OOPS! THEY PISSED OFF JUDGE WALKER BEFORE HE FINALIZES IMMUNITY

I just finished reading Vaughn Walker's opinion explaining that the government will have to give him the document that—the lawyers for al Haramain claim—shows they were wiretapped without a warrant under Bush's illegal wiretap program, so he can determine whether it really does show what the lawyers claim it shows. If it does, you see, then someone will finally be able to sue Bush and his cronies for violating FISA.

If you don't have time to read the entire opinion, I recommend you pick it up around page 16—where Walker includes a short summary of how the al Haramain lawyers proved they were surveilled under the illegal program—and then go to page 21—where Walker starts getting really cranky with the government.

> Defendants simply continue to insist that § 1806(f) discovery may not be used to litigate the issue of standing; rather, they argue, plaintiffs have failed to establish their "Article III standing" and their case must now be dismissed. But defendants' contention that plaintiffs must prove more than they have in order to avail themselves of section 1806(f) conflicts with the express primary purpose of in camera review under § 1806(f): "to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." § 1806(f).
>
> In reply, plaintiffs call attention to the circular nature of the government's position on their motion:
>
> > Do defendants mean to assert their theory of unfettered presidential power over matters of national security —— the very

> > theory plaintiffs seek to challenge in this case —– as a basis for disregarding this court's FISA preemption ruling and defying the current access proceedings under section 1806(f)? So it seems.
>
> So it seems to the court also.
>
> It appears from defendants' response to plaintiffs' motion that defendants believe they can prevent the court from taking any action under 1806(f) by simply declining to act.
>
> But the statute is more logically susceptible to another, plainer reading: the occurrence of the action by the Attorney General described in the clause beginning with "if" makes mandatory on the district court (as signaled by the verb "shall") the in camera/ex parte review provided for in the rest of the sentence. The non-occurrence of the Attorney General's action does not necessarily stop the process in its tracks as defendants seem to contend. Rather, a more plausible reading is that it leaves the court free to order discovery of the materials or information sought by the "aggrieved person" in whatever manner it deems consistent with section 1806(f)'s text and purpose.

Walker calls BushCo's lawyers on their bogus claims and throws in a "shall" to whip them around the head. And then he gets snarky.

I don't think you're really supposed to incite your judge to snark.

And the significance of Walker's crankiness extends beyond the al-Haramain case.

Walker has given the government short deadlines

for responding to this order. He has required they hand over the document in question—the one that will probably show that the government did spy on the al Haramain lawyers without a warrant—in the next two weeks. If you look at your calendar, you'll see that's just one day before BushCo leave office and Obama takes over (though, with their stall tactic on Eric Holder, it will be before Obama's got an Attorney General ready to take this over). Walker is also requiring the government to give the lawyers in this case Top Secret SCI clearance in crazy fast time (by mid-February) so they can continue to litigate this case.

But it's the first deadline—January 19—that I'm really interested in. Remember, Vaughn Walker has more than just this FISA mess on his plate. He is also—as we speak—deliberating on EFF's suit to prevent the awarding of retroactive immunity to the telecoms for their role in the illegal wiretap program. In fact, last we heard from him, Walker was wondering why he shouldn't wait until the new President comes in, to see whether that President's Attorney General is really so sure that the retroactive immunity for constitutional violations was as legal as Michael Mukasey claims it to have been. BushCo, of course, insisted that it's unheard of for a new Attorney General to reverse what the prior Administration's Attorney General has said.

> "We are going to have new attorney general," Walker interjected in Tuesday morning's hearing in a San Francisco courthouse. "Why shouldn't the court wait to see what the new attorney general will do?"
>
> [snip]
>
> "The Department of Justice rarely, if ever, declines to defend the constitutionality of a statute," Nichols said. "It's very, very unlikely for a future DOJ to decline to defend the constitutionality of this statute."

Mukasey has made his representations on this issue—both about the constitutionality of retroactive immunity, and about the legality of the underlying program—based on his typical crap about Yoo's OLC opinions.

But he's also about to hand over a document to Walker that proves that there are aggrieved parties that can sue the government for violating FISA. He's about to hand over a document that will demonstrate clearly that Bush broke the law.

It's going to be a lot harder for Walker to find retroactive immunity legal (not least because he's contemplating the same issues of separation of powers that has him so riled up here), and it'll be a lot harder for Mukasey's successor to continue to affirm the program itself was legal, if Walker is in the process of affirming that Bush broke the law.

bmaz has said—rightly—that BushCo is likely to appeal Walker's decision. But I suspect Walker is going to be reluctant to decide on immunity before he gets that document.