

NSA eavesdropping was illegal, judge says

Two attorneys who filed lawsuit may receive damages

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In the strongest legal repudiation yet of the George W. Bush administration's program of warrantless wiretapping, a federal judge in San Francisco ruled Wednesday that the National Security Agency acted illegally by eavesdropping on the phone conversations of two American lawyers and an Islamic charity.

U.S. District Judge Vaughn R. Walker said that the lawyers and the al-Haramain Islamic Foundation — plaintiffs in a high-profile lawsuit challenging the now-abandoned Terrorist Surveillance Program — are entitled to damages because of the government's actions.

President Obama's Justice Department followed the Bush administration's strategy of asserting a "state-secrets privilege" to try to stop the case, a tactic that provoked an outcry from the American Civil Liberties Union and other public policy groups. The effort by Attorney General Eric H. Holder Jr. marked the first time that the Obama administration tried to invoke the privilege.

Bush secretly authorized the surveillance program shortly after the attacks of Sept. 11, 2001, and ended it in 2007. The program allowed National Security Agency officials to bypass the courts and to intercept electronic communications believed to be connected to al-Qaeda.

Generally, government investigators are required to obtain search warrants signed by judges to eavesdrop on domestic phone calls, e-mail traffic and other electronic communications.

Walker's 45-page ruling marked the second time a federal judge has held that the surveillance program was illegal. In 2006, shortly after the program's existence was reported by the New York Times, a judge in Detroit found the program to be unconstitutional and ordered that it be stopped. An appeals court vacated that ruling when the plaintiffs could not prove that they were subjected to warrantless wiretapping.

The same year, the branch of al-Haramain in Ashland, Ore.,

and its lawyers, Wendell Belew and Asim Ghafoor, filed suit against the government.

Belew and Ghafoor alleged that their 2004 phone conversations with Soliman al-Buthi, an official with the Saudi-based foundation, were wiretapped without warrants soon after the Treasury Department declared the Oregon branch to be a supporter of terrorism. They argued that wiretaps installed without a judge's authorization are illegal.

Anthony Coppolino, the Justice Department lawyer who has represented the government in al-Haramain's lawsuit since before Obama took office, has never addressed the legality of the Bush administration program.

Rather, Coppolino argued that the case should be tossed out in the name of national security. He said the government risked exposing ongoing intelligence work if the lawsuit were allowed to proceed. The government argued that its state-secrets privilege trumped the Foreign Intelligence Surveillance Act, which requires investigators to seek wiretap approval from a special court that operates largely in secrecy.

In his ruling, Walker dismissed that argument, saying the government's "theory of unfettered executive-branch discretion" created an "obvious potential for abuse."

And though the government and its attorneys have declined to say whether a secret warrant existed, the judge said it should be assumed that none did.

"We are gratified," Jon Eisenberg, the lead attorney for the plaintiffs, said of the ruling. "It has been a long time."

Eisenberg called on the Obama administration to forgo any appeals. Justice Department spokeswoman Tracy Schmaler said the matter is under review.

The Bush administration invoked the secrets privilege numerous times in lawsuits over various post-Sept. 11 programs.

Holder has said Walker was given a classified description of why the case must be dismissed so the court could "conduct its own independent assessment of our claim," and he has said the administration would respect the outcome of that process.

That was a departure from the Bush administration, which resisted providing specifics about national security concerns to judges handling such cases.