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Jeh Johnson Speech on "A 'Drone Court': Some Pros and Cons"

By Benjamin Wittes
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Former Pentagon General Counsel Jeh Johnson is, at this hour, giving this speech at Fordham Law School in New York:

Keynote address at the Center on National Security at Fordham Law School:
A "Drone Court": Some Pros and Cons
by Jeh Charles Johnson[1]
March 18, 2013

[preliminary extemporaneous remarks]

Thank you for this invitation. Today I want to join the current public debate about a "national security court" for the prior approval of lethal counterterrorism operations, or, as some have put it, a "drone court." Many have come down forcefully on one side or the other on the idea. My goal here is to set out what I believe are the pros and cons, based on my prior personal experience as the senior legal official of the Department of Defense, a federal prosecutor, and as a career litigator.

As a preliminary matter, I can't help but reflect for a moment on how we got to where we are:

Most people, I think, do not have a quarrel with the bottom-line conclusions and results.

Most legal commentators would agree with the general proposition that a U.S. citizen who is a senior leader of al Qaeda and a terrorist, personally and actively involved in plotting from an overseas, remote location to kill innocent American men, women and children, and who cannot feasibly be captured or arrested, is an appropriate target for lethal force by the U.S. government.

And most informed observers would agree, I think, that as a result of our government's counterterrorism efforts, spanning both the Bush and Obama Administrations, and which have included targeted lethal force against known individuals, the U.S. homeland is safer today from a terrorist attack launched by al Qaeda from overseas.

Some would say "if it's not broke, don't fix it."

The problem is that the American public is suspicious of executive power shrouded in secrecy.

In the absence of an official picture of what our government is doing, and by what authority, many in the public fill the void by envisioning the worst. They see dark images of civilian and military national security personnel in the basement of the White House – acting, as Senator Angus King put it, as "prosecutor, judge, jury and executioner" — going down a list of Americans, deciding for themselves who shall live and who shall die, pursuant to a process and by standards no one understands.

Our government, in speeches given by the Attorney General,[2] John Brennan,[3] Harold Koh,[4] and myself,[5] makes official disclosures of large amounts of information about its efforts, and the legal basis for those efforts, but it is never enough, because the public doesn't know what it doesn't know, but knows there are things their government is still withholding from them.

The revelation 11 days ago that the executive branch does not claim the authority to kill an American non-combatant – something that was not, is not, and should never be an issue – is big news, and trumpeted as a major victory for congressional oversight.

A senator who filibusters the government's secrecy is compared in iconic terms to Jimmy Stewart.

At the same time, through continual unauthorized leaks of sensitive information, our government looks to the American public as undisciplined and hypocritical. One federal court has characterized the government's position in FOIA litigation as "Alice in Wonderland,"[6] while another, this past Friday, referred to it as "neither logical nor plausible."[7]

An anonymous, unclassified white paper leaked to NBC News prompts more questions than it answers.

Our government finds itself in a lose-lose proposition: it fails to officially confirm many of its counterterrorism successes, and fails to officially confirm, deny or clarify unsubstantiated reports of civilian casualties.

Our government's good efforts for the safety of the people risks an erosion of support by the people.

It is in this atmosphere that the idea of a national security court as a solution to the problem — an idea that for a long time existed only on the margins of the debate about U.S. counterterrorism policy but is now entertained by more mainstream thinkers such as Senator Diane Feinstein and a man I respect greatly, my former client Robert Gates – has gained momentum.

To be sure, a national security court composed of a bipartisan group of federal judges with life tenure, to approve targeted lethal force, would bring some added levels of credibility, independence and rigor to the process, and those are worthy goals.

In the eyes of the American public, judges are for the most part respected for their independence.

In the eyes of the international community, a practice that is becoming increasingly controversial would be placed on a more credible footing.

A national security court would also help answer the question many are asking: what do we say to other nations who acquire this capability? A group of judges to approve targeted lethal force would set a standard and an example.

Further, as so-called "targeted killings" become more controversial with time, I believe there are some decision-makers within the Executive Branch who actually wouldn't mind the added comfort of judicial imprimatur on their decisions.

But, we must be realistic about the degree of added credibility such a court can provide. Its proceedings would necessarily be ex parte and in secret, and, like a FISA court, I suspect almost all of the government's applications would be granted, because, like a FISA application, the government would be sure to present a compelling case. So, at the same time the New York Times editorial page promotes a FISA-like court for targeted lethal force, it derides the FISA court as a "rubber stamp" because it almost never rejects an application.[8] How long before a "drone court" operating in secret is criticized in the same way?

