AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Judicial Power and Constitutional Authority

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

*Anwar al-Aulaqi was born in 1971 to Yemeni parents in New Mexico, where his father was a graduate student. His father later served as the Minister of Agriculture in Yemen. Anwar al-Aulaqi returned to the United States to attend college and became a somewhat prominent religious and political figure in the United States. He eventually returned to Yemen, and the United States government concluded that he was intimately involved in recruitment and planning for the al-Qaeda terrorist group. The Obama administration determined that al-Aulaqi was an “imminent threat” to American national security, and the Central Intelligence Agency placed him on a list of targets for military action. In September 2011, al-Aulaqi was killed in Yemen by an American drone strike.*

*In the months prior to his death, his father had unsuccessfully sought to have the federal courts block the targeted killing of al-Aulaqi. Based on news reports, his father alleged that the younger al-Aulaqi was on a CIA “kill list,” and he filed suit in federal district court seeking an injunction against the president and other executive branch officials from carrying out a targeted killing against a U.S. citizen except in circumstances in which that citizen presents a “concrete, specific, and imminent threat to life or physical safety, and there are not means other than lethal force that could reasonably be employed to neutralize the threat.” The district court dismissed the suit, concluding that the father did not have proper legal standing to bring a suit on his son’s behalf and that military targeting decisions presented a non-justiciable political question.*

BATES, JUDGE.

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Although these threshold questions of jurisdiction may seem less significant than the questions posed by the merits of plaintiff's claims, "[m]uch more than legal niceties are at stake here" — the "constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. Here, the jurisdictional hurdles that plaintiff must surmount are both complex and at the heart of the intriguing nature of this case. But "[a] court without jurisdiction is a court without power, no matter how appealing the case for exceptions may be," and hence it is these threshold obstacles to reaching the merits of plaintiff's constitutional and statutory challenges that must be the initial focus of this Court's attention. Because these questions of justiciability require dismissal of this case at the outset, the serious issues regarding the merits of the alleged authorization of the targeted killing of a U.S. citizen overseas must await another day or another (non-judicial) forum.

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Before this Court may entertain the merits of his claims, plaintiff, as the party invoking federal jurisdiction, must establish that he has the requisite standing to sue. Article III of the U.S. Constitution "limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies,'" and the doctrine of standing serves to identify those "'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III" and which are thus "'appropriately resolved through the judicial process.'" *Lujan v. Defenders of Wildlife* (1992). . . .

Standing doctrine encompasses "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." To establish the "irreducible constitutional minimum of standing," a plaintiff must allege (1) an "injury in fact" which is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) "a causal connection between the injury and the conduct complained of"; and (3) a likelihood "that the injury will be redressed by a favorable decision." . . .

Closely related to the constitutional requirement that a plaintiff must suffer a "personal" injury to establish standing is the prudential requirement that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin* (1975). This "self-imposed" judicial limitation on the exercise of federal jurisdiction serves dual purposes, as it helps to prevent "the adjudication of rights which those not before the Court may not wish to assert" and also seeks to ensure "that the most effective advocate of the rights at issue is present to champion them." Nevertheless, since the prohibition against one party asserting the legal rights of another is prudential — not constitutional — the Supreme Court may "recognize[] exceptions to this general rule," and it has done so in “narrowly limited” circumstances. . . . *Duke Power Co. v. Carolina Environmental Study Group, Inc.* (1978).

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Plaintiff has failed to provide an adequate explanation for his son's inability to appear on his own behalf, which is fatal to plaintiff's attempt to establish "next friend" standing. In his complaint, plaintiff maintains that his son cannot bring suit on his own behalf because he is "in hiding under threat of death" and any attempt to access counsel or the courts would "expos[e] him[] to possible attack by Defendants." But while Anwar Al-Aulaqi may have chosen to "hide" from U.S. law enforcement authorities, there is nothing preventing him from peacefully presenting himself at the U.S. Embassy in Yemen and expressing a desire to vindicate his constitutional rights in U.S. courts. Defendants have made clear — and indeed, both international and domestic law would require — that if Anwar Al-Aulaqi were to present himself in that manner, the United States would be "prohibit[ed] [from] using lethal force or other violence against him in such circumstances." . . .

. . . . All U.S. citizens may avail themselves of the U.S. judicial system if they present themselves peacefully, and no U.S. citizen may simultaneously avail himself of the U.S. judicial system and evade U.S. law enforcement authorities. Anwar Al-Aulaqi is thus faced with the same choice presented to all U.S. citizens.

