Written by **Michael Tennant** on January 3, 2013

Judge Tosses Lawsuit for Documents on Obama's Targeted Killing Program

Is the federal government required to disclose the whys and wherefores of its targeted killing program? According to U.S. District Judge Colleen McMahon, the answer is a reluctant *no*.

McMahon, a judge in Manhattan, dismissed all but a tiny portion of a lawsuit seeking records concerning the Obama administration's targeted killing program, which has been used to assassinate various individuals in countries with which the United States is not formally at war. Among those killed were American citizens Anwar al-Awlaki, his 16-year-old son Abdulrahman al-Awlaki, and Samir Khan, all of whom perished in U.S. drone strikes in Yemen.

The case before the court was a combination of two separate lawsuits. The first, brought by the *New York Times*, sought a Justice Department memorandum providing the legal justification for the assassination of al-Awlaki. The second, brought by the American Civil Liberties Union (ACLU), was considerably broader, asking for a variety of records concerning the targeted killing program in general and the killings of the three American citizens in Yemen in particular. The plaintiffs had requested these records under the Freedom of Information Act (FOIA), but the government had refused to supply them, in most cases declining to state whether they existed or not.

McMahon, an appointee of President Bill Clinton, was clearly sympathetic to the plaintiffs' case. "The FOIA requests here in issue implicate serious issues about the limits on the power of the Executive Branch under the Constitution and laws of the United States, and about whether we are indeed a nation of laws, not of men," she wrote.

> The Administration has engaged in public discussion of the legality of targeted killing, even of citizens, but in cryptic and imprecise ways, generally without citing to any statute or court decision that justifies its conclusions. More fulsome disclosure of the legal reasoning on which the Administration relies to justify the targeted killing of individuals, including United States citizens, far from any recognizable "hot" field of battle, would allow for intelligent discussion and assessment of a tactic that … remains hotly debated.

She went on to offer an excellent brief against the targeted killing program. Noting that "the Founders … were fearful of concentrating power in the hands of any single person or institution, and most particularly in the executive," McMahon pointed to the "steps" they took "to address their fear" in the Constitution. She singled out the Fifth Amendment's guarantee of due process of law along with other protections for the accused in both that amendment and the subsequent one — none of which is observed when the government dispatches someone on the president's say-so.

While granting that "the activities in which Al-Awlaki is alleged to have engaged … constitute treason as defined in the Constitution," McMahon argued that al-Awlaki was therefore entitled to "special protections" under Article 3, Section 3, which demands the testimony of two witnesses or a confession in court for conviction. Moreover, she observed, since Article 3 concerns the powers of the judiciary, not the executive, "this suggests that the Founders contemplated that traitors would be dealt with by the courts of law, not by unilateral action of the Executive."

McMahon further noted that there are "statutory constraints" on executive power, including a 1994 law that "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.'" Targeted killings, she added, are not exempt by virtue of being covert activities because the president is required to keep such activities within the bounds of the law.

"So," she summarized, "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."

The plaintiffs argued that the government should be compelled to turn over the requested documents because various officials, including the president, have spoken publicly and at length about the targeted killing program. The government, therefore, could no longer claim that the program and related documents were secret, and thus it had waived its right to withhold the requested documents under FOIA.

McMahon, however, found that the administration had not explained its reasoning in detailed, precise, legal terms of the sort that would be included in the documents being sought, thereby preventing the contents of those documents from becoming public knowledge and allowing the government to withhold them. In addition, she stated that "it lies beyond the power of this court to conclude that a document has been improperly classified," and so she was forced to take the administration's word for it that the documents in question could not be released without compromising national security.

As a result, McMahon felt compelled to dismiss the case because, she wrote,

> this Court is constrained by law, and under the law, I can only conclude that the Government has not violated FOIA by refusing to turn over the documents sought in the FOIA requests, and so cannot be compelled by this court of law to explain in detail the reasons why its actions do not violate the Constitution and laws of the United States. The Alice-in-Wonderland nature of this pronouncement is not lost on me; but after careful and extensive consideration, I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules — a veritable Catch-22. 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.

The plaintiffs, naturally, were dismayed by the ruling, and both said they would appeal.

"We began this litigation because we believed our readers deserved to know more about the U.S. government's legal position on the use of targeted killings against persons having ties to terrorism, including U.S. citizens," said David McCraw, a lawyer for the *Times*. "Judge McMahon's decision speaks eloquently and at length to the serious legal questions raised by the targeted-killing program and to why in a democracy the government should be addressing those questions openly and fully."

ACLU deputy legal director Jameel Jaffer, in a statement, concurred: "This ruling denies the public access to crucial information about the government's extrajudicial killing of U.S. citizens and also effectively green-lights its practice of making selective and self-serving disclosures. As the judge acknowledges, the targeted killing program raises profound questions about the appropriate limits on government power in our constitutional democracy. The public has a right to know more about the circumstances in which the government believes it can lawfully kill people, including U.S. citizens, who are far from any battlefield and have never been charged with a crime."

Perhaps an appeal will force this information out of the government. But if even a judge sympathetic to the cause of transparency feels constrained to accede to the government's demands for continued secrecy, the odds certainly seem stacked against the plaintiffs and in favor of bigger, more powerful, and more secretive government.