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America's Spying Telecoms

ACLU Challenges FISA Law in Federal Court

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Global Research, September 18, 2008
Antifascist Calling... 18 September 2008

Region: USA
Theme: Police State & Civil Rights

Last Friday the American Civil Liberties Union challenged the FISA Amendments Act (FAA) in Federal District Court in New York. But on the same day, ***Wired*** reported that Justice Department special counsel Anthony Coppolino informed U.S. District Judge Vaughn Walker in San Francisco that the government would seek blanket immunity under FAA for spying telecoms.

Calling the FAA "the most sweeping surveillance bill ever enacted by Congress," the ACLU urged the court to strike down the law as an unconstitutional breach of privacy and free speech rights.

The FAA, a piece of Bushist legislative flotsam, was overwhelmingly approved by both houses of Congress and signed into law in July by president Bush. While the reputed "opposition" party, the Democrats, managed a few bleats against immunity provisions for lawbreaking corporate grifters, they quickly fell into line and passed this disgraceful statute.

Why? So as not to appear "soft on terror" during November's general election according to ***The New York Times***. But flip-flopping "liberal" Democrats, including the party's nominee for president, Sen. Barack Obama, joined their colleagues across the aisle for a more salient reason: cold, hard cash.

As I **wrote** in June (see: "'Fighting Democrats' Rake-in Big Telecom Bucks"), citing a blistering **report** by the watchdog group MAPLight, "the 94 Democrats who changed their position on telecom immunity 'received on average $8,359 in contributions from Verizon, AT&T and Sprint from January, 2005, to March, 2008'."

While none of this should come as a surprise to readers of *Antifascist Calling*, Glenn Greenwald pointed out Monday in ***Salon***,

> ...it is extremely easy to understand why not only the White House and Congressional Republicans, but also the Democratic leadership, was so eager to ensure that this law-breaking remain concealed from the public and that there are never any consequences for it. It's because, as is true for so much of the Bush radicalism and lawbreaking over the years, top Democrats were fully aware of what was taking place and either explicitly endorsed the lawbreaking or, with full complicity, allowed it to continue.

Indeed, *Washington Post* reporter Barton Gellman documents in his new **book**, *Angler: The Cheney Vice Presidency*, that top congressional Democrats worked covertly to conceal the Bush administration's illegal NSA surveillance programs from the American people. Gellman

writes:

> More than three years later, [former U.S. Attorney General Alberto] Gonzales would testify that there was "consensus in the room" from the lawmakers, "who said, 'Despite the recommendation of the deputy attorney general, go forward with these very important intelligence activities.'" By this account–disputed by participants from both parties–four Democrats and four Republicans counseled Cheney to press on with a program that Justice called illegal.

Greenwald comments:

> ...there is no dispute that the meeting took place and that these members were repeatedly briefed on the spying program–not only after 2004, but before 2004. This specific meeting described by Gellman, and the briefings generally, included Nancy Pelosi, Jane Harman, Steny Hoyer, and Jay Rockefeller–all of whom voted to put an end to the telecom lawsuits (and thereby ensure that these crimes remain concealed), and the latter two of whom were, far and away, the key forces behind the new law that killed the lawsuits looking into these spying activities (and then joined Bush and Cheney at a festive, bipartisan White House signing ceremony to celebrate their joint victory). ("What illegal 'things' was the government doing in 2001-2004?", Salon, Monday, September 15, 2008)

In other words, even when presented with the facts of Bushist criminality, congressional Democrats urged Cheney to "press on" with programs that would have made Watergate felon Richard Nixon and his cronies blush, a stunning indictment of the "Washington consensus" and the bogus "war on terror."

In this context, it makes perfect sense that the biggest recipients of telecom largesse were House Democratic Majority Leader Steny Hoyer (D-MD), $29,000, and House Speaker Nancy Pelosi (D-CA), $24,000. No slouch herself, Jane Harman (D-CA), House co-sponsor of the Orwellian "Violent Radicalization and Homegrown Terrorism Prevention Act of 2007" (**H.R. 1955**) pulled down some $7,000 from grateful corporate grifters in the telecommunications industry. But no matter how you slice it, that's a lot of boodle for the best Congress money can buy!

The FAA gives the Bush–and future administrations–virtually unlimited power to intercept the emails and phone calls of American citizens and legal residents. Indeed, the new law hands the state the authority to conduct intrusive spying operations "without ever telling a court who it intends to spy on, what phone lines and email addresses it intends to monitor, where its surveillance targets are located, why it's conducting the surveillance or whether it suspects any party to the communication of wrongdoing," according to the ACLU. Jameel Jaffer, the Director of the ACLU's National Security Project, **said**:

> "The FISA Amendments Act allows the mass acquisition of Americans' international e-mails and telephone calls. The administration has argued that the law is necessary to address the threat of terrorism, but the truth is that the law sweeps much more broadly and implicates all kinds of communications that have nothing to do with terrorism or criminal activity of any kind. The Fourth Amendment was meant to prohibit exactly the kinds of dragnet

> surveillance that the new law permits." ("ACLU Asks Court to Strike Down Unconstitutional Spying Law," American Civil Liberties Union, Press Release, September 12, 2008)

As the civil liberties group argues in its **brief**, the FAA grants unaccountable Executive branch agencies the right to acquire *all* of the international communications of American citizens under the pretext that "the surveillance is directed at collecting foreign intelligence information and targeted at people outside the United States."

