

President's Decision To Assassinate US Citizens Abroad Without Due Process Is 'Judicially Unreviewable'

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On Tuesday, in an extremely troubling ruling in the District Court in Washington D.C., Judge John D. Bates dismissed a lawsuit contesting what is described as President Obama's "targeted killing" policy, but which is, in fact, a program to assassinate US citizens anywhere in the world, without explanation, and without the involvement of Congress or the judiciary.

The case concerns Anwar al-Awlaqi (aka al-Awlaki or al-Aulaqi), an American citizen living in Yemen, who "was placed on kill lists maintained by the CIA and the US military's Joint Special Operations Command (JSOC) earlier this year," as [the Center for Constitutional Rights has explained](#). Al-Awlaki was also labeled as a "specially designated global terrorist" on July 16, even though, behind the rhetoric, doubts have been expressed about his significance, which make it obvious that there are profound problems in allowing the executive branch to have the unfettered power to decide when American citizens should be designated for assassination.

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As Gregory Johnsen, a doctoral candidate in Near Eastern studies at Princeton University, who writes the blog [Waq al-Waq](#), explained in an op-ed for the [New York Times](#) on November 19:

[N]o one should remain under the mistaken assumption that killing Mr. Awlaki will somehow make us safer. He is far from the terrorist kingpin that the West has made him out to be. In fact, he isn't even the head of his own organization, Al-Qaeda in the Arabian Peninsula. That would be Nasir al-Wuhayshi, who was Osama bin Laden's personal secretary for four years in Afghanistan ... Mr. Awlaki isn't the group's top religious scholar (Adil al-Abab), its chief of military operations (Qassim al-Raymi), its bomb maker (Ibrahim Hassan Asiri) or even its leading ideologue ... Rather, he is a midlevel religious functionary who happens to have American citizenship and speak English. This makes him a propaganda threat, but not one whose elimination would do anything to limit the reach of the Qaeda branch.

The lawsuit was submitted in August by the ACLU and CCR on behalf of Anwar al-Awlaqi's father, Nasser al-Awlaqi, against President Obama, CIA Director Leon Panetta, and Defense Secretary Robert Gates, challenging their decision to authorize the "targeted killing" of Anwar Al-Awlaqi as a violation of the Constitution and international law.

Quite how Judge Bates reached his conclusion is beyond me. On technical grounds, it may well be that, as [the ACLU explained](#), "the plaintiff did not have legal standing to challenge the targeting of his son," but I fail to understand how Judge Bates also concluded "that there are circumstances in which the Executive's unilateral decision to kill a US citizen overseas is 'constitutionally committed to the political branches' and judicially unreviewable."

Over nine years after the 9/11 attacks that prompted the Bush administration to launch the "War on Terror" that is clearly alive and well in the United States, despite a change of administration, it appears that the merest mention of "war" and "the executive" in the same breath is enough to send [otherwise sane and responsible judges](#) scuttling to abdicate their responsibilities.

Judge Bates, to be sure, made a show of struggling with this particular problem — before giving up on it. Referring to his conclusion about executive power, he acknowledged "the somewhat unsettling nature of its conclusion" and, as the ACLU explained, he also called the case "unique and extraordinary," said it presented "[s]tark, and perplexing, questions" and found that the merits "present fundamental questions of separation of powers involving the proper role of the courts in our constitutional structure." Ultimately, however, he dismissed the case on procedural grounds and found that "the serious issues regarding the merits of the alleged authorization of the targeted killing of a US citizen overseas must await another day."

Unanswered, therefore, are the answers to three important questions posed by the ACLU and CCR:

Outside of the context of armed conflict, should it not be the case that the government can only carry out the "targeted killing" of an American citizen "as a last resort to address an imminent threat to life or physical safety"?

Why did the court not order the government to disclose the legal standard it uses to place US citizens on government kill lists?

and

"How is it that judicial approval is required when the United States decides to target a US citizen overseas for electronic surveillance, but that, according to defendants, judicial scrutiny is prohibited when the United States decides to target a US citizen overseas for death?"

After the ruling, CCR attorney Pardiss Kebriaei stated, "The court refused to hear a claim on behalf of a US citizen under threat of death by his own government that his personal constitutional rights have been violated — exactly what the court itself acknowledges it appears no court has ever done." She added, "The court's holding on the political question doctrine is indeed 'unsettling.'"

In addition, Jameel Jaffer, Deputy Legal Director of the ACLU, said:

If the court's ruling is correct, the government has unreviewable authority to carry out the targeted killing of any American, anywhere, whom the president deems to be a threat to the nation. It would be difficult to conceive of a proposition more inconsistent with the Constitution or more dangerous to American liberty. It's worth remembering that the power that the court invests in the president today will be available not just in this case but in future cases, and not just to the current president but to every future president. It is a profound mistake to allow this unparalleled power to be exercised free from the checks and balances that apply in every other context. We continue to believe that the government's power to use lethal force against American citizens should be subject to meaningful oversight by the courts.

This is not the end of the story, of course, as there will undoubtedly be an appeal. In the meantime, perhaps someone close to the administration might like to draw attention to the conclusion reached by Gregory Johnsen in his recent op-ed:

[U]ntil the Obama administration put him on its hit list, [Anwar al-Awlaqi] had little standing in the Arab world. Now, however, Al-Qaeda in the Arabian Peninsula is taking advantage of this free advertising. No propaganda from the group had ever mentioned his name before it was reported in January that the United States had decided he could be legally assassinated. Shortly after, an article in the official Qaeda journal trumpeted that Mr. Awlaki had not been killed in December, as had been reported, in an air attack on a gathering in Shabwa Province.

So now that it has given Mr. Awlaki such a high profile, the administration is in a bind: if it ignores him, it will look powerless; if it succeeds in killing him, it will have manufactured a martyr. The best way out is to redouble its efforts to track down the real, more dangerous leaders of the Yemen group like Mr. Wuhayshi and Mr. Asiri, who likely made the bombs used in the [recent, foiled] parcel attacks and carried by Umar Farouk Abdulmutallab, the so-called Christmas Day bomber.

Mr. Awlaki's name may be the only one Americans know, but that doesn't make him the most dangerous threat to our security.

Moreover, when it comes to losing the propaganda war, someone close to the administration might also want to mention that it is nearly a year since, in the wake of the failed Christmas Day bombing, President Obama capitulated to Republican hysteria and [announced a moratorium](#) on the release of any more Yemenis from Guantánamo, even though the Guantánamo Review Task Force convened by President Obama had [recommended that 29 of those held](#) could be immediately released to Yemen — and that 30 more could be released if the security situation improved.

I have problems with the conditions attached to the release of those 30, but a more urgent problem is the fate of the 29 others recommended for immediate release. One of these men — [Mohammed Hassan Odaini](#), a transparently innocent student seized by mistake — was [freed last July](#) after he [won his habeas corpus petition](#), but the rest are still held, adding not to America's security, but to [a feeling of ill-will in Yemen](#), where people have, rightly, concluded that the entire population has been tarred as terrorist sympathizers, and where the cleared Yemenis can, in all honesty, only be regarded as political prisoners.

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