THE AL-HARAMAIN CASE STAYS ON TRACK

graphic by BobsViews

It was late and welcome news Friday afternoon when Judge Vaughn Walker's decision came in. Marcy already gave some cogent analysis on where the punches were pulled in the decision and where they landed. I actually think (yes, yes, I know I am usually the voice of pessimism) that the punches landing will prove to far outweigh those pulled.

First, and foremost, Judge Walker has kept the suit alive in the face of all the adversity thrown in his path by both the Bush/Cheney Administration and, now, that of Obama. This fact alone entitles Judge Walker to a king's ransom of gratitude from anybody that gives a tinker's damn about the rule of law and the Fourth Amendment, because Obama has been following Bush in pulling every stunt in the bag out to defeat the right of citizens to hold their government accountable for the illegal and unconstitutional acts it perpetrates on them. Take the recent unconscionable assertion of sovereign immunity for instance. Please.

The seminal importance of Walker's decision to proceed simply cannot be overstated. It is, quite simply, a ruling by a Federal court, albeit it a preliminary one, that the "Bush Program" was illegal. And keep in mind that it is not just the *al-Haramain* case that hangs in the balance of this determination, but potentially all the consolidated cases, including *Jewell*, too. As Marcy has explained, the ability of the of the plaintiffs in the remaining consolidated cases to establish the existence of illegal surveillance, separate and distinct from *al-Haramain*, may be effectively non-existent due to the state secrets assertion (even discounting the heinously bogus sovereign immunity assertion) made by Bush/Cheney and now

Obama. In the face of the state secrets claim there is no way for the plaintiffs to establish standing as plaintiffs having been illegally surveilled. Because of "the sealed document", in the form of a surveillance log that was inappropriately forwarded to al-Haramain's attorneys, the plaintiffs in *al-Haramain* have the ability to establish directly illegal surveillance.

So there is that, but there is also the process that Judge Walker has laid out in order to carry the action forward down the tracks. Having reviewed the sealed document, and the other filings made under seal (including those detailing the notorious "inaccurate information" previously lodged by the Bush administration), and determined that the case will proceed, there has to be a path crafted to allow the case to proceed and still protect the secrecy of information that is legitimately national security protected. As Marcy said:

> In other words, Walker has said, "I've read the secret evidence in this case and now I want you guys to figure out how to move foward with this case."
>
> Which pretty much implies that, having read the evidence, Walker believes it will move forward.

Oh yeah, this case is moving forward alright, and Walker has point blankedly reminded that neither he nor the 9th Circuit will permit any further interlocutory appeals (interim appeals before the case has reached a final judgment) on the core issues of his jurisdiction over the case and the sufficiency of the claim going forward. The judge has read the secret evidence and is letting the world know that he has found it compelling enough to establish, in at least a *prima facie* manner, that illegal surveillance has occurred. Not a kook, not dirty left wing bloggers, a real live federal jurist believes that George Bush and Dick Cheney committed illegal acts with their surveillance program. It

can no longer ever be called a baseless allegation anymore; in fact, the *presumption* from now on should be that their program was illegal and unconstitutional.

So, what happens now? Walker reiterates that he will go forward with litigation of standing (and it is crystal clear that Walker believes standing exists). The DOJ is ordered to meet and confer with the plaintiffs, with the goal of submitting to Walker, by May 8, a stipulated protective order establishing protocols for litigating standing under secure conditions for the sealed documents and sensitive information. Don't let the droll legal language and brevity of the order fool you, this is huge; and hugely problematic for the government and their reliance on the FISA Amendments Act retroactive immunity provisions.

