

INNOCENT UNTIL PROVEN GUILTY; IMMINENT UNTIL PROVEN — TOO LATE!

Those defending the language on imminence in the white paper released last week are right on one count: it is not new language. Below the fold, I've excerpted the language on imminence from three different formulations on imminence — Brennan's speech at Harvard, the white paper, and Holder's Northwestern speech — to show the consistency (and also, with John Brennan's September 16, 2011 speech, exactly two weeks to Anwar al-Awlaki notice that this was now US policy).

All three point to al Qaeda's non-combatant structure to describe the need for a more flexible concept of imminence. Both the white paper and Holder's speech discuss a "window of opportunity," which I find to be one of the more provocative aspects of this definition. And while Holder's speech appears to have been edited to make it pretty, it is almost precisely the ideas presented in the white paper on imminence. There is clear continuity between Brennan's 2011 speech, the white paper, and Holder's speech.

Which is why I'm interested in the language Brennan used last week when responding to Angus King's proposal for a FISA court for drone (and what should be targeted killing generally).

It's telling not because it introduces wholesale new ideas. But because it makes clear what is implicit — but unstated — in the three other formulations.

A person who poses an imminent threat does not have to have committed any crime in the past. Imminence is exclusively about the future possibility of violence, not necessarily past involvement in it.

BRENNAN: Senator, I think it's certainly worth of discussion. Our tradition – our judicial tradition is that a court of law is used to determine one's guilt or innocence for past actions, which is very different from the decisions that are made on the battlefield, as well as actions that are taken against terrorists. **Because none of those actions are to determine past guilt for those actions that they took.** The decisions that are made are to take action so that we prevent a future action, so we protect American lives. That is an inherently executive branch function to determine, and the commander in chief and the chief executive has the responsibility to protect the welfare, well being of American citizens. So the concept I understand and we have wrestled with this in terms of whether there can be a FISA-like court, whatever – a FISA- like court is to determine exactly whether or not there should be a warrant for, you know, certain types of activities. You know... KING: It's analogous to going to a court for a warrant – probable cause...

(CROSSTALK)

BRENNAN: Right, exactly. But the actions that we take on the counterterrorism front, again, are to take actions against individuals where we believe that the intelligence base is so strong and the nature of the threat is so grave and serious, as well as imminent, that we have no recourse except to take this action that may involve a lethal strike.

The white paper actually has the most language about past deeds, but with the language about membership plus past involvement in activities that pose an imminent threat that I keep pointing to, it doesn't actually require past deeds either. It does, however, at least imply

that an American must be involved in past crimes to be deemed an imminent threat.

John Brennan's language last week does not.

And that's precisely the explanation he gave for why the courts aren't the appropriate place to measure imminent threat: because they only get involved when people have already committed crimes. This new definition of imminence envisions declaring people to be imminent threats even before they've committed a crime.

One note about this. Brennan ties all this to the President's responsibility "to protect the welfare, well being of American citizens." The biggest threat to the well being of the American citizens is not terrorists at this point, not by a long shot. It's the big banksters who serially collapse our economy and require bailouts (and, it should be said, are often funding terrorists and drug cartels along the way because it is profitable). Does this definition of "imminent" threat extend to the banksters who are a much more systematic front than the rump of al Qaeda is at this point?

In any case, be warned. If the plan for a FISA Drone (and Targeted Killing) Court moves forward, it will not be measuring guilt – what courts were established to measure. But instead, potential future guilt.

Eric Holder, Northwestern Speech, March 5, 2012

First, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles.

The evaluation of whether an individual presents an "imminent threat"

incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States. As we learned on 9/11, al Qaeda has demonstrated the ability to strike with little or no notice – and to cause devastating casualties. Its leaders are continually planning attacks against the United States, and they do not behave like a traditional military – wearing uniforms, carrying arms openly, or massing forces in preparation for an attack. Given these facts, the Constitution does not require the President to delay action until some theoretical end-stage of planning – when the precise time, place, and manner of an attack become clear. Such a requirement would create an unacceptably high risk that our efforts would fail, and that Americans would be killed.

Whether the capture of a U.S. citizen terrorist is feasible is a fact-specific, and potentially time-sensitive, question. It may depend on, among other things, whether capture can be accomplished in the window of time available to prevent an attack and without undue risk to civilians or to U.S. personnel. Given the nature of how terrorists act and where they tend to hide, it may not always be feasible to capture a United States citizen terrorist who presents an imminent threat of violent attack. In that case, our government has the clear authority to defend the United States with lethal force.

Unknown Author, White Paper, November 8, 2011

First, the condition that an operational leader present an “imminent” threat of

violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future. Given the nature of, for example, the terrorist attacks on September 11, in which civilian airliners were hijacked to strike the World Trade Center and the Pentagon, this definition of imminence, which would require the United States to refrain from action until preparations for an attack are concluded, would not allow the United States sufficient time to defend itself. The defensive options available to the United States may be reduced or eliminated if al-Qa'ida operatives disappear and cannot be found when the time of their attack approaches. Consequently, with respect to al-Qa'ida leaders who are continually planning attacks, the United States is likely to have only a limited window of opportunity within which to defend Americans in a manner that has both a high likelihood of success and sufficiently reduces the probabilities of civilian casualties.

[snip]

By its nature, therefore, the threat posed by al-Qa'ida and its associated forces demands a broader concept of imminence in judging when a person continually planning terror attacks presents an imminent threat, making the use of force appropriate. In this context, imminence must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans.

[snip]

With this understanding, a high-level

official could conclude, for example, that an individual poses an “imminent threat” of violent attack against the United States where he is an operational leader of al-Qa’ida or an associated force and is personally and continually involved in planning terrorist attacks against the United States. Moreover, **where the al-Qa’ida member in question has recently been involved in activities posing an imminent threat of violent attack against the United States**, and there is no evidence suggesting that he has renounced or abandoned such activities, that member’s involvement in al-Qa’ida’s continuing terrorist campaign against the United States would support the conclusion that the members is an imminent threat. [my emphasis]

John Brennan, Harvard Law Speech, September 16, 2011

Others in the international community—including some of our closest allies and partners—take a different view of the geographic scope of the conflict, limiting it only to the “hot” battlefields. As such, they argue that, outside of these two active theatres, the United States can only act in self-defense against al-Qa’ida when they are planning, engaging in, or threatening an armed attack against U.S. interests if it amounts to an “imminent” threat.

In practice, the U.S. approach to targeting in the conflict with al-Qa’ida is far more aligned with our allies’ approach than many assume. This Administration’s counterterrorism efforts outside of Afghanistan and Iraq are focused on those individuals who are a threat to the United States, whose removal would cause a significant – even if only temporary – disruption of the plans and capabilities of al-Qa’ida and

its associated forces. Practically speaking, then, the question turns principally on how you define "imminence."

We are finding increasing recognition in the international community that a more flexible understanding of "imminence" may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts. After all, al-Qa'ida does not follow a traditional command structure, wear uniforms, carry its arms openly, or mass its troops at the borders of the nations it attacks. Nonetheless, it possesses the demonstrated capability to strike with little notice and cause significant civilian or military casualties. Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an "imminent" attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.