

2014

## An analysis of the extent of presidential power in regard to drone strikes

Kaitlyn Dugas

Follow this and additional works at: <https://commons.emich.edu/honors>



Part of the [American Politics Commons](#)

---

### Recommended Citation

Dugas, Kaitlyn, "An analysis of the extent of presidential power in regard to drone strikes" (2014). *Senior Honors Theses & Projects*. 392.

<https://commons.emich.edu/honors/392>

This Open Access Senior Honors Thesis is brought to you for free and open access by the Honors College at DigitalCommons@EMU. It has been accepted for inclusion in Senior Honors Theses & Projects by an authorized administrator of DigitalCommons@EMU. For more information, please contact [lib-ir@emich.edu](mailto:lib-ir@emich.edu).

---

# An analysis of the extent of presidential power in regard to drone strikes

## Abstract

Considerable controversy exists regarding the use of drones by the United States of America in the targeted killings of individuals overseas, including American citizens. The constitutionality of such strikes comes into question as well as whether the President even possesses adequate power, whether unitary or granted, to order the strikes against not only American citizens, who are obviously protected by the Constitution, but also foreigners to whom the Constitution may or may not apply. This study will take a look at presidential power from the perspective of each of the three branches of government within the United States and from the viewpoint of International Law in order to understand how much power the President actually has to order targeted killings. This analysis is followed by a case study. In the end, this research raises as many questions as it answers.

## Degree Type

Open Access Senior Honors Thesis

## Department

Political Science

## First Advisor

Dr. Barry Pyle

## Second Advisor

Dr. Jeffrey Bernstein

## Keywords

Targeted killings, assassinations, War on Terror, law of war, President Obama, Anwar Al-Aulaqi

## Subject Categories

American Politics

AN ANALYSIS OF THE EXTENT OF PRESIDENTIAL POWER IN REGARD TO  
DRONE STRIKES

By

Kaitlyn Dugas

A Senior Thesis Submitted to the

Eastern Michigan University

Honors College

in Partial Fulfillment of the Requirements for Graduation

with Honors in Political Science

Approved at Ypsilanti, Michigan, on this date April 17<sup>th</sup>, 2014

AN ANALYSIS OF THE EXTENT OF PRESIDENTIAL POWER IN REGARD TO  
DRONE STRIKES

By

Kaitlyn Dugas

A Senior Thesis Submitted to the

Eastern Michigan University

Honors College

in Partial Fulfillment of the Requirements for Graduation

with Honors in Political Science

EASTERN MICHIGAN UNIVERSITY

ABSTRACT

**An Analysis of the Extent of Presidential Power in regard to Drone Strikes**

by Kaitlyn Dugas

Faculty Advisor:

Professor Barry Pyle  
Political Science

Considerable controversy exists regarding the use of drones by the United States of America in the targeted killings of individuals overseas, including American citizens. The constitutionality of such strikes comes into question as well as whether the President even possesses adequate power, whether unitary or granted, to order the strikes against not only American citizens, who are obviously protected by the Constitution, but also foreigners to whom the Constitution may or may not apply. This study will take a look at presidential power from the perspective of each of the three branches of government within the United States and from the viewpoint of International Law in order to understand how much power the President actually has to order targeted killings. This analysis is followed by a case study. In the end, this research raises as many questions as it answers.

## TABLE OF CONTENTS

|  |    |
|--|----|
| Glossary.....  | 2  |
| Introduction.....  | 3  |
| Chapter I: The Supreme Court.....                                    | 5  |
| Section 1: Wartime and Foreign Powers.....                           | 5  |
| Section 2: Due Process.....  | 7  |
| Chapter II: <i>Youngstown Sheet &amp; Tube Co. v. Sawyer</i> .....   | 12 |
| Section 1: When the President Acts Against Congress' Wish.....       | 14 |
| Section 2: When the President Acts During Congressional Silence..... | 15 |
| Section 3: When the President Acts in Concert with Congress.....     | 16 |
| Chapter III: The Case of President Barack H. Obama.....              | 19 |
| Chapter IV: International Law.....                                   | 24 |
| Chapter V: The Case of <i>Al-Aulaqi v. Panetta</i> .....             | 29 |
| Chapter VI: Conclusions.....   | 35 |
| Footnotes.....   | 39 |
| Bibliography.....  | 40 |

## GLOSSARY

**Article I.** The first and longest article within the Constitution of the United States of America, which lists out the make-up and powers of both the House of Representatives and the Senate.

**Article II.** The second article within the Constitution of the United States of America, which lists out the make-up and powers of both the Executive branch of government.

**Article III.** The third and shortest of the three articles that create the structure of government in the Constitution of the United States of America, which lists out the make-up and powers of the Supreme Court.

**Caroline case,** An issue from 1837 between the United States of America and Great Britain that led to the creation of codes for the use of self-defense in warfare.

**Embargo.** A blockage of trade from a certain area for the purpose of political coercion.

**Formalism,** A way of interpreting the Constitution of the United States of America. This interpretation allows for no leeway within the Constitution; "it means what it means."

**International Court of Justice,** An international court that presides over cases between states and between states and people using international law.

**Judicial Realism,** A way of interpreting the Constitution of the United States of America. The interpretation of the Constitution changes with the interpreter, with the interpreter's culture and beliefs, and with society.

**Justiciable,** That an issue must be tried before a court of law.

**Laws of War,** The traditional rules of war which states must abide.

**State,** A country.

**Suspension Clause,** a section of the Constitution of the United States of America that allows for the writ of habeas corpus to be suspended during a time of war

**Writ of habeas corpus,** literally "bring the body here," a common law principle that allows those who have been detained without reason to demand his or her day before an objective decision-maker to plead his or her case.

## *Introduction*

### HOW MUCH POWER DOES THE PRESIDENCY POSSESS?

That is the question that this paper asks. This is not a question that we often consciously ask ourselves. Usually, Presidents act and the response to that action is an assumption that the President already possessed the authority to act in that manner. That is not necessarily the case. There are certain limitations on Presidential power. But those limitations are flexible, even different, depending on which perspective we look upon the Presidency. This paper takes a look at Presidential power from four different perspectives: that of the Supreme Court of the United States of America, that of the American Congress, that of the American President himself<sup>d</sup>, and that of International Law.

In order to place the analysis of the paper in context, this paper will look at drone strikes (also known in the broad sense as a targeted killing) and the power that the President has to order these strikes. According to a study by the United Nation's Council on Human Rights on the use of targeted killings, there is no definition of targeted killings that is widely agreed upon. The means of targeted killings that this paper focuses on is drone strikes. As the study points out, targeted killings occur in wartime and peace time. The United States of America has used drone strikes in order to commit targeted killings in Afghanistan and Iraq. The policy that the United States uses in ordering these strikes has been kept secret since September 11<sup>th</sup>, 2001 and remain unknown to the American people. There are allegations that the United States has used drone strikes in states other than Afghanistan and Iraq. Between 2002 and 2010, the supposed number of drone strikes by the United States is around 120, but there is no way to verify this number (Rise of the Drones.) Reports of collateral damage are also difficult to verify, with reports varying from the tens to the hundreds in casualties. Through it all, the United States has used a self-defense justification for all of its drone strikes.

The paper begins by analyzing Supreme Court cases that give the President nearly unlimited power on the international scene and cases that require the President to give minimal due process in detainment cases. One of the most important cases that influence Presidential power is *Youngstown Sheet & Tube Co. v. Sawyer*, which, through Justice Jackson's concurring opinion, creates the presidential triptych of power. Using the triptych, I explain how little Congress has said on the matter of drone strikes, which leads into the third chapter. In the third chapter, the paper explains how the current president has defined his own power to order drone strikes in the midst of congressional silence. The paper then looks into what international law restrictions there may be on the President's powers. The paper ends with a case study of the only instance where a drone strike ended the lives of American citizens overseas and the implications that could have on the President's ability to use drone strikes domestically.

