

WHERE THE BODIES ARE BURIED: A CONSTITUTIONAL CRISIS FEINSTEIN BETTER BE READY TO WIN

In a piece at MoJo, David Corn [argues](#) the Senate Intelligence Committee – CIA fight has grown into a Constitutional crisis.

What Feinstein didn't say—but it's surely implied—is that without effective monitoring, secret government cannot be justified in a democracy. This is indeed a defining moment. It's a big deal for President Barack Obama, who, as is often noted in these situations, once upon a time taught constitutional law. Feinstein has ripped open a scab to reveal a deep wound that has been festering for decades. The president needs to respond in a way that demonstrates he is serious about making the system work and restoring faith in the oversight of the intelligence establishment. This is more than a spies-versus-pols DC turf battle. It is a constitutional crisis.

I absolutely agree those are the stakes. But I'm not sure the crisis stems from Feinstein "going nuclear" on the floor of the Senate today. Rather, I think whether Feinstein recognized it or not, we had already reached that crisis point, and John Brennan simply figured he had prepared adequately to face and win that crisis.

Which is why I disagree with the assessment of Feinstein's available options [as laid out](#) by Shane Harris and John Hudson in FP.

If she chooses to play hardball,

Feinstein can make the tenure of CIA Director John Brennan a living nightmare. From her perch on the intelligence committee, she could drag top spies before the panel for months on end. She could place holds on White House nominees to key agency positions. She could launch a broader investigation into the CIA's relations with Congress and she could hit the agency where it really hurts: its pocketbook. One of the senator's other committee assignments is the Senate Appropriations Committee, which allocates funds to Langley.

Take these suggestions one by one: Feinstein can only "drag top spies" before Congress if she is able to wield subpoena power. Not only won't her counterpart, Saxby Chambliss (who generally sides with the CIA in this dispute) go along with that, but recent legal battles have largely gutted Congress' subpoena power.

Feinstein can place a hold on CIA-related nominees. There's even one before the Senate right now, CIA General Counsel nominee Caroline Krass, though Feinstein's own committee just voted Krass out of Committee, where Feinstein could have wielded her power as Chair to bottle Krass up. In the Senate, given the new filibuster rules, Feinstein would have to get a lot of cooperation from her Democratic colleagues to impose any hold if ever she lost Senate Majority Leader Harry Reid's support (though she seems to have that so far).

But with Krass, what's the point? So long as Krass remains unconfirmed, Robert EATINGER – the guy who ratcheted up this fight in the first place by referring Feinstein's staffers for criminal investigation – will remain Acting General Counsel. So in fact, Feinstein has real reason to rush the one active CIA nomination through, if only to diminish EATINGER's relative power.

Feinstein could launch a broader investigation

into the CIA's relations with Congress. But that would again require either subpoenas (and the willingness of DOJ to enforce them, which is not at all clear she'd have) or cooperation.

Or Feinstein could cut CIA's funding. But on Appropriations, she'll need Barb Mikulski's cooperation, and Mikulski has been one of the more lukewarm Democrats on this issue. (And all that's assuming you're only targeting CIA; as soon as you target Mikulski's constituent agency, NSA, Maryland's Senator would likely ditch Feinstein in a second.)

Then FP turns to DOJ's potential role in this dispute.

The Justice Department is reportedly looking into whether the CIA inappropriately monitored congressional staff, as well as whether those staff inappropriately accessed documents that lay behind a firewall that segregated classified information that the CIA hadn't yet cleared for release. And according to reports, the FBI has opened an [investigation](#) into committee staff who removed classified documents from the CIA facility and brought them back to the committee's offices on Capitol Hill.

Even ignoring all the petty cover-ups DOJ engages in for intelligence agencies on a routine basis (DEA at least as much as CIA), DOJ has twice done CIA's bidding on major scale on the torture issue in recent years. First when John Durham declined to prosecute both the torturers and Jose Rodriguez for destroying evidence of torture. And then when Pat Fitzgerald delivered John Kiriakou's head on a platter for CIA because Kiriakou and the Gitmo detainee lawyers attempted to learn the identities of those who tortured.

There's no reason to believe this DOJ will depart from its recent solicitous ways in

covering up torture. Jim Comey admittedly might conduct an honest investigation, but he's no longer a US Attorney and he needs someone at DOJ to actually prosecute anyone, especially if that person is a public official.

Implicitly, Feinstein and her colleagues could channel Mike Gravel and read the 6,000 page report into the Senate record. But one of CIA's goals is to ensure that if the Report ever does come out, it has no claim to objectivity. Especially if the Democrats release the Report without the consent of Susan Collins, it will be child's play for Brennan to spin the Report as one more version of what happened, no more valid than Jose Rodriguez' version.

And all this assumes Democrats retain control of the Senate. That's an uphill battle in any case. But CIA has many ways to influence events. Even assuming CIA would never encourage false flags attacks or leak compromising information about Democrats, the Agency can ratchet up the fear mongering and call Democrats weak on security. That always works and it ought to be worth a Senate seat or three.

If Democrats lose the Senate, you can be sure that newly ascendant Senate Intelligence Chair Richard Burr would be all too happy to bury the Torture Report, just for starters. Earlier today, after all, he [scolded](#) Feinstein for airing this fight.

“I personally don't believe that anything that goes on in the intelligence committee should ever be discussed publicly,”

Burr's a guy who has joked about waterboarding in the past. Burying the Torture Report would be just the start of things, I fear.

And then, finally, there's the President, whose spokesperson affirmed the President's support for his CIA Director and who doesn't need any Democrats help to win another election. As Brennan said earlier today, Obama “is the one

who can ask me to stay or to go." And I suspect Brennan has confidence that Obama won't do that.

Which brings me to my comment above, on AJE, that Brennan knows where the literal bodies are buried.

I meant that very, very literally.

Not only does Brennan know firsthand that JSOC attempted to kill Anwar al-Awlaki on December 24, 2009, solely on the President's authority, before the FBI considered him to be operational. But he also knows that the evidence against Awlaki was far dodgier than it should have been before the President authorized the unilateral execution of an American citizen.

Worse still, Feinstein not only okayed that killing, either before or just as it happened. But even the SSCI dissidents Ron Wyden, Mark Udall, and Martin Heinrich [declared](#) the Awlaki killing "a legitimate use of the authority granted the President" in November.

I do think there are ways the (Legislative) Democrats might win this fight. But they're not well situated in the least, even assuming they're willing and able to match Brennan's bureaucratic maneuvering.

Again, I don't blame Feinstein for precipitating this fight. We were all already in it, and she has only now come around to it.

I just hope she and her colleagues realize how well prepared Brennan is to fight it in time to wage an adequate battle.