

THE OBAMA & OLBERMANN MASTER PLAN FOR CRIMINAL FISA PROSECUTIONS

Okay, the words "Master Plan" in the title are a joke. So is the idea of criminal prosecutions, by a future Obama Administration, for Bush era FISA violations that has been hawked, to the point of near belligerence, by Keith Olbermann both on his show and in a running flame war with Glen Greenwald. The instant article will attempt to relate some of the glaring reasons, from a practical criminal justice perspective, that the Obama/Olbermann master plan is naive, almost to the point of being comical. Comical that is if we were not literally discussing the life and spirit of the Fourth Amendment and the health and well being of the Constitutional rule of law in this country.

This is the exchange between Olbermann and Dean from which Olbermann appears to have ginned up his Obama genius master plan narrative:

DEAN: Well, I spent a lot of time reading that bill today, and it's a very poorly-drafted bill. One of the things that is not clear is whether it's not possible later to go after the telecoms for criminal liability. And that something that Obama has said during this campaign he would do, unlike prior presidents who come in and really give their predecessor a pass, he said, "I won't do that." And that might be why he's just sitting back saying, "Well, I'm going to let this go through. But that doesn't mean I'm going to give the telecoms a pass." I would love it if he gets on the Senate floor and says, "I'm keeping that option opened."

OLBERMANN: In other words, let the

private suits drop and get somebody in there who'll actually use the laws that still exist to prosecute and make the actual statement and maybe throw a few people in jail.

DEAN: Exactly. And it looks to me, as I read this bill and talk to a number of people in Washington familiar with the bill, some who are involved in the negotiations, and they say, "You know – we just didn't think about this issue."

Notwithstanding Olbermann's fiery preacher in a pulpit exhortations, it should be noted that John Dean himself has walked his statement back from Olbermann's claims since his original offhand quote:

But even if the bill is unclear there is no question the Bush Administration is not going to do anything to the telecoms, so the question is whether a future DOJ could – and here there is case law protecting the telecoms. But there may be language buried in the bill that protects them as well but it can only be found by reading the bill with a half dozen other laws which I have not yet done.

I made no declarative statements rather I only raised questions that jumped at me when reading the 114 page monster.

In spite of the fact that Dean himself has rendered the putative operative basis of the Olbermann/Obama master plan meaningless, it appears that Olbermann intends to keep flogging it; having posted at DKos on the subject and having MSNBC incessantly advertising his upcoming ~~petulant rant~~ "Special Comment" on the subject set for Monday night June 30. So we can knock this turkey of an argument back to the contrived desperate corner it came from, let's assume that prosecuting telcos criminally for

their FISA violations under Bush really is the master stroke of genius behind Barack Obama's recent inexplicable cave, capitulation and wholesale sellout of the Constitution, Fourth Amendment and rule of law for the American people. What would come of these criminal prosecutions? Absolutely nothing, and what follows is only a partial list of the numerous reasons why.

WHAT CRIMES? – Neither Olbermann, Dean, Obama, nor anybody else discussing this hypothetical pipe dream has indicated exactly what crimes they think might be charged. Let us be clear on one thing, simply because a proscribed activity is unconstitutional does NOT make it criminal. For a crime to be charged, there needs to be a specific provision of the US Code (USC), or other statutory provision, making said conduct a crime. It is crystal clear, from the collective record to date, that the participating telcos were compelled by the Bush Administration to assist and were given written assurances that their cooperation was necessary for national security, legal and authorized by the President of the United States in a supposed time of war. That pretty much eliminates any crime that requires criminal intent by the perpetrator, and leaves only what, in criminal law, are known as strict liability crimes, of which none come to mind. The only cogent possibility is the criminal offense defined under the FISA law (18 USC 1809) which, you guessed it, requires specific intent. How are you going to prove that here? Oh, and by the way, this assumes that the Obama Administration is willing to actually have the cojones to prosecute; Obama has shown absolutely nothing of substance to indicate that this is the case; in fact, he consistently indicates he wishes to move forward and not expend energy on the past, especially on contentious partisan issues.

