



## Judge, Jury, & Executioner: Should Presidents Have a License to Kill?

President Obama had authorized the drone strike that killed the 16-year-old American boy in October. He had also authorized a different drone strike in Yemen that killed the boy's father, Anwar al-Awlaki, two weeks earlier. Anwar al-Awlaki had attached himself to the al-Qaeda terrorist organization. Like his son, he was a native-born American and U.S. citizen and had never been formally charged with a crime. But Obama stressed in a press conference after the drone killing of the elder Awlaki that the father had been killed because he had taken "the lead in planning and directing efforts to murder innocent Americans."

But that's also precisely what Obama did to the above-described 16-year-old Denver native, Abdulrahman al-Awlaki, just weeks later.

### Should Presidents Be Trusted?

For two years now, the press has been reporting that the Obama administration has an assassination list of several dozen or more U.S. citizens who are subject to being killed on presidential order, without being charged with a crime or brought to trial. Anwar al-Awlaki was reportedly on that list. It's unclear whether his son — a mere 16-year-old boy — was also on that list. The question Americans must now consider is: Should the President be trusted with the power to kill American citizens without due process? Should he be policeman, judge, jury, and executioner all rolled into one?

Certainly Presidents can't be trusted to tell the truth. The American people certainly have a recent habit of electing Presidents with a prolific tendency to lie to the voters. Here is just one example from each of the last four Presidents:

"Read my lips: no new taxes."

— *George H. W. Bush, at the Republican National Convention in 1988. The elder Bush signed a huge income tax increase with the 1990 Budget Reconciliation act on November 5, 1990.*

"I did not have sexual relations with that woman, Miss Lewinsky."

— *President Bill Clinton, January 21, 1998. Clinton admitted he did have a sexual "relationship" with "that woman" August 18 the same year.*

"Any time you hear the United States government talk about wiretap, a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so."

— *George W. Bush, April 20, 2004. Six months later, his Attorney General, Alberto Gonzales, admitted that the National Security Agency had a massive "terrorist surveillance program" that permanently records every American's phone records and Internet traffic without a warrant.*

"I taught the U.S. Constitution for 10 years. I believe in the Constitution and I will obey the Constitution of the United States. We're not going to use signing statements as a way of doing an end run around Congress."

— *Barack Obama, May 18, 2008, at a campaign stop in Billings, Montana. Yet by July of 2009, even members of his own party such as Barney Frank and David Obey complained in letters to Obama that he had ignored the clear language of Congress on funding for global bodies via executive signing*



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statements.

Presidents lie, at least those the voters have chosen recently. But many would contend that Presidents would not be so dishonest as to kill Americans undeserving of the death penalty.

Indeed, even if a President were honest, is he capable of determining guilt to the same extent as a jury? The deaths of both Awlakis, father and child, have led to some predictable positions in the controversy.

The ACLU opposes vesting the President with the power to kill Americans without trial. "The government's authority to use lethal force against its own citizens should be limited to circumstances in which the threat to life is concrete, specific and imminent," ACLU deputy legal director Jameel Jaffer said in a statement. "It is a mistake to invest the President — any President — with the unreviewable power to kill any American whom he deems to present a threat to the country."

Meanwhile, neoconservatives favor giving this extraordinary power to Presidents, a power that even many Kings did not enjoy throughout history. Former Bush administration official John Yoo wrote in *National Review* October 9 that "there is no legal reason why a nation at war must try to apprehend an enemy instead of shooting at him first. Every member of the enemy armed forces and leadership is a legitimate target in wartime, regardless of whether they can be caught or whether they pose an imminent threat."

Yoo also claimed that since the U.S. Civil War "our national leaders and the Supreme Court have agreed that a citizen who joins the enemy must suffer the consequences of his belligerency, with the same status as that of an alien enemy."

### **Fifth Amendment and the Whiskey Rebellion**

The Fifth Amendment to the U.S. Constitution guarantees that "no person shall ... be deprived of life, liberty, or property, without due process of law." But Yoo argues that in a war, even a "war" undeclared by Congress like the "war on terror," there is no due process. However, the Fifth Amendment — which modified the U.S. Constitution — makes no exceptions for war. By extension, Yoo argued that no court can review a President's assassination during these "wars," nor any killing in "collateral damage." Presidential power is unlimited, Yoo argues, and Obama's actions of targeting even U.S. children seem to concur with this Bush-era sentiment.

