

# New NSA domestic spying exposed as Obama stonewalls court challenges

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The National Security Agency carried out “significant and systemic” spying on Americans in recent months, intercepting their private e-mail messages and phone calls, according to intelligence officials who spoke on condition of anonymity to the *New York Times*.

The NSA refers to the spying as “overcollection” of data from telephone and computer communications by Americans.

The exposure of renewed illegal domestic spying by the NSA, apparently carried out since the inauguration of President Barack Obama, comes as the Justice Department is waging a relentless effort to quash lawsuits seeking to hold former officials accountable for the illegal spying operations mounted by the Bush administration.

The *Times* account provides further information on domestic surveillance activities under Bush, including a report that the NSA attempted to bug telephone and email communications of a member of the US Congress after the legislator made a trip to the Middle East and spoke with someone the agency considered an “extremist.”

According to an official who spoke to the newspaper, the plan was ultimately scrapped because of concern among some NSA officials that spying on congressmen, without court approval and with no genuine justification could create political problems for the agency.

Also, in the context of a two-year-old Justice Department investigation into NSA spying, the *Times* reports, an FBI agent has come forward with charges of “significant misconduct” involving NSA eavesdropping on Americans.

In response to the *Times* report, various officials in Washington acknowledged there had been “mistakes” at the NSA, but insisted that they had been reported and corrected.

Director of National Intelligence Dennis Blair, for example, called the new domestic spying a matter of “inadvertent mistakes.” He claimed, “The number of these mistakes are very small in terms of our overall collection efforts, but each one is investigated, the Congress and the courts are notified, corrective measures are taken, and improvements are put in place to prevent reoccurrences.”

A spokesman for the Justice Department insisted that the problem had been uncovered during routine, twice-annual certification that the department together with the NSA must submit to the secret Foreign Intelligence Surveillance Court on the

methods being employed in the agencies wiretapping activities.

“The Justice Department immediately notified the Foreign Intelligence Surveillance Court and took comprehensive steps to correct the situation and bring the program into compliance,” said Justice Department spokesman Dean Boyd.

Meanwhile the chairwoman of the Senate intelligence committee issued a statement vowing to investigate. “These are serious allegations, and we will make sure we get the facts,” said Dianne Feinstein (Democrat, California). “The committee is looking into this, and we will hold a hearing on this subject within one month.”

The problem with all of these statements, however, is that they were only made after the new revelations of NSA domestic spying appeared in the pages of the *New York Times*. Until then, the matter was concealed from the American people, not only by the NSA itself, but by Obama’s Justice Department and, presumably, Senator Feinstein herself, who according to Blair’s account would have been briefed on the “mistakes” that she now says she will investigate.

Moreover, as damning as the account in the *Times* is, it provides few specifics on what was actually done by the NSA, much less how, as the various agencies have claimed, it has been corrected.

As the *Times* acknowledges, “It is not clear to what extent the agency may have actively listened in on conversations or read email messages of Americans without proper court authority.” It adds, “Officials are still trying to determine how many violations occurred.”

These violations likely number in the tens of millions. In offering an explanation for the “overcollection” at NSA, the *Times* article states, “[T]he issue appears focused in part on technical problems in the NSA’s ability at times to distinguish between communications inside the United States and those overseas as it uses its access to American telecommunications companies’ fiber-optic lines and its own spy satellites to intercept millions of calls and email messages.”

This method of sweeping up masses of data, the paper continues, “led the agency to inadvertently ‘target’ groups of Americans and collect their domestic communications without proper court authority.”

In other words, the NSA is continuing the illegal practices initiated secretly under the Bush administration: accessing—with the collaboration of the telecommunications companies—data on tens of millions of domestic phone calls and emails, providing the agency with the ability to conduct “data-mining” operations that

yield extensive intelligence on large numbers of Americans.

According to the *Times* the NSA informed members of congressional intelligence committees recently that it was having “operational and legal problems in complying with the new wiretapping law” passed by Congress last summer.

