A DEFENSE OF TYRANNY?

I'm pretty fascinated by this attempt by one of John Cole's readers to defend the Administration's stance on assassinating US citizens. It's fascinating and not a little disturbing, but it deserves a response, if only to clarify precisely what the problem with the Administration's filing last Friday is.

The reader starts with this:

> On Al-Awlaki, what's your response to the argument that targeted killing of him is allowable, under international law, because he's been designated by the US and the UN as an "active operational member of AQAP" and, as such, if and only if the US determines he presents an imminent threat, the US can take actions to defend itself against an attack (like, say, the Christmas bombing, in which there's evidence he was involved in planning) by either capturing or killing him?

For starters, this question misrepresents what the suit tries to do. The suit readily admits that the government has the right to kill someone who presents an imminent threat. The plaintiffs are asking for the judge to prevent the government from killing Anwar al-Awlaki unless he is, in fact, an imminent threat.

> Plaintiff seeks a declaration from this Court that the Constitution and international law prohibit the government from carrying out targeted killings outside of armed conflict except as a last resort to protect against concrete, specific, and imminent threats of death or serious physical injury; and an injunction prohibiting the targeted killing of U.S. citizen Anwar Al-Aulaqi outside this narrow

> context. Plaintiff also seeks an injunction requiring the government to disclose the standards under which it determines whether U.S. citizens can be targeted for death. [my emphasis]

Moreover, John's reader misstates the argument the government is making. They refuse to grant that the only legal basis they'd have for assassinating al-Awlaki would be because they had determined him to be an imminent threat and never once argue that he is an imminent threat, particularly not that he, personally, as opposed to AQAP more generally, is an imminent threat.

> For example, even assuming for the sake of argument that plaintiff has appropriately described the legal contours of the President's authority to use force in a context of the sort described in the Complaint,

In fact, as I have shown, the government refuses to lay out its entire argument for claiming it has the authority to target al-Awlaki.

> Accordingly, although it would not be appropriate to make a comprehensive statement as to the circumstances in which he might lawfully do so, it is sufficient to note that, consistent with the AUMF, and other applicable law, including the inherent right to self-defense, the President is authorized to use necessary and appropriate force against AQAP operational leaders, in compliance with applicable domestic and international legal requirements, including the laws of war.

One thing is clear, though: the government is claiming to have the authority not only through international law (the "imminent threat"), but also the AUMF. But it's not at all clear the AUMF does grant them that authority (and this is one reason why John's reader's appeal to the

political branches is so problematic). AQAP was not included in the AUMF. No one has ever claimed it had a role in 9/11, which is how the AUMF defines the opponent. The decisions on habeas cases have been mixed about whether attenuated connections like AQAP's are strong enough to be included in the AUMF and because of it, legally detainable. John's reader just ignores that the primary basis for which the government claims authority to kill al-Awlaki is the AUMF (even if they refuse to say whether AQAP is al Qaeda, or only affiliated with al Qaeda). But that basis is contested.

But let's set aside the problems with the government's claim to authority under the AUMF for the moment and focus instead on what John's reader seems comfortable with: the "imminent threat." John's reader seems satisfied that al-Awlaki's role in the Christmas day bombing makes him an imminent threat. There are two problems with that. First, we have a tradition in this country of requiring the government to prove the allegations it makes against people. Here's how the government presents this allegation, in James Clapper's public declaration.

> Since late 2009, Al-Aulaqi has taken on an increasingly operational role in AQAP, including preparing Umar Farouk Adbulmutallab [sic], who attempted to detonate an explosive device aboard a Northwest Airlines flight from Amsterdam to Detroit on Christmas Day 2009, for his operation. In November 2009, while in Yemen, Abdulmutallab swore allegiance to the emir of AQAP and shortly thereafter received instructions from al-Aulaqi to detonate an explosive device aboard a U.S. airplane over U.S. airspace.

