QUESTIONS AND ANSWERS ABOUT BEGINNING OF DOMESTIC SPYING PROGRAM

The other day I noted that the Bush Administration seemed to have been using the 15-day exemption included in FISA to conduct domestic surveillance before the formal start date of the program.

> There were several things going on at once (see this post for more detail). There was some debate about the AUMF—but that got signed on September 18. There were initial discussions about the PATRIOT Act—including how FISA should be altered in it. There was a briefing of HPSCI on October 1 that—Nancy Pelosi understood—was part of expanded NSA authorities. And—according to Barton Gellman—the warrantless wiretap program was approved on October 4, 2001, and it began on October 6, 2001.
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> In other words, the program was formally approved on the 16th day after the AUMF.
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> But at least according to Nancy Pelosi, Congress was briefed on ongoing underlying activities as early as October 1.
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> Meaning, the Bush Administration was already using those expanded authorities—but they were doing so by exploiting the 15-day exemption written into FISA!

Since then, I've tried to confirm that assertion, but the picture has only gotten

muddier. There are two sets of conflicting data surrounding:

- Program start date
- OLC memo dates

James Bamford's *Shadow Factory* and Eric Lichtblau's reporting have some answers, but answers that raise a new set of questions. So here are some answers and more questions about the beginning of the domestic spying program.

Program Start Date

The IG Report explains the beginning of what it calls the Presidential Surveillance Program this way:

> In the days immediately after September 11, 2001, the NSA used its existing authorities to gather intelligence information in response to the terrorist attacks. When Director of Central Intelligence Tenet, on behalf of the White House, asked NSA Director Hayden whether the NSA could do more against terrorism, Hayden replied that nothing more could be done within existing authorities. When asked what he might do with more authority, Hayden said he put together information on what was operationally useful and technologically feasible. This information formed the basis of the PSP.
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> Shortly thereafter, the President authorized the NSA to undertake a number of new, highly classified intelligence activities. All of these activities were authorized in a single Presidential Authorization that was periodically reauthorized.

So, in the days immediately after 9/11, Hayden used "existing authorities" to gather intelligence information. Then Tenet asked Hayden what more he could do, and he said he

needed more authorities. "Shortly thereafter," Bush granted authorities covering a range of activities. The IG Report describes Hayden having a meeting with 80 to 90 people to explain the program which is useful to date the approval.

> After Hayden received the first Authorization, he assembled 80 to 90 people in a conference room and explained what the President had authorized. Hayden said: "We're going to do exactly what he said and not one photon or electron more."

Bamford dates the original authorization of the program to October 4, 2001 (Lichtblau does too, in *Bush's Law*, describing it as occurring 23 days after 9/11).

> … on October 4, Hayden received authorization to bypass the Foreign Intelligence Surveillance Court and begin eavesdropping on international communications to and from Americans without a warrant. (118)

And he describes the same meeting the IG Report describes—and dates it to October 6, 2001.

> In early October, Mike Hayden met a group of employees in a large windowless conference room just down the hall from his office.
>
> [snip]
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> "Let me tell you what I told them when we launched the program," said Hayden. This is the morning of October 6 in our big conference room—about eighty, ninety folks in there—and I was explaining what the president had authorized, and I ended up by saying, 'And we're going to do exactly what he said, and not one photon or one electron more' (119)

Note, one thing the IG Report says—but which Hayden appears not to have told Bamford—is that "all of these activities were authorized in a single Presidential Authorization." That is, the data mining and the large scale collection were authorized on October 4, too, though Hayden would like to claim just the wiretapping of al Qaeda-related calls was authorized.

