Written by **C. Mitchell Shaw** on August 29, 2015

Appeals Court Overturns NSA Spying Case

Last May a U.S. District Court handed down a decision that the NSA's broad-sweeping collection of private citizens' phone meta-data was illegal, "unprecedented and unwarranted." Friday, an appeals court struck down that court's ruling, sending the whole thing back to square one. The appeals court did not rule on the legality or constitutionality of the NSA surveillance program. Instead it simply ruled that the plaintiffs in the case do not have legal standing unless they can prove that their phone records were included in the collection of data.

Just let that sink in for a moment. Unless the plaintiffs can prove that their phone records were part of the secret spying — which a lower court ruled was illegal — they cannot sue the NSA and force the agency to disclose the collection of that data and destroy it. It's like an Abbott and Costello comedy routine. The three-member appellate panel said, "In order to establish his standing to sue, a plaintiff must show he has suffered a 'concrete and particularized' injury," adding that in this case the plaintiffs "fail to offer any evidence that their communications have been monitored." One is left to wonder whether the judges on that panel understand what is meant by "secret spying program."

The thing that makes this particularly ridiculous is that there is ample evidence that the "communications" of the plaintiffs in this case "have been monitored" by the NSA. Cindy Cohn of the Electronic Frontier Foundation points out that after the *New York Times* filed a Freedom of Information Act request, the federal government responded with a release of documents showing that the NSA "does indeed collect bulk telephone records from Verizon Wireless under Section 215." She went on to say, "Specifically, the formally-released documents reference orders to Verizon Wireless as of September 29, 2010, when they had to report a problem to the Foreign Intelligence Surveillance Court."

The plaintiffs in this case are Larry Klayman — an activist — and the parents of an NSA employee who was killed in Afghanistan. They were all Verizon Wireless customers during the time the federal government admits to collecting the phone data of Verizon Wireless customers. As Cohn put it:

> This should mean that the plaintiffs records were collected, at least as of 2010, but likely long before and after. The government should give up its shell game here and admit the time frame that it collected the Klayman plaintiffs records, along with all other Verizon Wireless customers.

So, beyond being confused by the idea of a "secret spying program," the appellate panel also either did not look at the available information or chose to ignore it.

Many consider the issue to be somewhat moot, because The USA FREEDOM Act supposedly curtails many of the "abuses" of the NSA's program. Even Judge Gerald E. Lynch, who handed down the initial ruling that the program was illegal, "did not order the program's closure, because Congress was due to

debate on the USA Freedom Act within a month's time," as Jenna McLaughlin wrote for The Intercept.

According to Agence France-Presse (AFP), the USA FREEDOM Act is "a law aimed at scaling back the NSA program and ending most bulk collection of Americans' records." Little about the USA FREEDOM Act (a misnomer if ever there was one) will scale back the NSA's activities. AFP goes on to say:

> The new law shifts responsibility for storing the data to telephone companies, allowing authorities to access the information only with a warrant from a secret counterterror court that identifies a specific person or group of people suspected of terror ties.

So the accepted solution is to allow a secret counterterror court to oversee a secret spying program that has routinely ignored the protections guaranteed by the Fourth Amendment? What could possibly go wrong? Considering the decisions handed down by judges of courts that aren't secret, this is a recipe for tyranny.

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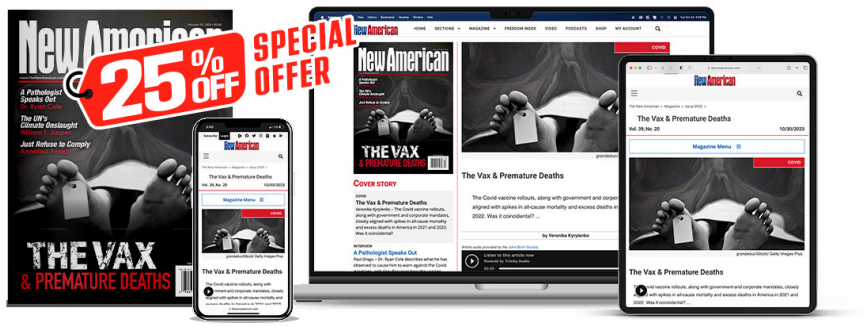

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