

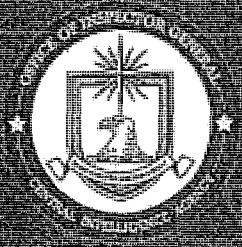
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(U) REPORT ON THE
PRESIDENT'S SURVEILLANCE PROGRAM

VOLUME I

10 JULY 2009



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OFFICES OF INSPECTORS GENERAL
OF THE
DEPARTMENT OF DEFENSE
DEPARTMENT OF JUSTICE
CENTRAL INTELLIGENCE AGENCY
NATIONAL SECURITY AGENCY
OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

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U.S. Department of Justice
Office of the Inspector General

A Review of the Department of Justice's Involvement with the President's Surveillance Program (U)



Department of Justice
Office of the Inspector General
Oversight and Review Division
July 2009

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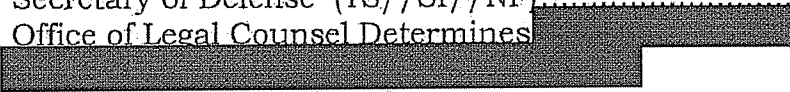
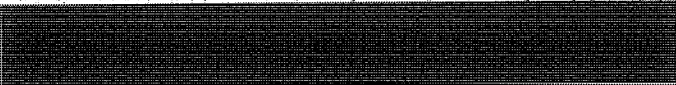
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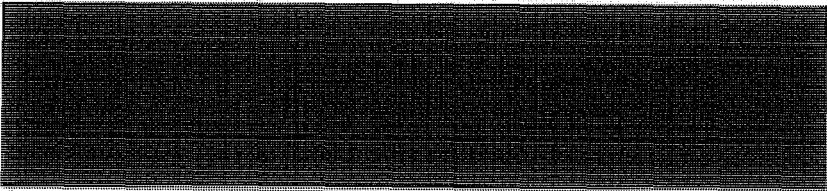
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electronic surveillance, as defined under FISA, must be conducted in accordance with FISA.¹⁶ (U)

Executive Order 12333 prohibits the collection of foreign intelligence information by "authorized [agencies] of the Intelligence Community . . . for the purpose of acquiring information concerning the domestic activities of United States persons." Id. at 2.3(b). (U)

However, in authorizing the Stellar Wind program, [REDACTED]

[REDACTED] As discussed previously, the legal rationale advanced for this exemption was that the Authorization for Use of Military Force and the President's Commander-in-Chief powers gave the President the authority to collect such information, notwithstanding the FISA statute. ~~(TS//STLW//SI//OC/NF)~~

II. Presidential Authorizations (U)

The Stellar Wind program was first authorized by the President on October 4, 2001, and periodically reauthorized by the President through a series of documents issued to the Secretary of Defense entitled "Presidential Authorization for Specified Electronic Surveillance Activities During a Limited Period to Detect and Prevent Acts of Terrorism Within the United States" (Presidential Authorization or Authorization). A total of 43 Presidential Authorizations, not including modifications and related presidential memoranda, were issued over the duration of the program from October 2001 through February 2007.¹⁷ Each Authorization directed the

¹⁶ Prior to September 11, 2001, Executive Order 12333 and FISA were generally viewed as the principal governing authorities for conducting electronic surveillance. For example, in 2000 the NSA reported to Congress that

(U) The applicable legal standards for the collection, retention, or dissemination of information concerning U.S. persons reflect a careful balancing between the needs of the government for such intelligence and the protection of the rights of U.S. persons, consistent with the reasonableness standard of the Fourth Amendment, as determined by factual circumstances.

(U) In the Foreign Intelligence Surveillance Act (FISA) and Executive Order (E.O.) 12333, Congress and the Executive have codified this balancing. (Citations omitted.)

NSA Report to Congress, *Legal Standards for the Intelligence Community in Conducting Electronic Surveillance* (2000). (U)

¹⁷ The Presidential Authorizations were issued on the following dates: October 4, 2001; November 2, 2001; November 30, 2001; January 9, 2002; March 14, 2002; April 18, 2002; May 22, 2002; June 24, 2002; July 30, 2002; September 10, 2002; October 15, 2002; November 18, 2002; January 8, 2003; February 7, 2003; March 17, 2003; April 22, 2003.

