

## Marked Imam Tests Lawn-Chair Constitutionals

Posted By [Kelley B. Vlahos](#) On September 6, 2010 @ 11:00 pm In [Uncategorized](#) | [2 Comments](#)

*"He that would make his own liberty secure, must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself."*

- Thomas Paine

The Constitution is being tested in the most extreme way imaginable: does the federal government really have the right to pursue the extra-judicial killing of it's own citizens abroad?

The American Civil Liberties Union has said no, and is [now suing the government](#), challenging its authority to target "individuals for execution who are suspected of terrorism but have not been convicted or even charged – without oversight, judicial process or disclosed standards for placement on kill lists." Specifically, it questions whether the Obama Administration can [legally execute Anwar al-Awlaki](#), an American citizen and Imam, now hiding out in Yemen, without charge, trial or conviction.

The lawsuit also points out, quite rightly, that the government has yet to disclose any evidence that al-Awlaki, 39, is an imminent national security threat nor "the standards it uses for authorizing the premeditated and deliberate killing of U.S. citizens located far from any battlefield."

This is a serious issue that challenges the resolve and integrity of groups and individuals who profess to defend the Constitution. While it is fairly easy to rail against government-run health care and federal meddling in the auto industry, it is quite another to defend the constitutional rights of a man [who has been accused of influencing not one but at least three domestic terror suspects, and has ties, however tenuous and circumstantial, to the 9/11 hijackers](#).

"What we are talking about here is this president and the previous president drafting up plans in secret to kill citizens with no public disclosure," said Jonathan Manes, legal fellow with the ACLU's National Security Project. "I think most people respond the way you hope they would."

One would hope, but the case itself has created an interesting, but uneasy standoff between the lawn chair constitutionalists populating the Tea Party and the progressive wing on one side, and resolute civil libertarians on both sides who often get pushed to the margins when the going gets tough.

"Fetishization or even worship of the Constitution means nothing once we no longer believe the principles it embodies," charge the authors of the [Fabius Maximus blog](#), which is run by a group of retired U.S. military officers. They highlighted several conservative commentators, including [Fox News's Bill O'Reilly](#), law professor John Eastman ([writing for the CATO institute](#)) and Kenneth Anderson at the popular [Volokh Conspiracy blog](#), now supporting the government's deadly pursuit of al-Awlaki.

Meanwhile, John Cole at the popular liberal Balloon Juice blog, [questioned his own readership](#) after they offered praise and support for the plans to assassinate al-Awlaki, who was born in New Mexico.

*"I just want to say that I'm kind of floored by the staggering [hypocrisy in the al-Awlaki thread](#) from last night. ...*

*"Some of you say 'I'm OK with it if it is done legally.' You know what else was deemed legal- the torture you screamed about for the last eight years. The law in Arizona that you all abhor is 'legal.' Segregation was 'legal.' ... If al-Awlaki is killed as a result of a military mission, I won't lose any sleep. If he is killed in the process of trying to apprehend him, I won't lose any sleep. If he were to drop dead of a stroke this very minute, I would not lose any sleep.*

*"But I'll be god damned if I'm going to pretend it is OK to start ordering the assassination of American citizens, even if it is done 'legally' and ordered by politicians I generally like."*

Former constitutional lawyer and *Salon* columnist [Glenn Greenwald also noted](#) the newfound willingness of many Democrats to support the government's authoritarian anti-terror policies:

*"That authoritarian mentality is stronger than ever now. Why? Because unlike during the Bush years, when it was primarily Republicans willing to blindly trust Government accusations, many Democrats are now willing to do so as well."*

*"Just look at the reaction to the Government's recent attempts to assassinate the U.S.-born American citizen and Islamic cleric Anwar al-Awlaki ... in the past few months, beginning with the Fort Hood shootings, government officials have repeatedly claimed that he's a Terrorist: usually anonymously, with virtually no evidence. ..."*

*"That's enough for many people – including many Democrats – to [march forward overnight and mindlessly proclaim](#) that al-Awlaki is 'a declared enemy of the United States working to kill Americans.'"*

Of course, true defenders of the Constitution – which the [ACLU lawsuit \[pdf\]](#) claims is being violated (particularly the fourth and fifth amendments, which prohibit illegal seizure and the deprivation of life without due process, respectively) – persist, and sometimes in the unlikeliest of corners. Whatever his motivation, [Glenn Beck](#) has used his unrivaled roost on the airwaves to criticize the assassination policy over the last few months.

"I am one of the strongest guys out there on terror and probably many people on the list are bona fide terrorists who – if I was on a jury to determine if they were terrorists or not – if they were, I'd probably vote to shoot them in the head. Call me a little nostalgic for the Constitution, but let's have that fair trial for American citizens first," Beck [declared on his Fox News program](#) in July.

"[It's] possibly the most bizarre, inhumane and abusive way that the White House is expanding its power over the American people," chimed in Hollywood action hero Chuck Norris, in his own [Aug. 25 commentary](#) on the conservative *Human Events* Web site.

"That's right. No arrest. No Miranda rights. No due process. No trial. Just a bullet."

Allahpundit, over at the Michelle Malkin-created right-wing blog, Hot Air, offered this [back in February](#):

*"I'm curious about how readers balance the idea of The One – or any president for that matter – enjoying the power to assassinate U.S. citizens with the fact that Awlaki's evidently an extremely dangerous jihadist filthbag with murderous designs on U.S. citizens himself. ..."*

*"Just interested to know what readers think."*

The "readers" quickly put to rest the question of what it is they "think:" the first comment was one word, "sniper," the second called for al-Awlaki's execution, and the third, "frag him, and bag him."