Meanwhile, what about the views of the judiciary itself? I know a number of federal judges who would accept this unpleasant job if asked out of a sense of duty. But many, I suspect, want the judiciary to have nothing to do with this. Former Judges Mukasey and Robertson have publicly articulated this view in emphatic terms.[9] I can hear many in the judicial branch saying that courts exist to resolve cases and controversies between parties, not to issue death warrants based on classified, ex parte submissions. Judges don't like arms-length ex parte submissions, because they know they are not getting two sides of the story. I'm sure they would like them even less if the decision they must make is final and irreversible. Put in a more cynical way, I can imagine many federal judges thinking "we don't exist to provide top cover to the Executive branch for difficult decisions; foist this responsibility on us and you diminish both our branches of government."

Next, the advisability of a national security court depends in very large part on the scope of what it is that court will review and approve. I suspect the constitutionality of such a court depends on that as well.

Here are three permutations, though there are more:

First, a court to review and approve all targeted lethal force by the U.S. government away from any so-called "hot battlefield," against a terrorist, including in the course of a congressionally-authorized armed conflict conducted by the U.S. military;

Second, a court to review and approve targeted lethal force by the U.S. government away from the "hot battlefield," but only against a terrorist who is also U.S. citizen, again including in the course of a congressionally-authorized armed conflict conducted by the US military; and

Three, a court to review and approve targeted lethal force by the U.S. government away from any "hot battlefield," against a terrorist who is a U.S. citizen, but only in instances not part of a congressional-authorized armed conflict conducted by the U.S. military.

Logistically, if this proposed court's jurisdiction is limited to U.S. citizens, then applications should be very rare, hopefully not even one a year. It is also the case that, as a result of FISA and other things, Article III judges can receive highly sensitive classified information ex parte; in Washington, DC, the infrastructure for doing this already exists.

But, of course, limiting the court's jurisdiction to U.S. citizens leads to the inevitable question from other nations: why do our citizens deserve less from your government?

On the other hand, if the proposal is to include all targeted lethal force off the "hot battlefield," that is a different matter. In that event, in the current world environment, the judge will have supplanted the senior legal official of a national security agency from a large part of his or her job. To do that conscientiously and effectively, one judge or another on this court should consider getting an office in the Pentagon or other agency, and plan on spending a lot of time there, be continually available, ever vigilant, and have continual, around-the-clock access to secure communications, counterterrorism personnel and executive branch lawyers, to hear presentations, receive intelligence, probe intelligence officers for weaknesses in the intelligence, and ask lots of other questions. This is not something to be done "on the papers," as they say in court.

Next, if the court's jurisdiction is limited to U.S. citizens, there is the question of exactly what the court is to decide. If one accepts the criteria for targeting a U.S. citizen set forth in the Attorney General's speech a year ago, it has several parts:

(1) the target is a senior operational leader of al Qaeda or associated forces who is actively engaged in planning to kill Americans,

(2) the individual poses an imminent threat to the United States,

(3) capture is not feasible; and

(4) the operation would be conducted in a manner consistent with applicable law of war principles.[10]

Starting with the last of these criteria: this one is implicit in every military operation, This includes consideration of, for example, the type of weapon used, and the elimination or minimization of collateral damage. Often, these matters are, and should be, left to the discretion of the military commander in direct control of the operation, along with the time, place and manner of the operation. Even if the overall approval of the operation

comes from the President or Secretary of Defense, this particular aspect of it is not something that we should normally seek to micromanage from Washington; likewise, there is also not much to be gained by having a federal judge try to review these details in advance.

Next, there are the questions of feasibility of capture and imminence. These really are up-to-the-minute, real time assessments of the type I believe Judge Bates was referring to when he said that courts are "institutionally ill-equipped 'to assess the nature of battlefield decisions.'"[11] Indeed, I have seen feasibility of capture of a particular objective change several times in one night. Nor are these questions ones of a legal nature, by the way.

