

DRONE ON: THE COMMANDER IN CHIEF POWER TO TARGET AND KILL AMERICANS

MICHAEL STOKES PAULSEN*

INTRODUCTION

My proposition is a simple but bracing one: The President of the United States, in his capacity as military Commander in Chief of the nation's armed forces in time of constitutionally authorized war, has the plenary power and discretion under the U.S. Constitution to target and kill specific individuals that he in good faith determines to be active enemy combatants engaged in lawful or unlawful hostilities against the United States.

By "active enemy combatants" I mean persons affiliated with an enemy force or power who have not been captured, who have not surrendered, and who have not laid down their arms and ceased their war-waging activities against the United States. My assumption in this essay is that such enemy combatants *might include U.S. citizens*. My legal position is that, where U.S. citizens engage in war against the United States, the war power of the United States may be employed against them, *just as it could be employed against non-U.S. citizens engaged in war against the United States*.

I further maintain that, in targeting and killing enemy combatants in time of war, the President, as Commander in Chief, may use any and all military means and technologies of war available to him, including drone technology. The President may employ such means and technologies wherever the enemy is present, as the President judges appropriate. And he may do so without re-

* Distinguished University Chair and Professor of Law, University of St. Thomas School of Law. This essay was adapted from remarks given at the 2014 Federalist Society Annual Student Symposium at the University of Florida in Gainesville, Florida. My thanks to the other panelists, and to Robert Delahunty, for comments. My thanks also to the editors of the *Harvard Journal of Law & Public Policy* for outstanding, patient, indulgent editing, and for invaluable research assistance and citation work. All errors remain my responsibility.

gard to whether international law purports to restrict such killings, without regard to whether any (otherwise) applicable U.S. statute might be thought to restrict such action, and without resort to any further U.S. legal process or judicial approval.

In setting forth this position, I wish to take as my paradigm case-illustration what might be thought, in theory, to present very nearly the hardest factual case for application of such a view: (i) the targeting of a *specific individual*; (ii) who is a *U.S. citizen*; (iii) for *killing*; (iv) by *aerial drone attack technology*; (v) by *unilateral presidential decision*; (vi) *without* any form of judicial legal process or notice; (vii) *irrespective of* any constraints that might be thought imposed by *international law* or other non-constitutional *domestic law*; (viii) *wherever* that individual might be found.

This was essentially the situation presented by the targeted killing of Anwar al-Awlaki, a U.S. citizen and al Qaeda operational commander, by drone attack in Yemen in 2011. My claim in this essay is that this seemingly hard case is actually a very easy case for the constitutional legitimacy of unilateral presidential military action under the President's Commander in Chief Clause authority. To see that this is an easy case, all one must do is think systematically about a series of discrete propositions. If one accepts each proposition as legally correct, the conclusion follows that the targeted killing by drone of al-Awlaki—and of others in similar circumstances—fully complies with the Constitution.

My discussion is organized as a series of answers to a series of questions:

First, is there a constitutionally authorized state of war? The answer is *yes*: The Authorization for Use of Military Force (AUMF) of September 18, 2001¹ is a legally operative constitutional authorization of war.

Second, was al-Awlaki a legitimate military target—an enemy combatant falling within the scope of this war authorization? The answer, again, is *yes*: Anwar al-Awlaki was a person who fit within the scope of the AUMF's authorization for use of force against enemy combatants.

Third, are decisions about targeting and killing enemy combatants within the President's exclusive Commander in Chief

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

Clause power to wage and conduct war, when authorized? The answer is a resounding *yes*: The President might legitimately and lawfully judge Anwar al-Awlaki to be an enemy combatant, covered by the September 18, 2001 AUMF.

Fourth, is al-Awlaki's citizenship relevant? Here, the correct answer is *no*—or at least it *should be* “no”: The Supreme Court wrongly seems to think that citizenship is, sometimes, relevant.² The correct answer is that, in terms of the constitutional application of the war power, the citizenship of an enemy combatant, fighting for a force or power with whom the United States is at war, is not relevant, so long as that combatant falls within the description of persons or groups subject to the application of the war power.

Fifth, does there exist in our constitutional system what might be called a “Due Process of *War*” Clause that requires further judicial authorization—or some form of “kill warrant”—as a precondition to targeting an enemy combatant? The answer is *no*, or again, it should be “no”: The same Supreme Court decision that wrongly seems to make citizenship relevant also seemingly implies, equally wrongly, that targeting decisions are subject to judicial review or some other form of judicial legal process, at least in the case of U.S. citizen enemy combatants.³

Sixth, what is the relevance of international law? The answer is that international law is primarily *a political and diplomatic constraint* on war-waging,⁴ not a domestic legal constraint that can alter or displace the constitutional powers of the President as Commander in Chief.

