

NO ONE BENEFITS FROM A ONE (WO)MAN FISC COURT

Over at Just Security, Steve Vladeck takes issue with yet another proposal for a Drone Court.

A new chapter by Professors Amos Guiora and Jeffrey Brand—“[Establishment of a Drone Court: A Necessary Restraint on Executive Power](#)”—has been receiving a fair amount of [media](#) and [blog](#) attention. The chapter differs from [some prior calls](#) for a “drone court” in seeing the Foreign Intelligence Surveillance Court (FISC) not as a model, but rather as a lesson in what *not* to do—a “non-starter,” in the authors’ words. Nevertheless, the chapter argues, we need a special “Operational Security Court” (OSC) comprised of already sitting Article III district and circuit judges (selected through a far different process from FISC judges) to strike the right balance between the government’s need to protect operational (and national) security and the rights of those targeted for drone operations to contest their targeting (through security cleared lawyers) *ex ante*.

My take on the proposal is slightly different from Vladeck’s. I take it as a proposal for a Sparkle Pony. The proper response to such a proposal is to point out all the reasons why we can’t have Sparkle Ponies. But I would end up largely where Valdeck is, looking at all the reasons FISC is failing its task, especially now that it has been blown up beyond proportion in the wake of President Bush’s illegal spy program. And Vladeck’s solution – to ensure people can sue after the fact – is a reasonable start.

That said, Vladeck asks an important question.

Finally, there's the question of why an entire new *court* (the "OSC") is needed at all. What's wrong with giving the U.S. District Court for the District of Columbia exclusive original jurisdiction over these proceedings—as the Supreme Court has effectively provided in the secrecy-laden Guantánamo habeas cases? Even if one believes that *ex ante* judicial review of drone strikes is constitutionally and pragmatically feasible, why reinvent the wheel when there are perfectly good judges sitting in a perfectly good courthouse replete with experience in highly classified proceedings?

In my insistence it's time to get rid of FISC, I've been thinking the same thing: why can't we just have all the DC District judges rule on these cases?

The biggest drawback I see in this is that it would mean the judges presiding over national security criminal cases – not even Espionage cases, which are more likely to be charged in EDVA – are not the same who preside over the National Security Court decisions. Just as an example, I think it important that a bunch of judges in Portland, OR are presiding over some of the more interesting national security cases. And for that reason I'm fascinated that Michael Mosman, who is presiding over the case of Reaz Qadir Khan, is also a FISC judge. While I don't think Mosman brings a neutral approach to the Khan case, I do think he may be learning things about how the FISC programs work in practice.

But both sides of this debate, both the government and reformers, could point to Vladeck's proposal as a vast improvement. That's because it gets us out of what has become a series of one person courts.

Partly for logistical reasons (and potentially

even for security reasons), rather than a court of 11 judges presiding over these expanding counterterrorism programs, we've actually had a series of single judges: Colleen Kollar-Kotelly, who presided over at least the Internet dragnet, some other important Pen Register rulings, and several initial Protect America Act reviews, then mostly Reggie Walton presiding over the Yahoo challenge and then the phone and Internet dragnet fixes, then John Bates presiding over the upstream fix (as well as reauthorizing and expanding the Internet dragnet). Presumably, presiding judge Thomas Hogan has assumed the role of one person court (though I suspect Rosemary Collyer, who is next in line to be presiding in any case, takes on some of this work).

And while I'd find great fault with some of Kollar-Kotelly and Bates' rulings (and even some of Walton's), I suspect the NatSec establishment was thrilled to see the end of Walton on the court, because he dared to consider questions thoughtfully and occasionally impose limits on the intelligence programs.

No one benefits from having what works out to be primarily one judge review such massive programs. But that's what we've effectively got now, and because it operates in secret, there's no apparent check on really boneheaded decisions by these individual judges.

There are a lot of reasons to replace the FISC with review by normal judges, and one of them is that the current system tends to concentrate the review of massive spying programs in the hands of one or two judges alone.