

OBAMA DOESN'T KNOW WHY THE FUCK HE'S ENTITLED TO KILL AL- AWLAKI, HE JUST IS, DAMNIT

The most striking aspect of the government's motion to dismiss the ACLU/CCR lawsuit challenging the use of targeted killing is that the government does not commit to the basis for its authority to kill an American citizen like Anwar al-Awlaki with no review.

This starts as soon as the filing tries to lay the ground work for unchecked authority under the AUMF. It doesn't commit to whether Al Qaeda in the Arabian Peninsula **is part of** al Qaeda itself, or is instead just **closely enough associated** to count under the AUMF.

The United States has further determined that AQAP is an organized armed group that is either part of al-Qaeda, **or** is an associated force, or cobelligerent, of al-Qaeda that has directed armed attacks against the United States in the noninternational armed conflict between the United States and al-Qaeda that the Supreme Court recognized in Hamdan v. Rumsfeld, 548 U.S. 557, 628-31 (2006).

[snip]

Furthermore, as noted above, the Executive Branch has determined that AQAP is an organized armed group that is either part of al-Qaeda **or**, **alternatively**, is an organized associated force, or cobelligerent, of al-Qaeda that has directed attacks against the United States in the noninternational armed conflict between the United States and al-Qaeda that the Supreme Court has recognized (see

Hamdan, 548 U.S. at 628-31). [my emphasis]

Though note the gigantic slip here: the AUMF only declares war against those “those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided **the terrorist attacks that occurred on September 11, 2001**, or harbored such organizations or persons” (when AQAP didn’t exist in its current form), not those who have attacked us since. This “either/or” statement only claims that AQAP is part of the same war, not that it had any role in 9/11, so it’s totally bogus in any case, even without the betrayal of their lack of confidence in both of these claims with the either/or construction.

Presumably to tie AQAP more closely to the AUMF, the government then notes that the Treasury declared AQAP a terrorist organization (not noting that that happened eight months after al-Awlaki was first targeted for assassination), which in turn relies upon a Presidential declaration issued roughly around the same time as the AUMF.

Based in part on this information, on July 16, 2010, the U.S. Department of the Treasury issued an order designating Anwar al-Aulaqi a “Specially Designated Global Terrorist” (SDGT) for, inter alia, “acting for or on behalf of al-Qaeda in the Arabian Peninsula (AQAP) . . . and for providing financial, material or technological support for, or other services to or in support of, acts of terrorism[.]” Designation of ANWAR AL-AULAQI Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594, 75 Fed. Reg. 43233, 43234 (July 23, 2010).¹

¹ This designation was issued pursuant to the President’s authority under the International Emergency Economic Powers

Act ("IEEPA"), 50 U.S.C. §§ 1701-06. After the terrorist attacks of September 11, 2001, the President issued Executive Order No. 13224 ("E.O. 13224"), 66 Fed. Reg. 49,079 (2001), effective September 24, 2001, declaring a national emergency with respect to the "grave acts of terrorism . . . and the continuing and immediate threat of further attacks on United States nationals or the United States." See E.O. 13224, Preamble. The Secretary of State previously designated AQAP as a Foreign Terrorist Organization on January 19, 2010, pursuant to her powers under the Antiterrorism and Effective Death Penalty Act, 8 U.S.C. § 1189. (See <http://www.state.gov/r/pa/prs/ps/2010/01/135364.htm>).

Gosh! That's almost like AQAP was included in the AUMF back in 2001, the reliance on a declaration made just days after the AUMF itself.

Except it's not. (And the argument itself presumes that anyone Timmeh Geithner wants to call a terrorist can be killed with no due process, whether or not they have a tie to Al Qaeda.)

You can tell DOJ's lawyers recognize this to be a gaping hole in their argument, because they repeatedly claim—without providing any evidence—that they have been authorized by "the political branches" to use all means against the threat that Al-Awlaki is part of.

In particular, plaintiff's requested relief would put at issue the lawfulness of the future use of force overseas that Executive officials might undertake at the direction of the President against a foreign organization as to which the political branches have authorized the use of all necessary and appropriate force.

[snip]

More broadly, the Complaint seeks judicial oversight of the President's power to use force overseas to protect the Nation from the threat of attacks by an organization against which the political branches have authorized the use of all necessary and appropriate force, in compliance with applicable domestic and international legal requirements, including the laws of war. See Authorization for Use of Military Force (AUMF), Pub. L. No. 107 40, 115 Stat. 224 (2001) (Joint Resolution of Congress signed by the President). [my emphasis]

Last I checked, only one political branch has the authority to declare war, Congress. Not multiple political branches. That the Administration has even invoked political branches, plural, for their authority to use force—basically arguing “we and that rump organization better known as Congress have authorized this, so there!”—demonstrates the audacity of their claim to self-authorize using unlimited power.

