US appeals court rejects lawsuit against warrentless domestic spying

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The US Court of Appeals for the Sixth Circuit on Friday threw out a suit brought by the American Civil Liberties Union (ACLU) against the Bush administration's program of warrentless surveillance of telephone and email communications by people residing in the United States.

In a two-to-one decision, a three-judge panel of the appeals court, based in Cincinnati, Ohio, ruled that the plaintiffs did not have standing to challenge the domestic spying operation in the courts because they could not prove that they were directly affected by the program.

At the same time, the majority acknowledged that no such proof was possible because the government refused to furnish the court with information about the classified program, on the grounds of "state secrets."

The ruling, with Republican-appointed judges in the majority, sent the case back to the US District Court in Detroit, Michigan for dismissal.

Last August, Judge Anna Diggs Taylor of the Detroit court ruled in favor of the ACLU in a sharply worded decision that declared the warrentless spying program to be in violation of the First and Fourth Amendments to the US Constitution, the constitutional principle of separation of powers, and the 1978 Foreign Intelligence Surveillance Act (FISA). The Fourth Amendment prohibits unreasonable searches or seizures, and the First Amendment guarantees freedom of speech.

The program in question was secretly launched by Bush in an executive order issued shortly after the terrorist attacks of September 11, 2001. It authorized the National Security Agency (NSA), then headed by the current director of the CIA, Gen. Michael Hayden, to wiretap international phone calls and intercept international emails involving US residents, without obtaining a court-issued warrant.

The flagrantly illegal and unconstitutional program first came to public attention when it was exposed in an article published in December, 2005 by the *New York Times*. Bush then acknowledged the existence of the program and defended it on the grounds that, as commander in chief in the "war on terror," he had unlimited powers to ignore the provisions of the FISA law and was not subject to oversight by Congress or the courts.

The following month, the ACLU filed a suit against the program on behalf of lawyers, journalists and scholars who claimed that it prevented them from performing their jobs properly. In her August 2006 ruling, Judge Taylor rejected the dictatorial claims of the White House and ordered the program halted.

She 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."

She rejected the government's argument that the plaintiffs did not have standing to bring the suit 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.

She 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."

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Bush personally denounced Taylor's ruling and much of the media portrayed it as either extreme or legally frivolous. The ACLU agreed to a stay of the judgment pending the government's appeal, which meant the spying program could continue until then.

Last January, the White House announced that it would submit the NSA program for supervision by the secret court established by the FISA act. It was claimed that this move made Judge Taylor's ruling moot. However, the ACLU plaintiffs insisted, correctly, that their suit remained critical since Bush had not renounced his supposed right to order warrentless wiretaps, and such programs could be implemented in the future either by him or by succeeding presidents.

Friday's appeals court ruling does precisely what Judge Taylor warned against. "This is Catch-22," said Steven R. Shapiro, legal director of the ACLU. "I think what in effect they're saying is that we can't tell you whether you have been wiretapped because that's a secret. And unless you know you've been wiretapped, you can't challenge that program."

He added, "We are deeply disappointed by today's decision that insulates the Bush administration's warrentless surveillance activities from judicial review and deprives Americans of any ability to challenge the illegal surveillance of their telephone calls and emails."

The two Republican judges who ruled against the plaintiffs, Judge Alice M. Batchelder and Judge Julia Smith Gibbons, sidestepped the question of the constitutionality of the NSA program and said the plaintiffs lacked standing to sue without proof that they were monitored by the government. They then upheld the right of the government to conceal the identity of those who had been wiretapped and concluded, in effect, that no victim of government wiretapping could seek redress in the courts if the government invoked the claim of state secrets.

Judge Gibbons wrote that the case turned "upon the single fact that the plaintiffs have failed to provide evidence that they are personally subject to the program," and then added that "plaintiffs are ultimately prevented from establishing standing because of the state secrets privilege."

Judge Batchelder, while evading consideration of the legality of the NSA program, implicitly attacked Judge Taylor's ruling, saying, "The district court answered all of these questions [whether the program violated the FISA act and the First and Fourth Amendments] in the affirmative and imposed an injunction of the broadest possible scope."

Judge Batchelder was appointed to the appeals court by the senior President Bush; Judge Gibbons by George W. Bush.

Judge Ronald Lee Gilman, a Clinton appointee, dissented, ruling that at least the plaintiffs who are lawyers had standing, since the NSA program affected the way they communicate with clients in the Middle East because they feared their discussions would be intercepted. He also said the surveillance program clearly violated the FISA act.

Steven Shapiro said the ACLU is considering its legal options, including asking for a full-court hearing in the Sixth Circuit or asking the US Supreme Court to consider the case.

A number of other challenges to the spying program have been consolidated and are being heard by a federal judge in California. Some plaintiffs in that suit, an Islamic charity and two of its lawyers, contend they can prove they have standing even under Friday's ruling by the Sixth Circuit. They claim to have seen a classified document showing that their communications were intercepted.

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