

“IT’D BE EASIER TO LAUNCH A HELLFIRE MISSILE AT A NON- CITIZEN THAN A CITIZEN”

The whole point of Joe Lieberman’s tea-bagger bait Terrorist Expatriation Act, according to his Republican House co-sponsor Charlie Dent, is to make it easier to launch Hellfire missiles at people. And Lieberman, too, ties his citizenship-stripping measure to Obama’s targeting of an American citizen with a predator drone.

Taking on critics who say his proposal goes too far, Lieberman pointed to news reports that President Barack Obama signed an order enabling the US military to kill US citizens like radical US-Yemeni cleric Anwar al-Awlaki.

“If the president can authorize the killing of a United States citizen because he is fighting for a foreign terrorist organization,” he said, “we can also have a law that allows the US government to revoke Awlaki’s citizenship.”

Lieberman said his proposal would make it harder for US nationals who cast their lot in with extremists, and train overseas, to return and carry out an attack, and if they do would make it possible to try them in military court.

“They will not enjoy the rights and privileges of American citizenship in the legal proceedings against them. That, I believe, will make America safer,” he said at a press conference with three other lawmakers.

"The US military may have more options to use necessary force to neutralize the threat, such as Anwar al-Awlaki, without the concerns associated with targeting an American citizen," said Republican Representative Charlie Dent.

"I suspect it'd be easier to launch a Hellfire missile at a non-citizen than a citizen," said Dent, referring to a weapon sometimes fired from US aerial drones at suspected terrorists.

Now, there's a lot to loathe about this bill. Shane Kadidal describes the many ways in which it is illegal here.

But what I find most astounding about it is that Lieberman ties this not to actual military preparations against the United States (as he claims in his comments to Andrea Mitchell) but simply to "providing material support or resources to a foreign terrorist organization." And while I'd be willing to consider the merits of deporting Congressman Peter King or former top Chiquita executives like Carl Lindner and Roderick Hills (though following the logic of Elena Kagan, we'd also have to deport Attorney General Holder), I'm also cognizant that the way the government currently uses material support charges, it is prone to ensnare people who donate socks or money, sometimes in the name of charity.

The logical endpoint of this, then, in the addled little brains of Joe Lieberman and Charlie Dent, is that we should consider drone strikes on brown people who might have a good faith belief that they're engaging in charity. And not just that we should consider drone strikes, but we should try to make it easier to execute those drone strikes.

HOLDER TESTIFIES BEFORE SENATE JUDICIARY COMMITTEE

The Committee feed is screwy right now, but cspan.org is carrying it. Pat Leahy will not be there today; he's at a funeral. I don't know if Herb Kohl (who will act as Chair) had an opening statement or not. But Jefferson Beauregard Sessions is up now whining about civilian trials.

(Incidentally, at 10, the House Judiciary Committee will have Glenn Fine and Valerie Caproni talking about the Exigent Letter IG Report. I'll do my best to keep my eye on that too.)

Sessions apparently doesn't know there was a hearing last week in a military commission, which basically consisted of everyone looking at each other and admitting that MCs have no rules right now.

Here's Holder's statement.

Holder: 19 USA nominees and 17 Marshal nominees pending.

Holder now listing all the terrorists prosecuted in civilian courts.

Use every tool available. Includes both civilian and military commissions. Referred 6 cases to military commissions. It would seriously weaken national security not to have civilian trials.

9/11 Commission trial. No decision yet.

Kohl: Review of 240 detainees. In your testimony did not mention if and when you plan to close Gitmo. Update?

Holder: Still intention to close Gitmo. Once was bipartisan support for closing it. Both men who ran for President last year supported closing Gitmo. Will close as soon as we can.

Holder basically says they intend to use Thompson to hold people indefinitely.

Kohl raises Holder's comment about reading Miranda rights to Osama bin Laden.

Kohl: Do you still believe civilian trials are better? When can this decision be made.

Holder: Reviewing decision. NY is not off the table. Have to take into consideration concerns raised by local community. Expect to be able to make determination in a number of weeks.

Sessions: Admin had been slow in making those nominations. I think if you look at where delays are are lack of nominations. You said 9/11 would be tried in NY. Caused quite a bit of controversy. I understand now WH suggesting that would be tried in NY. Makes me uncomfortable having politicians discussing where it'll be tried. What is your position. Are you uneasy that WH is leaking statements about where it will take place.

