

DEPARTMENT OF PRE-CRIME, PART TWO: THE FISA COURT IS BROKEN

Largely to avoid some difficult issues, members of Congress are moving to create a FISA Court for Drones (and/or Targeted Killing) to review the assassination orders for American citizens before they are carried out.

Setting aside all the problems with such a plan (which I'll return to), consider this more basic problem with this idea. Right now, the FISA Court isn't even carrying out its original purpose, to ensure that when Americans are wiretapped for national security purposes, the government first gets a warrant.

Consider, first of all, that while the law requires the government to get a warrant before it collects your calls, the 9th Circuit last year eliminated any penalties for actually collecting telecommunications without a warrant. So at least in the 9th, the government can simply avoid the FISA Court altogether, knowing that so long as it doesn't use those telecommunications in a court case, they'll never face a penalty for having broken the law.

But even if the government uses the FISA Court, consider how far from its original mission the FISC has strayed.

The FISA Court was set up in 1978, in the wake of the Nixon scandals and Church Committee, with the Keith case (in which Attorney General wiretapped members of the White Panther Party while investigating the bombing of a CIA office in Ann Arbor) in mind. The whole Keith decision is worth noting for the way the same objections raised in targeted killing – that courts can't make tough decisions or keep secrets – were dismissed by Justice Powell. But ultimately, the decision held,

■ The Fourth Amendment (which shields

private speech from unreasonable surveillance) requires prior judicial approval for the type of domestic security surveillance involved in this case.

The Government's duty to safeguard domestic security must be weighed against the potential danger that unreasonable surveillances pose to individual privacy and free expression.

The freedoms of the Fourth Amendment cannot properly be guaranteed if domestic security surveillances are conducted solely within the discretion of the Executive Branch, without the detached judgment of a neutral magistrate.

The Fourth Amendment holds that judges must decide whether wiretaps are reasonable or not.

Yet after the FISA Amendments Act, that's not what happens. Rather, judges are deprived of the ability to do more than review the government's certifications about targeting and minimization. Once a judge has done so, however, the government can not only bulk collect telecommunications involving someone overseas, but it can later search on those telecommunications to get to the US person's side of the conversation, apparently without court review on the back side.

Effectively, discretion over this massive system has collapsed back inside the Executive Branch.

And all that's before the government's use of the secret law that Mark Udall and Ron Wyden keep complaining about, which probably involves – in part – the bulk collection of geolocation information from cell phones. It's also before the government has interpreted the word "relevance" to justify other massive collection programs (at a minimum, of things like hydrogen peroxide and acetone purchases) involving US persons.

In short, the FISA Court has become a venue not for judges to exercise individualized discretion about probable cause. Rather, it has become the venue in which the government uses the secrecy offered to develop expansive legal interpretations to support vast new spying programs it won't even tell Americans about. Not only the promise of individualized judicial discretion has been eliminated, so has the very premise that Americans should know what laws they are subject to.

Particularly given that a key problem with the targeted killing program (and the NDAA detention authorities, for which the Administration's legal logic is undoubtedly the same) is that the Administration never has to clearly lay out what the criteria are for inclusion, sticking the Drone (and/or Targeted Killing) review inside the FISA Court, where the government has already been inventing secret law, simply won't achieve one of two things that needs to happen: communicating to Americans what can get you killed.