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Secretary of Defense to “use the capabilities of the Department of Defense, including but not limited to the signals intelligence capabilities of the National Security Agency, to collect foreign intelligence by electronic surveillance,” provided the surveillance met certain criteria. The specific criteria are described in detail in Chapters Three and Four of this report. ~~(TS//STLW//SI//OC/NF)~~

A. Types of Collection Authorized ~~(S//NF)~~

The scope of collection permitted under the Presidential Authorizations varied over time, but generally involved intercepting the content of certain telephone calls and e-mails, and the collection of bulk telephone and e-mail meta data. The term “meta data” has been described as “information about information.” As used in the Stellar Wind program, for telephone calls, meta data generally refers to “dialing-type information” (the originating and terminating telephone numbers, and the date, time, and duration of the call), but not the content of the call. For e-mails, meta data generally refers to the “to,” “from,” “cc,” “bcc,” and “sent” lines of an e-mail, but not the “subject” line or content. ~~(TS//STLW//SI//OC/NF)~~

The information collected through the Stellar Wind program fell into three categories, often referred to as “baskets”:

- Basket 1 (content of telephone and e-mail communications);
- Basket 2 (telephony meta data); and
- Basket 3 (e-mail meta data). ~~(TS//STLW//SI//OC/NF)~~

(b)(1), (b)(3)



2003; June 11, 2003; July 14, 2003; September 10, 2003; October 15, 2003; December 9, 2003; January 14, 2004; March 11, 2004; May 5, 2004; June 23, 2004; August 9, 2004; September 17, 2004; November 17, 2004; January 11, 2005; March 1, 2005; April 19, 2005; June 14, 2005; July 26, 2005; September 10, 2005; October 26, 2005; December 13, 2005; January 27, 2006; March 21, 2006; May 16, 2006; July 6, 2006; September 6, 2006; October 24, 2006; and December 8, 2006. The last Presidential Authorization expired February 1, 2007. There were also two modifications of a Presidential Authorization and one Presidential memorandum to the Secretary of Defense issued in connection with the Stellar Wind program. ~~(TS//STLW//SI//OC/NF)~~

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value. As the period for each Presidential Authorization drew to a close, the Director of Central Intelligence (DCI), and as of June 3, 2005, the Director of National Intelligence (DNI) prepared a threat assessment memorandum for the President describing potential terrorist threats to the United States and outlining intelligence gathered through the Stellar Wind program and other means during the previous Authorization period. The DCI (and later the DNI) and the Secretary of Defense reviewed these memoranda and signed a recommendation that the program be reauthorized.

~~(TS//STLW//SI//OC/NF)~~

Each recommendation was then reviewed by the OLC to assess whether, based on the threat assessment and information gathered from other sources, there was "a sufficient factual basis demonstrating a threat of terrorist attacks in the United States for it to continue to be reasonable under the standards of the Fourth Amendment for the President to [continue] to authorize the warrantless searches involved" in the program. The OLC then advised the Attorney General whether the constitutional standard of reasonableness had been met and whether the Presidential Authorization could be certified "as to form and legality."

~~(TS//STLW//SI//OC/NF)~~

D. Approval "as to form and legality" (U)

As noted above, the Presidential Authorizations were "[a]pproved as to form and legality" by the Attorney General or other senior Department official, typically after the review and concurrence of the OLC. The lone exception to this practice was the March 11, 2004, Authorization which we discuss in Chapter Four. ~~(TS//SI//NF)~~

However, there was no legal requirement that the Authorizations be certified by the Attorney General or other Department official. Former senior Department official Patrick Philbin told us he thought one purpose for the certification was to give the program a sense of legitimacy so that it not "look like a rogue operation."

Bradbury told us that the Justice Department certifications served as official confirmation that the Department had determined that the activities carried out under the program were lawful.

~~(TS//STLW//SI//OC/NF)~~

Former Attorney General Gonzales told us that certification of the program as to form and legality was not required as a matter of law, but he believed that it "added value" to the Authorization for three reasons. First,

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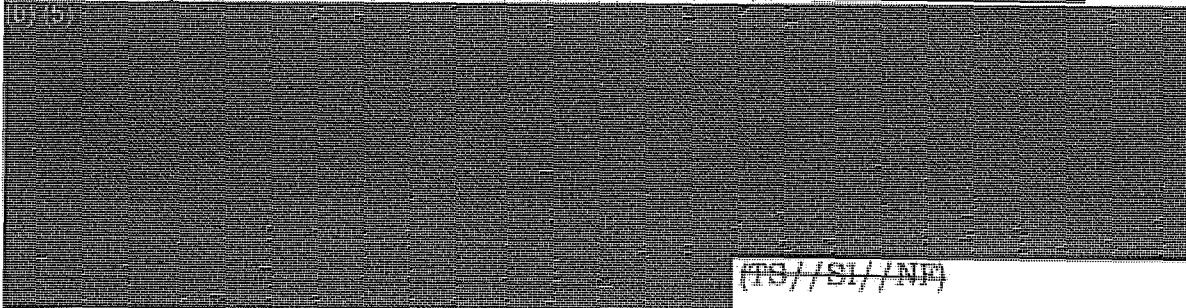
Bybee said that Yoo began working in OLC in July 2001 and that all of the Deputies were in place before Bybee began serving as head of the OLC that November. (U)