This is a patent falsehood. Driftnet-style communications obtained by the government in league with spying telecoms, as AT&T whistleblower Mark Klein revealed, were facilitated by AT&T when the NSA installed intercept equipment in a secret room in the corporation's San Francisco switching office.

Indeed, Klein submitted an **affidavit** in support of the Electronic Frontier Foundation's (EFF) landmark lawsuit, ***Hepting v. AT&T***. In that affidavit Klein declared, the room contained among other equipment, a Narus STA 6400 traffic analyzer into which *all* of AT&T's internet and phone traffic was routed. The retired technician should know since he helped wire the splitter box that made this possible.

Klein told the court that the company routed its "peering links" into the splitter which means that any and all traffic passing through AT&T's network could also be scanned. The whistleblower told Judge Walker that AT&T offices in Seattle, San Jose, Los Angeles and San Diego had similar secret rooms built for the exclusive use of NSA's multitude of surveillance programs.

In a direct threat to attorney-client privilege and the right of a detained person to receive a fair trail, the ACLU declares that FAA grants the government the right to "acquire all of the communications of European attorneys who work with American attorneys on behalf of prisoners held at Guantánamo, including communications in which the two sets of attorneys share information about their clients and strategize about litigation."

This is a particularly sinister feature of the law, considering Bushist treatment of so-called "enemy combatants" at the Guantánamo Bay prison gulag and global CIA "black sites."

Meanwhile, *Wired* **reports** that the Justice Department has moved to dismiss EFF's *Hepting v. AT&T* lawsuit. When Judge Walker ruled that the so-called "state secrets privilege" was not grounds for dismissal, the government deployed a new tactic, this time relying on the FAA's immunity provisions.

Like the ACLU, EFF has stated in court briefs that the FAA is unconstitutional. The organization provided the court with **five reasons** not to dismiss their case against AT&T:

1. Congress violated the separation of powers by attempting to usurp judicial authority to decide the Fourth Amendment claims of millions of ordinary Americans who have been, and continue to be, subjected to dragnet surveillance for the past seven years.

2. Congress exceeded its constitutional authority by passing legislation that grants to the Executive the discretion to essentially dictate the outcome of specific, pending litigation.

3. The statute improperly requires dismissal of claims of illegal surveillance between September 11, 2001 and January 17, 2007 based not on a judicial finding about the facts of

the surveillance or the legality or constitutionality of the surveillance, but instead merely based on a 'certification' from the attorney general that some unknown member of the Executive branch told the carriers that some undescribed surveillance is 'lawful.'

4. The legislation denies due process to the plaintiffs by granting to the Executive, rather than the courts, the essential decision making about their constitutional and statutory rights.

5. The legislation purports to grant the Executive a unilateral right to require that the court keep secret not only the evidence, but also its own decisions. (Electronic Frontier Foundation, "Joint Case Management for Cases Involving Telecommunications Carrier Defendants," United States District Court, Northern District of of California, San Francisco Division, MDL Docket No 06-1791 VRW, Filed September 2, 2008)

If the legislation stands constitutional muster–Bushist style–the telecoms will get off scott free if the government can prove their "assistance" was the result of a court order, authorized under the Protect America Act of 2007, or was approved by the president and was designed "to detect or prevent a terrorist attack, or in activities in preparation for a terrorist attack, against the United States, and the subject of a written request or directive."

But given the climate of hysteria surrounding "national security" and "terrorism" (the *retail* variety practiced by religious nutters such as al-Qaeda or Christian fundamentalist abortion clinic bombers, not the *wholesale* brand of state terrorism practiced let's say, by the U.S. government itself), the jury is out on how far the courts are willing to go in defiance of the Executive branch and a lap-dog Congress.

Endnote

Speaking of hysteria, the whistleblowing website *Wikileaks* released a non-public "for official use only" **document** by the U.S. Department of Homeland Security (DHS).

Titled "Fear of Terrorist Attack Could Trigger Mass Psychogenic Illness," the 2006 report by the Homeland Infrastructure Threat and Risk Analysis Center (HITRAC) cautions that *terrorism-fear-created* illnesses are "an additional factor to consider in the response to terrorist attacks, particularly those involving chemical, biological, or radiological (CBR) weapons. The number of those suffering psychogenic illness could far exceed the number of actual casualties in a CBR event."

That's rich coming from a government office that specializes in whipping-up endless terror frenzies amongst the American public! The HITRAC "private sector note" provides DHS's "perspective on the potential for mass psychogenic illness occurring as a result of *anxiety over terrorism*." (emphasis added)

Proving once again, as Lilly Tomlin wisely said: "No matter how cynical I get, I can't keep up"!

Tom Burghardt is a researcher and activist based in the San Francisco Bay Area. In addition to publishing in Covert Action Quarterly, Love & Rage and Antifa Forum, he is the editor of Police State America: U.S. Military "Civil Disturbance" Planning, distributed by **AK Press**.

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