

Justice Dept. Investigating Leak of NSA Wiretapping

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The Justice Department has opened a criminal investigation into recent disclosures about a controversial domestic eavesdropping program that was secretly authorized by President Bush after the Sept. 11, 2001, attacks, officials said yesterday.

Federal prosecutors will focus their examination on who may have unlawfully disclosed classified information about the program to the New York Times, which reported two weeks ago that Bush had authorized the National Security Agency to monitor the international telephone calls and e-mails of U.S. citizens and residents without court-approved warrants, officials said.

The Justice Department's decision to reveal the opening of a criminal investigation is rare, particularly given the highly classified nature of the probe. White House deputy press secretary Trent Duffy told reporters in Crawford, Tex., yesterday that the department "undertook this action on its own" and that Bush had only learned about it from senior staff earlier in the day.

But Duffy reiterated earlier statements by Bush, who had sharply condemned the disclosure of the NSA program and argued that it seriously damaged national security.

"The fact is that al Qaeda's playbook is not printed on Page One, and when America's is, it has serious ramifications," Duffy said, reading from prepared remarks. "You don't need to be Sun Tzu to understand that," he added, referring to the ancient Chinese general who wrote "The Art of War."

Leak investigations generally begin with a referral to the Justice Department by the agency in question -- in this case the NSA -- which prompts a preliminary inquiry by prosecutors to determine whether a crime has been committed. The opening of a criminal investigation signals that prosecutors believe that laws barring disclosure of classified information by government officials were broken. It is likely to be a full-blown probe involving FBI agents and department investigators.

The case is the latest in a series of clashes between the Fourth Estate and the Bush administration, which has aggressively enforced restrictions on classified information and has frequently complained about press disclosures related to terrorism or the war in Iraq.

Earlier this year, a grand jury investigation by Special Counsel Patrick J. Fitzgerald into the disclosure of CIA agent Valerie Plame's identity resulted in the jailing of Judith Miller, then a reporter at the New York Times, for refusing to testify, and in criminal charges against I. Lewis "Scooter" Libby, who resigned as Vice President Cheney's chief of staff. That probe is ongoing.

In another recent case, the CIA general counsel's office notified the Justice Department in November that classified information had been disclosed in a report by The Washington Post on the existence of secret "black site" prisons in Eastern Europe and elsewhere. Department officials declined to comment yesterday on whether that referral has also led to a full criminal probe.

News of the domestic spying program by the NSA, which is normally restricted to eavesdropping overseas, set off a firestorm of criticism from lawmakers and civil liberties advocates and contributed to the administration's failure to persuade Congress to pass a renewed version of the USA Patriot Act anti-terrorism law. The GOP chairman of the Senate Judiciary Committee has vowed to hold hearings on the NSA program, and some other Republicans have demanded a congressional probe into the leak.

The spying program also angered judges on a special court that administers the Foreign Intelligence Surveillance Act, which governs clandestine surveillance within the United States and which requires warrants for secret searches and wiretaps. One of the panel's members, U.S. District Judge James Robertson, submitted his resignation from the secret court in protest, according to sources familiar with his decision.

Soon after the story broke Dec. 15 in the online edition of the New York Times, Bush and other administration officials took the unusual step of publicly acknowledging the program's existence, describing details of its operation and arguing that the initiative was legal and necessary in a time of war. Attorney General Alberto R. Gonzales said the program "is probably the most highly classified program that exists in the United States government."

The Times said it held the story for a year after the administration argued that its disclosure would harm national security. The published story relied on "nearly a dozen current and former officials," the newspaper said. Times spokeswoman Catherine Mathis declined to comment on the Justice Department probe yesterday.

Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press, a journalism advocacy group, said the leak probe underscores the need for a federal "shield law" to protect reporters' sources. She and other observers also said that the NSA case appears to be less controversial, from a journalistic point of view, than the Plame case, which involves journalists attempting to protect sources allegedly engaged in political attacks.

"It doesn't seem to me that this leak investigation will take on the importance of the Plame case," said Carl W. Tobias, a law professor at the University of Richmond. "The bigger story here is still the one about domestic spying and whether the president intends, as he said, to continue doing it."

The American Civil Liberties Union, which has argued that a special prosecutor should be appointed to determine whether Bush violated federal wiretapping laws, called the leak probe an unwarranted attack on whistle-blowers.

"Attorney General Gonzales is cracking down on critics of his friend and boss," said ACLU Executive Director Anthony D. Romero.

Staff writer Lisa Rein in Crawford, Tex., contributed to this report.

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