

# TARGETED DRONE KILLINGS: LEGAL JUSTIFICATIONS UNDER THE BUSH AND OBAMA ADMINISTRATIONS

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Our topic is the use of drones for the targeted killing of suspected terrorists. Let us assume for the moment that by “suspected terrorists,” we mean “suspected al Qaeda terrorists,” and let us slightly reframe the question as: “when is it appropriate to use drones for targeted killing of al Qaeda terrorists?” That raises a set of very difficult policy questions—which I won’t address—such as “when do the political, diplomatic, or intelligence costs of killing instead of capturing the enemy outweigh the benefits?” These policy questions are not really my area of expertise.

I am going to focus instead on the legal questions regarding drone use. I think the ultimate question about the lawfulness of drone use for targeted killing is actually very easy, and it has nothing to do with either drones or targeted killing as such. Instead, it has everything to do with the question of whether the United States is engaged in an armed conflict with al Qaeda. In an armed conflict, one combatant can, of course, use lethal force against the enemy. Drones are simply one means of delivering lethal force. When the United States was engaged in an armed conflict with Germany in World War II, we could send planes to bomb German forces. That is not a controversial proposition—it is what countries do in war. Exactly the same legal justification would apply to al Qaeda operatives if, but only if, the United States is engaged in an armed conflict with al Qaeda. I take that to be the most fundamental question.

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One of the most important decisions of the Bush Administration was to treat the September 11th attacks as acts of war calling for a military response, not simply as crimes calling for a law-enforcement response.<sup>1</sup> President Bush did not simply dispatch the FBI to gather evidence of crimes for prosecution. He dispatched the United States military to go after those who had attacked us. That fundamental decision—to treat the al Qaeda attacks as acts of war—drives all of the questions addressed by this panel, as well as many other important questions. These include questions regarding military detention, prosecution by military commission, treatment of detainees, and the use of lethal military force through drones or otherwise.

That decision by the Bush Administration was perhaps controversial for a while. There were those who argued that armed conflict can occur only between sovereign nations, or at most between rival claimants of sovereignty in a civil war, but never between a sovereign nation and a non-state group like al Qaeda.<sup>2</sup> That view simply has not prevailed. The United States Congress passed the Authorization for Use of Military Force (AUMF),<sup>3</sup> which authorizes military force against the nations, organizations, or persons who either committed the September 11th attacks or harbored those who did. That self-evidently encompasses al Qaeda, the organization that committed the September 11th attacks.<sup>4</sup> In 2006, the Supreme Court in *Hamdan v. Rumsfeld*<sup>5</sup> likewise embraced a law-of-war framework to address questions regarding the prosecution and treatment of an al Qaeda operative. Finally, President Obama embraced the law-of-war paradigm wholesale when he became Commander in Chief—despite his campaign rhetoric against Bush Administration policies.<sup>6</sup> So now, some

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1. See Alberto R. Gonzales, *Waging War Within the Constitution*, 42 TEX. TECH L. REV. 843, 845 (2010).

2. See, e.g., Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 COLUM. J. TRANSNAT'L L. 435, 445 (2005).

3. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

4. Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 789 (2011).

5. 548 U.S. 557, 597 (2006).

6. Beau D. Barnes, *Reauthorizing the "War on Terror": The Legal and Policy Implications of the AUMF's Coming Obsolescence*, 211 MIL. L. REV. 57, 79 & n.89 (2012) (listing sources demonstrating the similarity between Obama and Bush's policies).

twelve years after September 11th, every branch of our government and Presidents of both parties have accepted that the United States is in an armed conflict with al Qaeda and therefore can use lethal military force against its operatives. That question seems to me clearly settled.

I said use of drones as such does not present any distinctive law-of-war questions. Drones are simply a means for delivering lethal force. That is what combatants do in war. The only difference between a drone and a conventional airplane is that, with a drone, bombing entails much less risk to one's own forces, as there is no pilot who can be shot down. There is certainly no law-of-war principle that requires use of a more risky method of attacking enemy forces instead of a less risky method.

Nor does targeted killing as such raise any distinctive law-of-war concerns. The alternative to targeted killing is indiscriminate killing, which is far more problematic. Targeted killing is not merely permitted but is affirmatively required—combatants must target enemy forces rather than neutrals or non-participating civilians.<sup>7</sup> Then, there is a further question of whom to target among the enemy forces, but there is no law-of-war rule prohibiting combatants from selecting particularly valuable or important enemy targets. If you have one bullet left in your rifle, you can fire at the opposing general rather than at a random private. Or, to take a more dramatic example, the operation to kill Osama bin Laden was obviously lawful, even though he was specifically targeted as the leader of al Qaeda, rather than as some random al Qaeda member.<sup>8</sup> Although the bin Laden operation was carried out through a ground assault, it would have been equally lawful if carried out through use of a piloted plane or a drone.

