A FUNNY THING HAPPENED ON THE WAY TO AL-HARAMAIN JUSTICE

As you will recall, there was an important hearing in the Northern District of California District Court (NDCA), Judge Vaughn Walker presiding, on June 3. There were significant briefs from both the plaintiffs al-Haramain and the defendant government filed a few days before the hearing. As MadDog pointed out, Judge Walker has subsequently issued a briefing order on June 5 making more specific the lay of the land.

The reports from the hearing were that it was one for the ages and there were calls for a transcript. I now have one in my hot little hands. I am sorry, but I cannot post the entire transcript; they are the proprietary product of the individual court reporters, and the preparation of transcripts is a source of income to them. Court reporters have a difficult job and they are entitled to this protection, and I will respect it.

The foregoing having been said, this hearing was a rare thing; an amazing blend of seriousness and comedy presided over by a Judge both firmly in control of difficult proceedings and wielding a fine and dry sense of humor. In the passages that follow, the following will be the pertinent abbreviations: JW is Judge Vaughn Walker, JE is al-Haramain attorney Jon Eisenberg and TC is DOJ/Government's attorney Anthony Coppolino.

> [JW] Well, Counsel, I've read your papers and now have a much better sense of that old expression about ships passing in the night.

And this really is true, but it is not just the parties' ships that are crossing in the night,

the government is sailing blindly and willfully by the court too. Coppolino could literally have just held up a paddle every time he was to speak, like those golf course marshals, with the words "Same Old Shit Judge!" printed on it. He really is a broken record and is willing to do anything, including insulting the court's intelligence, to get a ruling he can appeal immediately. Here is a prime example:

> [TC] I think, you know, you talk about two ships passing in the night, and I certainly think that's an apt description, I think we now have ships passing, again, in different directions, because the issue – the issue of standing and whether there is a genuine issue of fact and whether we could dispute their allegations of standing, of course, would turn on information we have, thus far, successfully protected, which goes to whether or not they have been subject to the alleged surveillance.

Well that about sums up the extreme and intentional duplicity of your United States Government in this whole mess from the get go, "…their allegations of standing, of course, would turn on information we have, thus far, successfully protected". No kidding. The government illegally surveils you, you have a right to sue them, and they frustrate that by hiding behind cheap tricks. Very admirable.

Coppolino, undeterred by the logic and patience of Judge Walker, holds up his "Same Old Shit" paddle again:

> [TC] My concern is if you say, well, we are going to now litigate the issue of standing on summary judgment, again, Article 3 standing, but we are going to do it just on the public record, but the Government, if it wants to dispute Article 3 standing, and the only way it could do that, to prove a negative or to

> address whether or not they have standing, would be through the privileged information, that, again, puts us in the position of either disclosing the privileged information or losing, because we won't do that, and then finding whether or not standing exists based on hypothetical facts such as the stuff they put in the record before.

Sorry Bubba, that dog ain't gonna hunt no matter how many times you drag it out. The government screwed itself by not appealing Walker's order long ago, both Walker and the 9th Circuit have said so, and yet they drone on. Walker must be very patient, and here he exhibits it:

> [JW] We are not, Mr. Coppolino. I mean — I'm not against you having your crack at appellate review, but what you — what I am against is sending this case up to the Court of Appeals in a state where the Court of Appeals really cannot do its job and review these issues. And so, we need to bring this whole matter to a head so that the Court of Appeals, when it reviews the whole issue, can do so in a coherent and orderly fashion.

Coppolino, of course, waves the shit paddle again demanding to have the case sent for appeal, and then the court responds:

> [JW] Well, you had a crack at an interlocutory appeal.
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> [TC] I have a few things to say about that, Your Honor.
>
> (Laughter.)
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> [JW] Well, perhaps you should save that for the Court of Appeals.
>
> (Laughter.)
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> [JW] I think you already had a crack at

> an interlocutory appeal. The Court of Appeals could have easily have taken that case in essentially the same posture that it's in now. So, what I conclude from the fact that the Court of Appeals declined to take an interlocutory appeal, agreed that there was no final judgment, in addition, as Mr. Eisenberg pointed out, passed on the opportunity to issue a writ of mandate, that the Court of Appeals wants a case that has been concluded, at least to the degree that it can be, before deciding how it wishes to further review the matter. And I think what, essentially, Mr. Eisenberg has proposed is a sensible way to bring that issue to a head.

The last part of the foregoing is just beautiful, and is exactly right. The 9th Circuit had two different paths with which to take custody of the issue that Coppolino keeps whining about, and they refused both. And that is exactly what makes the persistent moaning and groaning by Coppolino and the government so pernicious. The 9th didn't simply just consider that the case was not in a ripe posture for appeal, they could have taken the case on an extraordinary basis (writ) as an alternative. Could have if they materially disagreed with what Judge Walker was doing that is, and they quite clearly did not.

