**Should a president have the right
to eavesdrop on you?**

**By Alan Shapiro**

 **To the Teacher**

The three student readings below explore the issue of government eavesdropping. The first reading examines how a federal agency listened in on telephone conversations between the director of an Islamic charity and two lawyers, then considers the "state secrets privilege" the government has claimed in a case stemming from this eavesdropping, as well as the Foreign Intelligence Surveillance Act (FISA), which sets the rules for electronic surveillance. The second reading covers a federal judge's decision in the case. The third reading considers that same judge's decision in another FISA case, one involving government interception of Internet traffic data and its claim of immunity from a lawsuit.

Discussion questions, writing assignments, suggested group work, and citizenship activities follow. These activities ask students to examine how terrorist threats and secret government surveillance affect our civil liberties.

 **Student Reading 1:
Government officials tap private phone conversations**

In the spring of 2004, the director of a charity talked on the phone with two U.S. citizens who were lawyers for the organization. The director was in Saudi Arabia, the lawyers were in Washington, and the charity was the Al-Haramain Islamic Foundation, an Oregon branch of a Saudi organization.

The National Security Agency (NSA) was listening to the conversations.

The US Treasury Department had frozen the assets of Al-Haramain because of possible violations of tax laws. The phone conversations were about that and a lawsuit against Al Haramain by victims of the 9/11 terrorist attacks. The phone calls also included mentions of Osama bin Laden's brother-in law and two clerics bin Laden said had inspired him.

On September 9, 2004, the Treasury Department announced that an investigation of Al-Haramain showed "direct links between the US branch [of Al-Haramain] and Osama bin Laden," and declared Al-Haramain to be a terrorist organization.

This is a very serious charge that ordinarily requires government proof. Al-Haramain and its lawyers filed a lawsuit, seeking civil damages for "warrantless electronic surveillance" under the Foreign Intelligence Surveillance Act (FISA), violations of the separation of powers principle, the first, fourth, and sixth amendments to the Constitution, and the International Covenant on Civil and Political Rights.

**The state secrets privilege**

The Justice Departments under both President Bush and President Obama argued that the suit should be dismissed because national security secrets were involved--the "state secrets privilege."

In 1953 the Supreme Court ruled that the state secrets privilege was constitutional. But Bush was the first president to use the privilege to prevent specific evidence from being heard publicly--to prevent entire cases from being heard. Obama is the second.

After arguments in lower courts, the case reached Judge Vaughn Walker of the United States District Court for the Northern District of California. He denied the Justice Department's claim of the state secrets privilege and the case went forward under provisions of the Foreign Intelligence Surveillance Act of 1978 (FISA).

**FISA provisions**

FISA calls for the three branches of government to check one another on the sensitive First and Fourth Amendment issue of government spying (including surveillance of private telephone conversations, e-mail, or Internet use). It created a special court to review all presidential requests to conduct electronic surveillance. It built in further oversight by requiring Justice Department review, Attorney-General certification, and reporting to the House and Senate committees on intelligence.

FISA allows the government to go ahead with surveillance even before a request is submitted, but only in emergencies --and an application still must be made to a special FISA court within 72 hours. FISA allows such spying only if the target is a foreign power or an agent--and the surveillance must be aimed only at collecting foreign intelligence information.

**Two presidents and FISA**

After 9/11, President Bush secretly, and illegally, authorized the NSA to collect data on telephone, e-mail, and Internet use without first requesting FISA court permission. The *New York Times* revealed the existence of the program in December 2005. The president responded that the government had to act more quickly than FISA allowed "to detect and prevent a possible attack" by terrorists. He maintained that as commander-in-chief the Constitution provided him with this "inherent power."

During the next three years, Congress chose not to act on this apparent violation of the law. Instead, worried about the terrorist threat, they opted to give the president more power:

* The Protect America Act (2007) weakened FISA oversight and placed it mostly under the control of the attorney general and the director of national intelligence, who serve in those positions at the pleasure of the president.
* The FISA Amendments Act (2008) further limited FISA oversight and immunized the telecom companies against lawsuits for illegal spying. But it did not immunize government officials against illegal actions.

The revised FISA law still requires the government to show "probable cause" that an American citizen is an agent of a terrorist group or foreign government. And it still requires the government to obtain a warrant from the FISA court before conducting electronic surveillance of an American citizen or an organization in the US

When Senator Obama was running for president, he declared that it "was unconstitutional and illegal" for President Bush to conduct warrantless surveillance of Americans.

**For discussion**

**1.** What questions do students have about the reading? How might they be answered?

**2.** Why did the NSA tap the phones of Al-Haramain?

**3.** Why didn't the government present evidence in court to support its claim that Al-Haramain was a terrorist organization?

**4.** What is FISA? Why did it become law?

**5.** Why do suppose that Congress chose not to reverse President Bush's decision or to file charges against him?

**6.** What does FISA require if the government wants electronic surveillance of an American citizen?

**7.** Explain each of the laws, constitutional amendments and principles, and international agreements cited by Al-Haramain in its defense and why it cited each. If you need more information, how might you find it?

**8.** Should Judge Walker have allowed the government's state secrets claim? Why or why not?

 **Student Reading 2:
The verdict on warrantless surveillance**

On March 31, Judge Walker became the third federal judge to rule that NSA warrantless surveillance of Al-Haramain's director and lawyers was illegal because FISA required court approval first.