There are several interesting questions regarding the permissible use of lethal military force, including by drones, so let me lay out a few. I would like to give you a sense of how the Bush Administration addressed these questions, how the Obama Administration has addressed them, and how the respective positions compare and contrast.

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7. See Mark V. Vlasic, *Assassination & Targeted Killing—A Historical and Post-Bin Laden Legal Analysis*, 43 *GEO. J. INT'L L.* 259, 276 (2012).

8. *Id.* at 291.

One important question is *who can be targeted for the use of lethal force?* I started by defining the problem in terms of al Qaeda. Core al Qaeda fighters are the easy case—they are clearly lawful targets. There are harder questions at the margins. One involves supporters as opposed to combatants. Can an al Qaeda bombmaker be targeted? Probably so. Can someone who unwittingly writes a check to a group controlled by al Qaeda? Probably not. Another set of questions involves groups that may be affiliated with al Qaeda to one degree or another. What does or does not count as an associated force? Is al Qaeda in the Arabian Peninsula close enough? Probably so. Is Hezbollah close enough? Probably not. Obviously, the devil is in the details. As a general matter, though, the Bush Administration took the position that supporters of al Qaeda could be targeted, as could forces associated with al Qaeda.<sup>9</sup> The Obama Administration has agreed on both points.<sup>10</sup>

The other “who” question often discussed is *whether a government combatant can target its own citizens?* That is pretty easy. The Supreme Court, both in the World War II case of *Quirin*<sup>11</sup> and in the post-September 11th case of *Hamdi*,<sup>12</sup> said yes. And that makes good sense: If a citizen joins hostile forces, he does not somehow gain an immunity from being targeted along with his comrades. The Bush Administration successfully took that position, and the Obama Administration has continued it.<sup>13</sup>

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9. Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., to Sec’y of the Navy (July 7, 2004), available at <http://www.defense.gov/news/jul2004/d20040707review.pdf> [<http://perma.cc/LN4Q-CT2N>].

10. Respondent’s Memorandum Regarding The Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, *In re Guantanamo Bay Detainee Litig.*, (D.D.C. 2008) (Misc. No. 08-0442 (TFH)), available at <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf> [<http://perma.cc/ZMT2-AAL7>].

11. *Ex Parte Quirin*, 317 U.S. 1 (1942).

12. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (permitting the targeting of citizens, but requiring due process).

13. See Dana Priest, *U.S. military teams, intelligence deeply involved in aiding Yemen on strikes*, WASH. POST, Jan. 27, 2010, at A01 (explaining that after 9/11 “Bush gave the CIA, and later the military, authority to kill U.S. citizens abroad if strong evidence existed that an American was involved in organizing or carrying out terrorist actions against the United States or U.S. interests . . . .”); Michael Eshaghian, Note, *Are Drone Courts Necessary? An Analysis of Targeted Killings of U.S. Citizens Abroad Through a Procedural Due Process Lens*, 18 TEX. REV. L. & POL. 169, 175–76 (2013) (outlining the Obama Administration’s response to criticisms of its drone program).

The next set of significant questions are the “where” questions. *Where can the President deploy lethal force, whether through drones or otherwise?* The Bush Administration took the position that there are no geographic limits on the permissible use of force against al Qaeda.<sup>14</sup> Certainly, the AUMF contains no such limits. Nor does traditional wartime practice. To the contrary, one can follow the enemy forces wherever they may be found. That is why, in World War II, the United States dispatched General Patton to pursue German forces in North Africa without a separate declaration of war against any North African countries. This makes even more sense in dealing with terrorists groups like al Qaeda: such groups do not mass on a traditional battlefield. And in a very real sense, al Qaeda made Lower Manhattan, Northern Virginia, and Shanksville, Pennsylvania into battlefields on September 11th. Once again, the Obama Administration agreed with the Bush Administration that there are no geographic limitations in the fight against al Qaeda.<sup>15</sup>

Now, this raises a particularly difficult case: *can the President use drones or other forms of lethal military force inside the United States?* Many instinctively recoil against that thought. But I think the reason for that reaction is that there has been no significant armed conflict on American soil since the Civil War. Imagine if there were a significant armed conflict on American soil. Would it make sense to say that the one place where the President would be disabled from using lethal force is precisely where enemy fighters would be most dangerous—within the American heartland? That cannot be right.

The Obama Administration has walked a fine line on this issue. They have said that drones should not be used in the United States, which seems a perfectly sensible policy judgment under

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14. Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone*, 161 U. PA. L. REV. 1165, 1176 (2013) (noting that Bush “asserted the power to employ law-of-war tools anywhere and everywhere the terrorist enemy is found”).

