibid.

⁶ There is an awareness of ethical implications, but it is outside the scope of this thesis.

⁷ Rogers, “Dallas Police Used Bomb Robot to Kill Shooting Suspect.”

⁸ Micah Zenko, “JP 3-60 Joint Targeting and U.S. Targeted Killings,” *Politics, Power, and Preventive Action*, August 5, 2013, <http://blogs.cfr.org/zenko/2013/08/05/jp360-joint-targeting-and-us-targeted-killings>.

⁹ Jo Becker and Scott Shane, “Secret Kill Proves a Test of Obama’s Will,” *New York Times*, sec. World, May 29, 2012, <http://www.nytimes.com>.

appearance of procedural legal review (e.g., the appellate court will review the records and sufficient evidence will be presented), but the actual military process is non-judicial.

This thesis proposes a drone court that employs federal judges to weigh the government attorneys' evidence.¹⁰ The drone court would allow technically versed judges to determine if sufficient evidence exists *before* a decision is made to target a U.S. citizen. Unlike the military review, the drone court would have an established procedure for legal review.

This thesis reviews several models that could be used, in whole or in part, to create a drone court with the authority to decide who is eligible for fatal drone strike targeting. In short, the models include the Foreign Intelligence Surveillance Court (FISC)¹¹; the Operational Security Court (OSC), composed of current sitting Article III district and circuit judges, established to protect operational security and the rights of those targeted; and a Combatant Status Review Tribunal (CSRT), in which a tribunal reviews the case and determines the enemy combatant status of the detainees.¹²

A. RESEARCH QUESTION AND SIGNIFICANCE

The problem with the current process—and the problem that a drone court must address—is that at no time is the accused American afforded an opportunity to be heard prior to being targeted by the DOD for a drone attack. Based on the constitutional questions and the transparency problems in the targeting process, as well as the assumption that a newly formed drone court is a possible way to address these concerns, this thesis addresses the following question: What form should a drone court take?

¹⁰ The judges will measure the credible proof on one side of a dispute as compared with the credible proof on the other. See “Weight of Evidence Law and Legal Definition,” USLegal, accessed December 8, 2016, US Legal, <http://definitions.uslegal.com/w/weight-of-evidence>.

¹¹ Foreign Intelligence Surveillance Court (FISC) and Foreign Intelligence Surveillance Act (FISA) are the same and used interchangeably.

¹² Amos N. Guiora and Jeffrey S. Brand, *Establishment of a Drone Court: A Necessary Restraint on Executive Power* (Salt Lake City: University of Utah College of Law, 2014), 21, <http://ssrn.com/abstract=2526372>; Alberto Gonzales, “Drones: The Power to Kill,” *George Washington Law Review* 82, no. 1 (2013), <http://www.gwlr.org/gonzales/>.

In describing the DOD's process, Martin Flaherty states, "From what we think we know, the procedures in place for designating someone as a [drone] target are not modest."¹³ The DOD's Joint Publication 30-60, under the direction of the Joint Chiefs of Staff, provides public information about targeting.¹⁴ The Joint Forces Commanders must officially "identify" the accused as one of those on the kill list. According to Flaherty, if the individual is a sensitive target (as was, for example, Anwar al-Awlaki), the president or secretary of defense must approve the designation.¹⁵

Critics of the current drone protocol argue that the United States risks killing citizens with total disregard for its own laws and policies. Those laws and policies are specific to the right of due process under the Fifth Amendment and executive orders 11905 and 12333, which have banned assassinations. Under the Authorization for Use of Military Force (AUMF), Public Law 107-40, 115 Stat 224 (2001) the president has broad power to "use all necessary and appropriate force against ... persons he determines planned, authorized, committed, or ordered the terrorists attacks on September 11, 2001 or ... to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."¹⁶ The current policy arguably gives the president a great deal of flexibility for interpreting—and implementing—the law. Specifically, the authorization allows the president to interpret the acts and persons involved. To an extent, this broad interpretation could turn citizens accused of terrorism into targets for assassination.

Lieutenant Roger Herbert warns against this position, asserting that "the draconian practice of assassination as an instrument of foreign policy would contradict the United States' democratic ideals."¹⁷ He further states that "assassination cannot

¹³ Martin S. Flaherty, "The Constitution Follows the Drone: Targeted Killings, Legal Constraints, and Judicial Safeguards," *Harvard Journal of Law and Public Policy* 38, no. 1 (2016): 39.

¹⁴ Joint Chiefs of Staff, *Joint Targeting* (Joint Publication 3-60) (Washington, DC: Department of Defense, 2007), https://www.aclu.org/files/dronefoia/dod/drone_dod_jp3_60.pdf.

¹⁵ Martin S. Flaherty, "The Constitution Follows The Drone: Targeted Killings, Legal Constraints, and Judicial Safeguards," 39.

¹⁶ *Authorization for the Use of Military Force*, Public Law 107-40, 115 Stat 224 (2001), 1–2.

¹⁷ Roger Herbert, "Bullets with Names: The Deadly Dilemma" (master's thesis, Naval Postgraduate School, 1992), viii.

support long-term U.S. policy goals or warfighting efforts. Ultimately, such methods could weaken America's global position."¹⁸ The ambiguity of the president's authority could undermine U.S. goals and negatively affect how allies perceive the nation. In the context of these urgent concerns, further investigation into a drone court as a possible alternative may prove fruitful.

B. PROBLEM STATEMENT

As previously mentioned, three potential options from which to model the drone court exist: the Foreign Intelligence Surveillance Court, the Operational Security Court, and the Combat Status Review Tribunal.¹⁹ Most existing proposals have pointed to FISC as a preferred model for drone cases because the court already exists—although some argue that a court *similar* to FISC should be established and that FISC should not supply the actual forum. According to Neal Katyal, critics point out that “FISC’s role is to review cases and not to make wartime decisions.”²⁰ FISC was established to monitor domestic surveillance of U.S. citizens under the Foreign Intelligence Surveillance Act of 1978.²¹ This court’s authority would have to be expanded beyond its current jurisdiction to hear drone cases.²²

While FISC has been in existence for several years, critics further say that the court is secretive, lacks transparency, is imbalanced in the area of civil liberties, and is biased.²³ Neither Congress nor FISC has done much to ensure agency oversight. Evan

¹⁸ Ibid.

¹⁹ Foreign Intelligence Surveillance Court (FISC) is also referred to as the Foreign Intelligence Surveillance Act Court (FISA). Scott Shane, “Debating a Court to Vet Drone Strikes,” *New York Times*, sec. World, February 8, 2013, <http://www.nytimes.com>; Guiora and Brand, *Establishment of a Drone Court*; Alberto R. Gonzales, “Drones: The Power to Kill,” 52.

²⁰ Neal K. Katyal, “Who Will Mind the Drones?” *New York Times*, sec. Opinion, February 20, 2013, <http://www.nytimes.com>.

²¹ Pub. L. 95-511, 95th United States Congress, Statute at Large 92, Statute 1783.

²² United States Foreign Intelligence Surveillance Court, accessed April 27, 2016, <http://www.fisc.uscourts.gov>.

²³ “Senators: End Secret Law,” Ron Wyden: Senator for Oregon, June 11, 2013, <https://www.wyden.senate.gov/news/press-releases/senators-end-secret-law>; “Wyden Statement on President Obama’s Proposed Reforms to the FISC and PATRIOT ACT,” Ron Wyden: Senator for Oregon, August 9, 2013, <https://www.wyden.senate.gov/news/press-releases/wyden-statement-on-President-obamas-proposed-reforms-to-the-fisc-and-patriot-act>.

Perez reveals that, to date, “FISC has declined just 12 of the more than 33,900 surveillance requests made by the government in 33 years.”²⁴ While FISC is considered a model for the drone court by advocate Scott Shane, who believe an FISC forum would provide needed congressional oversight for drone strikes, critic Garrett Epps believes that this forum would send the federal courts into areas with which they are neither familiar nor, perhaps, even justified to involve themselves, such as determining military tactics.²⁵

Legal scholars Guiora and Brand suggest, instead, the Operational Security Court model.²⁶ The court does not currently exist and would have to be established by an act of Congress.²⁷ As imagined by its champions, the OSC would have jurisdiction to hear cases about drones and due-process violations; the established court would be staffed with military and JAG experts, and the president’s most senior operational security advisers. The executive branch senior advisers would help the president respond to issues, such as targeting U.S. citizens. The OSC judicial branch would review the decisions of the executive branch. However, if the president disagrees with the court, he or she could arguably overrule the court’s decision, but have to explain the action to the judicial branch.²⁸

The last model is the Combat Status Review Tribunal, which has been advocated by former Bush administration U.S. Attorney General Alberto Gonzales as a model for a potential drone court.²⁹ According to Gonzales, “The CSRT is an administrative process designed to determine whether each detainee under the control of Department of Defense

²⁴ Current number of surveillance requests declined is 12, in contrast to the original number quoted by Evan Perez’s article. See Evan Perez, “Secret Court’s Oversight Gets Scrutiny,” *Wall Street Journal*, sec. Politics, June 9, 2013, <http://www.wsj.com/articles>; Robert D. Fram, “A Public Advocate for Privacy,” *Inside Privacy*, June 5, 2014, <https://www.insideprivacy.com/united-states/a-public-advocate-for-privacy-1>.

²⁵ Shane, “Debating a Court to Vet Drone Strikes”; Garrett Epps, “Why a Secret Court Won’t Solve the Drone Strike Problem,” = *Atlantic*, sec. Politics, February 16, 2013, <http://www.theatlantic.com>.

²⁶ Katyal, “Who Will Mind the Drones?”; Guiora and Brand, *Establishment of a Drone Court*.

²⁷ Bill West, “National Security Court? We Already Have One,” The Investigative Project on Terrorism, January 26, 2009, <http://www.investigativeproject.org/984/national-security-court-we-already-have-one>.

²⁸ Guiora and Brand, *Establishment of a Drone Court*, 25.

²⁹ Gonzales, “Drones: The Power to Kill,” 52.

meets the criteria to be designated an enemy combatant.”³⁰ Gonzales has suggested that the same processes and procedures used by the CSRT should be used for the proposed drone court. This model is similar to the current process in that it is dominated by military staff, processes, and procedures. However, unlike the status quo, in which no representation is provided, the CSRT does provide an advocate who can argue on the target’s behalf. As Gonzales points out, under the CSRT, “the advocate for the accused will review information relating to the target’s possible placement on the kill list and call witnesses on the target’s behalf.”³¹ He further states that “the trial will be presided over by an independent military judge or some other neutral decision maker, and the accused shall be presumed innocent unless and until the prosecution proves his guilt beyond a reasonable doubt, which is the highest standard of proof recognized under U.S. law.”³²

C. LITERATURE REVIEW

The drone court concept has its critics. Not all agree that a separate drone court is the best way to provide due process and protect the rights of American citizens. Such opponents as legal scholar Neal Katyal argue that the drone court would be unsuitable for federal judges, who are accustomed to deliberating cases in detail without such stringent time requirements.³³ Anna Mulrine, another opponent of the drone court concept, argues that “drone courts would do little to change critics’ fundamental concern about drone strikes.”³⁴

This literature review analyzes the various points of view and scholarly arguments about the need for a drone court. This review divides the literature into four broad categories: assassinations (and why drone strikes are not considered assassinations), the

³⁰ “Combatant Status Review Tribunals,” Department of Defense, September 26, 2006, archive.defense.gov/news/Oct2006/d20061017CSRT.pdf.

³¹ Gonzales, *Drones: The Power to Kill*, 53.

³² Alberto R. Gonzales, *Prepared Remarks of Attorney General Alberto R. Gonzales on the Military Commissions Act of 2006 at the German Marshall Fund*, Department of Justice, October 25, 2006, https://www.justice.gov/archive/ag/speeches/2006/ag_speech_061025.html.

³³ Katyal, “Who Will Mind the Drones?”

³⁴ Anna Mulrine, “Would a US ‘Drone Court’ to Authorize Drone Strikes be a Good Idea?” *Christian Science Monitor*, May 24, 2013, <http://www.csmonitor.com/USA/Politics/DC-Decoder/2013/0524/Would-a-US-drone-court-to-authorize-drone-strikes-be-a-good-idea-video>.

etymology and law of enemy combatants, self-defense and the limits of executive power, and U.S. citizens as drone targets and their right to due process.

1. Assassinations

During the Ford and Reagan administrations, assassinations were prohibited; but in the wake of 9/11, the president's posture changed. While in office in 1976, President Gerald Ford signed Executive Order (EO) 11905, which was the first EO to ban assassinations. President Ford signed the EO in response to a report that the U.S. government was involved in several assassination attempts. EO 11905 stated, in part, that employees of the United States or anyone acting on their behalf were prohibited from conspiring to engage in assassinations; subsequently, the language was amended to be applicable to "all assassinations."³⁵ During the Reagan administration, another EO—12333—"prohibited" engaging or conspiring to engage in assassinations."³⁶ The same language used in EO 11905 to ban assassinations was used in EO 12333.³⁷

During the George W. Bush administration, Stephen Knoepfler points out that President Bush stated his intention to "proceed with targeted killings of terrorist leaders or their financiers. This action was declared even though President Reagan's EO 12333, which prohibited all assassinations, was still in effect."³⁸ Neither the Bush administration nor the Obama administration rescinded the executive order that prohibited assassinations.³⁹ This was a rapid paradigm shift in presidential policies, from prohibiting assassinations to allowing targeted killings. Shortly after 9/11, President Bush stated that Osama bin Laden was wanted "dead or alive," and subsequently declared "war on

³⁵ Knoepfler, "Dead or Alive," *New York University Journal of Law and Liberty* 5, no. 457 (2010): 457.

³⁶ *Ibid.*

³⁷ "Executive Order 12333," in *Encyclopedia Britannica*, accessed December 9, 2016, <http://www.britannica.com/topic/Executive-Order-12333>.

³⁸ Knoepfler, "Dead or Alive," 457.

³⁹ *Ibid.*, 4.

terror.”⁴⁰ Critics of the Bush administration referred to these lethally targeted actions as “extra-judicial executions,” while Congressman Charles Rangel (D-NY) stated that “U.S. forces had acted illegally and clearly violated the assassination ban.”⁴¹

In language similar to President Bush’s, President-Elect Obama, just before his inauguration, stated his intention to capture or kill bin Laden. Moreover, early in his administration, President Obama appears to have “used drones in the manner consistent with the prior administration.”⁴² These drone targets are known as targeted killings. Neither Presidents Bush nor Obama used the term “assassination” when talking about targeted killings. However, specific people were targeted through the use of drones; it could be argued that this does, in fact, fit the definition of “assassination.”

Although President Ford and Reagans’ EOs address assassination, the term is not clearly defined, and has resultantly been interpreted in various ways.⁴³ In each instance, when an administration targeted and killed terrorist leaders or financiers—such as Uday and Qusay Hussein, Anwar al-Awlaki, or Osama bin Laden—it could be argued that because the lives taken were of politically prominent people, that an assassination occurred. Although Stephen Knopfner points out that there is “no universally accepted definition of assassination,” it could be argued that targeted drone killings carried out without proper legal authority are assassinations.⁴⁴ In contrast, targeted drone killings performed under authority of law to preserve the security of a nation are not deemed assassinations.

Drone attacks may not be deemed assassinations because they are authorized and, as previously discussed, protected by law. Because of the broad statutory authority given

⁴⁰ Toby Harnden, “Bin Laden is Wanted: Dead or Alive,” *Telegraph*, sec. World News, Asia, Afghanistan, September 18, 2001, <http://www.telegraph.co.uk>; Pierre Tristain, “Full Text: President Bush Declares ‘War on Terror,’” About News and Issues, December 17, 2014, <http://middleeast.about.com/od/usmideastpolicy/a/bush-war-on-terror-speech.htm>.

⁴¹ Mollo, “The United States and Assassination Policy,” 3.

⁴² Knopfner, “Dead or Alive,” 458.

⁴³ Exec. Order No. 12, 333 3 C.F.R. 200 (1981).

