

HOW TO ENSURE YOU'LL ALWAYS HAVE WAR POWERS TO FIGHT EASTASIA

As we've known for years, the May 6, 2004 OLC opinion authorizing the warrantless wiretap program shifted the claimed basis for the program from inherent Article II power to a claim the Afghanistan AUMF trumped FISA.

But one problem with that argument (hard to fathom now that Afghanistan has once again become our main forever war) is to sustain the claim that we were still at war in 2004, given that so many of the troops had been redeployed to Iraq. And to sustain the claim that the threat to the US from al Qaeda was sufficiently serious to justify eviscerating the Fourth Amendment.

So, they used politicized intelligence and (accidentally) propaganda to support it.

Use of the Pat Tillman Propaganda to Support Case of Ongoing War

As I've noted, Jack Goldsmith made the unfortunate choice to use an article reporting Pat Tillman's death as his evidence that the war in Afghanistan was still going on.

Acting under his constitutional authority as Commander in Chief, and with the support of Congress, the President dispatched forces to Afghanistan and, with the cooperation of the Northern Alliance, toppled the Taliban regime from power. Military operations to seek out resurgent elements of the Taliban regime and al Qaeda fighters continue in Afghanistan to this day. See e.g., Mike Wise and Josh White, Ex-NFL Player Tillman Killed in Combat, Wash. Post, Apr. 24, 2004, at

Al (noting that “there are still more than 10,000 U.S. troops in the country and fighting continues against remnants of the Taliban and al Qaeda”).

That article was not really about the ongoing war in Afghanistan; rather, it told a lie, the lie that war hero Pat Tillman had died in combat, rather than in a friendly fire incident.

Pat Tillman, the Arizona Cardinals safety who forfeited a multimillion dollar contract and the celebrity of the National Football League to become a U.S. Army Ranger, was killed in Afghanistan during a firefight near the Pakistan border on Thursday, U.S. officials said yesterday.

Tillman, 27, was killed when the combat patrol unit he was serving in was ambushed by militia forces near the village of Spera, about 90 miles south of Kabul, the Afghan capital. Tillman was hit when his unit returned fire, according to officials at the Pentagon. He was medically evacuated from the scene and pronounced dead by U.S. officials at approximately 11:45 a.m. Thursday. Two other U.S. soldiers were injured and one Afghan soldier fighting alongside the U.S. troops was killed.

The death of Tillman, the first prominent U.S. athlete to be killed in combat since Vietnam, cast a spotlight on a war that has receded in the American public consciousness. As Iraq has come into the foreground with daily casualty updates, the military campaign in Afghanistan has not garnered the same attention, though there are still more than 10,000 U.S. troops in the country and fighting continues against remnants of the Taliban and al Qaeda.

Now, I say the choice was unfortunate because, in spite of the fact that Tillman's commanding officers knew within 24 hours of his death on April 22 that it was a friendly fire incident, in spite of the fact that General Stanley McChrystal sent an urgent memo within DOD on April 29 that the death was probably friendly fire, and in spite of the fact that the White House learned enough about the real circumstances of Tillman's death by May 1 to make no claims about how he died in a Bush speech, there's no reason to believe that Jack Goldsmith would have learned how Tillman died until it was publicly announced on May 29, 2004.

In other words, it was just bad luck that Goldsmith happened to use what ultimately became an ugly propaganda stunt as his evidence that the Afghan war was still a going concern.

Producing Scary Memos to Justify Domestic Surveillance

I'm less impressed with the description of the role of threat assessments that we're beginning to get.

Goldsmith's memo includes an odd redaction in its description of the threat assessment process.

As the period of each reauthorization nears an end, the Director of Central Intelligence (DCI) prepares a memorandum for the President outlining selected current information concerning the continuing threat that al Qaeda poses for conducting attacks in the United States, as well as information describing the broader context of al Qaeda plans to attack U.S. interests around the world. **Both the DCI and the [redacted] review that memorandum** and sign a recommendation that the President should reauthorize [redacted name of program] based on the continuing threat posed by potential terrorist attacks within the United States. That

recommendation is then reviewed by this Office. Based upon the information provided in the recommendation, and also taking into account information available to the President from all sources, this Office assess whether there is a sufficient factual basis demonstrating a threat of terrorist attacks in the United States for it to continue to be reasonable under the standards of the Fourth Amendment for the President to authorize the warrantless involved in [redacted, probably name of program]. [my emphasis]

Now, there are any number of possibilities for the person who, in addition to the DCI, reviewed the threat assessment: John Brennan and others who oversaw the threat assessment are one possibility, David Addington or Dick Cheney are another.

