

# SHORTER NEAL KATYAL: PLEASE APPOINT ME JUDGE!

If it weren't for this line, disdaining what judges do,

But judges should be left to what they know.

I would be convinced that this op-ed from Neal Katyal, arguing against a Drone and/or Targeted Killing Court, was a transparent attempt to curry favor with the man who gets to nominate people for lifetime appointments to federal courts.

Because it strikes me as a dishonest argument, one made by someone who almost surely knows better, repeating the AUMF fallacy.

But there is no true precedent for interposing courts into military decisions about who, what and when to strike militarily. Putting aside the serious constitutional implications of such a proposal, courts are simply not institutionally equipped to play such a role.

While the Bush Administration didn't read Ted Olson into its worst OLC opinions when he was Solicitor General – and so it's possible (though unlikely) that Katyal was likewise not read into the June 2010 opinion that authorized the CIA to kill Anwar al-Awlaki during the time he was Acting Solicitor General – he was almost certainly part of the legal strategy to respond to the ACLU/CCR suit hoping to enjoin the President from killing Awlaki unless he represented an imminent threat, which also occurred while he was Acting SG.

Neal Katyal almost certainly knows the CIA was cleared to carry out that killing (though he had

left the Administration by the time Awlaki was ultimately killed), and that this was a covert op.

To argue for a star chamber within the Executive Branch, he paints the judges who serve on the FISA Court as generalists who have no clue about national security issues.

There are many reasons a drone court composed of generalist federal judges will not work. They lack national security expertise, they are not accustomed to ruling on lightning-fast timetables, they are used to being in absolute control, their primary work is on domestic matters and they usually rule on matters after the fact, not beforehand.

[snip]

What reason does the FISA Court give us to think that judges are better than specialists at keeping executive power in check?

The FISA Court includes judges like Thomas Hogan (who has been a District Court judge in DC since Katyal was 12) and is now led by Reggie Walton (who joined DC District back when President Obama was still a State Senator). While they've seen their share of DC drug cases, they've also presided over some high profile national security cases (both had a part in the Libby case, both have issued key rulings in Gitmo habeas cases). But Katyal thinks they're just not capable of reviewing whether an American should be killed by his government with no due process.

There's more that's laugh out loud funny in Katyal's op-ed, such as the suggestion that targeted killing of an American (as far as I know, no one is even considering using a FISA process with non-citizens) presents no Constitutional issues.

Even the questions placed before the FISA Court aren't comparable to what a drone court would face; they involve more traditional constitutional issues – not rapidly developing questions about whether to target an individual for assassination by a drone strike.

And the suggestion that the Executive can be trusted to hand over its own analysis on targeted killing to Congress.

The adjudicator would be a panel of the president's most senior national security advisers, who would issue decisions in writing if at all possible. Those decisions would later be given to the Congressional intelligence committees for review.

Not to mention that a "court" which the President was free to overrule amounts to any kind of due process.

Crucially, the president would be able to overrule this court, and take whatever action he thought appropriate, but would have to explain himself afterward to Congress.

Mind you. I, like Katyal, think the idea of turning FISA into a Drone and/or Targeted Killing court is terrible. But I'm not arguing that's because an actual court would infringe too much on the President's claimed authority to kill Americans at will.