At the end of each of the chapters in this paper, I will provide a list of questions raised by the chapter that remain unanswered in order to demonstrate just how little is known about drone strikes and the President's power to order drone strikes. In the conclusion, I attempt to answer some of these questions with a case study of *Al-Aulaqi v. Panetta*. By its very nature, this paper raises as many questions as it answers.

## Chapter 1

### THE SUPREME COURT

*“Cases arising in the land or naval forces, or in the militia in time of war or public danger, are excepted from the necessity of presentment or indictment by a grand jury, and the right of trial by jury in such cases is subject to the same exception. Neither the President nor Congress nor the Judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution except so far as the right is given to suspend in certain cases the privilege of the writ of habeas corpus. A citizen not connected with the military service and a resident in a State where the courts are open and in the proper exercise of their jurisdiction cannot, even when the privilege of the writ of habeas corpus is suspended, be tried, convicted, or sentenced otherwise than by the ordinary courts of law. Suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course, and, on its return, the court decides whether the applicant is denied the right of proceeding any further. A person who is a resident of a loyal State, where he was arrested, who was never resident in any State engaged in rebellion, nor connected with the military or naval service, cannot be regarded as a prisoner of war.”*

-Justice Davis, writing for the majority, *Ex Parte Milligan* (1866)

#### *Section 1 : Wartime and Foreign Powers*

The Supreme Court first began looking at the extent of Presidential powers during the Civil War. The cases that arose out of the Civil War were titled the Prize Cases. These were a series of cases regarding the seizure of foreign ships during an embargo imposed by the

President. The owners of the ships sued for the ships to be returned, claiming that because there was no declaration of war by Congress that the embargo and therefore the seizure of the ships were unconstitutional. At the time of the seizures, Congress was not in session in order to declare that a war was occurring within the United States of America. Even if Congress had been in session, what is of particular interest is the fact that there were no opposing states during the Civil War, similar to the “war” today. The Civil War did not fit the definition of war; it was an insurrection, a rebellion.

When the cases came before the Supreme Court of the United States, the Court decided simplified the issue. It declared that simply because Congress has not given a name to something does not mean it does not exist. A state of war may exist within the United States without Congress having to declare it. At the time the ships were seized, there was an insurrection occurring within the United States that was an imminent threat to national security. Therefore, if the President is faced with a war (or an insurrection or a rebellion), he can and indeed must act accordingly to protect the nation and its citizens (Prize Cases.) In the Prize Cases, this protection came partly in the form of an embargo. In the case of the War on Terror, this protection came in the form of drone strikes.

In the only dissenting opinion for the Prize Cases, it is pointed out that Congress cannot simply delegate its powers to another branch of government. To do so would be to completely shatter the idea of a separation of powers (Prize Cases.) That is exactly what the Court did in the case of *United States v. Curtiss-Wright Export Corporation* (1936). *Curtiss-Wright* deals with a Joint Resolution of Congress and the President preventing trade with Bolivia. Bolivia was at war at the time with Paraguay over control of the Chaco region. The President had ordered an embargo on the country. The Curtiss-Wright Export Corporation intended to send Bolivia fifteen machine guns, thereby breaking the embargo. The question posed to the Supreme Court for the case was whether Congress had delegated its powers to the President by allowing the President to impose the embargo (see the Prize Cases dissenting opinion) and whether Congress could delegate those powers.

The Court decided not to answer those questions directly, instead positing that while the President was bound by the Constitution for domestic matters, that he was not bound in international matters. The President, according to the Court, is the figurhead of the United States for international matters and must be allowed to act depending on what is presented on the international scene, regardless of the Constitution. The President and his aides are often better informed about the goings-on of the international scene and are therefore better equip to handle foreign matters without the need to release perhaps sensitive information to other branches of government (Curtiss-Wright.) When this case law is applied to the idea of using drones in foreign airspace, it is easy to conclude that the President has been given authority to act as he sees fit. There may be information being supplied to the President that cannot be released to the public for safety reasons or there may be threats so imminent that to release information to the public would take so much time that the threat would likely become reality.

### *Section 2: Due Process*

Again, the case law starts at the time of the Civil War. During the war, the writ of habeas corpus had been suspended, which is allowable through the Suspension Clause of the Constitution during a time of war. Individuals were being detained without trials throughout the duration of the war. After the conclusion of the war, an individual by the name of Milligan was arrested and held without trial. In the case of *ex parte Milligan*, Mr. Milligan fought for his writ of habeas corpus because the United States was no longer at war. Milligan was a citizen of the United States. He was a resident of Indiana, where his arrest had occurred. Indiana was not a battlefield state, which might have matter if the war was still going on, but there was not even a state of war occurring within the United States anymore. The federal courts were open and in use at the time of his arrest. Mr. Milligan had, however, been seen by a military tribunal (Milligan.)

A military tribunal was not enough, the Court ruled. Mr. Milligan was a citizen and therefore was entitled to his due process before he was held against his will by his government. When the government of the United States wants to deprive someone of their freedom and hold them, there must be due process given. When that person is a citizen and the federal courts are open, that due process must be given before an Article III court, not a military tribunal (Milligan.) That runs again in the vein of the Executive asking the Executive's permission to detain someone. This can be again tied to drone strikes. This case seems to indicate that the President cannot deprive at least a citizen of the United States of his or her life while there is no war and the federal courts remain open.

The next case occurs near the end of World War II. In the case of *ex parte Quirin*, there were a group of eight German nationals who had been spying in the United States for Germany and were charged multiple times with different violations of the laws of war. Two of the saboteurs were American citizens, though neither are the namesake of the case. The case was tried before a military tribunal, like in *ex parte Milligan*. At the end of their trial, all eight were found guilty of the charges of violating the laws of war and all eight were given death sentences. Six of the saboteurs were executed by electric chair seven days after trial concluded. One of the saboteurs, George John Dasch, had his sentence commuted to thirty years in prison for assisting in the capture of the other saboteurs. Another, one of the two Americans Ernest Peter Burger, had his sentence commuted to a life sentence for his aid in the capture of the other saboteurs. The other American had been executed (Quirin.)

The Supreme Court ruled that in the case of *ex parte Quirin*, the military tribunal was constitutional. These were individuals who had sworn allegiance to a hostile state and were being held lawfully; they did not have a right to trial in a civilian Article III court. The President was within his right to order that the saboteurs be tried by military tribunal (Quirin.) The Court went so far as to draw several distinctions between *Milligan* and *Quirin*, stating that the Germans had willfully entered the United States as agents of an enemy to attempt to sabotage the United States. In contrast, Milligan was not acting as part of the Confederate State of America nor did he live in or near the Confederacy. When

applied to the idea of drone strikes, perhaps a strike on a citizen could be justified. If that citizen has pledged allegiance to a foreign enemy and is actively working against the United States in a time of war, there could be means to try this person by military tribunal (Quirin.) But there is no precedent set in this case for absolutely no due process whatsoever.

According to the Court's application of the Authorization for Use of Military Force Act in *Hamdi v. Rumsfeld* (2004), enemy combatants have limited access to the court system in the United States. However, the status does not preclude all access to due process. The Executive branch of government may augment or abridge the usual amount of due process afforded to enemy combatant so as to not add unnecessary stress to the military by requiring the removal of certain officials from the field of battle for a trial. There are issues that may occur when a person is given their due process rights through an Article III court including the possibility that secrets may be leaked and that there might not be sufficient evidence under those burdens to hold an enemy combatant. The release of that person back onto the battlefield may put Americans in danger (Hamdi.)

