

---

---

## REACTION

### JUDICIAL REVIEW OF TARGETED KILLINGS

*Jameel Jaffer*

Since 9/11, the CIA and Joint Special Operations Command (JSOC) have used armed drones to kill thousands of people in places far removed from conventional battlefields. Legislators, legal scholars, and human rights advocates have raised concerns about civilian casualties, the legal basis for the strikes, the process by which the executive selects its targets, and the actual or contemplated deployment of armed drones into additional countries. Some have proposed that Congress establish a court to approve (or disapprove) strikes before the government carries them out.

While judicial engagement with the targeted killing program is long overdue, those aiming to bring the program in line with our legal traditions and moral intuitions should think carefully before embracing this proposal. Creating a new court to issue death warrants is more likely to normalize the targeted killing program than to restrain it.

The argument for *some* form of judicial review is compelling, not least because such review would clarify the scope of the government's authority to use lethal force. The targeted killing program is predicated on sweeping constructions of the 2001 Authorization for Use of Military Force (AUMF) and the President's authority to use military force in national self-defense. The government contends, for example, that the AUMF authorizes it to use lethal force against groups that had nothing to do with the 9/11 attacks and that did not even exist when those attacks were carried out. It contends that the AUMF gives it authority to use lethal force against individuals located far from conventional battlefields. As the Justice Department's recently leaked white paper makes clear, the government also contends that the President has authority to use lethal force against those deemed to present "continuing" rather than truly imminent threats.

These claims are controversial. They have been rejected or questioned by human rights groups, legal scholars, federal judges, and U.N. special rapporteurs. Even enthusiasts of the drone program have become anxious about its legal soundness. ("People in Washington need to wake up and realize the legal foundations are crumbling by the day," Professor Bobby Chesney, a supporter of the program, recently said.) Judicial review could clarify the limits on the government's legal authority and supply a degree of legitimacy to actions taken within those limits.

It could also encourage executive officials to observe these limits. Executive officials would be less likely to exceed or abuse their authority if they were required to defend their conduct to federal judges. Even Jeh Johnson, the Defense Department's former general counsel and a vocal de-

fender of the targeted killing program, acknowledged in a recent speech that judicial review could add “rigor” to the executive’s decisionmaking process. In explaining the function of the Foreign Intelligence Surveillance Court, which oversees government surveillance in certain national security investigations, executive officials have often said that even the mere prospect of judicial review deters error and abuse.

But to recognize that judicial review is indispensable in this context is not to say that Congress should establish a specialized court, still less that it should establish such a court to review contemplated killings before they are carried out.

First, the establishment of such a court would almost certainly entrench the notion that the government has authority, even far away from conflict zones, to use lethal force against individuals who do not present imminent threats. When a threat is truly imminent, after all, the government will not have time to apply to a court for permission to carry out a strike. Exigency will make prior judicial review infeasible. To propose that a court should review contemplated strikes before they are carried out is to accept that the government should be contemplating strikes against people who do not present imminent threats. This is why the establishment of a specialized court would more likely institutionalize the existing program, with its elision of the imminence requirement, than narrow it.

Second, judicial engagement with the targeted killing program does not actually require the establishment of a new court. In a case pending before Judge Rosemary Collyer of the District Court for the District of Columbia, the ACLU and the Center for Constitutional Rights represent the estates of the three U.S. citizens whom the CIA and JSOC killed in Yemen in 2011. The complaint, brought under *Bivens v. Six Unknown Named Agents*, seeks to hold senior executive officials liable for conduct that allegedly violated the Fourth and Fifth Amendments. It asks the court to articulate the limits of the government’s legal authority and to assess whether those limits were honored. In other words, the complaint asks the court to conduct the kind of review that many now seem to agree that courts should conduct.

This kind of review — *ex post* review in the context of a *Bivens* action — could clarify the relevant legal framework in the same way that review by a specialized court could. But it also has many advantages over the kind of review that would likely take place in a specialized court. In a *Bivens* action, the proceedings are adversarial rather than *ex parte*, increasing their procedural legitimacy and improving their substantive accuracy. Hearings are open to the public, at least presumptively. The court can focus on events that have already transpired rather than events that might or might not transpire in the future. And a *Bivens* action can also provide a kind of accountability that could not be supplied by a specialized court reviewing contemplated strikes *ex ante*: redress for family members of people killed unlawfully, and civil liability for officials whose conduct in approving or carrying out the strike violated the Constitution. (Of course, in one profound sense a *Bivens* action will always come too late, because the

strike alleged to be unlawful will already have been carried out. Again, though, if “imminence” is a requirement, *ex ante* judicial review is infeasible by definition.)

Another advantage of the *Bivens* model is that the courts are already familiar with it. The courts quite commonly adjudicate wrongful death claims and “survival” claims brought by family members of individuals killed by law enforcement agents. In the national security context, federal courts are now accustomed to considering habeas petitions filed by individuals detained at Guantánamo. They opine on the scope of the government’s legal authority and they assess the sufficiency of the government’s evidence — the same tasks they would perform in the context of suits challenging the lawfulness of targeted killings. While Congress could of course affirm or strengthen the courts’ authority to review the lawfulness of targeted killings if it chose to do so, or legislatively narrow some of the judicially created doctrines that have precluded courts from reaching the merits in some *Bivens* suits, more than 40 years of Supreme Court precedent since *Bivens* makes clear that federal courts have not only the authority to hear after-the-fact claims brought by individuals whose constitutional rights have been infringed but also the obligation to do so.

Proponents of a specialized targeted killing court are right to recognize that the judiciary has a crucial role to play in articulating and enforcing legal limits on the government’s use of lethal force. Congress need not establish a new court, however, in order for the judiciary to do what the Constitution already empowers and obliges it to do.