

AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 11: The Contemporary Era—Separation of Powers

Congressional Hearings on Drone Strikes (2013)¹

As the wars in Afghanistan and Iraq progressed, the American military made increasing use of unmanned drones armed with air-to-surface missiles to strike selected targets, particularly in countries away from the battlefield such as Pakistan and Yemen. The use of drones involved the targeted killing of individuals who were not actively engaged in fighting on a battlefield. The attacks often resulted in civilian casualties, and the targets included American citizens who had not been charged or tried for any crimes.

Drone strikes were often the subject of controversy abroad, but had attracted less attention within the United States. In the spring of 2013, the White House publicly admitted that four American citizens had been killed by drone strikes during the Obama presidency, with Anwar al-Awlaki (accused of encouraging and training terrorists) specifically targeted in Yemen. Before that admission, the House Judiciary Committee held hearings on the targeting of American citizens in drone strikes, and in preparation for those hearings the Department of Justice released a white paper summarizing the administration's legal authority to making such strikes. The administration did not provide a witness for the House hearings, however.

Do drone strikes present any different constitutional issues than battlefield assaults on troops that included American citizens? Would there have been constitutional obstacles to President Lincoln authorizing an assault on General Robert E. Lee in the months before Lee's surrender at Appomattox? Is there any difference between a drone strike against a suspected American terrorist in Yemen and one in North Carolina? Could Congress require that the executive receive a "death warrant" in a judicial hearing before authorizing a strike? Could President Clinton have authorized the same attacks in 1998 before the destruction of the World Trade Center and the passage of the Authorization for the Use of Military Force?

JOHN B. BELLINGER III, Council on Foreign Relations

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.... I agree that an American citizen who is a senior al Qaeda leader outside the United States does enjoy a constitutional right to due process before being targeted. But I also agree that it would be sufficient due process for a senior, informed government official to conclude that the individual posed an imminent threat of violence against the United States before targeting the individual with lethal force. Under Supreme Court precedents, it is appropriate for the Executive branch to balance the private interest of the targeted individual against the interest the government is trying to protect, and the burdens the government would face in providing additional process.

... I do not believe that prior judicial review is currently required, nor should it be required, before the U.S. Government uses lethal force against an American citizen outside the United States. This does not mean that Congress, as the elected representatives of the American people, may want to specify the conditions and certain processes for targeting an American. In general, however, I believe these processes should reside inside the Executive branch, with appropriate notice to Congress.

¹Excerpt taken from *Drones and the War on Terror: When Can the U.S. Target Alleged American Terrorists Overseas? : Hearing before the Committee on the Judiciary, U.S. House of Representatives, 113th Cong., 1st Sess. (2013).*

ROBERT CHESNEY, University of Texas Law School

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... No significant aspect of the administration's position on this subject ought to give rise to concern that is claiming undue power.

....
The nature of this conflict, it bears emphasis, involves actual war. . . . Since many U.S. actions using lethal force would constitute murder or other crimes during peacetime, this is actually a pivotal point.

Another important aspect of the government's view of the conflict is that the war is not limited to Al Qaeda itself. . . . [T]here is no dispute among the branches of government that the United States is in a state of armed conflict with Al Qaeda and its co-belligerents, wherever they may be.

[I]n this armed conflict—as, indeed, in any armed conflict—the United States is lawfully entitled to target the enemy with lethal force. The existence of an ongoing armed conflict means that, legally speaking, the administration can strike, assuming the target is a lawful one, whenever it wants. . . . [I]t does not have to do a separate legal analysis of whether force can be used against each individual member of enemy forces or whether each individual member poses an imminent threat; a single conflict is, after all, already under way. Nor is there some general legal obligation to seek to capture a lawful target before attacking using lethal force. . . .

....
[T]here exists no general immunity from targeting for U.S. citizens who sign up to wage war against their own country. Americans have fought in foreign armies against their country in numerous armed conflicts in the past, and their citizenship has never relieved them of the risks of that belligerency—nor does it convey any need for judicial review of targeting decisions. . . . The principle is no different if a rebel leads Al Qaeda operations against the United States in Yemen than if he leads an army against U.S. forces in Virginia.

[W]hatever the Constitution's guarantee of Due Process may require before targeting a U.S. citizen aligned with the enemy overseas . . . these requirements are more than satisfied by a high-level, rigorous internal judgment that this person is a senior operational leader of Al Qaeda or its affiliates who poses an imminent threat, whose capture is not feasible, and whose targeting would be consistent with the laws of war.

To understand why this position must be correct, consider an example from an entirely different context: a domestic hostage situation. In such situations, even law enforcement will use targeted killings, and it will do so without judicial preapproval when the threat to the lives is adequately serious and when there are no available alternatives. . . .

....
The term "imminent threat," as the administration uses it, is something of a term of art. . . . [T]his definition of imminence incorporates a more flexible notion of an open window in time to address a threat which, left unaddressed, has independent momentum toward an unacceptable outcome. . . .

....
.... A government that asserts the power to kill its citizens is a frightening thing. More frightening still, however, is the government that forswears the power to target citizens in that menacing set [of extreme cases] and thus leaves such citizens unchecked.

....
REPRESENTATIVE BOB GOODLATTE (Republican, Virginia)

.... Congress has already required that the military get court approval before targeting an American citizen for surveillance. . . . Which has less consequences than killing them, even in a foreign country. So why shouldn't the requirement extend to targeted killing?

JOHN B. BELLINGER III, Council on Foreign Relations

. . . . The reason is about 30 years ago or so, Congress got concerned about electronic surveillance of Americans and said we want to set very specific parameters before the executive branch does that. Congress could do that in this case. . . .

Now, to a certain extent, I do believe . . . that this may be a solution in search of a problem. The United States is not out regularly killing Americans. . . .

. . . . [E]ven if only one American has been killed, if Congress, on behalf of the American people, is concerned about the Government targeting people, I think Congress could reasonably pass a statute that says not to require judicial review—because I really think that is too difficult, particularly in a war, in an armed conflict—but to specify the circumstances that the executive branch has to satisfy before they target an American and then to require some notice in reporting back to Congress. That is the check and balance.

. . . .

STEPHEN I. VLADECK, American University Law School

. . . . I think it is important to keep in mind that this conversation is not actually about drones as such. That it is about uses of any number of sources of military hardware to conduct targeted killings. . . . although I think the technological utility of drones makes it easier and cheaper for the Government to conduct these operations. . . .

REPRESENTATIVE ROBERT C. SCOTT (Democrat, Virginia)

[I]s there any rationale for killing them overseas? What if they are found in the United States, what happens?

STEPHEN I. VLADECK, American University Law School

[O]ne of the critical considerations is the feasibility, or lack thereof, of capture. I have to think that the Federal Government will never take the position that it is infeasible to capture an individual who is within the territorial United States.

But I still think they could probably . . . claim the authority in exceptional circumstances to use lethal force against a U.S. citizen in the U.S. Law enforcement officers do it all the time. . . .

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