US court rules NSA spying program unconstitutional

Bush appeals decision and denounces judge

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In a sharply worded decision, a federal judge ruled on Thursday that a program set up by the Bush administration to monitor phone calls and emails of US citizens without court-issued warrants violates a federal statute and the US Constitution.

Judge Anna Diggs Taylor of the US District Court in Detroit ruled that the program, operated by the National Security Agency (NSA) since 2001, violates the First and Fourth Amendments to the Constitution, the separation of powers principle laid out in the Constitution, and a 1978 law enacted to regulate domestic spying by the government. As a consequence, she ruled that the program must be stopped.

In a blunt rebuke to the Bush administration's assertion of virtually unlimited presidential powers, Taylor wrote that the government "appears to argue here that ... because the president is designated commander in chief of the Army and Navy, he has been granted the inherent power to violate not only the laws of the Congress, but the First and Fourth Amendment of the Constitution itself.... There are no hereditary kings in America and no powers not created by the Constitution."

The Bush administration immediately announced that it would appeal the decision and filed a brief calling on the judge to stay her ruling pending the outcome of legal appeals. A hearing on the request for a stay was scheduled for September 7. In the meantime, the NSA surveillance program will be allowed to continue on the basis of an agreement reached between the chief plaintiff, the American Civil Liberties Union (ACLU) and the US Justice Department.

The administration denounced the ruling, reiterating its position that the president has quasi-dictatorial powers, including the right to ignore federal laws and secretly wiretap Americans, by virtue of his position as commander in chief in the "war on terror."

At a press conference on Friday, Bush said that he "strongly" disagreed with the decision and added he was confident it would be reversed on appeal. The appeal will go before the politically conservative Sixth Circuit Court of Appeals, and is expected ultimately to end up in the US Supreme Court, which has shifted further to the right with the addition of two Bush appointees—Chief Justice John Roberts and Associate Justice Samuel Alito.

At his press conference, Bush said that those who heralded Taylor's ruling "simply do not understand the nature of the world in which we live." Ignoring the constitutional and legal issues addressed by the court, he declared, "[W]e must give those whose responsibility it is to protect the United States the tools necessary to protect this country in a time of war."

Republican Congressman Peter Hoekstra, the chairman of the House Intelligence Committee, came close to calling Judge Taylor a traitor, saying, "It is disappointing that a judge would take it upon herself to disarm America during a time of war."

In the case before Judge Taylor, the plaintiffs—including the ACLU, a Muslim-American organization, and several historians and journalists—did not challenge the government's claim that the NSA program is designed to monitor only calls between the US and other countries in which one of the parties is suspected of being a member of Al Qaeda. Several media reports have indicated that the program is much more expansive than this, and is only part of a much broader effort by the government to spy on the American people.

The plaintiffs did challenge, in addition to the NSA wiretapping operation, a separate NSA program, exposed earlier this year by *USA Today*, in which major telecommunications companies give the government access to massive databases of phone records of millions of Americans. Taylor accepted the administration's claim that any court action on this program would require the exposure of state secrets.

Nevertheless, her decision on the NSA eavesdropping

program was a sharp rebuff to the Bush administration. Taylor ruled that the NSA program violates the Fourth Amendment, which prohibits "unreasonable searches and seizures" and states that "no warrants shall issue, but upon probable cause."

Taylor cited a 1984 Supreme Court ruling which noted that the Court had repeatedly upheld the Fourth Amendment's insistence on adherence to judicial process and declared that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."

Certain exceptions are set out in the 1978 Foreign Intelligence Surveillance Act (FISA), which allows the attorney general to authorize a search without a warrant for up to 72 hours.However, the NSA program, according to the judge, was set up entirely "outside the judicial process." The program therefore violates not only the FISA Act, but also the Fourth Amendment.

In violating the Fourth Amendment, the judge argued, the administration is also violating the First Amendment, since the right of free speech is inextricably bound up with the prohibition of unreasonable searches and seizures. Taylor cited a 1961 Supreme Court case in which the court noted, "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."

In her argument, Taylor traced the history of both the First and Fourth Amendments, noting that they were passed in reaction to the authoritarian actions of the British crown, which indiscriminately searched the homes and persons of American colonists in an effort to repress political dissent.

As part of the separation of powers between three co-equal branches—legislative,executiveandjudicial—whichformsthe foundation of the American constitutional system, Article II of the Constitution grants to the president, as head of the executive branch, the task of executing laws. It also ensures civilian control over the military by making the president the commander in chief of the armed forces.

In justifying its sweeping attacks on democratic rights, the Bush administration has grossly distorted the commander in chief clause to advance the position that Article II gives the president an "inherent power" to override the legislative and judicial branches and take virtually any action in the name of national security.

Taylor also dismissed another repeated claim of the Bush administration: that the congressional resolution passed in the immediate aftermath of 9/11 authorizing military action against the perpetrators of the terrorist attacks on New York and Washington sanctioned any and all actions taken by the White House in the name of the "war on terror," including its secret domestic spying programs.

In presenting its case before Taylor, the government did not attempt to justify the NSA program on legal grounds. Rather, it argued that the suit should be thrown out because its adjudication would threaten the exposure of classified national security information.

Taylor rejected this argument, noting that the Bush administration has already acknowledged the existence of the NSA wiretapping program, and that the plaintiffs were not seeking additional information. She said that the plaintiffs had standing to bring the case, since the very existence of the program had already had a material effect in hindering or preventing communications between journalists and their sources, and between attorneys and their clients.

The judge wrote that if she were to accept the arguments of the government, "the president's actions in warrantless wiretapping ... would be immunized from judicial scrutiny. It was never the intent of the Framers to give the president such unfettered control, particularly where his actions blatantly disregard the parameters clearly enumerated in the Bill of Rights."

In appealing the ruling, the administration is counting on a sympathetic right-wing majority on the Supreme Court. On a parallel track, the White House is working with Republican Senator Arlen Specter to pass a bill that would take all of the cases presently in the courts challenging the NSA program and place them before the secret FISA court. That court, which was set up to approve FISA warrants, has already declared in a previous case that the president has an inherent authority to order warrantless wiretapping.