WORKING THREAD ON ILLEGAL WIRETAP MEMO

As I noted in this post, DOJ has released two of the memos used to authorize the illegal wiretap program. I made some brief comments on the November 2, 2001 John Yoo memo here. This will be a working thread on the May 6, 2004 Jack Goldsmith memo.

P1: Note in the TOC (and in later references), DOJ has redacted the date when the program was modified. We know this date is some time after the March 10, 2004 hospital confrontation. Pretty much the only reason to redact that date is to make it harder to know how long the program operated solely with Bush's authorization. And the biggest reason to do that is to hide the detail from al-Haramain's lawyers, because it would add evidence that the phone calls intercepted in early March 2004 were intercepted at a time when the program didn't have DOJ sanction.

P3: The first redaction on the page is interesting because it seems to qualify what they do after they intercept communications in the US; remember that one of the big conflicts at the hospital confrontation was the data mining they were doing (in defiance of Congress specifically defunding data mining of US citizens).

P3: Note the invocation of 18 USC 2510-2521 in addition to FISA. This makes it sort of explicit they were using other authorization processes for some of this. I'll come back to this point. But it's worth noting that the 2010 opinion cleaning up past exigent letter use used 18 USC 2511(2)(f) to do so.

P5-6: Note that footnote 2, which probably describes ongoing air patrol surveillance of the country is redacted. Note, too, that the entire paragraph is classified Secret. Goldsmith was basically using the black (heh) helicopters

patrolling the skies—which we could literally hear and see—as basis to rationalize the claim that it was okay for the military to be operating in the US. And the government believes we shouldn't know that. Moreover, there appears to have been ongoing patrols we weren't supposed to know about in 2004.

P6: Note how Cap'n Jack asserts that 2001 AUMF is still active in May 2004:

> Acting under his constitutional authority as Commander in Chief, and with the support of Congress, the President dispatched forces to Afghanistan and, with the cooperation of the Northern Alliance, toppled the Taliban regime from power. Military operations to seek out resurgent elements of the Taliban regime and al Qaeda fighters continue in Afghanistan to this day. See e.g., Mike Wise and Josh White, Ex-NFL Player Tillman Killed in Combat, Wash. Post, Apr. 24, 2004, at A1 (noting that "there are still more than 10,000 U.S. troops in the country and fighting continues against remnants of the Taliban and al Qaeda").

He could have found any number of sources to support his claim that the 10,000 troops (ah, the good old days) in Afghanistan sustained the AUMF. Instead, he cited a story reporting Pat Tillman was "killed in combat"—itself a story that was the product of elaborate govt propaganda.

P6-7: Note the citation of the Mueller quote from testimony he gave to SSCI on February 24, 2004. That's interesting timing, because at a February 11, 2004 hearing, Ron Wyden had asked whether Total Information Awareness, which had been explicitly defunded for that fiscal year, at which point Michael Hayden said he wanted to answer in closed session.

> Sen. **Ron Wyden**, D-Ore., asked Director

> of National Intelligence John Negroponte and FBI Director Robert Mueller whether it was "correct that when [TIA] was closed, that several … projects were moved to various intelligence agencies…. I and others on this panel led the effort to close [TIA]; we want to know if Mr. Poindexter's programs are going on somewhere else."
>
> Negroponte and Mueller said they didn't know. But Negroponte's deputy, Gen. **Michael V. Hayden**, who until recently was director of the NSA, said, "I'd like to answer in closed session." Asked for comment, Wyden's spokeswoman referred to his hearing statements."

I wonder if the Mueller briefing Goldsmith cited was from the closed session where DIA and FBI gave their response?

P7: Note the reference to minimization. I believe that's the first we've heard about minimization in the early days of the program. Also note that he directs DOD generally, not NSA specifically, to do the minimization. That's downright odd. [Update: now, we've had discussion about minimization before. See this post.]

P8: Note the fourth redaction on this page, after the words, "without resort to judicial warrants." It appears that warrants is followed by a period, but that doesn't make sense as it appears there are a few more words to that sentence. Judicial warrants … "and oversight," maybe? Any other guesses?

P8: Goldsmith notes that the Gang of Four were briefed on the program "in 2002 and 2003." As I have noted before, there should have been a briefing in January 2004. Much of the rest of that footnote may well explain how they got out of that briefing.

P9: Note the second redaction, hiding who besides the DCI reviews the threat assessment

that justifies the continuation of the program before it goes to OLC. That's particularly interesting given that the Terrorist Threat Integration System was doing the treat assessment in May 2004, when Goldsmith wrote this opinion. And John Brennan, currently Obama's Deputy National Security Advisor, was in charge of the TTIC at the time. In any case, it doesn't seem justifiable to redact who, besides the DCI, does this review. Note that the IG Report also refers OGC attorneys reviewing the the threat assessment to fluff it up if it wasn't sufficient to justify sustaining the program.