Holder: Not sure if there have been leaks. National Security Team deciding. SecDef, SoS, Intelligence Community. Meet w/President every Tuesday. This is a trial that is unique. It does involve national security concerns.

Sessions: There is a venue problem.

Holder: You're obviously a former US Attorney. If possibility that we move the trial, what would the possible venues be. What I will say is that SDNY is much larger place than simply Manhattan. Trying case in other venues beyond NY.

Sessions, after having said he doesn't want pols to decide where to have trials, is now criticizing Holder for making the decision w/o listening to Sessions.

Holder: Not many differences between civ and MC, biggest difference is interlocutory appeals. Much of other enhancements reflect what judges do on civ side.

Sesssions: when you try someone in civ court, lawyer, Miranda, discovery, when you hold them in MC, don't have to charge them at all, POW, until over. They may be tried if you choose to try them.

Holder: Decisions based on what is best. Whole variety of concepts and things that have to be taken into consideration. Case by case basis, being most effective in particular trial.

DiFi: Degree to which this dialogue has escalated is unhealthy. Dems did not do to Bush following 9/11 wrt decision-making. I find it reprehensible. Best interest of the people of this nation, served by Admin, and the President having maximum flexibility as to which venue these defendants will be tried. I have never seen anything quite like this. It doesn't matter that MCs which have been fraught w/controversy have convicted 3, two of whom are out. Doesn't matter that Zazi will plead guilty. I was mayor in the wake of a major assassination. I know what happens in a city w/major scar tissue. Indefinite detention?

Holder: People we decide should be held under laws of war, judge has ability to see whether detention appropriate. We have won some cases, we have not been successful with others. Some of people ordered released by judges have been released. We use that power with thought of keeping American people safe. If you look at number of people at Gitmo, number of people we would seek to detain relatively small.

DiFi: Children subject to detention. We've had no response to that.

Hatch: Why revise prosecutorial guidelines on marijuana. Specific intention of making dangerous drugs illegal. Not WH's vision of how controlled substances act should be enforced. Impending deadline of Adam Walsh Act.

Hatch wants more obscenity prosecutions.

Hatch: Undiebomber. You alone made this decision.

Between Hatch and Sessions, they should have practiced how to say "Abdulmutallab's" name. Woe betide them if we get around to talking about Anwar al-Awlaki, that's even harder to pronounce.

Holder: Decision has been shown to be the right one. The information that he has since provided as result of his decision to cooperate.

Feingold: Well aware of my support for federal trials. Continued strength. I have a statement that discusses that, asked to be place in record. COPs.

Here's what Feingold's statement for the record said about the 9/11 trials:

As members of this committee are aware, I strongly support the decision to try Khalid Sheikh Mohammed and other 9/11 plotters in our federal criminal courts. We have a great track record of successfully trying and convicting terrorists in civilian courts. The military commission system is largely untested, and these cases could easily get bogged down in years of legal challenges. The best way to bring these terrorists to justice swiftly is through our civilian courts. It has been nine years since 9/11, and it is inexcusable that these men have not yet been brought to justice for what they did.

Whatever one might think of using the military commission system, it is simply not yet ready to start handling prosecutions. The Military Commissions Act requires that the Secretary of Defense issue rules to govern those proceedings, and that has not yet happened. It hardly seems possible to start using military commissions without the rule book. The military commission system is also the subject of a constitutional challenge in the D.C. Circuit that is at only the beginning

stages of litigation, and anyone charged in a military commission prosecution could bring yet another legal challenge to the system itself before any trial begins. In fact, when a military commission defendant named Salim Ahmed Hamdan challenged a prior version of the military commission system, his case wound up in the Supreme Court after years of litigation. It strikes me as not only possible, but very likely, that the first few military commission trials will be subjected to legal challenges, and that any trials would not begin for several years.

The federal criminal system, on the other hand, is available now. It has been tested for literally hundreds of years, and we know it works because hundreds of people are sitting in federal prison today after being convicted of terrorism crimes in our federal courts. We know that our federal judges and prosecutors have the experience needed to take on these cases because they've done it, again and again. Indeed, the Department has achieved significant successes in the Zazi and Headley cases just in the past few months. Both were serious terrorism cases, and in both cases the Department used the criminal justice system to obtain intelligence and ultimately guilty pleas. So I support the Attorney General's decision and believe it is the best decision for the security of this country.

