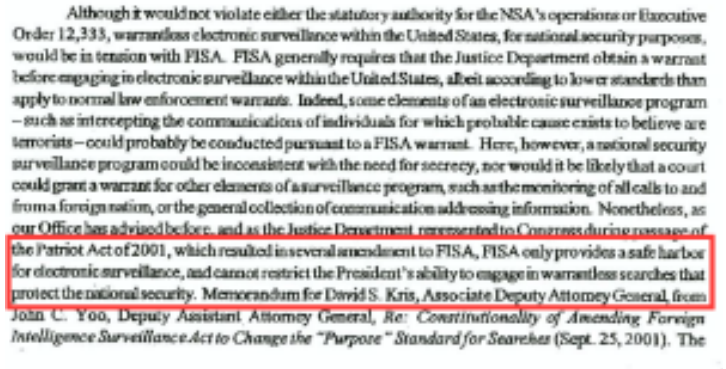
JOHN YOO'S TWO JUSTIFICATIONS FOR STELLAR WIND

Because I'm a hopeless geek, I want to compare the what we can discern of the November 2, 2001 memo John Yoo wrote to authorized Stellar Wind with the letter he showed FISA Presiding Judge Colleen Kollar-Kotelly on May 17, 2002. The former is almost entirely redacted. But as I'll show, the two appear to be substantially the same except for small variations within paragraphs (which possibly may reflect no more than citations). The biggest difference is that Yoo's memo appears to have two pages of content not present in the letter to Kollar-Kotelly.

What follows is a comparison of every unredacted passage in the Yoo memo, every one of which appear in exactly the same form in the letter he wrote to Kollar-Kotelly.

The first unredacted line in Yoo's memo — distinguishing between "electronic surveillance" covered by FISA and "warrantless searches" the President can authorize — appears in this paragraph in the letter.



Although it would not violate either the statutory authority for the NSA's operations or Executive Order 12,333, warrantless electronic surveillance within the United States, for national security purposes, would be in tension with FISA. FISA generally requires that the Justice Department obtain a warrant before engaging in electronic surveillance within the United States, albeit according to lower standards than apply to normal law enforcement warrants. Indeed, some elements of an electronic surveillance program – such as intercepting the communications of individuals for which probable cause exists to believe are terrorists – could probably be conducted pursuant to a FISA warrant. Here, however, a national security surveillance program could be inconsistent with the need for secrecy, nor would it be likely that a court could grant a warrant for other elements of a surveillance program, such as the monitoring of all calls to and from a foreign nation, or the general collection of communication addressing information. Nonetheless, as our Office has advised before, and as the Justice Department represented to Congress during passage of the Patriot Act of 2001, which resulted in several amendment to FISA, FISA only provides a safe harbor for electronic surveillance, and cannot restrict the President's ability to engage in warrantless searches that protect the national security. Memorandum for David S. Kris, Associate Deputy Attorney General, from John C. Yoo, Deputy Assistant Attorney General, *Re: Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the "Purpose" Standard for Searches* (Sept. 25, 2001). The

The line appears on page 7 of Yoo's memo, but page 5 of his letter (which also includes some foofy introductory language for Kollar-Kotelly). That says there's already 2 pages of information in Yoo's memo that doesn't appear in the letter. Yoo's description of the surveillance program in the letter to Kollar-Kotelly is actually fairly

short (and written entirely in the conditional voice), so there may be more of that in the actual memo. Also, anything that didn't involve electronic surveillance — such as the collection of financial data — would not necessarily be relevant to FISC. But as I argue below, it's also possible Yoo made claims about executive power in those two paragraphs that he rewrote as a two-page addition to for Kollar-Kotelly's benefit.

The next unredacted passage in the memo consists of the first sentences of these two paragraphs.

FISA purports to be the exclusive statutory means for conducting electronic surveillance for foreign intelligence, just as Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, claims to be the exclusive method for authorizing domestic electronic surveillance for law enforcement purposes. FISA establishes criminal and civil sanctions for anyone who engages in electronic surveillance, under color of law, except as authorized by statute, warrant, or court order. 50 U.S.C. § 1809-10. It might be thought, therefore, that a warrantless surveillance program, even if undertaken to protect the national security, would violate FISA's criminal and civil liability provisions.

Such a reading of FISA would be an unconstitutional infringement on the President's Article II authorities. FISA can regulate foreign intelligence surveillance only to the extent permitted by the

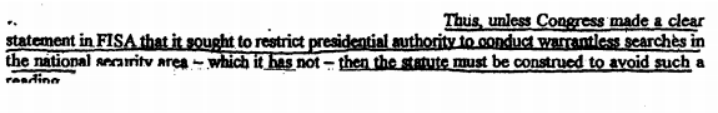
They appear on page 9 of Yoo's memo and page 7 of the letter, and it appears that the space in between the two is consistent — suggesting that the interim content remains the same.

