



U.S. District Court Holds U.S. Citizen Can Challenge His Inclusion on “Kill List”

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July 10, 2018

In a [decision](#) by the U.S. District Court for the District of Columbia, the court held that a U.S. citizen who could allege sufficient facts to credibly demonstrate he is being targeted by the U.S. military in Syria can challenge the alleged governmental decision to place him on the “Kill List” as a suspected terrorist. The Kill List is the colloquial name for the list of individuals deemed to be properly subject to targeted killing or capture under the [Authorization for Use of Military Force \(AUMF\)](#) Congress passed in response to the September 11, 2001 terrorist attacks. The interagency process for placing individuals on the list was set forth by President Obama in a [Presidential Policy Guidance \(PPG\)](#) in 2013.

In *Zaidan v. Trump*, plaintiffs Ahmad Muaffaq Zaidan and Bilal Abdul Kareem, both journalists covering terrorism and hostilities in the Middle East, believe that they are included on the Kill List and brought suit against various government agencies in an effort to challenge this designation. In order for their claims to survive the government’s motion to dismiss, plaintiffs had to demonstrate that they have standing to bring suit and that Congress has waived the government’s sovereign immunity for this type of claim. They also had to contend with the United States’ assertion that the claims are inappropriate for judicial review under the [political question doctrine](#).

Standing

The court [explained](#) that standing requires:

- (1) the plaintiff to have suffered an injury in fact that is both (a) concrete and particularized and (b) actual or imminent, as opposed to conjectural or hypothetical;
- (2) the injury must be traceable to the defendants’ actions; and
- (3) the injury must be redressable by a favorable decision of the court.

The government [apparently did not contest](#) that placement on the Kill List qualifies as a particularized

Congressional Research Service

7-5700

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LSB10167

injury. However, both plaintiffs were also required to set forth sufficient facts from which it could be inferred that they are indeed named on the list. Plaintiff Zaidan, a non-U.S. citizen employee of Al Jazeera, was unable to meet this burden. His **belief** that he could be targeted was based on evidence that he was listed in a U.S. intelligence database. While the court rejected the government's **contention** that Zaidan was precluded from citing classified (albeit publicly available) evidence, it was not persuaded that individuals listed in an intelligence database are necessarily also included on the Kill List. Therefore, the court **deemed** his allegations too speculative to evince an actual injury. On the other hand, plaintiff Kareem, a U.S. citizen freelance journalist, **alleged** that he had survived five military attacks—within a three-month period—that seemed specifically aimed at him. His allegations permitted the court to infer that his belief was sufficiently grounded to meet the requirement for an injury-in-fact.

The government **contended** that Kareem had nonetheless failed to allege sufficient facts to demonstrate that the U.S. military or other agencies were behind the attacks or that he was specifically targeted, arguing that the string of near-misses was merely the result of working in close proximity to hostilities in Syria. Noting that at least one of the attacks was carried out by a drone-controlled Hellfire missile, the court found Kareem's allegations plausible enough to overcome the government's argument for purposes of defeating the motion to dismiss, **noting** that plausibility and not probability is the standard.

The government having effectively conceded that the injury was one that could be judicially remedied, the court **held** that “his injury can be redressed through an injunction or order from this Court requiring, at the least, that the United States review and consider his evidence before it directs lethal force against him.”

Sovereign Immunity

Plaintiffs asserted that a clear waiver of **U.S. sovereign immunity** against their lawsuit could be found in the **Administrative Procedure Act** (APA). The government **countered** that an exception applies, namely the **exclusion** from the definition of agency of any “military authority exercised in the field in time of war or in occupied territory.” The court was **skeptical** that the action subject to the complaint, that is, the alleged inclusion on the list by agencies acting in Washington, D.C., amounts to an exercise of “military authority ... in the field.” Moreover, the opinion expressed some doubt that the element “in time of war” was met because the government did not offer an explanation of which war was relevant to activate the exception, and at the same time suggested that the conflict in Syria is an internal one in which the U.S. military provides only limited assistance. Nonetheless, the court suggested that further pleadings on the matter during the merits phase of the trial might sway the decision on the matter.