Grassley: Thanks for anti-trust hearings on Ag. [Feingold also raised this.] People who represented detainees. Your staff refuses to give information, but DOJ managed to verify for Fox News. Call into integrity of employees of department. I agree w/department's view that personal attacks inappropriate. Inquiry seeks to

understand who is advising you on these issues.

Holder: I know that your request comes from good place. Hesitance I had has been borne out. Drag their reputations through the mud. Reprehensible ads used to question their patriotism. I'm not going to be a part of that effort. Their names are out there, it has been placed in public record. I will not allow good decent lawyers, done what John Adams did, done what our Chief Justice has said is what is good.

Grassley: Request from this committee. Recently said that attorneys representing unpopular people patriots, doubt you'd say same about those representing mafia. Does not keep central database of recusals. You know large lawfirms have conflict committees to ensure that rules are followed. Why shouldn't DOJ have some centralized system of conflicts as private firms have.

Holder: Legitimate concern.

Grassley: FOI. Presidential Memoranda on FOI.FY 2009, Agencies cited FOI exceptions more than FY2008. B5 used 70,000 times, compared to 47,000 times in 2008.

Durbin: Courageous position to take, and the right one, SCOTUS ruled that detainees had right to habeas, Bush admin, right to counsel. Inspiration in Fox news. If anyone decides to represent Gitmo detainee, can't be trusted. If legal representation or possible inclinations toward one party or another, where does it end? You're standing up for a fundamental principle that does go back to John Adams. Men and women who've had the courage to stand up. I hope the record will reflect, it was Bush Admin that said Gitmo detainees had right to counsel. Miranda warnings. A lot of question about using Article III Courts, for fear of Miranda warnings. Policy of Bush?

Holder: I think a good case can be made that once people get Miranda information can flow. Especially in terrorism cases, and the lengthy sentences in Article III hearings.

Durbin: Richard Reid. How long after he was detained by Bush DOJ was it before given Miranda.

Holder: A few minutes.

Durbin: Five minutes.

Durbin: Those who are arguing that we have to shift to MC side would have to explain why we'd put aside this history of success.

Holder: Article III court can plead guilty to capital offense.

Lindsey Graham: President Obama has said we're at war with al Qaeda. Some people don't believe in that. Times when Article III court would be superior. Financier, more charging capabilities.

Holder confirms 48 detainees slotted for indefinite detention.

Lindsey: Lindsey now complaining that Robertson supported Slahi's habeas petition. If presumption should follow al Qaeda, once you're a member, presumption that you're still a member of al Qaeda. One reason why Congress needs to be more involved.

Lindsey: If you send new detainees to Afghanistan, you're going to bring down Afghan government.

Schumer: Want to reaffirm how difficult it would be to have trial in densely populated area.

Holder: It has not been ruled out. Would take into consideration.

Cardin [who calls it "Guantanamo"]: Asks about making review for indefinite detention transparent so international community can see it. Holder says he's working w/interagency, and also Graham.

Cardin: If we don't put sunlight on it, if we don't engaged intl community, this war's not going to end anytime soon.

Holder: need to deal with it on symbolic level.

Of course, what remains unsaid is that the REASON why Abu Zubaydah and al-Qahtani can't be tried is because we tortured them into insanity.

Cornyn: Financial crisis, border, healthcare fraud. Criminal prosecution can be deterrent . One thing that's been missing is show trials.

Holder: Madoff, other ponzi.

Cornyn: Who is coordinating investigation?

Holder: Me, financial task force.

Franken: Merger of Comcast and NBC. Want to delve into it a little bit. Concerned because I see potential of consolidation of media that is very frightening. Want the best for NBC. If this goes through, will Verizon and AT&T buy studios? Are we going to be seeing situation where 5 companies own all information we get. Very dangerous situation. Familiar with FinSyn in early 90s. Remember that basically networks prohibited from owning own programs, during testimony that all networks said why would we buy our own programs [heh] we're in the business of getting ratings. Right now we have this incredible concentration, reduced competition for independent producers. Comcast, yes, it's a vertical integration, but also horizontal, both have sports programming,

Holder: If determination were made that it would violate anti-trust. Not at liberty to talk about much. Ongoing investigation, one that antitrust div that has shown itself to be appropriately aggressive.

Franken: Varney previous DOJ anti-trust, significant conditions. Skeptical but still open to imposing conditions. I have problems with imposing conditions. Hard to enforce them. Almost inevitably expire after a few years. Make sure that DOJ conditions would actually have enough teeth, and long enough life, would really impose real conditions to prevent very thing I'm fearing.