Yet Americans once had Presidents who did not use their office as an excuse to kill and rack up massive "collateral damage." During the 1794 Whiskey Rebellion, President Washington encountered what he labeled U.S. citizens waging "overt acts of levying war against the United States." George Washington was authorized to use force by the Militia Act passed by Congress to suppress rebellion, but went to congressional leaders again anyway and received permission to use force. Moreover, he sent a delegation to meet with the violent insurgents in western Pennsylvania in order to prevent bloodshed. Washington used minimal force; he did not automatically try to "take out" the insurgents as Obama has done in the war on terror.

George Washington wrote in his diary on October 9, 1794 that the rebels at "war" with the United States would not be executed in cold blood, and neither would he subject them to military commissions:

I assured them that every possible care should be taken to keep the Troops from offering them any insult or damage and that those who always had been subordinate to the Laws, & such as had availed themselves of the amnesty, should not be injured in their persons or property; and that the treatment of the rest would depend upon their own conduct. That the Army, unless opposed, did



not mean to act as executioners, or bring offenders to a Military Tribunal; but merely to aid the civil Magistrates, with whom offences would lye. Thus endd. the matter.

In fact, when a man and a boy were killed by federal militia under Washington's command, Washington ordered both shooters arrested and handed them over to Pennsylvania state prosecutors. Washington did this even though the man had been killed while clearly resisting arrest. State judges later ruled that both shootings were accidental and set the militia members free, but Washington's example in the only two citizen deaths under his command is a sharp contrast with Obama's assassination of a man and a boy today. Instead of taking "war" as a license to kill, Washington arrested rebel insurgents during the Whiskey Rebellion. He then ensured that every one of the rebels who had been warring against the U.S. government received a civilian trial. When two of the defendants in the Whiskey Rebellion were found guilty of treason and sentenced to death, Washington pardoned both offenders and everyone else still facing trial for treason.

Had the Whiskey Rebellion occurred and been suppressed in a like manner today, President Washington would have been painted by neoconservatives like Yoo as one of the "principled fools" he mocked in his *National Review* column. In fact, George Washington would be mocked as a weak-minded President who released the terrorists and blamed his own troops for creating the terrorism.

But Washington and the Founding Fathers put a premium on avoiding unnecessary bloodshed, what is euphemistically called "collateral damage" today, and following the Fifth Amendment to the U.S. Constitution. This was part of a life-affirming principle rooted in the Founders' Christian heritage, but it was also based upon a very practical view that no one man should have the power of life and death over American citizens. It also helped to end the war. As Thomas Slaughter noted in his book *The Whiskey Rebellion*, "Federal officials had hoped to instill fear among dissidents, but not necessarily to kill them; friends of order had no wish to open themselves to charges of oppression or to create martyrs useful to the political opposition." Indeed, the Whiskey Rebellion soon faded, even while policymakers today talk about a "war on terror" without end.

The same principle applies all the more in the 21st century. Today, with the ability for special forces strike teams to fly across the globe quickly to any location, the U.S. government can apprehend anyone it can target with a cruise missile.

### **Jose Padilla: ?Not Getting the Story Straight**

American Presidents today have not only engaged in needless bloodshed against American citizens, they have otherwise deprived citizens of the "due process" that the Fifth Amendment guarantees. Just as Washington guaranteed all those who warred against the U.S. government a trial, the Bush and Obama administrations have conspired to deny people ordinary trials and to engage in torture. And they've done it using methods that involve lying.

Jose Padilla was a Brooklyn, New York-born criminal that Bush administration officials picked up at O'Hare Airport in Chicago in 2002. Shortly thereafter, Attorney General John Ashcroft announced to the nation that they had caught a man who had a master plan to detonate a "dirty bomb" in the United States as part of an al-Qaeda plot. Padilla had been a Latin Kings gang member, served time on a manslaughter conviction, and converted to Islam in prison. Padilla was never a model citizen, but neither could he ever be accused of being a mastermind. There was never any proof he had either the will or the intellectual ability to carry out the plot. The Padilla case is a good example of why the federal government can't be trusted on several levels. While the Bush administration tortured Padilla in prison



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for more than three years without even charging him with a crime, they continued to change their media story about what Padilla had supposedly been plotting.

