

SNOWBALL

I have a feeling (and I hope) things are going to snowball from here on out. With each new revelation, the things the Administration did while operating in secrecy get worse and worse. And, they make it easier for Democrats to push for still more revelations. For example, when the ACLU succeeds in liberating the Yoo Torture Memo, it makes everyone ask about that October 23, 2001 memo that claims the 4th Amendment is dead.

Second, in the March, 2003 Office of Legal Counsel (OLC) memorandum publicly released on April 1, 2008, the contents of a secret October, 2001 OLC memorandum were partially disclosed. Specifically, the 2003 memorandum explains that in an October 23, 2001 memorandum, OLC “concluded that the Fourth Amendment had no application to domestic military operations.”³ On two prior occasions – in letters of February 12 and February 20, 2008, – Chairman Conyers requested that the Administration publicly release the October 23, 2001, memorandum.⁴ The memorandum has not been received despite these specific requests.

Based on the title of the October 23, 2001 memorandum, and based on what has been disclosed and the contents of similar memoranda issued at roughly the same time, it is clear that a substantial portion of this memorandum provides a legal analysis and conclusions as to the nature and scope of the Presidential Commander in Chief power to accomplish specific acts within the United States. The people of the United States are entitled to know the Justice Department’s interpretation of the President’s constitutional powers to wage war in the United States. There can be no actual basis in national security

for keeping secret the remainder of a legal memorandum that addresses this issue of Constitutional interpretation. The notion that the President can claim to operate under "secret" powers known only to the President and a select few subordinates is antithetical to the core principles of this democracy. We ask that you promptly release the October 23, 2001, memorandum.

And, when the Attorney General makes bogus assertions to justify his calls for FISA reform, it makes everyone want to know why George Bush didn't prevent 9/11 if he had the opportunity to.

This statement is very disturbing for several reasons. Initially, despite extensive inquiries after 9/11, I am aware of no previous reference, in the 9/11 Commission report or elsewhere, to a call from a known terrorist safe house in Afghanistan to the United States which, if it had been intercepted, could have helped prevent the 9/11 attacks. In addition, if the Administration had known of such communications from suspected terrorists, they could and should have been intercepted based on existing FISA law. For example, even assuming that a FISA warrant was required to intercept such calls, as of 9/11 FISA specifically authorized such surveillance on an emergency basis without a warrant for a 48 hour period.² If such calls were known about and not intercepted, serious additional concerns would be raised about the government's failure to take appropriate action before 9/11.

Accordingly, we ask that you promptly answer the following questions:

1. Were you referring to an actual pre-9/11 incident in the portion of your

statement quoted above? If not, what were you referring to?

2. Do you believe that a FISA warrant would have been required to intercept a telephone call from a known terrorist safe house in Afghanistan to the United States in 2001? If so, please explain.

3. Even assuming that such a warrant would have been required, do you agree that even before 9/11, FISA authorized emergency interception without a warrant for a 48-hour period of phone calls from a known terrorist safe house in Afghanistan to the United States?

4. Assuming that you were referring to an actual pre-9/11 incident in your statement, please explain why such phone calls were not intercepted and appropriately utilized by federal government authorities in seeking to prevent terrorist attacks.

While DOJ will undoubtedly try to hide evidence that Bush claimed the 4th Amendment was dead for some time yet, those efforts will inevitably lead those trying to hide such embarrassments to say something else that will add to the snowball gathering momentum.

Of course, that means there's a bit of the race, between the gathering snowball and the end of Administration, when Bush will pardon more close Administration associates than anyone has ever pardoned before.