

2011

Litigating the Long War on Terror: The Role of *Al-Aulaqi v. Obama*

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Lesley Wexler *Litigating the Long War on Terror: The Role of Al-Aulaqi v. Obama*, 9 Loy. U. Chi. Int'l L. Rev. 159 (2011).
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LITIGATING THE LONG WAR ON TERROR: THE ROLE OF *AL-AULAQI V. OBAMA*

Lesley Wexler[†]

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“This is a unique and extraordinary case.”¹

I. Introduction

In early 2010, the Obama administration is believed to have placed Muslim cleric Anwar al-Aulaqi (also known as Anwar al-Alwaki)² on a Central Intelligence Agency (CIA) list of terrorists approved for targeted killing.³ While President Bush and President Obama have seemingly authorized many drone strikes to target individuals in Pakistan, Afghanistan, and Yemen,⁴ conventional wisdom suggests al-Aulaqi is the first American citizen to make an appearance on this list.⁵ After several failed attempts,⁶ the C.I.A.,⁷ in conjunction with a U.S.

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¹ *Al-Aulaqi v. Obama*, 727 F.Supp.2d. 1, 8 (D.D.C. 2010) (opinion of Judge John Bates dismissing the case).

² Commentators differ on the translation of al-Aulaqi's name. For consistency's sake, this article will employ the same spelling that the al-Aulaqi family used in filing the litigation.

³ See *Al-Aulaqi*, 727 F.Supp.2d. at 11; see also Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 7, 2011, <http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html>; Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, WASH. POST, Jan. 27, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012604239.html>.

⁴ Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a 'Legal Geography of War,'* in FUTURE CHALLENGES IN NATIONAL SECURITY AND LAW 1, 1-2 (Peter Berkowitz ed., 2011), available at <http://ssrn.com/abstract=1824783>.

⁵ Greg Miller, *U.S. Citizen in CIA's Cross Hairs*, L.A. TIMES, Jan. 31, 2000, <http://articles.latimes.com/2010/jan/31/world/la-fg-cia-awlaki31-2010jan31>.

⁶ Todd Eastham, *Anwar al-Awlaki Targeted in U.S. Military Attack in Yemen*, CHRISTIAN SCI. MONITOR, May 7, 2011, <http://csmonitor.com/World/Latest-News-Wires/2011/0507/Anwar-al-Awlaki-targeted-in-US-military-attack-in-Yemen> (describing a failed May 5, 2011 attempt); Mark Mazzetti, *Drone Strike in Yemen Was Aimed at Awlaki*, N.Y. TIMES, May 7, 2011, <http://www.nytimes.com/2011/>

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counterterrorism unit,⁸ used a drone attack to successfully strike and kill Anwar al-Aulaqi on September 30, 2011.⁹

Why did the government choose to target Anwar al-Aulaqi? Some terrorism experts, like Bruce Hoffman, suggest that al-Aulaqi played a key operational role in terrorist activities against the United States.¹⁰ Alleged activities that might place al-Aulaqi within that criteria include a role in facilitating terrorist training camps or planning terrorist attacks for al-Qaeda in the Arabian Peninsula (AQAP)¹¹ as well as conspiring with Rajib Karim to blow up a U.S. bound plane.¹² That said, other scholars note the public evidence directly linking al-Aulaqi to al-Qaeda operations “is slim.”¹³ The government has thus far been reluctant to disclose much information demonstrating these links, citing concerns about intelligence gathering.¹⁴ This reluctance to provide evidentiary support or even a public justification has led many civil libertarians to fear that the government may have instead listed him for pure speech acts or for other reasons insufficient to target an individual under domestic or international law.¹⁵

05/07/world/middleeast/07yemen.html (noting continued targeting efforts after the May 5, 2011 attempt); Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *CIA Strike Kills U.S. Born Militant in a Car in Yemen*, N.Y. TIMES, Oct. 1, 2011, <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html> (identifying several failed strikes and an aborted attempt by Yemen's counterterrorism commandos to force a Yemeni village to hand over al-Aulaqi).

⁷ The C.I.A. located al-Aulaqi after detaining and questioning one of his couriers. Colin Freeman et. al, *Strike on Voice of al-Qaeda Came after Clues from Courier*, SUNDAY TELEGRAPH, Oct. 2, 2011, <http://www.highbeam.com/doc/1P2-29771717.html> (commenting on how Yemeni cooperation provided some of the information needed to carry out the strike). Laura Kasinof, *Yemen Notes Its Own Role in U.S. Attack on Militant*, N.Y. TIMES, Oct. 2, 2011, <http://www.nytimes.com/2011/10/02/world/middleeast/yemen-notes-its-own-role-in-us-attack-on-militant.html>.

⁸ Apparently, the CIA controlled both the aircraft and the decisions to fire. Greg Miller, *Joint Strike Is Latest Example of CIA-Military Convergence*, WASH. POST, Oct. 1, 2011, http://www.washingtonpost.com/world/national-security/strike-on-aulaqi-demonstrates-collaboration-between-cia-and-military/2011/09/30/gIQAD8xHBL_story.html.

⁹ In so doing, the United States also killed Samir Khan, a naturalized American citizen who authored and produced the online terrorist magazine Inspire. As he was not the target of the attack, but merely collateral damage, his death does not raise the same legal questions. It is believed that Samir Khan was never on the kill list. Mazzetti, Schmitt & Worth, *CIA Strike Kills U.S. Born Militant in a Car in Yemen*, *supra* note 6.

¹⁰ Shaun Waterman, *Al-Awlaki's Killing Seen as Major Blow*, WASH. TIMES, Oct. 3, 2011, <http://www.washingtontimes.com/news/2011/oct/2/al-awlakis-killing-seen-as-major-blow/?page=all>.

¹¹ See generally Sarah Phillips, *Al-Qaeda and the Struggle for Yemen*, 53 SURVIVAL 95 (2011) (describing the nature of al-Qaeda in the Arabian Peninsula).

¹² *Britain: Former Airline Employer Gets 30 Years in Terrorism Case*, N.Y. TIMES, Mar. 19, 2011, <http://www.nytimes.com/2011/03/19/world/europe/19briefs-ART-Britain.html>.

¹³ Carol J. Williams, *CIA Drone Strike Raises Debate*, CHICAGO TRIB., Oct. 2, 2011, <http://mobile.chicagotribune.com/p.p?a=rp&m=b&postId=930941&curAbsIndex=3&resultsUrl=DiD%3D6%26DFCL%3D1000%26DSB%3Drank%2523desc%26DBFQ%3DuserId%253A54%26DFC%3Dcat1%252Ccat2%252Ccat3%26DL.w%3D%26DL.d%3D10%26DQ%3DsectionId%253A6957%26DPS%3D0%26DPL%3D3D3> (citing Micah Zenko, a Council on Foreign Relations fellow).

14 *Id.*

¹⁵ These other alleged activities that may have landed Anwar al-Aulaqi on the lists include: his connections to two September 11, 2001 planners; Nawaf Al-Hazmi and Khalid Almindhar; a previous arrest by Yemeni authorities for being part of an al Qaeda plot to kidnap a U.S. military attaché; the inclusion of his name on a list of prisoners that al Qaeda affiliates sought to be released in Yemen; his communications with Somali terrorist group al-Shabaab praising their use of violence; a message urg-

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The government's decision to list an American citizen raises an important series of questions. At the time the government allegedly placed Anwar al-Aulaqi on a kill list, remarkably little was known about the procedures for listing and reviewing placements of individuals. How and under what authority did the government target Anwar al-Aulaqi? What legal standards guide the decision to list? Who makes the initial decisions about listing? What evidentiary standards do they use to determine if the legal standards are satisfied? Who reviews the determinations and how frequently? What opportunity, if any, exists for the listing individual to challenge his placement? Does the executive possess sole discretion on these decisions or is it subject to Congressional or judicial oversight?

After al-Aulaqi's father learned of his son's predicament, he contacted the American Civil Liberties Union (ACLU) and the Center for Constitutional Rights (CCR) to file suit on his son's behalf and to find out the answers to the questions raised above.¹⁶ While international law scholars have been debating the general permissibility of drone strikes,¹⁷ the specific targeting of Anwar al-Aulaqi raises an additional set of legal questions, as he is an American citizen. Writ large, the pressing issue is whether the executive branch possesses unreviewable authority to order the targeted killing of an American that the President deems to be a threat to the nation. This legal problem also implicitly raises the underlying policy question of whether such targeting is an effective strategy to win the war on terror. Although the actual case has drawn to a close, first with the ACLU and the CCR abandoning their opportunity for an appeal, and second with al-Aulaqi's death, these questions remain important ones.

