Written by **Joe Wolverton, II, J.D.** on June 17, 2014

NSA: Our Surveillance System Is Too Complex to Stop

The National Security Agency (NSA) claims that its computers are so powerful that to try to protect data from erasure would have "an immediate, specific, and harmful impact on the national security of the United States."

This is the argument put forth by the surveillance agency to excuse itself from preserving data relevant to numerous legal challenges it faces to the constitutionality of its dragnet collection of telephone and Internet activity.

District Court Judge Jeffrey S. White reversed an earlier order he had issued enjoining the federal government from destroying data that one of the plaintiffs — the Electronic Frontier Foundation (EFF) — had requested be saved from the virtual shredder. Specifically, EFF wants to include information collected under Section 702 of the Foreign Intelligence Surveillance Act (FISA) Amendments.

The NSA balked, insisting that protecting the information would be overly burdensome.

"A requirement to preserve all data acquired under section 702 presents significant operational problems, only one of which is that the NSA may have to shut down all systems and databases that contain Section 702 information," NSA Deputy Director Richard Ledgett claimed in a document submitted to the court.

He averred that due to the high complexity of the surveillance equipment, the attempt at preservation might not work and it if did, the safety of the United States could be imperiled.

Pointing to the regulations imposed by the Foreign Intelligence Surveillance Court (the so-called FISA Court), Ledgett argued that the risks of data preservation far outweigh the rewards, and the complexity of such an operation outweighs them both.

"Communications acquired pursuant to Section 702 reside within multiple databases contained on multiple systems and the precise manner in which NSA stays consistent with its legal obligations under the [FISA Amendments Act] has resulted from years of detailed interaction" with the FISA Court and the Justice Department, Ledgett wrote in the filing quoted by the *Washington Post*.

The NSA routinely destroys data "via a combination of technical and human-based processes," he added.

In an interview with the *Washington Post*, EFF's legal director Cindy Cohn expressed her belief that the government's excuses raised more concerns:

> To me, it demonstrates that once the government has custody of this information even they can't keep track of it anymore even for purposes of what they don't want to destroy.
>
> With the huge amounts of data that they're gathering it's not surprising to me that it's difficult to keep track — that's why I think it's so dangerous for them to be collecting all this data en masse.

The NSA's "our systems are too sophisticated to stop" argument sounds very similar to another excuse

they gave Congress a couple of years ago.

In July of 2011 and again in May 2012, Senators Mark Udall (D-Colo.) and Ron Wyden (D-Ore.) wrote a letter to Director of National Intelligence James R. Clapper, Jr., asking him a series of four questions regarding the activities of the NSA and other intelligence agencies with reference to domestic surveillance.

In one of the questions, Udall and Wyden asked Clapper if "any apparently law-abiding Americans had their communications collected by the government pursuant to the FISA Amendments Act," and if so, how many Americans were affected by this surveillance.

In a response to the inquiry dated June 15, 2012, I. Charles McCullough III informed the senators that calculating the number of Americans who've had their electronic communications "collected or reviewed" by the NSA was "beyond the capacity of his office and dedicating sufficient additional resources would likely impede the NSA's mission.

In other words, the NSA was too busy illegally recording our private e-mails, texts, Facebook posts, and phone calls to figure out how many of us are already caught in their net. And furthermore, there is nothing Congress can do about it.

And now, it seems, the courts are willing to give the snoops a pass, too, by allowing them to destroy any evidence that could prove their myriad monitoring programs violate the rights against unwarranted searches and seizures protected by the Fourth Amendment.

Taken together, the roster of snooping programs in use by the federal government places every American under the threat of constant surveillance. The courts, Congress, and the president have formed an unholy alliance bent on obliterating the Constitution and establishing a country where every citizen is a suspect and is perpetually under the never-blinking eye of the government.

The establishment will likely continue construction of the surveillance until the entire country is being watched around the clock and every monitored activity is recorded and made retrievable by agents who will have a dossier on every American.

While the federal government carries on collecting and cataloging data on every American, there are those who recognize that there is something beyond Congress's flailing around, tossing out milquetoast half-measures at the constitutional deprivations carried on by the NSA.

During a recent interview with Fox Business Channel's Neil Cavuto, former congressman and libertarian icon Ron Paul called for the outright abolishment of the agency.

The disclosure of the NSA's "harvesting" of millions of images and faces from the web is the last straw, he said, and is "another reason to get rid of the NSA."

Paul believes that the NSA cannot be controlled and so must be eliminated. Regarding the image collecting, Paul said, "The bigger picture is they have no business doing it in the first place."

"But, you can't just say we're going to monitor it, and let's have search warrants to take pictures. We have to look at the principle, and the principle is the government has no right to do this, and the people shouldn't put up with it," he declared.

There is a way out, however, that isn't affected by the fecklessness of the Congress or the courts: nullification.

The efforts underway in several state legislatures to nullify the NSA's assault on the Fourth Amendment

recognize that any acts of the federal government that exceed the powers granted to it in the Constitution are null, void, and of no legal effect.

Or, as Alexander Hamilton explained in *The Federalist*, No. 33, such federal overreaches are "merely acts of usurpation, and will deserve to be treated as such."

It is a well-settled principle of Anglo-American law that a party to a contract may rightfully seek remedies if another party is in breach of the agreed-upon terms. One such remedy available to an aggrieved party is to require that the party in breach amend his behavior to conform to the terms of the contract. The aggrieved party may point to the violated provisions of the contract and remind the offending party of the obligations undertaken in the contract.

This reasonable approach is analogous to nullification. As the aggrieved parties, the states (or a single state) may remind the federal government of its repeated violations of key terms of the original agreement and demand that it cease such excesses and that it restrain itself according to the mutually approved contractual rights and responsibilities.

Should a state (or states) decide not to continue silently suffering constant breaches of that agreement by one of the other parties or by the agents of the general government created by it (or them), it (or they) may lawfully demand a halt to the offending behavior and a performance by the breaching party of its contractual obligations.

State legislators across the country proposing and fighting for passage of the various bills nullifying unconstitutional federal acts are demonstrating their understanding of and respect for the Constitution and the limited and enumerated powers granted to the federal government by the states.

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