A caveat: In setting forth and developing these propositions, I wish to emphasize that the views expressed here are points of legal analysis, not of military, strategic, or tactical correctness, moral propriety, or anything else. I am setting forth a purely legal argument. The essence of that argument is that Anwar al-Awlaki was a legitimate military target in time of constitutionally authorized war against an enemy force or power, al-Awlaki being an operational commander for al Qaeda of the

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

3. See *id.*

4. Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 YALE L.J. 1762, 1823 (2009).

Arabian Peninsula, an organization affiliated with al Qaeda, an entity with whom the United States is at war.

I. CONSTITUTIONALLY AUTHORIZED WAR

The first step of the argument is easy: The United States is in a state of constitutionally authorized war. On September 18, 2001, President George W. Bush signed into law a congressional resolution styled an “Authorization for Use of Military Force” (often referred to as the “AUMF”),⁵ the essential legal equivalent of a declaration of war, within Congress’s specific enumerated constitutional power “to declare War.”⁶ The September 18, 2001 AUMF is arguably the most sweeping declaration of war in our nation’s history. By its terms, it specifically authorizes the President to:

use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁷

In addition, somewhat more ambiguously but still significantly, in one of the “whereas” clauses preceding this specific authorization, Congress recited and embraced the proposition that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States,”⁸ a sweeping—and perhaps somewhat surprising—congressional endorsement of unilateral presidential military action in this area, arguably extending even beyond the scope of the specific authorization for use of force.

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

6. As I have written elsewhere, Congress has the power to declare war and the President does not. See Michael Stokes Paulsen, *The War Power*, 33 HARV. J.L. & PUB. POL’Y 113 (2010); Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 239 (2002); Michael Stokes Paulsen, *How to Avoid an Unconstitutional War: A Beginner’s Guide for Presidents and Congresses*, PUB. DISCOURSE, Sept. 9, 2013, <http://www.thepublicdiscourse.com/2013/09/10877> [<http://perma.cc/F2JA-BNPJ>].

7. § 2(a), 115 Stat. at 224.

8. Pmbl., 115 Stat. at 224.

The breadth of the AUMF's war-waging authorization is, as I have discussed at greater length in other writing,⁹ truly stunning: The *President* determines whether a *nation, organization, or person* possesses a sufficient connection to the attacks of September 11, 2001 by virtue of having been an organization or individual that planned, authorized, committed, or *aided*—a very broad, elastic term—such attacks. If so, the President is authorized to use force against such nation, organization, or person. Further, if the President determines that the described person, nation, or group *harbored*—an equally capacious term—*such organizations or persons* then he is authorized to use force against such person, nation, or group as well. The AUMF is thus a sweeping war authorization against nations, groups, persons, and networks of affiliations. The authority is cast in such broad, extended terms for a purpose: “[I]n order to prevent any future acts of international terrorism” by such nations, groups, or persons.

It does not take much imagination, or any stretching at all, to see that this war authorization extends to the al Qaeda radical Islamist terrorist network as a whole, and all who affiliate with it and embrace its continued goals of international terrorism and war on America and Americans, or who provide assistance or support of any kind for such network's activities, or who harbor its allies, affiliates, or specific persons. It takes but limited imagination to see that the AUMF might apply to Islamist or jihadist groups *and persons* who could fairly be cast as co-belligerents with al Qaeda and its affiliates in such war or terrorism against the United States.

Thus, whatever one's views as to the correct understanding of the Constitution's allocation of war powers—whether one tilts in the direction of a unilateral presidential power to initiate offensive military hostilities¹⁰ or, as I think correct, adheres to the view that, outside of a few limited and exceptional circumstances of defensive war-making, emergencies, and implications from strict necessity, *Congress* alone has the constitutional

9. See Paulsen, *The War Power*, *supra* note 6, at 121–23; Paulsen, *Youngstown Goes to War*, *supra* note 6, at 221–23.

10. *E.g.*, Robert J. Delahunty & John Yoo, *Making War*, 93 CORNELL L. REV. 123, 167 (2007) (“[W]e find that the Declare War Clause was *not* understood to vest Congress with the exclusive power to wage war or, even more broadly, to control any governmental activity that might even *signal* war.”).

power to take the nation from a condition of peace to a condition of war¹¹—it is clear that the President’s executive war-waging powers and discretion is at its absolute constitutional maximum with respect to persons, nations, or organizations falling within the scope of the September 18, 2001 AUMF. The AUMF adds all of Congress’s constitutional war-initiation powers to all of the President’s executive war-making powers and Commander in Chief powers. In terms of the familiar “categories” of Justice Jackson’s widely cited concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,¹² this is a “Category I” situation where presidential power is at its apex.¹³ The overall result is to vest in the President enormous power to wage war against individuals, groups, organizations, networks, affiliates, allies, and supportive harboring regimes meaningfully connected (in the President’s judgment) to those who planned or facilitated the attacks of September 11, 2001. That quite obviously includes al Qaeda and its affiliates and allies.¹⁴

11. I believe that this view is better supported by the original meaning of the Constitution’s language, the logic of its structure, and historical evidence of original intention and understanding. See Paulsen, *The War Power*, *supra* note 6, at 113–17; Paulsen, *Youngstown Goes to War*, *supra* note 6, at 237–39.

