

February 8, 2013

Debating a Court to Vet Drone Strikes

By **SCOTT SHANE**

WASHINGTON — Since 1978, a secret court in Washington has approved national security eavesdropping on American soil — operations that for decades had been conducted based on presidential authority alone.

Now, in response to broad dissatisfaction with the hidden bureaucracy directing lethal drone strikes, there is an interest in applying the model of the [Foreign Intelligence Surveillance Act](#) court — created by Congress so that surveillance had to be justified to a federal judge — to the targeted killing of suspected terrorists, or at least of American suspects.

“We’ve gone from people scoffing at this to it becoming a fit subject for polite conversation,” said Robert M. Chesney, a law professor at the University of Texas. He said court approval for adding names to a counterterrorism kill list — at least for American citizens abroad — “is no longer beyond the realm of political possibility.”

A drone court would face constitutional, political and practical obstacles, and might well prove unworkable, according to several legal scholars and terrorism experts. But with the war in Afghanistan winding down, Al Qaeda fragmenting into hard-to-read offshoots and the 2001 terrorist attacks receding into the past, they said, it is time to consider how to forge a new, trustworthy and transparent system to govern lethal counterterrorism operations.

“People in Washington need to wake up and realize the legal foundations are crumbling by the day,” Mr. Chesney said. That realization seemed evident at Thursday’s [confirmation hearing for John O. Brennan](#) as C.I.A. director, which became a raucous forum for complaints about the expansion of counterterrorist strikes and the procedures for deciding who should die.

Senator Ron Wyden, Democrat of Oregon, was one of those who complained that he could not get the administration to even list the countries where lethal strikes had been carried out. Among Republicans, Senator Saxby Chambliss of Georgia said he thought that killing had become a dubious substitute for capture. A program that began in the shadows was dragged for the first time into the spotlight of Congressional debate.

Today, with Al Qaeda’s core in Pakistan hugely diminished and Osama bin Laden dead, the terrorist threat is far more diffuse than it was a decade ago. Most drone-fired missiles now

kill not high-level terrorists plotting to attack the United States, but a mixed bag of midlevel militants and foot soldiers whose focus is often more on the Pakistani or Yemeni authorities than on the United States. And since a September 2011 drone strike deliberately killed an American citizen, Anwar al-Awlaki, who had joined Al Qaeda in Yemen, the legal and moral rationale for such strikes has been hotly debated.

Even if they are glad Mr. Awlaki is dead, many Americans are uneasy that a president can use secret evidence to label a citizen a terrorist and order his execution without a trial or judge's ruling. Hence the idea of court oversight for targeted killing, which on Thursday, unexpectedly, got serious discussion from senators and Mr. Brennan.

First, Senator Dianne Feinstein, Democrat of California, who is chairwoman of the Senate Intelligence Committee, said she would review proposals for establishing such a court. Her remark got a strong second from Senator Angus King of Maine, an independent.

“Having the executive being the prosecutor, the judge, the jury and the executioner all in one is very contrary to the traditions and the laws of this country,” he said.

Mr. Brennan then made a striking disclosure: The Obama administration had held internal talks on the feasibility of such a court. “I think it's certainly worthy of discussion,” Mr. Brennan said. “What's that appropriate balance between the executive, legislative and judicial branch responsibilities in this area?”

An administration official who spoke of the White House deliberations on the condition of anonymity said **President Obama** had asked his security and legal advisers a year ago “to see how you could have an independent review” of planned strikes. “That includes possible judicial review.”

“People on the national security staff and the legal side took a hard look at it, and the discussions are still going on,” the official said. “There are a lot of complexities. You'd need legislation and probably a new judicial body.”

The FISA court was created by Congress in 1978 after revelations of widespread eavesdropping on Americans by the National Security Agency and the Federal Bureau of Investigation convinced Congress that the executive branch had proved incapable of properly policing itself.

Eleven judges from around the country sit on the court, but one is on duty at a time, hearing cases in a special high-security courtroom added to Washington's federal courthouse in 2009. In 2011, according to the most recent statistics, the court approved 1,745 orders for electronic surveillance or physical searches, rejecting none outright but altering 30.

A drone court would have the same appeal, bringing in an independent arbiter. But it is likely there would be serious limitations to its jurisdiction. Most experts say judges do not have the alacrity or expertise to rule on a frantic call from the C.I.A. every time a terrorism suspect is in its sights. A better approach would be to have the court rule on whether the government had enough evidence against a suspect to place him on the kill list.

But if the court's jurisdiction extended to every foreign terrorism suspect, even some proponents believe, it might infringe on the president's constitutional role as commander in chief. Senator King, for instance, said he thought the court would pass constitutional muster only if it were limited to cases involving American citizens.

With such limits, however, a drone court would not address many of the most pressing concerns, including decisions on which foreign militants should be targeted; how to avoid civilian deaths; and how to provide more public information about strike rules and procedures.

“In terms of the politics and the optics, aren't you in the same position that you are now?” said William C. Banks, a national security law expert at Syracuse University. “It's still secret. The target wouldn't be represented. It's a mechanism that wouldn't satisfy critics or advance the due process cause much.”

Indeed, Hina Shamsi, director of the American Civil Liberties Union's national security project, said that a drone court would be a step backward, and that extradition and criminal prosecution of suspected terrorists was a better answer. “I strongly agree that judicial review is crucial,” she said. “But judicial review in a new secret court is both unnecessary and un-American.”

Nor are judges clamoring to take up the challenge. At an American Bar Association meeting in November, a retired FISA judge, James Robertson, rejected the idea that judges should approve “death warrants.”

“My answer is, that's not the business of judges,” Mr. Robertson said, “to decide without an adversary party to sign a death warrant for somebody.”

Mark Mazzetti contributed reporting.

<http://www.nytimes.com/2013/02/09/world/a-court-to-vet-kill-lists.html>