

# DECISION DAY ON AL-HARAMAIN (UPDATED)

✖ It is decision day for the gunslingers at the al-Haramain corral. If you recall when we last left this little vignette, exactly one week ago today, Judge Vaughn Walker had just issued a fairly terse ruling giving certain instructions to the parties. Both parties were given one week, until today, May 29th, to produce written responses to the court.

The plaintiff al-Haramain was addressed as follows:

Plaintiffs shall, no later than May 29, 2009, submit a memorandum addressing whether it would now be appropriate and/or feasible for plaintiffs to file a motion for summary judgment on their claim under 50 USC § 1810. Plaintiffs should address the merits of filing such a motion under two scenarios: (1) with a protective order in place allowing plaintiffs' counsel access to the Sealed Document; and (2) with no such protective order and no such access.

Basically very good news for the plaintiff, they are apparently going to proceed with their case, but were being given the option on how to proceed. Make no mistake, proceeding forward with the case is what plaintiffs are in this for; it is not about money for them.

The obstreperous and defiant defendant, the United States government by and through President Barack Obama was, however, not treated so kindly by the court. Judge Walker, clearly fed up with their belligerence and recalcitrance, drew the blade of a guillotine over the government's head (and rightly so I might add).

Defendants are now ordered to show cause why, as

a sanction for failing to obey the court's orders:

(1) defendants should not be prohibited, under FRCP 37(b)(2)(ii), from opposing the liability component of plaintiffs' claim under 50 USC § 1810 — that is, from denying that plaintiffs are "aggrieved persons" who were subjected to electronic surveillance; and

(2) the court should not deem liability under 50 USC § 1810 established and proceed to determine the amount of damages to be awarded to plaintiffs.

Defendants shall submit written response to this order no later than May 29, 2009.

By good fortune, today is May 29, and the documents are rolling in. Here is the filing from al-Haramain hot off the press and before it even hits PACER. As Marcy put it a week ago when Walker's order was filed, "how do you feel about summary judgment 1) with also getting the document, or 2) without getting the document." Not surprisingly, al-Haramain prefers to win *and* get the document, but they will take just a win. The key here for al-Haramain is to try to keep the suit moving forward and not put it in a posture from which the defendants can seek immediate appeal. Here is the general outlook expressed in the pleading by al-Haramain's attorney:

Plaintiffs understand this Court's order of May 22, 2009 to have a twofold purpose: (1) to enable the Court's pursuit of the third option – a default judgment of liability as a discovery sanction under Rule 37(b)(2)(A)(ii) of the Federal Rules of Civil Procedure – should the Court wish to choose that option, through the Court's issuance of an order to show cause; and (2) to solicit further briefing by plaintiffs

on the first two options – litigation of standing under a protective order, or an adjudication of standing forthwith on the existing record – through the Court’s request that plaintiffs submit a memorandum addressing the appropriateness and/or feasibility of summary judgment proceedings either with or without a protective order allowing plaintiffs’ counsel access to the Sealed Document.

This is interesting in that plaintiff al-Haramain has crafted the document to argue the full panoply of options, while still designating the one they will ride with if push comes to shove. Without further suspense, here is their preference:

... that the Court adjudicate Article III standing forthwith on the existing record and rule on whether plaintiffs were subjected to warrantless electronic surveillance within the meaning of the Foreign Intelligence Surveillance Act (FISA), without the need for a protective order or access to the Sealed Document, followed by a summary judgment on liability.

In short, the plaintiffs are willing to head straight to liability with the court finding standing to do so. As we discussed in the post, and especially in comments, one week ago, this is likely the smartest path for them to choose. Still, it must be very difficult to be willing to not keep pounding on the merits and depth of discovery when the court is blistering your opponent. But, again, this is the best choice for trying to foreclose a legitimate interlocutory appeal to the Ninth Circuit.

The entire filing by al-Haramain is very much worth reading, both for the law cited therein, but more importantly the way their attorney has phrased the argument. If pushed they want the

liability finding, but they are trying awful hard to give Judge Walker their blessing to find the desire and way to go further than simple liability and damages.

The government's filing, however, is another matter. It was not available at the time of this post, but I will update as soon as it is available. They were asked why they shouldn't be sanctioned for putting forth belligerent and repetitive arguments already declined by the court and they, in response, will undoubtedly put forth belligerent and repetitive arguments already declined by the court. I guess this should not be shocking considering the government's track record here but, still, it is a little brazen. It is not so much that they stick to their guns, as the cavalier attitude with which they do so. It is not particularly attractive, and it is quite clear Vaughn Walker doesn't think so either.

Oh yeah, and if all this were not enough fun already, Judge Walker is reeling in the government's dog and pony show with an ever shorter leash. The parties have been ordered to appear a scant five days from today in his courtroom for a hearing on these matters. I can personally tell you that such a quick setting in Federal District Court on a civil case is somewhere well in excess of light speed. Vaughn Walker is on a mission. Next Wednesday is going to be very interesting.

**UPDATE:** I promised an update when the government pleading hit the docket, and it has been filed. Above I opined the government would likely show up with the same repetitive arguments already declined by the court, and they did not disappoint.

Furthermore, even after the Ninth Circuit issued its decision, an additional review was conducted at the highest levels of the Department of Justice to determine whether continued invocation of the privilege was warranted in response to the plaintiffs'

claims under FISA. Based on that review, it is the Government's position that disclosure of classified information—even under protective order—would create intolerable risks to national security.

It is notable how the government hews to this line, but can never seem to offer up any valid justification why licensed attorneys, who are officers of the court and certified for the requisite security clearances cannot possibly be trusted. Just have to take their word for it, in spite of the fact that the court, who has knowledge of sealed matters, doesn't take their word for it. But still they come with the same blank assertion. And they still, of course, want Walker to immediately certify the matter for interlocutory appeal. ~~And a pony.~~

The government spends 28 pages imploring Judge Walker to give them their same precious interlocutory pony. He wasn't swayed previously; there is scant new here to change his mind.