This case has larger implications as a consensus of experts agrees on the high likelihood that the government has designated other Americans for targeting.¹⁸

ing American Muslims to commit violent Jihad against other Americans; using the magazine *Inspire* to threaten writers, journalists, and cartoonists; meetings with the Christmas day underpants bomber; and meetings with Abdulmutallahab prior to the attempted attack on a Detroit airplane. See Bruce Hoffman, *American Jihad*, 107 NAT'L INT. 17, 23-27 (May-June 2010); see also Charlie Szrom & Chris Harnisch, *Al Qaeda's Operating Environments: A New Approach to the War on Terror*, CRITICAL THREATS PROJECT OF THE AM. ENTER. INST. 1, 7, available at <http://www.aei.org/docLib/AQAM-final.pdf>; see also Gordon Lubold, *Why is Anwar Al-Awlaki Terrorist 'No. 1?'*, CHRISTIAN SCI. MONITOR, May 19, 2010, <http://www.csmonitor.com/USA/Foreign-Policy/2010/0519/Why-is-Anwar-Al-Awlaki-terrorist-No.-1> (describing Aulaqi's links to Major Nidal Malik Hassin who killed 13 people at Fort Hood, and Aulaqi's inspirational role in Faisal Shahzad's attempted Times Square bombing).

¹⁶ Robyn E. Blumner, *Some Basic Rights of an American*, ST. PETERSBURG TIMES, Aug. 8, 2010, <http://www.tampabay.com/opinion/columns/some-basic-rights-of-an-american/1113429>.

¹⁷ See generally Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346, 346-400 (Benjamin Wittes, ed., 2009); see also Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed., forthcoming), available at <http://ssrn.com/abstract=1501144>; see also Michael N. Schmitt, *Drone Attacks Under the Jus ad Bellum and Jus in Bello: Clearing the 'Fog of Law'*, Y.B. INT'L HUMANITARIAN L. (forthcoming), available at <http://ssrn.com/abstract=1801179>.

¹⁸ See Brian Bennett and David Meeks, *Still in U.S. Sights*, CHICAGO TRIB., Oct. 2, 2011, http://www.yellowbrix.com/index.nsp?sid=bp&pid=6&demo=1&story_id=164214766&&ID=infobrix&scategory=Defense (mentioning Adam Gadahn, a top propagandist, as a target); Nick Baumann, *Judge Dismisses Anwar al-Awlaki Targeted Killing Lawsuit*, MOTHER JONES, Dec. 7, 2010, <http://motherjones.com/mojol/2010/12/judge-dismisses-anwar-al-awlaki-targeted-killing-lawsuit>; see also Lendman, *supra* note 8 (noting that "[i]n late June, Deputy White House National Security Adviser for Homeland Security and Counterterrorism, John O. Brennan, acknowledged a hit list with dozens of other names, saying, 'There

As home-grown terrorism grows,¹⁹ the number of Americans listed will likely increase as well. While some believe that al-Aulaqi's targeting is *sui generis*,²⁰ others have gone so far as to suggest that the precedent may allow such attacks in the United States or will encourage other countries to kill their citizens abroad.²¹ At the very least, our capacity to carry out such strikes against our own citizens in similar locations has been enhanced with the creation of a new counterterrorism unit for Yemen and Somalia²² along with construction of a new air base in Yemen.²³

Rather than attempt to resolve the numerous legal issues raised by the al-Aulaqi litigation,²⁴ this short piece seeks to explain why the ACLU and CCR brought this lawsuit and then ultimately abandoned it.²⁵ In short, al-Aulaqi's case demonstrates both the potential for, and the limitations of, litigation as a strategy to curb executive authority during the so-called long war on terror. Even though Judge Bates rightly noted that al-Aulaqi's case is a "unique and extraordinary" one,²⁶ many issues raised by the litigation speak to more run of the mill terrorism cases. This article begins by identifying the ACLU and CCR's successful challenge of a specific procedural burden, effectively ensuring greater access to lawyers for many of those designated as terrorists.²⁷ This small victory

are, in my mind, dozens of US persons who are in different parts of the world, and they are very concerning to us, not just because of the passport they hold, but because they understand our operational environment here, they bring with them certain skills, whether it be language skills or familiarity with potential targets, and they are very worrisome, and we are determined to take away their ability to assist with terrorist attacks.'" Brennan also stated, "'If an American person or citizen is in Yemen or in Pakistan or in Somalia or another place, and they are (suspected of) trying to carry out attacks against U.S. interests, they also will face the full brunt of a US response. What we need to do is to apply the appropriate tool and the appropriate response.'"); but see Raffaella Wakeman, *The Kill or Capture List*, LAWFARE, <http://www.lawfareblog.com/2011/10/the-kill-or-capture-list/> (Oct. 6, 2011, 3:21 PM) (suggesting that some U.S. officials indicated Gadahn would not be listed as he was "not directly involved in plotting attacks").

¹⁹ See Alex Wilner & Claire-Jehanne Dubouloz, *Homegrown Terrorism and Transformative Learning: An Interdisciplinary Approach to Understanding Radicalization*, 22 GLOBAL CHANGE, PEACE AND SECURITY 33, 33 (2010), available at <http://www.tandfonline.com/doi/pdf/10.1080/14781150903487956>. This, of course, assumes that some homegrown terrorists will spend time outside the United States.

²⁰ Op-Ed., *A Rare Act, Killing of al-Awlaki Accords with Sound Legal Rules*, BOSTON GLOBE, Oct. 1, 2011, http://articles.boston.com/2011-10-01/bostonglobe/30233426_1_al-awlaki-al-qaeda-navy-seal.

²¹ See Matt Apuzzo, *American Drone Kills American Al-Qaeda*, LEWISTON MORNING TRIB., Oct. 1, 2011 (available on Lexis Nexis); see also Scott Shane, *Coming Soon: The Drone Arms Race*, N.Y. TIMES, Oct. 9, 2011, <http://www.nytimes.com/2011/10/09/sunday-review/coming-soon-the-drone-arms-race.html> (noting that while only the United States, Israel, and Britain have engaged in drone strikes, more than 50 countries have unmanned aerial vehicles which could be equipped with weapons including China, Russia, Iran, India, and Pakistan); but see Kenneth Anderson, *What Kind of Drones Arms Race Is Coming*, VOLOKH CONSPIRACY (Oct. 10, 2011 3:19 PM), <http://volokh.com/2011/10/09/what-kind-of-drones-arms-race-is-coming> (suggesting that UAV technology and weaponization would have developed even in the absence of U.S. drone use).

²² Greg Miller, *Joint Strike Is Latest Example of CIA-Military Convergence*, *supra* note 5.

²³ Laura Kasinof & Alan Cowell, *U.S. Drone Strike Kills Qaeda Leader*, INT'L HERALD TRIB., Oct. 1, 2011 (available on Lexis Nexis).

²⁴ See generally Chesney, *infra* note 73.

²⁵ The timely appeal period had expired. Benjamin Wittes, *No Appeal in al-Aulaqi*, LAWFARE, <http://www.lawfareblog.com/2011/02/no-appeal-in-al-aulaqi/> (Feb. 22, 2011, 1:55 PM).

²⁶ *Al-Aulaqi v. Obama*, *supra* note 1.

²⁷ 75 Fed. Reg. 234, 75904 (Dec. 7, 2010) (codified at 31 C.F.R. pts. 594, 595, and 597).

aids many of those seeking access to the courts, not just American citizens.²⁸ In contrast, Part II of this article notes the ACLU and CCR's general failures in accomplishing their immediate litigation goals. Their efforts to expand the standing doctrine and narrow the application of sovereign immunity, state secrets, and political question doctrines were largely futile. Yet, Part III suggests the ACLU and CCR's real goals may have been the lawsuit's extra-legal consequences and contributions. While they were unable to obtain a judicial review of the executive branch's behavior, this part documents how they leveraged the litigation to provoke and influence a public debate over certain aspects of the war on terror. As detailed below, the lawsuit allowed the ACLU and CCR to raise and initiate the framework for legal and policy questions about the targeting of American citizens. In the wake of al-Aulaqi's death, this framework is bearing some limited fruit as the push for greater transparency over legal standards for and reviewability of targeting decisions increases in strength and the demand for a rethinking of the policy wisdom of pursuing a targeting policy grows more fervent.

