

NSA Spying and the Shredding of the Constitution

ACLU Files New FOIA Requests for NSA Spying Documents. EFF Charges Telecom Amnesty Unconstitutional

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The American Civil Liberties Union (ACLU) filed new Freedom of Information Act ([FOIA](#)) requests demanding that the U.S. Department of Justice (DoJ) and the National Security Agency (NSA) disclose “any policies and procedures” that protect Americans’ privacy rights when the ultra-spooky agency “collects, stores and disseminates private U.S. communications.”

The FOIA brief opens a new front in an on-going campaign by the civil liberties’ group to pry information from unaccountable Bush administration spy agencies and their “up-armored” lawyers in the Justice Department.

According to Melissa Goodman, a staff attorney with the ACLU’s National Security Project, “the American public needs to know whether the NSA’s procedures are sufficiently protective of our privacy rights. Unfortunately, there is often no meaningful court oversight of the NSA’s surveillance activities and the NSA is left to police itself,” Goodman said in a [press release](#) on Wednesday.

Coming on the heels of last week’s report by [ABC News](#) that provided new details of the Agency’s illegal spying on hundreds of aid workers, journalists and soldiers stationed in Iraq, the ACLU is charging that the NSA spied on personal phone calls that “were not in any way related to national security.” Indeed, intimate phone calls intercepted by Army communications specialists were routinely shared and swapped like salacious trophies amongst NSA personnel for their amusement.

At a news conference last February, President Bush declared that “there is a constant check to make sure that our civil liberties of our citizens are treated with respect.” A whistleblower, former Navy Arab linguist David Faulk however, put paid to Bush’s lie when he told *ABC* that “he and his fellow intercept operators listened into hundreds of Americans picked up using phones in Baghdad’s Green Zone from late 2003 to November 2007.”

But the network’s belated report on a story initially broken in July 2007 by David Swanson at [AfterDowningStreet.org](#), former U.S. Army Reserve Arab linguist Adrienne Kinne, who was assigned to a special military signals intelligence unit run from the NSA facility at Fort Gordon, Georgia, revealed that illegal surveillance on Americans was widespread.

Prior to the September 11 terrorist attacks, NSA operators were forbidden to listen in or

collect information on Americans. The NSA was specifically barred from doing so by United State Signals Intelligence Directive 18 ([USSID 18](#)).

Kinne also told Swanson that many of the individuals the NSA spied upon were journalists, including those staying at a Baghdad hotel that turned up on a U.S. target list.

Despite Kinne's repeated attempts to bring this information to the attention of Sen. Patrick Leahy, Chairman of the Senate Judiciary Committee, she was rebuffed by Leahy and his staff. "Now, in response to *ABC News* picking up the story," Swanson [reported](#) October 10, "Leahy is pretending to be interested in the matter."

These revelations come hot on the heels of Congress' July passage of the unconstitutional FISA Amendments Act (FAA) that granted NSA free reign to carry out warrantless spying. As *Antifascist Calling* has reported on many occasions, [most recently](#) September 20 (see: "Democracy or Police State? New Lawsuit Targets Bush, Cheney, NSA over Illegal Spying"), FAA grants unaccountable intelligence agencies the power to conduct driftnet surveillance on the telephone and internet communications of American citizens and legal residents. As I wrote in September,

These covert intelligence operations arose as the result of secret Department of Justice memorandums written by the Office of Legal Counsel (OLC). According to an unsigned and undated [memo](#) released by the OLC, the Justice Department claims that President Bush has an "inherent right" to carry out "communications intelligence targeted at the enemy." Indeed, as the extent of these illegal programs have revealed, the "enemy" is none other than the American people themselves!

Additionally, FAA handed corporate grifters in the telecommunications industry such as AT&T, Sprint and Verizon retroactive immunity for aiding and abetting the Bush regime's unconstitutional spy operations. The "best money Congress can buy," with the Democrats in cahoots with their Republican colleagues in the Justice Department are attempting to derail the Electronic Frontier Foundation's ([EFF](#)) landmark lawsuit, [Hepting v. AT&T](#).

But in a move late Thursday, EFF attorneys challenged the law's constitutionality in a [brief](#) filed in U.S. District Court in San Francisco. Judge Vaughn Walker is the presiding judge hearing *Hepting v. AT&T*. In a [statement](#) issued Friday by the civil liberties group,

...the flawed FISA Amendments Act (FAA) violates the federal government's separation of powers as established in the Constitution and robs innocent telecom customers of their rights without due process of law. Signed into law earlier this year, the FAA allows for the dismissal of the lawsuits over the telecoms' participation in the warrantless surveillance program if the government secretly certifies to the court that either the surveillance did not occur, was legal, or was authorized by the president. Attorney General Michael Mukasey filed that classified certification with the court last month. ("EFF Challenges Constitutionality of Telecom Immunity in Federal Court," Electronic Frontier Foundation, Press Release, October 17, 2008)

EFF Senior Staff Attorney Kevin Bankston charged that "the immunity law puts the fox in charge of the hen house, letting the Attorney General decide whether or not telecoms like

AT&T can be sued for participating in the government's illegal warrantless surveillance."

