

Bush-era memos: president can wiretap Americans at all times

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The US Justice Department has released two memos detailing the Bush administration's legal justification for monitoring the phone calls and emails of Americans without a warrant.

The documents, released late Friday, relate to a secret program dubbed Stellar Wind that began after the September 11, 2001 attacks.

It allowed the National Security Agency to obtain communications data within the United States when at least one party was a suspected Al-Qaeda or Al-Qaeda affiliate member, and at least one party in the communication was located overseas.

"Even in peacetime, absent congressional action, the president has inherent constitutional authority ... to order warrantless foreign intelligence surveillance," then-assistant attorney general Jack Goldsmith said in a heavily redacted 108-page memo dated May 6, 2004.

"We believe that Stellar Wind comes squarely within the commander in chief's authority to conduct the campaign against Al-Qaeda as part of the current armed conflict and that congressional efforts to prohibit the president's efforts to intercept enemy communications through Stellar Wind would be an unconstitutional encroachment on the commander in chief's power."

The document was obtained by the American Civil Liberties Union rights group through a Freedom of Information Act lawsuit.

Goldsmith at the time also headed the Justice Department's Office of Legal Counsel under then-attorney general John Ashcroft and then-deputy attorney general James Comey, who now heads the FBI.

According to Goldsmith, Congress's authorization for the use of force passed shortly after 9/11 provided "express authority" for Stellar Wind.

"In authorizing 'all necessary and appropriate force,' the authorization necessarily included the use of signals intelligence capabilities (wiretapping), which are a critical, and traditional, tool for finding the enemy so that destructive force can be brought to bear on him," Goldsmith wrote.

He suggested that the congressional approval granted the president authority that "overrides the limitations" of the Foreign Intelligence Surveillance Act (FISA), a law requiring a court order to monitor the communications of any American or person on US soil.

The second memo, dated July 16, 2004, pointed to a Supreme Court decision handed down just over two weeks earlier as providing additional justification for Stellar Wind.

Goldsmith noted that five of the Supreme Court justices agreed that the detention of US citizen Yaser Esam Hamdi, who was captured while fighting in Afghanistan, was authorized because it was a "fundamental" and "accepted" incident of waging war.

"Because the interception of enemy communications for intelligence purposes is also a fundamental and long-accepted incident of war, the Congressional Authorization likewise provides authority for Stellar Wind targeted content," he added.

The program was brought under FISA court supervision in 2007, six

years into its existence. Its was first revealed by The New York Times in 2005.

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