Coming of Age in a New World Environment:


by

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To the men and women of our armed forces who have served and are serving around the globe, who tirelessly and with dedication give so much to the American people. The United States and many countries around the globe are fighting a battle never before seen in history, not against a concentrated foe with defined battle lines, but rather an ideology that is spread by our latest technology, the internet, into the small enclaves of individual minds in our local neighborhoods. We must give constant thanks to each and every law enforcement officer, who not unlike their military brethren gives so much in the face of adversity. To our leadership who we have entrusted with our national security and homeland protection, thank you for your dedication and governance. To my many academic instructors along the way who encouraged me to learn, and for their tutelage and inspiration to grow and expand not only my mind, but the hearts and minds of others. Special thanks to the outstanding mentors and Professors at American Military University and Henley-Putnam University for such specific knowledge and experience to understand the complex dynamic field of security, intelligence, and protection.
Coming of Age in a New World Environment:

The Feasibility and Potential Benefits of a

Judicial Review Process of US Counter-Terrorism Strikes

By

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Abstract

The introduction of advanced technology to warfare can create a lag between the use of the new tool and the administrative policies for the deployment of such devices. Unmanned Aerial Vehicles (UAV’s) with the ability to loiter over a potential target for up to two days, and armed with weapons capable of precision strikes have become a weapon of choice for the United States, not only in fighting an asymmetrical war in Afghanistan and Iraq, but also outside areas of defined conflict for counter-terrorism measures. However, the United States is controversially at odds with international laws, domestic laws, and other sovereign countries as to the legal basis for implementation of these measures, which have included targeted killings.

Interviews with legal experts in both the international and domestic arenas outline the ambiguities currently exploited by the US as a legal basis for launching these lethal strikes. Collaboration with these legal experts may result in the creation of an open and public structure whereby the US could easily demonstrate and defend its legal position for killing an individual, either an American citizen or a foreign national, due to circumstances that is expected to imminently result in death of a US citizen. Moreover, widespread unilateral drone attacks could actually be counterproductive to an effective fight against the expansion of terrorism (Hudson, 2012). Guiora (2013) worked as part of legal review board of military advisors within the Israeli Defense Force that analyzed evidence against a target before a strike was authorized. Zenko (2013) and Vladeck (2015) both believe it is necessary to have a review process that allows for the refuting of, not just the presentation of a evidence against a target.

The interviews presented in this dissertation can provide developmental basis for formulating the structure of a US legal review process. In addition, this dissertation presents a tool for the implementation of a transparent, well-defined, well-executed, review board process.
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that is adversarial in nature, and not only promotes the leadership role of the United States, but democracy. It is essential that the American public understand what their government representatives are doing on their behalf and interests, especially national security interests; there is no higher moral requirement than the protection of human life.
Chapter 1--Introduction

“What we have to fight for…is the freedom and independence of the fatherland, so that our people may be enabled to fulfill the mission assigned to it by the Creator.”

Adolph Hitler, _Mein Kampf_

1.1 Introduction

Throughout the course of human history numerous rulers have persecuted, ruled, or killed others, including entire races or cultures that were perceived as a threat. Government leaders have been left to their own devices to determine what they believed was a "threat" to their sovereignty. The United Nations Convention submitted a ruling that allowed countries, sometimes referred to as "states" to defend themselves against threats. However, the UN did not provide the definitions of what constitutes a real imminent threat; that was left up to the individual states. In addition, the UN ruled on the states "right to self-defense" which allowed for a "pre-emptive strike"; meaning a state did not have to wait until it was attacked before it retaliated, if the threat was apparent and imminent (UN, 2010).

After the September 11, 2001 attacks, the identification of a number of terrorists leaders, labeled High-Value-Targets (HVTs), located in remote areas of the world, unreachable by conventional means, required the implementation of new program to neutralize these future threats. The United States government declared openly in April 2012, after many years of being classified, that they had a targeted killing program for "self-defense" against foreign adversaries who were labeled an imminent threat to national security (Brennan, 2012). The primary weapon of choice for these targeted killings is the armed attack Unmanned Aerial Vehicle (UAVs), commonly known as “drones.” Drone strikes carried out by not only the US military, but also by the CIA, began shortly after 9/11 killing thousands of combatants, non-combatants, as well as suspected terrorists, and continue to this day (Lederer, 2010).
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Until 2012, it was the publicly disclosed position of the US government that targeted killings outside of defined conflict areas did not exist, and that drones were simply a tool for the declared wars in Afghanistan and Iraq. However, even though US participation in those wars has wound down, the number of drone strikes have actually increased not only in Afghanistan and Iraq, but also in other areas, including: Pakistan, Syria, Somalia, Yemen, Libya and possibly other African countries as well (Ross, 2015). While drone strikes have primarily targeted terrorist foreign nationals, targets have also included American citizens.

The foremost international legal justification that the US uses to defend its use of "lethal action" which we may also call targeted killings is that the subjects were terrorists, who posed an immediate and imminent threat to a US citizen or national security and the US is acting in self-defense, as outlined by the United Nations (UN, 2010). If the basis for this legal argument were assumed to be true, then the United States government should have little problem disclosing the evidentiary basis for the belief of every person targeted or killed. However, the US Executive branch, the ultimate authority for the military and CIA, has declined to release details of its targeted killing program or the evidence used to support the targeting of terrorist threats in areas not declared as conflict zones. The Obama administration’s decision not to disclose information about this classified program was supported by the US Supreme Court which upheld the Executive branch's power by dismissing a lawsuit filed by the American Civil Liberties Union, requesting the government to disclose any and all information regarding the US targeted killing program (Kaufman, 2015).

History has shown repeatedly, that the unrestrained killing of people without due process, regardless of their reasons given by governments, often leads to tyranny (Sifton, 2015). Hitler told the German people before and during World War II that the Jews were a threat to their
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country and must be prosecuted, imprisoned, or if necessary—targeted and killed. The average German citizen was not aware of the full extent of Hitler's definition of the term "prosecution", which meant the summary execution of Jews (UN, 1948). There is a similar issue with terminology used by the US government since the September 11, 2001 attacks by Muslim extremists, United States politicians and military officials have given the term "threat" a broad and unwieldy definition (Sanger, 2009). In fact, the United States currently has no clear definition or policy as to what comprises a terrorist threat, nor does it have clearly defined protocols for neutralizing such a threat. There is also no known legal process or evidentiary protocol to determine what is an ongoing imminent or credible threat.

The Magna Carta of 1215 was the beginning of codification for the protection of basic human and personal rights, so they would not be abused or ignored by any government (Hudson, 2012). The United States Constitution written just over 200 years ago was designed to lay out the personal protections for all its citizens. As per the Constitution, the US government created and utilizes a balance of power among three branches: executive, judicial, and legislative. Further Constitutional amendments were adopted to more specifically outline guarantees of basic human and civil rights in order to ensure the government and judicial system did not abuse their powers; such as the fifth Amendment against self-incrimination. The judicial and legislative branches have the responsibility to monitor the executive branch for acts that potentially violate domestic law, international law, or the US Constitution. The president is currently the final authority for protecting the United States against domestic and foreign adversaries, and he is using that authority to conduct extra-judicial killings. The United States would benefit from an increased public awareness of a defined open legal structure, before the government kills anyone,
not just within its borders, but abroad. The research presented in this dissertation outlines one potential method of achieving such valuable accountability.

1.2 The Problem

Since October 7, 2001, when the first armed UAV strike attempted to kill Al Qaeda's number two man in Afghanistan (Woods, 2015), the United States has built an arsenal of these precision attack vehicles. As of January 2014, the U.S. military operates a large number of unmanned aerial systems: 7,362 RQ-11 Ravens; 990 Aero Vironment Wasp IIIIs; 1,137 Aero Vironment RQ-20 Pumas; and 306 RQ-16 T-Hawk small UAS systems and 246 Predators and MQ-1C Grey Eagles; 126 MQ-9 Reapers; 491 RQ-7 Shadows; and 33 RQ-4 Global Hawk large systems (Osborn, 2014). Drawing on a presidential finding written for President Bill Clinton in 1998, which gave permission for the CIA to assassinate Osama bin Laden, the Bush administration concluded that executive orders banning assassination did not prevent the president from lawfully targeting terrorists for assassination (Williams, 2013). At that time, the Washington Post reported that the, "CIA is reluctant to accept a broad grant of authority to hunt and kill US enemies at its discretion. But the agency is willing and believes itself able to take the lives of terrorists designated by the president." (Gellman, 2001, p.2) A few weeks earlier on September 14, 2001, the US Senate had voted 98-0 and the House voted 420-1 to pass the Authorization for Use of Military Force (AUMF). This joint resolution authorized the use of United States Armed Forces against those responsible for the recent attacks that had been launched against the United States (Warren, 2012). Presidents Bush and later Obama would argue that this gave US presidents the mandate to hunt Al Qaeda terrorists wherever they were found. Critics noted that the AUMF gave the military, not the CIA, the authorization to go after
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terrorists, but for the decision-makers and legal analysts of the Bush administration, this was mere semantics (Morris, 2011).

Since the United States started using drones the number of targeted killings and collateral deaths, along with amount of property damage to homes, public buildings, vehicles, and infrastructure have accumulated significantly. From 2001 to 2014, there were 791 attack drone strikes, causing between 3960 to 6463 known killed (combatants and non-combatant civilians) across the countries of Afghanistan, Pakistan, Somalia, and Yemen (Ross, 2015). It is important to note that these numbers represent only the strikes and deaths that have either been reported and confirmed by the United States, the media, other countries, or discovered through investigation by other sources, such as non-governmental organizations (NGO), private companies, volunteer organizations, or individuals. What is clear is that it is not known how many drone strikes or kills are not reported by the United States government, purportedly for reasons of national security (Williams, 2013).

It has been suggested that, just as for criminal executions carried out on domestic soil as a result of death penalty convictions, these UAV executions on foreign soil should require the same judicial review and due process (Ochse, 2007). Since the founding of the United States the American public has struggled with capital punishment. The number of crimes where a death sentence is an option has decreased over the course of American history (DPIC, 2015). However, the average American citizen has little idea about the extent or use of attack drones for targeted killings because everything about them from who, when, and how many is classified and only small amounts of information are released to the public by the US government. The local, state, and federal judiciaries have enacted protections in cases of capital punishment. However, there is not yet a legal framework for killings outside of US borders, by drones or others means, either by
the CIA or the military. In addition, as a member of the United Nations, the United States is obligated to follow its human rights policies. In 1948, the United Nations adopted a Universal Declaration of Human Rights. Article 3 states, "Everyone has the right to life, liberty and security of person" (UN Charter, 1948). Through international laws, the United Nations also gives individuals the basic rights and privileges of due process for alleged crimes that they may have committed. Thus, foreign nationals should be entitled to basic human rights; not be arbitrarily killed by any nation. In order to adhere to the tenets of these international treaties and laws, the United States should adopt a legal process and basis for the execution of individuals around the world.

1.3 Purpose Statement

The United States is a democracy and leader among nations throughout the world. This leadership role necessitates that the US government be held accountable to establish a global legal standard, to be set for all nations with regard to the execution of persons outside of a sovereign state. The purpose of this paper is to explore and then recommend the establishment of a legal standard for the killing of alleged terrorists located either within or outside of declared conflict zones, and what the process should be to uphold this standard.

1.4 Research Question

What are the potential benefits and the feasibility of a judicial review process for targeted killings of terrorists outside of US borders? How do legal and policy experts suggest such a judicial review be established, duties, and their objectives?

1.5 Importance of the Study

The rapidly changing environments of warfare and technology have changed the process of identifying, locating, and neutralizing individuals and groups around the world who are both
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non-state actors (not representatives of state militia), and wish to threaten or harm citizens or the national security of the United States. As a further complication of this dynamic environment, social media and other internet sites allow for remote recruitment, motivation, and training of individuals from around the world. These individuals can act as lone-wolf assailants, and can engage in extremely lethal means of terrorism up to and including the detonation of a nuclear device. In this context, policymakers need to adopt policy and legislation to balance two often conflicting requirements: 1/ the protection of their citizenry from the threat of harm, and 2/ the protection of civil and human rights associated with democracy around the globe. It has been suggested that in this new globalized community, the United States must be an active and legitimate stakeholder (Brand, 2014). If the United States continues to act unilaterally and without regard for international laws and treaties, it is likely to provoke a backlash from terrorists (Brand, 2014).

Robotics along with their utilization as a means of killing are only in their infancy (Barker, 2015). At a conference on July 28, 2015 in Paris, scientists and technical experts – including physicist Stephen Hawking and Apple co-founder Steve Wozniak – warned of a global arms race with weapons using artificial intelligence (LA Times, 2015). Recently, leaders from around the world began signing a petition against purely autonomous military combat machines for fear of loss of human control. Artificial Intelligence (AI) is becoming a new technology with unknown abilities, limits, and consequences. The United States’ adoption of new policies that restricts technology and respects the rights of the individuals no matter where they are discovered, can bring about increased counter-terrorism effectiveness (Vladeck, 2015). These new policies and legal standards would need to identify the problems, remedies, and protocols associated with identifying, locating, capturing, and prosecuting criminal or terrorist suspects not
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only in areas of declared war, but also outside of areas of armed conflict. Could military or
civilian drone courts be the answer?

This dissertation synthesizes research on security and international relations as well as
domestic and international legal scholarship, in order to answer these questions. It is particularly
vital to the international community to understand and act on the issues covered by this study,
before other countries begin employing drones to target non-state actors.
Chapter 2--Literature Review

"Let us never forget that government is ourselves and not an alien power over us. The ultimate rulers of our democracy are not a president and senators and congressmen and government officials, but the voters of this country."

Franklin D. Roosevelt

2.1 Introduction

Technology brought us the Unmanned Aerial Vehicle in the 1990s; those early drones were used for reconnaissance. September 11, 2001 brought about the advent of the armed attack drone and a new aspect to war and counter-terrorism. Since the first American drone strike in October of 2001, the number of individuals targeted for killing via drone has increased dramatically. These numbers represent known or reported casualties; numbers that many believe are grossly understated, as strikes are most generally carried out clandestinely by the CIA or special operations units within the military. Drone strikes were developed as a tool to replace manned attack and bomber aircraft within war zones, but quickly were adapted for use outside of defined conflict areas.