II. Eliminating Pre-litigation Barriers to Terrorism Lawsuits

In order to make litigation more viable not only for al-Aulaqi, but also for many other terrorism suspects who wish to challenge the government's authority, the ACLU and CCR chose to address a pre-existing regulatory scheme that limits legal representation of "specially designated global terrorists."²⁹ In 2003, the U.S. Treasury's Office of Foreign Assets Control (OFAC) passed a regulation prohibiting lawyers from defending certain accused terrorists pro bono without explicit governmental permission.³⁰ Thus, while Nasser al-Aulaqi originally retained the ACLU and CCR on his son's behalf, OFAC's subsequent decision to name Anwar al-Aulaqi a "specially designated global terrorist" prohibited further legal representation until OFAC decided to grant his attorneys a license.³¹

Thus, in the complaint filed by the ACLU in *ACLU v. Geithner*,³² the two non-profits challenged the government's licensing policy as an unconstitutional violation of their "First Amendment right to represent clients in litigation consistent with their organizational missions,"³³ and a violation of due process and separation of powers by "depriving a U.S. citizen of the ability to obtain repre-

²⁸ *Id.*

²⁹ *ACLU, CCR and ACLU Receive License From OFAC to Pursue Challenge to Targeted Killing*, AMER. CIVIL LIBERTIES UNION, Aug. 4, 2010, <http://www.clu.org/national-security/ccr-and-aclu-receive-license-ofac-pursue-challenge-targeted-killing>.

³⁰ 31 C.F.R. 594.506(a) (2001). OFAC promulgated regulations to implement this order, which requires specific licenses for persons whose property or interests are blocked under the regulations. *Id.* President Bush issued an order blocking the "property of foreign persons determined by the Secretary of the Treasury to assist in, sponsor, or provide financial, material, or technological support for. . . acts of terrorism." Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

³¹ OFAC labeled al-Aulaqi as such on July 16, 2010. *ACLU and CCR v. Geithner*, ACLU, Dec. 17, 2010, <http://www.aclu.org/national-security/aclu-and-ccr-v-geithner>.

³² Complaint *ACLU v. Geithner*, No. 10-CV-1303 (D.D.C. filed Aug. 3, 2010).

³³ *Id.* at 3.

sentation in litigation against the United States in U.S. Courts.”³⁴ Soon thereafter, not only did OFAC grant the ACLU and CCR the specific license to represent al-Aulaqi,³⁵ but it also voluntarily revised its rules and regulations to eliminate the licensing requirement for attorneys seeking to represent clients who have had their assets frozen as terrorists.³⁶ This decision on the part of an executive agency represents a real victory for the ACLU and CCR against potential future licensing delays or denials. At the very least, those individuals who have been designated terrorists can now freely hire lawyers and begin to navigate both the court and administrative system.

III. Failing to Achieve Direct Litigation Goals

Viewed narrowly, the ACLU and CCR pursued some very specific litigation goals as embodied in their requested relief. First, they sought a declaration that both the Constitution and International Law prohibited the government from carrying out targeted killings outside of armed conflict except as a last resort to protect against “concrete, specific, and imminent threats” of death or serious injuries.³⁷ Relatedly, they further asked for an injunction prohibiting the targeted killing of al-Aulaqi outside the narrow confines of the aforementioned declaration.³⁸ Finally, they requested an injunction “requiring the government to disclose the standards under which it determines whether a U.S. citizen can be targeted for death.”³⁹ Ultimately, the court provided none of the requested relief, nor did it even engage in a merits discussion of these requests.

Viewed more expansively, Al-Aulaqi’s case also presented these non-profits with an opportunity to push for a broad interpretation of standing in certain types of terrorism cases. Individuals who wish to challenge their placement on these targeting lists, as well as other suspected terrorists living abroad who have had their assets frozen, are very unlikely to surrender themselves simply to enforce their legal rights. Thus, the ability for third parties or other parties in interest to stand in for them is quite important for pursuing litigation and challenging the very authority of many of these determinations. As a prudential matter, courts can construe next friend and third party standing broadly, but Judge Bates determined in this instance that the decision to hide from law enforcement, even under threat of death, is an insufficient explanation for a failure to appear on one’s behalf.⁴⁰ As Judge Bates decided that both domestic and international law would require the U.S. government to allow al-Aulaqi to surrender peacefully, he concluded mere fear of violence or death is insufficient to allow another to stand in

³⁴ *Id.* at 4. They also challenged the regulations exceeding statutory authority by regulating non-economic activity [as] “arbitrary and capricious.” *Id.* at 10.

³⁵ ACLU, *CCR and ACLU Receive License*, *supra* note 29.

³⁶ 75 Fed. Reg. 234, 75904 (Dec. 7, 2010) (codified at 31 C.F.R. pts. 594, 595, and 597).

³⁷ Complaint, *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (D.D.C 2010) (No. 10-01469).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Al-Aulaqi v. Obama*, *supra* note 1.

for him as a “next friend.”⁴¹ However, Professor Jack Goldsmith has noted that Judge Bates’ mention in dicta of the possibility of teleconferencing with attorneys from remote locations does provide some very slight solace for future plaintiffs.⁴² Similarly, the court rejected third party standing because, among other reasons, Judge Bates concluded Anwar al-Aulaqi’s failure to bring suit or express desire to litigate in American courts suggests his rights are not truly important to him and that a third party representative would have divergent interests.⁴³

Even had they prevailed on the standing issue, other threshold matters loomed large in this and many other terrorism cases challenging executive authority. Moving from the most favorable to least favorable rulings, at best, the ACLU and CCR got a draw on the military and state secrets privileges. While the government argued that resolving the claims would require disclosure of protected information, they urged the court to resolve the case on other grounds, which it did.⁴⁴ Accordingly, the litigation neither narrowed the scope of the state secrets doctrine, nor clearly affirmed its widespread use. Similarly, the plaintiffs’ requested relief under the Alien Tort Statute was deemed inappropriate on sovereign immunity grounds. While this holding is a more clear loss for the ACLU and the CCR, the court did at least decline to rule on whether the Administrative Procedure Act’s waiver of sovereign immunity would apply to it.⁴⁵ Instead, the court used its equitable discretion, leaving the more significant question of the statute’s applicability unanswered.⁴⁶

The threshold issue on which the ACLU and CCR suffered the most resounding defeat was on the political question doctrine, which is likely to present formidable obstacles for many cases brought during the long war on terror. Courts invoke the political question doctrine as a constitutional preclusion mechanism that forbids them from reviewing cases that turn on “policy choices and value determinations” committed to the executive branch or Congress.⁴⁷ In this case, Judge Bates determined that Anwar al-Aulaqi’s citizenship and claims of Constitutional violations did not forestall the application of the political question doctrine.⁴⁸ If the ACLU and CCR were hoping that al-Aulaqi’s case might be extraordinary and exceptional in the court’s willingness to engage the merits in the face of procedural escape hatches, their hopes were certainly dashed.⁴⁹

⁴¹ *Id.* at 22.

⁴² Jack Goldsmith, *What the ACLU and CCR Won in al-Aulaqi*, LAWFARE, <http://www.lawfareblog.com/2010/12/what-aclu-and-ccr-won-in-al-aulaqi/#more-931> (Dec. 7, 2010, 6:32 PM); see *Al-Aulaqi*, 727 F.Supp.2d at 19; but see, Benjamin Wittes, *Some Thoughts on Judge Bates’ Decision*, LAWFARE, <http://www.lawfareblog.com/2010/12/some-thoughts-on-judge-bates-decision/> (Dec. 8, 2010, 7:33 AM).

⁴³ *Al-Aulaqi*, 727 F.Supp.2d at 33-34.

⁴⁴ *Id.* at 54.

⁴⁵ *Id.* at 61.

⁴⁶ *Id.*

⁴⁷ *Id.* at 65.

⁴⁸ *Id.* at 49.

⁴⁹ Steven I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122, 123-26 (2001).

