HOW DAVID ADDINGTON HID THE DOCUMENT IMPLICATING GEORGE BUSH IN ILLEGAL WIRETAPPING

On December 16 and December 20, 2005, respectively — just days after the NYT revealed its existence — EPIC and ACLU FOIAed DOJ for documents relating to George Bush's (really, Dick Cheney's) illegal wiretap program (National Security Archive also FOIAed, though more narrowly). Among other documents, they requested, "any presidential order(s) authorizing the NSA to engage in warrantless electronic surveillance." Yet in spite of the fact that the ACLU was eventually able to get DOJ to cough up some of the OLC memos that provided a legal rationale for the program, no presidential order was ever turned over. I don't believe (though could be mistaken) it was even disclosed in declarations submitted by Steven Bradbury in the suit.

There's a very good (and, sadly, legal) reason for that. According to the 2009 NSC draft IG report the Guardian released yesterday, it's not clear DOJ ever had the Authorization. The White House is exempt from FOIA, and it's likely that NSA could have withheld the contents of the Director's safe from any FOIA, which is where the hard copy of the Authorization was kept.

It's worth looking more closely at how David Addington guarded the Authorization, because it provides a lesson in how a President can evade all accountability for unleashing vast powers against Americans, and how the National Security establishment will willingly participate in such a scheme without ensuring what they're doing is really legal.

The IG report describes the initial

Authorization this way:

> On 4 October 2001, President George W. Bush issued a memorandum entitled "AUTHORIZATION FOR SPECIFIED ELECTRONIC ACTIVITIES DURING A LIMITED PERIOD TO DETECT AND PREVENT ACTS OF TERRORISM WITHIN THE UNITED STATES." The memorandum was based on the President's determination that after the 11 September 2001 terrorist attacks in the United States, an extraordinary emergency existed for national defense purposes.
>
> [snip]
>
> The authorization specified that the NSA could acquire the content and associated metadata of telephony and Internet communications for which there was probable cause to believe that one of the communicants was in Afghanistan or that one communicant was engaged in or preparing for acts of international terrorism. In addition, NSA was authorized to acquire telephone and Internet metadata for communications with at least one communicant outside the United States or for which no communicant was known to be a citizen of the United States. NSA was allowed to retain, process, analyze and disseminate intelligence from the communications acquired under the authority.

And while the NSA IG report doesn't say it, the Joint IG Report on the program (into which this NSA report was integrated) reveals these details:

> Each of the Presidential Authorizations included a finding to the effect that an extraordinary emergency continued to exist, and that the circumstances "constitute an urgent and compelling governmental interest" justifying the

> activities being authorized without a court order.
>
> Each Presidential authorization also included a requirement to maintain the secrecy of the activities carried out under the program.

David Addington's illegal program

While the Joint report obscures all these details, the NSA IG report makes clear that Dick Cheney and David Addington were the braintrust behind the program.

> The Counsel to the Vice President used [a description of SIGINT collection gaps provided by Michael Hayden] to draft the Presidential authorization that established the PSP.

Neither President Bush nor White House Counsel Alberto Gonzales wrote this Authorization. David Addington did. On page 24, the report describes President George W. Bush being cleared into the program in its first 30 days along with Addington and others, as if that weren't a given.

As you consider this program, always remember that it was birthed by David Addington, a guy famous for carrying a Constitution in his pocket.

Not only did Addington draft this thing, he did so with very little input from NSA.

> no other NSA personnel [besides then Director of NSA Michael Hayden] participated in the drafting process. … [DOJ] representatives were not involved in any of the discussions that [Hayden] attended and he did not otherwise inform them.

The NSA IG report makes no mention whether DOJ personnel were involved; the Joint report

reveals that John Ashcroft approved the Presidential Authorization the same day he got read into the program.

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

John Yoo must have seen the Authorizations, as he would subsequently (starting a month after the program started) write a series of poorly crafted OLC memos supporting it. Counsel for Intelligence Policy James Baker was the only other non-FBI DOJ person read into the program. The head of OLC, Jay Bybee, was not.

It's equally unclear whether FBI Director Robert Mueller was shown the Authorization though it seems unlikely given that on October 21, 2001 Ashcroft wrote him a one-page mamo confirming the program had been appropriately authorized.