12. 343 U.S. 579 (1952).

13. See Paulsen, *Youngstown Goes to War*, *supra* note 6, at 222–23.

14. Does it also include members of the organization of jihadist terrorist now known as “Islamic State” (also sometimes known by the acronyms “ISIS” and “ISIL”)? Yes, if the President determines that ISIS, as an organization, and necessarily including new members who join it, is, or once was, an offshoot or affiliate of an “organization” (al Qaeda) that planned, authorized, committed or aided the attacks of September 11, 2001. Plainly, there is a reasonable basis for such a conclusion, given that ISIS is, in some sense, the successor organization of al Qaeda in Iraq (AQI). The fact that al Qaeda has now disassociated itself from ISIS does not alter this conclusion. The authority to use force is a matter of objective legal authority, derived from statutory language, applied to historical facts, and carried out with respect to current factual circumstances as judged appropriate by the President as Commander in Chief of the nation’s armed forces. Such authority is not affected by the decision of an enemy, fitting the statutory description of the AUMF, to disassociate itself from a splinter group that also fits the statutory description. Indeed, such consequence would border on the absurd: an enemy force could, by *its* own actions, deprive the President of part of his power to wage war pursuant to a congressional authorization, by the expedient of self-dividing the group and declaring a part of it no longer to be covered by the authorization. In addition, though not part of the operative language of authorization, the Preamble of the Authorization for Use of Military Force does, as noted above, recite Congress’s view that the President “has authority under the Constitution” to “take action to deter and prevent acts of international terrorism against the United States.” Authorization for Use of Military Force, Pub. L. No. 107-40, pmb1., 115 Stat. 224 (2001).

The September 18, 2001 AUMF contains no time limitation. That means that President Bush *was*, President Obama *is*, and President Obama's successor *will be* (absent a change of circumstance or legal situation) authorized to wage war against al Qaeda and allied jihadist Islamist entities waging war against the United States, and against all of the members of such organizations, with all the powers at the President's disposal.

II. LEGITIMATE MILITARY TARGET AS AN ENEMY COMBATANT (WITHIN SCOPE OF AUMF)

The second step of the argument is also easy. Anwar al-Awlaki was, without a doubt, an active member of—indeed, an operational commander within—the al Qaeda network, specifically al-Qaeda of the Arabian Peninsula (AQAP), an al Qaeda “franchise,” as it were. Anwar al-Awlaki made the transition from radical Islamist cleric resident in the United States, to al Qaeda recruiter, to—ultimately—an al Qaeda terrorist operational commander.¹⁵

15. This is obviously a broad-brush summary. The support for these conclusions, and the details supporting them, is set forth at length in many public sources, now including declassified portions of the Department of Justice's official legal memorandum justifying the targeted killing of al-Awlaki. Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to the Att'y Gen., *Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi* 21 (July 16, 2010) [hereinafter Barron Memo] (“High-level government officials have concluded, on the basis of al-Aulaqi's activities in Yemen, that al-Aulaqi is a leader of AQAP whose activities in Yemen pose a ‘continued and imminent threat’ of violence to United States persons and interests. Indeed, the facts represented to us indicate that al-Aulaqi has been involved, through his operational and leadership roles within AQAP, in an abortive attack within the United States and continues to plot attacks intended to kill Americans from his base of operations in Yemen. The contemplated DoD operation, therefore, would be carried out against someone who is within the core of individuals against whom Congress has authorized the use of necessary and appropriate force.”). See also Peter Finn, *Al-Awlaki directed Christmas ‘underwear bomber’ plot, Justice Department memo says*, WASH. POST, Feb. 10, 2012, http://www.washingtonpost.com/world/national-security/al-awlaki-directed-christmas-underwear-bomber-plot-justice-department-memo-says/2012/02/10/gIQArDOt4Q_story.html [http://perma.cc/B84L-4J55]; Terry Frieden, *Fort Hood shooting report faults FBI handling of accused shooter's e-mails*, CNN (July 20, 2012, 1:24 AM) <http://www.cnn.com/2012/07/19/politics/fort-hood-report/> [http://perma.cc/W8KE-EMLP]; Catherine Herridge, *Awlaki Trained Suspected Christmas Jet Bomber How to Detonate Underwear, Document Reveals*, FOX NEWS, Oct. 4, 2011, <http://www.foxnews.com/us/2011/10/04/al-awlaki-trained-suspected-christmas-day-jet-bomber-how-to-detonate-underwear> [http://perma.cc/

As such, al-Awlaki was a legitimate military target. He had not laid down arms. He had not surrendered. He had not ceased his war-making activities. He continued to be engaged in making war and committing acts of terrorism against the United States. That made him both an enemy combatant and—more specifically—an *unlawful* combatant, having committed acts in violation of the traditional law of war. The latter status made many of al-Awlaki's acts punishable by the U.S. military authority (under the direction of the Commander in Chief, of course)¹⁶ as “war crimes,” so that he lawfully might have been subjected to such military punishment, including the punishment of death, *even had he surrendered*.¹⁷ But the fact that al-Awlaki, as an unlawful enemy combatant, might have been subjected to military punishment for violation of the law of war, had he surrendered or been captured, does not alter the fact that he remained an enemy combatant, and thus a lawful, proper military target, while he remained at large.

