

Secret FISA Court Redefines Law to Justify Illegal Spying Operations

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Global Research, July 09, 2013

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The first details surrounding the secret body of law created by the Foreign Intelligence Surveillance Court (FISC) as part of the US government's massive surveillance operations were made public yesterday in the Wall Street Journal. The information, which was leaked by "current and former administration and congressional officials," gives a partial indication of the depth of FISC's unprecedented secret powers.

The leaked material shows how FISC has employed an Orwellian re-working of the meaning of a "relevancy" standard to justify the creation of a separate body of law aimed at justifying government actions that violate the Bill of Rights.

Following the passage in 2006 of a series of amendments to the USA PATRIOT Act, the standard for approving FISA surveillance orders under the "business records" provision of §215 was updated so as to require "a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation."

Though "relevancy" has historically required a showing that there is a "reasonable possibility" that a FISA surveillance order will lead to information related to a pending investigation, FISC has been given the power to establish its own clandestine standard that overrides the former, public standard.

Instead, FISC's interpretation of "relevant" has nothing in common with the actual meaning of the word. According to *The Wall Street Journal*: "In classified orders starting in the mid-2000s, the court accepted that 'relevant' could be broadened to permit an entire database of records on millions of people..."

According to the *Journal*, the specific program that this change was designed to justify is one that allows the government to collect the phone records ("metadata") on hundreds of millions of Americans, which can allow it to construct detailed social and political networks for almost everyone in the United States. This is only one part of a much larger spying operation carried out by the government, including the storage of the content of all phone calls, emails, text messages and Internet communications and activity.

The creation of an upside-down meaning of "relevance" highlights the deeply authoritarian nature of FISC, which has developed into a star chamber that operates entirely outside of the bounds of traditional bourgeois legality. Under the guise of the "special needs" doctrine, FISC claims that the overriding public danger of the "war on terror" gives it the power to abrogate basic democratic rights provided by the Constitution.

Though the recent leaks point toward the content of the series of clandestine decisions made public over the weekend in an article published by the *New York Times*, the decisions themselves remain under lock and key. (See: "[Secret laws, secret government](#)")

The courts with the support of the Obama administration have struck down lawsuits challenging the constitutionality and secretiveness of FISC decisions.

In a 2013 case, *Clapper, Director of National Intelligence, et al. v. Amnesty International USA et al.*, the Supreme Court struck down a Fourth Amendment challenge to the Foreign Intelligence Surveillance Act (FISA), which created FISC. The Court ruled that the civil rights groups that challenged the law did not have standing because they could not prove they were actually being spied on. The decision was reached less than four months before the Snowden revelations were first made public.

Additionally, a request made by the Electronic Frontier Foundation in August 2012 to force the release of FISC opinions under the Freedom of Information Act (FOIA) was denied by the Obama administration's Department of Justice.

Last month, the Department of Justice responded to the EFF's FOIA request by saying that "[a]ny such release would be incomplete and quite possibly misleading to the public about the role of this [FISC] Court and the issues discussed in the opinion."

In March 2013, FISC Presiding Judge Reggie B. Wilson responded to Congressional requests for written summaries of FISC opinions by explaining that there are "serious obstacles that must be considered" regarding making summaries of the opinions public.

Wilson added that he feared releasing the summaries would be "much more likely to result in misunderstanding or confusion regarding the court's decision or reasoning," ostensibly because "[s]ummarizing a judicial opinion of any length or complexity entails losing more nuanced or technical points of a court's analysis."

This reasoning is a hollow excuse for keeping the programs secret. What the courts, the Obama administration and Congress all fear is that the publication of the decisions would generate mass opposition to their doubtlessly authoritarian content.

This is made all the more clear when considering the questionable nature of the recent release of information to the *Wall Street Journal*, as well as the earlier article in the *New York Times*. It is entirely possible that the information was revealed intentionally by the Obama administration in an attempt to preempt the anticipated leak of the full court decisions by Snowden.

The fact that multiple administration and congressional figures both past and present were apparently part of the "leaks," and that the details provided were vague and minimal, indicates a level of state planning.

Regardless of the immediate source, the leaks make clear that the material contained in the decisions is deeply anti-democratic, involving decisions made by an unaccountable court, entirely behind the backs of the population.

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