THE PRECEDENT FOR USING PRESIDENTIAL NATIONAL EMERGENCY PROCLAMATIONS TO EXPAND SURVEILLANCE

On September 14, 2001 — 3 days before signing an expansive Memorandum of Notification that would authorize a suite of covert operations against al Qaeda, and 4 days before signing an AUMF that would give those operations the appearance of Congressional sanction — President Bush declared a National Emergency in response to the 9/11 attack.

The following day, according to a 2002 motion to the FISC to be able to share raw FISA-derived information with CIA and NSA (this was liberated by Charlie Savage), FISC suspended its rules on sharing intelligence derived under FBI-obtained FISA warrants with criminal investigations (see page 26 of this paper for background).

> On September 15, 2001, upon motion of the Government, the [FISA] Court suspended the "Court wall," certification, and caveat requirements that previously had applied to Court-authorized electronic surveillance and physical search of [redacted] related targets, while directing that the FBI continue to apply the standard minimization procedures applicable in each case. As stated in the order resulting from that motion, the Court took this action in light of inter alia:
>
> "the President's September 14, 2001, declaration of a national emergency and the near war conditions that currently exist;"
>
> "the personal meeting the Court had with the Director of the FBI on September 12,

> 2001, in which he assured the Court of the collection authority requested from this Court in the face of the nature and scope of the multi-faced response of the United States to the above-referenced attacks;
>
> "the need for the Government to rapidly disseminate pertinent foreign intelligence information to appropriate authorities."

Ten days after FISC dismantled its role in "the wall" between intelligence and criminal investigations in response to the Executive's invocation of a National Emergency, on September 25, 2001, John Yoo finished an OLC memo considering the constitutionality of dismantling the wall by replacing "the purpose" in FISA orders with "a purpose."

A full month later, on October 25, 2001, Congress passed the PATRIOT Act. For over 13 years, analysis of the PATRIOT Act has explained that it eliminated "the wall" between intelligence and criminal investigations by replacing language requiring foreign intelligence be "the purpose" of FISA wiretaps with language requiring only that that be "a significant purpose" of the wiretap. But the FISC suspension had already removed the biggest legal barrier to eliminating that wall.

In other words, the story we've been telling about "the wall" for over 13 years is partly wrong. The PATRIOT Act didn't eliminate "the wall." "The wall" had already been suspended, by dint of Executive Proclamation and a secret application with the FISC, over a month before the PATRIOT Act was initially introduced as a bill.

FISC suspended it, without congressional sanction, based on the President's invocation of a National Emergency.

That's not the only case where the Executive invoked that National Emergency in self-

authorizing or getting FISC to authorize expansive new surveillance authorities (or has hidden the authorities under which it makes such claims).

Perhaps most illustratively, on May 6, 2004, Jack Goldsmith pointed to the National Emergency when he reauthorized most aspects of Stellar Wind.

> On September 14, 2001. the President declared a national emergency "by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States." Proclamation No. 7463, 66 Fed. Reg. 43, !99 (Sept. 14, 2001). The United States also launched a massive military response, both at home and abroad. In the United States, combat air patrols were immediately established over major metropolitan areas and were maintained 24 hours a day until April 2002, The United States also immediately began plans for a military response directed at al Qaeda's base of operations in Afghanistan.

Only *after* invoking both the Proclamation and the immediate military response that resulted did Goldsmith note that Congress supported such a move (note, he cited Congress' September 14 passage of the AUMF, not Bush signing it into law on September 18, thought that may be in part because Michael Hayden authorized the first expansions of surveillance September 14; also remember there are several John Yoo memos that remain hidden) and then point to an article on the friendly-fire death of Pat Tillman as proof that combat operations continued.

