

2011

Targeted Killing and the Courts: A Response to Alan Dershowitz

Jameel Jaffer

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

 Part of the [Military, War, and Peace Commons](#), and the [National Security Law Commons](#)

Recommended Citation

Jaffer, Jameel (2011) "Targeted Killing and the Courts: A Response to Alan Dershowitz," *William Mitchell Law Review*: Vol. 37: Iss. 5, Article 26.

Available at: <http://open.mitchellhamline.edu/wmlr/vol37/iss5/26>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

TARGETED KILLING AND THE COURTS: A RESPONSE TO ALAN DERSHOWITZ

Jameel Jaffer[†]

Weeks after 9/11, Alan Dershowitz notoriously proposed that judges be empowered to issue warrants authorizing interrogators to use torture against suspected terrorists.¹ His theory was that government interrogators would torture prisoners whether or not court's authorized them to, and that, given this "fact," it would be better to regulate torture than to leave it unregulated. He argued that allowing interrogators to apply for torture warrants before using methods that would otherwise be illegal would make the practice of torture more visible to the public, allow interrogators to use torture without fear of criminal prosecution, and limit the use of torture to state-sanctioned methods. ("A sterilized needle underneath the nail might be one such approved method," Professor Dershowitz suggested helpfully.)²

Dershowitz provoked many people but persuaded few, and the ACLU was among the civil liberties organizations that criticized his proposal. But since the ACLU filed a suit challenging the Obama administration's asserted authority to carry out the targeted killing of a U.S. citizen,³ Dershowitz has seen inconsistency in the ACLU's argument that the Obama administration's targeted killing

[†] Director, ACLU Center for Democracy. The author was lead counsel to the plaintiff in *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 *D.D.C. 2010), a case concerning the scope of the government's authority to carry out targeted killings of U.S. citizens. The district court dismissed the ACLU's complaint in *Al-Aulaqi v. Obama* on the grounds that the plaintiff (the father of a U.S. citizen on the government's targeted-killing list) did not have standing to assert his son's rights and that the questions of whether and in what contexts the government could carry out the targeted killing of a U.S. citizen were political questions beyond the jurisdiction of the courts.

1. Alan Dershowitz, *The Case for Torture Warrants*, ALAN M. DERSHOWITZ, <http://www.alandershowitz.com/publications/docs/torturewarrants.html> (last visited May 2, 2011).

2. *Id.*

3. *See Al-Aulaqi*, 727 F. Supp. 2d 1.

program should be subject to judicial review.⁴ How can killing warrants be a good idea, he asks, if torture warrants are not? He writes:

The ACLU has now brought a lawsuit on behalf of [Anwar] Al-Awlaki's father demanding that before Al-Awlaki can be targeted for military action, the government must "disclose the criteria that are used in determining whether the government will carry out the targeted killing of a US citizen." It is also demanding that the government present evidence of "concrete, specific and imminent threats to life or physical safety, and there are no means, other than legal force, that could reasonably be employed to neutralize the threats."

Think about this! What the ACLU is now seeking is, in effect, a "killing warrant." They are demanding, as a precondition to targeted killing, essentially the same mechanism that I have sought as a precondition to the imposition of nonlethal torture.⁵

Dershowitz misunderstands both our lawsuit and our opposition to torture warrants. Our opposition to torture warrants is based not on an objection to judicial supervision of torture, but on an objection to torture itself. The ACLU has always taken the position that torture should be proscribed categorically—and, under existing law, it is. Torture is outlawed by the Geneva Conventions⁶ and by the Convention Against Torture,⁷ which the United States signed in 1988.⁸ Under domestic law torture is a crime punishable by life in prison;⁹ in some circumstances, it is a war crime.¹⁰ The existing law reflects a judgment (which the ACLU shares) that torture is always inhumane—that it denies the humanity of the prisoner and erodes the humanity of the torturer—and that there are means that even the most laudable ends can never justify. In a celebrated decision of the United States

4. Alan Dershowitz, *The ACLU Demands "Killing Warrants"*, THE HUFFINGTON POST (Nov. 23, 2010, 3:20 PM), http://www.huffingtonpost.com/alan-dershowitz/the-aclu-demands-killing-_b_787527.html.

5. *Id.*

6. Geneva Convention Relative to the Treatment of Prisoners of War arts. 3 & 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

7. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85.

8. *Id.*

9. *See* 18 U.S.C. § 2340A(a) (2010).

10. *See* 18 U.S.C. § 2441(a)-(d) (2010).

