THE YOO "EXCLUSIVITY" OPINION: MORE OUTRAGEOUS HACKERY

After significant efforts, Senator Whitehouse has finally gotten the Administration to declassify the fourth of the four outrageous opinions John Yoo wrote to justify the warrantless wiretap program (the other three Pixie Dust provisions basically allow the President to write his own laws). This one pertains to the exclusivity provision of FISA, which states clearly that FISA was the "exclusive means by which electronic surveillance … and the interception of domestic wire, oral and electronic communications may be conducted."

Here's what that purported genius, John Yoo, did with FISA's exclusivity provision:

> Unless Congress made a clear statement in the Foreign Intelligence Surveillance Act that it sought to restrict presidential authority to conduct warrantless searches in the national security area — which it has not — then the statute must be construed to avoid [such] a reading.

As it happens, DOJ actually appears to be somewhat cognizant of the legal hackery of this Yoo opinion. When he learned DNI had declassified the passage from the opinion, Brian Benczkowski sent a letter to Senators Whitehouse and DiFi, trying to claim that Yoo's opinion is unremarkable:

> The general proposition (of which the November 2001 statement is a particular example) that statutes will be interpreted whenever reasonably possible not to conflict with the President's constitutional authorities is unremarkable and fully consistent with

> the longstanding precedents of OLC, issued under Administrations of both parties.

Then, after ignoring the question of whether Yoo's interpretation of "reasonably possible" was itself reasonable, Benczkowski went on to stress that DOJ gave up Yoo's opinion in 2006 and replaced it with more hackery.

> However, as you are aware from a review of the Department's relevant legal opinions concerning the NSA's warrantless surveillance activities, the 2001 statement addressing FISA does not reflect the current analysis of the Department. Rather, the Department's more recent analysis of the relation between FISA and the NSA's surveillance activities acknowledged by the President was summarized in the Department's January 19,2006 white paper (published before those activities became the subject of FISA orders and before enactment of the Protect America Act of 2007). As that paper pointed out, "In the specific context of the current armed conflict with al Qaeda and related terrorist organizations, Congress by statute [in the AUMF] had confirmed and supplemented the President's recognized authority under Article II of the Constitution to conduct such surveillance to prevent further catastrophic attacks on the homeland."

As he did with Yoo's opinion, Benczkowski also ignored the question of whether this claim—that the AUMF authorized Bush to ignore FISA's exclusivity provision—was reasonable, particularly when Tom Daschle, who was Senate Majority Leader when the AUMF was passed, insists that Congress specifically refused to give the President war powers within the US.

> As Senate majority leader at the time, I

helped negotiate that law with the White House counsel’s office over two harried days. I can state categorically that the subject of warrantless wiretaps of American citizens never came up. I did not and never would have supported giving authority to the president for such wiretaps. I am also confident that the 98 senators who voted in favor of authorization of force against al Qaeda did not believe that they were also voting for warrantless domestic surveillance.

On the evening of Sept. 12, 2001, the White House proposed that Congress authorize the use of military force to "deter and pre-empt any future acts of terrorism or aggression against the United States." Believing the scope of this language was too broad and ill defined, Congress chose instead, on Sept. 14, to authorize "all necessary and appropriate force against those nations, organizations or persons [the president] determines planned, authorized, committed or aided" the attacks of Sept. 11. With this language, Congress denied the president the more expansive authority he sought and insisted that his authority be used specifically against Osama bin Laden and al Qaeda.

Just before the Senate acted on this compromise resolution, the White House sought one last change. Literally minutes before the Senate cast its vote, the administration sought to add the words "in the United States and" after "appropriate force" in the agreed-upon text. This last-minute change would have given the president broad authority to exercise expansive powers not just overseas — where we all understood he wanted authority to act — but right here in the United States, potentially

> against American citizens. I could see no justification for Congress to accede to this extraordinary request for additional authority. I refused.

Pretty much, Benczkowski is stuck in the unenviable position of trying to claim the warrantless wiretap program was legal, when it clearly wasn't. He ends his letter with a pathetic plea to the Senators not to circulate Yoo's interpretation of exclusivity by itself.

> Accordingly, we respectfully request that if you wish to make use of the 2001 statement in public debate, you also point out that the Department's more recent analysis of the question is reflected in the passages quoted above from the 2006 white paper.

As if that makes ongoing DOJ hackery defensible.