4PNR-RA4L]; David Johnston & Scott Shane, *U.S. Knew of Suspect's Tie to Radical Cleric*, N.Y. TIMES, Nov. 10, 2009, <http://www.nytimes.com/2009/11/10/us/10inquire.html?pagewanted=print> [<http://perma.cc/FRP3-24CU>]; Charlie Savage, *Christmas Day Bomb Plot Detailed in Court Filings*, N.Y. TIMES, Feb. 10, 2012, http://www.nytimes.com/2012/02/11/us/underwear-bomb-plot-detailed-in-court-filings.html?_r=0&pagewanted=print [<http://perma.cc/5GEX-NEW7>].

16. In *Hamdan v. Rumsfeld*, the Supreme Court held (in my view quite incorrectly and indefensibly) that the military power to punish unlawful enemy combatants for offenses against the law of war is not part of the Commander in Chief Clause power of the President, but requires separate statutory authorization of (and thus may be limited by) Congress, and further, that such power is subject to constraints imposed by international law. 548 U.S. 557, 591 (2008). Congress responded to the Supreme Court's decision by broadly and unequivocally authorizing the President to take such actions, insofar as congressional authority was deemed necessary, and further, embraced the President's *constitutional* authority to determine how to interpret and apply any applicable standards of international law. Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(3), 120 Stat. 2600, 2632 (2006). See also Paulsen, *supra* note 4, at 1837.

17. It should be noted, however, that President George W. Bush's original executive military order did not purport to authorize military tribunal proceedings against United States citizens and that Congress's subsequent enactment of the Military Commissions Act of 2006 followed suit in this regard. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006); Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

III. ACTION WITHIN SCOPE OF COMMANDER IN CHIEF POWER

Anwar al-Awlaki was thus a lawful military target in time of constitutionally authorized war. It therefore lay within the constitutional military power of the President, acting pursuant to his authority under the Commander in Chief Clause, to order an attack, through military means, directed against al-Awlaki personally. The Commander in Chief Clause does not authorize the President to declare or initiate a condition of war, but it does give the President the plenary power to *conduct* war. That includes all matters of military strategy and tactics, all rules of engagement with the enemy, all choices concerning the use of available weaponry, all decisions with respect to military objectives and targets, and all matters concerning the capture, detention, interrogation, and military punishment of enemy combatants.¹⁸

Some of these propositions about the scope of the Commander in Chief Clause power of the President may be debatable. But I know of no one who seriously contests the idea that the choice of legitimate military targets and the choice of weapons lies within the core of the Commander in Chief power. Drone technology is simply another form of weapons technology, no different in that sense from weapons technology innovations throughout history, and less troubling than many others—nuclear weapons, for example. If anything, drone attacks are, potentially, likely to be more discriminating and proportional than many other forms of weaponry.¹⁹ The choice to use drone attacks—where, how, when, against whom—is for the President. The choice to use such an attack against Anwar al-Awlaki was for the President.

18. I have developed this set of propositions in other writing. See Paulsen, *supra* note 4, at 1839–42; Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 GA. L. REV. 807, 828–29 (2006); Paulsen, *The War Power*, *supra* note 6, at 126. In some respects, my statement of the scope of the President's Commander in Chief Clause power is contested. The Supreme Court's decisions in *Hamdi* and *Hamdan* are in tension with (or outright contradiction of) some aspects of this position. I believe that those decisions are, to that extent, wrong. See Paulsen, *supra* note 4, at 1834–39.

19. I take up the question of collateral damage and mistaken targets later. See *infra* Part VII.

IV. THE RELEVANCE AND IRRELEVANCE OF CITIZENSHIP

Anwar al-Awlaki was a U.S. citizen. Does that make a difference? The long and short of it is: not much. Targeted drone attacks against persons or entities embraced by the AUMF are exercises of the *war* power, not the law enforcement power. It is absolutely clear that the war power may be employed against U.S. citizens who are engaged in war-waging activities against the United States.²⁰ This has been consistently recognized in the law, even in recent decisions of the U.S. Supreme Court that may have been reluctant to recognize the full constitutional scope of the war power.²¹ Put more simply: U.S. citizens can be enemy combatants. And where they are enemy combatants, they can be dealt with under the war power rather than the law enforcement power.

