

The Obama Administration's "Secret Law" to Spy on Americans

By [Tom Burghardt](#)

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First published by GR in July 2011, this article documents Obama's Police State Agenda.

During spring's run-up [2011] to the reauthorization of three expiring provisions of the USA Patriot Act, Senator Ron Wyden (D-OR) charged that the administration and the FBI was relying on a "secret" interpretation of law to vacuum-up exabytes of data, including cell phone location records and internet data mining that target Americans.

In March [2011], a written statement to the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security by Justice Department official Todd Hinnen confirmed that the administration had used Section 215, the so-called "business records" section of the Act "to obtain driver's license records, hotel records, car rental records, apartment leasing records, credit card records, and the like."

Further confirmation of Wyden's charges came from an unlikely source: a White House nominee for a top counterterrorism position.

Last week *Wired* reported that Matthew Olsen, the administration's pick to head the National Counterterrorism Center "acknowledged that 'some of the pleadings and opinions related to the Patriot Act' to the secret Foreign Intelligence Surveillance Court that approves snooping warrants 'are classified'."

If confirmed, Olsen will replace Michael E. Leiter, the Bushist embed who told the Senate last year during hearings into 2009's aborted plot to bring down Northwest Airlines Flight 253 over Detroit on Christmas Day: "I will tell you, that when people come to the country and they are on the watch list, it is because we have generally made the choice that we want them here in the country for some reason or another."

What those reasons are for wanting a terrorist to board a packed airliner were not spelled out to Senate nor were they explored by corporate media. This raises an inevitable question: what else is the administration concealing from the American people?

White House Stonewall

Back in May, the Electronic Frontier Foundation (EFF) filed a Freedom of Information Act lawsuit against the Justice Department "demanding the release of a secret legal memo used to justify FBI access to Americans' telephone records without any legal process or oversight."

So far, the administration has refused to release the memos.

According to the civil liberties' watchdogs, a report last year by the DOJ's own Inspector General "revealed how the FBI, in defending its past violations of the Electronic Communications Privacy Act (ECPA), had come up with a new legal argument to justify secret, unchecked access to private telephone records."

"The Obama administration," *The Washington Post* reports, has continued "to resist the efforts of two Democratic senators to learn more about the government's interpretation of domestic surveillance law, stating that 'it is not reasonably possible' to identify the number of Americans whose communications may have been monitored under the statute."

In a letter to Wyden and Senator Mark Udall (D-CO), Kathleen Turner, the director of legislative affairs for the Office of the Director of National Intelligence (ODNI), claimed that a "joint oversight team" has not uncovered evidence "of any intentional or willful attempts to violate or circumvent the Foreign Intelligence Surveillance Act or FISA, which was amended in 2008."

Turner went on to say that "with respect to FAA" [FISA Amendments Act of 2008, the statute that "legalized" Bushist surveillance programs and handed retroactive immunity to spying telecoms like AT&T], "you [Wyden] asked whether any significant interpretations of the FAA are currently classified. As you are aware, opinions of the FISA Court usually contain extensive discussions of particularly sources, methods and operations and are therefore classified."

Throwing the onus back on political grifters in the House and Senate, Turner wrote: "Even though not publicly available, by law any opinion containing a significant legal interpretation is provided to the congressional intelligence committees."

With circular logic Turner claims that because "FISA Court opinions are so closely tied to the facts of the application under review that they cannot be made public in any meaningful form without compromising the sensitive sources and methods at issue."

At best, her statement is disingenuous. After all, it is precisely that secret interpretation of the law made by the White House Office of Legal Counsel that Wyden and others, including EFF, the Electronic Privacy Information Network (EPIC) and journalists are demanding the administration clarify.

Justice Department Shields NSA's Private Partners

The FBI isn't the only agency shielded by the Justice Department under cover of bogus "state secrets" assertions by the Obama administration.

On July 13, EPIC reported that a U.S. District Court Judge issued an opinion in their lawsuit (*EPIC v. NSA*), "and accepted the NSA's claim" that it can "neither confirm nor deny" that the agency "had entered into a relationship with Google following the China hacking incident in January 2010."

The privacy watchdogs sought documents under FOIA "because such an agreement could reveal that the NSA is developing technical standards that would enable greater surveillance of Internet users."

According to EPIC, the administration's "Glomar response" to "neither confirm nor deny" a covert relationship amongst giant media corporations such as Google and secret state

agencies “is a controversial legal doctrine that allows agencies to conceal the existence of records that might otherwise be subject to public disclosure.”

