

ERIC HOLDER'S VIEW ON NATIONAL SECURITY: THREE BRANCHES. EXCEPT FOR WHEN THE THIRD BECOMES INCONVENIENT.

Eric Holder's speech—which starts with a defense of civilian trials and ends with dead American citizens—fails to achieve its impossible task. Granted, Holder frames his defense of civilian trials in efficacy, not rule of law (in language that really should have been a cornerstone of the NDAA debate). But ultimately, Holder claims to be upholding due process, and that's where his case for killing Anwar al-Awlaki falls apart.

Close to the beginning of his speech, Holder promises the counterterrorism powers of the government would be subject to checks and balances.

We must – and will continue to – use the intelligence-gathering capabilities that Congress has provided to collect information that can save and protect American lives. At the same time, these tools must be subject to appropriate checks and balances – including oversight by Congress and the courts, as well as within the Executive Branch – to protect the privacy and civil rights of innocent individuals.

Holder offers the use of the FISA Court as example of all three branches exercising such checks and balances.

Let me give you an example. Under section 702 of the Foreign Intelligence Surveillance Act, the Attorney General

and the Director of National Intelligence may authorize annually, with the approval of the Foreign Intelligence Surveillance Court, collection directed at identified categories of foreign intelligence targets, without the need for a court order for each individual subject. This ensures that the government has the flexibility and agility it needs to identify and to respond to terrorist and other foreign threats to our security.

But the government may not use this authority intentionally to target a U.S. person, here or abroad, or anyone known to be in the United States.

The law requires special procedures, reviewed and approved by the Foreign Intelligence Surveillance Court, to make sure that these restrictions are followed, and to protect the privacy of any U.S. persons whose nonpublic information may be incidentally acquired through this program. The Department of Justice and the Office of the Director of National Intelligence conduct extensive oversight reviews of section 702 activities at least once every sixty days, and we report to Congress on implementation and compliance twice a year. This law therefore establishes a comprehensive regime of oversight by all three branches of government. Reauthorizing this authority before it expires at the end of this year is the top legislative priority of the Intelligence Community.

Never mind that Holder exaggerates the statutory authority given to FISC. He still uses it as a robust example of the value of three branches exercising oversight. The court—even one operating in secret, Holder claims—provides an important check and balance.

Apparently, such checks and balances are not

what the Constitution has in mind when it talks about due process for American citizens.

The Supreme Court has made clear that the Due Process Clause does not impose one-size-fits-all requirements, but instead mandates procedural safeguards that depend on specific circumstances.

In cases arising under the Due Process Clause – **including in a case involving a U.S. citizen captured in the conflict against al Qaeda** – the Court has applied a balancing approach, weighing the private interest that will be affected against the interest the government is trying to protect, and the burdens the government would face in providing additional process. Where national security operations are at stake, due process takes into account the realities of combat.

[snip]

Some have argued that the President is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of al Qaeda or associated forces. This is simply not accurate. “Due process” and “judicial process” are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.

[snip]

The Constitution’s guarantee of due process is ironclad, and it is essential – but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war – even if that individual happens to be a U.S. citizen.

[my emphasis]

Unfortunately (for Holder and for the rule of law), his argument falls apart here. That bolded language explicitly invokes Hamdi (though interestingly, not by name). And here's what Hamdi has to say about what due process entails.

It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

[snip]

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and **a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.**

[snip]

In sum, while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, **the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.**

[snip]

Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its

head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process. [my emphasis]

That is, Hamdi—which Holder invokes for premise that “due process takes into account the realities of combat”—specifically says “the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen’s core rights to challenge meaningfully the Government’s case and to be heard by an impartial adjudicator.” Hamdi permits for balancing—for the use of things like hearsay, for example. But it explicitly says that the realities of combat don’t obviate a citizen’s right to an impartial adjudicator.

You know. Like a judge.

As I’ll show in a later post, Holder’s claim that the Awlaki killing had proper Congressional oversight is just as false. But in his efforts to dismiss the necessity of courts to provide checks and balances, he invokes a SCOTUS case that requires an independent reviewer to provide just such a check.