I bet you know what happens next, don't you? Yep, Coppolino whips out his paddle of poop one more time and then deadpans as follows:

> [TC] Well, you know, I don't — I obviously don't know the full implications of how what you are proposing would play out.
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> [JW] Well, I don't either, but I suspect you would figure it out pretty soon.
>
> (Laughter.)
>
> [TC] As we, you know, walk down the road

> that you would propose, we will be able to brief and argue that and then present – I'm actually sort of presenting arguments as to why I think that course might not work. And, I can present those arguments, if you choose to go that route, but I do think if you ask the question, what is a simple, clear, effective way to get this teed up now, it would have been through certification. And, I think I had suggested certification in connection with our last summary judgment motion. And, it probably would have been briefed by now. And if – the clarity of the issues is apparent: Does FISA preempt the privilege, or are the plaintiffs entitled to access the classified information in order to adjudicate a case of this nature under those procedures? And that issue can be set up now. You don't need to go to a summary judgment where the Government doesn't have the benefit of actually being able to defend itself. That's what the privilege was intended to avoid.
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> [JW] You know, you are underestimating your abilities, Mr. Coppolino.

You know, I am not sure if the sarcasm of that last by Walker comes across to those not experienced participants in complex hearings in Federal Court, but trust me, it is just dripping. And a beautiful thing.

Alright, the next passage is from Judge Walker speaking to Coppolino and is simply beautiful, both as to a summary of where we stand, how belligerent the government/Coppolino has been, and he ends it with one of the most classic cuts by a Federal Judge I have ever seen:

> [JW] Well, I have some understanding, I think, and certainly some sympathy, for the position that you are in as an advocate. You're adhering to your

> position with reference to the State Secrets Privilege; that's fair enough. I don't believe that that privilege is in play here for all the reasons that the preemption order described at some length. And what has occurred subsequently, is that the Government has essentially declined to join the battle on that field of battle, and that makes proceedings very difficult. And so, in order to bring the case to a coherent conclusion, which would permit effective appellate review, then I think we need to take this next step.
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> You talk about seriatim motions, of course, you filed a good many motions yourself, Mr. Coppolino, as you well know, but think of the position that we would be in if I were to certify an interlocutory appeal and either the Court of Appeals were not to take that interlocutory appeal, and, after all they do, under 92(b) have to agree to take it, or, if it were to go up to the Court of Appeals and they were to find that the issues had not been sufficiently teed up at the trial court, and send it back. And here we would be, another year or two, or Lord knows how long thereafter, and we wouldn't be any further along.
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> This is a lawsuit; it's not a career, Mr. Coppolino.

Well, if you couldn't easily detect Judge Walker's view of all this before, methinks you won't have any mistake here. Ouch, now that's gonna leave a mark. And a well deserved one too I might add.

Now you are probably wondering where in the world al-Haramain's attorney Jon Eisenberg has been all this time. Just sitting back and taking it all in would be a real fair guess; his opponent was digging himself into a hole and the

court was filling it in with dirt. But after Judge Walker's line about Coppolino trying to turn the case into a lifetime long project, Eisenberg couldn't help but chime in, which led to another absolute classic exchange:

> [JE] Thank you, Your Honor. I'm reaching an age where I'm just starting to think about retirement.
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> [JW] Oh, my goodness gracious.
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> [JE] Well, just starting to think about it. It's on the distant horizon.
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> [JW] Don't leave me before this case is over, Mr. Eisenberg.
>
> (Laughter.)
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> [JE] I don't intend to. You see, that's the whole point: I can't retire until the case is over.
>
> (Laughter.)
>
> [JE] And I don't want to be an octogenarian when that happens.
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> [JW] This could be an annuity, Mr. Eisenberg.
>
> (Laughter.)
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> [JE] Only if I get paid, Your Honor, and that's not happening.

At this point, the Court sets out where the case really stands as to how he sees the process going forward:

> [JW] Well, I don't think that that's the way I intend to proceed with the second alternative, or the second scenario, unless the Government takes a position that I must review the sealed document. And if I do, as I said, it will be subject to a — it will be disclosed to you subject to a protective order, or, alternatively, submits other classified

> information in response to your motion. But the content of the sealed document will not be a part of the Court's decision on this motion in the event that – or except under the two scenarios that I outlined.
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> [JE] Your Honor, I find myself in the very odd and uncomfortable position of saying I'm perfectly fine with that approach as long as we get a finding of standing.
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> (Laughter.)
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> [JW] Well, you've got a motion to write, Mr. Eisenberg.

