FISA court renews NSA spying program

Tom Carter
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On Friday, the Obama administration announced that it had sought—and the secret FISA court had granted—a renewed authorization for the NSA spying program that compels US telecommunications companies to turn over their telephone records in bulk.

"Consistent with his prior declassification decision and in light of the significant and continuing public interest in the telephony metadata collection program, the DNI [Director of National Intelligence] has decided to declassify and disclose publicly that the Government filed an application with the Foreign Intelligence Surveillance Court seeking renewal of the authority to collect telephony metadata in bulk, and that the Court renewed that authority," the Obama administration press release stated.

In other words, the Obama administration is disclosing the reauthorization this time, but it reserves for itself the power to conceal the program's continued existence from the public in the future at its own discretion. The particular NSA program that was the subject of Friday's press release apparently requires "renewal" every 90 days in the Foreign Intelligence Surveillance Court (FISC), also known as the FISA court after the 1978 Foreign Intelligence Surveillance Act that created it.

Contrary to the press release's characterization of recent events, the Obama administration did not voluntarily "declassify" the NSA program's existence. Instead, the administration made at best a number of preemptive disclosures designed to soften the impact of ongoing revelations by NSA whistle-blower Edward Snowden. Meanwhile, notwithstanding the "public interest," the United States is presently waging a desperate international campaign to capture or silence the 30-year-old former employee of Booz Allen Hamilton.

Snowden's disclosures, among many other things, have highlighted the extent to which in recent years the FISA court has quietly assumed a vastly more significant role in the state apparatus. Within this shadow judiciary, a body of secret law is being promulgated, including secret interpretations of the Constitution, pursuant to which secret rulings are issued purportedly granting legal authority for an array of secret programs and activities. (See "Secret laws, secret government")

Orders and decisions issued by this secret court purport to authorize the Obama administration to gather up and store the private data of hundreds of millions of individuals around the globe, including telephone calls, SMS messages, internet browsing activity, emails, Facebook activity, photos, videos, and more.

The FISA court is a "court" in name only. A person targeted for surveillance has no right to appear in the courtroom and contest the government's allegations. The court's proceedings are kept entirely secret and its records are considered "classified." There is no right to appeal or to challenge the court's rulings—except for the government.

The FISA court's secret proceedings are always *ex parte*, meaning that only one side—the government side—is represented. The targeted person's position is argued by an empty chair.

The FISA court issues warrants without any notice or public record of its rulings. Targeted individuals have no way of knowing that they have been targeted. It is authorized to issue "gag orders" against individuals who accidentally become aware that that they have been targeted. These orders prohibit a targeted person from telling anyone else about the activities of the intelligence agencies or of the FISA court.

According to recent statistics, the FISA court has issued 33,942 warrants since the court began operating in 1979. It has denied the government's request only 11 times. In other words, the government's requests in this court are granted approximately 99.997 percent of the time and denied 0.003 percent of the time.

Although constituted as a "court," the FISA court was actually physically located for many years in the federal Department of Justice building, which houses part of the executive branch.

The FISA court was established following the Senate Church Commission hearings in the late 1970s. These hearings uncovered a vast array of criminal activities on the part of the US intelligence agencies, including warrantless spying and murder. The Foreign Intelligence Surveillance Act of 1978 created the FISA court as an ostensible judicial

check on the future activities of the intelligence agencies.

The court consists of 11 judges appointed by the Chief Justice of the Supreme Court. Over recent decades, it has been stacked with former prosecutors and other figures closely aligned with the federal law enforcement and intelligence apparatus.

As early as June 2000, the Bush administration began conducting surveillance without even bothering to request authorization from the FISA court. This brazenly illegal spying was the subject of a *New York Times* exposure in December 2005. In 2008, by a bipartisan majority, Congress passed the "FISA Amendments Act of 2008." These amendments, which emerged from secret closed-door meetings, retroactively approved the Bush administration's illegal wiretaps and vastly expanded the government's surveillance powers.

Other expansions of the surveillance powers of the government and of the FISA court were included in the PATRIOT Act of 2001 and the Protect America Act of 2007.

As constituted in 1978, and in its vastly expanded form today, the secret FISA court is entirely unconstitutional. The Fourth Amendment to the Bill of Rights asserts, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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."

The requirement that the government obtain a warrant before conducting a search and seizure—and the requirement that the warrant be specific—reflected overwhelming hostility at the time of the American Revolution to the colonial authorities' practice of issuing "general warrants." General warrants were blank checks for colonial officers to invade homes and carry out arbitrary searches and arrests.

The 1776 Virginia Declaration of Rights, expressly prohibits general warrants: "That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted."

In the recent period the FISA court has shifted from issuing specific surveillance warrants to issuing general authorizations for entire surveillance programs. In other words, instead of issuing a warrant for the government to spy on a particular person for a particular period of time in a particular way, the FISA court is granting general authorizations for the government, for example, to access wholesale the records of telecommunications companies.

Retired U.S. District Judge James Robertson testified before a federal oversight board that, under the 2008 FISA amendments, the court "has turned into something like an administrative agency," referring to the authorizations the court hands down for entire spying programs. "What FISA does is not adjudication, but approval," Robertson said.

The FISA court now functions as a pseudo-legal mechanism pursuant to which the government can circumvent the entire system of constitutional and democratic rights and legal precedents established over a period of the last two and a half centuries. It exists as a separate, shadow judicial branch—one commentator described it as a "parallel Supreme Court"—with a key role in the framework of an emerging American police state.

In light of recent revelations regarding the FISA court, it is worth recalling that the *New York Times* and sections of the political establishment have repeatedly called for the establishment of a FISA-type court that would have the power to authorize assassinations.

In one such article, dated May 3, 2011, the *New York Times* argued "that a decision to kill an American citizen should have judicial review, perhaps by a special court like the Foreign Intelligence Surveillance Court, which authorizes eavesdropping on Americans' communications."

In other words, the *Times* is in favor of the establishment of secret courts with the power to issue death warrants. In these secret death courts, as in the FISA court, all of the basic legal protections in the Bill of Rights and later Civil War amendments would be ignored. There would be no due process, no equal protection of the law, no right to an attorney, no opportunity to present a defense, no right to confront one's accusers, no jury, no presumption of innocence, no proof beyond a reasonable doubt, and no right even to know about the charges. The death warrants could be directed against individual citizens or perhaps against entire organizations or political parties.

The secret FISA court system constitutes a menace of major proportions to the American and world public. Its trajectory further demonstrates the impossibility of imposing any reforms on the American military-intelligence complex.

Terrified of the possible emergence of mass opposition to its policies of plunder, war, and austerity, the capitalist class is deliberately building a police state. This regime cannot be reformed. It can be abolished and democratic rights secured only through the independent political intervention of the working class.