The next unredacted passage appears on page 12 of Yoo's memo, page 10 of the letter.

Due to the President's paramount constitutional authority in the field of national security, a subject which we will discuss in more detail below, reading FISA to prohibit the President from retaining the power to engage in warrantless national security searches would raise the most severe of constitutional conflicts. Generally, courts will construe statutes to avoid such constitutional problems, on the assumption that Congress does not wish to violate the Constitution, unless a statute clearly demands a different construction. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). Unless Congress signals a clear intention otherwise, a statute must be read to preserve the President's inherent constitutional power, so as to avoid any potential constitutional problems. *Cf. Public Citizen v. Department of Justice*, 491 U.S. 440, 466 (1989) (construing Federal Advisory Committee Act to avoid unconstitutional infringement on executive powers); *Association of American Physicians & Surgeons v. Clinton*, 997 F.2d 898, 906-11 (D.C. Cir. 1993) (same). Thus, unless Congress made a clear statement in FISA 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. Even if FISA's liability provisions were thought to apply, we also believe that for a variety of reasons they could not be enforced against surveillance conducted on direct presidential order to defend the nation from attack. This issue can be discussed in more detail, if desired.

While the general pagination still seems to be roughly tracking (again, suggesting the interim content is at least similar), the spacing of this paragraph is clearly different (note how the sentence begins in a different place in the column), suggesting Yoo may have made an even stronger defense of inherent authority in his memo, or perhaps that OLC has precedents for such a claim that Yoo thought inappropriate to share with the FISC. It's *possible* this and

later paragraph spacing differences arise from classification marks at the beginning of each paragraph, except the passages from the beginning of paragraphs seem to match up more closely than those from the middle of them.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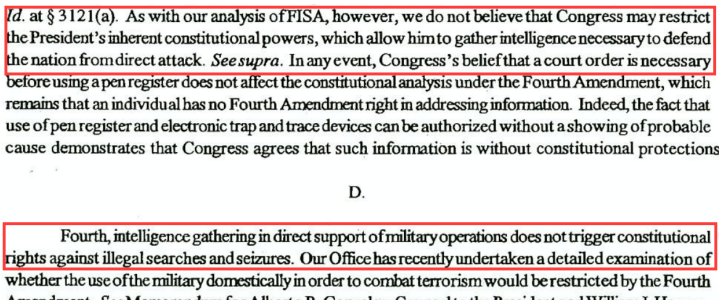
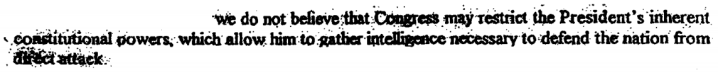
The next unredacted passage, on page 17 of Yoo's memo and 15 of the letter, extend the claim that Congress can't limit the President's use of pen registers used to defend the nation. That's followed closely by Yoo's shift to arguing that intelligence gathering "in direct support" of military operations does not trigger the Fourth Amendment.


Id. at § 3121(a). As with our analysis of FISA, however, we do not believe that Congress may restrict the President's inherent constitutional powers, which allow him to gather intelligence necessary to defend the nation from direct attack. *See supra*. In any event, Congress's belief that a court order is necessary before using a pen register does not affect the constitutional analysis under the Fourth Amendment, which remains that an individual has no Fourth Amendment right in addressing information. Indeed, the fact that use of pen register and electronic trap and trace devices can be authorized without a showing of probable cause demonstrates that Congress agrees that such information is without constitutional protections

D.

Fourth, intelligence gathering in direct support of military operations does not trigger constitutional rights against illegal searches and seizures. Our Office has recently undertaken a detailed examination of whether the use of the military domestically in order to combat terrorism would be restricted by the Fourth

Again, the pagination of both line up. But as with the discussion of Congress' ability to impose limitations with FISA, the discussion on pen registers appears to have different spacing within the paragraph.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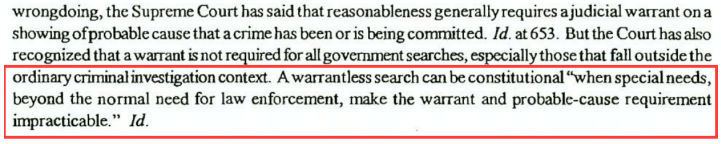
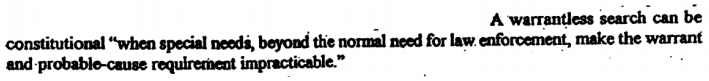
This citation, from the 1995 Supreme Court decision in Vernonia School District, is the next unredacted passage.


