US intelligence appeals court sanctions increased domestic spying

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Although it has been in existence for 25 years, the secret United States Foreign Intelligence Surveillance Court of Review, which consists of three semi-retired appeals court judges selected by Supreme Court Chief Justice William Rehnquist, issued its first-ever ruling on November 18, gutting a Watergate-era law intended to limit government wiretap surveillance within the US.

Each of the three judges on the Court of Review was initially appointed to the federal judiciary by Ronald Reagan and has a well-documented right-wing history. The hearing was conducted in closed chambers on September 9. Only the Bush administration was allowed to appear and argue its side.

The immediate impact of the November 18 ruling is to permit government agents to eavesdrop and search homes and offices simply by claiming that the information might relate to the activities of "agents of foreign powers"—regardless of whether criminal activity is involved—and to use the results in criminal prosecutions. Ordinarily in criminal cases, a search warrant based on probable cause to suspect illegal activity is required.

The ruling is the latest in a series of government actions and court decisions since September 11, 2001 attacking democratic rights, expanding the police powers of the state, and paving the way for authoritarian rule in the US.

Traditionally, the Fourth Amendment to the US Constitution's Bill of Rights bars police from eavesdropping on calls or searching premises without warrants, which require affidavits establishing probable cause. A judge must issue the warrant and limit its scope to the probable cause presented. Evidence obtained in violation of the Fourth Amendment is subject to the exclusionary rule, which prevents the use of illegally obtained evidence in criminal trials. Because of the November 18 decision, these basic rules no longer apply so long as the government uses intelligence gathering and counterterrorism as the justification for the wiretap or search.

Congressional investigations triggered by the excesses of the Nixon administration culminated in the mid-1970s with revelations of widespread government spying on domestic political organizations and figures. In 1978 Congress, accepting the contention that some spying had to be carried out for national security regardless of criminal conduct, passed the Foreign Intelligence Surveillance Act (FISA), which prohibits government agents from wiretapping or searching under the guise of national security unless they first obtain an order from the secret "FISA Court."

FISA applies a much lower legal standard than the Fourth Amendment warrant clause. Instead of probable cause relating to criminal activity, a surveillance order requires only a showing of reasonable suspicion that the target of the surveillance, who could be a US citizen or a foreign national, is an "agent of a foreign power." The definition of "foreign power" is not restricted to other nations, but includes "a group engaged in international terrorism or activities in preparation therefore," as well as "a foreign-based political organization, not substantially composed of United States persons."

There was concern from the beginning that government agents would use FISA orders to circumvent the Fourth Amendment's warrant requirement by using foreign intelligence investigations as a pretext for gathering evidence for use in domestic criminal prosecutions. Accordingly, FISA required that intelligence gathering be the "primary purpose" of a FISA wiretap order. Prior administrations established a "wall" separating intelligence gathering from criminal prosecutions, and previous court decisions, including one from the conservative Fourth Circuit Court of Appeals, established that the Fourth Amendment required the "wall."

These limitations were discarded by this week's ruling, leaving the field wide open for warrantless domestic wiretapping under the pretext of foreign intelligence gathering.

The case began last May when the FBI in secret sought two wiretap orders from the FISA court. The contents of those applications are still secret, so the public remains unaware of the surveillance targets or reasons for the government's interest in them. The FISA court judges issued a confidential ruling denying the applications, and set out guidelines to separate intelligence gathering from criminal prosecutions. In its 25-year history, the FISA court has approved over 13,000 surveillance orders. There is no record of any other applications being refused.

The written decision, which was signed by seven FISA judges, became public during Senate Judiciary Committee hearings last August, and its disclosure that the FBI lied on as many as 75 wiretap applications received widespread attention

in the media. That decision also affirmed the requirement that FISA wiretap orders be primarily for foreign intelligence gathering, and it placed strict limitations on use of the information gathered "to enhance criminal prosecutions."

The USA Patriot Act, which was rammed through Congress last year in the weeks following the September 11 attacks, replaced FISA's rule that foreign intelligence must be the "primary purpose" with a weaker standard, declaring that it must be "a significant purpose" of the spying. In this week's opinion reversing the lower FISA court decision, the Court of Review interpreted that provision to mean that foreign intelligence wiretapping is barred only when the "sole objective" is a criminal prosecution for "wholly unrelated ordinary crimes."

The lower court's May ruling made clear that foreign intelligence probes could not be controlled by prosecutors. The Court of Review's decision reversed that rule as well, finding that FISA courts cannot delve into "the origins of an investigation, nor examination of the personnel involved." By limiting the amount of review the FISA court can exercise over surveillance order applications, the Court of Review transferred most of the discretion to authorize a search from the FISA court to the Department of Justice itself, a further erosion of the Constitution's checks and balances.

An obviously elated Attorney General John Ashcroft hailed the decision, stating, "In intelligence, in counterintelligence and counterterrorism investigations, the court's ruling confirmed the Department of Justice's legal authority to integrate fully the functions of law enforcement and intelligence."

The ruling was denounced by civil libertarians, such as Ann Beeson, an attorney for the American Civil Liberties Union (ACLU), who explained that the ruling means "the attorney general can suspend the ordinary requirements of the Fourth Amendment in order to listen in on phone calls, read emails, and conduct secret searches of Americans' homes and offices."

The ruling "rolled back 25 years of precedent as to the proper boundaries between criminal investigation and foreign intelligence surveillance," according to Joshua Dratel of the National Association of Criminal Defense Lawyers (NACDL).

Both the ACLU and the NACDL were allowed to file "friend of the court" briefs as *Amicus Curiae*, but only Theodore Olson, the US Solicitor General, was permitted to argue before the Court of Review. Olson, a founding member of the right-wing Federalist Society, played a major role in the political conspiracy by right-wing Republicans to destabilize the Clinton administration, culminating in the Paula Jones sexual harassment suit, the Kenneth Starr investigation and the impeachment and Senate trial of Clinton. (*See* Behind the Clinton impeachment trial—Profile of a right-wing conspirator: The case of Theodore Olson)

Olson's last legal case before his current appointment was representing candidate George W. Bush before the US Supreme Court in the proceedings leading up to the High Court's infamous December 12, 2000 ruling that blocked the Florida vote recount and effectively installed Bush in the White House.

The judges on the FISA Court of Review include Laurence Silberman of the Court of Appeals for the District of Columbia Circuit. A career Republican Party operative before his appointment by Reagan to the most powerful appellate court next to the Supreme Court, Silberman has been instrumental in numerous right-wing legal provocations over the last 20 years. With fellow DC appellate judge David Sentelle, himself a former aide to right-wing Republican Senator Jesse Helms, Silberman reversed the criminal convictions of Lt. Col. Oliver North and Admiral John Poindexter in 1990, thus scuttling the efforts of Special Prosecutor Lawrence Walsh to prosecute the key figures in the Iran-Contra scandal.

Silberman and Sentelle were two of the three appellate judges responsible for installing Kenneth Starr as special prosecutor in 1994. Flipping 180 degrees on the powers of the special prosecutor, in 1998 Silberman penned a vitriolic opinion ordering secret service agents to cooperate with Starr in his witch-hunt over the Monica Lewinsky affair, writing that Clinton "has declared war on the United States."

Ashcroft has already implemented plans to create a new FBI unit for seeking FISA surveillance orders, assigning a "special intelligence prosecutor" for every judicial district and developing a computer system to get rapid FISA court approval of wiretaps.

Legal experts appear to agree that because the only party to the case is the government, there is no legal standing to appeal the November 18 decision to the US Supreme Court.