Written by **Joe Wolverton, II, J.D.** on October 25, 2012

NSA: We Will Illegally Spy on Citizens Only When Absolutely Necessary

The National Security Agency (NSA) says Americans should trust them to use their surveillance powers only for good. This from the group whose leader refused to say how many Americans they are spying on because it 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 emails, 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.

Apparently, NSA thinks it's beyond the court's oversight, as well.

In a motion to dismiss a class action suit challenging the nearly unlimited scope of the domestic surveillance agency's monitoring of citizens' electronic communication, attorneys for the Obama administration argued that it would use the authority granted it under the Terrorist Surveillance Program only when "absolutely necessary" and that disclosing the information requested would require it to reveal protected state secrets.

The plaintiffs in the case — *Jewel v. NSA* — are a group of AT&T customers who accuse the NSA, former President George W. Bush, and Dick Cheney among others of illegally using "a shadow network of surveillance devices … to acquire the content of a significant portion of phone calls, emails, instant messages, text messages, web communications, and other communications."

Originally filed in 2008 by the Electronic Frontier Foundation (EFF) on behalf of the plaintiffs, the suit "is aimed at ending the NSA's dragnet surveillance of millions of ordinary Americans and holding accountable the government officials who illegally authorized it."

On January 21, 2010, U.S. District Court Judge Vaughn Walker granted a motion to dismiss filed by the Obama administration. Upon appeal, however, the Ninth Circuit Court of Appeals on December 29, 2011 overturned the lower court's decision and remanded the case to district court for a hearing on the merits.

In July, 2012, EFF moved to have the court declare that the Federal Intelligence Surveillance Act (FISA) applies instead of the state secrets privilege; in response, NSA reaffirmed its "state secrets" defense.

NSA's attorneys in their motion claimed that disclosing the requested information would threaten the security of the United States.

"This lawsuit puts at issue alleged intelligence activities of the National Security Agency ('NSA') purportedly undertaken pursuant to presidential authorization since the terrorist attacks of September 11, 2001," the NSA says in its response.

They continued along those same lines:

> Plaintiffs allege that the NSA engages in warrantless "dragnet" surveillance by collecting the content of millions of domestic communications, as well as communication transactional records. For the past six years, the nation's most senior intelligence officials, in succeeding administrations, have consistently advised this court that litigation of plaintiffs' allegations would risk exceptional damage to national security, setting forth in detail the matters at issue.

Plaintiffs, on the other hand, reject the "state secrets" parry, arguing that the guidelines established by FISA should apply to the unwarranted monitoring of the electronic communications of Americans not suspected of any terrorist activity.

The FISA Amendments Act was signed into law by President George W. Bush on July 10, 2008 after being overwhelmingly passed 293 to 129 in the House and 69-28 in the Senate. Just a couple of days prior to its being enacted, Representative Ron Paul and a coalition of Internet activists united to create a political action committee, Accountability Now, and conduct a money bomb in order to raise money to purchase ad buys to alert voters to the names of those congressmen (Republican and Democratic) who voted in favor of the act.

George W. Bush's signature was but the public pronouncement of the ersatz legality of the wiretapping that was otherwise revealed to the public in a *New York Times* article published on December 16, 2005. That article, entitled "Bush Lets U.S. Spy on Callers Without Courts," described the brief history of the "anti-terrorist" program:

> Months after the Sept. 11 attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying, according to government officials.
>
> Under a presidential order signed in 2002, the intelligence agency has monitored the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants over the past three years in an effort to track possible "dirty numbers" linked to Al Qaeda, the officials said.
>
> The agency, they said, still seeks warrants to monitor entirely domestic communications.

The previously undisclosed decision to permit some eavesdropping inside the country without court approval was a major shift in American intelligence-gathering practices, particularly for the NSA, whose mission is to spy on communications abroad. As a result, some officials familiar with the continuing operation have questioned whether the surveillance has stretched, if not crossed, constitutional limits on legal searches.

Alarming evidence of the NSA's flagrant and frightening violation of FISA and, more importantly, the Fourth Amendment's prohibition on warrantless search and seizures, was provided to EFF by former AT&T employee-turned-whistleblower Mark Klein. In his testimony, Klein confirmed that AT&T was using its vast resources to assist the NSA in its wiretapping program.

Klein claimed that a device called Narus was purposely designed to lengthen the reach of the government's domestic spying apparatus. Furthermore, Klein said that similar systems were installed in Seattle, San Jose, Los Angeles, and San Diego. He told *Wired* magazine that he exposed the project "because he does not believe that the Bush administration is being truthful about the extent of its

extrajudicial monitoring of Americans' communications." He added,

> Despite what we are hearing, and considering the public track record of this administration, I simply do not believe their claims that the NSA's spying program is really limited to foreign communications or is otherwise consistent with the NSA's charter or with FISA […] And unlike the controversy over targeted wiretaps of individuals' phone calls, this potential spying appears to be applied wholesale to all sorts of Internet communications of countless citizens.

If recent actions by the Supreme Court are any indication, the federal courts are unlikely to exercise any sort of check on the consolidation of unlimited power by the executive branch, particularly the "right" of the NSA to collude with telecommunications companies to keep every American under the constant surveillance of the never-blinking eye of government.

On October 9, the Supreme Court denied review of an appeal court ruling upholding the constitutionality of FISA..

At issue in the case the Supreme Court refused to hear, *Hepting, et al v. AT&T, et al*, was the government's use of provisions of FISA to grant retroactive protection from prosecution to several telecommunications giants including AT&T, Verizon, and Sprint. These companies aided the government in wiretapping the phones of subscribers without obtaining warrants.

The case is similar to *Jewel* and was also filed by the EFF on behalf of customers of the cellphone companies named as defendants.

In the *Jewel* case, Judge Jeffery White of the U.S. District Court for the Northern District of California, a George W. Bush appointee, will consider the motion on November 2. The trial, if one occurs, is set for December 14, 2012.

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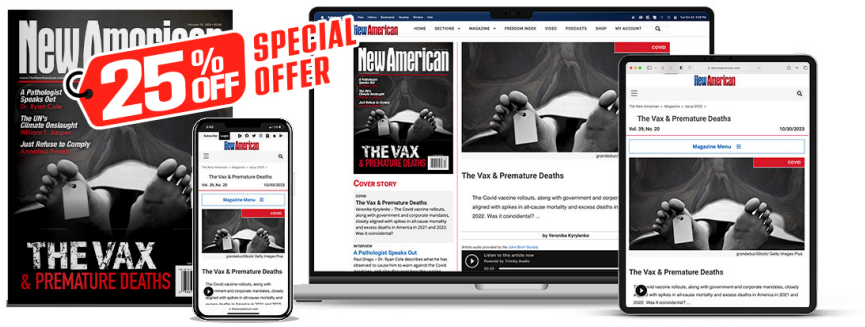

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