Obviously, that is one of the legal lessons incident to the Civil War: The fact that the enemy army consists entirely of persons that are rightly understood to be U.S. citizens does not mean that U.S. forces may not shoot at such persons when they are engaged in armed combat against the forces of the United States. The United States may apply the war power against such persons and forces.²² In concrete terms, this means that U.S. troops can shoot at Robert E. Lee, commanding enemy forces in the arena of combat. One may target an enemy commander of enemy forces, no matter that he may be, legally, one of your own citizens.

Now, Anwar al-Awlaki is no Robert E. Lee. Except that *legally*, in this situation, he is. Droning al-Awlaki is like a Union soldier taking a shot at General Lee. That a nation might, alternatively, or additionally, charge such a person with the domestic law criminal offense of treason does not mean that a nation may not also treat them as enemy combatants as a matter of the law of war. The Constitution authorizes either, or both, of these approaches.²³

20. *Ex parte Quirin*, 317 U.S. 1, 37–38 (1942).

21. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518–19 (2004).

22. The Civil War era Supreme Court rightly embraced this proposition in *The Prize Cases*, 67 U.S. (2 Black) 635, 666–67 (1862) (“When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a *war*.”).

23. *See id.* at 673.

That is the lesson, also, of the Nazi saboteurs case, *Ex parte Quirin*,²⁴ the unanimous 1942 Supreme Court decision upholding the constitutionality of the use of military commission proceedings, as an application of the war power and enforcement of the laws of war, against captured Nazi spies and saboteurs, including American citizens.²⁵ In particular, there is a lesson in the way that *Quirin* distinguished the early Reconstruction-era case *Ex parte Milligan*,²⁶ which struck down the use of military commission proceedings against Indiana residents for conspiracy and treason.²⁷ *Milligan* held that the U.S. government cannot employ military tribunals as, in effect, civilian criminal law-enforcement substitutes against (what the Court regarded as) civilian noncombatants *not* affiliated with an enemy force or power.²⁸ *Quirin* held that the U.S. government *can* employ the war power against enemy combatants—unlawful or lawful—who happen to be U.S. citizens.²⁹ Even *Hamdi v. Rumsfeld* agreed with that proposition: “There is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”³⁰

The right bright line is not between *citizens* and *non-citizens*, as Justice Scalia mistakenly thought in his badly confused separate opinion in *Hamdi*.³¹ The right bright line is between *combatants*—lawful and unlawful—to whom you *can* apply the war power, and *civilian noncombatants*, to whom you cannot. What made the Japanese internment wrong—and what made the Japanese cur-

24. 317 U.S. 1 (1942).

25. *Id.* at 44.

26. 71 U.S. (4 Wall.) 2 (1866).

27. *Id.* at 121–22.

28. *Id.*

29. 317 U.S. at 37–38 (“Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.”).

30. 542 U.S. 507, 519 (2004).

31. *See id.* at 554–78 (Scalia, J., dissenting). Scalia’s view was that the U.S. government may never hold U.S. citizens as enemy combatants, pursuant to the war power, unless Congress has formally suspended the privilege of the writ of habeas corpus; and, further, that the Court’s unanimous decision in *Quirin* was (evidently) wrong. *See id.* at 569, 572 (“[*Ex Parte Quirin*] was not this Court’s finest hour.”). Scalia’s opinion was joined by Justice Stevens—a sure signal that something must have gone awry.

few and internment cases of the Supreme Court, *Hirabayashi v. United States*³² and *Korematsu v. United States*,³³ wrong—is that they upheld the use of military power to restrain the liberty of concededly innocent civilian noncombatants, on the basis of race or ethnicity. That action was especially egregious because not only did it exceed the legitimate scope of the military power against persons, but it was employed against categories of *U.S. citizens*, and on the basis of race or ethnicity to boot. But had *Hirabayashi* or *Korematsu* been fighting for the enemy, or been engaged in sabotage or espionage for the enemy, that would be an entirely different story. In such an event, the war power—the power to capture, detain, and punish pursuant to military authority—would have been validly brought to bear, just as it was against the Nazis (including Americans) in *Quirin*.³⁴

V. “DUE PROCESS OF WAR”?

That is the correct substantive distinction: enemy combatants (be they lawful or unlawful, citizen or non-citizen) versus civilian noncombatants not associated with the enemy force (be they conspirators, criminals, or traitors in some non-law-of-war civilian domestic law sense). Enemy combatants of all stripes are legitimate targets while they remain at large and in the relevant field of battle.

But who makes the determination as to a whether a particular person—a target—is an enemy combatant and thus subject to the war power? I submit that, ultimately, *constitutionally*, that determination is vested *solely in the President*, as military Commander in Chief in time of constitutionally authorized war. Now, that is a rather bracing proposition, or at least it might be thought so by some lawyer-types, who often possess an acquired fondness for judicial legal process. But it is a correct

32. 320 U.S. 81 (1943).

