THE AL-HARAMAIN DECISION

Due to some doozy global warming storms last night, we had intermittent power, so I'm just now getting to the Vaughn Walker decision in the al Haramain case, in which he dismisses the suit but invites the plaintiffs to submit unclassified evidence in support of their case. So there's already a range of smart commentary on the decision. The Electronic Frontier Foundation argues that Walkers ruling bodes well for their own case—which relies on the AT&T documents liberated by Mark Klein, and not classified evidence. Wired's David Kravets notes that, coming as it does two business days before Congress will grant the telecoms immunity, the ruling has little meaning for EFF. McJoan basically makes the same argument—Congress is in the process of taking an unwieldy bad law and making it worse.

With regards the events of the next week, I sort of agree that this ruling will have little effect. There's nothing in Walker's ruling that will, by itself, persuade Barack Obama to take a stand on this legislation (he's due to make an announcement about his stance on the legislation, but I don't think this will change it one way or another). And I agree with Kravets—once Congress does pass its immunity, this ruling will be meaningless for those suing the telecoms (though perhaps it'll make the likely suits that the immunity itself is illegal more interesting).

State Secrets Is Not Absolute

But the decision is interesting for two other reasons. First, Walker makes a strong case that the government's ability to invoke state secrets is not absolute. Walker cites one of David Addington's favorite cases, Navy v. Egan, to show that even that case envisions the possibility of Congress placing limits on the President's ability to control national security

information.

> But Egan also discussed the other side of the coin, stating that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." Id at 530 (emphasis added). Egan recognizes that the authority to protect national security information is neither exclusive nor absolute in the executive branch. When Congress acts to contravene the president's authority, federal courts must give effect to what Congress has required. Egan's formulation is, therefore, a specific application of Justice Jackson's more general statement in Youngstown Sheet & Tube. [my emphasis]

And then, in yet another example of Article III reminding the executive branch about that whole co-equal branch thing, Walker reiterates that the courts get to decide the limits to the President's power.

> The weakness of defendants' first argument——that the Constitution grants the executive branch the power to control the state secrets privilege——is evident in the authorities they marshal for it. Defendants rely on United States v Nixon, 418 US 683 (1974), in which the Supreme Court rejected President Nixon's efforts to quash subpoenas under Federal Rule of Criminal Procedure 17(c) seeking tape recordings and documents pertaining to the Watergate break-in and ensuing events. The Court rejected the president's "undifferentiated claim of public interest in the confidentiality of [White House] conversations" between the president and his advisors, contrasting the need for confidentiality of these conversations with "a claim of

> need to protect military, diplomatic or sensitive national security secrets." Id at 706. In the course of making this comparison, the Court observed that privileges against forced disclosure find their sources in the Constitution, statutes or common law. At bottom, however, Nixon stands for the proposition that in the case of a common law privilege such as that asserted by President Nixon, it is the judiciary that defines the metes and bounds of that privilege and even the confidential communications of the president must yield to the needs of the criminal justice system. This hardly counts as authority that the president's duties under Article II create a shield against disclosure.

So Walker lays out the legal basis through which Congress can place limits on how the Executive Branch plays with classified information. Given that Congress is currently considering placing limits on the State Secrets privilege, Walker's decision may come in useful.

John Yoo Was Wrong

The other reason I find this opinion useful is because it directly refutes a claim John Yoo made in one of his still-classified OLC opinions. As I reported in May (though we basically knew this anyway), John Yoo claimed that Congress had never really said exclusive meant exclusive.

> After significant efforts, Senator Whitehouse has finally gotten the Administration to declassify the fourth of the four outrageous opinions John Yoo wrote to justify the warrantless wiretap program (the other three Pixie Dust provisions basically allow the President to write his own laws). This one pertains to the exclusivity provision of FISA, which states clearly that FISA was

> the "exclusive means by which electronic surveillance … and the interception of domestic wire, oral and electronic communications may be conducted."
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> Here's what that purported genius, John Yoo, did with FISA's exclusivity provision:
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> > Unless Congress made a clear statement in the Foreign Intelligence Surveillance Act that it sought to restrict presidential authority to conduct warrantless searches in the national security area — which it has not — then the statute must be construed to avoid [such] a reading.

Not that it should surprise us, but Judge Walker disagrees with Yoo.

> It is not entirely clear whether defendants acknowledge Congress's authority to enact FISA as the exclusive means by which the executive branch may undertake foreign intelligence surveillance in the domestic context. While their papers do not explicitly assert otherwise, defendants' attorney in this matter stated in open court during the hearing herein held on April 23, 2008 that, while he conceded that "Congress sought to take over the field" of foreign intelligence surveillance (Doc #452 at 29:2-3), whether the president actually had constitutional authority under Article II to order such surveillance in disregard of FISA remained an open question: "[D]oes the president have constitutional authority under Article II to authorize foreign intelligence surveillance? Several courts said that he did. Congress passed the FISA, and

> the issue has never really been resolved. That goes to the issue of the authority to authorize surveillance." Id at 33:7-12. Counsel repeatedly asserted that this issue was entirely separate from the preemption inquiry relevant to the state secrets privilege and urged the court not to "conflate" the two inquiries. E g, id at 32:8-10.
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> To the contrary, the court believes that the two areas of executive branch activity pertaining to foreign intelligence surveillance are not distinct for purposes of this analysis as defendants' counsel asserts. Congress appears clearly to have intended to——and did——establish the exclusive means for foreign intelligence surveillance activities to be conducted. Whatever power the executive may otherwise have had in this regard, FISA limits the power of the executive branch to conduct such activities and it limits the executive branch's authority to assert the state secrets privilege in response to challenges to the legality of its foreign intelligence surveillance activities. [my emphasis]

Remember, the Office of Professional Responsibility is currently investigating whether Yoo's decisions underlying the warrantless wiretapping program were improper. Not that it ought to take anything more than common sense to conclude that Yoo's claim—that FISA did not explicitly limit the President's ability to conduct wiretapping—is nuts on its face. But just in case, now there's another judge's ruling that clearly finds Yoo's proposition to be nuts.

In any case, with regards to FISA, this ruling is little more than a useful marker for how a court interprets a law that will, as of Tuesday, be out of date. But at the very least, the decision is probably giving David Addington and

John Yoo and the rest of the Unitary Executive clubbers heartburn right now—and that’s always a good thing.