Bybee told us he was never read into the Stellar Wind program and could shed no further light on how Yoo came to draft the OLC opinions on the program. However, he said that Yoo had responsibility for supervising the drafting of opinions related to national security issues by the time the attacks of September 11 occurred.³⁰ Bybee described Yoo as “articulate and brilliant,” and also said he had a “golden resume” and was “very well connected” with officials in the White House. He said that from these connections, in addition to Yoo’s scholarship in the area of executive authority during wartime, it was not surprising that Yoo “became the White House’s guy” on national security matters. (U)

b. Yoo’s Legal Analysis of a Warrantless Domestic Electronic Surveillance Program ~~(TS//SI//NF)~~

Before the start of the Stellar Wind program under the October 4, 2001, Presidential Authorization, Yoo drafted a memorandum evaluating the legality of a “hypothetical” electronic surveillance program within the United States to monitor communications of potential terrorists. His memorandum, dated September 17, 2001, was addressed to Timothy Flanigan, Deputy White House Counsel, and was entitled “Constitutional Standards on Random Electronic Surveillance for Counter-Terrorism Purposes.” ~~(TS//STLW//SI//OC/NF)~~

Yoo drafted a more extensive version of this memorandum, dated October 4, 2001, for White House Counsel Gonzales. [REDACTED]



³⁰ As noted above, Yoo, Ashcroft, Card, and Addington declined or did not respond to our request for interviews, and we do not know how Yoo came to deal directly with the White House on legal issues surrounding the Stellar Wind program. In his book “War by Other Means,” Yoo wrote that “[a]s a deputy to the assistant attorney general in charge of the office, I was a Bush Administration appointee who shared its general constitutional philosophy. . . . I had been hired specifically to supervise OLC’s work on [foreign affairs and national security].” John Yoo, *War by Other Means*, (Atlantic Monthly Press, 2006), 19-20. ~~(TS//SI//NF)~~

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Yoo's September 17 and October 4 memoranda were not addressed specifically to the Stellar Wind program, but rather to a "hypothetical" randomized or broadly scoped domestic warrantless surveillance program. As discussed below, the first Office of Legal Counsel opinion explicitly addressing the legality of the Stellar Wind program was not drafted until after the program had been formally authorized by President Bush on October 4, 2001. ~~(TS//SI//OC/NF)~~

Gonzales told the OIG that he did not believe these first two memoranda fully addressed the White House's understanding of the Stellar Wind program. Rather, as described above, these memoranda addressed the legality of a "hypothetical" domestic surveillance program rather than the Stellar Wind program as authorized by the President and carried out by the NSA.³⁵ However, Gonzales also told us that he believed these first two memoranda described as lawful activities that were broader than those carried out under Stellar Wind, and that therefore these opinions "covered" the Stellar Wind program. ~~(TS//SI//NF)~~

2. Presidential Authorization of October 4, 2001

~~(TS//SI//NF)~~

On October 4, 2001, President Bush issued the first of 43 Presidential Authorizations for the Stellar Wind program. The October 4 Authorization directed the Secretary of Defense to "use the capabilities of the Department of Defense, including but not limited to the signals intelligence capabilities of the National Security Agency, to collect foreign intelligence by electronic surveillance," provided the surveillance was intended to:

(a) acquire a communication (including but not limited to a wire communication carried into or out of the United States by cable) for which there is probable cause to believe that [REDACTED]

(b)(1), (b)(3) [REDACTED] a party to such communication is a group engaged in international terrorism, or activities in preparation therefor, or an agent of such a group; or

(b) acquire, with respect to a communication, header/router/addressing-type information, including telecommunications dialing-type data, but not the contents of the communication, when (i) at least one party to such communication is outside the United States or (ii) no party to such communication is known to be a citizen of the United States. ~~(TS//STLW//SI//OC/NF)~~

³⁵ Gonzales noted that Deputy White House Counsel Timothy Flanigan, the recipient of the first Yoo memorandum, was not read into Stellar Wind. ~~(U//FOUO)~~

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Authorization on the spot. According to Baker, Levin also told Baker that when he learned there was no memorandum from the Office of Legal Counsel concerning the program, Levin told Yoo to draft one.

~~(TS//STLW//SI//OC/NF)~~

Levin's account to us of the instruction that Yoo draft a memorandum concerning the legality of the program differed slightly from Baker's account. Levin told us that he said to Ashcroft that it "wasn't fair" that Ashcroft was the only Justice official read into the program, and that for Ashcroft's protection Levin advised Ashcroft to have another Department official read into the program for the purpose of providing advice on the legality of the program. Levin said he learned that Ashcroft was able to get permission from the White House to have one other person read into the program to advise Ashcroft, although Levin was not certain how Yoo came to be selected as that person.³⁹ As discussed below, Gonzales told us that it was the President's decision to read John Yoo into the program.

