

DIANNE FEINSTEIN UNDERMINES JOHN CORNBYN'S EFFORT TO GET TRANSPARENCY ON TARGETED KILLING

As I noted a few weeks ago, the Democrats on the Senate Judiciary Committee voted to prevent John Cornby from adding an amendment to the FISA Amendments Act Extension. I will have to hunt down the language of his amendment tomorrow, but it would basically have required the Administration to share the memos authorizing the killing of Anwar al-Awlaki—with targeted killing addressed specifically—with the Intelligence and Judiciary Committees. [Update: The Amendment is below.]

The Senate Intelligence Committee just passed the language that—DiFi promised—would address the issue. And it still leaves the Administration leeway to do what it has been doing for two years—withholding the actual memo from the committees that oversee it.

That's because the legislation passed as part of the Intelligence Authorization allows the government to withhold opinions from people not read into covert programs.

(a) REQUIREMENT TO PROVIDE.—Except as provided in subsections (c) and (d), not later than 180 days after the date of the enactment of this Act, the Attorney General, in coordination with the Director of National Intelligence, shall provide to the congressional intelligence committees a copy of every classified opinion of the Office of Legal Counsel of the Department of Justice that was provided to an element of the intelligence community on or after September 11, 2001.

[snip]

(c) EXCEPTION FOR COVERT ACTION.—If the President determines that it is essential to limit access to a covert action finding under section 503(c)(2) of the National Security Act (50 U.S.C. 413b(c)(2)), the President may limit access to information concerning such finding that is subject to disclosure under subsection (a) or (b) to those members of Congress who have been granted access to the relevant finding under such section 503(c)(2).

(d) EXCEPTION FOR INFORMATION SUBJECT TO EXECUTIVE PRIVILEGE.—If the President determines that a particular opinion subject to disclosure under subsection (a) or listing subject to disclosure under subsection (b) is subject to an executive privilege that protects against such disclosure, the Attorney General shall not be required to disclose such opinion or listing, if the Attorney General notifies the congressional intelligence committees, in writing, of the legal justification for such assertion of executive privilege prior to the date by which the opinion or listing is required to be disclosed.

This is, frankly, an outrage both specifically and generally.

First, nothing in this language guarantees the committees will get the memos in question. That's because the Administration has long been withholding the information even from members of the Senate Intelligence Committee based on claims that it is too secret to share with those who oversee intelligence and the Constitution.

Furthermore, both the Bush and Obama Administrations have fairly routinely withheld OLC memos—particularly drafts—on the basis

they're deliberative and have nothing to do with the basis on which the Administration makes the final decision. The language on Executive Privilege here codifies that practice. Further, in the case of targeted killing, the government went out of its way to get ACLU to agree not to ask for the drafts of their opinions on targeted killing. And remember, before they finalized the memo we think was ostensibly used to authorize the killing of Anwar al-Awlaki, they had already tried to kill him, at a time when FBI, at least, didn't have evidence showing he was operational. The authorization they used for the earlier kill attempt—if it exists—almost certainly looks nothing like the authorization described in the government's recent transparency theater.

And then there's this: the 6 months it allows the government to sit on this. That gets the Administration beyond the election, but also beyond the time when, if Obama loses, he'll leave office. So if there's anything really embarrassing, he can use late Administration game playing to clean it up.

This is disgusting. Really, really pathetic, even for the serially pathetic Senate Intelligence Committee.

Update: Here's Cornyn's amendment. His amendment would have gotten just the targeted killing opinions, shared with just the oversight committees (I had forgotten it included the Armed Services committees, too). But it also would have gotten the opinions within a month (and therefore before the election).

Not later than 30 days after the date of the enactment of this Act, the President shall submit, in classified or unclassified form, all legal analysis in effect on the date of the enactment of this Act related to the President's authority to target and kill United States citizens overseas to—

(1) the Select Committee on Intelligence of the Senate;

(2) the Committee on Armed Services of the Senate;

(3) the Committee on the Judiciary of the Senate;

(4) the Permanent Select Committee on Intelligence of the House of Representatives

(5) the Committee on Armed Services of the House of Representatives; and

(6) the Committee on the Judiciary of the House of Representatives.