As a result of these various determinations, the court chose not to address the question of when the United States may target a particular foreign terrorist organization and its senior leadership. Nor did the court address several subsidiary questions such as: whether the Authorization to Use Military Force (AUMF) implicitly authorizes the targeted killing of members of al-Qaeda in the Arabian Peninsula; whether the AUMF covers AQAP members because they have sufficient ties to al-Qaeda or because they are properly considered co-belligerents; and what sort of ties the AUMF requires in terms of training, operations, and/or shared membership for non-listed terrorist organizations? Similarly, the court punted on related fact-specific questions of whether Anwar al-Aulaqi's role with either al-Qaeda or AQAP would render him either a combatant or a civilian taking direct participation in hostilities. Relatedly, the court did not elucidate how the standards for targeting might differ between combatants and civilians taking direct participation in hostilities.

The conversation the ACLU and CCR seemed most interested in follows from negative answers to the previous set of questions. If the AUMF does not properly cover al-Aulaqi, then does he, as a US citizen abroad, have a Fifth Amendment right not to be deprived of life without due process? If so, what does the content of that right include in this particular context? As mentioned earlier, the ACLU and the CCR sought a declaration that in such instances both the Constitution and international law prohibit the government from carrying out targeted killings except as a last resort to protect against concrete, specific, and imminent threats of death or serious physical injury. They also sought a judicial role in reviewing any executive determination that an individual's behavior satisfied such criteria, (or at least the identification of what criteria the executive branch may use). Yet, the court demurred – identifying these inquiries as complex policy questions in which it both lacks competence and manageable standards to guide its answers.⁵⁰

IV. Assessing Extra Litigation Goals: Generating and Framing a Public Debate

While the ACLU and CCR lost big on paper, they may have achieved some gains in instigating other checks on executive authority. These litigation-savvy organizations must have recognized the very low probabilities of a judicial victory on most of the issues they raised. That said, they also know high profile lawsuits garner attention for an issue, and, when managed correctly, can cause a public outcry and allow the losing litigants to frame the debate.⁵¹ By bringing this case, the ACLU and CCR spurred a heated public and academic debate on the limits of the executive's authority to target individuals. For instance, the al-Aulaqi suit prompted editorials in the New York Times,⁵² the Washington Post,⁵³

⁵⁰ Al-Aulaqi, 727 F.Supp.2d at 52.

⁵¹ See generally Timothy Lytton, *Clergy Sexual Abuse Litigation: The Policymaking Role of Tort Law*, 39 CONN. L. REV. 809 (2007).

⁵² Op-Ed., *Judicial Scrutiny Before Death*, N.Y. TIMES, Dec. 13, 2010, <http://www.nytimes.com/2010/12/13/opinion/13mon2.html>.

and many other widely circulated publications.⁵⁴ The debate also continued on-line through spirited blog fights.⁵⁵ The ACLU and CCR certainly succeeded not only in creating a high profile debate, but also in introducing a new frame through which the issues should be viewed and assessed. Although targeting is a long-standing practice, the lawsuit serves as a mechanism by which the ACLU and the CCR can tie a renewed moral outrage about its current incarnation to specific legal hooks. Rather than starting from a national security perspective, the lawsuit and its resulting discourse encourages the media, the public, and the relevant policy actors to focus on constitutional, statutory, and international law questions.⁵⁶ By filing a lawsuit, the ACLU and CCR raised another issue not previously a significant part of the public debate on targeting: whether the President should have unreviewable authority to carry out the targeted killing of an American anywhere that the President deems to be a threat to the nation. This forces a debate about whether unilateral executive authority will sufficiently provide the constitutional protections of due process and whether new, publically reviewable constraints on executive authority need to be developed. The ACLU and CCR posed these questions as necessary to create a set of rules not just for al-Aulaqi, but also for future targets and future presidents.

It is worth noting that Al-Aulaqi's case is just one part of the ACLU's larger legal strategy to challenge targeting policy and the secrecy surrounding it. For instance, in January 2010, the ACLU used the Freedom of Information Act to request documents related to the drone strikes.⁵⁷ This request included any records including "information about the legal basis in domestic, foreign, and international law" for drone strikes as well as any information "regarding the rules and standards that the Armed Forces and CIA use to determine where and

⁵³ Op-Ed., *Whether to Use Drones on Americans Linked to al-Qaeda*, WASH. POST, Sept. 6, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/05/AR2010090502877.html>; Op-ed., *Should U.S. Citizens Who Join Forces with al-Qaeda Be Subject to Drone Strikes*, WASH. POST, Sept. 6, 2010, at A14 (this editorial is available on LexisNexis but is not available online); Anthony Romero & Vincent Warrant, Op-ed., *Sentenced to Death without Trial*, WASH. POST, Sept. 3, 2010, at A19 (this editorial is available on LexisNexis but is not available online).

⁵⁴ See, e.g., David Cole, *Breaking Away*, THE NEW REPUBLIC, Dec. 30, 2010, at 17; Philip Giraldis, *Deep Background*, THE AM. CONSERVATIVE, Apr. 1, 2010, at 21; Kevin Williamson, *Assassin in Chief – The War on Terror Has Blinded the Right to a Disturbing Expansion of Executive Power*, NAT'L REV., Nov. 1, 2010; Eric Posner, *Dockets of War*, NAT'L INTEREST, Mar- Apr 2011; Ben Lerner, *Citizenship as Sword*, AM. SPECTATOR, Oct. 25, 2010; Alex Kingsbury, *Can the CIA Put a U.S. Born al-Qaeda Figure on Its Kill List*, US NEWS, Sept. 7, 2010; see also Op-ed., *Judicial Scrutiny Before Death*, N.Y. TIMES, Dec. 12, 2010, at 24.

⁵⁵ See, e.g. John C. Dehn & Kevin Jon Heller, *Targeted Killing: The Case of Anwar al-Aulaqi*, 159 U. PA. L. REV. 175 (2011) (each author presented different sides of a debate); see also Kevin Jon Heller, *Ben Wittes' Unconvincing Hostage Taking Analogy*, OPINIO JURIS (Sept. 3, 2010) <http://opiniojuris.org/2010/09/03/ben-wittes-unconvincing-hostage-taking-analogy/>; Benjamin Wittes, *A Response to Kevin Jon Heller*, LAWFARE, <http://www.lawfareblog.com/2010/09/a-response-to-kevin-jon-heller/> (Sept. 4, 2010); David Rivkin & Lee Casey, *The American Terrorist Obama Wants To Kill*, THE DAILY BEAST, Apr. 7, 2010, <http://www.thedailybeast.com/articles/2010/04/07/the-american-terrorist-obama-wants-to-kill.html>.

⁵⁶ Of course, whether this frame is the normatively preferable way to conceptualize these issues is another inquiry entirely.

⁵⁷ Michael Doyle McClatchy, *Targeted Killing of al-Awlaki Debated*, SPOKESMAN REV., Oct. 1, 2011, <http://www.spokesman.com/stories/2011/oct/01/targeted-killing-of-al-awlaki-debated/>.

when these weapons may be used, the targets they may be used against, and the processes in place to decide whether their use is legally permissible in particular circumstances.”⁵⁸ In their letter, the ACLU raised the specific concern that U.S. citizens might be targeted as one of the reasons supporting the release of information.⁵⁹ In the subsequent litigation, Judge Rosemary Collyer granted summary judgment for the CIA concluding they did not have to disclose any material.⁶⁰ She determined that acknowledging or releasing even the information limited to the “scope, limits, oversight, and legal basis of this killing program” would implicate sources and methods of intelligence gathering.⁶¹ The other suits against the Department of Defense, the State Department, and the Justice Department continue, but they seem, like al-Aulaqi’s suit, more influential in creating public rather than judicial checks on executive action.

This section identifies four mechanisms by which the ACLU and CCR might have deployed the al-Aulaqi litigation as part of a larger strategy to challenge unfettered executive authority in the long war on terror. First, it raises the possibility that the public pressure generated by the lawsuit would constrain the administration’s willingness or ability to engage in drone strikes against American citizens. Such constraints could include the development and disclosure of the legal limits on the executive’s authority. Second, public pressure may instead lead to a second or third best situation in which the government instead discloses some of those legal limits by leaks. Third, this section notes that the litigation induced public debate may encourage the legislature to become more involved in targeting practices. Though such an involvement may lead to more rather than less targeting, it does in some sense limit the power of the unilateral executive and creates some democratic accountability. Finally, this section notes that the litigation may have helped reinvigorate the policy debate about whether targeting is a necessary or successful approach to conducting the long war.

