Written by **Thomas R. Eddlem** on March 11, 2013

# Wall Street Journal Attacks Rand Paul Filibuster

The Rand Paul filibuster against drone strikes in the nomination of John Brennan as CIA director brought plaudits from across the political spectrum, but also harsh (and inaccurate) criticism from the *Wall Street Journal* and other neoconservative pundits.

"He's apparently serious, though his argument isn't," a house *Wall Street Journal* editorial concluded of Rand Paul's demands. At the core of the *Journal's* complaint against Senator Paul's opposition to handing the president the power to assassinate American citizens in the United States was the *Journal's* belief that the president *can kill* Americans — inside or outside the borders of the United States — without due process. Moreover, we have the administration's word that this awesome power would be wielded only against "enemy combatants."

The White House appeared to approve of strikes against American citizens, with White House Press Spokesman Jay Carney telling the press on February 5, "We conduct those strikes because they are necessary to mitigate ongoing actual threats, to stop plots, prevent future attacks, and, again, save American lives. These strikes are legal, they are ethical and they are wise."

Attorney General Eric Holder issued a clarified statement last week saying they wouldn't kill a U.S. citizen unless he were designated an "enemy combatant" — *by the administration!*

Three U.S. citizens were killed in two separate drone strikes, including 16-year-old Abdulrahman al-Awlaki (born in Colorado). His father, New Mexico-born Anwar al-Awlaki, had been targeted and killed in a separate 2011 U.S. drone strike in Yemen, along with U.S.-born Samir Khan.

"Mr. Holder is right, even if he doesn't explain the law very well," the *Wall Street Journal* opined after Rand Paul's filibuster, since the White House claimed it would never target Americans in the United States unless they were actively engaged in terrorism. The president, the *Journal* counters, can order the assassination of U.S. citizens without trial whenever he deems it necessary: "Mr. Holder is right that the U.S. could have targeted (say) U.S. citizen Anwar al-Awlaki had he continued to live in Virginia. The U.S. killed him in Yemen before he could kill more Americans. But under the law al-Awlaki was no different than the Nazis who came ashore on Long Island in World War II, were captured and executed."

There's a lot in the *Wall Street Journal's* statement that needs to be set straight, not the least of which being that the Nazis who came ashore to engage in terrorism at the onset of American involvement in World War Two were *not* summarily executed on the president's orders. It is true that President Roosevelt convened an *ad hoc* (and unconstitutional) military tribunal to try them after they were

captured, but if al-Awlaki was truly "no different than the Nazis who came ashore on Long Island in World War II," then he'd have received at least a military tribunal before being executed.

At the heart of the issue is the right of the president to be able to designate "enemy combatants" in the absence of a congressional declaration of war or authorization of force. Many Americans are unaware that the U.S. Constitution delegates war powers to Congress, not the president. Senator Paul stressed in his filibuster speech that the congressional authorization of force in the wake of the September 11 attacks was to go after those responsible for the attacks:

> We abdicate our responsibility by not really writing legislation. We write shells of legislation that are imprecise and don't retain the power, and because of that, the executive branch and the bureaucracy, which is essentially the same thing, do whatever they want. This happened also with the use of authorization of force in Afghanistan. This happened over 10 years ago now, 12 years ago. I thought we were going to war against the people who attacked us, and I'm all for that. I would have voted for the war. I would have preferred it to have been a declaration of war.

Alexander Hamilton — who is hardly a critic of executive power — argued in *The Federalist, No. 69,* that the president's "commander-in-chief" power under Article II of the U.S. Constitution would simply make him the top general, *not* the "decider," as Presidents Bush and Obama have asserted. In Hamilton's words, the president's power "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies — all which, by the Constitution under consideration, would appertain to the legislature." Congress also has the additional powers — not the president — "To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water" and:

> To make rules for the government and regulation of the land and naval forces;
>
> To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions.

Each of these enumerated powers in the U.S. Constitution clearly indicates that Congress, not the president, is charged with keeping the nation safe and make the decisions to engage in violence. Even Alexander Hamilton — that great exponent of executive power — agreed with this, writing in 1794 that "war is a question, under our constitution, not of Executive, but of Legislative cognizance. It belongs to Congress to say—whether the Nation shall of choice dismiss the olive branch and unfurl the banners of War."

Of course, even if the original Constitution had authorized the president (or Congress, for that matter) to target and kill an American citizen without trial — which it didn't — the Fifth Amendment would have changed this forever. The Fifth Amendment stipulates that "no person shall … be deprived of life, liberty, or property, without due process of law." It also requires that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

And it's far from clear that the elder al-Awlaki was an imminent threat to Americans. The only information the Obama administration released publicly was that al-Awlaki had used his YouTube account to encourage attacks on Americans. While the administration did leak some more allegations to the *New York Times* for March 10 alleging al-Awlaki gave material advice to terrorist plotters, it's unclear al-Awlaki was an imminent threat.

Ft. Hood mass shooter Maj. Nidal Malik Hasan, according to the *New York Times*, had been in contact with al-Awlaki, though not in an operational manner. "Investigators quickly discovered that the major had exchanged e-mails with Mr. Awlaki," the *Times* reported March 10, "though the cleric's replies had been cautious and noncommittal." Dennis C. Blair, then director of national intelligence, told the *Times* that they decided to kill al-Awlaki after finding he had given advice to unsuccessful underwear bomber Umar Abdulmutallab. "He had been on the radar all along, but it was Abdulmutallab's testimony that really sealed it in my mind that this guy was dangerous and that we needed to go after him." None of this information is publicly available, or verifiable in the same way a trial makes evidence public. It's unclear that CIA analysts didn't win out with recommendations to "push the 'easy button'" and send a drone instead of a strike team to try to capture, as the CIA case officer did in the bin Laden case.

*Photo of Sen. Rand Paul: AP Images*