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Supreme Court to Decide Whether NSA Domestic Wiretapping Is Beyond the Law

On Monday, the Supreme Court of the United States granted a petition to hear a lawsuit calling for an end to another case challenging the constitutionality of the government's warrantless wiretapping program.

This Orwellian (and unconstitutional) surveillance scheme was established in the wake of the attacks of September 11, 2001 and was explicitly authorized by an act of Congress passed in 2008.

Naturally, the Obama administration is pleased by the high court's announcement, as it has followed the tack laid down by the George W. Bush White House that holds that the federal government's monitoring and recording of the private communications of American citizens is not subject to legal scrutiny.

At issue in the case is the interpretation of the Federal Information Securities Act (FISA) Amendments Act, which has been challenged by the American Civil Liberties Union (ACLU) and other civil rights watchdog groups. The FISA Amendments Act purports to permit the intelligence and security agencies of the United States government to eavesdrop on the electronic communications routinely carried on among citizens of this Republic and those residing overseas.

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 freedom from unwarranted searches and seizures) that it shocks the conscience even when the source is considered.

The FISA Amendments Act was signed into law by President George W. Bush on July 10, 2008 after being overwhelming passed 293 to 129 in the House and 69-28 in the Senate. Just a couple of days prior to 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, 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.

In an example of corporate-governmental collaboration that are seemingly de riguer when it comes to the sustained and systematic dismantling of the few remaining "parchment barriers" protecting civil liberties, a former employee with A&T turned whistle-blower, Mark Klein, claimed that the telecommunication giant was using its vast resources to assist the NSA in its wiretapping program.

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.

There are those who are diligently battling this unholy union of government and business. The American Civil Liberties Union (ACLU), for example, filed its legal challenge to the FISA Amendments Act of 2008 the very day that it became the purported law. The case was filed on behalf of a broad coalition of attorneys and human rights, labor, legal, and media organizations who depend on confidential communication to do their jobs. The case was dismissed by the district court, which held that the plaintiff could not provide a threshold level of evidence to support its claim. That decision was later reversed by the Second Circuit Court of Appeals.

It was the Second Circuit's unexpected reversal of the lower court's decision that prompted the Obama administration to ask the Supreme Court to consider the case, hoping that a majority of the justices will agree with the district court and return to the NSA the carte blanche gifted it by the previous administration — a status placing them beyond the reach of the legitimate law.

In the order granting certiorari, the justice made no comment on the case. This decision has historic implications as it marks the first time that the Supreme Court has agreed to hear a case challenging the post-9/11 wiretapping program.

The specific question before the court is:

> Whether respondents [the ACLU and its co-plaintiffs] lack Article III standing to seek prospective relief because they proffered no evidence that the United States would imminently acquire their international communications using Section 1881a authorized surveillance and did not show that an injunction prohibiting Section 1881a-authorized surveillance would likely redress their

> purported injuries.

In a press release issued after the Supreme Court's announcement, the ACLU expressed hope that the Second Circuit's decision would be upheld:

> The appeals court properly recognized that our clients have a reasonable basis to fear that the government may be monitoring their conversations, even though it has no reason to suspect them of having engaged in any unlawful activities. The constitutionality of the government's surveillance powers can and should be tested in court. We are hopeful that the Supreme Court will agree.

And ACLU legal director, Steven R. Shapiro added, "Given the importance of this law, the Supreme Court's decision to grant review is not surprising. What is disappointing is the Obama administration's effort to insulate the broadest surveillance program ever enacted by Congress from meaningful judicial review."

There has been little information regarding how the NSA has used the pernicious power given it by the FISA Amendments Act. In effort to shine a little light on the sinister inner-workings of the program, the ACLU filed a Freedom of Information Act (FOIA) petition. According to the ACLU, the federal government's response to the request for information "revealed that every six-month review of the act had identified 'compliance incidents,' suggesting either an inability or an unwillingness to properly safeguard Americans' privacy rights."

As to what qualifies as a "compliance incident" and whether those incidents included warrantless wiretapping of the type specifically mentioned in the ACLU's complaint was not disclosed in the government's response to the FOIA suit.

When Congress and the President collude to pass and enact these obviously unconstitutional acts, Americans would do well to recall the words of 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.