

Obama administration seeks to block lawsuit over illegal wiretapping

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For the second time in less than a week, lawyers from the Justice Department headed by Obama administration Attorney General Eric Holder have embraced the Bush administration's pseudo-legal argument that the "state secrets" doctrine bars civil lawsuits challenging the methods used in its so-called "war on terror."

On February 9, Obama administration lawyers argued before the United States Court of Appeal for the Ninth Circuit, headquartered in San Francisco, that the maintenance of "state secrets" mandates the dismissal of cases challenging "extraordinary rendition" - that is kidnapping and torture - by the US government. (See "Obama administration defends torturers")

The most recent intervention also occurred in San Francisco, with the filing of papers February 11 to block an order by United States District Judge Vaughn R. Walker reinstating the claim of the Al-Haramain Islamic Foundation that it was the target of government wiretapping. The surveillance was carried out without the required court approval, under the "Terrorist Surveillance Program." The blatantly illegal electronic surveillance took place before the Bush administration made the Ashland, Oregon-based charity a "Specially Designated Global Terrorist" organization and froze its assets.

During legal proceedings arising from the asset seizure, government attorneys mistakenly turned over classified documents that detailed illegal wiretaps to the charity's lawyers. After discovering the error, the government sent FBI agents personally to each member of the Al-Haramain legal team and forced the return of the documents, but not before they were read and disseminated.

Al-Haramain sued George W. Bush, alleging that the

secret government documents established that its federal privacy rights had been violated by Bush's illegal federal wiretaps, including some that recorded confidential attorney-client conversations. Walker, an appointee of George H.W. Bush, initially dismissed the complaint on the basis that the charity could not use the information in the classified documents to allege that the government illegally spied on it, and therefore could not prove "standing" that it was an "aggrieved person" entitled to challenge the surveillance program. The Ninth Circuit Court of Appeals subsequently affirmed this *Alice-in-Wonderland* decision.

On January 5, however, Walker reinstated the case after Al-Haramain produced a series of public statements by government officials corroborating allegations that the charity had been the victim of illegal surveillance. These included an October 2007 speech by a deputy FBI director at a conference of the American Bankers Association and American Bar Association on money laundering.

In a key provision of his ruling, Walker directed that lawyers for Al-Haramain have access to confidential material, ordering the government to provide top-security clearance to three of the charity's lawyers.

Filed as a supplement to a motion for a stay of the January 5 order initiated by Bush administration lawyers before the Obama inauguration, the recent papers argue that the "state secrets privilege" - a cold-war era judge-made doctrine - allows the executive branch to keep information confidential when it asserts that national security might be jeopardized.

Walker had ruled that "state secrets" do not trump a provision in the Foreign Intelligence Surveillance Act (FISA), which authorizes federal district judges, "whenever any motion or request is made by an aggrieved person," and "*notwithstanding any other*

law," to "review in camera and ex parte [confidentially] the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted."

The provision continues: "In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance."

Just like Bush administration lawyers who preceded them, the current Obama administration attorneys are asserting legal positions directly contrary to federal privacy laws. "We are aware of no prior case where the state secrets privilege has been held to be preempted by statutory law to decide whether alleged surveillance has occurred and to grant security clearances for the disclosure of classified information to a party seeking that information in order to litigate their claims," they wrote in their papers before Judge Walker.

The reason there are no such precedents, of course, is that the Bush administration's utter disregard for the letter of laws passed during the post-Watergate era, when attempts were made to reign in government spying, is itself unprecedented.

That the Obama administration would intervene to block confidential judicial review of illegal Bush administration wiretapping exposes the futility of attempting to defend fundamental liberties through the Democratic Party.

On February 13, Walker denied the Obama administration's request for a stay. He explained that his January 5 order "would prioritize two interests: 'protecting classified evidence from disclosure and enabling plaintiffs to prosecute their action,'" while at the same time "making it possible for the court to determine whether plaintiffs had been subject to unlawful electronic surveillance."

Walker ordered the government attorneys to inform him by February 27 how they intend to comply.

The Obama administration lawyers are expected to appeal again to the Ninth Circuit, and repeat their arguments that federal judges cannot review cases challenging the legality of Bush administration wiretaps.



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