WITH DAVID KRIS GONE, DOJ TRIES TO VACATE VAUGHN WALKER'S FISA OPINION

There's an interesting tidbit in the government's mediation questionnaire in anticipation of their appeal of Vaughn Walker's decision that al-Haramain had been illegally wiretapped and was entitled to damages.

The government is willing to negotiate.

In response to the direction, "Provide any other information that might affect the suitability of this case for mediation," the government wrote:

> This matter touches upon fundamental legal issues that may be difficult if not impossible to compromise. It is also not clear that any viable settlement could take place absent vacatur of the district court's legal rulings. The government is unwilling to state, however, that it would refuse to participate in mediation.

Granted, they didn't say, "Let's make a deal." But compared to the imperious language the government has been using throughout this case (directed not just at the al-Haramain team, but even at Judge Walker himself), the statement that "the government is unwilling to state … that it would refuse to participate in mediation," is like a romantic love letter. (Compare it, too, to what Imperial County said regarding mediation of Judge Walker's equally momentous ruling in the Prop 8 case: "Due to the nature and complexity of this case, mediation will not be beneficial;" the Prop 8 defendant-intervenor team itself didn't even answer the question!)

So on what terms is the government willing to

negotiate?

> It is also not clear that any viable settlement could take place absent vacatur of the district court's legal rulings.

They're suggesting they might just maybe be willing to maybe get into bed with al-Haramain if they'd be willing to vacate Judge Walker's rulings.

What's so horrible in Walker's rulings that the government might entertain "letting the terrorists win" in exchange for vacating the rulings? It seems there are three possible parts of Walker's July 2008 ruling the government might want vacated. (And remember, this is all premised on my supposition that the government's coy openness to mediation suggests they are focused on vacating Walker's ruling, which is really just a WAG.)

FISA trumps State Secrets; Congress can limit Article II secrecy

First, Walker ruled that FISA trumps state secrets.

> Plaintiffs argue that the in camera procedure described in FISA's section 1806(f) applies to preempt the protocol described in Reynolds in this case. Doc # 435/20 at 11-14. The court agrees.
>
> [snip]
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> Given the possibility that the executive branch might again engage in warrantless surveillance and then assert national security secrecy in order to mask its conduct, Congress intended for the executive branch to relinquish its near total control over whether the fact of unlawful surveillance could be protected as a secret.

Walker relied on the legislative history and

another case in which congressional action pre-empted common law, Milwaukee v. Illinois, to side with al-Haramain. More interesting, perhaps, is the way Walker addressed the government's claim that USA v. Nixon and Navy v. Egan held that Article II gave the President unlimited authority over classified information. I'm particularly interested in Walker's comments on Navy v. Egan (because both the Bush and Obama Administrations routinely rely on Navy v. Egan to claim unlimited control over classification, and it's one part of his ruling they repeatedly ignored) are Walker's comments on that case.

> Egan recognized the president's constitutional power to "control access to information bearing on national security," stating that this power "falls on the President as head of the Executive Branch and as Commander in Chief" and "exists quite apart from any explicit congressional grant." Id at 527. But Egan also discussed the other side of the coin, stating that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." Id at 530 (emphasis added). Egan recognizes that the authority to protect national security information is neither exclusive nor absolute in the executive branch. When Congress acts to contravene the president's authority, federal courts must give effect to what Congress has required.

Note, Walker also includes several references endorsing Congress' claim that the government can't withhold information about illegal intelligence activities, which probably gives the Administration gas all by itself.

In other words, one aspect of Walker's ruling the government might want to see vacated is the ways in which he shows Congress has the

authority to enact laws to limit the President's unlimited control over secrecy.

FISA is the exclusive means to conduct electronic surveillance

This is a big one, as readily apparent from the verbal gymnastics the government engaged in during the FISA Amendments Act debate. Repeatedly, they tried to avoid letting DiFi introduce language to the effect of, "no, we meant it the first time, exclusive means means exclusive means."

In his July 2008 ruling, Walker said,

> Congress appears clearly to have intended to—and did—establish the exclusive means for foreign intelligence surveillance activities to be conducted. Whatever power the executive may otherwise have had in this regard, FISA limits the power of the executive branch to conduct such activities and it limits the executive branch's authority to assert the state secrets privilege in response to challenges to the legality of its foreign intelligence surveillance activities.

To understand why the government might want this vacated, you have to go no further than the government's stall tactics with regards to the White Paper that purportedly made the warrantless wiretap program retroactively legal in 2006. The White Paper used this language to flip the concept of "exclusive means" on its head.