~~(TS//STLW//SI//OC/NF)~~

C. Presidential Authorization is Revised and the Office of Legal Counsel Issues Legal Memoranda in Support of the Program (November 2001 through January 2002)

~~(TS//STLW//SI//OC/NF)~~

1. Presidential Authorization of November 2, 2001

~~(TS//SI//NF)~~

On November 2, 2001, with the first Presidential Authorization set to expire, President Bush signed a second Presidential Authorization. The second Authorization relied upon the same authorities in support of the President's actions, chiefly the Article II Commander-in-Chief powers and the AUMF. The second Authorization cited the same findings in a threat assessment as to the magnitude of the potential threats and the likelihood of their occurrence in the future. However, the scope of authorized content collection and meta data acquisition was redefined by adding the italicized language below in paragraphs 4(a) and (b):

- (a) acquire a communication (including but not limited to a wire communication carried into or out of the United States by cable) for which, *based on the factual and practical considerations of everyday life there are reasonable grounds* to believe that ~~(b)(1), (b)(3)~~

³⁹ By October 4, 2001, Yoo had already drafted two legal analyses on a hypothetical warrantless surveillance program and therefore already had done some work related to the program prior to October 4 when Ashcroft was read in. ~~(TS//SI//NF)~~

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In addition, former OLC Principal Deputy and Acting Assistant Attorney General Steven Bradbury described this

(b) (5)

~~(TS//STLW//SI//OC/NF)~~

2. Yoo Drafts Office of Legal Counsel Memorandum Addressing Legality of Stellar Wind

~~(TS//STLW//SI//OC/NF)~~

The Stellar Wind program was first authorized by President Bush and certified as to form and legality by Attorney General Ashcroft on October 4, 2001, without the support of any formal legal opinion from the Office of Legal Counsel expressly addressing Stellar Wind. ~~(TS//SI//NF)~~

The first OLC opinion directly supporting the legality of the Stellar Wind program was dated November 2, 2001, and was drafted by Yoo. His opinion also analyzed the legality of the first Presidential Authorization and a draft version of the second Authorization.⁴⁰ ~~(TS//SI//NF)~~

In his November 2 memorandum to Attorney General Ashcroft, Yoo opined that the Stellar Wind program

(b) (5)

As discussed in Chapter Four of this report, however, perceived deficiencies in Yoo's memorandum later became critical to the Office of Legal Counsel's decision to reassess the Stellar Wind program in 2003. We therefore describe Yoo's legal analysis in his November 2 memorandum. ~~(TS//SI//NF)~~

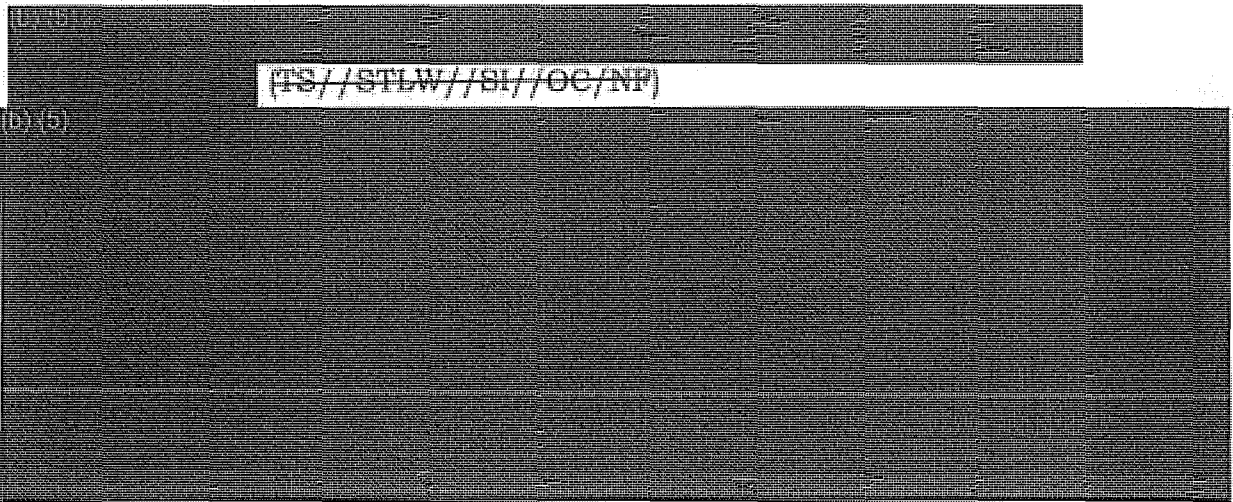
Yoo acknowledged at the outset of his November 2 memorandum that "[b]ecause of the highly sensitive nature of this subject and the time pressures involved, this memorandum has not undergone the usual editing and review process for opinions that issue from our Office [OLC]." The memorandum then reviewed the changes to NSA's collection authority between the first and second Presidential Authorizations.