The Executive cannot refuse all due process to an individual (Hamdi.) The level of due process required in Hamdi is important for citizens of the United States. If declared an enemy combatant, the government must at least allow the person access to counsel and a chance to present exculpatory evidence. The trial of a citizen enemy combatant must be done before a neutral decision maker (Hamdi.) It is important to note that the decision in Hamdi was a plurality opinion and not a majority opinion. Under the rules of precedent, it is technically not binding.

What is binding is the decision in the case of *Boumediene v. Bush* (2008). Between *Hamdi* and *Boumediene*, the Court ruled on *Hamdan v. Rumsfeld* (2006) (which ruled that the military tribunals set up by the Bush administration violated multiple sections Geneva Conventions) which spurred the creation of the Military Commission Act of 2006. The Act set up military tribunals that addressed the concerns of the Court brought up in the *Hamdi* and *Hamdan* cases. The Court ruled in *Boumediene* that both citizens and foreign terror

suspects have the right to challenge their detainment and are deserving of due process. This case is important in understanding the legality of drone strikes. In depriving a person a life, a drone strike order is not sent before a military tribunal. It is the sole decision of the Executive and his or her advisors. But the Supreme Court has ruled that even just detaining individuals needs to be seen before a military tribunal at least (*Boumediene*.) This logically calls into question the legality and constitutionality of the drone strikes being ordered.

The Supreme Court has not yet seen a case that deals with drones in any capacity due to the newness of the technology. There is no concrete jurisprudence to indicate how the President should act with regard to drones and drone strikes. Instead there is case law regarding how restricted the President's actions are depending on the actions of Congress: the concurring opinion of Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*. The application of the case to drones, which will be explained in the following chapter, can give the President an indication on how much or how little room he has to order the strikes.

#### Remaining Questions:

1. Could the President use his war powers without a formal declaration of war by Congress?
2. When then does the issue of drone strikes become international and when is it domestic?
3. Is a state of war dispositive to whether someone receives a trial by an Article III court? Is citizenship?

4. If an individual who is not a citizen of the United States of America has a right to challenge their detainment with a form of due process, how could that same individual not have a right to the same due process before they are killed?

## Chapter 2

### YOUNGSTOWN SHEET & TUBE CO. V SAWYER

*"The actual art of governing under our Constitution does not, and cannot, conform to judicial definitions of the power of any of its branches based on isolated clauses, or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress."*

-Justice Jackson, in his concurring opinion, *Youngstown Sheet & Tube Co. v. Sawyer* (1942)

Perhaps the most important Supreme Court case that deals with Presidential war powers is the case of *Youngstown Sheet & Tube Co. v. Sawyer*. Known as the Steel Seizure Case, it occurred during the Korean War era. In this chapter, we will use the case in order to analyze Congress and the powers it has granted the President over the years. In the case, the President aimed to take control of steel production within the United States of America in order to mitigate the effects of a potential strike upon the war effort.

The majority opinion in the case is less important than is the concurring opinion by Justice Jackson. In that opinion, Justice Jackson creates a system for determining the extent of power a President possesses at any particular time, on any particular issue. It is broken into three parts:

"1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these

circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government, as an undivided whole, lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least, as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables, rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system (Youngstown.)”

That is to say, simply, the President’s power depends on Congress.

*Section I: When the President Acts Against Congress' Wish*

At this point, when the President acts against Congress' expressed wishes, the President has his own Article I power, minus whatever powers Congress has taken from the President. This is when the President is the most limited in the actions that he or she may take.

In 1975, Congress created a committee called the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, otherwise known as the Church Committee. This committee looked into the intelligence agencies that existed in the United States, including the Central Intelligence Agency (C.I.A.), the Federal Bureau of Investigation (F.B.I.), and the National Security Agency (N.S.A.). The committee also investigated the technology being used by these agencies. The committee was a reaction to the occurrences in the Watergate Scandal. As a result of the committee, Senator Frank Church, after whom the committee was named, stated that

“In the need to develop a capacity to know what potential enemies are doing, the United States government has perfected a technological capability that enables us to monitor the messages that go through the air. Now, that is necessary and important to the United States as we look abroad at enemies or potential enemies. We must know, at the same time, that capability at any time could be turned around on the American people, and no American would have any privacy left such is the capability to monitor everything—telephone conversations, telegrams, it doesn't matter. There would be no place to hide.

“If this government ever became a tyrant, if a dictator ever took charge in this country, the technological capacity that the intelligence community has given the government could enable it to impose total tyranny, and there would be no way to fight back because the most careful effort to combine together in resistance to the government, no matter how privately it was done, is within the reach of the government to know (Church.)”

He declared that he never wanted the day to come where this technology being used by the intelligence agencies was used on American citizens. Today, it is common knowledge that the N.S.A. monitors the phones of all American citizens. President Obama has publicly stated his intentions to begin to monitor fewer phones. In order to promote national security, the President and the agencies under his control are collecting data from the Internet and from phones. There are no warrants for this information and Congress has expressed its fear of this use of the technology for years. The intelligence agencies that are using this information can use this information, if they feel it necessary, to place people on terrorist lists and/or kill lists (Al-Aulaqi.) These lists include individuals who may pose terrorist threats to the national security of the United States and in some cases the threats posed are so large that these individuals have become the victims in drone strikes. This is the President acting against Congressional wishes, but oddly without consequence. This brings the discussion into Congressional silence and how much power the President has when Congress has not yet acted.

### *Section 2: When the President Acts During Congressional Silence*

This paper has already discussed the aftermath of what has occurred when the President acts in the midst congressional silence. Looking back at the Prize Cases, the President does not necessarily become frozen and unable to act upon threats because Congress has not yet recognized the threat. Congress did later declare a state of war was present in the Prize Cases when the President acted. This does not diminish the fact that the President did act during Congressional silence in a way that may or may not have been permissible at the time. Acting in congressional silence puts the President in a state of limbo. There is no clear definition of his power in this case. This may arguably give the President to act however he chooses. The President can state that necessity and an inability to wait for Congress to say a word about the actions being taken in order to preserve the Union required the actions taken.

Article II of the Constitution of the United States makes the President the Commander in Chief of the Armed Forces. The President may use the Armed Forces in times of war. However, the President lacks the power to declare war; that power was given to Congress in Article I of the Constitution. When looking for an authorization from Congress of the President's use of drone strikes, one can find a handful of bills attempting to prevent either the use of drones upon American citizens within the United States or bills attempting to prevent the use of drones altogether. None of those bills have passed both houses of Congress. There is, therefore, no definitive word on whether the President can or cannot use drones and no word on what Congress thinks of the use of drones on American citizens. There are arguments that can be made that because Congress has attempted to ban the use of drones that drones are indeed unconstitutional. This argument is easily dismissed by the fact that if Congress as a whole (or as a majority) believed that the use of drones was impermissible, it would have been successful in banning them. The other argument is that because Congress has tried to and failed to pass a ban on the use of drones, that Congress therefore approves the use of drones. This is an argument less easy to dispel, as it may well be true. It may be a stretch to say that because Congress has not said anything on the matter that it must approve of the matter. But as we have already seen, in absence of Congressional action and it deemed "necessary", the President is free to use his discretion when deciding to use extra-Constitutional powers.