Presumably to reinforce the magic power of this strange invocation of the political branches, the filing then argues that judges aren't equipped “to manage” the Executive Branch.

The Judiciary is simply not equipped to manage the President and his national security advisors in their discharge of these most critical and sensitive executive functions and prescribe ex ante whether, where, or in what circumstances such decisions would be lawful. Whatever the limits of the political question doctrine, this case is at its core.

Of course, that's not what the suit asks the

court to do at all. It asks the court to review the decisions of the Executive Branch, not least to see whether its actions comply with the terms which that other political branch—the one that actually has the authority to declare war—has laid out.

Review ... manage.

What's the difference if an American citizen's life is at stake?

Of course, Courts review precisely the underlying question—whether the Executive can execute a citizen—all the time, but obviously it becomes a problem when the whole underlying premise is illegal. So to try to make this instance different, the filing repeatedly says the courts don't have the ability to review whether the targeting of an American citizen that was ordered over nine months ago is "imminent."

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, the questions he would have the court evaluate—such as whether a threat to life or physical safety may be "concrete," "imminent," or "specific," or whether there are "reasonable alternatives" to force—can only be assessed based upon military and foreign policy considerations, intelligence and other sources of sensitive information, and real-time judgments that the Judiciary is not well-suited to evaluate.

Obama's "imminent" just leapt past Clinton's word games with "is" as the most pathetic example of sophistry in modern politics.

Now, presumably recognizing that even right wing lawyers like John Bellinger and Jack Goldsmith

can recognize their claim to be acting under the AUMF to be false, the filing then basically says, “and if you don’t like our AUMF argument, here’s another one!”

In addition to the AUMF, there are other legal bases under U.S. and international law for the President to authorize the use of force against al-Qaeda and AQAP, including the inherent right to national self-defense recognized in international law (see, e.g., United Nations Charter Article 51).

But they don’t even try to make the argument that this backup claim to authority holds. They just say, “well, if the first thing I threw at the wall doesn’t stick, let me know if this one does.”

Which ultimately gets them to arguing they can’t explain why they have the authority to kill an American citizen with no due process. They just do, damnit.

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.

“Judge, we don’t really want to explain why we think we have the authority to target American citizens with no due process, we just do.”

The real tell, though, is when they argue that the Executive Branch simply can’t be expected to operate under “generalized standards” and “general criteria.”

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.

[snip]

Enforcing an injunction requiring military and intelligence judgments to conform to such general criteria, as plaintiff would have this court command, would necessarily limit and inhibit the President and his advisors from acting to protect the American people in a manner consistent with the Constitution and all other relevant laws, including the laws of war.

The law—all laws—are precisely that: general standards that limit the actions of all citizens. So to translate this last passage, the “constitutional lawyer” President’s lawyers just argued that asking the military and intelligence services to conform to general criteria like rule of law would inhibit the President from acting consistent with a set of laws including the Constitution.

This is not a court filing. It’s a “choose your own adventure novel” for the judge:

1. Is AQAP part of al Qaeda?
(if yes, then go to dead al-Awlaki)
2. Is AQAP an “organized associated force of al

Qaeda"? (if yes, then go to dead al-Awlaki)

3. Do Presidents get to self-authorize going to war (if yes, then go to dead al-Awlaki; if no, go to "alternatives to the AUMF")
4. What do you think of the "inherent right to self defense"? (if yes, then go to dead al-Awlaki)
5. To abide by the Constitution and other laws, the President can't be bound by "generalized standards." The End. (go to dead al-Awlaki)

And mind you, we've set off on this "choose your own adventure in tyranny novel" even before we've gotten to the government's invocation of state secrets. Just in case you had any doubts about their claim to unlimited power...

Update:

Here are the other documents submitted yesterday.

Notice of Leon Panetta's secret filing, and his public one, consisting entirely of boilerplate.

Notice of James Clapper's secret filing, and his public one, consisting entirely of boilerplate.

Notice of Robert Gates' secret filing, and his public one, asserting something called "the military and state secrets privilege," which I've never heard of.

NCTC head Michael Leiter's Congressional testimony from earlier this week, not even tailored for this argument about why the Executive Branch can assassinate citizens with no due process.

A copy of the state secrets policy Holder enacted last year, promising that, honest, they won't abuse the state secrets privilege.

Update: Glenn focuses on the state secrets invocation. As he points out, this means Obama is officially to the right of hack lawyer and Presidential power cheerleader David Rivkin.