Now, I had suggested that Hayden briefed Congress on October 1 on some preliminary version of this program. But that's not entirely right—or at least, Hayden has a different explanation. As noted, the IG Report says in the days immediately after 9/11, Hayden used his existing authorities to target al Qaeda. Bamford explains,

> Almost immediately after the attacks, Hayden beefed up the coverage of communications between Afghanistan and the U.S. Then, on his own initiative and without White House approval, he dropped the FISA-mandated rule of minimization on those communications, leaving in the names and other details of American citizens without court approval. (108)

Bamford's version—that Hayden stopped minimizing US person data—accords with the unredacted part of Nancy Pelosi's follow-up (dated October 11) on his October 1 briefing of his activities.

> During your appearance before the committee on October 1, you indicated that you had been operating since the September 11 attacks with an expansive view of your authorities with respect to the conduct of electronic surveillance under the Foreign Intelligence Surveillance Act and related statutes, orders, regulations, and guidelines. You seemed to be inviting expressions of concern from us, if there were any, and, after the briefing was over and I had a chance to reflect on what you said, I instructed staff to get more information

> on this matter for me. For several reasons, including what I consider to be an overly broad interpretation of President Bush's directive of October 5 on sharing with Congress "classified or sensitive law enforcement information" it has not been possible to get answers to my questions.
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> Without those answers, the concerns I have about what you said on the 1st can not be resolved, and I wanted to bring them to your attention directly. You indicated that you were treating as a matter of first impression, [redacted] being of foreign intelligence interest. As a result, you were forwarding the intercepts, and any information [redacted] without first receiving a request for that identifying information to the Federal Bureau of Investigation. Although I may be persuaded by the strength of your analysis [redacted] I believe you have a much more difficult case to make [redacted] Therefore, I am concerned whether, and to what extent, the National Security Agency has received specific presidential authorization for the operations you are conducting. Until I understand better the legal analysis regarding the sufficiency of the authority which underlies your decision on the appropriate way to proceed on this matter, I will continue to be concerned. [my emphasis]

I say Bamford's description that Pelosi's letter accords with the notion that Hayden stopped minimizing US person data because normally (as I understand it), FBI would get intercepts with US person data redacted, and would have to make a special request to learn the identities of US persons involved in the intercept (purportedly, to make sense of the rest of the intercept, not to spy on Americans directly). Pelosi's

description that Hayden was "forwarding the intercepts … without first receiving a request for that identifying information to the" FBI appears to suggest Hayden was just sending everything over—including identifying information—right away. That said, Pelosi's letter says more than that, which I'll return to below.

Pelosi's letter doesn't repeat the claim that Hayden was doing this "on his own initiative." That's significant, because Bamford relies on this Lichtblau and Shane article to make his claim, and that article overreads Pelosi's letter itself—suggesting the content I've included above proves the NSA "initiated growth of spying effort" (admittedly, in a headline, so it's not necessarily Lichtblau and Shane's doing). More interesting—for those who have followed my obsession with pixie dust—is this piece of news in the NYT article.

> Bush administration officials said on Tuesday that General Hayden, now the country's No. 2 intelligence official, had acted on the authority previously granted to the N.S.A., relying on an intelligence directive known as Executive Order 12333, issued by President Ronald Reagan in 1981. That order set guidelines for the collection of intelligence, including by the N.S.A.
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> "He had authority under E.O. 12333 that had been given to him, and he briefed Congress on what he did under those authorities," said Judith A. Emmel, a spokeswoman for the Office of the Director of National Intelligence. "Beyond that, we can't get into details of what was done."

EO 12333, we know, is the EO that Bush got the authority to change without altering to set up his program. Which suggests Bush may indeed have been involved in the early authorization for the program, but did so simply by sprinkling pixie

dust on St. Reagan's own EO.

So we've got the IG Report, presumably relying on no more than Hayden and Gonzales' explanation, that Hayden initiated the program on his own. We've got the NYT pointing to the EO that we know got pixie dusted—by George Bush—to make this program possible. And we've got Nancy Pelosi, not recording any indication of who initiated the program in her letter. Pelosi's concern, "whether, and to what extent, the National Security Agency has received specific presidential authorization"—aside from echoing Jane Harman's precise comment about the torture program 16 months later—shows that Hayden did not claim, at that point, to already have presidential authorization, but the comparison with the torture program makes it clear that's different than official authorization for the program (remember, Bush first "authorized" torture in 2003, after CIA had already waterboarded Abu Zubaydah, Ibn Sheikh al-Libi, and Khalid Sheikh Mohammed).