⁴⁴ Knopfner, “Dead or Alive,” 458.

to the president under the AUMF, he has the discretion to execute drone attacks and appropriate force whenever he deems it necessary to fight the war on terror.⁴⁵

2. The Etymology and Law of Enemy Combatants

In *Ex parte Quirin*, 317 U.S. 1 (1942), the United States Supreme Court, amid World War II, addressed a situation in which “four men were captured on American soil and accused of acts in violation of the Articles of War. Under this act, their crimes were to be tried in front of a military tribunal, and they were not afforded a trial in civil court. A tribunal did not afford a person all of the rights afforded under the United States Constitution.”⁴⁶ The men, who were born in Germany but had lived in the United States, were caught on shore and detained due to allegations that they had planned to destroy war industries and war facilities in the United States. The issue revolved around the constitutionality of a presidential order to try war crimes committed by enemy belligerents (i.e., enemy combatants) in a military tribunal instead of a civil court.⁴⁷ The Supreme Court upheld the jurisdiction of the military tribunal of the United States over the German “enemy invaders or saboteurs” of the United States.⁴⁸

Ex parte Quirin has been cited as a precedent for the military court trial of an unlawful combatant. The Supreme Court, in deciding that the president had authority to detain or try enemy combatants, stated:

The President’s power over enemies, who enter this country in time of war, as armed invaders intending to commit hostile acts, must be absolute. In his Proclamation, the President took the action he deemed necessary to deal with persons he and the armed forces under his command reasonably believed to be enemy invaders. He declared that all such persons should be subject to the law of war and triable by military tribunals. He removed whatever privilege such persons might otherwise have had to seek any remedy or maintain any proceeding in the courts of the United States. These acts were clearly within his power as Commander in Chief and Chief Executive and were lawful acts of the sovereign Government of the

⁴⁵ “Authorization for the Use of Military Force,” FindLaw, accessed December 9, 2016, <http://news.findlaw.com/hdocs/docs/terrorism/sjres23.enr.html>.

⁴⁶ *Ex parte Quirin*, 317 U.S. 1 (1942).

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

United States in time of war. The prisoners are enemies who fall squarely within the terms of the President's proclamation.⁴⁹

The Supreme Court's decision points out that military clothing or uniform is an insufficient criterion to render a captive a prisoner of war, even during World War II, when the purpose was to spy on and destroy property in the United States.

In *Hamdi v. Rumsfeld* (2004), "Hamdi was deemed an enemy combatant because he was among members of the Taliban terrorist group when he was captured: Yaser Esam Hamdi, a U.S. citizen, was captured by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government and eventually turned over to the United States military."⁵⁰ Hamdi was accused of fighting with the Taliban in Afghanistan and

initially detained and interrogated in Afghanistan. He was subsequently transferred to the United States Naval Base at Guantanamo Bay in January 2002 as the government contended that Hamdi was an enemy combatant of the United States. ... The Supreme Court's interpretation of the AUMF in *Hamdi v. Rumsfeld* confirmed that Congress in the AUMF gave its express approval to the military conflict against al Qaeda and its allies and thereby to the President's use of all traditional and accepted incidents of force in this current military conflict."⁵¹

However, while the Supreme Court reaffirmed its support of the president's inherent authority through the AUMF to protect the nation, it simultaneously adhered to Justice O'Connor's admonition that a "state of war is not a blank check for the President."⁵² Then, unlike the "*Ex parte Quirin* case, in which the four petitioners were ruled enemy combatants and tried by a military tribunal," the Supreme Court ruled that "Hamdi, a U.S. citizen, was entitled to due process and had the right to challenge his enemy combatant status before an impartial court."⁵³

⁴⁹ Ibid.

⁵⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), <http://caselaw.findlaw.com/us-supreme-court/542/507.html>.

⁵¹ "Legal Authorities," U.S. Department of Justice.

⁵² Ibid.

⁵³ *Ex parte Quirin*, 317 U.S. 1 (1942); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

During the Bush administration, it was determined that no matter the state affiliation of the terrorists, they were deemed “enemy combatants and legitimate targets of lethal force in the ‘war on terror.’”⁵⁴ Since President Bush’s administration, the term “enemy combatant” has been applied to Americans suspected of terrorism, as reflected in the status of al-Awlaki.⁵⁵

3. Self-Defense and the Limits of Executive Power

Some government officials argue that targeting U.S. citizens is justifiable.⁵⁶ This point of view appears to be affirmed by David Barron, acting assistant attorney general for the Department of Justice (DOJ). In an unclassified DOJ memo, Barron states that it is justifiable to target a U.S. citizen on foreign soil who has participated in recent activities that pose a possible threat to the United States. He argues that lethal targeting is justifiable if there is no evidence to indicate the individual has renounced his or her intention to attack the United States.⁵⁷

The Supreme Court, in evaluating the AUMF’s role in the 2004 *Hamdi v. Rumsfeld* case, recognized that the “national security underpinnings of the ‘war on terror,’ although crucial, were broad and malleable”; this indistinct basis also leaves the AUMF open to “being altered or influenced to change” important constitutional safeguards, which is of concern for Congress.⁵⁸ As an illustration, “the broad language of the AUMF affords the President ... [the] discretion to use all ... traditional and accepted

⁵⁴ Mollo, “The United States and Assassination Policy,”24.

⁵⁵ Andrew C. McCarthy, “Obama OK’s Targeted Assassination of Awlaki, a U.S. Citizen,” *National Review*, April 7, 2010, <http://www.nationalreview.com/corner/197534/obama-oks-targeted-assassination-awlaki-us-citizen-andrew-c-mccarthy>.

⁵⁶ David J. Barron, *Memorandum for the Attorney General, Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations against Shaykh Anwar al-Aulaqi* (U.S. Department of Justice, Office of Legal Counsel, 2010), 21; “Just Department Memo Reveals Legal Case for Drone Strikes on American,” NBC news, http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-Amerlcans, 21.

⁵⁷ *Ibid.*

⁵⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

incidents of the use of military force.”⁵⁹ This pliable language is part of the president’s apparent authority to defend and protect the nation.

Even further, some scholars assert the primacy of the United States’ right to self-defense over individual rights. Steven Groves of the Heritage Foundation’s Freedom Project argues that the United States has an inherent right to self-defense—even if it means that a U.S. citizen is the target. In Groves’ white paper, he reiterates that this right is implied if the U.S. citizen is deemed a threat against other citizens and the security of the nation.⁶⁰ He concludes that if there is “an imminent threat from a U.S. citizen, under the circumstances, no formal congressional authorization for declaration of war, authorization for the use of neither military force nor acknowledgment of armed conflict under international law will be necessary in order to secure our nation.”⁶¹ Groves believes that, for the United States to ensure terrorist organizations do not successfully attack the nation again, the U.S. government should preserve the option of using all tools, which arguably include drones.⁶² Groves, in making this assessment, relies on Article V of the Washington Treaty and the North Atlantic Treaty Organization (NATO), and Article 51 of the Charter of the United States “Right of Self-Defense,” which reads, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”⁶³ The AUMF gives the executive branch flexibility to conduct self-defense, and NATO supports the right of member states to act in self-defense.

In contrast to Barron and Groves’ arguments, some scholars believe that the DOD’s targeting of U.S. citizens is not an inherent matter for the executive branch.

⁵⁹ “Legal Authorities Supporting Activities,” U.S. Department of Justice, 2.

⁶⁰ Steven Groves, “Drone Strikes: The Legality of U.S. Targeting Terrorists abroad,” The Heritage Foundation, April 10, 2013, <http://www.heritage.org/research/reports/2013/04/drone-strikes-the-legality-of-us-targeting-terrorists-abroad>.

⁶¹ Ibid.

⁶² Ibid.

⁶³ North Atlantic Treaty Organization (NATO), Article 51 of the Charter of the United States, *Right of Self-Defense*, (1945), accessed May 10, 2016, http://www.nato.int/cps/en/natohq/official_texts_16937.htm.

Scholars in this camp, such as Alberto Gonzales, “propose additional measures that the ... president can take to ensure that the procedures comply with constitutional guarantees of due process.”⁶⁴ Moreover, Gonzales argues that “determining the scope of the president’s power in a time of war or armed conflict is one of the most difficult separation-of-powers questions to answer in constitutional law.”⁶⁵ According to Gonzales, “There are three possible sources of authority under domestic law guiding the president’s decision to unilaterally designate an American citizen as an enemy combatant and to place him on the kill list: express constitutional authority, implied constitutional authority, and statutory authority from Congress.”⁶⁶ In addition, Gonzales emphasizes the need for Congress and the president to propose additional measures to ensure that, if American citizens are placed on the list of targets for drone strikes, such procedures comply with constitutional guarantees.⁶⁷

These arguments all trace back to fundamental questions about the bounds of executive authority. In 1952, the Supreme Court established that the president could not overstep the congressional limits of his authority, even during wartime, when it heard *Youngstown Tube and Sheet Co. v. Sawyer*.⁶⁸ In 1951, when the United States went to war with Korea, labor unrest threatened the day-to-day functions of the Youngstown steel manufacturing plant. President Truman had judged the Youngstown Plant to be critical infrastructure for the war effort, so when a strike occurred, he issued an executive order to block it. *Youngstown* was decided in 1952, and the case continues to be the standard from which executive determinations are made in response to the president’s overreach and Congress’ limits upon his office. In a much-cited concurring opinion, the test Justice Jackson gave to determine the extent of executive authority is three-part:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.

⁶⁴ Gonzales, “Drones: The Power to Kill,” 19.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ *Youngstown Tube and Sheet Co. v. Sawyer*, 343 U.S. 579 (1952).

2. When the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.⁶⁹

The Youngstown criteria are more difficult to establish than Jackson's language might imply. Proponents of drone strikes overseas in the course of the war in Afghanistan, echoing the Supreme Court's opinion in *Hamdi*, posit that the AUMF represents the express sanction of Congress—the muscular executive action in this matter.

Opponents and those who see clearer limits to the extent of executive authority—picking up the other strand of the Supreme Court's *Hamdi* decision—insist that the real issue is the individual citizen's right to due process before being subject to lethal targeting. Deborah Pearlstein discusses this point in her issue brief:

The Court has recognized that an after-the-fact civil suit for damages may be all the process due when no pre-deprivation hearing could have made a difference, as in a death the state caused accidentally, or in exigent circumstances. But, where, as in many targeting operations, the state deliberately plans in advance to deprive an individual of life, (e.g., administering the death penalty) it regularly provides a set of procedures that dwarf those offered in any Court's standard due process cases.⁷⁰

⁶⁹ *Ibid.*, Case Brief Summary, S. Ct. 863, 96 L. Ed. 1153 (1952), 1.

⁷⁰ Deborah Pearlstein, *Enhancing Due Process in Targeted Killing* (Washington, DC: American Constitution Society, 2013), 2, https://www.acslaw.org/sites/default/files/Pearlstein_-_Due_Process_in_Targeted_Killing.pdf.

4. Due Process and Liberty

The current drone targeting of U.S. citizens seeks to exact the death penalty without providing the due process procedures required by the Constitution. The scene in the Dallas parking garage described previously raises similar concerns. Pearlstein notes that, even if the Constitution were not applicable under the circumstances of the drone strikes overseas, “any government agency must pursue some kind of process before engaging in lethal targeting operations.”⁷¹

Some constitutional experts and such legal scholars as Benjamin Wittes do at least agree that a process must be in place to undergird and protect due process rights.⁷² However, there remains disagreement about the manner in which the drone targeting should be addressed. Pearlstein assesses that procedural safeguards should be in place before targeting while Gonzales argues that the decision to execute drone attacks resides in the president’s executive authority.⁷³ Pearlstein is convinced there is a gap in the process, while Groves maintains that the United States has an inherent right to defend itself, even if it means a U.S. citizen is targeted.⁷⁴

Carol Lee and Dion Nissenbaum point out that the death of American hostage Warren Weinstein and U.S. citizens Anwar al-Awlaki and Abdulrahman al-Awlaki reveal a significant disparity between the government’s professed stringent standards for drone targeting and the standard that is actually being used.⁷⁵ The first standard is one in which terrorist suspects are put on the kill list and presidential signoff is required.⁷⁶ The other standard is known as a “signature strike,” in which, as explained by Arianna Huffington, the suspected terrorist is targeted based upon an exhibition of

⁷¹ Ibid., 3.

⁷² Wittes, “On Due Process and Targeting Citizens.”

⁷³ Pearlstein, “Enhancing Due Process in Targeted Killing,” *The American Constitution Society for Law and Policy*,” 3; Alberto R. Gonzales, “Drones: The Power to Kill,” 19.

⁷⁴ Steven Groves, “Drone Strikes: The Legality of U.S. Targeting Terrorists Abroad,” 6.

⁷⁵ Carol E. Lee, Dion Nissenbaum, Damian Paletta, and Kristina Peterson, “Obama’s Drone-Strike Rules to Be Reviewed,” *Wall Street Journal*, sec. Politics, April 23, 2015, <http://www.wsj.com>.

⁷⁶ Ibid.

suspicious patterns, such as associating with al-Qaeda.⁷⁷ In the signature strike, Lee and Nissenbaum point out that the military makes the decision and the president's approval is not required.⁷⁸ It was a "signature strike" that killed the American hostage Warren Weinstein.⁷⁹ Similarly, Peter Grier calls the entire targeting selection process "vague," Benjamin Friedman calls it a "secret process," and Dylan Matthew cites his colleague Greg Miller: "The administration uses something called the 'disposition matrix' to determine targets for drone strikes"; Miller describes it as a "single, continually evolving database in which biographies, locations, known associates and affiliated organizations are all cataloged."⁸⁰ Ultimately, the process by which U.S. targets are selected for drone attacks has many names and faces many challenges.

The scholars' overarching concern is if the liberties of the individual outweigh the security of the nation or vice-versa. Judge Richard A. Posner argues that "rights should be modified according to circumstance and that we must find a pragmatic balance between personal liberty and community service."⁸¹ Professor Daniel J. Solove argues against piling too many assumptions on either side of that balance, noting that we "do not have to choose security over individual privacy or vice-versa because protecting privacy isn't fatal to security measures; it merely involves adequate oversight and regulation."⁸²

⁷⁷ Arianna Huffington, "'Signature Strikes' and the President's Empty Rhetoric on Drones," *Huffington Post*, July 10, 2013, <http://www.huffingtonpost.com>.

⁷⁸ Lee et al, "Obama's Drone-Strike Rules to Be Reviewed."

⁷⁹ Huffington, "Signature Strikes."

⁸⁰ Peter Grier, "Can Drone Strikes Target US Citizens? Critics Say Rules are Vague," *Christian Monitor*, sec. Politics, February 5, 2013, <http://www.csmonitor.com>; Benjamin H. Friedman, "Drone Policy Must Include Checks and Balances," *U.S. News and World Report*, February 6, 2013, <http://www.cato.org/publications/commentary/dronw-policy-must-include-checks-and-balances>; Dylan Matthews, "Everything You Need to Know about the Drone Debate, in one FAQ," *Washington Post Wonkblog*, March 8, 2013, https://www.washingtonpost.com/news/wonk/wp/2013/03/08/everything-you-need-to-know-about-the-drone-debate-in-one-faq/?utm_term=.a43235db0845. The quote was from Dylan Mathew's colleague, Greg Miller.

⁸¹ Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (London: Oxford University Press, 2006).

⁸² Daniel J. Solove, *Nothing to Hide: The False Trade-off between Privacy and Security* (New Haven, CT: Yale University Press, 2011), <https://www.danielsolove.com/nothing-to-hide>.

D. RESEARCH DESIGN

The purpose of this thesis is to analyze, identify, and propose alternative forums to allow targeted U.S. citizens access to a court-like process involving constitutional protections. Although a military process is currently in place, the function of the proposed alternative forum would be to address what the current military process lacks—due process and transparency. This research explores innovative processes and methodologies that will help strengthen the current procedure or assist in creating a new one. Moreover, the proposed alternative will help ensure that constitutional and procedural safeguards are in place to protect civil liberties.

Policy options analysis (POA) provides a framework for assessing criteria that are important to the foundation of a drone-court system, “to provide greater accountability for drone strikes domestically and internationally.”⁸³ Moreover, the POA serves to evaluate and address the constitutional issues surrounding presidential and judicial authority. Under the assumption that the current policy is flawed or dysfunctional, a POA can help identify and address those flaws. Also, this approach involves looking into the future and making a recommendation based on alternatives. The POA method works well to examine future policy options, while other analysis methods focus on the present. In short, the POA involves taking into consideration different alternatives and recommending those associated with the best outcomes.

