

Judge dismisses case challenging targeted killing of US citizens by Obama administration

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On December 7, Federal District Judge John D. Bates dismissed a lawsuit that challenged the Obama administration's policy of targeted killings of individuals around the world, including US citizens. The judge's chilling and reactionary ruling represents a victory for the Obama administration and its assertion of quasi-dictatorial executive powers, and highlights the extreme state of decay of democratic processes in the United States.

In January of this year, the Obama administration placed the name of US citizen Anwar Al-Aulaqi on a "kill list," permitting any of the US government's myriad military/intelligence agencies to carry out his assassination. Al-Aulaqi, who was born in New Mexico and attended US universities, is now in hiding in Yemen.

In April, President Barack Obama gave the order for the targeted killing of Al-Aulaqi. The US Central Intelligence Agency (CIA) launched a cruise missile at a meeting Al-Aulaqi was attending in Yemen, but the intended victim survived.

While the death toll from US targeted killing missile attacks—in Pakistan, Afghanistan, Yemen and elsewhere—figures in the many hundreds if not thousands, the attempt on Al-Aulaqi's life marked the first time in US history that a president officially ordered the assassination of a US citizen.

In August, the American Civil Liberties Union (ACLU) and the Center for Constitutional Rights (CCR) filed a lawsuit (*Al-Aulaqi v. Obama*) on behalf of Al-Aulaqi's father, Nasser Al-Aulaqi, challenging the targeted killing program.

In court and in broad daylight, the Obama administration claimed that the president has the power to unilaterally and secretly order the killing of an American citizen without a trial or judicial review of any kind. The administration further argued that the case should not be allowed to proceed because it threatened to reveal "state secrets." (See: "Obama administration invokes "state secrets" doctrine to defend the

assassination of US citizens")

The Obama administration's assertion of the power, normally associated with dictatorships, to issue secret and extrajudicial death warrants to be carried out by the intelligence apparatus is in clear violation of international law and the US Bill of Rights. The Fifth Amendment to the US Constitution states: "No person shall be ... deprived of life ... without due process of law."

In July, the administration unilaterally placed Al-Aulaqi's name on the "Specifically Designated Global Terrorist" list. Once an individual is designated a "terrorist," it becomes a crime to render services to that person. This list, created by the Bush administration, has been maintained by Obama.

Accordingly, the ACLU and CCR, in order to bring a case challenging the targeted killing program, had to request permission in the form of a "license" from the Obama administration's Treasury Department Office of Foreign Assets Control (OFAC). If any lawyer attempted to bring the case against the administration without the government's permission, he or she could be convicted of the new crime of "material support for terrorism." In this case, the ACLU and CCR were granted permission to file the case after a long delay.

Judge Bates, in his ruling (available [here](#)), acknowledged that the case raised "stark" and "perplexing" questions. For example, he wrote, "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 [the Obama administration], judicial scrutiny is prohibited when the United States decides to target a US citizen overseas for death?"

However, Bates declined to answer such questions. Instead, he concluded that the case could not proceed because Anwar Al-Aulaqi's father, Nasser Al-Aulaqi, lacked legal standing to bring the case. This implies that in order for the targeted killing program to be challenged, the persons marked for death must appear themselves in the courts of the

country that is trying to assassinate them.

This Orwellian ruling takes as good coin promises by the Obama administration to guarantee Al-Aulaqi's safety if he surrenders, even though the administration already attempted to assassinate Al-Aulaqi with a cruise missile.

In fact, as the ACLU wrote in its brief, Anwar Al-Aulaqi is "hiding under threat of death and cannot access counsel or the courts to assert his constitutional rights without disclosing his whereabouts and exposing himself to possible attack by Defendants [the Obama administration]." Al-Aulaqi's father confirmed in a separate declaration that "[b]ecause the US government is seeking to kill my son... he cannot access legal assistance or a court without risking his life."

The ACLU further pointed out that should Al-Aulaqi's location become known to the US government, if he were not killed outright he would be immediately picked up and held incommunicado without charge at a facility such as Guantánamo Bay, where he would be tortured and prevented from filing a lawsuit or meeting with attorneys. Judge Bates dismissed this scenario as "hypothetical" and a "mere prospect."

Bates, a former army lieutenant, was appointed by President George W. Bush in 2001. Before becoming a judge, Bates served as deputy independent counsel for Kenneth Starr during the right-wing impeachment drive against then-President Bill Clinton. His decision in the Al-Aulaqi case may be appealed to the DC Circuit Court of Appeals, notoriously stacked with right-wing judges.

In a noxious adaptation to the current official political climate, Bates included in his opinion a bigoted passage suggesting that in light of Anwar Al-Aulaqi's political and religious views, he should not be entitled to the protections of the US Constitution. The judge wrote that Al-Aulaqi has "decried the US legal system and suggested that Muslims are not bound by Western law." Bates added that Al-Aulaqi "has made clear his belief that 'international treaties' do not govern Muslims, and that Muslims are not bound by any law—US, international, or otherwise—that conflicts with the 'law of Allah.'"

Accordingly, Bates wrote, Al-Aulaqi would not "likely want to sue to vindicate his US constitutional rights in US courts."

This novel and chilling legal theory, carried to its logical conclusion, implies that constitutional rights can be denied to any person in hiding who maintains dissenting political or religious views. The US Constitution and its protections have never been held to extend only to persons that a judge deems worthy of them.

Judge Bates dismissed Al-Aulaqi's claims under international law on the basis of the doctrine that the US

government is "immune" from them. This expanding doctrine of "sovereign immunity" prevents the government from being the target of certain lawsuits without its express consent.

Finally, Bates held that a judicial evaluation of the Obama administration's assassination program would involve a "political question" not subject to judicial review. In this case, the application of the "political question" doctrine amounts to an open renunciation of the constitutional principle of "checks and balances," under which the courts are obliged to overrule governmental actions that violate the Constitution.

Today, US judges routinely refuse to address the most egregious excesses of the executive branch, proclaiming instead their "deference" for reasons of "national security." Under this and similar doctrines, US judges are relegated to the same role as judges in a police state, functioning as a rubber stamp for state crimes.

With regard to the "military and state secrets" doctrine raised by the Obama administration, Bates noted approvingly the recent Ninth Circuit Court of Appeals *Jeppesen Dataplan* decision in which a case that threatened to reveal torture was dismissed on the grounds of "state secrets." (See Obama's victory for torturers.) Nevertheless, Bates indicated that in light of his other rulings dismissing the case, it was unnecessary to decide whether the "state secrets" doctrine applied.

In a press release following the decision, CCR attorney Pardiss Kebriaei explained that Judge Bates' ruling was without precedent in the history of the US legal system. "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," she wrote, "exactly what the court itself acknowledges it appears no court has ever done."



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