This issue is hardly irrelevant to internet users. CNET News reported last week that “Google’s Street View cars collected the locations of millions of laptops, cell phones, and other Wi-Fi devices around the world, a practice that raises novel privacy concerns.”

And given the government’s penchant to vacuum-up so-called “transactional data” without benefit of a warrant, would media giants such as Google, high-tech behemoths such as Apple or Microsoft, beholden to the federal government for regulatory perks, resist efforts by the feds demanding they cough-up users’ locational data?

Investigative journalist Declan McCullagh found that the cars “were supposed to collect the locations of Wi-Fi access points. But Google also recorded the street addresses and unique identifiers of computers and other devices using those wireless networks and then made the data publicly available through Google.com until a few weeks ago.”

According to CNET, “the French data protection authority, known as the Commission Nationale de l’Informatique et des Libertés (CNIL) recently contacted CNET and said its investigation confirmed that Street View cars collected these unique hardware IDs. In March, CNIL’s probe resulted in a fine of 100,000 euros, about \$143,000.”

On Friday, CNET reported that Microsoft too, is in on the geolocation spy game.

Declan McCullagh wrote that “Microsoft has collected the locations of millions of laptops, cell phones, and other Wi-Fi devices around the world and makes them available on the Web.”

A security researcher confirmed that the “vast database available through Live.com publishes the precise geographical location, which can point to a street address and sometimes even a corner of a building, of Android phones, Apple devices, and other Wi-Fi enabled gadgets.”

Such information in the hands of government snoops would prove invaluable when it comes to waging War On Terror 2.0, the so-called “cyber war.” Which is why the administration is fighting tooth and nail to keep this information from the public.

On the cyber front, EPIC is suing the White House to obtain the top secret National Security Presidential Directive that sets out the “NSA’s cyber security authority,” and is seeking clarification from the agency about so-called internet vulnerability assessments, “the Director’s classified views on how the NSA’s practices impact Internet privacy, and the NSA’s ‘Perfect Citizen’ program.”

As *Antifascist Calling* previously reported, “Perfect Citizen” is a \$100 million privacy-killing program under development by the agency and defense giant Raytheon. Published reports informed us that the program will rely on a suite of sensors deployed in computer networks and that proprietary software will persistently monitor whichever system they are plugged into.

While little has been revealed about how Perfect Citizen will work, it was called by a corporate insider the cyber equivalent of “Big Brother,” according to an email obtained last year by *The Wall Street Journal*.

New Report Highlights “Transparency” Fraud

The refusal by the White House to divulge information that impact Americans’ civil liberties and privacy rights, along with their expansion of repressive national security and surveillance programs launched by the Bush regime, underscores the fraudulent nature of Obama’s so-called “transparency administration.”

A new report published by the American Civil Liberties Union, *Drastic Measures Required: Congress needs to Overhaul U.S. Secrecy Laws and Increase Oversight of the Secret Security Establishment*, documents how “out-of-control secrecy is a serious disease that is hurting American democracy.”

Authors Jay Stanley and former FBI undercover agent turned whistleblower, Michael German, write that “we are now living in an age of government secrecy run amok.”

According to the report, “reality has not always lived up to the rhetoric” of the Obama regime. Since the administration took office, the White House:

- Embraced the Bush administration’s tactic of using overbroad “state secrets” claims to block lawsuits challenging government misconduct.
- Fought a court order to release photos depicting the abuse of detainees held in U.S. custody and supported legislation to exempt these photos from FOIA retroactively. Worse, the legislation gave the Secretary of Defense sweeping authority to withhold any visual images depicting the government’s “treatment of individuals engaged, captured, or detained” by U.S. forces, no matter how egregious the conduct depicted or how compelling the public’s interest in disclosure.
- Threatened to veto legislation designed to reform congressional notification procedures for covert actions.
- Aggressively pursued whistleblowers who reported waste, fraud and abuse in national security programs with criminal prosecutions to a greater degree than any previous presidential administration.
- Refused to declassify information about how the government uses its authority under section 215 of the Patriot Act to collect information about Americans not relevant to terrorism or espionage investigations. (Mike German and John Stanley, *Drastic Measures Required*, Washington, D.C., The American Civil Liberties Union, July 2011, pp. 7-8)

Amongst other findings in the report we learn that more than 2.4 million personnel, “official” denizens of the secret state which include the 16 agencies of the so-called “Intelligence Community” and outsourced private contractors hold top secret and above security clearances.