Supported by both then President Bush and Senator Barack Obama—who interrupted his campaign last July to come back and vote on the measure—the FISA Amendment Act essentially provided congressional sanction for the secret and illegal warrantless wiretapping program initiated by the Bush administration in 2001. The legislation explicitly allowed the NSA to conduct dragnet surveillance of international communications by Americans. Given the wholesale character of this spying, it is hardly a surprise that domestic calls and emails are being subjected to warrantless surveillance as well.

The act, approved with the support of the entire Democratic leadership in the House and nearly half of the Democratic senators, overturned even the limited restraints on government spying that existed under the FISA law passed in 1978, in the wake of revelations of gross abuses of power by the White House and the intelligence agencies under the Nixon administration.

Now, rather than having to seek approval from the secret FISA court for wiretaps—which were almost invariably granted under the old law—the NSA obtains a generalized warrant to conduct surveillance of Americans’ phone calls and emails with the sole requirement that the agency “reasonably believed” that they involved international communications. Full discretion was given to the agency to determine whom it views as suspect, without any requirement to inform the FISA court whom it is spying on, much less show probable cause for its suspicions of criminal activity.

Supposedly, the court’s approval is required for spying on purely domestic communications. It would appear that it is this provision that presents the NSA with “operational and legal” difficulties. This is hardly a surprise, given the agency’s past practice of having the entire Internet traffic flowing through telecom operations centers diverted to the NSA, ostensibly in order to sift through it for terrorist communications.

The bill passed last summer with Obama’s support also granted retroactive immunity to the telecommunications companies that collaborated in the warrantless wiretapping program, leading to the dismissal of scores of lawsuits charging them with illegal invasion of privacy. Thus, the legislation sought to prevent any accountability for the crimes that had already taken place, while essentially legalizing going forward what had been criminal acts.

At the time, Democratic supporters of the legislation offered assurances that the retroactive immunity for the telecoms would not preclude accountability, because individuals could still sue the government.

However, since Obama entered the White House, his Justice Department has sought to block just such suits. Using the same method as the Bush administration before it, federal attorneys are invoking the “state secrets” privilege for withholding information on the illegal spying and arguing that for a court to even hear the case would result in “grave harm to national security.”

In two cases—one involving the illegal wiretapping of the Al-Haramain Islamic Foundation in Oregon, and the other brought on

behalf of millions of AT&T customers subjected to dragnet surveillance—the Obama Justice Department has insisted that the criminal activities of the NSA are so secret that not even a judge can review them.

Earlier this month, the Justice Department went into court over the dragnet surveillance suit—*Jewel v. NSA*, brought by the Electronic Frontier Foundation—and advanced a claim of sweeping executive power not even claimed under Bush. It argued that the government enjoys “sovereign immunity,” meaning that no citizen can sue the government over the illegal domestic wiretapping.

Under the FISA act of 1978 as well as other legislation, Congress had specifically waived sovereign immunity in relation to unlawful surveillance, allowing those spied upon to sue. The Obama Justice Department, however, advanced the argument that the Patriot Act of 2001 had effectively reinstated the government’s immunity from such suits. This amounts to a claim that this reactionary legislation provided a legal cover for the government to carry out criminal acts.

The Obama administration’s uncompromising defense of illegal domestic spying under the Bush White House is not only an attempt to prevent anyone from being held accountable for these crimes and to bar the American people from learning the extent of the surveillance conducted against them. It is also a defense of the continuation of these same essential practices today, hidden behind a wall of secrecy.

While the Obama administration has jettisoned the “global war on terrorism” rhetoric of its predecessor, the attacks on fundamental democratic and constitutional rights carried out under the pretext of fighting terrorism continue. With the NSA spying, this includes an assault on freedom of speech and freedom from unreasonable searches, guaranteed in the First and Fourth Amendments to the Constitution.

With his defense of illegal domestic spying—as with his sanctioning of torture and extraordinary rendition—Obama acts as a front man for the massive US security agencies that are only increasing their power under his administration.



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