COLLEEN MCMAHON: THE COVERT OP THAT KILLED ANWAR AL-AWLAKI WAS ILLEGAL

A lot of people have discussed this section of Judge Colleen McMahon's January 2, 2013 ruling dismissing ACLU and NYT's FOIA for memos and other documents related to the targeted killing of Anwar al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki:

> I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for their conclusion a secret. [my emphasis]

But I'm not aware of anyone commenting at length on the section she titles, "Constitutional and Statutory Concerns about Targeted Killings," a 5-page discussion of assessing targeted killing in terms of due process, treason, and other laws.

While the section is not entirely off point — she explores some of the legal questions raised in ACLU's FOIA, though as I'll show, she expands on the questions ACLU raised — the section is completely extraneous to her task at hand, determining whether or not the government has to turn over its legal justifications for killing Anwar al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki. In other words, McMahon takes a 5-page detour from her work of adjudicating a FOIA dispute and lays out several reasons why the Awlaki killing may not be legal.

She recalls how central due process was to the founding of our nation.

> As they gathered to draft a Constitution for their newly liberated country, the Founders – fresh from a war of independence from the rule of a King they styled a tyrant- were fearful of concentrating power in the hands of any single person or institution, and most particularly in the executive. That concern was described by James Madison in Federalist No. 47 (1788):
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> > The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny ….
> >
> > The magistrate in whom the whole executive power resides cannot of himself … administer justice in person, though he has the appointment of those who do administer it.

She reminds that the Treason Clause appears in Article III of the Constitution, not Article II.

> Interestingly, the Treason Clause appears in the Article of the Constitution concerning the Judiciary – not in Article 2, which defines the powers of the Executive Branch. This suggests that the Founders contemplated that traitors would be dealt with by the courts of law, not by unilateral action of the Executive. As no less a constitutional authority than Justice Antonin Scalia noted, in his dissenting opinion in *Hamdi*, 542 U.S. at 554, "Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime."

Thus far, she has just made it abundantly clear she meant her earlier comment about "actions that seem on their face incompatible with our Constitution and laws" seriously (and she addresses points — due process and Treason — the ACLU brought up explicitly). She interrupts her work of assessing the FOIA case before her to make it very clear she believes the Awlaki killing violated key principles of our Constitution.

But I'm particularly interested in the last two pieces of law she raises to suggest she thinks the Awlaki killing might be illegal. First, she looks at 18 USC 1119.

> Assuming arguendo that in certain circumstances the Executive power extends to killing without trial a citizen who, while not actively engaged in armed combat against the United States, has engaged or is engaging in treasonous acts, it is still subject to any constraints legislated by Congress. One such constraint might be found in 18 U.S.C. § 1119, which is entitled "Foreign murder of United States nationals." This law, passed in 1994, makes it a crime for a "national of the United States" to "kill[] or attempt[] to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country." The statute contains no exemption for the President (who is, obviously, a national of the United States) or anyone acting at his direction. At least one commentator has suggested that the targeted killing of Al-Awlaki (assuming it was perpetrated by the Government) constituted a violation of the foreign murder statute. Philip Dore, Greenlighting American Citizens: Proceed with Caution, 72 La. L. Rev. 255 (2011).

18 USC 1119 is, of course, the passage of the

white paper I focused on here, which the Administration dismisses, in part, this way.

> Similarly, under the Constitution and the inherent right to national self-defense recognized in international law, the President may authorize the use of force against a U.S. citizen who is a member of al-Qa'ida or its associated forces who poses an imminent threat of violent attack against the United States.

And I'm such a geek that I actually mapped out what Eric Holder said in his Northwestern Speech and what actually appears in the white paper. The discussion on section 1119 is, by far, the topic explored in greatest length in the white paper but left unmentioned in Holder's public spin of the legal thinking behind Awlaki's killing. Section 1119 is something that Administration was very worried about, but didn't want the public to know how worried they were.

McMahon's discussion is interesting, too, because it's somewhat tangential to the list of things ACLU asked about. They ask for "the reasons why domestic-law prohibitions on murder … do not preclude the targeted killing of Al-Awlaki." And their original FOIA letter cites the same Dore article that McMahon cites. The ACLU never mentions section 1119 by name. But McMahon does, honing in on the statute that — at least given the relative focus of the white paper — the Administration seemed most concerned about. (She did get classified declarations, so it's possible she got the white paper, though her comments about not needing to see the one OLC memo identified in the Vaughn Indices would seem to suggest she had not seen it.)

Then McMahon brings up something that doesn't show up in the white paper (but one I've brought up).

> There are even statutory constraints on

> the President's ability to authorize covert activity. 50 U.S.C. §413b, the post-World War II statute that allows the President to authorize covert operations after making certain findings, provides in no uncertain terms that such a finding "may not authorize any action that would violate the Constitution or any statute of the United States." 50 U.S.C. § 413b(a)(5). Presidential authorization does not and cannot legitimize covert action that violates the constitution and laws of this nation.

McMahon is, by this point, basically arguing that the Article II rationalizations that end up in the white paper (whether or not she had seen it) are invalid. The President cannot authorize something that violates the Constitution and US law, not even for (or especially not for) a covert operation the CIA would conduct.

Mind you, she's a bit more gentle in her legal condemnation of the argument.

> So there are indeed legitimate reasons, historical and legal, to question the legality of killings unilaterally authorized by the Executive that take place otherwise than on a "hot" field of battle. [my emphasis]

But she refutes, in 5 pages, not only what the government argued in the white paper (including its extensive section 1119 argument), but also the Treason Clause question they didn't address.

And look at what she's refuting here. She says the Executive "unilaterally authorized" Awlaki's killing. She suggests they did so via a covert op.

In this section, she doesn't once mention the Authorization to Use Military Force the Administration tries to yoke CIA actions onto, in spite of her discussion of the AUMF earlier

in her ruling. (Update: Though she does introduce her Treason section by saying, “If the War on Terror is indeed a war declared by Congress pursuant to its constitutional power, and if Al-Awlaki was a combatant in that war, then he is a traitor.”)

In Colleen McMahon’s 5-page detour, having read a slew of classified declarations on the legality of the Awlaki killing — including CIA’s rationale for invoking Glomar — she addresses this killing as a covert operation authorized “unilaterally,” with no mention of the AUMF attaching Congressional authorization to the killing.

Perhaps that’s just her skepticism about whether the AUMF applies away from the “hot” battlefield; elsewhere, she notes that Awlaki “was located about 1500 miles from Afghanistan, in Yemen, a country with which the United States is not at war (indeed, which the United States counts as an ally).” That is, perhaps she just doesn’t buy the Administration’s arguments about the global battlefield.

But I find it very telling that a Judge who has read classified declarations from several agencies (and went on to write her own classified ruling, in addition to the public one) assesses the legality of the Awlaki killing as if it were solely based on Article II authority.