



DOJ Memo: President Has Constitutional Authority for Dragnet Surveillance

The Obama administration wants everyone to know that it claims the power to conduct dragnet surveillance of American phone records and that it is not going to bother revealing the source of that authority.

The administration has released another redacted version of the May 2004 Department of Justice (DOJ) memo approving the National Security Agency's (NSA) Stellarwind program; an earlier, more heavily redacted, version of the document had been released in 2011.



Stellarwind, as described by the *New York Times*, is “a set of warrantless surveillance and data collection activities that President George W. Bush secretly authorized after the terrorist attacks of Sept. 11, 2001.”

In a 2012 documentary, NSA veteran and whistleblower William Binney described the operation this way:

After 9/11 they took one of the programs I had done — the back end of it — and started to use it to spy on everybody in this country. That was a program they created called STELLAR WIND. That was separate and compartmented from the regular activity that was ongoing because it was doing domestic spying.

Despite its egregious violations of the Constitution, Stellarwind remains in effect, apparently, as revealed during a Senate Intelligence committee hearing in February 2014. On that occasion, the then-acting head of the DOJ's Office of Legal Counsel (OLC), Caroline Krass, admitted to Senator Ron Wyden (R-Ore.) that the Stellarwind memo was still active.

When asked by Wyden, “Has the OLC taken any action to withdraw this opinion?” Krass responded:

OLC generally does not reconsider the status of its prior opinions in the absence of a practical need by an element of the Executive Branch to know whether it can rely upon the advice in connection with its ongoing operations. My understanding is that any continuing NSA collection activities addressed in the May 6, 2004 opinion are being conducted pursuant to authorization by the Foreign Intelligence Surveillance Court, and thus do not rely on the advice of the opinion.

In other words, the NSA could still rely on the authorization set out in the now partially declassified Stellarwind memo — called the Goldsmith memo after its author — but it doesn't have to because the FISA court continually rubber stamps requests to collect the phone data in the government's dragnet.

While most of the 2004 memo is declassified — little more than a formality in light of the revelations made by Edward Snowden — there is a 15-page section that is completely redacted.

Why would that single section still be classified months after the rest of the information has percolated



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up to the top of the public consciousness? Perhaps that portion is still protected because President Obama wants to show that regardless of congressional action to reauthorize the dragnet surveillance program, he will continue carrying it out under his own presumed authority — authority that he believes he doesn't have to justify to anyone, citizen or congressman.

Or, as Jack Goldsmith explained in the memo:

The president has inherent constitutional authority as commander in chief and sole organ for the nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States. Congress does not have the power to restrict that authority.

Of course, that enumeration of power is antithetical to that set out in the Fourth Amendment to the Constitution, which reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Notice the use of the words “warrantless” in the first selection and “warrants” in the second. The Goldsmith memo asserts that the president has “inherent constitutional authority ... to conduct warrantless surveillance,” while the Fourth Amendment specifically states that “the right of the people ... against unreasonable searches and seizures shall not be violated.”

Day by day, the dossier of dictatorship being compiled by President Obama grows thicker and thicker. From the assumption of authority to draw “First Amendment Zones” to the supposed right to capture and indefinitely detain American citizens in violation of the Fourth and Fifth Amendments, President Obama (and his congressional co-conspirators) is establishing “legal justification” for the gradual establishment of an American autocracy.

Caesar would be very proud.

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