THAT TIME WHEN JOHN YOO DEEMED EO 12333 OPTIONAL (WORKING THREAD)

I Con the Record has just released the May 17, 2002 letter John Yoo wrote to Colleen Kollar-Kotelly justifying Stellar Wind. This either lays out for the first time or repeats Yoo's claim — which I first reported in 2007, based on a Sheldon Whitehouse Senate address, here — that the President doesn't have to follow EO 12333.

This will be a working thread.

(2) Note Yoo says the attacks caused 5,000 deaths, well beyond the time when authorities knew it to be closer to 3,000.

(2) Yoo mentioned the anthrax attack. Did NSA use Stellar Wind to investigate it?

(2) Yoo uses a more moderate justification here — military being deployed to protect buildings — than Goldsmith did in his 2004 memo, where he talked about specific military flights.

(2) Check EO on creating Homeland Security office on domestic program.

(2) As soon as Yoo starts talking about Stellar Wind, he adopts the conditional tense: "Electronic surveillance techniques would be part of this effort." This of course follows on Yoo admitting Congress modified FISA (though he doesn't name the statute).

(2) Note in this really squirrelly hypothetical section, Yoo says the surveillance could include email "within" the US, which would be entirely domestic.

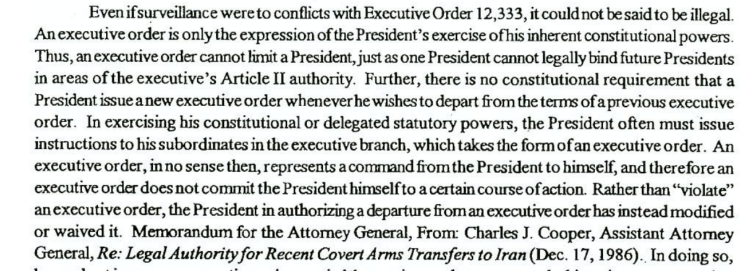
(2-3) Note throughout Yoo describes Bush as "Chief Executive."

(3) Yoo points to absence of a charter as basis for doing whatever NSA wants.

(3) “Congress, however, has not imposed any express statutory restrictions on the NSA’s ability to intercept communications that involve United States citizens or that occur domestically.” (based on the absence of such language in NSA)

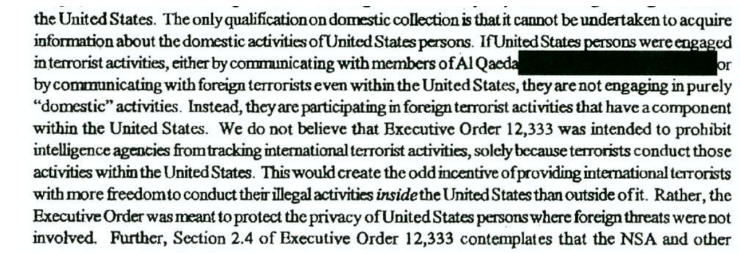
(4) I believe the second redaction is designed to enable the wiretapping of people claimed to be tied to the anthrax attack.

(5) Here’s the passage that said EO 12333 is optional.



Even if surveillance were to conflicts with Executive Order 12,333, it could not be said to be illegal. An executive order is only the expression of the President's exercise of his inherent constitutional powers. Thus, an executive order cannot limit a President, just as one President cannot legally bind future Presidents in areas of the executive's Article II authority. Further, there is no constitutional requirement that a President issue a new executive order whenever he wishes to depart from the terms of a previous executive order. In exercising his constitutional or delegated statutory powers, the President often must issue instructions to his subordinates in the executive branch, which takes the form of an executive order. An executive order, in no sense then, represents a command from the President to himself, and therefore an executive order does not commit the President himself to a certain course of action. Rather than "violate" an executive order, the President in authorizing a departure from an executive order has instead modified or waived it. Memorandum for the Attorney General, From: Charles J. Cooper, Assistant Attorney General, *Re: Legal Authority for Recent Covert Arms Transfers to Iran* (Dec. 17, 1986). In doing so,

(4-5) I find Yoo’s language the more troubling given what precedes it — the rationale.



the United States. The only qualification on domestic collection is that it cannot be undertaken to acquire information about the domestic activities of United States persons. If United States persons were engaged in terrorist activities, either by communicating with members of Al Qaeda [redacted] or by communicating with foreign terrorists even within the United States, they are not engaging in purely "domestic" activities. Instead, they are participating in foreign terrorist activities that have a component within the United States. We do not believe that Executive Order 12,333 was intended to prohibit intelligence agencies from tracking international terrorist activities, solely because terrorists conduct those activities within the United States. This would create the odd incentive of providing international terrorists with more freedom to conduct their illegal activities *inside* the United States than outside of it. Rather, the Executive Order was meant to protect the privacy of United States persons where foreign threats were not involved. Further, Section 2.4 of Executive Order 12,333 contemplates that the NSA and other

I’ll come back to this, but note how “domestic” gets defined here. Much of this is still on the books and explains why Muslims get treated differently.

(5, 6) Note Yoo’s explanation for doing this off the books.

