THE OBAMA ADMINISTRATION ALMOST DOUBLED DOWN ON YOO'S ILLEGALITY

Over at JustSecurity the other day, ACLU's Patrick Toomey argued that the Administration's current interpretation of FISA — especially its embrace of upstream surveillance — means the Obama Administration has gone beyond John Yoo's thinking on surveillance as exhibited in his May 17, 2002 letter to FISC judge Colleen Kollar-Kotelly.

> Perhaps most remarkably, however, the Obama Justice Department has pressed legal theories even more expansive and extreme than Yoo himself was willing to embrace. Yoo rounded out his Stellar Wind memo with an effort to reassure Judge Kollar-Kotelly that the government's legal interpretation had limits, saying: "Just to be clear in conclusion. We are not claiming that the government has an unrestricted right to examine the contents of all international letters and other forms of communication." But that is essentially the power the NSA claims today when it conducts Upstream surveillance of Americans' Internet communications. The NSA has installed surveillance equipment at numerous chokepoints on the Internet backbone, and it is using that equipment to search the contents of communications entering or leaving the country in bulk. As the ACLU recently explained in *Wikimedia v. NSA*, this surveillance is the digital analogue of having a government agent open every letter that comes through a mail processing center to read its contents before determining

> which letters to keep. In other words, today the Obama administration is defending surveillance that was a bridge too far for even John Yoo.

I'm not sure I'm convinced. After all, the Administration claims it is *not* examining the contents of all international letters, but rather only looking at those where selected identifiers show up in data packets. Yeah, I know it's a bullshit argument, but they pretend that's not searching the contents, really. Moreover we have substantial reason to believe they were doing (some) of this anyway.

But there is a curious relationship between a claim Yoo made in his letter and the Obama Administration's views on FISA.

In the letter, Yoo writes,

> FISA purports to be the exclusive means for conducting electronic surveillance for foreign intelligence, … FISA establishes criminal and civil sanctions for anyone who engages in electronic surveillance, under color of law, except as authorized by statute, warrant, or court order. 50 U.S.C. § 1809-10. It might be thought, therefore, that a warrantless surveillance program, even if undertaken to protect the national security, would violate FISA's criminal and civil liability provisions.
>
> Such a reading of FISA would be an unconstitutional infringement on the President's Article II authorities. FISA can regulate foreign intelligence surveillance only to the extent permitted by the Constitution's enumeration of congressional authority and the separation of powers.
>
> [snip]
>
> [A]s we explained to Congress during the passage of the Patriot Act, the ultimate

> test of whether the government may engage in foreign surveillance is whether the government's conduct is consistent with the Fourth Amendment, not whether it meets FISA.
>
> This is especially the case where, as here, the executive branch possess [sic] the inherent constitutional power to conduct warrantless searches for national security purposes.

Effectively, Yoo is saying that even if they blow off FISA, they will be immune from the penalties under 50 USC §1809-10 so long as what they were doing fulfilled the Fourth Amendment, including an expansive reading of special needs that Yoo lays out in his memo. (Note, this was explained in the DOJ Stellar Wind IG Report — starting at PDF 47 — but this letter makes it more clear.)

As a reminder, on two occasions, John Bates disagreed with that interpretation, first in 2010 when he ruled NSA couldn't continue to access the five years of data it overcollected under the PRTT Internet dragnet, and then again in 2011 when he said the government couldn't disseminate the illegally collected upstream data (and Vaughn Walker disagreed in a series of rulings in the Al Haramain case in 2010, though the 9th Circuit partially overturned that in 2012). We know, thanks to Snowden, that the government considered appealing the order. And in his summary of the resolution of this issue, Bates made it clear that the government's first response was to say that limits on illegally collected data don't apply.

> However, issues remained with respect to the past upstream collection residing in NSA's databases. Because NSA's upstream collection almost certainly included at least some acquisitions constituting "electronic surveillance" within the meaning of 50 U.S.C. § 1801 (f), any overcollection resulting from the

> government's misrepresentation of the scope of that collection implicates 50 U.S.C. § 1809(a)(2). Section 1809(a)(2) makes it a crime to "disclose[] or use[] information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized" by statute. The Court therefore directed the government to make a written submission addressing the applicability of Section 1809(a), which the government did on November 22, 2011. See [redacted – probably a reference to Bates' July 2010 opinion], Oct. 13, 2011 Briefing Order, and Government's Response to the Court's Briefing Order of Oct. 13, 2011 (arguing that Section 1809(a)(2) does not apply).

Ultimately, though, the government not only (said it) destroyed the illegal upstream data, but claims to have destroyed all its PRTT data in a big rush (so big a rush it didn't have time to let NSA's IG certify the intake collection of data).

And it replaced that PRTT program by searching data under SPCMA it claimed to have collected legally … somewhere.

I don't pretend to understand precisely went on in those few weeks in 2011, though it's clear that Obama's Administration at least *considered* standing by the spirit of Yoo's claim, even though the opinion itself had been withdrawn.

But I do know that at least through 2009, the government treated all its PRTT and Section 215 data *as* EO 12333 data, and in fact the providers appear not to have distinguished it either (more on this in upcoming days, hopefully). That is, it was collecting data with FISC sanction that it treated as data it collected outside of FISC sanction (that is, under EO 12333), and it was ignoring the rules FISC imposed.

Which leads me to wonder whether the government *still* doesn't believe it remains immune from penalties laid out in FISA.