

THE MARCH-AND APRIL OR MAY-2004 CHANGES TO THE ILLEGAL WIRETAP PROGRAM

Apologies in advance. I'm going to be in the weeds reading the May 6, 2004 Goldsmith opinion for a little bit.

In this post, I want to point to some details of timing that, I think, suggest that the changes DOJ made to Cheney's illegal wiretap program in 2004 included, first, a limitation on collection to people with actual alleged terrorist ties (but not just with al Qaeda), and second, a shift of the data-mining part of the program under other parts of the PATRIOT Act.

What follows is largely a wildarsed guess.

The Half-Redacted Timing of the Post-Hospital Changes

As I noted in my working thread, DOJ has redacted part of the date of the 2004 modifications in the table of contents and pages 9 and 11. But on page 16, it has left unredacted a reference to a March 19, 2004 redaction. The opinion itself gives partial explanation for this: Goldsmith refers to "those" modifications, plural, on page 9, and describes a "series of changes" on page 11. The existence of more than one modification is confirmed by the IG Report, which says,

Notwithstanding Gonzales's letter, on March 17, 2004 the President decided to modify certain PSP intelligence-gathering activities and to discontinue certain Other Intelligence Activities that DOJ believed were legally unsupported. The President's directive was expressed in two modifications to the March 11, 2004 Presidential Authorization.

Though note the slight discrepancy between Goldsmith's reference to a "series" (which to me means more than two) versus the IG reference to two modifications.

Now, the redactions and common sense suggest when at least one of the other changes must have taken place. Since Goldsmith wrote the memo on May 6, the redacted phrase can only be "April" or "May." Given the spacing in the redactions—particularly the one in the second line of the only complete paragraph on page 11, which takes up the same space as the 9 characters "concernin" in the line below—it is unclear which it would be. It might read "and April " or it might read "and May, ". It is worth noting that if the March 11 authorization were a 45-day one, it would have expired on April 25 and left, without this May 6 opinion, the program working without any basis still. Yet SSCI has told us the March 11 authorization was for "not more than 60 days," which would have extended to May 5. For these and other reasons, my guess is May (suggesting that Goldsmith waited until the last changes were made to write his memo), but that's just a guess. And DOJ, obviously, isn't telling.

[Update: Thanks to William Ockham, who did the kerning work, it looks like "May" is correct.]

The March 19 Modification Limits Content Collection to Terrorist Conversations

On page 16, Goldsmith writes,

In the March 19, 2004 Modification, the President also clarified the scope of the authorization [~ 6-7 word redaction] He made clear that the Authorization applied where there were reasonable grounds to believe that a communicant was an agent of an international terrorist group

Further down that page, Goldsmith begins the list of the only three things this opinion authorizes. The first is:

the authority to intercept the content of international communications “for which, based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are reasonable grounds to believe ... [that] a party to such communication is a group engaged in international terrorism, or activities in preparation therefor, or any agent of such a group,” as long as that group is al Qaeda, an affiliate of al Qaeda or another international terrorist group that the President has determined both (a) is in armed conflict with the United States and (b) poses a threat of hostile actions within the United States;

Goldsmith’s language here is remarkably similar to that he used in some of the letters he wrote at precisely the same time limiting the torture program. In both cases, he is trying to impose limits on a program that has already exceeded those limits. That, plus the reference to Bush’s “clarifi[cation]” of the scope of the program suggests the limit on intercepting the content of conversations in which one party is a terrorist is new.

I’ll have much more to say about this. But note that Goldsmith’s limit here does not match the terms of the Afghan AUMF, which is limited to those who were directly tied to 9/11.

That the President is authorized 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. [my emphasis]

In other words, while the requirement that the program collect content only from those with a tie to a terrorist may be a new limit imposed in 2004, it also seems to exceed the very AUMF that Goldsmith was newly relying upon to authorize the program.

Goldsmith does have one out for that problem. As he notes elsewhere, the Afghan AUMF language on terrorism is repeated (and actually expanded) in the Iraq AUMF.

Whereas Congress has taken steps to pursue vigorously the war on terrorism through the provision of authorities and funding requested by the President to take the necessary actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such persons or organizations;

Whereas the President and Congress are determined to continue to take all appropriate actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such persons or organizations;

Did you know that the Iraq AUMF mentions “terrorist” or “terrorism” two more times—19—than it mentions “weapon”—17?

So writing in 2004, I guess, Goldsmith could claim that a still-active AUMF authorized war against terrorism more generally. Now, we apparently just avoid written AUMFs altogether.

And with it, he authorized the interception of content of not just al Qaeda affiliates conversations, but of any terrorist who was at

war with the United States. I wonder if Hamas and FARC are included in that?

The April or May Change(s)

But that's just the change DOJ is willing (sort of) to let us know about. What about the other changes?

While I can't say for sure, consider the following data points.

First, note that Robert Mueller's chronology of the warrantless wiretap confrontation had what used to seem like a bizarre end date. He shows multiple contacts a day with Jim Comey until March 17. Shortly thereafter on March 19, it appears, Bush at least narrowed the content collection to actual alleged terrorist conversations. But then there's a March 23 meeting between Mueller and Dick Cheney, at the Vice President's request and in his office.

Next, remember there's a great deal of evidence—including reporting during the Protect America Act debate—to suggest that data mining was one of, if not the key, problem behind the hospital confrontation.

A 2004 dispute over the National Security Agency's secret surveillance program that led top Justice Department officials to threaten resignation involved computer searches through massive electronic databases, according to current and former officials briefed on the program. It is not known precisely why searching the databases, or data mining, raised such a furious legal debate. But such databases contain records of the phone calls and e-mail messages of millions of Americans, and their examination by the government would raise privacy issues.

Then, note that the day after Mueller's meeting with Cheney, FBI moved toward actually using Section 215 of PATRIOT, which they had not done

previously.

Finally, consider some of the changes made to the way Section 215 and NSLs were used that year—effectively using them to collect call data—and Section 215 specifically to support a secret program in 2005.

So Lichtblau suggests that the big change—the one DOJ won't let us know about—has to do with searches of massive databases of records of phone calls and email messages of millions of Americans. And on the day after a private Mueller meeting with Cheney but probably before the second (at least) big change from spring 2004, FBI starts using the provision they would go on to use, some time in 2004, to collect call data. (And sometime in 2005 Section 215 came to be used to support a secret program unto itself.)

In any case, this is a wild guess. But it appears likely that DOJ stopped acquiring metadata on calls to use in data mining in one fashion, and instead started using Section 215 and trap and trace requests to get the data.

Given the Bybee memo we've recently discovered which seems to support fairly expansive use of databases, however, I'm guessing they didn't stop doing data mining of the call data.