If you will recall back when we got the first reports from the hearing, everyone seemed unclear as to whether or not Judge Walker was going to review the "sealed document" (i.e. surveillance log) in considering the motion for summary judgment. It is the next passage that caused that confusion:

> [JE] Okay. I'm fully prepared to proceed that way with Your Honor understanding that my preference is to be able to refer to the secret document. And, I mention that only for purposes of preserving the point for appellate review, which I hope will never be necessary.
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> [JW] Well, what do you mean "make reference to the sealed document"?
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> [JE] Well, what we would like to do is just say, Your Honor, here is the public evidence we have; you have seen the sealed document now; we do not need further access to the document to argue our case. We are prepared to go forward making our further arguments only on the public evidence and with Your Honor having reviewed and considered the sealed document. That's what we propose

> to do. My feeling from the January 5th order was that – that's the scenario I envisioned: We do not at this point feel we want or need access to the document. And when I say that, I mean either to see it again – remember, we've seen it – or to argue about it.
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> [JW] All right. Well, then – then you don't need to see it unless something further is filed that requires its disclosure.
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> [JE] I'm sorry?
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> [JW] Unless some additional information is disclosed which requires that the sealed document be disclosed to you, you're telling me you don't need to see it.
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> [JE] Yes.
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> [JW] That's fine.
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> [JE] I understand your ruling, Your Honor. Thank you.

Now here's the thing, despite Jon Eisenberg saying "I understand your ruling", I am not so sure that is really totally true. I have read the transcript a couple of times now, and I am not totally clear on whether or not Judge Walker will refer to the "sealed document" or not. It appears that he will not unless the government resorts to the "sealed document" or other classified/sealed material in their response to Eisenberg's motion for summary judgment. However, that presupposes that Walker can find standing without resort to inclusion of the "sealed document"; what if he suddenly decides that the sealed document is necessary to the finding of standing? My best guess is he then treats it the same as if the government had raised it, and he rules it disclosed under a protective order.

On the other hand, that is not totally clear, Walker also indicated that he may change his

mind. And there is one glaring reason he may do so, if he discloses under the protective order, he instantly creates an immediately appealable order, something he desperately does not want to do. So there is at least a remote possibility he simply takes judicial notice of his prior review of the "sealed document", uses that to find standing and/or liability and *does not* disclose it under the protective order. It is hard to tell and, quite frankly, I am not sure even Walker knows for sure.

Thus the confusion, or at least semblance thereof. Now, there is one last passage from the hearing I want to relate, and that is effectively the summation by Eisenberg of what the weight and meaning of his coming motion for summary judgment will be:

> [JE] Now, will our motion for summary judgment look just like what we filed previously, as Mr. Coppolino mentioned? The answer to that is most certainly no. We'll be arguing liability and specifically issues including the legality of the warrantless surveillance program, the president's power or not to disregard an act of Congress in the name of National Security. We will be arguing the merits of this case. Mr. Coppolino says, well, that's going to require a consideration of classified information, and my response to that is, it didn't require a consideration of classified evidence when the Government presented its case to the public in a 42-page white paper in January of 2007. There is no – it is a purely legal issue we are looking to litigate. This Court needs no further classified evidence to decide the purely legal issue whether the president has the expansive power that President Bush and now President Obama are claiming.
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> [JW] All right.

For those that have been asking what impact the possible ruling by Judge Walker on this motion for summary judgment, assuming he finds in favor of the plaintiffs, could have on the cases by the other consolidated plaintiffs against the Bush (now Obama) Administration, you start to get a hint here. "We'll be arguing liability and specifically issues including the legality of the warrantless surveillance program, the president's power or not to disregard an act of Congress in the name of National Security. We will be arguing the merits of this case." I could not say it better than that. This, if it gets indeed entered (still a long way to go on that though), would be a judgment on the merits.

A judgment on the merits could pose a nightmare situation for the government, because once entered, it might be argued as binding on all the other cases currently pending before Walker (what I commonly refer to as the "consolidated cases") through a doctrine known as collateral estoppel. Do not get me wrong, and do not do any Snoopy happy dances, because this is far from a given. In fact, if you had to bet, the smart money would be that it does not get applied. That said, the mere specter of the possibility would cause contemplation of hari kari by the government. As I have said before, they are currently boxed in between a rock and a very hard place. Couldn't happen to a more deserving lot either.

So that is the long and short of what really happened in the June 3rd hearing in Judge Walker's courtroom. And, as I mentioned at the beginning of this post, Judge Walker issued a briefing order detailing the path forward as a result of the hearing, take a look at it now that you have had a guided tour through the court proceeding. I am sorry I cannot post the transcript, but as I said before, that would be wrong; I love court reporters, they are some of the hardest working and nicest people you will find in and around trial courtrooms, and they deserve every penny they earn. If you have further questions, put them in comments and

either I or Marcy will try to answer, if possible.