15. *Id.*; see also John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Remarks at the Program on Law and Security at Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> [<http://perma.cc/J63W-Y4WL>].

current conditions.<sup>16</sup> But they have never quite brought themselves to say that use of drones in the United States would be unlawful. And preserving that option for the President, if it should someday be needed, seems to me prudent.

The next question is *under what legal conditions may drones be used?* In a 2011 White Paper prepared by the Justice Department,<sup>17</sup> the Obama Administration set out a three-part legal test that is designed to sound, and at first does sound, quite careful and measured. But the analysis describes what is said to be a set of *sufficient* conditions to justify use of a drone attack. It does not say that these conditions are *necessary*. Moreover, even if the conditions were necessary, they turn out not to be very constraining at all.

The first condition set out in the DOJ White Paper is that the targeted terrorist must be an imminent threat as determined by an informed United States official.<sup>18</sup> That sounds like a significant constraint until you read the fine print. In particular, the White Paper says that mere involvement with al Qaeda would support a determination of imminence.<sup>19</sup> As used in this analysis, the word “imminent” does not really mean imminent. Instead, it connotes a *status*-based test: members of al Qaeda are fair game for targeting. And that, of course, is simply the traditional rule under the laws of war.

There is also the point that there must be an informed determination that the target is in fact a member of al Qaeda.<sup>20</sup> Here is some implicit notion of adjudicatory procedure, but the White Paper does not suggest any particular kind of process that the executive branch must or should have to follow in or-

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16. President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) [hereinafter Remarks by the President], available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [<http://perma.cc/RN6G-GL34>].

17. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 1 (2011) [hereinafter DOJ White Paper], available at [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf) [<http://perma.cc/P4KH-26MV>].

18. *Id.*

19. *Id.* at 8.

20. *Id.* at 1.

der to make the necessary determination. DOJ simply says: If the determination is informed, that is good enough.<sup>21</sup>

The second condition is that capture has to be infeasible, which again sounds constraining at first.<sup>22</sup> But consider President Obama's counterterrorism speech of May 23, 2013.<sup>23</sup> There, he discussed the difficulties of attacking terrorists hiding in distant countries such as Yemen or Pakistan.<sup>24</sup> In that context, he said that operations involving boots on the ground are generally infeasible: they pose too great a risk to United States forces, carry higher risk of civilian casualties, and pose a greater risk of inflaming the local country where our troops would march.<sup>25</sup> So the Administration is effectively saying that the infeasibility condition will be satisfied at least whenever the issue is striking at terrorists in countries like Yemen and Pakistan, who are the focus of many of these operations.

The third condition is that strikes must be consistent with international law, which prohibits targeting civilians, disproportionate civilian casualties, and so on.<sup>26</sup> That is not a constraint distinctive to drones. Instead, it is simply a reaffirmation that the United States follows the laws of war in its targeting decisions. In so doing, it breaks no new ground.

The White Paper also addresses whether and to what extent federal constitutional protections like the Fifth Amendment apply.<sup>27</sup> The Bush Administration faced these questions in the context of military detention rather than the use of lethal force, but the legal analysis is similar in both contexts.<sup>28</sup> The Bush Administration took the position that the Fifth Amendment does not apply at all to aliens held outside the country, and that even where the Fifth Amendment does apply—as in the case of detention of citizens—considerably less process is due

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21. *Id.*

22. *Id.*

23. Remarks by the President, *supra* note 16.

24. *Id.*

25. *Id.*

26. DOJ White Paper, *supra* note 17, at 1.

27. *Id.* at 5–6.

28. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).

because of the unique demands of wartime exigency.<sup>29</sup> For all of this, the driving consideration was that war is different.

The Obama Administration has now analyzed the Fifth Amendment question in the specific context of drone attacks.<sup>30</sup> They assume that the Fifth Amendment applies, and they start the analysis with a soothing invocation of the three-factor balancing test of *Mathews v. Eldridge*,<sup>31</sup> which involved the question of what process is due before social security benefits can be taken away. It all sounds so conventional. But again, when you read the fine print, the reality is quite different. What they say is that the balancing test will always be satisfied whenever the conditions described above are satisfied.<sup>32</sup> So if those conditions do nothing except confirm that the United States follows the laws of war, the Fifth Amendment overlay adds no further constraints. The analysis is perhaps cosmetically different from what the Bush Administration would have done, but the bottom line is identical.

The final question is judicial review, which is not quite the same as the question whether the Constitution applies. Specifically, *can a party have the relevant legal standards determined and applied by a court, whether those standards arise under the Constitution itself or otherwise?*

During the Bush Administration, there were howls of protest when the government tried to cut off judicial review in military detention cases such as *Rasul*<sup>33</sup> and *Boumediene*,<sup>34</sup> which involved aliens held outside the United States at Guantanamo Bay, Cuba. The Obama Administration has faced the question of judicial review in the specific context of drones in *Al-Aulaqi v. Obama*.<sup>35</sup> Anwar Al-Aulaqi is to date the only United States citizen known to have been targeted and then killed in a successful drone attack.<sup>36</sup> He was an al Qaeda leader plotting attacks on the United

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29. See Brief for Respondent at 41, *Hamdi*, 542 U.S. 507 (No. 03-6696).