Although the Government Accountability Office (GAO) disclosed that the Intelligence Authorization Act of 2010 “required required the Director of National Intelligence (DNI) to calculate and report the aggregate number of security clearances for all government employees and contractors to Congress by February 2011,” as of this writing “the DNI has so far failed to produce this data.”

Last year, *The Washington Post*’s “Top Secret America” series revealed that “some 1,271

government organizations and 1,931 private companies work on programs related to counterterrorism, homeland security and intelligence in about 10,000 locations across the United States,” and that “the privatization of national security” has been made possible by a “nine-year ‘gusher’ of money.”

The *Post*’s reporting on America’s security outsourcing mania echoed critical investigations by other journalists, including those by Tim Shorrock, who has reported extensively on intelligence privatization in his essential book *Spies For Hire* and by James Bamford in *The Shadow Factory*, which explored how NSA was turned loose on the American people.

In a follow-up piece last December, investigative journalists Dana Priest and William M. Arkin described how “the United States is assembling a vast domestic intelligence apparatus to collect information about Americans, using the FBI, local police, state homeland security offices and military criminal investigators.”

“The government’s goal,” Priest and Arkin wrote, “is to have every state and local law enforcement agency in the country feed information to Washington to buttress the work of the FBI, which is in charge of terrorism investigations in the United States.”

As the *Post* reported, “technologies and techniques honed for use on the battlefields of Iraq and Afghanistan have migrated into the hands of law enforcement agencies in America.”

This is a pernicious development. As I reported three years ago, one such program were efforts by the Department of Homeland Security, partnering-up with the Pentagon, to train America’s fleet of top secret surveillance satellites on the American people.

That program, since killed by DHS, the National Applications Office, would have provided state and local authorities access to geospatial intelligence gleaned from military spy satellites and would have done so with no congressional oversight or privacy controls in place and would have handed over this sensitive data to selected law enforcement partners.

Local Police Control Ceded to the FBI

Along with intrusive techniques and highly-classified programs, Priest and Arkin wrote that the FBI has built “a database with the names and certain personal information, such as employment history, of thousands of U.S. citizens and residents whom a local police officer or a fellow citizen believed to be acting suspiciously.”

What constitutes “suspicious behavior” of course, is in the eye of the beholder, and can constitute anything from taking photographs on a public street to organizing and participating in protests against America’s endless wars.

Just recently, the *San Francisco Bay Guardian* revealed that local cops “assigned to the FBI’s terrorism task force can ignore local police orders and California privacy laws to spy on people without any evidence of a crime.”

Investigative journalist Sarah Phelan discovered that even after a “carefully crafted” set of rules on intelligence gathering had been in place “since police spying scandals of the 1990s,” were “bypassed without the knowledge or consent of the S.F. Police Commission.”

John Crew, a police practices expert with the American Civil Liberties Union of Northern California told the *Bay Guardian* that the 2007 Memorandum of Understanding by S.F. cops

and the FBI means that “Police Commission policies do not apply” and that it “allows San Francisco police to circumvent local intelligence-gathering policies and follow more permissive federal rules.”

Despite serious concerns over the Bureau’s long-standing practice of spying on political dissidents and its “War On Terror” racial profiling policies, in a follow-up piece the *Bay Guardian* reported that Police Commission President Thomas Mazzucco, a former federal prosecutor, seemed “more concerned about defending federal practices and officials ... than worrying about the role and authority of the civilian oversight body he now represents.”

The ACLU’s Crew noted that when the FBI came to the SFPD with a new MOU, “there was no review by the City Attorney, and no notice to the police commission.”

“Now, we didn’t know about that MOU because it was kept secret at the insistence of the FBI for four years,” Crew told Sarah Phelan. Crew also noted that “when ACLU and ALC [Asian Law Caucus] met with the SFPD in 2010, they were suddenly told that the police department couldn’t talk about these issues without FBI permission.

“That set off a warning sign,” Crew observed, “noting that in early April, when the ACLU and ALC finally got the MOU released, their worst suspicions were confirmed.”

“There was no public discussion of transforming the SFPD into a national intelligence gathering association,” ALC attorney Veena Dubal told the *Bay Guardian*. “The problem is that the FBI changed the deal, and the SFPD signed it, without telling anyone.”

