AL-HARAMAIN: THE DEAD-ENDERS MISREPRESENT THEIR APPEAL TO DISMISS THE NEED TO WAIT FOR OBAMA

al-Haramain's lawyer, like me, has some doubt whether or not the motion for appeal submitted on Monday and reaffirmed under Obama's name on Thursday reflects the thinking of the Obama Administration.

> Jon Eisenberg, the attorney for the two lawyers, suggested the litigation be put on hold to give the new Obama administration time to reconsider the legal posture it inherited from Bush.
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> "None of us knows whether or not they might take a different approach to this case," Eisenberg argued to Walker.
>
> Neither [Anthony] Coppolino nor [Vaughn] Walker responded to that point.

And I'm guessing since Coppolino, who is purportedly speaking for the Obama Administration, didn't immediately answer that question, he has some doubt, too.

I suspect Walker has some doubt, too, as he has asked for more briefing, which will have the effect of delaying his response until such time as Eric Holder and Dawn Johnsen and David Kris have had time to fully review the documents behind the case and actually be read into this program.

> On Friday, Walker instructed the government and Eisenberg to provide further written arguments within weeks about why he should or should not permit

> the government to appeal a case brought by two former lawyers for the Al-Haramain Islamic Foundation.

And well he should demand more briefing. Because the dead-enders make a claim in the only document with Obama's name on it—the case management statement initially submitted with Bush's name on it and then re-submitted with Obama's name on it—that completely misrepresents the scope and nature of their appeal.

The Dead-Enders Argue They're Not Making a Unitary Executive Argument

In its own case statement, al-Haramain cites Eric Holder's call for "a reckoning" for Bush having illegally authorized warrantless wiretap, and then cites Dawn Johnsen arguing that the "unitary executive" theory threatens "balance of powers and individual rights." Then, al-Haramain argues that these statements suggest the Obama Administration will adopt a different course with this case.

> It would be a remarkable turnabout for the new Department of Justice, under the guidance of Mr. Holder and Ms. Johnsen, to refuse any declassification here and continue the effort to resist a decision on plaintiff's standing and this Court's ajudication of the Bush administration's "unitary executive" and Commander-in-Chief" theiries.

The dead-enders respond by claiming that what's at issue in this appeal is not what's at issue in those statements from Holder and Johnsen.

> Finally, in arguing that the Order is not appealable, plaintiffs refer to some statements of two individuals who have been nominated to offices in the Department of Justice r**egarding the lawfulness of some particular forms of surveillance**. See Pls. CMC at 5-6. These observations are also irrelevant to

> whether the Court should grant a stay pending appeal. **The concern raised by the Government's stay motion is that the privilege assertion not be irreparably harmed** pending appeal. The Government's position remains that this case should be stayed. [my emphasis]

Note carefully what the dead-enders do here. They collapse the two statements and pretend both are about the legality of the warrantless wiretap program itself. They make no mention of Johnsen's objections to Bush's unitary executive theories—particularly as they relate to balance of powers and individual rights. And after ignoring her reference to the unitary executive, they claim that the sole issue they've raised in the appeal is that their state secrets assertion will be "irreparably harmed" unless Walker stays the suit. They respond to Johnsen's published discrediting of the unitary executive by pretending their appeal is based solely on a desire to protect state secrets as invoked with regard to the al-Haramain suit.

But that's not what they argued in their appeal.

The Dead-Enders Misrepresent Walker's Order to Argue for Irreparable Harm

Yes, a big part of their appeal argued that the government would be irreparably harmed if it were forced to follow Walker's orders. But most of that's based on a misrepresentation of what Walker required in his orders.

As a reminder, on January 5, Walker ordered BushCo to hand over the document that—we believe—proves al-Haramain was illegally wiretapped. He then said he would review the document *in camera* to find out whether the al-Haramain lawyers do, in fact, have standing under FISA. Then, he said, the government would have to get al-Haramain's lawyers security clearances such that they could at least respond to his own orders, and possibly the filings of

the government.