Particularly given the government's reported belief, before the Nidal Hasan attack, that al-Awlaki's activities extended only to First Amendment protected speech, we deserve to know how they determined that his activities since

then have become operational. If we know that from classified intercepts, then the government can share them with the Court without disclosing them publicly. If we know that solely through Abdulmutallab's interrogations, then we deserve to know the circumstances surrounding those interrogations, not least whether Abdulmutallab was promised he would not face the death penalty if he implicated al-Awlaki.

More importantly, we have means to do all this—to have a judge weigh the evidence to make sure the government's allegations are true. That's a trial. And for some reason, the government has chosen not to charge al-Awlaki with conspiracy in Abdulmutallab's crime, and therefore chosen not to expose its evidence to the scrutiny of a judge. I wouldn't necessarily have much reason to doubt the government's claims about al-Awlaki, but the government loses a great deal of credibility when they choose not to avail themselves of the means to prove those allegations.

If the case against al-Awlaki is strong enough to kill him, then it ought to be strong enough to prove in a court.

And then there's the other problem with the claim that al-Awlaki is an "imminent" threat: the timing.

If the government really were justifying its targeting of al-Awlaki because he's an imminent threat (they don't commit to that argument, but it is what John's reader argues), then they'd effectively be arguing that al-Awlaki has been an imminent threat since at least December, when he was on a JSOC kill list. And yet, in that entire period, the only thing the government alleges al-Awlaki personally has done is make a video praising attacks on the US and justifying jihad. (It does note that AQAP claimed responsibility for an attempted assassination of the UK's Ambassador to Yemen, but does not claim al-Awlaki had an operational role.) That video may be dangerous, but it's the kind of thing that the government had previously considered

protected speech.

Plus, there's another timing problem. John's reader points to the designation of al-Awlaki as an operational member of AQAP as justification for the claim that he is an imminent threat.

But that didn't happen until July 16, 2010, at least seven months after JSOC put al-Awlaki on their kill list, and three months after CIA put him on their kill list. In fact, AQAP as an organization wasn't even on the UN's terrorist list until several weeks after al-Awlaki was put on JSOC's kill list.

So if formal designation as a terrorist is what makes assassination okay, then the government was clearly not justified in targeting al-Awlaki in December, even if they are now. But that would admit the entire point: that the government is targeting people without legal basis to do so.

From his defense of the government by making an argument they don't make (that al-Awlaki is an imminent threat), John's reader then accepts an argument the government makes: that al-Awlaki has access to the courts.

> How about your argument to rebut the government's position that, under the Constitution, he has no basis to make a habeas-type argument because he is not being denied access to process, he's refusing to submit himself to the judicial process in the US?

Setting aside the fact that accused terrorists have fairly routinely been denied the opportunity to challenge their designation as such in court, John's reader accepts the more troubling implication in the government's filing: that a citizen who has been formally charged with no crime, but is nonetheless targeted for killing, bears the burden of challenging that targeting in court. That shifts the entire burden from the government to the citizen! That's the whole point of this suit—to

demand that the government give a citizen his due process guaranteed under the Fifth Amendment.

From there, John's reader argues that the judge will review the government's claim to state secrets and that al-Awlaki's father might not have standing. Those are stronger arguments. (And I think one likely outcome of this suit is that Judge John Bates bounces the suit on the standing issue, just as he did with Valerie Plame's suit, because it is by far the easiest solution for him.)

And if all the government argued in its filing is that al-Awlaki's father doesn't have standing, then those of us who are so upset would still be upset, but not so horrified.

But that's not what the government did. It repeatedly asserted it had the authority to kill al-Awlaki with no due process, even as it didn't commit to what the basis for that authority is.

John's reader, apparently, thinks that the government has legitimately described the question of whether it kills American citizens with no due process as a political question.

> Last, do you have a rebuttal to the argument that the case itself presents non-justiciable political questions that are outside of the purview of the courts? Do you believe that the Article III courts should be able to override the authority given to the other two branches in Article I and II for pursuit of foreign policy and military actions?

I see only three ways you can argue that this is appropriately a political question over which judges should have no purview.

