Arguments in Supreme Court warrantless spying case

Obama administration asserts unchecked powers

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On October 29, the US Supreme Court heard oral arguments in a case challenging the power asserted by the Bush and Obama administrations to conduct secret warrantless surveillance around the world without any significant judicial oversight.

The oral arguments were noteworthy for the position, put forward by the Obama administration and supported by right-wing Associate Justice Antonin Scalia, that the case should be thrown out because certain actions by the president are not subject to judicial review.

The case, *Clapper v. Amnesty International*, was brought by the American Civil Liberties Union (ACLU) on behalf of lawyers, journalists, human rights activists and others challenging the 2008 amendments to the Foreign Intelligence Surveillance Act (FISA) that abolished significant restrictions on National Security Agency (NSA) spying.

At the center of the case is a challenge to NSA spying by lawyers representing overseas clients. These lawyers have no way of knowing whether the government is listening in on their communications without a warrant.

Many such lawyers, who have a duty to protect the confidentiality of their communications with their clients, have been compelled to take extraordinary measures to protect their communications from interception by the government. Journalists, likewise, are concerned that the government is listening in on their communications with confidential sources.

The case brings home the reality of the vast expansion of domestic spying in recent years. Warrantless government spying is not a hypothetical possibility, but a fact of daily life—something that has to be taken into consideration with every phone call, email and text message. With secret electronic monitoring rooms installed in every major telecom facility, it is impossible to know what the government is intercepting and reading.

The Bush and Obama administrations both sought to block the ACLU case with an extraordinary Catch-22 argument. Lawyers for both administrations asserted that the identity of people who are subject to government eavesdropping is a "state secret," which cannot be discovered or disclosed. At the same time, both administrations argued that challenges to eavesdropping should be dismissed unless the people bringing the lawsuits could affirmatively demonstrate that their individual communications were, in fact, monitored as a result of the 2008 FISA amendments.

The Obama administration has consistently and aggressively attacked all lawsuits challenging the police state infrastructure erected after September 11, 2001 by invoking the "state secrets" privilege and the president's so-called "commander-in-chief" and "wartime" powers.

In September of last year, the Second Circuit Court of Appeals ruled against the Obama administration in the *Clapper* case and allowed the ACLU challenge to proceed. The Obama administration appealed, and the Supreme Court in May announced that it would take the case.

Almost immediately after the beginning of oral arguments, Justice Scalia intervened to suggest that the Supreme Court should rule that the case cannot be heard at all for lack of "standing." In other words, because the ACLU could not show that any of its communications were monitored (because such information is a "state secret"), the ACLU could not demonstrate that it suffered any legally ascertainable injury or harm.

"That's exactly right, Justice Scalia," responded the Obama administration's attorney, Solicitor General Donald B. Verrilli, Jr.

Scalia continued: "[T]hat just proves that under our system of separated powers, it is none of our business." On behalf of the Obama administration, Verrilli agreed that "the Court's authority cannot be invoked in that circumstance."

Underlying Scalia's invocation of "separated powers" is the so-called "unitary executive theory," of which Scalia is a well known advocate. Largely alien to centuries of American legal precedent, the theory is borrowed wholesale from fascist jurisprudence.

The "unitary executive theory" stands the concept of separation of powers on its head. Instead of operating as a check on the executive and legislative branches, the judiciary is

asserted to have no power to intervene in "wartime" matters and matters of national security, which are deemed to be the exclusive and "separate" province of the executive branch.

The purpose of the doctrine is to detach the executive branch from all historic restraints such as the Bill of Rights, providing a legal rationale for the establishment of a police state. Championed by the Bush administration, this authoritarian doctrine has been embraced and expanded by the Obama administration.

During oral arguments, several justices expressed doubts about the Obama administration position that government spying is completely insulated from judicial review. Associate Justice Sonia Sotomayor asked incredulously, "[Solicitor] General [Verrilli], is there anybody who has standing?"

These justices are no doubt concerned that the Obama administration's position, taken to its logical conclusion, undermines the raison d'etre of the Supreme Court itself, which is ostensibly to ensure that the activities of the executive and legislative branches are lawful and consistent with the US Constitution.

The FISA system was created in 1978 following exposures by the Senate committee headed by Frank Church of Nixon's use of warrantless surveillance against his political opponents. The FISA system consists of secret courts that review requests by intelligence agencies for warrants to conduct surveillance. The system was promoted as a mechanism for protecting the public against warrantless surveillance of the kind perpetrated by the Nixon administration, but in practice the FISA courts rubber stamp virtually all of the intelligence agency requests, giving a veneer of legality to previously illegal government spying.

In 2005, the *New York Times* revealed that the Bush administration was conducting surveillance without even bothering to obtain warrants through the FISA system. Under the Bush administration, intelligence agencies also began illegally colluding without warrants with private telecommunications companies to compile vast amounts of private information concerning ordinary citizens.

In 2008, Congress passed a series of amendments to FISA that in part retroactively justified the Bush administration's activities and dramatically broadened the federal power to eavesdrop. (See "Obama joins Senate vote to legitimize Bush's domestic spying operation")

Most importantly, the 2008 FISA amendments dispense with the requirement that warrants obtained through the FISA system be supported by probable cause and specifically describe the individual subject to the warrant, the facilities targeted, and the communications to be intercepted. Instead, the 2008 amendments permit dragnet acquisition of data, which is then compiled and analyzed by the intelligence agencies.

The warrantless surveillance conducted by the Bush and Obama administration, as well as the 2008 FISA amendments, clearly violate the Fourth Amendment to the US Constitution, which asserts the right to be free from unreasonable searches and requires that the government obtain a warrant from a judge before conducting a search. The Fourth Amendment also prohibits general warrants and requires all warrants to be supported by probable cause.

In the aftermath of 9/11, the Bush administration launched a program of illegal and unconstitutional government spying. Although this spying was clearly illegal for the same reasons that the spying conducted by the Nixon administration was illegal, nobody in the Bush administration has ever been held accountable. On the contrary, the Bush administration program was expanded, codified, and institutionalized by the Obama administration.

Obama has presided over the establishment of "bottomless" databases to house information gathered about ordinary citizens, expanded warrantless wiretapping and monitoring of phone calls and other communications, sent undercover spies and provocateurs to infiltrate dissident political groups, and arranged for the deployment of thousands of military surveillance drones over the US mainland. (See "Obama administration expands illegal surveillance of Americans")

The Obama administration's position that its spying activities are not subject to judicial review is especially significant in light of the recent revelations concerning the "disposition matrix," which is the administration's extrajudicial procedure for "disposing of" (i.e., assassinating) certain individuals selected by the president.

Obama's position with regard to extrajudicial domestic spying goes hand-in-hand with his position regarding extrajudicial assassination. Just as the administration asserts the power to kill any person anywhere in the world without judicial review of any kind, it likewise asserts the right to spy on anyone and everyone free from any oversight by the judiciary.

Where the president can spy on or kill a person on his own initiative without judicial review, the Bill of Rights is effectively nullified. Under the Obama administration's theory, historic democratic legal protections can be invoked only if the president sees fit to allow a case to proceed in the judicial system. Otherwise, they have no effect. The judiciary, rather than being a separate branch of government operating as a check on the executive, is relegated to a mere rubber stamp for executive decisions.

The position taken by the Obama administration in last week's oral arguments is further confirmation that the US political establishment is moving rapidly toward authoritarian forms of rule.