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Spying on Americans: Obama Endorses Bush Era Warrantless Wiretapping

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President Barack Obama instructed Justice Department attorneys to argue last week in San Francisco before Federal District Judge Vaughn Walker, that he must toss out the Electronic Frontier Foundation's *Shubert v. Bush* lawsuit challenging the secret state's driftnet surveillance of Americans' electronic communications.

This latest move by the administration follows a pattern replicated countless times by Obama since assuming the presidency in January: denounce the lawless behavior of his Oval Office predecessor while continuing, even expanding, the reach of unaccountable security agencies that subvert constitutional guarantees barring "unreasonable searches and seizures." EFF senior staff attorney Kevin Bankston wrote:

> In a Court filing late Friday night, the Obama Administration attempted to dress up in new clothes its embrace of one of the worst Bush Administration positions–that courts cannot be allowed to review the National Security Agency's massive, well-documented program of warrantless surveillance. In doing so it demonstrated that it will not willingly set limits on its own power and reinforced the need for Congress to step in and reform the so-called 'state secrets' privilege. (Kevin Bankston, "As Congress Considers State Secrets Reform, Obama Admin Tries to Shut Down Yet Another Warrantless Wiretapping Lawsuit," Electronic Frontier Foundation, November 2, 2009)

In June, Judge Walker dismissed EFF's landmark *Hepting v. ATT* lawsuit, when he ruled that the telecoms enjoyed immunity from liability after the Democratic-controlled Congress rammed through the despicable FISA Amendments Act (FAA) in July 2008.

That law, passed in response to citizen challenges to the state and their corporate partners in crime, granted the Attorney General exclusive power to require dismissal of the lawsuits "if the government secretly certifies to the court that the surveillance did not occur, was legal, or was authorized by the president," the civil liberties' watchdog group wrote in June.

In essence, it is not the co-equal and independent federal Judiciary that determines whether or not a crime has been committed that flaunts constitutional norms but rather, an unchallengeable assertion by an imperial Executive Branch.

As *Antifascist Calling* has averred many times, this craven capitulation by Congress to the Executive locks in place the statutory machinery for a presidential dictatorship, one where power is wielded with neither transparency nor accountability.

EFF's *Jewel v. NSA* civil suit, brought on behalf of AT&T customers to halt the firm's ongoing

collaboration with the government's illegal surveillance continues–for the moment.

In April however, taking a page from the Bush/Cheney playbook, the Obama administration argued that this lawsuit too, must be dismissed, claiming that should the litigation go forward it would require government disclosure of "privileged state secrets."

Antifascist Calling reported at the time that the Obama administration has argued that under provisions of the disgraceful USA PATRIOT Act, the state is "immune from suit under the two remaining key federal surveillance laws: the Wiretap Act and the Stored Communications Act."

Claiming "sovereign immunity" in practice, this means that under DoJ's ludicrous interpretation of the Orwellian PATRIOT Act, the government can *never* be held accountable for illegal surveillance under any federal statute. As *Salon* pointed out:

> In other words, beyond even the outrageously broad "state secrets" privilege invented by the Bush administration and now embraced fully by the Obama administration, the Obama DOJ has now invented a brand new claim of government immunity, one which literally asserts that the U.S. Government is free to intercept all of your communications (calls, emails and the like) and–even if what they're doing is blatantly illegal and they know it's illegal–you are barred from suing them unless they "willfully disclose" to the public what they have learned. (Glenn Greenwald, "New and worse secrecy and immunity claims from the Obama DOJ," Salon, April 6, 2009)

The "change" regime's cynical maneuver to have *Shubert* kicked to the curb is all the more remarkable considering that the Justice Department announced *a month earlier* that the administration will "impose new limits on the government assertion of the state secrets privilege used to block lawsuits for national security reasons," *The New York Times* reported.

"Under the new policy," investigative journalist Charlie Savage wrote, "if an agency like the National Security Agency or the Central Intelligence Agency wanted to block evidence or a lawsuit on state secrets grounds, it would present an evidentiary memorandum describing its reasons to the assistant attorney general for the division handling the lawsuit in question."

According to the *Times*, "if that official recommended approving the request" it would be sent on to a high-level committee comprised of DoJ officials who would be charged "whether the disclosure of information would risk 'significant harm' to national security."

Under the new guidelines, Justice Department officials are supposed to reject the request to deploy the state secrets privilege to quash lawsuits if the Executive Branch's motivation for doing so would "conceal violations of the law, inefficiency or administrative error" or to "prevent embarrassment."

While Holder has claimed DoJ's so-called "high-level committee" has reviewed the relevant material and concluded that disclosure would risk "significant harm" to "national security" if the case went forward, security analyst Steven Aftergood wrote in *Secrecy News* that "one aspect of the new policy that he did not address was the question of referral of the alleged misconduct to an agency inspector general for investigation."

This is supposed to occur whenever "invocation of the privilege would preclude adjudication of particular claims," as it certainly does in the *Shubert* litigation, particularly when the "case raises credible allegations of government wrongdoing."

However as Aftergood avers, "somewhat artfully" (although this writer prefers a stronger phrase to describe the Attorney General's actions) "the government denies that any such collection occurred 'under the Terrorist Surveillance Program,' implicitly allowing for the possibility that it may have occurred under some other framework."

What that "other framework" is hasn't been specified; however, in all probability it relates to other NSA above top secret Special Access Programs which haven't come to light.