Once David Addington's Authorization was completed, it got stuck away in Hayden's safe and closely held.

> The original Authorization and renewals were kept in the NSA Director's safe, and access to the documents was tightly controlled.

Addington continued to write the renewal Authorizations and would personally deliver it to the NSA (on a few occasions NSA picked it up at the White House).

Hayden hides the Authorization from those who needed to ensure compliance with it

As Hayden set about implementing this program, he shared the authorization with very few people.

He initially shared it with the General Counsel, and subsequently — **4 days after the program was launched** — the Associate General Counsel for

Operations and the NSA Deputy General Counsel, who reviewed it and said the program was legal. No one at NSA's Office of General Counsel documented these reviews.

Ultimately, Hayden would share the Authorization with those NSA lawyers, Program Managers, and "certain operational personnel."

When he briefed the people who would implement it on October 8, 2001, "he did not share the specific content of the Authorization with attendees." Rather than relying on the Authorization itself for the limits of the program, analysts used criteria provided by OGC based on it. Going forward, "most NSA operations personnel, including the Chief of the [Counterterrorism] Product Line, who approved tasking for content collection, were not allowed to see the actual authorization."

Within the first 18 months of the programs operations, this close hold led to "two early violations of the Authorization." Only after that — at the NSA IG's insistence — did anyone even write up formal Delegations of Authority that explained the Authorization for those implementing it. And even then, this was only shared with the Program Managers and two Signals Intelligence Directorate CT Product Line managers.

It's unclear when NSA's IG got to look at it (though he presumably did to write this report). But the IG wasn't even read into the program until August 2002.

Those other branches and the Authorization

The IG Report makes no mention of the Authorization being shared with Congress in its briefings on the program (remember that when she first got read into the torture program in February 2003, Jane Harman consistently but unsuccessfully nagged about seeing the presidential authorization tied to that program).

And then there are the judges, who of course

didn't review the program but did have worries about information collected under it being used in FISA applications. The NSA IG report describes Hayden providing then Chief FISA Judge Royce Lamberth "a very detailed PSP briefing" on January 31, 2002, with John Yoo "explain[ing] the Program's legality." The Joint IG report on the program suggests there was more to Lamberth's initial briefing than that:

> The classified report and the full DOJ OIG report describe the circumstances under which the Presiding Judge was notified of the existence of the PSP and read into the program, and the measures subsequently taken to address the effect of the PSP on the government's relationship with the FISC.

Lamberth appears to have insisted that his predecesor, Collen Kollar-Kotelly, get briefed in from the start, because he attended her May 17, 2002 briefing. At that briefing, she was shown, but not allowed to retain, "a short memorandum, prepared by [John Yoo] that set out a broad overview of the legal authority for conducting the PSP. I get the feeling that didn't satisfy her, because on August 12, 2002, she was briefed at the White House. At that point, she was able to review the Authorization, apparently the only person outside of the White House and NSA (and, presumably, John Yoo, but that is unclear as well) that got to glimpse it.

The telecoms bow down before Article II

The NSA IG report makes no mention of the Authorization being shared with the telecoms who cooperated "voluntarily" based on formal NSA letters asking for the help, though the initial letters did state that "the requested assistance was authorized by the President with the legal concurrence of the Attorney General, pursuant to Article II of the Constitution." (The later ones, which came after the President signed the Afghan AUMF, cited the President's Commander-in-Chief powers.) Just one company — an internet

provider first approached in October 2002 — appears to have asked for "a letter from the Attorney General certifying the legality of the PSP." That company, and another "private sector" company (that is, presumably not a telecom and not an internet provider) that asked to consult with an outside counsel about the legality, did not participate in the program. One telecom (probably Verizon or MCI) asked for and got an Attorney General letter stating that the program was "a lawful exercise of authorities assigned to the President under Article II of the Constitution" on August 8, 2003, after having participated from the start. And, of course, the letters sent to the telecoms on March 12, 2004 stated that White House Counsel Alberto Gonzales, not Attorney General John Ashcroft, had approved the program's legality (interestingly, the IG Report calls Gonzales, "Counsel to the President," apparently unaware of the Clinton-era ruling that WHCO works for us).

