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

FISA Court Colludes with NSA to Allow Unconstitutional Surveillance

Documents obtained by *The Guardian* (U.K.) reveal that the court that was ostensibly created to keep the federal domestic spy apparatus from invading the rights of Americans is actually routinely giving the National Security Agency (NSA) and others the go-ahead to use data "inadvertently" collected during unwarranted surveillance of American citizens.

The newspaper that broke the story of the NSA's activities as revealed by whistleblower Edward Snowden published on June 20 "two full documents submitted to the secret Foreign Intelligence Surveillance Court." Both documents were signed by Attorney General Eric Holder and were issued in July 2009.

According to the article written by Glenn Greenwald and James Ball, the documents "detail the procedures the NSA is required to follow to target "non-US persons" under its foreign intelligence powers and what the agency does to minimize data collected on US citizens and residents in the course of that surveillance."

Not surprisingly, neither the Fourth Amendment nor the freedoms against tyranny that it protects are honored by Holder or the other architects and construction crews erecting the surveillance state.

As Greenwald and Ball report, the leaked documents demonstrate that when the NSA is conducting surveillance under the pretense of monitoring foreign targets, any U.S. communication caught in the dragnet is "collected, retained and used."

Using Section 215 of the Patriot Act as justification, the NSA is now known to monitor and seize the phone records of millions of Americans who are not now or ever have been suspected of any crime that would justify the issuing of a search warrant. This wholesale watching of the telephone activities of citizens was revealed by *The Guardian* a few weeks ago as part of Snowden's release of information on his former employer.

With regard to the lack of oversight provided by the so-called FISA court, *The New American* reported in May that, as required by provisions of the Foreign Intelligence Surveillance Act Amendments of 2008 (FISA) and the Patriot Act (as amended in 2005), the Department of Justice revealed to Congress the number of applications for eavesdropping received and rejected by the FISA court.

The letter addressed to Senator Harry Reid (D-Nev.) reports that in 2012, of the 1,789 requests made by the government to monitor the electronic communications of citizens, not a single one was rejected.

That's right. The court, established specifically to judge the merits of applications by the government to

spy on citizens, gave a green light to every government request for surveillance.

Not content to be a mere formality for electronic surveillance, the FISA court also held the coats of the FBI while that agency carried out the constitutionally suspect searches and seizures set out in 212 applications.

The documents released last week by *The Guardian* go beyond merely recounting the secret combination of the FISA court with the NSA's unconstitutional domestic spying program, however. As Greenwald and Ball write,

> The top secret documents published [June 20] detail the circumstances in which data collected on US persons under the foreign intelligence authority must be destroyed, extensive steps analysts must take to try to check targets are outside the US, and reveals how US call records are used to help remove US citizens and residents from data collection.

Perhaps the most pernicious aspect of the FISA court's collusion with the NSA to eradicate the Bill of Rights is the policies of the latter rubber stamped by the former. *The Guardian* provided a summary of what the FISA court allowed the NSA to get away with. According to the newspaper's report, the FISA court-approved NSA petitions allow the spy agency to:

- Keep data that could potentially contain details of US persons for up to five years;
- Retain and make use of "inadvertently acquired" domestic communications if they contain usable intelligence, information on criminal activity, threat of harm to people or property, are encrypted, or are believed to contain any information relevant to cybersecurity;
- Preserve "foreign intelligence information" contained within attorney-client communications;
- Access the content of communications gathered from "U.S. based machine[s]" or phone numbers in order to establish if targets are located in the US, for the purposes of ceasing further surveillance.

All these activities violate the Fourth Amendment requirement that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In practical terms, that means that the federal government cannot purposely monitor the phone or Internet communications carried on by an American or a person inside the United States without a qualifying warrant.

One warrant issued by a FISA court judge in 2010 purporting to pass constitutional muster is appallingly light on legal justifications for issuing of the order. *The Guardian* reports that the warrant in question "declares that the procedures submitted by the attorney general on behalf of the NSA are consistent with US law and the fourth amendment."

The procedures referred to in the warrant state that "NSA determines whether a person is a non-United States person reasonably believed to be outside the United States in light of the totality of the circumstances based on the information available with respect to that person, including information concerning the communications facility or facilities used by that person."

If the NSA claims it cannot accurately determine whether a target is operating inside or outside of the United States, the agency is "free to presume they are overseas" according to the document published by *The Guardian*.

Just how long can the NSA hold on to the data it monitors and seizes? Five years. The policy, according

to Greenwald, states:

> communications which may be retained include electronic communications acquired because of limitations on the NSA's ability to filter communications".
>
> Even if upon examination a communication is found to be domestic — entirely within the US — the NSA can appeal to its director to keep what it has found if it contains "significant foreign intelligence information", "evidence of a crime", "technical data base information" (such as encrypted communications), or "information pertaining to a threat of serious harm to life or property".

Where is Congress in all of this? With very few exceptions, the people's elected representatives have been AWOL in the battle to preserve the Constitution and the fundamental liberties it was designed to protect.

In July of 2011 and again in May 2012, Senators Mark Udall (D-Colo.) and Ron Wyden (D-Ore.) wrote a letter to Director of National Intelligence James R. Clapper, Jr., asking him a series of four questions regarding the activities of the NSA and other intelligence agencies regarding domestic surveillance.

In one of the questions, Senators Udall and Wyden asked Clapper if "any apparently law-abiding Americans had their communications collected by the government pursuant to the FISA Amendments Act" and if so, how many Americans were affected by this surveillance.

In a response to the inquiry dated June 15, 2012, I. Charles McCullough III informed the senators that calculating the number of Americans who've had their electronic communications "collected or reviewed" by the NSA 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 e-mails, texts, Facebook posts, and phone calls to figure out how many of us are already caught in their net. And, furthermore, the NSA considers Congress an impotent impediment that can be ignored, stonewalled, and lied to.

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