

WHEN AND TO WHAT DEGREE WAS JOHN ASHCROFT READ INTO THE ILLEGAL SURVEILLANCE PROGRAM?

We have long known that John Ashcroft was not properly read into the illegal domestic surveillance program. Senator Whitehouse suggested as much when Attorney General Gonzales testified in July 2007. And both Gonzales and Robert Mueller revealed that John Ashcroft—from his ICU bed—complained that his advisors had not been able to get read into the program and as a result he was ill-informed about the program.

But here's an interesting detail about the hospital visit:

I also recall that, prior to the time I departed, General Ashcroft briefly mentioned a concern about security clearances for members of his staff regarding the NSA activities that were the subject of the presidential order.

[snip]

Well, here's the relevant detail from Mueller's notes:

The AG also told [Card and Gonzales] that he was barred from obtaining the advice he needed on the program by the

strict compartmentalization
rules of the WH.

But the IG Report raises new and different questions about when—and to what degree—John Ashcroft was read into Cheney’s illegal domestic surveillance program. It includes the same details as Gonzales and Mueller have already revealed (though it looks like Gonzales was rather more cautious when speaking with the IG than before, and the IG appears not to have asked Mueller for his version of the story).

Former Attorney General Gonzales and former OLC Assistant Attorney General Bybee both told the DOJ OIG that they did not know how Yoo became responsible for analyzing the legality of the PSP.

[snip]

Gonzales told the DOJ OIG that the Yoo opinions represented the legal opinion of DOJ, and that it was Ashcroft’s decision as to how to satisfy his obligations as Attorney General. Gonzales told the DOJ OIG that Ashcroft complained to the White House that it was "inconvenient" not to have the Deputy Attorney General or Ashcroft’s Chief of Staff read into the PSP, but Gonzales also stated that he never got the sense from Ashcroft that this affected the quality of the legal advice about the program that DOJ provided to the White House. As noted, Ashcroft declined the DOJ OIG’s request for an interview. The DOJ OIG therefore was unable to determine from Ashcroft whether he sought additional DOJ read-ins to assist in the legal analysis of the program, how hard he may have pressed for these additional read-ins, or whether he believed he was receiving adequate legal advice about the program from Yoo alone during this early phase

of the PSP.

But there's one big-huge-tell about whether or not Ashcroft conducted sufficient analysis of this program to approve its legality:

Attorney General John Ashcroft approved the first Presidential Authorization for the PSP as to "form and legality" on the same day he was read into the program.

And again, later,

As noted, the Attorney General was read into the program on the same day he signed the first Authorization as to form and legality.

That's how at least three different explicit laws protecting your privacy and civil liberties got eliminated in the matter of one day, ladies and gentlemen!

Yoo Appears to Have Been Read In Before Ashcroft

Now, the second reference to Ashcroft's seemingly insta-approval of the program actually explains why Ashcroft was even asked to give the program insta-approval: neither he nor—at least according to Michael Hayden—Yoo were involved in early planning discussions for the program.

According to the NSA OIG report, the first Presidential Authorization was the product of discussions between former NSA Director Hayden and White House officials. Hayden also consulted with NSA senior technical experts and experienced attorneys from the NSA's Office of General Counsel. While he consulted with NSA personnel in identifying critical intelligence gaps, only Hayden knew about and participated in the development of the Presidential Authorization by serving as a technical advisor. After the Authorization was

signed, NSA attorneys supported the
lawfulness of the resulting program.
Hayden stated that DOJ did not
participate in his early meetings about
the NSA's collection activities.

So, to summarize thus far. Shortly after 9/11, Cheney and Hayden sat down and dreamt up vast new domestic spying capabilities. Presumably, Alberto Gonzales (not exactly a legal heavyweight) and David Addington (a legal heavyweight if you're a fan of authoritarianism) participated in the planning. But no one representing the rule of law was at the table. Then, after they had planned the program and drafted a Presidential Authorization, they brought it to John Ashcroft who—that very same day—certified its "form and legality."

Ashcroft may or may not have asked, that day, to consult with Deputy AG Larry Thompson and his Chief of Staff David Ayres. But Bush or Cheney said no, and that was that.

Here's where the timing gets confusing. The timeline shows that the program was authorized—presumably, given the reference to Ashcroft signing "the first Authorization," with Ashcroft's insta-authorization—on October 4, 2001 (in any case, Ashcroft was telling FBI Head Robert Mueller that the program was legal as early as October 21, 2001). Note that, if the Bush Administration was already using these techniques under FISA's 15-day exemption, they likely pressured Ashcroft using the expiration of that exemption period. According to the timeline Steven Bradbury gave the ACLU, that very same day as the program was first approved, October 4, Yoo wrote his first memo on the illegal program, for Gonzales, "regarding what legal standards might govern the use of certain intelligence methods to monitor communications by potential terrorists." Yet the IG Report says, "In September and early October 2001, Yoo prepared several preliminary opinions relating to hypothetical random domestic electronic surveillance activities." Now, Yoo wrote an

opinion on FISA on September 25 for David Kris, but that was in no way hypothetical. So there would seem to be at least one other memo, written in September, one Bradbury didn't mention to the ACLU (which means it must be a doozy, I figure).

