

NOT EVEN JOHN YOO APPROVED OF THE ILLEGAL WIRETAP PROGRAM

I do hope that Eric Lichtblau's book gets enough coverage this week to further stall Jello Jay's attempts to ram through telecom immunity. The excerpt in the NYT today reveals that when the illegal wiretap program started in 2001, it had **no** specific legal authorization—not even from the compliant John Yoo!

Robert S. Mueller III, the F.B.I. director, assured nervous officials that the program had been approved by President Bush, several officials said. But the presidential approval, one former intelligence official disclosed, came without a formal legal opinion endorsing the program by the Office of Legal Counsel at the Justice Department.

At the outset of the program in October 2001, John Ashcroft, the attorney general, signed off on the surveillance program at the direction of the White House with little in the way of a formal legal review, the official said. Mr. Ashcroft complained to associates at the time that the White House, in getting his signature for the surveillance program, "just shoved it in front of me and told me to sign it."

Aides to Mr. Ashcroft were worried, however, that in approving a surveillance program that appeared to test the limits of presidential authority, Mr. Ashcroft was left legally exposed without a formal opinion from the Office of Legal Counsel, which acts as the legal adviser for the entire executive branch.

At that time, the office had already issued a broad, classified opinion declaring the president's surveillance powers in the abstract in wartime, but it had not weighed in on the legality or the specifics of the N.S.A. operation, officials said.

The nervousness among Justice Department officials led the administration to secure a formal opinion from John Yoo, a deputy in the Office of Legal Counsel, declaring that the president's wartime powers allowed him to order the N.S.A. to intercept international communication of terror suspects without a standard court warrant.

The opinion itself remains classified and has not been made public. It was apparently written in late 2001 or early 2002, but it was revised in 2004 by a new cast of senior lawyers at the Justice Department, who found the earlier opinion incomplete and somewhat shoddy, leaving out important case law on presidential powers.

So they started the program—purportedly—in October 2001. They bullied John Ashcroft into "approving" the program. But it took them several months before they went to John "organ failure" Yoo to get him to craft an opinion justifying the program. And that opinion—perhaps typically, for John Yoo—was "shoddy" enough that Comey and Goldsmith and Philbin had to rewrite it in 2004—after staging their hospital confrontation.

This passage also reveals how precarious Ashcroft's position was, having approved the original program with no legal backing, and then learning in 2004 that he had had no business doing so. It makes his support of Comey and Goldsmith in the hospital confrontation much more akin to stories of how Comey convinced Ashcroft to recuse himself in the CIA Leak

investigation—because it badly tainted his own authority—rather than a heroic stand from his ICU ward. Lucky for Ashcroft, then, that he's getting rich at the DOJ teat. No wonder Ashcroft complained at that point that his staffers hadn't had the authority to review the program. That was his defense for approving the program. Ignorance.

Which is, of course, what we still have operating—ignorance. And on that basis—on the same faulty basis Ashcroft used—Jello Jay and his Republican allies want to sign away our right to know.