One reason drones were seen as particularly useful by the US military and people engaged in counter-terrorism work is that terrorists have been attracted to locations that American military units have found almost impenetrable, both in failed states and in remote areas within sovereign nations (Morris, 2011). Thus, counter-terrorism units began using drones to target and kill known, "high-value terrorist" (HVT) leaders wherever they were hiding, no matter what country, sovereign nation or not. HVT is a term used for a person by the US intelligence community and Department of Defense (DoD) who represents significant interest or threat to US national security. Under the Bush administration, the United States based the legality of these strikes, in part, on the international laws of imminent threat and self-defense (Lederer, 2010). As time passed both Presidents Bush and Obama expanded the set of viable
targets to include people who were simply believed to be terrorists, or acting like terrorists. These targets were identified as "signature strikes" and their inclusion expanded the area of operations to include Syria, Somalia, Libya, and possibly other African nations (Sanger, 2009).

The move to target not only military combatants within declared war zones but also individuals outside of these war zones who would now be defined as combatants, has many people and government officials around the world challenging the legality of these extra-judicial executions (UN, 2010). Another issue is that these drone strikes seem to be causing retaliatory terrorist attacks resulting in academics such as Professor Leila Hudson (2012), Professor John Sifton (2015), and Professor Joseba Zulaika (2012) all lawyers, and are pushing for policy changes. Some specialists (e.g., Professor Jeff Brand, 2014 and Professor Amos Guiora, 2013) believe there should be a specific process for judiciary involvement before drone strikes are carried out, in order to balance the executive branch power currently used as a basis for these killings. Law professor and legal expert from the Washington school of Law, American University Stephen Vladeck (2015) believe there should be a special kind of legal proceeding, an after-action review similar to a civil lawsuit, whereby federal judges and courts encourage the executive branch to determine if appropriate legal conventions were followed. Moreover, the lack of a judicial process for the targeted killing of non-state actors outside of a declared war zones by what the defense department is using as a counter-terrorism tool is unsustainable. This study seeks to further understand how counter-terrorism would be affected if the United States had a transparent judicial review process before UAV strikes.
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2.2 Reviews

The first UAVs were developed by the US Department of Defense for reconnaissance, which was their primary use in the 1990's. Singer (2009) provides data on the many different types of drones the US military has developed for diverse sets of applications. Over the last 15 years, two models which are basically the same aircraft type have developed particular notoriety. The first is the Predator, solely a reconnaissance platform with sophisticated equipment for video and photography. The second, known as the Reaper, named after the Grim Reaper of Death, is not only used for reconnaissance, but is also weapons capable and has been the primary drone of choice for targeted killings (Singer, 2009).

*The Naval Institute Guide for Ships and Aircraft of the US Fleet,* (Polmar, 2005) discusses the history and evolution of the entire fleet of UAVs and how they have played a role in the US military arsenal. In the early days of development, the US government was unsure how to employ an armed drone or how the world would respond to an unmanned vehicle launching weapons and killing people without direct human intervention or responsibility. Today, the US government and military still struggle with establishing evidence, authority, and basis for lethal attacks, as well as who is ultimately responsible, but have moved rapidly forward with increasing numbers of drones, deployed in multiple theaters of operation around the world.

It is difficult to compile accurate statistics on the number of drones, and lethal attacks, partly because there is such a wide range of theaters of operations across many countries and partly because of the secretive nature of the data. Ross (2015) provides data and statistics on the various types of drones, locations, numbers of reported killed, the number of suspected deaths of combatants, those killed as collateral damage, as well as those injured and property damage. It is important to understand from Ross's data that this is no small issue in numbers of combatants
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killed, and the numbers of people injured and killed who were innocent civilians caught in the crossfire or bomb blast. The Bureau of Investigative Journalism (2016) is also an organization that maintains daily current data on US drone strikes for up-to-date information on strike locations, injuries, and casualties.

Drone strikes began as a tool to replace manned attack and bomber aircraft within war zones—the goal was to lower casualty and capture rates of US pilots. Morris (2011) delineates how terror groups, leaders, and individuals moved from war zones to areas perceived as safe havens in failed states or geographic areas within sovereign states that were out of reach of the local military. Drones quickly found a new mission and were adapted for use outside of these designated conflict or war zones as a counterterrorism tool with great effectiveness. Counterterrorism units of the US military and the CIA began initially to use drones to target high-value leaders, no matter what country they were believed to be hiding in, as well as hunt for Osama Bin Laden (Morris, 2011).

The United States under the Bush Administration based the legality of these strikes, in part, on the international law UN conventions of self-defense and imminent threat (Lederer, 2010). Before 9/11, then CIA director George Tenet and Secretary of Defense William Cohen both discussed their reluctance to use attack drones in warfare or for targeted attacks for fear of international and domestic public outcry (Mayer, 2009). After the events of 9/11, President George Bush authorized the use of attack drones for kill missions (Yenne, 2010). Bush had the CIA begin a secret drone war against the terror group Al Qaeda, by targeting the top leaders of the organization and hunting for Osama Bin Laden (Williams, 2013). The first drone strike in the war against Al Qaeda was actually a failure because the missile missed its target, Mullah Omar, a high-value enemy seen as Osama's right-hand man (Woods, 2015). Both the Bush and Obama
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administrations expanded the drone strike or targeted killing program beyond known evidence-based high-value targets when they started employing "signature strikes" (Sanger, 2009). These were simply strikes against individuals who were being monitored by drone surveillance systems and exhibited certain "signature" characteristics of terrorist behavior. For example, a signature set of traits may include: living in a known terrorist village, driving a known terrorist around, aiding in any way a known terrorist, carrying or using weapons in coordination with known terrorists, or helping known terrorists who have been injured or killed, like first responders. In addition both Presidents Bush and Obama expanded the program to include targets who were believed to be terrorists without evidence-based criteria; these believed terrorists were ordered killed (Sanger, 2009). There were also rules-of-engagement changes called "double and triple taps." These drone attacks were second and third strikes on the same target after people on the ground began to aid the original terror targets who had been hit. It was believed that if one helped, supported, or aided a terrorist, then the new target must be a terrorist as well and subject to strike (Sanger, 2009).

In 1948, the United Nations drafted the Universal Law of Human Rights. This draft created the original structure for many subsequent conventions which attempted to protect all individuals who were or were not involved in war or armed conflict. UN Special Rappateur Philip Alston was tasked to respond to concerns about the legality of the United States use of attack drones (UN, 2010). In his arguments defending the American use of attack drones, Alston drew upon the principle of proportionality, imminent threat, and self-defense (UN, 2010). The United Nations has acted as the centralized remediation organization for countries who are against and have had drone strikes kill innocent civilians, have had strikes damage significant areas of property, or are representing those killed. The UN conventions and supporting
international laws are the supporting mechanisms for these countries seeking retribution.

Furthermore, Ochse (2007) goes more in-depth in his discussion of international law and targeted killing programs. Mayer (2009) in his work, "The Predator War" develops ideas about the risks of the US CIA covert targeted killing program and the ramifications to the global community and international law.

Mulrine (2013) reported that President Obama was "tentatively" opening the door for the use of some type of judicial court to evaluate the use of drones to strike enemy targets. Moreover, the research being conducted for this dissertation is assisting in bringing different opinions as to how best protect individual rights and civil liberties while still providing for the national security of the US. Obama acknowledges that there were procedural differences between the two agencies using drone strikes, the CIA and the military, and that a review process would help to consolidate those differences (Mulrine, 2013). In a May 2013 speech, Obama said, “The establishment of a special court to evaluate and authorize lethal action has the benefit of bringing a third branch of government into the process,” (Mulrine, 2013). He also sounded a cautionary note, saying such a court would raise "constitutional issues about presidential and judicial authority” (Mulrine, 2013). Mark Jacobson, senior transatlantic fellow at the German Marshall Fund of the United States, agrees with Obama. He said, "The courts could help increase accountability as will having more drone strikes under the auspices of the US military rather than under the Central Intelligence Agency (CIA) – a change the White House has indicated it will make. It puts drone targeting within a well-established process, with rules of engagement, legal review, oversight, and a post-strike review process (Mulrine, 2013, p.11)." Not everyone agreed that the use of drone courts would solve the governmental issues related to drone strikes. For example, the directors of both Amnesty International and The Center for Civilian Conflict,
organizations that are against the use of UAV strikes for counter-terrorism. US Senator Ron Wyden disagrees with President Obama and suggest that review of drone attacks is already covered by domestic, international and Federal Intelligence Surveillance Act laws in place to protect civilian rights. Their position was that there are already too many courts and that more courts were not the answer (Brand, 2013). Many military experts felt that adding another layer of bureaucracy, with a judicial court process, would only slow an already poor process for eliminating national threats. Judicial officials have agreed that a drone court is outside their jurisdiction and within the job of the president; to secure and protect the nation.

The value of the UAV is its ability to carry out precision attacks with minimal collateral deaths. However, the results of UAV strikes rest upon the intelligence provided for the attacks. Sifton (2015) is a human rights lawyer and the advocacy director for Asia at Human Rights Watch, he travels throughout the Middle East to chronicle and study violence. His personal accounts of people who have directly witnessed the use of attack drones are remarkable. He provides a unique perspective as to the atrocities committed by the unilateral unparalleled use of drone strikes, discussing the effects and devastation on the local populations (Sifton, 2015). Like Hudson (2012), Sifton believes there is a direct correlation between the US use of drones and violence by insurgents as retaliation for those drone strikes. Sifton is outspoken in his views that drone strikes are illegal and immoral by international law or any ethical human compass. He is against the use of drones, and in fact believes that world issues and problems can be solved solely by use of non-violent diplomacy. The value of his research is in his interviews with local civilians, freedom fighters, and insurgents.

In addition to legal grounds, the effectiveness of UAVs as counterterrorism tools has been up for debate for some time (Vladeck, 2015). Cloud (2010) provides insight as to how the
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CIA has developed a broader list of targets beyond combatants in war zones, to terrorists outside areas of known conflict. However, it is not known exactly who the CIA is targeting or what their objectives are, counterterrorism or political. The CIA's clandestine program is another reason the government needs to be more transparent with its use of extra-judicial killing. Gellman (2001) researched the ways that the CIA targeted specific individuals, including US citizens who had become engaged in terrorism, and the legal basis used by the administration for these killings.

Not everyone engaged in the debate believes that there should be a legal process before a drone strike occurs, in that there are degrees of uncertainty as to the time and place of the strike. Vladeck (2015) is a Law Professor at American University, Washington DC and has written several books on drone strikes and the international implications of the counterterrorism measures. His position is that there needs to be a legal review, after a strike in a manner not dissimilar to our American civil courts. This legal review would be a remedy and means to evaluate each strike as to its legality and effects. Vladeck believes this would change the manner in which military leaders and policy-makers used such lethal force. He writes,

That’s not to say that judicial review is the wrong answer; it isn’t. But as is already true for lawsuits challenging lethal uses of force by the police, such review should take place through after the fact damage suits expressly authorized by Congress and be heard by ordinary federal judges. By that time, we'll know what we couldn't have known in advance — whether in light of the circumstances at the time of the attack, the government acted lawfully. (Vladeck, 2015, p144)

Thus, he is in favor of moving forward with drone strikes under certain conditions with the review process he delineates. Strangely what US intelligence and counterterrorism officials have never provided is the objective results of the effectiveness of their targeted killing program; have
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their strikes stopped a terrorist threat? The effectiveness of this program is difficult to assess, in part due to the secrecy of much of the program. There has been significant discussion that killing key leaders of terrorist organizations, especially the founders, dramatically disrupts the organization and its ability to operate its command and control functions.

US lethal strikes have caused significant tension not only with other governments, but also with groups and individuals within targeted areas. Hudson (2012) argues that expanding counter-terrorism measures with targeted UAV killings, has increased violence and instability in all geographic areas of use. His research provides background on US drone strikes, gives estimates of a HVT-to-Total Deaths ratio, and describes acts of terrorism that may be retaliatory for drone strikes in Pakistan. Hudson acknowledged that it is difficult to irrefutably establish direct causality between drone strikes and recent terrorist acts, but is working to establish a body of knowledge on the effects of drone strikes. Hudson's work is particularly valuable in that it attempts to devise a means of evaluating the cost-benefit tradeoff of continuing US drone strikes in Pakistan. Hudson is against the United States’ unilateral use of drone strikes as a means to combat terrorism which he ultimately views as illegal. Hudson's research is a valuable resource in the correlation between a counterterrorism tool and the potential, instigation of further terrorist acts.

Zulaika (2012) also engaged in research on American counter-terrorist activities and looked at ways they may be causing more harm than good. His academic background in anthropology and Basque studies provides a unique approach to counterterrorism and the use of drones. He is a Professor at the University of Reno and from the Middle East. Zulaika suggests that the current US counter-terrorism policy is a self-fulfilling prophecy, in that the more the US takes action to fight the "terrorists" especially with the use of remote drones, the more the
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insurgents protest and carry out actions in response to the attacks. Furthermore, his study concludes that the United States is not considering all the relevant factors as to its policy effectiveness, the legality of its extra-judicial killings, the validity of its intelligence gathering, and the results of its counter-insurgency tactics. For example, Zulaika notes that the US has no feedback loop to determine if its drone campaign is accomplishing what it is meant to. In addition, he points out the very high number of uninvolved civilians killed in these drone attacks: a ratio of around 80 civilians killed by drone strikes for each actual combatant. Zulaika's research provides a differing perspective on the effectiveness of the US drone strike policy now in place within the CIA and military and is against the current policies of attack drones and provides empirical data to support his beliefs.

