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## Court Affirms Wiretapping Without Warrants

By [JAMES RISEN](#) and [ERIC LICHTBLAU](#)

WASHINGTON — In a rare public ruling, a secret federal appeals court has said telecommunications companies must cooperate with the government to intercept international phone calls and e-mail of American citizens suspected of being spies or terrorists.

The ruling came in a case involving an unidentified company's challenge to 2007 legislation that expanded the president's legal power to conduct wiretapping without warrants for intelligence purposes.

But the ruling, handed down in August 2008 by the Foreign Intelligence Surveillance Court of Review and made public Thursday, did not directly address whether President Bush was within his constitutional powers in ordering domestic wiretapping without warrants, without first getting Congressional approval, after the terrorist attacks of 2001.

Several legal experts cautioned that the ruling had limited application, since it dealt narrowly with the carrying out of a law that had been superseded by new legislation. But the ruling is still the first by an appeals court that says the Fourth Amendment's requirement for warrants does not apply to the foreign collection of intelligence involving Americans. That finding could have broad implications for United States national security law.

The court ruled that eavesdropping on Americans believed to be agents of a foreign power "possesses characteristics that qualify it for such an exception."

Bruce M. Selya, the chief judge of the review court, wrote in the opinion that "our decision recognizes that where the government has instituted several layers of serviceable safeguards to protect individuals against unwarranted harms and to minimize incidental intrusions, its efforts to protect national security should not be frustrated by the courts."

The three-judge court, which hears rare appeals from the full Foreign Intelligence Surveillance Court, addressed provisions of the Protect America Act, passed by Congress in 2007 amid the controversy over Mr. Bush's program of wiretapping without warrants. It found that the administration had put in place sufficient privacy safeguards to meet the constitutional standards of the Fourth Amendment's ban on unreasonable searches. Because of that, the company had to cooperate, the court said.

That finding bolstered the Bush administration's broader arguments on wiretapping without warrants, both critics and supporters said.

William C. Banks, a law professor at [Syracuse University](#) who has criticized the administration's legal

position on eavesdropping, said that while the ruling did not address Mr. Bush's surveillance without warrants directly, "it does bolster his case" by recognizing that eavesdropping for national security purposes did not always require warrants.

Coming in the final days of the Bush administration, the ruling was hailed by the administration and conservatives as a victory for an aggressive approach to counterterrorism. The Justice Department said in a statement that it was "pleased with this important ruling."

"It provides a very good result; it reaffirms the president's right to conduct warrantless searches," said David Rivkin, a Washington lawyer who has served in Republican administrations.

Representative Peter Hoekstra of Michigan, the ranking Republican on the House Intelligence Committee, said the ruling "reinforces the significant, bipartisan political consensus" in favor of the president's broad assertions of wiretapping powers.

But others were cautious about the significance of the ruling.

"I think this kind of maintains the status quo," said Scott Silliman, an expert on national security law at [Duke University](#). "I don't think it is a surprise that the FISA court found that the legislation was constitutional. They are going to defer to Congress, especially since there was a lot of discussion when the law was passed about the ability of the government to compel providers."

The ruling is the latest legal chapter in a dispute dating back to the aftermath of the Sept. 11 attacks, when Mr. Bush secretly ordered the [National Security Agency](#) to eavesdrop on the international communications of American citizens without the approval of Congress or the courts. After the agency's program was publicly disclosed in December 2005, critics said it violated a 1978 law. The White House initially opposed any new legislation to regulate surveillance, arguing that it would be an infringement of the president's powers.

But after the Democrats took control of Congress in the 2006 midterm elections, the administration agreed to bring the N.S.A. program under the jurisdiction of the FISA court. In 2007, Congress passed the Protect America Act, which was replaced in 2008 by another surveillance law.

The case arose in 2007, when a telecommunications company refused to comply with the government's demands that it cooperate without warrants under the terms of the Protect America Act. The company was forced to comply, under threat of contempt, while it challenged the law in the FISA court, the opinion noted.

The company argued that the law violated the constitutional rights of its customers and that the act placed too much power and discretion in the hands of the executive branch. It also raised specific privacy problems, which the court ruling did not identify, that could occur under the surveillance directives it had received from the government.

In rejecting the company's complaint, the FISA appeals court found that the administration had so carefully carried out the Protect America Act that it was not in violation of the Fourth Amendment. It concluded that the procedures put in place under the law properly balanced the constitutional rights of American citizens and the national security interests of the government.

The company argued that “by placing discretion entirely in the hands of the executive branch without prior judicial involvement, the procedures cede to that branch overly broad power that invites abuse,” the court wrote.

But, the court ruled, “this is little more than a lament about the risk that government officials will not operate in good faith.’

“That sort of risk exists even when a warrant is required,” it said.

*Scott Shane contributed reporting.*

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