33. 323 U.S. 214 (1944).

34. On the incorrectness of *Hamdi*, *Hamdan*, and *Boumediene*, on the incorrectness of *Hirabayashi* and *Korematsu*, and on the principle that the Court should have sustained the exercise of presidential war power as Commander in Chief in the former three situations and invalidated it in the latter two, see Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for its Own Interpretation?*, 103 NW. U. L. REV. 857, 900 n.129 (2009). On the wrongness of *Hamdi*, *Hamdan*, and *Boumediene* generally and specifically, see Paulsen, *supra* note 4, at 1768–69, 1813 & n. 132, 1823–41.

proposition. It follows as a necessary incident of the idea that the President, as Commander in Chief, has the constitutional power to conduct hostilities against an enemy, including the selection of appropriate targets. Yes, that allows for the possibility of the President making targeting mistakes. Yes, that allows for the possibility of the President abusing or misusing his military power. But that is simply a consequence of the Constitution's allocation of power to the President as Commander in Chief and the resulting vesting of responsibility for such decisions in a single civilian, elected official. The buck stops with the President.

That is all the "due process" that the Constitution requires, or permits, as to the Commander in Chief's military targeting decisions. By virtue of the Constitution's vesting of military authority in the President, the President's military targeting decisions satisfy the requirement of being conducted in accordance with the law of the land. Recall that *the President*—and no other official—ultimately has the power to choose the targets, tactics, techniques, and technologies of war waging, as an aspect of the Commander in Chief Clause power. *The courts do not*. Indeed, the very idea that the courts could review wartime targeting decisions of the Commander in Chief—With what? By requiring a "kill warrant" of some type?—is almost absurd. In addition to being impractical, such a requirement is unconstitutional. Congress's war authorization is all the authorization constitutionally needed, and triggers the full extent of the President's Commander in Chief Clause powers.

Now, this position is *not* consistent with the reasoning of *Hamdi*, but that is because *Hamdi* is wrong. Indeed, *Hamdi* is, on the point in question, arguably one of the most profoundly wrong, confoundingly incoherent decisions ever rendered by the Court in the area of war powers, exceeded in its wrongness, perhaps, only by the decisions that followed a few years later in *Hamdan* and *Boumediene*. *Hamdi* holds that captured enemy unlawful combatants who are also U.S. citizens have some not-precisely-specified due process right to a hearing, of some unspecified type, to determine their status as enemy combatants or not.³⁵ The decision is *textually* incoherent in its limitation to citizens, of course: The Fifth Amendment right not to be deprived of liberty "without due pro-

35. See *Hamdi*, 542 U.S. at 533.

cess of law" extends to any *person*, without differentiation based on citizenship status. The decision is *practically* incoherent, in that the exact hearing required is unspecified, and apparently can be conducted by executive and military officials.³⁶ Yet even this is not exactly clear, because the holding itself appears to contemplate judicial power to review the adequacy of such hearings.³⁷ It is difficult to view the Due Process holding of *Hamdi* as anything other than an *ad hoc*, judicially crafted political compromise, lacking any meaningful principle. (*Mathews v. Eldridge*,³⁸ the Due Process "balancing of interests" precedent on which the Court relied, makes all things possible.) Justice Thomas's dissent had it right: The process that the Constitution requires, with respect to wartime prisoner detentions, is the process that the military Commander in Chief, to whom the Constitution assigns power with respect to such determinations, judges to be appropriate.³⁹ If further argument were needed, *Hamdi* itself demonstrates the inappropriateness of judicial interference with such executive decisions. The lack of judicial expertise and the lack of doctrinal or practical coherence in such judicial efforts show the wisdom of the Framers in vesting such decisions solely in a single set of hands: those of the President as Commander in Chief (a point also made in Justice Thomas's dissent in *Hamdi*).⁴⁰

But the drone critics have a point: If *Hamdi* were right, its "logic" indeed would seem to apply no less to battlefield targeting decisions than to war prisoner detention decisions, at least where an American citizen is a target. After all, the "interests" in the balance are surely greater for the citizen in the case of being targeted for killing than in the case of being held in military custody. But logical reasoning only yields correct conclusions if the premises are sound. The right way to think about *Hamdi* is to apply this process of principled reasoning in the reverse direction: It seems plain that wartime military targeting decisions are committed to the judgment of the President as military Commander in Chief. Period, full stop. If there is no persuasive ground for distinguish-

36. *Id.*

37. *Id.*

38. 424 U.S. 319, 334–35 (1976).

39. *Hamdi*, 542 U.S. at 580–86 (Thomas, J., dissenting).

