

# US Supreme Court refuses to hear case against warrantless wiretapping

Joe Kay  
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The US Supreme Court on Tuesday refused to hear an appeal brought by the American Civil Liberties Union and other groups challenging the Bush administration's warrantless domestic wiretapping program.

The case involves the National Security Agency (NSA) wiretapping program begun in 2001 but first revealed to the public through a media leak in December 2005. The program, the full details of which are still not known, included domestic spying in violation of the Foreign Intelligence Surveillance Act (FISA) and the US Constitution.

The ACLU and other civil liberties groups brought the case on behalf of several individuals, including lawyers who argued that correspondence with their clients had been hindered or intercepted by the program. In August 2006, Judge Anna Diggs Taylor of the US District Court in Detroit ruled that the program violates the First and Fourth Amendments of the US Constitution, the separation of powers, and FISA.

In July 2007, the Sixth Circuit Court of Appeals overturned the district court's decision. The appellate court ruled that the ACLU and other groups and individuals do not have standing to challenge to government operation because they could not demonstrate that they had been directly affected. The Supreme Court action on Tuesday means that the appellate court decision will stand.

ACLU Legal director Steven Shapiro noted that the challengers were caught in a "Catch-22." The government has refused to identify the individuals targeted by the NSA program, on the grounds that this information constitutes a "state secret." However, the appellate court decision upheld the government's argument that only those who could prove they had been specifically targeted by the program could have standing to sue.

The effect of this decision is to severely gut any oversight of executive power. The government can violate laws and constitutional rights, but since these actions are carried out in secret no one is able to prove that they have been directly affected.

In her initial decision, Judge Taylor strongly condemned the government's position, pointing to the dictatorial implications of the argument that the "war on terror" gave the president the power to spy on US citizens. She condemned the argument 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."

Taylor ruled that the NSA program violated the Fourth Amendment prohibition of unreasonable searches and seizures because it sets up a system of spying that is entirely outside of any judicial review. The constitutional amendment requires the government obtain judicial warrants based on probable cause.

Taylor also ruled that the program violates the First Amendment because government spying tends to stifle free speech and expression. Individuals who fear government monitoring may curtail political, legal or other activity.

Taylor rejected arguments by the government that the case should be thrown out based the alleged non-standing of the challengers and the state secrets privilege of the government. If this decision were made, she warned, "The president's actions in warrantless wiretapping...would be immunized from judicial scrutiny. It was never the intent of the Framers [of the Constitution] to give the president such unfettered control, particularly where his actions blatantly

disregard the parameters clearly enumerated in the Bill of Rights.”

In a separate case challenging the NSA program, a three-judge panel of the US Ninth Circuit Court of Appeals ruled in November 2007 that a key piece of evidence should be excluded on the grounds of the “state secrets” power of the executive branch. That case has been brought by the Al-Haramain Islamic Foundation, challenging the NSA program on similar grounds as the ACLU case.

Unlike the ACLU case, however, the Al-Haramain charity said that it had received a file from the government showing that the group had been subject to wiretapping. The government argued that it had released the file by accident and that it had to be excluded even though it was no longer secret. The appellate court upheld this position. Without this evidence, Al-Haramain is in a similar situation as the other challengers, being unable to argue its standing to challenge the government program.

The Al-Haramain case added another layer to the “Catch-22.” Even if a group or an individual somehow obtains evidence of being directly targeted, this evidence cannot be used. This sets up an absolute firewall preventing legal challenge. No one can sue unless they can prove standing in the case, but any evidence that can prove standing is excluded on the grounds of “state secrets.”

While the Supreme Court action on Tuesday does not set precedent for other cases, the fact that the Sixth Circuit Court decision will stand does strengthen the government in its attempts to squash or dismiss all challenges to its illegal actions.

The Bush administration is currently seeking to place its spying program on a pseudo-legal foundation by pushing Congress to pass permanent changes to FISA while granting retroactive immunity to telecommunications companies that have collaborated with the government.

Several dozen cases are currently before a California court, charging corporations with violating the rights of their customers by participating in the NSA program. Companies such as AT&T and Verizon turned over massive amounts of data, including emails and phone records, to the government.

Earlier this week, the Senate voted with substantial support from the Democratic Party to permanently alter

FISA and grant telecommunications companies retroactive immunity. The House of Representatives has so far refused to pass a similar bill. While both houses of Congress and both parties are united in their agreement that government powers to spy on the American people should be expanded, negotiations have thus far stalled on the question of immunity.

If the immunity provision passes, it will close off one of the few remaining legal avenues for challenging the illegal spying program.



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