Written by **Thomas R. Eddlem** on April 2, 2010

Federal Judge Rules Warrantless Wiretapping Violates FISA

U.S. District Court Chief Judge Vaughn Walker ruled March 31 that the executive branch cannot flatly ignore the Foreign Intelligence Surveillance Act of 1978 in a fiery decision that lambasted both the Obama and Bush administrations for dishonesty in its proceedings. Walker wrote that both administrations had engaged in "intransigence" and a consistent "refusal to cooperate with the court's orders punctuated by their unsuccessful attempts to obtain untimely appellate review."

In other words, the Bush and Obama Justice Departments were openly flouting the court while at the same time doing their best to use court procedural rules to delay the proceedings indefinitely. The picture Walker paints is one of a lawless executive branch with a bipartisan policy of disregarding separation of powers, the law, and the U.S Constitution. The executive branch, Walker sarcastically wrote, was engaging in "an impressive display of argumentative acrobatics." He concluded that their policies "would violate basic concepts of due process in our system of justice."

The six-year long case — drawn out for that long solely because of carefully-calculated executive branch delays — involves the Islamic charity, al-Haramain Islamic Foundation, which the Bush administration put under surveillance without a warrant shortly after the September 11 attacks. Surveillance of al-Haramain would have remained secret, but in May 2004 an FBI official accidentally faxed surveillance records to the very organization it was spying upon.

The FBI later seized all copies of the document from al-Haramain and demanded the document remain sealed. But this proof that the warrantless surveillance existed served as the first opportunity for critics of the blatantly unconstitutional policy to challenge it in court. In order to challenge the policy in court, plaintiffs must have "standing," which means they must be able to document that they have been personally harmed by the policy. Because the so-called "Terrorist Surveillance Policy" initiated by the Bush administration (and continued unchanged by Obama) involved exclusively secret data not revealed to the public or the courts, prior to al-Haramain most people lacked standing to sue.

Judge Vaughn Walker explicitly rejected the argument by Bush/Obama lawyers that the President can

put any American under unlimited surveillance without a warrant and then not reveal that surveillance to a court, employing the so-called "state secrets privilege." Walker ruled: "Under defendants' theory, executive branch officials may treat FISA as optional and freely employ the SSP [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."

The one flaw in Walker's decision was that he rejected the bipartisan presidential policy solely on the basis of the FISA law. The FISA law, while in some respects a legitimate attempt to update wiretapping rules to the modern age, was also a legislative grant for the executive branch to engage in unconstitutional searches without "probable cause."

The Fourth Amendment to the U.S. Constitution has four conditions to determine constitutional searches, to avoid government fishing expeditions and massive violations of a citizen's right to be left alone from government interference. The Fourth Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The first clause of the Fourth Amendment declares in the first clause what the amendment is designed to accomplish, to protect against "unreasonable searches and seizures." The amendment then goes on to create a four-part test to explain what is a reasonable search:

1.The government needs a *"warrant"* from a court, a requirement designed to ensure searches are approved by a neutral body, and not just simply rubber-stamped by executive branch officials that have traditionally been eager to impose upon the privacy of citizens.

2.The warrant must show *"probable cause,"*i.e., that a crime has probably been committed (more than 50 percent chance) and that the search will probably reveal that evidence in order for the search to be a "reasonable" search under the Constitution. Note that "reasonable suspicion" by police officers or federal intelligence officers is not sufficient evidence to make it a constitutionally acceptable search; government officials must have "probable cause." This provision also protects against fishing expeditions and ensures better police work. The "probable cause" requirement ensures that police engage in fruitful labor, rather than wasting time on what are — by definition — unlikely leads.

3.The oath must be supported by an *"oath or affirmation."*This provision ensures that someone from the government puts his own name and career on the line that he/she is engaging in a lawful search. It ensures accountability against rogue police officers who frequently trump up evidence against suspects, and can lead to denial of search requests by judges from police officers with a poor track record.

4.The search must declare *particulars*. It must declare both "the place to be searched, and the persons or things to be searched." Again, this protects against fishing expeditions by government officials who want to search everything about a particular person they don't like. Police must specify what evidence they expect to find and where they will find it on the search warrant, or it is not a "reasonable" search warrant within the meaning of the U.S. Constitution. This provision was deemed particularly important to the Founding Fathers, who suffered under British "general search warrants" that vaguely specified persons and were used for political intimidation.

Ironically, President Obama clearly and correctly stated the issue as a presidential candidate back in a December 2007 interview with the *Boston Globe:* "Warrantless surveillance of American citizens, in

defiance of FISA, is unlawful and unconstitutional." But that was when he was still running in the Democratic primary and trying to curry favor with the left wing of his party, which — despite its legion of other faults — still respects the idea of privacy of citizens from government intrusion and the Fourth Amendment to the U.S. Constitution. And as the *New York Times* reported April 1: "since Mr. Obama won the election, administration officials have avoided repeating that position. They have sidestepped questions about the legality of the program in Congressional testimony. And in lawsuits over the program, they followed a strategy intended to avoid ever answering the question by asking courts to dismiss the lawsuits because the litigation could reveal national security secrets."

Walker's decision means that the federal courts have — in part at least — begun to trim the edges of executive branch unconstitutional power grabs.