### *Section 3: When the President Acts in Concert with Congress*

When the President acts with Congress' blessing, then, according to Justice Jackson's triptych of presidential power, the President has his entire Article I powers and any of the powers Congress has granted him out of Article II of the Constitution. The President embodies the will of the federal government at this point and can act knowing that his actions are within his power to act.

The only bill that the 113<sup>th</sup> Congress has passed regarding drones is the National Defense Authorization Act for Fiscal Year 2014. The National Defense Authorization Act has been re-passed by Congress each year it has been introduced since its first introduction in 2004. For the fiscal year 2014, the only section that mentions drones in the entire 1104 page document is Section 1264 which calls for the prevention of the use of drones against U.S. citizens. There is an exception: if an American citizen is found to be actively engaged in combat against the United States of America (H.R. 1960.) The section fails to define what would be active engagement or what combat would count as. The exception does not mention whether a strike within the borders of the United States would be unacceptable.

This demonstrates the confusion that still surrounds the grant of power to the President to use targeted killings. Congress has taken the time to define who the President may not, generally, use drone strikes against: citizens who are not enemy belligerents. However, Congress has failed to define an enemy belligerent in the National Defense Authorization Act, where the prohibition can be found. With the definition of enemy belligerent in question, the President can strike anyone he finds to either is A) not a citizen of the United States and/or B) an enemy belligerent.

Congress has specifically allowed for any means necessary to bring those involved in 9/11 to justice. This would include drone strikes if that was declared a necessary means by the President. Within the Authorization for Use of Military Force Act, passed right after and in reaction to the 9/11 attack, Congress grants the President power to use the Armed Forces. The Act is not a declaration of war. This creates an issue when the President begins using his or her war powers in order to bring those involved in the attack to justice.

It would appear that in the current instance the President's power floats somewhere in between acting during congressional silence and acting with congressional approval. There has not been a firm disapproval of the President's actions with regards to drone strikes, nor has there been a firm approval. This would place the President in the second tier of the triptych of power. However Congress has granted the President some wartime power. With the A.U.M.F. and the National Defense Authorization Act (N.D.A.A.), the President can

act to secure the nation and take down those individuals who are associated with either al Qaeda or the Taliban. It is not clear how much evidence the President must have in order for the A.U.M.F. to apply or if there is any evidence that must be presented at all. The President has claimed, as recently as 2013, that he will refuse to expand the A.U.M.F. any further and that he will not use drones to attack American people on American soil (National Defense University Speech.)

Neither the court system nor the legislature has specifically addressed the issue of drone strikes or how much power the President has to order drone strikes. While there has been some legislation to give the President general wartime powers, there is very little specific to drones. Even then, vagueness of wording leaves questions as to how restricted the President's powers are. In the next chapter, this paper will explore how the current President, Barack H. Obama, has filled in the gap left by the legislature and the courts with his own definition of his powers.

#### Remaining Questions:

1. Does the President have the authorization of Congress to attack people using drones in states in which no battles are occurring, such as Yemen and Pakistan?
2. What are the limitations of the Authorization for Use of Military Force Act and when will it no longer be in effect?
3. Will Congress pass a bill making the use of drone strikes on American citizens or on American soil illegal?
4. Can the President order a strike on American soil?

## Chapter 3

### THE CASE OF PRESIDENT BARACK H. OBAMA

*"...Our operation in Pakistan [the S.E.A.L. Team 6 Operation] against Osama bin Laden cannot be the norm. The risks in that case were immense... The fact that we did not find ourselves confronted with civilian casualties, or embroiled in an extended firefight, was a testament to the meticulous planning and professionalism of our Special Forces, but it also depended on some luck. And it was supported by massive infrastructure in Afghanistan. And even then, the cost to our relationship with Pakistan – and the backlash among the Pakistani public over encroachment on their territory – was so severe that we are just now beginning to rebuild this important partnership. So it is in this context that the United States has taken lethal, target action against al Qaeda and its associated forces, including with remotely piloted aircraft commonly referred to as drones."*

-President Barack H. Obama in a speech at the National Defense University on March 23<sup>rd</sup>, 2013

One of the campaign promises of current President Barack Obama was ending the wars in which the United States was involved. Since taking office in 2009, President Obama has decreased the number of soldiers on the ground in both Iraq and Afghanistan. He has also increased the number of drones in the arsenal of the United States of America. Under this president, there has been an increase in the number of targeted killings by the United States using Predator drones. The President admits that he seeks to take down Al Qaeda through the use of drones (National Defense University Speech.) By comparison, the administration of former President George W. Bush did not use drones quite as much as the current administration. Many argue that this is hypocrisy on President Obama's part (H.R. 2647; H.R. 1960.) However, something else explains the change: the fact that the Central

Intelligence Agency had not yet created a reliable intelligence presence within Afghanistan and Pakistan. The drone technology was being used by Israel during the Bush administration and was relatively new.

The newness of the technology is one of the reasons that its use is so controversial. There are no domestic or international laws of war that exist that rules over the use of drones. Knowledge about specific policies governing the use of drones in targeted killings is tenuous at best. The laws and morals that may one day rules over use of this technology have not yet been hammer out<sup>2</sup>. There are no reports on how drones are used, how they are used on, or how the government decides to use them and on whom.

In a speech to the National Defense University on 23 May 2013, the President claimed that “by the end of 2014, we will no longer have the same need for force protection, and the progress we’ve made against core al Qaeda will reduce the need for unmanned strikes.” However, the budget for unmanned drones has increased nearly nine million dollars since the last National Defense Authorization Act was passed by the 112<sup>th</sup> Congress (H.R. 4310.) The budget for drones was nearly doubles in the National Defense Authorization Act passed by the 111<sup>th</sup> Congress (H.R. 2647.) It is, however, important to note while looking at these numbers that not all drones are used for targeted strikes. Some drones are simply used for intelligence gathering or security that may in turn lead to an increase in strikes.

In that same speech to the National Defense University, President Obama lays out some convincing arguments in favor of the use of drones. He points out that having troops on the ground can cause hostility among local inhabitants. While having American soldiers on foreign soil is not necessarily an invasion, it is visually very difficult to tell the difference. Using drones in operations to kill or capture al Qaeda operatives is, supposedly, less likely to incite the locals in the country in which the strike occurs (National Defense University Speech.) How a ground troop operation would incite people any more or less than an unmanned Predator drone dropping out of the sky to eliminate a threat is unclear. This also less of a risk to our soldiers, as the operator of the drone is not actually within the line of fire of the enemy (National Defense University Speech.) The operative is safe within the

boundaries of the United States of America. The victim of a drone strike does not receive due process as prescribed by Article III of the Constitution and the Bill of Rights.

In the speech the President also claims that the drone strikes he has ordered have been effective and that they have foiled the plots of terrorists many times over (National Defense University Speech.) However, there is no report on just how effective these strikes are. There are no definitive reports on how much collateral causality these drone strikes have caused. He claims that these strikes have saved lives, but at what cost to the lives of others? The President also points out the legality of his actions. He mentions that just following the attacks on the Twin Towers in New York on September 11<sup>th</sup>, 2001, Congress passed an act (the Authorization for Use of Military Force Act) that allowed the President to pursue any necessary actions to bring people associated with those attacks to justice. The act has expanded Presidential power immensely over the past 13 years. President Obama points out that the act means that "...the United States of America is at war with al Qaeda, the Taliban, and their associated force." (National Defense University Speech.) But there must be a declaration of war by Congress in order for that to be true. There has been no such declaration. Likely, there will not be.