The POA approach involves defining the problem, constructing alternative forums, projecting the outcomes, and choosing the best solution. The criteria used within the POA approach to compare and contrast the models include procedural accuracy, the legal differences of the various forums, transparency, speed of decision-making, and judges and legal representation, as well as the procedure for legal review by which each forum is regulated. Each forum is discussed and compared against the status quo.

In Chapter II, the role of FISC as a drone court is explored, along with the structural changes that would need to occur before it could be an effective forum for drone cases. Chapter III examines the OSC as a drone court. The OSC, unlike FISC, does

⁸³ Anna Mulrine, “US ‘Drone Court.’”

not exist and would have to be created by an act of Congress. As part of the OSC's creation, Congress and executive staff would play an increased role in decision-making. In Chapter IV, the Combat Status Review Tribunal is reviewed. The CSRT, unlike FISC, allows the accused to be heard before a judge, but the court structure is a military tribunal. The analysis is presented in Chapter V, followed by conclusions and recommendations in Chapter VI. This policy options analysis provides important, deeper insight into the pivotal issues concerning drone strikes against U.S. citizens in a drone court forum and the prospective role of each court in addressing them.

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II. THE FOREIGN INTELLIGENCE SURVEILLANCE COURT

FISC has been in existence for close to 40 years, and the court's history has not been without controversy. In the beginning, according to Charles Savage and Laura Poitras, the court primarily approved wiretap requests. It has since evolved to “engaging in a [more] complex analysis of the law,” so government agencies can rationalize collecting American's private information, such as emails and phone metadata.⁸⁴ After 9/11, as part of the war on terror, the Bush administration weakened restrictions in the Foreign Intelligence Surveillance Act (FISA), which allowed government agencies to request access to personal information on private citizens such as emails and telephone numbers.⁸⁵ However, the court has established itself as a well-tested forum for guaranteeing procedure for legal review while remaining secretive. Furthermore, the court is a viable option because it is an established legal forum from which prospective drone issues could be heard without a major overhaul to its process.

This chapter examines what is known about the cases brought before FISC, the secrecy surrounding its procedures, the timeframe in which the issues are heard and speed of decision-making, the role and responsibility of FISC judges, and the current procedure for legal review.

A. BACKGROUND

In 1978, Congress established the Foreign Intelligence Surveillance Court under FISA, 50 U.S.C. 1801–1885c, to approve applications for government surveillance.⁸⁶ When Congress established the court, the United States was still in the throes of the Cold War, and “foreign spying, not terrorism, was the main focus.”⁸⁷ According to the FISC website, “The Court sits in Washington, DC, and is composed of eleven federal district

⁸⁴ Charles Savage and Laura Poitras, “How a Court Secretly Evolved, Extending U.S. Spies' Reach,” *New York Times*, sec. Politics, March 11, 2014, http://www.nytimes.com/2014/03/12/us/how-a-courts-secret-evolution-extended-spies-reach.html?_r=1.

⁸⁵ *Ibid.*

⁸⁶ Bill Mears and Halimah Abdullah, “What Is the FISA Court?” CNN, January 17, 2014, <http://www.cnn.com/2014/01/17/politics/surveillance-court/index.html>.

⁸⁷ *Ibid.*

court judges who are designated by the Chief Justice of the United States. Each judge serves for a maximum of seven years and their terms are staggered to ensure continuity on the Court.”⁸⁸ In accordance with FISA, judges rotate one week at a time and have to represent a minimum of seven U.S. judicial circuits.⁸⁹

The court hears cases for a broad range of issues but does not have to share anything with the public. As described on the Electronic Privacy Information Center, FISC’s official website:

FISC has jurisdiction to hear matters pertaining to applications for, and to issue orders [for] authorizing four traditional FISA activities such as electronic surveillance, physical searches, pen/trap surveillance and compelled production of business records. ... Records from FISC hearings are not revealed, even to petitioners challenging surveillance orders under the court rules. The FISC has the discretion to publish its opinions.⁹⁰

In recent years, the court has received increased criticism due to publicly perceived bias and lack of transparency.⁹¹ For example, one of the main criticisms about the court is that it approves the majority of government requests without disclosing its procedure.⁹² This perceived lack of transparency occurred primarily because, when FISC was initially established, it performed wiretaps and later evolved to electronic surveillance and secret bulk collection of personal data on Americans.⁹³

B. EXECUTIVE BRANCH

FISC rarely, if ever, denies a government request for foreign intelligence warrants from such agencies as the CIA, FBI, and National Security Agency (NSA). Conor Clarke affirms this criticism: “A striking feature of proceedings at the Foreign Intelligence

⁸⁸ “United States Foreign Intelligence Surveillance Court, accessed June 3, 2016, <http://www.fisc.uscourts.gov>.

⁸⁹ *Ibid.*

⁹⁰ “Foreign Intelligence Surveillance Court (FISC),” Electronic Privacy Information Center, accessed July 27, 2016, <https://epic.org/privacy/surveillance/fisa/fisc>.

⁹¹ Guiora and Brand, *Establishment of a Drone Court*, 21.

⁹² *Ibid.*

⁹³ Dia Kayyali, “What You Need to Know about the FISA Court—And How it Needs to Change,” Electronic Frontier Foundation, August 15, 2014, <https://www EFF.org/deeplinks/2014/08/what-you-need-know-about-fisa-court-and-how-it-needs-to-change>.

Surveillance Court ... is that the executive always wins.”⁹⁴ Critic Robert D. Fram further asserts that, over the court’s 33-year span and 35,651 requests, only 12 requests have been denied.⁹⁵ Amos N. Guiora and Jeffrey S. Brand corroborate this 99.9 percent approval statistic and attribute it to the fact that FISC is really just an extension of the executive branch.⁹⁶ They further assert that the executive branch controls the information that the secretive court receives, and that judges use when deciding if the same executive branch can pursue surveillance in a given case. Guiora and Brand point out that, while the judges are well meaning, their ability to “search for credible and reliable facts” is inhibited because the hearings are non-adversarial, which means that only one party—in this case, the government—is present, and the defendant is never summoned.⁹⁷

Jennifer Granick and Christopher Sprigman argue that FISC “has a strong practical incentive to find a way to say ‘yes’ to the government.”⁹⁸ They point out that FISC assesses the requests from the various agencies “knowing that the government is heavily committed to mass surveillance already and has been for a long time.”⁹⁹ They further state that this propensity to acquiesce to the executive branch’s requests for surveillance has been illustrated by the administration’s ability to collect, for years, personal data on Americans. Moreover, it has been done without a warrant.¹⁰⁰ Arguably, under FISC, the executive branch—in conjunction with the NSA—has exhibited broad authority to conduct surveillance. For example, during the Bush administration, the NSA implemented the Terrorist Surveillance Program (TSP), which broadened the scope of American data that the government could access.¹⁰¹ The TSP allowed for grand-scale

⁹⁴ Conor Clarke, “Is the Foreign Intelligence Surveillance Court Really a Rubber Stamp? Ex Parte Proceedings and the FISC Win Rate,” *Stanford Law Review*, February 2014, <https://www.stanfordlawreview.org/online/is-the-foreign-intelligence-surveillance-court-really-a-rubber-stamp>.

⁹⁵ Fram, “A Public Advocate for Privacy.”

⁹⁶ Guiora and Brand, *Establishment of a Drone Court*, 17.

⁹⁷ *Ibid.*

⁹⁸ Jennifer Granick and Christopher Sprigman, “The Secret FISA Court Must Go,” *The Daily Beast*, July 24, 2013, <http://www.thedailybeast.com/articles/2013/07/24/the-secret-fisa-court-must-go.html>.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ Guiora and Brand, *Establishment of a Drone Court*, 21.

warrantless surveillance; according to Elizabeth Goitein and Faiza Patel, “After 9/11, Congress passed the Patriot Act to expand the tools available to the government to combat terrorism.”¹⁰² In other words, the TSP was implemented shortly after 9/11 and was instrumental in opening the door for the surveillance of Americans without prior judicial review. This was not the case prior to 9/11.¹⁰³

The administration was challenged on its use of the TSP in *American Civil Liberties Union et al. v. National Security Agency et al.*, 1493 F. 3d 644 (2007).¹⁰⁴ In 2006, the American Civil Liberties Union brought suit against the NSA, alleging that the NSA’s warrantless wiretapping program was unconstitutional. However, in July 2007, the 6th Circuit ruled that the plaintiffs had no standing to sue because “they could not state with certainty that they had been wiretapped by the NSA. The case went to the Supreme Court in February 2008, but the court declined to review the challenge.”¹⁰⁵ In other words, the substantive issue was never decided.¹⁰⁶ The TSP persists, yet its method of operation has not been sanctioned by a court of review.

C. LEGAL/PROCEDURAL ISSUES

This section examines what is known about the type of cases the FISC court reviews, the lack of transparency in which it operates, the timeliness of the process, the role and responsibility of FISC judges, and the current procedure for legal review.

¹⁰² Elizabeth Goitein and Faiza Patel, “What Went Wrong With The FISA Court,” Brennan Center for Justice at New York University School of Law, March 18, 2015, <https://www.brennancenter.org/publication/what-went-wrong-fisa-court>; Patriot Act granted broader spying authorities to the government than had existed before.

¹⁰³ *Ibid.*

¹⁰⁴ *The American Civil Liberties Union, et. al., v. National Security Agency, et.al*, 493 F. 3d 644, (2007), <https://www.justice.gov/osg/brief/aclu-v-nsa-opposition>. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism* (U.S. Patriot Act of 2001, Public Law 107-56); “Surveillance Under The Patriot Act,” American Civil Liberties Union, accessed December 9, 2016, <https://www.aclu.org/infographic/surveillance-under-patriot-act>.

¹⁰⁵ “ACLU v. NSA—Challenge to Warrantless Wiretapping,” American Civil Liberties Union, last modified September 10, 2014, <https://www.aclu.org/cases/aclu-v-nsa-challenge-warrantless-wiretapping?redirect=national-security/aclu-v-nsa-challenge-illegal-spying>.

¹⁰⁶ *Ibid.*

1. Transparency

Over the years, FISC has become increasingly complicated; the court has grown beyond the boundaries for which Congress originally envisioned it. According to Dia Kayyali, FISC's expansion has created a massive body of "secret policy and legal precedent."¹⁰⁷ She explains:

The court is no longer simply approving applications but regularly assessing broad constitutional questions ... [that establish] important judicial precedents with almost no public scrutiny. What Congress originally authorized...was an expedited system of approving individualized warrants for foreign surveillance of specified individuals—much like what regular magistrate judges do with warrants now, with safeguards built for the national security context.¹⁰⁸

In other words, FISC's role was to approve applications for warrants, not to adjudicate.

Along this same line, former NSA contractor Edward Snowden revealed the FISC's approval of NSA metadata collection.¹⁰⁹ Mears and Abdullah state that the government approved metadata collection from Verizon, Apple, Google, and other internet giants.¹¹⁰ In the process of approving the collection of what could be argued as personal information, the judges went beyond their original mission to issue orders for surveillance—they delved into the personal and private information of the public at large, such as detailed phone records. As a result, when judges go beyond their original mission, as Mears and Abdullah describe it, they are "reinterpreting the Constitution."¹¹¹ In other words, FISC judges were authorized to approve surveillance and ended up expanding their own authority by approving the government's secret collection of private information.¹¹² The problem with FISC is that the Constitution, as well as the

¹⁰⁷ Kayyali, "What You Need to Know about the FISA Court."

¹⁰⁸ Ibid.

¹⁰⁹ Mears and Abdullah, "What Is the FISA Court?"; National Information Standards Organization, *Understanding Metadata* (Bethesda, MD: NISO Press, 2004), <http://www.niso.org/publications/press/UnderstandingMetadata.pdf>, supra, Metadata is data that describes information about other data.

¹¹⁰ Mears and Abdullah, "What is the FISA Court?"

¹¹¹ Ibid.

¹¹² Ibid.

constitutional limits of privacy and due process, are malleable under the judges' discretion.¹¹³

Furthermore, according to Stanley, unlike most courts, FISC lacks the administrative capacity to issue violations, but it can issue orders that are part of the government's application process. To illustrate, FISA is not an "administration agency like the [Environmental Protection Agency] or [United States Department of Agriculture] that have inspectors on the ground (e.g., issue violations) able to watch over an operation and verify first-hand exactly what is taking place."¹¹⁴ Moreover, in a traditional court, a judge requires the parties to report back on efforts to comply with a court order, or the judge relies on an aggrieved party to bring to his or her attention to the other party's failure to comply. This is not, however, the case with FISC; it neither issues citations nor has an aggrieved party reporting back to them on the other party's failure to comply. As a result, FISA has no idea if the FBI or NSA is complying with its orders, because the orders go into a "black hole."¹¹⁵ For example, when FISC allowed the NSA to obtain metadata, which went beyond "the original scope of authorized [metadata] acquisition [order]," FISC was unaware that the NSA had not complied with the previously agreed-upon FISC order.¹¹⁶ On the other hand, Stanley argues that black holes are not as much an issue in an adversarial proceeding, "where the aggrieved party will notify the judge if the court's orders are not being followed."¹¹⁷ Stanley further states that the NSA has been doing this for years and has a very poor record of complying with FISC court orders.¹¹⁸

¹¹³ Ibid.

¹¹⁴ Jay Stanley, "FISA Court's Problems Run Deep and More Than Tinkering Is Required," American Civil Liberties Union, November 21, 2013, <https://www.aclu.org/blog/fisa-courts-problems-run-deep-and-more-tinkering-required>.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

FISC's overall system lacks the transparency critical to increasing the public's awareness of how the court functions. In response to this concern, Congress initiated an inquiry concerning potential changes to the FISC's law and practice.¹¹⁹

Judge John D. Bates, the former presiding judge for FISC, responded with a letter to Senator Dianne Feinstein, chair of the Senate Intelligence Committee.¹²⁰ In letter, he discussed several points and opposed the court's need to become more transparent through public disclosure, arguing that further public disclosure would only increase the public's confusion.¹²¹ He explains that such disclosure is "not likely to enhance the public's understanding of FISA's implementation and that the release of freestanding summaries of court opinions [is] likely to promote [public] confusion and misunderstanding."¹²²

Overall, while FISC's proceedings are shrouded in secrecy, the rules governing the proceedings, such as FISC's Rules of Procedure, are publicly available. Moreover, the public has access to the FISC Proceedings on the FISC website.¹²³

2. Timeliness

FISC's Rules of Procedure "are promulgated pursuant to 50 U.S.C. 1803(g), govern all of the court's proceedings."¹²⁴ The rules are straightforward concerning the manner and timeframe in which proceedings should occur. For example, Rule 9, Time and Manner of Submission of Applications, states:

(a) Proposed Applications. Except when an application is being submitted following an emergency authorization pursuant to 50 U.S.C. §§ 1805(e), 1824(e), 1843, 1881b(d), or 18 81 c(d) ("emergency

¹¹⁹ "Former FISA Court Judge Outlines Views on FISA Reform," Dianne Feinstein: United States Senator for California, January 14, 2014, <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=33e2b15e-e4ae-4e5b-a147-fed5c5a431d4>.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ "Rules of Procedure: Effective November 1, 2010," United States Foreign Intelligence Survey Court, accessed December 9, 2016, <http://www.fisc.uscourts.gov/sites/default/files/FISC%20Rules%20of%20Procedure.pdf>.

¹²⁴ Ibid., "Rule 9. Time and Manner of Submission of Applications."

authorization”), or as otherwise permitted by the Court, proposed applications must be submitted by the government no later than seven days before the government seeks to have the matter entertained by the Court. Proposed applications submitted following an emergency authorization must be submitted as soon after such authorization as is reasonably practicable.¹²⁵

Another provision under 50 U.S.C. 1805(e), Emergency Orders, is related to the seven-day timeframe in which a procedure is to be performed. The language is more subjective because the attorney general is able to alter the speed of procedures based upon his or her determination. As an illustration, 50 U.S.C. 1805(e) reads:

The Attorney General may authorize specific emergency employment of electronic surveillance if the Attorney General “reasonably believes” that an emergency exists, “reasonably determines” that a factual basis exists for the emergency order, he subsequently can inform the judge of the decision made, and the Attorney General makes an application ... as soon as practicable, but not later than seven days after the authorization for the surveillance by the Attorney General.¹²⁶

The statute also reads, “When the application for the order is denied, or after the expiration of seven days from the time of authorization by the Attorney General, whichever is earliest ... the Attorney General still has the authority to assess compliance.”¹²⁷

Because FISC operates under established processes and procedures, it could be argued that FISC’s timeframes are reasonable and sufficient. As an illustration, the FISC emergency order uses the seven-day window for making immediate decisions if, according to the statute, the attorney general “reasonably determines that an emergency exists,” or if the judge determines there is probable cause for an order.¹²⁸ However, there are challenges concerning the timeframe in which judges can adequately review each case.