Walker's order is also crafted so narrowly as to make it pretty much non-appealable. The DOJ will have to decide whether to continue stonewalling Walker, now that the DOJ has no recourse to the Ninth Circuit. You have to wonder what Walker will do if the DOJ continues to stonewall him. No doubt the DOJ is wondering the very same thing. I have an inkling that he is loaded for bear and ready for their intransigence. Planning and thinking two steps ahead of the DOJ has become Vaughn Walker's hallmark. And keep in mind that Federal judges have been getting very testy with the DOJ in this area lately, witness Judge Emmett Sullivan in the *Stevens* case:

> "How can this court have any confidence whatsoever in the United States government to comply with its obligations and to be truthful to the court?"

The DOJ's chickens of perfidy have come home to roost in a hornet's nest. How tragic; how deserved.

Now, I want to address one other aspect of Walker's order that I think has been overlooked

in the early analysis. Walker has not just told the respective parties to get together and determine how to move forward, he has given them a specific path to do so. And it is a path that is already established and accepted by the DC Federal Court in a case with certain national security implications:

> The United States District Court for the District of Columbia has successfully employed protective orders in the In Re Guantánamo Bay Detainee Litigation, D DC No Misc 08-0442 TFH, even providing for the use of top secret/sensitive compartmented information (TS/SCI). See, for example, the documents at docket numbers 409 and 1481 in that matter. The United States has advanced no argument that would suggest a reason why the court's use of a protective order in instant matter modeled on those in use in the Guantánamo Bay would not adequately protect the classified information at issue here.

Interesting that the courts are doing what the Congress is too lame to get accomplished. It is long past time that a process similar to the Classified Information Procedures Act (CIPA) be devised for civil cases in addition to criminal, and Judge Walker has clearly taken it upon himself to forge his own.

It could be argued that Judge Walker engaged in a bit of a punt in ordering the parties to attempt to form an agreement on how to proceed when they have been at diametrical loggerheads on the issue from the get go. That said, I think it was a necessary step for the sake of the record going forward. If the court had not given the parties an opportunity to negotiate and fashion a stipulation, that may well have created a sore spot as far as the appearance of fairness when the case really is viewed from the vantage of appeal after it truly is done and over. It may be tedious and time consuming to the rest of us, but Judge Walker is, as he has

been all along, setting this up masterfully.

Lastly, note that Judge Walker gave the return date for a stipulation to protect sensitive evidence and information, and put the parties on a relative short leash:

> The parties shall submit to the court a stipulated protective order on or before May 8, 2009. If the parties are unable to agree on all terms, they shall jointly submit a document containing all agreed terms together with a document setting forth the terms about which they are unable to reach agreement and the respective positions of the parties with regard to each such term.

Marcy was, I believe, dead on when she opined that Walker was setting the various "interlocking" cases that comprise the consolidated cases lodged in Judge Walker's court up to be managed as a whole. Just so that it is clear, *al-Haramain*, as a case, exists in its own cause of action *and* as part of the "consolidated cases" docket. Yesterday's order was captioned in the consolidated cases docket initially (although I suspect it will eventually be docketed under the separate al-Haramain cause as well). At any rate here is another recent scheduling docket entry under the consolidated cases:

> Set Schedule/Time for Hearing: Opposition to the United States' motion for summary judgment in the State Cases – 3/20/2009. United States Replies in support or its motion and Telecomm carrier defendants Respond to the govt's motion and any Responses thereto – 4/9/2009. Sur-reply of the State Officials – 4/23/2009. **Hearing on the United States' Motion set for 5/7/2009** at 10:30 AM in Courtroom 6, 17th Floor, San Francisco. (cgk, COURT STAFF) (Filed on 3/3/2009)

So Vaughn Walker has given the al-Haramain litigants 24 hours after the threshold hearings on the consolidated cases to come up with a stipulation. Yeah, I would say he is lining his ducks up; you betcha. It has been a wonderful thing to watch Judge Vaughn Walker ride herd on this the various consolidated cases and be the sole and silent sentry protecting the rule of law and the Constitution for the people.

As a parting shot, remember the title to the post? The al-Haramain Case Stays On Track. Just like a train. Atrios would love this, al-Haramain really has, or is, a modern train. Go figure.