

WHY DOJ IS LIKELY TO ACCEPT VAUGHN WALKER'S RULING

As I posted earlier, Judge Vaughn Walker ruled against the government in the al-Haramain case today. Basically, Walker ruled that al-Haramain had been illegally wiretapped and the case should move to ~~settlement~~ judgment (corrected per some lawyer).

But there's more to it. I think Walker has crafted his ruling to give the government a big incentive not to appeal the case. Here's my thinking.

As you recall, last year when Walker ruled that al-Haramain had standing and therefore its lawyers should get security clearance that would allow them to litigate the case, the government threatened to take its toys—or, more importantly, all the classified filings submitted in the case—and go home. After some back and forth, Walker instructed the parties to make their cases using unclassified evidence; if the government wanted to submit classified evidence, Walker said, then al-Haramain would have to be given clearance to look at and respond to the evidence. The move did two things: it neutralized the government's insistence that it could still use State Secrets to moot Walker's ruling that al-Haramain had standing (and, frankly, avoided a big confrontation on separation of powers). But it also forced the government to prove it hadn't wiretapped al-Haramain illegally, since it had refused to litigate the case in the manner which Congress had required.

The government basically refused to play. It made no defense on the merits. Which made it easy for Walker to rule in al-Haramain's favor.

That's the big headline: that Walker ruled the government had illegally wiretapped al-Haramain.

But there were two more parts of the ruling that are important. First, Walker refused al-Haramain's request that he also issue an alternate ruling, one that relied on his review of the wiretap log and other classified filings, that would amount to a ruling on the merits. He basically said that such a ruling would muddy up the record if and when this case was appealed.

He also dismissed al-Haramain's suit against the only remaining individual named as an individual defendant, Robert Mueller.

These last two parts of the ruling are, I think, the big incentives Walker has given for the government to just accept this ruling.

If this ruling stands, al-Haramain will get a ruling that the wiretapping was illegal. The government will be directed to purge any records it collected from its databases (I'll explain in a later post why I think this will present some problems). And it'll be asked to pay a fine, plus legal fees. But the fines, at least (\$100 per day per day of illegal wiretapping) might end up being a relative pittance—tens of thousand or hundreds of thousand of dollars. Sure, there will be punitive fines and legal fees for four years of litigation. But the government was happy to settle Hatfill and Horn for millions, why not have this be done for the same range of millions?

What al-Haramain won't get—unless it litigates some of the other issues in the case, which likely can be dismissed with State Secrets—is access to what the government was doing. Or details of how it came to be wiretapped illegally.

I'm betting that the government will be willing to accept the ruling that it illegally wiretapped al-Haramain in exchange for the ability to leave details of how and what it did secret, leaving the claim of State Secrets largely intact.

There is little risk that other people will sue on the same terms al-Haramain did, because few,

if any, other people are going to be able to make the specific prima facie case that they were wiretapped that al-Haramain did. Few people are going to be able to point to public FBI statements and court documents to prove their case, as al-Haramain was able to. And anyone who does sue will end up before Walker, who has dismissed all other suits precisely because they lacked the specific proof that they were wiretapped that al-Haramain had. Plus, with the extent to which Congress has already gutted FISA, there's little risk someone could sue going forward.

Since Walker dismissed the suit against Mueller, the government doesn't have any individuals on the hook still for this illegal activity.

And, finally, by accepting this ruling—which argues that only if Congress has provided very specific guidance about court review, will a law automatically trump State Secrets—the government preserves the status quo on State Secrets largely intact (unless and until the full 9th Circuit panel upholds the Jeppesen decision, but I have increasing doubts they will).

So you decide. If you're President Obama and Attorney General Holder, both of whom have already said that the illegal wiretap program was illegal, which are you going to choose? Accepting a ruling that says it was illegal, in exchange for keeping the details of that illegality secret? Or the invitation to take your chances with an appeal?