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Big Brother, Kill Lists, and Secrecy: What to Expect from Obama's Second Term

By Christian Stork

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Following Barack Obama's significant electoral victory, the ways in which the President will interpret his new "mandate" are still very much up for debate. While pundits, many of whom got the election seriously wrong, fumble to come up with new predictions, an analysis of Obama's track record and statements on national security policy can be quite illuminating. Two momentous stories of the past few weeks can help us evaluate current and future prospects for our Constitutional rights, a year after Osama bin Laden's death and a decade after 9/11. One grim harbinger of what's to continue: a nighttime drone strike in Yemen that killed three "al-Qaida militants" was carried out within 24 hours of Obama's victory speech.

But even more important was the bombshell story that appeared in the *Washington Post* on October 23, revealing the existence of a new database within the National Counterterrorism Center (NCTC) that will list suspected terrorists and militants slated for extrajudicial assassination. The article details the creation of a "next-generation targeting list called the 'disposition matrix'" which "contains the names of terrorism suspects arrayed against an accounting of the resources being marshaled" to kill them, including the ability to map "plans for the 'disposition' of suspects beyond the reach of American drones."

Additionally, on October 29, the Supreme Court heard oral arguments in *Amnesty v. Clapper*, evaluating a lawsuit filed by journalists, human rights workers, and lawyers, who claimed that their jobs are unnecessarily hampered by the specter of the National Security Agency

eavesdropping on their communications with clients overseas. As described by the Electronic Frontier Foundation (EFF), "the [Supreme] Court will essentially determine whether any court… can rule on whether the [National Security Agency]'s targeted warrantless surveillance of Americans' international communications violates the Constitution."

What do NSA's warrantless wiretapping program and the Obama administration's recently developed "disposition matrix" have to do with one another? Two points resound in particular. First, both are only able to function in an environment of total secrecy. Also, they represent significant advances in the codification of a new norm for U.S. national security policy—one very much at odds with the constitutionally limited Commander-in-Chief of common lore.

Perhaps even more ominously, the infrastructure development of the Obama administration's policy of targeted killing signals a creeping move toward domestic application. As drone technology continues to be imported home, the convergence of the kill-list(s) within the NCTC bureaucracy—which houses huge repositories of both domestic and foreign intelligence with no probable cause of criminality—is a foreboding development in this saga of eroding checks and disappearing balance.

Climbing Out of the Abyss, Jumping Back In

Unknown to the American people and to much of their government until the late 1970's, NSA has enjoyed free rein to intercept the electronic communications of Americans and foreigners since its secret inception in 1952. To those who were familiar with it, the uniform joke was that NSA stood for "No Such Agency," an indication of its covert and prized status within the intelligence community.

After media revelations of intelligence abuses by the Nixon administration began to mount in the wake of Watergate, NSA became the subject of Congressional ire in the form of the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities—commonly known as the "Church Committee" after its chair, Senator Frank Church (D-ID)—established on January 17, 1975. This ad-hoc investigative body found itself unearthing troves of classified records from the FBI, NSA, CIA and Pentagon that detailed the murky pursuits of each during the first decades of the Cold War. Under the mantle of defeating communism, internal documents confirmed the executive branch's use of said agencies in some of the most fiendish acts of human imagination (including refined psychological torture techniques), particularly by the Central Intelligence Agency.

The Cold War mindset had incurably infected the nation's security apparatus, establishing extralegal subversion efforts at home and brutish control abroad. It was revealed that the FBI undertook a war to destroy homegrown movements such as the Black Liberation Movement (including Martin Luther King, Jr.), and that NSA had indiscriminately intercepted the communications of Americans without warrant, even without the President's knowledge. When confronted with such nefarious enterprises, Congress sought to rein in the excesses of the intelligence community, notably those directed at the American public.

The committee chair, Senator Frank Church, then issued this warning about NSA's power:

That capability at any time could be turned around on the American people and no American would have any privacy left, such is the capability to monitor everything. Telephone conversations, telegrams, it doesn't matter. There would be no place to hide. If this government ever became a tyranny, if a dictator ever took charge in this country, the technological capacity that the intelligence community has given the government could enable it to impose total tyranny, and there would be no way to fight back, because the most careful effort to combine together in resistance to the government, no matter how privately it was done, is within the reach of the government to know. Such is the capability of this technology. I don't want to see this country ever go across the bridge. I know the capability that is there to make tyranny total in America, and we must see to it that this agency and all agencies that possess this technology operate within the law and under proper supervision, so that we never cross over that abyss. That is the abyss from which there is no return.

