OBAMA DOJ DECLINES TO SUPPORT LEGALITY OF BUSH SURVEILLANCE PROGRAM

Hot on the heels of the Telephone Immunity Secrecy Blob, today the 2nd Circuit Court of Appeals heard oral argument on *Wilner v. NSA and DOJ*, a FOIA case wherein the Center for Constitutional Rights is seeking disclosure of evidence of clandestine surveillance of attorney-client conversations between detainees and their counsel. The CCR issued this press release today:

> The Court of Appeals heard arguments today in the Center for Constitutional Rights (CCR) warrantless surveillance case, *Wilner v. National Security Agency (NSA)*. CCR and co-counsel argued that the executive branch must disclose whether or not it has records related to wiretapping of privileged attorney-client conversations without a warrant.
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> Said Kathryn Sabbeth, Assistant Professor of Law at the University of North Carolina at Chapel Hill School of Law, who argued the case, "No argument could be made that targeting American lawyers on American soil to obtain information about their clients was legal, and indeed when counsel for the government was pressed for an explanation he offered none."
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> The rights attorneys appealed the government's Glomar assertions, meaning its refusal to either confirm or deny the existence of records sought in Freedom of Information Act (FOIA) litigation relating to the NSA warrantless wiretapping program and surveillance of attorneys representing

> detainees at Guantánamo.
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> “Our work with our clients may have been deeply compromised by illegal surveillance carried out by the last administration,” said Shayana Kadidal, Senior Managing Attorney of the CCR Guantánamo Global Justice Initiative. “The new administration has no legal basis for refusing to come clean about any violations of attorney-client privilege by the NSA.”
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> During arguments, the government’s counsel stated, “We take no position on the legality of the TSP,” referring to the Bush administration’s Terror Surveillance Program.
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> The case is a FOIA lawsuit on behalf of 23 attorneys, including CCR staff attorneys Gitanjali S. Gutierrez and Wells Dixon, law professors, and partners at prominent international law firms, who believe they may have been the subjects of the NSA’s warrantless wiretapping program authorized by the prior administration shortly after September 11, 2001. CCR, the Institute of Public Representation at Georgetown University Law Center and the Chicago law firm Butler Rubin Saltarelli & Boyd filed the case in the U.S. District Court for the Southern District of New York on May 17, 2007. The district court ruled the NSA could refuse to say anything either confirming or denying the existence of any related materials because to do so “would reveal information about the NSA’s capabilities and activities.”
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> Plaintiffs argued that the program and many details about it have already been made public, and a confirmation or denial that the lawyers were subject to surveillance cannot possibly harm NSA’s intelligence-gathering abilities. The

> government cannot refuse to confirm or deny that these records exist, they said, because it would be unconstitutional and illegal to be eavesdropping on the lawyers without a warrant, and FOIA exemptions cannot shield unconstitutional or illegal conduct.
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> For more information on Wilner v. NSA, click here.

Did you notice the bolded paragraph in the release and the direct quote from the government during argument? Because it is fairly interesting.

The plaintiffs are arguing that exceptions to FOIA cannot be asserted to shield illegal and unconstitutional conduct and the government is refusing to affirmatively defend the legality of the conduct at oral argument on appeal. To be fair, the government is simply being consistent as they also refused to defend the legality in the trial court, instead relying on the FOIA equivalent of a state secrets assertion known in FOIA litigation circles as the "Glomar Response". (For further discussion and explanation of the Glomar defense, see the order by Judge Cote in the District trial court).

In short, once again the Obama Administration is, in yet another forum, adopting lock, stock and silencer fitted barrel the policy, tactics and arguments of the Bush/Cheney Administration to shield wholesale illegal and unconstitutional conduct by way of executive classification and secrecy.

President Obama may have won the Nobel Peace Prize; but, contrary to his strident promises while campaigning, he sure won’t be up for any prize for honesty, transparency, and repeal of Bush/Cheney illegal and unconstitutional surveillance programs.