And that, my friends, is how 500 government employees started cooperating to wiretap the American people with fewer than 20 people getting to see the piece of paper the President signed saying his ass was on the line for it all.

NSA's disinterest in the legal basis for it all

And while about half of the people who had seen a document with President Bush's signature were at NSA, those people seemed to be equally uninterested in seeing anyone else's real legal analysis of the program.

According to the NSA IG report, at least, not a single person at NSA saw an OLC opinion on the program until 2004.

> General Hayden, NSA lawyers, and the NSA Inspector General agreed that it was not necessary for them to see the early opinions in order to execute the terms of the Authorization, but felt it would be helpful to do so. NSA was, however,

> given access and provided comments to the OLC opinion issued in 2004.

Interestingly, then DOD General Counsel Jim Haynes got some kind of OLC memo on February 2, 2002, one that curiously spoke of hypothetical activities. And the GC of some agency (which could be Haynes again) got a memo on May 30, 2003, but this doesn't appear to have been the NSA.

And it's not like no one at NSA asked for OLC guidance. In 2 stunning paragraphs, the IG Report reveals that even those who wanted to read the OLC memo were not permitted to read it.

> **First Request**. NSA General Counsel Robert Deitz stated that he asked the Vice President's Counsel if he could see the opinion. Even though Mr. Deitz's request was denied the Vice President's Counsel read a few paragraphs of the opinion to him over the classified telephone line.
>
> **Second Request**. At a 8 December 2003 meeting with the DOJ Associate Deputy Attorney General to discuss collection of metadata and an upcoming NSA OIG compliance audit, NSA's IG and Deputy GC requested to see the OLC legal opinion. The Counsel to the Vice President, who unexpected attended the meeting, denied the request and said that any request to see the opinion had to come directly from General Hayden.

This second one is particularly troubling, because we know that Pat Philbin and Jack Goldsmith were already worried about the legal authorization of the program. And it is unclear whether this December 8 meeting took place before or after one the Joint IG report describes:

> In December 2003, Goldsmith and Philbin met with Counsel to the Vice President

> Addington and White House Counsel Gonzales at the White House to express their growing concerns about the legal underpinnings of the program.

But I trust Addington had other ways to find out about meetings he should surprisingly appear at.

And while some at NSA at least acknowledged that it was "odd" that they were wiretapping Americans without anymore backup than they had, they never insisted on getting more.

> General Hayden stated he never asked for or read the OLC legal opinion supporting the PSP. The Deputy GC stated that it was his understanding that the opinion was not shared with NSA because it was considered confidential legal advice to the President.
>
> The IG, GC, Deputy GC agreed that their inability to read the OLC opinion did not prevent or impair them from executing and overseeing the Program. They were able to determine legality of the program independently from DoJ (see Appendix D). However, the IG said that he found the secrecy surrounding the legal rational to be "odd." Specifically, he said that it was "strange that NSA was told to execute a secret program that everyone knew presented legal questions, without being told the underpinning legal theory." The IG, GC, and Deputy GC all stated that they had yet to see the full text of the original OLC opinion.

And so it happened that the spy bureaucracy just kept churning along, wiretapping Americans, without a burning curiosity whether it was all legal.

Update, 12/29: Fooling Ashcroft

I should have included this passage in this post

from the start, from the Joint IG Report:

> On the morning of March 11,2004, with the Presidential Authorization set to expire, President Bush signed a new Authorization for the PSP. In a departure from the past practice of having the Attorney General certify the Authorization as to form and legality, the March 11 Authorization was certified by White House Counsel Gonzales. The March 11 Authorization also 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 actually 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.** 17
>
> 17 The DOJ OIG determined that this statement subsequently was removed from future Authorizations after Ashcroft complained to Gonzales that the statement was "inappropriate." 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.

Given everything we've seen, this passage makes

several things clear.

First, domestic wiretapping **was** authorized (see this post). That's clear not just because the reference back to clarity seems to be a reference back to that Hayden comment, but also because superseding FISA would be unnecessary unless you were conducting domestic surveillance.

And they had, via a variety of means, tried to prevent Ashcroft from knowing that, so he'd approve it without getting cranky about clearly violating the law.