The reforms that followed, as enshrined in the Foreign Intelligence Surveillance Act (FISA) of 1978, included the establishment of the Foreign Intelligence Surveillance Court (FISC): a specially-designated panel of judges who are allowed to review evidence before giving NSA a warrant to spy on Americans (only in the case of overseas communication). Hardly a contentious check or balance, FISC rejected *zero* warrant requests between its inception in 1979 and 2000, only asking that two warrants be "modified" out of an estimated 13,000.

In spite of FISC's rubberstamping, following 9/11 the Bush administration began deliberately bypassing the court, because even its minimal evidentiary standard was too high a burden of proof for the blanket surveillance they wanted. So began the dragnet monitoring of the American public by tapping the country's major electronic communication chokepoints in collusion with the nation's largest telecommunications companies.

When confronted with the criminal conspiracy undertaken by the Bush administration and telecoms, Congress confirmed why it retains the lowest approval rating of any major American institution by "reforming" the statute to accommodate the massive law breaking. The 2008 FISA Amendments Act [FAA] entrenched the policy of mass eavesdropping and granted the telecoms retroactive immunity for their criminality, withdrawing even the negligible individual protections in effect since 1979. Despite initial opposition, then-presidential candidate Barack Obama voted for the act as one of his last deeds in the Senate. A few brave (and unsuccessful) lawsuits later, this policy remains the status quo.

Seemingly Impossible to Stand (Up For Your Rights)

The latest challenge to government snooping, *Amnesty v. Clapper*, isn't even about Big Brother's legality in the first place. The defendants are appealing a federal circuit court's decision that granted legitimate "standing" to the plaintiffs to bring suit disputing the electronic surveillance program's constitutionality.

The Justice Department maintains that the plaintiffs don't have standing to challenge the powers granted in the FAA because they are unable to claim with certainty that they were specifically wiretapped in the first place. Such a determination is impossible to make because all attempts to gather said information have hitherto been quashed by federal courts. They have overwhelmingly

agreed with the government's assertion that disclosing such information would divulge state secrets. Thus the only way to prove aggrieved status, and then challenge government snooping, is through government admission.

Despite pledges to use the privilege sparingly, Barack Obama's administration has enshrined the Kafkaesque nature of American judicial proceedings in the War on Terror: the government claims it is a state secret whether you've been targeted for surveillance, thereby invalidating any legal challenges you may present because you can't even prove you've been a victim.

As Justice Sonia Sotomayor put it ten seconds into the Solicitor General's argument: "General [Donald Verrelli], is there *anybody* who has standing?"

The Supreme Court's decision in *Amnesty v. Clapper* has the potential to determine how far the government can extend the cloak of secrecy over its national security activities. Notwithstanding the tough questioning by Sotomayor and her liberal colleagues on the bench, legal scholars note that the court usually doesn't hear a case unless it sees legitimate ground to overturn a circuit court's decision—which in this case would mean denying that the plaintiffs had standing to bring suit.

National Clearinghouse for Treasonous Contentions

Surreal judicial machinations aside, what are the real threats of the government collecting all the communications and personal data that fall into NSA's surveillance net?

The National Counterterrorism Center (NCTC) is a freshly minted bureaucracy—within the Office of the Director of National Intelligence (ODNI)—that houses and evaluates "terrorism" intelligence from the nation's 16 other spy agencies, including NSA. It was created to streamline interagency intelligence sharing but ironically, or perhaps indicatively, has led to even more red tape.

Thanks to a series of new "guidelines" issued by the Attorney General, Director of National Intelligence (DNI), and head of NCTC in March of 2012, the center now also acquires information mined from any government database (ranging from local law-enforcement data to employment history and student records). It can also buy data from private sector aggregators—including millions upon millions of lawful commercial transactions over the past decade.

Previously, as the American Civil Liberties Union (ACLU) noted, "the intelligence community was barred from collecting information about ordinary Americans unless the person was a terror suspect or part of an actual investigation." When the NCTC acquired non-terrorism related data, such as that described above, it had to identify and discard it within 180 days. That regulation was scrapped in the new guidelines, which allow NCTC to collect innocuous data and "continually assess" information concerning innocent Americans for up to five years. The ACLU goes on to mention:

Perhaps most disturbing, once information is gathered (not necessarily connected to terrorism), in many cases it can be shared with "a federal, state, local, tribal or foreign or international entity, or to an individual or entity not part of a government"—literally anyone.

As revealed in a recent *Washington Post* expose, we now know the NCTC also coordinates counterterrorism operations such as the CIA's targeted assassination program. As one anonymous official told the *Post*, "[i]t is the keeper of the criteria" that determine who is killed by the President. How is this designation reached? Presumably through the same ineffective algorithms and data-mining technology mentioned above.

FML: What Once Was TMI For TIA is Now A-OK

Immediately following 9/11, the Pentagon unveiled the closest thing to an actual "Big Brother" program that had ever earnestly been considered in the United States: Total Information Awareness (TIA). A pilot scheme designed to collate as much information as possible about as many people as possible within one massive database, TIA would have been accessible to government officials who could then extract actionable information about potential terrorists.

