



2011 FISA Court Ruling Denounced Its Having Been Lied To by the Bush and Obama Administrations

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An October 3, 2011, ruling by conservative Judge John Bates of the Foreign Intelligence Surveillance Court (FISC), declassified and disclosed yesterday by the Obama Administration, addressed April 2011 applications made by the government to amend procedures for bulk electronic surveillance, which had been previously authorized by the FISC.

Those new applications included a new revelation by the NSA, about modes and types of information-collection never previously revealed to the FISC. Judge Bates, a G.W. Bush appointee to the federal bench, said that the April 2011 revelation "fundamentally alters the Court's understanding of the scope of the collection conducted pursuant to [FISA] Section 702 and requires careful reexamination of many of the assessments and presumptions underlying prior approvals." In a footnote to that discussion, the Court further remarked, in barely-concealed anger,

"The Court is troubled that the government's revelations regarding the NSA's acquisition of Internet transactions mark the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program.

"In March, 2009, the Court concluded that its authorization of NSA's bulk acquisition of telephone call detail records from [REDACTED] in the so-called 'big-business records' matter 'ha[d] been premised on a flawed depiction of how the NSA uses [the acquired] metadata,' and that '[t]his misperception by the FISC existed from the inception of its authorized collection in May 2006, buttressed by repeated inaccurate statements made in the government's submissions, and despite a government-devised and Court-mandated oversight regime.' [Docket citation.] [REDACTED] Contrary to the government's repeated assurances, NSA had been routinely running queries of the metadata using querying terms that did not meet the required standard for querying. The Court concluded that this requirement had been 'so frequently and systematically violated that it can fairly be said that this critical element of the overall ... regime has never functioned effectively.'"

A page later, in a footnote to a paragraph relating that "The government's submissions make clear ... that NSA has been acquiring Internet transactions since BEFORE the Court's approval of THE FIRST Section 702 certification in 2008 ..." [emphasis added],

Judge Bates pointedly wrote, "The government's revelations regarding the scope of NSA's upstream collection implicate 50 U.S.C. sec. 1809(a), which makes it a crime [to engage in electronic surveillance under color of law, or to use information obtained through such surveillance] See [REDACTED] (concluding that Section 1809(a)(2) precluded the Court from approving the government's proposed use of, among other things, certain data acquired by NSA without statutory authority through its 'upstream collection'). The Court will address Section 1809(a) and related issues in a separate order."

In another section, Judge Bates makes particular reference to the Administration's violation of the Fourth Amendment: "The Court is also unable to find that NSA's targeting and minimization procedures, as the government proposes to implement them in connection with MCTs [multi-communication transactions-ed.], are consistent with the Fourth Amendment."

These remarks give the lie to the repeated protests of President Obama and top officials of the U.S. intelligence community since the publication of Edward Snowden's NSA leaks of vast electronic surveillance conducted against U.S. citizens, that there is nothing to worry about, since the programs have been fully reviewed and authorized by the Foreign Intelligence Surveillance Court (FISC). More recently, the FISC's chief judge, Reggie Walton publicly demurred in a front-page *Washington Post* article, that the FISC has no way to evaluate the information it is given by government officials seeking rulings from the FISC, and Judge Bates's remarks clearly indicate that Judge Walton's assertions, not the Obama Administration's, reflect the actual reality of the matter

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