



Written by [Joe Wolverton, II, J.D.](#) on July 28, 2012

## Ninth Circuit OKs Feds Use of Cellphones as Roving Bugs

The Ninth Circuit of Appeals ruled on July 20 that agents of the federal government may use a cellphone as a microphone and record the conversations overheard even when the phone itself is not being used otherwise.

This frightening bit of judicial lawmaking came as part of the [decision in the case of the \*United States v. Oliva\*](#), 2012 WL 2948542 (9thCir. July 20, 2012).

For a bit of background, Oliva was convicted by a jury of drug-related crimes involving the distribution of methamphetamine, cocaine, and marijuana. He appealed a decision by a district court denying his motion to suppress evidence obtained from a series of electronic surveillance orders authorizing interception of communications over cellular phones associated with him and his alleged co-conspirators.

Oliva argued that the orders authorizing these wiretaps were not standard intercept orders and did not meet the “specificity” requirement of the applicable federal law.

In its decision, the Ninth Circuit has upheld the lower court’s ruling, essentially allowing the federal government to convert cellphones into “roving bugs” so long as the government makes it clear that it will be using the target’s cellphone in that manner. Notice, the Ninth Circuit — a court created under the authority granted to Congress in Article III of the Constitution — did not throw out the matter as a violation of the defendant’s Fourth Amendment right against “unreasonable searches and seizures.” Instead, it simply informed the government that it needs to get permission before doing so.

There are, of course, far reaching implications of such a decision. As [we reported recently](#), a person will not know, and perhaps will never know, if he has been the target of surveillance on the part of the federal government. Assuming, as many a savvy American would, that the federal government is liable to eventually want to monitor and record your personal electronic communication, is there not an expectation that when the cellphone is off the surveillance is suspended?

Not anymore. In the wake of the Ninth Circuit’s ruling in *Oliva*, “roving bugs” are likely to become a favorite weapon in the ever expanding arsenal of the surveillance state. A person’s expectation of privacy when sitting at home talking to a friend is ridiculous in the face of the judicially upheld fact that government snoops may now use powerful surveillance technology to use your idle mobile phone as a very active mobile microphone.

Some of the dictum in the *Oliva* decision is almost as disturbing as the ruling itself. For example, in one part of its discussion of the various technological tools available to federal agents, the court describes how one such advance allows the agents to remotely upload software into a target’s cellphone that





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converts it into the “roving bug” mentioned above. Again, this sort of power is undoubtedly only the tip of the surveillance iceberg.

At times like this when the courts, Congress, and the president form a unholy alliance bent on obliterating the Constitution and establishing a country where every citizen is perpetually under the never-blinking eye of the government, it would be well to remember the words written by Alexander Hamilton in [The Federalist, No. 33](#). Therein, Hamilton explained that acts of the federal government exceeding its constitutional powers and violating the inherent rights of the people are not law, but are “merely acts of usurpation, and will deserve to be treated as such.”



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