OBAMA BECOMES BUSH AS WE WAIT FOR WALKER'S RULING

graphic by politicalbase

As you may recall, since February 27, we have been waiting for a decision, of some sort, from Vaughn Walker in the al-Haramain and Consolidated Cases litigation in NDCA. The decision is not in yet; however, there is a new filing in the Consolidated Cases further ingraining the oneness of Obama with Bush in the litigation.

There really wasn't much doubt about the oneness with the exception of the nuance Marcy noted as to Obama shifting slightly away from privilege in favor of the merits. Slightly is the key word there; the overall tenor of the Obama position in the consolidated wiretapping cases is disgustingly identical to the duplicitous and wrongheaded state secrets policy of Bush/Cheney.

The new filing is by the government, by and through the Obama DOJ, and is a motion to dismiss in a recently consolidated case, *McMurray v. Verizon Communications*. Interestingly, McMurray was already a plaintiff from the start in the Consolidated Cases, but attempted to file a separate action in July of 2008 in the Southern District of New York challenging the application of Section 802 to their original action that had already been consolidated. Section 802 of the Foreign Intelligence Surveillance Act of 1978 ("FISA"), 50 U.S.C.§ 1885a(a) provides that a civil action "may not lie or be maintained" against electronic communication services providers alleged to have provided assistance to an element of the intelligence community, and "shall be promptly dismissed" if the Attorney General of the United States certifies that one of several circumstances exist with respect to

the alleged assistance.

Now you may ask yourself why did McMurray file this challenge in SDNY instead of in Vaughn Walker's court where his case, and all the others, already was lodged? Excellent question, and one I have no answer for since it was bound to be transferred out to Walker's court with the rest of the Consolidated Cases including, notably, McMurray's. Of course, the better question is how did all the cases ever get consolidated in the 9th to start with, and I will get back to that later.

Now, with respect to the motion to dismiss filed Friday the 13th, there is one new wrinkle regarding a takings clause claim, mostly, however, it is notable for the fact that it continues the same crappy and duplicitous pleading style that was so prevalent under Bush. It is yet one more (as if more was needed at this point) indication that Barack Obama has completely morphed into George Bush and Dick Cheney in terms of craven support for government intrusion into the privacy of the citizenry, and the ability to conceal the Constitutionally infirm activity through the unitary and unreviewable imposition of state secrets doctrine.

> These counts largely repeat claims plaintiffs, including the McMurray plaintiffs, made in response to the Government's prior dispositive motion, and fail for the reasons set forth at length in the Government's brief, which are incorporated in full by reference herein.

Same old song, same old dance. Barack Obama avowed he was a man that believed in the sanctity of the Constitution, the rights of citizens and in transparency of the Executive. Obama would be the agent of change from Bush/Cheney. Except, now that he has taken office, that is all no longer operative. As Glenn Geenwald has noted, the Obama

Administration has proven itself just as cravenly addicted to secrecy, imperial executive power and willingness to strip its citizens of their rights under the Constitution, and its Bill of Rights, as Bush and Cheney.

As to the Takings Clause violation allegation that the government claims is newfangled, I believe that is new only to *McMurray*, other plaintiffs in the Consolidated Cases have at least noticed the claim in their pleadings to the best of my knowledge, but this is a decent opportunity to discuss it a little. I first mentioned the theory well over a year ago in the indemnification post:

> In addition to the foregoing, there is an extremely good case to be made that the granting of retroactive immunity to the telcos would comprise an improper and unjust taking of the existing plaintiffs' right to compensation under the Fifth Amendment and would, therefore, be in direct violation of the Constitution. I don't want to belabor this thought; just put it out there so that it is considered in the mix. Hey, "Teh Google" is a most marvelous thing; here is an absolutely outstanding discussion of this issue by Professor Anthony J. Sebok of the Cardozo School of Law.

In a nutshell, the takings clause is contained in the Fifth Amendment

> …nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

and is what protects citizens from having their property interests seized by the government without due process and just compensation. It is what lies at the root of eminent domain cases like the notorious *Kelo v. City of New London*

decision. There is some intellectual merit to the Takings Clause argument, but not a lot of practical hope for success on it. There are far too many ways around the Constitutional provision, several of which the government picked up on in their motion to dismiss. If you are interested in a general primer in how the Takings Clause could theoretically apply to the FISA situation, see the Sebok article referenced in the quote above.

