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Orwellian Justice System: Spying on Americans Continues Despite Court Order

The Securitization and Militarization of Daily Life

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What could be a significant legal victory in the on-going battle against blanket surveillance transpired March 31 in district court in San Francisco, along with a stinging rebuke of the Obama administration.

U.S. District Court Chief Judge Vaughn R. Walker ruled that the government had violated the Foreign Intelligence Surveillance Act (FISA) and that the National Security Agency's warrantless spying program was illegal.

In Al-Haramain Islamic Foundation v. Obama, Walker found that the government employed extralegal means in 2004 to wiretap the now-defunct Islamic charity's phone calls, as well as those of their attorneys. Ruling that the plaintiffs had been "subjected to unlawful surveillance," Walker declared that the government was liable to pay them damages.

The court's decision is a strong rejection of administration assertions that an imperious Executive Branch, and it alone, may determine whether or not a case against the government can be examined by a lawful court, merely by invoking the so-called "state secrets privilege."

The Justice Department has not decided whether it will appeal the decision; it appears likely however given the stakes involved, that the case will be remanded back to the Ninth Circuit Court of Appeals.

Like their Bushist predecessors, the Obama administration has heartily embraced the dubious state secrets theory, a dodgy legalistic invention manufactured to conceal criminal policies and illegal acts authored by the government and their agents.

The March 31 decision is all the more remarkable, in light of Judge Walker's dismissal of a series of lawsuits brought by the American Civil Liberties Union (ACLU) and the Electronic Frontier Foundation (EFF) over the explosive issues of driftnet surveillance and the CIA's kidnapping and torture program that disappeared alleged terrorist suspects into Agency "black sites."

The latter case, Mohamed et al. v. Jeppesen Dataplan, Inc., was dismissed by Walker in 2008 after Justice Department attorneys successfully argued that the "state secrets privilege" applied.

The appeals court rejected those arguments and ruled last year that "the state secrets

privilege has never applied to prevent parties from litigating the truth or falsity of allegations, or facts, or information simply because the government regards the truth or falsity of the allegations to be secret."

The court added, "According to the government's theory, the judiciary should effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law."

Several other cases dismissed by Walker challenged the secret state's authority to spy on the American people in a profitable arrangement with the nation's giant telecommunications firms, internet service providers and a host of shadowy private security corporations.

In late January, Antifascist Calling reported that Walker dismissed EFF's Jewell v. NSA lawsuit challenging the agency's targeting of the electronic communications of millions of U.S. citizens and legal residents.

As AT&T whistleblower Marc Klein told Wired earlier this year, internal AT&T documents suggest that the on-going NSA spy program "was just the tip of an eavesdropping iceberg."

According to Klein, these programs are not "targeted" against suspected terrorists but rather "show an untargeted, massive vacuum cleaner sweeping up millions of peoples' communications every second automatically."

Despite overwhelming evidence that the state acted illegally, Walker dismissed Jewell claiming that driftnet spying by the government was not a "particularized injury" but instead a "generalized grievance" because almost everyone in the United States has a phone and internet service. Chillingly, Walker asserted that "a citizen may not gain standing by claiming a right to have the government follow the law."

What prompted Walker's change of heart in the Al-Haramain case?

During the course of litigation objecting to the government's characterization that Al-Haramain was a "Specially Designated Global Terrorist Organization," U.S. attorneys inadvertently turned over a classified document from the Office of Foreign Assets Control (OFAC) that revealed a broad pattern of illegal surveillance.

Based on that document, the charity's lawyers filed a lawsuit under the FISA provision that "an aggrieved person … shall be entitled to recover … actual damages, but not less than liquidated damages of $1,000 or $100 per day for each day of violation, whichever is greater" along with "reasonable attorney's fees."

The Bushist DOJ moved to squash the lawsuit, claiming that it would jeopardize "privileged state secrets" and "national security," a position upheld by the Ninth Circuit Court of Appeals in San Francisco. That court, the World Socialist Web Site reported April 6, "issued a truly Orwellian ruling that, due to the states secret doctrine, 'the [classified document], its contents, and any individuals' memories of its contents, even well-reasoned speculation as to its contents, are completely barred from further disclosure in this litigation'."