(b) (5)

⁴⁰ The second Authorization was issued on November 2, 2001. In developing his legal memorandum, Yoo analyzed a draft of the second Authorization dated October 31, 2001. The OIG was not provided the October 31 draft Presidential Authorization, but based on Yoo's description in his November 2 memorandum, it appears that the draft that Yoo analyzed tracked the language of the final November 2, 2001, Authorization signed by the President. ~~(TS//SI//NF)~~

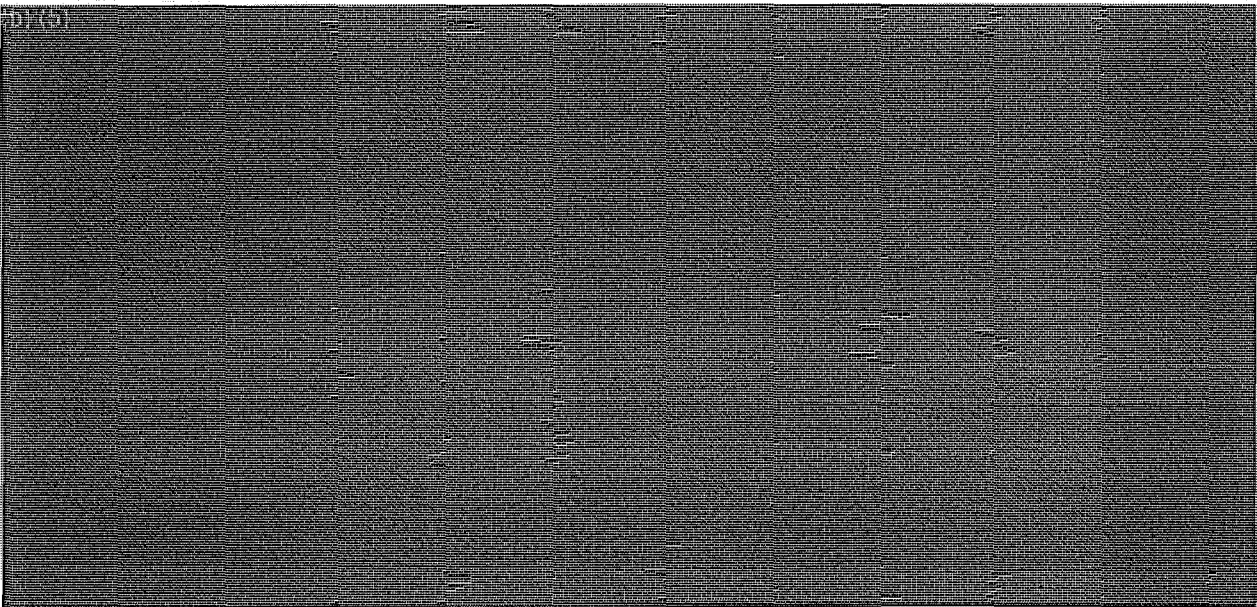
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Yoo did acknowledge in his memorandum that the first Presidential Authorization was “in tension with FISA.” Yoo stated that FISA “purports to be the exclusive statutory means for conducting electronic surveillance for foreign intelligence,” but Yoo then opined that “[s]uch a reading of FISA would be an unconstitutional infringement on the President’s Article II authorities.”⁴¹ Citing advice of the OLC and the position of the Department as presented to Congress during passage of the USA PATRIOT Act several weeks earlier, Yoo characterized FISA as merely providing a “safe harbor for electronic surveillance,” adding that it “cannot restrict the President’s ability to engage in warrantless searches that protect the national security.”

~~(TS//STLW//SI//OC/NF)~~



⁴¹ As discussed in Chapter Four, Goldsmith criticized this statement as conclusory and unsupported by any separation of powers analysis. (U//~~FOUO~~)

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Regarding whether the activities conducted under the Stellar Wind program could be conducted under FISA, Yoo wrote that it was problematic that FISA required an application to the FISA Court to describe the ~~(b)(1), (b)(3)~~ or "facilities" to be used by the target of the surveillance. Yoo also stated that it was unlikely that a FISA Court would grant a warrant to cover ~~(b)(1), (b)(3)~~ as contemplated in the Presidential Authorization. Noting that the Authorization could be viewed as a violation of FISA's civil and criminal sanctions in 50 U.S.C. §§ 1809-10, Yoo opined that in this regard FISA represented an unconstitutional infringement on the President's Article II powers. According to Yoo, the ultimate test of whether the government may engage in warrantless electronic surveillance activities is whether such conduct is consistent with the Fourth Amendment, not whether it meets the standards of FISA.