Holder: Take myself away from NBC Comcast. A

wide range of things that can be done.

Franken: Can affect cable bill.

Holder: Now I'm concerned.

Franken: The way to Holder is through his pocketbook.

Klobuchar: Commend on Petters case, Ponzi.

Klobuchar: Cybercrime.

Whitehouse: Associate myself with remarks DiFi made. Emblems of American Justice, admired and revered around the world, justifiably take great pride. Blindfold and balance, not torch and pitchfork. Values of Article III courts, experiential base. Prosecutors can know how it's going to play out. Hundreds of Article III terror prosecutions. Of the MC, a number were plea agreements.

Holder: I think that's correct.

Whitehouse: Raises Goldsmith statement talking about novel legal issues that might render MCs ineffectual. Legislature has no proper business in exercise of prosecutorial discretion.

Holder: Letter from me and SecDef, inherently Executive Branch function.

Whitehouse: Graham's remarks, flexible pragmatic and aggressive. A good one.

Specter: Oppty to test warrantless wiretaps unconstitutional.

Holder: We have not decided. Protection of sources and methods. A determination as to what we're going to do has not been made. We are considering our options. I haven't made up my mind yet. We have to see what the impact will be on this case, wrt program that ended in 2007, 2006, to the extent that the support of congress is the way in which Exec branch should operate. When we work w/Congress to set up these programs. When we look at requirements under FISA. We will have to consider what our options are and understand what the ramifications are.

Specter: I'd urge you to get a decision. I've filed a bill to compel SCOTUS to decide it.

Specter: Miranda warnings. All it means is that statements made by subject of interrogation cannot be admitted into evidence. When you dealt w/someone like Christmas day bomber, caught red handed, didn't need confession. I would hope they not be given.

Holder: Intelligence. I think we have to have flexibility. They did not give Miranda warnings in initial interaction. Gathering of intelligence of critical importance.

Sessions, to Specter: Good to see you in that [Chair's] chair, except it's on the other side of the aisle.

Specter: This is not on an aisle.

Sessions: Yes, it's in the middle of the room.

Holder: If bin Laden were captured, I can see no reason why he'd be given Miranda warnings. Concern with Miranda warnings only whether that information would be excluded. We have sufficient information.

Sessions: With Abdulmutallab, as a result of not giving Miranda, may create many defenses that would not otherwise exist. Rule would simply be that you expect these terrorist individuals be taken into military custody. We've done that a number of times.

Sessions keeps interrupting Holder.

Holder: FBI agents, had presence of mind, understand did not have to give him Miranda warnings.

Oops, Lindsey just said this: Obviously, we're not torturing these people but we'll have the authority to do that.

He means authority to interrogate, but didn't say it.

Graham: What additional rights would a person have if transferred to Thomsen?

Holder: We don't know yet.

Graham: Congress could give some direction. I think Lamberth has been very open about Congress needs to help. Have you been reading those?

Holder laughs.

Holder: yes, I have to read them.

Graham: We're in a dilemma as a nation. GB has changed their rules to allow people to be held up to 1 year. We have the right here, if you're an enemy combatant, law of war takes over.

Graham wants to make have non-arbitrary indefinite detention, even after govt loses habeas case.

Lindsey: 59% of American people opposed to closing Gitmo. Why?>

Holder: politicization and misinformation.

Lindsey: Alternate theory, a lot of people worried that we don't have a coherent policy. I think it would be helpful to focus not only on our allies, but also on Americans. Tell them we'll keep them secure. We've got to assure American people that we've got an enduring system. Let's park some of the rhetoric.

Holder: Point you last made a good one, incumbent on people like myself, what our intentions are and to explain to them, ways I have not done, so degree of assurance, that in addition to whatever I have mentioned, factors you have mentioned is why approval has dropped.

NOW BOTH JSOC AND CIA HAVE GREEN LIGHT

TO TARGET AMERICAN CITIZEN

Let the competition begin. The WaPo clarifies an earlier Reuters report (which was unclear that this pertained to CIA) that Anwar al-Awlaki has been added to the CIA's kill list, after having been on JSOC's kill list for some months.

Anwar al-Aulaqi, who resides in Yemen, was previously placed on a target list maintained by the U.S. military's Joint Special Operations Command and has survived at least one strike carried out by Yemeni forces with U.S. assistance against a gathering of suspected al-Qaeda operatives.