Once back in the district court, Bush administration lawyers moved to dismiss the case because the charity had "no standing" without the classified document. The Ninth Circuit's ruling was both poison pill and Catch 22 because, as socialist critic John Andrews wrote, without a document "which no one was allowed to remember [Al-Haramain] could not prove

that it had actually been spied upon." How's that for circular reasoning and Kafkaesque logic!

When Al-Haramain's attorneys listed 28 publicly available sources to bolster their claims, Walker rejected the government's motion to dismiss and the case went forward.

And when the "change" administration blew into town on January 19, 2009, the Obama regime decided it was time to "look forward, not backward," refusing to open any inquiries or investigations into a host of illegal practices, from waging aggressive war to torture and blanket surveillance, carried out by the previous government.

Once in power, Obama's Justice Department replicated the Star Chamber atmospherics of the Bush administration, arguing that spy operations against the charity were lawful because the President's "wartime powers" allowed him to override FISA.

This too, was a legal fiction crafted by Bush torture-enablers John C. Yoo and (current) U.S. Ninth Circuit Court Judge Jay Bybee when they worked at the Office of Legal Counsel (OLC). The pair, along with Vice President Dick Cheney's Chief of Staff, David Addington, were chief architects of the Bush regime's criminal policies enacted in the aftermath of the 9/11 attacks.

Jon Eisenberg, one of the attorneys who represented Al-Haramain, told The New York Times that "Judge Walker is saying that FISA and federal statutes like it are not optional. The president, just like any other citizen of the United States, is bound by the law."

In a follow-up report April 1, Eisenberg told the Times, "If Holder wanted to be really aggressive, he could go into the Justice Department's files and pick out some of the people who were wiretapped and prosecute those cases," Mr. Eisenberg said. "But do they want to do that? No. The Obama administration made a decision a long time ago that they are not going to prosecute Bush's warrantless wiretapping program."

Walker also rejected arguments made by the government that the charity's lawsuit should be dismissed "without ruling on the merits" the Times reported, because allowing the case to go forward could reveal "state secrets."

The judge rejected those arguments out of hand and characterized Obama administration assertions of a "state secrets privilege" as amounting to "unfettered executive-branch discretion" that had "obvious potential for governmental abuse and overreaching."

Additionally, Walker ruled that the government arguments amounted to a demand that the Executive Branch ignore FISA, even though Congress had enacted the statute "specifically to rein in and create a judicial check for executive-branch abuses of surveillance authority."

The constellation of programs now known as the President's Spying Program (PSP) and specifically NSA's Stellar Wind program, which monitored Americans' email messages and phone calls without court approval, as stipulated by FISA, was first revealed by The New York Times in 2005.

Since those disclosures, the severity of the state's illegal activities against the American people have escalated and now pose a far-greater threat to a functioning democracy then at any time in our history.

Why the Ruling Matters

FISA is a 1978 law that was the result of earlier, illegal programs such as the FBI's COINTELPRO, the CIA's Operation CHAOS and the NSA's Operation SHAMROCK during the 1960s and 1970s. When those programs were exposed by investigative journalists and the Senate Select Committee on Intelligence (the Church Committee), the secret state was thrown into crisis.

Similar to today's driftnet surveillance and infiltration operations that rely on informants and agents provocateurs to gin-up "national security" and "counterterrorism" cases against official enemies, those earlier programs targeted domestic political dissidents and "suspect" racial and ethnic groups, in full-on counterinsurgency-type "neutralization" actions that all but destroyed the vibrant social movements of the Johnson and Nixon years.

A Justice Department spokeswoman, Tracy Schmaler, told the Times that the Obama administration had "overhauled" procedures for invoking the states secrets privilege and that it would be invoked only when "absolutely necessary to protect national security."

This is a rank mendacity.

Under new guidelines in place since September 2009, as I reported last November, Justice Department officials are supposed to reject the request to deploy the state secrets privilege to quash lawsuits if the Executive Branch's motivation for doing so would "conceal violations of the law, inefficiency or administrative error" or to "prevent embarrassment."

Despite strong legal grounds for allowing surveillance and torture cases to go forward, the Obama administration, like the discredited Bush regime before it, continues to stonewall, obfuscate and obstruct.

