OBAMA AGAIN SUPPORTS BUSH'S BOGUS STANCE ON AL-HARAMAIN, BUT PARTLY PUNTS ON STATE SECRETS

This time in the al-Haramain case.

The argument in this new filing is substantially the same as they made in January, particularly in their misrepresentation of Judge Walker's approach to classified information. Once again, they suggest Walker has ordered the wiretap log declassified (though they do so less dishonestly than they did in January), when in fact Walker has ordered the government consider what can be declassified.

> The Court then held that it would review, initially ex parte, the Sealed Document that was the subject of the state secrets privilege assertion and will then issue an order regarding a factual question at issue in that privilege assertion— "whether the Sealed Document establishes that plaintiffs were subject to electronic surveillance not authorized by FISA." Id. at 23. The Order then adds that fully ex parte proceedings under Section 1806(f) "would deprive plaintiffs of due process to an extent inconsistent with Congress' purpose in enacting FISA Sections 1806(f) and 1810." Id. Accordingly, the 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." Id. The Court's Order also

> "specifically rejected" the Government's assertion that the Executive branch controls access to classified information, see id. at 21, and held that Section 1806(f) "leaves the court free to order discovery of the materials or other information sought by the 'aggrieved person' in whatever manner it deems consistent with section 1806(f)'s text and purpose."

That phrase, " initially ex parte," suggests that Walker would definitely review the document openly, when he said no such thing (and only required declassification of government briefs going forward).

That said, there is a very significant difference. This filing defends the state secrets invocation of the past, arguing that the invocation of state secrets in this case has already been ruled to be proper.

> The Court of Appeals has previously determined that plaintiffs' case cannot proceed without critical information that the state secrets privilege was properly asserted to protect—including whether or not plaintiffs were subject to alleged surveillance and, in particular, the classified sealed document at issue in this case.

And then it accuses Judge Walker of changing his stance regarding the use of the document.

> The Court initially reviewed the allegations in the amended complaint to determine whether the case may proceed to Section 1806(f) proceedings. See Dkt. 57 at 2-8. The Court then considered and rejected the Government's contention that the public evidence cited in the amended complaint was insufficient to establish plaintiffs' standing to proceed under Section 1806(f) as

> "aggrieved persons" subject to the alleged surveillance. See id. at 9. In making this determination, the Court decided an issue held open in its July 2 decision: what the standard would be for determining whether the case could proceed under Section 1806(f), see id. at 10-12 (discussing standard applicable under 18 U.S.C. § 3504), and then decided for the first time that it was sufficient for plaintiffs merely to establish a prima facie case of alleged surveillance, see id. at 13.

The balance of the argument, then, focuses on whether Walker made the correct interpretation that 1806(f) trumped state secrets.

I will need to read closer, but I suspect the resolution of this will depend on how far state secrets extends. Does it prevent a judge from assessing evidence *ex parte*, which is all Walker has ordered (contrary to the misrepresentations of the government)?

Just as interesting, though, is the shift in this filing away from one of privilege, per se, and toward the legal issues themselves. Sure, Obama is supporting Bush's crappy stance in al-Haramain. But this filing spends little time defending Bush's invocation of state secrets, instead relying on the 9th Circuit's prior ruling that Bush's invocation of state secrets was valid.