



Written by [Joe Wolverton, II, J.D.](#) on July 20, 2014

Disclosure: Reagan NSA Executive Order Worse Than Patriot Act

For those Americans angry with President Barack Obama for authorizing the National Security Agency's (NSA) dragnet collection of citizens' data, a recent disclosure should cause them to be even more upset with a former Oval Office occupant — Ronald Reagan.



In an op-ed published July 18 in the *Washington Post*, [former State Department section chief John Napier Tye made the following disclosure](#) regarding the source of NSA's surveillance practices:

Public debate about the bulk collection of U.S. citizens' data by the NSA has focused largely on Section 215 of the Patriot Act, through which the government obtains court orders to compel American telecommunications companies to turn over phone data. But Section 215 is a small part of the picture and does not include the universe of collection and storage of communications by U.S. persons authorized under Executive Order 12333.

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As Tye explains, [Executive Order 12333 was issued in 1981 by President Ronald Reagan](#) "to authorize foreign intelligence investigations." Unlike Section 215, however, the language of this edict contains no provision protecting the Fourth Amendment guarantees of Americans when the data is gathered outside the United States. Later in the piece, Tye identifies additional distinctions between the two surveillance authorizations:

Unlike Section 215, the executive order authorizes collection of the content of communications, not just metadata, even for U.S. persons. Such persons cannot be individually targeted under 12333 without a court order. However, if the contents of a U.S. person's communications are "incidentally" collected (an NSA term of art) in the course of a lawful overseas foreign intelligence investigation, then Section 2.3(c) of the executive order explicitly authorizes their retention. It does not require that the affected U.S. persons be suspected of wrongdoing and places no limits on the volume of communications by U.S. persons that may be collected and retained.

The Fourth Amendment guarantees: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

All that information — the private, formerly protected information of American citizens — that is "incidentally" collected by the NSA is likely to be of such enormous volume as to render even the newly built Utah Data Center unequal to the task.

Regarding the importance one should place on a single word in an executive order that runs 16 pages



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long, remember that the West Wing of the White House (and the greater intelligence bureaucracy) is full of attorneys who know the importance of specificity of language. They know that vagueness in language is contrary to good law. In fact, every day in court rooms around the country, laws are struck down for being too vague.

The point is: If these men and women, so many of whom are trained in the law, meant explicitly to forbid the NSA from monitoring and collecting the constitutionally protected data of American citizens, then they could have done so. They chose not to. They chose to leave that option open, and in 1981 Ronald Reagan chose to exercise that option.

To be precise, in his *Washington Post* op-ed, Tye's is not talking about the collection of metadata. Executive Order 12333, he explains, "authorizes collection of the content of communications, not just metadata, even for U.S. persons."

That is patently and unapologetically unconstitutional, and it was made "law" by the man considered by many Republicans and Tea Partiers to be exemplar of all things constitutional and conservative.

Despite the attention given to Tye's piece, it is not the first time Americans have been made aware of the scope of Executive 12333-authorized surveillance.

In October 2013, the *Washington Post* published a slide included among a cache of documents released by NSA subcontractor-turned-whistleblower Edward Snowden that laid out the NSA's real-time tapping of the data centers owned and operated by Internet behemoths Google and Yahoo.

In that disclosure, the *Washington Post* noted Executive Order 12333's immense grant of surveillance power to the NSA. The paper quoted former NSA analyst John Schindler as saying, "Look, NSA has platoons of lawyers, and their entire job is figuring out how to stay within the law and maximize collection by exploiting every loophole. It's fair to say the rules are less restrictive under Executive Order 12333 than they are under FISA [the Foreign Intelligence Surveillance Act]."

Tye's assessment of the relative impact of Executive Order 12333 on the fundamental civil liberties protected by the Constitution is clear.

"I don't believe that there is any valid interpretation of the Fourth Amendment that could permit the government to collect and store a large portion of U.S. citizens' online communications, without any court or congressional oversight, and without any suspicion of wrongdoing," he writes.

Perhaps equally undermining of the rule of law is the legalistic doublespeak demonstrated by former NSA chief General Keith Alexander. Regarding the protocols governing the NSA's collection of e-mail metadata and phone metadata, Tye writes:

Gen. Keith Alexander, a former NSA director, has said publicly that for years the NSA maintained a U.S. person e-mail metadata program similar to the Section 215 telephone metadata program. And he has maintained that the e-mail program was terminated in 2011 because "we thought we could better protect civil liberties and privacy by doing away with it." Note, however, that Alexander never said that the NSA stopped collecting such data — merely that the agency was no longer using the Patriot Act to do so. I suggest that Americans should dig deeper.

In the final paragraph of his piece, Tye explains that he is coming forward because he thinks "Americans deserve an honest answer to the simple question: What kind of data is the NSA collecting on millions, or hundreds of millions, of Americans?"

This question has been asked for years, most often by Senator Ron Wyden (D-Ore.). Wyden's every



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effort to measure the scope of the unwarranted, unconstitutional surveillance of Americans by agents of their own government has been thwarted.

Although Tye is to be lauded for asking this constitutionally critical question, it is unlikely he will get any more meaningful answer than the hedges and outright lies told to Senator Wyden.

Photo of President Reagan: AP Images

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