

# VAUGHN WALKER'S CHESS GAME: THE CASES

I know we joke (and usually mock) the notion that Obama is playing 11 dimensional chess with all the active court cases of late. But I believe Vaughn Walker, the judge overseeing all the warrantless wiretapping cases, really is playing chess. All of the relevant cases have been consolidated under him (though there are two related cases, which I'll get to), and in the process, he has gotten pretty damn fed up with the government's attempt to game the system, and partly as a result (and mostly because it is right in terms of law), he appears to be consciously working through all the suits together with an eye toward some kind of justice in the case.

In this post, I'm going to lay out the many factors at play here—the four cases (broadly defined) before Walker, two other related cases, and the IG report. In two follow-up posts, I'll explain where I think this will go from here.

**Al-Haramain:** The Islamic charity once had a wiretap log showing allegedly illegal wiretaps from 2004, yet the government has promised to appeal any order that it make that—or other materials—available to litigate the suit. In response, Judge Walker has directed plaintiffs to submit a motion for summary judgment, with a hearing scheduled September 1; the parties are working on a briefing schedule now.

**Retroactive Immunity Challenge:** Electronic Frontier Foundation and other groups challenged the constitutionality of Congress' grant of retroactive immunity to the telecoms under FISA Amendments Act. Yesterday, Walker dismissed the challenge, finding that Congress had explicitly directed the Attorney General that he could certify the telecoms to receive immunity. Significantly, Walker invoked the legislative

record of FAA to support **both** his ruling that the law did not violate the Constitution and his finding that "plaintiffs retain a means of redressing the harms alleged in their complaints by proceeding against governmental actors and entities." In addition, Walker recalled that *Navy v. Egan* allows Congress to limit the executive branch's control of national security issues, including classification—but that it had specifically **allowed** the executive to keep the AG certifications secret here. The plaintiffs have said they will appeal, and given Walker's comment that, "the lack of a charge to the Attorney General [specifically directing the Attorney General to undertake review and to submit to the court the specified certifications] remains a problem," they are sure to focus on their argument that Congress abdicated its own rule-making authority to the Attorney General. In addition, Walker has dismissed this suit without prejudice, suggesting that if plaintiffs can amend their complaint to cover telecom wiretapping not covered by the immunity granted by FAA, they are welcome to do so; significantly, Walker reminds plaintiffs that immunity only covers wiretapping that happened between September 11, 2001 and January 7, 2007.

**Jewel:** In September, some of the plaintiffs that had sued the telecoms filed a new suit against Bush and the government agencies that had undertaken the warrantless wiretapping. The government has argued that it is immune from suit in this case, but the plaintiffs have pointed to the same legislative records that the government used in the warrantless wiretap challenge (and which Walker cited in his ruling) to show that Congress specifically intended to reserve the ability to sue the government and its officials. Walker has not ruled on this suit yet. [Update: see EFF's latest opposition to the govt's motion to dismiss, plus an EFF declaration, thanks to MadDog] The hearing on the govt's motion to dismiss will be July 15.

**State Cases:** Also yesterday, Judge Walker

dismissed a set of state investigations into the warrantless wiretapping, based on a provision of the FAA that reads, "No State shall have authority to ... conduct an investigation into an electronic communication service provider's alleged assistance to an element of the intelligence community." I'm not in the least surprised these got dismissed as the language in FAA on this topic was pretty clear.

As I suggested, there are a few more things that may affect Walker's calculus—or the plaintiff's ability to make their cases—going forward.

