THE FISA DANCE IN THE WAKE OF 9/11

Looseheadprop asks some good questions about the September 25, 2001 opinion on FISA David Kris requested from OLC.

> Now that the Obama Administration has released this opinion (as well as others—see more FDL coverage from Christy and emptywheel), the first thing that strikes me is: How did he get this researched and written so fast (especially during a period when many people where spending lots of work hours reconnecting with friends and family and chewing over every scrap of information coming out of the attack sites)? Or had he started work on it earlier? And if so, why?

The question Kris asked,

> You have asked for our opinion on the constitutionality of amending the Foreign Intelligence Surveillance Act. . . . so a search may be approved when the collection of foreign intelligence is "a purpose" of the search. In its current form, FISA requires that "the purpose" of the search be the collection of foreign intelligence.

… presents a ready answer for the timing. After all, Congress made almost precisely this change when it amended FISA as part of the PATRIOT Act, which got rushed through Congress from October 23 to October 26, 2001 ("the purpose" became "a significant purpose").

> **Change in certification requirement for electronic surveillance and physical searches under FISA from “the purpose” being gathering of foreign intelligence information to “a significant purpose”**

> **being gathering of foreign intelligence information.**
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> Under Section 218, Sec. 104(a)(7)(B) and Sec. 303(a)(7)(B) of FISA, 50 U.S.C. §§ 1804(a)(7)(B) and 1823(a)(7)(B) respectively, are amended to strike “the purpose” and to replace it with “a significant purpose.” As amended, under Sec. 104(a)(7)(B), in an application for a FISA court order authorizing electronic surveillance, a national security official must certify that “a significant purpose” of the surveillance is to gather foreign intelligence information. Similarly, in an application for an order authorizing a physical search under FISA, a national security official must certify, under the amended Sec. 303(a)(7)(B), that “a significant purpose” of the search is to gather foreign intelligence information. This has been interpreted to mean that the primary purpose of the electronic surveillance or physical search may be criminal investigation, as long as a significant purpose of the surveillance or search is to gather foreign intelligence information.

And the admission in the memo that "most courts have adopted the test that the ‘primary purpose’ of a FISA search is to gather foreign intelligence" may be the reason the PATRIOT Act ultimately included the modifer "significant" on "purpose." Thus, it seems that Kris was using this memo to prepare more general changes to FISA to make it easier to use intelligence information in criminal prosecutions (as LHP points out).

The FISA Dance Timing

But since LHP has raised the question of timing and Yoo’s larger project, consider this timing.

> **September 12, 2001**: AUMF authorizes 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 future acts of international terrorism against the United States by such nations, organizations or persons."
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> **September 18, 2001**: Bush signs AUMF.
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> **September 25, 2001**: OLC provides memo to David Kris on "a purpose" language for FISA.
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> **October 2, 2001**: Predecessor bill to PATRIOT Act introduced into House.
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> **October 3, 2001**: 15-day exception in FISA after declaration of war expires.
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> **October 4, 2001**: Still-unreleased OLC memo for Alberto Gonzales on "what legal standards might govern the use of certain intelligence methods to monitor communications by potential terrorists." Warrantless wiretapping program authorized. Predecessor bill to PATRIOT Act introduced into Senate.
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> **October 6, 2001**: Warrantless wiretapping begins.
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> **~October 7, 2001**: Technicians discover the program; FBI worries that it violates the law.
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> **October 21, 2001**: Ashcroft writes Mueller to reassure him that "certain intelligence collection activities are legal and have been appropriately authorized."
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> **October 23, 2001**: PATRIOT Act introduced into Congress by James Sensenbrenner.
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> **October 23, 2001**: OLC provides memo Alberto Gonzales and Jim Haynes

> eviscerating the First and Fourth Amendments—partially to justify illegal wiretapping—even as PATRIOT moves to the House.
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> **October 26, 2001**: Bush signs PATRIOT Act.
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> **November 2, 2001**: Still-unreleased OLC memo for Ashcroft on "legality of communication intelligence activities."

Golly. It's as if they simply didn't get that First-and-Fourth-evisceration in time to submit to Congress, isn't it? As if by magic…

And all the more troubling given the extensive attention Yoo pays in his October 23 memo—but not his September 25 one—to the Article II powers that vest in cases of exigencies. Even while Yoo was grabbing power for the President by arguing that there was an emergency that meant the President had to act on his own, Congress was rushing legislation through Congress that directly modified some of the same things Yoo wanted to do with this later memo, thereby proving that the President didn't have to act on his own.

And consider how the memos work together. The Kris memo—written to a top DOJ official—basically argues that:

1. The standard for "reasonable search" under the Fourth Amendment is probably lower because of 9/11.
2. In any case, Courts have allowed some leeway for how much the purpose of surveillance may be criminal in nature under FISA.
3. After admitting that "the courts have been exceedingly deferential to the

> government" on FISA warrants, the memo then goes on to argue that since the FISA court is a "neutral magistrate" that "still remains an Article III court," so long as the FISA Court said an application of FISA was permissible, that was enough.

It certainly exploits all the leeway in the FISA system, but still fundamentally defends the value of the judicial review for warrants for wiretapping in the United States.

The Tom Daschle Problem

But that leaves the problem of how you expand the application of wiretapping that evades FISA to the United States.