In 2003, Congress shut down the program after bipartisan objections to this massive domestic surveillance proposal reached a fever pitch. Among the concerns voiced was the need to protect the privacy of millions of Americans whose personal information – including "huge volumes of records of domestic emails and Internet searches as well as bank transfers, credit-card transactions, travel and telephone records"– would be stored and perused by deficient computer programs aimed at detecting suspicious activity patterns, without any probable cause to suspect criminal wrongdoing.

Regardless of the corporate rush to massage "big data" in order to target consumers, when such data-mining technologies are placed at the disposal of the state, the result is to contravene the protection against "unreasonable searches and seizures" enshrined in the Bill of Rights. The Fourth Amendment forbids the issuing of "warrants" that do not specify who is to be searched and for what purpose. But technological ubiquity and interconnectedness have called this fundamental Constitutional protection into question.

Despite the Congressional backlash against TIA, the government's current data-mining operations represent the realization of TIA's core purpose: the acquisition and storage of massive amounts of personal data that can be mined to determine everything the government would ever want to know about a person. By utilizing pattern recognition software, it can even lay out a timeline of your life's activities: everything you've ever done since the program was initiated, with predictive (albeit fallible) algorithms used to foresee where or what you'll be doing in the future.

The news of the Obama administration's "disposition matrix" adds new icing to the cake. The *Post's* article implies that the information culled from these databases can be used not just to track you, but to determine your "disposition" toward violence against the U.S. government: your predilection for terrorist activities—what could amount to a death sentence for crimes that have yet to be committed.

The only types of intelligence within these databases that can possibly be used to predict future criminal activity are suspicious commercial transactions (large bank transfers or the purchase of bomb-making materials, for example) or alarming speech. Despite assurances from the Obama administration that they're simply targeting "bad guys," the adoption of preventive counterterror measures requires the (currently secret) deployment of evidence against a suspect before they commit a crime. To borrow a phrase from the science-fiction dystopia *Minority Report*, it requires conviction of a "pre-crime."

Because there have been notably few successful terrorist attacks on US interests (outside of declared war zones, like Iraq and Afghanistan, where the label "terrorist" lacks any objective meaning) since 9/11, it cannot conceivably be argued (nor has it) that the people the president is assassinating in Yemen and Pakistan have actually committed any acts of terrorism. So how did they get onto the list to begin with? Here, a close look at the most-discussed case arising from the targeted killing program is instructive.

I Left My Heart—and Right to Due Process—in Albuquerque?

Anwar al-Awlaki—the radical Islamist preacher from New Mexico who joined al-Qaeda in the Arabian Peninsula (AQAP)—was assassinated by a drone strike in Yemen on September 30, 2011. His case has been a centerpiece of debate regarding the kill-list because of his status as an American citizen outside a declared war zone, which many argue should make applicable Constitutional protections like the right to due process of law.

Less often discussed, because they can never be definitively known, are the criteria leading to his placement on the kill list. Few claim that Awlaki was an innocent bystander—he openly preached for violence against the US military in retaliation for what he saw as unbridled aggression against Muslims across the world—but aside from anonymous assertions made in the press and the flourish of speeches from the White House, no government official has ever presented any evidence that he was an "operational commander" in the organization. That is to say, it has never been determined or even legitimately claimed that he committed an act of terrorism or engaged in a conspiracy to commit such an act.

What we do know is this: he was a remarkably successful recruiter of Western Muslims to the cause of al-Qaeda. His English fluency in particular made his sermons and speeches quite palatable to disaffected Muslims in the U.S. and Great Britain, including (allegedly) the Fort Hood shooter and the Underwear Bomber.

Many will say, "But surely incitement to violence of this sort is a crime, right?" Well, the lack of charges against him notwithstanding, it depends.

In 1969 the Supreme Court heard the case of *Brandenburg v. Ohio*, in which an Ohio-based Klansman was arrested for making a speech that advocated violence against government officials who, along with various minorities, "suppress[ed] the white, Caucasian race." The statute he allegedly violated was a remnant of the 1919 Red Scare that prohibited advocating for violence to achieve political or industrial reform.

Brandenburg's lower-court conviction was overturned because his speech failed three elements of what later became known as "the Brandenburg test" for criminal incitement—intent, imminence, and likelihood. To hastily summarize, urging criminal activity against specific persons in a situation where it can be reasonably conceived such action will take place is a crime. However, championing violence as a general method of achieving political goals without a clear target, subjective intention, or reasonable presumption of accomplishment is *not* a crime and is protected under the First Amendment.

