WAS THE OCTOBER 23, 2001 OLC OPINION THE BASIS FOR THE ILLEGAL WIRETAP PROGRAM?

By now, you've noted the footnote in the Torture Memo referencing a different OLC opinion declaring the 4th Amendment invalid.

> [O]ur office recently concluded that the Fourth Amendment had no application to *domestic* military operations. *See* Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes, II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, *Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States* at 25 (Oct. 23, 2001).

Scribe and I have been in a bit of a dispute whether or not that October 23, 2001 document was written to justify the illegal wiretapping program. I'm going to try to lay out what we know about it here.

The Case for Believing the 10/23/01 Memo Authorized the Warrantless Wiretap Program

The basis for arguing that the opinion is the rationale for the illegal wiretapping program is simple. First, the timing is right. As the AP notes, the opinion was written just two days before Dick briefed the Gang of Four on the program.

> The October memo was written just days before Bush administration officials, including Vice President Dick Cheney, briefed four House and Senate leaders on the NSA's secret wiretapping program for the first time.

Then there's the argument that DOJ included the document in a list of materials withheld in response to an ACLU FOIA.

> The government itself related the October memo to the TSP program when it included it on a list of documents that were responsive to the ACLU's request for records from the program. It refused to hand them over.

The document they're referring to is this Steven Bradbury declaration. In the declaration, Bradbury writes,

> OLC 146, which is a 37-page memorandum, dated October 23, 2001, from a Deputy Assistant Attorney General in OLC, and a Special Counsel, OLC, to the Counsel to the President, prepared in response to a request from the White House for OLC's views concerning the legality of potential responses to terrorist activity OLC 146 is withheld under FOIA Exemption Five.

I'm going to add an update below, showing the other OLC documents Bradbury withheld in this declaration. But note that this one does not specifically address communications (some of the others do).

The last reason it would make sense is the content. By all appearances, the warrantless wiretap program is a clear violation of the Fourth Amendment's prohibition against unreasonable searches. Thus, it would be logical that the Administration simply invalidated the Fourth Amendment in an OLC opinion to make its illegal wiretap program legal.

Update: Here's part of scribe's logic for arguing the opinion relates to domestic spying (click through to the comment for his complete argument).

> The NSA is part of the military .

> The title of Yoo's 10/23/01 memo is, what: "Authority for Use of Military Force to Combat Terrorist Activities Within the United States"
>
> But the proposition for which that memo is cited* in footnote 10 of the memo is:
>
> > Indeed, drawing in part on the reasoning of *Verdugo-Urquidez*, as well as the Supreme Court's treatment of the destruction of property for the purposes of military necessity, our Office recently concluded that the Fourth Amendment had no application to domestic military operations.
>
> So, what does this mean? Depends on how you define "domestic military operations", don't it?
>
> I argue the 10/23/01 memo was the lawyerly justification for:
>
> (a) NSA (military) wiretapping and surveillance operations inside the United States;
> (b) domestic military operations of the intel-gathering sort – e.g., CIFA, physical surveillance, black-bag jobs, etc.;
> (c) the incarceration of suspected terrists in military brigs, regardless of citizenship status (e.g., Jose Padilla, etc.), their removal from the civilian criminal justice system and their transportation from place to place;
> (d) when done by the military, the odd kidnapping, interrogating, whacking of suspected terrists who happened to be within the United States (none of which we know about actually having occurred, but which could have been deemed "legitimate" under the analysis we know

> about so far).
>
> All of those things are military operations.

The Case against Believing the 10/23/01 Memo Authorized the Warrantless Wiretap Program

But there are several reasons to believe the opinion has nothing to do with the warrantless wiretap program. Least credibly, there's Tony Fratto's insistence that it doesn't.

> White House spokesman Tony Fratto said Wednesday that the Fourth Amendment finding in the October memo was not the legal underpinning for the Terrorist Surveillance Program.
>
> "TSP relied on a separate set of legal memoranda," Fratto told The Associated Press. The Justice Department outlined that legal framework in a January 2006 white paper issued by the Justice Department a month after the TSP was revealed by The New York Times.

More credibly, there's Eric Lichtblau's reporting, which I've examined here.

> 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.

In other words, Lichtblau says the program had the following authorization:

> **October 2001**: No OLC review

> **Late 2001 to Early 2002**: John Yoo opinion
>
> **[Likely March to April] 2004**: Revised OLC opinion

Finally, when DOJ wrote a White Paper explaining its legal justification in January 2006, it relied almost exclusively on the President's Article II power and on the Authorization to Use Military Force. Of note, the White Paper dismissed concerns about the Fourth Amendment by stating that this surveillance pertained to foreign intelligence (an argument that seems to be the precise opposite of the "domestic military operations" argument in the October 23, 2001 opinion), and that it was reasonable.