Because he is a U.S. citizen, adding Aulaqi to the CIA list required special approval from the White House, officials said. The move means that Aulaqi would be considered a legitimate target not only for a military strike carried out by U.S. and Yemeni forces, but also for lethal CIA operations.

"He's in everybody's sights," said the U.S. official, who spoke on the condition of anonymity because of the topic's sensitivity.

Does it strike you as odd that we're targeting US citizens with no judicial process? Does it strike you as odd that we've got two entirely separate sets of list on which Americans can be targeted to be killed? Does it strike you as odd that we've now got an apparent turf battle over who gets to kill al-Awlaki?

One more bit of irony. The intelligence that won al-Awlaki a place on the kill list? It almost certainly came from Umar Farouk Abdulmutallab, who is not an American citizen (though he was captured in the US and he is the son of a bigwig banker), about whom we fought for months over

whether we ought to Mirandize him.

"THE PRESIDENT HIMSELF DOES NOT HAVE TO SIGN OFF ON KILL ORDERS."

That's the most striking line from the most recent post from Mark Hosenball, in which he tries to understand the process by which US citizens are placed on a list to be assassinated. Here's Hosenball's fuller explanation.

...strikes specifically targeting Americans must first be approved by a secret committee made up of senior intel officials and members of the president's cabinet (it's not known which ones). The president himself does not have to sign off on kill orders.

It's handy, isn't it, the way the President gets to retain plausible deniability for the killing of a US citizen? And the way Obama has conveniently wrapped himself in the same plausible deniability that Bush (or, more likely, Cheney) created? That way you can kill US citizens without ever worrying about the President going to jail for it. And if you're really good at hiding the identities of those who do sign off on the killings, then no one can sue!

Also note that Hosenball seems to be looking closely at the same loophole that I have been thinking about: the ability to knowingly kill Americans so long as the purported target of that assassination is the guy sitting next to the American in the car that's about to blow up.

The sources say that committee approval is required only if the specific target of the assassination is an American—not if an American happens to be in the vicinity of a foreign target at the time of the strike. At least once, U.S. forces have killed an American this way. In November 2002 a missile attack targeting a Yemeni terrorist also killed Kamal Derwish, an American citizen associated with an alleged terrorist cell in Lackawanna, N.Y. U.S. forces almost did it again last Christmas Eve, with an airstrike against another Yemeni terrorist; he was believed to be hiding with Anwar al-Awlaki, the U.S.-born radical cleric who advised both the suspected Fort Hood shooter and the alleged Christmas Day bomber. Al-Awlaki is believed to have escaped.

It would add another convenient level of plausible deniability, of course. “Oh, we weren’t actually targeting Kamal Derwish! We were targeting Harithi, even at precisely the time we targeted him, we had the guy who did what we claim he did in custody.”

I can’t wait until this gets to the courts.

WHERE WILL BRENNAN LAND IN RAHM V. DOJ SPAT?

As Jason notes, David Axelrod has already taped a CSPAN response to Jane Mayer’s piece on Rahm’s spat about distractions like “the law” and “human rights” with Eric Holder and Greg Craig. In it, Axe appears to try to distance the White House from the decisions that have been attacked

in the last few weeks, particularly the decision to try Khalid Sheikh Mohammed in New York.

David Axelrod did not dispute that a rift had emerged between the White House and the Justice Department over the 9/11 case, which has recently become a political sore spot for the administration. Despite a rising tide of opposition to having a trial in Manhattan, which has sent the administration scrambling to find another location, Axelrod said it was not a mistake for Holder to announce the trial would be held there. **But Axelrod did not defend it – or portray it in any way as a decision that came from the White House. “The attorney general was responding under the protocol that was developed between the Department of Justice and the Department of Defense for the prosecution of terrorists,”** Axelrod said in an interview for C-SPAN’s “Newsmakers” series set to air on Sunday.

Acknowledging White House resistance to the Justice Department decisions, Axelrod continued: “Rahm has a perspective that’s different. He’s the chief of staff. He looks at things from a legislative perspective, he looks at things from other perspectives.”

Side note: Responsible journalism would dictate that Anne Kornblut avoid the metonymy of “White House” here, as it obscures whether this is just Axe and Rahm working the press as they do, or Obama as well. After all, if Obama has decided to give Holder autonomy on this decision, he has, in fact, supported such a decision, or should have. But therein may be the real root of White House dysfunction on this issue.

