DEPARTMENT OF PRE-CRIME, PART 4: THE NDAA CONGRESS IS NOT ABOUT TO LEGISLATE TARGETED KILLING

In three earlier posts, I have discussed the problem with turning the FISA Court into the Drone and/or Targeted Killing Court: As I noted, the existing FISA Court no longer fulfills the already problematic role it was set up to have, ensuring that the government have particularized probable cause before it wiretap someone. On the contrary, the FISA Court now serves as a veil of secrecy behind which the government can invent new legal theories with little check.

In addition, before the FISA Court started rubberstamping Drone Strikes and/or Targeted Killings of Americans, presumably it would need an actual law to guide it. (Though Carrie Cordero, who is opposed to the Drone and/or Targeted Killing FISA Court idea because it might actually restrain the Executive, seems to envision the Court just using the standards the Executive has itself invented.) And there's a problem with that.

The same Congress that hasn't been successful passing legislation on detention in the 2012 NDAA is certainly not up to the task of drafting a law describing when targeted killing is okay.

As a reminder, here's what happened with the NDAA sections on military detention. The effort started with an attempt to restate whom we are at war with, so as to mandate that those we're at war with be subject to law of war detention. The language attempting to restate whom we're at war with ended up saying:

> (a) IN GENERAL.—Congress affirms that the authority of the President to use all necessary and appropriate force

> pursuant to the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war.
>
> (b) COVERED PERSONS.—A covered person under this section is any person as follows:
>
> (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
>
> (2) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.

Compare that language with what the actual AUMF says:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Part of the difference arises from the shift to focusing exclusively on persons (you can't detain a nation, after all, though Palestine might disagree).

Part of the difference comes from the effort — clause 2 above — to extend the AUMF to those associated forces. This was meant to cover groups like AQAP and al-Shabaab, but as we'll see, it's one source of the problem with the law.

But part of the problem is that the NDAA language smartly took out the "he determines" and "in order to prevent any future acts of international terrorism" language. The former has long been a giant loophole, allowing the President to define in secret whom we're at war against. And I increasingly suspect the Administration has been using the latter language to expand the concept of imminent threat.

In other words, in an effort to parrot back its understanding of whom we're at war against, Congress both introduced some new fuzzy language — associated forces — and took out existing loopholes — the "he determines" and "prevent any future acts."

This already made the White House squirrelly and veto-threaty, which is why, as I understand it, this language was inserted.

> (d) CONSTRUCTION.—Nothing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force.

If the Administration ever has to assert its authority goes beyond what Congress laid out in the NDAA, it will point to this clause and argue it guarantees the President can still do what he was already doing, deciding who presents an imminent threat in secret. Note, too, that this clause affirms not just what he was already doing under the AUMF, but "the authority of the President," Article II power.

Along the way, the Senate Armed Services Committee (which was striving for something that looked balanced as compared to the House Armed

Services Committee), tried to restrict the use of military detention with US citizens based on activities they undertook in the US. But when the Administration asked, they withdrew that language.

> The initial bill reported by the committee included language expressly precluding "the detention of citizens or lawful resident aliens of the United States on the basis of conduct taking place within the United States, except to the extent permitted by the Constitution of the United States." The Administration asked that this language be removed from the bill. [my emphasis]

Carl Levin and Dianne Feinstein (who of course would still be the lead players in any FISA Drone and/or Targeted Killing legislation) actually had a remarkably heated squabble about this. When DiFi and others tried to provide further protections for Americans as part of the amendment process, this is the best they could come up with:

> (e) AUTHORITIES.—Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.

As with clause (d), if anyone ever challenges the Administration's authority under this law, they'll point to clause (e), argue they already had the authority (based perhaps on the Jose Padilla or the Anwar al-Awlaki precedent) and therefore they can keep doing whatever they were doing.

So they passed this law, which basically inserted loopholes in just about every place where the law might impose real limits on the

fairly unlimited authority the Bush and Obama Administrations have claimed under the 2001 AUMF.