Which is one of the things October 23, 2001 memo does. It solves the Tom Daschle problem.

You'll recall that the Bush Administration had changing rationales for how the President could ignore FISA. First it was AUMF, then inherent powers that exempted him from FISA, and after the program was exposed, it was AUMF again.

Shortly after the Bush Administration reverted to the AUMF again in 2005, Tom Daschle wrote an op-ed making it clear that Congress specifically refused a last minute attempt to gain war powers within the US.

> On the evening of Sept. 12, 2001, the White House proposed that Congress authorize the use of military force to "deter and pre-empt any future acts of terrorism or aggression against the United States." Believing the scope of this language was too broad and ill defined, Congress chose instead, on Sept. 14, to authorize "all necessary

> and appropriate force against those nations, organizations or persons [the president] determines planned, authorized, committed or aided" the attacks of Sept. 11. With this language, Congress denied the president the more expansive authority he sought and insisted that his authority be used specifically against Osama bin Laden and al Qaeda.
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> Just before the Senate acted on this compromise resolution, the White House sought one last change. Literally minutes before the Senate cast its vote, the administration sought to add the words "in the United States and" after "appropriate force" in the agreed-upon text. This last-minute change would have given the president broad authority to exercise expansive powers not just overseas — where we all understood he wanted authority to act — but right here in the United States, potentially against American citizens. I could see no justification for Congress to accede to this extraordinary request for additional authority. I refused.

We didn't know it at the time, but in 2001, Bush asked for broad powers to use the military in the US. But the Bush Administration knew it. They knew that the legislative intent of the AUMF specifically stopped short of letting them use military power in the US. And that prevented them from doing some things they wanted to do.

So they wrote this memo. This memo—among other things—eliminates the Tom Daschle problem (that is, the legislative intent that refused them this power). It does so by:

1. Giving the War Powers Resolution—with its clause naming "a national emergency created by attack upon the

United States"—precedence over the AUMF.
2. Pretending the language "protect United States citizens both at home and abroad" did what Congress refused to do, give the President power to operate in the US.
3. Citing the Posse Comitatus Act's exception in circumstances "expressly authorized by … an Act of Congress."
4. Arguing that Posse Comitatus only prohibits the use of the military for law enforcement purposes, but not the use of the military for military purposes.

Warrantless wiretapping under NSA, of course, is part of DOD and as such military. And the memo to Kris—which ostensibly only authorized the sharing of intelligence with law enforcement and vice versa—had the effect of blurring the lines between law enforcement and intelligence. So with this memo—sent to Alberto Gonzales and Jim Haynes but probably compartmented from people in DOJ whose eyes would pop at this reasoning—takes the blurred lines created in the Kris memo and blurred them much, much further.

And Yoo even cites the earlier memo to defend this blurring of the lines.

> We have recently reviewed and proposed amendments to [FISA].
>
> [snip]
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> Distinguishing between "law enforcement" and "foreign intelligence" seems, if

> anything, more difficult than distinguishing between "law enforcement" and "military" functions. Yet the FISA courts seem to have found little difficulty in applying the statute's "purpose" test. This, we believe, reflects the care and circumspection with which the executive branch itself reviews and prepares FISA applications, and the courts' justified confidence in the executive branch's self-monitoring. Likewise here, we believe that the courts will defer to teh executive branch's representations that the deployment of the Armed Forces furthers military purposes, if the executive insitutes and follows careful controls.

After Affirming Neutral Magistrates, Now Eliminating Them

Which is where we come full circle. The memo to Kris has claimed the 4th Amendment could be limited under the circumstances, but even while it did that, it pointed to the role of the FISA Court in measuring how to interpret "reasonable" under the given circumstances. But having argued the military could operate on US soil, Yoo now calls judges a big hindrance.

> In our view, however well suited the warrant and probable cause requirements may be as applied to criminal investigations or to other law enforcement activities, they are unsuited to the demands of wartime and the military necessity to successfully prosecute a war against an enemy.
>
> [snip]
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> It also seems clear that the Fourth Amendment would not restrict military operations within the United States against an invasion or rebellion. Were the mainland of the United States invaded by foreign military forces, for

> example, our armed forces must repel them. Allowing the Fourth Amendment, in general, to constrain their efforts would interfere with the Government's higher constitutional duty of preserving the nation and defending its citizens. Our forces must be free to "seize" enemy personnel or "search" enemy quarters, papers and messages without having to show "probable cause" before a neutral magistrate, and even without having to demonstrate that their actions were constitutionally "reasonable."

Note the scare quotes around "seize," "search," "probable cause," and "reasonable." I can't decide whether Yoo has done that because he knows this language will be appropriated for more than physical searches—that is, it'll be used to cover things like the search of email servers. Or whether he has done it because, fundamentally, he (or Addington, whose work this feels like) simply disdains the Fourth Amendment altogether.

Nevertheless, in the span of a month, Yoo has gone full circule. First blurring the lines between intelligence and law enforcement. Then, blurring the lines between military and law enforcement. But ultimately, in doing so, going from endorsing the importance of a judge in one opinion to—just weeks later and after the response of Congress proves the relaxation of the exigency that Yoo used to rationalize the later opinion—arguing that the review of judges is simply a hindrance to the Executive's execution of its duties.

Note: the last section of this was changed after the post was first posted. And I've since made additions to the timeline and other parts of this post for clarity.