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Feds Want Warrantless Spying Loss Overturned, Saying the Law Can't Touch Them

- By [David Kravets](#)
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The Obama administration is set to argue to a federal appeals court Friday that the government may breach, with impunity, domestic spying laws adopted in the wake of President Richard M. Nixon's Watergate scandal.

The case tests whether Americans may seek recourse or monetary damages when a sitting U.S. president bypasses Congress's ban on warrantless spying on Americans — in this instance when President George W. Bush authorized his secret, warrantless domestic spying program in the aftermath of the September 2001 terror attacks.

A federal judge found in 2010 that two American lawyers' telephone conversations with their clients in Saudi Arabia in 2004 were siphoned to the National Security Agency without warrants. The allegations were initially based on a classified document the government accidentally mailed to the former [al-Haramain Islamic Foundation](#) lawyers.

The document was later declared a state secret, removed from the long-running lawsuit and has never been made public. With that document ruled out as evidence, the lawyers instead cited a bevy of circumstantial evidence that a judge found showed the government illegally wiretapped the lawyers as they spoke on U.S. soil to Saudi Arabia.

Against the government's objections, San Francisco U.S. District Court Judge Vaughn Walker awarded the two lawyers — [Wendell Belew and Asim Ghafoor](#) — \$20,400 each in damages and their legal counsel \$2.5 million in costs. It marked the first time anyone had prevailed in a lawsuit challenging Bush's so-called Terrorist Surveillance Program.

The government [appealed](#) to the 9th U.S. Circuit Court of Appeals, and arguments before a three-judge panel are set to be heard in Pasadena, California, this Friday.

The al-Haramain litigation was considered the dark horse in a string of lawsuits challenging the Bush spy program. Eventually, it became the only case to reach a verdict against the government, establishing that it is actually possible to hold the government to task in a public court for secretly violating the law.

More high-profile cases, such as the Electronic Frontier Foundation's case against the nation's telecoms for their participation in the spy program, [was thrown out of court](#) — thanks to a retroactive immunity law Congress passed in 2008. Suits brought by the American Civil Liberties Union and others have floundered — facing the burden of proving that Americans were actually victims of the once-secret spy program. In a move that bodes well for the government, the Supreme Court earlier this month agreed to hear the government's appeal of a lawsuit brought by journalists and attorneys, arguing that the case should be dismissed because of the plaintiffs' inability to actually [prove they were spied upon](#).

The domestic spying program was first disclosed by *The New York Times* in December 2005, and the government subsequently admitted that the National Security Agency was eavesdropping on Americans' telephone calls without warrants if the government believed the person on the other line was overseas and associated with terrorism. Further news investigations found that the government had secretly enlisted the help of major U.S. telecoms, including AT&T, to spy on Americans' phone and internet communications without getting warrants as required by the 1978 Foreign Intelligence Surveillance Act.

Parts of the surveillance program were so egregious that the upper echelon of the Justice Department, including then-Attorney General John Ashcroft, [threatened to resign](#) en masse if it wasn't changed.

Congress, with the vote of President Barack Obama — who was an Illinois senator at the time — subsequently legalized much of the [warrantless spying](#) in the summer of 2008. The legislation also provided the nation's telecommunication companies immunity from lawsuits accusing them of being complicit with the government's warrantless wiretapping.

The al-Haramain lawyers, who were representing the Saudi-based charity when the U.S. government declared it a terror group in 2004, sued the government under the [Foreign Intelligence Surveillance Act](#), a 1978 measure adopted in the [aftermath of Watergate](#) to set domestic spying boundaries.

The government, however, claims said it cannot be held liable under the spying law, and that Congress has not waived sovereign immunity — meaning the government has not consented to being sued for breaching its own laws.

“In sum, there is no waiver of sovereign immunity here permitting the district court's multi-million dollar damages and attorney fees judgment against the government. For this reason, the judgment of the district court must be set aside as a matter of law on this sovereign immunity ground alone, and this court need not proceed any further to dispose of this appeal,” Justice Department attorney Thomas Bondy wrote in a court [filing](#). (.pdf)

Bondy also argued in a court briefs that Judge Walker should have dismissed the lawsuit after both the Bush and Obama administrations invoked the so-called [state secrets privilege](#). The privilege was first recognized by the U.S. Supreme Court in a [McCarthy-era lawsuit in 1953](#), and has been increasingly and successfully invoked by federal lawyers seeking to shield the government and its agents from court scrutiny. At the government's request, judges generally [toss lawsuits when the privilege is cited](#).

