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Approval to target terrorists, U.S. citizens

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The president has the constitutional authority to target American citizens overseas.

This authority is derived from his war-making power as commander-in-chief of the armed forces. But this does not mean that the president has unfettered discretion to strike anyone he chooses.

The executive's war-making power is checked by the Founding Fathers' reservation in Congress of the power to declare war. The executive may not use this power unless authorized to do so by Congress.

Although since World War II formal declarations of war have not been utilized, Congress has not abrogated its responsibility to check the executive in this area. The president has enjoyed large bipartisan majorities for major uses of military force in the Persian Gulf in 1991, in Afghanistan in 2001, and in Iraq in 2003.

It is the Authorization to Use Military Force (AUMF) from 2001 that enables the president to continue to use his war-making power against al-Qaeda.

Complaints that the AUMF is either outdated or overly vague do not present constitutional barriers to the executive's continued reliance on that authorization. The Senate Armed Services Committee held hearings on the continued viability of the AUMF last year and elected not to propose changes or updates to the direction given the president.

So the legislative branch has not only authorized the president to utilize his war-making powers, but has recently decided to maintain that authorization.

The judicial branch has also weighed in on the interpretation of the AUMF in the extensive habeas corpus litigation brought by Guantanamo detainees. Courts have interpreted the authorization to allow the executive to use his war-making powers (which includes detention authority incident to an armed conflict) against "al-Qaeda and associated forces." The judiciary deemed this broad interpretation appropriate to the current conflict.

Although groups such as al-Qaeda in the Arabian Peninsula, al-Shabaab, Ansar al-Sharia, and others may not have taken part in 9/11, if their activities include targeting American soldiers abroad or American citizens at home, then the courts read the AUMF as authorizing the president's war-making powers against such groups, without requiring him to seek formal congressional approval as each new threat is identified.

Once the use of the war-making powers is authorized, the conduct of the war and the judgments associated with it are exclusively the province of the executive branch. Historically, presidents have used their war-making powers against American citizens who have joined opposing forces.

During World War II, U.S. armed forces killed many American citizens who were fighting in the armies of Germany and Japan, and they did so without making any attempt to provide them with due process. Even in more recent armed conflicts, in which the enemy does not wear uniforms and hides among the civilian population, deciding who is a legitimate target was likewise left to the executive branch.

That decision may rest, in Afghanistan, with Lt. Smith, who orders an attack on a compound based upon behavior and intelligence that the individuals there are al-Qaeda or Taliban fighters. Or it may rest with President Obama, who determines that an individual is an operational member of al-Qaeda or its associated forces who poses a threat to U.S. citizens. In either case, the decision rests exclusively with the executive branch, where it constitutionally belongs.

Whether the implementation of such policies is wise, productive, or sufficiently transparent may be questioned. But such questions are not challenges to the existence of the war-making power, or to the scope that all three branches of government have established for its continued use in the conflict with al-Qaeda.

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