Now, as I understand it, Hayden didn't really explain on what basis he could ignore FISA, he just said it didn't apply or that he had expanded authorities. So he wasn't, on October 1, making an argument that he was working within the 15-day window. Rather, after having stopped far short of what he was legally permitted to do before 9/11 (which is why he didn't figure out Mihdhar and Hazmi were operating within the United States, even though NSA picked up calls between them and a known al Qaeda safehouse), he claims he—with his existing authorizations—ignored a very clear requirement of FISA that he minimize US person data. I find that utterly unbelievable, as I'll explain below.

Before I do, though, note one other date in this chronology: on October 5—after Hayden first briefed the full intelligence committee, after the program was officially approved, but before Hayden told 90 people at NSA about it—President Bush issued directions that agencies involved in

counter-terrorism could only brief the Gang of Eight (and only certain people within those agencies could do the briefings).

> As we wage our campaign to respond to the terrorist attacks against the United States on September 11, and to protect us from further acts of terrorism, I intend to continue to work closely with the Congress. Consistent with longstanding executive branch practice, this Administration will continue to work to inform the leadership of the Congress about the course of, and important developments in, our critical military, intelligence, and law enforcement operations. At the same time, we have an obligation to protect military operational security, intelligence sources and methods, and sensitive law enforcement investigations. Accordingly, your departments should adhere to the following procedures when providing briefings to the Congress relating to the information we have or the actions we plan to take:
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> > (i) Only you or officers expressly designated by you may brief Members of Congress regarding classified or sensitive law enforcement information; and
> >
> > (ii) The only Members of Congress whom you or your expressly designated officers may brief regarding classified or sensitive law enforcement information are the Speaker of the House, the House Minority Leader, the Senate Majority and Minority Leaders, and the Chairs and Ranking Members of the Intelligence Committees in the House and Senate.

I'm sure the timing of Bush's attempt to crack down on briefings to Congress, just as Pelosi is seeking more information on the program, is entirely a coinkydink.

OLC Memo Dates

In its response to an ACLU FOIA for documents on this, the Administration appears to have claimed that the first domestic spying program-related OLC opinion was dated October 4, 2001, the day Bamford gives as the first start date. I may simply be missing something, or Bradbury may have listed the document as either undated and/or not an agency document. But the ACLU's list of all known OLC memos does not list a domestic spying memo from September.

The IG Report claims there was an OLC memo in September, but that that memo, plus the October 4, 2001 memo—coinciding with the presidential approval of the program—and the October 23, 2001 memo—eviscerating the Fourth Amendment—were just hypothetical (though with its reference to "early October," perhaps the IG Report is trying to distance the program from the October 23 memo).

> In September and early October 2001, Yoo prepared several preliminary opinions relating to hypothetical random domestic electronic surveillance activities, but the first OLC opinion explicitly addressing the legality of the PSP was not drafted until after the program had been formally authorized by President Bush in October 2001. 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.
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> The first OLC opinion directly supporting the legality of the PSP was dated November 2, 2001, and was drafted by Yoo.

Here's what Bamford writes of the early OLC

memos, relying on Yoo's public writings.

