

8 YEARS LATER, NSA STILL USING SAME PR STRATEGY TO HIDE ILLEGAL WIRETAP PROGRAM

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Between these two posts (one, two), I've shown that the Executive Branch never stopped illegally wiretapping Americans, even after the worst part of it got "shut down" after the March 2004 hospital confrontation. Instead, they got FISC to approve collection with certain rules, then violated the rules consistently. When that scheme was exposed with the transition between the Bush and Obama Administrations, the Executive adopted two new strategies to hide the illegal wiretapping. First, simply not counting how many Americans they were illegally wiretapping, thus avoiding explicit violation of 50 USC 1809(a)(2). And, starting just as the Executive was confessing to its illegal wiretapping, moving – and expanding it – overseas. Given that they're collecting content, that is a violation in spirit, at least, of Section 704 of FISA Amendments Act, which requires a warrant for wiretapping an American overseas (the government probably says this doesn't apply because GCHQ does much of the wiretapping).

One big discovery the Snowden leaks have shown us, then, is that the government has never really stopped Bush's illegal wiretapping program.

That actually shows in the PR response the government has adopted, which has consisted of an affirmative and a negative approach. The affirmative approach emphasizes the programs – PATRIOT Act Section 215 and Section 702 of FAA – that paralleled the illegal wiretap program (I'm

not conceding either is constitutional, but only the upstream collection under 702 has been deemed an explicit violation of the law). This has allowed the government to release a blizzard of documents – Transparency!™ – that reveals some shocking disclosures, without revealing the bigger illegal programs. But note how, when the revelations touched on the Internet dragnet (which should be no more revelatory than the phone dragnet), ODNI tried to obscure basic details by hiding dates (even if they left those dates in one URL).

Meanwhile, the I Con has invested energy in trying to undermine every story that touches on the larger illegal wiretapping programs. When WSJ reported that the NSA has access to 75% of the Internet traffic in the US, I Con released a misleading rebuttal. When, in the wake of a NYT report that NSA and GCHQ were using vastly expanded contact chaining (which we now know was initiated just as the illegal domestic program was being revealed) to produce dossiers on people, even inattentive members of Congress started asking about upstream collection and EO 12333 violations, top officials first distorted the questions then refused to answer them. When various outlets in Europe revealed how much spying NSA and GCHQ were doing on Europeans, the I Con unleashed their secret weapon, the “conjunction,” which succeeded in getting most National Security journalists to forget about GCHQ’s known, voracious collection.

Then there’s the response to WaPo’s report that NSA had returned to its old ways of stealing data from Google and Yahoo. At first, I thought they were just engaging in their typical old non-denial denials. They were doing that, sure, but as Bart Gellman revealed during his debate with Michael Hayden (just after 44:00), they also tried to undermine WaPo’s report by refusing to engage at all.

In my most recent story, the scenario was different. This was also about getting information from big Internet

companies. This time, I said, I've now got evidence that besides going in through the front door, in this PRISM process where you tell the companies, please hand over this information under court authority, that the NSA and its British counterpart are breaking into the private internal networks of Google and Yahoo, and taking information. They're doing it from points overseas because it couldn't be done lawfully inside the United States. And on that one, they decided to not engage at all.

They didn't do the most extreme version of it, which has happened with me, which is they say you have information that purports to be highly classified information about communications intelligence. If that is authentic information and if you publish it, you are subject to the penalties of 18 USC 798, and then a bunch of words that you can't put in the newspaper.

But this time they simply decided not to engage at all. They said, we're not going to answer any questions, we're not going to tell you what we wish you would or wouldn't publish about this this, and then the next day and the day after that, they came out with four statements denouncing the story, appearing to deny the story but not actually denying it.

In response to this treatment, the WaPo did a remarkable fisking of Administration pushback claims and – in the process – released more sensitive documents to prove they were right. Ha!

Almost 8 years ago, when NYT revealed the illegal wiretap program, the Bush Administration largely succeeded in hiding the biggest legal problems with the program by focusing attention on just a small fraction of the program, which they dubbed the "TSP," while hiding the rest.

Remarkably, the I Con is still using precisely the same strategy to hide what remains structurally the same illegal wiretap program that has, however, ballooned in size.