TEN YEARS AFTER 9/11, INHERENT AUTHORITY DIES A SMALL LEGAL DEATH

Al-Haramain has submitted its brief for the appellate review on a number of issues related to the government's illegal wiretapping of the charity. The questions at issue are:

> 1. Does FISA waive federal sovereign immunity?
> 2. Does FISA preempt the state secrets privilege?
> 3. Was plaintiffs' non-classified evidence sufficient to prove their warrantless electronic surveillance?
> 4. Did the district court properly award counsel's full attorney's fees?
> 5. Did the district court err in dismissing defendant Mueller in his individual capacity?

Most of the brief will be familiar to those who have followed this case. But this passage—because it comes at the appellate level—is new.

> Finally, we note that defendants do not challenge the district court's ruling that the President lacks inherent power to disregard FISA's preemption of the state secrets privilege. See 564 F. Supp. 2d at 1121 [ER 108]; supra at 16. Thus, for purposes of this appeal, defendants have forfeited any claim of inherent power to disregard FISA. See, e.g., Independent Towers of Wash. v. Washington, 350 F.3d 925, 929 (9th Cir. 2003). **More broadly, defendants have abandoned any defense of the TSP's purported theoretical underpinning that the President may disregard an Act of Congress in the name of national security**.
>
> This forfeiture should come as no surprise.

> Top officials in the Obama administration had conspicuously repudiated the inherent power theory before taking office. See Donald Verrilli (now Solicitor General) et al., Brief for Amici Curiae Center for National Security Studies and the Constitution Project, American Civil Liberties Union v. National Security Agency, 493 F.3d 644 (6th Cir. 2007), 2006 WL 4055623, at *2 & *15 (inherent power theory is "particularly dangerous because it comes at the expense of both Congress's and the judiciary's powers to defend the individual liberties of Americans"); Neal Kumar Katyal (now Principal Deputy Solicitor General), Hamdan v. Rumsfeld: The Legal Academy Goes to Practice, 120 HARV. L. REV. 65, 117 (2006) ("overblown assertions" of inherent power "risk lawlessness in the name of national security"); Eric Holder (now Attorney General), Address to American Const. Society (June 13, 2008), http://www.youtube.com/watch?v=6CKycFGJOUs&feature=relmfu (videotape at 3:41–3:52) ("We must utilize and enhance our intelligence collection capabilities to identify and root out terrorists, but we must also comply with the law. We must also comply with FISA."). [my emphasis]

The passage is not central to the argument except insofar as it notes the government has procedurally given up the theory that they used to initially rationalize the illegal wiretap program. It is, as I said, just a small legal death, limited to this one case, rather than a wholesale repudiation.

Nevertheless, I thought the timing—not just coinciding with the anniversary of 9/11 but also the release of Dick Cheney's autobiographical novel—rather apt.

And the rhetorical value in citing three of DOJ's top lawyers dismissing the theory—which the brief repeats by citing Holder's even more damning call for "a reckoning" in that same ACS

speech at the very start of the brief does have value.

> "[S]teps taken in the aftermath of 9/11 were both excessive and unlawful. Our government . . . approved secret electronic surveillance of American citizens . . . . These steps were wrong when they were initiated and they are wrong today. We owe the American people a reckoning." Eric Holder, June 13, 2008

Verilli's and Katyal's and Holder's criticism of inherent power may have just been the rhetorical blatherings of political lawyers then in the political and legal opposition, blatherings not entirely consistent with steps they have taken since they've been in positions of authority.

But for the purposes of this legal brief, who better to kill the theory of inherent authority than the Attorney General?