P9: Goldsmith writes:

> As explained below, since the inception of [redacted name of program] intelligence from various sources (particularly from interrogations of detained al Qaeda operatives) has provided a continuing flow of information indicating that al Qaeda has had, and continues to hae, multiple redundant plans for executing further attacks with the United States.

See how one illegal program serves to justify another illegal program?

P11: Goldsmith launches his discussion of the changes that took place in March 19 with a discussion of "how the NSA accomplishes the collection activity under [the program]." That might support the datamining aspect, but maybe not.

P15: Note there's a word after the "Commander in Chief Clause" in the description of the basis Bush invoked to authorize the program on March 11. Wonder what that is?

P16: The modification took place on March 19. Note that it pertained to making it clear "there were reasonable grounds to believe that a communicant was an agent of an international terrorist group …" I'm betting the caveat after

that doesn't ultimately say what Goldsmith would, that the terrorist organization has to target the US.

P16: Note Goldsmith authorizes three activities. One is the authority to "intercept the content of international communications 'for which … a party to such communication is a group engaged in international terrorism, or activities in preparations therefor, or any agent of such a group,' as long as that group is al Qaeda, an affiliate of al Qaeda, or another international terrorist group that the President has determined both (a) is in armed conflict with the United States and (b) poses a threat of hostile action within the United States."

P17: Goldsmith lists the following opinions related to this program:

- October 4, 2001
- November 2, 2001, expressly authorizing a November 2, 2001 authorization
- October 11, 2002: confirming the application of prior analysis

Note two things. First, this list doesn't coincide with other lists (Goldsmith ignores the October 23, 2001 4th amendment eliminating one, as well as some "hypothetical ones" in between; the IG Report only talks about the November 4 one, and Bradbury talks about a few more.

Also note the space between the date, October 4, 2001, and the main clause of the sentence, "we evaluated." One thing I'm increasingly convinced is that the program operated under FISA's 15-day window until October 3, 2001. So I wonder if that acknowledges that fact?

P18: Note that Goldsmith starts w/12333. That's the EO that Bush pixie dusted.

P20: The paragraphs that appear in part on this page appear to be misclassified. They both talk

exclusively about published legislation. Neither mentions the name of the program. Yet both are classified TS.

P21: Note how Goldsmith introduces his claim that FISA is not exclusive: “We conclude that the Congressional Authorization is critical for [redacted name of program] in two respects.” That reveals how much he reverse his analysis, not looking at what the AUMF said, bu what he needed to justify the program.

P23: My discussion of the newly disclosed OLC opinion discussed in the footnote is here.

P30: The examples Goldsmith uses to show the continuity of SIGINT is terrible cherry picking. How is Jeb Stuart’s personal wiretapper, wiretapping commercially run cables, similar to wiretapping private phone calls? MOre damning still is his lack of any treatment of Vietnam era wiretapping, done under cover of war, but targeting speech.

Note too where Goldsmith highlights the phrase “control all other telecommunications traffic” when discussing WWII surveillance. Since that’s what we think they were doing here, I find the emphasis notable.

P31: Note that Goldsmith refers to the 15-day exemption under FISA; he says “as noted above,” meaning he has already treated this, in what must be a now-redacted section. Particularly given Goldsmith’s discussion of the legislative intent–to give Congress time to alter FISA in time of war–his non-discussion of PATRIOT here is nothing short of dishonest. (He does discuss it later, though.) This allows him to say, “The mere fact that the Authorization does not amend FISA is not material,” without at the same time acknowledging that Congress was at that moment amending FISA! It’s all the more important given the October 4 approval that would have marked the end of the 15-day exemption period.

P31: Note the footnote invoking the Padilla and Hamdi circuit court decisions. On his last day as AAG, Goldsmith wrote an opinion that reviews

whether a recent court decision—almost certainly Rasul—affected his analysis. But we're not being given that opinion.

P32: I wonder how Goldsmith responded to Tom Daschle's op-ed making it clear that Congress specifically refused action in the US, given that he claims the "deter and prevent acts of international terrorism against the US" amounted to carte blanche to operate in the US.

P32: NOte the reference to the Iraq AUMF—and its invocation of terrorism. That's relevant not least bc Goldsmith expands the terms of the Afghan AUMF beyond al Qaeda.

P34: Note that the paragraph of this page, discussing a PATRIOT change, is unclassified. The next, also discussing a PATRIOT change, is classified TS. The only plausible explanation I can think of for the the second is to hide from people outside of the compartment how full of shit that second paragraph is.