So Rahm and Axe are out there declaring that the decision to try KSM in a civilian trial in NY belongs entirely to DOJ and DOD, which Axe

appears to portray as somehow divorced from the authority and will of the White House (and therefore, from Obama). In the likelihood that the trial will be moved to some other venue altogether, then, Axe and Rahm can continue to make Holder the scapegoat. Heck, they may even be trying to force Holder out like they have forced Craig out.

But what's going to happen when the White House strongly owns its decisions on the handling of the Underwear Bomber? They've got John Brennan on Meet the Press tomorrow to defend the Administration's decisions on his treatment. As Mark Ambinder tweets,

Admin puts Brennan on Sunday shows to defend Abdulmuttalab's handling. He is steaming mad about the CW.

Whatever my complaints with Brennan, he does come off as less of a backroom bumbler than Rahm and Axe of late. And he plans to go on TV and rebut the conventional wisdom about the decision to mirandize Umar Farouk Abdulmutallab and try him in civilian court.

In other words, Brennan will be making the same defense of civilian law as Eric Holder has. Maybe, in the process, he'll explain how Abdulmutallab's testimony has already led the White House to put Anwar al-Awlaki on a kill list, just to look tough in the process!

So it seems that as Rahm and Axe try to set up and scapegoat Holder, one of the grownups is about to go on TV and own not the KSM decision, but certainly the decision to sustain our system of civilian law.

ASSASSINATION PERMISSION SLIPS AND HALL PASSES

Yesterday, Dennis Blair gave the House Intelligence Committee an explanation of the “specially permission” that the Government grants itself before it places a US citizen on its kill list.

The U.S. intelligence community policy on killing American citizens who have joined al Qaeda requires first obtaining high-level government approval, a senior official disclosed to Congress on Wednesday.

Director of National Intelligence Dennis C. Blair said in each case a decision to use lethal force against a U.S. citizen must get special permission.

“We take direct actions against terrorists in the intelligence community,” he said. “If we think that direct action will involve killing an American, we get specific permission to do that.”

He also said there are criteria that must be met to authorize the killing of a U.S. citizen that include “whether that American is involved in a group that is trying to attack us, whether that American is a threat to other Americans. Those are the factors involved.”

If you haven’t already, you should read Glenn Greenwald’s entire piece on why this stance violates US law. Here’s Glenn’s description of the legal background.

The severe dangers of vesting assassination powers in the President are so glaring that even GOP Rep. Pete

Hoekstra is able to see them (at least he is now that there's a Democratic President). At yesterday's hearing, Hoekstra asked Adm. Blair about the threat that the President might order Americans killed due to their Constitutionally protected political speech rather than because they were actually engaged in Terrorism. This concern is not an abstract one. The current controversy has been triggered by the Obama administration's attempt to kill U.S. citizen Anwar al-Awlaki in Yemen. But al-Awlaki has not been accused (let alone convicted) of trying to attack Americans. Instead, he's accused of being a so-called "radical cleric" who supports Al Qaeda and now provides "encouragement" to others to engage in attacks – **a charge al-Awlaki's family vehemently denies** (al-Awlaki himself is in hiding due to fear that his own Government will assassinate him).

The question of where First Amendment-protected radical advocacy ends and criminality begins is exactly the sort of question with which courts have long grappled. In the 1969 case of *Brandenburg v. Ohio*, the Supreme Court unanimously reversed a criminal conviction of a Ku Klux Klan leader who – surrounded by hooded individuals holding weapons – gave a speech threatening "revengeance" against any government official who "continues to suppress the white, Caucasian race." The Court held that the First Amendment protects advocacy of violence and revolution, and that the State is barred from punishing citizens for the expression of such views. The *Brandenburg* Court pointed to a long history of precedent protecting the First Amendment rights of Communists to call for revolution – even violent

revolution – inside the U.S., and explained that the Government can punish someone for violent **actions** but not for speech that merely advocates or justifies violence (emphasis added):

As we [395 U.S. 444, 448] said in *Noto v. United States*, 367 U.S. 290, 297 -298 (1961), **“the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”** See also *Herndon v. Lowry*, 301 U.S. 242, 259 -261 (1937); *Bond v. Floyd*, 385 U.S. 116, 134 (1966). A statute which fails to draw this distinction **impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments.** It sweeps within its condemnation speech which our Constitution has immunized from governmental control.