Judge Walker found otherwise, and the government then refused to set up a secure system to prove to the court that a secret warrant had actually been obtained, prompting Walker to consider sanctioning the government for disobeying court orders.

The attorney for the two lawyers for the now-defunct charity scoffed at the suggestion that the appeals court should reverse the monetary damages Walker awarded his clients.

“This case has now been successfully adjudicated without any breach of state secrecy or harm to national security — without using the sealed document, and without revealing intelligence sources, methods, or operational details,” attorney Jon Eisenberg wrote in a filing to the appeals court, adding:

“By an exemplary act of judicial minimalism, the district court narrowly determined the bare fact of plaintiffs' warrantless electronic surveillance, based solely on public evidence. National security has

been protected, while the rule of law has been vindicated. A more satisfactory conclusion of this litigation cannot be imagined.”

Judge Walker ruled that the lawsuit made its case using [snippets of evidence](#), including public statements from government investigations into al-Haramain, the Islamic charity for which the lawyers were working. The evidence included speeches by government officials discussing an investigation that concluded with the listing of al-Haramain as a terror organization, the FBI’s public disclosure that it monitored al-Haramain officials, and a speech about their case by an FBI official.

The government, however, contends that the snippets do not demonstrate whether any eavesdropping was warrantless — and the Obama and Bush administrations have neither admitted nor denied the allegations.

A group of retired admirals and generals teamed with the [Washington Legal Foundation](#) to urge the court to reverse Judge Walker. They agree with the government’s contention that it was never proven that the surveillance was done without a warrant issued by the Foreign Intelligence Surveillance Act Court, a secret body the 1978 FISA legislation set up to supervise government spying of Americans. The foundation says it is “devoted to defending and promoting the principles of free enterprise and individual rights.”

But in this case, it’s siding with a secretive government program.

“They could do no more than speculate that perhaps the government did not obtain a required FISA warrant before engaging in electronic surveillance,” Richard Samp, the foundation’s attorney, told the appeals court in a [filing](#). (.pdf)

The Electronic Frontier Foundation also weighed in with a friend-of-the-court [filing](#). (.pdf)

“The dangers of allowing the executive unfettered power to use the state secrets privilege to turn the Constitution on and off at will are plain,” EFF legal director Cindy Cohn wrote, “and strike at the heart of our constitutional system of government.”

Judge Walker, when finding for the two lawyers, [found the surveillance was unlawful](#) (.pdf) since the government refused to say whether it did or did not have a warrant, but did not declare the Terrorist Surveillance Program unconstitutional. Walker also declined to issue punitive damages to punish the government for wiretapping in the country without warrants.

Instead, the judge granted the two spied-upon lawyers \$100 a day for each of the 204 days he found that their telephone calls were wiretapped beginning in February 2004, an amount they sought. In addition, they requested about \$200,000 each in punitive damages, and the same amount to be awarded to the charity — all of which was denied.

“The president and other senior executive branch officials responsible for national security necessarily bear some risk that their actions may one day be held to be unlawful,” Walker [wrote](#) in 2010, “They must balance this risk against the harm that may come to the nation if they fail to act. While the court has the constitutional duty to apply the law in cases before it and hold violators accountable, it need not mete out punitive measures on officials for perceived ‘recklessness’ in dealing with a serious, proven threat to the national security.”

Walker ruled the record showed the government had reason to believe al-Haramain supported acts of terrorism and that “critical intelligence was obtained monitoring al-Haramain.” Walker added that al-Haramain was involved in planning and financing terrorist attacks against the United States’ embassies in Kenya and Tanzania.

Despite that, the government appealed, hoping to re-establish that citizens spied on by the government in the name of national security have no recourse in the courts, even if the government flagrantly violates the laws and the Constitution.

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