

BREAKING: JUDGE WALKER GRANTS SUMMARY JUDGMENT FINDING GOV'T LIABLE UNDER FISA

Short version: al-Haramain wins!

Judge Walker just issued the following ruling in the al-Haramain case:

The court now determines that plaintiffs have submitted, consistent with FRCP 56(d), sufficient non-classified evidence to establish standing on their FISA claim and to establish the absence of any genuine issue of material fact regarding their allegation of unlawful electronic surveillance; plaintiffs are therefore entitled to summary judgment in their favor on those matters. Defendants' various legal arguments for dismissal and in opposition to plaintiffs' summary judgment motion lack merit: defendants have failed to meet their burden to come forward, in response to plaintiffs' prima facie case of electronic surveillance, with evidence that a FISA warrant was obtained, that plaintiffs were not surveilled or that the surveillance was otherwise lawful.

In the absence of a genuine issue of material fact whether plaintiffs were subjected to unlawful electronic surveillance within the purview of FISA and for the reasons fully set forth in the decision that follows, plaintiffs' motion for summary judgment on the issue of defendants' liability under FISA is GRANTED.

Walker is basically saying, "Well, government, if you won't give us any evidence to prove you legally wiretapped al-Haramain, and given all the evidence they've presented proving they were wiretapped, then they win!"

Here's his argument. The government had a way to defend against al-Haramain's case directly, in camera, but they refused to avail themselves of it.

In FISA proceedings, 50 USC § 1806(f) provides a procedure by which the government may do this in camera, thus avoiding the disclosure of sensitive national security information. See *In Re NSA Telecom Litigation*, 564 F Supp 2d at 1131-35. Defendants declined to avail themselves of section 1806(f)'s in camera review procedures and have otherwise declined to submit anything to the court squarely addressing plaintiffs' prima facie case of electronic surveillance.

Walker goes onto explain that, particularly given the government's refusal to use the means by which Congress dictated that such review should be done, the government has a burden to prove it had a warrant to wiretap al-Haramain—a burden it has not met.

Plaintiffs have made out a prima facie case and defendants have foregone multiple opportunities to show that a warrant existed, including specifically rejecting the method created by Congress for this very purpose. Defendants' possession of the exclusive knowledge whether or not a FISA warrant was obtained, moreover, creates such grave equitable concerns that defendants must be deemed estopped from arguing that a warrant might have existed or, conversely, must be deemed to have admitted that no warrant existed. The court now determines, in light of all

the aforementioned points and the procedural history of this case, that there is no genuine issue of material fact whether a warrant was obtained for the electronic surveillance of plaintiffs. For purposes of this litigation, there was no such warrant for the electronic surveillance of any of plaintiffs.

Now, the government did present three reasons why it should not have to present evidence to defend itself. But much of that argument amounts to stating “we disagree with Judge Walker’s decision that FISA trumps State Secrets.” Not surprisingly, then, Walker gets a little snippy when explaining why the government’s arguments about why they shouldn’t have to prove they didn’t wiretap al-Haramain illegally fail.

Under defendants’ theory, executive branch officials may treat FISA as optional and freely employ the SSP to evade FISA, a statute enacted specifically to rein in and create a judicial check for executive-branch abuses of surveillance authority.

[snip]

In an impressive display of argumentative acrobatics, defendants contend, in essence, that the court’s orders of June 3 and June 5, 2009 setting the rules for these cross-motions make FISA inapplicable and that “the Ninth Circuit’s rulings on the privilege assertion therefore control the summary judgment motions now before the Court.” Doc #672/105 at 6. In other words, defendants contend, this is not a FISA case and defendants are therefore free to hide behind the SSP all facts that could help plaintiffs’ case. In so contending, defendants take a flying leap and miss by a wide margin.

And that's without even looking at Bush's claim that Congress **can't** tell the President he can't wiretap Americans.

As I said: the government refused to engage on the merits, al-Haramain made a sufficient prima facie case, so the government has basically conceded the case.

[Note, this post has been updated several times.]