

DOMESTIC COLLECTION AND STELLAR WIND

I'm in the middle of comparing John Yoo's May 17, 2002 letter to Colleen Kollar-Kotelly (which is largely the November 2, 2001 justification he wrote for Stellar Wind) with Jack Goldsmith's May 6, 2004 memo on Stellar Wind, which reined in some aspects of Stellar Wind. And I realized something about the authorization process.

On page 17 of his memo, Goldsmith describes the previous opinions issued by OLC. The discussion is largely redacted, but it does describe say the October 4, 2001 memo "evaluated the legality of a hypothetical electronic surveillance program," whereas the November 2, 2001 memo "examined the authorities granted by the President in the November 2, 2001 Authorization of STELLAR WIND and concluded that they were lawful."

Already, that's an interesting assertion given that the Yoo letter doesn't do that entirely. First, at least in the letter to Kollar-Kotelly, Yoo also treated the program as hypothetical.

Electronic surveillance techniques would be part of this effort. The President would order warrantless surveillance in order to gather intelligence that would be used to prevent and deter future attacks on the United States. Given that the September 11 attacks were launched and carried out from within the United States itself, an effective surveillance program might include individuals and communications within the continental United States. This would be novel in two respects. Without access to any non-public sources, it is our understanding that generally the National Security Agency (NSA) only conducts electronic surveillance outside the United States that do not involve United States persons. Usually, surveillance of

communications by United States persons within the United States is conducted by the FBI pursuant to a warrant obtained under the Foreign Intelligence Surveillance Act ("FISA"). Second, *interception could include electronic messages carried through the internet, which again could include communications within the United States involving United States persons.* Currently, it is our understanding that neither the NSA nor law enforcement conducts broad monitoring of electronic communications in this matter within the United States, without specific authorization under FISA.

[snip]

Thus, for example, all communications between United States persons, whether in the United States or not, and individuals in [redacted—likely Afghanistan] might be intercepted. The President might direct the NSA to intercept communications between suspected terrorists, even if one of the parties is a United States person and the communication takes place between the United States and abroad. The non-content portion of electronic mail communications also might be intercepted, even if one of parties is within the United States, or one or both of the parties are non-citizen U.S. persons (i.e., a permanent resident alien). Such operations would expand the NSA's functions beyond the monitoring only of international communications of non-U.S. persons. [my emphasis]

Importantly, these hypothetical descriptions come from the section of Yoo's letter before it appears to begin tracking his earlier memo closely. So it's unclear whether this description of Stellar Wind matches the one in the November 2 memo. It's certainly possible

that Yoo gave an incomplete version of what he had in the earlier memo or even pulled in (hypothetical) language from the October 4 memo. It's possible, too, that language on domestic content collection reflected a retroactive review Yoo did of the first authorization. (An extended discussion of how Yoo's early memos track the Authorizations – including discussion of another hypothetical memo Yoo wrote on September 17 – starts at PDF 361.)

Of particular interest, this hypothetical description includes the possibility of intercepting entirely domestic Internet communications (see emphasized language). We know – from the unredacted NSA Stellar Wind IG Report and even from the redacted Joint IG Report – that was something included in the first presidential Authorization, but not the subsequent ones.

The wording of the first authorization could have been interpreted to allow domestic content collection where both communicants were located in the U.S. or were U.S. persons. General Hayden recalled that when the Counsel to the Vice President pointed this out, General Hayden told him that NSA would not collect domestic communications because 1) NSA was a foreign intelligence agency, 2) NSA infrastructure did not support domestic collection, and 3) his personal standard was so high that there would be no problem getting a FISC order for domestic collection.

We also know NSA did collect some domestic collection – on about 3,000 selectors, possibly triggered to non-US persons within the US – at least until Stellar Wind got transitioned to FISA in 2009.

This is a minor, but potentially important one. Yoo was writing hypothetical authorizations for stuff the NSA later pretended not to be authorized to do, but was doing. Those earlier

hypothetical authorizations didn't go away. And therefore, no matter what the authorizations said, there'd still be that authorization sitting there.