

## Do You Really Think We Need To Have This Discussion?

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Eavesdropping by the National Security Agency on international telephone calls? Papers opposing a motion to suppress data collected by the NSA sealed at the request of the Justice Department? A court decision on the motion also sealed at the request of the Department of Justice?

Could this happen in America? Yes, in a case arising out of Albany. Were the actions legal? A federal appeals court will have to tell us.

The case started out with a splash. The government tried and convicted two Muslim Americans for agreeing to launder money as part of a fake assassination attempt on a Pakistani diplomat. See *United States of America v Aref*, 04-CR-402 (N.D.N.Y.).

While the case was pending, the *New York Times* revealed that the National Security Agency was eavesdropping on calls involving suspected terrorists without first obtaining a warrant from the Foreign Intelligence Surveillance Court. Later the *New York Times* reported that the FBI found most of the data gathered by the NSA to be useless. “Unnamed government sources” pushed back. They cited the two Muslim Americans from Albany as a successful investigation begun as a result of NSA leads.

The defendants did not know of the leads and the Justice Department did not tell them before trial. Believing that the surveillance program violated several statutes and the Fourth Amendment, the defendants filed a motion to suppress the NSA information, as “the fruit of a poisonous tree.”

The Justice Department submitted papers in opposition and requested the court to seal the papers in their entirety. It also requested the court to seal its opinion. Surprisingly, the court did both and only announced the result— motion denied. See *United States v Aref*, 2007 WL 603508 (N.D.N.Y. Feb. 22, 2007).

The Supreme Court has held repeatedly that there is a “presumption of openness” with respect to judicial documents. The presumption applies to the papers of private litigants and government litigants.

To overcome the presumption of openness a party must demonstrate that “closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise Co. v Superior Court of Calif., Riverside Co.*, 464 U.S. 501, 510 (1984). Circumstances justifying closure will be “rare.” While national security may be such a higher value, redacting sensitive information from a judicial document is the usual remedy, not a total sealing.

The Supreme Court has not addressed the power of a court to seal an entire opinion. The few appellate and district court cases on the subject have uniformly condemned the practice. See, e.g., *Hicklin Engineering, L.C. v R.J. Bartell*, 439 F.3d 346, 348-49 (7<sup>th</sup> Cir. 2006) and the cases cited therein.

The rationales for public opinions are weighty. Public opinions educate the people about the functioning of the judicial system. They force judges to explain the reasoning behind their decisions. The dissemination of the opinions deters partiality and bias and generally limits judicial power. “In short, justice must not only be done, it must be seen to be done.” *United States v Rosen*, 487 F.Supp.2d 703, 715-716 (E.D. Va. 2007).

The potential for justice in the Albany case is great. In July of 2007 the ACLU lost a challenge to the NSA surveillance program on procedural grounds. The plaintiffs—journalists, educators, and lawyers who regularly communicated overseas—could not prove that the NSA had eavesdropped on their conversations. *ACLU v Nat'l. Sec. Agency*, \_\_\_F.3d\_\_\_ WL 1952370 (6<sup>th</sup> Cir. 2007). The Albany defendants do not face this obstacle.

Hopefully, the federal Second Circuit Court of Appeals will unseal the government papers and the district court's opinion. Then it will use the case to rule on an issue of national significance—the legality of the eavesdropping program.

Finally, do not confuse the standard for sealing judicial documents and opinions with the state secrets doctrine. The latter enables the federal government to withhold information from an opposing party if the information may contain sensitive national security content. The government does not even have to show the information to a court. Lately the government has been using the doctrine to have entire proceedings dismissed. See, e.g., *El-Masri v United States*, 479 F.3d 296 (4<sup>th</sup> Cir. 2007). More on this topic in a future column.