

Federal court considers legality of drone strike killings of US citizens

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On July 19, 2013 in the Federal District Court in Washington, DC, Federal Judge Rosemary Collyer heard arguments concerning a constitutional challenge to the drone strike killings of three U.S. citizens which occurred in Yemen in 2011. The lawsuit was filed last July by the Center for Constitutional Rights (CCR) and the American Civil Liberties Union (ACLU) on behalf of the relatives of the three US citizens who were killed.

Nasser al-Awlaki, the father of Anwar al-Awlaki and grandfather of Abdulrahman al-Awlaki, and Sarah Khan, the mother of Samir Khan, charged that the US government violated the Constitution and international law when it targeted Anwar al-Awlaki for extrajudicial killing and carried out the execution by means of drone-fired missiles on September 30, 2011 in Yemen.

Samir Kahn, who was reportedly not on the Obama administration's "kill list" and not targeted, died in the attack on Awlaki, along with two other people. Abdulrahman al-Awlaki, Anwar al-Awlaki's 16-year-old son, was killed in a separate drone attack on October 14, 2011 that killed seven people in another part of Yemen.

The suit argues that all three killings of US citizens were unlawful because, apart from war, the US Constitution and international law prohibit killing without due process, "except as a last resort to avert a concrete, specific, and imminent threat of death or serious physical injury," conditions that did not apply to any of the victims.

In response to this lawsuit the Justice Department filed a motion to dismiss the case, asserting that the "political questions" doctrine and national security issues bar judicial review.

In response to the Justice Department's position, CCR Senior Staff Attorney Pardiss Kebriaei stated, "The government's position is unprecedented and extraordinary. It claims the most consequential power a government can exercise against its own citizens—the power to take life without due process—and asserts that the courts should have no role at all in reviewing its actions, even after the fact, even when the killings are off any battlefield. ... The court should exercise its constitutionally mandated role and review our clients' fundamental claims. It is for the court to determine the legality of the government's

actions, not for the government simply to assert it."

On the eve of the hearing, the New York Times (July 17, 2013) published an op-ed from plaintiff Nasser al-Awlaki entitled, "The drone that killed my grandson." Nasser al-Awlaki lived in the United States from 1966 to 1977, where he studied as a Fulbright scholar, earning a doctorate and working as a researcher and assistant professor at universities in New Mexico, Nebraska, and Minnesota. Upon returning to Yemen he held several positions within the Yemeni government, including minister of agriculture, and is the founder of Ibb University and a former president of Sana'a University.

In 2010, when the Obama administration added his son's name to the Specially Designated Global Terrorist kill list, Nasser al-Awlaki received the support of the CCR and the ACLU to file a lawsuit in an attempt to stop the killing of his son Anwar. The CCR and ACLU demanded, on behalf of Nasser al-Awlaki, that the government halt efforts to assassinate his son, remove his son's name from secret "kill lists," and make public the "targeted killing program," including what criteria the president uses to determine whom to assassinate.

On December 7, 2010, at the Obama administration's request, US District Judge John D. Bates dismissed the lawsuit on the grounds that Nasser al-Awlaki, as a father, did not have legal standing, and also for failing to satisfy various onerous procedural obstacles, including that the lawsuit was barred by the "political question" doctrine.

In his op-ed statement, referring to the extrajudicial murder of his son, Nasser-al Awlaki stated, "The government repeatedly made accusations of terrorism against Anwar—who was also an American citizen—but never charged him with a crime. No court ever reviewed the government's claims nor was any evidence of criminal wrongdoing ever presented to a court. He did not deserve to be deprived of his constitutional rights as an American citizen and killed."

His grandson Abdulrahman was born in Denver. "He lived in America until he was seven, then came to live with me in Yemen. He was a typical teenager—he watched "The Simpsons," listened to Snoop Dogg, read "Harry Potter" and had a Facebook page with many friends. He had a mop of curly hair, glasses like me and a wide, goofy smile."