From all appearances, al-Awlaki seems to believe that violence by Muslims against the U.S. is justified in retaliation for the violence the U.S. has long brought (and continues to bring) to the Muslim world. But as an American citizen, he has the absolute Constitutional right to express those views and not be punished for them (let alone killed) no matter where he is in the world; it's far from clear that he has transgressed the advocacy line into violent action.

I want to go back to just one more problem with this whole state of affairs.

We have been focusing all of our powers of

telecom surveillance on Anwar al-Awlaki for at least a year (and probably far longer). Our government has tracked not only what he has said on jihadist websites, but also knows precisely what he has been emailing and presumably saying on the phone.

But none of that stuff, before Christmas Day, even merited an indictment.

And then—perhaps only because of the testimony from Umar Farouk Abdulmutallab that Republicans have shrieked for weeks was inadequate—the Government moved from having no charges against al-Awlaki to attempting to assassinate him. All at a time when we've increased our presence in and cooperation with Yemen (so therefore, presumably also our ability to extradite someone from Yemen).

Glenn's point is important because it appears the government agrees with him on the First Amendment point: all of the speech al-Awlaki has engaged in for the last decade was not deemed worthy of even a criminal indictment. Yet all of a sudden, it got al-Awlaki on the kill list.

The process by which that happened must be transparent to the American people.

REVISITING THE AL-HARITHI/DERWISH ASSASSINATION

I wanted to expand on this comment, because the discussion of whether Anwar al-Awlaki is on both the JSOC and CIA kill lists or not has focused new attention on the assassination, on November 3, 2002, of Abu Ali al-Harithi and Kamal Derwish.

Greg Miller mentions the assassination in his

story today.

The CIA has carried out Predator attacks in Yemen since at least 2002, when a drone strike killed six suspected Al Qaeda operatives traveling in a vehicle across desert terrain.

The agency knew that one of the operatives was an American, Kamal Derwish, who was among those killed. Derwish was never on the CIA's target list, officials said, and the strike was aimed at a senior Al Qaeda operative, Qaed Sinan Harithi, accused of orchestrating the 2000 attack on the U.S. destroyer Cole.

Dana Priest mentions the assassination in her story on escalated operations in Yemen.

In November 2002, a CIA missile strike killed six al-Qaeda operatives driving through the desert. The target was Abu Ali al-Harithi, organizer of the 2000 attack on the USS Cole. Killed with him was a U.S. citizen, Kamal Derwish, who the CIA knew was in the car.

And ABC mentions it as well.

An American citizen with suspected al Qaeda ties was killed in Nov. 2002 in Yemen in a CIA predator strike that was aimed at non-American leaders of al Qaeda. The death of the American citizen, Ahmed Hijazi of Lackawanna, NY, was justified as "collateral damage" at the time because he "was just in the wrong place at the wrong time," said a former U.S. official familiar with the case.

Now, all of these articles were written by journalists with long experience in intelligence reporting, so all must know this detail. Still,

I find the inclusion of it in all three stories (including Priest's, in which the focus is on Yemen, rather than assassination) rather notable. Is it possible that all the guys leaking this story have pointed the journalists to the earlier assassination?

I ask because—for starters—I find it rather interesting that that 2002 assassination was rationalized in the name of killing al-Harithi, accused of organizing the USS Cole bombing. That strike happened not long after the US started torturing a guy—Rahim al-Nashiri—whom we're about to try in military commission for organizing the USS Cole bombing. (And remember, al-Nashiri had been in custody in Dubai for a month by the time the US took custody.) Who was the mastermind of the Cole bombing, then? al-Harithi, who doesn't even merit a mention in the 9/11 Commission report (though reports from when he was killed said he was among the 12 most senior al Qaeda figures), or al-Nashiri, who does, and is about to be tried for it? Note, too, that the Bush Administration did not announce it had custody of al-Nashiri until several weeks later in November.

Now compare al-Harithi, with his loosely accused role in the Cole, with Kamal Derwish, whom the US accused of recruiting a number of Lackawanna youth into al Qaeda. Not only was Derwish accused of being an ongoing threat—the standard purportedly used to put Americans on kill lists now. But he was accused of training Americans in al Qaeda. Which is not all that different than what the government is accusing al-Awlaki of now.