⁵⁸ Memorandum Opinion at 2, ACLU, et. al. v. Dep’t of Justice, Civil Action No. 10-0436 (D.D.C., Sept. 9, 2011) *available at* <http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2010cv00436/141218/34/0.pdf>.

⁵⁹ *Id.* at 4. The C.I.A. responded by issuing a letter neither confirming nor denying the existence of any related records and asserting its legal defense against revealing such information. Notably, the C.I.A. declined to explicitly raise the state secrets doctrine at any point in the FOIA litigation, though the Washington Legal Foundation’s amicus brief did assert it. In fact, the Washington Legal Foundation argued that C.I.A. director Leon Panetta’s arguments that the al-Aulaqi litigation raised state secret problems was a reason the court should acknowledge the privilege in the FOIA case as well. Press Release: *Court Urged to Dismiss Request for CIA Records on Drone Attacks*, WASH. LEGAL FOUNDATION (Oct. 19, 2010) (available via Targeted News on Lexis Nexis).

⁶⁰ The court found that releasing or even acknowledging the existence or nonexistence of records would reveal correctly protected classified information. In so doing, Judge Collyer found that the National Security Act of 1947 is a withholding statute. ACLU v. Dep’t of Justice, No. 10-0436 at 6-8 (D.D.C. Sept. 9, 2011). The court further concluded that opening the records could “reveal information on the CIA’s internal structure and its capabilities and potential interests and involvement in/operation of the drone program.” *Id.* at 10.

⁶¹ *Id.* at 11-15.

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A. Direct Executive Checks through Public Pressure

Given the reluctance of judges to engage these issues on the merits, any ultimate review of the individual listing determinations seems likely to be embedded in the executive rather than in the judiciary. Even so, the ACLU and CCR seem to be using lawsuits as part of a larger strategy to push for more transparent executive review, or at the very least an acknowledgement and elucidation of existing review standards. While the lawsuits themselves did not directly result in a judicial order calling for executive constraints or transparency, litigation can provide a frame from which the public and policy makers can pressure for such limits.

That said, the ACLU and CCR's generation of legal attention and framing failed in the most immediate sense to alter the executive's behavior. Despite the lawsuits, the CIA continued to target al-Aulaqi until it ultimately struck and killed him. Nor did the litigation and ensuing debate force a public account of the legality of this action. Thus far, the administration has been largely silent on the legal grounds and evidence for the targeting of al-Aulaqi.⁶² At best, the government has made a few modest nods towards a public justification by describing al-Aulaqi as someone who could be lawfully targeted.⁶³ Yet, the administration has provided no evidence to support its assessment nor any meaningful explanation of which facts, if true, would allow his targeting.

In fact, the number and scope of issues on which the administration has remained silent is staggering.⁶⁴ To begin with, the administration has not even acknowledged the existence of a drone program. Unsurprisingly then, it has also been close-lipped on the existence of a targeting list, the names of those on the list, the legal and evidentiary standards by which someone is placed on the list, and any review processes that might take place both after listing and after successful targeting. Human rights groups are reading the administration's silence as a deliberate decision,⁶⁵ particularly in light of the more detailed explanation

⁶² Paul Harris & Jamie Doward, *How US Tracked Objective Troy to his Death*, THE GUARDIAN, Oct. 2, 2011, (describing President Obama's reluctance to provide any operation details, including his role in the chain of command).

⁶³ Court Urged to Dismiss Request for CIA Records on Drone Attacks. Laura Kasinof & Alan Cowell, *U.S. Drone Strike Kills Qaeda Leader*, *supra* note 23. Obama also referred to al-Aulaqi as the leader of al Qaeda's external operations. Matt Apuzzo, *American Drone Kills American Al-Qaeda*, *supra* note 21. Relatedly, Obama's Press Secretary also stated that al-Aulaqi "was also very demonstrably and provably involved in operational aspects of AQAP." White House Press Secretary Jay Carney, News Briefing (Sept. 30, 2011). White House Spokesman Robert Gibbs had previously identified al-Aulaqi as a regional commander for AQAP. Matt Apuzzo, *American Drone Kills American Al-Qaeda*, *supra* note 21.

⁶⁴ Victoria Nuland, State Department Spokesperson, State Department News Briefing (Sept. 30, 2011) (referring questioners to ask the Justice Department for answers to questions about the legality of the strike); White House Press Secretary Jay Carney, News Briefing (Sept. 30, 2011) (refusing to answer questions about the circumstances surrounding al-Aulaqi's death including questions about whether any proof of al-Aulaqi's operational role will be made available to the public).

⁶⁵ Scott Wilson, *No Safe Haven Anywhere in the World*, WASH. POST, Oct. 1, 2011, http://www.pressherald.com/news/nationworld/obama-uses-high-risk-tactics-against-terrorists_2011-10-01.html.

provided after the boots on the ground operation leading to Osama bin Laden's death.⁶⁶

In the wake of al-Aulaqi's death, many in the domestic and foreign press have questioned the legal precedent.⁶⁷ And notably, many have also mentioned the incident in reference to the ACLU's lawsuit in making their objections.⁶⁸ Even Al Qaeda in the Arabian Peninsula has argued that the "U.S. government did not prove the accusations against [him], and did not present evidence against [him] in their unjust laws of their freedom."⁶⁹ Unfortunately, few politicians on either side of the aisle have seriously questioned the legality of the decision,⁷⁰ with even Obama's political rivals lauding the outcome.⁷¹ If restraint and overt trans-

⁶⁶ Adam Baron, *Al-Awlaki's Death Deprives al-Qaida of Key Recruiting Voice*, McCLATCHY NEWS BUREAU, Sept. 30, 2011, <http://www.mcclatchydc.com/2011/09/30/125728/us-born-cleric-anwar-al-awlaki.html>.

⁶⁷ For example, see Neil Steinberg, *Suddenly They Trust Obama to Kill People*, CHICAGO SUN TIMES, Oct. 3, 2011, <http://www.suntimes.com/news/steinberg/7999840-452/suddenly-they-trust-obama-to-kill-people.html>; Op-Ed., *Al-Awlaki and the Bounds of Power*, NEWSDAY, Oct. 3, 2011, at A34; Adam Bates, *Judge and Assassinated*, WASH. POST, Oct. 3, 2011, http://www.washingtonpost.com/opinions/no-jury-for-mr-awlaki/2011/09/30/gIQAraTOGL_story.html; Op-Ed., *Terrorist Assassination Exposes Hypocrisy of Obama Policies*, WASH. TIMES, Oct. 3, 2011, <http://www.washingtontimes.com/news/2011/sep/30/awlaki-the-model-moderate-muslim/>; Op-ed, Yasir Qadhi, *An Illegal and Counterproductive Assassination*, N.Y. TIMES, Oct. 2, 2011, <http://www.nytimes.com/2011/10/02/opinion/sunday/assassinating-al-awlaki-was-counterproductive.html>; Maajid Nawaz, *Commentary, By Abandoning Our Own Values We Reinforce The Extremists*, OBSERVER, Oct. 2, 2011, <http://www.guardian.co.uk/world/2011/oct/01/drone-killing-anwar-al-awlaki>; Matt Apuzzo, *American Drone Kills American Al-Qaeda*, *supra* note 21; Matt Apuzzo, *Drone Strike on Two Americans Raises Questions*, ARMY TIMES, Sept. 30, 2011, <http://www.armytimes.com/news/2011/09/ap-drone-strike-on-2-americans-raises-questions-093011/>; Scott Shane, *Judging a Long Deadly Reach*, N.Y. TIMES, Oct. 1, 2011, <http://www.nytimes.com/2011/10/01/world/american-strike-on-american-target-revives-contentious-constitutional-issue.html>; Michael Doyle McClatchy, *Targeted Killing of al-Awlaki Debated*, SPOKESMAN REV., Oct. 1, 2011, <http://www.spokesman.com/stories/2011/oct/01/targeted-killing-of-al-awlaki-debated/>; Sophie Quinton, *No Due Process in Awlaki's Killing*, *Civil Libertarians Worry*, NAT'L J., Sept. 30, 2011, <http://www.nationaljournal.com/nationalsecurity/no-due-process-in-awlaki-s-killing-civil-libertarians-worry-20110930>; Op-ed., Ed Husain, *U.S. Shouldn't Have Killed al-Awlaki*, CNN OPINION, Sept. 30, 2011, http://articles.cnn.com/2011-09-30/opinion/opinion_husain-awlaki-killing_1_al-awlaki-al-zawahiri-yemeni-prison?_s=PM:OPINION.

