Written by **Joe Wolverton, II, J.D.** on August 13, 2013

NSA Uses Loophole to Justify Collecting Domestic E-mail, Phone Calls

The National Security Agency (NSA) is using a "secret backdoor" to conduct warrantless searches of the e-mails and phone calls of American citizens, the *Guardian* (U.K.) reports. As with earlier reports, this latest revelation comes from information given to the newspaper by former NSA contractor Edward Snowden.

Spencer Ackerman and James Ball, reporting for the *Guardian*, write that a rule change that was previously unreported is giving the NSA the inroad it needs to monitor "individual Americans' communications using their name and other identifying information."

In a statement to the *Guardian*, Senator Ron Wyden (D-Ore.) reportedly said that this rule change makes it possible for the NSA to conduct "warrantless searches for the phone calls or e-mails of law-abiding Americans."

The regulatory restatement relied on by the NSA to justify their unconstitutional surveillance was "approved in 2011" by the Obama administration, in direct contradiction to the president's commitment to protect the constitutionally protected privacy of the American public "from the NSA's dragnet surveillance programs."

The federal spy apparatus is relying on Section 702 of the Foreign Intelligence Surveillance Act Amendments of 2008 (FISA). This provision purports to grant the government the "authority to target without warrant the communications of foreign targets, who must be non-US citizens and outside the US at the point of collection."

Under this same section, furthermore, Americans' communications with people residing overseas can also be collected without a warrant. Of course, the NSA admits that "purely domestic communications can also be inadvertently swept into its databases." These accidents are known as "incidental collection" in the argot of the surveillance state.

The information revealed in the document provided by Snowden to the *Guardian* is "the first evidence that the NSA has permission to search those databases for specific US individuals' communications."

In a nutshell, the change to the procedure the NSA is required by law to follow in order to minimize the "incidental collection" of domestic communications was amended in the "document provided to operatives in the NSA's Special Source Operations division — which runs the Prism program and large-scale cable intercepts through corporate partnerships with technology companies." The precise pattern is described by the *Guardian*:

> "While the FAA 702 minimization procedures approved on 3 October 2011 now allow for use of

> certain United States person names and identifiers as query terms when reviewing collected FAA 702 data," the glossary states, "analysts may NOT/NOT [not repeat not] implement any USP [US persons] queries until an effective oversight process has been developed by NSA and agreed to by DOJ/ODNI [Office of the Director of National Intelligence]."
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> The term "identifiers" is NSA jargon for information relating to an individual, such as telephone number, email address, IP address and username as well as their name.
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> The document — which is undated, though metadata suggests this version was last updated in June 2012 — does not say whether the oversight process it mentions has been established or whether any searches against US person names have taken place.
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> Senator Wyden told *The Guardian* that the surveillance methods employed by the NSA under this section of FISA is nothing less than a "backdoor search" of private communications data of millions of Americans who are not suspected of committing any crime.
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> "Section 702 was intended to give the government new authorities to collect the communications of individuals believed to be foreigners outside the US, but the intelligence community has been unable to tell Congress how many Americans have had their communications swept up in that collection," he said.
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> "Once Americans' communications are collected, a gap in the law that I call the 'back-door searches loophole' allows the government to potentially go through these communications and conduct warrantless searches for the phone calls or emails of law-abiding Americans."

Wyden is a veteran of the battle to restore constitutional standards of freedom from unwarranted searches and seizures.

In July of 2011 and again in May 2012, Senators Mark Udall (D-Colo.) and Ron Wyden 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 regarding domestic surveillance.

In one of the questions, Senators 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 is 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, the NSA considers Congress an impotent impediment that can be ignored, stonewalled, and lied to.

Recently, Wyden and Udall have persisted in their efforts to exercise some degree of oversight of the NSA. The *Guardian* reports:

> But in a letter they recently wrote to the NSA director, General Keith Alexander, the two senators warned that a fact sheet released by the NSA in the wake of the initial Prism revelations to reassure the American public about domestic surveillance was misleading.
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> In the letter, they warned that Americans' communications might be inadvertently collected and

> stored under Section 702, despite rules stating only data on foreigners should be collected and retained….
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> "We note that this same fact sheet states that under Section 702, 'Any inadvertently acquired communication of or concerning a US person must be promptly destroyed if it is neither relevant to the authorised purpose nor evidence of a crime,'" they said.
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> "We believe that this statement is somewhat misleading, in that it implied the NSA has the ability to determine how many American communications it has collected under Section 702, or that the law does not allow the NSA to deliberately search for the records of particular Americans."
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> The foreign intelligence surveillance (Fisa) court issues approvals annually authorizing such operations, with specific rules on who can be targeted and what measures must be taken to minimize any details "inadvertently" collected on US persons.

Secret minimization procedures dating from 2009, published in June by the *Guardian*, revealed that the NSA could make use of any "inadvertently acquired" information on U.S. persons under a defined range of circumstances, including if they held usable intelligence, information on criminal activity, threat of harm to people or property, are encrypted, or are believed to contain any information relevant to cybersecurity.

Documents obtained by the *Guardian* reveal that the court that was ostensibly created to keep the federal domestic spy apparatus from invading the rights of Americans is actually routinely giving the National Security Agency (NSA) and others the go-ahead to use data "inadvertently" collected during unwarranted surveillance of American citizens.

The newspaper that broke the story of the NSA's activities as revealed by Snowden, published on June 20 "two full documents submitted to the secret Foreign Intelligence Surveillance Court." Both documents were signed by Attorney General Eric Holder and were issued in July 2009.

According to the article written by Glenn Greenwald and James Ball, the documents "detail the procedures the NSA is required to follow to target "non-US persons" under its foreign intelligence powers and what the agency does to "minimize data collected on US citizens and residents in the course of that surveillance."

Not surprisingly, neither the Fourth Amendment nor the freedoms against tyranny that it protects are honored by Holder or the other architects and construction crews erecting the surveillance state.

Despite the fact that with rare exception the people's elected representatives in Congress have been AWOL in the battle to preserve the Constitution and the fundamental liberties it was designed to protect, there are a few lawmakers who won't sit idly by as the establishment repeals the Bill of Rights. Again, from the *Guardian's* interview with Senator Wyden:

> Wyden told the *Guardian* that he raised concerns about the loophole with President Obama during an August 1 meeting with legislators about the NSA's surveillance powers.
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> "I believe that Congress should reform Section 702 to provide better protections for Americans' privacy, and that this could be done without losing the value that this collection provides," he said.
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> According to a document released August 9 by the NSA, "NSA touches about 1.6% of that. However, of the 1.6% of the data, only 0.025% is actually selected for review."

Irrelevant. Unless that 1.6 percent is suspected of crimes and a warrant has been issued, every one of

those bits is protected by the Constitution and everyone accessing that data or authorizing that access should be held accountable.

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