Whatever the secret state is continuing to do under Obama, a recent piece in *InformationWeek* provides striking details that it is massive.

The publication reports that the NSA "will soon break ground on a data center in Utah that's budgeted to cost $1.5 billion."

According to *InformationWeek*, the new facility will "provide intelligence and warnings related to cybersecurity threats, cybersecurity support to defense and civilian agency networks, and technical assistance to the Department of Homeland Security."

The new data center will be located at Camp Williams, a National Guard training facility 26 miles from Salt Lake City in the conservative state of Utah. While providing few details on how NSA will use the 1.5 million square foot center, Glenn Gaffney, a deputy director of intelligence with the Office of the Director of National Intelligence (ODNI), claims that NSA will "protect civil liberties."

"We will accomplish this in full compliance with the U.S. Constitution and federal law and while observing strict guidelines that protect the privacy and civil liberties of the American people," Gaffney said.

As with other pronouncements by intelligence officials, Gaffney's statement should be taken with the proverbial grain of salt.

The New York Times revealed in April and June that the ultra-spooky agency "intercepted private e-mail messages and phone calls of Americans in recent months on a scale that went beyond the broad legal limits established by Congress last year."

Indeed, a former NSA analyst told investigative journalists James Risen and Eric Lichtblau that he was "trained in 2005 for a program in which the agency routinely examined large volumes of Americans' e-mail messages without court warrants."

We do know that NSA's STELLAR WIND and PINWALE intercept programs are giant data mining vacuum cleaners that sift emails, faxes, and text messages of millions of people in the United States. These programs are not, as the Bush and now, the Obama regime mendaciously claim, primarily "targeting al-Qaeda."

As Cryptohippie points out in their analysis of current global surveillance trends, "an electronic police state is quiet, even unseen. All of its legal actions are supported by abundant evidence. It looks pristine."

Answering those who claim they have "nothing to hide," Cryptohippie argues that "state use of electronic technologies to record, organize, search and distribute forensic evidence" is primarily for use "against its citizens."

Indeed, the information gathered by the secret state and stored in huge data warehouses scattered across the country "is criminal evidence, ready for use in a trial," and "it is gathered universally and silently, and only later organized for use in prosecutions."

> In an Electronic Police State, every surveillance camera recording, every email you send, every Internet site you surf, every post you make, every check you write, every credit card swipe, every cell phone ping… are all criminal evidence, and they are held in searchable databases, for a long, long time. Whoever holds this evidence can make you look very, very bad whenever they care enough to do so. You can be prosecuted whenever they feel like it–the evidence is already in their database. (Cryptohippie, The Electronic Police State: 2008 National Rankings, no date)

How does this "quiet, pristine" system operate? As AT&T whistleblower Mark Klein revealed in a sworn affidavit that described how the company physically split and copied the traffic that flowed into its offices, NSA was virtually duplicating, sifting and storing the *entire Internet*. Klein wrote in his self-published book:

> What screams out at you when examining this physical arrangement is that the NSA was vacuuming up everythingflowing in the Internet stream: e-mail, web browsing, Voice-Over-Internet phone calls, pictures, streaming video, you name it. The splitter has no intelligence at all, it just makes a blind copy. There could not possibly be a legal warrant for this, since according to the 4th Amendment warrants have to be specific, "particularly describing the place to be searched, and the persons or things to be seized." …
>
> This was a massive blind copying of the communications of millions of people, foreign and domestic, randomly mixed together. From a legal standpoint, it does not matter what they claim to throw away later in the their secret rooms, the violation has already occurred at the splitter. (Mark Klein, Wiring Up the Big Brother Machine… And Fighting It, Charleston, South Carolina: BookSurge, 2009, pp. 38-39.)

Klein's revelations were confirmed by former NSA analyst and whistleblower Russell Tice, who told MSNBC's Countdown with Keith Olbermann in January that the NSA "had access to *all*Americans' communications" and spied "24/7" on domestic political activist groups and "U.S. news organizations and reporters and journalists."

In demanding that the independent federal judiciary toss these cases, the Obama administration is asserting a broad interpretation of Executive Branch privileges that caused much outrage and hand-wringing by congressional Democrats–when they were out of power.

Under the "change" regime however, what were once viewed by Democrats and their supporters as prime examples of Bushist lawlessness and contempt for constitutional safeguards, are now deemed vital state secrets that "protect" the American people, even as the capitalist state wages an endless "War on Terror" to seize other people's resources for geostrategic advantage over the competition. As Glenn Greenwald wrote:

> That was the principal authoritarian instrument used by Bush/Cheney to shield itself from judicial accountability, and it is now the instrument used by the Obama DOJ to do the same. Initially, consider this: if Obama's argument is true–that national security would be severely damaged from any disclosures about the government's surveillance activities, even when criminal–doesn't that mean that the Bush administration and its right-wing followers were correct all along when they insisted that The New York Times had damaged American national security by revealing the existence of the illegal NSA program? Isn't that the logical conclusion from Obama's claim that no court can adjudicate the legality of the program without making us Unsafe? (Glenn Greenwald, "Obama's latest use of 'secrecy' to shield presidential lawbreaking," Salon, November 1, 2009)

Democrat or Republican, "liberal" or "conservative:" what matters most for *all* factions in Washington is the defense and preservation of the elites.

Criminality on such a scale requires that the armed fist of the state is mobilized and ever-vigilant

Warrantless

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