He said that if the government was concerned about revealing national security secrets, it could have gone through the FISA private court. Judge Walker added that the government "declined to submit anything to the court squarely addressing" Al-Haramain's argument that it had been the victim of illegal surveillance.

**"Abuses of surveillance authority"**

But both the Bush and Obama administrations have now acted as if FISA regulations are optional for officials of the executive branch. If they choose not to submit to FISA, they can invoke the state secrets privilege, offer no other explanation or defense, and sidestep a lawsuit.

Judge Walker said the government's claim of the state secrets privilege amounted to "unfettered executive-branch discretion" that had "obvious potential for government abuse and overreaching." Congress had approved FISA "specifically to rein in and create a judicial check for executive branch abuses of surveillance authority."

The judge criticized the Justice Department lawyers and the Obama administration for attempting to place itself above the law. FISA provides that anyone who violates it has committed a felony and will be subject to five years in prison and a $10,000 fine for each offense.

The Obama administration has not announced if it intends to appeal this decision. If it does not, it remains to be seen whether under the rule of law President Obama, as well as NSA and FBI officials, will be charged with FISA penalties.

The attorney for the Al-Haramain director and its two lawyers seek 1) either compensatory damages of $20,200 for each of the three individuals or $100 for each of the 202 days they were wiretapped; 2) punitive damages that could be much higher; and 3) reimbursement for legal fees over the past five years.

**For discussion**

**1.** What questions do students have about the reading? How might they be answered?
 **2.** What reasons did Judge Walker give for ruling against the government?
 **3.** Why is the state secrets privilege important? Why might it produce "government abuse and overreaching"? Do you agree with this conclusion? Why or why not?

**Student Reading 3:
Digital rights case**

The Electronic Frontier Foundations (EFF) regards itself as "the first line of defense" against what it views as violations in the networked world against freedom of speech and privacy. On its website, EFF reports on "cutting-edge issues defending free speech, privacy, innovation, and consumer rights today." It is a nonprofit organization. ([www.eff.org](http://www.eff.org))

In October 2008, EFF filed a lawsuit against a number of officials in the Bush administration for illegally spying on the communications of Americans. It acted on the assurances that while changes in FISA did provide immunity to telecom companies, it did not provide it to government officials.

EFF evidence in the case, known as Jewell V. NSA, included what it calls "undisputed documents" provided by former AT&T telecommunications technician Mark Klein. They showed that AT&T routed copies of Internet traffic reports to a secret room in San Francisco controlled by the National Security Agency.

EFF's suit accuses the NSA and other government agencies involved in intercepting Internet traffic as well as individuals responsible for creating, authorizing, and implementing the illegal program. They include former President George W. Bush, former Vice President Dick Cheney, and other officials.

**The Obama defense**

In April 2009, the Obama administration insisted that the EFF lawsuit be dismissed on two grounds: 1) the state secrets privilege and 2) a claim that the Patriot Act, signed into law by President Bush a month after 9/11, prohibits any lawsuits over government electronic surveillance unless there is "willful disclosure" of the illegal interception.

"In other words," Glenn Greenwald, a former constitutional and civil rights lawyer, wrote, "the Obama Department of Justice has now invented a brand new claim of government immunity, one which literally asserts that the US government is free to intercept all of your communications (calls, emails and the like) and -- even if what they're doing is blatantly illegal and they know it's illegal -- you are barred from suing them unless they willfully disclose to the public what they have learned…." ([www.salon.com](http://www.salon.com), 4/6/09)

The government's response would be that a continuing terrorist threat requires these actions and that the government can be trusted not to invade the privacy of citizens who are not involved with terrorists.

**The verdict**

In January 2010, Judge Vaughn Walker ruled against EFF. He argued that "the privacy harm to millions of Americans from the illegal spying dragnet was not a 'particularized injury' but instead a 'generalized grievance' because almost everyone in the United States has a phone and Internet service."

"'The alarming upshot of the court's decision is that so long as the government spies on all Americans, the courts have no power to review or halt such mass surveillance even when it is flatly illegal and unconstitutional,' said EFF Senior Staff Attorney Kevin Bankston." (1/21/10)

EFF has appealed the decision.

**For discussion**

**1.** What questions do students have about the reading? How might they be answered?

**2.** What is the role of the telecom companies in government surveillance? Why couldn't EFF sue AT&T, Verizon, etc.?

**3.** Why can EFF sue government officials? Why did they sue? Why did Judge Walker rule against them?

**4.** Why do Glenn Greenwald, EFF, and others regard the decision as dangerous? What would be the government's answer to their concerns? Which point of view comes closest to your own opinion and why?

 **For writing**

Write a paper of about 300 words in which you support or oppose the question in the title of these readings. You may do any background reading you care to before preparing your paper. You must cite appropriately any sources you use to support your argument.

**For group work**

Divide the class into groups of four to six students to read their papers, respond to any clarifying questions, then select what they regard as the group's best paper, which will be read to the class and discussed.

 **For action**

Following class discussions of the pros and cons of the surveillance issue, assign a 100-word draft e-mail to be addressed to the president with a copy to the attorney-general. Collect the drafts for teacher comments and any necessary re-writing. When an e-mail is approved, ask the student to send it and to report any response. One excellent way to encourage a response, the teacher might tell students, is for them to include a clear, specific question to be answered.