There is a substantial amount of intelligence evidence needed to identify and convict a terrorist or criminal suspect, and a significant legal boundary that is crossed when moving a suspect from the terror watch list, to the kill list. Guiora (2013), working from his experience as a Judge Advocate for the Israeli Defense Forces (IDF) provides insight into the many dimensions involved in a government's choice to assassinate. He details how necessary it is in his book and research which provides excellent detail, shows how necessary it is to pay strict attention to the many facets that need to be examined before a targeted killing to be considered. For example, is the threat ongoing and imminent? Can the target be identified? Are there multiple sources of intelligence to establish the subject is involved in terror activities? Can he be apprehended instead of killed? Is he in a jurisdiction or place where the local military or law enforcement forces cannot investigate or apprehend? Are there any issues with collateral damage or death if the strike were to be carried out? What is the legal and political basis for the strike, self-defense or immediate threat to national security? What is the counterterrorism objective? Guiora
discusses the aspects such as legal boundaries, domestic and international laws, political fallout, counter-terrorism achievements of a particular strike, collateral deaths and damage, moral and ethical issues, as well as civil and humanitarian rights. No other publication was discovered that has the breadth of this material on the subject matter. Guiora provides a unique perspective from his experiences and education that transcend both sides of this political issue. He addresses bias and presents what he believes are the policies to be addressed in undertaking such a difficult decision by a government to combat terrorism in today's world. Guiora believes that, "...strikes of this nature are here to stay" (2013, Preface). In his view, it is not necessary to stop the targeted killing of suspected terrorists who are placing the US or other countries in immediate peril. What is important is how we review the immediate peril facts necessary to make that evaluation.

In the final months of Obama's presidency, in the fall of 2016, Freedom of Information Act (FOIA) lawsuits by the ACLU may have persuaded administration to release many documents related to his targeted killing program (ACLU, 2016). Some of these documents include:

- Report on Congressional Notification of Sensitive Military Operations and Counterterrorism Operational Briefings
- Report On Process For Determining Targets of Lethal Or Capture Operations

These documents can now be reviewed and determinations made as to what the administration’s past practices and procedures were, and then formal legal future adjustments can be made in cooperation with legal and policy experts. It is important to note that under President Obama’s
administration, the CIA and US military had separate and distinct programs for drone strikes and targeted killings, and that no information has been released regarding CIA drone strike operations, past or present.

Brand (2014) suggested that drone courts would establish a vital balance of power within the US government, which is currently giving the executive branch unequal power to kill in the name of national security. Other academics, human and civil rights advocates, and legal scholars believe that separate and specific courts of law should be adopted to hear evidence, much like a grand jury, to establish a legal threshold before a UAV strike occurs. Brand’s idea is to establish a judicial mechanism, not necessarily a court with an adversarial environment that would review target information prior to a strike. The difference between a mechanism and a court could simply be a government committee, such as in Congress, to review evidence and intelligence to ensure it meets a valid and reliable threshold, before passing it on to the president for approval. This review would examine protections guaranteed by the US Constitution, international law, and moral boundaries. Brand suggests this type of review is needed to protect not only individual rights, but also the roots of democracy, and to put important checks in place that would provide oversight and compliance within the executive branch. He emphasizes the process would need to take place prior to an engagement, with no after-action review, and that there could be a carefully articulated exception written that would allow for situations of imminent threat to national security whereby procedures are bypassed. Brand is a law professor at University of California, San Francisco and supports the use of targeted killings under strict legal protocols. Legal protocols could be incorporated into a judicial review process. Furthermore, to explain judicial review would simply be that there would be a review of the evidence of guilt, not necessarily that it was conducted by a judge or lawyer.
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Under the Obama administration, the drone strike and targeted killing program was expanded significantly to include multiple theaters of operation: Afghanistan, Pakistan, Iraq, Yemen, Somalia, Libya, Syria, and it is believed but not yet confirmed that the program was expanded to other African countries (Shane, 2015). Shane investigated these expanded programs and documents strikes that go beyond those originally targeted. In 2013, Obama's administration promised there would be more transparency on the drone strike program, targets, and collateral civilian deaths (Mulrine, 2013). Shane's (2015) suggests one possible solution to the transparency issue is a Congressional commission appointed to review the US targeted killing and drone strike program. The ACLU and other human rights organizations filed lawsuits against the Obama administration to force them to release procedures, protocols, and numbers of killed/injured in drones strikes (Kaufman, 2015). Kaufman (2015) provides substantive information on court responses to the above lawsuits, as well as a Supreme Court decision to preserve the administration’s right to keep the drone program secret. Hartle (2004) suggests in his book, "Moral Issues in Military Decision Making" that the United States has a responsibility to uphold not only the law, but the moral code in warfare, by adjudicating those who would be identified and listed for targeted killing. The President of the United States, on behalf of the American people, is placing the US accountable by implementing a program of killing that gives the appearance of being outside the boundaries of the international law and the treaties of war. Moreover, he suggests there is a duty bound to this accountability, and it demands that there be an effort made toward transparency of the legal framework for the killing of a human being.

The United States has been the foremost leader in the last sixteen years to use UAVs for military and counterterrorism applications that included the targeted killing of alleged combatants and terrorists. During this time, drone strike technology has continued to improve
and proliferate. Some scientists believe that the continued trend and lack of substantial legal definitions for targeted killing and drone strikes will lead to other nations beginning to engage in the same practices as the US (Barker, 2015). The scientists predict that the upward trend in use of UAVs could start an arms race of attack drones of all sizes and shapes (Barker, 2015). In light of that potential arms race, Barker suggests that there is an immediate need for all nations and the United Nations to enact swift controls for drones and for strikes outside of delineated war zones. He further believes technology is moving faster than the international legal system can adapt to for controls and oversight.

As the world's leading super-power, the United States is in a special position and UN proponents argue that the US needs to take a leadership role in adopting and reforming drone policy (UN, 2014). Zenko (2013) also delineates the need for new policies and laws to control the proliferation of reconnaissance and armed attack drones. He suggests that if the US takes the lead, it could stop the future illegal killing of suspects or innocent civilians by drone strikes (Zenko, 2013). The United States has a complex legal system and judicial branch of government that protects the rights of US citizens. Zenko argues these rights should to be extended to global citizens, and the killing without a judicial process or protections are immoral and illegal (Zenko, 2015). Dietrich (2013) asserts in his CNN article that the United States has not only a legal, but more importantly a moral responsibility to develop policy that allows the global community to refute what the US is doing with its drone program. In addition, there continues to be substantial pressure from foreign governments, scholars, and human rights organizations for the United States to be more transparent about its drone program, and to adopt a legal process for its targeted killing program.
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While some people engaged in the debate on drone attacks, such as Vladeck (2015), believe that legal review is required only after strikes, others believe that separate and specific courts of law should be adopted to hear evidence to establish a legal threshold before a UAV strike occurs. Numerous legal scholars within and outside the United States are providing research and opinions as to what a judicial process could look like for the US targeted killing program (Brand 2014). This process would examine the various protections guaranteed by the Constitution, international law, and moral principles. Brand suggests this type of review is needed to protect not only individual rights, but also the roots of democracy, and to put important checks in place that would provide oversight and compliance within the executive branch. He emphasizes the process would need to take place prior to an engagement, with no after action review, but that there could be a carefully articulated exception that would allow for situations of imminent threat to national security, taking into account operational considerations for situations that occur in a fluid, immediate, and tactical environment. It is important to consider limiting the scope of the judicial review process in its infancy, to avoid cumbersome or ineffective protocols that do not do what was originally intended.

Since its inception, the drone strike and targeted killing program in the United States has lived in the classified areas of the military, CIA, and governmental departments. Over the years, human rights groups around the world have pursued legal avenues to attempt to get the United States to release information about their targeted killing program; to no avail. However, in late 2016, President Obama made an attempt to be more transparent about American programs to "...capture or take direct action..." against targets that are an imminent threat to US citizens or are in self-defense of US national security (DOD, 2014--release date August 5, 2016). Obama recently released a white paper, Report on Process for Determining Targets of Lethal Or
Capture Operations, which identifies a process by which any department of the government may "nominate" an individual to be entered into the consideration for capture or targeted for lethal action. Obama's released structure for determining targets, included a step-by-step organizational process, including reviews by department legal authorities, that ultimately arrive at the president's desk for final authorization for approval. Missing from this process is any adversarial legal review outside of the executive branch. What is suggested by scholars and the subject of this research is to take the review process outside the executive, and place it in the judicial branch.

2.3 Summary

There have been calls from many countries from around the world, as well as the United Nations, for the US to stop all drone strikes until they can provide a transparent legal process that outlines who it is killing, the evidence against them, and the basis (UN, 2010). There are other groups, Amnesty International, Red Cross International, ACLU, who simply want all drones strikes stopped (Hudson, 2012); in this case, the need for any further policy requirements would not be needed. Academic research conducted by Hudson (2012), Sifton (2015), and Zulaika (2012) suggests that the US drone strike program actually promotes terrorism. The American Civil Liberties Union is attempting to use all legal means to get the US to release the evidence and basis on individuals it has killed (Haufman, 2015). Professors Brand (2014) and Guiora (2013) both believe some type of judicial process should be implemented by the US administration. Professor Vladeck (2015) suggests an after-action review process for monitoring drone strikes.

There are currently two separate entities within the US that are using attack drones, the CIA and the military, each of which uses distinct chains of command and protocols for their kill
lists (Ross, 2015). The bureau of investigative journalism keeps running statistics on US drone
strikes from available gathered information. According to President Obama, the executive branch
does not want to lose the flexibility and unilateral ability to target anyone they wish outside the
US without justification and impunity, although he only broached the topic in this speech in May
2013 (Mulrine, 2013). President Obama did relate he wished to stop the CIA use of drone strikes
and move them all under the DoD (Mulrine, 2013).

The research has found little evidence of an actual judicial review architecture being
formulated, by government officials, outside agencies, or academics. Brand (2014) delves into
complexity of a potential drone court, but is somewhat non-specific on how it should function.
The judiciary and Congress have failed to act to preserve the rule of international and domestic
law in this subject area (Haufman, 2015). The premise of imminent threat and right to self-
defense used as a lethal action legal basis are investigated by Lederer (2010). The expansion of
lethal action strikes against unknown individuals who mimic terrorist behavior known as
both discuss the issues of the effects of collateral damage and objectives as a counter-terrorism
tool for drone strikes. Hudson (2012) documents the international political ramifications of drone
strikes. Guiora (2013) who has experience in the IDF and suggests a criteria-based approached to
evaluation targets for lethal action. Last, Zenko (2013) calls on the US to change its policy
regarding lethal action striking. Research interviews need to be gathered and analyzed from legal
scholars, political scientists, policy-makers, and military leaders to outline how the process of
ordering drone strikes on individuals could occur within a moral and legal framework. In
addition, further research must be conducted to investigate the ramifications of a unilateral
unabated controversial drone strike program, which potentially does more harm than good.
Chapter 3--Methodology

"This is quite an awesome power, the power to label somebody as the enemy, then wipe them out without judicial process of any kind."

Jameel Jaffer of the American Civil Liberties Union 2010

3.1 Introduction

The United States has developed a foundation within the military, government, and CIA for the use of targeted killing by drone strike as a counter-terrorism tool. This tool has displayed an amazing ability to accurately destroy a target while limiting or eliminating collateral damage and civilian casualties. The United States has engaged in drone strikes outside the realm of legal protections and moral implications, it has possibly caused terrorist retaliation events for these strikes (Valdeck, 2015). It is also possible, that in the course of American attempts to stop terrorism in the Middle East, Central Asia, and North Africa, they have also created resentment, anger, and feelings of futility to groups and individuals who otherwise would not have had issue with the west (Hudson, 2012). Furthermore, by displaying a lack of judicial review to the global community, other governments and groups may be initiating their own targeted killing or lethal action program with drones using the US program as legal precedent. This could cause the potential beginnings of drone proliferations (Guiora, 2013). What would be the feasibility and potential benefits of a judicial review process that would take place before US counter-terrorism lethal action strikes?

3.2 Research Focus

In addition to the data gathered via the literature review, the novel data for this dissertation was collected by conducting interviews with experts in the field of political science, international and domestic law, government and military policy, and human rights. The research is almost entirely qualitative in nature, as the qualitative method is the best avenue to gain insight
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into how a specific judicial review process could be tailored in order to meet the needs of not only the counter-terrorism community, but also the human rights and legal communities, and to work towards the ultimate goal of protecting US citizens and national security. The interviews elicited information from eight experts on the national security side of the issue of drone attacks, and eight on the human rights and civil liberties side of the issue. Gathering information from both sides of the issue allows a more complete analysis and results in a better understanding of how to construct mechanisms that fulfill as many of system requirements as possible and meet as many goals as possible for people in a range of positions. It was the responsibility of the researcher to search out and vet prospective candidates who would best understand and be able to provide specific feedback on this issue. It was determined that the candidates would need to have a background in legal, military, political, or human rights policy issues. Candidates for interviews could not be active duty military or actively engaged in direct contact with the current drone strike program, allowing for some mitigation of bias.

The interviews were conducted in an open-ended format to encourage a freer flow of ideas and information. Interviewees were asked to assess how a transparent judicial review process for targeted UAV attacks would affect the United States’ ability to effectively combat terrorism, fight immediate threats to US citizens, and defend national security. Interviewees were also asked to consider what a judicial review structure might look like for targeted executions. In addition, the interviews explored whether the current administration’s process provides sufficient legal protocols to protect the rights, privileges, and lives of individuals, both foreigners and US citizens. Interviewees were also asked for their feedback on the idea of transferring the final authority for deciding on strike targets from the executive branch to the judicial branch of government, in cases where targets are known in well in advance (in other words, not for
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operational environments). The interviews also explored the potential goals of a review board process, such as:

- determination of guilt
- level of evidence requirements for lethal action
- requirements of identification of the target
- determinations of imminent threat or self-defense of national security
- evaluations of responsibility of host nation or area
- time constraints of the operation
- opportunity for capture vs. kill

Analysis of the interviews will be combined with academic studies and legal research on drone attacks in order to determine the best future course that could be implemented by the United States for lethal action operations, counter-terrorism methods using drone strikes, and potential terrorist retaliation from drone strikes.

3.3 Method of Study

Research for this dissertation used mostly qualitative methodology, with some complementary quantitative methodology. The quantitative aspects were limited to the collection and analysis of the magnitude of drone strikes, lethal direct action operations (kills and injured), property damage, and to the documentation of any types of violence that could be perceived as retaliation for drone attacks. Grounded theory best describes the research methodology for this project, which generated theories from interviews, case studies, and review of the literature.

Grounded theory research develops theories to understand identified phenomena (Haig, 1995). A resulting theory should derive from the data analysis and contribute to the explanation of the research question. Further, the grounded theory process calls for the repetitive reading of related
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reference materials and the detection of data connections and work on the “discovery of thematic consistencies from the influences of the interpretation of the literature” (Denscombe, 2007, p. 88). The grounded theory method fits this qualitative research due to the exploratory nature of this investigation, and the required examination of information and conclusions embedded in the statistical records, subject matter documents and experts.