¹²⁵ Ibid.

¹²⁶ *The Rules of Procedure for the Foreign Intelligence Surveillance Court*, 50 U.S.C., 1805(e), <https://www.law.cornell.edu/uscode/text/50/1805>.

¹²⁷ Ibid., (e) Emergency Orders.

¹²⁸ Ibid., (e) Emergency Orders, (b) Determination of Probable Cause.

While FISC may have established procedural rules to ensure timeliness of the process, one area that may challenge timeliness pertains to the rotational basis on which FISC judges work. Arguably, the lack of continuity could interfere with the judges' ability to have the requisite time to review and become familiar with the intricacies of each prospective case. In response to Senator Patrick J. Leahy's inquiry concerning FISC operations, Judge Bates stated that the judges have the support of other attorneys and legal staff to assist in evaluating applications.¹²⁹ However, Bates points out that "at the discretion of the presiding judge, some of the court's more complex or time-consuming matters are handled by judges outside of the duty-week system."¹³⁰ In short, a problem with FISC concerning timeliness of the process centers on if the assigned judges have sufficient time and opportunity to review, to evaluate applications or cases, and to perform these tasks.

3. Judges and Legal Representation

According to Judge Reggie B. Walton, the role of FISC judges and the staff is to make determinations. The determinations are based on factors such as whether or not the applications reviewed and evaluated have met the statutory legal requirements for a "proposed application for an order for surveillance, or similarly related FISC activity."¹³¹ Walton acknowledges that additional legal responsibilities, as part of the process are to seek additional information, and clarity, if needed. Walton further asserts that once the initial contact is made, the staff attorney drafts a written analysis and points out any application issues. Subsequently, the judge then reviews the proposed application in light of the attorney's analysis.¹³²

Walton points out that even though the attorney plays a pivotal role in assisting the FISC judge, the judge still has a great deal of discretion in determining ifnan

¹²⁹ Honorable Reggie B. Walton, letter to Honorable Patrick Leahy, July 29, 2013, <http://www.fisc.uscourts.gov/sites/default/files/Correspondence%20Leahy-1.pdf>.

¹³⁰ Ibid.

¹³¹ Ibid., 2.

¹³² Ibid.

application will be approved.¹³³ Walton affirms this by referring to the rules, which state in part,

In conjunction with its submission of a final application, the government has the opportunity to request a hearing, even if the judge did not otherwise intend to require one ... if the judge schedules a hearing, the judge decides whether to approve the application thereafter. Otherwise, the judge makes a determination based on the final written application submitted by the government.¹³⁴

Overall, based on Judge Walton's assessment of their current role, FISC judges have broad discretion to accept or deny the applications brought before them.¹³⁵ However, suggested congressional reform to the court's status quo may be a challenge for some of the judiciary, as explained by Judge Bates in his letter to Senator Dianne Feinstein.¹³⁶

Bates claims that suggested changes would increase the court's work. Even with increased resources in finances, personnel, and such, Walter explains that increases would be logistically problematic for the court's operations. Bates states that these changes will be "disruptive to the court's ability to perform their duties, including responsibilities under FISA and the Constitution to ensure that the privacy interests of United States citizens and others are adequately protected."¹³⁷ For example, FISC would have to undergo structural changes, such as increasing the number of applications the judges will have to review, even if additional personnel are brought aboard. Judge Bates concludes by stating that such changes would drastically transform the foundation of FISC "to the detriment of its current responsibilities."¹³⁸ Arguably, the FISC judges prefer the status quo, in contrast to any prospective FISC reform bills that could be introduced by Congress.

¹³³ Ibid., 3.

¹³⁴ FISC Rules of Procedures; see Honorable Reggie B. Walton, letter to Honorable Patrick Leahy, 2.

¹³⁵ Ibid., FISC Rules of Procedure, Rule 9(a) and (b).

¹³⁶ Ibid.; "Former FISA Court Judge Outlines Views on FISA Reform," Dianne Feinstein.

¹³⁷ Ibid.

¹³⁸ Ibid.

4. Procedure for Legal Review

The procedure for legal review under the current FISC is very narrow in scope; presently, FISA court judges “weigh the reliability of intelligence information in determining whether to grant government ex-parte requests for wire-tapping warrants.”¹³⁹ To illustrate, ex-parte proceedings occur when only one side is present, typically the government. The NSA and FBI often go before a FISC judge, in ex-parte proceedings, to obtain orders for surveillance.¹⁴⁰ Because of the ex-parte nature of the review, those who are the targets of the surveillance are not only unaware, but they also lack legal representation at this proceeding and, thus, the ability to challenge the application.

While it could be argued that the ex-parte proceeding falls short of providing a safeguard for protecting procedural due process (e.g., the right to an attorney), Bates disagrees. He argues that having an advocate “would not create a true adversarial process” (i.e., involving opposing parties) and that such appointment (i.e., through congressional reform) would not be “constructive in helping the court to assess the facts.”¹⁴¹ In his letter to Senator Feinstein, he states:

The participation of a privacy advocate is unnecessary and could prove counter-productive in the vast majority of FISA matters, which involve the application of a probable cause or other factual standard to case-specific facts and typically implicate the interests of few persons other than the specified target. Given the nature of FISA proceedings, the participation of an advocate would neither create a truly adversarial process nor constructively assist the Courts in assessing the facts, as the advocate would be unable to communicate with the target or conduct an independent investigation.¹⁴²

Bates further asserts his ambivalence on having an advocate for FISC, stating “advocate involvement in run-of-the-mill FISA matters would substantially hamper the work of the

¹³⁹ Amos N. Guiora, *Targeted Killing: When Proportionality Gets All out of Proportion* (Salt Lake City: University of Utah, 2013), <http://ssrn.com/abstract=2230686>.

¹⁴⁰ *Ibid.*

¹⁴¹ “Former FISA Court Judge Outlines Views on FISA Reform,” Dianne Feinstein; Mike Masnick, “FISA Court Judges Say They Don’t Want Any Changes to How the Rubber Stamp Court Is Run,” *Techdirt*, January 15, 2014, <https://www.techdirt.com/articles/20140115/09241725885/fisa-court-judges-say-they-don-t-want-any-changes-o-how-the-rubber-stamp-court-is-run>.

¹⁴² *Ibid.*

Courts without providing any countervailing benefit in terms of privacy protection or otherwise.”¹⁴³ Bates concludes by stating that “indeed, such pervasive participation could actually undermine the Courts’ ability to receive complete and accurate information on the matters before them.”¹⁴⁴ In other words, there may be a flaw in FISA’s procedures, but if the status quo were to change, this change could prevent the court from operating as it should.

According to Stanley, whether FISC has an ex-parte proceeding or not, the court will still have problems. Stanley states that appointing an advocate will not help a court, which lacks the “administrative capability to have boots-on-the-ground verification of its rulings.”¹⁴⁵ It could be argued, whether or not the court has ex-parte or advocate (adversarial) proceedings, it still lacks the capacity to verify if an agency, such as the NSA, has complied with the rulings.

D. CONCLUSION

FISC has many years of experience on which to build pertaining to how a court should operate, even if the court operates in a shroud of secrecy and the public lacks understanding about its functions. Furthermore, because the judges rotate on a regular basis, it is unclear how timely the processes and procedures are for issuing orders, making decisions, and for determining if agencies are complying with the orders. Moreover, the judges’ decisions must be made immediately, which means they may not be sufficiently deliberated or vetted. In addition, the procedure for legal review is lukewarm because the burden of proof for FISC is low. Before the court approves an order, it relies on the evidence of the FBI, CIA and NSA on the justification for the order. Also, the procedure is ex-parte concerning the requests; only the government comes before the court to discuss what the government should do.

Ultimately, all of these procedures are shrouded in a problematic canopy of secrecy. But, in spite of its flaws, FISC has been advantageously standing and

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Stanley, “FISA Court’s Problems Run Deep.”

functioning as an agency for close to 40 years. FISC has a structure in place, in which a hearing—though one sided—can be held; judges are established, and federal procedural guidelines are in place. The disadvantage is that FISC’s current structure is flawed and lacks procedural safeguards concerning a target’s right to notice and legal representation when they are subject to surveillance. FISC has the potential for becoming a stronger and more transparent institution. These improvements could take place through congressional reform or an act of Congress.¹⁴⁶ If nothing more, FISC is a good model of how a court should not operate.¹⁴⁷

¹⁴⁶ “Former FISA Court Judge Outlines Views on FISA Reform,” Dianne Feinstein.

¹⁴⁷ Guiora and Brand, *Establishment of a Drone Court*, 4.

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III. THE OPERATIONAL SECURITY COURT (OSC)

This chapter discusses the Operational Security Court (OSC). The OSC is a theoretical court conceived by Amos Guiora and Jeffrey Brand.¹⁴⁸ If established, the proposed OSC forum would review drone cases solely. Moreover, the OSC would involve itself in the drone decision cycle before the determination is made. For the OSC to become a reality, it would have to be established, according to Bill West, by an act of Congress.¹⁴⁹ Building the court from the ground up provides a unique opportunity to address due-process concerns associated with the current model, the role of the executive branch in the decision-making process, and the need for congressional oversight to increase transparency and awareness of the process.¹⁵⁰

One of the problems this chapter addresses is *when* the executive branch should make a determination on targeting the terrorist suspect. For example, Guiora and Brand argue that the executive branch should have supporting documentation to substantiate the decision before the actual targeting occurs. This chapter also addresses other issues related to the OSC, such as its interaction with the executive branch, transparency, timeliness of the process, the Sixth Amendment right to confront and cross-examine witnesses, and the right to legal representation as well as to procedure for legal review.¹⁵¹

A. BACKGROUND

Guiora and Brand have recommended the creation of a court designed especially for the purpose of hearing drone-targeting cases—to review executive branch intelligence information before a determination is made to target a U.S. citizen.¹⁵² The court’s fundamental function would be to analyze and assess the information *prior to* the execution of a targeted attack “in order to determine whether the planned attack comports

¹⁴⁸ Guiora and Brand, *Establishment of a Drone Court*, 25.

¹⁴⁹ West, “National Security Court.”

¹⁵⁰ Shane, “Debating a Court to Vet Drone Strikes.”

¹⁵¹ Guiora and Brand, *Establishment of a Drone Court*.

¹⁵² Shane, “Debating a Court to Vet Drone Strikes,” abstract.

with judicial standards and criteria.”¹⁵³ In other words, the intelligence information that is used to justify the targeting of U.S. citizens must be substantiated through judicial review. Guiora and Brand’s “hypothetical fact scenario” is used in this thesis to illustrate how the court will work.¹⁵⁴

The role of the OSC is initiated when a U.S. target who has been under surveillance moves toward enacting a terror plot. In other words, based on intelligence, he or she is in the final stages of the planning process. Once the individual is identified as a “legitimate target,” the executive branch “orders the CIA and the Department of Defense to make necessary arrangements for a drone attack at the earliest feasible opportunity.”¹⁵⁵ Also at this stage, the executive branch will “notify” the OSC and request a hearing.¹⁵⁶

Those who will attend the OSC hearings include the target’s counsel, who has received clearance to view classified information, and a tribunal of judges, who will immediately schedule the hearing.¹⁵⁷ Additionally, if the judges from the district court and the court of appeals are not in physical proximity to the hearing, the hearing will be conducted through secured, closed-circuit channels.¹⁵⁸ At the trial, a senior official from the Department of Defense or another designated agency will present *all* relevant intelligence against the target.¹⁵⁹ Intelligence analysts and senior operational commanders will be “subject to cross-examination by the target’s attorney.”¹⁶⁰ Each side will have an opportunity to “fully present their respective cases,” although the target is

¹⁵³ Ibid., 24.

¹⁵⁴ Guiora and Brand, *Establishment of a Drone Court*, 33.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid. “The burden of proof is the duty of one party in a legal case to convince the decision-maker (judge and/or jury) that their version of the facts is true. The burden of proof is carried by the plaintiff in civil trials and the prosecution in criminal trials. The burden of proof is much greater in criminal trials than it is in civil trials, largely because there is much more at stake- like the defendant’s liberties in a criminal trial.” See “Burden of Proof,” Criminal Lawyer Source, accessed December 9, 2016, <http://www.criminal-law-lawyer-source.com/terms/burden-proof.html>.

¹⁶⁰ Guiora and Brand, *Establishment of a Drone Court*, 33.

arbitrarily assigned counsel without his or her knowledge. As a result, even though the attorney appears and tests the evidence presented against the target, the target is unaware that the proceedings are even occurring and plays no role in them.¹⁶¹ While the hearing will not be open to the public, the rulings will be publicly available if the information is unclassified. Rulings containing classified information will be redacted.¹⁶²

The OSC will use a standard known as the “Operational Strict Scrutiny standard.”¹⁶³ Under this standard, the court determines the reliability of the intelligence and the information submitted against the target, as well as if there is “corroborating evidence” to justify the decision to kill the target with a drone strike.¹⁶⁴ In addition, the OSC drone court will have an appellate division for appeals if the target’s attorney wants to challenge the OSC’s decision.¹⁶⁵

One problem with the OSC is that it does not include the target in the evidentiary process. Specifically, the target is not allowed to attend the hearing. The lawyer represents the target, even though the target is absent and therefore unable to confront or challenge coerced governmental evidence that may be brought against him.¹⁶⁶ In short, the lawyer can attend the hearing and confront and challenge evidence, but, under the proposed OSC process, the target has no role in the proceedings. Stephen I. Vladeck believes this lack of procedural protection for the target is “controversial,” stating that even evidence that has been attained by governmental coercion may be used against the

¹⁶¹ Ibid., 26.

¹⁶² Ibid., 33.

¹⁶³ The OSC uses the “Strict Scrutiny standard which is a form of judicial review that courts use to determine the constitutionality of certain laws. To pass strict scrutiny, the legislature must have passed the law to further a “compelling governmental interest (government able to regulate or manage matter). For a court to apply strict scrutiny, the legislature must either have significantly abridged (e.g., deprived) a fundamental right (e., Fifth and Sixth Amendment) with the law’s enactment or have passed a law that involves a suspect classification. Suspect classifications have come to include race, national origin, religion, alienage, and poverty.” See “Strict Scrutiny,” Legal Information Institute, accessed December 9, 2016, https://www.law.cornell.edu/wex/strict_scrutiny.

¹⁶⁴ Guiora and Brand, *Establishment of a Drone Court*, 33.

¹⁶⁵ Ibid., 34.

¹⁶⁶ Ibid., 24.

target.¹⁶⁷ Guiora and Brand agree that while a hypothetical OSC may be one approach to addressing issues concerning the role of the executive branch, the court still needs to overcome the hurdles of transparency, speed of decision-making, the role of the judges and legal representation, as well as the legal and procedural review.¹⁶⁸

B. EXECUTIVE BRANCH

One of the issues to be addressed by the OSC is the executive branch's role in making determinations concerning targeted drone strikes. While Guiora and Brand champion the independence of the executive branch and state their awareness of the "difficult task of reining in executive authority," they point out the need for oversight during the process.¹⁶⁹ In short, when it comes to the role of the executive branch's role, some type of oversight needs to be established to increase transparency and awareness of the process, such as through judicial review. However, critics such as Steven Vladeck disagree with this approach. Vladeck argues that the OSC structure, which allows for judicial review of executive branch decisions prior to any executed targeted drone strikes, is precarious.¹⁷⁰ Vladeck asserts, "if one accepts that the Constitution confers any unilateral military power upon the Executive Branch, a proposal that would prevent uses of such power until and unless a federal judge signs off, is problematic on constitutional and practical grounds."¹⁷¹ Arguably, Vladeck defends the president's authority to act independently of other branches in order to protect our nation in times of national crises.¹⁷² Guiora and Brand refute Vladeck's argument, countering that confidence in the executive branch is the "real issue"; if there are no checks to the executive branch's

¹⁶⁷ Stephen I. Vladeck, "The Case against National Security Courts," *Articles in Law Reviews & Other Academic Journals*, no. 98: 513.

