



Written by [Thomas R. Eddlem](#) on January 19, 2009

FISA Court: Telecoms Must Help Warrantless Wiretaps

The FISA court was created for the sole purpose of protecting the warrant requirement of the Fourth Amendment to the U.S. Constitution. But the language in the court of review's decision casually casts aside the constitutional requirement.

The case involved an unnamed telecommunications company that had refused to cooperate in the Bush administration's unconstitutional wiretapping scheme and had taken the administration to court. According to the court opinion, 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." That's exactly right.



But the court concluded: "That sort of risk exists even when a warrant is required." The decision is almost an admission that FISA and other federal courts serve no protective purpose and that *carte blanche* has been handed to the executive branch.

The *New York Times* quoted chief judge of the FISA appeals court Bruce M. Selya, who summed up the ruling: "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."

But the Constitution and the Bill of Rights do not require "serviceable safeguards" against searches and seizures invented by the executive branch for its own convenience. The [Fourth Amendment](#) enumerates four specific safeguards against "unreasonable searches":

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.

That magnificent Fourth Amendment guarantees a fourfold test for what constitutes a "reasonable" search or seizure:

1. You need a warrant from a court.
2. You need probable cause (more than 50 percent chance that the crime has been committed).
3. You need a public oath by a witness.
4. What is being searched has to be specified.

The FISA court of review opinion is clearly an instance of judges not following their sworn duty to uphold the Constitution.



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According to the *New York Times*, this case involved not calls between foreigners, but “phone calls and e-mail of American citizens.” Some neoconservatives have taken refuge in the illusion that the Bush administration is only wiretapping the phone calls of foreigners without a warrant. But the record documents that the NSA has even [stooped so low](#) as to wiretap the intimate phone calls between U.S. soldiers deployed abroad and their sweethearts at home.

The executive branch has no right to wiretap even foreigners without a warrant. The Fourth Amendment makes no such exception allowing foreign searches without warrants. Some neoconservatives poseurs have [argued that the limits of the Constitution do not apply to foreigners](#) living in the United States, or that [the Constitution doesn't apply abroad](#). But as constitutional champion Harry Browne has [pointed out](#), “The important point is that the Constitution doesn't apply to Americans, it doesn't apply to citizens, it doesn't even apply to ‘people.’ It applies to the federal government.”

Moreover, to claim that foreigners don't have rights is to fundamentally misunderstand the [Founding Fathers' view of rights](#) as “endowed by our Creator” upon “all men.” The war for American independence from Great Britain was fundamentally a war to decide whether rights were limited to a geographical area (the island of Great Britain) or were given to all men by God. Modern neoconservatives fundamentally reject the Judeo-Christian worldview of our Founding Fathers, who argued that rights are “inalienable.” To neoconservatives, rights are quite alienable and based upon geographical location, as they were to the British king and parliament in 1776.

Neoconservatives also reject one of the fundamental precepts of Christianity, as expressed in the words of Jesus Christ: “Do to others whatever you would have them do to you.” This was an echo of similar words in the Jewish Torah in Leviticus 19:18. Jesus' instructions, and the instructions in the Torah, neoconservatives argue, are ["suicide."](#)

The problem of unconstitutional searches is no longer just with the Bush administration and its neoconservatives adherents, however. This decision proves that even the judges have become enemies of the Fourth Amendment. That's a real danger to freedom.



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