But the IG Report provides another possibility or two that makes this whole passage that much more interesting:

The CIA initially prepared the threat assessment memoranda that were used to support the Presidential Authorization and periodic reauthorizations of the PSP. The memoranda documented intelligence assessments of the terrorist threats to the United States and to U.S. interests abroad from al Qaeda and affiliated terrorist organizations. These assessments were prepared approximately every 45 days to correspond with the President's Authorizations of the PSP.

The Director of the Central Intelligence's (DCI) Chief of Staff was the initial focus point for preparing the threat assessment memoranda. According to the former DCI Chief of Staff, he directed CIA terrorism analysts to prepare objective appraisals

of the current terrorist threat, focusing primarily on threats to the U.S. homeland, and to document those appraisals in a memorandum. Initially, the analysts who prepared the threat assessments were not read into the PSP and did not know how the threat assessments would be used. CIA's terrorism analysts drew upon all sources of intelligence in preparing these threat assessments.

After the terrorism analysts completed their portion of the memoranda, the DCI Chief of Staff added a paragraph at the end of the memoranda stating that the individuals and organizations involved in global terrorism (and discussed in the memoranda) possessed the capability and intention to undertake further attacks within the United States. The DCI Chief of Staff recalled that the paragraph was provided to him initially by **a senior White House official**. The paragraph included the DCI's recommendation to the President that he authorize the NSA to conduct surveillance activities under the PSP. **CIA Office of General Counsel (OGC) attorneys reviewed the draft threat assessment** memoranda to determine whether they contained sufficient threat information and a compelling case for reauthorization of the PSP. **If either was lacking, an OGC attorney would request that the analysts provide additional threat information or make revisions to the draft memoranda.**

[snip]

NCTC personnel involved in preparing the threat assessments [beginning in 2005] told the ODNI OIG that the danger of a terrorist attack described in the threat assessments was sobering and "scary," resulting in the threat assessments

becoming known by ODNI and IC personnel involved in the PSP as the “scary memos.” [my emphasis]

This passage names one entity personally who reviewed what would later become known as the “scary memos:” the Office of General Counsel. Of course it also mentions an unidentified “senior White House official” (remember, there was a classified version of this report that might have described who it was in more detail) who provided the DCI’s Chief of Staff with the language to use for the authorization.

It’s the function of OGC here I find particularly interesting (and which might provide a reason why DOJ chose to redact mention of OGC’s rule on Goldsmith’s memo): lawyers at CIA reviewed the threat assessment “to determine whether they contained ... a compelling case for reauthorization of the PSP. If [such a case] was lacking, an OGC attorney would request that the analysts provide additional threat information make revisions to the draft memoranda.”

So let’s be clear what these two descriptions of the scary memos tell us. It is clear that the entire claim that surveillance in the US was justified was based on the argument that there were dangerous people here in the US who were plotting attacks, in the US. It seems that, either for PR reasons or legal ones (heh), the White House (or maybe DOJ) took this requirement pretty seriously. The IG Report invokes the possibility that “a case for reauthorization” might be “lacking,” suggesting someone, at least, wanted to see proof of the threat.

But look at what constituted that proof.

First, a bunch of CIA analysts were asked to do “objective analysis” of the current terrorist threat, focusing on threats to the “US homeland.” These analysts, at least for some time, had no idea how their report would be used. After they prepared the report, the DCI COS slapped language that Cheney Addington

someone at the White House had told them to slap onto the report, presumably creating the incorrect documentary appearance that the analysts who did the "objective analysis" had bought off on the conclusion that the terrorists they had discussed had the "capability and intention" to commit further attacks in the US, all of which justified vacuuming up all the international phone traffic coming into the US.

Apparently, on at least some occasions, the "objective analysis" did not sufficiently back up the claims slapped on courtesy of Cheney Addington someone at the White House; it was OGC's job to make sure it did. Mind you, if the "objective analysis" did not back up the conclusion, OGC did not issue a report saying, "sorry, Cheney, you're going to have stop wiretapping Americans," but instead, they found information to fluff out the request. Perhaps they went back to the "objective analysts" and told them they had to fearmonger some more about domestic threats. ~~Perhaps they simply "ma[de] revisions" to the "objective analysis" themselves.~~ [Update: Mary has convinced me I misread this—that the analysts, not the OGC lawyers—would make the changes.]

But the result was, apparently, that every time the program was up for renewal, CIA produced a report that claimed there was sufficient danger to the US domestically that they had to continue wiretapping Americans.

As Goldsmith describes, there was one more level of review done within OLC. OLC, you see, did not limit itself to what appeared in writing in the scary memos. Instead, it sometimes supplemented the threats described in the scary memos by considering "information available to the President from all sources." Nothing says the additional information that came from the President was ever documented. Or vetted by actual intelligence professionals. But OLC could and apparently did invoke it in finding the warrantless wiretapping program necessary.

