

SETTING UP A DEPARTMENT OF PRE- CRIME, PART ONE: WHY ARE WE DOING THIS?

I'm going to have a series of posts on the proposed FISA Drone (and/or Targeted Killing) Court, starting with a description of why I think there's movement to do this now.

There are, as I see it, three different motivations among those now backing a FISA Drone (and/or Targeted Killing) Court.

First, there's Dianne Feinstein. Now that the white paper has been released – and the actual OLC memos to the other members of her committee – it has been made clear that the program she has been assuring Americans, based on her Gang of Four review, is lawful is not the slam dunk she made it out to be. And while Mike Rogers' constituents may not object to his continued reassurances that it is okay for the President to kill an American based on his sole authority (though they may; we shall see), DiFi's are likely to. (Saxby Chambliss, of course, is not running for re-election; Dutch Ruppersberger has been rather quiet in the last few days). So to the degree that DiFi takes a lead on this issue, it is an effort to put a palatable spin on something she has been spinning as legal for years.

If a FISA Drone (and/or Targeted Killing) Court is necessary and justified, it should have been in 2009, when she took over the Chair at Senate Intelligence Committee (or at the very least, by January 2010, when it became clear the Obama Administration was targeted Anwar al-Awlaki). But somehow, DiFi is only backing the idea now that her poor judgment in letting the killings continue without oversight is being exposed. To some degree, I'd put Patrick Leahy (who doesn't want to be tough with Obama) and Chuck Grassley

in this position, as well.

Then there's John Brennan, who in response to Angus King's suggestion of a FISA Drone (and/or Targeted Killing) Court said,

And that's why I do think it's worthy of discussion. And the point particularly about due process really needs to be taken into account because there's not a different standard as far as if a U.S. citizen joins Al Qaida, you know, in terms of the intelligence base or whatever. But American citizens by definition are due much greater due process than anybody else by dint of their citizenship.

I think this is a very worthwhile discussion. I look forward to talking to the committee and others about it. What's that appropriate balance between executive, legislative and judicial branch responsibilities in this area?

I think Brennan's motivation is far better summed up in the response he gave Jello Jay Rockefeller, who basically used his second round question to deliver a very sloppy blow job to Brennan. In response, Brennan got fiery.

I want every member of this committee to be an ardent advocate, proponent, and defender of the men and women of the Central Intelligence Agency.

And I see it as my obligation to represent them to you on their behalf, so that when times get tough and when people are going to be criticizing and complaining about the CIA, I have all of you to say you knew about what the CIA was doing, you supported it, and you will defend it.

My impression is that, contrary to the moral rectitude myth, Brennan is a pretty amoral guy.

It's not right and wrong that motivates him; it's allegiance, and as CIA Director (and, probably, even now) his allegiance is going to be to the institution.

And as he said in no uncertain terms to Jello Jay, he believes it is the role of the Intelligence Committee to support and defend the illegal actions the CIA does.

Brennan likely also knows that the easiest way to give the Committee cover for ardently defending what is, at its core, indefensible, and the only way to do so without affecting the flexibility accorded to the Executive Branch, is to let them pawn off the moral questions to a court operating in secret. That's the way it has worked with the FISA Amendments Act, for the most part (if you ignore Ron Wyden and Mark Udall's complaints about what – no doubt in the name of flexibility – has now been sanctioned by that court). So it's a pretty good bet that if you throw the tough decisions to judges working in secret, it'll give the Committee cover to defend his people, without limiting his or President's Obama options on who or how they kill.

And then, finally, there's Angus King (who write a letter repeating his idea, without expanding it much). I'm sure King means well. But he floated the proposal after having received the targeted killing memos just hours before, and just a month after he got involved in these issues in the first place. I highly doubt he has thought through the implications of the white paper, which, after all, asserts that the President has authority to kill Americans based solely on his Article II power, and does not situate that authority exclusively in the AUMF. Given that King cited Sandra Day O'Connor on Hamdi, I doubt King has thought through how inapt Hamdi should be to what happened to Anwar al-Awlaki. Unlike the process that arose from Hamdi and Hamdan and Boumediene – which had the legal basis of the AUMF to point back to – so long as this killing is based on an Article II

claim, there are no easy guidelines you could possibly give the court to use.

And for someone like King, who means well and who is seeking a check, the court is easy, reasonable.

What's not easy is doing what it would take to rein in that Article II claim: legislating some real terms that would make using CIA to kill Americans reasonable.

Ultimately – as I showed yesterday – the Administration has not been in the business of killing people for crimes they have committed, but for crimes they might commit in the future. And if Congress is going to try to make that legal for CIA especially without modifying the Constitution (heh), they would need to write some really extensive guidelines about what counts as a pre-crime (otherwise known, in the Administration's language, an imminent threat). Indeed, that would be necessary before any court got stuck with this job.

But no one is talking about doing that work.

Which is really why this court is being considered as an option right now. Because no one wants to talk about what it means to kill in the name of pre-crime, and no one wants to make the difficult decisions about when killing in the name of pre-crime would be sound and when it wouldn't be.