⁶⁸ Donna Leinwand Leger, *Al-Awlaki Strike Did Not Kill Bombmaker; Critics Say Drone Hit Disregards U.S. Law*, USA TODAY, Oct. 3, 2011 at 6A; Carol J. Williams, *CIA Drone Strike Raises Debate*, CHICAGO TRIB., Oct. 2, 2011 at C29; Peter Finn, *Awlaki Assassination Triggers Legal Debate*, BOSTON GLOBE, Oct. 1, 2011, http://articles.boston.com/2011-10-01/news/30233533_1_yemen-awlaki-military-force; Op-Ed., *Targeting Those Who Target Us*, DENVER POST, Oct. 1, 2011, http://www.denverpost.com/opinion/ci_19014973; Scott Shane, *In Cleric's Killing An Issue of Due Process*, INT'L HERALD TRIB., Oct. 1, 2011, <http://www.highbeam.com/doc/1P1-198217615.html>.

⁶⁹ Thomas Jocelyn, *AQAP Confirm Anwar Al-Awlaki Killed in U.S. Drone Strike*, THE LONG WAR J., Oct. 10, 2011, http://www.longwarjournal.org/archives/2011/10/al_qaeda_confirms_an.php.

⁷⁰ Jackie Calmes, *Success Battling Terrorists, but Scant Glory for It*, N.Y. TIMES, Oct. 3, 2011, <http://www.nytimes.com/2011/10/03/us/politics/for-obama-success-battling-terrorists-seems-to-mean-little.html?pagewanted=all> (noting Dennis Kucinich as one of the few Democrats to respond publicly who "objected that the killing was 'wrong legally, internationally, and morally.'"); Stu Bykofsky, *Home Grown Terrorists Deserved to Die*, THE PHILADELPHIA DAILY, Oct. 3, 2011, <http://www.nytimes.com/2011/10/03/us/politics/for-obama-success-battling-terrorists-seems-to-mean-little.html?pagewanted=all> (noting that Republican Ron Paul criticized the action, but most of the far left has remained silent); Sophie Quinton, *No Due Process in Awlaki's Killing*, *Civil Libertarians Worry*, *supra* note 67.

⁷¹ Anissa Haddadi, *Al-Awlaki's killing: Obama's Proof he is Better at Fighting the War Against Terror than Bush?*, INT'L BUS. TIMES NEWS, Sept. 30, 2011, <http://uk.ibtimes.com/articles/222881/>

parency were the measures by which one ought to judge the success of the *al-Aulaqi* lawsuit, it again appears to be a failure.

B. Creating Conditions for Indirect Transparency: Government By Leaks

All that said, the ACLU and CCR successfully contributed to an atmosphere that encouraged the administration to at least leak information about the legal standards governing the targeting of an American citizen and about constraints on targeting more generally. Between the *al-Aulaqi* lawsuit and the FOIA lawsuit, the ACLU and CCR generated momentum to push for answers to at least three different types of related questions.⁷² First, what are the legal standards for listing and how are those abstract standards interpreted on the ground? Second, who makes those legal determinations and who reviews them? Third, what are the evidentiary standards by which those determinations are made? And finally, what deference or review exists for those evidentiary requirements? Although the government has not provided anything approaching full disclosure on any of these questions, we now at least seem to have more information about Al-Aulaqi's listing and the listing procedure in general.

For instance, at the time Anwar al-Aulaqi appeared on the list, the government provided very little public detail on how it selected anyone, much less an American citizen, for listing.⁷³ After the news of al-Aulaqi's placement on the list, Director of National Intelligence, Dennis Blair, did articulate a relevant factor in listing as "whether that American is involved in a group that is trying to attack us, whether that American is a threat to other Americans. . . . We don't target people for free speech. We target them for taking action that threatens Americans or has resulted in it."⁷⁴ But much more information has been revealed in the wake of al-Aulaqi's death as several sources have come forward. For instance, former head of the Office of Legal Adviser Jack Goldsmith recently commented that in order for the government to place anyone on the kill list, high level agency lawyers along with high level policy makers must assess the legal and political

20110930/al-awlaki-s-killing-obama-s-proof-he-is-better-at-fighting-the-war-against-terror-than-bush.htm.

⁷² While proving such a causal relationship is often difficult, it does seem that the ACLU and CCR request for transparency and accountability may have helped motivate the leaks. Of course, the government may have chosen to leak information in the absence of either political pressure or the lawsuits, but given both the intensity and quality of the pressure, it would be reasonable to think a relationship does exist.

⁷³ The State Department Legal Adviser Harold Koh did "address the factors that the United States considers in connection with specific targeting decisions including the imminence of the threat," but not the evidentiary thresholds for when someone makes the list. See Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, Y.B. OF INT'L HUMANITARIAN L. 1, 10 (forthcoming 2011), available at <http://ssrn.com/abstract=1754223>; see also Harold Hongju Koh, Legal Adviser, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

⁷⁴ See Stephen Lendman, *Targeted Assassinations: Challenging U.S. Policy*, ATL. FREE PRESS, Aug. 6, 2010, <http://www.atlanticfreepress.com/news/1/13632-targeted-assassinations-challenging-us-policy.html>; see also Eli Lake, 'Permission' Needed to Kill U.S. Terrorists, WASH. TIMES, Feb. 4, 2010, <http://www.washingtontimes.com/news/2010/feb/04/permission-needed-to-kill-american-terrorists/>.

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risk, approve the action, and inform the Congressional intelligence committee about the intelligence community's role in the operations.⁷⁵ News reports also contend that the C.I.A. general counsel along with White House counsel⁷⁶ review individual determinations every six months to ensure that targets continue to satisfy the legal standards.⁷⁷ In addition, some evidence suggests the entire National Security Council reviews the determination if an American citizen is listed.⁷⁸

Moreover, in the wake of al-Aulaqi's death, the public learned that the Justice Department's Office of Legal Counsel issued a classified memorandum detailing its understanding of the legality of al-Aulaqi's strike.⁷⁹ While the administration has not officially declassified and released the memo, it seems those at the highest levels may have allowed or even encouraged its leakage. At the very least, some officials who have read it anonymously described its contents to NYT reporter Charlie Savage. According to these sources, Office of Legal Counsel attorneys David Barron and Martin Lederman served as primary drafters, writing the memo after deliberations and consultations with high-level lawyers from the Pentagon, the State Department, the National Security Council, and intelligence agencies.⁸⁰ Under this account, the memo assesses an executive order banning assassinations, domestic prohibitions on murder, constitutional protections, and the laws of war and concludes none barred the targeting of al-Aulaqi.⁸¹

While these leaks provide some vague sense of the decision-making process, the memo leaves as many questions as answers. For instance, the memo is not thought to reveal the identity of those who decide to put targets on the kill list and no public record has been made of their reasoning or decisions.⁸² Nor is the

⁷⁵ Op-Ed, Jack Goldsmith, *A Just Act of War*, N.Y. TIMES, Oct. 1, 2011, <http://www.nytimes.com/2011/10/01/opinion/a-just-act-of-war.html>.

⁷⁶ Op-Ed., David Ignatius, *Risks of Drone Addiction*, WASH. POST, Sept. 22, 2011, http://www.washingtonpost.com/opinions/the-price-of-becoming-addicted-to-drones/2011/09/21/gIQAovp4IK_story.html.

⁷⁷ Peter Finn, *In Secret Memo, Justice Department Sanctioned Strike*, WASH. POST, Oct. 1, 2011, http://www.washingtonpost.com/world/national-security/aulaqi-killing-reignites-debate-on-limits-of-executive-power/2011/09/30/gIQAxl1bUAL_story.html.

⁷⁸ Op-Ed., David Ignatius, *Risks of Drone Addiction*, WASH. POST, Sept. 22, 2011, http://www.washingtonpost.com/opinions/the-price-of-becoming-addicted-to-drones/2011/09/21/gIQAovp4IK_story.html.

