



HISTORICAL SOCIETY *of the* NEW YORK COURTS

WHO WATCHES THE WATCHERS?

Essay Prompts

1. **Weighing the interests of national security and a free press, when do government actions like those described here violate the U.S. Constitution's First Amendment protection of freedom of the press?**

In May 2013 it was reported in the news that federal investigators had secretly and without notice seized two months of phone records of reporters and editors of The Associated Press, in what the news organization said was a "serious interference with A.P.'s constitutional rights to gather and report the news." Though not told the reason for the seizure, it was strongly suggested at the time that it related to a continuing government investigation into the leaking of information about the Central Intelligence Agency's disruption of a Yemen-based terrorist plot to bomb an airliner, i.e. an event involving national security. This incident represents one of many collisions of news organizations and federal investigators over government efforts to prevent the disclosure of national security information.

2. **The FISA Court (described below) conducts its reviews of requests for surveillance warrants hidden from the public and without providing an opportunity to any party to challenge or be informed about the proceedings. Discuss the constitutionality of the FISA Court rulings.**

The Court established under the **Foreign Intelligence Surveillance Act of 1978 (FISA)** issues classified decisions on requests for surveillance warrants from law enforcement officials. Initially set up to review requests by federal law enforcement agencies for surveillance warrants against suspected foreign intelligence agents, the Court's jurisdiction has been steadily extended by legislation, particularly the Patriot Act. The FISA Court consists of 11 federal district court judges, appointed by the Chief Justice of the U.S. Supreme Court.

3. **Should Federal Press Shield legislation like the proposal described below be enacted in whole or in part when weighed against the interests of national security?**

In mid-July 2013, the U.S. Court of Appeals for the Fourth Circuit held that: "There is no First Amendment testimonial privilege, absolute or qualified, that protects a reporter from being compelled to testify by the prosecution or the defense in criminal proceedings about criminal conduct that the reporter personally witnessed or participated in... even though the reporter promised confidentiality to his source." In May 2013, U.S. Senators Charles Schumer (D-NY) and Lindsey Graham (R-SC) introduced a bill that could become the Free Flow of Information Act (2013) that would establish a federal press shield law. The proposed law would protect a journalist's confidential sources unless a court determines that the public interest requires such disclosure.



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4. **Does the secret nature of court proceedings conducted under the Electronic Communications Privacy Act threaten the Rule of Law?**

Stephen W. Smith, U.S. Magistrate Judge, Southern District of Texas, wrote an article in *Harvard Law & Policy Review* discussing the **Electronic Communications Privacy Act of 1986 (ECPA)**. Magistrate Smith argues that federal magistrates preside over the most secret docket in America, and issue electronic surveillance orders that are permanently hidden from public view through sealed court files, gag orders, and delayed-notice. He points out that most of its sealed cases involve various forms of electronic surveillance, such as the monitoring of electronic communications and data transmitted by cell phones, personal computers, and other digital devices.