Court of Appeals for the Second Circuit, those who perpetrate torture are labeled *hostis humani generis*, an enemy of all mankind.¹¹

But while torture is categorically prohibited, the use of lethal force is not. In wartime, states can permissibly use lethal force against enemy soldiers.¹² Outside the context of armed conflict, government agents—and the rest of us—can permissibly use lethal force in self-defense or defense of others.¹³ It is true that the circumstances in which the government can permissibly use lethal force without charge or trial are narrow: except in zones of armed conflict, lethal force can be used only as a last resort, and only to address threats that are imminent.¹⁴ But the point is that the government's use of lethal force—unlike its use of torture—is not always unlawful. Professor Dershowitz acknowledges this distinction but misses its import.

Because the government is not categorically prohibited from using lethal force, it makes sense to ask what standards will control the use of lethal force, and who will decide whether the standards are satisfied in any particular instance. The central proposition of the ACLU's legal challenge was that the courts have a role to play in articulating the standards under which lethal force is used and in ensuring that the government actually complies with those standards. We rejected the Obama administration's argument that the President's authority to order the targeted killing of suspected terrorists—including American citizens—is entirely unreviewable:

The government's brief seeking the dismissal of this case runs to nearly sixty pages but can be summed up in a single sentence: No court should have any role in establishing or enforcing legal limitations on the executive's authority to use lethal force against U.S. citizens whom the executive has unilaterally determined to pose a threat to the nation. The government has clothed its bid for unchecked authority in the doctrinal language of standing, justiciability, equity, and secrecy,

11. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

12. See generally Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 90 INT'L REV. RED CROSS 991 (2008) available at <http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf>.

13. See, e.g., *Tennessee v. Garner*, 471 U.S. 1 (1985); *Scott v. Harris*, 550 U.S. 372 (2007). Some jurisdictions also allow the death penalty, but the legitimacy of that practice is contested, including by the ACLU. See *Capital Punishment*, ACLU, <http://www.aclu.org/capital-punishment> (last visited Apr. 10, 2011).

14. *Garner*, 471 U.S. at 11.

but the upshot of its arguments is that the executive, which must obtain judicial approval to monitor a U.S. citizen's communications or search his briefcase, may execute that citizen without any obligation to justify its actions to a court or to the public. While the Constitution designates the President Commander-in-Chief of the nation's armed forces, it does not provide him with a blank check over the lives of its citizens.¹⁵

To say that the courts have a role to play, though, is not to say that judges should be empowered to issue killing warrants, and while others have proposed that judges oversee the government's real-time targeting decisions,¹⁶ the ACLU has not. The reason is that, except in zones of armed conflict, the government's authority to use lethal force is limited to circumstances in which a prior-warrant requirement would be unworkable—circumstances in which there is not time for a court to weigh the evidence.¹⁷ A warrant requirement might make sense if the government had sweeping authority to carry out the targeted killing of anyone, anywhere, who might at some point in the future present a threat to the country. But it does not have this kind of authority, and it should not. (Indeed, if the government had that authority, it could dispense with criminal trials altogether by summarily executing criminal suspects instead.)

Professor Dershowitz is right about one thing: the courts should play a role in overseeing the targeted killing program. They should do this by articulating the legal standards under which the government can permissibly use lethal force against individuals who have not been charged with crimes, and by reviewing, after

15. See Reply Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction and In Opposition to Defendants' Motion to Dismiss, *Al-Aulaqi v. Obama*, No. 10-cv-01469, 2010 WL 4974323, (D. D.C. Oct. 8, 2010).

16. See, e.g., Vicki Divoll, *Op-Ed, U.S. Targets an American Abroad: Should the Executive Branch be Allowed to Put a Citizen on a CIA Death List Without Judicial Review?*, L.A. TIMES, Apr. 23, 2010, <http://articles.latimes.com/2010/apr/23/opinion/la-oe-divoll-20100423>; Editorial, *Lethal Force Under Law*, N.Y. TIMES, Oct. 9, 2010, <http://www.nytimes.com/2010/10/10/opinion/10sun1.html>; Editorial, *Our View on War on Terror: Yes, the U.S. Can Seek to Kill an American Terrorist Abroad*, USA TODAY, Nov. 15, 2010, http://www.usatoday.com/news/opinion/editorials/2010-11-16-editorial16_ST_N.htm.

17. See generally Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Study on Targeted Killings*, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

lethal force has been used, whether the government has complied with the legal standards. (American courts are already familiar with this framework because it is the framework used whenever an individual alleges that government agents used excessive force.)¹⁸ Empowering courts to issue killing warrants is neither necessary nor advisable—which is why the ACLU has not proposed it.

18. *See, e.g., Graham v. Connor*, 490 U.S. 386 (1989).