

How NSA Can Secretly Aid Criminal Cases

From the Archive: Official Washington is thrilled by the choice of ex-FBI Director Mueller as Russia-gate special counsel, hailing him as a straight-shooter, but he cut some legal corners in office, ex-CIA analyst Ray McGovern wrote in 2014.

By Ray McGovern (Originally published on June 12, 2014)

Rarely do you get a chance to ask a just-retired FBI director whether he had “any legal qualms” about what, in football, is called “illegal procedure,” but at the Justice Department is called “parallel construction.”

Government wordsmiths have given us this pleasant euphemism to describe the use of the National Security Agency’s illegal eavesdropping on Americans as an investigative tool to pass on tips to law enforcement agencies which then hide the source of the original suspicion and “construct” a case using “parallel” evidence to prosecute the likes of you and me.

For those interested in “quaint” things like the protections that used to be afforded us by the Fourth and Fifth Amendments to the Constitution, information about this “parallel construction” has been in the public domain, including the “mainstream media,” for at least a year or so.

So, I welcomed the chance to expose this artful practice to still more people with cameras rolling at a large conference on “Ethos & Profession of Intelligence” at Georgetown University on June 11, 2014, during the Q & A after former FBI Director Robert Mueller spoke.

Mueller ducked my question regarding whether he had any “legal qualms” about this “parallel construction” arrangement. He launched into a discursive reply in which he described the various “authorities” enjoyed by the FBI (and the CIA), which left the clear impression not only that he was without qualms but that he considered the practice of concealing the provenance of illegally acquired tip-off information somehow within those professed “authorities.”

Bottom line? Beware, those of you who think you have “nothing to hide” when the NSA scoops up your personal information. You may think that the targets of these searches are just potential “terrorists.” But the FBI, Internal Revenue Service, Drug Enforcement Administration and countless other law enforcement bodies are dipping their cursors into the huge pool of mass surveillance.

And, chances are that if some of your scooped-up data gets shared with law enforcement and the Feds conclude that you’ve violated some law, you’ll never

become aware of how they got onto you in the first place. They'll just find some "parallel" evidence to nail you.

After all, it's altogether likely for a great majority of us that some dirt can be retrieved with the NSA's voluminous files an inviting starting point. AT&T, for example, apparently has kept metadata about its customers, as well as all other traffic going through its switches, for the past 27 years.

For those who are Caesar's-wife pure and whose loved ones also approach perfection, "constructing" a prosecutable case may be more of a challenge. But relax not. If for some reason the government decides to get you if you've popped up as somehow an obstacle to "national security" it is not impossible. Even in recent decades, critics of government policies have ended up facing dredged-up, if not trumped-up, criminal charges over some past indiscretion or misdeed.

Learning Curve

It has been my good fortune to sponge up data and wisdom in equal measure from NSA alumni like Bill Binney, Kirk Wiebe, Tom Drake, and Ed Loomis, who in early January 2014 authored ["NSA Insiders Reveal What Went Wrong."](#)

More recently (on May 31, 2014), Bill and I took part in a panel discussion in New York, so this freshly sponged-up learning still dwelled in my frontal lobe when I was [interviewed](#) by RT on June 5, 2014, the anniversary of the first-published disclosure from Edward Snowden.

When asked how "ordinary people" in the U.S. were being affected by the disclosures about bulk collection, I passed along what I had recently learned from Bill and other whistleblowers regarding how law enforcement is masking illegal surveillance to the severe detriment of defendants' constitutional rights.

Former FBI Division Counsel in Minneapolis Coleen Rowley who, with Jesselyn Radack, Tom Drake and me, visited Snowden in Russia in October 2013 told me of two legal doctrines established many decades ago: the "exclusionary rule" and the rule regarding the "fruit of the poisonous tree."

These were designed to force over-zealous law enforcement officers to adhere to the Constitution by having judges throw out cases derived from improperly obtained evidence. To evade this rule, law enforcement officials who have been on the receiving end of NSA's wiretap data must conceal what tipped off an investigation.