U.S. Attorney General Eric Holder claims that a DOJ "high-level committee" has reviewed relevant material in the Al-Haramain and other cases equally relevant to charges that the secret state, specifically the nexus of programs known as the PSP, violated the law. The guidelines further stipulate that lawbreaking by a specific agency, the FBI and NSA in the Al-Haramain case, must be reviewed by those agency's inspectors general.

This is supposed to occur whenever "invocation of the privilege would preclude adjudication of particular claims," particularly when a specific "case raises credible allegations of government wrongdoing." If such a review has taken place, the results have never be publicly disclosed.

Commenting on the ruling, Salon's Glenn Greenwald wrote April 1 that while news reports have focused on the illegality of Bush's NSA spy program, "the bulk of Judge Walker's opinion was actually a scathing repudiation of the Obama DOJ."

"In fact" Greenwald avers, "the opinion spent almost no time addressing the merits of the claim that the NSA program was legal. That's because the Obama DOJ–exactly like the Bush DOJ in the case before Judge [Ann Diggs] Taylor–refused to offer legal justifications to the court for this eavesdropping."

"Instead" Greenwald writes, the Obama administration advanced "the imperial and hubristic position" that the court, indeed any court, "had no right whatsoever to rule on the legality of the program because (a) plaintiffs could not prove they were subjected to the secret

eavesdropping (and thus lacked 'standing' to sue) and (b) the NSA program was such a vital 'state secret' that courts were barred from adjudicating its legality."

In further comments to the media, Eisenberg stated: "The Obama Administration stepped right into the shoes of the Bush Administration, on national security generally and on this case in particular," adding, "even though I have the security clearance, I don't have the 'need to know,' so I can't see anything. This is Obama. Obama! Mr. Transparency! Mr. Change! It's exactly what Bush would have done."

As this writer has argued many times, while the color of the drapes in the Oval Office may have changed since Obama took office, on every substantive issue, from warrantless wiretapping, to indefinite detention and preemptive wars of imperialist aggression, the current regime has recapitulated, indeed expanded, the onerous policies of his predecessor.

Illegal Programs Proliferate Under Obama

Despite pledges from candidate Obama and his acolytes that illegal activities by the secret state would be reined-in, the Obama administration has sought to embellish the Executive Branch's lawless policies as the "War on Terror" metastasizes on a planetary scale.

Both The New York Times and The Washington Post have confirmed that the Obama administration "has taken the extraordinary step of authorizing the targeted killing of an American citizen, the radical Muslim cleric Anwar al-Awlaki."

Whether or not al-Awlaki is an operative of the Afghan-Arab database of disposable Western intelligence assets known as al-Qaeda, or whether the dodgy cleric's targeting is part of a CIA clean-up operation that would preempt disclosure of the Agency's foreknowledge of the 9/11 attacks is besides the point.

What is significant is that the administration is now standing-up a presidential assassination program that would target American citizens far from any battlefield, solely on the basis of unchecked accusations by the Executive Branch that they're involved in terrorism.

No warrant, no arrest, no trial: in place of a lawful conviction by a "jury of his peers," "justice" will come in the form of a Hellfire missile or a bullet in the back of the head!

In November, I wrote of a suggested plan published by the Joint Special Operations University (JSOU) to create a secretive "National Manhunting Agency."

In that piece I said while the text was not an "official" report, the fact that the monograph, Manhunting: Counter-Network Organization for Irregular Warfare, was written by retired Air Force Lt. Colonel George A. Crawford and published by JSOU, lends added weight to arguments by critics that the United States Government has "gone rogue" and is preparing a planet-wide Operation Condor network to capture or kill imperialism's enemies.

In light of last week's reports, does such an entity now exist, either as an official, though compartmented, code-word protected secret operation, or as a privatized Murder, Inc.?

On the domestic surveillance front, as The New York Times revealed in several investigative pieces in 2009, NSA, despite assurances from the Obama administration, continued to intercept "private e-mail messages and phone calls of Americans in recent months on a scale that went beyond the broad legal limits established by Congress last year."

According to journalists Eric Lichtblau and James Risen, the "intelligence officials" said that the agency "had been engaged in 'overcollection' of domestic communications of Americans. They described the practice as significant and systemic."

In a follow-up piece, the Times' reporters disclosed, that a former NSA analyst "described being trained in 2005 for a program in which the agency routinely examined large volumes of Americans' e-mail messages without court warrants. Two intelligence officials confirmed that the program was still in operation."

