JACK GOLDSMITH'S STILL ACTIVE PRESIDENTIAL DRAGNET AUTHORIZATION

In the follow-up questions for CIA General Counsel nominee Caroline Krass, Ron Wyden asked a series of his signature loaded questions. With it, he pointed to the existence of still-active OLC advice — Jack Goldsmith's May 6, 2004 memo on Bush's illegal wiretap program — supporting the conduct of a phone (but not Internet) dragnet based solely on Presidential authorization.

He started by asking "Did any of the redacted portions of the May 2004 OLC opinion address bulk telephony metadata collection?

Krass largely dodged the question — but did say that "it would be appropriate for the May 6, 2004 OLC opinion to be reviewed to determine whether additional portions of the opinion can be declassified."

In other words, the answer is (it always is when Wyden asks these questions) "yes."

This is obvious in any case, because Goldsmith discusses shutting down the Internet dragnet program, and spends lots of time discussing locating suspects.

Wyden then asked if the opinion relied on something besides FISA to conduct the dragnet.

> [D]id the OLC rely at that time on a statutory basis other than the Foreign Intelligence Surveillance Act for the authority to conduct bulk telephony metadata collection?

Krass dodged by noting the declassification had not happened so she couldn't answer.

But the 2009 Draft NSA IG Report makes it clear the answer is yes: NSA collected such data, both before and after the 2004 hospital showdown, based solely on Presidential authorization (though on occasion DOJ would send letters to the telecoms to reassure them both the metadata and content collection was legal).

Finally, Wyden asks the kicker: "Has the OLC taken any action to withdraw this opinion?"

Krass makes it clear the memo is still active, but assures us it's not being used.

> 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.

Of course, just yesterday both Dianne Feinstein and Mark Udall made it clear that no one at DOJ is paying close attention to EO 12333 — that is, Presidentially — authorized activities. So how would she know?

One way or another, the Executive Branch still has OLC sanction to conduct a phone dragnet off the books, using only Presidential authorization.

The question is whether, in addition to pointing to this authorization, Wyden is also suggesting that the Executive is currently using it.

(h/t to KH for alerting me that the QFRs had been posted)