Corbin and Strauss identify three basic elements of grounded research: concepts, categories, and propositions (Corbin, 1990). In addition, Pandit (1996) has identified five analytic phases of grounded theory: 1) research design, 2) data collection, 3) data ordering, 4) data analysis, and 5) literature comparison. Within the phase of data analysis, Creswell (2007) describes several stages. In open coding, the researcher forms categories of information about the phenomenon being studied by segmenting information (Creswell, 2007). Within each category, the investigator finds several properties, or subcategories, and looks for data to “dimensionalize,” or show the extreme possibilities on a continuum of the property. The result of this process of data collection analysis is a theory. The theory emerges with help from “memoing,” a process in which the researcher writes down ideas about the evolving theory throughout the process of open, axial, and selective coding of the data (Creswell, 2007). This project used the above elements of grounded research for data collection and analysis.

In the research of Corbin and Strauss, concepts emerged from the interpretation of information through analysis and resulted in theory development. The analytic process of comparing concepts to emphasize similarities and differences among them led to the identification of categories. Propositions, previously identified as hypotheses by Glaser and Strauss, then suggested concurrence both between a category and its concepts and between categories (Corbin, 1990). The grounded theory used in this research contributed to the
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emergence of concepts, categories, and propositions. The validity and reliability of the data were my responsibility particularly during the interviews when my questions ensured that interviewees understood the intent of the research and subject matter and remained focused on the topic. The second part, again the responsibility of the researcher, was to interpret the interview responses in a manner that was not only the intent of the interviewee, but also to remain within the focus of this study of the category of the question. As researcher, I also needed to be vigilant and aware of political bias that may have found its way into the conversations with interviewees.

Following Pandit’s model, the first phase of research design for this dissertation consisted of a literature review and case selection (Pandit, 1996). The research involved the extensive review of documents and statistics in order to draw correlations between drone strikes, targeted executions, and follow-up terror attacks. The data collection effort focused on the locations of drone strikes and insurgency attacks; data was verified through multiple sources whenever possible.

During research comparison, the emerging theories will evolve to either support or refute the current literature (Pandit, 1996), or design of new theories, ideas, and concept structures. The comparison can either confirm or contest findings throughout the literature. Grounding can assist to alleviate bias by directing emerging theories. The flexibility of the grounded theory approach supports qualitative research with its focus human interaction.

3.4 Interviews

I used interviews to gather data and opinions from international and domestic legal scholars, subject matter experts, academics, government officials, and military advisors in an attempt to evaluate the current legal standing of drone strikes. Additionally, I questioned my interviewees about legal case studies would give direction for a proposed legal review that could
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take place prior to drone strikes. After a literature analysis, I designed interview questions for government officials regarding their stances on current US foreign policy involving drone counter-terrorism strikes and the possible adaptation of a judicial review process. Upon completion of the interviews, the analysis of the gathered material resulted in the categorization of information into groups, which could form new legal structures. Demographic information for all interviewees was evaluated for any bias patterns which may have occurred.

Interviews were conducted in a range of communication channels: face to face, by telephone, and via Skype. All interviews were recorded and transcribed. Following appropriate protocols for interactions with human subjects, all audio recordings were destroyed after they were transcribed. The transcribed material was stored in a personal database that is password protected, and will remain so for at least two years. The names of all participants will be removed, if they choose to provide such information.

3.5 Interview Questionnaire

The following text formed the basis of my interviews, which were tailored to each participant.

Preamble:

The United States since shortly after 9/11 has been engaged in a program to kill individuals who have been identified through intelligence sources as terrorists. These terrorists have ranged from Osama Bin Laden himself, to lower level terror operatives who in some way or another, are perceived to be, directly threatening the United States. These targeted killings have occurred solely outside the borders of the US in other sovereign countries or failed states. The United States legal basis presented to the American public and international community is that the president can capture or kill any terrorist under the authority of the AUMF and under the
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right to self-defense for imminent threats to National Security or harm to US citizens, under the United Nations charter.

There is little-to-no public information about the US targeted killing program. Information as to who is on the targeted kill list, how does someone get on the list, the threshold of evidence/intelligence to get on the list, who are the decision-makers of the list, analysts of the evidence/intelligence, who is/are making the kill decisions, and is the final authority the president of the United States?

This study is designed to assist in creating a model or framework to be implemented by the US military and CIA, e.g. US government for a judicial process before a targeted killing takes place outside the borders of the United States, against a suspected criminal or terrorist.

Your participation in this study will be confidential and helpful in developing a legal framework for the targeting of individuals abroad, in areas of the world inaccessible and hostile to American or other military forces, who are a direct and imminent threat to the safety and security of US National Security, or our allies.

Demographics:

Age:

Ethnicity:

Education:

Political affiliation:

Employment background:
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Questions:

1/ There are currently two separate organizations involved in US targeted killings, the military and the CIA. Do you favor a separate and distinct review process for each of these organizations? Why or why not?

2/ Would you support a three-judge panel for each of the review boards? Three military lawyers for military, three civilian lawyers for the CIA. Or who and how many should be on each panel?

3/ Should this review process be adversarial, much like a court room environment, or should it be more of a search warrant type process, in that evidence is presented to a judge or panel and they render a decision? Explain your opinion.

4/ If an American citizen is the subject of interest or targeting, should the individual or their family have the right to hire a private counsel to represent their interests? How would the review process work to protect the secrecy of the intelligence operation or the network of how the evidence was derived?

5/ How could the process be transparent to the US public and international community?
   a/ Knowledge of the review process and that it exists?
   b/ Release of information after the targeted killing? evidence? Name of individual? Threat?

6/ How much evidence should be a presumption of guilt to implement a targeted kill? How many separate or types of sources?

7/ Should the potential or existence of collateral damage have an effect on the decision to strike?

8/ If you do not believe in the drone strike targeted killing program, how does the United States or other countries apprehend or stop known terrorists or criminal imminent threats in defense of their National Security or citizens? What if the individuals or groups are in areas of the world that are inaccessible, without a large military force, which would threaten or harm the lives of many civilians and military members?

9/ Should the review board be removed from the Executive, and housed in the Judicial branch of government?
3.6 Hypotheses

The hypothesis posed at the beginning of the research process was that data from the interviews could lead to a working structure for a judicial review process for drone attacks that would be placed not in the executive branch but rather in the judicial branch. I hypothesized that the data would also provide insight into the potential political biases that occur during the current process, or could occur in a future judiciary-based process. The plan was to also use the data to create an open and public structure whereby the US could easily demonstrate and defend a legal position for the killing of an individual, American citizen or foreign national due to criminal or terrorist behavior, which is an immediate and ongoing threat to US lives. Additionally, it was expected that the research would likely show that widespread unilateral drone attacks are counter-productive and are in fact not effective tactics to combat the expansion of terrorist groups and terrorism. Finally, the result will be a tool that will allow for the implementation of a transparent, defined, well-executed, judicial process, that is adversarial in nature, and not only promotes the leadership role of the United States, but democracy worldwide.

3.7 Limitations

When attempting to understand the benefits of a legal procedure for the killing of “terrorists” and inaccessible criminals worldwide, as well as the adoption of potential restrictions to the protection of the homeland, it is important to take into account individual and political biases relating to this topic. For example, someone in the decision-making process could have a personal reason for pursuing a lethal action strike against a particular person or target; this is not legitimate. Another example, might be when the biases of the Bush administration allowed for the use of limited intelligence as a basis for action against Iraq also not legitimate. It is acknowledged there are not many people that are willing to sacrifice human life for the protocols
of law, in other words most will accept potential strains of law to save people who are being threatened by imminent terrorist actions. However, it must be recognized that counter-terrorism efforts are a fluid environment in which people are trying to stop bad things from happening. In addition, the requirements for secrecy always protects intelligence sources, as well as around a killing program that is not easily understood or accepted. Finally, it would be beneficial for this research to have the ability go deep into the field where the drone strikes are occurring and interview friends, family, and neighbors about their reactions to these drone strikes; but personal safety precludes such a mission.

The secret nature of the drone-strike targeted-killing program within the government creates real limitations for this project, as it is currently impossible to determine what legal mechanisms they have in place or to access their data. While the US military is just now beginning to release documents about the drone strike targeted killing program, it is only after it was compelled to by lawsuit and media attention, but it is still reluctant to do so. What processes or legal mechanisms are hidden is an unknown factor. Who within the United States government is processing information and intelligence that ultimately results in a lethal action order remains classified and therefore must be the subject of conjecture for this research.

3.8 Delimitations

It is important to understand what this study is not. This research is aimed at the legal processes or policies for judicial review of drone strikes. It is *not* an attempt to make judgments, or assessments, or to gain data regarding military or CIA field operations with respect to battlefield tactical standard operational procedures (SOP), or drone-strike operation rules of engagement (ROE). The legal issues for SOPs and ROEs engage with a very different set of requirements and are entirely different than the subject matter focus for this research which is an
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examination of the process for identification of a suspect, determination of guilt, and carrying out a lethal strike. Additionally, this study is not an attempt to understand or collect data on the policy, protocols, or internal chain of command structure for intelligence gathering on potential terrorist or criminal suspects in foreign countries. How a suspected terrorist is identified and brought through the military, government, or CIA departments to ultimately find their way to a kill list is not the subject of this study.

However, this study is designed to determine the feasibility that after the CIA, government agency, or military unit nominates an individual whom they believe is an “ongoing imminent threat to a US citizen” such that direct or lethal action is believed to be necessary, a judiciary-based court, review process, or review board could be the next step for evaluation of evidence-based criteria for determination of guilt and a potential lethal action order. Any other policy judgments outside the specific delimitations mentioned above are outside the scope of this dissertation. For example, this research does not cover actions such as the prosecution of a suspect or American citizen on US soil, or any aspect of legal or policy protocols relating to such a prosecution. In addition, the issue of whether a proposed judicial review process should be open to the public or closed, classified or unclassified, is also outside of the scope of this dissertation.

3.9 Summary

This research sought to gain insight into the feasibility and potential benefits of a judicial review process before using drones or other means to execute terrorists abroad. Additionally, the task shall be undertaken to formulate what that legal process would look like for both the CIA and the US military. The goal is a structure that the American public and government officials could openly view and rebut; before the application of targeted killings.
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Finally, statistics of strike areas and interviews of academics will be evaluated for any data correlating retaliation for the use of drone strikes. The collected data should provide greater insight into the question, “What would be the feasibility of a judicial review process before US counter-terrorism strikes?”
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Chapter 4--Data Collection

“Bathtub falls and police officers kill more Americans than terrorism, yet we’ve been asked to sacrifice our most sacred rights for fear of falling victim to it.”  
Edward Snowden, 2013

4.1 Interview Selection Process

Sixteen people were selected for interviews which took place either in person or on the phone. I located most of those interviewed from the website Linked-In by reviewing their profiles. The remainder of the people I had specific previous knowledge of the backgrounds, which included their academic and professional histories. There were 30 individuals contacted, of which 16 chose to participate; there were no specific reasons given for non-participation. In an effort to narrow potential biases and gain various perspectives on this issue, I targeted eight individuals who were self-identified as politically conservative, with field experience in military, intelligence, or international law. I chose also eight individuals who were actively working in the fields of human and civil rights and self-identified as politically liberal.

The interviewees are all highly experienced, most with many years of either military operations and policy, or practicing lawyers involved in domestic and/or international human rights litigation and/or policy making. All of the subjects had at least a working knowledge, and some an intimate knowledge, of the United States’ applications of lethal force or targeted killings, by drone strikes or other means. Most of the subjects did not have knowledge of the US policy for targeting killings, the methodology for nominating a potential target, or the procedures for evidence review when ordering a lethal action strike, much like the American public and international community. This lack of procedural awareness assisted in a more open, non-prejudicial dialogue on the possibilities of developing a transparent, effective, open, legal forum for the evaluation of evidence to prosecute individuals with established dossiers of terrorist acts.
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In other words, individuals who were believed to be an *ongoing immediate imminent threat* to an American citizen or to US national security. The names of the individuals who volunteered for this study have been redacted and will be kept confidential: some did not want their names released, while others are in sensitive career positions. Each participant signed a consent form per Institutional Review Board instructions, which will be electronically stored for three years. The duration of each interview ranged from 30-45 minutes.

The following section provides a summary of the respondents’ answers to the interview questions. Presenting the data mostly in summary form is both due to space constraints and to maintain confidentiality. I present the general theme of answers for a given question, and in some instances provide direct quotes to further illuminate responses.
4.2 Demographics

The demographics were chosen to gain a cross-section of political, legal, and policy perspectives, which would also assist to negate potential bias from a particular group.

<table>
<thead>
<tr>
<th>Category</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age</td>
<td>Range from 26 to 70 years old; average 50.</td>
</tr>
</tbody>
</table>
| Political Affiliation | 4 Republicans  
                          | 7 Independents  
                          | 3 Democrats  
                          | 2 Libertarians            |
| Race              | 3 African-Americans  
                          | 4 Jewish  
                          | 11 White/Caucasian         |
| Education         | 6 PhDs  
                          | 7 JDs  
                          | 2 MAs  
                          | 3 BAs                     |
| Work Experience   | 10 Counter-terrorism, intelligence, government policy  
                          | 8 Prior military officers  
                          | 8 Human or civil rights defense, activism, support |
| Gender            | 11 Men  
                          | 5 Women |
4.3 Identification of Interview Subjects

In order to provide a higher level of validity and reliability to the data collection, the interview subjects will be provided an identifying tag, as a reminder that all participants transcripts were de-identified after the interviews were dated and cataloged. In this way, the subjects can be quoted without while protecting their identities, and avoiding jeopardizing their safety, security, or national intelligence. Interviewees belonging to the human and civil rights group are tagged HR1-8. Interviewees in the military and counter-terrorism group are labeled CT1-8.

**Human rights (politically liberal subjects)**

HR1: interviewed February 2, 2017
47yr old female; white; democrat; Boston university BA, Yale law school; international, business, civil rights law practice.

HR2: interviewed January 29, 2017
36yr old female; African-American and Latina; independent; Georgetown, Georgetown school of law; international human rights lawyer; experience UNHCR, IACHR, OAS.

