AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

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

**Al-Aulaqi v. Panetta, \_ F.Supp. 2d \_** (DDC, 2014)

*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 family had unsuccessfully sought to have the federal courts block the targeted killing of al-Aulaqi. After his death, his father filed suit in federal district court on behalf of his estate. Following* Bivens v. Six Unknown Named Agents *(1971), the elder al-Aulaqi asked the court to recognize an implied cause of action against Leon Panetta (then-director of the CIA) and other government officials for monetary damages for violating the younger al-Aulaqi’s constitutional rights as an American citizen. The district court ruled that the suit was not barred by the political question doctrine but that* Bivens *could not properly be extended to this context without encroaching on the separation of powers.*

COLLYER, JUDGE.

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This case presents fundamental questions regarding the nature of a citizen’s right to due process under the Fifth Amendment. It is poised at the intersection of the federal government’s separation of powers into three co-equal branches.

Defendants move to dismiss for lack of jurisdiction pursuant to the political question doctrine, urging the Court to find that there is no judicial role here. “The political question doctrine 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.” *Japan Whaling Association v. American Cetacean Society* (1986). The doctrine is “primarily a function of the separation of powers.” *Baker v. Carr* (1962).

However, “[i]t is emphatically the province and duty of the judicial department to say what the law is,” *Marbury v. Madison* (1803), and the political question doctrine’s “shifting contours and uncertain underpinnings” make it “susceptible to indiscriminate and overbroad application to claims properly before the federal courts.” . . .

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. . . . The powers granted to the Executive and Congress to wage war and provide for national security does not give them carte blanche to deprive a U.S. citizen of his life without due process and without any judicial review. The interest in avoiding the erroneous deprivation of one’s life is uniquely compelling. . . . The Bill of Rights was passed to protect individual rights from an over-reaching government, and this Court cannot refuse to provide an independent legal analysis.

This conclusion is not changed because Defendants argue that *El-Shifa Pharmaceutical Industries v. United States* (D.C. Cir., 2010) make this case non-justiciable. . . . Foreign aliens suing for deprivation of a foreign property interest are not comparable to U.S. citizens suing for deprivation of their lives. Because Plaintiffs here pointedly allege that Defendants, U.S. officials, intentionally targeted and killed U.S. citizens abroad without due process, the Court finds that this case is justiciable and that it has subject matter jurisdiction.

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The due process clause of the Fifth Amendment was intended to secure the individual from arbitrary exercises of government power. It encompasses both substantive and procedural elements. To state a procedural due process claim, a plaintiff must establish that he had a protected interest in life, liberty, or property, and that government officials knowingly, and not merely negligently, deprived him of that interest, without notice and an opportunity to be heard “at a meaningful time and in a meaningful manner, “ see *Mathews v. Eldridge* (1976).

To state a substantive due process claim, a plaintiff must assert that a government official was so “deliberately indifferent” to his constitutional rights that the official’s conduct “shocks the conscience.” . . . No court has ever examined the precise nature of the substantive due process rights of an enemy, who also is a U.S. citizen, killed by a drone. . . .

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. . . . [Plaintiffs] allege a procedural claim by asserting that Answar Al-Aulaqi was executed without charge, indictment, or prosecution. They also allege a substantive due proess claim by asserting that Defendants killed Anwar Al-Aulaqi with deliberate indifference to his constitutional right to life, both outside of armed conflict and at a time when he did not present a concrete, specific, and imminent threat to the United States. The Court does not opine that Anwar Al-Aulaqi was entitled to notice and a predeprivation hearing, or that his Estate was to a postdeprivation hearing, or that the drone killing of Anwar Al-Aulaqi “shocks the conscience.” The Court merely holds that the Complaint states a “plausible” procedural and substantive due process claim on behalf of Anwar Al-Aulaqi.

The Court concludes that the political question doctrine does not bar its review of Plaintiffs' Complaint and that Plaintiffs have stated a claim that Defendants violated Anwar Al-Aulaqi's due process rights. Nonetheless, the Court finds no available remedy under U.S. law for this claim.

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The D.C. Circuit held in *Doe v. Rumsfeld* (D.C. Cir., 2012) that special factors counseled hesitation and forestalled a *Bivens* lawsuit brought by a civilian government contractor who was subjected to military detention in Iraq. . . .

The D.C. Circuit concluded that Mr. Doe's claims could not be remedied under *Bivens* because the Supreme Court "has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence." "[T]he insistence (evident from the number of Clauses devoted to the subject) with which the Constitution confers authority over the Army, Navy, and militia upon political branches . . . counsels hesitation in our creation of damages remedies in this field." . . .

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The reasons for this constitutional structure are apparent. Questions of national security, particularly in times of conflict, do not admit of easy answers, especially not as products of the necessarily limited analysis undertaken in a single case. It is therefore unsurprising that "our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." . . .

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In this delicate area of warmaking, national security, and foreign relations, the judiciary has an exceedingly limited role. This Court is not equipped to question, and does not make a finding concerning, Defendants' actions in dealing with AQAP [al-Qa’ida in the Arabian Peninsula] generally or Anwar Al-Aulaqi in particular. Its role is much more modest: only to ensure that the circumstances of the exercise of war powers against a specifically-targeted U.S. citizen overseas do not call for the recognition of a new area of *Bivens* relief.

Here, Congress and the Executive acted in concert, pursuant to their Constitutional authorities to provide for national defense and to regulate the military. The need to hesitate before implying a *Bivens* claim is particularly clear. . . .

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Permitting Plaintiffs to pursue a *Bivens* remedy under the circumstances of this case would impermissibly draw the Court into "the heart of executive and military planning and deliberation," as the suit would require the Court to examine national security policy and the military chain of command as well as operational combat decisions regarding the designation of targets and how best to counter threats to the United States. . . . The Constitution commits decision-making in this area to the President, as Commander in Chief, and to Congress. . . . Further, allowing Plaintiffs to bring a *Bivens* action against Defendants would hinder their ability in the future to act decisively and without hesitation in defense of U.S. interests. . . .

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The Supreme Court has never suggested that citizenship matters to a claim under *Bivens*. It would be offensive to our allies, and it should be offensive to our own principles of equal treatment, to declare that this nation systematically favors U.S. citizens over Canadians, British, Iraqis, and our other allies when redressing injuries caused by our military and intelligence operations. . . .

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Under binding D.C. Circuit precedent, this Court finds that special factors preclude the implication of a *Bivens* remedy here. Because it reaches this conclusion, the Court does not address additional claims or defenses. . . . Accordingly, the Court will grant Defendants’ motion to dismiss.

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