This is, Goldsmith tells us, the review process

they used to ensure “relevant constitutional standards of reasonableness under the Fourth Amendment.”

It was, of course, a classic case of politicized intelligence, a Team B operating in secret, serving as the only check on abuse of the Fourth Amendment.

“All Sources,” Including Tortured Confessions

The IG Report says the “objective” analysts “drew upon all sources of intelligence” to write their scary memos.

Goldsmith says OLC also took “into account information available to the President from all sources.”

And he also says this:

As explained in more detail below, since the inception of [redacted program name] intelligence from various sources **(particularly from interrogations of detained al Qaeda operatives)** has provided a continuing flow of information indicating that al Qaeda has had, and continues to have, multiple redundant plans for executing further attacks within the United States. These strategies are at various stages of planning and execution, and some have been disrupted. They include plans for [several lines redacted; my emphasis]

Ahem.

Before I point out the obvious problem with relying “particularly” on detainee interrogations to justify the illegal wiretap program, let me note that the passage where Goldsmith “explain[s] in more detail below” the intelligence that has justified the scary memos does not appear in the unredacted parts of the memo. So between the several lines redacted here, and what must be Goldsmith’s more extensive discussion redacted somewhere else in this memo, there’s a whole bunch of alleged

threats to the US that DOJ doesn't really want us to read.

But we don't have to guess, entirely, at what kind of threats to the US the scary memos were reporting that detainees had said. We can refer to one of Dick Cheney's two favorite reports on detainee reporting, the report "Khalid Sheikh Muhammad: Preeminent Source on Al-Qa'ida" released on July 17, 2004, not long after Goldsmith wrote this memo. Here's what that report said about threats to the US:

KSM steadfastly maintains that his overriding priority was to strike the United States but says that immediately after 11 September he realized that a follow-on attack in the United States would be difficult because of new security measures. As a result, KSM's plots against the US homeland from late 2001 were opportunistic and limited, including a plot to fly a hijacked plane into the tallest building on the US West Coast and a plan to send al-Qa'ida operative and US citizen Jose Padilla to set off bombs in high-rise apartment buildings in a US city.

[snip]

Striking the United States. Despite KSM's assertion that a post-11 September attack in the United States would be difficult because of more stringent security measures, he has admitted to hatching a plot in late 2001 to use Jemaah Islamiya (JI) operatives to crash a hijacked airliner into the tallest building on the US West Coast. From late 2001 until early 2003, KSM also conceived several low-level plots, including an early 2002 plan to send al-Qa'ida operative and US citizen Jose Padilla to set off bombs in high-rise apartment buildings in an unspecified major US city and an early 2003 plot to employ a network of Pakistanis—including

Iyman Faris and Majid Khad—to target gas stations, railroad tracks, and the Brooklyn Bridge in New York. KSM has also spoken at length about operative Ja'far al-Tayyar, admitting that al-Qa'ida had tasked al-Tayyar to case targets in New York City in 2001.

[snip]

KSM stated that he had planned a second wave of hijacking attacks even before September 2001 but shifted his aim from the United States to the United Kingdom because of the United States' post-11 September security posture and the British Government's strong support for Washington's global war on terror.

So the guy whom Dick Cheney himself considered to be the best detainee source on al Qaeda's plans at the time Goldsmith wrote this memo said that the threats to the US consisted of the Library Tower plot that was canceled before 2002, Jose Padilla's purported dirty bomb plot that ultimately amounted to filling out an application to join al Qaeda by the time it got to the courts, Iyman Faris' plot to bring down the Brooklyn Bridge with a blowtorch, and Ja'far al-Tayyar, who may have cased NY subways three years before Goldsmith wrote the memo (and ultimately may have had ties with Najibullah Zazi). But actually—Cheney's favorite detainee source kept insisting—he had given up on attacking the US, and had instead focused on the UK.

Nevertheless, detainee reporting like this served as one particularly important source, Goldsmith tells us, for the scary memos that created the justification for illegally wiretapping American citizens.

One more thing. Goldsmith published this report on May 6, 2004. The very next day, CIA's Inspector General would publish the report that Goldsmith had been discussing for weeks, which

showed, among other things, that CIA's "preeminent source" had been waterboarded 183 times. CIA's IG would also raise questions about the efficacy of the intelligence (though he did say it revealed plots in the US). Goldsmith knew of the problems in the detainee interrogation program when he wrote about the role of detainee interrogations in this memo.

They tortured the detainees to get claims of plots against the US. And then—even though the detainees insisted they had stopped planning against the US—they used intelligence about canceled or absurd plots to write scary memos so they could continue to use their illegal wiretap program. Mind you, now they use entrapment to do the same thing. But back in the day KSM's tortured confessions gave Dick Cheney his excuse to wiretap you.