

THE NEW STELLAR WIND LANGUAGE

Charlie Savage got another drip drip drip of language declassified from the Joint IG Stellar Wind reports (his story, annotated document).

The new language reveals a bit more about what Alberto Gonzales included in his March 11, 2004 authorization that led Jim Comey to renew his resignation threat on March 16, 2004. And it reiterates a detail about the March 19, 2004 modification I've covered repeatedly (though leaves the other at least two March 19, 2004 modifications, as well as the April 2 one(s), entirely redacted).

One thing that *did* get changed on March 19 – the exclusion of the Iraq targeting John Yoo had authorized in 2003 – is now unredacted. That language only permits the use of Stellar Wind with al Qaeda, groups affiliated with al Qaeda, or “another group that [the President determines] for the purposes of this Presidential Authorization is in armed conflict with the United States and poses a threat of hostile action within the United States.” This language is precisely consistent with language in the May 6, 2004 Jack Goldsmith opinion I've noted before – indeed, the newly unredacted language appears unredacted in that memo (see page 16). Goldsmith situates the broader-than-al Qaeda authorization, in part, in this language in the 2001 AUMF.

The Congressional Authorization contains another provision that is particularly significant in this context. Congress expressly recognized that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.” Congressional Authorization, pmb. That provision gives express congressional recognition

to the President's inherent constitutional authority to take action to defend the United States even without congressional support.

Note, Savage misstates that the change only permits targeting "Al Qaeda, rather than allowing it to be used for other types of international counterterrorism investigations," ignoring that the President (and Goldsmith's subsequent OLC memo) permitted the inclusion of other international terrorist groups. That may reflect reporting that will show up in his book, but the language adopted pursuant to DOJ complaints, both in the March 19 authorization and in Goldsmith's memo, clearly permits targeting of more than just al Qaeda at the President's prerogative, so long as it actually has to do with "international" terrorism (Goldsmith distinguishes international terrorism from domestic in an effort to comply with the Supreme Court Keith decision, but not in a way that I believe to be adequate in logic or, since Goldsmith's opinion, implementation).

We don't know whether two other things newly revealed to be in the March 11, 2004 memo got changed, because we don't see the other March 19 modifications.

First, Gonzales explicitly asserted in the March 11 authorization that Article II authority "displace[s] the provisions of law, including the Foreign Intelligence Surveillance Act and chapter 119 of Title 18 of the United States Code (including 18 U.S.C. §2511(f) relating to exclusive means), to the extent any conflict between provisions and such exercises under Article III." This idea may have been tweaked in one of the modifications, given that Goldsmith's memo largely provides an explanation for how FISA got displaced via the AUMF, but I also suspect that, even as problematic as Goldsmith's memo is, it was probably stronger than any modifications before he issued the memo.

Far more interesting is the language Gonzales

included in the March 11 authorization designed to retroactively authorize the bulk collection of entirely domestic metadata. It did so by claiming that metadata “is ‘acquired’ for the purposes of subparagraph 4(b) above when, and only when, the Department of Defense has searched for and retrieved such header/router/addressing-type information, ... and not when the Department obtains such header/routing/addressing-type information.” Effectively, that March 11 authorization – and Gonzales’ effort to pretend they hadn’t been violating the law for 3 years – is the source of the Orwellian definition of “collect” that James Clapper relied on when caught in his lies about dragnets. There is a great deal in Goldsmith’s opinion on metadata that remains redacted, so Goldsmith may well have amended this formula. And I think FISC operates with a more reasonable definition of “collect” than the IC does (which ought to be a problem!). But some version of that definition covers probably even more invasive spying of US persons under SPCMA, and that language and logic was always withheld from FISC. My strong suspicion is that Goldsmith did change this. I even think it remotely possible that the scope of SPCMA has been modified since James Baker became FBI General Counsel.

Regardless of whether that definition was reined in in the modifications and/or Goldsmith’s memo, however, that’s still the way the government thinks.