¹⁶⁸ Guiora and Brand, *Establishment of a Drone Court*, 26.

¹⁶⁹ Jeffery S. Brand, Amos Guiora, and Steven Barela, "Drone Court Proposal: A Response to Professor Vladeck," *Global Justice*, December 18, 2014, <https://www.law.utah.edu/a-response-to-professor-vladeck>.

¹⁷⁰ Steven I. Vladeck, "Drone Courts: The Wrong Solution to the Wrong Problem," *Just Security*, December 2, 2014, <https://www.justsecurity.org/17914/drone-courts-wrong-solution-wrong-problem>.

¹⁷¹ *Ibid.*

¹⁷² Steven J. Barela, "The Imperative of a 'Drone Court,'" *Just Security*, October 28, 2015, <https://www.justsecurity.org/27155/imperative-drone-court>.

decision-making, the targeted killing process puts into question the basis upon which the decision was made.¹⁷³

C. LEGAL/PROCEDURAL ISSUES

This section examines what is known about the type of cases the OSC court reviews, the lack of transparency in which it operates, the timeliness of the process, the role and responsibility of the OSC judges, and the procedure for legal review currently used.

1. Transparency

Such scholars as Joel H. Rosenthal have expressed that there is a lack of clarity (from the government) concerning what is the applicable legal interpretation for a drone court like the OSC: Are the drone activities to be tried under the law of armed conflict or under the criminal justice system?¹⁷⁴ Glenn Sulmasy, a proponent of the OSC, states in part, “the military is constantly changing tactics and adapting to be able to know how best to combat the enemy. Although the fight against al Qaeda and international terrorism involve the use of the American military, unlike prior conflicts, the so-called ‘war on terror’ now involves the FBI, the CIA, and even local law enforcement.”¹⁷⁵ Rosenthal argues that the government needs to be more transparent.¹⁷⁶ On one hand, “the current administration has aligned with the criminal justice model while distancing itself from the war on terror language and from trying 9/11 suspects in civil court.”¹⁷⁷ On the other hand, by “engaging in executive action to drone target and kill enemies of the state,

¹⁷³ Amos N. Guiora, Jeffrey S. Brand and Steven J. Barela, “The Specific Parameters of Our Proposal,” <https://www.law.utah.edu/a-response-to-professor-vladeck>.

¹⁷⁴ For purposes of this thesis the OSC’s lack of transparency is discussed in light of Rosenthal’s argument. See Joel H. Rosenthal, “Drones: Legal, Ethical, and Wise?” Carnegie Council for Ethics in International Affairs, March 19, 2013, http://www.carnegiecouncil.org/people/data/joel_h__rosenthal.html. Rosenthal discusses problems with transparency in general.

¹⁷⁵ Glenn Sulmasy, “The Need for a National Security Court System,” *Journal of Civil Rights and Economic Development* 23, no. 4 (March 2009): Article 5, scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1053&.

¹⁷⁶ *Ibid.*; Rosenthal, “Drones: Legal, Ethical, and Wise.”

¹⁷⁷ *Ibid.*

President Obama has embraced the core doctrine of the war approach, which bypasses the legal due process of the criminal justice system.”¹⁷⁸

It could be argued that the OSC is a middle ground between the two competing frameworks to which Rosenthal makes reference. For example, while the OSC adheres to the processes and procedures of criminal procedure, etc., in a court of law, there is a provision, according to Guiora and Brand, in which the executive branch has an “exemption to the requirement of prior judicial approval of lethal drone strikes.”¹⁷⁹ In other words, the executive branch can “bypass procedural due process and engage in executive action to target a U.S. citizen.”¹⁸⁰ Rosenthal states that this criminal–war dichotomy arises from a nebulous connection between law enforcement and warfare.¹⁸¹ Arguably, the lines are blurred between the government trying the target in a criminal court of law, or bypassing procedural due process and engaging in executive action to target a U.S. citizen.

In light of a concern pertaining to executive drone strikes, Guiora and Brand assert that the OSC’s goal is to require the executive branch to produce the intelligence data that supports a planned drone strike. The OSC’s primary role will be to examine and evaluate the executive branch’s data *prior* to the execution of a drone strike. Such evaluations will help ensure transparency, and that the decision has been made in compliance with established judicial safeguards.¹⁸² Arguably, transparency is paramount in the OSC and it is crucial that established processes and procedures are in place.

2. Timeliness

One of the OSC’s biggest challenges is ensuring that structures are in place to protect the target’s right to be heard in a timely manner. In other words, the challenge is

¹⁷⁸ Ibid.

¹⁷⁹ Guiora and Brand state that such exception must be “under very unique and limited circumstances of a narrowly defined ‘imminent threat’ to the national security.” Guiora and Brand, *Establishment of a Drone Court*, 5.

¹⁸⁰ Rosenthal, “Drones: Legal, Ethical, and Wise.”

¹⁸¹ Ibid.

¹⁸² Guiora and Brand, *Establishment of a Drone Court*, 5.

to prevent the drone strike from occurring until the OSC has an opportunity to deliberate and make a decision. Vladeck not only has constitutional concerns in reference to prior judicial review of the executive branch’s decision-making authority, but that such requirement would also put undue pressure on OSC judges. The judges may have insufficient notice and time to adequately vet the decision. Vladeck states that “part of why such an approach is problematic and raises constitutional concerns ... is that the prior judicial approval would place pressure on the OSC judges to sign off on cases on which they have doubt.”¹⁸³

Vladeck likens this dilemma to law enforcement’s use of force for self-defense. He points out the “impossibility of requiring a law enforcement officer to obtain judicial review before they use lethal force in self-defense or for a third party.”¹⁸⁴ Vladeck argues that the need to obtain prior judicial review is circumspect “since the entire legal question turns on what was actually true in the moment, as opposed to what might have been predicted to be true in advance. Without such facts, are judges really going to tie the Executive Branch’s hands?”¹⁸⁵ In response to Vladeck’s argument, Guiora and Brand state that the role of the OSC is not to “supplant the executive branch’s decision-making in determining whether a particular drone strike is warranted,” but to make sure that there is a proper balance between the roles of the judicial and executive branches.¹⁸⁶

3. Judges and Legal Representation

The OSC will make a selection of “current” sitting federal judges, according to Guiora and Brand, from “diverse judicial backgrounds”¹⁸⁷ The judges will be evenly distributed—twelve will be from the district courts and twelve from the court of appeals, and each will serve a four-year term.¹⁸⁸ If a judge is selected to work in the OSC, their prior roles and responsibilities will be adjusted so that the OSC responsibilities can be

¹⁸³ Vladeck, “Drone Courts.”

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ Guiora and Brand, *Establishment of a Drone Court*, 24.

¹⁸⁷ *Ibid.* 25.

¹⁸⁸ *Ibid.*

added to their prior judicial duties.¹⁸⁹ Also, the role of the judiciary under the OSC will not only be to oversee court hearings about a drone target, but also to be responsible for reviewing intelligence submitted by the executive branch.

Once the government has determined a target, the OSC is subsequently notified by the executive branch to hold a hearing.¹⁹⁰ The attorney, who is representing the target *in absentia* (i.e., the target is being represented by the attorney, in his absence) will have an opportunity to review and cross-examine those who brought evidence against the target, such as “government intelligence analysts.”¹⁹¹ Additionally, the hearing will be closed to the public.¹⁹² If the government meets its burden, the targeting proceeds, or the matter can be appealed.¹⁹³ However, the target is summarily assigned counsel without his or her knowledge. Moreover, even though the attorney appears and challenges the evidence presented against the target, the target is unaware that the proceeding is taking place, and is absent from the process.¹⁹⁴ Arguably, the need for judicial oversight of the executive branch’s role in the drone process and the executive branch’s need to protect the nation’s security is a balancing of interests. Such decisions will need to be made on a case-by-case basis to ensure that the executive branch’s actions are not overbroad, and to ensure that the judiciary process does not hinder the president’s authority to protect the nation against threats.¹⁹⁵

The judges in the OSC, according to Guiora and Brand, have two primary functions: to ensure that the target is represented—although it “falls far short of the standard envisioned by the Confrontation Clause”—and to substantiate the evidence brought by the executive branch against the target.¹⁹⁶ In sum, it could be argued that the OSC addresses two of the most critical needs concerning the drone targeting of U.S.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid., 33.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid., 26.

¹⁹⁵ Ibid., 28.

¹⁹⁶ Ibid., 27.

citizens: internal structures have been established from which the target has a right to due process, and the method by which a determination is made to release the drone is transparent. Moreover, the OSC judges are federal judges and experts at reviewing the intelligence information and making rational decisions based upon the available facts.¹⁹⁷ It could be argued that they are legally and technically equipped to do the job.

4. Procedure for Legal Review

In the hypothetical OSC, Guiora and Brand explain that the court will not only resemble an intimate part of our Article III judicial system, but it will be a reflection of our core values: symbolizing a court that is independent and far from the influence of outside forces, as well as a court that functions with transparency. Furthermore, the OSC will be a forum in which the target is afforded right to counsel and an opportunity for the target's counsel to examine the veracity of the facts, as well as the evidence brought before the court.¹⁹⁸

Article III courts are rooted in constitutional and legal tradition. Vladeck affirms this, explaining that, as part of the established American judicial system, we have “the right to confront witnesses under the sixth amendment’s confrontation clause; the exclusion of hearsay evidence and evidence obtained through coercion; the right to self-representation; and the right to a trial by a jury of the defendant’s peers.”¹⁹⁹ However, because the OSC rules are somewhat relaxed, according to Guiora and Brand, the OSC would not be a duplicate of an Article III court.²⁰⁰ For example, they state that the OSC rules do not allow the target the right to confront witnesses, although he will have legal counsel to challenge the witnesses for him.²⁰¹ Furthermore, there is no right to a jury trial, nor is the trial open to the public.²⁰² Additionally, they point out that coerced

¹⁹⁷ Ibid., 26.

¹⁹⁸ Ibid., 23.

¹⁹⁹ Vladeck, “Case against Operational Security Courts,” 514.

²⁰⁰ Guiora and Brand, *Establishment of a Drone Court*, 26.

²⁰¹ Ibid.

²⁰² Ibid.

governmental evidence may be used against the target, this arguably violates the the Sixth Amendment Confrontation Clause, which prevents the admission of hearsay.²⁰³

The notion upon which the OSC will be established is to ensure that the target has a right to due process and to ensure that such procedural safeguards are in place, although there are flaws in this procedure according to Guiora and Brand.²⁰⁴ One of the OSC's strengths is that the target's attorney will have access to the military expertise needed to decipher the intelligence data used in the hearing.²⁰⁵ Guiora and Brand expound on this point by stating that "counsel for the target would have access to military experts designated by the court who would brief counsel as necessary concerning the meaning and content of the intelligence reports."²⁰⁶ Guiora and Brand acknowledge that the OSC's approach to incorporating the Sixth Amendment is "not perfect," but the system is a "workable process given the context of the court's processes" and is "continually in the process of being developed."²⁰⁷

In short, in using the OSC as a model, admittedly, the court has procedures that would not pass "constitutional muster in a federal district court criminal proceeding."²⁰⁸ In other words, this is how the court will function, but it will not be without challenges.

D. CONCLUSION

In their OSC proposal, Guiora and Brand attempt to address the concerns pertaining to U.S. citizens deemed terrorist suspects and targeted for lethal drone attacks, but are neither provided an opportunity to be heard nor given notice that they are the subject of a drone strike decision. The OSC procedure falls short of clarifying the dichotomy between armed conflict and criminal justice.

²⁰³ Ibid., 26–7.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid., 26.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

One challenge to the OSC's judicial structure is that the judges rotate. The judges' ongoing rotations may be problematic in that continuity of facts, information familiarity with the cases and its nuances, etc., may be lost if the judge has to "rotate out" before he or she has had an opportunity to hear the case while the law and facts are still fresh in mind. On the contrary, the ongoing judicial rotations could be instrumental in preventing rulings based on bias. In other words, as Guiro and Brand point out, the judges will not become ossified or stale with the case nor the facts if they are rotated on an ongoing basis.

Details about the timeliness of the OSC process were vague in reference to "when" particular procedures occur in the process, after the executive branch has notified the OSC to request an immediate hearing. For example, there are no timeframes describing when the target's attorney comes aboard, nor when the judges are scheduled to participate in hearings.²⁰⁹ It could be argued, however, that the more immediate a threat, the greater the need for a quick decision. It remains unclear what steps are required to ensure that the decision has been properly vetted and if it has been executed in a timely manner. However, the procedure for legal review was strong in detail.

A challenge with the OSC is that constitutional procedural protections such as the right to a hearing, the right to confront witnesses, and the right to a public trial are not included in the OSC model. As discussed previously, the target has right to counsel in this forum, but not a right to be at the hearing, nor the right to personally confront and cross-examine evidence that may be brought against him. The target's attorney being apprised of the intelligence data and able to confront or cross-examine on behalf of the target does not go far enough to address these constitutional challenges.

²⁰⁹ Ibid.

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IV. THE COMBATANT STATUS REVIEW TRIBUNALS

The DOD created the CSRT following the Supreme Court's ruling in *Hamdi v. Rumsfeld*, and on July 7, 2004, "the U.S. government established the CSRT process at Guantanamo Bay Naval Base in Cuba."²¹⁰ Even though the Court found that Hamdi was guaranteed due process as a U.S. citizen, it was argued that, as a citizen, he should have been given a "meaningful opportunity to contest the factual basis for that detention before a neutral decision maker."²¹¹ In the majority opinion, Justice O'Connor, joined by the Chief Justice, Justice Kennedy, and Justice Breyer, concluded that "although Congress authorized the detention of combatants in the narrow circumstances alleged in this case, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker."²¹² The CSRTs were established, by order of U.S. Secretary of Defense Paul Wolfowitz, as a viable forum for guaranteeing a procedure for legal review in which prospective enemy combatant cases could be heard.²¹³

This chapter examines what is known about how CSRTs review cases, the transparency issues surrounding its procedures, the timeframe in which the issues are heard and the timeliness of the process, the role and responsibility of the CSRT Tribunal (three military officers who hear the cases), and the procedure for legal review currently used.

A. BACKGROUND

The CSRT is, in essence, a military tribunal. The DOD defines CSRT as a one-time administrative process designed to determine whether each detainee under the control of the Department of Defense at Guantanamo meets the criteria to be designated as an enemy combatant. Each detainee

²¹⁰ "Combatant Status Review Tribunals," Department of Defense.

²¹¹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), 14–15

²¹² *Ibid.*

²¹³ Paul Wolfowitz, "Order Establishing Combatant Status Review Tribunal," Department of Defense, July 7, 2004, <http://www.defenselink.mil/news/jul2004/d20040707review.pdf>.

has the opportunity to contest such designation. It is not a criminal trial and it is not intended to determine guilt or innocence; rather, it is an administrative process structured under the law of war (e.g., Geneva Convention Article 5) to confirm the status of enemy combatant detained at Guantanamo as part of the Global War on Terrorism.²¹⁴

While the Court in *Hamdi* recognized the “power of the U.S. government to detain enemy combatants, including U.S. citizens, it ruled that detainees who are U.S. citizens must have the rights of due process and the ability to challenge their enemy combatant status before an impartial authority.”²¹⁵

Thomas R. Johnson gives a detailed roadmap of how the CSRT functions.²¹⁶ According to Johnson, when a detainee wants to challenge his status as an enemy combatant, the CSRT will hold a hearing. Those who participate in the hearing are the detainee and a personal representative who will advise the detainee of the charges against him. However, the detainee is denied the right to counsel, has limited access to witnesses (witnesses attending hearing are at the discretion of the government), and has limited access to review evidence the government brings against him (e.g., classified evidence).²¹⁷ Three “neutral commissioned officers” hear the case.²¹⁸

Gordon R. England elaborates on the qualifications of the tribunal and assesses that those chosen are senior military from across the board (e.g., majors from Navy, Airforce, etc.) and have been previously screened to ensure that there is no bias. For example, the military officials answer questionnaires that are part of the military personnel process.²¹⁹ It is unlikely that there will be a personal connection between the detainee and the board. Also, because the tribunal consists of senior military officials,

²¹⁴ “Combatant Status Review Tribunals,” Department of Defense.