By June 2004, the *Chicago Tribune* reported that the Bush administration had dropped the “dirty bomb” plot charade. Bush officials instead claimed in 2004 that Padilla had planned to “blow up high-rise apartment buildings through natural gas explosions.” All the while, Bush officials denied that Padilla should ever have a chance to argue his case in court. The case went all the way to the Supreme Court, and only when Bush officials faced losing a Supreme Court decision did they decide to indict Padilla.

By the time of the 2005 indictment, both the “dirty bomb” and “natural gas bomb” allegations had disappeared entirely. In fact, Padilla’s indictment contained no specific attack plans, and neither did prosecutors allege specific plots in court during his 2007 trial.

Interestingly, one of the chief accusers of Padilla was Binyam Muhammad, a man with dual British and Ethiopian citizenship who had been arrested by U.S. authorities and suffered genital mutilation during “interrogation” sessions under U.S. “extraordinary rendition” custody in Morocco. Not surprisingly, Binyam Muhammad chose to weave lurid tales of Padilla’s nefarious plots in the hopes that interrogators would not renew the 18-month torture regimen where a scalpel had been taken to his private parts.

### **Confessing to Anything ?“for a Sandwich”**

While no American citizen was administered the kind of medieval tortures that Binyam Muhammad suffered (that we know of, anyway), American citizens were certainly tortured under the Bush administration. Some of those American citizens were innocent. Two of these innocent American citizens are Donald Vance and Nathan Ertel. Vance, an American citizen and Navy veteran, had volunteered to work for a private contractor helping the U.S. war in Iraq. When he noticed people in his company trading weapons for liquor with insurgents, he went to the Chicago FBI while on leave in the United States, and became an FBI informant. When his cover was blown, Vance and his friend Ertel (who had also become an FBI informant) were arrested by the same people who were engaging in the corrupt activities, and thrown into solitary confinement at Camp Cropper in Iraq.

Donald Vance was detained for more than three months without charges in Iraq and underwent the same kind of “enhanced interrogation” that Padilla underwent, which included prolonged solitary confinement, beatings called “walling,” and food deprivation for days at a time. Asked if he could see false confessions emerging from that kind of treatment, Vance replied, “Absolutely. I can definitely imagine that. I certainly imagine someone admitting to incredible crimes, maybe, for a sandwich.”

Vance and Ertel weren’t vilified on national television by top-level Bush administration officials. Instead, Vance and Ertel were “disappeared” secret police-style, kidnapped off the streets, and nobody even acknowledged their arrest. Only the persistent and very public efforts of Vance’s friends and fiancée in Chicago won his release. Vance and Ertel’s experience highlights the importance of restoring the ancient Anglo-American principle of habeas corpus, a principle explicitly enshrined in the U.S. Constitution. Habeas corpus guarantees that nobody can be locked up in prison before being brought before a court to justify their continued detention. Habeas corpus guarantees innocent people are not just thrown into prison by Presidents or their flunkies and left to rot. Yet this is a principle both the Bush and Obama administrations have explicitly fought in court. Recently, the Obama administration admitted that, even if men selected for the President’s military tribunal trials are declared “not guilty” by the military commissions, they would never be set free from prison.



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## **“Worst of the Worst” in Guantanamo Turn Out Innocent**

Habeas corpus and criminal trials prevent executive branch officials from keeping innocents imprisoned without a court hearing because executive branch officials have a long history of keeping innocent people locked up in prison to maintain the false appearance of justice. One egregious example of this is former Vice President Dick Cheney, who on June 1, 2009 reiterated the Bush administration talking points that “the worst of the worst” were held at the Guantanamo Bay prison. Cheney said this even as 17 innocent Uighurs languished in prison. The Uighurs are Chinese Muslims who were picked up by bounty hunters during the 2001 dragnet as U.S. forces invaded Afghanistan. The Bush Defense Department had ruled internally that the detainees were innocent and were just turned over as “terrorists” to fool U.S. officials into granting the bounty, a ruse that netted the bounty hunters several thousand dollars. But the Uighurs remained in prison for years thereafter in order to save face for the public Bush administration statements about the prisoners at Guantanamo. Just 10 days after Cheney’s remarks, the U.S. government made arrangements to resettle the 17 Uighurs in the Pacific island nation of Palau.

Likewise, Bush administration Secretary of Defense Donald Rumsfeld claimed on June 27, 2005 that Guantanamo detainees were all captured on a battlefield. “If you think of the people down there,” Rumsfeld told a radio audience, “these are people all of whom were captured on a battlefield. They’re terrorists, trainers, bomb makers, recruiters, financiers, UBL’s body guards, would-be suicide bombers, probably the 20th hijacker, 9/11 hijacker. We’re learning a great deal of information about how al-Qaida operates, and able to stop other terrorist attacks.”