After the Tip-Off

Among the revelations over the past year was DEA's definition of "parallel construction" as "the use of normal [read legal] investigative techniques to re-create the information received by DEA's Special Ops Division" from NSA or other sources that can't be acknowledged. Some of these sources may be confidential informants whose identities need protecting, but the NSA's massive database has become a very inviting place to trawl for valuable leads.

As Reuters reported in August 2013, "A secretive U.S. Drug Enforcement Administration unit is funneling information from intelligence intercepts, wiretaps, informants and a massive database of telephone records to authorities across the nation to help them launch criminal investigations of Americans.

"Although these cases rarely involve national security issues, documents reviewed by Reuters show that law enforcement agents have been directed to conceal how such investigations truly begin – not only from defense lawyers but also sometimes from prosecutors and judges.

"The undated documents show that federal agents are trained to 'recreate' the investigative trail to effectively cover up where the information originated, a practice that some experts say violates a defendant's Constitutional right to a fair trial. If defendants don't know how an investigation began, they cannot know to ask to review potential sources of exculpatory evidence – information that could reveal entrapment, mistakes or biased witnesses."

So, in this way, the NSA's warrantless surveillance can result in illegal law enforcement. And the FBI, the DEA and other organs of the deep state have become quite good at it, thank you very much.

Here's how it works: NSA's domestic surveillance though supposedly restricted to detecting terrorism gets wind of some potentially illegal activity unrelated to terrorism. So, NSA passes the information on to the relevant law enforcement agency. It could be a vehicle transporting illegal drugs or a transfer of suspicious funds or pretty much anything.

This evidence then sparks an investigation, but the original information can't be used legally because it was acquired illegally for "national security" purposes. After the tip, "parallel" law enforcement techniques are introduced to collect other evidence and arrest and charge the suspects/defendants.

The arrest is made to appear the splendid result of traditional detective techniques. However, if the court learns of the initial shenanigans, the defendant may be released because her/his constitutional rights were violated.

To avoid that possibility, the government simply perjures itself during the court discovery process by concealing the key role played by the NSA database,

exculpatory evidence that could weaken or destroy the government's case.

Blackmail?

Last week a journalist asked me why I thought Congress' initial outrage seemingly genuine in some quarters over bulk collection of citizens' metadata had pretty much dissipated in just a few months. What started out as a strong bill upholding Fourth Amendment principles ended up much weakened with only a few significant restraints remaining against NSA's flaunting of the Constitution?

Let me be politically incorrect and mention the possibility of blackmail or at least the fear among some politicians that the NSA has collected information on their personal activities that could be transformed into a devastating scandal if leaked at the right moment.

Do not blanch before the likelihood that the NSA has the book on each and every member of Congress, including extramarital affairs and political deal-making. We know that NSA has collected such information on foreign diplomats, including at the United Nations in New York, to influence votes on the Iraq War and other issues important to U.S. "national security."

We also know how the late FBI Director J. Edgar Hoover used much more rudimentary technology a half century ago to develop dossiers on the personal indiscretions of political and ideological opponents. It makes sense that people with access to the NSA's modern surveillance tools would be sorely tempted to put these new toys to use in support of their own priorities.

I happened to be with a highly accomplished attorney one not involved in security law when we saw TV reporting that the Solicitor General of the United States had misled the U.S. Supreme Court. My lawyer friend kept shaking his head, with his mouth agape: "Now THAT is not supposed to happen" is all he could muster.

Other than the Supreme Court justices themselves, the Solicitor General is among the most influential members of the legal community. Indeed, the Solicitor General has been called the "tenth justice" as a result of the relationship of mutual trust that tends to develop between the justices and the Solicitor General.

Thus, while it is sad, it is hardly surprising that no one took President Obama's Solicitor General Donald Verrilli Jr. to the woodshed. There are seldom penalties in Washington for playing fast and loose with the truth.

