JUDGE COLLYER'S FACTUALLY ERRONEOUS FREELANCE RUBBER STAMP FOR KILLING AMERICAN CITIZENS

As I noted on Friday, Judge Rosemary Collyer threw out the Bivens challenge to the drone killings of Anwar and Abdulrahman al-Awlaki and Samir Khan.

The decision was really odd: in an effort to preserve some hope that US citizens might have redress against being executed with no due process, she rejects the government's claims that she has no authority to decide the propriety of the case. But then, by citing precedents rejecting Bivens suits, including one on torture in the DC Circuit and Padilla's challenge in the Fourth, she creates special factors specifically tied to the fact that Awlaki was a horrible person, rather than that national security writ large gives the Executive unfettered power to execute at will, and then uses these special factors she invents on her own to reject the possibility an American could obtain any redress for unconstitutional executions. (See Steve Vladeck for an assessment of this ruling in the context of prior Bivens precedent.)

The whole thing lies atop something else: the government's refusal to provide Collyer even as much information as they had provided John Bates in 2010 when Anwar al-Awlaki's father had tried to pre-emptively sue before his son was drone-killed.

On December 26, Collyer ordered the government to provide classified information on how it decides to kill American citizens.

> MINUTE ORDER requiring the United States, an interested party 19 , to

> lodge no later than January 24, 2014, classified declaration(s) with court security officers, in camera and ex parte, in order to provide to the Court information implicated by the allegations in this case and why its disclosure reasonably could be expected to harm national security…, include[ing] information needed to address whether or not, or under what circumstances, the United States may target a particular foreign terrorist organization and its senior leadership, the specific threat posed by… Anwar-al Aulaqi, and other matters that plaintiff[s have] put at issue, including any criteria governing the use of lethal force, updated to address the facts of this record.

Two weeks later, the government moved to reconsider, both on jurisdictional grounds and because, it said, Collyer didn't need the information to dismiss the case.

> Beyond the jurisdictional issue, the Court should vacate its Order because Defendants' motion to dismiss, which raises the threshold defenses of the political question doctrine, special factors, and qualified immunity, remains pending. The information requested, besides being classified, is not germane to Defendants' pending motion, which accepts Plaintiffs' well-pled facts as true.

As part of their motion, however, the government admitted to supplementing the plaintiffs' facts.

> Defendants' argument that decedents' constitutional rights were not violated assumed the truth of Plaintiffs' factual allegations, and supplemented those allegations only with judicially noticeable public information, the content of which Plaintiffs did not and

> do not dispute.

The plaintiffs even disputed that they didn't dispute these claims, pointing out that they had introduced claims about:

- AQAP's status vis a vis al Qaeda
- Whether the US is in an armed conflict with AQAP
- The basis for Awlaki's listing as a Special Designated Global Terrorist

Ultimately, even Collyer scolds the government for misstating the claims alleged in the complaint.

> The United States argued that the factual information that the Court requested was not relevant to the Defendants' special factors argument because special factors precluded Plaintiffs' cause of action, given the context in which the claims, "as pled," arose——that is, "the alleged firing of missiles by military and intelligence officers at enemies in a foreign country in the course of an armed conflict." Mot. for Recons. & to Stay Order at ECF 10. The United States, however, mischaracterizes the Complaint. Nowhere does the Complaint allege that Anwar Al-Aulaqi was an "enemy" of the United States or that he was part of AQAP. The Complaint states only that "government officials told reporters that Al-Aulaqi had "cast his lot" with terrorist groups and encouraged others to engage in terrorist activity. Later, they claimed he had played "a key role in setting the strategic direction" for [AQAP]." Compl. ¶ 26. Further, far from alleging that Anwar Al-Aulaqi was killed "in the course of an armed conflict," the

> Complaint asserts that he was killed outside of armed conflict, in Yemen. See Compl. ¶ 4 ("At the time of the killing, the United States was not engaged in armed conflict with or within Yemen."). In fact, Plaintiffs allege that "at the time the strike was carried out, Anwar Al-Aulaqi was not engaged in activities that presented a concrete, specific, and imminent threat of death or serious physical injury."

All this, she complains, made it a lot harder to come up with the legally improper but judicially cowardly decision to throw out the case.

> The United States' truculent opposition to the December 26, 2013 Minute Order made this case unnecessarily difficult. Were the Court not able to cobble together enough judicially-noticeable facts from various records, it would have denied the motion to dismiss for the sheer fact that the Defendants failed to support the assertion that Bivens special factors apply.

She doesn't let the government's "truculence" dissuade her, however. In spite of the fact that both sides say she needs no more details to decide the motion to dismiss, Collyer takes judicial notice of what she calls facts and uses them to decide the issue.

> Because the Court may take judicial notice of facts contained in the public records of other proceedings, see Covad, 407 F.3d at 1222, the Court takes judicial notice of the facts regarding Anwar Al-Aulaqi's involvement in the Christmas Day attack. See Sentencing Mem. at 12-14; Tr. of Plea Hr'g (Oct. 12, 2011) at 26. The Court also takes judicial notice of the fact that in a May 2010 video interview, Anwar Al-Aulaqi called for "jihad against

> America" and declared that he would "never surrender." Al-Aulaqi v. Obama, 727 F. Supp. 2d at 10-11; Clapper Decl. ¶ 16. Judicial notice is taken, too, of the Treasury publication in the Federal Register, i.e., the designation of Anwar Al-Aulaqi as a Specially Designated Global Terrorist due to the fact that he was a key leader of AQAP. See 75 Fed. Reg. 43,233-01.

