

INCAPACITATING TERRORISTS IN THE US: THE FBI'S JOB

Remember when I suggested that a targeted killing in the US would look a lot like the killing of Imam Luqman Abdullah in 2009 (though I'm not saying that Abdullah's killing was a targeted killing), in which bunch of FBI's Hostage Rescue Team members flew in from around the country, set up an "arrest" operation, sicced a dog on him, and then shot him 21 times as he tried to hold off the dog?

Here are three assertions in the letters Eric Holder and John Brennan made in response to Rand Paul's question about whether "the President has the power to authorize lethal force, such as a drone strike, against a US citizen on US soil, and without trial," each addressing a different agency which might conceivably conduct targeted killing.

DOD

It is possible, I suppose, to imagine an extraordinary circumstance in which it would be necessary and appropriate under the Constitution and applicable laws of the United States for the President to authorize the military to use lethal force within the territory of the United States.

CIA

I can, however, state unequivocally that the agency I have been nominated to lead, the CIA, does not conduct lethal operations inside the United States – nor does it have any authority to do so. Thus, if I am fortunate enough to be confirmed as CIA Director, I would have no "power" to authorize such operations.

As a policy matter, moreover, we reject the use of military force where well-established law enforcement authorities in this country provide the best means for incapacitating a terrorist threat. We have a long history of using the criminal justice system to incapacitate individuals located in our country who pose a threat to the United States and its interests abroad. Hundreds of individuals have been arrested and convicted of terrorist-related offenses in our federal courts.

All three answers are interesting. Paul is upset that Holder said the President could use lethal military force in the US. Holder invoked Pearl Harbor and 9/11, during the latter of which the Vice President, on his sole authority, ordered DOD to shoot down domestic aircraft in the US. If Paul has a problem, he should probably also have a problem with Dick Cheney's order on 9/11.

Brennan's answer about the CIA is a masterpiece of misdirection. Brennan doesn't answer whether the CIA can operate in the US, which is broadly covered by other questions Paul asked so easily could and should have been included in his answer. He uses very interesting scare quotes around power. He makes it very clear that this answer does not address the legal question of whether the CIA *could* do this (he says DOJ will answer that, but Holder in fact didn't address whether CIA could be ordered to kill in the US). Most importantly, however, Brennan answers a question Paul didn't answer: Whether the *CIA Director* could order the CIA to use lethal force in the US.

The CIA, of course, conducts covert operations based on Presidential authorization, not CIA Director authorization. And Brennan stopped well short of answering whether the President could authorize the CIA to conduct lethal operations in the US, and whether the Executive Branch

believed the President could authorize such strikes based on his own authority. And as I said, Holder quite simply didn't answer that question at all.

Finally, though, I love the way Eric Holder discusses trials only after talking about using law enforcement – like the FBI – to incapacitate terrorists and other evil-doers twice.

Holder didn't comment, one way or another, on whether the President could authorize law enforcement authorities to conduct targeted killings in the US. And since the precedents for using lethal force in the white paper are domestic law enforcement cases, that use of lethal force would come with the most cover from legal precedent.

In short, none of these assertions constitutes a denial that a particular agency could, under certain circumstances, could conduct targeted killing in the US. All they say, in conjunction, is that were a targeted killing to be conducted in the US, it would most likely be conducted by law enforcement.