Obama Administration Accused Again of Concealing Bush-Era Crimes

Monday 12 October 2009

by: Matt Renner, t r u t h o u t | Report

President Obama promised to usher in a new era of government transparency when he was sworn into office nine months ago.

On January 21, Obama signed an executive order instructing all federal agencies and departments to "adopt a presumption in favor" of Freedom of Information Act (FOIA) requests and promised to make the federal government more transparent.

"The government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed or because of speculative or abstract fears," Obama's order said. "In responding to requests under the FOIA, executive branch agencies should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public."

But since that time, the Obama administration has sought to conceal information in several high-profile court cases, in an effort that civil libertarians say amounts to covering up crimes committed by the Bush administration.

Last week, in a federal courthouse in New York, Obama's Justice Department attorneys again argued in favor of secrecy. The case involved 23 lawyers representing detainees at Guantánamo Bay who alleged in court papers that they were targets of the Bush administration's so-called Terrorist Surveillance Program(TSP), an initiative operated by the National Security Agency (NSA) that Obama called "unlawful and unconstitutional" during his presidential campaign in 2007.

"Our work with our clients may have been deeply compromised by illegal surveillance carried out by the last administration," said Shayana Kadidal, senior managing attorney of the Center for Constitutional Rights (CCR) Guantánamo Global Justice Initiative, a civil rights organization. "The new administration has no legal basis for refusing to come clean about any violations of attorney-client privilege by the NSA."

Kadidal told Truthout that he could not describe details of the specific incidents that led CCR attorneys to suspect that their privileged communications were intercepted by the government. The plaintiffs in the case argue that listening in on the phone calls of lawyers who represent Guantánamo prisoners is a violation of attorney-client privilege. Kadidal could not go into detail because he wanted to avoid violating the same privilege.

The lawsuit centers around the Bush administration's surveillance programs, specifically the TSP, which was revealed by The New York Times in 2005. In defending the warrantless spying activities conducted by the NSA, the Bush administration said the TSP only allowed surveillance of electronic communications when one party is outside the United States and one party is suspected of being "a member or agent of al Qaeda or an associated terrorist organization," according to a letter from then-Attorney General Alberto Gonzalez.

The TSP was not administered or overseen by the special court set up by Congress to review secret surveillance activities. The Foreign Intelligence Surveillance Act (FISA) established the court as a check on the executive branch's power.

Under the TSP, the special FISA court was sidestepped, with shift supervisors at NSA - not judges in a courthouse - deciding who was an appropriate target for surveillance.

Whistleblowers have reported widespread abuse of this power. According to reports and documents, the NSA spied on UN Security Council members in the run-up to the Iraq war. Whistleblowers say the NSA monitored the personal calls of aid workers, journalists and active-duty soldiers serving in Iraq (video). Technology expert Mark Klein says that the NSA was collecting massive amounts of data traffic that passed through a major data hub in San Francisco.

Lawyers for the prisoners held after the 9/11 attacks have particular reason to be concerned about surveillance, because their communications fit perfectly with targets specified by the Bush administration. Their clients are suspected terrorists or are associated with suspected terrorists calling into the United States.

In April 2008, The New York Times quoted two unnamed Bush Justice Department officials who addressed the possibility of surveillance of lawyers representing suspected terrorists or related individuals:

> Two senior Justice Department officials, speaking on the condition of anonymity because the department has not authorized them to discuss the issue with reporters, said they knew of only a handful of terrorism cases since the Sept. 11 attacks in which the government might have monitored lawyer-client conversations. They said they understood that the intercepted conversations were not shared with front-line prosecutors in an effort to be certain that there was no violation of attorney-client privilege.
>
> "If a terrorist suspect living in a foreign country is calling into the United States and all of his calls are being monitored, the calls to his lawyers here might be intercepted, as well," one of the officials said. "It' s not as if we' re targeting the lawyer for surveillance. It' s not like we' re eager to violate lawyer-client privilege. The lawyer is just one of the people whose calls from the suspect are being swept up."

Thomas Wilner, an attorney at Shearman & Sterling LLP, is the lead plaintiff in the case. He has represented multiple Kuwaiti citizens detained at Guantánamo. In his declaration, Wilner says that government officials have twice informed him that he is "probably the subject of government surveillance."

Wilner and 22 other attorneys are suing to try and force the NSA to turn over documents pertaining to any surveillance activities against them. They argue that any documents which demonstrate past illegal spying should not be concealed by the Obama administration.

In their complaint, the Guantánamo lawyers point out that written responses to questions posed by Congress regarding the spying program

show that the Bush administration "acknowledged that Guantánamo lawyers may be subject to TSP surveillance, and [the Bush administration] has argued that it has the right to target them." In the document, the Bush Department of Justice states:

> Although the program does not specifically target the communications of attorneys or physicians, calls involving such persons would not be categorically excluded from interception if they met these criteria.

Kathryn Sabbeth, an assistant professor of law at the University of North Carolina who argued on behalf of the 23 attorneys, slammed the Obama administration for refusing to take a position on the legality of the spy programs of the Bush administration.

"No argument could be made that targeting American lawyers on American soil to obtain information about their clients was legal, and indeed when counsel for the government was pressed for an explanation he offered none," Sabbeth said after last week's court hearing.

The NSA has refused to confirm or deny the existence of the documents detailing the surveillance of lawyers who represent prisoners of the so-called "war on terror," on the grounds that knowledge of the existence or nonexistence of the documents is itself a classified piece of information.

"Defendants can neither admit nor deny whether they have possession and control of records responsive to certain other portions of plaintiffs' request, because to do so would require the disclosure of classified information, or could tend to reveal classified information," the NSA and Department of Justice state repeatedly in their response to the complaint.

Thomas Bondy, a Justice Department attorney, told US District Court Judge Denise Cote that the act of informing people whether records exist related to surveillance activity targeting them would give information to potential enemies.

"Anyone who asks that question [do records exist?] gets the same answer: We're not saying yes and we're not saying no," Bondy said in court, adding, "if we ever answered this question for anyone, inferences can be made when we do not answer."

The defense prevailed in district court, defending their "Glomar

response," a technique for combating FOIA requests on national security grounds. It was first used to conceal the CIA's involvement in the construction of the Glomar Explorer, a deep-sea ship designed to covertly raise a sunken Soviet nuclear submarine.

The Glomar response has never been ruled on by the Supreme Court, has very limited case history and has never been ruled on by the 2nd Circuit Court of Appeals, where the fate of *Wilner v. NSA* will be decided shortly.

The Glomar response was one of the many legal tactics that the Bush/Cheney administration used to maintain an unprecedented level of secrecy and executive power. Civil libertarians hoped the Obama administration would abandon this policy, but so far they have been disappointed.

Constitutional scholars express regret that the Obama administration and Congress have failed to hold the Bush administration accountable.

"I'm frustrated that the Obama administration and Congress have not moved more quickly to establish accountability for Bush administration programs that were likely unlawful," Ohio State University law professor and constitutional law scholar Peter Shane told Truthout. "The Bush administration has been history for 10 months, and it is still not clear what path we are on to clarify the historical record on what the Bush administration did or did not do with regard to civil liberties. I wish there were less resistance to lawsuits that are trying to vindicate people's rights in these matters."

Matt Renner is the Director of Development at Truthout. He can be reached at Matt@truthout.org.