

EXECUTIVE STILL HIDING ITS PHONE DRAGNET SELF-AUTHORIZATION, WHILE MAKING SURE WE KNOW IT HAS IT

III. Telephony Dialing-Type Meta Data Collection – Statutory Analysis	81
A. [REDACTED]	83
B. [REDACTED]	86
C. [REDACTED]	89
IV. [REDACTED]	96

Back in February, Ron Wyden got then acting OLC head Caroline Krass to admit that Jack Goldsmith's May 6, 2004 Stellar Wind authorization remained active. Although they could rely on it at any time, Krass suggested they weren't, because FISA currently authorizes the very same phone dragnet that OLC authorized a decade ago.

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.

[snip]

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.

Last night, the government finally released a new version of that memo, reflecting all the things that have been declassified thanks to Edward Snowden's leaks.

And it shows that a 15-page section of the memo authorize(s) the phone dragnet.

Only, that section is entirely redacted.

Even after the phone dragnet has been declassified for 15 months, the Executive refuses to show its claim that it can engage in that dragnet with or without Congressional authorization.

Understand what this amounts to: The Executive just waved its dick around in advance of Congressional action that may or may not reauthorize this program. It said, to Congress and to us, that it will continue operating its phone dragnet with or without Congressional authorization.

For what it's worth, I think that's a bluff. I believe Verizon would refuse to cooperate without explicit authorization from Congress and legal mandates it can show. But the Executive is, at least, trying to send a message that it doesn't believe it needs anything so piddly as Congressional approval to spy on every single American.