

NSA Warrantless Wiretaps Continue, Where is Congress?

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The New York Times Reminds Us the NSA Still Warrantlessly Wiretaps Americans, and Congress Has the Power to Stop It

Last week, the *New York Times* published two important op-eds highlighting how the National Security Agency (NSA) has retained expansive powers to warrantlessly wiretap Americans after Congress passed the FISA Amendments Act in 2008. And unlike in 2005—when the exposure of the NSA’s warrantless wiretapping program provoked widespread outrage—Congress is now all but ignoring ample evidence of wrongdoing, as it debates renewing the FISA Amendments Act before it expires at the end of this year.

The first op-ed published by the *Times*, written by longtime national security reporter Shane Harris, recounts the controversy over the Orwellian-sounding “Total Information Awareness” (TIA) spying program proposed by former national security advisor John Poindexter in the aftermath of 9/11. The TIA aimed to “scan the world’s electronic information — including phone calls, e-mails and financial and travel records” and was widely condemned for allowing wholesale violations of Americans’ privacy. Congress, which had been more than willing to weaken privacy protections in the name of national security in other areas, voted to dismantle the program in 2003, acknowledging it went too far.

Yet, as Harris describes, “Total Information Awareness” is alive and well within the NSA. The NSA has adopted nearly all of the TIA’s features into its warrantless wiretapping program, except for two: “an application that would ‘anonymize’ data, so that information could be linked to a person only through a court order; and a set of audit logs, which would keep track of whether innocent Americans’ communications were getting caught in a digital net.”

In other words, the NSA is currently operating the same program Congress explicitly rejected over privacy concerns, with even fewer privacy protections than the original program called for.

Separately, the *New York Times* published a compelling eight-minute documentary and op-ed by Oscar nominated filmmaker Laura Poitras, profiling the 32-year NSA veteran William Binney, in which he describes how the NSA took a foreign data analysis system he engineered and turned it inward, using it to collect vast quantities of information on Americans. The system, Binney says, builds extensive profiles of everyone in the database. Binney recently submitted an affidavit, along with two other NSA whistleblowers, in EFF’s long running lawsuit against the NSA over its warrantless wiretapping program.

Of course, there’s long been ample evidence the NSA has been unlawfully collecting Americans’ communications since the passage of the FISA Amendments Act. As the *New York Times* reported in 2009, the NSA was still collecting purely domestic communications of Americans’ in a “significant and systemic” way. And just last month, the NSA officially admitted for the first time that the secret FISA court ruled their surveillance had violated the Fourth Amendment of the Constitution “on at least one occasion”. As we said at the time, given the expansive power the FISA Amendment Act gives the government, one court order under the FAA could potentially violate millions of Americans’ privacy.

Despite this admission, the NSA [has so far refused to give even a general estimate](#) of the number of Americans whose communications have been surveilled under the wiretapping program (ironically claiming that providing an estimate would violate the same Americans' privacy). And even worse, Congress [has so far refused to add](#) privacy safeguards to the FISA Amendments Act or force the NSA to become more transparent.

Meanwhile, the Obama administration [is also trying its hardest to prevent the courts](#) from determining whether it has broken (or is still breaking) the law. In October, the Supreme Court [is set to hear](#) the government's claim that the ACLU can't challenge [the constitutionality of FISA Amendments Act](#) because the ACLU can't prove that their clients' communications have been monitored (and, at the same time, the government refuses to release any evidence that would prove or disprove their claims). And in November, the Northern District Court in California will hear—for about the fifth time—the government's incorrect claim that EFF's [Jewel v. NSA case](#) must be blocked by [the controversial 'state secrets' privilege](#).

It's important to remember that while the NSA disputes the extent to which they have unconstitutionally spied on Americans, there is *no* dispute that they retain the capabilities to collect Americans' communications without warrants. As Cato Institute's [Julian Sanchez documented last week](#), the Justice Department's own top intelligence lawyer from 2009-2011, David S. Kris, says as much in a just-published treatise on national security law he co-wrote with J. Douglas Wilson.

You can [read the relevant section of the treatise here](#), but Sanchez aptly sums up the DOJ's interpretation of the FISA Amendments Act: "All the law requires is that they not *intentionally* record the American's calls and e-mails when they are *known in advance* to be to or from another American." And as Kris and Wilson [write in their treatise](#), this restriction "is imperfect because location is difficult to determine in the modern world of communications, and the restriction applies only when the government 'knows' that the communication is domestic." And as a [recent Wired investigation](#) explained, the NSA's tapping gear is installed in locations that will inevitably lead to large portions of domestic communications getting sucked up by the NSA.

Given the alleged loophole that allows the NSA to collect Americans' communications without a warrant, the credible reports that the NSA has even unconstitutionally exceeded *that* authority, and the fact that the FISA court does not review whether communications of Americans are actually being collected, Congress has a responsibility to act now and not wait for the resolution of lengthy judicial cases. The FISA Amendment Act needs to be overhauled or voted down; Americans' constitutional rights hang in the balance.