Verrilli assured the Court in the "Clapper v. Amnesty International USA" case

that defendants would be informed of evidence coming from NSA. The Department of Justice had reviewed his draft testimony and did not tell Verrilli that this was not the truth.

In the case, a majority of the Supreme Court justices decided to wait until a criminal defendant was actually convicted with the admitted use of NSA evidence before ruling on whether this violates the Fourth Amendment and the requirement of court warrants based on "probable cause" before police searches can be conducted.

The result of the Supreme Court's decision was that the challenge to the constitutionality of NSA's mass collection was abruptly stopped, and the mass surveillance continued. But Verrilli subsequently found out that his assurances had been false, and there ensued an argument with the Department of Justice, which opposed revealing use of NSA sources in any court.

Verrilli apparently prevailed partially, with the government subsequently notifying a few defendants in ongoing terrorism cases that NSA sources were used.

Separation of Powers?

We cannot escape some pretty dismal conclusions here. Not only have the Executive and Legislative branches been corrupted by establishing, funding, hiding and promoting unconstitutional surveillance programs during the "war on terror," but the Judicial branch has been corrupted, too.

The discovery process in criminal cases is now stacked in favor of the government through its devious means for hiding unconstitutional surveillance and using it in ways beyond the narrow declared purpose of thwarting terrorism.

Moreover, federal courts at the district, appeals and Supreme Court levels have allowed the government to evade legal accountability by insisting that plaintiffs must be able to prove what often is not provable, that they were surveilled through highly secretive NSA means. And, if the plaintiffs make too much progress, the government can always get a lawsuit thrown out by invoking "state secrets."

The Separation of Powers designed by the Constitution's Framers to prevent excessive accumulation of power by one of the branches has stopped functioning amid the modern concept of "permanent war" and the unwillingness of all but a few hearty souls to challenge the invocation of "national security." Plus, the corporate-owned U.S. media, with very few exceptions, is fully complicit.

Thus, a massive, intrusive power now looms over every one of us and especially

those few brave individuals with inside knowledge who might be inclined to inform the rest of us about the threat. Whistleblowers, like Chelsea Manning and Edward Snowden, have faced decades in prison for divulging important secrets to the American people. And so the legal rot continues.

The concept of a “United Stasi of America,” coined by Pentagon Papers whistleblower Daniel Ellsberg, has been given real meaning by the unconstitutional behavior and dereliction of duty on the part of both the George W. Bush and Obama administrations.

Just days after the first published disclosure from Snowden, Ellsberg underscored that the NSA, FBI and CIA now have surveillance capabilities that East Germany’s Stasi secret police could scarcely have imagined.

What, We Worry?

In June 2013, Mathew Schofield of McClatchy conducted an interesting interview of Wolfgang Schmidt, a former lieutenant colonel in the Stasi, in Berlin. With the Snowden revelations beginning to tumble out into the media, Schofield described Schmidt as he pondered the sheer magnitude of domestic spying in the United States.

Schmidt: “You know, for us, this would have been a dream come true.”

Schofield continues: “In those days, his department was limited to tapping 40 phones at a time, he recalled. Decide to spy on a new victim and an old one had to be dropped, because of a lack of equipment. He finds breathtaking the idea that the U.S. government receives daily reports on the cellphone usage of millions of Americans and can monitor the Internet traffic of millions more.”

“So much information, on so many people,” says Schmidt who, at that point, volunteers a stern warning for Schofield and the rest of us:

“It is the height of naivete to think that, once collected, this information won’t be used. This is the nature of secret government organizations. The only way to protect the people’s privacy is not to allow the government to collect their information in the first place.” [emphasis added]

(For those who missed it, “The Lives of Others,” a 2006 film, offers a chilling depiction of the Stasi, a far more capable incarnation of which may soon be coming to your home or neighborhood with assistance of “parallel construction.”)

Take note, those of you who may still feel fearless, those of you with “nothing to hide.”

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