> In United States v. United States District Court, 407 U.S. 297 (1972) (the "Keith" case), the Supreme Court concluded that the Fourth Amendment's warrant requirement applies to investigations of wholly domestic threats to security—such as domestic political violence and other crimes. But the Court in the Keith case made clear that it was not addressing the President's authority to conduct foreign intelligence surveillance without a warrant and that it was expressly reserving that question: "[T]he instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country."
>
> [snip]
>
> After Keith, each of the three courts of appeals that have squarely considered the question have concluded—expressly taking the Supreme Court's decision into account—that the President has inherent authority to conduct warrantless surveillance in the foreign intelligence

> context.
>
> [snip]
>
> In sum, the NSA activities are consistent with the Fourth Amendment because the warrant requirement does not apply in these circumstances, which involve both "special needs" beyond the need for ordinary law enforcement and the inherent authority of the President to conduct warrantless electronic surveillance to obtain foreign intelligence to protect our Nation from foreign armed attack. The touchstone of the Fourth Amendment is reasonableness, and the NSA activities are certainly reasonable, particularly taking into account the nature of the threat the Nation faces.

Of course, that doesn't rule out the possibility that DOJ has simply changed its rationale for the program; we know, for example, that it has alternately used and not used the AUMF as part of its justification, so it's possible that its evolving justifications have dismissed the Fourth Amendment differently over time.

But there's one more clue that the October 23, 2001 opinion is not among those the Administration currently claims to have used in justifying the illegal wiretap program over time. In his letter demanding the October 23, 2001 opinion, John Conyers–who has already seen the documents turned over as the basis for the illegal wiretap program–said:

> 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. 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.

This is curious. Conyers made the two prior requests in February of this year–right around a Mukasey visit to HJC. That leaves open the possibility that this does pertain in some way to the illegal wiretap program. Except that by the time he wrote this yesterday, Conyers was supposed to have seen all the documents justifying the program. Except for Lichtblau's reporting, I would think those documents would be among those Conyers refers to when he mentions "the contents of similar memoranda issued at roughly the same time."

Update:

Here are the OLC opinions Bradbury describes in his declaration:

> **October 4, 2001, to Alberto Gonzales**: OLC 132,which consists of two copies, one with handwritten comments and marginalia, of a 36-page memorandum, dated October 4, 2001, from a Deputy Assistant Attorney General in OLC to the Counsel to the President, created in response to a request from the White House for OLC's views regarding what legal standards might govern the use of certain intelligence methods to monitor communications by potential terrorists.
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> **October 23, 2001, from Yoo and Delahunty to Alberto Gonzales**: OLC 146, which is a 37-page memorandum, dated October 23, 2001, from a Deputy Assistant Attorney General in OLC, and a Special Counsel, OLC, to the Counsel to the President,

prepared in response to a request from the White House for OLC's views concerning the legality of potential responses to terrorist activity.

November 2, 2001, to John Ashcroft: OLC 131, which consists of two copies, both with underscoring and marginalia, of a 24-page memorandum, dated November 2, 2001, from a Deputy Assistant Attorney General in OLC to the Attorney General, prepared in response to a request from the Attorney General for OLC's opinion concerning the legality of certain communications intelligence activities.

February 8, 2002, to General Counsel of "another agency": OLC 62, which consists of two copies, one with highlighting and marginalia by an OLC attorney, of a February 8, 2002, memorandum from a Deputy Assistant Attorney General in OLC to the General Counsel of another federal agency, prepared in response to a request for OLC views regarding the legality of certain hypothetical activities.

October 11, 2002, to John Ashcroft: OLC 129, which consists of two copies, one with handwritten comments and marginalia, of a nine-page memorandum, dated October 11, 2002, from a Deputy Assistant Attorney General in OLC to the Attorney General, prepared in response to a request for OLC's views concerning the legality of certain communications intelligence activities.

February 25, 2003, for John Ashcroft: OLC 16, which consists of four copies, one with handwritten marginalia, of a 12-page memorandum, dated February 25, 2003, for the Attorney General from a Deputy Assistant Attorney General for OLC, prepared in response to a request from the Attorney General for legal advice concerning the potential use of

certain information collected in the course of classified foreign intelligence activities.

May 6, 2004, from Jack Goldsmith for John Ashcroft: OLC 54 which consists of six copies, some with handwritten comments and marginalia, of a 108-page memorandum, dated May 6, 2004, from the Assistant Attorney General for OLC to the Attorney General, as well as four electronic files, one with highlighting, prepared in response to a request from the Attorney General that OLC perform a legal review of classified foreign intelligence activities.

July 16, 2004, from Jack Goldsmith for the Attorney General: OLC 85, which is a nine-page memorandum, with highlighting, dated July 16, 2004, from the Assistant Attorney General in OLC to the Attorney General, evaluating the implications of a recent Supreme Court decision for certain foreign intelligence activities.

November 17, 2004, memorandum "for the file": OLC 59, which consists of four copies Of an 18-page memorandum for the file, dated November 17, 2004, from the Acting Assistant Attorney General in OLC, plus an electronic file, prepared in response to a request for OLC views regarding the applicability of certain statutory requirements.