

What we know about the NSA surveillance program

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Daily Show alum John Oliver confronted former NSA director Gen. Keith Alexander about the agency's controversial surveillance practices in the first edition of Oliver's new HBO show, [Last Week Tonight](#).

The conversation was heavy but not entirely serious, with Oliver suggesting the "slightly less tainted" logo of the Washington Redskins or Mr. Tiggles the cuddly kitten as rebranding options for the NSA. On the serious side, we flagged this exchange:

Oliver: "Do you think that the NSA is suffering from a perception problem with the American people at the moment, bearing in mind that the answer to that is yes?"

Alexander: "Absolutely. You know, the first assumption is that you're collecting on the American people. And therein lies the problem because the reality is the target is not the American people."

Oliver: "No, the target is not the American people, but it seems that too often you miss the target, and you hit the American person standing next to him, going WHOA, WHOA, HIM!"

Alexander: "But see, we're not just out there gathering U.S. communications, listening to their phone calls, or collecting their emails. But that's the first thing that people jump to."

Oliver: "But you are out there doing that, you're just saying you're not then reading them. You are gathering that data."

The back-and-forth reignites a debate over to what extent the NSA targets, handles and examines the communications of U.S. citizens.

After consulting experts, the NSA and a host of independent reporting, we find Alexander's characterization of the situation misleading. But by just how much is difficult to say -- and tougher to pin down on the Truth-O-Meter -- because of the many things we don't know about the clandestine surveillance programs.

What 'Big Brother' is up to

Former NSA contractor Edward Snowden leaked documents about secret NSA programs to the [Guardian](#) and the [Washington Post](#) in June 2013 before fleeing the country and eventually landing in Russia.

Journalist [Glenn Greenwald](#) wrote a June 5 story in the [Guardian](#) revealing a [secret court order](#) that compelled Verizon to give customer call records on an "ongoing daily basis" to the government under the "business records" section of the Patriot Act. The "metadata" records do not include the content of calls, but they do include to-from numbers, call duration and time. [AT&T and Sprint](#) also continually turn over records, the *Wall Street Journal* reported.

More reports revealed the NSA's data-collection program [code-named PRISM](#), which collects email, instant messages, videos, photos, and other files from nine companies, including Google, Microsoft, Facebook, Yahoo and Apple. Yet another [NSA program](#) revealed by Greenwald based on Snowden documents, called [XKeyscore](#), which a presentation claims collects "nearly everything a user does on the Internet." [More](#) and [more](#) NSA tactics have come to light through Snowden's leaks, some of which operate under [executive order](#).

These programs have ties to the Foreign Intelligence Surveillance Act of 1978. The [not-so-transparent](#) Foreign Intelligence Surveillance Court established under this legislation hears government requests for warrants related to national security investigations. The 11-member court's role has grown from approving warrants on an individual case basis, the [New York Times reported](#), to developing a classified body of law for intelligence activities, including the wiretapping of domestic networks for targeting [noncitizens abroad](#).

Alexander, who led the NSA from 2005 to March 2014, was essentially saying the government does not routinely monitor the content of communications among Americans. More from him in a bit.

The NSA is prohibited from targeting Americans for surveillance -- listening on their phone calls, or reading their emails -- without a warrant from FISA, which requires the agency show a person is an agent of a foreign power.

But there's another method by which Americans' communications could end up in NSA hands, and privacy advocates say it violates the Fourth Amendment.

The NSA can collect Americans' communications -- inadvertently, the NSA says -- through broad, FISA-approved intelligence searches for all communications about a particular topic in a foreign location, said Mark Jaycox, a legislative analyst at the Electronic Frontier Foundation. Americans working abroad or using foreign-based Internet servers may be affected, and Jaycox says the NSA can then search the content of that information.

[A letter](#) from former director of national intelligence James Clapper to Sen. Ron Wyden, D-Ore., confirms American intelligence analysts have made queries of the databases containing NSA-collected communications without a warrant. Wyden and others have criticized this as a backdoor search loophole that circumvents the process to seek a warrant.

"That's the full disagreement between the administration and privacy advocates. They say that was not intentional, and it was inadvertent, so we're free to search it afterwards," he said. "And we say, no it doesn't matter if it was inadvertent. It's an American's email and phone calls, so it's got to be protected (by the Fourth Amendment)."

[The Post](#) detailed in October 2013 the practice of the NSA's Special Source Operations branch, which collects hundreds of thousands of email address books from Yahoo, Hotmail, Gmail and others in a single day, as well as instant-messaging buddy lists. Even though the government collects this data from overseas access points, the *Post* quoted anonymous intelligence officials as conceding the contacts of Americans are swept up, too.

