

# BUSH'S INFO SHARING MEMO AND THE WARRANTLESS WIRETAP REVELATIONS

Okay, this is going to be a bit weedy, but bear with me.

In the wake of the recent domestic spying revelations and the news that the NCTC center—and current Deputy National Security Advisor John Brennan—were key players in Bush's illegal spying program, I've been reading the October 2007 National Information Sharing Strategy.

And I couldn't help but notice that the day Risen and Lichtblau first exposed the domestic wiretap program, Bush issued a Memorandum to Heads of Executive Departments and Agencies setting up a framework for information sharing.

On December 16, 2005, in accordance with section 1016 of the Intelligence Reform and Terrorism Prevention Act of 2004, the President issued a Memorandum to Heads of Executive Departments and Agencies prescribing the guidelines and requirements in support of the creation and implementation of the [Information Sharing Environment]. In the December Memorandum, the President directed that the ISE be established by building upon "existing Federal Government policies, standards, procedures, programs, systems, and architectures (collectively "resources") used for the sharing and integration of and access to terrorism-related information, and ... leverage those resources to the maximum extent practicable, with the objective of establishing a decentralized, comprehensive, and coordinated environment for the sharing and

integration of such information.” [my emphasis]

Now, the memo—and the creation of ISE itself—is not suspicious. As noted, it was required by the Intelligence Reform and Terrorist Prevention Act of 2004. It’s the timing I find curious.

If I read section 1016 correctly, it requires the President to start pushing agency heads to share information 270 days after passage of the law—or roughly September 13, 2005.

(d) Guidelines and Requirements.—As soon as possible, but in no event later than 270 days after the date of the enactment of this Act, the President shall—

[snip]

(3) require the heads of Federal departments and agencies to promote a culture of information sharing by—

(A) reducing disincentives to information sharing, including over-classification of information and unnecessary requirements for originator approval, consistent with applicable laws and regulations; and

(B) providing affirmative incentives for information sharing.

Now, perhaps Bush fulfilled this requirement with EO 13388, signed on October 25, 2005. But the language in Bush’s own Information Sharing Strategy—with its explicit invocation of section 1016—seems to suggest this Memo fulfilled that requirement. Only he sent it three months late. And, coinkydink of all coinkydinks, he sent it just as it became known that he was spying on Americans.

Oh, just FYI, there were actually three things required within 270 days under section 1016: in addition to requiring Agency heads to share information and leveraging existing resources,

1016 required the President,

(2) in consultation with the Privacy and Civil Liberties Oversight Board established under section 1061, issue guidelines that—

(A) protect privacy and civil liberties in the development and use of the ISE; and

(B) shall be made public, unless nondisclosure is clearly necessary to protect national security; and

The Privacy and Civil Liberties Oversight Board did not first meet until March, 2006. Lanny Davis quit the board in May 2007, citing (among other things) doubts whether the White House was giving the board "early access to developing and current anti-terrorist programs affecting privacy rights and civil liberties." In August 2007, Congress replaced the board with an independent one. But Bush never appointed the full roster he was required to appoint. And Obama has been even worse, appointing no one at all! Most troubling, Obama's team took all mention of the board off the White House website sometime in June or July. So we effectively have no PCOB.

The ISE did finally release privacy guidelines, mind you, a year after Bush issued this memo. But they're pretty weak tea.

So while Bush sort of kind of complied with 1016 by ordering all levels of government to share information on the very same day that the domestic surveillance program was revealed, neither he nor Obama have fully complied with 1016's requirement that the President consult with the PCOB to ensure civil liberties.

(Incidentally, the Project Manager for the ISE didn't work out all the way it was supposed to, either.)

But back to the December 16, 2005 Memorandum. I find the date of its release to be suspicious

for two reasons. First, the release of a memorandum (with related note to Congress) just when the domestic surveillance program was revealed and when Congress was balking over PATRIOT reauthorization may have been an attempt to remind Congress that it demanded the Administration actually do more, not less, information sharing. The inclusion of a bunch of deadlines—180 days, 90 days, 180 days, one year—basically would buy time for the Bush Administration before it had to talk to Congress in detail about its domestic data sharing and collection.

I'm just as curious whether the Bush Administration used that time to basically categorize the "Other Intelligence Activities" that were part of the domestic surveillance program as just the information sharing required by Congress. I say that, first of all, because the central position the NCTC had in the program and in this other information sharing would make it easy to conflate all of the information sharing. And, given the way the Bush Administration invented and carved off the use of the term, "Terrorist Surveillance Program," this would make it easier to claim that the data collection and sharing was something different, unrelated to Lichtblau's and Risen's revelations.

That's all speculative. But I will say this. Between the time Bush issued the Memorandum and the time he released his Information Sharing Strategy in 2007, the terms of Guideline 2 had morphed to include "homegrown terrorists" unrelated to al Qaeda.

The President's guidelines recognized that State, local, and tribal authorities are critical to our Nation's efforts to prevent future terrorist attacks and are the first to respond if an attack occurs. The attacks of September 11 illustrated that foreign terrorists wanting to commit acts of terrorism might live in our local

communities and be engaged in criminal or other suspicious activity as they plan attacks on targets within the United States or its territories. At the same time, there is increasing concern regarding the potential threat posed by homegrown terrorists. While lacking formal ties to al-Qaida, these disaffected, radicalized, violent extremists often draw inspiration from al-Qaida and other global terrorist organizations.

Given that we know the Administration failed to adequately police anti-abortion terrorists yet apparently did track peace activists, the appeal to "homegrown terrorists" seems to be a gaping hole allowing a great deal of domestic surveillance. And the Bush Administration (and, frankly, the Obama Administration) could introduce such flexible language to retroactively justify their domestic surveillance.

As I said, the timing could just be a crazy coincidence. But given how much time we know the Bush Administration was spending doing damage control on December 16, 2005, I strongly suspect the release of this Memorandum on that day was part of the damage control as well.