Judges are accustomed to making legal determinations based on a defined, settled set of facts – a picture that has already been painted; not a moving target, which is what we are literally talking about here. These are not one-time-only judgments and we want military and national security officials to continually assess and reassess these two questions up until the last minute before an operation. If these types of continual reassessments must be submitted to a member of the Article III branch of government for evaluation, I believe we compromise our government's ability to conduct these operations effectively. The costs will outweigh the benefits. In that event, I believe we will also discourage the type of continual reevaluation I'm referring to.

That leaves the question of whether the objective is in fact a senior leader of al Qaeda, plotting to kill Americans. Of those I have identified, this one is actually the simplest and most straight-forward, but it is the only one that could plausibly be referred to a court, in my view. But it is not a question unique to U.S. citizens. Whether an objective is a combatant and part of the congressionally-declared enemy is a question we should ask in every instance. Is it, therefore, really worth submitting to a court?

Other considerations:

Many like to draw distinctions between on and off a so-called "hot battlefield." In my view, the distinction is becoming increasingly stale. On the one "hot" battlefield left since 2001, Afghanistan, the U.S. is winding down operations, while al Qaeda has migrated to Yemen and north Africa. Further, I can envision a lot of debate and uncertainty about what constitutes the "hot battlefield?" Is it U.S. boots on the ground? If so, how many? Why should that be the test? What about Libya in 2011, for example? The distinction makes sense for developing policy, but I caution against the development of different legal regimes and standards on this basis.

Next, a minor point: the phrase "drone court" is a catchy phrase that fits on the bumper-sticker, but it's a conceptual misnomer. The activity we are talking about is not limited to unmanned aerial vehicles. Targeted lethal force can be, and is, conducted from a several other types of platforms, including manned aircraft.

Then there are the constitutional issues. Again, this depends in large part on the scope of what we are considering. I agree with the analysis of Professors Vladeck and Epps on the subject.[12] Article II of the Constitution states that the President "shall" be the Commander-in-Chief of the armed forces. That is his burden and responsibility. He may delegate his war-fighting authority within his chain of command, but he cannot assign part of it away to another branch of government, nor have it taken away by an act of Congress. The Article III problems are just as serious: the judiciary does not exist to issue advisory opinions or offer legal advice to the President; they exist to resolve live cases or controversies.[13]

Many refer to the FISA court by analogy, to say that the FISA court, too, does not resolve cases or controversies between parties; it also authorizes surveillance based on classified, ex parte submissions. But this judicial activity has its roots in the warrant requirement in the Fourth Amendment. What FISA judges do is an extension of what judges do every day ex parte in the domestic law enforcement context when they issue search warrants.[14] The idea of judicial authorization of lethal force against an enemy combatant, particularly during armed conflict, has no similar roots in an activity typically performed by the judiciary. To the contrary, the idea is motivated by a desire to rein in the President's constitutional authority to engage in armed conflict and protect the nation, which is the very reason it has constitutional problems.

Next, any requirement to submit certain objectives to a national security court must contain exceptions for the Executive Branch to act on its own in exigent circumstances. Again, is it therefore worth it?

Also, beware of creating the wrong set of incentives for those who must conduct these operations. A lawful military objective may include an individual, whether his name or his citizenship are known; it may also include a location (like a terrorist training camp) or an object (like a truck filled with explosives). By creating a separate legal regime with additional requirements for an objective if his name or citizenship becomes known, what disincentives do we create for an operator to know for certain the identity of those likely to be present at a terrorist training camp or behind the wheel of the truck bomb? Or, must the government refrain from an attack on what it knows to be an active and dangerous training camp if an al Qaeda terrorist who might be a U.S. citizen wanders in?

Here is my bottom line: like others, I believe the idea of a national security court is worth serious consideration, for the sake of our democratic process. I see certain advantages, but also a number of legal and practical problems. As I said before, the advisability of the idea also depends in very large part on the scope of what such a court is to review. If I must be labeled one way or another, I guess I belong in the category of "skeptic."

What is my alternative prescription? I offer three things:

First, continued efforts at transparency, as an important government interest in and of itself – and not just to keep the press, Congress and the courts off its back, when its back is against the wall. That is easier said than done. Transparency is hard. The reality is that it is much easier to classify something than it is to de-classify it, and there are huge bureaucratic biases against de-classifying something once it is classified. Put 10 national security officials in a room to discuss de-classifying a certain fact, they will all say I'm for transparency in principle, but at least 7 will be

concerned about second-order effects, someone will say "this is really hard, we need to think about this some more," the meeting is adjourned, and the 10 officials go on to other more pressing matters.