[Note: I lost a huge chunk of this post right in here—looking to see if I can reconstruct it]

P39: Check out this tautology Goldsmith uses to argue foreign intelligence doesn't need a warrant:

> In foreign intelligence investigations, the targets of surveillance are agents of foreign powers who may be specially trained in concealing their activities from our government and whose activities may be particularly difficult to detect.

Of course, the whole point of this program is to find people who might be agents of foreign powers; we don't know that they are until the investigation finds them.

P40-41: This is a troubling assertion about Keith:

> In addition, there is a further basis on which Keith is readily distinguished. As Keith made clear, one of the significant

> concerns driving the Court’s conclusion in the domestic security context was the inevitable connection between perceived threats to domestic security and political dissent. As the Court explained, “Fourth Amendment protections become the more necessary when teh targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute when the Government attempts to act under so vague a concept as the power to protect “domestic security.” Keith 407 US at 314.see also id at 120 (“Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent.”) Surveillance of domestic groups necessarily raises a First Amendment concern that generally is not present when the subjects of the surveillance are the agents of foreign powers.

Aside from the obvious fact that the surveillance Goldsmith was justifying almost always had a religious component, a lot of the evidence picked up on alleged domestic Islamic terrorists amounts to speech. And often a disagreement about things like the Iraq war. It’s more of the tautological construction, if foreign then not First Amendment, when that is obviously not the case. Note, there’s a big redaction after the passage above which I suspect is nonsense.

P41: Goldsmith:

> Second, it also bears noting that in the 1970s the Supreme Court had barely started to develop the “special needs” jurisprudence of warrantless searches under the Fourth Amendment.

I’m gonna have to either return to this or just hope bmaz hits it. It’s like every section of this opinion Goldsmith chooses to deal with a second, exclusive period of history.

P43: Note how Goldsmith pretends Congress passed FISA in 2001, not 1978.

> To be more precise, analysis of [redacted–name of program] presents an even narrower question: namely, whether, in the context of an ongoing armed conflict, Congress may, through FISA, impose restrictions on the means by which the Commander in Chief may use the capabilities of the Department of Defense to gather intelligence about the enemy in order to thwart foreign attacks on the United States.

Putting aside the fact that this program identified **who the enemy is**, as much as collecting information from that enemy, Goldsmith here betrays his task. Not to see whether Bush acted properly in not asking for legislation to amend FISA, but to suggest that FISA is an addition to the already existing program. Which of course it was not.

This is made more clear a few lines later:

> In almost every previous instance in which the country has been threatened by war or imminent foreign attack and the President has taken extraordinary measures to secure the national defense, Congress has acted to support the Executive through affirmative legislation granting the President broad wartime powers, or else the Executive has acted as exigent circumstances in the absence of any congressional action whatsoever.

In his book Goldsmith repeatedly says Bush’s (Cheney’s, Addington’s) mistake was in not consulting Congress. And that’s evident here,

too: of course Congress made affirmative legislation. It's called the PATRIOT Act. But for some reason the President refused to ask for these powers.

P46: Note that in his review of enumerated Congressional powers Goldsmith doesn't consider the power to declare war?

P51: Note the reference to the President's threat assessment on March 11, 2004. You'd think that'd mention the Madrid bombing that happened that day. But of course at that point Aznar was pretending that ETA caused the bombing, not an al Qaeda inspired–but not AQ direct–group.

P61: I presume Goldsmith didn't have a straight face when he wrote the last full paragraph trying to distinguish Youngstown–bc Congress gave other alternatives to resolve labor disputes–from FISA, which Congress was actively changing per the Executive's requests in 2001.

P70ff: Note how here Goldsmith argues not just that FISA can't restrict POTUS bc of inherent power, but it can't bc FISA is so onerous that "it 'render[s] it impossible for the President to perform his constitutionally prescribed functions.' [Redacted–curious what this cite is] Several factors combine to make the FISA process an insufficient mechanism for responding to the crisis the President has faced in the wake of the September 11 attacks." It then has a totally redacted discussion about why FISA makes POTUS' job impossible. This strikes me as the reason why Goldsmith's innocuous discussion of the switch to 72-hour warrant requirement is classified TS. Because Congress was working to make it less onerous.

P102: Jack Goldsmith, bleeding heart defender of Wall Street:

> The nation has already suffered one attack that disrupted the Nation's financial center for days and that successfully struck at the command and control center for the Nation's military.

Glad to see those 3000 people didn’t weigh in here. I’ll return to this logic in upcoming days. After all, if the risk of disruption on Wall Street gives the President super-human powers, then shouldn’t we be using them to reel in Wall Street now?

P105: Goldsmith’s stawmen:

> Thus, a program of surveillance that operated by listening to the content of every telephone call in the United States in order to find those calls that might relate to terrorism would require us to consider a rather different balance here.

Right. They’re not taking “content” of every telephone call. They’re taking data.