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Federal Appeals Court: Warrantless Data Collection Is Constitutional

The Second Circuit Court of Appeals issued an opinion that domestic data gobbled up by the National Security Agency (NSA) under Section 702 of the Foreign Intelligence Surveillance Act (FISA) and PRISM are are not covered by the Fourth Amendment and their collection by the government is usually constitutional.

The court held that the data gathered via electronic query in pursuance of the case against Agron Hasbajrami did not violate the Fourth Amendment's prohibition of unwarranted searches and seizures, stating that, "The 'incidental collection' of communications (that is, the collection of the communications of individuals in the United States acquired in the course of the surveillance of individuals without ties to the United States and located abroad) is permissible under the Fourth Amendment."

Furthermore, the court held that "the vast majority of the evidence detailed in the record was lawfully collected."

In fairness, the court did opine that the federal government's dragnet collection of the electronic data of Americans raises "novel constitutional questions" that could be addressed by another court.

For its part, the federal government argued that the Fourth Amendment doesn't extend to private e-mails or phone-call data.

Here's the background of the facts of the case, as printed in the opinion of the Second Circuit Court of Appeals:

> Agron Hasbajrami was arrested at John F. Kennedy International Airport in September 2011 and charged with attempting to provide material support to a terrorist organization. After he pleaded guilty, the government disclosed, for the first time, that certain evidence involved in Hasbajrami's arrest and prosecution had been derived from information obtained by the government without a warrant pursuant to its warrantless surveillance program under Section 702 of the FISA Amendments Act of 2008. Hasbajrami then withdrew his initial plea and moved to suppress any fruits of the Section 702 surveillance. The district court denied the motion to suppress and Hasbajrami again pleaded guilty, this time pursuant to a conditional guilty plea that allowed him to appeal the district court's ruling denying his motion to suppress.

Remarkably, Hasbajrami's lawyers seemed pleased by the decision. "We are gratified by the Court's

remand to resolve a critical factual and constitutional question in this case, as well as its recognition of the important constitutional issues that FISA section 702 raises for everyone. We look forward to the next stage of the litigation," Hasbajrami's lawyer Joshua Dratel said in a statement.

While the judges did hold that querying certain intelligence databases "could violate the Fourth Amendment, and thus require the suppression of evidence," the decision was overall a victory for the surveillance state.

The PRISM program mentioned above was one of the surveillance programs revealed by Edward Snowden.

Under PRISM, the NSA and the FBI are "tapping directly into the central servers of nine leading U.S. Internet companies, extracting audio, video, photographs, e-mails, documents and connection logs that enable analysts to track a person's movements and contacts over time," as reported by the *Washington Post*.

One document in the Snowden revelations indicated that PRISM was "the number one source of raw intelligence used for NSA analytic reports." Snowden claimed that the program was so invasive that the NSA and the FBI "quite literally can watch your ideas form as you type."

That's the sort of thing the Second Circuit Court of Appeals held was permissible under the Fourth Amendment.

The Founders would disagree.

The assault on our rights made by the NSA and other agencies within the federal surveillance apparatus is in every significant way identical to a tactic used by the British Empire in its own attempt to deprive Americans of their liberties some 250 years ago.

King George II (and his son and successor, George III) issued orders known as general writs of assistance. In simple terms, these writs authorized law enforcement and other representatives of the crown to enter buildings to search for contraband without obtaining a warrant. This did not sit well with American Englishmen, and they were determined to boldly declare their determination not to be subjected to searches that exceeded the constitutional authority of the king and Parliament.

Given the role that rebellion against these searches and seizures by government played in igniting the spark that lit the fires of armed resistance in America and the American War for Independence, it is remarkable that there aren't more Americans advocating for the immediate abolition of all the agencies involved in the issuing and executing of these contemporary Writs of Assistance.

James Otis is a name that is almost completely forgotten by contemporary Americans, but he was once the most famous lawyer in the colonies, and it was his renowned recrimination of unreasonable searches in Boston that earned him fame and influenced his countrymen to resist the tyranny of these deprivations.

At a trial challenging the constitutionality of the General Writs of Assistance, Otis spoke eloquently and persuasively in favor of freedom from the unreasonable searches being carried out by 18th-century government agents:

> Now, one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may

> enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court can inquire. Bare suspicion without oath is sufficient.
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> This wanton exercise of this power is not a chimerical suggestion of a heated brain. I will mention some facts. Mr. Pew had one of these writs, and, when Mr. Ware succeeded him, he endorsed this writ over to Mr. Ware; so that these writs are negotiable from one officer to another; and so your Honors have no opportunity of judging the persons to whom this vast power is delegated. Another instance is this: Mr. Justice Walley had called this same Mr. Ware before him, by a constable, to answer for a breach of the Sabbath-day Acts, or that of profane swearing. As soon as he had finished, Mr. Ware asked him if he had done. He replied, "Yes." "Well then," said Mr. Ware, "I will show you a little of my power. I command you to permit me to search your house for uncustomed goods" — and went on to search the house from the garret to the cellar; and then served the constable in the same manner.

In the years prior to the ratification of the Constitution, those later involved in that process already had experience drafting documents to protect these precious liberties from the ever-grasping hand of government.

These men abhorred the violence to liberty done by those who were searching their homes and seizing their property without a warrant and on behalf of the Crown and Parliament, believing that "papers are often the dearest property a man can have" and that permitting the government to "sweep away all papers whatsoever," without any legal justification, "would destroy all the comforts of society."

In 1776, George Mason, the principal author of the Virginia Declaration of Rights — a document of profound influence on the construction of the federal Bill of Rights — upheld the right to be free from such searches, as well:

> That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

The federal government relies on state agencies and officers to assist in the collection of data, so the surest way to stop the surveillance and gut the surveillance programs is for states to follow the advice of James Madison and refuse to "cooperate with officers of the union" when their actions exceed the constitutional limits of their authority.