A few weeks after the killing of his father, Abdulrahman, his teenage cousin, and at least five other civilians were killed by a missile while eating dinner at an open-air restaurant in southern Yemen.

“I visited the site later, once I was able to bear the pain of seeing where he sat in his final moments. Local residents told me his body was blown to pieces. They showed me the grave where they buried his remains. I stood over it, asking why my grandchild was dead.

“Nearly two years later, I still have no answers. The United States government has refused to explain why Abdulrahman was killed. It was not until May of this year that the Obama administration, in a supposed effort to be more transparent, publicly acknowledged what the world already knew—that it was responsible for his death.

“My grandson was killed by his own government. The Obama administration must answer for its actions and be held accountable.”

In explaining this pending lawsuit, Nasser al-Awlaki states, “After the deaths of Abdulrahman and Anwar, I filed another lawsuit, seeking answers and accountability. The government has argued once again that its targeted killing program is beyond the reach of the courts. I find it hard to believe that this can be legal in a constitutional democracy based on a system of checks and balances.

“The government has killed a 16-year-old American boy. Shouldn’t it at least have to explain why?”

During the July 19, 2013 hearing to determine whether this lawsuit can go forward, US District Judge Collyer expressed concern that the government’s position would essentially strip US citizens abroad of their constitutional rights.

In response Deputy Assistant Attorney General Brian Hauck argued there was a difference between having a constitutional right—which he said could be protected by the executive and legislative branches—and being able to make constitutional claims in court.

Collyer countered that not being able to access the courts would deprive citizens of the ability to enforce their rights. “I’m really troubled that you cannot explain to me where the end of it is...That, yes, they have constitutional rights but there is no remedy for those constitutional rights.”

Hauck also asserted the legal principle known as the “political question” doctrine, which he contended prevents the court from taking up the case. A federal judge, he said, didn’t have the same “apparatus” as the military and the executive and legislative branches to weigh the policy considerations that went into missile strikes. To consider a claim that the strikes were unconstitutional, Hauck said, the court would have to answer “extraordinarily sensitive questions.”

When Hauck claimed the “constitutional structure” enabled the executive and legislative branches to protect citizens’ rights, Collyer pointed out that the structure included three branches of government. “The problem is, how far does your

argument take you?” She added that she found it “a little disconcerting” that the government was arguing that there could be no court review of a decision by the executive and Congress to target American citizens abroad.

Hauck then emphasized that the decisions on targeting “are made at the highest levels of the executive branch, with robust consultation with Congress.”

“No, no, no, no,” Collyer said. “The executive is not an effective check on the executive when it comes to individual constitutional rights.”

Hauck’s arguments echo those of Attorney General Eric Holder, who in March 2012 at Northwestern University Law School stated, “Some have argued that the President is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of al Qaeda or associated forces. This is simply not accurate. ‘Due process’ and ‘judicial process’ are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.”

“The defendant’s arguments aren’t just wrong,” said Pardiss Kebriyai of the Center for Constitutional Rights. “We think they’re dangerous.”

Kebriyai said under the Fourth Amendment, the court should question whether the strike in which Abdulrahman died was reasonable. “An operation that targets a civilian eating area in plain view, outside of hostilities, that kills seven people including two minors is objectively unreasonable,” she said.

Hina Shamsi of the ACLU told the court that moving the case forward would “deter unconstitutional conduct” by government officials. Without that option, Shamsi said, “plaintiffs really have nothing. They have no other source of remedy.”

Judge Collyer conceded that was true, “[b]ut there are instances where wrongs are done but for one reason or another, they cannot be remedied in a civil suit.”

The 67-year-old Collyer has a record of fully supporting the government’s position on national security challenges. Appointed to the bench by President George W. Bush, she is currently a member of the infamous Foreign Intelligence Surveillance Court. Last week Collyer upheld the force-feeding of Guantanamo Bay detainees. Two years ago, she rejected an ACLU effort to obtain the CIA’s drone strike documents through a Freedom of Information Act request.

Collyer did not rule from the bench and did not say when she expected to issue a decision.



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