> Ten days after the attacks, Yoo wrote an internal memorandum arguing that the NSA could use "electronic surveillance techniques and equipment that are more powerful and sophisticated than those available to law enforcement agencies in order to intercept telephonic communications and observe the movement of persons but without obtaining warrants for such uses." He noted that while such unprecedented and intrusive actions might be rejected on constitutional grounds during normal times, they are now justified as a result of the 9/11 attacks. During such times, he said, "the government may be justified in taking measures which in less troubled conditions could be seen as infringements of individual liberties."
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> Yoo thought that constitutional guarantees instantly evaporate following a terrorist attack. "It appears clear that the Fourth Amendment's warrant requirement does not apply to surveillance and searches undertaken to protect the national security from external threats, he said. In another memo, this one to Alberto Gonzales, the White House counsel, he reiterated his view that the president's power trump the Constitution. "Our office recently concluded," he wrote, "that the Fourth Amendment had no application to domestic military operations."(116)

So we've got the September 21 (or 22) memo, in which Yoo advocates for using "more powerful and sophisticated techniques and equipment" (which would seem to envision databases and data mining). We've got no description—from anyone, that I know of—of the October 4, 2001 memo, dated on the day of the Presidential Authorization. We've got Bamford's description

of the October 23, 2001 Fourth Amendment eviscerating opinion. We've got the IG Report assuring us not to worry about any of these earlier memos, the only one that really counted was the November 2, 2001 memo. And we've got no mention, from any of these, explicitly referring to the OLC memo Whitehouse described as addressing EO 12333, which says that if the President departs from a prior EO, even without changing the language of that EO, it is the same as modifying it.

I'll need to go and read Yoo's book, but it seems that he doesn't have the clarity that the IGs have regarding which of his OLC memos actually authorized the program. And given the IG Report's claim that only the November 2 memo specifically addressed the legality of the program, and given Whitehouse revelation that a key part of the program was Bush's claim to be able to pixie dust EOs, I'm not sure we can point to one day when the program was authorized. At a minimum, Yoo wrote at least three memos that—the IG Report claims—were not definitive, Bush at least got the authority to pixie dust EO 12333, Bush signed an authorization on October 4 purportedly not relying on the memo dated the same day, and a month later Yoo wrote a memo that determined the program to be legal.

What Hayden Was Already Doing

Given the fluidity of the apparent authorization of the program, let's return to what Hayden briefed Congress on on October 1, described to pertain to minimization. Pelosi wrote:

> You indicated that you were treating as a matter of first impression, [redacted] being of foreign intelligence interest. As a result, you were forwarding the intercepts, and any information [redacted] without first receiving a request for that identifying information to the Federal Bureau of Investigation. Although I may be persuaded by the

> strength of your analysis [redacted] I believe you have a much more difficult case to make [redacted]

Note, first of all, in addition to suggesting that Hayden is disseminating US person data absent any request from the FBI, Pelosi's comment suggests Hayden is doing so with at least two categories of intercepts. Pelosi suggests she "may be persuaded" by such treatment of intercepts in one case, but says Hayden has "a much more difficult case to make" with another case. [Update: See Mary's alternative suggestion here.] Now, I have no idea what was included in the redacted information, but one of them (probably the first) is likely to be intercepts of conversations with known al Qaeda operatives (or safehouses, which is the information that Hayden's NSA ignored leading up to 9/11). But it looks likely Hayden was already disseminating US person data on conversations of wider scope (while I don't know if this is what is at issue, there were reports of NSA tapping everything coming from at least some parts of Afghanistan).

Now, compare that description with Michael Hayden's claims about the program in January 2006—claims which are limited to Bush's "TSP" and not the whole domestic surveillance program (note, earlier in his statements he claims the activities he described in his October 1 briefing to Congress "were not related — these programs were not related — to the authorization that the president has recently spoken about").

> This is targeted and focused. This is not about intercepting conversations between people in the United States. This is hot pursuit of communications entering or leaving America involving someone we believe is associated with al Qaeda. We bring to bear all the technology we can to ensure that this is so. And if there were ever an anomaly, and we discovered that there had been an

> inadvertent intercept of a domestic-to-domestic call, that intercept would be destroyed and not reported. But the incident, what we call inadvertent collection, would be recorded and reported. But that's a normal NSA procedure. It's been our procedure for the last quarter century. And as always, as we always do when dealing with U.S. person information, as I said earlier, U.S. identities are expunged when they're not essential to understanding the intelligence value of any report. Again, that's a normal NSA procedure.
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> So let me make this clear. When you're talking to your daughter at state college, this program cannot intercept your conversations. And when she takes a semester abroad to complete her Arabic studies, this program will not intercept your communications.
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> Let me emphasize one more thing that this program is not – and, look, I know how hard it is to write a headline that's accurate and short and grabbing. But we really should shoot for all three – accurate, short and grabbing. I don't think domestic spying makes it. One end of any call targeted under this program is always outside the United States.