1. Need for secrecy
2. Inability to get FISC to approve bulk content collection or domestic metadata collection
3. No knowledge of identity of target

That's not speed, which later became the excuse

(5) "FISA only provides a safe harbor for electronic surveillance, and cannot restrict the President's ability to engage in warrantless searches that protect the national security."

(5) Note Yoo refers to the metadata dragnet as "general collection," which sounds an awful lot like a general warrant.

(7) The redactions on 7 are especially interesting given likelihood they conflict with either what K-K, Bates, or Howard subsequently approved.

(8) The timing of this is remarkable. This letter was written on the same date that Ashcroft changed the rules on the wall, which Lamberth unsuccessfully tried to impose some limits on. Then, on July 22, OLC further expanded the GJ sharing address in FN 8.

(8) Note, again, how Yoo is rewriting Keith and Katz.

(10) again, Yoo seems to be laying the groundwork for back door searches, which makes me wonder whether that's why this got released?

(12) I don't believe this border exception appears in Goldsmith. Which suggests there's something with the way this was applied that is particularly problematic.

(13) This must be the language in question. Goldsmith used another means to justify cross-border collection, while admitting it outright.

(14) This language also disappears from later justifications, suggesting it is part of the problem.

properly route the communication. A reasonable person could be expected to know that an ISP would record such message information for their own business purposes, just as telephone companies record phone numbers dialed. Furthermore, other information such as routing and server information is not even part of the content of a message written by the sender. Rather, such information is generated by the ISP itself, as part of its routine business operations, to help it send the electronic message through its network to the correct recipient. A sender could have no legitimate expectation of privacy over information he did not even include in his message, but instead is created by the ISP as part of its own business processes. A person would have no more privacy interest in that information than he would have in a postmark stamped onto the outside of an envelope containing his letter.

The discussion continues onto the next page. It

is of particular interest that K-K got this letter, given that her category distinctions probably addressed these distinctions.

(15) Bingo. This might be a very simple explanation for why they had to go to FISC.

Congress extended pen register authority to surveillance of electronic mail, it also subjected that authority to the general restrictions of Title III and FISA, which require the Justice Department to obtain an ex parte court order before using such devices. While the requirements for such an order are minimal, see 18 U.S.C. § 3122 (government attorney must certify only that information likely to be gained from pen register "is relevant to an ongoing criminal investigation being conducted by that agency"), a warrantless surveillance program would not seek a judicial order for the surveillance program here. Title III attempts to forbid the use of pen registers or, now, electronic mail trap and trace devices, without a court under Title III or FISA.

(17) This passage about picking the Defense Secretary rather than AG is pretty much what I noted in my post on the underyling 4A argument, but it has ramifications for the post-2004 program. Also note how closely it piggybacks with the changes to AG guidelines and the

Thus, the Fourth Amendment should not limit military operations to prevent attacks that take place within the American homeland, just as it would not limit the President's power to respond to attacks launched abroad. A surveillance program, undertaken for national security purposes, would be a necessary element in the effective exercise of the President's authority to prosecute the current war successfully. Intelligence gathered through surveillance allows the Commander-in-Chief to determine how best to position and deploy the Armed Forces. It seems clear that the primary purpose of the surveillance program is to defend the national security, rather than for law enforcement purposes, which might trigger Fourth Amendment concerns. In this respect, it is significant that the President would be ordering the Secretary of Defense (who supervises the NSA), rather than the Justice Department, to conduct the surveillance, and that evidence would not be preserved for later use in criminal investigations. While such secondary use of such information for law enforcement does not undermine the primary national security purpose motivating the surveillance program, it is also clear that such intelligence material, once developed, can be made available to the Justice Department for domestic use.

This language explains why they weren't looking in Stellar Wind for Brady material, and also explains how they do parallel construction (which plays out in the IG Report).

(19) This section lays out the need for the scary memos, without revealing to K-K they exist.

In authorizing an electronic surveillance program, the President should lay out the proper factual predicates for finding that the terrorist attacks had created a compelling governmental interest. The September 11, 2001 attacks caused thousands of deaths and even more casualties, and damaged both the central command and control facility for the Nation's military establishment and the center of the country's private financial system. In light of information that would be provided by the intelligence community and the military, the President could further conclude that terrorists continue to have the ability and the intention to undertake further attacks on the United States. Given the damage caused by the attacks on September 11, 2001, the President could judge that future terrorist attacks could cause massive damage and casualties and threatens the continuity of the federal government. He could conclude that such circumstances justify a compelling interest on the part of the government to protect the United States and its citizens from further terrorist attack. It seems certain that the federal courts would defer to the President's determination on whether the United States is threatened by attack and what measures are necessary to respond. *See, e.g., The Prize Cases,* 67 U.S. 635, 670 (1862) (decision whether to consider rebellion a war is a question to be decided by the President). These determinations rest at the core of the President's power as Commander-in-Chief and his role as representative of the Nation in its foreign affairs. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

(21) The big redacted section—the biggest redaction in the letter—suggests they're still hiding the capture and pull up method of this,

and therefore the sheer bulk of all this. That’s all the more interesting given that the wall was coming down at that moment. The other redactions in this section, too, seem to track the indexing function. Again, it’s interesting K-K had read (or reviewed) this before the PRTT discussion.