Neither the *Bay Guardian* nor the ACLU of Northern California have released the 2007 Memorandum of Understanding. However, the secrecy-shredding web site Public Intelligence has posted a sample MOU that makes for interesting reading indeed.

According to the document, local police agencies who participate in JTTFs will adhere to loose rules covered by the “Attorney General’s Guidelines for Domestic FBI Operations.” As *Antifascist Calling* reported last month, those rules will soon be loosened even further by “constitutional scholar” Barack Obama’s Justice Department.

But here’s the kicker; local police participating in JTTFs will be subject to rules crafted in Washington. State and municipal policies which sought to limit out-of-control spying on local activists by notorious police “Red Squads,” are annulled in favor of “guidance on investigative matters handled by the JTTF” that “will be issued by the Attorney General and the FBI.”

Such “guidance” we’re told governs everything from “the Use of Confidential Informants” to “Guidelines Regarding Disclosure to the Director of Central Intelligence and Homeland Security Officials of Foreign Intelligence Acquired in the Course of a Criminal Investigation.”

In other words, police participating in JTTFs become the CIA’s eyes on the ground!

We are informed that “in order to comply with Presidential Directives, the policy and program management of the JTTFs is the responsibility of FBI Headquarters (FBIHQ).” As readers are well aware, more often than not those “Presidential Directives” arrive with built-in poison pills in the form of top secret annexes concealed from the public.

Such questions are not academic exercises.

More than three years ago, author and researcher Peter Dale Scott wrote in *CounterPunch* that “Congressman Peter DeFazio, a member of the House Homeland Security Committee, told the House that he and the rest of his Committee had been barred from reviewing parts of National Security Presidential Directive 51, the White House supersecret plans to implement so-called ‘Continuity of Government’ in the event of a mass terror attack or natural disaster.”

“The story,” Scott wrote, “ignored by the mainstream press, involved more than the usual tussle between the legislative and executive branches of the U.S. Government. What was at stake was a contest between Congress’s constitutional powers of oversight, and a set of policy plans that could be used to suspend or modify the constitution.”

Should something go wrong, the onus for civil or criminal penalties resulting from lawsuits for illegal acts by JTTF officers rests solely with local taxpayers who may have to foot the bill. This is clearly spelled out: “The Participating Agency acknowledges that financial and civil liability, if any and in accordance with applicable law, for the acts and omissions of each employee detailed to the JTTF remains vested with his or her employing agency.”

Got that? You violate someone’s rights and then get caught, well, tough luck chumps.

Intelligence Spending, No End in Sight

While the administration and their troglodytic Republican allies in Congress are planning massive cuts in social spending as a result of a manufactured “deficit crisis,” the President’s fiscal year 2012 budget proposes a five-year freeze for “all discretionary spending outside of security.”

Indeed, according to the Associated Press, the Defense Department will reap a windfall some \$727.4 billion and DHS \$44.3 billion. But these numbers only tell part of the story.

Back in March, *Secrecy News* disclosed that figures provided by ODNI and the Secretary of Defense “document the steady rise of the total U.S. intelligence budget from \$63.5 billion in FY2007 up to last year’s total of \$80.1 billion.”

Americans are told they face “hard choices” when it comes to America’s fiscal house of cards and that they—and they alone—not the capitalist thieves who destroyed the economy, must shoulder the burden.

But as economist Michael Hudson warned last week in a *Global Research* article, the American people are “being led to economic slaughter.”

Hudson writes that “whenever one finds government officials and the media repeating an economic error as an incessant mantra, there always is a special interest at work. The financial sector in particular seeks to wrong-foot voters into believing that the economy will be plunged into crisis if Wall Street does not get its way—usually by freeing it from taxes and deregulating it.”

However, when it comes to the secret state and the corporate interests *they* serve, regulators, in the form of congressional oversight or the public, seeking answers about illegal government programs, need not apply.

After all, as ODNI securocrat Kathleen Turner told the Senate, “the questions you pose ...

are difficult to answer in an unclassified letter.”

And so it goes...

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, he is a Contributing Editor with Cyrano's Journal Today. His articles can be read on Dissident Voice, The Intelligence Daily, Pacific Free Press, Uncommon Thought Journal, and the whistleblowing website WikiLeaks. He is the editor of Police State America: U.S. Military "Civil Disturbance" Planning, distributed by AK Press and has contributed to the new book from Global Research, The Global Economic Crisis: The Great Depression of the XXI Century.

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