HR3: interviewed January 15, 2017
58yr old male; white; libertarian; California state university BA, American military university MA, California state university PhD; ex-military captain USAF intelligence, pilot American airlines.

HR4: interviewed January 4, 2017
70yr old male; Jewish; democrat; BS, strategic studies MS, MBA, JD; ex-US Army officer, information technology, information security, law; retired California judge; employee global security company.

HR5: interviewed February 1, 2017
64yr old male; white; libertarian; BA aviation management; ex-USAF Major, pilot; FedEx pilot international operations.

HR6: interviewed February 12, 2017
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55yr old female; African-American; democrat; JD; international, human rights, civil rights lawyer; current work with non-profit NGO.

HR7: interviewed January 24, 2017

60yr old female; Jewish; independent; JD; international human rights lawyer, 30yrs litigator.

HR8: interviewed January 8, 2017

26yr old female; white French ethnicity; independent; MA; research associate at leading counter-terrorism organization.

Counter-terrorism (politically conservative subjects)

CT1: interviewed December 23, 2016

45yr old male; Jewish; independent; PhD international relations; ex-IDF officer; professor and author international political science.

CT2: interviewed December 20, 2016

60yr old male; African-American; no comment political position; PhD; police officer, professor intelligence and counter-terrorism, consultant global security company.

CT3: interviewed January 20, 2017

45yr old male; White; independent; PhD; ex-US military Officer, professor state university.

CT4: interviewed January 12, 2017

38yr old male; white; independent; mechanical engineering BS; active duty reserve US Navy officer, pilot American airlines international flying.

CT5: interviewed January 10, 2017

65yr old male; white; republican; MA Cambridge university; president of leading security research company.

CT6: interviewed January 10, 2017

33yr old male; white; republican and independent; Indiana university BA, BS, JD; ex-USMC military officer law enforcement, current employment law enforcement.

CT7: interviewed November 30, 2016

50yr old male; white; republican; MS intelligence studies American military university; ex-USAF intelligence officer.

CT8: interviewed December 15, 2016
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36yr old male; white; republican; BA and MA intelligence studies American military university, doctorate strategic security Henley Putnam university; ex-US Army officer 16yrs; private sector intelligence community employment.

4.4 Summary of Question Responses

1/There are currently two separate organizations involved in US targeted killings, the military and the CIA. Do you favor a separate and distinct review process for each of these organizations? Why or why not?

The responses to this question were nine favoring a single review board, and five for separate boards. Two respondents felt that the current system was sufficient and appropriate and no changes needed to be made.

The reasons given for a single review board revolved around the central premise laid out clearly by CT3: “...the US government's legal criteria for an international lethal action strike does not vary between organizations.” Furthermore, HR6 stated, “...having a separate review board for the CIA could only cause greater political biases, as well as promote less transparency.” Most acknowledged their concerns for the safety of CIA operatives, and the need to maintain the secrecy of CIA operations and intelligence, and believed one centralized review board could meet those needs. Mulrine (2013) brought out that although Obama did not directly say a single review board was best, an inference could be drawn from his statement, "Obama acknowledges that there were procedural differences between the two entities using drone strikes, the CIA and the military, and that a review process would help to consolidate those differences." (Mulrine, 2013, p.7)

The ideas for believing two separate review boards would be necessary are summarized by CT4: “The CIA... because of its operational needs for secrecy, one review process would compromise secret operations by having details leaked.” Additionally, CT6 noted that the “CIA has different goals and objectives for their operations, as opposed to the DoD rules of engagement, thus requiring separate boards to hear evidence of nominees.”
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The two responses stating that there need be no change to the current system for nomination of an individual for lethal action both came from mid-ranking ex-military officers with intimate knowledge of the processes for lethal action nomination. It was their belief, as stated by CT3, “…that there were already many levels of strict review conducted by groups of attorneys at each level until ultimately the president signs off on it.” It was their conclusion that a review board of any kind would be an impediment and time consuming, as the current system seemed to be working fairly well. These individuals could not advise how many total people were involved in the process from start to finish, but felt that whatever the number were involved only served to assist in determining risk and safeguarding human rights.

2/ Would you support a three-judge panel for each of the review boards? Three military lawyers for military, three civilian lawyers for the CIA. Or who and how many should be on each panel?

The overriding number that came up in the responses to this question were 5. But, there was flexibility with six interviewees suggesting 5-7 people on the panel, and seven interviewees suggesting panels of 3-5 people. One interviewee, HR5 even suggested “the possible need for 7-9.” Overwhelmingly, respondents said that lawyers needed to be on the panel. However, there were varying ideas about the status of those lawyers, whether military or civilian, and how they should be appointed or by whom. HR2 thought that “Congress should appoint the panel.” CT2 said, "I'm not for military lawyers making military decisions. We need someone outside the military process." CT8, who comes from a military background, suggested, “There should be no panel, simply one person, a lawyer or judge, who reviews each case, much like a judge who signs a search warrant after being presented the evidence. Then, if sufficient belief exists forward it to the president for final signing of the lethal action request.” Numerous respondents believed it should be a mixed panel of civilian and military lawyers, and also include intelligence experts. CT2, who wanted a panel made up of 5-7 people, CT2 believed that “There needs to be a greater
number on the panel to include intelligence experts, as well as more civilian than military
lawyers, but both need to be included.” CT2 felt that with this greater number of panelists would
come more input, understanding, and protections based on what and how much evidence was
presented.

3/ Should this review process be adversarial, much like a court room environment, or should it
be more of a search warrant type process, in that evidence is presented to a judge or panel and
they render a decision? Explain opinion.

All but one of those interviewed, HR7, stated that there should not be an adversarial
process within the review board. In other words, there should not be a prosecution- or defense-
type presentation to the board. Furthermore, their collective views asserted that the review board
process itself, by virtue of the number of persons on the board and their qualifications, acted in
the capacity as an adversary of the evidence presented. CT2 said it best, "The presenting body is
sufficient and the board should be the adversarial aspect." The overall consensus was that an
adversarial process was more appropriate for a courtroom scenario where a judge or jury was
present, and could not ask questions when there was a need for more evidence or clarification. In
addition, most believed this type of process would be too cumbersome, time consuming, and
unnecessary. HR1 believed, "If the process were adversarial it would lead one to believe that the
threat were not immediate and imminent to take that much time to argue."

However, one interviewee, HR5, a libertarian, believed that, “... the accused or nominee
should be in some way represented by someone in the process to question aspects which they
would not be able to do for themselves.”
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4/If an American citizen is the subject of interest or targeting, should the individual or their family have the right to hire a private counsel to represent their interests? How would the review process work to protect the secrecy of the intelligence operation or the network of how the evidence was derived?

All the respondents, except for HR7 – a US human rights lawyer – suggested that if an American was involved in terrorist activities outside of United States boundaries, they would not be entitled to any special treatment or counsel before the board of review. Furthermore, there would be no culpability or responsibility by the US to notify the family or the individual of potential evidence against them. HR3 stated, “Individuals who are involved in terror activities abroad give up their rights and privileges.” HR7 responded, “Those Americans or any other person subject to capital punishment should have the same standards as if they were in the USA.” HR4, a retired Superior Court Judge, thought that the board should hear a special session prior to the main body evidence in order to “make a determination of waiver of US Constitutional rights.” Finally, it was pointed out by HR3 that the President of the United States could waive this tenet and give the family an opportunity to provide evidence at a review board hearing.

There was a general agreement among all participants that any potential review board process would have to be a closed session, top secret and not available to the public. Only those individuals or entities with appropriate security clearances and a need to know would be allowed access to the evidence, and know where it came from and how it was obtained. For example, CT3 asserted that while “[t]he process itself is public knowledge that a review of the evidence is taking place, the actual intelligence should remain classified.” HR1 went into further detail, "In general the US should officially disclose its policies and procedures with regards to drone targeted killings, as well as for investigating all credible allegations of civilian harm resulting from such operations under the domestic and international legal framework."
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5/How could the process be transparent to the US public and international community?
   a/ Knowledge of the review process and that it exists?

This question seemed to create the most anxiety among the people interviewed. However, there was a level of consistency across party lines although there were two main schools of thought. First, essentially half of those questioned believed it was sufficient that the public is only made aware that a clear and distinct review process exists for lethal action strikes, and that no details of the pre-strike evidence or intelligence need be made public. HR5 said it this way, "Review boards are an inherently self-sustaining court itself being completely public. The secret evidence could be vetted separately during or prior to public review." Further, the consensus believed that the public should understand the need for secrecy in intelligence gathering along with the need to not alert the targets. Interviewees in this group asserted that the US government was following the judicial precedent by having a board review the evidence and ultimately decide if the threat was credible and no other options were available to mitigate that threat.

The second group was in favor of having an after-action Congressional review, to be held in secret and not open or available to the public. CT1 suggested that Congress could be “a second-tier review of all the facts including threat level, target distinction, review process, outcome, and objectives attained.” In addition, it was suggested that after a Congressional review, Congress could publish a public document including those items which are not jeopardizing any current intelligence operations, to include: location, affiliation with terror group, threat level, names of primary targets, number of combatants and non-combatants (collateral damage) killed. HR2 said, "Review board information is closed. The public would know of the decision after the strike with no details. Congress could possibly provide a review."
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6/How much evidence should be a presumption of guilt to implement a targeted kill? How many separate or types of sources?

To answer this question, several of the lawyers described and presented their interpretations of the various legal levels of presumption of guilt established by US legal precedent. The first is “beyond a preponderance,” the second is “clear and convincing evidence,” and the last is “beyond a reasonable doubt”. CT6 provided further clarification of these levels, explaining that “beyond a preponderance” of the evidence “points to more likely than not an event occurred,” or that there is a 51% likelihood that the event is as described. The next level up, “clear and convincing evidence,” is “highly and substantially more probable to be true than not,” near the level of 75%. The highest level, “beyond a reasonable doubt,” which is the level for US criminal trials, is evidence where there is “no other plausible reason to believe otherwise, all doubt removed.” These descriptions of levels of evidence were presented to the interviewees, who were asked to decide which level of evidence would be appropriate in order for a review board to sign off on a lethal action order. The responses did not align with conservative or liberal political belief systems and. Furthermore, the lowest level of evidence, “beyond a preponderance,” was the clear favorite:

- Beyond a preponderance of evidence 9 votes
- Clear and convincing evidence 5 votes
- Beyond a reasonable doubt 2 votes

In addition to the level of presumption, the question was posed as to the number of board members needed to have a vote in favor of the order. Would a majority need to be in favor, or should the decision be unanimous?

- Unanimous 6 votes
- Majority 10 votes
Most interviewees did not feel that there should be no set level of evidence other than to meet the aforementioned standards. Further, several mentioned that no single-source evidence be allowed to stand unless it was either a real-time threat, or a direct video feed establishing an imminent impending threat. However, these last two points of real-time or video feed are typical of a tactical operation, not strategic. HR8 summarized basically what most others said, "I think it is hard to quantify the number or type of sources that have to be presented. In some cases, it might be that a single piece of evidence can provide all the required data to confirm an individual's culpability. In other cases, it might be that a number of pieces are necessary to do so. In either case, the most important thing to bear in mind is that the evidence presented has to be absolutely undeniable and concrete."

Should the potential or existence of collateral damage have an effect on the decision to strike?

One interviewee, CT1, noted that there is already a standard in international warfare of “proportionality” that must be adhered to by any country before targeting, whether in a war zone or otherwise. HR4 suggested that “the threat level defines proportionality, as in the nuclear bombs used in WWII. If thousands are going to die, then hundreds in collateral are viewed as reasonable.” But CT5 took an opposing view: “No, if it is necessary, it is part of warfare.” HR7 suggested that it was important to wait and only strike “when the target is isolated, if possible.” Most of the respondents simply said that “yes,” collateral damage should be a factor in deciding when to strike. In regard to the functions of a potential review board, this would be outside their function because it delves into operational rules of engagement.
8/If you do not believe in the drone strike targeted killing program, how does the United States or other countries apprehend or stop known terrorists or criminal imminent threats in defense of their National Security or citizens? What if the individuals or groups are in areas of the world that are inaccessible, without a large military force, which would threaten or harm the lives of many civilians and military members?

This was a bit of a leading question in that the first aspect was if you do or do not believe in the US lethal action strike program. Only HR7, one person out of sixteen, did not believe the United States should have a targeted killing program in any form in order to protect national security. HR7 said, "We should not be killing people outside of a war zone. Besides for counter-terrorism objectives, if we kill one they will simply be replaced by someone else, so it's useless."

However, several of those surveyed did believe that this program should only be employed in situations where imminent threat was present. HR8 said, "I do believe the targeted drone strike program has an undeniable use in protecting public security, and is necessary to combat terrorism. However, I also believe by itself it is of little use; it must be used alongside other counter-terrorism tools." This was combined with the belief that there were very few situations abroad where an imminent threat to US national security, an American citizen, or US interests was present. In other words, it would be difficult to determine how a person or a group in a foreign land could pose an imminent threat; this difficulty made the program’s use and effectiveness problematic. CT3 said it best, "It's hard to imagine a case where the imminent threat requirement for the exercise of lethal force in criminal court could be met by drone strike."

Still others posed the idea that if there was a person who was assisting or persuading others to commit terrorism and that person was targeted and killed, then another person would quickly fill that position, thus causing only a temporary disruption to the terror organization, as stated above by HR7.
9/Should the review board be removed from the Executive branch, and housed in the Judicial branch of government?

Aside from one libertarian, HR5, all the respondents chose to leave the decisions of military operations within the executive branch. CT4 put it this way, "It is the responsibility of the judicial branch to interpret the constitution and limit the power of the other branches of government, not to make military decisions. The Department of Defense falls under the executive branch. Now, if the judicial wants to conduct a judicial review and decides to restrict the executive ability to conduct drone strikes by declaring them unconstitutional, then by all means go ahead and do so." Many expressed the idea that this board should not be a “judicial” review, simply a review board housed within the confines of the DoD. Former judge HR4 noted, “Judges rule on the law, not military operational issues to defend the country.” HR2, a lawyer, said, “The Judicial branch is responsible to interpret the Constitution, not defend the country.” A human rights lawyer, HR7, said, “It should be the review board’s decision when they decide NOT to strike, but the president’s decision when their conclusion is to authorize a lethal strike.”