~~(TS//STLW//SI//OC/NF)~~

Citing cases applying the doctrine of constitutional avoidance, Yoo reasoned that reading FISA to restrict the President's inherent authority to conduct foreign intelligence surveillance would raise grave constitutional questions.⁴² Yoo wrote that "unless Congress made a clear statement in FISA that it sought to restrict presidential authority to conduct warrantless searches in the national security area – which it has not – then the statute must be construed to avoid such a reading."⁴³ ~~(TS//STLW//SI//OC/NF)~~

⁴² Yoo's memorandum cited the doctrine of constitutional avoidance, which holds that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). Yoo cited cases supporting the application of this doctrine in a manner that preserves the President's "inherent constitutional power, so as to avoid potential constitutional problems." See, e.g., *Public Citizen v. Department of Justice*, 491 U.S. 440, 466 (1989). ~~(TS//STLW//SI//OC/NF)~~

⁴³ On March 2, 2009, the Justice Department released nine opinions written by the OLC from 2001 through 2003 regarding "the allocation of authorities between the President and Congress in matters of war and national security" containing certain propositions that no longer reflect the views of the OLC and "should not be treated as authoritative for any purpose." Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, Memorandum for the Files, "Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001," January 15, 2009, 1, 11. Among these opinions was a February 2002 classified memorandum written by Yoo which asserted that Congress had not included a clear statement in FISA that it sought to restrict presidential authority to conduct warrantless surveillance activities in the national security area and that the FISA statute therefore does not apply to the president's exercise of his Commander-in-Chief authority. In a January 15, 2009, memorandum (included among those released in March), Bradbury stated that this proposition "is problematic and questionable, given FISA's express references to the President's authority" and is "not supported by convincing reasoning." ~~(TS//STLW//SI//OC/NF)~~

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Yoo's analysis of this point would later raise serious concerns for other officials in the Office of Legal Counsel and the Office of the Deputy Attorney General (ODAG) in late 2003 and early 2004.⁴⁴ Among other concerns, Yoo did not address the 15-day warrant requirement exception in FISA following a congressional declaration of war. See 50 U.S.C. § 1811. Yoo's successors in the Office of Legal Counsel criticized this omission in Yoo's memorandum because they believed that by including this provision in FISA, Congress arguably had demonstrated an intention to "occupy the field" on the matter of electronic surveillance during wartime.⁴⁵

~~(TS//STLW//SI//OC/NF)~~

Yoo's memorandum next analyzed Fourth Amendment issues raised by the Presidential Authorizations. Yoo dismissed Fourth Amendment concerns regarding the NSA surveillance program to the extent that the Authorizations applied to non-U.S. persons outside the United States. Regarding those aspects of the program that involved interception of the international communications of U.S. persons in the United States, Yoo asserted that Fourth Amendment jurisprudence allowed for searches of persons crossing the border and that interceptions of communications in or out of the United States fell within the "border crossing exception." Yoo further opined that electronic surveillance in "direct support of military operations" did not trigger constitutional rights against illegal searches and seizures, in part because the Fourth Amendment is primarily aimed at curbing law enforcement abuses. ~~(TS//STLW//SI//OC/NF)~~

Finally, Yoo wrote that the electronic surveillance described in the Presidential Authorizations was "reasonable" under the Fourth Amendment and therefore did not require a warrant. In support of this position, Yoo cited Supreme Court opinions upholding warrantless searches in a variety of contexts, such as drug testing of employees and sobriety checkpoints to detect drunk drivers, and in other circumstances "when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable," *Veronia School Dist. 47J v. Acton*, 515 U.S. 464, 652 (1995) (as quoted in November 2, 2001, Memorandum at 20). Yoo wrote that in these situations the government's interest was found to have outweighed the individual's privacy interest, and that in this regard "no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 435 U.S. 280, 307 (1981). According

⁴⁴ One of these officials was Patrick Philbin, who following Yoo's departure was "dual-hatted" as both an Associate Deputy Attorney General and a Deputy Assistant Attorney General in the Office of Legal Counsel. (U)

⁴⁵ We discuss the OLC's reassessment and criticism of Yoo's analysis in Chapter Four. (U)

