

THEY'RE USING AUMF IN THEIR JUSTIFICATION FOR WARRANTLESS WIRETAPPING

I'm going to have a whole slew of posts on this SSCI report on their FISA bill (you'll all be hoping Mr. Emptywheel gets up and distracts me with pancakes, no doubt). In this post, I want to show the language the report uses to privilege the Authorization to Use Military Force. In its description of the basis for the program, the report depicts the warrantless wiretapping program as distinctly military.

The NSA program was described by the Department of Justice in January 2006 as "an early warning system to detect and prevent the next terrorist attack" a program with a military nature that requires speed and agility.

It then invokes the AUMF explicitly—though it doesn't quite say that the AUMF authorized the program.

After the attacks of September 11, 2001, Congress passed a joint resolution on September 14, 2001, declaring that the attacks "continue to pose an unusual and extraordinary threat to the country and calling on the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any further acts of international terrorism against the United States Authorization for Use of Military Force, Pub. L. No.

107-40, section 2(a), 115 Stat. 224 (2001). The President also declared a national emergency on September 14, 2001, stating that there was "a continuing and immediate threat of further attacks on the United States. The intelligence community assessed in October 2001 that additional waves of al Qaeda attacks were imminent. This assessment was manifested in the mobilization of 35,000 reservists and National Guard troops for homeland defense; actions by the Attorney General putting all federal and state law enforcement officials and the U.S. business community on the "highest level of alert; and the formal announcement of the FBI that the Government had reason to believe that new terrorist attacks might be launched in the United States over the next several days. **It was during this period that the President first authorized the program.** [my emphasis]

This is troublesome because—as the blogospheres best lawyers have shown—the rationale for this program changed over its life. As far as we know, it was initially authorized based on the theory of the unitary executive, a theory which collapsed in light of SCOTUS rulings on executive power. After that theory collapsed, the Administration then claimed that the AUMF had authorized the program, even though it had done no such thing and Democrats describe explicitly refusing such authorization. Which is why it's disturbing that a report coming out of a Democrat-led committee (albeit one chaired by a bowl of jello) would include this in the report, even if it doesn't make the connection explicit. Once again, Jello Jay got rolled by Kit Bond.

I'm not the only one who seems to see this as a problem. Senators DiFi, Snowe, and Hagel make it clear in their additional views that they do not

believe the AUMF authorized the warrantless wiretap program.

This intent, and FISA practice for more than 20 years, was cast in doubt after September 11, 2001. At that time, the Executive Branch concluded that it was not bound by FISA's procedures, and proceeded with the Terrorist Surveillance Program (TSP) without requesting amendments to FISA.

As explained in the Department of Justice's 2006 White Paper on the legality of the TSP, the Administration cited the Authorization for the Use of Military Force (AUMF) against al Qaeda and its supporters as an alternative authority. The Department pointed to language in FISA that it was exclusive except as authorized by other statute.

Congress intended for the "other statute to be the laws governing criminal wiretaps, not a broad and undefined exception.

We do not believe that the AUMF provided this authorization. We have seen no evidence that Congress intended the AUMF to authorize a widespread effort to collect the content of Americans' phone and email communications, nor does the AUMF refer to the subject.

Furthermore, FISA already contained a provision that clearly governed surveillance actions in a wartime situation " a 15-day authorization for warrantless surveillance following a declaration of war. So this was not an un contemplated question following September 11 and the passage of the AUMF.

All of which begs the question—if two Republicans and our Republican-lite DiFi all believe strongly that AUMF didn't authorize the

warrantless wiretap program, why is it so prominently featured in the description of the context of the program?