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Finding success in the absence of victory

By Jon B. Eisenberg

Seven years and 3,000 non-billable hours ago, I joined a handful of public-spirited lawyers as counsel for the plaintiffs in *Al-Haramain Islamic Foundation, Inc. v. Bush*. The lawsuit challenged the legality of President George W. Bush's post-9/11 program of warrantless electronic surveillance. Our clients were an Oregon-based Islamic charity and two of its lawyers, who had been wiretapped in violation of the Foreign Intelligence Surveillance Act (FISA). Our proof of the surveillance was a top-secret document that the government had accidentally disclosed to Al-Haramain's lawyers during proceedings to declare Al-Haramain a terrorist organization. Our goal was for the judiciary to rule that the president may not disregard an act of Congress in the name of national security.

We were not alone in litigating this case. The warrantless wiretapping program spawned some four dozen lawsuits against the federal government and the telecommunications carriers that participated in the program. Eventually, all of those lawsuits failed, foundering on the state secrets privilege (which shields sensitive national security information from use in litigation) and a congressional grant of retroactive immunity to the telecommunications carriers. Disappointingly, President Barack Obama embraced the state secrets privilege as robustly as his predecessor.

One lawsuit succeeded at the district court level — ours, which in 2008 was re-titled *Al-Haramain Islamic Foundation, Inc. v. Obama*. After a years-long dispute over whether the top-secret document was within the scope of the state secrets privilege, we abandoned our reliance on that document and

amassed enough publicly-available evidence to prove our case. In 2010, District Judge Vaughn R. Walker, declaring that the president may not disregard FISA, ruled that our clients had been unlawfully wiretapped and awarded a modest amount of statutorily-prescribed damages plus attorney fees totaling some \$2.5 million. *California Lawyer* magazine gave me that year's CLAY

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award for Constitutional Law.

Two years later, in 2012, the 9th U.S. Circuit Court of Appeals reversed our judgment, invoking the doctrine of sovereign immunity. According to the appeals court, regardless of the public proof of our clients' warrantless electronic surveillance, the government is immune from liability and cannot be sued. Ironically, although we had sought a judicial pronouncement that the president may not violate FISA, the 9th Circuit instead proclaimed that he can get away with it.

So much for the villa in Provence that had become an inside joke within the *Al-Haramain* legal team after Judge Walker awarded attorney fees. But we did not pursue this litigation to get rich. Nor did we have any illusions about the odds against us. We knew from the start that our chance of victory was slim.

We have decided not to challenge the 9th Circuit's ruling in the U.S. Supreme Court. We feel that, given the Supreme Court's current ideological tilt, it is better to leave other courts free to disagree with the 9th Circuit than to risk a bad ruling by the current Supreme Court.

The *Al-Haramain* case is over. Perhaps someday another court will adjudicate the scope of the president's domestic wiretapping powers in a national climate less charged by post-9/11 fears.

Several years into the litigation, when it had become evident that we were in for a very long haul, I began to wonder how I would handle a defeat. Would I regret that I had

devoted all those years to the case? Would I become disillusioned? Disheartened? Embittered?

Another member of the *Al-Haramain* legal team told me to read a book about fighting lost causes, called "Success Without Victory: Lost Legal Battles and the Long Road to Justice in America," by Jules Lobel of the Center for Constitutional Rights. Lobel speaks of the view, expressed in the writings of Ralph Waldo Emerson and Henry David Thoreau, that "work is a calling, an expression of oneself, and a way to cultivate moral sensibilities, not merely a utilitarian activity that leads to winning." He quotes the losing attorney in *Plessy v. Ferguson*: "I believe I do it because I am built that way." And former Attorney General Ramsey Clark: "You need to act. You don't measure the odds. They're all long shots."

Lobel says: "Instead of measuring success and failure in terms of achievements, we should view success as the living out of values, persistence in the face of great odds, and the strength to stand up for principle even when defeat seems inevitable."

Those are comforting words to a lawyer who has just lost the most important case of his career. And they work for me. I am proud of the *Al-Haramain* litigation, and I have no regrets. That case is a big part of who I am. Victory, no. Success, yes.

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