

# THE OTHER AUTHORITY FOR THE PHONE DRAGNET

Back in February, I noted Ron Wyden's question for then acting OLC head Caroline Krass (she's now CIA's General Counsel) about Jack Goldsmith's 2004 OLC opinion authorizing the dragnet.

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.

This is an exchange Center for National Security Studies Kate Martin brings back into the discussion of whether USA Freedom Act actually ends bulk collection.

[W]e don't know whether the Justice Department has opined that other statutory authorities – not now addressed in the USA Freedom Act – could authorize the NSA's bulk collection. Without this knowledge, we can't be certain whether the proposed amendments to section 501 (215) will in fact be sufficient to prohibit the NSA from engaging in bulk collection of metadata using some other hitherto unidentified authority.

This is not a fanciful concern. There is in fact a still partly secret OLC opinion by the Justice Department that may address precisely this question.

CNSS is using the debate over USA Freedom to demand the Administration declassify the rest of that opinion.

When the government declassified the statements submitted in the Jewel v. NSA case last December, it basically declassified everything that *should* be in that memo. So what's the holdup on releasing the memo itself?