

# ACLU Challenges Warrantless Wiretapping

By [Stephen Lendman](#)

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Throughout its history, America always governed extrajudicially. Post-9/11, it became more repressive than ever. Modern technology makes it easy.

Big Brother has lots of ways to spy. It can be done from space, eyes in the sky on drones, secret agents, neighborhood snoops, or electronic monitoring of phones, emails, and other personal communications.

There's no way to hide. Privacy no longer exists. Constitutional rights are null and void. Practically anything government wants to know about us can be found out secretly without our knowledge or consent.

What better definition of a police state. Challenging what free societies don't tolerate isn't easy. The ACLU is trying. The 2008 FISA Amendments Act (FISAAA) authorizes government to spy globally for alleged national security reasons.

The 1978 Foreign Intelligence Surveillance Act (FISA) authorized surveillance relating to "foreign intelligence information" between "foreign powers" and "agents of foreign powers."

It restricts spying on US citizens and residents to those engaged in espionage in America and territory under US control. No longer. Today anything goes.

NSA uses this authority abusively. In the 1960s, Senator Frank Church warned that its "capability at any time could be turned around on the American people, and no American would have any privacy left, such is the capability to monitor everything: telephone conversations, telegrams, it doesn't matter."

"There would be no place to hide." Presidents could "impose total tyranny, and there would be no way to fight back." He warned us, but we didn't listen.

America today is a total surveillance society. Obama officials claim no court or judge can challenge them. What they say goes. Governing this way is called tyranny.

Bush administration officials went all out to keep information on their program secret. At first they succeeded. Later what they authorized was revealed.

FISAA established a massive warrantless wiretapping program. It violates constitutional and statute laws with impunity. Congressional investigations and lawsuits haven't stopped it.

The FISA Amendments Act (FISAAA) granted telecom companies retroactive immunity. They spy freely on US citizens. NSA intercepts millions of online, phone, and other communications. Everyone is vulnerable globally.

Everything NSA does is classified and secret. It menaces freedom. It's unaccountable. It's shielded from prosecution.

Given today's technological capabilities, it's more dangerous than anyone could have imagined decades earlier. Big Brother expanded exponentially. Fourth Amendment protections were gutted. Freedom hangs by a thread.

The ACLU fought back. It faces stiff headwinds. It's challenging FISAAA's constitutionality. It's doing it on behalf of a group of lawyers, journalists, labor advocates, and human rights groups.

They fear their unjustifiable foreign and domestic monitoring of privileged communications. Witnesses and sources used deserve confidentiality. Lawyers and journalists are obligated to provide it.

In 2009, a district court dismissed the case on the grounds that ACLU clients couldn't prove they were being monitored. In 2011, the Second Circuit Court of Appeals ruled their case has merit.

It rejected Washington's Catch-22 argument about not needing to identify individuals it's monitoring. Claiming only persons aware they're being watched may challenge the legitimacy of doing it doesn't wash.

Last May, the Supreme Court took the case. On October 29, justices heard arguments in *Amnesty et al v. Clapper: FISA Amendments Act Challenge*

ACLU lawyers challenged government authority. At issue they said is a "narrow one: whether our clients have legal 'standing' to challenge the law. But it is also about the ability of the executive and legislative branches to insulate a policy from meaningful review."

ACLU deputy legal director, Jameel Jaffer, argued the case. "We were pleased with today's argument," she said. "The court seemed appropriately skeptical of the government's attempts to shield this sweeping surveillance law from meaningful judicial review."

"The justices seemed appropriately sympathetic to lawyers, journalists and human rights researchers who are forced to take burdensome precautionary measures because of the law."

On October 29, ACLU National Security Project Legal Fellow [Mitra Ebadolahi](#) headlined "Today at the Supreme Court: The Right to Challenge Warrantless Wiretapping," saying:

At issue are fundamental constitutional rights. Justices heard Jaffer's powerful argument. "For example, David Nevin has served as defense lawyer for accused terrorists."

He needs secure telephone and online communications with "experts, witnesses, family members, and his clients abroad."

It's essential to building an effective defense. Lawyers are also obligated to assure confidentiality for cooperating witnesses and other sources. Their profession ethically binds them. The same holds for journalists.

Government lawyers argued that ACLU clients don't know for sure they're being surveilled. Moreover, identities of people spied on is secret. National security requires they not be identified or disclosed. As a result, plaintiff's suit has no merit.

Several justice "appeared rightfully troubled by this Kafkaesque position, expressing concern that, under the government's interpretation, no one would be able to challenge the law—ever."

Justice Breyer said risk and certainty are just matters of degree. "It might not be a storm tomorrow. I mean, you know, nothing is certain," he explained

Justice Antonin Scalia disagreed. He claimed the case lacks "standing." In other words, plaintiffs can't prove they're monitored or harmed. According to the ACLU:

"The government theory of standing would render real injuries nonjusticiable and insulate the government's surveillance activities from meaningful judicial review."

Scalia and like-minded ideologues argue for "unitary executive" authority. Chalmers Johnson called it a "ball-faced assertion of presidential supremacy dressed up in legal mumbo jumbo."

All despots claim power they're unjustified to have. Judicial ideologues support them. Scalia is one of the worst. Obama needs four more like him to prevail.

Fundamental constitutional rights are at stake. At issue also is a "proper balance of power within our constitutional democracy—specifically, the crucial duty our judiciary can, and must, fulfill in safeguarding and enforcing those rights."

In a CNN.com [op-ed](#), Jaffer and Alex Abdo said:

"The government's argument is really about the role of the judiciary in patrolling the boundaries between the lawful measures that the executive should take in the defense of national security, and the unconstitutional and effectively unbridled discretion the government now has to acquire Americans' international communications."

"Whatever one's views of the legality of the FISA Amendments Act, the government's efforts to shield the law from any meaningful judicial review should be profoundly disturbing to all Americans."

Fundamental law alone protects us. Obama wants unchallenged dictatorial powers. How many supporters know what they voted for? How many realize their mistake?

Equity and justice depend on rejecting duopoly power. Choosing one of its two candidates perpetuates what no one should accept. They got it for four more years. Don't bet they'll be wiser next election.

*Stephen Lendman lives in Chicago and can be reached at [lendmanstephen@sbcglobal.net](mailto:lendmanstephen@sbcglobal.net).*

*His new book is titled "How Wall Street Fleeces America: Privatized Banking, Government Collusion and Class War"*

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#### About the author:

Stephen Lendman lives in Chicago. He can be reached at [lendmanstephen@sbcglobal.net](mailto:lendmanstephen@sbcglobal.net). His new book as editor and contributor is titled "Flashpoint in Ukraine: US Drive for Hegemony Risks WW III."

<http://www.claritypress.com/LendmanIII.html> Visit his blog site at [sjlendman.blogspot.com](http://sjlendman.blogspot.com). Listen to cutting-edge discussions with distinguished guests on the Progressive Radio News Hour on the Progressive Radio Network. It airs three times weekly: live on Sundays at 1PM Central time plus two prerecorded archived programs.

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