40. *Id.* at 580–81.

ing battlefield targeting and prisoner detention decisions, then the correct conclusion is simply that *Hamdi* is wrong.⁴¹

The same goes for Fourth Amendment arguments.⁴² For essentially the same reason that Fifth Amendment due process is satisfied by the President's military wartime determinations concerning whom to attempt to kill or capture, the Fourth Amendment "reasonableness" of war-waging activities that might (otherwise) fit the description of a "search" or "seizure" is subsumed within the fact that the executive is engaged in the conduct of war and the affected person is a legitimate military target—that is, is properly subject to application of the war power. To analyze such war activities in terms of the categories that apply to conventional law enforcement (as, for example, the Obama Administration OLC Memorandum and White Paper do)⁴³ is really to miss the point. The point is that, in time of constitutionally authorized *war*, the waging of war against enemy forces will involve "searches" and "seizures" that, in a domestic law enforcement context, might be thought unreasonable (or, under applicable precedents, to require judicial warrants) but that, in the context of waging *war*, cannot reasonably be labeled unreasonable.

Note that this is not at all to say that the Constitution does not apply in times of war—that in time of war the laws go silent (*inter arma silent leges*). Rather, it is to say that, in time of war, and in the context of war, certain provisions of the Constitution apply *differently* than they would in time and context of peace and of ordinary domestic law enforcement.⁴⁴

41. I set to one side, as not worthy of serious discussion, any proposition that *Hamdi* is right because the Supreme Court says it is. For general discussion of (essentially) every possible variant on this rudimentary mistake, see Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227 (2008); Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706 (2003); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

42. See Barron Memo, *supra* note 15, at 38–41.

43. *Id.* (citing and discussing, inter alia, *Tennessee v. Garner* and *Scott v. Harris*, precedents concerning the appropriate degree of police force in various "pursuit" situations); U.S. 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 5, 9 (2011) [hereinafter DOJ White Paper], available at <http://fas.org/irp/eprint/doj-lethal.pdf> [<http://perma.cc/SEM9-AZBP>].

44. Lincoln made this salient observation a number of times in publicly defending his actions against charges of improper use of executive power. He never ar-

This position concerns people. It should. It is, alas, distressing to think that a constitutional state of war changes—significantly, sometimes hugely—the application of important constitutional provisions concerning individual liberty. If I may be forgiven for making an impolitic, but I think correct, legal observation: *War changes things*. The legal condition of war triggers the full scope of the Commander in Chief Clause power to wage war against identified enemies. Those enemies might include U.S. citizens as well as other persons, and the legal status of such persons as enemies in time of war affects the application of other constitutional provisions to those persons. That is the reality—an unpleasant reality perhaps—but that is surely among the least unpleasant realities of war. There is much that is horrible and regrettable about war. But on the scale of war’s horrors, the fact that individuals properly subject to the constitutional application of the war power have, under such circumstances, a lower level of practical due process and Fourth Amendment rights, ranks relatively low on the list.

VI. THE RELEVANCE AND IRRELEVANCE OF INTERNATIONAL LAW

Then there is the question of international law. A little over five years ago, at a Federalist Society conference, I gave a presentation entitled “The Fog of International Law,” posing the question of

gued that the Constitution did not apply to the Civil War. Quite the contrary, practically his entire justification for fighting the Civil War was a *constitutional* one: that the Union under the Constitution did not permit unilateral dissolution by a constituent part or parts of the whole, and that the obligation of the presidential oath required him to act on this view and preserve the Union, and to seek to execute the laws throughout the Union and to protect the rights of loyal U.S. persons throughout the Union. But Lincoln did argue that the Constitution’s provisions in certain respects apply differently in time of war than in time of peace:

If I be wrong on this question of constitutional power, my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or invasion, the public safety requires them, which would not be constitutional when, in the absence of rebellion or invasion, the public safety does *not* require them: in other words, that the Constitution is not, in its application, in all respects the same, in cases of rebellion or invasion involving the public safety, as it is in time of profound peace and public security. The Constitution itself makes the distinction; and I can no more be persuaded that the Government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace

Abraham Lincoln, Letter to Erastus Corning and Others, in *LINCOLN: POLITICAL WRITINGS AND SPEECHES* 172, 178 (Terrence Ball ed., 2013).

the force of international law as a matter of United States law, and asking the further question of who gets to interpret and apply the content of such law for the United States. A few years later, I published a greatly expanded version of that talk as a law review article, in which I argued that international law is only U.S. law to the extent the U.S. Constitution makes it so, can never be applied in contravention of powers and rights specified in the U.S. Constitution, and even where it is not in conflict with the Constitution, always remains subject to the U.S. Constitution's supremacy and assignments of powers.⁴⁵ That is to say, for U.S. actors, the U.S. Constitution is supreme over international law. International law, to the extent its dictates produce determinate commands or obligations in conflict with the U.S. Constitution, including impairment of a U.S. constitutional power—such as Congress's power to declare war or the President's powers to execute war as Commander in Chief—is precisely to such an extent unconstitutional.