So, where does Awlaki figure into this precedent? To our knowledge, his speech did not meet the criteria set forth in the Brandenburg decision, and is thus protected by the Constitution.

Which adds another layer of intrigue to the equation: could he have been added to the kill list not because of his criminal actions but because what he was doing—as threatening as it was—was *not* illegal under the law? Was assassination a convenient method of bypassing an arduous, and potentially unsuccessful, prosecution while demonstrating that *anyone* who challenges US power can and will be killed?

We will never definitively know the answers to those questions because they were eviscerated with Anwar al-Awlaki's flesh following the explosion of a Hellfire missile in Yemen 13 months ago. And not even the whisper campaign being conducted in the media against the dead cleric can explain why his son, an American minor, was killed in a *separate* drone strike some two weeks later.

Enter the Legal Labyrinth

Because the Obama administration insists on keeping its national security policies furtive, the criteria for placement on the kill list remain off-limits in a court of law. Even if those placed on such a list somehow found out about it, they would be unable to challenge it in court—since, according to the Catch-22 interpretation of the government's state-secrets privilege, knowledge of that designation can be considered a state secret.

Prior to al-Awlaki's assassination, the ACLU and Nasser al-Awlaki, the slain preacher's father, brought suit to have the government disclose its reasoning in putting his son on a kill list. Although narrowly focused, the court's decisions, as well as the procedural hurdles faced by the plaintiffs, are an enlightening model of how such cases tend to be adjudicated in the federal judiciary.

Ten days after Nasser al-Awlaki retained counsel on his son's behalf, the Treasury Department's Office of Foreign Asset Control (OFAC) placed the son, Anwar, on a list that labeled him a "specially designated global terrorist." Placement there made "it a crime for lawyers to provide representation for his benefit without first seeking a license from OFAC." Only after OFAC reluctantly gave lawyers the right to sue on behalf of their client (after being sued itself), was the case allowed to proceed.

The court determined that the elder Awlaki didn't have standing to ask why his son was listed as a "specially designated global terrorist," because technically Nasser wasn't the party subject to

assassination. The judge presiding over the case also found that cases like this could not be adjudicated the way retroactive habeas cases arising from Guantanamo Bay are, because of the "[im]propriety of a judge doing so in advance of what he characterizes as a military decision," as noted by Adam Serwer of *The American Prospect*. In sum, it was decided the court couldn't determine the legality of extrajudicial state murder until it occurs.

To recap: you are placed on a kill list, making your assassination a priority of the state. First, you must fight in court to receive permission to *even have* legal representation. Then you must present yourself and file suit in federal court, thereby disclosing your location and possibly enabling the very murder you're trying to halt (or, in this case, simply trying to figure out the justifications for). Moreover, the court cannot suspend your execution order because doing so would be preemptively second-guessing the executive.

And even if you get that far, the government can still assert the state-secrets privilege to withhold vital information from the court and prevent meaningful challenge. If this warren of procedural minutiae and legal dilemmas seems designed to obstruct and preclude accountability, that's because it is.

Same Wine, Different Bottles

Due process of law, as it pertains to national security, has now become a fictive concept only seen in the movies. "Pre-crime," whether determined by computer algorithm or physical activity, is now a reality punishable by death.

With the knowledge that some of the nation's largest domestic data-mining programs are now housed under the same roof as the "disposition matrix" for determining who is threatening enough to kill by Hellfire missile, Americans should be acutely aware of the danger this presents. The potential for abuse is grave, and will remain so until the legislative and judicial branches of government tasked with checking executive power re-assert their Constitutional prerogatives.

The partisan duopoly enjoyed by the Democrats and Republicans recently gave the American public a choice between two candidates who embraced a vast majority of the same policies, yet struck different tones and styles in their rhetorical delivery. Both parties have endorsed George W. Bush's once-controversial executive power grab. It is up to the people to begin a process that will stop this wholesale violation of the Fourth Amendment's "right of the people to be secure in their persons, houses, papers, and effects," and the Fifth and Fourteenth Amendments' due process clause: "nor shall any person . . . be deprived of life, liberty, or property, without due process of law…."

Referencing the temporary suspension of habeas corpus in Britain during WWII, Winston Churchill famously remarked:

The power of the Executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him the judgment of his peers, is in the highest degree odious and is the foundation of all totalitarian government whether Nazi or Communist.

George W. Bush, despite having a bust of the great English statesman, violated this maxim (and American law) by establishing a legal black hole for terrorism suspects at Guantanamo Bay, Cuba. Barack Obama doesn't even bother with the challenges involved in kidnapping persons without due process; he just kills them.

With neither major political party willing to address this fundamental issue of our government's relationship to its citizenry, and no endpoint in sight for the War on Terror that is used to justify the excesses of our current surveillance state, we may very well ask ourselves: What was this election for, anyway?