Despite the feeding frenzy of their audiences, Beck and the others seem to "get" the significance of the moment. Sure, they have been yanked out of the fog by their own aversion to Obama and everything he stands for (how else to explain their docility throughout the wave of post-9/11 terror laws enacted by the Bush Administration). But no doubt they were reminded quite starkly early on how these laws might come back to bite them – that the focus on terrorist threats, particularly "domestic terrorism," tends to shift under different presidents, thus the recalibration, from ["eco-terrorists"](#) to ["right wing extremists"](#) under the current Obama regime.

Now Beck and others are [popping up to agree publicly](#) with Fox News' libertarian stalwart Judge Andrew Napolitano. They are starting to notice that the current laws for charging terrorists abroad, including the [2006 Military Commissions Act](#) and the [2001 Authorization for the Use of Military Force](#) (under which al-Awlaki is presumably being targeted) carry vague charges like "providing material support to terrorism" that could conceivably be used to detain someone on anything from donating to a charity to preaching or writing things the government doesn't like. In other words, they can threaten the first amendment right to free speech, too.

It's not as though it hasn't been done before. In 2008, [Ali Hamza al-Bahlul](#), an al-Qaeda media man, became one of only three detainees ever convicted under the current military tribunal system. A foreign national, al-Bahlul was never connected to any violent act, but was charged with material support, conspiracy and "solicitation to commit murder," mostly based on the propaganda he produced, particularly a recruitment video, [State of the Ummah](#).

"There is little doubt that Mr. Al-Bahlul is not a sympathetic defendant," [read his written appeal](#), filed with the Military Commission Review last September. The solicitation charge, however, "conflates offensive behavior with criminal behavior. As offensive as it may be, *State of the Ummah* is speech that falls within the core protections of the First Amendment."

His military lawyers' are appealing the conviction, in part because they say that since he was detained and tried in an American court, he is afforded the same constitutional rights as an American. While their appeal might seem far-fetched, his lawyers have said they fear the precedent Bahlul's conviction is setting. Maybe we're seeing it today – with al-Awlaki – this time an American, who is nowhere near the so-called "war zone," but targeted by predator drones nonetheless. And for what? His extremist rhetoric and religious counsel?

"If you stop and think about it, the idea that the government can pick off a citizen for saying vial and wretched things ... is quite remarkable," said the ACLU's Manes.

The Obama Administration insists it now has enough evidence to prove al-Awlaki's angry anti-American sermons and screeds turned "operational," that "the danger (he) poses to this country is no longer confined to words ...he's gotten involved in plots."

In a briefing to Congress back in February, [then-Director of National Intelligence Dennis Blair said](#), "we don't target people for free speech. We target them for taking action that threatens America or as resulted in it."

Rep. Jane Harman (D-CA), chairwoman of the House Intelligence Committee, which has a greater degree of access to classified intelligence than the rest of Congress, [told reporters this spring](#) that al-Awlaki is "probably the person, the terrorist, who would be terrorist No. 1 in terms of threat against us."

So prove it, says the ACLU. Prove it to the American people that al-Awlaki is "participating" in terrorist acts for which the U.S. must immediately defend itself. The rules of war say Americans fighting actively against their country on the battlefield can be killed in self-defense – is this truly the case here?

"They've said things like 'he is operational,' or he's involved in plots, but that sort of language ... seems pretty hedged," said Manes.

Major Todd Pierce, an Army reservist and defense counsel at the Office of Military Commissions, said he is discouraged because it would seem the targeted assassination of both foreigners and citizens abroad flouts all of the hard-fought legal protections won for detainees since the commissions began – including the [right of prisoners brought to Guantanamo to challenge their imprisonment in court](#), otherwise known as habeas corpus.

"This is even worse than the military commissions; it's the Commissions on steroids," said Pierce, in an interview with Antiwar.com.

Pierce says the government's brief against al-Awlaki, the details of which are kept from public scrutiny, could have broader, more foreboding implications on U.S. homeland security long-term.

"Where does this end? Who is 'the terrorist'? What if a pastor counseled someone that abortion is the worst sin there is ... and then the person counseled went and bombed one or two abortion clinics. That's terrorism," he said asking whether the U.S. government might then go after the pastor for counseling "a terrorist."

"So how can we be sure some future administration won't take an incident where someone is fed up with taxes, suffering from depression and commits an act that can be called 'terrorism,' that (the government) won't sweep up everyone connected with that person. Why not the 'Tea Party?' We're setting this as precedent."

Funny, there wasn't much of a stink raised by Tea Partiers when Sen. John McCain (R-AZ), supported by the aforementioned Chuck Norris and Tea Party favorite Sarah Palin, when he

introduced [a bill](#) would have taken the situation more than halfway to the horror that Pierce described.

The "Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010," co-sponsored by fellow war hawk Sen. Joe Lieberman (I-CT) would have the feds scooping up "enemy belligerents" ("the new unlawful enemy combatant"), U.S. citizens included, anywhere in the world (including the U.S.) and rushing them off for an indefinite stay at Gitmo without Miranda, nor a trial.

"In other words, if at any point, anywhere in the world, a person is caught who might have done something to suggest that he or she is a terrorist or somehow supporting a terrorist organization against the U.S. or its allies, that person must be imprisoned by the military... as long as U.S. officials want," pointed out [AlterNet's Liliana Segura](#) in March.

The bill is languishing in committee and probably will continue to do so until the Republicans take back control of Congress (which might happen sooner than later). Which way will right wing constitutionalists – lawn chairs or otherwise – blow when the political winds prevail in their favor?

For now, it is important to recognize that like it or not, we are all potential targets of government overreach. Al-Awlaki reportedly survived one U.S. drone attack already. Who among the so-called constitutionalists will stand with the ACLU to ensure the military doesn't get a second shot?

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