Last year we declassified the basics of the U.S. military's counterterrorism activities in Yemen and Somalia and disclosed what we were doing in a June 2012 War Powers report to Congress. It was a long and difficult deliberative process to get there, but certain people in the White House persevered, we said publicly and officially what we were doing, and, so far as I can tell, the world has not come to an end.

Second, in my view targeted lethal force is at its least controversial when it is on its strongest, most traditional legal foundation. The essential mission of the U.S. military is to capture or kill an enemy. Armies have been doing this for thousands of years. As part of a congressionally-authorized armed conflict, the foundation is even stronger. Furthermore, the parameters of congressionally-authorized armed conflict are transparent to the public, from the words of the congressional authorization itself, and the Executive Branch's interpretation of that authorization, which this Administration has made public.

Lethal force outside the parameters of congressionally-authorized armed conflict by the military looks to the public to lack any boundaries, and lends itself to the suspicion that it is an expedient substitute for criminal justice.

Third, the President can and should institutionalize his own process, internal to the Executive Branch, to ensure the quality of the decision-making. In this regard I will note the various public reports that the Obama Administration is considering doing exactly that.[15]

This brings me to my final point. Let's not lose sight of the reality that in this country we have for some time entrusted the President with awesome powers and responsibilities as Commander in Chief; he controls the nuclear arsenal and he alone has the authority to use it; he alone has the constitutional authority, with certain limits, to deploy thousands of men and women in the U.S. military into hostilities on the other side of the world.

Further, as we entrust the President to conduct war and authorize lethal force against an individual, that presidential-level decision brings with it a whole cadre of cabinet and subcabinet-level national security advisers from across the Defense, State and Justice Departments and the intelligence community who, in my experience, bring to the table different perspectives and engage in very lively, robust debate.

I say only half-jokingly that in 2009, in the existing structure, one of the most aggressive things the new President could do to promote credibility and ensure robust debate within the Executive Branch was add to the mix, as State Department Legal Advisor, a certain progressive human rights law professor from Yale, give him access to all our counterterrorism activities, and give him a voice and a seat at the table. And, over the first four years of the Administration, Harold Koh made me and others work a lot harder.

Now, those who hear or read this will ask "what about the future? Koh is back at Yale. The answer is that the President we entrust with the ultimate responsibility is elected by the people and accountable to them; his legal and policy advisors are chosen just like a federal judge, appointed by the President and confirmed by the Senate. If the Senate is not satisfied that a nominee for a legal position in the national security element of our government will provide independent advice and follow the rule of law, it should exercise its prerogative to withhold its advice and consent. These days, the Senate delays the confirmation of a presidential nominee for a lot less.

I am confident that the man we elected to be President for the next four years, Barack Obama, is sensitive to these issues.

I also have a lot of faith in the new CIA director John Brennan, who happens to be an alumnus of this university. Over the first four years of the Obama Administration, I probably sat with him through somewhere between 50-100 situation room meetings. I believe I know his mind and his values, and in my opinion John Brennan embodies what the President talks about when he says that aggressive counterterrorism policies, the rule of law and American values are not trade-offs, and can co-exist.

I finish with something I said a year ago at Yale law school, while I was still in office:

"[A]s a student of history I believe that those who govern today must ask ourselves how we will be judged 10, 20 or 50 years from now. Our applications of law must stand the test of time, because, over the passage of time, what we find tolerable today may be condemned in the permanent pages of history tomorrow."[16]

Our national security, and people's faith in our government, depend on this. Thank you.

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[1] With the valuable research assistance of Justin Fraterman, Esq., associate, Paul, Weiss, Rifkind, Wharton & Garrison LLP.

[2] Eric Holder, Address at Northwestern University School of Law, Chicago, IL (Mar. 5, 2011), http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html.

[3] John O. Brennan, Address at Program on Law and Security, Harvard Law School, Cambridge, MA: Strengthening our Security by Adhering to our Values and Laws (Sep. 16, 2011), http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an; John O. Brennan, Address at Woodrow Wilson International Center for Scholars, Washington, DC: The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012), http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy.

[4] Harold H. Koh, Keynote Address at the Annual Meeting of the American Society of International Law, Washington, DC (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm.