wrongdoing, the Supreme Court has said that reasonableness generally requires a judicial warrant on a showing of probable cause that a crime has been or is being committed. *Id.* at 653. But the Court has also recognized that a warrant is not required for all government searches, especially those that fall outside the ordinary criminal investigation context. A warrantless search can be constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Id.*

Here, the pagination of the two documents remains close – the line appears on the bottom of page 19 in Yoo's memo but near the top of page 18 in the letter – but it's possible

there's somewhat less content in the memo at this point than the letter. And again, the spacing within the paragraph seems to be off slightly.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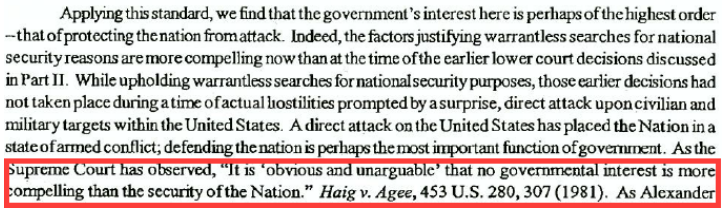
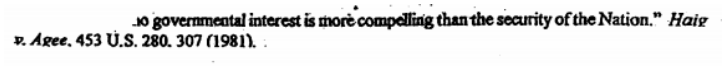
Two pages later in both documents (page 21 of the memo and 19 of the letter), the quote from *Haig v Agee*, which the executive always uses to assert expansive powers for national security, appears.


Applying this standard, we find that the government's interest here is perhaps of the highest order –that of protecting the nation from attack. Indeed, the factors justifying warrantless searches for national security reasons are more compelling now than at the time of the earlier lower court decisions discussed in Part II. While upholding warrantless searches for national security purposes, those earlier decisions had not taken place during a time of actual hostilities prompted by a surprise, direct attack upon civilian and military targets within the United States. A direct attack on the United States has placed the Nation in a state of armed conflict; defending the nation is perhaps the most important function of government. As the Supreme Court has observed, "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). As Alexander

Though once again, the spacing within the paragraph appears slightly different.


...o governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981).

That's the last unredacted passage of Yoo's memo. The memo released to the ACLU under its EO 12333 FOIA reveals there are 3 more pages to Yoo's memo (for a total of 24). That would suggest that the remaining body of the documents were, at least, close in length.

That is what the letter has as well. But in addition to the letter, DOJ released an unexplained 2 page description of "Authority for Warrantless National Security Searches" that does not appear in the Yoo memo *as far as we know*. So the Kollar-Kotelly letter is 22 pages, plus the 2 page addendum, whereas the memo is 24 pages, apparently without it.

Which says one obvious explanation for the difference in length is that Yoo replaced two pages of content from his memo with the two page Authority document.

Half the two-page Authority document deals with citations in *Keith*, the Supreme Court decision

requiring warrants for even domestic security wiretaps; it effectively does this to suggest Keith was more supportive of warrantless wiretapping than it was. The other page treats more recent decisions, all except Congress' decision to include physical searches in FISA, pre-dating FISA. Some of these citations are even repeated in the letter (so presumably in the memo). It seems, then, that these two pages are a special interpretation of past actions to interpret them as saying something different than they do. (As I'll note in a future post, the Keith gymnastics are particularly important.)

But I'll add one more thing. The fact that Yoo had claimed the Executive could ignore the content of EO 12333 first became public when Sheldon Whitehouse got language from the memo declassified in 2007 and read it on the Senate floor (he specifically refers to memos, not letter, so it's presumably from the November 2, 2001 memo). But Whitehouse also got two more claims declassified at the time:

- The President, exercising his constitutional authority under Article II, can determine whether an action is a lawful exercise of the President's authority under Article II.
- The Department of Justice is bound by the President's legal determinations.

I believe the second claim – that DOJ is bound by the President's legal determinations – refers to a note that Alberto Gonzales sent DOJ after the hospital confrontation. But the first – that the President can determine what is a lawful exercise of his own Article II authority – has not (as far as I can think of) since been made public. So I think it's possible that the two pages of the memo that don't exist in the letter

might make such a claim (which would in turn justify the October 4, 2001 decisions to authorize the program). In which case, when Yoo was rewriting it to make it palatable to a judge who otherwise might balk, simply rewrote those two pages to make them appear reasonable so long as no one got to review it closely. That's just a guess, but we know we're looking for 2 pages of content written by Yoo in 2001, and I believe we're still looking for the claim that the President can determine whether his own actions are legal, so it's possible the claim is in those two pages. And some of the later Article II claims that appear in the letter (and the memo) would make more sense if Yoo had made such a case for Article II authority in those missing two pages.

If I'm right, though, it would suggest that DOJ's claim that it cannot release the November 2, 2001 memo is an effort to ensure those two pages don't become public, because all the rest has already been made public (in only slightly redacted form).