²¹⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

²¹⁶ Thomas R. Johnson, “Combatant Status Review Tribunals: An Ordeal through the Eyes of One ‘Enemy Combatant,’” *Lewis & Clark Law Review* 11, no. 4 (Winter 2007): 943, <http://law.lclark.edu/live/files/9548-lcb114art4johnsonpdf>.

²¹⁷ *Ibid.*, 949.

²¹⁸ *Ibid.*

²¹⁹ Gordon R. England, “Combatant Tribunal Series,” C-SPAN video recorded at the Pentagon, July 9, 2004, <https://www.c-span.org/video/?182629-1/combatant-status-review-tribunals&start=99>.

there is a concern that the “judges” will bring a war-mindedness into their decision-making as a tribunal.

“The standard of evidence that the hearing officers use, according to Johnson, is a preponderance of the evidence (i.e., the civil court standard used to make determinations—whether it is more likely than not that the case has been proven).”²²⁰ England explains that the additional criteria the tribunal uses to make enemy combatant determinations is the “totality of the circumstances” and the relevant available data. It is essential, England continues, that all data is brought forward so that the best-informed decisions can be made, which includes bringing forth affidavits or witnesses on behalf of the enemy combatant.²²¹

The purpose of the CSRTs is not to determine guilt or innocence, but rather, according to England, “to determine if the detainee had the status of an enemy combatant (e.g., one who directly provokes or supports actions against the United States), and if it was determined by the CSRT that he did have the status of an enemy combatant—he could be retained by the United States.”²²² It could be argued that the CSRT is like a grand jury for terrorism suspects, except the tribunal is not evaluating probable cause to determine if a crime has been committed by the detainee, which is the standard for the grand jury.²²³ What the tribunal is determining is if the target’s combat status puts him in the literal and figurative cross hairs of further detention, and if he is classified as an enemy combatant.

In the Supreme Court’s *Hamdi* ruling, Justice O’Connor reaffirmed the right of the target to go before a neutral decision maker to challenge his status. She states in part,

We are called upon to consider the legality of the Government’s detention of a United States citizen on United States soil as an “enemy combatant”

²²⁰ Johnson, “Combatant Status Review Tribunals,” 948.

²²¹ England, “Combatant Tribunal Series.”

²²² Ibid.

²²³ “A Brief Description of the Federal Criminal Justice Process,” FBI, accessed October 29, 2016, <https://www.fbi.gov/resources/victim-assistance/a-brief-description-of-the-federal-criminal-justice-process>; “What Is Probable Cause?,” Probablecause.org, accessed December 10, 2016, <http://www.probablecause.org/whatisprobablecause.html>.

and to address the process that is constitutionally owed to one who seeks to challenge his classification as such. ... We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker.²²⁴

Justice O'Connor further points out that "American citizens could be detained as an enemy combatant when they have associated themselves with the military arm of the enemy government," as Hamdi exhibited through his association with the Taliban.²²⁵ Furthermore, the military proceedings used were deemed sufficient to meet procedural due process standards for an enemy combatant.²²⁶

As described in the legal basis of U.S. Detention Policies, the CSRT mirrors many of the "procedures and protections found in the AR 190-8 cited by the Supreme Court as sufficient for the detention of United States citizen."²²⁷ Secretary Gordon asserts that the United States uses AR 190-8 to implement Article 5 of the Geneva Convention.²²⁸ Both procedures are jointly incorporated as part of the CSRT.²²⁹ In short, it could be argued that the CSRT is a combination of the existing AR 190-8 and Article 5 of the Geneva Convention. As an illustration, according to the Geneva Convention, "When combatant status is unclear, the Third Geneva Convention states that the captives must be afforded the protection of prisoner-of-war (POW) status until a tribunal meets and determines that the captive does not qualify as a lawful combatant."²³⁰ The U.S. Detention Policy describes these tribunals as "typically held on the battlefield within a short time of capture, and an officer makes a quick determination, based on all the relevant evidence

²²⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

²²⁵ *Hamdi v. Rumsfeld*, 542 U.S. 519; Gonzales, "Drones: The Power to Kill," 25.

²²⁶ Procedural due process refers to the right to be given sufficient notice and the right to be heard; Gonzales, "Drones: The Power to Kill," 28.

²²⁷ "The Legal Basis of U.S. Detention Policies," The Heritage Foundation, accessed December 10, 2016, <http://www.heritage.org/research/projects/enemy-detention/detention-policy>.

²²⁸ England, "Combatant Tribunal Series."

²²⁹ *Ibid.*

²³⁰ See Chapter I, Section B for discussion of enemy combatants; these Tribunals are referred to as Article 5 Tribunals.

available at the time, whether the captive is properly classified as a combatant or noncombatant.”²³¹

The language under AR 190-8 sounds similar to the Article 5 language. AR 190-8 is used by the DOD “when a captive’s legal status is in doubt, and therefore a tribunal under Article 5 of the Geneva Convention is required. The regulation spells out the procedures the U.S. military must follow to determine a captive’s legal status as a combatant or non-combatant.”²³² The language further states that “the AR 190-8 proceeding is a simple one-time administrative hearing, usually held on the battlefield, to determine whether or not a captive should be held for the duration of the conflict.”²³³ Both processes use Article 5 when the captive’s status is uncertain. Moreover, Article 5 tribunals, as well as AR 190-8, hold hearings on the battlefield.²³⁴ The policy language specifically refers to AR 190-8 battlefield hearings as a “simple one-time administrative hearing.”²³⁵

Furthermore, Article 5 and AR 190-8 are similar in processes and procedures. However, the language in each policy is unclear; for example, the language used to explain how a captive is classified in Article 5 states that “the determination [of captive’s status] will be made based upon evidence deemed relevant at the time.”²³⁶ AR 190-8 follows the same proceeding and language as Article 5 for determining the status of a captive. However, in both cases, neither Article 5 nor AR 190-8 gives the criteria or standards that are used for determining the status of a captive. Moreover, even though both procedures are incorporated into the CSRT, the CSRT is broader in scope and offers “more protections and processes to detainees than required by the Geneva Convention or AR 190-8.”²³⁷

²³¹ “Legal Basis of U.S. Detention Policies,” The Heritage Foundation.

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Ibid.*

While the Supreme Court deemed the military proceedings (i.e., AR 190-8) sufficient to meet due process standards, there is a general concern, from scholars such as Gonzales about the president's authority to designate someone as an enemy combatant.²³⁸ Gonzales' argument is explored in his analysis of the CSRT process and the role of the executive branch.

B. EXECUTIVE BRANCH

Concerning the president's role in the CSRT process—what is the extent of a president's authority to designate an American citizen an enemy combatant? It is well known, Gonzales explains, that having this is sufficient grounds to target an American citizen for a drone strike.²³⁹

An illustration of this point is the case of Anwar al-Awlaki, a U.S. citizen born in New Mexico and educated in the United States.²⁴⁰ According to Gonzales, over a period of time al-Awlaki was “suspected of associating with two 9/11 hijackers, Khalid al-Mihdhar and Nawaf al-Hazmi, and with Umar Farouk Abdulmutallab, the Nigerian national who attempted to blow up Northwest Airlines Flight 253.”²⁴¹ Al-Awlaki was also suspected of encouraging Nidal Malik Hasan, the Fort Hood shooter and “facilitating terrorist training camps.”²⁴² Although “there was no evidence that al-Awlaki was aware that he was on the kill list nor of any reasons for being on the list, President Obama sanctioned that he be targeted, and he was eventually killed by a drone strike.”²⁴³ There are those, such as Gonzales, who question that authority. In his CSRT analysis, Gonzales proposes “steps that the United States government should consider to ensure fairness of the process such as a checks-and-balances approach, in which Congress would review

²³⁸ Gonzales, “Drones: The Power to Kill.”

²³⁹ *Ibid.*, 14.

²⁴⁰ Anwar al-Awlaki's name has also been spelled al-Aulaqi and al-Awalaki.

²⁴¹ Gonzales, “Drones: The Power to Kill,” 12.

²⁴² *Ibid.*

²⁴³ *Ibid.*, 13.

any drone target decisions made by the President, in addition to appointing an advocate, on behalf of the accused.²⁴⁴

Along the same lines, Glenn Sulmasy, in describing his CSRT “hybrid” approach (i.e., an Operational Security Court run by civilians), envisions detainees staying in prisons built on military bases. In his “hybrid” court, the “President would retain some thin authority to detain those found not guilty under extreme circumstances, but there would be strict safeguards on the exercise of this power, and its exercise would be public.”²⁴⁵ Arguably, Gonzales and Sulmasy both agree the president should have a role in the overall military detainee process, but it is unclear the extent to which this authority should be exercised.

C. LEGAL/PROCEDURAL ISSUES

This section examines what is known about the type of cases the CSRT court reviews, the lack of transparency in which it operates, the timeliness of the process, the CSRT judges’ role and responsibility, and the current procedure for legal review.

1. Transparency

Tom Johnson, counsel for one of the Guantanamo detainees experienced firsthand the challenges that detainees and those who are appointed by the CSRT to advise them have experienced. Johnson encountered problems with the inadequate transparency, legal representation, and procedural due process, and with the timeframe and tribunal decision-making process. These were the same challenges, he emphasized that detainees going through the CSRT process faced. For example, Johnson represented Ihlkham Battayev, who was known as detainee number 84.²⁴⁶

²⁴⁴ Ibid.

²⁴⁵ Glenn Sulmasy, “The National Security Court System: An Interview with Glenn Sulmasy,” *The Atlantic*, August 5, 2009, <http://www.theatlantic.com/politics/archive/2009/08/the-national-security-court-system-an-interview-with-glenn-sulmasy/22708>.

²⁴⁶ Johnson, “Combatant Status Review Tribunals,” 943,.

According to Johnson, Battayev, a citizen of Kazakhstan and a native Uzbek, was married and had a family.²⁴⁷ “After Battayev had lost his job coaching soccer, he started selling fresh fruit and other agricultural products on the market. During one of his travels to obtain fresh fruit, a Tajik man named Kari approached him and offered to sell Battayev fruit from his private orchard. Battayev agreed, and Kari drove Battayev to a farm well outside of town.”²⁴⁸ Based on Johnson’s account, Kari took Battayev to the Taliban and left him there. When he refused to join the Taliban despite the group’s coercion, they held him captive. Eventually, while en route to another destination, the Taliban and Battayev were seized and turned over to the United States.²⁴⁹

While in Afghanistan, Battayev was “never provided any process to determine his status as an enemy combatant.”²⁵⁰ Additionally, although Battayev was vigorously questioned about his origin, he was never questioned about his status as a soldier.²⁵¹ Furthermore, Battayev “had almost no time talking with Americans before his transport to Guantanamo, nor did he have an opportunity to explain why he should not be taken away from his wife, children, and family for five years.”²⁵² Arguably, the CSRT process lacked transparency when it failed to provide Battayev a full and fair process to determine his status as an enemy combatant.²⁵³

Such critics as Joseph Blocher argue that the term “enemy combatant” itself lacks transparency.²⁵⁴ According to Blocher, the “U.S. government has argued that the CSRTs which were established to determine the enemy combatant status of Guantanamo detainees, and which completed their work in March, [also] properly adjudicated the

²⁴⁷ Ibid.

²⁴⁸ Ibid., 950.

²⁴⁹ Ibid., 951.

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² Ibid., 952.

²⁵³ Ibid., 945.

²⁵⁴ Joseph Blocher, “Combatant Status Review Tribunals: Flawed Answers to the Wrong Question,” *Yale Law Journal*, 116 (2006): 667, <http://ssrn.com/abstract=972356>.

[prisoner of war (POW)] status of the detainees.”²⁵⁵ Blocher argues that there is an overlap in the definition between enemy combatant and POW; when the CSRT determines a detainee’s enemy combatant status, it is actually “supporting a detainee’s POW status.”²⁵⁶ Blocher asserts that the definition for enemy combatant “overlaps” with the definition for POW and concludes by stating that, “even after their enemy combatant status has been adjudicated by the CSRTs, Guantanamo detainees should still be treated as presumptive POWs.”²⁵⁷ Johnson similarly argues that detainees not only lack understanding of the CSRT process, but that there is no procedural safeguard allowing them too rebut the government’s presumption of enemy combatant status (i.e., the government assumes that the detainee’s enemy status is genuine), nor is there an offer of evidence for their innocence (e.g., there are few to no witnesses and few documents available for detainees’ defense, and detainees are not afforded the opportunity to review the evidence used against them).²⁵⁸

2. Timeliness

The CSRT follows two flawed procedures that could challenge timeliness. The first is determining the status of the target, and the second is determining how long a detainee should be held.²⁵⁹ The timeframe in which the decisions are made for either procedure is unclear. “Under Article 5 of the Geneva Convention the tribunals are typically held on the battlefield within a short time of capture, and an officer makes a quick determination, based on all the relevant evidence available at the time, whether the captive is properly classified as a combatant or non-combatant.”²⁶⁰ Also, the CSRT follows the proceedings under AR 190-8, which determines if “a captive should be held for the duration of the conflict.”²⁶¹ It could be argued that the language under Article 5

²⁵⁵ Ibid.

²⁵⁶ Ibid., 668.

²⁵⁷ Ibid.

²⁵⁸ Ibid., 947–49.

²⁵⁹ “Legal Basis of U.S. Detention Policies,” The Heritage Foundation

²⁶⁰ Ibid.

²⁶¹ Ibid.

and AR 190-8 both lack clarity. What would initiate a “quick determination,” and how is “duration of the conflict” defined? Does the clock start ticking on duration of the conflict when the target is captured? The existing descriptive language for timeliness is ambiguous.

Moreover, under these facts, it is questionable if the deciding officer has had adequate time to properly vet a decision, since the determination is not only made immediately after capture, but must be made quickly. Furthermore, the determination is based on “relevant evidence available at the time.”²⁶² It could be argued that the process opens the door to procedural inquiries—for example, from where did the evidence come? Is it based on evidence that has been previously gathered against the captive, or is it evidence that was made available on the battlefield? Who represents the captive? Does he have an opportunity to speak on his own behalf, or is that delayed until he is actually brought to Guantanamo and detained?²⁶³ Because the language under AR 190-8 is similar to language in the Article 5 Tribunals, AR 190-8 has similar procedural challenges. Moreover, timeliness of the CSRT’s decision-making is problematic. What procedural safeguards are in place (e.g., are there grounds to challenge the captivity and status even before the detainee arrives at Guantanamo)? In short, the language in the various policies lacks clarity and the procedures implemented are questionable. Although the processes discussed may be speedy, it is questionable if they are fair.

3. Judges and Legal Representation

One critic CSRT critic was Lieutenant Colonel Stephen Abraham, “a 26-year veteran of military intelligence who served on the tribunals.”²⁶⁴ Abraham explained in affidavits, submitted in court, that the documents brought against the detainees in the

²⁶² Ibid.

²⁶³ The language under the Geneva Convention and Army Regulation 190-8 overlap and make up the CSRT process. However, the language and processes and procedures are unclear regarding if these steps are “pre-Guantanamo.” For the purposes of this thesis, this assumption was made as part of the overall CSRT process.

²⁶⁴ “US Rebuts Criticism over Gitmo Tribunals,” *USA Today*, July 6, 2007, http://usatoday30.usatoday.com/news/washington/2007-07-06-2911369447_x.htm.

CSRT were “vague” and “incomplete.”²⁶⁵ Moreover, this approach was compounded by pressure to rule against the detainees without specific evidence. The DOJ immediately refuted Abraham’s allegation, stating that they were unsubstantiated (i.e., lacked evidence or proof) and, in short, he did not have a “fundamental understanding of the process.”²⁶⁶ In addition, as England pointed out, while the tribunal members do not have to be lawyers, they must be senior military officials.²⁶⁷ Johnson, on this issue, asserts that “judges should determine the fates of the detainees.”²⁶⁸ Whether they are military judges or federal judges, lawyers should first review the cases and weigh evidence since this is a part of the training.²⁶⁹ Johnson concludes by stating that it is “essential that the arbiter of fact and law—military judges, are insulated from the chain of command.”²⁷⁰

Not only are there challenges with the tribunal, but the lack of legal representation is an additional hurdle in the CSRT process. Johnson asserts that it is important that the detainees be given “access to counsel to counteract the lopsided nature of the CST proceedings.”²⁷¹ He explains that many of the detainees do not speak English, and have no understanding of the process. In light of this, the detainees are provided with a “personal representative” whose role is to assist the detainee with the review process.²⁷² According to Johnson, however, it “seems that the role of the PR is to visit the detainee before the hearing and read the list of charges.”²⁷³ Arguably, the lack of counsel during this critical stage exemplifies how the system lacks the judicial safeguards needed to ensure a fair hearing. However, Gonzales disagrees with Johnson’s assessment, and states in part that, “today, those that are held by our government are provided procedural due

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ England, “Combatant Tribunal Series.”

