

GOVERNMENT TRYING TO FUDGE ON ITS CLAIM TO ABSOLUTE POWER

I'm working on a post on the news that DOJ will not charge Jose Rodriguez for destroying the torture tapes. But that's going to take a while (read the NYT on the news in the meantime).

In the meantime, though, I wanted to point to Adam Serwer's summary of yesterday's hearing on the Anwar al-Awlaki suit. The most amusing detail in Adam's story is that the government only wants to rely on its invocation of State Secrets as a fallback position.

Letter explicitly asked Bates to dismiss the lawsuit on state-secrets grounds only as a last resort.

See?!? They have some shame about their abuse of executive power, even if they're going to rely on it anyway.

The most important issue, IMO, pertains to standing—I have already suggested that Judge Bates might reject the suit for lack of standing, not least because it's the easiest way to punt. Adam suggests that Bates was thoroughly uninterested in one of two potential ways to establish standing.

The ACLU/CCR contends they have standing under two criteria, "Next Friend" and "Third Party." Meeting the standard under "Next Friend" requires the ACLU/CCR to show that the younger al-Awlaki would want to sue but can't, while "Third Party" demands that the elder al-Awlaki show that he would "suffer a concrete, redressable injury" from the government's actions. Although Ben Wittes, who was also there, would disagree with me, I think Bates was more sympathetic to "Next Friend" than he was

to the “Third Party” question, as he warned the latter could lead to a flood of lawsuits based on government action, and an “unprincipled landscape” in which judges arbitrarily decide standing based on the plaintiffs they’re sympathetic to.

But perhaps the most dramatic part of the hearing appears to have been when Jameel Jaffer stood up and stated that this suit was about whether or not the President can order the assassination of a citizen with no review. I actually differ with Adam’s take on some of this.

There was an exchange at the end of arguments that, beyond the legalese, really crystallized what this case is about. Both sides had offered their final rebuttals, but ACLU attorney Jameel Jaffer stood again and stated that the lawsuit was really about whether the president possesses an “unreviewable authority to order the assassination of an American citizen.” It moved Bates to ask Letter if he wanted to respond.

[DOJ Attorney Douglas] Letter rose and called Jaffer’s statement “absurd” and “ridiculous” but what followed was less convincing. He pointed out that the AUMF limits the president to overseas operations, that al-Awlaki was part of an “officially designated” terrorist group who was “attempting to carry out operations” against Americans. The fact that al-Awlaki had just **released** a new video calling for Muslims to kill Americans probably weighed on reporters in the courtroom.

Only the first of Letter’s statements is beyond dispute. The other two concern unproven – but not necessarily inaccurate – assumptions of fact that go

to the heart of the case: whether or not al-Awlaki is actually an “operational leader” of al-Qaeda in the Arabian Peninsula or simply a vicious hater who justifies and exhorts terrorism against Americans. The government is actually saying that its unilateral determination that the latter two assumptions are accurate that allow the government to deprive al-Awlaki of life without due process.

First, note that Letter’s claim that al-Awlaki was part of an “officially designated” terrorist group is a bunch of baloney. He is now part of that group, at least according to the unproven allegations of the government. But the State Department didn’t get around to designating al Qaeda in the Arabian Peninsula as such until several weeks after they had put al-Awlaki on the JSOC kill list (though he was not yet on the CIA kill list), so the suggestion that the President would only target someone formally designated a terrorist for assassination is a lie.

But the other claim—that the AUMF only covers operations overseas—is even sillier.

Consider: the government has not yet withdrawn the White Paper retroactively authorizing the illegal wiretap program under the AUMF. Thus, DOJ still supports claims that the AUMF authorized the President—any President—to conduct operations (in that case, military operations in the form of NSA wiretapping) in the United States.

Mind you, Tom Daschle has made it clear that Congress specifically refused to grant the President authority to operate in the United States. But so long as DOJ supports that White Paper, they stand by a public claim that the AUMF authorized the President to operate within the US.

So Jaffer is right: there’s nothing about

Douglas Letter's claims that rebut Jaffer's argument that this is about whether the President can unilaterally assassinate an American citizen. As Adam has shown, simply asserting someone is a member of a terrorist organization does not make the assertion any less unilateral. And Letter's claims that the AUMF does not authorize operations in the United States seems to ignore DOJ policy that supports just such a claim.

LET THE DRONES BEGIN

Fresh off exempting Yemen from any sanctions for its use of child soldiers and partly in response to this week's attempted package bombings, the government appears to be ready to let the CIA start operating drones in Yemen.

Allowing the U.S. military's Special Operations Command units to operate under the CIA would give the U.S. greater leeway to strike at militants even without the explicit blessing of the Yemeni government. In addition to streamlining the launching of strikes, it would provide deniability to the Yemeni government because the CIA operations would be covert. The White House is already considering adding armed CIA drones to the arsenal against militants in Yemen, mirroring the agency's Pakistan campaign.

[snip]

Placing military units overseen by the Pentagon under CIA control is unusual but not unprecedented. Units from the Joint Special Operations Command have been temporarily transferred to the CIA in other countries, including Iraq, in recent years in order to get around

restrictions placed on military operations.

[snip]

The CIA conducts covert operations based on presidential findings, which can be expanded or altered as needed.

Congressional oversight is required but the information is more tightly controlled than for military operations. For example, when the military conducts missions in a friendly country, it operates with the consent of the local government.

An increase in U.S. missile strikes or combat ground operations by American commando forces could test already sensitive relations with Yemen, which U.S. officials believe is too weak to defeat al Qaeda. Such an escalation could prompt Yemeni president Ali Abdullah Saleh to end the training his military receives from U.S. special operations forces.

If Saleh is too weak (or ideologically compromised) to get the job done against al Qaeda, then why are we foisting our special ops training on him and the 50% of his military that are children (though the US insists that no children will go through our training)?

And I wonder what would have happened if we responded to the UnaBomber by dropping bombs throughout Montana?

The WSJ doesn't say it, but this may well be an effort to evade the AUMF problem limiting the Afghan war on terror to targets who had a hand in 9/11, which AQAP did not. We know Cheney repeatedly chose to do his covert work through JSOC, claiming he didn't have to brief Congress on the actions. This seems to be the opposite: Obama appears ready to brief Congress (presumably, with the new Intelligence Authorization, the entire intelligence

committees). But by running essentially military actions through CIA, you can avoid the whole declare war thing—you just issue and tweak a finding, letting the Commander-in-Chief dictate the terms of the not-war.

Meanwhile, here's a rather curious detail from our other drone war. Two top Tehrik-i-Taliban figures were reportedly shot. Like with guns, not drones.

Former Tehreek-i-Taliban Pakistan's (TTP) commander Baitullah Mehsud's brother Yaqoob Khan has reportedly been shot dead by unidentified men in Mir Ali, North Waziristan.

[snip]

Earlier this week, a key commander of the TTP, Adnan Afridi, is reported to have been shot dead by unknown persons in the Naseerabad area of Rawalpindi.

Maybe these were internal disputes, maybe we didn't kill these men. But it would be an interesting development if we started targeting individual people, wouldn't it?

Update: See Spencer's very good piece on this.