

GARBAGE IN, GARBAGE OUT: THE PROBLEM WITH A FISA DRONE COURT

Since the Administration turned over the OLC memos authorizing the killing of Anwar al-Awlaki Thursday, there's been a sudden surge of support for setting up a FISA type court for targeted killing (actually, for drone targeting; I guess Americans being killed by cruise missile or gun still won't get due process).

There are a lot of problems with such a court, which I hope to explore at length in upcoming weeks.

But, in the same way John Brennan undermined the very premise of drone targeting in his hearing (by attesting that the judge and jury in the existing targeting program is not competent to serve as judge and jury), he also undermined the value of a FISA Drone Court.

In this exchange, Richard Burr finds a way to corner John Brennan into agreeing that he trusted information gotten in the torture program. Burr gets Brennan to admit that he submitted declarations to the FISA court that may have relied on information gained from torture.

Burr: I'm still not clear on whether you think the information from CIA interrogations saved lives. Have you ever made a representation to a court, including the FISA court, about the type and importance of information learned from detainees including detainees in the CIA detention and interrogation program?

Brennan: Ahm, first of all, in the first part of your question, as to you're not sure whether I believe that there has

been information ... I don't know myself.

Burr: I said I wasn't clear whether I understood, whether whether I was clear.

Brennan: And I'm not clear at this time either because I read a report that calls into question a lot of the information that I was provided earlier on, my impressions. Um. There, when I was in the government as the head of the national counterterrorism center I know that I had signed out a number of um affirmations related to the uh continuation of certain programs uh based on the analysis and intelligence that was available to analysts. I don't know exactly what it was at the time, but we can take a look at that.

Burr: But the committee can assume that you had faith if you made that claim to a court or including the FISA court, you had faith in the documents in the information that was supplied to you to make that declaration.

Brennan: Absolutely. At the time if I had made any such affirmation, i would have had faith that the information I was provided was an accurate representation.

To corner Brennan, however, Burr also gets him to admit that a number of FISA-approved programs were probably based on torture.

The government was wiretapping people based on tortured confessions the Senate Intelligence Committee has now, a decade later, deemed unreliable.

And because of how rarely FISA-derived information gets double checked, we'll never learn which wiretaps were approved based on tortured evidence.

Compare that to what has happened even in the Gitmo habeas cases, even with some limits on

discovery. Because detainee lawyers got to challenge the information behind accusations, and because the source of accusations were somewhat public, it made it much easier to challenge the accusations from certain detainees, especially Abu Zubaydah, who had been tortured. Indeed, the government dropped a number of charges originally derived from Abu Zubaydah.

As a threshold matter, intelligence is different from evidence. And a FISA Court would be relying on the former.

But because it operates in secret, it would never be able to vet out the intelligence of dubious provenance, whatever the reason. It was torture 9 years ago when Brennan was making dicey declarations. We're still seeing questionable allegations from informants work through the system (even in the regular courts!). It could be the self-interested claims of our foreign partners, setting up the death of someone they don't like.

In the FISA Court, unlike a regular court, there's no way to clean up Brennan's torture-based declarations.

The very same day Congress started talking about a FISA Drone Court in earnest, John Brennan demonstrated how dodgy some of the representations submitted to the existing FISA Court have been. That ought to give us pause before we extend the court's warrants to death, in addition to wiretaps.