Written by **Joe Wolverton, II, J.D.** on October 10, 2012

Supreme Court Allows NSA's Warrantless Wiretapping to Continue

On October 9, the Supreme Court denied review of an appeal court ruling upholding the constitutionality of the Federal Information Securities Amendments Act (FISA).

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.
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> 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.
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> 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 National Security Agency (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.

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 a warrant.

The Hepting case was filed in 2006 by the American Civil Liberties Union and Electronic Frontier Foundation on behalf of customers whose constitutional right against unreasonable searches and seizures was violated by their telephone service providers' collaboration with the NSA's electronic surveillance program.

The lawsuit alleges that beginning in 2002, AT&T allowed and assisted the NSA to install a NarusInsight system at its San Francisco switch. The NSA's device monitored millions of Internet users' traffic, including the recording of any telephone calls routed through the internet (known as Voice Over IP). Thus in collusion with AT&T, the NSA began spying on Americans without establishing a probable cause that any of them were involved in criminal activity. This is an open and hostile disregard of fundamental principles of privacy and due process that undergird the Constitution.

A former employee with A&T turned whistleblower, Mark Klein, confirmed that AT&T was using its vast resources to assist the NSA in its wiretapping program.

In a statement, Klein claimed that the Narus device 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. Klein 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.

As if the monitoring of telephone communications weren't egregious enough, EFF also alleges in *Hepting* that AT&T gave NSA unfiltered access to terabytes of its clients private records, including detailed transaction records of all domestic phone numbers called since 2001, as well as a list of all websites visited during that same period.

EFF's attorney Kevin Bankston explained, "Our goal is to go after the people who are making the government's illegal surveillance possible…. They could not do what they are doing without the help of companies like AT&T. We want to make it clear to AT&T that it is not in their legal or economic interests to violate the law whenever the president asks them to."

This scenario is surprising to no one. The government creates, often *ex nihilo*, an exception to a constitutionally protected right in order to fend off the threat from some foreign foe and then secretly recruits some large American business to perpetrate it on their unsuspecting customers.

The plaintiffs appealed a decision of the Ninth Circuit Court of Appeals that upheld a district court ruling granting Congress the power to assign the attorney general to block private citizens from suing telecommunications companies for their participation in the warrantless wiretapping of customers. This power to loan out its constitutional authority to the executive branch was non-existent until FISA was amended to include it.

In his decision, District Court Judge Vaughn Walker tossed out the challenge, holding that:

> in the case of a covered civil action, the assistance alleged to have been provided by the electronic

> communication service provider was in connection with an intelligence activity involving communications that was authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007; designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States; and the subject of a written request or directive, or a series of written requests or directives, from the Attorney General or the head of an element of the intelligence community (or the deputy of such person) to the electronic communication service provider indicating that the activity was authorized by the President; and determined to be lawful.
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> On December 29, 2011, a three-judge panel of the Ninth Circuit Court affirmed Judge Walker's ruling.

With the Supreme Court's refusal this week to consider the merits of the challenge filed by the ACLU and EFF, it is unlikely that much information will ever be revealed regarding how the NSA partners with powerful providers of telecommunications and Internet service to spy on citizens of the United States — none of whom was suspected of committing any crime.

Despite the secrecy and the surveillance carried out under the color of law, when Congress and the president collude to pass and enact these obviously unconstitutional acts and the courts refuse to check them, Americans should take the position recommended by Alexander Hamilton:

> If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted [sic] to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed.... But it will not follow from this doctrine that acts of the larger society which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such.

Photo: laptop and mail via Shutterstock