All of which, though speculative, suggests that Yoo actually **was** involved in discussions even before Ashcroft got read in and immediately authorized the program, because he had already written a memo on the program before Ashcroft got read in and immediately approved the program (which presumably happened on or shortly before October 4). This seems to accord with public reports that Addington went around Ashcroft to work with Yoo directly on this. So much for Gonzales' claim that " it was Ashcroft's decision as to how to satisfy his obligations as Attorney General." But, because Ashcroft refused to cooperate with the IG investigation, we don't get details of the degree to which Ashcroft remained ignorant of Yoo's work with Addington and Gonzales.

The DOJ OIG was also unable to determine whether Attorney General Ashcroft was fully aware of the advice Yoo was providing directly to the White House about the PSP.

Pretty convenient the way that Ashcroft, Addington, and Yoo all couldn't manage to explain this to the IG, huh?

Note, the approvals for the program after that first month largely consist of Yoo memos written for Ashcroft. The IG Report doesn't say it, but the November 2, 2001 memo that was the first official memo supporting the program was addressed to Ashcroft. Yoo wrote another, 2-page memo for Ashcroft on January 9, 2002, apparently in conjunction with reauthorization of the program. He wrote a memo on October 11, 2002—that just happened to coincide with Congress passing the Iraq War authorization. The IG Report states that this memo "reiterated the

same basic analysis" that Yoo made in his November 2, 2001 memo (though given the timing and the subsequent expansion of FAA to WMD proliferation, I wonder if Yoo extended its application to WMD at that point). Then, finally, Yoo wrote a memo in February 2003 on "the potential use of certain information collected in the course of classified foreign intelligence activities." This appears to be what the IG Report describes as Yoo's analysis of "DOJ's handling of PSP information with respect to its discovery obligations in international terrorism prosecutions."

Ashcroft Claims He Wasn't Fully Briefed on Data Mining Aspects of Program

That all addresses when Ashcroft was read into the program—but not what he learned. At least according to Ashcroft, he was never fully briefed on what are presumably the vacuuming and data-mining aspects of the program (we know this because of all the leaks that make it clear that data mining was the primary issue behind the March 10 confrontation) until after Philbin and Goldsmith replaced Yoo. The IG Report explains:

In a May 20, 2004 memorandum, Ashcroft wrote that it was not until Philbin and later Goldsmith explained to him that aspects of the NSA's Other Intelligence Activities were not accurately described in the prior Authorizations that he realized that he had been certifying the Authorizations prior to March 2004 based on a misimpression of those activities.

The IG Report reinforces Ashcroft's point here. It says that Yoo's memos left out details on the Other Intelligence Activities that were part of the program.

Yoo also discussed in his memoranda the legal rationale for Other Intelligence Activities authorized as part of the PSP. To the extent that particular statutes might appear to preclude these

activities, Yoo concluded that "we do not believe that Congress may restrict the President's inherent constitutional powers, which allow him to gather intelligence necessary to defend the nation from direct attack."

However, as detailed in Chapter Three of the DOJ OIG report, Yoo's discussion of some of the Other Intelligence Activities did not accurately describe the scope of these activities. Yoo's factual description of these activities was later identified by his successors in the Office of Legal Counsel and ODAG in late 2003 as insufficient and presenting a serious impediment to recertification as to form and legality.

Given that these "Other Intelligence Activities" are almost certainly the data mining and vacuuming parts of the program, it's not just FISA that Yoo was blowing off here; it was also the Electronic Communication Protection Act and the Wiretap Act. And, by the time Philbin and Goldsmith discovered the discrepancy between what Yoo had described and what was actually being done, it also violated Congress' explicit prohibition in the 2004 Defense Appropriations Law against DOD conducting such activity.

All of which seems to explain the issues behind Ashcroft's being read in on the program. He wasn't involved in the initial discussions about the program (John Yoo may or may not have been). And from that point going forward, he took his understanding of the program from Yoo's description of it—which left out key details about the data mining and vacuum side of things.

Using the Guy in ICU to Cover Your Legal Shortcomings

In typical fashion, when this all blew up in March 2004, the White House tried to claim that Ashcroft's approvals of a program he remained partly ignorant about still counted as valid

approvals of the program.

The March 11 Authorization differed markedly from prior Authorizations in three other respects. It explicitly asserted that the President's exercise of his Article II Commander-in-Chief authority displaced any contrary provisions of law, including FISA. It clarified the description of certain Other Intelligence Activities being conducted under the PSP to address questions regarding whether such activities had been authorized explicitly in prior Authorizations. It also stated that in approving the prior Presidential Authorizations as to form and legality, the Attorney General previously had authorized the same activities now being approved under the March 11 Authorization.

When Addington wrote this Authorization, of course, the AG in question was still lying in the ICU ward, according to his doctors, legally incompetent to respond. What a convenient way for Addington to finagle retroactive authorization for data mining data from American citizens without any explicit authorization to do so.