²⁶⁸ Johnson, “Combatant Status Review Tribunals,” 960.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Ibid., 949.

²⁷² Ibid.

²⁷³ Ibid.

process through the Supreme Court's precedence and the Executive's CSRT process."²⁷⁴ In other words, Gonzales believes the procedure is fair.

While the CRST has its problems, it is a system that has been established to ensure that U.S. and non-U.S. citizens are afforded some type of judicial review. In defense of Abraham's criticisms, the DOJ stated that the tribunal was "set up to review the best information provided by the intelligence agencies after broad searches," not to sift through layers of documents looking for additional information.²⁷⁵ England refers to part of this process as looking at the "totality of the circumstances."²⁷⁶ Abraham defends his stance and concludes by stating that the government has "lost sight of what the CSRT process is all about."²⁷⁷

4. Procedure for Legal Review

Johnson has asserted that the CSRT process lacks "procedural protection, such as access to evidence."²⁷⁸ He explains that the tribunals are the ones who look at the preponderance of evidence and determine if the government has met the criteria to have the detainee be labeled an enemy combatant, and if the government's evidence is genuine and accurate. While the tribunals are "not bound by the rules of evidence they are asked to consider any evidence that would be relevant and helpful, although the participation of the detainee at this stage is minimal."²⁷⁹ The detainee's access to evidence is uneven; the government has access to evidence, but the detainee cannot review the evidence that will be used against him. Johnson points out that the detainee also lacks legal representation and is "subject to whatever mail rules the military chooses for that detainee, and he has limited (if any) access to information outside the base."²⁸⁰ Johnson points out that there are additional challenges with the CSRT process, such as the detainee having "limited"

²⁷⁴ Gonzales, "Drones: The Power to Kill," 33.

²⁷⁵ "US Rebutts Criticism over Gitmo Tribunals," *USA Today*.

²⁷⁶ England, "Combatant Tribunal Series."

²⁷⁷ *Ibid.*

²⁷⁸ Johnson, "Combatant Status Review Tribunal," 960.

²⁷⁹ *Ibid.*, 948.

²⁸⁰ *Ibid.*, 949.

access to witnesses; detainees can only access those witnesses that the government deems “reasonably available (e.g., members of the Armed Forces are not reasonably available to the extent that their superiors believe that their presence would affect military operations.”²⁸¹ Additionally, because the government controls the scheduling, they have time to prepare for the hearing while the detainee, who has “minimal notice” of the hearing, has less time to prepare to refute the allegations.²⁸²

Although such critics as Gonzales, Johnson, Blocher, and Sulmasy have challenged the CSRT’s processes or procedures, at times, it could be argued that the process does work. An illustration of this can be seen in the eventual resolution of Battayev’s case. However, one of the pivotal factors upon which Battayev’s case turned was his access to witnesses, who were able to confirm his story.²⁸³ Still, the CSRT must be reformed to ensure that detainees have proper access to counsel and witnesses. In addition, the detainee’s access to review the evidence that will be used against him should be transparent, but without compromising intelligence data.

D. CONCLUSION

The purpose of the CSRT was to establish a forum through which the DOD could determine detainees’ enemy combatant status.²⁸⁴ As part of this process, the detainee has a right to challenge the DOD determination. However, while there is a military process in place, there are procedural challenges—detainees cannot challenge their status before they are sent to Guantanamo and, once detained at Guantanamo, they lack access to legal counsel, have limited access to witnesses, lack the opportunity to review evidence that will be used against them, and lack general knowledge and understanding about the overall CSRT process.

Johnson’s suggestion that the tribunal should consist of military lawyers (judge advocate generals) and federal judges is viable; the majority of the issues with the CSRT

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ Ibid., 956.

²⁸⁴ Ibid.

are problematic legally. Legal issues include a detainee having no access to counsel, inadequate understanding of the timeframe in which decisions should be made, limited access to witnesses, and limited access to review evidence.²⁸⁵ Military lawyers or judges should be involved in the early stages of the CSRT process, according to Johnson, because they are in essence trained to address such issues. Johnson concludes that if the lawyers were involved, the overall CSRT approach would be less procedurally problematic—from the beginning to the end.

²⁸⁵ *Ibid.*, 960.

V. THE POLICY OPTIONS ANALYSES

The government's current drone targeting of U.S. citizens lacks procedural safeguards. The challenge is that no current forum exists in which a targeted U.S. citizen has an opportunity to be heard. The Fifth Amendment of the Constitution was established as a judicial safeguard to protect against interference with such liberties.²⁸⁶ The POA used in this thesis examines the executive branch's transparency, timeliness, judges and legal representation, and legal/procedural review. In this chapter, each forum is discussed and compared to the status quo to determine which forum best addresses the deficiencies of the current process.

A. FISC

1. Executive Branch

FISC has been in existence for several decades and, through a few court challenges, it has remained intact as an institution. However, it has drawbacks as a model for the drone court. "Critics argue that because the executive branch has influence over FISC's decision-making, the executive branch has very few government requests for warrants denied by FISC."²⁸⁷

FISC's greatest strength has been its ability to adapt to various policies. In its 40 years, FISC has been overseen by various administrations and has had the fortitude and adaptability to change without actually being overhauled. The court has been criticized as an extension of the executive branch as illustrated by the Bush administration's Terror Surveillance Program, discussed in Chapter II, increased the scope of American data that the government could access. Moreover, FISC has enabled the executive branch to implement broader authority to conduct surveillance, such as through the 2001 Patriot Act.²⁸⁸ In short, it could be argued that a drone court needs the kind of durability that

²⁸⁶ *The Constitution of the United States*, 25th edition (Washington, DC: Joint Committee on Printing, 2012), Amendment V.

²⁸⁷ Clarke, "Is the Foreign Intelligence Surveillance Court Really a Rubber Stamp?"

²⁸⁸ *Ibid.*

FISC has had over the years—to undergo various policy and procedural changes but continue to operate in its capacity.

FISC’s greatest weakness is that it lacks independence in its decision-making. FISC has been deemed an extension of the executive because the agency has accepted 99 percent of government requests, showing a propensity to say “yes” to the government.²⁸⁹ It could be argued that what the executive branch wants from FISC, the executive branch will get. During the Bush administration, for instance, FISC acquired personal data and other private information on Americans without a warrant or prior judicial notice, as discussed in Chapter II (regarding *American Civil Liberties Union et al. v. National Security Agency et al.*).²⁹⁰

2. Transparency

FISC’s Rules of Procedure are known for their transparency. These rules are free from legal ambiguity and govern the proceedings under 50 U.S.C. The wording is not only straightforward, as illustrated by the language used under 50 U.S.C. 1805,²⁹¹ but the public also has access to the rules on the FISC website.²⁹² While the rules governing FISC’s proceedings are transparent under Title 50, however, it otherwise operates in secrecy. Because the drone courts are dealing with such issues as procedural due process—in which legal transparency pertaining to constitutional rights is critical—FISC’s lack of operational transparency is a procedurally problematic flaw in a drone court. On the other hand, FISC judges such as Judge John D. Bates have argued that such transparency would “not likely enhance the public’s understanding of FISA’s

²⁸⁹ Jennifer Granick and Christopher Sprigman, “The Secret FISA Court Must Go,” July 24, 2013, *Daily Beast*, <http://www.thedailybeast.com/articles/2013/07/24/the-secret-fisa-court-must-go.html>.

²⁹⁰ *Ibid.*

²⁹¹ 50 U.S.C. 1805(e) reads: “The Attorney General may authorize specific emergency employment of electronic surveillance if the Attorney General ‘reasonably believes’ that an emergency exists, ‘reasonably determines’ that a factual basis exists for the emergency order, he subsequently can inform the judge of the decision made, and the Attorney General makes an application ... as soon as practicable, but not later than seven days after the authorization for the surveillance by the Attorney General.”

²⁹² “Rules of Procedure,” United States Foreign Intelligence Survey Court.

implementation ... and release of the freestanding summaries of the court's opinions would likely cause confusion and misunderstanding to the public."²⁹³

3. Timeliness

It could be argued that the current FISC timeframes, processes, and procedures are reasonable and sufficient under the circumstances. The justification for this argument is that the FISC emergency order uses the seven-day window for making immediate decisions if, according to the statute, the attorney general "reasonably determines that an emergency situation exists," or if the judge determines there is probable cause for an order, although in a drone court it would be probable cause for a hearing.²⁹⁴ Arguably, the immediate threat of deprivation of life under the circumstances equates with a reasonable determination that probable cause exists for a hearing to take place within the seven-day window.

It could be argued that these standards must be met in order for a U.S. citizen to have the opportunity to be heard before a FISC drone court. Even if the FISC judge does not make a decision right away the timeframe in which the decision is made could still be reasonable. The reason for this justification is based on the FISC emergency order, which uses the seven-day window timeframe for making immediate decisions.

While FISC may have established procedures to ensure timely decisions, decision-making speed for drone cases may be challenged by the rotation of judges. Arguably, the lack of continuity could interfere with the judges' ability to review the intricacies of each prospective case in a timely manner. In response to Senator Patrick J. Leahy's inquiry into FISC operations, Judge Bates stated that the judges have the support of other attorneys and legal staff to assist in evaluating applications. However, Bates points out that "at the discretion of the presiding judge, some of the court's more complex or time-consuming matters are handled by judges outside of the duty-week system."²⁹⁵

²⁹³ Dianne Feinstein, "Former FISA Court Judge Outlines Views on FISA Reform."

²⁹⁴ 50 U.S.C. 1805 (e), (b).

²⁹⁵ Honorable Reggie B. Walton, letter to Honorable Patrick Leahy.

In short, critical factors to be considered when addressing timely judicial review of drone strikes are that judges have the opportunity to review and evaluate applications or cases, and the necessary time to perform these tasks.

4. Judges and Legal Representation

FISC's judges are limited by the type of cases they can hear, and broadening their scope could only be accomplished through an act of Congress. According to Judge Reggie B. Walton, the role of the FISC judges is to determine if submitted surveillance applications have met the statutory legal requirements for approval.²⁹⁶ In addition, FISC judges have broad discretion to accept or deny the applications brought before them.²⁹⁷ However, FISC's authority to hear cases beyond its original purview (e.g., surveillance, wiretaps) would have to be implemented through an act of Congress.

Judge Bates, in his letter to Senator Dianne Feinstein, points out several concerns within FISC, all of which, if allowed to remain, would prove logistically problematic for additional drone court operations.²⁹⁸ According to Judge Arnold, hearing drone cases would increase FISC's workload, straining the FISC's "small number of judges, attorneys, and staff [who are already] fully occupied by its current workload."²⁹⁹

In short, the workload increase and the expansion in subject-matter jurisdiction may be disruptive changes to the status quo. Nevertheless, these changes will be required if the FISC is considered for becoming the drone court forum.

5. Procedure for Legal Review

FISC has an established forum and procedure in place, though it is ex-parte (i.e., only the state has representation). In light of the status quo, which offers no format through which the target can have a hearing, the FISC structure is an improvement. Even

²⁹⁶ Ibid.

²⁹⁷ "Rules of Procedure," United States Foreign Intelligence Survey Court, Rule 9(a), (b).

²⁹⁸ Dianne Feinstein, "Former FISA Court Judge Outlines Views on FISA Reform."

²⁹⁹ Presiding Judge Morris S. Arnold, Response to Reggie B. Walton's Letter to Chairman Leahy, Committee on the Judiciary, United States Senate, March 27, <https://fas.org/irp/agency/doj/fisa/fisc-032713.pdf>.

though FISC has an ex-parte proceeding, the target would still need to have access to an attorney (i.e., an adversarial proceeding), sufficient notice, and an opportunity to be heard. It is critical that the adversarial proceeding is part of the FISC structure to ensure that the target has right to an attorney. However, expanding FISC's procedural authority from ex-parte to adversarial must be promulgated through an act of Congress. Because the FISC has ex-parte in place, it could be argued that, with Congressional reform, the court could broaden its procedures and incorporate the adversarial proceeding to ensure that the target is represented by an attorney and that a fair hearing is held.

However, the FISC model is inappropriate for a drone court because its ex-parte court proceedings are biased toward the government.³⁰⁰ The lack of an adversarial proceeding calls into question if a fair hearing could be held. Although the court will need to be congressionally reformed to ensure that an advocate is appointed for the accused, there are those who are critical of this approach. Judge Bates reaffirms that the ex-parte proceeding should not change and states that the participation of an advocate would prove unfruitful.³⁰¹ He also argues that having an advocate would not promote an adversarial process "nor constructively assist the Courts in assessing the facts, as the advocate would be unable to communicate with the target or conduct an independent investigation."³⁰² In sum, Judge Bates sees no role for the advocate or a need for an adversarial proceeding, which falls short of the drone court requirement that the target have an advocate.

6. Summary

FISC has historically been able to operate long term under various presidents even though the court has been embroiled in controversy and remains an enigma to the general public. Because the judges rotate on a regular basis, there are concerns about timeliness, and the judges' ability to analyze and vet the cases before decisions are made. Additionally, before the court approves an order, it relies on the evidence of the FBI, CIA

³⁰⁰ Guiora and Brand, *Establishment of a Drone Court*, 25.

³⁰¹ "Former FISA Court Judge Outlines Views on FISA Reform," Dianne Feinstein.

³⁰² *Ibid.*

and NSA for justification. The challenge with this procedure is that only the government comes before the government to decide what the government should do. Senator Wyden referred to FISC as the most “one-sided court” of which he is aware.³⁰³ All of these characteristics would pose a problem in a FISC drone court. Moreover, while FISC has an established hearing process and procedural rules and guidelines in place, it lacks an adversarial structure and operations are somewhat nebulous. Because of these shortcomings, FISC would not be a suitable forum for the drone court.

B. OSC

1. Executive Branch

The OSC is a proposed drone court recommended by Amos N. Guiora and Jeffrey S. Brand to “review executive branch drone decisions prior to their execution.”³⁰⁴ The purpose of the court would be to hear drone target cases, and to assess the information of the executive branch *before* the execution of a targeted strike. The OSC would have the authority to review and assess the executive branch’s intelligence prior to the execution of the drone strikes. Because the OSC has processes and procedures in place that would comport with judicial standards, it is a viable model for the drone court. One of the OCS’ strengths is that it provides judicial oversight of the executive branch’s role in the deciding drone strikes. While Guiora and Brand champion the independence of the executive branch and state their awareness of the “difficult task of reining in executive authority,” they argue that, when it comes to the role of the executive branch in making decisions pertaining to targeting U.S. citizens, oversight is needed to increase transparency.³⁰⁵

On the other hand, Steven Vladeck refutes Guiora and Brand’s assessment of judicial oversight as an interference with the executive branch’s authority to make unilateral decisions in national security matters. Vladeck argues that the OSC structure, which allows for judicial review of executive branch decisions prior to any targeted drone

³⁰³ Ron Wyden, “Wyden’s Statement on President Obama.”

³⁰⁴ Guiora and Brand, *Establishment of a Drone Court*, 1.

³⁰⁵ *Ibid.*

strikes, is precarious.³⁰⁶ Vladeck asserts, “*if* one accepts that the Constitution confers any unilateral military power upon the Executive Branch, a proposal that would prevent uses of such power until and unless a federal judge signs off, is problematic on constitutional and practical grounds.”³⁰⁷ Vladeck’s argument concerning the president’s authority to act independently of other branches in order to protect our nation in times of national crises is a sound, but it does not mitigate the fact that some type of judicial oversight would still be needed.