> To be more specific, the court will review the Sealed Document ex parte and in camera. The court will then issue an order regarding whether plaintiffs may proceed —— that is, whether the Sealed Document establishes that plaintiffs were subject to electronic surveillance not authorized by FISA. As the court understands its obligation with regard to classified materials, only by placing and maintaining some or all of its future orders in this case under seal may the court avoid indirectly disclosing some aspect of the Sealed Document's contents. Unless counsel for plaintiffs are granted access to the court's rulings and, possibly, to at least some of defendants' classified filings, however, the entire remaining course of this litigation will be ex parte. This outcome would deprive plaintiffs of due process to an extent inconsistent with Congress's purpose in enacting FISA's sections 1806(f) and 1810. **Accordingly, this order provides for members of plaintiffs' litigation team to obtain the security clearances necessary to be able to litigate the case, including, but not limited to, reading and responding to the court's future orders**.
>
> Given the difficulties attendant to the use of classified material in litigation, it is timely at this juncture for **defendants** to review their classified submissions to date in this litigation and **to determine whether the Sealed Document and/or any of defendants' classified submissions may now be declassified**. Accordingly, the court now directs defendants to undertake such a review. [my emphasis]

The only document that Walker demands the

plaintiffs will get to see are his own orders—orders written by an Article III judge after such time as he had determined that these plaintiffs had standing.

But the dead-enders pretend that Walker's order went much further.

> First, the Court ordered that it will now review, initially ex parte, the Sealed Document which the Ninth Circuit excluded under the Government's privilege assertion, and then proceed to decide the very fact question that is also barred from adjudication under the privilege—whether the plaintiffs were subject to the alleged surveillance. See January 2009 Order at 23. Second, the Court has held that **due process requires** that, for plaintiffs' counsel to litigate the case, they must obtain security clearances for **access to certain classified information, including the heretofore Sealed Document**, court orders and possibly the Government's classified filings in this case. Both holdings raise serious questions of law and would subject the Government to irreparable harm. [my emphasis]

That is, the dead-enders claim that Walker has demanded they allow the al-Haramain lawyers to see the Sealed Document itself, when in fact, right now, they are only being required to conduct a review to see whether they—the government—can declassify the Sealed Document and other filings.

In other words, Walker orders the government to review the Sealed Document and their filings, but he leaves it up to them whether or not they can be declassified going forward. Yet to make the argument that Walker's order requires actions that constitute irreparable harm, the dead-enders misconstrue Walker's order.

The Dead-Enders Do Make a Unitary Executive Argument

And from that stance, the dead-enders launch into a unitary executive argument. To do so, they restate their claim, once again, that Walker has required the government to turn over classified information and that he has asserted he—Walker—will control the process.

> The January 2009 Order poses irreparable harm to the Government's interests in another respect: it specifically provides for the disclosure of classified information by the Court to the plaintiffs in Section 1806(f) proceedings—that is, for a direct abrogation of the Government's privilege assertion. The Order "provides for members of plaintiffs' litigation team to obtain the security clearances necessary to litigate the case." January 2009 Order at 23. This aspect of the Order is based on the Court's conclusion that due process requires that plaintiffs obtain access to classified information to litigate their claims under Section 1806(f). See id. Furthermore, the Court has held that it—not the Executive branch—will now control that process. The Court concluded that Section 1806(f) "leaves the court free to order discovery of materials or information sought by the 'aggrieved person' in whatever manner it deems consistent with section 1806(f)'s text and purpose." Id. at 22.

Note, this is a disingenuous mis-citation of the worst sort. What Walker actually said—speaking in the hypothetical—was that FISA required that Article III judges have some means to require the disclosure of the proof that an aggrieved person was wiretapped.

> Rather, a more plausible reading is that it leaves the court free to order

> discovery of the materials or information sought by the "aggrieved person" in whatever manner it deems consistent with section 1806(f)'s text and purpose. Nothing in the statute prohibits the court from exercising its discretion to conduct an in camera/ex parte review following the plaintiff's motion and entering other orders appropriate to advance the litigation if the Attorney General declines to act.

