



Yassin Aref (left) and Mohammed Hossain, leaving court in Albany

# PACKING HEAT

THE WHITE HOUSE DEFENDS ITS WARRANTLESS SPYING PROGRAM, BUT A SMALL ARMY OF LAWYERS IS GUNNING TO SHOOT IT DOWN

By Chitra Ragavan

**S**uliman al-Buthe's troubles began six years ago this month. Heading home to Saudi Arabia with \$150,000 in cashiers and travelers checks that had been donated to a charity for which he served as codirector, al-Buthe failed to report the checks to U.S. Customs officers, as required by law. Al-Buthe was unaware of the rule, he says. Four years later, federal agents stepped in and froze his charity's assets, alleging ties to Osama bin Laden, then slapped an indictment on him for illegally taking money out of the country.

Today, al-Buthe's troubles may open the first real window into the Bush administration's controversial program of warrantless spying on terrorism suspects. In a lawsuit filed against the government, his attorney alleges that the National Security Agency illegally wiretapped conversations between al-Buthe and his previous American

attorneys and that the government used the information to target both al-Buthe and his charity, the al-Haramain Islamic Foundation Inc., based in Ashland, Ore. FBI agents investigating al-Buthe and his charity mistakenly gave copies of the classified surveillance logs to the two attorneys who were wiretapped. Late last month, al-Buthe's current attorney, Thomas Nelson, filed the logs under seal and asked the trial judge to review them. "This," Nelson says, "may be just the tip of the iceberg."

That remains to be seen. But President Bush's post-9/11 decision to allow the NSA to eavesdrop on American citizens without court-approved warrants has certainly created a political firestorm. Since the program was first disclosed, in December, defense lawyers from New York to Portland, from Florida to Virginia, have filed more than 20 legal challenges to it. Justice Department lawyers are scrambling to respond to court orders for disclosure, with deadlines looming as early as this week and next. Experts agree that the bar for

these challenges is high. But with Congress reluctant to hold hearings on the policy, and the legal challenges coming to a boil, the federal courts may become the real forum for debate and perhaps resolution of the issue. An adverse verdict for the White House in any one of these cases could bring the NSA surveillance program to at least a temporary halt while raising questions about President Bush's repeated assertions that he was acting in accordance with the law.

The challenges range from lawsuits filed in civil court by the American Civil Liberties Union and others to motions filed in some of the government's most high profile terrorism cases. The big hurdle for the ACLU, legal scholars, journalists, and others involved in the civil suits is to prove that they have legal standing to sue. Criminal defense attorneys, meanwhile, will have to grapple with the highly classified nature of the surveillance program. But Syracuse University law Prof. William Banks says some initial rulings indicate that at least a few judges are curious to push the envelope and get some answers. "The government is vulnerable here," says Banks, "in that no judge has determined that this program was lawful, and we don't know its full scope." The Bush administration argues that the president was acting within his rights as commander in chief during wartime when he ordered the warrantless spying. However, Justice Department spokesman Brian Roehrkasse said he can't comment on any of the pending cases.

**Delayed.** A few of the challenges are being especially closely watched. Last Thanksgiving, a federal jury in Virginia convicted a young American Muslim and alleged al Qaeda member named Ahmed Omar Abu Ali of nine counts of plotting to assassinate President Bush. Now his attorney, Khurram Wahed, has filed a motion to postpone Abu Ali's sentencing proceedings. "Our question," says Wahed, "is, how broad was this program?"

U.S. District Judge Gerald Bruce Lee has granted Wahed's request to delay sentencing, and he ordered prosecutors to present a sworn declaration from the government by Thursday as to whether warrantless surveillance was used and if so, under what "specific constitutional or statutory authority."

Defense lawyers are also tracking the case of Ali al-Timimi with interest because it's in one of the nation's most conservative appeals courts, the U.S. Fourth

suspicion that other intercepts existed," says Turley. "The government repeatedly denied that."

In Albany, an FBI sting case has also taken a legal detour. The case involves an Iraqi-born Islamic scholar named Yassin Aref and his codefendant Mohammed Hossain—both members of an Albany mosque—who were accused of conspiring to sell missile launchers to terrorists. The trial is scheduled for next year. Aref's attorney, Terence Kindlon,

wants the court to suppress any NSA-obtained evidence and dismiss the indictment. At the time of their arrest, the government stated that it had targeted Aref and Hossain after coalition forces found "pocket litter" with their names in a destroyed western Iraqi encampment. "The explanation for why they took an interest in him," says Kindlon, "has always been suspect to me."

The government has two weeks to respond to Kindlon's motions, which he says were inspired by a popular liberal criminal defense website, [www.talkleft.com](http://www.talkleft.com), created by Denver, Colo., defense attorney Jeralyn Merritt—one of Oklahoma bomber Timothy McVeigh's principal trial lawyers. Now others, like Chicago public defender Mary Judge, are learning from Kindlon. Judge wrote a



**TWO FRONTS.** Aref and Hossain were both members of the Masjid As-Salam Mosque in Albany, N.Y. (above). Ahmed Omar Abu Ali's parents speak out on behalf of their son outside a federal courthouse in Alexandria, Va.

Circuit Court of Appeals, in Richmond, Va. Al-Timimi is an American biologist and Islamic scholar, convicted last April of inciting young men who had formed the so-called Virginia Jihad Network to join the Taliban and fight against coalition troops in Afghanistan. He was sentenced to life in prison, with no prospect of parole. His attorney, Jonathan Turley, persuaded the Fourth Circuit to freeze al-Timimi's appeals proceedings. The Justice Department was expected to notify the court early this week that it does not oppose Turley's motion to remand the case to the lower court to determine if the government wiretapped al-Timimi without a warrant and if it failed to disclose potentially exculpatory wiretaps. "There was at trial great

letter in January to federal prosecutors seeking to find out if NSA surveillance was used against her client, Sami Latchin, who is being held under house arrest in Des Plaines, Ill., for allegedly being an Iraqi sleeper agent for Saddam Hussein. Initially, there was no response. Then Judge wrote another letter saying she'd appreciate a reply even if was "simply, that you refuse to respond to the inquiries." Judge's wish was granted, more or less. The U.S. attorney in Chicago, Patrick Fitzgerald, responded with a crisp one-sentence note, stating that he would have no response at this time. ●

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