

RUSS FEINGOLD THROWS VAUGHN WALKER A SOFTBALL

With this letter:

I am writing to reiterate my request for you to formally and promptly renounce the assertions of executive authority made by the Bush Administration with regard to warrantless wiretapping. As a United States Senator, you stated clearly and correctly that the warrantless wiretapping program was illegal. Your Attorney General expressed the same view, both as a private citizen and at his confirmation hearing.

It is my hope that you will formally confirm this position as president, which is why I sent you a letter on April 29, 2009, urging your administration to withdraw the unclassified and highly flawed January 19, 2006, Department of Justice Legal Authorities Supporting the Activities of the National Security Agency Described by the President ("NSA Legal Authorities White Paper"), as well as to withdraw and declassify any other memoranda providing legal justifications for the program. Particularly in light of two recent events, I am concerned that failure to take these steps may be construed by those who work for you as an indication that these justifications were and remain valid.

On June 8, Director of National Intelligence Blair asserted in a speech and in response to a question from a reporter that the warrantless wiretapping program "wasn't illegal." His office subsequently clarified that

he did not intend to make a legal judgment and that he had meant to convey only that the program was authorized by the president and the Department of Justice. Nonetheless, Director Blair's remarks – which directly contravene your earlier position, as well as the position of Attorney General Holder – risk conveying to the Intelligence Community, whose job it is to explore legally available surveillance options, that not complying with the Foreign Intelligence Surveillance Act may be such an option. Moreover, his "clarification" highlights the need to formally renounce the legal justification that the "White Paper" provides.

In addition, I asked your nominee to be General Counsel for the Director of National Intelligence, whether, based on the "White Paper" and other public sources, he believed that the warrantless wiretapping program was legal. His written response to my question, which was presumably vetted by your administration, indicated that, because the program was classified, he could not offer an opinion. Should he be confirmed, this position, too, risks conveying to the Intelligence Community that there may be classified justifications for not complying with FISA. As a member of the Senate Intelligence Committee who has seen all of the legal justifications, classified and unclassified, that were offered in defense of the warrantless wiretapping program, I strongly disagree with this implication.

As president, you have spoken clearly on the importance of the rule of law and have taken action in a number of areas, such as torture, that have reassured the American people and provided much-needed

clarity to the Intelligence Community and the rest of the executive branch.
For these reasons, I strongly urge you to formally renounce the legal arguments behind the previous administration's warrantless wiretapping and to demonstrate again your clear commitment to the rule of law in this area.

Thank you for considering my views on this important matter.

Sincerely,

Russell D. Feingold
UNITED STATES SENATOR

Mind you, I expect Obama and friends to deep six this request and go on letting people pretend the program was legal, at least until Judge Walker has cleared his docket of anything remotely resembling a warrantless wiretapping case. But this does focus attention on the rank hypocrisy of Eric Holder's DOJ as the al-Haramain and other wiretapping cases move forward.

Update: One reason this is so interesting is because al-Haramain's lawyer, Jon Eisenberg, suggested he was going to use the January 2006 White Paper in question to show that the warrantless wiretap program was illegal (he got the year wrong, but meant the White Paper).

MR. EISENBERG: Now, will our motion for summary judgment look just like what we filed previously, as Mr. Coppelino mentioned? The answer to that is most certainly no. We'll be arguing liability and specifically issues including the legality of the warrantless surveillance program, the president's power or not to disregard an act of Congress in the name of National Security. We will be arguing the merits of this case.

Mr. Coppelino says, well, that's going to require a consideration of classified

information, and my response to that is, it didn't require a consideration of classified evidence when the Government presented its case to the public in a 42-page white paper in January of 2007. There is no – it is a purely legal issue we are looking to litigate.

This Court needs no further classified evidence to decide the purely legal issue whether the president has the expansive power that President Bush and now President Obama are claiming.

As I said, I fully expect Obama to ignore this (actually withdrawing the White Paper might well sink the government's case in al-Haramain). But this letter really focuses on the hypocrisy and inconsistency here.