

## **Federal District Judge Presses Executive Branch Authority on Drone Strike Deaths**

Last week I had the chance to observe the government arguing in federal district court in Washington, D.C. that U.S. citizens have constitutional rights but they cannot be enforced in courts. It reminded me, yet again, that the executive and legislative branches cannot be trusted to defend our fundamental rights. Dedicated, unrelenting advocacy is crucial to ensure that our rights to expression and constitutional protections do not wither away.

The hearing was an argument over whether to dismiss *Al-Aulaqi v. Panetta (Al-Awlaki v. Panetta)*, but it turned into a rare bout between the executive and judicial branches on protecting individual rights in times of war. The case itself was brought by Dr. Nasser Al-Aulaqi, the father of Anwar Al-Aulaqi and grandfather of Abdulrahman Al-Aulaqi, both U.S. citizens residing in Yemen who were killed by drone strikes without ever being publicly charged with crimes. As Dr. Al-Aulaqi wrote in *The New York Times* last week, “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.”

For the last decade, the U.S. government has carried out killings of suspected terrorists overseas, largely in areas where there is no armed conflict. It was just revealed in a leaked Pakistani report that the drone death toll has surpassed published U.S. figures. New figures suggest over 400 civilians may have been killed in the nine-year drone campaign, compared to fifty to sixty total “non-combatants” according to the U.S. government. The packed courtroom in *Al-Aulaqi* evidenced the magnitude of these issues. Interns of the court packed the jury box, and a crowd congregated at the courtroom doors. Judge Collyer even remarked, “Holy cow!” upon entering the court.

Representing Dr. Al-Aulaqi were Pardiss Kebriaei of the Center for Constitutional Rights and Hina Shamsi of the American Civil Liberties Union. The defendants included Leon Panetta, former director of the CIA, former CIA director David Petraeus, and Admiral William McRaven who leads the U.S. Special Operations Command. The argument itself was fast-paced, and was typified by Judge Rosemary Collyer “going into the thicket” of questioning that the government did not want her to go into.

Brian Hauck, arguing for the Department of Justice, claimed that the court has no place to review killings of U.S. citizens by drone strike due to the political question doctrine. In other words, the fact that the drone strikes implicated the War on Terror and a broader armed conflict meant that the executive, not the judiciary, had the final say in related decisions—even when they implicated constitutional rights.

Judge Collyer was highly skeptical of Hauck’s claim. She first questioned the government counsel on whether this meant that a U.S. citizen abroad had no constitutional rights. When

Hauck said no, Judge Collyer wondered aloud where those citizens could assert their rights. “The executive is not an effective check on the executive when it comes to individual constitutional rights,” she continued.

Hauck pressed that the political question doctrine applied, and that political safeguards were in place to protect individual rights. He also emphasized that, in his view, this was a rare set of facts. But Judge Collyer stressed that while the facts might be limited, the implications of his argument were not. She repeatedly asked Hauck where it ended. She wanted a limiting principle, but Hauck could not give her one.

“I consider us a nation of laws,” remarked Judge Collyer. She found it “troubling” that the government gave no authority for asking the courts to defer to its own determinations of due process.

Last year, Attorney General Eric Holder said that ‘due process’ and ‘judicial process’ are “not one and the same, particularly when it comes to national security.” Essentially, Holder meant that due process can happen behind closed doors. The executive branch’s position is that rights can be taken away secretly without any charges, hearings, or even right to cross-examine or retain an attorney. Indeed, some U.S. citizens, because of the War on Terror, have fewer due process rights facing death than do drivers stopped for traffic violations.

Despite Judge Collyer’s concern with the reaches of the government’s argument, it is unclear that this case will continue. The case was brought seeking damages from federal officers—which is allowed in limited circumstances under the 1971 Supreme Court case *Bivens v. Six Unknown Named Agents*. Some of the questions to Kebriaei of the Center for Constitutional Rights underscored hesitance on part of the court to accept the *Bivens* claim, with Judge Collyer calling its application a “stretch.” The plaintiffs brought claims under the Fourth and Fifth Amendments. But, Judge Collyer was skeptical of calling the taking of life by drone a “seizure” under the Fourth Amendment.

Finally, most alarming was the fact that Judge Collyer asked the plaintiffs questions regarding discovery and other aspects of case management down the road. This revealed that she was concerned about aspects of the case beyond the legal questions behind dismissal. While issues like discovery are not relevant to the questions she will have to decide, they certainly provide a glimpse of her judicial calculus.

The CIA and armed forces are distorting international law to justify carrying out lethal military operations and extend the Authorization for Use of Military Force (“AUMF”) in countries like Yemen where there is no declared war. These policies led to the killings at issue in this case, and will undoubtedly lead to more. At worst, the exchange witnessed in this case may be the judiciary merely giving the executive a hard time before caving into its demands. But the

continued headlines of how Judge Collyer was “troubled” give hope for an enduring and vibrant public dialogue on these issues. And, Judge Collyer’s questioning hopefully reflects genuine, increased judicial skepticism of the extralegal actions of the executive branch.

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