1. Congress really did pass an AUMF that covers this case.
2. The Executive Branch's targeting decisions of both

groups and individuals are not reviewable by the courts.

3. The Executive Branch really does have the authority to kill its citizens because it says so.

Now, as I have noted, it is not at all clear that the political branch that has the authority to declare war has declared war against AQAP. It may be that a judge would say they have, but in habeas cases, judges have been mixed. And one reason this is critical is because the Administration repeatedly suggests that targeting al-Awlaki is authorized because he is on a battlefield. He's not until Congress says he is, and it's not at all clear they have (though I don't doubt they would if the Administration asked them to.)

The question of whether the courts can review whether a citizen is an imminent threat is the entire point of this suit. But the government actually refuses the premise, arguing that it can't be held to the general standard that it only kill someone who is an imminent threat because things like tactical analysis and diplomatic considerations might trump it.

> Moreover, the declaratory and injunctive relief plaintiff seeks is extremely abstract and therefore advisory—in effect, simply a command that the United States comply with generalized standards, without regard to any particular set of real or hypothetical facts, and without any realistic means of enforcement as applied to the real-time, heavily fact-dependent decisions made by military and other officials on the basis of complex and sensitive intelligence, tactical analysis and diplomatic considerations.

Aside from reminding, once again, that according to David Ignatius, we first considered targeting al-Awlaki because Yemen asked us to—that is, Ignatius suggest we targeted al-Awlaki entirely out of diplomatic considerations—note what this passage argues. It's not just that it says a court can't review whether al-Awlaki is an imminent threat (not even in the nine months al-Awlaki has been targeted). It's also saying that tactical and analysis and diplomatic considerations may be determinative on whether someone is an imminent threat or not. Effectively, the government is rejecting that it should comply with the "imminent threat" standard because other things might trump it (and, presumably, trump it in such a way that a judge wouldn't agree or shouldn't be allowed to judge).

There's one more thing the government does to support the argument that they alone should be able to determine whether al-Awlaki, the individual, is a threat: they point to case law that says the political branches have the authority to determine what foreign groups are threats.

> As the D.C. Circuit stated in El-Shifa —a case that involved the President's decision to launch a military strike against a facility in Sudan that the United States believed was associated with Osama bin Laden—"[i]f the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target." 607 F.3d at 844. Addressing the Baker standards, the Court in El-Shifa observed that "whether the terrorist activity of foreign organizations constitute threats to the United States" are "political judgments" vested in the political branches. [my emphasis]

There's a whole bunch of this similar language, showing that courts have supported the political branches—and even the Executive Branch alone—authority to decide what foreign organizations are a threat.

But as far as the reporting goes, this is not about the government deciding that AQAP locations themselves to be legitimate targets. Questions of international law and efficacy aside, I have a lot less problem with al-Awlaki being killed because of his presence at an AQAP site (though that's precisely how the government "accidentally" killed a Yemeni Deputy Governor in May, not to mention uncounted numbers of civilians in Pakistan). And I'm more comfortable with the way the government killed Kamal Derwish, even if the claim that they were targeting Abu Ali al-Harithi and not Derwish personally is just a legal facade. This is about targeting a named American citizen against whom the government has not proven any allegations justified more generally because of the association the government alleges that citizen has made. And the government's filing actually doesn't present legal authorization to do that.

Which leaves just the "I can kill and American citizen because I say so."

Now, again, that's not what John's reader is saying. I guess he's defending this argument on the grounds number two—that what is an imminent threat is strictly political and so courts shouldn't be able to review it.

But particularly given the Administration's refusal to even lay out what it considers its authority for targeting an American citizen, I'm not so sanguine with that. Once something vaguely called a political consideration can trump due process, and once we allow the government to make claims against other citizens without offering any proof, then nothing limits what the government can do to its own citizens.

Anwar al-Awlaki may well be a dire threat to the US (though I question whether he is an imminent

one). But before the government kills him, I’d like them to prove it.