

ALBERTO GONZALES: THE COUNSEL REPRESENTED BY COUNSEL AND BABYSAT BY CHENEY'S COUNSEL

Footnote 147 of the DOJ IG Report on Stellar Wind (PDF 462-3) modifies a discussion of the discussions on March 6 and 7, 2004 in which Jack Goldsmith and Patrick Philbin informed David Addington and Alberto Gonzales that they could not reauthorize Stellar Wind – in spite of applying a relaxed standard of review – because the White House wanted them to affirm that John Yoo's November 2, 2001 memo had covered the program, yet Yoo's memo had not included all aspects of it (this likely pertains to the collection of Internet metadata from telecom switches, though it may also pertain to the collection on Iraqi targets).

After reporting Gonzales' claimed reaction to the meetings at which DOJ's lawyers told the White House the program was illegal, the report notes that Gonzales was lawyered up at his IG interview, but later provided further elaboration in writing.

Later on March 6, Goldsmith and Philbin went to the White House to meet with Addington and Gonzales to convey their conclusions that the [2 lines redacted] According to Goldsmith's chronology of these events, Addington and Gonzales "reacted calmly and said they would get back with us." Goldsmith told us that the White House was not worried that it was "out there," meaning that it was implementing a program without legal support.

On Sunday afternoon, March 7, 2004, Goldsmith and Philbin met again with

Addington and Gonzales at the White House. According to Goldsmith, the White House officials informed Goldsmith and Philbin that they disagreed with Goldsmith and Philbin's interpretation of Yoo's memoranda and on the need to change the scope of the NSA's collection. Gonzales told us that he recalled the meetings of March 6 and March 7, 2004, but did not recall the specifics of the discussions. He said he remembered that the overall tenor of the meetings with Goldsmith was one of trying to "find a way forward."¹⁴⁷

¹⁴⁷ As noted above, Gonzales was represented by counsel during his interview with the OIG. Also present during the interview because of the issue of executive privilege was a Special Counsel to the President, Emmitt Flood. We asked Gonzales whether the President had been informed by this point in time of the OLC position regarding the lack of legal support for the program and [redacted]. Flood objected to the question on relevancy grounds and advised Gonzales not to answer, and Gonzales did not provide us an answer. However, when Gonzales commented on a draft of the report, he stated that he would not have brought Goldsmith and Philbin's "concerns" to the attention of the President because there would have been nothing for the President to act upon at this point. Gonzales stated that this was especially true given that Ashcroft continued to certify the program as to legality during this period. Gonzales stated he generally would only bring matters to the President's attention if the President could make a decision about them.

Remember the situation Gonzales would have been

in. The interview (and probably, though not certainly, the review of the draft) would have taken place in fall to winter 2008, when Bush was still in office.

Thus, the interview would have happened during the period or just after DOJ IG conducted an investigation into what amounted to a CYA file Gonzales had carried around in his briefcase – documents and draft documents relating to all the illegal programs in which he had been involved, including his notes pertaining to the hospital confrontation over Stellar Wind. There's reason to believe he was referred for that investigation precisely because it was recognized as a CYA file and he was no longer regarded as loyal on surveillance issues.

In addition, at the time, too, DOJ was still considering whether to file charges against Gonzales for the US Attorney scandal. So it makes sense that Gonzales' retained lawyer, George Terwilliger, was there (and it is somewhat surprising that, given that John Ashcroft got away without cooperating, Terwilliger let him cooperate).

But then there is Emmet Flood.

Both before and after his tenure in the White House Counsel's office – where he was brought in to deal with the scandals of the late Bush Administration – Flood was (and remains) a partner at Williams & Connolly. And not just a partner. He was formally part of Dick Cheney's defense team when Patrick Fitzgerald was honing in on the Vice President for leaking Valerie Plame's identity, and Flood would remain involved in protecting Cheney even after moved onto the taxpayer dime.

Emmet Flood may have been there in the name of protecting Executive Privilege, but it was not Bush's privilege Flood was protecting.

So we learn that on March 6, 2004, Goldsmith and Philbin tell Gonzales and Addington that parts of Stellar Wind have never been legal. On March 7, 2004, Gonzales and Addington come back and

tell OLC's lawyers they're wrong.

And when DOJ's IG asked Gonzales whether – in the interim day – he had informed the President about this, Cheney's defense lawyer pipes up and tells him not to answer. Given that Bush apparently learned new details of all this 4 days later when Comey and Robert Mueller would tell him directly, the answer is no (which is consistent with what Gonzales said when Cheney's lawyer wasn't present).

Which leaves the logical and thoroughly unsurprising conclusion – but one Cheney's taxpayer funded lawyer didn't want included in a legal document – Cheney (who is not a lawyer, nor does he have Article II authority directly) is the one who told Gonzales and Addington to dig in.

Update: Flood also had Gonzales refuse to answer a question about whether anyone had thought to include DOJ in the meeting with Congress.