Indeed, as a heavily-redacted 38-page report released last year by the inspectors general of five federal agencies found, most "intelligence officials" interviewed "had difficulty citing specific instances" when the National Security Agency's wiretapping program contributed to successes against "terrorists."

But as a means for monitoring the communications of dissident and activist groups, lawless surveillance programs have been a boon to America's political police as they zero-in on anarchists, Muslims, environmentalists, indeed any group perceived to be a "threat" to the capitalist order.

The report goes on to state that when President Bush authorized the illegal warrantless wiretapping operation, he also signed off on a host of other surveillance programs that the secret state has never publicly disclosed. According to multiple published reports, those programs include a massive data-mining operation of the email, internet searches, blog posts, GPS locational data of American citizens.

Security researcher Chris Soghoian, the publisher of the web site Slight Paranoia, discovered at the secretive Intelligent Support Systems (ISS) wiretapping conference last October in Washington, that a niche security outfit, Packet Forensics was marketing internet spying boxes to the federal government.

In December, Soghoian revealed that a Sprint Nextel executive disclosed at ISS that the firm provided law enforcement agencies with its customers' (GPS) location information "over 8 million times between September 2008 and October 2009" and that this new "tool" for tracking our every move "was made possible due to the roll-out by Sprint of a new, special web portal for law enforcement officers."

According to Soghoian and researcher Sid Stamm, Packet Forensics has developed technology designed to intercept communications without breaking encryption, by deploying forged security certificates instead of real ones that websites use to verify connections.

SSL certificates are the tiny lock symbol that appears in your web browser when you make a "secure" connection for online banking or to purchase a book or video game.

In a paper published March 24, Certified Lies: Detecting and Defeating Government Interception Attacks Against SSL, Soghoian and Stamm reveal that "a new attack" on individuals' privacy rights is "the compelled certificate creation attack, in which government agencies compel a certificate authority to issue false SSL certificates that are then used by intelligence agencies to covertly intercept and hijack individuals' secure Web-based communications. We reveal alarming evidence that suggests that this attack is in active use."

According to a marketing brochure handed out by Packet Forensics at the ISS conclave, “Users have the ability to import a copy of any legitimate key they obtain (potentially by court order) or they can generate ‘look-alike’ keys designed to give the subject a false sense of confidence in its authenticity.” In other words, secret state agencies, with or without the legal niceties one generally expects in a democracy, can forge security keys “for reasons of state.”

Soghoian and Stamm aver that the product is recommended for government investigators and that Packet Forensics stated that “IP communication dictates the need to examine encrypted traffic at will,” therefore “your investigative staff will collect its best evidence while users are lulled into a false sense of security afforded by web, e-mail or VOIP encryption.”

In blunt terms, all your communications belong to us! And if you don’t like it, well, there’s a jail cell waiting for you in some quiet, out-of-the-way “secure location” otherwise known as a black site!

How has the “change” administration responded to these, and a raft of other reports? The Washington Post reported April 9, that congressional grifters and privacy advocates “are stepping up the pressure on the Obama administration to fill the five vacant seats on the Privacy and Civil Liberties Oversight Board, a panel created in 2004 to ensure that executive branch counterterrorism policies protect Americans’ civil liberties.”

Post journalist Ellen Nakashima disclosed that the “board has been vacant since the end of the last administration.”

On and on it goes.

The securitization and militarization of daily life in the “greatest democracy money can buy” proceeds apace. As anthropologist and social critic David Price revealed in a new piece for CounterPunch, America’s military-industrial-intelligence-academic-complex has pressured U.S. universities to welcome the CIA and other secret state agencies back onto campuses with open arms.

“After 9/11” Price writes, “the intelligence agencies pushed campuses to see the CIA and campus secrecy in a new light, and, as traditional funding sources for social science research declined, the intelligence community gained footholds on campuses.”

These programs, managed by the Office of the Director of National Intelligence’s (ODNI) Intelligence Advanced Research Projects Activity (IARPA) “use universities to train intelligence personnel by piggybacking onto existing educational programs.”

“Even amid the militarization prevailing in America today,” Price writes, “the silence surrounding this quiet installation and spread of programs … is extraordinary.”

Not so extraordinary however, if one considers America’s rapid transformation into a police state even as the capitalist Empire runs aground.

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