CHELSEA MANNING WONDERS WHETHER SHE COULD HAVE GOTTEN ANWAR AL-AWLAKI'S TREATMENT

In accepting the Sam Adams prize, Chelsea Manning raised the ACLU/NYT lawsuits for the OLC memo authorizing the killing of Anwar al-Awlaki. (h/t Kevin Gosztola)

In doing so, she borrows an argument about separation of power and secrecy Judge Colleen McMahon made in her opinion on the FOIA.

Here's McMahon:

> As they gathered to draft a Constitution for their newly liberated country, the Founders – fresh from a war of independence from the rule of a King they styled a tyrant- were fearful of concentrating power in the hands of any single person or institution, and most particularly in the executive. That concern was described by James Madison in Federalist No. 47 (1788):
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> > The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny ….
> >
> > The magistrate in whom the whole executive power resides cannot of himself … administer justice in person, though he has the appointment of those who do administer it.

> [snip]
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> The Framers – who were themselves susceptible to being hanged as traitors by the King of England during the Revolutionary War – were as leery of accusations of treason as they were of concentrating power in the hands of a single person or institution. As a result, the Constitution accords special protections to those accused of the most heinous of capital crimes; Article 3, Sec. 3 sets the procedural safeguard that, "No Person shall be convicted of treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."
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> Interestingly, the Treason Clause appears in the Article of the Constitution concerning the Judiciary – not in Article 2, which defines the powers of the Executive Branch. This suggests that the Founders contemplated that traitors would be dealt with by the courts of law, not by unilateral action of the Executive. As no less a constitutional authority than Justice Antonin Scalia noted, in his dissenting opinion in *Hamdi*, 542 U.S. at 554, "Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime."

Here's Manning:

> The founders of America – fresh from a war of independence from King George lll – were particularly fearful of concentrating power. James Madison wrote that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly

> be pronounced the very definition of tyranny."(1)
>
> [snip]
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> When drafting Article III of the American Constitution, the founders were rather leery of accusations of treason, and accorded special protections for those accused of such a capital offense, providing that "[n]o person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."
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> For those of you familiar with the American Constitution, you may notice that this provision is under the Article concerning the Judiciary, Article III, and not the Legislative or Executive Articles, I and II respectively. And, historically, when the American government accuses an American of such crimes, it has prosecuted them in a federal criminal court.

After having repeated McMahon's lesson on the checks our Founders gave Article III courts over the President, Manning described how frustrated McMahon was in not being able to release the OLC memo to ACLU and NYT.

> In a recent Freedom of Information Act case(2) – a seemingly Orwellian "newspeak" name for a statute that actually exempts categories of documents from release to the public – a federal district court judge ruled against the New York Times and the American Civil Liberties Union. The Times and the ACLU argued that documents regarding the practice of "targeted killing" of American citizens, such as the radical Sunni cleric Anwar Nasser al-Aulaqi were in the public's interest and were being withheld improperly.

> The government first refused to acknowledge the existence of the documents, but later argued that their release could harm national security and were therefore exempt from disclosure. The court, however, felt constrained by the law and "conclud[ed] that the Government [had] not violated the FOIA by refusing to turn over the documents sought in the FOIA requests, and [could not] be compelled . . . to explain in detail the reasons why [the Government's] actions do not violate the Constitution and laws of the United States."
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> However, the judge also wrote candidly about her frustration with her sense that the request "implicate[d] serious issues about the limits on the power of the Executive Branch under the Constitution and laws of the United States," and that the Presidential "Administration ha[d] engaged in public discussion of the legality of targeted killing, even of [American] citizens, but in cryptic and imprecise ways." In other words, it wasn't that she didn't think that the public didn't have a right to know – it was that she didn't feel that she had the "legal" authority to compel disclosure.

Against that background, Manning notes that she was charged with treasonable offense, and wonders whether under the Awlaki precedent she could have been drone killed, just like Awlaki.

> I was accused by the Executive branch, and particularly the Department of Defense, of aiding the enemy – a treasonable offense covered under Article III of the Constitution. Granted, I received due process. I received charges, was arraigned before a military judge for trial, and eventually acquitted. But, the al-Aulaqi case

> raises a fundamental question: did the American government, and particularly the same President and Department, have the power to unilaterally determine my guilt of such an offense, and execute me at the will of the pilot of an Unmanned Aerial Vehicle?

She then compares (I think, though the timing on this is perhaps understandably murky) the release of both the OLC memo and follow-up speeches – and its revelation of the powers claimed by the President – with her own releases.

> Until documents held by the U.S. Department of Justice's Office of Legal Counsel were released after significant political pressure in mid-2013, I could not tell you. And, very likely, I do not believe I could speak intelligently of the Administration's policy on "targeted killing" today either.
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> There is a problem with this level of secrecy, obfuscation, and classification or protective marking, in that they supposedly protect citizens of their nation; yet, it also breeds a unilateralism that the founders feared, and deliberately tried to prevent when drafting the American Constitution. Now, we have a "disposition matrix," classified military commissions, and foreign intelligence and surveillance courts – modern Star Chamber equivalents.
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> I am now accepting this award, through my friend, former school peer, and former small business partner, Aaron, for the release of a video and documents that "sparked a worldwide dialogue about the importance of government accountability for human rights abuses," it is becoming increasingly clear to me that the dangers of withholding

> documents, legal interpretations, and court jurisprudence from the public that pertain to the right to “life, liberty, and property” of a state’s citizens is as fundamental and important to protecting against such human rights abuses.

Of course, we still don’t know what happened to Anwar al-Awlaki; the White Paper leaves many of the key details obscure. Even as the government prepares to execute another of its citizens.

But in comparing her own releases with the government’s refusal to reveal precisely how they decided to execute an American with no due process, Manning points to where this has already gone.

And she makes a compelling case that the government’s claims of secrecy cannot be trusted.