

IN 2003, OLC DOUBLED DOWN ON UNLIMITED (DE)CLASSIFICATION AUTHORITY FOR THE PRESIDENT

One of the tactics those in DOJ attempted to use in 2004 to put some controls on Stellar Wind, it appears from the DOJ IG Report, was to point to legal requirements to inform Congress (for example, to inform Congress that the Attorney General had decided not to enforce particular laws), which might have led to enough people in Congress learning of the program to impose some limits on it. For example, Robert Mueller apparently tried to get the Executive to brief the Judiciary Committees, in addition to the Gang of Four, about the program.

On March 16, 2004 Gonzales wrote a letter to Jim Comey in response to DOJ's efforts to force the Administration to follow the law. Previous reporting revealed that Gonzales told Comey he misunderstood the White House's interest in DOJ's opinion.

Your memorandum appears to have been based on a misunderstanding of the President's expectations regarding the conduct of the Department of Justice. While the President was, and remains, interested in any thoughts the Department of Justice may have on alternative ways to achieve effectively the goals of the activities authorized by the Presidential Authorization of March 11, 2004, the President has addressed definitively for the Executive Branch in the Presidential Authorization the interpretation of the law.

This appears to have led directly to Comey drafting his resignation letter.

But what previous reporting didn't make clear was that Gonzales *also* claimed the Administration had unfettered authority to decide whether or not to share classified information (and that, implicitly, it could blow off statutory Congressional reporting requirements).

Gonzales letter also addressed Comey's comments about congressional notification. Citing *Department of the Navy v. Egan*, 484 U.S. 518 (1988) and a 2003 OLC opinion, Gonzales's letter stated that the President has the constitutional authority to define and control access to the nation's secrets, "including authority to determine the extent to which disclosure may be made outside the Executive Branch."
(TS//STLW//SI/OC/NF) [PDF 504]

I'm as interested in this as much for the timing of the memo – 2003 – as the indication that the Executive asserted the authority to invoke unlimited authority over classification as a way to flout reporting mandates (both with regards to Stellar Wind, but the implication is, generally as well).

The most likely time frame for this decision would be around March 25, 2003, when President Bush was also rewriting the Executive Order on classification (this EO is most famous because it gave the Vice President new authorities over classifying information). If that's right, it would confirm that Bush's intent with the EO (and the underlying OLC memo) was to expand the ability to invoke classification for whatever reasons.

And if that OLC opinion was written around the time of the March 2003 EO, it would mean it was on the books (and, surely, known by David Addington) when he counseled Scooter Libby in July 2003 he could leak whatever it was Dick Cheney told him to leak to Judy Miller, up to and including Valerie Plame's identity.

But I'm also interested that this footnote was classified under STLW, the Stellar Wind marking. That may not be definitive, especially given the innocuous reference to the OLC memo. But it's possible that means the 2003 opinion – the decision to share or not share classified information according to the whim of the President – was tied to Stellar Wind. That would be interesting given that George Tenet and John Yoo were declaring Iraq and their claimed conspirators in the US were terrorists permissible for surveillance around the same time.

Finally, I assume this OLC memo, whatever it says, is still on the books. And given how it was interpreted in the past – that OLC could simply ignore reporting mandates – and that the government continued to flout reporting mandates until at least 2010, even those tied specifically to surveillance, I assume that the Executive still believes it can use a claimed unlimited authority over classification to trump legally mandated reporting requirements.

That's worth keeping in mind as we debate a bill, USA F-ReDux, celebrated, in part, for its reporting requirements.