A WHOLE HEAP OF BAD FAITH IN AL-HARAMAIN

The Obama Administration has filed its latest brief in the al-Haramain case. In its effort to shield the Bush Administration from liability for their crimes, it engages in a whole host of bad faith so as to prevent Judge Walker from actually making a determination that the al-Haramain lawyers were illegally spied on.

As a reminder, Judge Walker's January 5 order did three things. First, it answered the question the Appeals Court had remanded the case back to Walker to answer: does FISA, which imposes criminal penalties for illegal wiretapping, pre-empt state secrets claims? Walker answered that question in the affirmative: he reasoned that, if Congress passed a law imposing penalties on the executive for breaking the law, the executive couldn't very well restrict access to the evidence that provides proof that the executive broke the law. Congress wouldn't have provided for penalties if it didn't intend for it to be possible to litigate those penalties.

Next, Walker said he would review the wiretap log that proves the government spied on al-Haramain illegally to see whether it proves the government spied on al-Haramain illegally. Very important: he said he would conduct this review in secret!!

Finally, Walker laid the groundwork for talking about how the case would proceed going forward, if, on review of the document proving the government spied on the al-Haramain lawyers illegally, he determined that the government spied on the al-Haramain lawyers illegally (frankly, I think this was a mistake on Walker's part, but nevermind). Here's the most important passage in which he does this:

> 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.
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> 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]

Now, I'll come back to this language, but the important thing to note here is that Walker said plaintiffs would have to be given access to the court's rulings. He asks the government to

review everything else, to see if they could be made available to the plaintiffs, but the only thing he imagines necessarily being given to plaintiff's lawyers is the Court's rulings.

So let me review. Walker said:

1. He had determined FISA's punishment for illegal wiretapping cannot simply be neutralized by a state secrets claim.
2. He would review the wiretap log, under classified conditions, and determine whether al-Haramain had been wiretapped illegally.
3. If he determined al-Haramain had been wiretapped illegally, then al-Haramain's lawyers would have to get access to court materials going forward, "including, but not limited to … the court's future orders."
4. The government should undertake a review about what might be shared with al-Haramain's lawyers safely.

Got it?

Now, in response, the Dead-Enders and (now) the Obama Administration are appealing. But they're making two arguments in their appeal:

- Walker was incorrect when he determined that FISA's punishment for illegal

wiretapping cannot simply be neutralized by a state secrets claim.

- Walker was planning on imminently sharing state secrets information with plaintiffs.

I actually have some sympathy for the first part of this claim. As the government has pointed out, no one has answered this question before (that's because there's never been such a blatant example where the executive violated FISA—there's never been such smoking gun evidence before). So the Dead-Ender/Obama Administration wants the Appeals Court to check Walker's work on this issue, to see whether or not they agree.

But in order to get an immediate stay (which they need or Walker will surely rule that the Bush Administration did illegally wiretap al-Haramain, which is a big fat genie which will bring other consequences down on the Bush Administration), they've got to prove something bad will happen right now. And to do that, they're completely misrepresenting (rather, ignoring) the passage I quoted above, which makes it very clear that Walker is not going to imminently share state secrets with the plaintiffs and has in fact sought government input on what he can and can't share with them.

Here's some of the language they use to misrepresent Walker's order:

> …where a district court order threatens to disclose protected information…
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> There is no question that irreparable harm is likely to occur absent a stay. Plaintiffs note that the district court has not set out in full detail how it intends to proceed. The district court has made clear, however, that it will provide plaintiffs' counsel with access

> to classified information over the objections of the Executive.
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> The district court's treatment of classified information is also legally incorrect. The NSA Director has determined that plaintiffs' counsel have no "need to know" the classified information at issue. Plaintiffs assert that the district court has the authority to make its own need-to-know determination. [note how they conflate "the district court's treatment of classified information" with plaintiff's assertions about classified information?]
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> As noted, the district court has made clear that it intends to provide plaintiffs' counsel with access to classified information that this Court has held lies
> within the scope of the state secrets privilege.

That's all from the first two pages of the government's brief. Rest assured, though, it continues like that throughout, without ever getting around to citing the passage I've cited above.

The district court has not threatened to disclose protected information. It has said it will share its rulings, going forward. It has started the negotiating process with the government about maybe making other materials available—but has not "threatened" to do so. Indeed, the very request for a review of whether the information could be declassified or not proves that the Dead-Ender and (now) Obama claims are a complete fabrication. But the Dead-Enders and (now) the Obama Administration make the claim anyway so as to artificially create some reason to stay this case immediately.

There's more—most of all the irony that the government is treating explicit law in this case

as negotiable, whereas in the retroactive immunity case they're filling in the holes that Congress didn't fill in. But for now, just know that the Dead-Enders and (now) the Obama Administration have totally mispresented Walker's order so as to create the false claim of imminent irreperable harm.