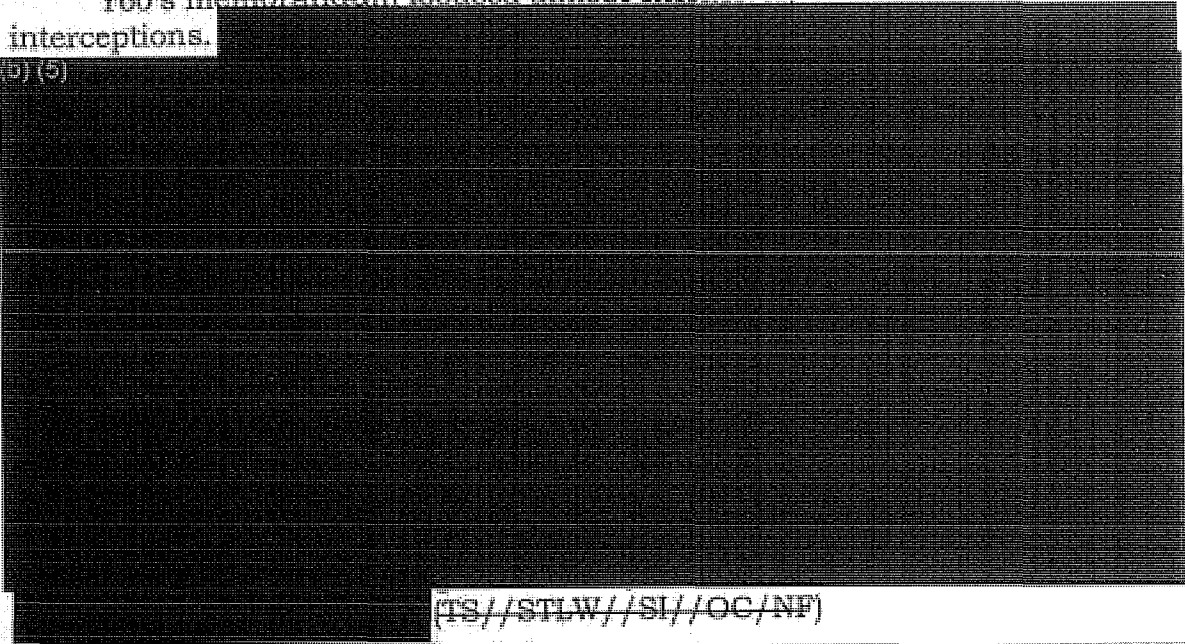
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to Yoo, the surveillance authorized by the Presidential Authorizations advanced this governmental security interest. ~~(TS//STLW//SI//OC/NF)~~

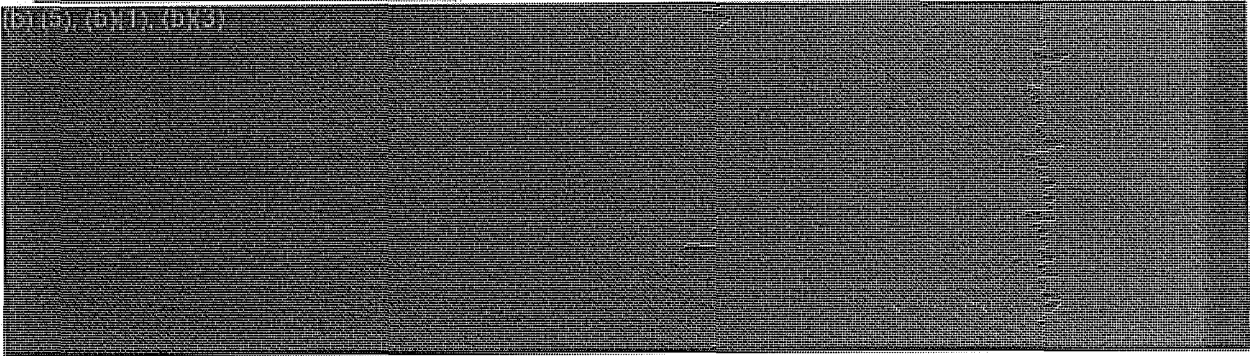
Yoo's memorandum focused almost exclusively on content interceptions.

(b) (5)

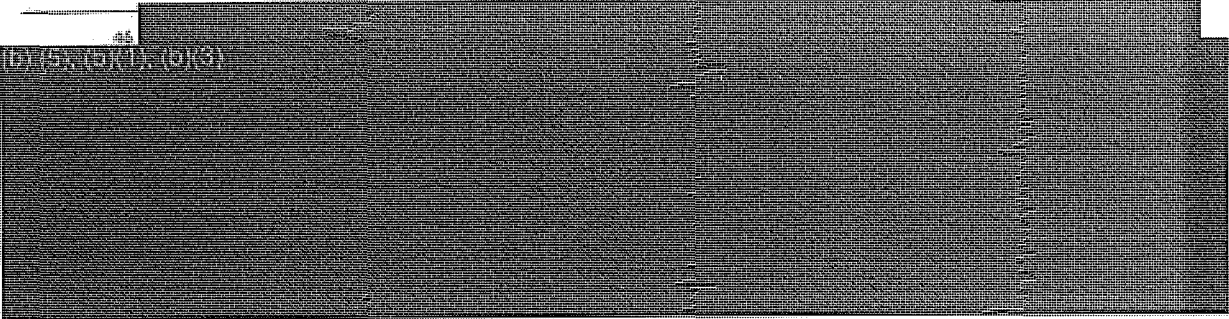


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(b) (5), (b) (1), (b) (3)