30. DOJ White Paper, *supra* note 17, at 2. See also Andrew P. Napolitano, *A Legal History of National Security Law and Individual Rights in the United States*, 8 N.Y.U. J.L. & LIBERTY 396, 450 (2014).

31. 424 U.S. 319 (1976).

32. DOJ White Paper, *supra* note 17, at 1.

33. *Rasul v. Bush*, 542 U.S. 446 (2004).

34. *Boumediene v. Bush*, 553 U.S. 723 (2008).

35. 727 F. Supp. 2d 1 (D.D.C. 2010).

36. Napolitano, *supra* note 30, at 452.

States.<sup>37</sup> Before he was attacked, the Obama Administration leaked the fact that he was on a kill list, and his father then promptly sued in District Court in Washington.<sup>38</sup> The senior Al-Aulaqi argued that his son could not be killed without judicial process.<sup>39</sup> In response, the Obama Administration made a narrow standing argument, perfectly good for the facts of that case, explaining that the father would have next-friend standing only if the son was not available to come into court.<sup>40</sup> Being a fugitive hiding in caves and plotting attacks against Americans, of course, does not count as being unavailable. If Al-Aulaqi wanted to come into court and argue that he was not a lawful target, he was perfectly free to do that, but he chose not to do so.

Instead of stopping with that narrow standing argument, however, the Obama Administration went on to make broader arguments in sweeping terms akin to those pressed during the Bush Administration.<sup>41</sup> They argued that the President's wartime targeting decisions are not judicially reviewable at all, even when they involve the use of lethal force directed against an American citizen.<sup>42</sup> Instead, they are political questions.<sup>43</sup> Moreover, the Obama Administration invoked the state secrets privilege to argue that Mr. Al-Aulaqi's case could not be litigated without putting state secrets in danger, just as the Bush Administration had done in a case involving alleged wartime detentions by the CIA.<sup>44</sup>

Just to give you a sense of how broad and forceful the Administration's arguments were in *Al-Aulaqi*, consider the following passage from their brief:

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37. See Alberto R. Gonzales, *Drones: The Power to Kill*, 82 GEO. WASH. L. REV. 1, 3 (2013).

38. *Al-Aulaqi*, 727 F. Supp. 2d at 18.

39. *Id.* at 8–9.

40. *Id.* at 17.

41. See Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss, *Al-Aulaqi*, 727 F. Supp. 2d 1 (No. 10-cv-1469) [hereinafter Defendant's Memorandum]; Gonzales, *supra* note 37, at 36–40; Robert Bejesky, *War Powers Pursuant to False Perceptions and Asymmetric Information in the "Zone of Twilight,"* 44 ST. MARY'S L.J. 1, 1–25 (2012).

42. *Al-Aulaqi*, 727 F. Supp. 2d at 51.

43. *Id.* at 13.

44. *Id.* at 52; see also *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); Timothy Bazzle, *Shutting the Courthouse Doors: Invoking the State Secrets Privilege to Thwart Judicial Review in the Age of Terror*, 23 GEO. MASON U. C.R. L.J. 29, 29–30 (2012).

In particular, plaintiff's requested relief [judicial review of the targeting decision against Al-Aulaqi] would put at issue the lawfulness of the future use of force overseas that Executive officials might undertake at the direction of the President against a foreign organization as to which the political branches have authorized the use of all necessary and appropriate force. Specific decisions regarding the use of force frequently must be made in the midst of crisis situations that can arise at any time, and that involve the delicate balancing of short- and long-term security, foreign policy, and intelligence equities. The Judiciary is simply not equipped to manage the President and his national security advisors in their discharge of these most critical and sensitive executive functions and prescribe *ex ante* whether, where, or in what circumstances such decisions would be lawful. Whatever the limits of the political question doctrine, this case is at its core.<sup>45</sup>

I have a couple of reactions to this. First, I have to admit that as a former member of the Bush Administration—which was pilloried over positions much less aggressive than this—I am a little galled by the double standard in the court of public opinion. Imagine the outcry if the Bush Administration had filed a brief like this. But as the official who would have had to defend the *Al-Aulaqi* case had it arisen in the Bush Administration, I have to congratulate the Obama Administration for its very vigorous, persuasive, and ultimately successful defense of the President's power to protect the country in this ongoing armed conflict.

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45. Defendant's Memorandum, *supra* note 41, at 3.