

Former State Department employee reveals spying on Americans by executive order

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In the latest revelation of unconstitutional spying on US citizens by the National Security Agency (NSA), former State Department employee John Napier Tye has given his account of ongoing violations of privacy under cover of a legal fig leaf known as Executive Order 12333.

Last week the *Washington Post* published Tye's lengthy criticism of the Obama administration under the title "Meet Executive Order 12333: The Reagan rule that lets the NSA spy on Americans." The editorial underscores both the immense scope of illegal spying by an unaccountable military-intelligence apparatus and the sham character of the official "reform."

President Ronald Reagan enacted Executive Order 12333 in 1981. The order was aimed at providing a lax legal standard for the collection of communication *content*—not just metadata such as call logs—of US citizens, as long as the communication was not *obtained* within the United States.

While 12333 was legally dubious even in 1981, it was not until the widespread transfer of data over the internet that it could be exploited for the mass collection of communications. Enormous amounts of data and communications generated by Americans in the form of emails, for example, are now routinely routed to servers all over the world, bringing the data within the now much broader reach of 12333.

Tye's editorial calls attention to 12333, saying that the order is now used to justify possibly more illegal surveillance than Section 215 of the Patriot Act, which sanctions bulk collection of telecommunications records. While Section 215 has garnered more public attention, Tye argues that it "is a small part of the picture and does not include the universe of collection and storage of communications by US persons authorized under Executive Order 12333."

Referring to "classified facts that I am prohibited by law from publishing," Tye writes, "I believe that Americans should be even more concerned about the collection and storage of their communications under Executive Order 12333 than under Section 215 [of the Patriot Act]."

Because it is an executive order as opposed to a statute, 12333 is subject to virtually zero oversight. The attorney general, who is part of the executive branch and serves at the pleasure of the president, determines what restraints, if any, apply. Currently, intelligence agencies are permitted to keep data obtained pursuant to 12333 for up to five years.

Nor does 12333 typically require a warrant. Tye explains that the NSA keeps data obtained through 12333 even if it is not directly related to a surveillance target who was subject to a warrant. This so-called "incidental" collection represents the exception that swallows the rule.

As Tye describes it, incidental collection is "a legal loophole that can be stretched very wide. Remember that the NSA is building a data center in Utah five times the size of the U.S. Capitol building, with its own power plant that will reportedly burn \$40 million a year in electricity. 'Incidental collection' might need its own power plant."

Tye worked for the State Department from 2011 until this past April. He currently serves as legal director for the nonprofit advocacy group Avaaz. His *Post* article was reviewed and cleared by the State Department and NSA prior to publication. Before he left his State Department job, Tye filed a complaint about 12333-related spying with the department's inspector general, and he eventually brought this complaint to the House and Senate intelligence committees, as well as to the inspector general of the NSA.

While Tye did not leak any documents or data to the press, it is clear that what he saw and heard at the State Department deeply troubled him.

He begins his *Washington Post* piece with this disturbing anecdote:

“In March I received a call from the White House counsel’s office regarding a speech I had prepared for my boss at the State Department... The draft stated that ‘if U.S. citizens disagree with congressional and executive branch determinations about the proper scope of signals intelligence activities, they have the opportunity to change the policy through our democratic process.’”

“But the White House counsel’s office told me that no, that wasn’t true. I was instructed to amend the line, making a general reference to ‘our laws and policies,’ rather than our intelligence practices. I did.”

In other words, Tye was directed to remove from his speech something that might give the misleading impression that the US population has any meaningful oversight where the military-intelligence apparatus is concerned.

In his op-ed comment, Tye also points out the Obama administration’s “reforms” are bogus. Obama’s Review Group on Intelligence and Communications Technologies recommended that data obtained by incidental collection should be purged. Tye writes that an unclassified document he saw while working with the State Department made the White House’s position clear: there were no plans to change the practices around Executive Order 12333.



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