Obama, Congress Wink at Massive Surveillance Abuses

This week's reauthorization of the Patriot Act comes on the heels of the revelation Obama's Office of Legal Counsel granted fresh retroactive immunity for Bush-era telecommunication lawbreaking.

JULIAN SANCHEZ | *March 3, 2010* | web only

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Here's how it was supposed to be. Under his administration, candidate Barack Obama explained in 2007, America would abandon the "false choice between the liberties we cherish and the security we provide." There would be "no more National Security Letters to spy on citizens who are not suspected of a crime" because "that is not who we are, and it is not what is necessary to defeat the terrorists." Even after his disappointing vote for the execrable FISA Amendments Act of 2008, which expanded government surveillance power while retroactively immunizing telecoms for their role in George W. Bush's warrantless wiretapping, civil libertarians held out hope that the erstwhile professor of constitutional law would begin to restore some of the checks on government surveillance power that had been demolished in the panicked aftermath of the September 11 attacks.

The serial betrayal of that hope reached its culmination last week, when a Democratic-controlled Congress quietly voted to reauthorize three controversial provisions of the USA Patriot Act without implementing a single one of the additional safeguards that had been under consideration -- among them, more stringent limits on the national security letters (NSLs) Obama had once decried. Worse yet, the vote came on the heels of the revelation, in a blistering inspector general's report, that Obama's Office of Legal Counsel (OLC) had issued a secret opinion, once again granting retroactive immunity for systematic lawbreaking -- and opening the door for the FBI to ignore even the current feeble limits on its power to vacuum up sensitive telecommunications records.

NSLs have been around for decades, but their scope was radically expanded by the Patriot Act and subsequent intelligence bills. They allow investigators to obtain a wide array of financial records and telecommunications transaction data without a court order -- revealing the phone numbers, e-mail accounts, and Web addresses with which their targets have been in contact. (See this article for a full explanation of their role in post-9/11 spying law.)

But as a detailed report released last month by the office of the inspector general (OIG) revealed, between 2003 and 2006, the FBI sought to stretch its NSL powers beyond even these ample boundaries. Investigators obtained thousands of records from telecommunications providers using a made-up process called an "exigent letter" -- which essentially promised that a proper NSL would be along shortly. Among those whose records were obtained in this way were reporters for *The Washington Post* and *The New York Times* -- in violation of both the law and internal regulations requiring that the attorney general approve such requests.

Still more incredibly, investigators sought records pertaining to more than 3,500 telephone numbers *without any process at all*, simply requesting records verbally or via scrawled Post-

***Also by Julian Sanchez*:**

It notes. Many of those data requests were either unrelated to any authorized investigation or had to do with domestic criminal investigations -- meaning they could not legally have been made via NSLs. Despite this, the letters would routinely, and falsely, claim that an NSL or subpoena was already being sought.

When the OIG interviewed the agents responsible, it found that "no one could satisfactorily explain their actions," instead offering only "unpersuasive excuses." When supervisors attempted to implement a database to track these requests, agents revolted, refusing to use the new system "because they did not want the responsibility for inputting the data," which suggests either an extreme aversion to clerical work or an awareness that something not quite Hoyle was afoot. When information obtained by these extralegal means was later cited in warrant applications to the secret Foreign Intelligence Surveillance Court, the applicants falsely claimed that legitimate NSLs or subpoenas had been used.

All of this, the OIG report noted, constituted a gross violation of the Electronic Communications Privacy Act (ECPA), which clearly stipulates that subscriber records may only be turned over to the government pursuant to legal process. There's an exception for genuine emergencies, as when an attack is believed to be imminent, but that exception was not invoked and would not have applied to only a tiny fraction of the putatively "exigent" cases.

Following standard practice, the OIG sent a draft copy of its report to the FBI for comment before publication. Understandably distressed by the watchdog's finding that analysts had broken the law repeatedly and systematically over a period of years, FBI attorneys scrambled for retroactive cover. As a heavily redacted section of the report explains, they hatched a novel theory, according to which some broad class of records was actually exempt from the requirements of the ECPA, and therefore eligible to be handed over "voluntarily" by the telecoms. Even in the freewheeling days of the Bush administration, apparently, nobody had come up with this particular rationalization for evading federal privacy statutes -- but it would still serve as a retroactive excuse if Obama's Office of Legal Counsel could be persuaded to bless the new reasoning.

