

# OBAMA'S FISA HEADACHE

As I reported, the 9th Circuit has rejected the Obama/Dead-Enders appeal on the al-Haramain case.

We're not out of the woods yet (apparently Judge Walker is out of his office until Monday, and Obama and his DOJ presumably are not). But here's some context on why the 9th Circuit's rejection of Obama's appeal is so significant.

Barring some last minute stay from SCOTUS, Walker can come back Monday morning, look at a wiretap log of US persons not approved by FISA, and rule that that wiretap was illegal. I will, quite literally, be holding my breath on Monday, but Walker may well beat any games from Obama.

But there are at least three other reasons why this is important.

## Al-Haramain's Dates

I pointed out in this post that al-Haramain has reason to believe (and remember—they've read the wiretap log) that they were wiretapped on, among other dates, March 11 and March 25.

I'm guessing, then, it is not a mistake that the lawyers are honing in on these dates. That is, I'm guessing that these specific conversations were among those described in the document that al-Haramain once had in hand. Which means that when Walker reviews the document, it'll be affirmation of precisely the argument al-Haramain makes here.

It's easier writing these things, I guess, when you've seen the answers to the test.

But that's not the really delectable part of the description of these calls. Look at this sentence.

Soon after the blocking of plaintiff Al-Haramain Oregon's assets on February 19, 2004, plaintiff Belew spoke by telephone with Soliman al-Buthi (alleged to be one of Al-Haramain Oregon's directors) **on the following dates: March 10, 11 and 25, April 16, May 13, 22 and 26, and June 1, 2 and 10, 2004.**[my emphasis]

Hahahahahahaha!!!

On March 11, 2004, remember, the warrantless wiretap program was operating without the approval of the Acting Attorney General. After Jim Comey refused to recertify the program on March 9, after Andy Card and Alberto Gonzales tried to get John Ashcroft to overrule Comey from his ICU bed on March 10, Bush reauthorized the program using only the legal sanction of then-White House Counsel Alberto Gonzales on March 11.

This means that any review arising out of this proceeding will not just focus on the larger illegal wiretap program, but on Bush's actions on March 11, 2004, to override the advice of DOJ and allow the program to go forward only with the approval of his then-White House counsel, Alberto Gonzales.

### **Statute of Limitations**

I've been assured by smart prosecutors that there is no way a prosecutor could put together an indictment in a week or so. But nevertheless, we may well have Judge Walker's ruling on whether al-Haramain was illegally wiretapped on March 11, 2004 before March 10, 2009, when the five year statute of limitations for the FISA violations on that date run out (that's a week from Tuesday).

Obama's DOJ is still likely not to indict on this issue. But it will mean we might have evidence that Bush broke the law before the statute of limitations runs out for his crime.

### **Retroactive Immunity**

Judge Walker has his own issues with the retroactive immunity provision in the FISA Amendments. Those issues won't be mooted legally if, before he rules on whether retroactive immunity is illegal, he reads a document that proves that the illegal wiretap program that Congress attempted to immunize was, in fact, illegal. After all, many of the Members of Congress who voted for immunity knew they were immunizing illegal action (much to their shame).

But there are two ways it may affect things. First, politically, it'll be a lot harder to attack Walker's decision that retroactive immunity is unconstitutional if everything the dead-enders like Kit Bond have been telling us for the last several years has been proven demonstrably wrong. Sure, I guarantee you that Kit Bond will say Walker's decision (if he rules that retroactive immunity is unconstitutional) is wrong and sure, he'll harp on al-Haramain being a dangerous charity with ties to Al Qaeda. Nevertheless, a ruling that the program was illegal and that the content of US persons was not minimized will make that a tougher battle.

And remember the nature of the Obama disagreement with the telecoms wrt retroactive immunity. The telecoms say the FISA Amendment mandates the AG to certify if they were wiretapping because Bush told them to under certain circumstances. Obama, however, says that the AG retains discretion on whether or not to certify in such cases.

... the United States does not join the Carriers' argument that if necessary the Court should interpret Section 802 to require the Attorney General to file a certification whenever the factual

predicates are met (Carriers' Supplemental Br., (Dkt. 571)). By its terms, Section 802 imposes no such requirement, and this Court should not create one. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 n.16 (1993) ("we may not add terms or provisions were Congress has omitted them"). There is no need for the Court to add a requirement not contained in the statute since it is well-settled that the non-delegation doctrine permits Congress to leave the decision whether and when to file a certification to the Attorney General's discretion.

Now, I am not imagining that just because Walker declared the wiretap program illegal Holder would un-certify the telecoms for the retroactive immunity. But we've got Obama on the record stating that the AG gets to decide at his discretion whether to grant immunity. And Holder might be able to claim that Walker's ruling is just the kind of unexpected thing (completely foreseeable, yeah, but Holder can claim ignorance since Bush hadn't read him in on the program yet) that would prevent him from certifying the telecoms.

Again, I don't think that's going to happen. But Obama's stance on immunity means it can—which means (unless Walker and the Courts above him rule retroactive immunity unconstitutional) it'll be Holder's decision alone to make.

Which is why this ruling creates multiple layers of headaches for Obama now. As if the economy wasn't enough.

(Note, drational has a good diary on this over at the Great Orange Satan.)