Then, in his signing statement, Obama created one more loophole to make sure Section 1024 — which would have required the Administration provide meaningful reviews to detainees held in Bagram — really didn't impose any new requirements there, either.

> Going forward, consistent with congressional intent as detailed in the Conference Report,my Administration will interpret section 1024 as granting the Secretary of Defense broad discretion to determine what detainee status determinations in Afghanistan are subject to the requirements of this section.

And when, 4 months later, DOD got around to exercising that discretion, they basically picked a date so far in the future (3 years) as to make Congress' requirement DOD give detainees meaningful review meaningless. (Along the way Obama also gutted his own plan to offer periodic reviews at Gitmo.)

In short, even in an effort to reaffirm and slightly expand the AUMF, Congress and the President ended up recreating or replacing the loopholes that two Administrations have used to claim the AUMF offers fairly unlimited authority. As a threshold matter, this is the kind of law that would result of any effort to rein in targeted killing.

Hilarity ensued as soon as this law hit the courts. When Judge Katherine Forrest asked the Administration's lawyers to define what an "associated force" (one of the new loopholes inserted into the law) was, they refused to go on the record at all.

> The Court then asked: Give me an example. Tell me what it means to substantially support associated forces.

> Government: I'm not in a position to give specific examples.
>
> Court: Give me one.
>
> Government: I'm not in a position to give one specific example.

Judge Forrest concluded what we should assume would be a starting place for the arguments that would take place in the secrecy of the FISA Drone and/or Targeted Killing Court.

> It must be said that it would have been a rather simple matter for the Government to have stated that as to these plaintiffs and the conduct as to which they would testify, that § 1021 did not and would not apply, if indeed it did or would not. That could have eliminated the standing of these plaintiffs and their claims of irreparable harm. Failure to be able to make such a representation given the prior notice of the activities at issue requires this Court to assume that, in fact, the Government takes the position that a wide swath of expressive and associational conduct is in fact encompassed by § 1021.

Mind you, the government has since tried to put this genie back in the bottle, by arguing that the specific plaintiffs in the Hedges suit won't be indefinitely detained, but the underlying point is clear: the Administration does not believe the "associated forces" has any clear bounds.

All that, of course, is driven by law.

But there's one more problem with the notion that Congress — this Congress!!! — would be able to write law adequate to making a FISA Drone and/or Targeted Killing review meaningful.

Back when the NDAA was coming to a close, Jay Carney made this comment, which was striking

then but is even more so given the claims we've seen made public in the interim.

> MR. CARNEY: Well, let me make clear that this was not the preferred approach of this administration, and we made clear that any bill that challenges or constrains the President's critical authorities to collect intelligence, incapacitate dangerous terrorists, and protect the nation would prompt the President's senior advisors to recommend a veto.
> After intensive engagement by senior administration officials, the administration has succeeded in prompting the authors of the detainee provisions to make several important changes, including the removal of problematic provisions. [my emphasis]

Carney couched this language in objections – which were clearly held and definitely part of the problem – to limits on FBI interrogation and detention of detainees. But the "protect the nation" language is familiar from the white paper on targeted killing. It's that half of the argument that grounds targeted killing authority not in the AUMF, but in Article II authority. An anonymous official saying precisely the same things Brennan would later say on the record went even further, pointing to Anwar al-Awlaki's killing as the example that the Administration can and should have unlimited flexibility in Counterterrorism operations. CIA's General Counsel and others have made clear: Obama is conducting covert operations – including targeted killing and almost certainly the targeted killing of Awlaki – under his Article II authority; the AUMF is just gravy to that.

The NDAA debacle makes clear: Congress is so unwilling to even impose real constraints on the AUMF, there is no chance any law they might pass would accidentally impose new constraints on covert operations conducted under Article II authority.

Which is why I said what I said at the start: the calls for a FISA Drone and/or Targeted Killing Court are just Congress' (DiFi's especially) effort to punt this to a place where it won't embarrass Congress for their refusal to rein in the Executive Branch anymore. The push to give FISA review over this authority is just an attempt to stick this all someplace we can't see it anymore, not to impose any meaningful review of the Executive.