Notice how they leave out the following sentence where Walker talks, once again, about *ex parte* review? The one that makes it clear that Walker envisions this taking place within guidelines that protect classified information? And this is not the section where he orders the government to undertake a review to see what can be declassified?

Thus, even though the order itself grants the government the ability to determine what can and cannot be declassified, the dead-enders cite Walker out of context to support the claim that "Court has held that it—not the Executive branch—will now control that process." A patently false claim.

And now, finally, we're at their unitary executive argument, which they had to get to, even via this circuitous and thoroughly dishonest route, because what they really want to argue is that Congress—not Article III judges—cannot limit the government's ability to decide what can and cannot be classified.

> And, citing its July 2008 decision, the Court again rejected the Government's contention that, under Department of the Navy v. Egan, 484 U.S. 518, 529 (1988), the Executive branch, not the Court, controls access to classified information. See January 2009 Order at 21. Indeed, the Court expressly held that "Egan recognizes that the authority to protect national security information

> is neither exclusive nor absolute in the executive branch." Al-Haramain, 564 F. Supp. 2d at 1121 (citing language in Egan courts have been reluctant to intrude upon Executive authority "unless Congress specifically has provided otherwise") (citing Egan, 484 U.S. at 530). But even if Egan is read to reflect the general principle that Congress may attempt to expressly preempt executive authority by statute, whether that has occurred here is the very issue in dispute at this stage of the case. And to avoid the extraordinary constitutional concern of a court disclosing classified information over the Executive's express objection and, indeed, successful privilege assertion, any such disclosure should not occur without further review of the legal underpinnings of the Court's Order.

Navy v. Egan, you'll recall, is the same statute that David Addington cited to argue that the President could decide to insta-declassify the identity of a CIA spy. It's the signature case that David Addington uses to argue that the President (and, though he doesn't say so publicly, the Vice President) can classify and declassify like madmen.

Just to give you a sense of how dubious Addington's—and therefore, presumably, these dead-enders'—interpretation of *Navy v. Egan* is, here's what noted felon Scooter Libby responded when Fitzgerald asked him in his first grand jury appearance whether or not *Navy v. Egan* said what Addington claimed it did.

> Q. Did it appear to say what you thought Addington said that it meant?
> A. Within reason, yes, sir.

"Within reason." Via dishonest argument, we're now at the case the unitary executives use to support their pet theory of classification and

declassification, all to argue that Congress could not legislate any limits on the Executive's ability to determine what is and is not classified, not even in cases where the Executive is using it to cover up a crime.

Now, to be fair, I can grant the importance of the government arguing for a ruling on how clause 1806(f) ought to be interpreted. But when they do that, they (at least if the dead-enders get to make the argument) will be making a unitary executive argument.

But their arguments to support the case that such a review must happen now are based on completely dishonest representations of what Vaughn Walker's order is. That is, to argue that moving forward with his orders would create irreparable harm, they just make shit up.

The Dead-Enders Say No Need to Wait for Obama because They Don't Make a Unitary Executive Argument … Then They Make a Unitary Executive Argument

But that's not the only curious thing about this appeal and its subsequent reaffirmation under Obama's name. They say we shouldn't wait until Obama has a DOJ because—they argue in part—this appeal has nothing to do with theories of the unitary executive.

Only, it does.

Now, this still doesn't answer the questions I raised yesterday about whether or not Obama could be properly said to have weighed in on this before his AG is confirmed and read into the program at issue.

But it does make one thing crystal clear. In their attempt to dismiss the need to wait for Obama on this ruling, the dead-enders badly misrepresent their argument (which already contains a slew of misrepresentations), pretending they're not relying on the unitary executive theory when in fact they are for the question at issue—how to interpret one clause of FISA.

That may mean Obama has bought onto this appeal without being adequately briefed on it. It may mean that Obama has bought onto it even though his nominees disagree with it. It may mean he hasn't been briefed and doesn't have a meaningful means of engaging with it and the dead-enders are speaking in Obama's name to get this resolved before Holder and Johnsen come in, which would explain why they're pushing to accelerate the deadlines on the appeal.

It is quite possible that Obama will badly disappoint us all on this issue.

But it is not clear that he has.