Written by **Raven Clabough** on August 22, 2013

Secret Court Ruled in 2011 That NSA Surveillance Is Unconstitutional

The Electronic Frontier Foundation has been fighting the federal government in court to release to the public an 86-page opinion of the secret Foreign Intelligence Surveillance Court (FISC), issued in 2011. According to that opinion, the surveillance conducted by the National Security Administration is unconstitutional under the FISA Amendments Act.

On August 21, the government was ordered by the court to release the opinion, one year after the EFF announced that it would be filing a Freedom of Information Act (FOIA) lawsuit against the Justice Department in pursuit of "any written opinions or orders from the FISC discussing illegal government surveillance, as well as any briefings to Congress about those violations."

Responding to the court papers, the Department of Justice stated it would provide the EFF with a "redacted [partially blacked out] version of the Foreign Intelligence Surveillance Court opinion" as well as a "redacted version of the one responsive paragraph in the classified white paper to Congress also previously withheld" as per FOIA exemptions.

The pressure to release the opinion increased significantly following the revelations of whistleblower and former NSA contractor Edward Snowden. Snowden's leaks helped drive a national debate on security versus privacy protections and increased government overreach.

"It's unfortunate it took a year of litigation and the most significant leak in American history to finally get them to release this opinion," said foundation staff attorney Mark Rumold, "but I'm happy that the administration is beginning to take this debate seriously."

The 2011 court opinion that is being unveiled addresses a data collection method referred to as an "upstream" program, which took data from fiber-optic networks that funneled a significant portion of Internet and phone data, and not the surveillance programs that have drawn recent attention, such as PRISM, which collect over 250 million Internet communications a year, according to the opinion.

The opinion indicates that the National Security Agency acted in violation of civil rights when it collected thousands of e-mails and other digital messages between Americans.

Written by Judge John D. Bates of the Foreign Intelligence Surveillance Court, the opinion asserts that the government misrepresented its surveillance efforts at least three times from 2008 to 2011. Bates explains that the government had first opened its surveillance program to the court in 2011, and had been collecting Internet data since at least 2008.

Bates' opinion references the government's explanations, stating "the Court understood that the acquisition of Internet communications … would be limited to discrete 'to/from' communications between or among individual account users and to 'about' communications." But the revelation of the court "fundamentally alters" what the court had understood about the program's scope.

"For the first time, the government has now advised the court that the volume and nature of the information it has been collecting is fundamentally different from what the court had been led to believe," Bates wrote in his October 3, 2011, opinion. "By expanding its Section 702 acquisitions to include the acquisition of Internet transactions through its upstream collection, NSA has, as a practical matter, circumvented the spirit of [the law]," Bates wrote. "NSA's knowing acquisition of tens of thousands of wholly domestic communications through its upstream collection is a cause of concern for the court."

Additionally, Bates opined that the government had misrepresented itself on numerous occasions: "The Court is troubled that the government's revelations regarding NSA's acquisition of Internet transactions mark the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program."

In this particular case of government misrepresentation, Bates observes "the quantity of incidentally-acquired, non-target, protected communications being acquired by NSA through its upstream collection is, in absolute terms, very large, and the resulting intrusion is, in each instance, likewise very substantial."

Ultimately, Bates declares the upstream collection to be a "small, but unique part" of the government's efforts to obtain valuable information "but not without substantial intrusions on Fourth Amendment protected interests."

U.S. intelligence officials defended the NSA by pointing out that it was the NSA who brought the collection method to the court's attention in the first place as part of its regular reporting process.

"This was not in any respect an intentional or wholesale breach of privacy of American persons," Robert S. Litt III, the general counsel for the Office of the Director of National Intelligence, told reporters Wednesday.

However, as noted by the *Washington Post*, "In practice, the NSA was unable to filter out the communications between Americans."

The release of the court opinion comes just one week after an internal audit at the NSA found that the NSA has broken U.S. privacy rules "thousands of times each year" since 2008.

And while the opinion marks an unprecedented public release of information about NSA surveillance activities, the EFF asserts that there is still much more to be done to advance a public debate on the subject of the legality of the NSA's domestic surveillance programs.