# Appeals court panel bars key evidence from lawsuit against NSA spying

**Don Knowland**
**19 November 2007**

A three-judge panel the US Ninth Circuit Court of Appeals, consisting entirely of liberals appointed by Democratic presidents, issued a ruling Friday excluding evidence of illegal wiretapping by the National Security Agency (NSA) against a Muslim charity based in Oregon.

The ruling confirms a sweeping "state secrets" power for the executive branch, allowing the president and the intelligence agencies to torpedo any legal action against an abuse of power by claiming that the court process would result in damage to national security.

The decision arises from a lawsuit brought by the Al-Haramain Islamic Foundation against the Bush administration, charging that the "Terrorist Surveillance Program," the massive spying on domestic communications by the NSA, violates both federal law and the US Constitution, including the First, Fourth and Sixth amendments (providing freedom of speech, freedom from warrantless searches, and the separation of powers), as well as the International Covenant on Civil and Political Rights.

Al-Haramain alleged that the NSA engaged in electronic surveillance of the charity's private telephone, email, and other electronic communications without probable cause, warrants, or other prior authorization, as required under the Foreign Intelligence Surveillance Act (FISA).

The Bush administration admitted the existence of the program in early 2006, a few months after it was first revealed by the *New York Times*. The NSA engaged in warrantless interception of international communications into and out of the United States of persons it claimed to have connections to Al Qaeda or other terrorist organizations.

This is one of 50 cases filed across the US, challenging the NSA program, but it is unique because the Al-Haramain charity, unlike other plaintiffs, had specific evidence that it had been spied on. During a 2004 attempt by the government to freeze the charity's assets, the government inadvertently gave Al-Haramain a file showing just that. When the charity filed its lawsuit it included a copy of this file in order to substantiate its claim.

The government then sought to dismiss the case. It argued that the subject matter of the lawsuit was so secret it could not be challenged in court. It asserted that federal attorneys had released the file by accident, and that the documents could not be used to support the charity's allegation that it had been spied on because the file contained state secrets. The government argued that without that secret evidence Al-Haramain did not have a sufficient stake in the controversy and thus had no "standing" to sue, because it could not prove it had in fact been spied on.

The lower district court judge ruled that the existence of the surveillance program was not a secret because President Bush, his Attorney General Alberto Gonzalez and NSA head Michael Hayden, now Director of National Intelligence, had discussed it extensively in public following the *Times'* disclosure of the program in late 2005. The district court agreed that the government had the privilege to keep the file secret because it contained means, sources and methods of intelligence gathering.

But the lower court found there was "no reasonable danger that national security would be harmed" if the charity's officers who had seen the file were permitted to testify that the file indicated they had been wiretapped, as long as they did not disclose anything about intelligence-gathering capabilities revealed in the file. Thus the court refused to dismiss the suit.

The court of appeals reversed the lower court decision in an opinion written by Judge Margaret McKeown, appointed by President Bill Clinton, and joined in by Judges Harry Pregerson, appointed by President Jimmy Carter, and Michael Daly Hawkins, also appointed by Clinton. These three Democratic appointees are also widely considered "liberal" judges, particularly Pregerson, who is routinely attacked in right-wing legal and political circles as one of the most liberal judges on the frequently reversed "activist" Ninth Circuit court.

The appellate panel ruled that the case was determined by application of the state secrets privilege, merely a "common law" privilege, shielding confidential communications from

discovery or use as evidence, which was developed, like the attorney-client privilege. The privilege permits the government to bar disclosure of information if "there is a reasonable danger" that disclosure will "expose military matters which, in the interest of national security, should not be divulged."

The decision looked for guidance to two prior US Supreme Court cases in particular. In 1875 the Supreme Court threw out a case that had sought money damages for breach of an espionage contract between President Lincoln and a secret agent who was allegedly dispatched to spy on enemy troops. The Court explained in a very short opinion that "as a general principle" public policy forbids the maintenance of any suit, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential. It then barred suit regarding the contract, as the secrecy which such contracts impose precludes any action for their enforcement, noting that "the existence of a contract of that kind is itself a fact not to be disclosed."

In 1953 the Supreme Court decided that the widows of Air Force crewmen killed in a plane crash could not obtain release of accident reports to support their negligence suit because the bomber the airmen manned was on a secret test mission and details of secret electronic equipment might be revealed in the reports.

The Ninth Circuit decision in the Al-Haramain case agreed with the lower court judge in rejecting the government's argument that the NSA spying program by its very nature could not be the subject of a court suit, because of the widespread public disclosures of its existence of the program by Bush and others.

But this reasoning necessarily implies that had the program not been revealed by the government publicly, it could not be challenged in court because it would have remained a state secret. That is a perversion of the prior Supreme Court cases the court relies on. In neither case were the plaintiffs alleging that the government program involved—an espionage contract and a bombing test mission—were intrinsically illegal or unconstitutional.

The Al-Haramain case, however, charges that the surveillance program itself amounts to a wholesale violation of constitutional rights and federal statutes restricting warrantless spying. Where in the constitution, or federal law for that matter, does it say that unconstitutional government action can be protected under the guise of national security? The court does not say.

Thus, the court in its decision, necessarily accepts the government's framing of the case, the very government that committed the wrong in question. The logic of this approach is that any police-state program is unchallengeable as long as the government keeps it secret from the public.

After reviewing the documents in question behind closed doors, the Ninth Circuit panel also agreed with the district judge that the file in question merited application of the state secrets privilege. While claiming not to take the Bush administration claim at face value, the three judges nonetheless accepted, "the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second-guessing the Executive in this arena."

The Ninth Circuit disagreed with the eminently reasonable conclusion of the lower court that the charity's officers could testify as to the spying on Al-Haramain based on their having read the file, as long as they were not permitted to testify about intelligence means and personnel. The lower court judge's approach was entirely in line with the Supreme Court's decision in the 1953 airmen case, where the case was permitted to proceed based on testimony of other crew members, without revealing electronic secrets.

The three-judge panel threw out the case as far as its constitutional claims, but ordered the district court to reconsider the claim under FISA. But the process is now a classic Catch 22, since Al-Haramain has been denied the evidence—the NSA document now suppressed under the "state secrets" privilege—to satisfy FISA's requirement that only an "aggrieved person" may have standing to bring a suit to determine whether surveillance "was lawfully authorized and conducted."

This Appeals Court judges' legal opinion is full of language purporting to express concern about the illegal wiretapping and the court's duties to scrutinize the government's conduct. This is so much breast-beating, like similar rhetoric from Democratic members of Congress over the last few years over the Bush administration's wholesale gutting of constitutional rights, the rule of law and separation of powers.

This Ninth Circuit decision in Al-Haramain is yet another clear example of this moribund character of American liberalism and its organic inability to protect democratic rights.