STATUTE OF LIMITATIONS: – Even if you could identify specific crimes to charge telcos and/or their owners, directors and personnel with, the crime must be viable and ripe for prosecution.

The first question any criminal defense attorney is going to ask is "Gee, is this crime within the statute of limitations"? FISA is subject to the Federal general statute of limitation contained in 18 USC 3282, which is five years. And, remember, the statute starts to run when the crime is committed and/or when the government becomes aware of the conduct; in this case the Department of Justice knew about the conduct as, or before, it was being committed. When we, as citizens learned about it is not the relevant test. Obama, assuming he is indeed elected, will not be issuing indictments at the end of his inaugural address. The FISA Amendment Act provides for an investigation and report of the Bush/telco wiretapping/datamining and snooping to be completed by applicable Inspectors General within one year of passage; assuming Bush signs the FAA in mid-July, that would be mid-July 2009 for the report. The Bush Administration will not be working diligently to effect this while they are still in office; any meaningful work will have to be reviewed and/or performed under the new administration. It is unrealistic to expect that any charges could possibly be filed before said report is due, so any act occurring prior to about July 15, 2004 will not be within the statute of limitations and will be barred from prosecution. That will eliminate the lion's share of the overt acts and violations that are the subject of the currently pending civil lawsuits, pending in consolidated form in the Northern District of California in front of Judge Vaughn Walker, that are to be dismissed. Where will be the justice, rule of law, and equal protection of law guaranteed by the United States Constitution for these American citizens and subjects? How do Mr. Olbermann and Mr. Obama account for the rights and lives of these victims with their genius master plan; or are they simply expendable in the face of their petty political ambitions?

REASONABLE DOUBT: – Let's assume the master plan makes it past the previously described hurdles. What happens when these putative criminal charges get tried to a jury? Well, as we all

know, the standard of proof is "beyond a reasonable doubt". We already have established conclusively that the participating telcos are in possession of certifications and authorizations from the United States Government, authorized and demanded by the President of the United States and the Attorney General of the United States (except a single brief interlocutory period where it was countersigned by the White House Counsel) asserting and avowing that the requested conduct was legal, constitutional, and necessary for national defense and security. This was occurring after 9/11 and in a putative time of war and under repetitive terror alerts by the United States Government and Department of Homeland Security. Now, tack on to that evidence that Congressional leaders of both parties were briefed and consented to the activity to some extent. Then the clincher. Both houses of Congress, not one, not two, but three different times voted to ratify, approve, and legitimize the conduct in question via the Protect America Act, extension of the Protect America Act and, finally, passage of the FISA Amendment Act. Keep in mind that the FISA Amendment Act dismisses *civil* cases for the same conduct, which have a far lower standard of proof (preponderance of the evidence) than the criminal charges that will be under consideration, because it was deemed legal, proper and necessary by the Congress. Now, add all that up. Exactly what jury do you think is going to find a telco defendant guilty beyond a reasonable doubt? A monkey could successfully argue this defense to a jury; heck, Alberto Gonzales might even pull it off (although I would take my chances with the simian).

WHAT IF BUSH PARDONS ALL TELCO CORPORATE AND INDIVIDUAL DEFENDANTS? – Yep, as you may recall, there is an easy way for criminal perps to Scoot out of responsibility for their criminal conduct performed for the Bush Administration. The Constitutional pardon power, which, under Article II, Section 2, is unfettered. That would completely remove any ability of a successor Obama Administration to prosecute under the

vaunted, Olbermann/Obama genius master plan.

WHAT IF OBAMA LOSES AND McCAIN IS THE NEXT PRESIDENT? – This one is fairly self explanatory. Curiously, I have not heard it addressed in the Olbermann/Obama secret master plan.

Well folks, there you have it. These are just a few of the glaring problems. Telcos hire the best, most persistent, and most capable lawyers available. Always. They will not be being represented by some sleepy, understaffed and overworked public defenders; they will have the best criminal defense talent in the world. It will not be necessary; a child could win these proposed Olbermann/Obama master plan prosecutions. So easy that even Alberto Gonzales could carry the day. Bottom line, this is one of the most ridiculous non-starters I have ever heard. If this is the "Master Plan", we are in a world of hurt.