In one of the narrowest descriptions of the program made by the Bush Administration in the days after it was exposed, Hayden claimed the program was the interception of communications "involving someone we believe is associated with al Qaeda." He claims "US identities are expunged when they're not essential to understanding the intelligence value of any report," which apparently they weren't in late September 2001. He emphasizes "one end of any call targeted under this program is always outside the United States."

For the moment, let me suggest that if you were

not minimizing US person data, and you could claim someone a US person was speaking to in Afghanistan or somewhere else "is associated with al Qaeda," then you could accomplish almost all of what Hayden describes the the TSP to include. The single limitation—the single new thing the TSP seems to include—is if the known al Qaeda affiliate was in the US. But if you don't have to show a court how you get to that person, then nothing would stop you from reverse targeting, simply claiming that the person overseas was the person who "is associated with al Qaeda." You would need no more authorization to do everything included in the TSP, as described by Hayden, than to simply stop minimizing US person data. Which, it appears, is what Hayden was doing in September 2001.

Now look at EO 12333 as written—which we know may not be the same as EO 12333 as understood in the days after 9/11. Here's how it restricts surveillance of US persons.

> The Attorney General hereby is delegated the power to approve the use for intelligence purposes, within the United States or against a United States person abroad, of any technique for which a warrant would be required if undertaken for law enforcement purposes, provided that such techniques shall not be undertaken unless the Attorney General has determined in each case that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power. Electronic surveillance, as defined in the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), shall be conducted in accordance with that Act, as well as this Order. [my emphasis]

As late as 2007, we know, this was actually the authority the government used to establish probable cause to wiretap Americans.

And here's how it describes NSA's role in foreign intelligence.

> (3) Collection of signals intelligence information for national foreign intelligence purposes in accordance with guidance from the Director of Central Intelligence;
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> (4) Processing of signals intelligence data for national foreign intelligence purposes in accordance with guidance from the Director of Central Intelligence;
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> (5) Dissemination of signals intelligence information for national foreign intelligence purposes to authorized elements of the Government, including the military services, in accordance with guidance from the Director of Central Intelligence;

We know that in response to Pelosi's concerns, Hayden basically said FISA does not apply. We know that OLC told Bush (at some point) he had the authority to pixie dust EO 12333, to change what it said. And we know that Pelosi understood Hayden was "treating as a matter of first impression," some kind of intercepts "being of foreign intelligence interest." (And, surely by design, we don't know what date Ashcroft approved the program.)

Even without pixie dusting EO 12333, so long as you've said FISA doesn't apply (and Yoo wrote a memo saying warrants ought not apply by September 21 or 22), the only thing preventing you from wiretapping Americans in the US for foreign intelligence purposes is the Attorney General. But it would be pretty easy to pixie dust Ashcroft, particularly if he was not yet read into the program.

The Bush Administration tries very hard to distinguish what Michael Hayden was doing before October 4, 2001 from what he was doing afterwards. But that claim is not convincing.

If—as seems to be the case from the unredacted sections of Pelosi's letter, Hayden had declared US person data to be foreign intelligence, and if on that basis he had stopped minimizing US person data, you could (by using reverse targeting) carry out the full extent of the TSP.

What appears to have been new, after October 4, is the inclusion of data mining and large scale collection in the US in the larger presidential authorization.

While it's always possible the Administration maintains the pre-October 4 activities are a different program by some fancy parsing game (which is, after all, what the term TSP is in any case), there is no reason to believe the actions themselves were different.