THE POST FISA AMENDMENT ACT ACTION BEGINS: ACLU FIRES THE FIRST SALVO – A WORKING THREAD

As all know by now, July 9, 2008 was a day that will live in infamy. It seems stark to use that historic phrase, but to a lot of us, it really feels that way. The video attached to this post has been so attached to several now, and is of Professor Jonathan Turley on Countdown with Rachel Maddow explaining the gut shot to the Fourth Amendment the FISA Amendment Act constitutes. Turley is exactly right, and as most here know, that is precisely what I have been saying is the real danger of this act for a long, long time.

The foregoing you all know. What many have been asking, and rightfully so, is where do we go from here. You have all dedicated so much passion, time, and effort to the cause of fighting this damnable act of Congress. Cold turkey leaves a void. Well, the next phase is just beginning. There is the Strange Bedfellows fund that can always use your love; and as Jane and Howie have advised, there has been some positive love given to some of the Democrats that actually stood tall for us. And on August 8, there will be a MoneyBombing.

But, by far, the biggest news you need to know about is the activity today by the ACLU. The ACLU has made two filings in response to the passage and signing of the FISA Amendments Act (FAA). The first is a new complaint(attn: large pdf) filed in the Southern District of New York (SDNY). The action is captioned *Amnesty International USA et al. v. John M. McConnell et al.*; there are several plaintiffs you will recognize, and DNI Mike McConnell, NSA Director Keith Alexander and Mukasey as defendants. The

action is for declaratory judgment/injunctive relief which, I will be honest, is not the favorite form of action that Federal courts consider. This is similar to the tact taken in *ACLU v. NSA*, the 6th Circuit case that Judge Anna Taylor Diggs bounced just to give you an idea of what i mean. In fairness, the ACLU is already saying that the new case is distinguishable because the existence of surveillance, and potential for surveillance, is much more established here, and there is some truth to that. Whether there is enough in that regard or not will only be told by time; but it will be dicey. It should be noted that the plaintiffs here are not proceeding under "aggrieved person" status pursuant to FISA in their standing claim, rather they are asserting that their livelihood, work and income, as well as privacy, are being, and will be, chilled by the pervasive effects of the FAA provisions.

The second filing by the ACLU today was made to the FISA Court and is encaptioned Motion For Leave To Participate In FISC Proceedings Required By The Fisa Amendments Act Of 2008. (another pdf). The caption is fairly self explanatory, the motion basically seeks leave for the ACLU to participate in proceedings in the FISC that occur pursuant to section 702(i) of the FAA by filing of briefs, require the government to file public unclassified versions of government briefs and filings, and that the court issue unclassified versions of any decisions. It will be interesting to see how the FISC rules and responds to this application. I would have been very skeptical prior to this order in an earlier application the ACLU made to the FISC seeking certain sealed court records. Colleen Kollar-Kotelly may just be peeved enough at the whole surveillance mess wrought by the Bush Administration to agree to this intervention.

So, these are the two actions proffered by the ACLU, and we owe them a world of thanks for waging the battle for all of us. I think they are designed to bring leverage both legally and

in the court of public opinion. Until the plaintiffs start filing responsive pleadings to the motions to dismiss in the various consolidated cases in front of Vaughn Walker in NDCA, this is where the legal action is going to be. Take a look at these pleadings and let's unpack them together, discuss and see if we cannot find some additional ideas for moving forward.

Alright, one extra little bonus. I have been holding this back for quite a while now because I was literally loathe to have it in the public domain and be latched onto by people like Obama and the other folks selling out the Constitution and 4th Amendment, as well as those that would support them and rationalize their egregious sellout. Specifically, we have worked single mindedly under the assumption that, while many parts of the FAA might could be reversed or minimized through subsequent legislation with a new Congress, the retroactive immunity portion was irrevocable and final. That may, and I emphasize this is a tentative and weak may, not necessarily be the case.

It is feasible that, providing the repealing legislation was enacted prior to the final determination of the appeals that will be made from the dismissals of the 40 some odd cases in the consolidated litigation in NDCA currently in Vaughn Walker's court, the cases could be returned to the posture they were in prior to the immunity grant. And the appeals, assuming they go all the way through the Supreme Court, which is a given, could not possibly be done before next spring. Given the weak Democratic leadership, I think this quite unlikely, but it is a possibility to consider. So please, keep up the pressure on your Congresspeople, and let them know your fury at what has transpired and that you expect them to correct it after the election and the new term starts. And it is not just me that thinks this, it is the belief of the litigators at the EFF I have spoken to as well. Back to the salt mines; it ain't over till it's over!