

# The Secret Court: Is it Constitutional?

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*Americans are just beginning to discover that a secret court has been quietly erasing their constitutional right to be free from unreasonable searches and seizures. They are also learning that this court is made up primarily of conservative activists from the Republican Party who have no respect for the original intent of the Constitution's framers.*

*With the blessing of this secret court, the National Security Agency (and well-paid companies like Booz Allen) have recorded billions of phone calls and e-mails belonging to nearly all Americans, with the intent of searching them later.*

Under the Fourth Amendment, the NSA and its contractors are supposed to obtain specific judicial authority before seizing anyone's communications.

But, where NSA's spying is concerned, no judicial warrants based on probable cause and authorizing targeted searches are required. Quite the contrary. The secret "warrant" that Edward Snowden disclosed permits bulk seizures and subsequent searches without probable cause to believe that the targets of these computer searches are terrorists, criminals, or foreign agents. It is the very sort of general warrant that triggered the American Revolution and inspired the Fourth Amendment.

When the secret court was created in 1978, it was meant to authorize targeted searches, but sometime around 2004 it began, in secret, to issue general warrants for bulk seizures of communications. And it secretly coerced telephone companies and Internet servers to betray their customers' privacy, without telling them.

According to Snowden, the agency's analysts can use their super-computers to search anyone's records within these vast caches at their own discretion. The government denies this, but then, it has a long history of lying about its intelligence activities.

They say we shouldn't worry about these secret searches because the government never does anything wrong. But officials can use the results of these searches to punish their critics or intimidate employees and reporters from blowing the whistle on government waste, fraud, law-breaking, kidnapping, torture, cruel detentions, or the killing of citizens by drone in foreign lands. Embarrassing information can also be used to destroy the reputations of whistleblowers like Daniel Ellsberg and anti-Wall Street politicians like New York Governor Eliot Spitzer.

All this is perfectly legal, Obama's lawyers say, because a secret court says it is. But the judicial power of the United States only extends to cases and controversies arising under the Constitution and laws of the United States. Are general warrants secretly issued in one-sided hearings the kind of "cases" that the framers had in mind? Did they intend to vest the

judicial power in a secret court that only listens to the government and never gives the people any opportunity to challenge its decisions?

Our legal system presupposes that every “case” must be decided according to legal doctrines publicly laid down in similar cases in the past. That is what a system of legal precedent means. Nothing in the Constitution says that a secret court may lay down secret law, or make ad hoc decisions overriding constitutional rights, without letting the people to know their reasoning. That is not the system we inherited from the British, who abolished their last secret court — the infamous Star Chamber — in 1641.

National security courts like the Star Chamber are always a threat to freedom because, like war itself, they are based in the assumption that the end of security justifies almost any means. Our Constitution is based on the principle that means and ends must both be justifiable before the government may compromise our liberties, and that politicians and secret agents may not hide their wrongdoing behind layers of secrecy.

Unfortunately, our government, with the help of the secret FISA court, has strayed far from that principle. It’s time to abolish that court before it is asked to endorse even worse abominations, like issuing death warrants for the murder of citizens whom the administration wants to kill.

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