

# FISA'S 15-DAY EXEMPTION

*Update, 7/16: See this post for a modification of this one.*

I'm updating my warrantless wiretapping timeline and noticed something important (I think).

The IG Report released today notes that the 15-day exemption in FISA proves that Congress always intended FISA to restrict the Executive Branch's authority, even in times of war.

Among other concerns, Yoo did not address the section of FISA that creates an explicit exemption from the requirement to obtain a judicial warrant for 15 days following a congressional declaration of war. See 50 USC 1811. Yoo's successors in OLC criticized this omission in Yoo's memorandum because they believed that by including this provision in FISA Congress arguably had demonstrated an explicit intention to restrict the government's authority to conduct electronic surveillance.(12)

But now look at the timeline (this is evolving quickly so it may change by the time you look at it).

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."

September 18, 2001: Bush signs AUMF.

September 25, 2001: OLC provides memo to

David Kris on “a purpose” language for FISA.

October 1, 2001: Hayden briefs HPSCI.

October 2, 2001: Predecessor bill to PATRIOT Act introduced into House.

October 3, 2001: **15-day exception in FISA after declaration of war expires.**

October 4, 2001, from DAAG OLC to Alberto Gonzales: OLC 132, which consists of two copies, one with handwritten comments and marginalia, of a 36-page memorandum, dated October 4, 2001, from a Deputy Assistant Attorney General in OLC to the Counsel to the President, created in response to a request from the White House for OLC’s views regarding 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.

October 6, 2001: Program begins. [my emphasis]

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.

In other words, the program was formally approved on the 16th day after the AUMF.

But at least according to Nancy Pelosi, Congress was briefed on ongoing underlying activities as early as October 1.

Meaning, the Bush Administration was already **using** those expanded authorities—but they were doing so by exploiting the 15-day exemption written into FISA!

So Yoo's analysis is **not just** dead wrong because FISA clearly contemplates its application even during wartime. But it's even worse because during this particular wartime situation, the Administration had already used that 15-day exemption period as it debated what and how to implement its warrantless wiretap program.

The Administration showed, by its actions, that it knew the AUMF didn't trump FISA. But then it proceeded to base its entire wiretap program on that very assumption.