Yoo also omitted from his November 2 memorandum – as well as from his earlier September 17 and October 4, 2001, memoranda – any discussion of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), a leading case on the distribution of government powers between the Executive and



(b) (5), (b) (1), (b) (3)

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Legislative branches.⁴⁷ As discussed in Chapter Four, Justice Jackson's analysis of President Truman's Article II Commander-in-Chief authority during wartime in the *Youngstown* case was an important factor in the Office of Legal Counsel's reevaluation in 2004 of Yoo's opinion on the legality of the Stellar Wind program. ~~(TS//SI//NF)~~

3. Additional Presidential Authorizations (U)

On November 30, 2001, the President signed a third Authorization authorizing the Stellar Wind program. The third Authorization was virtually identical to the second Authorization of November 2, 2001, in finding that the threat of terrorist attacks in the United States continued to exist, the legal authorities cited for continuing the electronic surveillance, and the scope of collection. ~~(TS//STLW//SI//OC/NF)~~

OLC Principal Deputy and Acting Assistant Attorney General Bradbury told the OIG that

(b)(1), (b)(3)

Accordingly, the fourth Presidential Authorization, signed on January 9, 2002, modified the scope of collection to provide:

- (a) acquire a communication (including but not limited to a wire communication carried into or out of the United States by cable) for which, based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are reasonable grounds to believe such communication originated or terminated outside the United States and a party to such communication is a group

⁴⁷ In *Youngstown*, the Supreme Court held that President Truman's Executive Order directing the Secretary of Commerce to seize and operate steel plants during a labor dispute to produce steel needed for American troops during the Korean War was an unconstitutional exercise of the President's Article II Commander-in-Chief authority. In a concurring opinion, Justice Jackson listed three categories of Presidential actions against which to judge the Presidential powers. First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum[.]" Id. at 635. Second, Justice Jackson described a category of concurrent authority between the President and Congress as a "zone of twilight" in which the distribution of power is uncertain and dependant on "the imperatives of events and contemporary imponderables rather than on abstract theories of law." Id. at 637 (footnote omitted). Third, "[w]hen the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." Id. Justice Jackson concluded that President Truman's actions fell within this third category, and thus "under circumstances which leave Presidential power most vulnerable to attack and in the least favorable of possible constitutional postures." Id. at 640. (U)

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characterized the collection [REDACTED] and thus their legal advice was based on facts that more closely reflected the actual operation of the program.²²⁵
 (TS//STLW//SI//OC/NF)

In addition, Goldsmith and Philbin discovered that Yoo's assertion that the President had broad authority to conduct electronic surveillance without a warrant pursuant to his Commander-in-Chief powers under Article II of the Constitution, particularly during wartime, never addressed the FISA provision that expressly addressed electronic surveillance following a formal declaration of war. See 50 U.S.C. § 1811. Goldsmith also criticized Yoo's legal memoranda for failing to support Yoo's aggressive Article II Commander-in-Chief theory with a fully developed separation of powers analysis, and instead offering only sweeping conclusions. As an example, Goldsmith cited Yoo's assertion that reading FISA to be the "exclusive statutory means for conducting electronic surveillance for foreign intelligence" amounts to an "unconstitutional infringement on the President's Article II authorities."²²⁶ Moreover, noted Goldsmith, Yoo omitted from his separation-of-powers discussion any analysis of how the Youngstown Steel Seizure Case, a seminal Supreme Court decision on the distribution of governmental powers between the Executive and Legislative Branches during wartime, would affect the legality of the President's actions with respect to Stellar Wind.²²⁷ (TS//STLW//SI//OC/NF)

In reliance on Yoo's advice, the Attorney General certified the program "as to form and legality" some 20 times before Yoo's analysis was determined to be flawed by his successors in OLC and by attorneys in the Office of the Deputy Attorney General. We agree with many of the criticisms offered by Department officials regarding the practice of allowing a single Department attorney to develop the legal justification for the program

[REDACTED]

²²⁶ See Yoo Memorandum, November 2, 2001, at 9. Yoo went on to state that

[REDACTED] Yoo concluded that FISA "represents a statutory procedure that creates a safe harbor for surveillance for foreign intelligence purposes." Id. (TS//SI//NF)

²²⁷ The Department's Office of Professional Responsibility (OPR) intends to review whether Yoo's legal analysis concerning the Stellar Wind program violated any standards of professional conduct. OPR has similarly reviewed whether the legal analysis by Yoo and others concerning the detainee interrogation program violated standards of professional conduct. (TS//SI//NF)

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