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Is the Government Spying on Us?

Read the following articles and make notes about things you think as you are reading, questions you have, personal experiences, and things you agree or disagree with about the article.

# **The NSA is trying to have it both ways on its domestic spying programs**

By Timothy B. Lee

*The Washington Post*

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On Friday, the Obama administration told a federal judge that even after the disclosures of Edward Snowden, a legal battle over the National Security Agency's domestic surveillance program poses a grave threat to national security. A [declaration](http://www.dni.gov/files/documents/1220/NSA%20Fleisch%202013%20Jewel%20Shubert%20Declaration%20Unclassified.pdf) by acting Deputy NSA Director Frances Fleisch argues that litigating a constitutional challenge from the Electronic Frontier Foundation could reveal operational details of NSA surveillance programs, tipping off terrorists to the best ways to evade detection.

Fleisch's argument suggests that the agency expects the American people to simply trust it to use its vast spying powers responsibly without meaningful public oversight. That's not how domestic surveillance is supposed to work.

Traditionally, domestic surveillance powers were held by law enforcement agencies, not the NSA. And the existence of the spying powers were not secret. Everyone knows that the FBI and local police departments have the power to compel telecommunications companies to disclose their customers' communications. But first they must get a warrant, supported by probable cause, from a judge. That oversight gives Americans confidence that domestic surveillance powers won't be abused.

Things are very different when the U.S. government spies on people overseas. Obviously, U.S. intelligence agencies don't generally have the power to compel foreign telecommunications companies to cooperate with surveillance efforts. So instead of a formal legal process, they traditionally have used covert means—bribing insiders, installing bugs, tapping undersea cables, hacking into foreign networks—to intercept foreign communications. For these methods to work, the government must keep secret not only the specific surveillance targets, but the fact that the surveillance program exists at all. If the program's existence is revealed, the foreign government is likely to shut it down.

That secrecy meant that American foreign intelligence-gathering operations have not had the checks and balances that applied to domestic law enforcement surveillance. But Americans were protected by the rule that American foreign intelligence agencies were only supposed to operate overseas.

But now the Internet has made a hash of the tidy distinction between foreign and domestic surveillance. Today, citizens of France, Brazil and Nigeria routinely use Facebook, Gmail, and other American online services to communicate. Americans make calls with Skype. And much Internet traffic between two foreign countries often passes through the United States.

The NSA has reacted to this changing communications

landscape by trying to claim the best of both worlds. The FISA Amendments Act, passed in 2008, gave the NSA the power to compel domestic telecommunications providers to cooperate with the NSA's surveillance programs. Yet the NSA has resisted the transparency and judicial oversight that has traditionally accompanied domestic surveillance. They've argued that disclosing the existence of these programs would compromise their effectiveness. And they've argued that because the "targets" of surveillance are overseas, only limited judicial oversight by the secretive Foreign Intelligence Surveillance Court, not individualized Fourth Amendment warrants, were required.

But the NSA programs revealed by Snowden, including PRISM and the phone records program, look more like domestic surveillance programs than foreign ones. Like conventional domestic wiretaps, they rely on compelling domestic firms to cooperate with surveillance. Like conventional wiretaps, they sweep up information about the communications of Americans on American soil. And like domestic wiretaps, information collected by the NSA is sometimes [shared with domestic law enforcement agencies](http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/05/the-nsa-is-giving-your-phone-records-to-the-dea-and-the-dea-is-covering-it-up/) for prosecution of Americans.

If the NSA is going to run what amounts to a domestic surveillance program that collects the private information of Americans on American soil, it's going to face pressure to subject that program to the same kind of oversight as other domestic surveillance program. That means disclosing the general characteristics of the program—but not the specific targets—to the public. And it means requiring individualized warrants, supported by probable cause, before the government can intercept the communications of Americans on American soil.