

THE INCREDIBLE DISAPPEARING PFIAB

Smintheus provides a good background on Bush's Executive Order to gut PFIAB (h/t scribe).

On Friday afternoon the White House posted without fanfare a new Executive Order that revamps an important though little known intelligence board. There are a few minor changes, but the most radical revision appears to be that the board has now been stripped of nearly all its powers to investigate and check illegal intelligence activities. It's difficult to see what legitimate reasons there could have been for gutting the oversight activities of the board in this way, and the WH has not explained the changes.

[snip]

The newly revised IOB is much more passive. Gone is the duty to review agency guidelines regarding illegal intelligence activities. Gone is the duty to hold accountable the intelligence watchdog offices, such as inspectors general, who are supposed to serve as a bulwark against illegal activities.

Gone is the duty ("shall...forward") to take illegal activities directly to the Attorney General.

I wanted to add just a few details of context.

First, recall that the referrals by IOB—and the absence of any response to such referrals—got Alberto Gonzales in trouble.

In 2005, Gonzales had assured Congress there were no violations of privacy associated with the PATRIOT Act. But last year it became clear that Gonzales received reports of at least six

violations.

As he sought to renew the USA Patriot Act two years ago, Attorney General Alberto R. Gonzales assured lawmakers that the FBI had not abused its potent new terrorism-fighting powers. "There has not been one verified case of civil liberties abuse," Gonzales told senators on April 27, 2005.

Six days earlier, the FBI sent Gonzales a copy of a report that said its agents had obtained personal information that they were not entitled to have. It was one of at least half a dozen reports of legal or procedural violations that Gonzales received in the three months before he made his statement to the Senate intelligence committee, according to internal FBI documents released under the Freedom of Information Act.

When cornered on his lie, Gonzales invented some mumbo jumbo about how violations that get reported to the IOB aren't really violations.

On the strict question of whether Gonzales, you know, *lied*, he pled context: he was speaking earlier about broader problems with the Patriot Act. But that's obviously wrong, since the FBI's NSL authority for intelligence investigations derives from the Patriot Act. So then he sought to redefine what we should mean by "abuse." Just because a problem with a National Security Letter is serious enough to require notification of the president's Intelligence Oversight Board (IOB), he said, doesn't mean it's a big deal.

IOB violations, which is what I want to refer to these as – is IOB violations – referrals or violations made to the Intelligence Oversight Board.

These do not reflect, as a general matter, intentional abuses of the Patriot Act.

There was no sign that the six reported abuses were ever addressed by Gonzales or anyone else. But now, with this new EO, apparently they might never get referred to the Attorney General at all—the DNI only has to refer such issues if they constitute crimes.

(ii) [the DNI shall] forward to the Attorney General information in such reports relating to such intelligence activities to the extent that such activities involve possible violations of Federal criminal laws or implicate the authority of the Attorney General unless the DNI or the head of the department concerned has previously provided such information to the Attorney General;

So your garden variety abuse of privacy probably would just get buried under the DNI's desk. Which, of course, also means that Congress will only learn about such violations in the privacy of an Intelligence Committee briefing, and not a more public Attorney General hearing.

Also note this new clause, which—if the DNI bottleneck already didn't—guards against any suggestion that there should be legal repercussions from an IOB discovery of an intelligence problem.

(d) This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies or entities, its officers, employees, or agents, or any other person.

Even if the IOB determines the FBI has been abusing your privacy, that won't help you sue the government for such abuse.

Another interesting bit of background this seems to respond to is the whole Fourth Branch controversy. You'll recall that PFIAB started refusing to comply with regulations on classification and declassification at the same time Mr. Fourth Branch did. And the spreadsheet showing whose emails disappeared from the White House indicates that a lot of PFIAB emails went missing.

So what, then, does it mean that this EO changes the restrictions on use of classified information? It used to be,

Each member of the Pfiab, each member of the Pfiab's staff and each of the Pfiab's consultants shall execute an agreement never to reveal any classified information obtained by virtue of his or her services with the Pfiab except to the President or to such persons as the President may designate.

Now, the restriction against revealing any classified information has been changed to limit unauthorized disclosure.

(b) Any person who is a member of the PIAB or IOB, or who is granted access to classified national security information in relation to the activities of the PIAB or the IOB, as a condition of access to such information, shall sign and comply with the agreements to protect such information from unauthorized disclosure. This order shall be implemented in a manner consistent with Executive Order 12958 of April 17, 1995, as amended, and Executive Order 12968 of August 2, 1995, as amended.

So, if you're Ray Hunt and, pursuant to

information you learned on PFIAB, you've got intelligence on Kurdistan, does that mean you can reveal that information to designees within Kurdistan?

We'll probably never know, since the newfangled PIAB doesn't appear to be forthcoming with such information.