Yet an analysis by Seton Hall Law School Professor Mark Denbeaux reveals that the numbers are almost exactly the opposite. Analyzing the federal government’s own public release of data on Guantanamo detainees, Denbeaux found:

- Only twenty-one (21) — or four percent (4%) — of 516 Combatant Status Review Tribunal unclassified summaries of the evidence alleged that a detainee had ever been on any battlefield;
- Only twenty-four (24) — or five percent (5%) — of unclassified summaries alleged that a detainee had been captured by United States forces;
- Exactly one (1) of 516 unclassified summaries alleged that a detainee was captured by United States forces on a battlefield.

Denbeaux also noted that many of those the Bush administration had claimed “returned to the battlefield” after their release were actually living peacefully in the West. Three British former Guantanamo detainees known as the “Tipton Three” were listed as having returned to the “battlefield” for giving interviews for the acclaimed documentary film, *The Road to Guantánamo*:

For the Department of Defense, however, the men’s participation in *The Road to Guantánamo* — in the absence of any other allegations — is apparently enough to justify their inclusion among the “at least 30 former GTMO detainees [who] have taken part in anti-coalition militant activities after leaving U.S. detention.”

Interestingly, Rumsfeld privately had acknowledged that low-level detainees had been sent to Guantanamo. In an April 2003 memorandum to Defense officials, Rumsfeld wrote, “We need to stop populating Guantanamo Bay (‘GTMO’) with low-level enemy combatants. GTMO needs to serve as an [REDACTED] not a prison for Afghanistan.” In short, Rumsfeld was telling the American people in public radio interviews that Guantanamo detainees were the worst sort of terrorists, while





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acknowledging privately that they weren't.

Again, should you trust the federal government?

Consider also that President Obama campaigned on a promise to close the prison at Guantanamo within a year, yet Guantanamo remains open to this day, almost three years since his inauguration. This constitutes yet another promise-turned-lie by a U.S. President.

### **This Is the "Land of the Free," Right?**

Despite all these lies, assassinations, and torture, many Americans believe that they should trust their government leaders. This is, after all, America. We elected the President, after all. We live in the freest nation in human history, do we not?

Such a question can only be answered by the suggestion that America only became the freest nation in human history because its Founders and citizens have never trusted the federal government. And elections alone are not enough protection to retain freedom, the Founding Fathers argued. James Madison wrote in *The Federalist*, No. 51:

But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

America's Founders understood that when you trust government officials with a power, you don't just trust the officials and government you have today, you trust all future officials and all future governments.

History has borne out the dangerousness of trusting governments again and again. When the German Weimar Republic banned personal firearms possession, citizens trusted their government to hold a monopoly on force. And Weimar officials never violated that trust. But eventually the German people elected a man named Adolf Hitler who ended up with a program of massive executions that came to be called the Holocaust, and there was no one to fight back against the government's monopoly of force. Indeed, Jews for the Preservation of Firearms Ownership published a study in the 1990s called *Lethal Laws* analyzing the gun laws of every nation that had committed genocide against its own people during the 20th century. Authors Aaron Zelman and Jay Simkin found that every one of the nations had confiscatory gun laws, of course. Perhaps more tellingly, they also found that most of the gun laws had been passed during earlier, apparently benign governments. In other words, the seeds to genocide were sown by people blindly trusting their own governments.

And it should be stressed that most of these sad peoples who were victimized by genocide didn't explicitly invest their government officials with the power to kill their own citizens. They only invested them to confiscate privately held weapons. The power Americans such as John Yoo put into the hands of government officials today is much greater than the trust put into the hands of the Weimar Republic.

America's Founding Fathers taught the opposite lesson. James Madison wrote in 1785: "It is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution. The freemen of America did not



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wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it."

Abdulrahman's grandfather, Nasser al-Awlaki, told *Time* magazine that the principle of government assassination has already been exercised. "I really feel disappointed that this crime is going to be forgotten. I think the American people ought to know what really happened and how the power of their government is being abused by this Administration. Americans should start asking why a boy was targeted for killing."

Do Americans still revere the above Madisonian principle the same way they did in 1785? That remains to be seen.

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