And note, too, that Priest and maybe Miller [ed. changed per MD's comment] both now report that the CIA knew Derwish was in the car when they targeted (they say) al-Harithi. When Miller first reported this in 2002, he didn't mention Derwish's presence (nor did Pincus). When Priest broke the story of Derwish's presence in the car, she stated it was unclear whether CIA knew he was there or not.

It was unclear whether the CIA operatives who fired the missile from hundreds of miles away knew that an American citizen was among their targets. It also was unclear whether that would have made any difference.

I guess I'm suggesting that, first of all, it would seem unnecessary to kill a guy for planning the Cole bombing if you knew you had the guy who—you say—planned the Cole bombing in custody. But that claiming a tie between him and the Cole bombing might provide the excuse to target a car carrying your real target, Derwish.

THE LIST OF US CITIZENS TARGETED FOR KILLING (OR CAPTURE)

This Dana Priest article is interesting for the way it fleshes out the way the US is working in Yemen (primarily), Pakistan, and Somalia. But note this line, which she kind of buries in there.

As part of the operations, Obama approved a Dec. 24 strike against a compound where a U.S. citizen, Anwar al-Aulaqi, was thought to be meeting with other regional al-Qaeda leaders. Although he was not the focus of the strike and was not killed, **he has since been added to a shortlist of U.S. citizens specifically targeted for killing or capture by the JSOC**, military officials said. [my emphasis]

That is, somewhere there's a list of Americans who, the President has determined, can be killed with no due process.

Priest goes on much later in the article.

After the Sept. 11 attacks, Bush gave the CIA, and later the military, authority to kill U.S. citizens abroad if strong evidence existed that an American was involved in organizing or carrying out terrorist actions against the United States or U.S. interests, military and intelligence officials said. The evidence has to meet a certain, defined threshold. The person, for instance, has to pose "a continuing and imminent threat to U.S. persons and interests," said one former intelligence official.

The Obama administration has adopted the same stance. If a U.S. citizen joins al-Qaeda, "it doesn't really change anything from the standpoint of whether we can target them," a senior administration official said. "They are then part of the enemy."

Both the CIA and the JSOC maintain lists of individuals, called "High Value Targets" and "High Value Individuals," whom they seek to kill or capture. The JSOC list includes three Americans, including Aulaqi, whose name was added late last year. ~~As of several months ago, the CIA list included three U.S. citizens, and an intelligence official said that Aulaqi's name has now been added.~~ [Update, February 17, 2010: WaPo has since retracted the report that CIA had US citizens on its kill list.]

Of course, they said Jose Padilla had close ties to al Qaeda, but those turned out to be more tenuous than originally claimed. Likewise the case against John Walker Lindh. And there are any number of "aspirational" terrorists whom officials have claimed had joined al Qaeda.

But I guess the tenuousness of those ties don't

really matter, when the President can dial up the assassination of an American citizen.

PEACE ON EARTH AIR STRIKE IN YEMEN

What Siun dubbed our Fourth War continues to heat up, this time with air strikes that reportedly kill Anwar al-Awlaki, the cleric who communicated with Army psychiatrist Major Nidal Hasan via email in the months leading up to the Fort Hood killings.

Backed by U.S. intelligence, Yemeni forces struck a series of suspected al-Qaida hideouts Thursday, killing more than 30 militants in its stepped-up campaign against the terror network, the government said. A radical Muslim preacher linked by U.S. intelligence to a gunman who killed 13 people at a U.S. Army base is believed to have been killed in the airstrike, a security official said on Thursday.

"Anwar al Awlaki is suspected to be dead (in the air raid)," said the Yemeni official, who asked not to be identified.

[snip]

Yemen's Supreme Security Committee said airstrikes in the eastern Shabwa province targeted an al-Qaida leadership meeting that was organizing attacks. It said top al-Qaida officials were at the meeting, though it was unclear whether they were harmed.

Don't get me wrong. I suspect there are far more dangerous members of al Qaeda in Yemen right now

than in Afghanistan. If so, we're at least targeting the guys we're supposedly at war with.

Still, the convenience of killing al-Awlaki now, at a time when we're investigating his communication with Hasan, after we've been tracking him closely for seven years, along with the way this strike fits into the "30 casualties" formula, makes me a wee bit suspicious.

FBI ASKS WILLIAM WEBSTER TO LOOK CLOSER AT NIDAL HASAN ANALYSIS

As interesting as the news that FBI has asked William Webster to review the analysis of Nidal Hasan before the Ft. Hood killing are some other details from the story.