What I find interesting (with a little prodding by Marcy) is that John Yoo and the Bush/Cheney regime planned on being confronted with Takings Clause complaints by citizens when they declared war on the Constitution. Yoo blithely dispensed with the applicability of the takings clause, indeed the entire Bill of Rights effectively, to the President's military program (and remember the wiretapping was run militarily through the NSA) via a footnote in his infamous March 2003 Torture Memo. As Greenwald described Yoo's execrable arguments:

> The President's power to use military force domestically in violation of the Bill of Rights applies equally even if the actions are ordered against American citizens on U.S. soil ….. The President, when using military force against American citizens on U.S. soil, is "free from the constraints" not only of the Fourth Amendment, but also of other core guarantees of the Bill of Rights — including First Amendment liberties, Due Process rights, and the takings clause ….. If this isn't the unadorned face of warped authoritarian extremism, what is?

No kidding. The galling part is to compare and contrast what Yoo tried to do in his sweeping blithe evisceration of the Constitution and Bill of Rights, substantially via a freaking footnote, with a detailed lawyerly dissertation on specific case precedence and statutory history; the merits if you will. See, the Takings Clause can be worked around through

proper legal argument, or at least a proper argument therefore made; that is proved by the government's response in the March 13, 2009 motion to dismiss. But Yoo, Bush and Cheney wanted none of the legal niceties, they wanted to seize supreme unadulterated power and went about doing so in blanket fashion. Now they are using the bludgeon of state secrets to cover the power grab, even under the supposedly enlightened Obama. Different name, but the same totalitarian bludgeon for the same unitary executive power grab.

Oh yes, back to the interesting point about why the cases may have been consolidated in the 9th Circuit in the first place. It always has perplexed me as to how, and why, in the world the government ever allowed all these critical FISA/Fourth Amendment cases to be consolidated in the 9th, the most liberal and rebel appellate circuit of all. If there is any circuit you would think the government would not want to be stuck in, it is the 9th. Yet there they all are, consolidated in Vaughn Walker's San Francisco courtroom and subject to appeals to panels of the notorious Ninth.

Marcy previously discussed the September 25, 2001 *Memorandum Regarding Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the "Purpose" Standard for Searches* authored by John Yoo. Tucked in that memo on page 10, innocuously stuck in the middle of all the Yoo goo, is this paragraph:

> In order to police the line between legitimate foreign intelligence searches and law enforcement, most courts have adopted the test that the "primary purpose" of a FISA search is to gather foreign intelligence. See id.; United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991); United States v. Pelton, 835 F.2d 1067 (4th Cir. 1987), cert, denied, 486 U.S. 1010 (1988); United States v. Badia, 827 F.2d 1458,1464 (11th Cir. 1987), cert,

> denied, 485 U.S. 937 (1988). Not all courts, however, have felt compelled to adopt the primary purpose test. The Ninth Circuit has explicitly reserved the question whether the ”primary purpose" is too strict and the appropriate test is simply whether there was a legitimate foreign intelligence purpose. United States v. Sarkissian, 841 F.2d 959,964 (9th Cir. 1988). No other Circuit has explicitly held that such a formulation would be unconstitutional.

So it is quite possible that the reason the government today finds itself twisting in the 9th is because, at the start, they stupidly forum shopped looking for a tiny bit of extra advantage on the merits, when their whole defense rested not on the merits at all, but on states secrets, classification privilege and other obstruction. It sure isn’t the play I would have made were I in their shoes, but it is the best explanation to date for the insanity of the government not having fought tooth and nail to stay the heck out of the wooly 9th.

If that is indeed the reason, or even part of the reason, the cases were consolidated in the 9th, it was a fools errand. The 9th may have left the issue unresolved in *Sarkissian*, but it by no means left any indication that it would be open to a trumped up illegal skim like was being run by the "Bush Program". If the government thought they were going to build a life raft out of this thin reed, in the 9th Circuit of all places, they were stark raving mad.