

# THE "OBAMA" SUPPORT FOR STAY PENDING APPEAL IN AL- HARAMAIN

A number of you have emailed to ask about this report—that Obama has supported Bush's request for a stay pending appeal in the al-Haramain case.

The Obama administration fell in line with the Bush administration Thursday when it urged a federal judge to set aside a ruling in a closely watched spy case weighing whether a U.S. president may bypass Congress and establish a program of eavesdropping on Americans without warrants.

In a filing in San Francisco federal court, President Barack Obama adopted the same position as his predecessor. With just hours left in office, President George W. Bush late Monday asked U.S. District Judge Vaughn Walker to stay enforcement of an important Jan. 5 ruling admitting key evidence into the case.

Thursday's filing by the Obama administration marked the first time it officially lodged a court document in the lawsuit asking the courts to rule on the constitutionality of the Bush administration's warrantless-eavesdropping program. The former president approved the wiretaps in the aftermath of the Sept. 11, 2001, terror attacks.

"The Government's position remains that this case should be stayed," the Obama administration wrote (.pdf) in a filing that for the first time made clear the new president was on board with the Bush

administration's reasoning in this case.

On its face, this looks like really horrible news—a spineless attempt on Obama's part to play along with Bush's efforts to run out the clock on Bush's alleged crimes in wiretapping al-Haramain and other Americans. And frankly, this should not be surprising news; Eric Holder said in his confirmation hearing that—unless he finds anything unexpected—he would continue the Bush Administration's support for retroactive immunity, a case that is also before Judge Vaughn Walker. So it would be unsurprising that the Obama Administration would be cautious in this case as well.

That said, there is some confusion about the whole decision. Here's the timeline:

January 16: Bush files appeal

January 19: Bush motions for stay pending appeal, informs Walker and al-Haramain of what it is doing

January 20: al Haramain responds, Obama becomes President

January 21: Specter places his one-week hold on Holder's nomination

January 22: The "Obama Administration" submits support of Bush motion

January 23, 10:30 AM PST: Hearing scheduled

As al-Haramain complains in its response, the Bush Administration appears to have deliberately held their appeal until "64 minutes before midnight on the last day of the Bush presidency." Two days later, Holder's nomination was held up in a highly unusual move. And the next day, a group of lawyers submit "Obama's" support for Bush's motion for a stay pending appeal. The lawyers defending the case remain largely the same: Douglas Letter, Joseph Hunt, Anthony Coppolino, and Alexander Haas, with only

Gregory Katsas and John O'Quinn replaced by Michael Hertz. But Michael Hertz—who is on this motion as the Acting Assistant Attorney General but who was Deputy Assistant Attorney General under Bush—seems to be a loyal Bushie. (Here he is arguing against a bill that would make it easier to sue contractors based on information supplied by government whistleblowers.) In other words, the lawyers making this argument appear to be a team of Bushies.

In fact, to give an idea of the degree to which Obama's participation in this motion is negligible, check out the docket: they originally filed this with Bush's name, and not Obama's, on the docket.



So that raises a giant question: Given that the Republicans are stalling Holder's nomination even as they submit this motion, to what degree is this just the output of dead-enders in Bush's DOJ? Yes, I'm sure if Obama didn't support this in principle, he'd be telling Vaughn Walker about that right now. But it does not appear to be the product of the Obama DOJ because that DOJ simply doesn't exist yet. (Al-Haramain even cites Holder and Dawn Johnsen dismissing Bush's claims to the unitary executive to argue Obama would think differently of Vaughn Walker's ability to require the Administration to hand over the document.) But this was implemented, anyway, by Bushies, not Obama people.

That said, that might make it even more offensive on Obama's part. After all, Holder has been denied an opportunity to read this document; it's not clear Obama has read it either. Would they—working in the dark—simply support Bush's attempt to run out the clock, even while Republicans appear to be deliberately stalling Holder's approval?