**Jeppesen:** In 2007, the 9th Circuit ruled that "(1) whether Al-Haramain was subject to surveillance and (2) the Sealed Document wiretap log and information on whether al-Haramain was wiretapped" were properly invoked state secrets. But in April, the 9th Circuit ruled in a suit brought against a Boeing subsidiary involved in extraordinary renditions that "the government must assert the privilege with respect to secret evidence (not classified information)." Not only might this affect al-Haramain going forward (in that the four new declarations submitted this year were not reviewed by the 9th when it made its prior ruling), but it is particularly relevant to the Jewel case. In the invocation of state secrets in that case, Dennis Blair claimed state secrets covered,

Information concerning the specific nature of the al-Qaeda terrorist threat

Information that may tend to confirm or deny whether the plaintiffs have been subject to any alleged NSA intelligence activity

Any information concerning NSA intelligence activities, sources, or methods that may relate to or be necessary to litigate plaintiffs' allegations

Information concerning the scope of the now inoperative "Terrorist Surveillance Program"

Information concerning whether or not the NSA obtained from telecommunications companies such as AT&T communication transactional records

Information that may tend to confirm or deny whether AT&T ... has provided assistance to the NSA

Information, information, information, information, information, and more information—but no discussion of discrete evidence, not even of Mark Klein's reports of a tap into the Folsom street AT&T circuits (nor of Russell Tice's public reporting that has been made public more recently).

**Pete Seda Criminal Case:** In addition, there is a very narrowly drawn criminal case targeting Pete Seda and Soliman al-Buthe, who were affiliated with al-Haramain before it went defunct. This is sort of an Al Capone case—an attempt to get two people targeted for completely different reasons under a narrow tax issue. And, surely by design, the entire case is built around dates that don't implicate the illegal wiretapping of al-Haramain: the most recent date in the indictment is October 16, 2001—just two weeks after the first memos relating to the illegal wiretap program and after the "freebie" 15-day FISA window expired after the AUMF. It's totally conceivable that the government included al-Haramain in its first batch of illegal wiretapping, but the timing is dicey. Nevertheless, Seda's lawyer is pushing for discovery of things that might implicate illegal wiretapping, including:

- [Relating to a request for emails] "other communication it has obtained from other means that are also exculpatory"
- Any information gathered regarding AHIF, AHIF-US,

Pirouz Sedaghaty [Pete Seda], or Soliman Al Buthe pursuant to any National Security Letters or the Foreign Intelligence Surveillance Act [the discovery request notes this might have been collected "otherwise" than NSLs or FISA]

- Notice and all information regarding when the investigation against AHIF, AHIF-US, Pirouz Sedaghaty, or Soliman Al Buthe began
- Any and all bank records relating to AHIF, AHIF-US, Pirouz Sedaghaty, or Soliman Al Buthe; specifically Bank of America account number 2880311561
- Any and all records or notes relating to any telephone numbers held by AHIF, AHIF-US, Pirouz Sedaghaty, or Soliman Al Buthe
- Any and all records, documents, notes, regarding any internet provider, including but not limited to, Unicom, as relative to AHIF, AHIF-US. Pirouz Sedaghaty, or Soliman Al Buthe

There's more that would implicate illegal wiretapping as well. The government says it doesn't have to turn this stuff over because

it's not part of its case in chief (which of course was designed to avoid dependence on the warrantless wiretapping, but Seda's lawyer argues it would exculpatory (not least, presumably, because the whole case might be poisoned fruit)).

**The IG Report:** And there's one more legal item that might play into how things roll out--the IG Report on the illegal wiretap program, mandated to be completed next month. Frankly, I absolutely expect the IGs to miss their deadline. I absolutely expect there to be a big squabble over how much of the report will be unclassified (though it is supposed to be presumptively unclassified) and how long it'll take for us to actually get it. And I question how effective some of the IGs will be. But if you look at the scope of the IG Report--as reported back in November--you can see that some of this information might well be pertinent both to al-Haramain and to the Jewel suit, at a minimum.

So, in summary, here's where we are:

- Al-Haramain's briefing on summary judgment due in late summer with a hearing September 1
- The retroactive immunity challenge headed to the 9th for appeal, plus a possible refiling for telecom actions (probably) after January 7, 2007
- The hearing in Jewel scheduled for July 15
- The state cases dismissed pretty definitively
- The Jeppesen ruling and its potential effect on the government's invocation of

state secrets in Jewel

- Any discovery action in the Seda case
- The legally required IG report on warrantless wiretapping due (ha!) next month