Congress at this point has given the President the authority to make use of the Armed Forces. The issue that emerges is that the Constitution only gives him the authority to use the Armed Forces when Congress declares war. If one takes a formalistic interpretation of the Constitution, then this means that the President does not have the authority to send any troops anywhere or to use drones strikes in order to kill enemies of the state. This is because there has been no formal declaration of war. Even then, the traditional laws of war apply when two or more states are fighting each other. They have never before been applied to a terrorist organization that exists without a state or a government. It becomes difficult, under the traditional laws of war, to call "The War on Terror" an actual war.

President Obama points out that the ability to use these strikes in self-defense does not make their use moral or ethical. He mentions that his administration has created a document that rules over the use of drones. While the document in its entirety has not been

made available to the public, a summarizing document has been. In the document, titled *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, there is an abridged version of the process that the President and his administration go through in order to decide when and where to use strikes and on whom. The proposed attack must have a legal basis, the target must be a “continuous, imminent threat” (which the Executive determines), and the attack must be done with respect to international law and the sovereignty of the state in which the attack will occur. There is also a list of criteria that must be met:

- “1) Near certainty that the terrorist target is present;
- 2) Near certainty that non-combatants will not be injured or killed;
- 3) An assessment that capture is not feasible at the time of the operation;
- 4) An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and
- 5) An assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons. (U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities.)”

The decision will be made by senior officials in the United States government and special agencies with sensitive knowledge. There is no mention of any form of judicial review of the cases to ensure due process is properly given. This internal process allows the Executive Branch to give itself permission to act. The President does claim in his speech that he and his administration inform Congress of their intention to act and ask for opinions there. However, those opinions are not restrictive with the permissions that the President has already received. Nor is asking Congress’ permission a sufficient substitute to the due process given by an Article III court.

The President later goes on to speak on the fact that he does not believe it would be constitutional for him to attack American citizens on American soil (National Defense University Speech.) He has, however, order an attack on an American citizen on foreign soil, which will be discussed in the final chapter of this paper.

In the midst of congressional silence on the President's actions with regard to drone strikes, the President has stoppped up to define his own power. While claiming that he is seeking opinions on the legality of strikes per each individual he seeks to target, he has given no evidence of contacting a court to review the legality. If constitutional law and federal law don't restrict the President's power, perhaps international law will.

#### Remaining Questions:

1. Will the operators of unmanned drones in the United States continue to be as safe as they are now once the use of drones is more wide-spread?
2. How accurate are drones?
3. How many drone strikes have occurred to date and where have they occurred?
4. Does the use of drone strikes really cause less hostility toward the United States than having troops on the ground?

## Chapter 4

### INTERNATIONAL LAW

“...A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

-Article 53: Treaties Conflicting With A Preemptory Norm Of General International Law ("JUS COGENS"), Vienna Convention on the Law of Treaties (1969)

International law is a series of agreed upon conventions and treaties between states. Some of the most important of international laws are those called *jus cogen*. These *jus cogen* are essentially international laws that are so basic that they are universally agreed upon by the states that are part of the international scene. Examples of *jus cogen* are the bans on torture, on the use of chemical and biological weapons in warfare, on slavery, and on genocide. There can be no derivation away from the bans on these, in theory. A state cannot violate *jus cogen* in a treaty or convention. No state can deviate from them. In practice, there are still violations of *jus cogen* around the world.

According to a meeting of legal experts that were called before the United States Congressional hearing regarding unmanned drone attacks, the only time targeted killings can be used is when they are used by trained military or military personnel during an armed conflict or war. This raises questions of whether strikes in a theater of war are different from strikes that occur while not at war. The meeting, dubbed ‘Rise of the Drones’, declare that the use of targeted killings is also legal in the case of self-defense. Even so, the legality of the use of drones becomes blurry when the conflict is not international or when the conflict deals with an organization and not a state. Current international law does not

discuss the legality of attacks from entities that are not states. This makes the current War on Terror a difficult issue to find precedent for guidance.

During the meeting, experts confirmed the legality of the use of targeted killings in the case of targeting the leader of a state or a government as pertains to the Laws of War. They explained that the question of morality may not necessarily line up with legality. The experts on the panel then discussed that drones were moral due to their ability to discriminate between targets, or at least the drone technician's ability<sup>3</sup> (Rise of the Drones.)

However, the parameters given during the Rise of the Drones meeting create more questions regarding the use of drones. Victims of drone strikes do not receive adequate due process. These targeted killings are essentially for political reasons; an argument could be made that that makes them assassinations. Would it ever be legal to target someone off of the battlefield and how far away from the battlefield would that extend? What defines a military or military personnel? Are strikes limited to those that are part of that military or could citizens be attacked as well? If you can strike citizens, then the next logical train of thought goes to who can you strike and for what reason? What actions must a citizen perform to qualify for death by drone? According to 10 U.S.C. § 948 (a) (7) an enemy belligerent is any who engages in hostilities against the United States or has helped someone else engage in hostilities against the United States or was a part of Al Qaeda or was previously defined as an enemy belligerent. When a civilian meets this definition, they are considered to be part of the fighting. When they join the fray, they are just as open to attack as any soldier. There is no data that indicates how accurate targeted drone strikes are. There is no data that supports the fact that every drone strike is successful in destroying the intended target. The system for deciding who is a civilian, who is an enemy belligerent, and who is a target is unknown.

While it is possible to argue that targeted killings are not assassinations and that they do not take away someone's right to trial, there is not a lot of evidence to support those two claims. The only apparent argument for targeted killings not being synonymous with assassination is that targeted killings are legal and assassinations are illegal. There is no

fundamental difference between the two otherwise and the legality of targeted killings is in question in current international law. Targeted killings also do not include trials to prove the guilt of the person being targeted (MacDonald.) In a presentation given by Lord MacDonald at Wadham College at Oxford University, he pointed out that a lot of the time the Central Intelligence Agency gives money to individuals for the names of potential terrorists. The large sum of money is tempting for many in countries where targeted killings are performed, with widespread warfare and poverty (MacDonald.) Names may be given just for the money, but also for petty reasons like revenge and names are difficult for the Central Intelligence Agency to verify. A strike is proposed, according to Lord MacDonald, if the name of an individual is given multiple times from different sources. However, as Amos Guiora points out in his paper "Targeted Killing as Active Self-Defense", in theory "an individual will only be targeted if he presents a serious threat to public order and safety based on criminal evidence and/or reliable, corroborated intelligence information clearly implicating him." Despite this, no trials occur. Nor is there any warning of the attack given (Guiora.)

The legality of taking target killings off the battlefield and into everyday life is questionable to say the least. The targeting of civilians is also questionable, as is the collateral damage that comes with targeted killing of any one person. Civilians may be targeted only when they are involving themselves voluntarily in the fire fight and/or violence of a battlefield according to international law. They may also be targeted if a government has reason to believe that there is an imminent threat that this citizen poses, such as a potential suicide bombing threat<sup>4</sup>. This is generally the justification used when states are targeting terrorists. When these terrorists attack, they are considered hostile and are therefore viable for targeted killing by a state capable of such an action. In such cases, a self-defense exception may be justified.

However, like the Caroline case describes, the threat the citizen poses must be imminent, "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." The Caroline case occurred in 1837 between the United States of America and Great

Britain and led to the creation of codes for the use of self-defense in warfare. The definition of self-defense brings into question the United States' use of drones in targeted killings of terrorists over the past decade. Take a look, for example, at the Authorization for Use of Military Force Act. In the A.U.M.F., Congress has given the President full authorization to use any means to bring those involved in the 9/11 attacks to justice. That would count as self-defense, to prevent further attacks. A decade of self-defense in reaction to one act does not fit that definition.