[5] Jeh C. Johnson, Address at Yale Law School, New Haven, CT: National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012), http://www.cfr.org/national-security-and-defense/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448; Jeh C. Johnson, Address at the Oxford Union, Oxford University, Oxford, United Kingdom: The Conflict Against Al Qaeda and its Affiliates: How Will it End? (Nov. 30, 2012), http://www.cfr.org/national-security-and-defense/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448.

[6] New York Times Co. v. U.S. Department of Justice, No. 11-cv-9336, 2013 WL 50209 (S.D.N.Y. Jan 3, 2013) (McMahon, J.)

[7] American Civil Liberties Union v. Central Intelligence Agency, No. 11-5320 (D.C. Cir. March 15, 2013).

[8] See Editorial, A Court for Targeted Killings, N.Y. Times, Feb. 13, 2013, http://www.nytimes.com/2013/02/14/opinion/a-special-court-is-needed-to-review-targeted-killings.html.

[9] Michael B. Mukasey, Op. Ed., How to Untangle an Incoherent Drone Policy, Wall Street Journal, Feb. 19, 2013, at A15, http://online.wsj.com/article/SB10001424127887324162304578302422573622506.html; James Robertson, Op. Ed., Judges Shouldn't Decide about Drone Strikes, Washington Post, Feb. 15, 2013, http://articles.washingtonpost.com/2013-02-15/opinions/37117878_1_drone-strikes-justice-department-white-paper-federal-courts.

[10] See Holder, supra note 2.

[11] Al-Aulaqi v. Obama, 727 F.Supp.2d 1, 45 (D. D.C. 2010) (quoting DaCosta v. Laird, 471 F.2d 1146, 1155 (2d Cir. 1973)).

[12] See Steve Vladeck, Why a "Drone Court" Won't Work—But (Nominal) Damages Might, Lawfare, Feb. 10, 2013, http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work/; Garrett Epps, Why a Secret Court Won't Solve the Drone-Strike Problem, The Atlantic, Feb. 16, 2013, http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work/.

[13] Id.

[14] See Vladeck, supra note 12 ("[I]nsofar as the FISC operates ex parte, courts have consistently upheld its procedures against any Article III challenges by analogy to the power of Article III judges to issue search warrants –a process defended entirely by reference to the Fourth Amendment, which the Supreme Court has interpreted to require a 'prior judicial judgment' (in most cases, anyway) that the government has probable cause to justify a search . . . .").

[15] John O. Brennan, Statement at Senate Select Committee on Intelligence, Washington, DC (Feb. 7, 2013), 31-2, http://intelligence.senate.gov/130207/transcript.pdf ("[L]et me talk, generally, about the counterterrorism program and the role of CIA, and this effort to try to institutionalize and to ensure we have as rigorous a process as possible, that we feel that we're taking the appropriate actions at the appropriate time. The President has insisted that any actions we take will be legally grounded, will be thoroughly anchored in intelligence, will have the appropriate review process, approval process, before any action is contemplated, including those actions that might involve the use of lethal force. The different parts of the government that are involved in this process are involved in the interagency, and my role as the President's counterterrorism advisor was to help to orchestrate this effort over the past four years to ensure, again, that any actions we take fully comport with our law and meet the standards that I think this Committee and the American people expect of us, as far as taking actions we need to protect the American people, but at the same time ensuring that we do everything possible before we need to resort to lethal force."); Jay Carney, White House Press Briefing, Washington, DC (Feb. 6, 2013), http://www.whitehouse.gov/the-press-office/2013/02/06/press-briefing-press-secretary-jay-carney-262013 ("Q: You mentioned a minute ago that the President wants to put a legal architecture in place for the drone strikes. What steps is he taking to do that? Is he proposing something to Congress? Is he asking them to come up with it?

Mr. Carney: Again, I think this is — I was quoting the President and this is something that he and others have talked about. Mr. Brennan has said in the past that we're trying to right now – 'What we're trying to do right now is to have a set of standards, a set of criteria and have a decision-making process that will govern our counterterrorism actions so that irrespective of the venue where they're taking place, we have a high confidence that they're being done for the rights reasons in the right way. . . But as Mr. Brennan and the President have discussed, this is something that has been underway and will continue to occupy a fair amount of time for people involved here, because it is the desire of this President to make sure that we have an architecture in place that governs these issues not just for this President and this administration, but for the future.").

[16] Johnson, Address at Yale Law School, supra note 5.

Filed under: Domestic Drones, Targeted Killing

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