

US appeals court dismisses suits against telecom firms over warrantless wiretapping

Tom Carter
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On December 29, the Ninth Circuit Court of Appeals dismissed 33 lawsuits against telecommunications companies that challenged the companies' participation in warrantless electronic surveillance. The Ninth Circuit decision not only entrenches the massive and criminal NSA domestic spying program, it represents a radical assault on the long-standing framework of democratic legal protections in the US.

A three-judge panel of the Ninth Circuit, the intermediate federal appeals court covering much of the western United States, based its decision to toss out the cases on a provision of the Foreign Intelligence Surveillance Act (FISA) that allows the executive branch to grant "immunity" to private telecommunications companies from suits for "providing assistance to an element of the intelligence community." In 2008 the telecommunications industry successfully lobbied the legislature—then controlled by the Democratic Party—to amend FISA to include this provision.

In other words, under the FISA amendment passed by Congress, victims of illegal corporate spying may file lawsuits only with the president's permission. Fundamental democratic rights are thus transformed into mere "privileges," to be enjoyed only with the executive's permission.

The 33 lawsuits were filed in January 2006 in federal court in the Northern District of California. In September 2008, after the FISA amendment was passed, the Bush administration intervened to secure the dismissal of the lawsuits on the grounds of "immunity." The Obama administration, which took office a few months later, made no changes to the legal arguments of Bush administration lawyers, and the district court dismissed the 33 lawsuits in June 2009.

The Obama administration has maintained the policy

developed under the Bush administration of intervening in any case that threatens to reveal criminal collaboration between the government and big business—asserting "state secrets", "immunity," and other authoritarian legal doctrines.

Lawyers from the Electronic Frontier Foundation, which helped initiate the lawsuits, appealed the decision to dismiss the cases, arguing that the 2008 amendment was patently unconstitutional: it would, among other things, make fundamental democratic legal protections contingent on case-by-case "permission" from the executive branch.

The Ninth Circuit—a court that in an earlier period had a reputation as the most liberal of the federal appeals courts—ruled last Thursday in *Hepting v. AT&T Corp.* that the 2008 FISA amendment "is constitutional and does not violate Articles I or II of the Constitution or the Due Process Clause of the Fifth Amendment." Since the 2008 FISA amendment is constitutional, according to the court's reasoning, the telecommunications companies are "immune" from litigation.

After the September 11, 2001 attacks, under the guise of the so-called "war on terror," the US government launched a massive warrantless domestic spying operation. The program's true scale is as-yet unknown, as its existence remains officially secret. However, one source told *USA Today* in May 2006 that the National Security Agency has created "the largest database ever assembled in the world."

This database consists of the complete phone call records of tens of millions of people, using data provided by the major telecommunications companies, including AT&T, Verizon, and BellSouth. These call records can easily be linked to cellphone GPS location information, names, street addresses, and other

information, and can be used to facilitate data-mining and, ultimately, secretly listening in on the calls themselves.

USA Today's source at the NSA confirmed that the agency's goal is "to create a database of every call ever made." To assemble such a database, the NSA has entered into criminal conspiracies with telecommunications firms, which—without a warrant or legal justification of any kind—have been turning over their customers' private information to the government.

Historically, the highly secretive NSA, which was created in 1952, officially targeted only international security threats. Revelations in 1975 that the NSA had been conducting warrantless surveillance led to the passage of the Foreign Intelligence Surveillance Act, which established a secret rubber-stamp court through which the intelligence apparatus could obtain warrants to conduct surveillance.

In May 2006 then-President George W. Bush admitted that the NSA had conducted domestic surveillance without even bothering to obtain the rubber-stamp warrants through the FISA system. The NSA spying program was brazenly illegal from the start, violating a broad spectrum of existing laws, including not only the 1975 FISA laws, but also the Communications Act of 1934 and, ultimately, the Bill of Rights.

The Communications Act of 1934 prohibits phone companies from giving out information about their customers' calls, levying large fines and penalties for each violation. The Fourth Amendment to the US Constitution affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and requires that the government obtain a specific warrant before conducting a search. The First Amendment guarantees the right to speak and associate privately.

The Electronic Frontier Foundation, in its complaint filed in January 2006, identified six separate categories of state and federal laws, including the Constitution, which the telecommunications companies had participated in violating. Each of the 33 lawsuits represented a person or class of persons who had been affected in different ways by the telecommunications firms' behavior.

The Ninth Circuit decision ensures that these widespread corporate violations of existing law will

receive no effective legal sanction and that NSA spying will continue.

It is impossible not to note the ever-present hypocrisy of the American legal system. For ordinary individuals who run afoul of the law, prosecutors are ready to impose the harshest possible punishment for the most minor offense, justified as necessary to preserve "law and order." However, when huge corporations commit serious offenses affecting the lives of millions, the government does nothing to prosecute them, even going out of its way to intervene in any case to ensure that these corporations are protected.

The Ninth Circuit decision to uphold the 2008 FISA amendment has far-reaching implications. Under the precedent set by last Thursday's decision, laws may now be passed giving the executive branch the power to grant or deny "permission" to assert democratic rights, effectively turning the Bill of Rights into a "Bill of Privileges."

In a separate opinion in a related case decided the same day, *Jewel v. National Security Agency*, the Ninth Circuit permitted only one of a group of cases challenging the government on the same grounds as *Hepting* to pass through the jungle of procedural obstacles that bars suits against the government.

The *Jewel* case is distinct from the *Hepting* case because it targets the federal government and not the telecommunications corporations, so the 2008 FISA "immunity" amendment does not apply. Nevertheless, the Obama administration has argued that the case should be dismissed on the grounds of the authoritarian "sovereign immunity" and "state secrets" legal doctrines.

The legal edifice of American democratic rights as they have existed for centuries is being subjected to a spectacular and accelerating demolition.



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