> On September 14, 2001, both houses of Congress passed a joint resolution authorizing the President "to use

> all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September I I. Congressional Authorization § 2(a). Congress also expressly acknowledged that the attacks rendered it "necessary and appropriate" for the United States to exercise its right "to protect United States citizens both at home and abroad," and acknowledged in particular that the "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." id. pmbl. Acting under his constitutional authority as Commander in Chief, and with the support of Congress, the President dispatched forces to Afghanistan and, with the cooperation of the Northern Alliance, toppled the Taliban regime from power Military operations to seek out resurgent elements of the Taliban regime and al Qaeda fighters continue in Afghanistan to this day. See, e.g., Mike Wise and Josh White, Ex-NFL Player Tillman Killed in Combat, Wash. Post, Apr. 24, 2004, at AI (noting that "there are still more than 10,000 U.S. troops in the country and fighting continues against remains of the Taliban and al Qaeda").

That is, even in an OLC memo relying on the AUMF to provide legal sanction for President Bush's systematic flouting of FISA for 2.5 years, Goldsmith relied primarily on the National Emergency Proclamation, and only secondarily on Congress' sanction of such invocation with the AUMF.

The White Paper released in 2006 largely regurgitating Goldsmith's opinion for more

palatable consumption mentions the AUMF first in its summary, but then repeats Goldsmith's emphasis on the Proclamation in the background section (see pages 2 and 4).

Paragraphs that may discuss such authorizations get redacted in the 2006 application to move content collection under FISC (see page 6). The entire background section (starting at page 5) of the initial Internet dragnet application is also redacted. While we can't be sure, given parallel claims made in the same 2004 to 2006 period, it seems likely those memoranda also repeated this formula.

Such a formula was definitely dropped. The 2006 memorandum in support of using Section 215 to create a phone dragnet included no mention of authorities. The 2007 memorandum to compel Yahoo to fulfill Protect American Act orders cites PAA, not Emergency Declarations.

But the formula was retained in all discussions of the Administration's illegal wiretap program in secret declarations submitted in court in 2006, 2007, and 2009, being repeated again in an unclassified 2013 declaration. While these declarations likely all derive, at least in part, from Goldsmith's memo, it's worth noting that the government has consistently suggested it could conduct significant surveillance programs without Congressional sanction by pointing to the that National Emergency Proclamation.

This is the precedent I meant to invoke when I expressed concern about President Obama's expansive Executive Order of the other day, declaring a National Emergency because of cybersecurity.

Ranking House Intelligence Member Adam Schiff's comment that Obama's EO is "a necessary part of responding to the proliferation of dangerous and economically devastating cyber attacks facing the United States," but that it will be "coupled with cyber legislation moving forward in both houses of Congress" only adds to my alarm

(particularly given Schiff's parallel interest in giving Obama soft cover for his ISIL AUMF while having Congress still involved). It sets up the same structure we saw with Stellar Wind, where the President declares an Emergency and only a month or so later gets sanction for and legislative authorization for actions taken in the name of that emergency.

And we know FISC has been amenable to that formula in the past.

We don't know that the President has just rolled out a massive new surveillance program in the name of a cybersecurity Emergency (rooted in a hack of a serially negligent subsidiary of a foreign company, Sony Pictures, and a server JP Morgan Chase forgot to update).

We just know the Executive has broadly expanded surveillance, in secret, in the past and has never repudiated its authority to do so in the future based on the invocation of an Emergency (I think it likely that pre FISA Amendments Act authorization for the electronic surveillance of weapons proliferators, even including a likely proliferator certification under Protect America Act, similarly relied on Emergency Proclamations tied to all such sanctions).

I'm worried about the Cyber Intelligence Sharing Act, the Senate version of the bill that Schiff is championing. But I'm just as worried about surveillance done by the executive prior to and not bound by such laws.

Because it has happened in the past.

Update: In his October 23, 2001 OLC memo authorizing the President to suspend the Fourth Amendment (and with it the First), John Yoo said this but did not invoke the September 14, 2001 proclamation per se.

> As applied to the present circumstances, the [War Powers Resolution] signifies Congress' recognition that the President's constitutional authority

> alone enables him to take military measures to combat the organizations or groups responsible for the September 11 incidents, together with any governments that may have harbored or supported them, if such actions are, in his judgment, a necessary and appropriate response to the national emergency created by those incidents.

Update: Thanks to Allen and Joanne Leon for the suspend/suspect correction.