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Like standing, the political question doctrine is an aspect of "the concept of justiciability, which expresses the jurisdictional limitations imposed on the federal courts by the 'case or controversy' requirement of Article III of the Constitution." The political question doctrine "is 'essentially a function of the separation of powers,'" and "'excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.'" The precise "'contours'" of the political question doctrine remain "'murky and unsettled.'" Still, the Supreme Court has articulated six factors which are said to be "[p]rominent on the surface" of cases involving non-justiciable political questions:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Baker v. Carr* (1962)

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An examination of the specific areas in which courts have invoked the political question doctrine reveals that national security, military matters and foreign relations are "'quintessential sources of political questions.'" *El Shifa Pharmaceutical Industries Co. v. United States*, 559 F.3d 578 (D.C. Cir., 2010). . . . Unlike the political branches, the Judiciary has "no covert agents, no intelligence sources, and no policy advisors." Courts are thus institutionally ill-equipped "to assess the nature of battlefield decisions," or to "define the standard for the government's use of covert operations in conjunction with political turmoil in another country." These types of decisions involve "delicate, complex" policy judgments with "large elements of prophecy," and "are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility." . . .

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Judicial resolution of the "particular questions" posed by plaintiff in this case would require this Court to decide: (1) the precise nature and extent of Anwar Al-Aulaqi's affiliation with AQAP; (2) whether AQAP and al Qaeda are so closely linked that the defendants' targeted killing of Anwar Al-Aulaqi in Yemen would come within the United States's current armed conflict with al Qaeda; (3) whether (assuming plaintiff's proffered legal standard applies) Anwar Al-Aulaqi's alleged terrorist activity renders him a "concrete, specific, and imminent threat to life or physical safety"; and (4) whether there are "means short of lethal force" that the United States could "reasonably" employ to address any threat that Anwar Al-Aulaqi poses to U.S. national security interests, see id. Such determinations, in turn, would require this Court, in defendants' view, to understand and assess "the capabilities of the [alleged] terrorist operative to carry out a threatened attack, what response would be sufficient to address that threat, possible diplomatic considerations that may bear on such responses, the vulnerability of potential targets that the [alleged] terrorist[] may strike, the availability of military and non-military options, and the risks to military and nonmilitary personnel in attempting application of non-lethal force." Viewed through these prisms, it becomes clear that plaintiff's claims pose precisely the types of complex policy questions that the D.C. Circuit has historically held non-justiciable under the political question doctrine.

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. . . . The first, fourth, and sixth *Baker* factors thus all militate against judicial review of plaintiffs' claims, since there is a "textually demonstrable constitutional commitment" of the United States's decision to employ military force to coordinate political departments (Congress and the Executive), and any after-the-fact judicial review of the Executive's decision to employ military force abroad would reveal a "lack of respect due coordinate branches of government" and create "the potentiality of embarrassment of multifarious pronouncements by various departments on one question."

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. . . . Courts have been willing to entertain habeas petitions from U.S. citizens detained by the United States as enemy combatants, see, e.g., *Hamdi v. Rumsfeld* (2004), and they have also heard claims from U.S. citizens alleging unconstitutional takings of their property by the U.S. military abroad, see, e.g., *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir., 1984). But habeas petitions and takings claims are both much more amenable to judicial resolution than the claims raised by plaintiff in this case.

. . . . While the Suspension Clause reflects a "textually demonstrable commitment" of habeas corpus claims to the Judiciary, there is no "constitutional commitment to the courts for review of a military decision to launch a missile at a foreign target." . . . Moreover, the resolution of habeas petitions does not require expertise beyond the purview of the Judiciary. . . . But courts are certainly not accustomed to assessing claims like those raised by plaintiff here, which seek to prevent future U.S. military action in the name of national security against specifically contemplated targets by the imposition of judicially-prescribed legal standards enforced through "after-the-fact contempt motion[s]" or "after-the-fact damages action[s]." Hence, the *Baker* factors dictate a different outcome for plaintiff's claims than for habeas petitions filed by detainees at Guantanamo Bay.

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To be sure, this Court recognizes the somewhat unsettling nature of its conclusion — that there are circumstances in which the Executive's unilateral decision to kill a U.S. citizen overseas is "constitutionally committed to the political branches" and judicially unreviewable. But this case squarely presents such a circumstance. The political question doctrine requires courts to engage in a fact-specific analysis of the "particular question" posed by a specific case, and the doctrine does not contain any "carve-out" for cases involving the constitutional rights of U.S. citizens. . . .

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. . . . This Court readily acknowledges that it is a "drastic measure" for the United States to employ lethal force against one of its own citizens abroad, even if that citizen is currently playing an operational role in a "terrorist group that has claimed responsibility for numerous attacks against Saudi, Korean, Yemeni, and U.S. targets since January 2009." But as the D.C. Circuit explained in Schneider, a determination as to whether "drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking." *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir., 2005) . . .

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For the foregoing reasons, the Court will grant defendants' motion to dismiss. . . .