FINDINGS VERSUS LAW: "THE INTELLIGENCE COMMUNITY DOES NOT TASK ITSELF"

Predictably, Ben Wittes adopted the Shane Harris piece airing NSA gripes about the White House's flaccid defense of them as part of Lawfare's Empathy for Wiretappers series (brought to you in part by NSA contractor Northrop Grumman!).

In his commentary on the piece, Wittes compares Bush's defense of torture (which Wittes calls coercive interrogation) and warrantless wiretapping (I assume he means the illegal warrantless wiretapping, as distinct from the warrantless wiretapping permitted under the existing legally sanctioned program) with Obama's relative silence on NSA's programs.

> Another comparison would be to the way President Bush handled the firestorms over NSA's warrantless wiretapping program and the CIA's coercive interrogation program. Whatever one thinks of the programs in question, in my view the comparison does not flatter Obama.
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> Say what you will about Bush and the CIA's interrogation program; there's no question that he owned it. Nobody in the public ever thought that the program belonged to then-CIA Director George Tenet—though Tenet certainly was an enthusiastic executor. It was Bush's program, and the reason it came off this way was that Bush publicly, repeatedly, and personally defended it. He made speeches about it. He wrote about it in his book. He never ran away from it. Nor, notably, did his attorney general. Similarly, Bush never ran away

> from warrantless wiretapping program. We associate him so personally with these programs, because he stoutly stood by them.
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> Obama has a lot on his plate right now. But he and his White House should not be leaving defense of intelligence programs he believes in to the intelligence community. Nor should Eric Holder, whose department convinced the FISA Court of the legal views currently at issue and oversees day-to-day FISA collection activity at NSA.
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> The intelligence community does not task itself. And when the political leadership tasks it to do something that then engulfs it in controversy, it should be a matter of honor not to let it dangle in the breeze.

As a threshold matter, who in their right mind would ask Eric Holder to defend a program? For better or worse, he has no more credibility right now than James Clapper or Keith Alexander, particularly among conservatives who believe he's responsible for Fast and Furious. That may make him ineffective as an AG, but that is the AG Obama has chosen to retain.

Furthermore, which Attorney General does Ben have in mind that also defended these programs (or does he mean just torture?). Not only did John Ashcroft refuse to reauthorize parts of the illegal wiretap program, but Alberto Gonzales lied about it to get confirmed as Attorney General. Or does he mean Michael Mukasey, who by all appearances sold his soul at a meeting with David Addington, promising he wouldn't oppose torture, in order to become Attorney General in the first place?

But I'm more interested, generally, in what I consider an inapt comparison.

One can argue that the President should aggressively defend whatever intelligence

activities take place under his watch. But there is a big difference between the illegal wiretap and torture programs — which were authorized by a Presidential Directive and Finding, respectively — and the surveillance programs being exposed as a result of the Snowden leaks — which were authorized by law.

In the former case, the intelligence agencies are all the more reliant on the President's vocal defense, because without it they are entirely illegal. And for better and worse, the President should (but didn't, at least not in the case of torture) pay close attention to the execution of those programs because he's on the hook for them himself. That makes it much harder for the President to criticize any violations of the programs he authorized (like torture contractors James Mitchell and Bruce Jessen exceeding the terms of the program).

To the extent that the Intelligence Committees operate within the terms of the law, the same could be said of congressionally sanctioned programs.

That's not what we're talking about here. We're talking about phone dragnet, Internet dragnet, and upstream collection, all of which violated the laws and/or Court ordered procedures authorizing them. When the government moved the phone dragnet under Section 215, it retained access for other agencies, performed contact chaining on unapproved selectors, and allowed access to the database from other NSA interfaces, old features of the illegal program that should have been turned off in 2006. We don't know what the Internet dragnet violations were, but they're likely also continuations of the illegal program. And NSA used FISA to intentionally target (according to John Bates) US person communications, in violation of the law and the Fourth Amendment, but also a practice that continued from the illegal program.

And the phone dragnet and (presuming they were discovered as part of the end-to-end review,

though if they weren't it'd be even more damning) Internet dragnet violations were admitted, after having persisted for 3 years, just as Obama entered the White House. The phone dragnet violations, at least, did not operate unchecked under the Obama Administration.

Further, as I noted yesterday, the woman now being criticized for her silence, Lisa Monaco, is one of the handful of people who had to ride herd on NSA as DOJ's National Security Division brought NSA practices into compliance with the actual letter of the law.

I'd like to learn more about the tensions between Agencies as the Administration tried to bring the NSA programs into line with the letter of the law and FISC orders. Perhaps NSA worked proactively to reveal and fix everything (though the record seems to suggest the opposite). Perhaps it didn't, and David Kris and Lisa Monaco had to push to force them to comply. But under Keith Alexander, the NSA failed to stay within the letter of the law (which ought to be reason enough to fire him). That makes the problems now being revealed substantively different from the torture and illegal wiretap programs, where the Executive only had to comply with what the President personally bought off on.

It may well be that Obama has approved all of what we're seeing (he certainly approved an expanded StuxNet so should be held responsible for much of the hacking we're doing; note that our offensive attacks actually are parallel to the covert programs raised by Wittes), though he couldn't have approved the phone dragnet violations. It may well be that his Administration instead reined them in as soon as they discovered them, with whatever cooperation or resistance from NSA. We simply don't know.

But an Agency violating the letter of the law and court orders affirmatively authorizing their actions is qualitatively different than an Agency violating the law based on direct orders from the President.