AL-HARAMAIN REPLY FILED; CONSTITUTION & RULE OF LAW IN JUDGE VAUGHN WALKER'S HANDS

In a spring and summer of noteworthy and important legal cases winding in and out of the national conscience, or at least the conscience of the enlightened readers of this blog, perhaps none have as much weight and significance as *al-Haramain v. Obama*, pending before Judge Vaughn Walker in the Northern District of California. Subsequent to oral argument set before the court on the morning of September 23, Judge Walker will issue a most critical opinion on Plaintiff al-Haramain's motion for summary judgment.

We have previously discussed in depth the initial motion for summary judgment by plaintiffs and the timeline for the subsequent briefing thereto.

Today, Plaintiff al-Haramain filed their Reply, the last brief joining the issues and argument on plaintiffs' motion for summary judgment prior to argument and decision.

> At long last, the time has come for this Court to adjudicate the merits of this lawsuit and confirm, in the words of lead defendant Barack H. Obama, that "[w]arrantless surveillance of American citizens, in defiance of FISA, is unlawful and unconstitutional."

Indeed the time *has* come, and no less than the sanctity of the Fourth Amendment, Constitutional separation of powers, the continuation of unbridled unitary executive power and the rule of law sits in the hands of Judge Walker. And the plaintiffs' counsel has teed up the ball quite nicely for him.

On whether the government's surveillance program was lawful:

> Sometimes a litigant's brief is more significant for what it does not say than for what it says. That is the situation here. After three and one-half years of litigation in which the government has exploited multiple procedural devices to evade an adjudication on the merits, defendants say *nothing* on the ultimate question now posed for decision: Was the TSP unlawful?
> …
> Given the present procedural posture of this case, however, that silence has consequences. "[F]ailure of a party to address a claim in an opposition to a motion for summary judgment may constitute a waiver of that claim." Foster v. City of Fresno, 392 F.Supp.2d 1140, 1146, n. 7 (C.D. Cal. 2005); accord, e,g., Seals v. City of Lancaster, 553 F.Supp.2d 427, 432 (E.D. Pa. 2008) (failure by party opposing summary judgment to address moving party's claims "constitutes abandonment of those claims"). On this motion for partial summary judgment of liability – where plaintiffs have squarely presented and argued their claims on the merits as to why the TSP was unlawful – defendants' silence regarding those claims effectively concedes them.

Not only was the TSP illegal, Obama's DOJ does not even attempt to argue to the contrary. And, perhaps sensing what a bone it would be to throw to the informed denizens of Emptywheel, plaintiffs' attorney Jon Eisenberg excoriates the OLC bogus memo meisters for ignoring the *Youngstown* case. Citing the Inspectors General Report, the brief states:

> The report adds that Yoo "omitted any discussion of Youngstown Sheet & Tube

> Co. v. Sawyer, 343 U.S. 579 (1952),” and that Justice Jackson’s formulation in Youngstown for determining the extent of presidential power “was an important factor in OLC’s subsequent reevaluation of Yoo’s opinions.” In 2009, former OLC Principal Deputy Assistant Attorney General Steven G. Bradbury formally repudiated Yoo’s memorandum as “‘problematic and questionable’” and “‘not supported by convincing reasoning.’” Thus, not even Yoo’s successors in the Bush administration were convinced by Yoo’s “inherent power” theory. Yoo stands alone and discredited in asserting that theory. (citations omitted).

See, it’s not just dirty hippies like Marcy Wheeler that are shocked and confounded by John Yoo’s legal fraud in failing to affirmatively discuss the seminal *Youngstown* case in the malevolent fiction he passed off as OLC opinions.

Plaintiffs go on to dispatch the weak and mostly rehashed arguments the government presses as to standing as well. It is quite clear that Judge Walker will be well within his discretion in finding standing if inclined to do so. It would appear Walker is so inclined from the way he has handled the litigation since its last remand from the Ninth Circuit.

