
April 4, 2010**EDITORIAL**

We Can't Tell You

For more than 20 years, it was settled law, born of bitter experience, that the government may not eavesdrop on people in the United States without a warrant.

Until, that is, after the 9/11 attacks, when President George W. Bush ordered the National Security Agency to ignore the law. When The Times disclosed the spying in late 2005, Mr. Bush argued that the attacks changed everything: Due process and privacy were luxuries the country could no longer afford. Far too many members of Congress bought this argument. Others, afraid of being painted as soft on terror, refused to push back. In 2008, at the White House's insistence, they expanded the government's ability to eavesdrop without warrants.

Even that was not enough for the Bush administration, which insisted that targets of the earlier, illegal spying could not sue the government because what happened was "too secret" even to be discussed in court. The Obama administration has embraced the secrecy argument and has used it to block several cases.

Fortunately, it has not completely succeeded.

The chief judge of the Federal District Court in San Francisco, Vaughn Walker, ruled last week that the 1978 Foreign Intelligence Surveillance Act was the law of the land for Mr. Bush and that when the government failed to get a warrant to wiretap, it broke the law. He also said that the government could not evade accountability with absurdly broad claims of state secrets.

This ruling does not end warrantless wiretapping. The particular program The Times uncovered has been suspended; there are still others, however, and the 2008 FISA amendments permit warrantless spying.

Judge Walker's ruling establishes that state secrecy claims do not trump the requirements of FISA. The next big case, filed by several human rights groups and still being appealed, challenges the 2008 amendments.

Judge Walker's ruling also provides a chilling account of the relentless efforts by the Bush administration and then the Obama administration to kill the civil lawsuit filed by an Islamic charity in Oregon called Al Haramain. The group was subjected to warrantless surveillance and then declared a sponsor of terrorism in 2004.

When the lawsuit was filed in 2006, the government argued that the charity and two lawyers who worked with it could not sue unless they knew the charity was being wiretapped. They could not know that because the wiretapping was secret. If they somehow found out, they could not prove the wiretapping was warrantless, because that was also a secret.

The plaintiffs first tried to build their case on a classified document they were given by mistake. When that document was suppressed, they showed from public records that they were subject to illegal surveillance. The government said that those should be suppressed, too. The lawyers argued that the only basis for a suit would be if the government admitted it had no warrant. And it would not admit that, because that was a secret.

A clearly exasperated Judge Walker said all the government had to do was produce a FISA warrant. It refused. Because any warrant was, well, you get it.

That reminded us of the movie "Animal House" and the college dean who puts a fraternity on "double-secret probation."

It doesn't know the rules, or even that it is on probation, so it can never get out of it. Judge Walker more politely called the government's defense "argumentative acrobatics" that took a "flying leap" and missed "by a wide margin."

The new suit over the FISA amendments points out that the Supreme Court recognized more than 40 years ago that there are few threats to liberty "greater than that posed by the use of eavesdropping devices." In fact, FISA was originally passed because of spying conducted on anti-Vietnam War protesters and civil rights activists.

Senator Obama promised repeatedly in the 2008 campaign to reverse Mr. Bush's many abuses of power. This was one of them. President Obama should read this court ruling with chagrin and eliminate warrantless spying. It is also far past time to stop hiding behind spurious, often ludicrous, claims of national security.

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