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Making Tyranny 'Legal'

By Peter Casey

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The more corrupt the state, the more numerous the laws. ~ Tacitus

Since the Guardian's publication of the "telephone metadata" order, courtesy of Edward Snowden, the law professoriate *et al.* have been speculating about a Foreign Intelligence Surveillance Court's "secret" opinion that would explain the seemingly inexplicable – how the National Security Agency legally can obtain in real time a record of every single telephone call made to, from and within the United States of America?

Days after the June 5 story, the American Civil Liberties Union filed a motion asking the Foreign Intelligence Security Act (FISA) court to unseal the secret "legal interpretations" underlying the order. The ACLU argued that publication of the court's interpretation of Section 215 of the PATRIOT Act, the "business records" statute cited by the order for its authority, "would benefit the public interest immensely" and permit it "to more fully understand the order's meaning and to contribute to the ongoing debate."

So far, the secret opinion has remained secret – although the Washington Post has hinted that it has seen an opinion, issued on May 24, 2006, in which "the [FISA] court ruled it would define the relevant business records as the entirety of a telephone company's call database." The two-page order itself made that obvious.

The ACLU's motion tweaks the FISA court a bit. "Secret legal opinions" are secret for a reason. Their arguments would make Roy Cohn blush. The President or other executive branch official who asks for a secret legal opinion is not looking for honest legal guidance. He wants justification for a predetermined course of action – and to provide legal cover in the remote chance he's indicted and wants to argue as an excuse that he "relied on advice of counsel."

Some recent secret legal opinions have been gems. When Dick Cheney needed a legal opinion that the President could wage war anywhere at any time, he turned to John Yoo, a lawyer in the Justice Department's Office of Legal Counsel. Yoo set out to oblige, but ran into a problem. He discovered that the Constitution grants "power to declare war" to Congress. Because saying no to Cheney was not an option, Yoo came up with a simple solution: the Constitutional Convention *didn't really mean it*! "[T]he Framing generation," Yoo wrote in his secret memo, "well understood that declarations of war were obsolete." According to Yoo, the "Framing generation" granted Congress a ceremonial sop to quiet those at the Convention whining about checks and balances. Although it says no such thing, the Constitution empowers the President to "make" any war he pleases, Yoo reasoned. Problem solved.

More recently, President Obama needed a legal memo that would sanction the killing of fellow Americans without any courts or other obstacles. On his (then still secret) death list, Obama had penciled in the al-Qa'ida cleric and rabble rouser Anwar al-Awlaki, a US citizen living in Yemen with his family. Because al-Awlaki was American, the President (Harvard law grad and a constitutional law professor) had to consider the technicality that prohibits "deprivation of life" without "due process of law." So he ordered two of Yoo's successors at "OLC" to explain why extrajudicial homicide of Americans was OK. They duly produced a secret white paper, which justified Obama's plan based on the uncontroversial proposition that every nation has the right to defend itself from "imminent threat of violent attack." Like Yoo and the war power clause, however, the OLC lawyers had to find a way around "imminent threat," since the purpose of Obama's hit list to kill people who weren't. As the "white paper" droned on, "imminent attack" underwent a metamorphosis to a "broader concept of imminence," eventually emerging from its legal cocoon to mean, in essence, a threat of "attack sometime in the future, maybe."

In September 2011, the CIA assassinated al-Awlaki in Yemen, as the Falls Church Imam and several others tried to race away in a pick-up truck after spotting a US drone. Probably not many legal experts would find that shooting an unarmed, fleeing American in the back with a Hellfire missile–in a dirt-poor desert country nine thousand miles from the Homeland–is necessary to stop a "threat of imminent attack." The "broader concept of imminence" also may explain the legality of the drone-murder in Yemen of al-Awlaki's 16-year old American son, two weeks later, as he and some teen-age friends had barbecue.

The record of secret government legal opinions is little reason to be optimistic that the FISA court's secret legal opinion to contribute to a "debate." The outing of Yoo's infamous secret memos was greeted with ridicule and disgust, but did not prevent Bush and then Obama from later invading Pakistan, Libya, Somalia and now Syria. The sunlight shining on Obama's Grisham-esque "death list" memo has not slowed the rainfall of drone missiles on the Pashtun countryside. Any secret FISA court opinion – influenced entirely by the government's position,

since there's no adversary in this "ex parte" process – may be as inane as the secret war powers and death list memos. If history is any guide, that alone will not add significantly to any debate.