Several interviewees with military backgrounds reinforced that the passage of the AUMF (Authorization for Use of Military Force), as well as the fact that the president is the Commander-in-chief and so is tasked with national security, authorizes the president to make decisions regarding threats against the US.
Chapter 5--Analysis

"This is a targeted, focused effort at people who are on a list of active terrorists who are trying to go in and harm Americans, hit American facilities and bases."

President Barack Obama, 2011

5.1 Introduction

In the wake of the terror attacks on September 11, 2001 the United States government and President George W. Bush were looking for methods to deal with a new brand of threat to US national security: radical Islamic terrorism. These Islamic terrorist organizations intentionally positioned their operations headquarters and training centers in remote areas of foreign countries or in failed states, outside of central government control.

Failed states are countries where the government has been completely abandoned or is in total chaos due to civil war, dysfunction, regime change, corruption, or lack of leadership. A partial list of current failed states includes Libya, Yemen, Somalia, Syria, Sudan, and some would argue, Afghanistan (Sifton, 2015). These remote locations posed a dynamic problem to the security of the global community as well as to counter-terrorism and military strategists. The challenge for countries, sometimes referred to as "states," was how to protect themselves and their citizens against individuals and groups in foreign lands where there was no declared war, no front lines, no uniforms to identify enemy combatants, and where suspected terrorists were virtually inaccessible. Furthermore, due to the complications of topography and logistics with these locations, suspects could not be apprehended without significant losses of troops and resources. Other significant issues included interference in sovereign state rights (such as Pakistan), or substantial amounts of collateral damage due to bombing campaigns.

Technology has played an important role in the evolution of this type of terrorism. The internet, global communications, and social media have allowed terrorist organizations to
employ tactics never before witnessed by the global community. In addition, a new era of remote terrorism began on September 11, 2001. Remote terrorism uses the internet and global communications to solicit and inspire individuals from around the globe to commit acts of terror in their local areas. The last few years have brought multiple "home-grown" acts of terror in places like Boston, San Bernardino, the United Kingdom, France, Brussels, and, on the very day this text was being written (April 7, 2017), Sweden. The individuals who solicit and provide training, assistance, money, inspiration, guidance, or other resources are co-conspirators, no different than if they carried out the deadly act themselves. One prominent co-conspirator working with radical Islamic terrorists was Anwar al-Awlaki, an American turned terrorist who was killed by a US lethal action drone strike on September 30, 2011. (Morris, 2011). Military and counter-terrorism officials have struggled to find methods to neutralize or bring to justice those members of terrorist organizations who have isolated themselves within remote and hostile locations, and are providing support for others who threaten, injure, or kill.

The UAV or drone was the newest technology to the US military's arsenal retrofitted and designed to combat this new form of terrorism. These aircraft were first used only for surveillance with amazing results due to the drones’ ability to fly undetected for long periods of time over a subject area and to provide real time video feed to intelligence and military analysts out of harm's way. It was quickly realized that this new capability could be weaponized and a new era in military tactics was born. The UAV became the United States’ premier counter-terrorism tool for killing threats abroad.

The advent of this new counter-terrorism tool brought about the need for a well-defined and transparent apolitical process for reviewing evidence of threats by terrorists. The United States, as a global leader, super-power, and society based in the rule of law, should consider the
adoption of a clear, concise, transparent review board process that precedes any lethal action strikes. There have been calls from people and institutions around the world, including the United Nations, ACLU, Human Rights International, etc. for the US to stop these types of strikes until they can provide a legal process that outlines who is being killed, who decides who is to be killed, the reason for the killing, and the supporting evidence. In some cases, there have been retaliation attacks for drone strikes. Cohn (2015) provides an example of the backlash against drone strikes in her article, *Hell from Above:*

In fact, in the wake of the ISIL-linked terrorist attacks in Paris, four whistleblowers in the United States Air Force wrote an open letter to the Obama Administration calling for an end to drone strikes. The authors, all of whom had operational experience with drone strikes, wrote that such attacks “fueled the feelings of hatred that ignited terrorism and groups like ISIS, while also serving as a fundamental recruitment tool." They say that the killing of innocent civilians by American drones is one of most “devastating driving forces for terrorism and destabilization around the world." (p. 2)

There are currently two separate entities within the US that are using attack drones, the CIA and the military, each of which use a distinct and separate chain of command and protocol for their kill lists (Hudson, 2012). The CIA's process is completely secret, and little details have been released to the public (Hudson, 2012). As recently as 2016, the military's process has been only partially revealed (DoD, 2014). Under the veil of self-defense, the executive branch has tremendous flexibility and unilateral ability to target groups or individuals outside the US, that have been identified as a threat to national security. Research by outside agencies, the media, and academics has yielded little information regarding the government's legal structure or DoD review process for these strikes.
The adoption of a legal process within the executive branch of government, one that takes place before individuals are executed and attempts to remove political bias, would allow not only the global community, but also American citizens to know that the United States does not arbitrarily and capriciously kill people. The judicial branch of the United States is a central component of our democracy and allows citizens to understand that the government cannot infringe on personal or human rights without due process of the law. These same rights and privileges for citizens of the United States should be extended to American treatment of all citizens around the world.

Both American and international political scientists and legal scholars have put forth various suggestions for a transparent process for lethal actions by drone; none appear to have been implemented by the US government. Brand, in his work *Establishment of a Drone Court: A Necessary Restraint on Executive Power* (2014), has attempted to delve in to the complex issue of a judicial review process for these lethal actions. The judiciary and Congress of the United States have failed to sufficiently address the rule of international or domestic law in this subject area. It is important to understand that if a criteria-based review process is developed, that it conforms not only within a moral and legal framework of American democracy, but also international law. This dissertation aims to fill the theoretical gaps found in previous research, as well as gather and analyze information enabling policymakers to better understand the components of a review board process in which evidence can be evaluated for the appropriateness of a lethal action strike on a nominated subject. In order to do so, this study gathered and analyzed information from legal scholars, political scientists, policy-makers, and military leaders.
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This research project has sought to bring extra-judicial killings stemming from drone attacks, which have been operating with few known restraints for over fifteen years, into a more comprehensible public perspective. One particular difficulty for people working on this topic, including work for this study, is the classified nature of these types of operations. The intelligence operations for counter-terrorism are sensitive, rightfully so, and must be designed to protect the many areas of operations that are critical to stopping terror attacks before they occur. Now that we are in our third presidential administration since the UAV program was initiated, it is past time for our nation to take steps to improve operational boundaries within international law, and to do it in an open and transparent manner. United States’ leadership in foreign policy within the global community is a paramount factor in global and economic stability.

A substantial hurdle to the adoption of policy change in this area is the potential for political bias, both within the nomination process for targets and as part of the presidential authority that ultimately controls and licenses this program. Shortly after 9/11, the office of the President was given the authority by Congress to use any and all means necessary to protect and defend US national security when it passed the AUMF. With this authorization in place, how can such authority and power be questioned, modified, or changed? What is needed is a centralized review board that approves or disallows nominated targets before a lethal action strike takes place. This study, by interviewing subject matter experts who have significant knowledge and experience in the fields of human rights, military policing, and international law has sought to discover new possibilities for policy processes and changes that would allow the American political, military, criminal justice, and legal systems to catch-up to these technological advances and the new uses for this tactical weapon and counter-terrorism measure. Whatever process or policy is established, any legal justification for the killing a human being outside of the
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battlefields of war must be debated openly in a review board forum within the legal framework of the United States.

5.2 Research Process

In this chapter, I propose ways to develop a review board process, and detail the policies and legal structures that could be adopted for a review of intelligence and evidence that should be standard procedure before an order can be given for a targeted killing or lethal action strike. These proposals will include:

1/ review board member appointments and composition
2/ duties and objectives
3/ legal thresholds of evidence
4/ levels of classified information that should be kept confidential
5/ process for after action reviews
6/ public dissemination of post-strike data
7/ oversight

The research upon which these proposals are based is qualitative in nature and informed by grounded theory. In their classic text, *Discovery of Grounded Theory*, Glaser and Strauss (1967) described what they believed to be the primary goal of qualitative research: the generation of theory, rather than theory testing or mere description. In their view, theory is not a “perfected product but an ever-developing entity or process.” Glaser and Strauss claim that one of the requisite properties of grounded theory is that it be “sufficiently general to be applicable to a multitude of diverse situations within a substantive area” (p. 27). For the present study, the process of analyzing the data was done for the purpose of developing a specific set of guidelines or policy for a specific problem area. Since the study is based in grounded theory, ideas were
synthesized in order to develop a theory on how to mitigate the problems and issues related to US lethal action strikes via understanding the feasibility and benefits of a review board process.

Qualitative research involves the collection, analysis, and interpretation of data not easily reduced to numbers. These data relate to the social world and to the concepts and behaviors of people within it. Qualitative research can be found in all the social sciences and in the applied fields that derive from them. Creswell (2007) notes that qualitative research is often criticized as "biased, small scale, anecdotal, and/or lacking rigor; however, when it is carried out properly it is unbiased, in depth, valid, reliable, credible and rigorous. In qualitative research, there needs to be a way of assessing the extent to which claims are supported by convincing evidence" (p. 261). In this study, the data do not point to one single, specific conclusion, instead provides evidence for ways to construct a workable process or policy tool. Thus, there was not a need for overwhelmingly convincing evidence supporting a single conclusion.

Another consideration involving qualitative research design for this study was sample size. Despite the relatively low number of participants included in the study, due to the nature of qualitative research, a greater number of participants would not necessarily have improved the validity of the results (Andersen, 2010). The selection and use of highly-qualified individuals, quality data, was favored over a greater quantity of participants in order to focus on a more profound analysis of the subject matter. In this way, the metrics of quantitative analysis do not apply. Rather, a qualitative framework allowed for conclusions to be drawn from various schools of thought.

The advantage of a qualitative research method for this project is that the data can be interpreted for considering theory for the research question. The use of interview data and the subsequent formulation of themes supports an analysis that then provides the basis for a policy
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strategy that is not only feasible, but most likely to be an effective and legal response to the ethical dilemma identified by the researchers.

When gathering data, qualitative researchers must consider issues such as establishing trustworthiness, credibility, transferability, dependability, and confirmability (Lincoln, 1985).

- **Establishing Trustworthiness.** In qualitative research, data must be auditable in order to affirm that the interpretations are credible, transferable, dependable and confirmable. In this study, the data is auditable and will be retained for three years. Each individual chosen has substantial credentials and experience in their fields of study, all of which are relevant to UAV strikes and the establishment of a review board process.

- **Credibility** is improved through long engagement with the respondents. The researcher provided ample time for the respondents to clarify each answer they provided.

- **Transferability** is achieved through a thick description of the research process to allow a reader to see if the results can be transferred to a different setting (external validity). This dissertation provided the reader with a thorough introduction to the study, as well as a detailed description of the data collection process. Furthermore, the analysis was a direct reflection of the data collected.

- **Dependability** and **reliability** can be examined through the audit trail, e.g., member checking. The researcher has retained all the documents on those individuals interviewed.

- **Confirmability** is achieved by ensuring that a description of audit trail categories is used (e.g., raw data included, data analysis and reduction processes described, data reconstruction and synthesis including structuring of categories and themes used, process notes included, instrument development information included).

The efforts made to build an acute understanding and awareness of potential weaknesses in the data collection method ensure the study is both valid and reliable.
5.3 Data Collection: Interviews

The interview method was the most appropriate method of data collection to gain intimate insight and understanding of this topic, as well as potential solutions for policy change. During the interviews and while interpreting the data, it was acknowledged that political and individual biases are difficult to identify and characterize with this type of research. In addition, selecting people who possessed the experience and knowledge to understand this current, sensitive, and dynamic topic was a challenge.

For this study, sixteen people were selected as interviewees. Although a larger group could potentially negate further biases or provide a broader spectrum of information for analysis, there also is the possibility of passing the point of saturation where greater amounts of data are ultimately going to lead to the same conclusions. Furthermore, this specific number of people was chosen to represent a wider group of government supporters, libertarians, and human rights activist personnel while also preserving enough time for the researcher to adequately investigate the backgrounds and experience of those selected, while also gaining complete informed consent for each. Andersen (2010) suggests,

Qualitative research necessitates having a small sample because of the detailed and intensive work required for the study. So sample sizes are not calculated using mathematical rules, and probability statistics are not applied. Instead qualitative researchers should describe their sample in terms of characteristics and relevance to the wider population. Purposive sampling is common in qualitative research. Particular individuals are chosen with characteristics relevant to the study who are thought will be most informative (Anderson, 2010, p.130).
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This study group included bipartisan expert individuals who are in relevant fields of study. The interview method was selected as the best means of data collection and analysis, but an awareness was needed of potential errors of communication and interpretation. The researcher’s use of coding themes to draw conclusions is an area subject to biases in interpretation, but these pitfalls and biases were mitigated by recognizing the potential for such errors and committing to reliance on the data. Also of benefit in allaying this concern was the decision to develop the questions to be specific in nature and not subject to vast amounts of interpretation.

Throughout the course of these interviews, I did at times definitely feel the general tone of bias in one political direction or another which could have influenced the respondent’s overall perspective. However, when questioned for specifics regarding each question, the respondents took particular care to specify or clarify their reasoning and basis for their responses. In this way, I believe the interviewees contained their political and personal leanings, and within the context of this research were professional and respectful in order to provide further insight into this complex, emotional, and politically charged issue. Moreover, it is especially important for an individual involved with lethal action strike policy to have a developed awareness of these biases in order to ensure the rights and privileges of the Constitution and democracy are upheld. In the remainder of this chapter, I will outline recommendations, feasibility, benefits, conclusions, and final thoughts for a review process.

5.4 Themes

Thematic analysis is the process of making meaning from collected data. Unlike quantitative researchers who wait until the end of the study to analyze their data, qualitative researchers usually analyze their data throughout the study. According to Bogdan and Biklen (2007), qualitative analysis involves “working with data, organizing it, breaking it into
manageable units, synthesizing it, searching for patterns, discovering what is important and what is to be learned, and deciding what to tell others” (Bogdan & Biklen, 2007, p. 145). This description accurately reflects the data collection and analysis utilized for this dissertation. However, this dissertation has an additional step often not found in qualitative research, which is the creation of specific policy recommendations based on the data analysis. This dissertation will provide the themes, categories, and requirements of a newly formed review board process.

