In my August 15 column for this site, I discussed Northern California federal district judge Vaughn Walker's decision rejecting the Administration's claim that the state-secrets privilege applied. As I discussed there, the state-secrets privilege protects against disclosures of information that could imperil national security. I argued that Judge Walker's ruling was supported both by recent Supreme Court war-on-terror precedents, and by an older Supreme Court decision, Reynolds v. United States.

Recent precedents like Rasul v. Bush and Hamdan v. Rumsfeld have reasserted the crucial role of the federal courts as a check on executive power, and rejected the idea that courts either lack jurisdiction to hear cases, or, if they have jurisdiction, must blindly accept the Administration's say-so on factual matters where courts otherwise would look to the evidence. And Reynolds made clear that in state-secrets privilege cases, in particular, federal judges are not to be transformed into mere rubber-stamps for executive officials' claims.

Since my last column, on August 17, another ruling relating to the NSA program came down. (Although on August 9, a judicial panel transferred seventeen cases relating to
the NSA program to the Northern District of California, and thus to Judge Walker, this was not one of them.) In this second ruling, federal district judge Anna Diggs Taylor of the Eastern District of Michigan also rejected the state-secrets privilege - citing, among other sources, Judge Walker's earlier ruling.

But there was a twist: The case before Judge Taylor involved not only wiretapping of phone lines, but also interception of Internet communications. Judge Taylor found that the state-secrets privilege required dismissal of the Internet-based claims, but not of the wiretapping-based claims.

Interestingly, Judge Walker had reached a different type of split result in allowing some civil discovery to go forward, but with limits. He expressly reserved his right to find, at a later stage of the litigation, that the state secrets privilege did, indeed, apply. Plainly, both judges recognized this was an area where it was necessary to tread cautiously.

Like Judge Walker, Judge Taylor had the benefit of looking at certain government submissions *ex parte* (that is, without the party's opponents or the public having access), and *in camera* (that is, in a closed courtroom or in the judge's own chambers). Those submissions, of course, could not be detailed in the judges' opinions. So some of the two jurists' specific reasoning cannot yet be made public. But to the extent that the judges were able to make their reasoning public, it was persuasive.

**How Secret Are the Government's Secrets, Given Its Own Public Relations Campaign Defending Warrantless Wiretapping?**

Why didn't the two judges agree with the government that to protect state secrets, the case had to be immediately dismissed?

For one thing, both judges reasoned that at least some of the secrets were no long secret. Rather than remaining silent about the program after its existence was leaked, the Bush Administration mounted an active defense.

Both judges, however, found the Administration's defense deceptive. Judge Taylor noted, for instance, that the Administration claimed its program had "a valid basis in law" even though, she noted, it had acted, undisputably, in violation of the *Foreign Intelligence Surveillance Act*, or FISA - and, she reasoned likely in violation of the *First Amendment* and the *Fourth Amendment* as well. And Judge Walker noted that the Administration's early statements had suggested limits on the surveillance program - via claims that it targeted only international calls directly related to Al Qaeda - but that strong evidence suggested that no such limits actually existed.

The Administration has an answer to Judge Taylor's point (though reasonable minds
can differ as to how persuasive that answer is): It has argued that the President's Article II powers as Commander-in-Chief trump FISA (and, presumably, the First and Fourth Amendments, too). But it does not seem to have an answer to Judge Walker's point: Why did the Administration try to actively deceive the public, when it might have stayed silent on the matter?

After all, as Judge Walker noted, the answer that the deception was really directed at terrorists, not the public, is unpersuasive: Any terrorist who was familiar with headlines would have simply avoided AT&T and used one of the carriers -- Qwest, Bell South, and Verizon -- who insisted they'd never participated.

The Judges Were Rightly Concerned by Evidence of Administration Deception

Courts don't like deception. And they don't like to hear what they call "partial evidence." They won't, for instance, let you present part of a document but leave out other parts that provide context, so that the part you have presented in court is misleading. And they won't allow you to testify on some questions, but then "take the Fifth" on closely related questions, the answers to which could undermine your testimony.

Put another way, courts believe that if you open your mouth, you ought to tell the whole story - and the whole truth. It seems the Administration didn't do that - and that decision made both judges skeptical of its state-secrets claims with respect to the wiretapping program.

No similarly deceptive defense of the email data-mining program has been conducted, as far as we now know. No wonder that, as noted above, Judge Taylor dismissed the suit before her insofar as it targeted that program. She did so, in addition, without much discussion.

The message to the Executive is pretty clear: Keep your own secrets, and judges will honor your secrets too. Defend your "secrets" deceptively, and you will lose the deference judges otherwise would accord you.

In this particular case, I think it was also important that the judges involved - especially Judge Taylor - appeared to deem the Executive's violations of the Constitution and federal law pretty flagrant: the kind of lawbreaking that ought to inspire courts to fulfill their role as a check on executive power.

Why This Administration Will Have Particular Trouble Claiming the State-Secrets Privilege

The Administration has already filed notices of appeal for both decisions -- to the
rather conservative U.S. Court of Appeals for the Sixth Circuit, in the case of Judge Taylor's decision, and to the generally liberal U.S. Court of Appeals for the Ninth Circuit, in the case of Judge Walker's decision. (The federal government is considered a party in the Northern California case since the court allowed it to "intervene," legal parlance for allowing it to join the litigation as a party, not just a "friend of the court" entitled to file an amicus brief.) The Administration is also seeking a stay of Judge Taylor's decision pending appeal. Meanwhile, Judge Walker has granted a stay of the proceedings against AT&T pending appeal.

While "interlocutory" appeals - those that come in the midst of litigation - are generally disfavored in the federal courts, that presumption won't apply to the Taylor decision, since she entered a permanent injunction against the program, and immediate appeals from injunctions are allowed. The presumption against interlocutory appeals also won't apply to Judge Walker's decision, because of the risk of irreparable injury if state secrets are wrongly revealed: Once information becomes public in litigation, the cat is out of the bag, so the Administration is entitled, via an appeal, to try to keep it in.

In the end, it seems very likely that this issue will make its way to the Supreme Court - as it ought to, for it is of crucial importance to the nation, and will have lasting impact. Ordinarily, I think both conservative and liberal Justices would be quite receptive to a state-secrets claim. But not now.

Federal courts' probing into Executive decisionmaking arguably raises a separation-of-powers issue, even if federal judges -- as I've argued earlier - are among the most trustworthy people to do the probing. And on this kind of issue, courts can easily feel the Executive's pain: By analogy, federal judges don't like it when Congress tries to probe into their decisionmaking - via, for instance, calls for impeachment that are motivated not by competence issues, but by political disagreements. In sum, just as courts want their sphere of decisionmaking to be their own, they can understand why the Executive would want the same.

The problem, though, is that this Administration has hardly respected the federal courts' - including the Supreme Court's - role in deciding issues of national significance in the "War on Terror." Instead, the Administration has disputed courts' jurisdiction, and tried to force its own self-serving fact findings - such as its "enemy combatant" designations - down courts' throats.

The separation of powers isn't just policed by judicial decisions; it's also policed by institutional practices and traditions. Incursion can be met with incursion - and legitimately so. If the Executive tries to unduly shrink the courts' sphere, the courts can - indeed, must - reassert their role as a coequal branch of government.

In sum, this Administration will very probably pay for its general assault on federal
court jurisdiction and power by facing a far less receptive audience for its state-secrets privilege claims, than would otherwise have been the case. With this privilege, the rule may turn out to be: If you abuse it, you lose it.