Some argue that by performing targeted killings now, even if they are illegal as it currently stands in international law, their continued use will lead to their becoming legal later as more states enter the practice. It also becomes easier to enter the practice of targeted killings when drones are involved. As Lord MacDonald pointed out in his presentation, being able to direct a Predator drone from thousands of miles away as if playing a video game provides for complete safety for the operator of the drone. For now, the operator has no threat of attack. This level of safety may change as drone technology proliferates, or if countries using drones are close enough to each other that other means of warfare may put the operator in harms-way (MacDonald.) When there is literally no threat of casualty to a country's troops that country will logically be more willing to utilize the drones in targeted killings and more willing to enter into conflicts, knowing that this technology is at the ready.

The last issue that occurs with targeted killings is the efficiency of their use. Claims that drone attacks are nearly 100 per cent accurate cannot be confirmed. Reports of collateral damage are unverified and are hard to rely on due to the difficult task of identifying who is a hostile citizen and who is an innocent citizen. In any case, it also becomes difficult to justify the killing of any number of innocent civilians. It is quite obvious that the destruction of an entire city or the death of thousands in order to kill one hostile is outrageous, but what is the actual cut off point? There has been no measure yet proposed. All there is to go on is that the extreme of thousands of deaths for one hostile death would mostly likely not be allowed. The targeted attacks must be proportional, but there has been no

definition of what would be proportional or how to go about minimizing the damage from attacks. Without information on exactly how accurate the drones used in targeted killing really are, the task of defining proportionality and a method of minimizing damage remains difficult, if not impossible.

There is very little international law that addresses specifically the use of drone strikes. It is also difficult to enforce international law and to punish violations, especially violations by an economically powerful country like the United States. The next chapter deals with a real-life situation in which a drone strike occurred and caused the deaths of three American citizens.

#### Remaining Questions:

1. Under international law, is the use of drones extrajudicial execution? Is it assassination?
2. Can the operative using an unmanned drone in a targeted killing be arrested and tried for murder or, at the very least, assault?
3. How can countries with firm belief in and laws regarding due process condone targeted killings?
4. How does the United States define "hostilities against the United States" and "enemy belligerent"?
5. How many degrees of separation away from a terrorist place someone far enough away to not qualify as "a part of Al Qaeda"?

6. Can the United States legally use a drone strike that would kill people who are not soldiers and are not enemy belligerents in order to kill someone who was? If so, how many can the United States kill to kill the intended target?
7. How many civilians die when drone strikes are unsuccessful and how can those unsuccessful strikes be justified?

## Chapter 5

### THE CASE OF AL-AULAQI V. PANETTA

Anwar Al-Aulaqi was an American and Yemeni citizen. He was born within the United States. At the time of his death, he was in Yemen, in a car. He was targeted in a drone strike and killed in Yemen in 2012. Before this he had allegedly been placed on both a C.I.A. and Joint Special Operations Command, or J.S.O.C., kill list. A case occurred in 2010, *Al-Aulaqi v. Obama* that had contested Al-Aulaqi's inclusion on the kill lists. The issue there was that the government never explained (and still has yet to explain) the imminent threat that Al-Aulaqi posed that warranted his placement on those lists. According to the government of the United States of America, Al-Aulaqi was the leader of Al-Qaeda in the Arabian Peninsula or A.Q.A.P. Al-Aulaqi was also involved in the planning of the Christmas Day underwear bomber attack. The defense in the *Al-Aulaqi v. Panetta* case alleges that Al-Aulaqi provided the underwear bomber (who attempted to detonate a bomb hidden in his underwear while on board a flight from Amsterdam to Detroit on Christmas Day 2009) with the means and instructions to carry out the intended terrorist attack.

The *Al-Aulaqi v. Panetta* case brings up interesting questions about the ability of the Executive to target American citizens in drone strikes. As we have discussed in the chapter on the legislature, in the past Congress attempted to make it illegal to target U.S. citizens in drone strikes. Congress failed to pass a law on this so far, but in attempting to do so, it declares, in fiction, that the Executive does indeed have this right. Otherwise, how could Congress take away that right through the creation of a law? Congress has also authorized the use of military force in order to take down Al-Qaeda. If Al-Aulaqi was indeed an active, high-ranking member of Al-Qaeda, military action against him was already authorized.

A set of questions, however, also arises out of the citizenship status of Al-Aulaqi. According to the Plaintiff in the case, the Defendants (Leon C. Panetta, William H. McRaven, Joseph Votel, and David. H Petraeus) violated the 4<sup>th</sup> and 5<sup>th</sup> Amendments to the Constitution along with violating the Clause on the Bill of Attainder. This issue therefore seems to be justiciable by the Court. But in response to the complaint filed by the Plaintiff, the Defendants claimed that the issue was a political question and was therefore out of reach of the Courts to decide.

The government framed the question of the Plaintiff, in their Motion to Dismiss, as whether "...U.S. officials unlawfully applied the war-making and national defense powers of the political branches to conduct alleged missile strikes abroad against enemy forces engaged in an armed conflict against the United States..." In order to evaluate the political question claim, the Defendants look to the Supreme Court case of *Baker v. Carr*. In the case, there are six ways to determine whether a court case is justiciable or whether it includes a non-justiciable political question: that the issue being raised has a "demonstrable constitutional commitment" to the branches of government, or that the issue has no standard by which it may be resolved, or that prima facie the issue is clearly not for the Court to decide, or that the issue would require the Court to show a lack of respect to the other branches or government, or that the issue, for whatever reason, creates "an unusual need for unquestioning adherence to a" handling of the issue by a separate branch of the government, or, finally, that the issue may "embarrass" the other branches of government.

The Defense uses the *Baker* argument to state that when the Plaintiff asks the Court to determine whether the threat posed by Al-Aulaqi was imminent, they ask the Court to decide on a political, not a legal, question. Al-Aulaqi was in a car at the time of his death. There is nothing in the literature on the case that would suggest that Al-Aulaqi was at the time of his death attacking or that he was committing any act that would create an imminent threat to national security in the United States. There is also nothing in the literature that suggests that he was *not* engaged in anything posing an imminent threat to the national security of the United States. However, if Al-Aulaqi had been brought before

an Article III court to determine whether he was or was not an imminent threat, the burden would not be with Al-Aulaqi to prove he was not a threat, but on the state to prove he was. In order to deprive him of his life, the state would have had to have met a high burden of proof: beyond a reasonable doubt. Even if the case was seen before a military tribunal, Al-Aulaqi would have been able to present evidence before the tribunal in support of his innocence and would have had access to legal counsel, according to the cases of *Hamdi*, *Hamdan*, and *Boumediene*, as discussed in Chapter 2. The Plaintiff also claims that the Defendants had means other than deadly force in order to halt Al-Aulaqi's potentially harmful actions.

The first issue that the Plaintiff brings in their complaint against the Defendants is a violation of the 4<sup>th</sup> Amendment. The 4<sup>th</sup> Amendment to the Constitution protects citizens of the United States against unreasonable searches and seizures of property by the government without the due process of the law. The seizure that the Plaintiff argues to have occurred is a seizure of life, which was the property of Al-Aulaqi. The next issue brought by the Plaintiff against the Defendants is a violation of the 5<sup>th</sup> Amendment. The 5<sup>th</sup> Amendment of the Constitution allows for, along with the well-known right against being compelled to self-incriminate, just compensation when the government of the United States seizes something, in this case a life. The final issue brought by the Plaintiff against the Defendants is the violation of the Bill of Attainder Clause. The Clause is within Article I, Section 9 of the Constitution. A Bill of Attainder is an act by a legislature that declares a specific person or a group guilty of a criminal act. As has been discussed throughout this paper a legislature summarily declaring someone guilty would be a violation of due process. It would remove the Article III court from being used to determine the guilt or innocence of a person. While in this case, Congress didn't declare Al-Aulaqi guilty, the Executive branch did and so did the intelligence agencies upon whose kill lists Al-Aulaqi was placed.