What this means with respect to targeted killing is that if anything in international law limits the President's power as Commander in Chief to employ such techniques and weapons technologies, and select appropriate military targets for their use, such a limitation is unconstitutional and ineffective as a matter of U.S. constitutional law. International law is often highly relevant at the level of diplomacy, international politics, symbolism, and rhetoric. I would never undervalue its importance in these respects. But on matters of U.S. constitutional power to wage war, nothing in international law can trump constitutional powers possessed by U.S. actors.

VII. OTHER LEGAL IRRELEVANCIES AND DISTRACTIONS

I conclude with a brief run-down of other, miscellaneous legal irrelevancies and distractions. First, what about the prospect of collateral damage from drone strikes, the possibility of missed targets, and mistaken targeting? These are unfortunate, but sadly inevitable, incidents of the conduct of war, but do not impair the existence of the constitutional power to use drone technology. They are problems with war generally. Drone technology is no

45. Paulsen, *supra* note 4.

exception, even if it is more discriminating and precise than many other forms of weapons technology and armed combat.

Second, does the existence of drone technology in any way change the legal calculus? It is hard to see why, as noted above. The control over the use of armed force, and the discretion in the use of such force, is committed to the Commander in Chief and embraces whatever weaponry is within the power of the U.S. military at the time, be it muskets, cannons, machine guns, or nuclear bombs.

Third, does it matter that there might be military alternatives to drone strikes? Again it is hard to see why this would be relevant to the question of constitutional power. The simple answer is that the President, as Commander in Chief, makes these choices among alternatives. He may use drone attacks when he judges them appropriate, as President Obama did with respect to al-Awlaki, and he may use commando raids when he judges them appropriate, as President Obama did with respect to the capture and killing of Osama bin Laden.⁴⁶ The Constitution vests the choice of tactics—the choice among alternative means—in the Commander in Chief.

Fourth, there is the question of *location*. Anwar al-Awlaki was killed in Yemen. Is Yemen part of the relevant “battlefield”? Again, the short legal answer is that the President may engage the enemy where he finds him and use the military means he deems appropriate to the place. The September 18, 2001 AUMF contains no geographical limitation. If the enemy is in Yemen, he may be bombed in Yemen. If he is in Stockholm, he may be bombed in Stockholm. If he is in Minneapolis, or New York City, or Lexington, Kentucky, he may be bombed in Minneapolis, New York, or Lexington. Obviously, I am stating this as a proposition of the scope of *constitutional power*. There may be tactical, practical, diplomatic, and moral reasons for the Commander in Chief to decline to use a drone attack in any or all of these places. But once again: The Constitution vests the power to make such decisions, and the responsibility for making the appropriate judgments, in the President as Commander in Chief.

Fifth, there is the question about susceptibility to abuse. Again the answer is that of course military power is susceptible to abuse,

46. See Peter Baker, Helene Cooper, & Mark Mazzetti, *Bin Laden is Dead, Obama Says*, N.Y. TIMES, May 2, 2011, at A1; Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant In A Car In Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1.

in all its forms. It is always essential to have a responsible, accountable Commander in Chief. All power is susceptible to abuse, but military power must be lodged somewhere and the Constitution has vested the power to authorize war in the Congress and the power to conduct war in the President. Although the Constitution's separation of powers provides for a certain amount of overlap and mutual checking, it also provides for a certain amount of autonomy in the President in the conduct of war.⁴⁷

Sixth, and finally, there is the equal-and-opposite problem: What if the nation has a poor, ineffectual Commander in Chief serving as President? Sadly—and with all due respect—that is the situation in which the United States finds itself today. We have, right now, an exceedingly poor Commander in Chief serving in the office of President of the United States, arguably the weakest such commander in more than 100 years. The current occupant of the office appears to lack the essential qualities of a good Commander in Chief: decisiveness, moral clarity, consistency, conviction, political and personal acumen, diplomatic savvy, strategic sense and vision, resiliency, thick-skinned moral toughness, and good old-fashioned guts. As I write, the U.S. President is not a strong person, and is not a strong Commander in Chief. The consequences in terms of world events, lost wars, invasions, and deaths, are evident for all to see and have been much commented upon by others.

My point here, however, is that *none of this goes to the existence of constitutional power*. As poor as the Commander in Chief may be at any given point of time, in terms of personal qualities and abilities, he or she always retains the constitutional powers of the office. These include the power to target and kill enemy combatants in time of war, including U.S. citizens, by available weapons technology when the President determines that they are active enemy combatants engaged in war against the United States. That this is a fearsome and important power is only another reason why it is so vitally important to elect a person with the requisite abilities and character to perform so awesome a task as serving as Commander in Chief of U.S. military forces in time of constitutionally authorized war.

47. On this specific point, see Paulsen, *The War Power*, *supra* note 6.