Interestingly, in arguing that they have met the burden of proof necessary to obtain summary judgment, plaintiffs remind the court of the fact it has already indicated they have established a *prima facie* case under section 1806(f) of FISA:

> Thus, the court did not merely hold that the allegations in plaintiffs’ amended complaint are sufficient to survive a dismissal motion; the Court also held that the evidence presented on plaintiffs’ 1806(f) motion constitutes

> prima facie evidence that they were subjected to electronic surveillance. The latter holding is critical to the pending motion for partial summary judgment, because plaintiffs' burden on that motion is identical to their burden on the 1806(f) motion – to establish a prima facie case. See F.T.C. v. Gill, 265 F.3d 944, 954 (9th Cir. 2001) (plaintiff's burden is to establish "a prima facie case for summary judgment"). Because plaintiffs have presented prima facie proof of their electronic surveillance on the 1806(f) motion, they necessarily have sustained their burden of proving electronic surveillance on their motion for partial summary judgment.

The other thing noteworthy is the plaintiffs have wisely noted Vaughn Walker's tendency to operate a step ahead of them, and three steps ahead of the government. In this vein, they have noticed the court of their consent and request that the court exercise its judicial discretion and prerogative to uphold judicial efficiency and make certain all potentially appealable issues that could result from the ruling on the instant motion be determined and perfected for concurrent appeal thereafter.

> Plainly this case is not destined to end at the district court level. If this Court finds Article III standing, defendants will certainly contend in the Ninth Circuit that plaintiffs' non-classified evidence is insufficient to support that finding. The Ninth Circuit would benefit from an alternative ruling by this Court as to whether the non-classified evidence plus the classified evidence (including the Sealed Document) together demonstrates standing. That way, in the unlikely event the Ninth Circuit finds the non-classified evidence insufficient, the appellate

> court can resolve all standing issues in a single appeal, without any need for remand to this Court to decide the sufficiency of the combined non-classified and classified evidence and then another trip to the Ninth Circuit.
>
> This Court can make that alternative ruling without giving plaintiffs' counsel access to the classified evidence, and thus without re-entering the legal thicket that defendants have created with their strident resistence to further proceedings under section 1806(f). Plaintiffs have previously advised the Court that they are agreeable to the Court adjudicating Article III standing based on the classified evidence, without giving plaintiffs' counsel access to that evidence under section 1806(f). See Plaintiffs' Opposition To Defendants' Third Motion To Dismiss Or, In The Alternative, For Summary Judgment at 21-22, Dkt. #50 at 30-31. Plaintiffs now reiterate that position with regard to their motion for partial summary judgment (but not otherwise). Defendants cannot reasonably object to this approach, in light of the Court's advisement in the order of April 17, 2009, that the Court has now reviewed the Sealed Document, so that the Court is now well positioned to determine whether the non-classified evidence, the Sealed Document, and the other classified filings demonstrate standing.

This is both smart and consistent with what counsel and the court, in a sometimes hilarious oral argument back on June 3rd discussed. It is certainly within Walker's discretion to touch both bases and thusly preserve the concept of judicial economy at both the District and Circuit levels. In short, it makes sense, even in the twisted world of civil litigation. Expect

the government, by and through lead beagle of delay, obstruction and obfuscation, Tony Coppolino, to howl like a banshee about this at oral argument.

So those are the key nuts and bolts from my vantage point. The entire Reply Brief is only a 21 page PDF, and four of those pages contain only caption and contents info. It is an easy, relatively short and worthwhile read.

Judge Vaughn Walker has certainly evidenced the heart of a civil libertarian lion so far in this and other cases. I do not know how he will rule here, but the ball holding the Constitution and rule of law seems to be in capable, honorable and fair hands. That is all you can ask for. Well, all you could ask for short of an honorable President willing to live up to his word given the people that elected him when it comes to transparency, right to privacy, accountability and upholding the rule of law. Sadly, that part seems too much to ask for.