The Political Question Doctrine

The government **argued** the plaintiffs' claims were not subject to judicial review under the first two factors in *Baker v. Carr*, maintaining that “the decision of whether to target an individual for lethal action is a wartime decision that is committed to the executive with no judicially manageable standard for review.” Plaintiff Kareem **analogized** his claim to State Department decisions to label a group as a foreign terrorist organization, which the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) found in **one case** to be judicially manageable because sufficient standards were supplied by **statute**. The court, however, **determined** that the PPG did not supply concrete enough standards to support judicial review to determine if its application is arbitrary and capricious. Moreover, unlike the statute for foreign terrorist organization designations, the PPG expressly provides for no remedy.

As to Kareem's **claim** that the Kill List designation was not in accord with law and was in excess of statutory authority because his potential killing allegedly would violate various laws and treaties, the court found that analyzing such assertions would require it to determine the propriety of executive branch decision making, which the court **found** impermissible under the political question doctrine.

However, the court [found](#) Kareem's claims to be justiciable insofar as they argued constitutional violations. Kareem [claimed](#) that his alleged placement on the Kill List without notice and the opportunity to be heard, and presumably based on his journalistic activities abroad, violates his rights under the [First](#), [Fourth](#), and [Fifth](#) Amendments to the Constitution. [Noting](#) that "[T]he Supreme Court has repeatedly found that claims based on [due process] rights are justiciable, even if they implicate foreign policy decisions," the court [stated](#) that "Due process is not merely an old and dusty procedural obligation required by Robert's Rules. Instead, it is a living, breathing concept that protects U.S. persons from overreaching government action even, perhaps, on an occasion of war."

As the court [described](#) it, "[Kareem, as a U.S. citizen,] seeks to clarify his status and profession to Defendants and, thereby, assert his right to due process and a prior opportunity to be heard. His interest in avoiding the erroneous deprivation of his life is uniquely compelling."

The government likened his claim to [a case](#) in which claims for compensation by owners of a Sudanese pharmaceutical plant destroyed by a U.S. missile attack were denied on political question grounds. The court [determined](#) that case to be distinguishable on the ground that the plaintiffs there had insufficient ties to the United States to assert constitutional rights. Moreover, the court [stated](#):

. . . Mr. Kareem does not seek a ruling that a strike by the U.S. military was mistaken or improper. He seeks his birthright instead: a timely assertion of his due process rights under the Constitution to be heard before he might be included on the Kill List and his First Amendment rights to free speech before he might be targeted for lethal action due to his profession.

Comparing Kareem's claim to habeas cases in which the Supreme Court (*Hamdi v. Rumsfeld*) and the D.C. Circuit (*Doe v. Mattis*, described in this [previous Legal Sidebar](#)) have found that U.S. citizens have the right to "a meaningful opportunity to challenge the factual basis for [their] designation as an enemy combatant," the court [reasoned](#) that placement on the Kill List implicates similar constitutional rights that must be recognized.

The court [declined](#) to treat the case as analogous to claims on behalf of [Anwar al-Aulaqi](#), a U.S. citizen with connections to al Qaeda who was intentionally targeted and killed by the United States in 2011. In [one case](#), al-Aulaqi's father was denied standing to enjoin the United States from targeting his son. In [another case](#) for compensation after al-Aulaqi's death, his father's claim urging a court-fashioned remedy for the alleged constitutional violation was denied based on the court's determination that special factors precluded the [Bivens precedent's](#) extension to cover such a claim.

Unless the decision is appealed or resolved outside the court, Kareem may have the opportunity to seek information necessary for proving the facts he alleges regarding his placement on the Kill List. On the other hand, the government could potentially assert other legal rationales to resist this outcome. The survival of Kareem's claim in the face of the government's motion to dismiss does not seem to provide assurances with respect to his eventual triumph on the merits.