The popular reaction to the Guardian's story thus far also suggests that the public doesn't think that disclosure of a secret legal opinion will "benefit the public's interest immensely," notwithstanding the ACLU's claim. The public has not seemed all that interested – and hasn't for a long time. Except for the FISA court order itself, the Guardian story was old news – *seven years old*, to be precise. As the Guardian acknowledged, "a furore erupted in 2006 when USA Today reported that the NSA has been 'secretly collecting the phone records of tens of millions of Americans' and was 'using the data to analyze calling patterns in an effort to detect terrorist activity.'" The lede of that old story, reported by USA Today on May 11, 2006, could easily be mistaken for the June 5 Guardian story:

The National Security Agency has been secretly collecting the phone call records of tens of millions of Americans, using data provided by … Verizon… The NSA program reaches into homes and businesses across the nation by amassing information about the calls of ordinary Americans… [T]he spy agency is using the data to analyze calling patterns in an effort to detect terrorist activity, sources said in separate interviews…With access to records of billions of domestic calls, the NSA has gained a secret window into the communications habits of millions of Americans.

The "furore" in 2006 fizzled out in a matter of months at most – even though the Bush/Cheney administration never denied the story and never claimed that NSA had stopped. When Obama came into office, he said nothing. Neither administration claimed to change any laws to either ban or permit these seizures. Thus, for seven years, NSA carried on business as usual, gobbling up every pico-byte of "metadata" for every call made or received. Americans seemed oblivious.

The recent polling numbers following publication of the Guardian story are also counterintuitive to those who think that Americans like to be free from massive government privacy infringements. According to June 12-June 16 Washington Post-ABC News poll, "[a]mong all Americans, most – 58 percent – support the NSA's program collecting extensive phone call records and Internet data." A Washington Post-Pew Research Center poll a week earlier "found 56 percent saying the NSA's tracking of phone call records of millions of Americans is 'acceptable.'"

Providing Appropriate Tools Required to Intercept and Obstruct Terrorism – The Last Refuge of Scoundrels

Many legal commentators already have concluded that the FISA's court's "interpretation" of Section 215 of the PATRIOT Act must be "ridiculous." Not surprisingly, plenty in Congress who voted for Section 215 now claim, Prufrock-like, that that is not what they meant at all, and insist that the FISA court must have misunderstood the statute.

It is true that the statute appears to allow only limited and specific data collection concerning particular persons or activities. Until recently, moreover, the government never hinted at some "broader concept" of relevant "tangible things" (to borrow a phrase). On the contrary, when

Congress "reauthorized" the PATRIOT Act in March 2006, the Department of Justice in a press release extolled the "dozens of additional safeguards to protect Americans' privacy and civil liberties." It specifically praised the "a**mendments to section 215 orders"** for "provid[ing] ***significant additional safeguards of Americans' civil liberties and privacy*** while continuing to allow investigators to use so-called 'section 215 orders' – court orders requiring production of business records – in all phases of authorized national security investigations."

The government's double-cross and the disfigurement of language typical of "secret legal opinions" could explain why so many commentators speculate that the FISA court must have screwed up in its interpretation of the statute. Yes, the FISA court order is ridiculous. But – and here's the crucial point – so is Section 215. The PATRIOT Act is a magic bag of verbal tricks and grammatical feints that in skilled hands easily could be shaped into an order allowing the NSA access to "all call detail records or 'telephony metadata' … for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls" on an on-going basis:

The first part of Section 215 says that the FBI can apply "for an order [to the FISA court] requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." The second part states that the FBI's application shall include –

A. a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, such things being presumptively relevant to an authorized investigation if the applicant shows in the statement of the facts that they pertain to –

   (i) a foreign power or an agent of a foreign power;

   (ii) the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or

   (iii) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation…

The final part provides that if the judge finds that the FBI's application meets the requirements of the first two parts, then he "shall" enter a secret order as requested or as modified approving the release of the "things."

Most would believe that, to get a "215 order," the government must show that the "tangible things" are "relevant" to an "authorized investigation." That much seems black and white. So the government must show that those "tangible things" are relevant to who or what it is investigating, right? *Wrong*. This is where the PATRIOT Act employs a devious *trompe l'oeil*. It

does not require the "things" to be relevant to the *persons or subjects* of the "authorized investigation." They must only be relevant to the "authorized investigation" itself.

How can "investigation" logically be separated from who or what is being investigated? To begin, that law does not explicitly define "investigation" by reference to its subjects. The wording of Section 215 otherwise compels that the distinction be made. For example, among the categories of "presumptive relevance," in the first, "tangible things" are "presumptively relevant" if they "pertain" to "a foreign power or an agent of a foreign power." Neither the "things" nor the "foreign power" require any connection to the subject of the authorized investigation – only each other. The second and third categories, on the other hand, accord the status of "presumptive relevance" *only if* the "things" pertain to "suspected agents" of the foreign power "who is the subject of such authorized investigation." By specifying a connection between the items sought and the subject of an investigation in two of the three "presumptive relevance" categories, Section 215 by necessary implication does not require any such connection either in general or in the first "presumptive relevance" category.