What Alexander, NSA think

Alexander told PunditFact via a spokesman that the FISA court addresses concerns about Americans' communications scooped up in broader searches through "minimization procedures."

"Within policy guidance by the White House and the Director of National Intelligence, NSA shares analytic conclusions and collection with many allies in the U.S.," Alexander said in a statement. "In all cases, NSA follows strict guidelines to ensure every effort is made to minimize information about U.S. persons before collection or analytic results are transmitted to partners."

A spokeswoman for the NSA, Vanee Vines, said "incidental" collection of an American's communications in lawful searches "has long been recognized" and protections exist for the handling, storage and dissemination of the data, such as audits of database queries.

Opponents of NSA spy programs, such as the ACLU, argue "minimization" is more [misleading agency jargon](#) because the agency can retain Americans' communications for an indefinite amount of time if they involve "foreign intelligence information," which is broadly defined.

Alexander pointed to [comments](#) of University of Chicago law professor Geoffrey Stone, who was [part of a White House-led review of NSA practices](#).

A self-described libertarian, Stone said, "I came away from my work on the Review Group with a view of the NSA that I found quite surprising. Not only did I find that the NSA had helped to thwart numerous terrorist plots against the United States and its allies in the years since 9/11, but I also found that it is an organization that operates with a high degree of integrity and a deep commitment to the rule of law." (Stone also said while the NSA deserves Americans' respect and appreciation, "it should never, ever, be trusted.")

What experts think

Alexander's point is accurate because the agency is acting with authority established by legislation and judicial order, says Bob Turner, associate director of the Center for National Security Law at the University of Virginia and counsel to the President's Intelligence Oversight Board from 1981-84. With one recent [exception](#) Turner thinks will be reversed, federal courts

have decided the president has the power to authorize warrantless monitoring for the purpose of gathering foreign intelligence.

"Yes, pursuant to statute and court order, they are collecting and storing information from telephone bills -- but not a word of content," White said. "I don't mean to play Humpty Dumpty and say that words mean what I want them to mean, but if I were asked what 'communications' meant in John Oliver's question, I would interpret that as capturing written or spoken words, not just gathering up phone bills for possible search to identify phone numbers that have connected to phone numbers used by terrorists."

We also consulted experts dubious of the NSA after these reports.

Patrick C. Toomey, a staff attorney for the National Security Project of the American Civil Liberties Union, said Alexander's statement is misleading because the NSA can and does collect the content of Americans' international phone calls and emails under the 2008 [FISA Amendments Act \(FAA\)](#).

"The NSA claims it does so only 'incidentally,' in the course of targeting foreigners located abroad, as Alexander argues here," Toomey said. "But we also know from the legislative history of the FAA that one of the purposes of the surveillance law was to allow the government to monitor communications where one person is inside the United States—and that it has proceeded to monitor Americans' calls and emails in exactly that way, under the guise of targeting foreigners located abroad."

Toomey says the government plays word games to downplay the significance of its surveillance abilities and practices, pointing to [this ACLU-authored blog post](#) about the agency's use of "target," "incidental" and others.

[Jim Harper](#), a senior fellow at the libertarian Cato Institute, said Alexander purposefully uses "the ambiguous preposition 'on' to reassure Americans without actually denying that the NSA is conducting surveillance of them."

"But if you were to ask him whether the NSA has data that would allow one to draw inferences about Americans' communications, relationships, finances, interests, and medical conditions, he would have to say, 'Yes'," Harper said in an email.

Jaycox, the Electronic Frontier Foundation legislative analyst, said it's a stretch to say the NSA isn't targeting American-to-American communication because the agency *is* collecting it.

He pointed to an October 2011 [Foreign Intelligence Surveillance Court ruling](#) that [scolded the NSA](#) for violating the Constitution by its programs gathering domestic messages for three years, calling into question the government's disclosure of its surveillance programs to even FISA. He said the agency should be trying harder to protect Americans' information from being retrieved in its searches of communications to foreigners.

Summary

Alexander added a splash to Oliver's debut of *Last Week Tonight*, seeking to downplay concerns about NSA surveillance programs. He said, "We're not just out there gathering U.S. communications, listening to their phone calls, or collecting their emails."

Our reporting shows Alexander has a point that the agency simply cannot peek into the details of Americans' calls and emails without the permission of a secretive court. But it does collect massive amounts of network data that reveals details about conversations. And experts say swaths of Americans' data is obtained by the NSA through its network-tapping programs targeting foreigners. It's less clear what the NSA does with that information because of the secretive nature of the intelligence agency.

Alexander washed over some important details of NSA's spying programs in talking to Oliver. To what extent? It's tough to put a finger on the scale.