

Supreme Court to Take Up Warrantless Wiretapping Case

May 22, 2012 - The United States Supreme Court is finally going to start reviewing laws passed in the wake of the 9/11 attacks on the World Trade Center in New York. The first case that it will hear will concern warrantless wiretapping conducted by the federal government under the guise of the Foreign Intelligence Surveillance Act; commonly known as FISA.

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After 9/11, Congress expanded the federal government's authority under the Patriot Act to monitor phone calls and e-mail messages in which at least one participant was located outside of the United States. Prior to that time, FISA had established a secret federal court system which still had judicial oversight and in which warrants were required for most forms of electronic surveillance.

In 2005, it was revealed that the Bush administration had begun to monitor phone calls and email messages of American citizens and residents without a warrant, provided that the calls or emails involved at least one overseas participant. This is when a group of people, including reporters, decided to sue in federal court. Their claim was that their Fourth Amendment rights against unreasonable search were being violated.

When the case finally made it to federal court, the courts found in favor of the government. The ruling was that the people who filed suit against the government didn't have standing. On appeal though, the US 2nd Circuit Court of Appeal saw it differently. In two separate rulings they determined that those filing the law suit did have a reasonable expectation that at least some of their calls had been subjected to federal government surveillance. That gave them standing to sue, over the objections of the US Solicitor General.

The federal government appealed those decisions to the Supreme Court; which has agreed to hear the case. Regardless of the decision the court reaches, warrantless wiretapping will not go away immediately. The court will not hear arguments on the Fourth Amendment claims. The sole purpose of the arguments will be to determine if those filing the suit have legal standing to continue. If the court decides against plaintiffs in the case, there will likely be further attempts to bring cases with different groups of people. If the court sides with the plaintiffs, the case will be sent back to a lower court for determination of the Fourth Amendment claims. Under these circumstances, it is likely to wind up back with the Supreme Court for a final determination two or three years from now.

There are a variety of other similar cases winding their way through the court system, as well as other cases involving differing privacy issues as a result of laws passed after the World Trade Center attacks. Several of these are expected

with wind up at the Supreme Court over the next two years. The decisions made by the court could be critical to online and electronic privacy rights.

by Jim Malmberg

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