But she misstates some of the facts she takes judicial notice of, most significantly in the way she misreads the evidence in the record on the UndieBomb attack.

> When pleading guilty, Mr. Abdulmutallab stated that he conspired with Anwar Al-Aulaqi to carry an explosive device onto the aircraft, thereby attempting to kill those onboard and wreck the plane, as an act of jihad against the United States. Tr. of Plea Hr'g (Oct. 12, 2011) at 26. Mr. Abdulmutallab was debriefed by FBI agents at various times between January and April 2010; he specifically named Anwar Al-Aulaqi as the AQAP leader who approved the Christmas Day attack, and he described in detail the nature of Anwar Al-Aulaqi's participation in the attack. See United States v. Abdulmutallab, Crim. No. 10-CR-20005-1 (E.D. Mich.), Gov't Sentencing Mem., Supp. Factual Appx. (Sentencing Mem.) at 12-14.

Ultimately, Collyer points to the UndieBomb as "proof" of the "fact" that Awlaki was dangerous (and just as importantly, that he supported attacks rather than just propagandized for them).

> The fact is that Anwar Al-Aulaqi was an active and exceedingly dangerous enemy of the United States, irrespective of his distance, location, and citizenship.

> As evidenced by his participation in the Christmas Day attack, Anwar Al-Aulaqi was able to persuade, direct, and wage war against the United States from his location in Yemen, i.e., without being present on an official battlefield or in a "hot" war zone. Defendants, top military and intelligence officials, acted against Anwar Al-Aulaqi, a notorious AQAP leader, as authorized by the AUMF.
>
> [snip]
>
> Anwar Al-Aulaqi was an AQAP leader who levied war against his birth country, as unambiguously revealed by his role in the Christmas Day bombing, as well as his video and writings.

But Collyer completely misquotes the evidence from Abdulmutallab's guilty plea, in which he said Awlaki's tapes — which he watched long before he arrived in Yemen — inspired his attempted attack, but pointedly does not name his co-conspirators and definitely did not name Awlaki as such. And the claim that any of the rest of the evidence is "unambiguous" is equally false. Significantly, Collyer doesn't mention Abulmutallab's initial confession — details of which appear in the sentencing memo she does cite and which were used for the opening of the trial — which attributes the actions blamed on Awlaki on someone made up, a probable synthesis of multiple people, including Fahd al-Quso (whom the government doesn't name in the sentencing memo) named Abu Tarak.

Collyer similarly ignores evidence in the White Paper showing that the government considered Awlaki to be outside the battlefield — a point the plaintiffs called attention to prior to her ruling.

Even her claim that this was authorized by the AUMF is, at least, unproven. Not even Ron Wyden, who by law should have been but was probably not

a participant in what she "prior approval" of the killing (only the Gang of Four gave prior approval, but even there, they had inadequate information), did not know for over a year after Awlaki's killing whether he was killed under the AUMF or not, and the White Paper she invokes leaves that studiously unclear as well.

And while her freelance research isn't as egregious in the case of Abdulrahman al-Awlaki (mostly because there's almost no hard evidence one way or another), she doesn't take notice of the report that the government deliberately killed the younger Awlaki. Given that John Brennan reportedly ordered a report into the killing to find out who had killed him deliberately, that claim is something that rightly should be assessed in discovery, not ignored so as to make dismissing the case more palatable.

In their comments on the decision, both Center for Constitutional Rights and ACLU talk about Collyer accepting the government's allegations as proof so she could rubber stamp the killing.

> Said Center for Constitutional Rights Senior Attorney Maria LaHood, "Judge Collyer effectively convicted Anwar Al-Aulaqi posthumously based on the government's own say-so, and found that the constitutional rights of 16-year-old Abdulrahman Al-Aulaqi and Samir Khan weren't violated because the government didn't target them. It seems there's no remedy if the government intended to kill you, and no remedy if it didn't. This decision is a true travesty of justice for our constitutional democracy, and for all victims of the U.S. government's unlawful killings."
>
> Said ACLU National Security Project Director Hina Shamsi, one of the attorneys who argued the case, "This is a deeply troubling decision that treats the government's allegations as proof while refusing to allow those

> allegations to be tested in court. The court's view that it cannot provide a remedy for extrajudicial killings when the government claims to be at war, even far from any battlefield, is profoundly at odds with the Constitution. It is precisely when individual liberties are under such grave threat that we need the courts to act to defend them. In holding that violations of U.S. citizens' right to life cannot be heard in a federal courtroom, the court abdicated its constitutional role."

But it's worse than that. Having been refused details by the government of those allegations, Collyer went out looking for "proof" of the allegations on her own. What the evidence she consulted shows is that the public proof, at least, is actually contradictory. So she ignored that and just rubber stamped away.