The Plaintiff has argued that a *Bivens* solution is warranted in the case, meaning that despite the fact that there is no federal statute that the government violated, that the Constitutional amendment violation creates a cause of action against the government. In the

actual *Bivens v. Six Unknown Named Agents* case (1971), Mr. Bivens was arrested without a warrant by the six federal agents. When his case went before a court, Mr. Bivens claimed that his 4<sup>th</sup> Amendment rights against unreasonable search and seizure had been violated. The counsel for the agents argued that the 4<sup>th</sup> Amendment did not apply as Bivens claimed it did and instead said that only state laws regarding privacy applied. When the case went before the Supreme Court, the Court ruled that the 4<sup>th</sup> Amendment did indeed apply to the case and damages can be awarded in a case where constitutional amendments have been violated (Bivens.)

The case of *Al-Aulaqi v. Panetta* was argued in front of the United States District Court for the District of Columbia on Friday, June 19<sup>th</sup>, 2013. On January 24<sup>th</sup>, 2014, the Court ordered that the Plaintiff bring more evidence to some why Al-Aulaqi was such an imminent threat to the United States of America. Since that date, there have been no updates on the case and the case has gone *in camera*, meaning that it is taking place behind the doors of the Judge's chambers. There is no certainty as to when or if a ruling on the case will be published.

The implications of the case are great. First, it is an attack on an American citizen on foreign soil. The citizen was not placed before an Article III court in order to plead his case. There was no ability to present exculpatory evidence, no access to counsel, and no neutral decision maker, which are the due processes that the Supreme Court have said are at least due in cases where liberty is being taken away. It is logical to think that at least this much due process, if not more, is necessary to take a person's life away.

The files on Al-Aulaqi and his activities, the Defense tells the Court, was seen by some of the top military personnel in the country and was reviewed by the Department of Justice. The Department of Justice is indeed required to review any potential lethal use of force against a United States citizen regardless of where they are located. One must keep in mind though that the Department of Justice is part of the Executive branch of the government, not part of the judiciary branch. The issue becomes the Executive asking the Executive to

review whether or not the Executive should be allowed to end the life of an American citizen. There is no check on the power of the Executive then.

Al-Aulaqi was not placed before a military tribunal either. None of the information on his actions that were such imminent threats has been released. He had been considered an imminent threat since 2010. He spent two years on C.I.A. and J.S.O.C. kill lists before he was finally killed in a drone strike. The drone strike also killed the other individuals in the car, including another American citizen. This is a clear violation of what even the most recent cases regarding due process have called for (Hamdi; Hamdan; Boumediene.) We see that even as recently as 2008, even those who are not citizens must have some form of due process before they are detained. It is not too far out to assume that a citizen of the United States must have some form of due process before his or her life is taken from him or her.

It is also important to note that this case also includes the death of Al-Aulaqi's son, a minor, in a separate attack. The attack occurred after Al-Aulaqi's death and again occurred in Yemen. Al-Aulaqi's son was not the target. The target was not actually killed in the attack. A total of seven people were killed in the attack, two of which were minors. The government claims that Al-Aulaqi's son was not the target and that the target of the attack was not killed in the attack. If this is true, then this calls into question just how accurate drone strikes are. It also should raise the question of why an American child was placed at risk of death in order to attack a terror suspect. What threat did that terror suspect pose that was so immediate and so destructive that it warranted the death of an American child?

Second, it is not impossible that an attack on an American citizen on American soil could occur. In fact, it is not even unconstitutional. In order to understand how such an attack could be constitutional, one must go as far back as 1878 to the Posse Comitatus Act (18 U.S.C. 67 §1385). The Act makes illegal the creation of a "posse comitatus" or essentially a militia in order to enforce the law. The Act originally states "From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly

authorized by the Constitution or by act of Congress...” The President, accordingly, cannot use the military within the United States of America to enforce law, unless Congress expressly authorizes it.

When the restriction within the Posse Comitatus Act is coupled with the allowance of presidential power within the A.U.M.F., it is possible that the President could use the military within the United States if it were being used to eliminate a threat to the American people associated with al Qaeda or the Taliban. In fact, the President has a military force within the United States that acts as a peace-keeping force. The military group is named the Consequence Management Reaction Force, or C.C.M.R.F., and is comprised of active and reserve members of the Army. The force typically acts to contain chemical, biological, radiological, nuclear, and high yield explosives (together these threats are known as C.B.R.N.E.). The group was used as recently as 2005 in the aftermath of Hurricane Katrina in New Orleans. In theory, the group could also be deployed if a C.B.R.N.E. threat came from an individual associated with al Qaeda or the Taliban in order to remove the threat. If drones are as safe and as accurate as is claimed by the President and his administration, it is not a far leap from C.C.M.R.F. then to the use of drones to neutralize a domestic threat instead.

## *Chapter 6*

### CONCLUSIONS

In attempting to answer my initial question, the previous five chapters pose more complicated questions regarding the use of drones in targeted killings rather than answering the originally posed question. The legality of drone strikes, both at a domestic and an international level, appears to be questionable at best. The morality of the attacks? Perhaps less so. The international law pertaining to targeted killings and assassination seems to make the practice exceptionally difficult to justify. It is not easy to ignore the striking similarity between a targeted drone strike and a political assassination. The only difference between them? The former is currently legal and uses brand-new state-of-the-art technology to keep the perpetrator safely away from the intended target and the latter is illegal according to both domestic law and international laws.

While there are many domestic Supreme Court cases that would appear to allow for the President to have the ultimate authority over issue of national security and international issue, one must take into account that the Constitution then may not apply when the President is acting on the international scene. There is an argument to be made that then citizens of the United States who travel abroad may open themselves up to attacks by drones or the revocation of their rights under the Constitution. But is staying at home, within the borders of the United States any safer? We know now that there are intelligence gathering agencies that exist within the United States that are monitoring phone calls, text messages, emails, social media, etc. in order to seek out threats to national security. We also know that American citizens have been placed on C.I.A. and J.S.O.C. kill lists in the past. There is an argument to be made theoretically that the Authorization for Use of Military Force Act could allow the President to remove the ban created in the Posse Comitatus Act. We know that the President has military forces in the United States that mobilize in order to help in times of crisis and that terrorist attacks fall in that category.

Given all that we know, it is not hard to replace that domestic military force with a remote controlled drone that could more safely and effectively (according to the President) remove terrorist threats. Lastly, we know that the United States has acted against American citizens who it has regarded as a threat in the past. Why, then, should it not be possible to mobilize a drone strike against an American citizen on American soil if the threat is imminent enough to demand such actions?

There are yet some things that remain that we do not know. There are no concrete reports on how accurate drones are. There is no information about how people are selected to be attacked by a target drone strike. There are no reports on just how many casualties have been caused by drone strikes overseas, nor is there any information on how many people have died despite not being the target. We have yet to learn the outcome of *Al-Aulaqi v. Panetta, et. al.* The case will be an important part of deciding just how much power the President possesses to attack American citizens on foreign soil. Will the recent habeas corpus cases such as *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush* rule over the lack of due process in the *Al-Aulaqi* case? Or will *United States v. Curtiss-Wright Export Corp.* hold and give the President the ultimate power to make decision effect foreign matters and national security? Is the targeted killing of an American citizen by the United States overseas a domestic or an international issue?