> The amendments that section 201(b) of FISA made to title 18 are fully consistent, however, with the conclusion that FISA contemplates that a subsequent statute could authorize electronic surveillance outside FISA's express procedural requirements. Section 2511(2)(e) of title 18, which provides that it is "not unlawful" for an officer

> of the United States to conduct electronic surveillance "as authorized by" FISA, is best understood as a safe-harbor provision. Because of section 109, the protection offered by section 2511(2)(e) for surveillance "authorized by" FISA extends to surveillance that is authorized by any other statute and therefore excepted from the prohibition of section 109. In any event, the purpose of section 2511(2)(e) is merely to make explicit what would already have been implicit—that those authorized by statute to engage in particular surveillance do not act unlawfully when they conduct such surveillance. Thus, even if that provision had not been enacted, an officer conducting surveillance authorized by statute (whether FISA or some other law) could not reasonably have been thought to be violating Title III. Similarly, section 2511(2)(e) cannot be read to require a result that would be manifestly unreasonable—exposing a federal officer to criminal liability for engaging in surveillance authorized by statute, merely because the authorizing statute happens not to be FISA itself.
>
> [snip]
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> In sum, by expressly and broadly excepting from its prohibition electronic surveillance undertaken "as authorized by statute," section 109 of FISA permits an exception to the "procedures" of FISA referred to in 18 U.S.C. § 2511(2)(f) where authorized by another statute, even if the other authorizing statute does not specifically amend section 2511(2)(f).

Keeping in mind that the government has outlasted all critics of this White Paper (including, as of today, David Kris), and keeping in mind that in 2010, the government got

itself a new interpretation of 18 USC 2511(2)(f) to retroactively authorize their exigent letter program (don't worry, they said, we're not going to use it going forward!!), it sure seems like they're pretty tied to maintaining this Orwellian "exclusive language" loophole. But they can't do that with Walker's ruling that FISA is the exclusive means.

The Executive Branch does not have sovereign immunity to limit liability when it illegally wiretaps someone

And then, finally, there is the part of Walker's ruling where he found that FISA included an implicit waiver of sovereign immunity.

> It is, of course, true that section 1810 does not contain a waiver of sovereign immunity analogous to that in 18 USC section 2712(a) which expressly provides that aggrieved persons may sue the United States for unlawful surveillance in violation of Title III. But FISA directs its prohibitions to "Federal officers and employees" (see, e g, 50 USC §§ 1806, 1825, 1845) and it is only such officers and employees acting in their official capacities that would engage in surveillance of the type contemplated by FISA. The remedial provision of FISA in section 1810 would afford scant, if any, relief if it did not lie against such "Federal officers and employees" carrying out their official functions. Implicit in the remedy that section 1810 provides is a waiver of sovereign immunity.

Sovereign immunity is, quite literally, the Executive Branch's "Get Out of Jail Free" card, basically allowing them to avoid personal liability when they flout the law. Walker said that members of the Executive Branch had no such immunity given FISA's clear contemplation of prohibitions on Federal officers. And even aside from the crazy stuff the government is doing

right now online (not least, I imagine, to target WikiLeaks), the Obama Administration has proven to have an even greater aversion than the Bush Administration did to Executive Branch accountability.

Resetting FISA rules just as David Kris leaves DOJ?

Now, to repeat, all of this is wild speculation about what the government means with its coy openness to negotiate. Here, I'm just piling on and reiterating my observation from last week that, as of Friday, the last big defender of rule of law *particularly as it relates to electronic surveillance* has left the Administration.

Welcome to the post-Kris era, ladies and gentleman. I have all the expectation that it will resemble the pre-hospital Bush era, only with a completely complacent Congress (thanks not least to the great civil libertarian Koch brothers buying out Russ Feingold's seat). (**As I've been writing this**, the White House has announced new rules for Gitmo that basically return us to the unconstitutional past.)

But we have three data points on where the government may be going in the post-Kris era:

- Refusal to overturn the legally dubious White Paper inventing, among other things, big loopholes to FISA's exclusive means language
- Development of new OLC opinion creating a new loophole for electronic surveillance in 18 USC 2511(2)(f)
- Apparent willingness to negotiate with terrorists

> (well, with their lawyer) in exchange for vacating key parts of Vaughn Walker's FISA ruling

Negotiating with Obama

All of which doesn't bode well. With that bleak outline, then, all I can do is remind the folks on the al-Haramain team the first rule of negotiating with Barack Obama. The man is apparently constitutionally (as in physically—he doesn't much care for the Big-C constitutionally) unable to to drive a hard bargain in any negotiation. So if you're considering such a deal in mediation, start by demanding tax cuts for billionaires, because anything less than an all-out sell-out of his goals represents less than you can get from Barack Obama.