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Secrets Exposed: How the NSA Rubber-Stamps Warrentless Spying

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7/14/2013

If we are to regard ourselves as a grown-up nation—and anything else will henceforth be mortally dangerous—then we must, as the Biblical phrase goes, put away childish things; and among these... the first to go, in my opinion, should be... the search for absolute security...

—George Kennan, The Sources of Soviet Conduct, in Foreign Affairs (1947.)

Now we know what they so badly wanted to tell us but couldn't and what a revelation it is. I refer to the exciting and long-awaited news reported in the *Wall Street Journal* as to what it was that Senators Mark Udall and Tom Wyden have been dying to tell the American public about the operations of the NSA but were unable to disclose because the information was of such a top-secret nature.

According to the *WSJ*, the secret information that the senators had that was so confidential they could only hint at it was an interpretation of one word in the Patriot Act by the FISA Court. The super super secret word was "relevant." To the non-lawyer this may seem like a secret that was hardly worth keeping and, indeed, it may even seem so to the legal mind. To understand the true importance of this revelation, a bit of history is called for. The word "relevant" has become important because of two other words, "special needs."

In legal parlance “special needs” has referred to two different things. In one context it refers to individuals who, because of abilities and related issues, are described as having “special needs.” In another context, and the one that concerns us today, it refers to situations that—because of their great importance—are used to justify the government obtaining court orders permitting it to conduct searches without first obtaining a warrant as would normally be required by the 4th amendment to the Constitution.

“Special needs” finds its genesis in a 1989 case in which a court ruled that an individual’s Fourth Amendment protection from unreasonable search was not violated when random drug tests were conducted on railway workers. The court reasoned that running a railroad was a sufficiently dangerous operation that it was reasonable for the government to conduct random drug tests of employees without first obtaining a court order permitting the tests. Following this line of reasoning, the FISA court greatly expanded the use of “special needs” to include warrantless collection of vast amounts of communication information that it claims pertain to “special needs”—i.e. “terrorist" activities. Once the court adopted the broad interpretation of “special needs,” the jump to “relevant” was an easy one. Relevant, too, comes with a bit of history, however.

Until the FISA Court adopted a broader meaning for “relevant,” something was considered “relevant” in criminal law if it was information pertinent to a particular investigation. If, for example, a prosecutor sought an order asking a judge to permit the prosecutor to tap the phone of Whitey Bulger so it could see if he was ordering people to be killed, a court would almost certainly have considered that “relevant” to the inquiry and permitted the tap without requiring that Whitey be given notice of the tap. If, however, the prosecutor asked the court for permission to obtain the phone records of all the residents of the community in which the prosecutor thought Whitey lived, the court would have laughed the prosecutor out of the court while denying the request.

The FISA court, as we now know, lacks a sense of humor. Not only does it lack a sense of humor, it has quite a different idea of what is meant by the word “relevant” when used in the context of its activities. It believes that, because of the special needs attendant upon terrorist investigations, an order permitting the aggregation of records on millions of people would be relevant to an investigation. Put another way, it would seem that anything the government wants, the FISA court thinks the government should get.

The FISA judges do not take kindly to the suggestion that the court is simply a rubber stamp for the government’s request for secret orders. That became obvious when Russell Tice, a former NSA analyst described the FISA Court as a “kangaroo court with a rubber stamp.” Reggie Walton, the Court’s presiding judge took umbrage at the comment, telling the *Guardian*: “The perception that the court is a rubber stamp is absolutely false... There is a rigorous review process of applications submitted by the executive branch.” Judge Walton’s assertion of 'rigorous review' was borne out by statistics.

According to a report in the *Guardian*, in 2012 the court received 1,856 requests for surveillance, which was a 5% increase over the number of requests received in 2011. Although there was a slight increase in the number of requests received, there was one number that neither increased

nor decreased during those two years. The unchanged number was zero—the number of requests for surveillance that the FISA court, applying the rigorous scrutiny described by Judge Walton, turned down. Zero does not help us understand the meaning of "rigorous review." The requests for surveillance that were approved, however, help us understand the meaning of "special needs" and "relevant."