

Federal Judge Slams Obama Administration Lawyers' Defense of Illegal Wiretapping

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A federal judge has rebuffed the Obama administration's latest attempt to defend illegal Bush-era eavesdropping, ruling that a now defunct US Islamic charity, Al-Haramain, and two of its lawyers are entitled to money damages because government agents failed to obtain a warrant before tapping their phones.

District Judge Vaughn R. Walker of San Francisco determined, based solely on publicly available information, that the US government violated the Foreign Intelligence Surveillance Act (FISA) by installing wiretaps to monitor Al-Haramain telephone conversations without obtaining a warrant from the secret FISA court in Washington, D.C.

The decision is the first to establish any government liability after the Bush administration's secret wiretapping program was revealed by the *New York Times* in December 2005—over a year after the paper first learned of it. (See "[A damning admission: New York Times concealed NSA spying until after 2004 election](#)"). The Bush administration admitted to the program's existence months later.

The case, *Al Haramain v. Obama*, arose out of largely successful Bush administration efforts to shut down numerous Islamic charities, whose philanthropy sometimes conflicted with the objectives of US imperialism. The case was transferred to Walker—appointed by the first president Bush in 1989—because he is overseeing complex litigation arising from the actions of telecommunications giant AT&T in giving the National Security Administration access to its west coast communications hub in San Francisco for widespread warrantless wiretapping.

In the course of litigation contesting the finding that Al-Haramain was a "Specially Designated Global Terrorist" organization, US government lawyers inadvertently turned over a classified document to Al-Haramain's lawyers that apparently revealed the illegal surveillance. Based on that document, Al-Haramain filed suit in 2006 under the FISA provision that "an aggrieved person ... shall be entitled to recover ... actual damages, but not less than liquidated damages of \$ 1,000 or \$ 100 per day for each day of violation, whichever is greater" along with "reasonable attorney's fees."

Bush administration lawyers moved to dismiss on the basis of the "state secrets" privilege, a judge-made legal doctrine with no basis in the Constitution or any statute of the United States. The motion was denied, but a three-judge panel of United States Court of Appeals for the Ninth Circuit—consisting solely of liberals appointed by Democratic presidents—issued a truly Orwellian ruling that, due to the states secret doctrine, "the [classified document], its contents, and any individuals' memories of its contents, even well-reasoned speculation as

to its contents, are completely barred from further disclosure in this litigation.”

Back in the district court, the Bush administration again moved to dismiss, this time claiming that Al-Haramain could not prove it had “standing” to bring the lawsuit because without the classified document—which no one is allowed to remember—it could not prove that it actually had been spied upon. In response, Al-Haramain listed 28 publicly available sources—most readily available on the internet—which established that the government had built the case against it with illegal wiretap evidence.

Walker denied the motion to dismiss, and ordered the government to review Al-Haramain’s lawyers for security clearances. He ordered that the government provide those who qualified with the necessary information about the government’s eavesdropping program under appropriate “protective orders,” which would keep the matters secret.

At this stage of the case, lawyers under incoming Attorney General Eric Holder took over from the Bush administration. Throughout his campaign Obama pledged to end the constitutional abuses of his predecessor by following FISA and other federal statutes. But rather than resolving the plaintiffs’ claims, the Obama administration lawyers continued stonewalling, often resorting to arguments more resembling those found in the novel *Catch-22* than in any law book.

In a memorandum decision issued March 31, Walker outlined the “governmental abuse and overreaching inherent in defendants’ theory of unfettered executive-branch discretion” advanced by the lawyers from the federal Department of Justice.

According to Walker’s memorandum, “What followed were several months of which the defining feature was defendants’ refusal to cooperate with the court’s orders punctuated by their unsuccessful attempts to obtain untimely appellate review.”

Although two of Al-Haramain’s lawyers qualified for “top secret/secure compartmented information,” the Obama administration attorneys asserted in court filings that “plaintiffs’ attorneys did not ‘need to know’ the information that the court had determined plaintiffs’ attorneys would need in order to participate in the litigation.” Additionally, the government lawyers “refused to agree to any terms of the protective order proposed by plaintiffs and refused to propose one of their own.”

Walker then directed Al-Haramain to file a motion for summary judgment based on the publicly available information. In response, the Obama administration lawyers argued that Al-Haramain could not prove any part of its case, even including whether there was a FISA warrant authorizing the wiretapping, without jeopardizing state secrets, and therefore the case had to be dismissed.

“Under defendants’ theory,” Walker wrote, “executive branch officials may treat FISA as optional and freely employ the [state secrets privilege] to evade FISA, a statute enacted specifically to rein in and create a judicial check for executive-branch abuses of surveillance authority.”

Walker lambasted the Obama administration lawyers for their assertion that “the presence or absence of a FISA warrant . . . may be cloaked” by the state secrets privilege, accusing them of “argumentative acrobatics” to “hide behind” the state secrets privilege “all facts that could help plaintiffs’ case.”

“In so contending,” Walker concluded, “defendants take a flying leap and miss by a wide margin,” unusually blunt language for a federal judge to direct against government attorneys.

Jon Eisenberg, one of the lead attorneys for the plaintiffs, told the press after the ruling, “The Obama Administration stepped right into the shoes of the Bush Administration, on national security generally and on this case in particular,” adding that “Even though I have the security clearance, I don’t have the ‘need to know,’ so I can’t see anything. This is Obama. Obama! Mr. Transparency! Mr. Change! It’s exactly what Bush would have done.”

The continuation of Bush administration legal positions condemned as unconstitutional during Obama’s presidential campaign in the Al-Haramain case—among many others—is so blatant that it has even drawn condemnation from major liberal media organs, including highly critical editorials in the *New York Times* and the *Los Angeles Times*.

The plaintiffs have been asked to submit proof of their damages. A request for attorneys’ fees is expected to follow. The Department of Justice has yet to issue a statement on the decision, or to indicate whether it will appeal once again to the Ninth Circuit.

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