A rare court hearing on lawsuit against CIA spying on Julian Assange visitors

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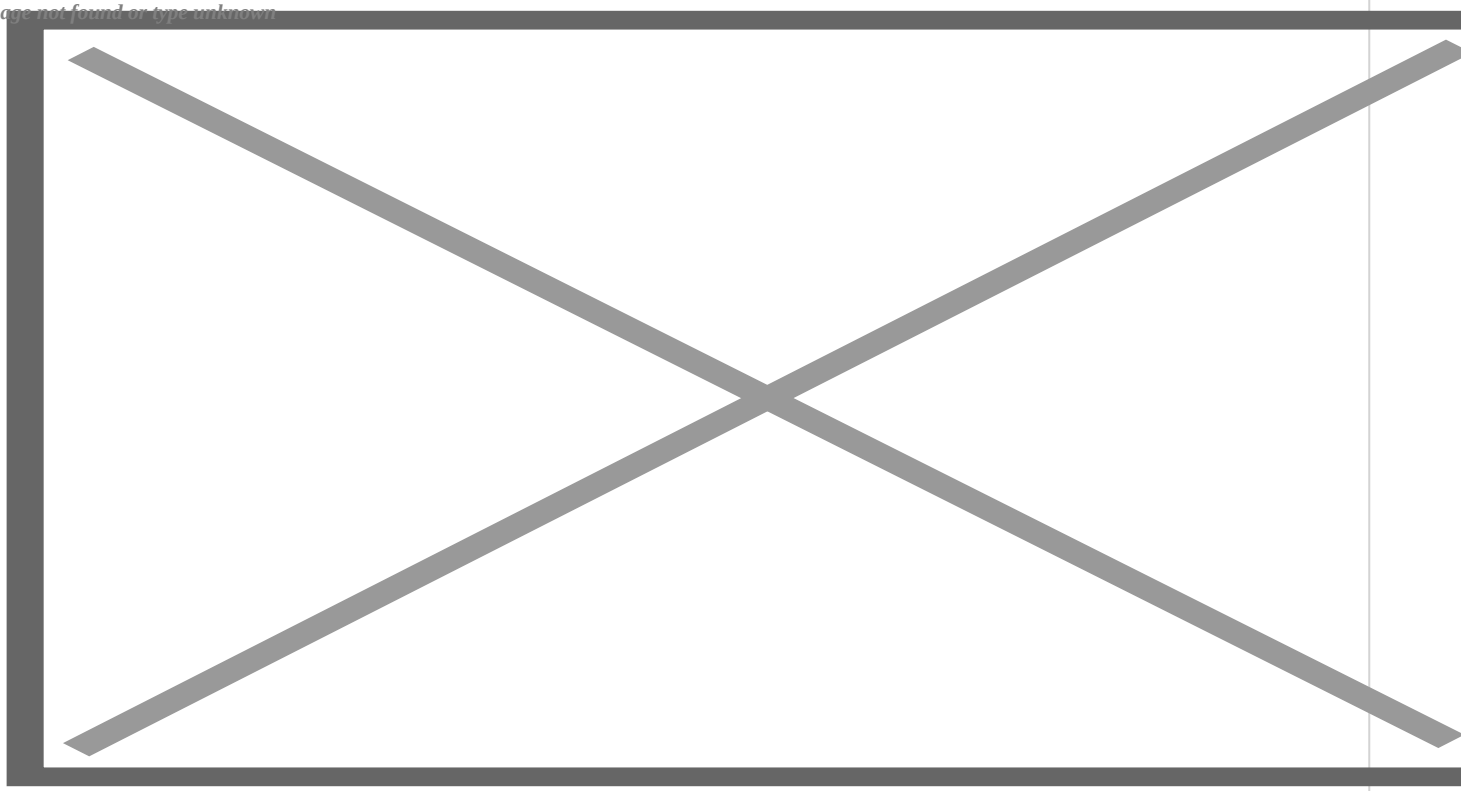

By Kevin Gosztola / The Dissenter

New York, November 24 (RHC)-- A U.S. court held an extraordinary hearing on November 16th, where a judge carefully considered a lawsuit against the CIA and former CIA director Mike Pompeo for their alleged role in spying on American attorneys and journalists who visited WikiLeaks founder Julian Assange.

Judge John Koeltl of the Southern District of New York pushed back when Assistant U.S. Attorney Jean-David Barnea refused to confirm or deny that the CIA had targeted Americans without obtaining a warrant. He also invited attorneys for the Americans to update the lawsuit so that claims of privacy violations explicitly dealt with the government's lack of a warrant.

In August 2022, four Americans sued the CIA and Pompeo: Margaret Ratner Kunstler, a civil rights activist and human rights attorney; Deborah Hrbek, a media lawyer who represented Assange or WikiLeaks; journalist John Goetz, who worked for Der Spiegel when the German media organization first partnered with WikiLeaks; and journalist Charles Glass, who wrote articles on Assange for The Intercept.

The lawsuit alleged that as visitors Glass, Goetz, Hrbek, and Kunstler were required to “surrender” their electronic devices to employees of a Spanish company called UC Global, which was contracted to provide security for the Ecuador embassy.

UC Global and the company’s director David Morales “copied the information stored on the devices” and shared the information with the CIA. The agency even had access to live video and audio feeds from cameras in the embassy.

