# 2004 Bush administration memos advocate unlimited presidential powers

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Two top-secret legal memoranda on the subject of NSA spying were publicly released over the past week as a result of a Freedom of Information Act (FOIA) lawsuit filed by the American Civil Liberties Union (ACLU). The heavily redacted documents, dating from 2004, were signed by Assistant Attorney General Jack L. Goldsmith, then head of the Justice Department's Office of Legal Counsel, and addressed to the attorney general, who at that time was John Ashcroft.

These memoranda detail the early stages of the ongoing campaign to create the pseudo-legal framework for a police state in America—a campaign that has accelerated in the intervening decade, under both the Bush and Obama administrations. They are particularly remarkable for the crude, internally contradictory, and essentially anti-democratic arguments they advance.

The first memorandum (available here), dated May 6, 2004, addresses the NSA's practice of gathering the content of the communications of American citizens through its secret STELLAR WIND program, which was a special unit of the President's Surveillance Program (PSP). The STELLAR WIND program was later enlarged by the Obama administration, who divided it into four separate expanded programs—one of which is the massive PRISM program revealed by NSA whistleblower Edward Snowden in 2013.

The STELLAR WIND program from the start was in flagrant violation of the Bill of Rights, which prohibits searches without a warrant and without evidence of a crime, and which also guarantees the right of the people "to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."

It is significant that the memorandum was prepared three years *after* the program in question had already been implemented. In other words, Goldsmith had been assigned to cobble together a pseudo-legal justification for something that the NSA had already started doing.

The basic argument that Goldsmith employs in favor of the legality of the STELLAR WIND program borrows directly (without acknowledgement) from Nazi jurisprudence. Echoing the "state of exception" theory of Nazi jurist Carl Schmitt, Goldsmith argued that the September 11, 2001, attacks created a "national emergency," which justified ignoring the civil liberties otherwise enjoyed by the population.

"On September 14, 2001, the President declared a national emergency," Goldsmith wrote. "As the President made explicit in his Military Order of November 13, 2001, authorizing the use of military commissions to try terrorists, the attacks of September 11 'created a state of armed conflict,'" thus activating all of the president's supposed "wartime" powers.

According to Goldsmith, a president in a "national emergency" is empowered to assume unchecked powers, supreme military authority, and freedom from checks and limits imposed by the other branches of government.

Goldsmith also cited the congressional joint resolution of September 14, 2001, authorizing military force as a basis for the legality of the NSA's surveillance programs. This argument is absurd on its face, since that resolution referred to "military force" and did not refer to surveillance at all.

But Goldsmith went further, taking special care to concede no limits on presidential power. His memorandum refers repeatedly to the president's "inherent authority as Commander in Chief and the sole organ of the nation in foreign affairs." Goldsmith continued, "Congress does not have the power to restrict the President's exercise of that authority." Goldsmith concluded that the president has "an authority that Congress cannot curtail."

In other words, Goldsmith claimed that the congressional authorization for use of military force justified warrantless NSA surveillance, but in the next breath he argued that the NSA does not need congressional authorization to conduct surveillance. Similar inconsistencies abound.

With respect to the Fourth Amendment, which prohibits unreasonable searches and seizures, Goldsmith argues that the Constitution is satisfied because the NSA obtained warrants for the searches it conducted from the Foreign Intelligence Surveillance Court, which was established by

the Foreign Intelligence Surveillance Act of 1978 and subsequent amendments.

The FISA court, a core mechanism in the growing infrastructure of a police state, is a "court" in name only. It convenes in secret, all of its proceedings are secret, and only the government side is represented (see: "Secret laws, secret government"). In secret decisions, it relies its own secret interpretations of the Constitution, and it has rubber-stamped virtually all of the government's requests since its establishment.

The implication of Goldsmith's argument is that the American revolutionaries would have been satisfied if only the colonial government had set up a secret court to issue secret warrants for all of the searches and seizures that were being conducted at the direction of the British monarch.

Incredibly, after arguing that the Fourth Amendment's warrant requirement is satisfied by the FISA "warrant" process, Goldsmith goes on to argue that the NSA does not even need warrants to conduct surveillance. Goldsmith argues that "the President has inherent constitutional authority, consistent with the Fourth Amendment, to conduct searches for foreign intelligence purposes *without securing a judicial warrant"* (emphasis added).

Perhaps the grandest inconsistency in the document is the theory of the president's "wartime" powers itself. All of the pseudo-legal arguments in the document are premised on the president's supposedly unlimited powers during "wartime," under Goldsmith's interpretation of the Constitution. However, Goldsmith hastens to add that the president can conduct spying without congressional approval "even in peacetime."

The general method of the memorandum is to point to some purported source of legal authority as justification for the president's actions, and then proceed to argue that the president's actions are at any rate not limited by that source of legal authority. These rhetorical sleights of hand, taken together, amount to arguing that America's president is a dictator with unlimited and unreviewable powers.

Goldsmith's memorandum also throws in, for good measure, the argument that citizens "voluntarily" surrender their personal information to telecommunications companies when they make phone calls or browse the Internet.

The second and much shorter memo (available here), dated July 16, 2004, reevaluates the STELLAR WIND program's legitimacy in light of the Supreme Court's decisions in *Hamdi v. Rumsfeld* (2004). Goldsmith seizes on the opinions of the extreme right-wing justices—and Justice Clarence Thomas in particular, who authored a fascistic rant on the president's unlimited "wartime" powers—to conclude that NSA spying should continue unaffected.

Goldsmith resigned from his position at some point after preparing the memoranda that were recently released, and he is now a professor at Harvard Law School. In 2007 he published a memoir titled *The Terror Presidency* in which he claimed to have been critical of some of the Bush administration's policies regarding torture, surveillance, and international law. However, his signatures at the bottom of these memoranda implicate him in the conspiracy to build up the legal framework for a police state behind the backs of the American population.

"Unfortunately, the sweeping surveillance they sought to justify is not a thing of the past," Patrick Toomey, staff attorney for the American Civil Liberties Union, told the *Washington Post*. "The government's legal rationales have shifted over time, but some of today's surveillance programs are even broader and more intrusive than those put in place more than a decade ago by President Bush."

Indeed, many of the authoritarian legal arguments advanced in 2004 have undergone further development and refinement in the intervening years. While domestic spying has vastly increased since the early days of STELLAR WIND, the Obama administration took Goldsmith's arguments a step further, contending following the 2011 assassination of Anwar Al-Awlaki that the president has the power to unilaterally authorize the assassination of US citizens. (See Military Tribunals and Assassination )

Another of the Obama administration's pseudo-legal innovations was the argument that constitutional "due process" is satisfied when the president meets in secret with his national security advisers before issuing a death warrant.