Throughout the analysis, themes were identified via what Simon (2011) calls “open coding.” According to Simon (2011), something can only be classified as a theme when a “preponderance” of the data suggests it. After reviewing and creating summaries of the interviews, the next step was an examination of the categories in order to discover emerging links or themes, a process sometimes referred to as “axial coding.” The purpose of coding is not only to describe, but also, more importantly, to acquire a new understanding of the subject matter. It is during axial coding that a conceptual model of the topic is built to determine if there is sufficient data to support interpretation and conclusions (Strauss, 1990).

The themes derived from the data can be summarized as follows:

1/ There should be a lethal action program.

2/ This program should remain within the executive branch, which would retain the legal authority to carry out lethal action in the interest of national security.

3/ A group of 5-7 people should be appointed for the review of intelligence and evidence to establish the existence of ongoing imminent threats to US citizens and national security. It was suggested that these individuals be appointed by Congress; more specifically, by the U.S. Senate Select Committee on Intelligence (SSCI). These appointees should be chosen based on a high level of expertise in their respective career
fields, ideally including: intelligence, military investigations, international or domestic law, human and civil rights law, criminal law, political science, public policy, international relations, and counter-terrorism. This is not an all-inclusive list, but is a good starting point.

4/ The data supports that the evidence required to acquire an affirmative vote by the board should be, at minimum, beyond a preponderance of guilt that a specific individual is guilty of committing terrorist acts.

5/ A single review board should hear all cases originating from the Department of Defense and the CIA.

6/ Review board positions should have a set term of 4-6 years, to constrain bias or political influence. This review board, whose members could represent a cross-section of DoD departments, would provide the necessary checks and balances similar to an adversarial court system of a prosecution and defense.

7/ American citizens who are involved in terrorism outside the borders of the US should not receive any special legal protocols, and should be adjudicated like any other nominee.

8/ A significant attempt should be made to capture or arrest the suspected terrorist(s) or allow the local jurisdiction, if one exists, to neutralize the threat before a lethal action order is signed.

9/ The public should be made aware of the existence of the review board and its objectives; however, classified information regarding the derivation of intelligence and evidence need not be released. After-action press releases of the information regarding the strike should be made available to the press.

10/ Congress shall have oversight requirements and privileges of the review board.
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11/ There should be a mechanism established whereby if there was a problem within the review process, it could be brought forth to the Senate Intelligence Committee and they could investigate and publish a report. The case could also be turned over to the Justice Department, if they deemed it necessary.

The adoption of a review board process would answer current system and public questions, such as:

1/ who are the people making lethal action decisions?
2/ on what intelligence and evidence are the decisions being made?
3/ is the decision-making process minimally influenced by political or personal bias?
4/ is there a current threat against a US citizen or national security?

After reaching an affirmative decision, this review board would forward its recommendation to the president for signing and implementation. Moreover, this board would not be a court of law with a single judge, but rather outside the judiciary, simply operating as a committee with oversight by Congress or the president.

5.5 Policy-related issues: Transparency and Political Bias

One of the major issues with current US policies for use of lethal action strikes is their lack of transparency. It is therefore difficult for researchers to weigh the effectiveness, efficiency, cost, and issues of any program or policy without fully knowing how it was designed or is expected to operate. The strength of this research project is gaining a deeper understanding of this program, to widen its transparency, support its legal standing, and increase the counter-terrorism benefits.

Political bias is another potential area of concern when discussing government policies related to UAV strikes; this is why there were individuals with various political affiliations...
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included in the study. Additional biases to understand and be mindful of were military and human interest mindsets. By this I mean there are organizational culture-type biases within certain career fields which must be acknowledged. For those who gravitate toward military service, there is an understanding that they may be asked to take a human life. This understanding could be transferred or applied more easily within the military group. Conversely, those who choose a career path in fields focused on human and civil rights are less inclined to support actions that call for the taking of a human life, especially when it requires the less than perceived full adjudication of the case.

5.6 Feasibility

A data analysis suggests that a review board is not only feasible, but also consistent with the greater interests of American counter-terrorism efforts and legal legitimacy. Furthermore, it is necessary, prudent, and logical to develop this review-board policy structure and process forth evaluation of evidence regarding the identification and capture or killing of criminals/terrorists outside the United States. The importance of this study is based in our Constitution and international law which state that everyone is entitled to the rights of life, liberty, and pursuit of happiness. It is not within the right of a state, no matter how powerful it is, to kill someone believed to be a danger to its society without the protections of the law. The United States has been carrying out extra-judicial killings for more than fifteen years, and the people it identified as threats have not been afforded the protections of international human rights laws, or the basic assumption of innocence until proven guilty (due process). Finally, while there were no specific studies found that detail these strikes are effective and are a useful counter-terrorism tactic. However, there are statistics and studies that show increasing evidence of potential terrorist
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backlash and retaliation from the unilateral uncontrolled drone killings ordered and carried out by the US (Hudson, 2012).

This research sought, in part, to understand the feasibility of challenges involved with the establishment by the executive branch of some type of centralized review board for the weighing of evidence on potential targets of lethal action in a foreign location. There was no reason found, legal or otherwise, why a review board could not be established. In discussions with several of the interview participants who have worked closely with this program, they related that a review board of this nature could be an opportunity for increased efficiency and effectiveness by removing unnecessary layers of bureaucracy.

What does not appear to be feasible is the premise that there should be a judicial review, or as some have suggested, a drone court for the adjudication of such cases. The lawyers who participated believe that it was not practical, or even legal, to have such a judicial court, because the court would not be reviewing material based in criminal law or precedent. This process is based on threats of suspected terrorist activity outside of the United States, and so is not within the bounds of domestic laws. Furthermore, the authority given to a US president to act in self-defense also allows for preemptive strikes before a threat is carried out, so such decisions would be outside the realm of a judicial court or judges.

Developing a feasible plan to implement a review board process before a lethal action strike would be plausible enough for the president, Congress, the Joint Chiefs of Staff, or any other organization within the Intelligence community, DoD, or CIA. The research throughout this study found nothing in the bylaws within these organizations would prohibit such a board, especially if authorized by the president. An important point to consider is how a case nomination would make its way to the review board from a DoD or CIA department. A key
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component here is that the department submitting the nomination portfolio would have intimate knowledge of the evidence and intelligence in the case, which could compromise secrecy issues. One solution to secrecy issues is to have all individuals on the review board or taking part in the submissions process acquire or maintain an appropriate secret security clearance. Thus, at every level, from the initial intelligence gathering, to passing through department review, those members are bound by security requirements. The review board would not be expected to review a case until the totality of evidence had reached a sufficient threshold to indicate that it would be subsequently submitted to the President of the United States for signature and authorization.

There was little if any downside discovered during the research for the implementation of a review board process. Any skepticism on the part of interviewees came from the potential of adding a layer of bureaucracy to an already convoluted and multi-layered process. Before implementing any policy and program changes necessary to establish the board, a review of the entire current organizational process would need to take place in order to streamline, reorganize, and withdraw aspects that are unnecessary. If current dysfunctional or duplication layers were removed, and the review board was the final authority prior to the president, it should make the process more cost-effective and efficient. Ultimately, even if the review board was seen as adding a layer of bureaucracy, it should allow the process to work to improve personal rights and transparency.

5.7 Benefits

There are numerous significant benefits to the proposed review board and review process. One of the most compelling benefits of a pre-strike review board process is that the American public and international community would know exactly who is reviewing the evidence recommending a person be put to death by lethal action strike. At this time, both the identity of
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these people and the details of their decision-making process are classified, and few if any details are released. The public is left to wonder exactly who makes the decisions to strike, what the evidence is against the target, if the strike is being conducted for political reasons, what the objectives are, and what the threat is. Thousands of people have been targeted and killed with UAVs in the last 15 years, ostensibly on behalf of US citizens, yet little is known about the internal workings of how this program functions, its purpose, or its objectives.

In addition, the board's review would work to mitigate political biases within the review process and provide the president with a substantive analytical review of the evidence. The adoption of such a board should allow the DoD and CIA to reduce the number of employees who need to be involved in the process. Furthermore, a board of experts, legal and technical, with ongoing experience should be able to provide a higher level of review than is currently the case.

Transparency is an integral component of how the US government was formulated and is expected to function. The American public must have available to them a significant number of the components of this particular program to ensure that it is being conducted without corruption and not for political or personal benefit, and that it operates within the legal framework of Jameel domestic and international law. Without transparency, individual power by those in government can easily stray beyond the boundaries of ethical, moral, and legal constraints. Spencer Ackerman has raised questions about the secrecy of American drone strike program and its lack of transparency. In 2015, he wrote:

On Monday, the American Civil Liberties Union (ACLU) will file a disclosure lawsuit for secret Obama administration documents specifying, among other things, the criteria for placement on the so-called “kill list” for drone strikes and other deadly force. The suit, to be filed in a New York federal court, also seeks basic data the Obama
administration has withheld about “the number and identities of individuals killed or injured” in counterterrorism strikes, according to the ACLU filing. The public should know who the government is killing, and why it’s killing them,” Jameel Jaffer, deputy legal director for the ACLU, told the Guardian. (Ackerman & Jaffer, 2015, p. 2)

Even if this review board does not disclose all of the exact details reviewed, such as the person, evidence, crimes, location, or objectives of a lethal action strike, the public can at least know that there is a credentialed and vetted group of people who are acting on their behalf to examine all of these details as part of a rigorous review in order to make the difficult decision to kill a human being. Having a review board comprised of known individuals that is also accountable to Congressional oversight and that provides statistics on past strikes should also be useful.

President Obama and his administration understood the need for transparency and oversight and made strides in that direction, even if the result still left much to be desired. Ackerman (2015) notes in his online article:

Obama announced he was raising the still-undisclosed standards for launching drone strikes in May 2013 and insisting on strong oversight of all lethal action. He said future strikes would require near-certainty that no civilians will be killed or injured. His White House portrayed the acknowledgment of the strikes as a transparency milestone, but the administration still refused to disclose the processes and legal memoranda underpinning the speech. (Ackerman & Jaffer, 2015, p. 6)

A further benefit of a centralized review board for hearing all nominee cases is that it would provide all personnel in the DoD and CIA with a clear process for nominations, including who the responsible decision-makers are. Interviewees CT4 and CT7 suggested that having this knowledge available within these agencies would increase not only confidence for personnel
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associated with the program, but also efficiency. A centralized review board could also serve as a corrective for organizational involvement in the past that may have allowed or inhibited strikes on the basis of misinterpreted evidence or intelligence because too many, not enough, or not the right people were involved.

In the past, the bifurcated process between the CIA and DoD created a multi-layered review process in both organizations, potentially creating inefficiency and causing difficulty in analyzing issues in after-action reviews and compiling statistical data. An analysis of interviews revealed very strong support for a single review board process for both the CIA and the military, with the review board housed within the Department of Defense. In this way, joint military and CIA operations could more easily coordinate and more importantly; the same standards would be applied across all departments and would operate with the same oversight, requirements, and transparency. Interviewees felt that the CIA should not have a separate review process, and should also be required to present the same thresholds of evidence as any DoD department. A higher percentage of those interviewed were opposed to CIA use of its own set of rules for executing individuals outside the United States. Furthermore, the CIA’s attempt to use the cloak of necessity for a clandestine operation or the need to preserve the secrecy of operatives should no longer be valid (Zenko, 2013). Review board oversight is a benefit and should be provided formally by Congress, but also by the media to some extent, through the information they are provided for public release. Moreover, of further benefit is a centralized review board with ongoing experience and expertise could refine the process, with time, to make the panel more efficient and effective.

The selection of a bipartisan board, appointed by the SSCI, would have the benefit of removing presidential or party rubber-stamp approvals. Under the current system, there is a real
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risk that nominees could be pushed through by presidential influence. Without a more transparent process, it is easy to envision political, personal, or management-level abuses, as well as the potential for presidential authoritarianism to overwhelm the current process.

A final important benefit of a review board evaluative process, even without the adversarial-type environment of the American judicial system, is that it would demonstrate that the basic doctrines of democracy are being preserved. This process would show that the United States is not unilaterally taking lives around the globe without legal justification, evidence, or provocation for unknown reasons.

5.8 Review Board Considerations

The following are the considerations for each review board case brought before it. The board will be required to evaluate the evidence presented to it and consider whether it reflects beyond a preponderance. In addition, the board must reach a simple majority before forwarding it to the president for his/her signature.

1/ Who is the person in question? Can he or how shall he be convincingly identified?

2/ Are they committing an act which meets the elements defined as terrorism or criminal?

3/ Is the act ongoing and creating an immediate imminent threat of great bodily harm or death to a US citizen or jeopardizing national security?

4/ What are the potentials for collateral damage? Delineate how they can be mitigated.

5/ Is it feasible that the person(s) can be captured?

6/ Can or will the host country or local authorities neutralize the threat?

7/ What is the time element of a potential strike and is there an expiration date?

8/ What are the overall counter-terrorism or political objectives of the targeted strike?

9/ Will the strike be proportional to the level of threat?
10/ What can be released as *public information* after the strike?

What aspects of evidence would the review board be expected to weigh in?

For example, for Criterion 1, would it be required to completely and without question identify a nominee by name, or would it be sufficient to simply have the intelligence and evidence that a particular verifiable individual or group were involved in terrorist activities?

The Obama administration's *Report on Process for Determining Targets of Lethal or Capture Operation*, released in October 2016, a few months before he left office, delineated the criteria and requirements for lethal action strikes (DoD, 2014). Two key criteria were the assessment by intelligence and military officials that an individual or group (a) posed an *immediate ongoing imminent threat* to national security or a US citizen, and (b) that there was sufficient evidence that it would require unreasonable assets or significantly jeopardize US soldiers to attempt to capture these perpetrators; this considers Criteria 3 and 5 above.

In addition, for Criterion 2, the review board would need to weigh the evidence that an individual was *currently* participating in an activity viewed as terrorist in nature, whether identified by name, stature, profile, or modus operandi.

For implementation of criteria 1 and 4, operationally, the people tasked with implementing the lethal action strike would need to be provided with sufficient identity information so as to be able to confirm they were striking the correct person or persons whose dossier was reviewed. The level of certainty provided to the operational units would be determined by the review board. And the level of collateral damage is within what has been identified as acceptable.