On June 4, 2023, the Spanish newspaper El País reported that UC Global director David Morales had a folder on his laptop marked “CIA.” Spanish police initially withheld 213 gigabytes of files in a criminal case against Morales that has unfolded as the U.S. government pursues Assange’s extradition on Espionage Act charges. (Morales and UC Global were sued as well.)

Often a lawsuit—especially one involving allegations of illegal and unchecked surveillance—would end swiftly. A judge would accept all of the “national security” arguments made by the CIA and dismiss the case. However, Koeltl has chosen to be more fair and measured when assessing the stunning allegations.

Barnea, who represents the CIA and Pompeo, contended that the Fourth Amendment right to privacy under the U.S. Constitution did not apply at the Ecuador embassy in London. The CIA did not play a “sufficient role in controlling or directing” the actions of Morales and UC Global contractors.

When Barnea maintained that CIA access to live video feeds would not necessarily mean that the agency was in control or directing UC Global, Koeltl seemed baffled. “So U.S. agents were monitoring the feed in the United States, and that’s not sufficient involvement by the government?”

“You don’t seem to dispute in your papers that a warrant would be necessary to seize the contents of the electronic devices,” Koeltl said, as Barnea outlined the government’s argument that Americans who visited Assange had no “reasonable expectation of privacy” when they entered the embassy.

Barnea replied, “I don’t believe that a warrant is ever required outside the United States. The Second Circuit [Court of Appeals] has held that the warrant requirement of the Fourth Amendment only applies within the United States.”

Effectively, the government asserted in a U.S. courtroom that Americans cease to have constitutional privacy protections from U.S. government intrusion when they travel abroad.

As Brian Levenson, an attorney for the Americans, stated, “There is no case like this.” Not a single case has specifically dealt with the question of whether an American citizen has a “reasonable expectation of privacy” under the Fourth Amendment while in a foreign embassy.

“The argument can certainly be made that when people go into a foreign embassy, they would expect that there is security in the embassy that would cover surveillance in the same way that when you enter a courthouse, you can expect there is surveillance,” Koeltl said, repeating one of the government’s main responses to the lawsuit.

Levenson clarified that the issue was not over typical embassy building surveillance. The issue is that Americans identified themselves as U.S. citizens, and the CIA still targeted them.

“The Fourth Amendment protects conversations that cannot be heard except by means of artificial enhancement, which is what this is,” Levenson said. “Tiny microphones bugged on fire extinguishers, special devices put on windows to obscure outside noises. That is the only way these conversations could be heard.”

At one point, Koeltl flatly asked Barnea, “Can I take it from your argument that the government concedes that there was no warrant that was obtained—because no warrant was required?”

“We neither concede nor have any statement about whether any warrant was needed or was obtained in this case,” Barnea answered. The government has no “factual comment” on any of the “facts of this case.”

Except the U.S. government included a line in their response to the lawsuit that contended the Americans had failed to allege what made the search and seizure of the contents of their electronic devices illegal. That caught the court’s interest.

“Here’s my problem with that argument. The government knows whether a warrant was obtained or not obtained,” Koeltl declared. “If the government knows that there was no warrant, then I wonder whether in good faith the government can make the argument that ah-ha you haven’t alleged that no warrant was obtained, when the government knows as a matter of fact that no warrant was obtained.”

Barnea said, “I’m not at liberty to comment about whether a warrant was required or was obtained, whether it was required by statute or by the Constitution or something else.”

To which Koeltl stated, “It’s not clear to me whether the government can argue in good faith, without any explanation, with respect to some of the defenses that the government sometimes raises, that it is a matter of national security simply to say we cannot affirm or deny whether there was a CIA offices in that particular country.”

“It doesn’t seem that that’s an argument that the government could make when the government knows full well that hypothetically there was no warrant because it’s not required under the Constitution,” Koeltl added.

The question of whether a warrant should have been obtained or not was important enough to convince the judge to ask Levenson to submit an “amendment letter” that added a section to the lawsuit dealing with how the “search and seizure was unreasonable and without a warrant.”

[NOTE: Koeltl instructed the attorneys for the Americans to submit this filing at the end of November and then the government would respond on December 8. Attorneys for the Americans could reply on December 13, if necessary. This will come before any decision on the government’s motion to dismiss.]

Though the court was open to reviewing arguments against the CIA, Koeltl seemed highly skeptical that the claim against Pompeo in his individual capacity would survive against the government.

In 1971, a U.S. Supreme Court case known as Bivens created a process for bringing cases against federal government officials for violating a person’s constitutional rights. Pompeo was sued under that doctrine. However, courts have been extremely reluctant to allow plaintiffs to pursue damages when a case may set a precedent or lead to a court intruding upon national security and foreign policy matters.

“This is a long way away from Bivens itself. And there are only three cases where the Supreme Court has said, yes, that’s a Bivens claim. We’ll recognize it. And the kinds of distinction that the Supreme Court has drawn with respect to whether Bivens should be extended to a new situation would seem to argue that it shouldn’t be extended here,” Koeltl explicitly stated.

Yet what Levenson described as a “tremendous fact” appeared to be significant to the court—that the search and seizure of devices that belonged to American attorneys and journalists who visited Assange

were “separated in time and space.”

The CIA knew from their passports whether they were American citizens or not, and the agency still went ahead with targeted surveillance against them.

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