

# HAS OLC WRITTEN MEMOS AUTHORIZING ILLEGAL WIRETAPPING AGAIN?

Yesterday, CNet reported that, as part of an expanding cybersecurity effort, DOJ has immunized telecoms for violating wiretap laws.

The secret legal authorization from the Justice Department originally applied to a cybersecurity pilot project in which the military monitored defense contractors' Internet links. Since then, however, the program has been expanded by President Obama to cover all critical infrastructure sectors including energy, healthcare, and finance starting June 12.

"The Justice Department is helping private companies evade federal wiretap laws," said Marc Rotenberg, executive director of the **Electronic Privacy Information Center**, which obtained over 1,000 pages of internal government documents and provided them to CNET this week. "Alarm bells should be going off."

Those documents show the National Security Agency and the Defense Department were deeply involved in pressing for the secret legal authorization, with NSA director Keith Alexander participating in some of the discussions personally. Despite initial reservations, including from industry participants, Justice Department attorneys eventually signed off on the project.

The Justice Department agreed to grant legal immunity to the participating network providers in the form of what participants in the confidential

discussions refer to as “2511 letters,” a reference to the Wiretap Act codified at 18 USC 2511 in the federal statute books.

One of Obama’s first acts as leader of the Democratic party was to cave on immunity for telecoms that accepted Attorney General notes in lieu of warrants under Dick Cheney’s illegal wiretap program.

Those notes may be very similar to what they’re getting in this case, which may explain why the telecoms are squeamish about relying on AG notes again.

In CNet’s article, Paul Rosenzweig (also a Lawfare contributor) likens these notes to the torture memos.

Paul Rosenzweig, a former Homeland Security official and founder of Red Branch Consulting, compared the NSA and DOD asking the Justice Department for 2511 letters to the CIA asking the Justice Department for the so-called torture memos a decade ago. (They were written by Justice Department official John Yoo, who reached the controversial conclusion that waterboarding was not torture.)

“If you think of it poorly, it’s a CYA function,” Rosenzweig says. “If you think well of it, it’s an effort to secure advance authorization for an action that may not be clearly legal.”

But remember, before DOJ wrote those notes for Cheney’s program, they got John Yoo to write a series of OLC memos authorizing the practice.

Which reminded me of the January 8, 2010 memo OLC wrote to authorize telecoms to “voluntarily” hand over records on international calls with no legal process. The memo reinterpreted a different part of 18 USC 2511 than this one, one

limited to foreign communications.

(f) Nothing contained in this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.

But it still authorized a very novel reading of the statute.

And yet here DOJ is, making an even more novel reading either of statute or prosecutorial function.

Did OLC authorize this reading too?