To what legal evidentiary standard should these cases to be held? What threshold of evidence will satisfy the global community and US public indicating that the due diligence is
being offered by those in our government? These points are key to the overall purpose at their own determination, but each board member should have an understanding of the legal thresholds (beyond a preponderance, clear and convincing evidence, and beyond a reasonable doubt), and adjust them accordingly to the evidence presented before them. Based on the interviews, it is important that review board members not be bound by these aforementioned legal standards of evidence and that instead they should have the flexibility to make assessments based on the amount of evidence in combination with necessity and threat level in order to make their determination. In other words, if the threat level were determined to be very high and very time sensitive, the review board might determine that there was not enough time to gather a preponderance of evidence and so make a positive determination even if the evidence fell below that threshold. By design, if necessary, a subsequent inquiry could be taken up after action with the Senate Intelligence Committee.

For reference, the legal standard in a criminal court for the conviction of a defendant in a death penalty case is a unanimous jury; not even one of twelve can dissent. There was variation among interviewees in terms of what percentage of the review board should approve a nominated package in order for it to be passed on to the president for lethal action signature. Six of them believed unanimous board approval should be required, while ten wherein favor of requiring only a simple majority. In this proposed process, the review board would be the penultimate point for review of the evidence, and the president would make the final decision to approve a lethal action order. It is therefore recommended that there only be a simple majority required. Setting up the review board with an odd number of members specifically ensures that a simple majority will be possible for all board decisions.
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It would be incumbent upon each member of the review board to have an intimate understanding of each of the following terms and their relevance to this subject matter: *Immediate, Ongoing, Imminent, Threat to National Security, or a US Citizen*. Each of these words has a specific meaning and legal precedent that serves to reinforce the threshold or requirements before a lethal action can be taken. A full definition of these phrases or exploration of their history and application in government contexts is outside the scope of this dissertation.

After 9/11, the United States adopted a legal position for lethal action strikes, one based on the United Nations doctrine of the right to self-defense and imminent threat; pre-emptive strikes were also a key concept to that policy statement (Lederer, 2010). President George W. Bush, who first implemented drone strikes, attempted to make further legal arguments with regard to UAV attacks, but his and other administrations since that time have struggled with presenting a clear, precise legal justification. *The National Security Strategy of September 2002* outlined the U.S. government's policy for national defense and provides a small amount of information regarding these above legal premises (Lederer, 2010). In this document, the Bush administration argued that the international law concept of "imminent threat," which allows countries to defend themselves against opponents who are poised to attack them, was applicable to US use of lethal action strikes against terrorists (Brennan, 2012). In closing on this topic, the review board shall be tasked with adopting a criteria-based approach to weigh the evidence for each of the following elements including: *Immediate, Ongoing, Imminent, Threat, and Feasibility of Capture*.

For Criterion 4, the review board would consider the potential for collateral damage. Collateral damage has been one of the most inflammatory aspects of lethal action strikes, not only within the international legal community, but also particularly in those communities and
areas where the strikes are being carried out. Each member of this study weighed in on this topic. However, after further research, this question is essentially beyond the scope of the review board. This is more of an operational vulnerability for units carrying out the lethal action order. The US government and the president must abide by the laws of war – this particular element is contained within the concepts of proportionality. A review board can have overwhelming criminal evidence against a person, with the necessity to carry out a strike immediately due to the nature of the threat, however international convention prohibits excessive force to neutralize the threat. Without going into further detail, it is sufficient to say that this area is beyond the scope of the review board process, which is the focus of the study.
5.9 Conclusions

This dissertation has sought to answer the question: Should there be a standardized review process for lethal action strikes outside the boundaries of a declared war or conflict zone, and if so, what should that process be? In order to answer that question, data were gathered from a synthesis of existing academic research and policy writing, and from interviews with experts in the fields of government policy, military strategy, human and civil rights, and international law. The original thesis for the dissertation was that there is, indeed, a need for a judicial review process that would take place before all lethal action strikes. The data gathered from both the literature review and the interviews supported that thesis, and gave shape to the what such a process might look like. The individuals interviewed were not only from varied backgrounds, but also crossed several political and ideological divides. This type of qualitative study cannot point to exact empirical data to state a precise outcome based on scientific fact, rather inferences can be drawn from themes of the responses.

The original idea for a review process within the judiciary (a drone court) was dispelled early on when the data suggested that any type of review process should remain within the executive branch and not be adjudicated as a formal court room process. While some subject matter experts believed that there should be no lawyers at all on the review board, others felt there was a need to have lawyers who could provide opinion based in case law and precedent.

The consensus was clear that there should be only one review board for all components of the US government involved in lethal action strikes. Respondents felt the CIA should bring their nominees before the same board as the DoD, and should not run any special lethal operations outside the oversight of Congress and the public.
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While there was not an exact agreement on the optimal number of members for a review board, this could be left up to the final draft by members of Congress, or whoever designs and provides oversight to the board. The President of the US or the SSCI could designate board members. An analysis of the data suggests that a board made up of five members would provide an adequate balance of power, and constrain bias and political control of the review board process.

There was a consensus among subject matter experts that any American citizen who chose to become involved in terrorist activity outside of the United States would have waived his rights under the US Constitution, and would be judged under international law. Moreover, Americans could not be captured abroad and brought back to the US for trial, they could be subjected to the same lethal action order as a foreign nationals.

The president's staff could allow for a press release regarding the establishment of a pre-strike review board for lethal actions against suspected or known terrorists who are hiding in areas inaccessible to US or allied forces. Furthermore, the Congress shall ensure that the review board was comprised of bi-partisan members, who may or may not remain anonymous, but who would be tasked with the duty of assessing intelligence and evidence to establish terrorist threats abroad. If the board members found that there was sufficient evidence to substantiate an imminent threat, they would forward their recommendation and the nomination packet to the president, who would then have the option of ordering a lethal action strike. The sensitive information about perpetrators or the manner in which the intelligence was gathered should not be available for public release. However, after-strike information might be released, as long as it did not impact other investigations or national security, detailing intelligence such as: location, objectives, number injured, number of casualties, property damage, and collateral damage.
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Thanks to the transparency of the board process, criteria for evaluation, and after-attack data releases, the American and international communities would finally have the assurance that individual rights were being maintained by the members of the review board.

At a minimum, a preponderance of the evidence should be the threshold to establish guilt, although that would not be an exact standard. The board members would decide with the totality of the evidence how much weight to place on certain pieces of intelligence when balanced with the perceived threat level. In addition, the board need not have a unanimous vote to forward their review to the president, but rather a simple majority. Accompanying the review to the president would be information demonstrating that all resources had been exhausted to capture or neutralize the threat by all means possible other than lethal action.

The adoption of this review board would provide transparency and an increased balance of power between separate branches of government. Furthermore, the members of the review board would mitigate potential political biases, and could focus solely on assessing the immediate threat.

These conclusions are based on the data collected and suggest that a review board would provide many feasible and beneficial components to the government with regards to consistency, transparency, and depoliticization for decision-making around using lethal action strikes to respond to threats to national security. This board would improve the sharing of information across DoD departments, as well as the CIA, in a joint effort to stop threats and provide a more transparent effective process.
5.10 Potential Areas for Further Research

One potential area of future research is who or what governing body would appoint members to the proposed UAV strike review board. While this question was not part of study, the topic was brought up by several of the respondents, who believed it should be a responsibility of Congress. In this scenario, Congress would also provide oversight for review submissions and after-action reports. The oversight process by members of Congress would ensure that the objectives of the strike were fulfilled, and any improvements to the process or particular mission could be implemented.

Another interesting area for additional research is the investigation of terrorist acts carried out in retaliation for drone strikes, especially in communities which have experienced significant collateral damage, defined as civilian deaths or injured noncombatants. This is a difficult topic to investigate, particularly in terms of correlating evidence and statistics, but it merits further study. This type of study would be of benefit to the counter-terrorism community in their analysis of costs and benefits of lethal action strikes.

Finally, key legal concepts that were interpreted and adopted to support the use of drone strikes for lethal actions during the Bush administration and still being used are based in international law and UN conventions. There must be continued legal research to rigorously define these terms and concepts as this program moves forward. These are the concepts of imminent threat, state's right to self-defense, pre-emptive strike, assassination, conflict zones, and proportionality.
5.11 Final Thoughts

The United States and many other countries around the globe are attempting to address the ever-evolving threats that confront them. Terrorism in particular has become a prominent issue in the global community. Tremendous resources around the world are now dedicated to combating terrorism which has permeated nearly every country on the planet. Leaders at every level of government must gain an understanding of the threat level to their constituents and how to protect them without unnecessary and undue restrictions to civil and personal liberties. Even countries with relatively strict limitations on personal rights and freedoms, such as Saudi Arabia, have terrorist problems they are constantly attempting to understand and combat.

The use of lethal action strikes, which some call assassinations, is nothing new to the arsenal of military machines, which they have utilized since the dawn of humanity. What is new, and has brought both remoteness and anonymity, is the UAV. Public policy and the legal community in the United States have struggled to keep up with this new and dynamic killing platform. The drone has become a strategic and tactical advantage unmatched in the global arena, but it is not without controversy. In the beginning, there were clear and distinct “high value” known targets for these UAV strikes that few questioned. But soon thereafter President Bush realized and implemented, and President Obama continued, a “targeting killing” program that was unprecedented in history. Military and counter-terrorism officials raced to understand the effectiveness of these measures and tried to determine if they were indeed fulfilling their objectives. Human rights and international watchdog groups have also struggled to understand and interpret the breadth, legality, and moral and ethical boundaries of this program.

History has shown we must constantly assess our actions, both at the individual and at the government levels. As I have shown in this dissertation, it is time that the United States adopts
significant policy upgrade structures to give a transparent view of a system which initiates the termination of a human life. Not only is a review board process feasible, but it is morally and operationally necessary and it should be quickly implemented by the United States.

Murphy and Radsan, in the Cardozo Law Review (2009), concluded that a review process is not only necessary, but required under the US Constitution, as argued by the US Supreme Court in two 2007 cases. Their conclusions support and align with the conclusions of this research.

Our primary conclusion is that (under Boumediene) the executive has a due process obligation to develop fair, rational procedures for its use of targeted killing no matter whom it might be targeting anywhere in the world. To implement this duty, the executive should, following the lead of the Supreme Court of Israel (among others), require an independent, intra-executive investigation of any targeted killing. These investigations should be as public as is reasonably consistent with national security. Even in a war on terror, due process demands at least this level of accountability for the power to kill suspected terrorists (Murphy & Radsan, 2009, p. 405).

In addition, they note,

This makes executive self-control all the more important—and leads to our second claim. Due process is everywhere. For a century, debate has bubbled over the extra-territorial reach of the Constitution. The logic of Boumediene’s five-justice majority opinion is that the Due Process Clause binds the executive worldwide—from Alaska to Zimbabwe. This duty exists even for matters that cannot or should not be subject to significant judicial control; the executive must obey the Constitution even if no court is in a position to say
so. Honoring this obligation requires the executive to adopt procedures that maximize the
accuracy and propriety of the targeted killing without unacceptably harming national
security. Following the lead of cases from the European Court of Human Rights and the
Supreme Court of Israel, we submit that as one integral element of these procedures,
executive authorities should conduct independent, impartial, review of the legality of any
targeted killing and that this review should be as public as national security permits
(Murphy & Radsan, 2009, p. 411).

The benefits of a review board are many, and the most significant may be to demonstrate
to the American people and others that our military is obliged to answer to the public and the
Constitution. The implementation of this review board process would promote a transparent
democratic legal model for the implementation of protocols designed to eliminate national
threats. The Obama administration in March of 2016 said, "...we need to peel back the layers of
secrecy and be more transparent in our drone strike process" (Monaco, 2016). As interviewee
HR4, a retired judge, noted, “The public does not have a need to know the details of the process.
Simply that a process exists to protect the liberties and laws of its people.”

Finally, it has been unsettling for many to have learned over the years about the
thousands of people who have been killed, injured, or maimed by the United States’ lethal action
strikes. What is of gravest concern that over the years since the UAV program began, it has been
the administration's position that the program did not exist, which was combined with a complete
absence of transparency for the public. It was not until April of 2012 that the Obama
administration openly acknowledged the existence of the “US targeted killing” program, ten
years after its implementation (Kaufman, 2015). Americans have a right to know how their
government uses this tool as a counter-terrorism or military strategy, and deserve to be have
access to the same kind of information available for manned aircraft strikes: Who? Where? Why? Who gave the authorization, and reviewed the evidence and objectives? It is problematic when a government conducts lethal actions under a veil of secrecy, and when neither the public nor the judicial branch have information about who is being killed, why they were killed, how the authorization process of evidence against someone was evaluated, or what the political and military objectives were. Part of the issue is the American people have been subjected to a propaganda campaign of imminent threats to the US (for example, during the Bush years, there were constant updates to threat condition levels). This has led the American public to an unrealistic perception of danger and to a level of fear that has been promoted by certain government officials and the media. This perception may have caused them to disregard or rationalize a program that ultimately causes death without legal proceedings.

The importance and relevance of this research was demonstrated as recently as March 13, 2017, as this dissertation was reaching its final stages. A Wall Street Journal article entitled Trump Broadens CIA Powers, Allows Deadly Drone Strikes highlights the immediate need to address this ongoing lethal action program:

President Donald Trump has given the Central Intelligence Agency secret new authority to conduct drone strikes against suspected terrorists, U.S. officials said, changing the Obama administration’s policy of limiting the spy agency’s paramilitary role and reopening a turf war between the agency and the Pentagon. (Lubold & Harris, 2017, p. 4)

The article notes that, in contrast, Obama had not allowed the CIA to carry out any drone strikes and had restricted them only to surveillance. This information regarding President Obama’s willingness to restrict the CIA was classified and not previously released. Moreover, Obama’s decision to not allow the CIA to act independently supports, through inference, the conclusions
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of this research in that there should be one centralized review board for both the DoD and the
CIA, before a lethal action strike.

This research project is meant to stimulate further dialogue and will hopefully contribute
to change in our current UAV policies, or cause the adoption of new policies that enhance our
open, democratic society. The founding fathers of this country understood the need for checks
and balances within our government. The addition of a transparent review board would fulfill an
important role in checking the power being exerted by the executive branch’s use of this
controversial program.
References


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