FISA court releases document defending NSA bulk metadata collection

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The Foreign Intelligence Surveillance Court (FISA court) released a 29-page document this week arguing for the legality of bulk telephone metadata collection by the National Security Agency (NSA). The document, dated August 29, argued in favor of decisions made since 2006 authorizing the NSA to demand telecommunications metadata from corporate providers, and held that bulk metadata collection does not violate the Fourth Amendment.

The opinion released by the court, only three weeks old, sought to retroactively justify bulk data collection practices that have been going on since at least 2006. Jameel Jaffer of the American Civil Liberties Union (ACLU) told the *Washington Post*, "This isn't a judicial opinion in the conventional sense. It's a document that appears to have been cobbled together over the last few weeks in an effort to justify a decision that was made seven years ago. I don't know of any precedent for that, and it raises a lot of questions."

Claire Eagan, a judge who sits on the FISA court, signed the opinion, which was developed out of a hearing that received testimony from NSA and FBI personnel. On the basis of the 1979 Supreme Court ruling *Smith v. Maryland*, which established that individuals have no reasonable expectation of privacy protection when dialing telephone numbers, Eagan concluded that gathering of metadata does not violate Fourth Amendment protections.

"Where one individual does not have a Fourth Amendment interest, grouping together a large number of similarly-situated individuals cannot result in a Fourth Amendment interest springing into existence ex nihilo," wrote Eagan.

The metadata at issue in the ruling includes the phone numbers dialed, the length of phone calls, and the times at which calls are made. This data, though it is sufficient to construct a detailed profile of an individual's associates and activities, was said by Eagan to fall outside the scope of Fourth Amendment guarantees against warrantless searches. By picking up the telephone, Eagan contends, individuals forfeit their right to freedom from government surveillance.

Like similar efforts to legitimize NSA spying, the Eagan ruling focused on one specific program or aspect of the surveillance. As Edward Snowden's revelations have shown, however, the past decade witnessed a tropical growth of government surveillance programs. Telephone metadata is only a fraction of the issue.

In addition to metadata, the government continues to collect the actual content of email, telephone calls, and text messages. Federal agencies have already used information acquired through surveillance to build criminal cases, without revealing their sources. Individuals' lives can be searched by virtual means without a warrant, and this can form the basis for arrest and criminal prosecution.

The language of the Eagan opinion granted broad powers to state agencies engaging in surveillance. The opinion asserted that under Section 215 the government need only have "reasonable ground to believe that the information sought to be produced has some bearing on its investigations of the identified international terrorist organizations." Any data which investigators have "reasonable ground to believe" is relevant can be searched.

Such a loose definition gives the surveillance state open-ended authority to collect information on the American people. Under this standard, as Patrick Toomey of the ACLU told the *Guardian*, "the government is allowed to collect records merely in anticipation of investigations." Eagan also held that the government was authorized to engage in bulk data collection because of the necessity to locate "unknown" terrorist cells. A senior Justice Department official acknowledged to the *Washington Post* that this specification allowed the government to

gather a “larger body of data.”

Also confirmed by the Eagan opinion was the fact that none of the telecommunications companies that collaborate in government surveillance efforts have ever mounted a legal challenge against the government’s demands for information.

“To date, no holder of records who has received an Order to produce bulk telephony metadata has challenged the legality of such an Order,” Eagan’s opinion stated. “Indeed, no recipient of any Section 215 Order has challenged the legality of such an order, despite the mechanism for doing so.”

These lines serve as a reminder of the increasing integration of technology and communications corporations with the military-intelligence bureaucracy. The largest communications corporations—including AT&T and Verizon—have proven themselves willing accomplices in the erection of police-state surveillance systems by the US ruling elite. Far from representing a bulwark against abuses of state power, top representatives of American capitalism have been key enablers of the surveillance.

The Eagan opinion provides yet another proof that the FISA court, the NSA surveillance programs, and the entire intelligence bureaucracy are incompatible with democratic rights. Sweeping reinterpretations of fundamental constitutional principles are being made by a secret court where only the government is allowed to present arguments.

The opinion upholds that the simple act of using a telephone authorizes the government to conduct surveillance against an individual, emptying the Fourth Amendment of all content. When basic activities such as placing telephone calls entail forfeiting one’s rights, those rights are no longer real.

In the “oldest constitutional democracy in the world,” the intelligence bureaucracy and the ruling elite are freeing themselves from all legal restraints in preparation for a confrontation with the working class.