

# EYES ON THE SPIES: WHAT OBAMA CAN DO ABOUT ILLEGAL SURVEILLANCE

With all the commotion and hubbub surrounding the personalities and gossip of Obama's cabinet formation, and expression of everyone's opinion on how that should proceed, little has been said about the actual policies and actions (other than Iraq) that should be implemented right out of the gate. One area that has been neglected is that of the illegal wiretapping and surveillance policies and practices that were instituted in the country's name by the Cheney/Bush regime.

Our friends at the Electronic Frontier Foundation (EFF) have some ideas for the incoming Obama Administration in this regard, and they are pretty good.

President Obama can end the immunity process. Consistent with his previous opposition to immunity – then-Senator Obama voted in favor of Senator Dodd's amendment to strip the immunity provisions out of the FAA altogether – Obama could instruct his new Attorney General to withdraw the government's motion to dismiss the lawsuits based on the immunity statute. Or,

President Obama can temporarily freeze the immunity process until he has learned all the details about the NSA program. Consistent with his support of Senator Bingaman's proposed FAA amendment to delay implementation of the immunity provisions, Obama could instruct his new Attorney General to ask the court for a temporary stay of the immunity proceedings. That would give the Administration time to review the classified details of the NSA program as

well as the FAA-mandated reports about the program that are expected by this July from the Inspectors General of the Department of Justice, the NSA, and other agencies involved in the program. After having reviewed all the facts, the new administration can then re-evaluate whether it wants to continue to press for immunity in court, or drop its motion to dismiss and let the cases against the telecoms continue. Or,

President Obama can choose not to appeal if the immunity statute is found unconstitutional. If, after the hearing on December 2nd, Chief Judge Vaughn Walker of the federal Northern District of California agrees with EFF that the **immunity statute is unconstitutional** and denies the government's motion to dismiss, Obama could instruct his new Attorney General to not appeal that decision to the Ninth Circuit Court of Appeals.

All of these are things Obama could do – on his own and without any help from Congress – to stop the implementation of the immunity scheme that he repeatedly opposed during his presidential campaign.

These recommendations aren't EFF's alone: as part of the **transition roadmap** published yesterday by a broad coalition of groups including EFF, seventeen different civil liberties organizations signed onto national security surveillance recommendations that included the proposition that President Obama should "[d]irect the Attorney General to withdraw the government's motion to dismiss pending privacy litigation brought against telecommunications carriers for assisting with unlawful warrantless surveillance, or seek a stay of those

proceedings until such time as the Attorney General, based on review of the Inspectors' General reports required by the FISA Amendments Act, determines that a grant of immunity is appropriate."

We at EFF – along with many of Obama's supporters – were sorely disappointed when he failed to uphold his promise to filibuster any bill that contained immunity, and instead reversed course and ultimately voted for passage of the FAA. But, as Obama himself said when defending his support for the FAA:

This was not an easy call for me. I know that the FISA bill that passed the House is far from perfect. I wouldn't have drafted the legislation like this, and it does not resolve all of the concerns that we have about President Bush's abuse of executive power. It grants retroactive immunity to telecommunications companies that may have violated the law by cooperating with the Bush Administration's program of warrantless wiretapping. This potentially weakens the deterrent effect of the law and removes an important tool for the American people to demand accountability for past abuses. That's why I support striking Title II from the bill, and will work with Chris Dodd, Jeff Bingaman and others in an effort to remove this provision in the Senate.

As we all know, those efforts to amend the FAA by stripping immunity out of the bill or delaying its implementation failed, despite Obama's support. But now, as President, Obama will have the

power to make things right. By taking one of the above steps after he takes office on January 20th, Obama would prove that he meant what he said when he opposed telecom immunity, that he stands behind the votes he made against immunity, and that his claims of a coming "change" when it comes to reversing the Bush Administration's excesses are more than empty rhetoric.

If Obama truly supports change – if he truly supports a more open and accountable federal government, where Americans have the tools to demand accountability for past abuses – then he should end the Bush Administration's attempt to cover-up lawbreaking by the NSA and its telecom collaborators, and ensure that the judicial branch is finally allowed to rule on the legality of NSA program.

Some decent points. I would like to add a couple. The Obama DOJ could flat out withdraw allegations of "state secrets" in any instance that has been pled and is not absolutely necessary to national security. By what I can tell, that is going to be most of the cases. In a corollary, the Obama DOJ could declassify and otherwise release information and documentation that the Bush Administration wrongfully classified to brazenly obstruct justice and prevent plaintiff's abilities to establish standing and the *prima facie* burden for their suits.

In short, the Obama could reset the table so that the scales of lady justice are able to find their own natural balance, as they were designed and intended to do.

However, for all of those that think this will be an easy call for Obama and his DOJ, it will not. There will be a lot of pushback from intelligence and DOJ personnel that were involved in the Bush/Cheney programs, there will

some instances where there really are operational details that must be protected and, quite significantly, there is the issue of liability for damages. Yes, money is a big time consideration. The potential for damage liability could extend into the billions. It is a factor, and there is a very fair chance that the government is on the hook for most all of it, not the telcos. In the financial straits this country is in, do not discount that as a factor.

In short, there are many things that Barack Obama can do to right the wrongs of the Bush/Cheney administration on illegal surveillance and, specifically, on the imposition of retroactive immunity by the Bushies and a complicit (near criminally) Democratic Congressional Leadership. But will he do it? Time will tell.

It is time to lead, President-to-be Obama, and to do so for the right instead of from the right. Remind us what it is like to have an American Government that does the right thing instead of the politically expedient thing. Please.