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The Lawfare Wars

The al-Nashiri bugout, and attack of the killer lawyers—on drones.

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However well our troops do on the battlefield, a reality of modern times is that the U.S. can still lose the war on terror in the courtroom. Two separate cases this week show that lawfare is alive and dangerous.

The first case involves the Obama Administration's sudden, and so far unexplained, decision to stop the military commission trial of Abd al-Rahim al-Nashiri, the mastermind behind the al Qaeda suicide attack on the USS Cole in 2000 that killed 17 Navy sailors. Military prosecutors have been preparing a case against al-Nashiri after the Obama Administration reviewed detainee policy in 2009 and decided to keep a few terrorists out of the civilian justice system. The Cole bombing "was an attack on a United States warship, and that, I think, is appropriately placed into the military commissions setting," as Attorney General Eric Holder put it last November.

But this week the Washington Post reported that Justice Department court filings maintain that "no charges are either pending or contemplated with respect to Nashiri in the near future." The Defense Department issued a statement saying that it is "actively investigating the case against Mr. al-Nashiri and developing charges against him," but there's been no elaboration from the Obama Administration.

An anonymous military official speculated to the Post that the White House wants to delay the tribunal until it could find a politically palatable way to mount concurrent civilian proceedings for Khalid Sheikh Mohammed, et al. Others wonder if the White House wants to avoid angering the anti-antiterror left before the November election.

In any event, and right on cue, the American Civil Liberties Union called the al-Nashiri delay "one more reason the military commissions should be shut down for good, and terrorism suspects should be tried in federal courts that guarantee the right to a robust defense and uphold the rule of law."

Which brings us to the lawsuit filed Monday by the ACLU and the Center for Constitutional Justice against U.S. Predator drone attacks. The two anti-antiterror outfits represent the father of Anwar al-Awlaki, the U.S. cleric turned al Qaeda operative who is now thought to be hiding in Yemen. The suit contends that President Obama's reported authorization to target al-Awlaki is unconstitutional because he is a U.S. citizen.

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The suit claims Yemen is not a foreign battlefield like Iraq or Afghanistan, and thus al-Awlaki should be entitled to due process. It is asking a federal district court to grant an injunction and subject Defense and CIA drone strikes to judicial review. "A preliminary injunction to enjoin the government from killing a U.S. citizen outside of armed conflict in violation of the Constitution and international law will not 'substantially harm' the U.S., the ACLU argues, since the Pentagon could still pursue al-Awlaki "with constitutional law enforcement tools."

Except of course for the innocent U.S. civilians who may be killed in the meantime if the ACLU prevails. The Treasury designated al-Awlaki as a terrorist in July—the ACLU is challenging that too—after U.S. intelligence officials linked him to Nidal Malik Hasan (the Fort Hood shooter), Umar Farouk Abdulmutallab (the Christmas Day bomber), Faisal Shahzad (the Times Square bomber) and even the 9/11 hijackers.

As for the ACLU's legal claims, the drone strikes are part of the President's core war-fighting powers under the Constitution. The authority to launch combat operations against enemies, and how to carry them out, unquestionably belongs to the Commander in Chief.

Congress authorized the use of force against al Qaeda in the wake of 9/11, and it's impossible to believe it didn't have men like al-Awlaki in mind. No less a lawfare advocate than Harold Koh, former Yale law dean who is now the State Department's chief legal adviser, issued a vigorous legal defense of the drone attacks in an April speech. Should al-Awlaki be read a Miranda warning before the U.S. launches the missile?

The question may sound absurd, but it's only logical given the limits the legal left wants to put on the U.S. ability to kill terrorists. The Obama Administration has an obligation to defend the President's war powers against this assault, and a good first step would be to proceed with the al-Nashiri trial.

Printed in The Wall Street Journal, page A14

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