“LIBERAL” 9TH CIRCUIT DEALS DEATH BLOW TO AL-HARAMAIN ILLEGAL WIRETAPPING ACCOUNTABILITY CASE

There is only one substantive case left in litigation with the ability to bring tangible accountability for the illegal *and* unconstitutional acts of the Bush/Cheney Administration’s warrantless wiretapping and surveillance program. That case is *Al-Haramain v. Bush/Obama*. Yes, there is still *Clapper v. Amnesty International*, but that is a prospective case of a different nature, and was never designed to attack the substantive crimes of the previous Administration.

A little over a couple of hours ago, late morning here in the 9th, the vaunted “most liberal of all Circuit Courts of Appeal”, the Ninth Circuit, drove what may be the final stake in the heart of *Al-Haramain* by declining to conduct an *en banc* review of its August 7, 2012 opinion. The notice from the court today is brief:

> The opinion filed on August 7, 2012, and appearing at 690 F.3d 1089, is hereby amended. An amended opinion is filed concurrently with this order.
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> With these amendments, the panel has voted to deny the petition for panel rehearing and the petition for rehearing

> en banc.
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> The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.
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> The petition for panel rehearing and petition for rehearing en banc are DENIED. No further petitions for en banc or panel rehearing shall be permitted.

Before going further with analysis, a word about the "amendments" to the opinion. The "Amended Opinion" is here. You can compare for yourself to the August 7 original opinion linked above, but the difference is pretty slight.

It appears all the court did is delete a few sentences here and there about 18 USC 2712(b). The court did not address, nor change, their erroneous assertion that plaintiffs' Al-Haramain could have sued under 1806(a), or restore the misleadingly-omitted (by elipsis) language from 1806(a). Nor did the court address plaintiffs' alternative theory of waiver of sovereign immunity.

Now, more than ever, you have to wonder just exactly what is in the secret sealed filings originally lodged by the DOJ in the 9th Circuit in *Al-Haramain* that the government scrambled so tellingly to "correct" in November of 2009. It would be nice if the inestimable Judges Harry Pregerson, Margaret McKeown and Michael Hawkins, "liberal lions" all, would deign to tell the American public what lies and/or fraud the Department of Justice perpetrated upon the court and the *Al-Haramain* plaintiffs that necessitated their blatant ass covering moves in November of 2009, and how those falsities interrelated to the decision to deny justice to the plaintiffs and the American public. How do these judges sleep at night?

With that out of the way, what does it all mean? Well, the key language in the original 9th

Circuit opinion dated August 7, 2012 was:

> Congress can and did waive sovereign immunity with respect to violations for which it wished to render the United States liable. It deliberately did not waive immunity with respect to § 1810, and the district court erred by imputing an implied waiver. Al Haramain's suit for damages against the United States may not proceed under § 1810.

In short, wiretapping crimes against citizens and their organizations cannot, under any circumstance, be addressed. Because….IMMUNITY SUCKERS!

The perspective was explained by Marcy at the time of the August 7 opinion:

> Because al-Haramain, at a time when Vaughn Walker was using 1810 to get by the government's State Secrets invocation, said "it was not proceeding under other sections of FISA," its existing claim is limited to 1810. The government used the information collected—in a secret process that ended up declaring al-Haramain a terrorist supporter—but not in a trial, and therefore not in a way al-Haramain can easily hold the government liable for.
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> The implication, of course, is that all the rest of the collection the government engages in—of all of us, not just al-Haramain—also escapes all accountability. So long as the government never uses the information itself—even if the entire rest of their case is based on illegally collected information (as it was in, at a minimum, al-Haramain's terrorist designation)—a person cannot hold the government itself responsible.
>
> The people who can be held accountable? The non-governmental or non law

> enforcement persons who conduct the surveillance.
>
> But of course, they—the telecoms—have already been granted immunity.

Yes, there is now immunity every which way from Sunday, and between the AT&T cases of *Hepting* and *Jewel*, and now Al-Haramain, it has all been sanctioned by the "most liberal Circuit" in the land. Booyah.

A last word about why the title contains the words "death blow". In short, it is because if *this* case, with *these* facts, with *that* judge (Vaughn Walker), and *that* trial court decision, cannot make it past the rank cynicism, duplicity and secrecy of the Bush/Obama continuum of regimes, then no case can. If none of that is possible in the "liberal" 9th Circuit, with a completely "liberal" panel of judges, then it is simply not possible. Yes, it is possible that plaintiffs Al-Haramain petition for certiorari to the Supreme Court, but it is almost certainly fruitless if they cannot even make it in the 9th Circuit, and they may well have a fear of further ingraining heinous law into the national books. We shall see, but it is certainly no given.

You have to feel for plaintiffs Al-Haramain, Wendell Belew and Asim Ghafoor who lost their constitutional rights and cause of action, Judge Vaughn Walker who meticulously crafted a solid opinion working around state secrets and FISA constraints, as well as plaintiffs' attorney Jon Eisenberg, who lost, along with co-counsel, over $2.5 million dollars worth of attorney fees and expenses, and the time those fees represented out of their lives. All down the drain to a craven Executive Branch, a duplicitous Department of Justice and a fraudulent "war on terror". Ain't that America.