The legislative record makes it crystal clear that the government has no burden to show that the "things" it wants to seize are relevant to whom or what it is investigating. Under the original 2001 version, Section 215 allowed the FBI to get a FISA court order to grab "tangible things" merely by the making the meaningless recital that the requested records were sought for an authorized investigation – a formulation that easily could have granted NSA access to the metadata of every American phone call ever made. During 2005 and into 2006, Congress "reauthorized" most of the PATRIOT Act, including Section 215, due to expire under its "sunset" provisions. The competing House and Senate versions of this "USA PATRIOT Act Improvement and Reauthorization Act of 2005," clashed on Section 215. As explained in a report by Congressional Research Service:

The "relevancy" standard set forth in the Act was criticized by several Members of

Congress during the floor debate on the conference report. See … statement of Sen. Feingold ("Relevance is a very broad standard that could arguably justify the collection of all kinds of information about law-abiding Americans."). The Senate-passed version of the USA PATRIOT Improvement and Reauthorization Act … required that the statement of facts show that the records or things sought are relevant to an authorized investigation *and* that the things sought pertain to, or are relevant to the activities of, a foreign power or agent of foreign power, or pertain to an individual in contact with or known to a suspected agent of a foreign power. *The Act [as passed] does not require such a connection*.

(emphasis added). Further, the legislators who wrote the final version of the "Improvement and Reauthorization Act" reported that the amendments were

a compromise between … the House bill and … the Senate amendment. This section … amends section 215 of the USA PATRIOT Act to clarify that the tangible things … must be "relevant" to an authorized preliminary or full investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities. The provision also requires a statement of facts … in the application that

shows there are reasonable grounds to believe the tangible things sought are relevant, and, if such facts show reasonable grounds to believe that certain specified connections to a foreign power or an agent of a foreign power are present, the tangible things sought are presumptively relevant. ***Congress does not intend to prevent the FBI from obtaining tangible items that it currently can obtain under section 215.***

Conference Report at 90-91(December 8, 2005). In short, the new verbiage was not intended to change anything. The government could continue to "obtain tangible items" by asserting that they were relevant to an authorized investigation.

By connecting the "relevance" of the "things" to the investigation, rather than the subject matter of the investigation – the who, what, where–Section 215 enables the government to show "relevance" in relation to investigational goals, objectives, techniques, processes or methods. The imagination of "authorized" agents is the only limit to an "authorized investigation" – a matter in which the FISA court simply has no say. As a result, the government does not have the burden of connecting what it wants to get with some person or thing in the real world – it only has to connect it to what *it wants to do*. For example, say the FBI is conducting an investigation of international terrorist activities of radical Islamists from the Russian region of Dagestan. Part of the authorized investigation is determining *whether* and/or to *what extent* those international activities have materialized in the Homeland. Presto – all calls to, from and within the United States are "relevant" – that is, tending to make the existence or non-existence of an Islamic Dagestan terrorist connection to the United States "more or less probable than it would be without such evidence," in the words of the evidentiary standard for "relevance."

Does this "interpretation," as many complain, give the government a "fantastically overbroad" reach into Americans' privacy? Of course. Does it render "relevance" a "meaningless" limitation – or no limitation at all? Pretty much. Is it, in fact, "insane," as argued by James Bamford, the country's foremost independent chronicler of the NSA? Indisputably so.

But none of that means that the FISA court got it wrong, or must have "misinterpreted" the law passed by Congress and signed by the Executive. On the contrary, Section 215 permits the NSA to obtain "all kinds of information about law-abiding Americans," as Feingold complained, including the fingerprint of every phone call connected to American telephones for the last seven years.

At a speech in San Jose Two days after the Guardian story, President Obama said: "If people can't trust not only the executive branch but also don't trust Congress, and don't trust federal judges, to make sure that we're abiding by the Constitution with due process and rule of law, then we're going to have some problems here." Under the circumstances, the comment was nonsensical – and weirdly threatening, as if the President had said, "We lied to you. You caught us. Now you'd better trust us – or else." The remark seemed to betray an understanding that the State cannot continue indefinitely to hide behind the "rule of law" even as it subverts its substance at every turn, and may need to advert to more coercive "tools."

Since 911, Washington has overwhelmed America with new laws and changes to those laws ostensibly to protect the country's security, with the "USA Providing Appropriate Tools

Required to Intercept and Obstruct Terrorism Act" leading the way. Thanks to Edward Snowden, Bradley Manning, Jeremy Hammond, and others fighting the battle for radical transparency, however, the façade of all of the "PATRIOT acts" has begun to crumble. Each new disclosure confirms that the purpose of those laws is not protection from some mythical horde of Islamists intent on world domination through terror, but from those whom Washington considers the greatest threat, more terrifying than any terrorist yet—*us*.