Bankston pointed out that in a constitutional system "it is the judiciary's role as a co-equal branch of government to determine the scope of the surveillance and rule on whether it is legal, not the executive's. The Attorney General should not be allowed to unconstitutionally play judge and jury in these cases, which affect the privacy of millions of Americans."

Mendaciously, U.S. Attorney General Michael Mukasey—a darling of "liberal" Democrats during his confirmation hearing last year—claimed in a public version of the government's certification to the court for dismissal, that the state had no "content-dragnet" program that searched for key words in the body of communications.

As AfterDowningStreet, ABC News and AT&T whistleblower [Mark Klein](#) have revealed, this is clearly a lie as communications were vacuumed into government databases while state officials offered one prevarication after another to conceal the breadth of these illegal programs from the public.

EFF has presented the court with a [summary](#) of thousands of pages of documentary evidence that clearly demonstrate the broad, driftnet surveillance of millions of innocent Americans since 9/11.

EFF Senior Staff Attorney Kurt Opsahl said, "We have overwhelming record evidence that the domestic spying program is operating far outside the bounds of the law. Intelligence agencies, telecoms, and the Administration want to sweep this case under the rug, but the Constitution won't permit it."

But that doesn't mean they won't continue trying. Immunity provisions in the FAA authorized Mukasey to inform Judge Walker in classified and non-public documents why the government is within its rights to seek immunity for spying telecoms. With little latitude, Walker has no recourse to deny Mukasey's request to dismiss.

However, as *Wired Magazine* analyst Ryan Singel [writes](#), Walker, "a libertarian-leaning Republican appointee, has so far not been sympathetic to the government, ruling early on that the suits could continue despite the government's claim that the suits would put the nation at risk."

The EFF's constitutional challenge is set to be heard December 2.

The ACLU has also filed a lawsuit to stop the state from conducting surveillance under the new spy law, charging that FAA violates the Fourth Amendment by giving the government (and its alphabet-soup mix of intelligence agencies) "virtually unchecked power" to intercept e-mails and telephone calls. ([See](#): "ACLU Sues Over Unconstitutional Dragnet Wiretapping Law," Press Release, July 10, 2008) The ACLU's current FOIA inquiries demand that the NSA and Justice Department produce:

Any and all legal memoranda, procedures, policies, directives, practices, guidance or guidelines created between 1993 and the present pertaining to the acquisition, processing, analysis, retention, storage or dissemination of Americans' communications—whether targeted for interception or incidentally intercepted—during the course of NSA surveillance activities conducted inside or outside the United States; and

Any and all records created between September 2001 and the present concerning complaints about, investigations of, or disciplinary actions related to the NSA's monitoring of U.S. communications.

Illegal interception of telephone and internet communications are intimately connected to data mining, a practice that seeks to establish relationships amongst "targets" by literally "mining" commercial and government databases for telephone communications, internet searches, medical records, travel itineraries, credit card purchases, etc.

As used by intelligence agencies, data miners claim they can identify trends that go beyond simple analytical results produced by the data. Relying on sophisticated algorithms, state data miners claim they can forecast "future events" through predictive analysis and its deranged off-shoot, link analysis, a subset of network analysis that explores the associations and relationships between objects and people. However, these spooky Nostradamuses more often than not generate false-positives that have real world consequences for their victims.

Just ask anyone unfortunate enough to have landed on the state's Kafkaesque "no fly list" or the FBI's sinister Terrorist Screening Center, a "terrorist watch list" that surpassed some *one million names* this summer, according to the [ACLU](#).

Earlier this month, the National Academy of Science's National Research Council issued a scathing [report](#) questioning the validity of automated data mining, citing the slipshod manner in which data sets are linked together as well as the severe privacy breeches such programs inevitably produce.

Poor-quality data are a major concern in protecting privacy because inaccuracies may cause data-mining algorithms to identify innocent people as threats, the report says. Linking data sources together tends to compound the problem; current literature suggests that a "mosaic" of data assembled from multiple databases is likely to be error-prone. Analysts and officials should be aware of this tendency toward errors and the consequent likelihood of false positives. ("All Counterterrorism Programs That Collect and Mine Data Should Be Evaluated for Effectiveness, Privacy Impacts," National Academy of Science, Press Release, October 7, 2008)

But given the current trajectory of the "unitary executive branch," especially now as the financial system continues melting down and imperial wars relentlessly grind on, the corporatist criminals who rule the roost will undoubtedly expand the "public-private partnership" that has proven so profitable for the telecommunications industry.

With upcoming presidential elections in the United States, neither Sen. Barack Obama nor Sen. John McCain, the respective candidates of the capitalist parties of war and repression, have opposed FAA, NSA spying or the shredding of the U.S. Constitution. Nor is it likely either candidate will repudiate the unprecedented Executive Branch power-grab by the Bush gang once the winner attains "high office" come January.

Tom Burghardt is a researcher and activist based in the San Francisco Bay Area. In addition to publishing in Covert Action Quarterly and [Global Research](#), an independent research and media group of writers, scholars, journalists and activists based in Montreal, his articles can be read on [Dissident Voice](#) and [The Intelligence Daily](#). He is the editor of Police State America: U.S. Military "Civil Disturbance" Planning, distributed by [AK Press](#).

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