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The Ethics of Exposure: Whistleblower Thomas Tamm, the DOJ and Bush Era Rampant Surveillance

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The role of the whistleblower tends to be that of scapegoat and sacrificial lamb. Someone has to take the fall for calling out the rotten state of affairs. The formula is repeated time and time again: rather than tossing out the rotten apples, the good ones are to be pulped, leaving the mouldering to continue.

Under the Bush administration, warrantless surveillance ballooned, inflated by the notion that the prospects of terrorism were not merely external matters but internal ones. It was a pre-Snowden world, and it laid the foundations for the future surveillance state.

In 2005, *The New York Times* reported that the President had authorised the National Security Agency to "intercept international communications into and out of the United States" by "persons linked to al-Qaeda or related terrorist organizations" based upon "his constitutional authority to conduct warrantless wartime electronic surveillance of the enemy." The origins for the program stemmed from a 2002 executive order that caused considerable mischief.

The tip-off for the story by Jim Risen and Eric Lichtblau came from Justice Department lawyer, **Thomas Tamm** [pictured left]. The reaction from the Justice Department went by the book: find the discloser, rather than assessing the dire nature of the material disclosed. The FBI was also charged with the task of getting answers, with 18 agents raiding Tamm's home in his absence and interrogating his wife.

Tamm, currently a Maryland state public defender, has now become the subject of ethics charges from the DC Office of Disciplinary Counsel for his role in revealing the rampant nature of surveillance during the Bush era. He is said to have breached DC ethics rules for spilling the beans to *The New York Times* instead of disclosing details of "the program" to his superiors. This little bit of petty persecution is made starker by the fact that the Department of Justice decided in 2011 against prosecuting Tamm over the disclosures.

According to the petition, "The information with which the Respondent was entrusted to support his warrant applications was secret, and [the] Respondent was required to obtain a special security clearance before he could make such applications."[1]

In 2004, Tamm became aware that various applications to the FISA Court were "given special treatment." Such treatment entailed exclusive signature for such surveillance applications by the Attorney-General and made only to the chief judge of the FISA court. "The existence of these applications and this process was secret."

This grim yet laughable state of affairs is typical of the circuitous reasoning within secretive

bureaucracies. Function is placed ahead of reason. The petition notes, for instance, that Tamm was "told by his colleagues that [the program] was probably illegal."

In a 2008 interview with *Newsweek*, Tamm revealed that this very view was expressed by his superiors, the very ones to whom he referred the subject to.[2] But each individual he raised the matter with, including a former colleague working for the Senate Judiciary Committee, poured cold water on it. The groupthink culture was total: "the program", despite flying in the face of the law, should remain concealed.

Tamm was, after all, on the Justice Department's Office of Intelligence Policy and Review team responsible for seeking electronic surveillance warrants from the Foreign Intelligence Surveillance Court.

A weak observation is made in the petition: Tamm's belief that an agency within the DOJ was involved in illegal conduct should have led to its referral "to higher authority within the Department" or "the highest authority that can act on behalf of the Department, the Attorney General".

Instead, he engaged in unethical conduct by disclosing "confidences" and "secrets" as defined by the District of Columbia Rule of Professional Responsibility. This near ludicrous assertion is informed by observations of status and position rather than reality – the Attorney-General, complicit in the secret surveillance program, was hardly going to take to Tamm's suggestions of illegality lightly.

When the President of the United States, holding the executive reins, is responsible for both the culture and execution for such an illegal set of practices, the question of referral becomes a redundant one. The options for Tamm, short of falling on his own sword, were always scant.

In the end, he took the public route, aghast that "somebody higher up the chain of command [did not] speak up." He explained his reasoning to *Newsweek*. "I thought that this [secret program] was something the other branches of government – and the public – ought to know about. So they could decide: do they want this massive spying program to be taking place?"

The Electronic Frontier Foundation has attempted to capitalise on Tamm's revelations, and those of other whistleblowers, building a case against the NSA's use of dragnet surveillance in ongoing proceedings.[3]

Whistleblowing's primary function is to expose the deficiency or patent illegality at work. The very idea of internalising such complaints is a glaring contradiction in terms, especially when it is sanctioned by executive order. Very often, higher placed officials are responsible for the very behaviour that forms the subject of exposure. The accrual of unaccountable power is inherent in the nature of political organisation. And for that, individuals like Tamm, rather than hands that signed the various papers, continue to suffer.

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Notes:

[1] https://www.documentcloud.org/documents/2698529-Thomas-Tamm-Specification-of-Charges.html
[2] http://www.newsweek.com/whistleblower-who-exposed-warrantless-wiretaps-82805
[3] https://www.eff.org/cases/jewel

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