⁷⁹ Peter Finn, *In Secret Memo, Justice Department Sanctioned Strike*, WASH. POST, Oct. 1, 2011, *supra* note 77; Scott Shane & Thom Shanker, *Yemen Strike Reflects U.S. Shift to Drone as Cheaper War Tool*, N.Y. TIMES, Oct. 2, 2011, <http://www.nytimes.com/2011/10/02/world/awlaki-strike-shows-us-shift-to-drones-in-terror-fight.html?pagewanted=all>. The arguments within the memo are believed to have constrained decision-making; for instance, the C.I.A. may have delayed the strike until Al-Aulaqi was away from a populated area. Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES (Oct. 9, 2011) <http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all>.

⁸⁰ Allegedly, no writer raised a dissenting opinion as to the legality of killing al-Aulaqi. Peter Finn, *In Secret Memo, Justice Department Sanctioned Strike*, *supra* note 77.

⁸¹ Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, *supra* note 79.

⁸² Bruce Ackerman, *On the Presidential Assassination of American Citizens*, BALKINIZATION (Oct. 9, 2011 7:17 PM), <http://balkin.blogspot.com/2011/10/on-presidential-assassination-of.html> (observing that we do not know how much information midlevel operatives who make list recommendations provide to National Security Council panels or how that evidence is weighed, nor does the president make the final

memo alleged to have grappled with the specific evidence that such individuals assessed to put al-Aulaqi on the list. Given that the memo is merely leaked, rather than declassified, the public and scholars do not have the opportunity to see or question the arguments and precedents that inform the writers' reasoning and conclusions. Nor can they be sure that the leaks accurately represent the actual positions taken by the administration.

Many, including the ACLU, scholars, and politicians, have now called for the declassification of the memo and an ensuing public debate over its contents.⁸³ Some explicitly note the absence of the kind of judicial review called for in al-Aulaqi's case as a reason why the memo's disclosure is so important.⁸⁴ Even those supportive of targeting like the former head of the House Intelligence Committee⁸⁵ and Former State Department Legal Adviser John Bellinger III have asked the White House to make public the secret memos.⁸⁶ Others like Professor David Cole have suggested that a public justification of the legal grounds upon which the decision to target al-Aulaqi rested is necessary to keep both international and domestic support for on-going targeting.⁸⁷ Given the government's skittishness about compromising intelligence sources and methods, some have limited their call for disclosure for legal reasoning only,⁸⁸ while others also want an assessment of the facts on the ground. Whether the administration will release the memo remains to be seen, but we do appear to know more than we did before

decision- he merely retains veto power); Jonathan Turley, *Death Panel: Obama Delegates Hit List to Panel of Unnamed Officials*, JUNATHANTURLEY.ORG (Oct. 20, 2011 4:16 PM), <http://jonathanturley.org/2011/10/06/death-panel-obama-delegates-hit-list-to-panel-of-unnamed-officials/>.

⁸³ Op-Ed., *Explaining the Awlaki Strike*, WASH. POST, Oct. 6, 2011, http://www.washingtonpost.com/opinions/administration-should-do-more-to-defend-the-awlaki-strike/2011/10/04/gIQASHEbOL_story.html (calling for a release of the memo); Op-Ed., *Define the Rules of Engagement*, SAN FRANCISCO CHRON., Oct. 5, 2011, at A13 (calling for a public justification), Op-Ed., Karinne Combes, *The Killing of Anwar al Awlaki*, TORONTO STAR, Oct. 5, 2011, at A19 (calling for a public debate); Steve Huntley, *Obama Right to Target al-Awlaki*, CHICAGO SUN TIMES, Oct. 4, 2011, <http://www.suntimes.com/news/huntley/8010361-452/obama-right-to-target-al-awlaki.html> (supporting the targeting but also the release of the memo so long as it does not compromise intelligence gathering or military operations); Peter Finn, *Legal Experts Ask for Release of Awlaki Memo*, WASH. POST, Oct. 8, 2011, http://www.washingtonpost.com/world/national-security/political-legal-experts-want-release-of-justice-dept-memo-supporting-killing-of-anwar-al-awlaki/2011/10/07/gIQABCv9TL_story.html (noting that several democrats and former George W. Bush administration officials have now called for a release of the memo).

⁸⁴ Jack Goldsmith, *Release the al-Aulaqi OLC Opinion, Or Its Reasoning*, LAWFARE, <http://www.lawfareblog.com/2011/10/release-the-al-aulaqui-olc-opinion-or-its-reasoning/> (Oct. 3, 2011 7:45 a.m.) (calling for the release of the OLC memo since a judicial review of the action is not going to happen and suggesting that release of the memo would allow a fuller vetting of the constitutional arguments made and it may "describe the limits of presidential power in this context").

⁸⁵ Joby Warrick, *Cheney Says Obama Owes an Apology after Awlaki Killing*, WASH. POST, Oct. 3, 2011, http://www.washingtonpost.com/world/national-security/cheney-after-yemen-strike-obama-owes-apology-to-bush/2011/10/02/gIQADug9FL_story.html.

⁸⁶ Op-Ed., John B. Bellinger, *Obama's Drone Danger*, WASH. POST, Oct. 3, 2011, http://www.washingtonpost.com/opinions/will-drone-strikes-become-obamas-guantanamo/2011/09/30/gIQAOReIGL_story.html; Op-Ed., Linda Ocasio, *The Use of Drones to Kill Terrorists Comes under Fire*, THE STAR LEDGER PERSPECTIVE, Oct. 2, 2011, http://blog.nj.com/njv_editorial_page/2011/10/qa_the_use_of_drones_to_kill_t.html.

⁸⁷ Linda Ocasio, *The Use of Drones to Kill Terrorists Comes under Fire*, *supra* note 86.

⁸⁸ Jack Goldsmith, *More on al-Aulaqi and Transparency*, LAWFARE, <http://www.lawfareblog.com/2011/10/more-on-al-aulaqui-and-transparency/> (Oct. 5, 2011, 2:17 PM) (distinguishing transparency as to legal justifications and transparency as to methods of intelligence gathering).

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the lawsuit about the rules that govern the determination of listings and of the listings of Americans in particular.⁸⁹ Both the government's decision in how much information to reveal and the manner in which the revelations have occurred are likely deeply unsatisfying to the ACLU and CCR, but perhaps better than nothing.

C. Revitalizing Congressional Checks

Another way in which *al-Aulaqi* may move the decision-making away from an unfettered executive is by revitalizing the discussion about amending the AUMF to cover nations like Yemen or groups like AQAP, as well as organizations that share some goals with al-Qaeda. Of course, such a debate does not guarantee that Congress will limit the executive. In fact, Congress may decide to expand the scope of the AUMF and with it provide a greater reach to the executive.⁹⁰ While this may not have been the ACLU and CCR's first order preference, as a second order matter, such amendments have the non-trivial benefit of enhanced democratic legitimacy and greater clarity about the scope of the war on terror.

D. Encouraging Policy Debate over Targeting

Filing *al-Aulaqi v. Obama* also provided the ACLU and CCR with a platform to address policy issues of whether targeting is necessary, sufficient, or preferable to other strategies to ensure national security. Media coverage and, to some extent, the government has presented the decision as a binary one: either allow the executive unreviewable authority to target al-Aulaqi or do nothing. Yet, the lawsuit allowed the ACLU and CCR to present another option to the court, to the executive, and to the public. This third (and clearly lawful) approach is to use law enforcement to attempt an arrest.⁹¹ Yemen had already arrested al-Aulaqi once in 2006.⁹² Though al-Aulaqi's re-arrest would have presented many logistical burdens, U.S. diplomatic pressure could have been quite effective in persuading Yemen to arrest al-Aulaqi if the opportunity had presented itself. For instance, although Yemen refused for a long time to extradite al-Aulaqi, as of October 2009, they agreed to charge him and subsequently sentenced him in

⁸⁹ Most interestingly, the memo is said to require the capture of an American citizen if feasible. Peter Finn, *In Secret Memo, Justice Department Sanctioned Strike*, *supra* note 77.

⁹⁰ For instance, the U.S. has been increasingly concerned about the Haqqanis in Pakistan and Afghanistan. Rob Crilly, *Warlord Snared*, *SUNDAY TELEGRAPH*, Oct. 2, 2011 at 27. One could imagine Congress expanding the AUMF to include them.