Shamefully, the OLC appears to have done just that in a secret opinion issued in January, just weeks before the publication of the OIG report. While it's impossible to know the precise scope of this novel legal loophole -- sufficiently clever parsing of the statutory definition of "subscriber" or "record" might generate a good deal of wiggle room -- the OIG stressed that this freshly discovered power "has significant policy implications that need to be considered by the FBI, the Department, and the Congress." It was a page straight from the John Yoo playbook: When intelligence agencies are discovered to have broken the law, simply reinterpret the law!

Though the NSL provisions were not among those slated to expire, previous OIG reports documenting widespread abuse of NSL authority had placed them at the center of the reauthorization debate, even before this latest bombshell. The Justice Department, meanwhile, had declared its openness to "modifications" of the Patriot Act to better protect civil liberties but took no overt position on the competing proposals.

Indeed, by the time the House Judiciary Committee took up the question of reauthorization in early November, legislators of both parties were venting their frustration about the scant guidance they'd gotten from the administration.

Behind closed doors, however, the administration was anything but silent. Instead of openly opposing civil-liberties reforms that had been under consideration in the Senate, *The New York Times* reported in October, the Obama administration opted for a kind of political ventriloquist's routine. The Justice Department wrote a series of amendments diluting or stripping away the new protections, then laundered them through Republicans on the Judiciary Committee, who offered them up verbatim.

It's worth taking a closer look at one such reform proposal -- again, predating the latest and most damning OIG report -- to get a sense of the disconnect between the administration's public and private stances. Some legislators had wanted to require the FBI to develop "minimization procedures" for NSLs, as they do when full-blown wiretaps are employed, to ensure that information about innocents is not circulated indiscriminately and that irrelevant records are ultimately discarded. This would only bring NSLs in line with other Patriot provisions compelling production of business records, where minimization is already required, and in principle, the Justice Department is already on board with this plan: As Inspector General Glenn Fine noted in his testimony before the Senate in September, the department's NSL working group was already laboring to develop such procedures in response to the abuses documented in previous OIG reports -- but the working group had been dragging their heels for more than two years.

The task of blocking any legal requirement that the Justice Department pick up the pace fell to Rep. Dan Lungren, a Republican from California. At a House markup session in November, Lungren offered up an amendment that would strip away the minimization mandate and even argued, bizarrely, that the very concept of "minimization" was inapplicable in the NSL context. He was visibly confused when Judiciary Committee Chair John Conyers, after making a point of praising Lungren's "scrupulous study" of the issue, pointed out that the Justice Department itself had publicly accepted the need for such procedures.

"This is the first I had heard that the Justice Department was either considering it or had not raised any objections to this," a visibly perplexed Lungren stammered, "because it was my

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understanding they felt this was an inappropriate transfer of a process that is used in the electronic surveillance arena." The talking points with which Lundgren had been supplied, it seems, had not been checked against the official assurances the department had been providing.

It seems the administration need not have troubled itself with torpedoing civil-liberties reforms one at a time. Despite the publication of the OIG's blistering January report -- which warned that the OLC's new secret opinion "creates a significant gap in FBI accountability and oversight," making it "critical for the Department and Congress to consider appropriate controls" -- even the flaccid reforms approved by the Senate Judiciary Committee appear to have fallen by the wayside for the time being. The only silver lining for civil libertarians is that the expiring Patriot provisions have only been reauthorized for one year, meaning Congress will have to take up these issues again relatively soon.

The question, given the muted public reaction to the abuses that have already been disclosed, is why we should hope legislators will be any more willing to expend political capital resisting the intelligence community's demands a year from now. The "choice between the liberties we cherish and the security we provide" may be a false one, but in the current political climate, it appears to be an easy one as well.

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Julian Sanchez is a writer based in Washington, D.C., and a research fellow at the Cato Institute.

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