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Trans-Border Exclusion and Execution

Posted By [Timothy Zick](#) On October 7, 2011 @ 8:42 am In [Civil Rights, Constitutional Law, First Amendment](#) | [5 Comments](#)

Two trans-border First Amendment issues I plan to address in my book-in-progress are ideological immigration exclusions and the challenges posed by harmful expression in the emerging global theater. Both issues have been in the news recently.

Civil liberties groups continue to complain that the Obama Administration is excluding aliens based on speech or associational concerns. In the most recent case, the visa of [Kerim Yildiz](#) ^[1], a Kurdish human rights activist, was delayed. According to the ACLU, the delay was owing to his advocacy and criticism of American foreign policy. (The visa has recently been granted, without explanation for the delay.) Cases like this will continue to arise. Whether the executive has the constitutional authority to exclude aliens on ideological grounds has never been definitively resolved. [Kleindienst v. Mandel \(1972\)](#) ^[2] held that the government must have a "facially legitimate and bona fide" reason for exclusion and strongly implied that courts were not empowered to look behind the government's explanation. The Obama Administration has lifted previous exclusion orders that appeared to be based at least in part on ideological concerns. However, the Administration has refused to disclaim the constitutional authority to exclude aliens who espouse terrorism or whose advocacy otherwise threatens national security. Other countries openly engage in, and even tout, ideological exclusion of aliens. As I'll argue in the book, this is one area in which I think the First Amendment ought to be exceptional.

The recent drone attack that claimed the lives of two American citizens in Yemen involves a potentially more troubling practice. The target of the drone strike was [Anwar Al-Awlaki](#) ^[3], an American citizen who, according to the government, was a principal propagandist for Al Qaeda and an organizer of terrorist attacks in the U.S. and abroad. A companion, [Samir Khan](#) ^[4], also an American citizen, was killed in the strike. Khan was reported to be an editor of a pro-jihadi publication. The legality of the drone program in general is beyond my scope here. I am interested in the free speech implications of this practice. No court had ever heard evidence of the allegations against Al-Awlaki (a lawsuit brought by his father was dismissed on justiciability grounds), or Khan. Insofar as the targeting of a citizen is based in part on his speech or associational activities, the First Amendment is at least implicated (the Supreme Court has assumed, but never actually decided, that the First Amendment applies to citizens extraterritorially). Could a citizen be executed in this fashion solely for expressive activities? Even accepting the CIA's allegations against Al-Awlaki, Khan's death would seem to raise this uncomfortable question. If, as the Supreme Court recently held in [Holder v. HLP](#) ^[5], speech that is "coordinated" with foreign terrorist organizations can be criminalized, then it may not be a giant leap to target a citizen for execution based solely on his propagandist activities. The answer may depend, as it does in the detention area, on the propagandist's status as an enemy combatant or as an agent of the enemy. (Some old cases suggest that enemy-aiding speech might support a treason conviction.) Al-Awlaki and others have demonstrated that remotely located speakers can pose real threats to American interests and security. Determining whether targeted execution is a constitutional response to that threat may require in some cases that we consider not only due process concerns, but free speech ones as well.

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URLs in this post:

[1] Kerim Yildiz: <http://www.nytimes.com/2011/09/30/us/kurdish-advocates-visa-delay->

prompts-push-for-answers.html?_r=2

[2] *Kleindienst v. Mandel* (1972): <http://supreme.justia.com/us/408/753/>

[3] Anwar Al-Awlaki: http://en.wikipedia.org/wiki/Anwar_al-Awlaki

[4] Samir Khan:

<http://www.google.com/hostednews/ap/article/ALeqM5h88Lb5VTxeVR8LFgHnwLKYIkZQPg?docId=ccecaeee99b148b4bf677e358637e544>

[5] Holder v. HLP: <http://www.supremecourt.gov/opinions/09pdf/08-1498.pdf>

[6] : <http://opiniojuris.org/2008/04/17/vile-crime-or-inalienable-right-defining-incitement-to-genocide/>

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