

The Obama Administration Is Setting a Dangerous Precedent about Due Process

The DOJ unnecessarily claims Awlaki got due process, a risible claim at odds with history.

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A federal court [recently dismissed](#) a lawsuit brought by Nasser al-Awlaki, the relative of two U.S. citizens who were killed by American drone strikes in Yemen and Pakistan.

The court was right to do so, since, as Attorney General Eric Holder asserted, Anwar al-Awlaki was directly and personally involved “in the continued planning and execution of terrorist attacks against the U.S. homeland.” The executive branch also believed that al-Awlaki was directly linked to the 2009 attempted Christmas Day bombing of a Detroit-bound jetliner and the 2009 Fort Hood shooting.

But in reaching that conclusion, the court also found it “plausible” that Awlaki’s Fifth Amendment due-process rights were violated. Ultimately, the judge decided, there was no remedy available, so the lawsuit was dismissed. But this sets a dangerous precedent for the targeted-killing program. And the problem began with the Obama administration itself – several key members of which are defendants in this case — which argued several years ago that the determination to target Awlaki complied with due process.

The essence of due process, as Harvard Law professor Noah Feldman recently argued at [an Intelligence Squared debate](#), is that “the government would not kill its own citizens without a trial.” That derived from the English Magna Carta of 1215, and the Framers of the U.S. Constitution had such a history in mind when, in the Fifth Amendment, they wrote that no one may “be deprived of life, liberty, or property, without due process of law.”

So this seems like an easy issue: The Constitution is clear that due process is required before the federal government takes a citizen’s life. But in many cases, that would fly in the face of common sense.

Professor Alan Dershowitz pointed out in the same debate that a bank robber firing at police as he flees is not entitled to a trial before police can shoot back at him. This exception is widened in the case of war, which is why the laws of war have never required a prior hearing before incapacitating an enemy combatant that is on the battlefield.

A Department of Justice [white paper](#) leaked last year stated that the current policy of the executive branch is that it can lawfully target and kill Americans abroad who pose an imminent threat of violent attack to the U.S. (with a few other conditions too).

The court in the al-Awlaki case agreed that he met this standard: “The fact is that Anwar Al-Aulaqi was an active and exceedingly dangerous enemy of the United States.” When the court determined that Awlaki was an imminent threat, under the Constitution and the laws of war, the case should have been dismissed (if it even should have gotten that far).

So why did the court go on to say that it is plausible that Awlaki’s due-process rights were violated? Because the DOJ’s white paper argued that it actually is affording due process to targeted Americans.

In the situation of the bank robber noted earlier, few would say that the police afforded due process to the robber before shooting him. Rather, the dangerous and imminent threat posed by the robber justified an exception to due process.

The DOJ, however, argues that “the process due in any given instance is” determined by weighing the interests involved. The private interest involved, e.g., someone’s life, is weighed against the government’s asserted interest in protecting American lives. While both interests are weighty, the government’s interest is weightier, so due process can be expedited and simplified for those targeted. (Justice Antonin Scalia [vehemently criticized](#) this malleable recapitulation of due process in 2004 when it was applied to wartime detention.) According to the white paper, the executive branch apparently thinks due-process requirements are met “where an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat.”

There are two problems with this: First, neither the Constitution nor the international laws of war require that imminently dangerous people associated with al-Qaeda be afforded due process before being targeted, and so this sets a dangerous precedent of granting such rights.

Second, due-process rights should not be watered down, even after “a balancing of interests,” from the nearly 800-year old requirement of something like a trial to a mere secret determination by a government official. The first problem makes Americans less safe from threats abroad, and is of immediate concern. The second is more abstract, but nonetheless begins to make Americans less safe from their government at home.

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