2. Transparency

The strength of Guiora and Brand’s OSC is that it was designed with the drone court in mind. Additionally, they were able to address procedural due process concerns that a target might encounter, such as not having right to counsel, adequate notice, or an opportunity to be heard. The court includes an advocate for the target, but the target is not personally involved in the process and has no contact with advocate appointed to act on his behalf. The strength of the Guiora and Brand’s OSC is that it tackles these issues.

The flaw in this forum is that there are constitutional constraints and lack of transparency. No public trial is available; the target has counsel, but is not allowed to attend the trial. Additionally, the target has no contact with the advocate appointed to act on his behalf. These procedures go against a foundation of the drone court, which is to ensure protection of constitutional rights and the integrity of procedural and judicial safeguards. While Guiora and Brand have addressed the target’s need for an attorney, the issue is that the target is represented in absentia and, thus, lacks the opportunity to have input into the review and cross-examine those who would bring evidence against him.”³⁰⁸ Additionally, the hearing is closed to the public, although the attorney can appeal the decision to the appellate court.³⁰⁹

³⁰⁶ Vladeck, “Drone Courts.”

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*

3. Timeliness

The OSC does not adequately cover the timeliness of the process as it relates to a drone court. Within Guiora and Brand's OSC drone court proposal, there is some discussion about the time constraints in reference to judicial review, but it could be argued that their OSC does not articulate the bigger picture of the process' timeliness. As a result, Michael Eshaghian's "timeliness of the process" was used as the point of reference for determining the timeframe in which a decision should be made before targeting a U.S. citizen for a drone attack. Eshaghian argues that there is time to deliberate the facts of a case and to review the intelligence *before* striking a target. He states that the decision to strike should be deliberate and not hurriedly made.³¹⁰ According to Eshaghian, and as noted in Chapter III, the decision to target can be made years in advance.³¹¹

Guiora and Brand's OSC timeframe emphasizes the role of the executive branch and whether or not there is an "imminent threat" to national security, as deemed by the executive branch. Arguably, they discuss that the more immediate the threat, the greater the need for a quick decision. That does not take into consideration, however, the varied details or steps that are needed to ensure the case details have been properly vetted.

4. Judges and Legal Representation

The judges and legal representation structure is a strength of the OSC because of the proposed judges' diversity and expertise. The judicial structure under the OSC would be strong and replete with established judges whose "sole responsibility will be to evaluate drone strikes."³¹² Guiora and Brand further assert that the OSC will be based on the Article III federal court structures.³¹³ The primary contrast between the two courts is that the OSC will utilize sitting judges (e.g., current judges), unlike the Article III courts,

³¹⁰ Michael Eshaghian, "Are Drone Courts Necessary? An Analysis of Targeted Killings of U.S. Citizens abroad through a Procedural Due Process Lens," *Texas Review of Law & Politics* 18, no. 1 (Fall 2013): 196.

³¹¹ *Ibid.*

³¹² Guiora and Brand, *Establishment of a Drone Court*, 25.

³¹³ *Ibid.*

which use a “cadre of newly appointed Senate-confirmed judges.”³¹⁴ The judges selected for the OSC drone court will come from the federal district courts or from the court of appeals. Additionally, each judge will have a background and working knowledge of federal law and procedure concerning constitutional challenges. Because the judges will have expertise in hearing federal cases, they will arguably be well versed in hearing cases pertaining to Fifth and Sixth Amendment issues for the prospective drone cases.

In response to this constitutional challenge, Guiora and Brand concede that “the Drone Court would be a very different forum in which he or she is to be tried.”³¹⁵ The fact that the accused may be affected by a negative outcome from the hearing—he has been given right to counsel, but has not been given personal notice—goes against the established protective measures enshrined in the Constitution.

5. Procedure for Legal Review

One of the OSC’s strengths is that the executive branch’s decision-making process is reviewed, and the target is represented through counsel in the proceeding, as discussed in Chapter III. However, a problem with the OSC is that the “cross examination” proceeding for the target’s attorney is ambiguous. Guiora and Brand point out that the “cross examination [for the target’s attorney] will be conditioned on the executive branch sharing ... the intelligence information in its entirety and in a timely manner to allow for adequate preparation by the target’s counsel.”³¹⁶

6. Summary

The judges in the OSC, according to Guiora and Brand, have two primary functions. The first is to ensure that the target is represented, although it “falls far short of the standard envisioned by the Confrontation Clause.”³¹⁷ The second is to substantiate the executive branch’s evidence against the target.³¹⁸ The OSC arguably addresses two of

³¹⁴ Ibid.

³¹⁵ Ibid.

³¹⁶ Ibid, 26.

³¹⁷ Ibid. 27.

³¹⁸ Ibid.

the most critical needs concerning the drone targeting of U.S. citizens. The first need OSC addresses is to establish internal structures that protect the integrity of the target's right to due process, and the second is that it has ensured that the method is transparent. Additionally, the OSC's strength lies in its sound judicial structure and the procedural format under which it would operate. However, the structure lacks a specific timeframe in which decisions could or should be made. Even though the timeframe is uncertain, there is an assumption that the OSC would follow the procedures of Article III courts as discussed in Chapter III. The OSC has its procedural challenges, but because it is a structure *similar to* the Article III courts, but not *the same* as the Article III courts, it could be argued that the OSC has a strong foundation as a suitable drone forum.

C. CSRT

1. Executive Branch

The CSRT was established as a result of *Hamdi v. Rumsfeld*.³¹⁹ “The CSRT is a one-time administrative process designed to determine whether each detainee under the control of the Department of Defense at Guantanamo meets the criteria to be designated as an enemy combatant.”³²⁰ Some of the processes are procedurally vague. These factors pose problems, particularly as a model for the drone court.

Gonzales asserts not only that there is a need for Congress and the president to propose additional measures before American citizens are placed on the kill list for drone strikes, but also that such procedures must comply with constitutional guarantees.³²¹ However, it is unclear if the executive branch's decision to target U.S. enemy combatants is in response to the president's overreach or in response to Congress' limits upon his office. These arguments all trace back to fundamental questions about the bounds of executive authority as established in *Youngstown Tube and Sheet Co. v. Sawyer*.³²²

³¹⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

³²⁰ “Combatant Status Review Tribunals,” Department of Defense.

³²¹ Gonzales, “Drones: The Power to Kill,” 19.

³²² *Youngstown Tube and Sheet Co. v. Sawyer*, 343 U.S. 579 (1952). The U.S. Supreme Court established that the president could not overstep the congressional limits of his authority even during wartime.

Under the CSRT drone court, Gonzales points out that the president would have to notify Congress of any potential U.S. citizen target. “An issue concerning the role of the President, under the CSRT pertains to the extent of the authority that a President has to designate an American citizen as an enemy combatant.”³²³ The congressional notification is not part of the current forum. However, the implementation of this process would “propose additional measures that Congress and the President can take to ensure that the procedures comply with constitutional guarantees of due process.”³²⁴

2. Transparency

One of the challenges with the CSRT process is the unclear definition of an enemy combatant.³²⁵ Critic Joseph Blocher states that the “U.S. government has argued that the CSRTs, which were established to determine the enemy combatant status of Guantanamo detainees, and which completed their work in March, [also] properly adjudicated the POW status of the detainees.”³²⁶ In essence, Blocher argues that there is an overlap in the definitions of enemy combatant and POW and, as a result, when the CSRT makes a determination about the detainees’ enemy combatant status, the CSRT is “actually supporting a detainee’s POW status.”³²⁷

3. Timeliness

The CSRT has two processes related to timeliness that lack clarity. The processes for classifying a target and determining the extent to which a captive should be held are both ambiguous. As discussed in Chapter IV, the language under Article 5 states in part that the determinations for classifications are made on the battlefield shortly after capture. In other words, the determinations are made quickly based on evidence available at that time. Because the determinations are made “quickly,” and the government is proceeding unilaterally, it is unclear if the captive has been given prior notice about the government’s

³²³ Gonzales, “Drones: The Power to Kill,” 28.

³²⁴ *Ibid.*, Abstract.

³²⁵ Blocher, “Combatant Status Review Tribunals,” 667.

³²⁶ *Ibid.*

³²⁷ *Ibid.*, 668.

actions. Similarly, the process in which a determination is made about the duration of the captive's imprisonment is also ambiguous. Both processes raise more questions than answers. In either scenario, it is unclear if the deciding officers have had adequate time to properly vet the decisions. Furthermore, as discussed in Chapter IV, it could be argued that the process opens the door to procedural inquiries concerning not only the origin of the evidence but also the credibility of the evidence that would be used against the target.

4. Judges and Legal Representation

In the CSRT process, senior military officials—rather than attorneys—participate in the tribunal and the detainees do not have access to counsel. According to Johnson, “Judges should determine the fates of the detainees ... whether they are military judges or federal judges.”³²⁸ Johnson further argues that, “concerning the tribunals, it should be lawyers in the first instance to review the cases and weigh evidence since this is a part of the training.”³²⁹ Additionally, Johnson asserts that it is important that the detainees be given “access to counsel to counteract the lopsided nature of the CST proceedings.”³³⁰ Johnson points out that the detainees often do not speak English, do not understand the process, do not have the right to counsel, cannot see all the evidence that the government intends to use against them, and can call limited witnesses to testify on their behalf.³³¹ The “only presence they are provided is that of a Personal Representative who is to visit the detainee before the hearing and read the list of charges.”³³²

Arguably, the lack of counsel throughout the process exemplifies the inadequate judicial safeguards that ensure a fair hearing. One of the purposes of the drone court is to ensure procedural fairness in a court of law. The lack of right to counsel would be procedurally problematic in a drone court; as a result, this forum should not be considered a viable drone court forum.

³²⁸ Johnson, “Combatant Status Review Tribunals,” 960.

³²⁹ *Ibid.*

³³⁰ *Ibid.*, 949.

³³¹ *Ibid.*

³³² *Ibid.*

5. Procedure for Legal Review

The tribunals examine the preponderance of the evidence and decide if the detainee has met the criteria to be labeled an enemy combatant, and also determine if the government's evidence is genuine and accurate. The problem with this structure is that the target does not have access to all the evidence that can be used against him in his combatant status hearing. Furthermore, the government can decide to consider any evidence that it deems relevant or helpful, while the detainee has limited access to evidence.³³³ It could be argued that the detainee's right to a fair trial, access to witnesses, and right to cross examine are impeded and can be deemed a major hindrance to any evidence that would be relevant and helpful in a drone court forum.

6. Summary

The purpose of the CSRT was to establish a forum in which the DOD could determine the enemy combatant status of detainees.³³⁴ The CSRT method is questionable at times due to the process' lack of clarity. While the CSRT has established procedures in place, it can be argued that the detainee is denied the right to counsel at a critical stage of the process. The personal representative's role is only to inform the detainee of the charges brought before him, and nothing more. Also, the proceedings that take place before the detainee arrives at Guantanamo are somewhat cryptic. The absence of attorneys at the beginning of the proceeding—and throughout the process for the detainee—hinders the detainee's insurance of a fair hearing.

D. CONCLUSION

1. Executive Branch

Under the OSC, the role of the executive branch will be subject to judicial review.³³⁵

³³³ Ibid., 948.

³³⁴ Ibid.

³³⁵ Guiora and Brand, *Establishment of a Drone Court*.

Concerning the role of the executive branch, the OSC is the strongest of the forums to be considered for a drone court. Guiora and Branch have incorporated judicial oversight structure of the executive branch's role in the decision-making process of drone strikes. Furthermore, they have pointed out the need for judicial oversight during the executive branch's role *prior* to the actual drone strike.³³⁶

In contrast, FISC has been criticized for being an extension of the executive branch, as well as for lacking independence. In addition, FISC has approved 99 percent of government requests, which arguably raises an inference of inherent bias that FISC has for the executive branch. Although the CSRT lacks transparency regarding the executive branch's authority to designate an American citizen as an enemy combatant, this is an issue that Gonzales would address in his proposal. However, because the role of the executive branch under FISC and CSRT is inconclusive, it would make an effective for drone court.

2. Transparency

In the area of transparency, the OSC is the best-suited drone court forum. The strength of Guiora and Brand's OSC is that the court is structured with drones in mind. Moreover, the OSC addresses constitutional concerns that a drone target could encounter as part of the legal process, such as implementation of procedural due process, and right to counsel.

In contrast, the FISC functions in a shroud of secrecy and lacks operational transparency. The CSRT also has its problems. One of the primary purposes of the CSRT is to define what an enemy combatant is, and it fails to do this. In other words, the term enemy combatant lacks transparency according to Joseph Blocher. In short, Blocher argues that the definition for enemy combatant "overlaps" with the definition for POW and assesses that "even after their enemy combatant status has been adjudicated by the CSRTs, Guantanamo detainees should still be treated as presumptive POWs."³³⁷

³³⁶ Brand, Guiora, and Barela, "Drone Court Proposal."

³³⁷ Blocher, "Combatant Status Review Tribunals," 667.

Arguably, both, FISC and the CSRT lack transparency and therefore should not be considered for a drone court.

3. Timeliness

FISC's current timeframes, processes, and procedures are arguably reasonable and sufficient enough to grant a U.S. citizen an opportunity for judicial review in a drone court. The justification for this argument is that the FISC emergency order uses the seven-day window for making immediate decisions if, according to the statute, the attorney general "reasonably determines that an emergency situation exists," or if the judge determines there is probable cause for an order (although, in a drone court, it would be probable cause for a hearing).³³⁸ It could be argued that an imminent drone strike of a U.S. citizen would qualify as an emergency and avail the target an opportunity to be heard. In contrast, the OSC has vague timeframes for when the target's attorney should come aboard, and the CSRT lacks clarity on the timeframe in which detainees can challenge their enemy combatant status.

4. Judges and Legal Representation

The diversity of the judges and the presence of an advocate for the target are the OSC's strengths. The judicial structure proposed by Guiora and Brand has the sole responsibility of evaluating drone strikes and ensuring that procedural due process protections are established.³³⁹ Moreover, the OSC will be similar to established Article III court structures.³⁴⁰ The scope of FISC judges would have to be broadened in order to hear drone cases. However, it has been argued by some judges, such as Bates, that the court already has enough work, and an increase in the type of cases they hear would be disruptive.

The CSRT lacks the legal presence reflected in FISC. The lack of legally trained representation at the initial stages of the CSRT proceedings, and the lack of attorneys as part of the tribunal, is problematic, according to Johnson. Johnson argues that judges

³³⁸ 50 U.S.C. 1805 (e), (b).

³³⁹ Guiora and Brand, *Establishment of a Drone Court*, 25.

³⁴⁰ *Ibid.*

should determine the fate of detainees, and attorneys should represent detainees since both are legally trained to review cases and weigh evidence.³⁴¹ Arguably, FISC and the CSRT do not meet prospective drone court requirement for available judges to conduct hearings and attorneys for legal representation.

5. Procedure for Legal Review

The OSC's strength is that the overall processes, roles, and responsibilities of the executive branch, the military, and intelligence experts, as well as the advocate for the target, are established. Each role is concise, as illustrated in Chapter III. In contrast, FISC has an established ex-parte proceeding which Senator Ron Wyden has called one-sided.³⁴² Although the government has the ex-parte proceeding, FISC lacks an adversarial proceeding that would represent the target.

Furthermore, under the CSRT a detainee is not availed of the right to review all the evidence that could be used against him and the target has little to no access to witnesses. In short, it could be argued that FISC and the CSRT lack sufficient procedural safeguards that would ensure a fair hearing, and which would be a requirement in a drone court.

Policy option B, the Operational Security Court was chosen as the best option to be considered for a drone forum and to ensure that these rights are protected, as shown in Table 1.

³⁴¹ Johnson, "Combatant Status Review Tribunals," 960–949.

³⁴² Ron Wyden, "Statement on President Obama."

Table 1. Policy Options Evaluation

	Policy Option A FISC	Policy Option B OSC	Policy Option C CSRT
Criteria			
Executive Branch	No	Yes	No
Transparency	No	Yes	No
Timeliness	Yes	No	No
Judges and Legal Representation	No	Yes	No
Procedure for Legal Review	No	Yes	No
Score Total	Yes = 1 No = 4	Yes = 4 No = 1	Yes = 0 No = 5

6. Summary

While the OSC is the closest forum for being considered a drone court, it will need to be modified through policies that address issues of timeliness and OSC operational procedures. The suggested modifications would ensure that procedural due process for U.S. citizens is implemented and the integrity of the Constitution preserved.

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