

ANOTHER REASON DAVID BARRON SHOULD NOT GET A LIFETIME APPOINTMENT WITHOUT FURTHER DISCLOSURE

The other day I noted that President Obama had nominated David Barron to a lifetime appointment on the First Circuit even while his government was stonewalling the release under FOIA of Barron's OLC memo authorizing the due process-free execution of an American citizen.

While I presume Patrick Leahy will rush Barron's confirmation through the Senate Judiciary Committee anyway, he shouldn't, not until Americans have a better sense of Barron's fairly outrageous claims (including, that courts couldn't review such executions) in that memo.

Here's another thing Leahy should insist we see before Barron gets to be a Circuit Judge.

If the N.S.A. does not immediately use the phone and e-mail logging data of an American, it can be stored for later use, at least under certain circumstances, according to several documents.

One 2011 memo, for example, said that after a court ruling narrowed the scope of the agency's collection, the data in question was "being buffered for possible ingest" later. A year earlier, an internal briefing paper from the N.S.A. Office of Legal Counsel showed that the agency was allowed to collect and retain raw traffic, which includes both metadata and content, about "U.S. persons" for up to five years online and for an additional 10 years offline for "historical searches."

Now, Barron left during the summer of 2010, so it's not at all clear he wrote the OLC briefing paper (which presumably means "memo that is called something else to make it harder to FOIA") authorizing retention of US person data, including content (presumably collected off the switches, but who knows?), for up to 15 years.

And it may well be that this is not as outrageous as an argument as those deployed to authorize the Anwar al-Awlaki killing. Perhaps this mem – um, briefing paper – doesn't address the legality of the underlying collection at all and only addresses reasonable (!) retention policies under the Privacy Act or some other statute. Probably this memo invests the same blind faith in minimization – the argument that collecting and holding US person data is no big deal so long as there are procedures purportedly limiting the distribution of it, even if those procedures allow the Intelligence Community to operate with great discretion in secret –as the rest of NSA's programs do.

So I'm not asserting that I know this mem– um, briefing paper – is problematic. I'm suggesting it may be.

I'm suggesting that we ought to know whether David Barron has green-lighted pretty broad abuses of US person privacy before he takes up an appellate position for the rest of his life.