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Guest Column: With presidential kill lists, who needs trials and judges?

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Guest Column: With presidential kill lists, who needs trials and judges?

NAT HENTOFF Guest Columnist azdailysun.com | Posted: Thursday, September 16, 2010 5:00 am | (0) Comments

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President Barack Obama, CIA Director Leon Panetta and Defense Secretary Robert Gates are now defendants in a historic lawsuit filed in U.S. District Court, Washington, by the American Civil Liberties Union and the Center for Constitutional Rights. The case is brought on behalf of American citizen Nasser Al-Aulaqi.

The complaint in the case starkly and accurately lays out the constitutional issue at stake: "This case concerns the executive's asserted authority to carry out 'targeted killings' of U.S. citizens suspected of terrorism far from any field of armed conflict."

As I and other reporters have confirmed, the complaint continues: "the (U.S.) government maintains lists of suspects -- 'kill lists' -- against whom lethal force can be used without charge, trial or conviction."

That is an utterly clear description of how to deny the Fifth Amendment's command that "no person shall be...deprived of life, liberty or property without due process of law."

As the lawsuit adds: "Individuals, including U.S. citizens, are added to the ("kill") lists based on executive determinations that secret criteria have been satisfied. Executive officials (Leon Panetta and Robert Gates as well) are invested with sweeping authority to impose extrajudicial death sentences in violation of the Constitution and international law."

The first U.S. citizen whom the administration has confirmed as being on this lethal list is Anwar Al-Aulaqi. He himself did not bring this suit because he has been hiding for his life in Yemen. His father, Nasser Al-Aulaqi, acting on his son's behalf, retained the ACLU and the CCR to bring his son back into the protection of the Constitution.

In this case, our court system, based on our vaunted rule of law, is also asked "to order the government to

disclose the standards it uses to place U.S. citizens on government kill lists."

Is that too much to ask -- not of a government ruthlessly run by Gen. al-Bashir of Sudan or the ultimate executive in the maximum prison called Iran -- but of the president of these United States? But I'm not aware of many free Americans being much concerned by this terminal execution of due process. I don't see protestors on the streets or marching on Washington.

As a reporter, I am aware of much of the evidence the Obama administration believes it has directly connecting Anwar Al-Aulaqi to acts of terrorism. But where does it find the assassinating authority to obliterate Mr. Al-Aulaqi without even bringing a charge against him?

In two sentences, the lawsuit gets to the core of this case: "The right to life is the most fundamental of all rights. Outside the context of armed conflict, the intentional use of lethal force without prior judicial process is an abridgement of this right except in the narrowest and most extraordinary circumstances."

What are, according to President Obama, the "extraordinary consequences" here? The CIA, whose drone planes are among the most experienced executioners searching for Al-Aulaqi, won't tell us. The CIA operates in a secret wing of our government, not envisioned by the Founders as is shown in James Madison's notes during the Constitutional Convention.

But doesn't President Obama owe us, or at least history, an answer to where the justifying "context of armed conflict" is in his hunt to the death of this American citizen? good pullquote

In this legal action, the ACLU and the CCR tell Obama, Panetta and Gates: "The United States is not at war with Yemen, or within it," yet this quarry is being hunted there, so far escaping, says the complaint, "as many as a dozen unsuccessful attempts (according to one media report) on his life."

So again, what are "the extraordinary circumstances" authorizing President Obama's relentless pursuit of this citizen, who could be said to be a person without a country?

The ACLU and CCR provide the test our government must meet in fulfilling the "extraordinary circumstances" for the summary killing of this citizen:

"Outside of armed conflict, both the Constitution and international law prohibit targeted killing except as a last resort to protect against concrete, specific, and imminent threat of serious physical injury. The summary use of force is lawful in these narrow circumstances only because imminence of the threat makes judicial process infeasible."

Now dig this, Mr. President: "A targeted killing policy under which individuals are added to kill lists after a bureaucratic process -- and remain on these lists for months at a time -- plainly goes beyond the use of lethal force as a last resort to address imminent threats, and accordingly goes beyond what the Constitution and international law permit."

Also further, and wholly violating the heart of the Constitution, the ACLU and CCR remind all of us it's this administration's absolute refusal to disclose its standards for target killing an American citizen. This startlingly violates U.S. citizens "rights to know what conduct may subject them to execution at the hands of their own government.

"Due process requires, at a minimum, that citizens be put on notice of what may cause them to be put to death by the state."

Where is an indication that congressional leaders, regardless of party, are seriously concerned about these hidden fatal standards?

"The accumulation of all powers," wrote James Madison in Federalist Papers No. 47, "legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny."

The tea partiers appear to be more conversant with the Constitution than many of us. What do they think of the official, secret, targeted killings of American citizens by the U.S. government? What do you think?

Is this still America?

Nat Hentoff is a nationally renowned authority on the First Amendment and the Bill of Rights. He is a member of the Reporters Committee for Freedom of the Press, and the Cato Institute, where he is a senior fellow.

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