

In connection with Freedom of Information Act litigation brought by *The New York Times* in the Southern District of New York, additional information has been declassified by agencies with the authority to do so from the "Report on the President's Surveillance Program," which was prepared in 2009 by the Offices of the Inspectors General of the Department of Defense, Department of Justice, Central Intelligence Agency, National Security Agency, and Office of the Director of National Intelligence.

The following page contains information that was previously redacted. This page replaces page 35 of Volume III of the 2009 report available here: <https://oig.justice.gov/reports/2016/PSP-01-08-16-full.pdf>.

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Regarding whether the activities conducted under the Stellar Wind program could be conducted under FISA, Yoo wrote that it was problematic that FISA required an application to the FISA Court to describe the "places" or "facilities" to be used by the target of the surveillance. Yoo also stated that it was unlikely that a FISA Court would grant a warrant to cover [REDACTED] (b)(1), (b)(3) as contemplated in the Presidential Authorization. Noting that the Authorization could be viewed as a violation of FISA's civil and criminal sanctions in 50 U.S.C. §§ 1809-10, Yoo opined that in this regard FISA represented an unconstitutional infringement on the President's Article II powers. According to Yoo, the ultimate test of whether the government may engage in warrantless electronic surveillance activities is whether such conduct is consistent with the Fourth Amendment, not whether it meets the standards of FISA.

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Citing cases applying the doctrine of constitutional avoidance, Yoo reasoned that reading FISA to restrict the President's inherent authority to conduct foreign intelligence surveillance would raise grave constitutional questions.⁴² Yoo wrote that "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."⁴³ (TS//STLW//SI//OC/NF)

⁴² Yoo's memorandum cited the doctrine of constitutional avoidance, which holds that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). Yoo cited cases supporting the application of this doctrine in a manner that preserves the President's "inherent constitutional power, so as to avoid potential constitutional problems." See, e.g., *Public Citizen v. Department of Justice*, 491 U.S. 440, 466 (1989).
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⁴³ On March 2, 2009, the Justice Department released nine opinions written by the OLC from 2001 through 2003 regarding "the allocation of authorities between the President and Congress in matters of war and national security" containing certain propositions that no longer reflect the views of the OLC and "should not be treated as authoritative for any purpose." Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, Memorandum for the Files, "Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001," January 15, 2009, 1, 11. Among these opinions was a February 2002 classified memorandum written by Yoo which asserted that Congress had not included a clear statement in FISA that it sought to restrict presidential authority to conduct warrantless surveillance activities in the national security area and that the FISA statute therefore does not apply to the president's exercise of his Commander-in-Chief authority. In a January 15, 2009, memorandum (included among those released in March), Bradbury stated that this proposition "is problematic and questionable, given FISA's express references to the President's authority" and is "not supported by convincing reasoning."
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