

US Appeals Court Upholds Suppression of Secret Legal Memo approving Collection and Handover of Phone Records to the FBI

By [Patrick Martin](#)

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The United States Court of Appeals for the District of Columbia Circuit, the second most powerful federal court, ruled Friday that the Obama administration could keep secret a Justice Department legal memorandum that approved the handover of telephone company consumer data to the Federal Bureau of Investigation.

The unanimous ruling by a three-judge panel upheld the decision of a US district court judge, who had rebuffed a lawsuit filed by the Electronic Freedom Foundation (EFF), a privacy and consumer rights group.

The case concerns a spying program distinct from the dragnet collection of telephone metadata by the National Security Agency, which was exposed last year by former NSA contractor Edward Snowden. On Friday, the secret Foreign Intelligence Surveillance (FISA) Court renewed the authority of the NSA and other intelligence agencies to continue the collection of the telephone records of virtually every American and millions of people internationally for three more months. The extension, routinely granted by the FISA Court, was announced in a press release issued by the Office of Director of National Intelligence James Clapper.

The DC Circuit Court ruling handed down Friday relates to the FBI practice of ordering telecommunications companies to produce the phone records of specific individuals, without a judicial warrant.

The EFF was seeking release of a classified memorandum signed by the Justice Department's Office of Legal Counsel (OLC) on January 8, 2010. The memo's existence was revealed in a subsequent report by the Justice Department's inspector general, which also revealed its conclusion that telephone companies could provide consumer information to the FBI and other government agencies "without legal process or a qualifying emergency."

The OLC issued the memo to the FBI in response to an internal investigation into data collection under the Bush administration between 2003 and 2006, when the FBI used orders known as "exigent letters" to get information from telecommunications and financial companies.

The EFF filed its lawsuit in 2011 after the Justice Department rejected a Freedom of Information Act request for the memo. The district court judge ruled that the memo was covered by an exception to the law known as the "deliberative process privilege."

The three-judge appeals court panel agreed with lower court, declaring, “The District Court correctly concluded that the unclassified portions of the OLC Opinion could not be released without harming the deliberative processes of the government by chilling the candid and frank communications necessary for effective governmental decision-making.”

Much of the 20-page opinion issued by the appeals court is a laborious and highly technical effort to conceal the obvious fact that the Office of Legal Counsel was effectively setting policy for the FBI. The appeals court decision quotes numerous judicial precedents to the effect that “an agency is not permitted to develop ‘a body of “secret law,”’ used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege ...”

But this is precisely what the latest decision sanctions, behind a screen of legalistic doubletalk claiming that OLC legal memoranda are only advisory and that the FBI did not formally adopt the OLC guidelines as its own rules of operation.

However, as the *New York Times* pointed out in its analysis of the decision, “The Office of Legal Counsel issues binding legal advice to the executive branch on whether proposed actions would be legal. If it says something is permitted, government officials who act on that advice are essentially immune from prosecution by the Justice Department.”

This is particularly true in the case of the FBI, since both the OLC and the FBI are units of the Justice Department, and the OLC serves as the in-house legal counsel for the entire department.

Prior to the telephone records collection issue, the most notorious case involving the OLC was its drafting of rules, under the Bush administration, permitting the torture of prisoners at Guantanamo Bay, CIA “black sites” and other US government and military prisons.

The Obama administration ultimately made public the “torture memos,” but blocked any sanctions against the Bush administration officials responsible for writing them. John Yoo, Jay Bybee and others were never prosecuted and have since enjoyed prosperous legal careers. Bybee is a federal appeals court judge on the Ninth Circuit, covering the Pacific Coast states.

The composition of the three-judge panel that issued the ruling demonstrates the across-the-board support for police state measures in every section of the US ruling elite. The opinion was written by Judge Harry T. Edwards, one of the longest-serving federal appellate court judges, nominated by President Jimmy Carter in 1979, and one of the first African Americans on the most powerful US circuit court.

Joining the opinion were Judge David Sentelle, a former top aide to arch-reactionary US Senator Jesse Helms and one of the most right-wing federal judges, and Judge Sri Srinivasan, the newest member of the DC Circuit Court, nominated by President Obama and approved by the Senate late last year.

This unanimous line-up only underscores what the *World Socialist Web Site* has long said about the decay of American politics: there is no significant support for democratic rights in any section of the US ruling class—“left,” right or center.

The appeals court ruling was only one of a number of important developments Thursday and

Friday in relation to government surveillance of the American population. In addition to Friday's FISA Court renewal of the telephone metadata collection program:

* The Justice Department filed a notice of appeal of the decision by US District Court Judge Richard Leon, who ruled last month that the NSA telephone metadata collection program was an unconstitutional violation of the Fourth Amendment. The appeal would go before the same appeals court that issued Friday's ruling upholding the suppression of the OLC memorandum on telephone spying.

* The American Civil Liberties Union filed notice of appeal of a district court decision in New York City that upheld the constitutionality of the NSA telephone metadata collection program.

* Hundreds of academics around the world launched a petition calling for the governments of the United States, Britain and other countries to halt mass surveillance of telecommunications and the Internet. The petition, billed as "Academics Against Mass Surveillance," declared, "Without privacy people cannot freely express their opinions or seek and receive information. Moreover, mass surveillance turns the presumption of innocence into a presumption of guilt."

* The *Washington Post* reported, based on documents from Edward Snowden, that the NSA had spent \$80 million on a research program called "Penetrating Hard Targets," whose goal was to create qualitatively new quantum computers that could break the encryption now used to protect banking, medical, business and government records throughout the world.

* A federal judge in Brooklyn, New York ruled that US border agents had the authority to search and copy laptop computers carried by travelers at border crossings, even when the travelers were members of the news media. District Judge Edward Korman dismissed a lawsuit filed on behalf of the National Press Photographers Association and other plaintiffs, ruling that the Fourth Amendment prohibition of unreasonable searches does not apply to border crossings because of the threat of terrorism.

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