# NEWLY RELEASED OLC OPINION REVEALS HOW YOO RELIED ON ELIMINATING FOURTH AMENDMENT TO WIRETAP ILLEGALLY

As Josh Gerstein and Jack Goldsmith note, DOJ just released two of the opinions underlying the warrantless wiretap programs. They both focus on the May 6, 2004 opinion Goldsmith wrote in the wake of the hospital confrontation; I'll have far more to say about that opinion later today and/or tomorrow.

But I wanted to look at what the highly redacted opinion John Yoo wrote on November 2, 2001 tells us.

The opinion is so completely redacted we only get snippets. Those snippets are, in part:

> FISA only provides safe harbor for electronic surveillance, and cannot restrict the President's ability to engage in warrantless searches that protect the national security.
>
> [snip]
>
> Thus, unless Congress made a clear statement 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.
>
> [snip]
>
> intelligence gathering in direct support of military operations does not trigger constitutional rights against illegal searches and seizures.

> [snip]
>
> A warrantless search can be constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."

To understand what those quotes mean, it helps to recall that on October 23, 2001, John Yoo and Robert Delahunty wrote another memo assessing whether the military could deploy in the US in a war against terrorists. It concludes, in part, that,

> Fourth, we turn to the question whether the Fourth Amendment would apply to the use of the military domestically against foreign terrorists. Although the situation is novel (at least in the nation's recent experience), we think that the better view is that the Fourth Amendment would not apply in these circumstances. Thus, for example, we do not think that a military commander carrying out a raid on a terrorist cell would be required to demonstrate probable cause or to obtain a warrant.
>
> Fifth, we examine the consequences of assuming that the Fourth Amendment applies to domestic military operations against terrorists. Even if such were the case, we believe that the courts would not generally require a warrant, at least when the action was authorized by the President or other high executive branch official. The Government's compelling interest in protecting the nation from attack and in prosecuting the war effort would outweigh the relevant privacy interests, making the search or seizure reasonable.

It relies on the hypothetical in which a

military commander searches an entire apartment building for the WMD inside.

> Consider, for example, a case in which a military commander, authorized to use force domestically, received information that, although credible, did not amount to probable cause, that a terrorist group had concealed a weapon of mass destruction in an apartment building. In order to prevent a disaster in which hundreds or thousands of lives would be lost, the commander should be able to immediately seize and secure the entire building, evacuate and search the premises, and detain, search, and interrogate everyone found inside.

As I have suggested in the past, it helps to replace "apartment building" with "email server" to understand the implications of such an opinion given that our wiretapping is done by military commanders at the NSA.

In other words, on October 23, 2001, Yoo wrote an opinion largely justifying searches by military commanders domestically.

And then on November 2, 2001, he interpreted wiretapping as a search (presumably arguing that since we were vacuuming up all data signals, we were obtaining physical possession of them that thereby got around restrictions on electronic surveillance, at least in Yoo's addled little mind).

Of course, the Fourth Amendment opinion is utterly ridiculous. But they were still relying on it until October 6, 2008, even while equivocating to members of Congress about doing so.

So you see, Cheney's illegal wiretapping program was totally legal. What you didn't know, though, is that the Fourth Amendment is just a quaint artifact of time before 9/11.