Written by **Joe Wolverton, II, J.D.** on February 27, 2013

Supreme Court Throws Out Challenge to Government Electronic Surveillance

The conversion of the United States into a type of "prison" with the inmates under the constant surveillance of the government "jailers" is progressing quickly; this time, with the help of the Supreme Court.

By a 5-4 decision on Tuesday, the court rejected a challenge to the constitutionality of government wiretaps and monitoring of citizens' e-mails, telephone calls, and electronic messages. Those targeted for the surveillance are not suspected of committing any crime, so searching their communications is a direct violation of the Fourth Amendment.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...."

The case before the court was *Clapper v. Amnesty International.*

The likely effect of this decision, the *New York Times* reports, will be that "the Supreme Court will never rule on the constitutionality of that 2008 law."

The law in question is the Foreign Intelligence Surveillance Act Amendments (FISA) passed by Congress in 2008. FISA was recently renewed by Congress and will not expire until 2017.

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 FISA being enacted, Representative Ron Paul led a coalition of Internet activists united to create a political action committee, Accountability Now. The sole purpose of the PAC was to 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.

It's not the eavesdropping that's the most egregious violation of the Constitution and the Bill of Rights (such activities are conducted by law enforcement all the time for legitimate purposes), but it's the indefensible fact that the federally empowered snoops conduct this surveillance without a probable cause warrant so long as one of the parties being monitored is located outside the territory of the United States. The justification being that if an American is talking, texting, or e-mailing a foreigner, then something might be said that would aid in the acquisition of "foreign intelligence information."

This policy is such a shameful disregard for our long history of individual-based human and civil rights (including the Fourth Amendment) that it shocks the conscience even when the source is considered.

Tuesday's decision, however, strengthens the federal government's position and all but guarantees that its drive to make every citizen a suspect will accelerate.

Writing for the majority, Justice Samuel Alito ruled that the attorneys, human rights groups, and labor and media organizations challenging FISA had no standing to bring the suit because their claim of harm due to having their communications monitored by the government was "too speculative."

Regarding the respondents' claim that the fear of having their phone calls, e-mails, and other electronic communications monitored by the government forced them to make burdensome changes to the way they conduct business, the Supreme Court held that "respondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending."

What the majority fails to recognize is that the constant surveillance of Americans is not hypothetical. The government admits that it is listening to, recording, and cataloging electronic communications — including those of Americans not suspected of any crime. Such otherwise unconstitutional surveillance is necessary, the government claims, to "meet the challenges of modern technology and international terrorism."

The goal, they insist, is to prevent future attacks by a "member of al-Qaeda or any affiliated terrorist organization."

Of course, in FISA as in the National Defense Authorization Act (NDAA), key terms such as "terrorist" and "affiliated terrorist organization" go undefined. This gap is just large enough for the government to squeeze its unlawful surveillance plan past the Constitution and the Supreme Court that ostensibly is empowered to protect it.

It is this vagueness that worries the coalition of organizations challenging this law. They argue that if, as part of their job as a journalist or human rights worker, they interact via telephone or e-mail with someone who might be considered by the federal government to be "associated with al-Qaeda" or some other suspected terrorist organization, that their First Amendment right of free speech is infringed by being forced to restrict themselves to communicating only with people approved by the government.

They have a good point, and one that was completely overlooked by Justice Alito. If a reporter is writing a story on the growing backlash in Yemen to the U.S. drone war, for example, would he be subject to electronic eavesdropping by the feds because there is a chance that he would be talking to someone they don't approve of?

What if, furthermore, the fear of surveillance forces the reporter to meet face-to-face with the subject of

the interview and that person has been, without the reporter knowing it, targeted for assassination by drone? Would a dead American reporter just be acceptable collateral damage in the never-ending "War on Terror?"

The majority was unpersuaded. They (Justices Alito, Roberts, Scalia, Kennedy, and Thomas) ruled that the Article III requirement that plaintiffs have standing was not met and therefore the constitutional merits of the law would not be examined.

To "have standing" means that the person filing the suit must have a case where they have suffered injury or are about to suffer injury. The Supreme Court has decided, in other words, that the people challenging FISA have not suffered, cannot prove that they will ever suffer, and thus they have no case.

Justice Breyer disagrees. In his dissent, Justice Breyer writes that the harm suffered by complainants is real and not hypothetical, as Justice Alito held.

"Indeed," Breyer wrote, "it is as likely to take place as are most future events that common-sense inference and ordinary knowledge of human nature tell us will happen."

It has been over a decade since the American people were placed under the never-blinking, ever-watchful eye of the federal government in the name of national security. Not once has there been a successful challenge to the body of federal acts that created this situation. The Fourth Amendment has been legislatively repealed and Presidents Bush and Obama signed off on it. Now, with the rejection of this latest legal challenge, the Supreme Court has joined the crew demolishing the Bill of Rights and constructing the surveillance state on top of the rubble.

Photo of United States Supreme Court building

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