It seems as if until the methods, rational, and legality of targeted killings and the selection of targets become more clearly understood their use should remain illegal and the drone strikes should remain unused. The argument that they should be used and that their use will cause them to become legalized seems to be an abuse of the method of creation of customary international law. These killings through use of drone strikes are tantamount to assassination as it stands now. The only, very slight difference between targeted killings and assassinations is that it has been agreed upon that assassinations are illegal, whereas the legality of targeted killings is still in question. It is as if in order to be allowed to use assassinations once more, governments have renamed assassinations and gathered new technology to attempt to put the matter back on the table for more debate. Or perhaps they

are hoping to skip the debate by removing any information about how the method works or how the targets are decided.

Targeted killings used by the United States are justified by Congress through the use of self-defense. The issues that arise out of the use of a self-defense excuse are numerous. One is whether or not a state must wait to be attacked before they are allowed to retaliate or if a state may defend itself when an attack is imminent in order to prevent casualties. This leads to the question of how imminent must an attack be in order for a state to act. Why should a state wait to attack and risk the lives of its citizens and its natural resources in the process? How long can a self-defense attack last and how proportional are the methods used? How proportional should the self-defense be? How large must an attack (or potential attack) be to justify retaliation (or preemption)? Is an attack against one citizen enough? One-hundred? One-thousand? One-million?

Another issue is how long can a self-defense excuse be used? A decade must be too long to retaliate. Is one year too long of a retaliation then? Is one month? Self-defense must also be proportional. How many of your own people can you sacrifice to attack a target? How many of innocent-bystanders can you sacrifice to reach your end goal? That becomes difficult to ascertain when reports differ as to how many drone strikes have occurred, how accurate they are, and how many people have already died as a result of the attacks. Problems arise in the definition of those who are killed as well. Who is an enemy belligerent and who is a civilian? Even then, what sort of due process rights do enemy belligerents deserve, if any? What sort of due process rights does a citizen deserve before his or her life is taken in an attack? Surely the answer must be at least equal to, if not more, than the due process afforded to the enemy belligerent. What happens if an enemy belligerent is a citizen?

An issue that this paper does not discuss, but that is rather important, is how effect drones are in preventing terrorism. According to the Rise of the Drones meeting, many people in the countries in which the attacks are occurring see the attacks. They understand that it is the United States that has the technology to swoop from the skies in a plane without a pilot

inside to attack and kill someone near them. They see that there is some collateral damage done in these attacks and wonder if they are the next to die. They see villages being destroyed to get to one hostile individual, one enemy belligerent. The attacks on individuals in villages and towns in countries where there are no battlefields like Yemen and Pakistan appear to be creating a hatred of America. That hatred is reinforced through every attack, whether the attack is by soldiers on foot or by unmanned aircrafts. Individuals whose lives are effected by drone strikes are easier targets for terrorist groups looking to recruit new members to their cause. The use of drone strikes may or may not be effective at neutralizing current terrorist that may or may not be imminent threats to the national security of the United States of America. That is unknown, although the groups using the drones assure the American people that the drones are indeed effective. The problem becomes that yes, the United States may be ridding the world of old terrorist foes, but by doing so are they creating new and more enemies?

## FOOT NOTES

1. As there has not yet been a female in the position of President of the United States of America, this paper will use male pronouns when referring to the President.
2. There is little information on the proliferation of this technology, how accurate the drones are, or how soon other countries may have use of these same drones.
3. This ability is debatable due to the limited information that has been released by the government regarding drones and their targeting abilities.
4. However, there is debate on how imminent a threat must be to skip verification of the threat and go straight to a targeted killing of said threat.

## BIBLIOGRAPHY

- 18 U.S.C., § 67-1385 (1878). Web. 03 Jan. 2014.
- 50 U.S.C., § 1541 (2001). Web. 03 Jan. 2014.
- Al-Aulaqi v. Panetta. United States District Court for the District of Columbia. 19 July 2013. Print.
- Baker v. Carr. The Supreme Court of the United States of America. 26 Mar. 1962. Print.
- Bell, Josh. "American Civil Liberties Union." American Civil Liberties Union. N.p., 19 July 2013. Web. 09 Mar. 2014.
- Bivens v. Six Unknown Named Agents. The Supreme Court of the United States of America. 21 June 1971. Print.
- Cassese, Antonio. *International Law*. Oxford: Oxford UP, 2005. Print.
- Center for Constitutional Rights. "Al-Aulaqi v. Panetta." Center for Constitutional Rights. Center for Constitutional Rights, 2012. Web. 9 Mar. 2014.
- Costanzo v. Tillinghast. The Supreme Court of the United States of America. 5 Dec. 1932. Print.
- Ex Parte Milligan. The Supreme Court of the United States of America. 3 Apr. 1866. Print.
- Ex Parte Quirin. The Supreme Court of the United States of America. 31 July 1942. Print.
- Guiora, Amos. "Targeted Killings as Active Self-Defense." *Case Western Research Journal International Law* 36 (2004): 319-34. Social Science Research Network. 29 June 2010. Web. 5 June 2013.
- Harris, D. J. *Cases and Materials on International Law*. London: Sweet & Maxwell, 1998. Print.
- Higgins, Rosalyn. *Problems and Process: International Law and How We Use It*. Oxford: Clarendon, 1994. Print.
- H.R. 1960, 113th Cong., *Congressional Record* (2014) (enacted). Web. 03 Jan. 2014.
- H.R. 2647, 111th Cong., U.S. G.P.O. (2011) (enacted). Web. 03 Jan. 2014.
- H.R. 4310, 112th Cong., *Congressional Record* (2013) (enacted). Web. 03 Jan. 2014.
- H.R. 6166, 109th Cong., U.S. G.P.O. (2006) (enacted). Web. 03 Jan. 2014.
- The Prize Cases. The Supreme Court of the United States of America. 10 Mar. 1863. Print.

- "Rise of the Drones." Rise of the Drones. CSPAN. CSPAN, 23 Mar. 2010. CSPAN. CSPAN, 23 Mar. 2010. Web. 2 Feb. 2014.
- MacDonald, Ken. "Drone Strikes under International Law." Drone Strikes under International Law. Okinaga Room, Wadham College, Oxford University, Oxford, Oxfordshire, United Kingdom. 28 May 2013. Lecture.
- Tomselliott. "Sen. Frank Church Warns of How Easily Government Can Abuse Expanding Surveillance Capabilities :: Grabien - The Multimedia Marketplace." Sen. Frank Church Warns of How Easily Government Can Abuse Expanding Surveillance Capabilities :: Grabien - The Multimedia Marketplace. Grabien, 5 Aug. 2013. Web. 06 Apr. 2014.
- United Nations. Human Rights Council. Study on Targeted Killings. By Human Rights Council. N.p.: United Nations, n.d. Print.
- United Nations. Treaties Series. Vienna Convention on the Law of Treaties; Vienna, 23 May 1969. By United Nations. London: H.M.S.O., 1971. Print.
- United States of America. Office of the President of the United States of America. U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities. N.p.: n.p., 2013. Print.
- United States Senate. "Church Committee Created." U.S. Senate: Art & History Home. United States Senate, n.d. Web. 05 Apr. 2014.
- United States v. Curtiss-Wright Export Corp. The Supreme Court of the United States of America. 21 Dec. 1936. Print.
- The White House, Office of the Press Secretary. "Remarks by the President at the National Defense University." The White House. The Office of the Press Secretary, 23 May 2013. Web. 03 Jan. 2014.
- Youngstown Sheet & Tube Co. v. Sawyer. The Supreme Court of the United States of America. 2 June 1952. Print.