Written by **Steve Byas** on June 11, 2015

Will Obama Ignore Court Decision Against NSA Spying?

Despite a ruling by the Second U.S. Court of Appeals that the National Security Agency's collection of data derived from the private telephone communications of Americans exceeded statutory provisions of the "Patriot Act," the Obama administration is asking the Foreign Intelligence Surveillance Court (better known as the FISA Court) to simply ignore the decision of the three-judge panel. In fact, the British paper *The Guardian* said that the Obama administration does not even consider the decision of the circuit court "the last word" on the matter.

According to *The Guardian*, U.S. officials confirmed last week that they would ask the FISA court to allow the government to continue the controversial surveillance program. John Carlin, national security chief at the Justice Department, argued that the newly enacted "Freedom" Act allowed a six-month transition period of the activities of the NSA regarding the bulk collection of millions of pieces of phone call data that had been carried out under now-expired provisions of the Patriot Act. Carlin allowed that the FISA court could "consider" the case of *ACLU vs Clapper* (the decision of the circuit court disallowing the NSA telephone megadata program) as part of its "evaluation of the government's application," but dismissed its controlling jurisdiction. "Second circuit rulings do not constitute controlling precedent for this court," Carlin claimed in an application on June 2 to the FISA court.

Carlin made the case that the unconstitutional mass-surveillance actions of the NSA based on the Patriot Act would remain "in effect" during the transition period. But former House Judiciary Committee Chairman James Sensenbrenner, a principal author of the Patriot Act, flatly denies that the Patriot Act ever authorized the NSA's program of collecting information from the phone calls of millions of Americans. "I can say in no uncertain terms that Congress did not intend to allow the bulk collection of Americans' records," Sensenbrenner said. "The government's overbroad collection is based on a blatant misreading of the law."

The Second U.S. Court of Appeals agreed on May 7 with Sensenbrenner's interpretation of his own law.

Very few Americans even knew that the NSA was collecting phone data of Americans' private phone calls until former NSA contractor Edward Snowden leaked certain government documents, exposing the program's activities. Snowden's leaked information revealed that a secret court ruling had ordered Verizon to hand over the telephone "metadata" of all its customers. Metadata refers to information such as phone numbers. Defenders of the program contended that the NSA was not monitoring actual phone calls, but if they saw that someone was calling, or receiving phone calls of persons suspected of terrorism, then the agency could seek a warrant to actually listen to the calls.

Opposition to the NSA mass spying program has come from across the political spectrum. Alex Abdo of the American Civil Liberties Union (ACLU) declared the court's decision was "a resounding victory for the rule of law. For years, the government secretly spied on millions of innocent American based on a shockingly broad interpretation of its authority. The court rightly rejected the government's theory that

it may stockpile information on all of us in case that information proves useful in the future."

Responding to those who are willing to accept a loss of liberty in order to have more security, Abdo said, "Mass surveillance does not make us any safer, and it is fundamentally incompatible with the privacy necessary in a free society."

In response to the government's motion to continue its surveillance, the conservative Freedom Works group filed a motion before the FISA court, asking it to reject the government's request as a violation of the Fourth Amendment's prohibition on unreasonable searches and seizures.

The Freedom Works motion gets to the heart of the matter. Even if Congress had authorized the mass collection of phone data, was such a statute in violation of the Constitution, specifically the Fourth Amendment?

The appellate court rightly expressed alarm about the program. "Such expansive development of government repositories of formerly private records would be an unprecedented contraction of the privacy expectations of all Americans." But, the court was prepared to defer to Congress, should Congress actually pass a law authorizing such spying! "Perhaps such a contraction is required by national security needs in the face of the dangers of contemporary domestic and international terrorism. But we would expect such a momentous decision to be preceded by substantial debate, and expressed in unmistakable language," noting that there was no evidence of such a debate in the "legislative history" or the "language of the statute."

But, it is not the job of the appellate court to defer to Congress, but rather to the Constitution. In fact, every federal judge, like every other federal official, including the president and all members of Congress, takes an oath to uphold the Constitution of the United States.

The most relevant portion of the Constitution to this debate is the Fourth Amendment, which reads, "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The clear wording of the Fourth Amendment would seem to prohibit the actions of the NSA, and in fact, raise questions about the FISA court itself.

Congress created the FISA court with the Foreign Intelligence Surveillance Act (FISA) of 1978 for the purpose of hearing requests for surveillance warrants against foreign spies inside the United States by federal agencies such as the Federal Bureau of Investigation (FBI) or the NSA. Since its creation, about 40,000 requests for warrants have been submitted, and only 12 have been denied! This has led the FISA court to be called a "kangaroo court with a rubber stamp."

It was the Obama administration, in 2011, that secretly won permission from this FISA court to allow the NSA to intercept e-mails and phone calls on a mass level. This clearly violates the Fourth Amendment prohibition on a warrant being issued, except after probable cause. Probable cause means that a law enforcement official must convince a judge that it is likely that the surveillance or search will reveal evidence of a crime. There is simply no way that the bulk collection of information on millions of Americans would meet this probable cause standard.

Secondly, the Fourth Amendment restricts the search or surveillance by actually naming or listing the thing or things that they expect to find. Again, this "general" search warrant presently used in the NSA

phone metadata collection program is certainly beyond the realm of powers allowed under the Fourth Amendment.

Before the American Revolution, the British initiated the use of "general" search warrants, as a "law enforcement tool" against smuggling. Massachusetts lawyer James Otis denounced the use of general warrants in 1761, contending that such orders violated Britain's unwritten constitution, with the prohibition traced back to the Magna Carta (or the Great Charter of English liberties of 1215). John Adams and other American patriots were inspired by the arguments of Otis, and opposition to "general" search warrants developed into a major grievance in the time leading up to the colonies seceding from the British Empire.

When Patrick Henry, George Mason, and others demanded the addition of a Bill of Rights to the U.S. Constitution, to restrict the power of the newly created federal government, the unpleasant memory of the abuse of the general search warrants by the British led to the adoption of the Fourth Amendment.

It is hard to imagine a more direct violation of the intent of the Fourth Amendment's prohibition of general search warrants than the ability of the government to collect data on every single American who simply makes a telephone call. Certainly there is no probable cause to believe every American is a terrorist.