AS EXPECTED, JUDGE BATES PUNTS ON RULE OF LAW

I almost felt like I was reading Judge John Bates' ruling on whether or not Valerie Plame could sue those who outed her when I read Judge Bates' ruling dismissing the suit challenging the government's ability to assassinate Anwar al-Awlaki with no due process.

He starts by admitting the importance of the issues at hand.

> This is a unique and extraordinary case. Both the threshold and merits issues present fundamental questions of separation of powers involving the proper role of the courts in our constitutional structure. Leading Supreme Court decisions from Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), through Justice Jackson's celebrated concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), to the more recent cases dealing with Guantanamo detainees have been invoked to guide this Court's deliberations. Vital considerations of national security and of military and foreign affairs (and hence potentially of state secrets) are at play.
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> Stark, and perplexing, questions readily come to mind, including the following: How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to defendants, judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death? Can a U.S. citizen — himself or through another — use the U.S. judicial system to vindicate his

> constitutional rights while simultaneously evading U.S. law enforcement authorities, calling for "jihad against the West," and engaging in operational planning for an organization that has already carried out numerous terrorist attacks against the United States? Can the Executive order the assassination of a U.S. citizen without first affording him any form of judicial process whatsoever, based on the mere assertion that he is a dangerous member of a terrorist organization? How can the
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> courts, as plaintiff proposes, make real-time assessments of the nature and severity of alleged threats to national security, determine the imminence of those threats, weigh the benefits and costs of possible diplomatic and military responses, and ultimately decide whether, and under what circumstances, the use of military force against such threats is justified? When would it ever make sense for the United States to disclose in advance to the "target" of contemplated military action the precise standards under which it will take that military action? And how does the evolving AQAP relate to core al Qaeda for purposes of assessing the legality of targeting AQAP (or its principals) under the September 18, 2001 Authorization for the Use of Military Force?

But then he punts entirely on standing grounds.

> Although these threshold questions of jurisdiction may seem less significant than the questions posed by the merits of plaintiff's claims, "[m]uch more than legal niceties are at stake here" — the "constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers,

> restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects."
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> [snip]
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> Because these questions of justiciability require dismissal of this case at the outset, the serious issues regarding the merits of the alleged authorization of the targeted killing of a U.S. citizen overseas must await another day or another (non-judicial) forum.

But just for good measure, Bates says he would rule in the government's favor on state secrets, but doesn't need to.

> So, too, defendants have established that the three procedural requirements for invocation of the state secrets privilege – (1) a formal claim of privilege (2) by an appropriate department head (3) after personal consideration – have been satisfied here. See Reynolds, 345 U.S. at 7-8; Jeppesen Dataplan, 614 F.3d at 1080; Defs.' Mem. at 48-50.[snip]
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> Under the circumstances, and particularly given both the extraordinary nature of this case and the other clear grounds for resolving it, the Court will not reach defendants' state secrets privilege claim. That is consistent with the request of the Executive Branch and with the law, and plaintiff does not contest that approach. Indeed, given the nature of the state secrets assessment here based on careful judicial review of classified submissions to which neither plaintiff nor his counsel have access, there is little that plaintiff can offer with respect to this issue.17 But in any

> event, because plaintiff lacks standing and his claims are non-justiciable, and because the state secrets privilege should not be invoked "more often or extensively than necessary," see Jeppesen Dataplan, 614 F.3d at 1080, this Court will not reach defendants' invocation of the state secrets privilege.

It was nice of Bates to save the Obama Administration the embarrassment of invoking state secrets to hide the logic for its tyranny.

All in all, a tremendous victory for unchecked executive powers!

Update: Key to Bates' ruling is the government's claim that al-Awlaki can just waltz up to an Embassy and make a legal request that they stop their illegal targeting of him.

> In his complaint, plaintiff maintains that his son cannot bring suit on his own behalf because he is "in hiding under threat of death" and any attempt to access counsel or the courts would "expos[e] him[] to possible attack by Defendants." Compl. ¶ 9; see also id. ¶ 26; Al-Aulaqi Decl. ¶ 10. But while Anwar Al-Aulaqi may have chosen to "hide" from U.S. law enforcement authorities, there is nothing preventing him from peacefully presenting himself at the U.S. Embassy in Yemen and expressing a desire to vindicate his constitutional rights in U.S. courts. Defendants have made clear – and indeed, both international and domestic law would require – that if Anwar Al-Aulaqi were to present himself in that manner, the United States would be "prohibit[ed] [from] using lethal force or other violence against him in such circumstances."

Bates makes the very helpful suggestion that if al-Awlaki wants to access the justice system, he should just email some lawyers—not admitting, of course, that the government now routinely wiretaps attorney-client correspondence.

> There is no reason why — if Anwar Al-Aulaqi wanted to seek judicial relief but feared the consequences of emerging from hiding — he could not communicate with attorneys via the Internet from his current place of hiding.

But there's a problem with this (aside from the whole abuse of attorney-client privilege). Bates has said that he would support the government's state secrets claim, if it came to that. Which means even if al-Awlaki waltzed up the American Embassy in Yemen, he would have no way to challenging his targeting, because his suit—like that of Binyam Mohamed or Maher Arar—would be dismissed on state secrets grounds. Which gets to the whole underlying problem here. The government has refused to indict al-Awlaki, to even place their accusations into a legal form. Absent that and in light of Bates' advance assault on state secrets, al-Awlaki would still have no legal means to challenge his targeting.