⁹¹ Complaint, *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (D.D.C 2010) (No. 10-01469).

⁹² Scott Stewart, *Why Anwar al-Awlaki Is NOT Bin Laden's Successor*, *BUS. INSIDER* (May 12, 2011, 1:08 PM), http://www.businessinsider.com/why-anwar-al-awlaki-is-not-bin-ladens-suc-e-sor-2011-5?utm_source=feedburner&utm_medium=feed&utm_campaign=feed%3A+businessinsider+%28Business+Insider%29 (stating al-Aulaqi was only released at the behest of the United States which did not believe at the time it had "sufficient evidence" to pursue legal action. One might find it worrisome that the executive branch refuses to allow the judiciary or the public review the evidence leading it to conclude al-Aulaqi is a legitimate target, but it was not convinced that it had sufficient evidence to prosecute him. In fairness, however, the arrest took place several years before his alleged placement on the targeting lists).

absentia.⁹³ At the time of his death, the Yemeni police were authorized to arrest him by any means necessary.⁹⁴ They were also well equipped to handle the post-arrest phase as they are successfully prosecuting other American al-Qaeda suspects like Al-Hajj.⁹⁵ Presumably, the intelligence required to locate al-Aulaqi for targeting ought to be sufficient to locate him for an arrest as well. Of course, an arrest presents different and much more significant risks than drone targeting because it requires people to put themselves in harm's way. Despite this risk, the successful use of "boots on the ground" in getting to Osama bin Laden shows the United States is capable of executing such a plan even with well-protected, high-value targets.

Moreover, law enforcement strategies to incapacitate specific suspected terrorists include more than arrests and prosecutions. The United States has long been using other law enforcement mechanisms to dry up funding, seize assets, and generally make it more difficult for terrorists to operate.⁹⁶ The national security frame often overlooks or obscures these tools, while the ACLU and CCR's reframing can help bring them to the forefront.

Finally, implicit in this discussion of lawful and unlawful approaches to dealing with al-Aulaqi is a prior policy question about whether emphasizing leadership decapitation is the right strategy in the war on terror.⁹⁷ Will targeting succeed? In this context, success means more than the first order question of whether the United States can find and eliminate the targets it seeks which it is in fact rather good at.⁹⁸ But rather, if the executive branch does eliminate these targets, will terrorism directed at the United States and its allies subside?⁹⁹ While the empirical literature here is still in its nascent stages, work from politi-

⁹³ Robert F. Worth, *Yemen: U.S. - Born Cleric is Sentenced*, N.Y. TIMES, Jan. 19, 2011, at A7 (article available on LexisNexis).

⁹⁴ *American Born al-Qaeda Cleric Al-Awlaki Killed*, AL-ARABIYA NEWS, Sept. 29, 2011, <http://english.alarabiya.net/>.

⁹⁵ Robert Chesney, *GTMO Habeas Ruling Excluding Detainee Statements Based on Prior Abuse*, LAWFARE, <http://www.lawfareblog.com/2011/06/gtmo-habeas-ruling-excluding-detainee-statements-based-on-prior-abuse/> (June 8, 2011 4:13 PM) (describing the ongoing prosecution).

⁹⁶ James J. Savage, *Executive Use of the International Emergency Economic Powers Act: Evolution through the Terrorist and Taliban Sanctions*, 10 CURRENTS INT'L L.J. 28, 37-41 (2001).

⁹⁷ See, e.g., Jenna Jordan, *When Heads Roll: Assessing the Effectiveness of Leadership Decapitation*, 18 SECURITY STUDIES 719, 721 (2009) (stating "Israel has consistently targeted the leaders of Hamas.") Other countries, such as Peru and Spain, have shown diverging responses and instead focused on arrest for high-level operatives.

⁹⁸ The United States intelligence capabilities seem quite good given its strong of high level targeted killings. William McLean, *After Awlaki's Death, al-Qaeda Woes Deepen with Loss of Its Top Propagandist*, ALARABIYA NEWS, Sept. 30, 2011, <http://www.alarabiya.net/articles/2011/10/01/169586.html>. The U.S. Undersecretary of Defense for Intelligence suggests that eight of al-Qaeda's top 20 leaders have been killed this year. CNN Wire Staff, *U.S. Officials Warn of Possible Retaliation after al Qaeda Cleric Is Killed*, CNN U.S., Sept. 30, 2011, http://articles.cnn.com/2011-09-30/middleeast/world_africa_yemen-radical-cleric_1_al-qaeda-cleric-samir-khan-awlaki?_s=PM:MIDDLEEAST.

⁹⁹ No doubt, the United States has eliminated some high value targets. Moreover the policy of targeting can itself make it more difficult for terrorists to operate as they must hide and reduce or eliminate communications and planning roles. See, e.g., Daniel L. Byman, *The Targeted Killings Debate*, COUNCIL ON FOREIGN REL. (June 8, 2011), www.cfr.org/international-peace-and-security/targeted-killings-debate/p25230.

cal scientist Jenna Jordan suggests that successfully targeting high-level operatives rarely causes organizational collapse.¹⁰⁰ In fact, she suggests terrorist organizations effectively replace even very high-level members.¹⁰¹ Her work also suggests that religiously-motivated organizations engaged in terrorist activities are more likely to fade away when states choose not to pursue a decapitation strategy.¹⁰² International security scholar Robert Pape has similarly suggested that killing key members of religiously motivated groups can be particularly counter-productive because it may cause splintering with increasingly smaller numbers of groups that attempt more and more attacks.¹⁰³ Likewise, many question the benefits of killing al-Aulaqi as he may not have been a key player in al-Qaeda's hierarchy¹⁰⁴ or similarly they question the focus on killing Bin Laden given the decentralized nature of al-Qaeda and its affiliates.¹⁰⁵ That said, others suggest that some individuals play such an important recruiting and organizational role that they cannot be replaced.¹⁰⁶ Regardless of where one falls on this issue, the executive implemented this strategy without a thorough public debate. By emphasizing the legal standards for targeting, the ACLU and CCR helped invigorate a discussion of available options and strategies for combating high-level terrorists.

V. Conclusion

Although the resolution of both the legal and the policy debate, has ultimately been left to the executive, the ACLU and CCR helped make these questions part of the larger landscape of public discourse by filing *al-Aulaqi*. While raising constitutional and statutory questions brings the discussion within a legal framework, the related media and academic commentary encourages a more thorough public vetting of the policy issues implicated by targeting. One of the most important lessons of *al-Aulaqi* may be that while the judiciary remains cautious about treading on executive prerogatives, even seemingly hopeless litigation can generate the conditions for some public check on the executive during the long war on terror.

¹⁰⁰ Jordan, *supra* note 97 at 720, 745.

¹⁰¹ *Id.* at 736.

¹⁰² *Id.* at 739.

¹⁰³ See ROBERT PAPE AND JAMES FELDMAN, CUTTING THE FUSE: THE EXPLOSION OF GLOBAL SUICIDE TERRORISM AND HOW TO STOP IT, 43 (2010); see also, Kate Clark, *The Targeted Killings Debate*, COUNCIL ON FOREIGN REL. (June 8, 2011), www.cfr.org/international-peace-and-security/targeted-killings-debate/p25230.

¹⁰⁴ Erik Stier, *Is Anwar al-Awlaki's Importance to Al-Qaeda Overstated?*, CHRISTIAN SCI. MONITOR, May 10, 2011, <http://www.csmonitor.com/World/Middle-East/2011/0510/Is-Anwar-al-Awlaki-s-importance-to-Al-Qaeda-overstated> (citing Gregory Johnsen, a Yemen specialist at Princeton University, suggesting that he "would argue that if the U.S. were to kill him AQAP would continue without missing a beat").

¹⁰⁵ Scott Shane & Robert F. Worth, *Even Before Al-Qaeda Lost Its Founder, It May Have Lost Some of Its Allure*, N.Y. TIMES, May 2, 2011, <http://www.nytimes.com/2011/05/03/world/03qaeda.html>.

¹⁰⁶ Op-Ed., Ali H. Soufan, *The End of the Jihadist Dream*, N.Y. TIMES, May 2, 2011, <http://www.nytimes.com/2011/05/03/opinion/03Soufan.html>.