OBAMA'S RESPONSE TO THE AL-HARAMAIN SMACK-DOWN? CHENEYESQUE REASONING

The Executive Branch's Cheneyesque claim that it has a stranglehold on classified information is crumbling around Cheney's rancid flesh.

Courts Get to Determine Classified Information for Their Trials

First there was the ruling, earlier this week, in the AIPAC case, which imagined mere jurors—as distinct from elites like Cheney—could determine what counted as classified information.

> Now the interesting thing here is that the court is accepting that classified information, whether or not it ought to be classified, and whether or not it will necessarily harm the United States if made public, is not the exclusive domain of the Executive, but may be intruded upon by the court.

Or, as the al-Haramain lawyers described it in their brief to the 9th Circuit, Courts get some say over what is classified.

> A new decision further confirms 1 Judge Walker's authority to allow plaintiffs' counsel to use a redacted version of the Sealed Document to demonstrate standing. In United States v. Rosen, No. 08-4358, 2009 WL 446097, at *6 (4th Cir. Feb. 24, 2009), the Fourth Circuit held that, in proceedings under the Classified Information Procedures Act to determine whether classified evidence was relevant and admissible, the district court did not abuse its discretion in determining

> the extent to which the evidence should be redacted. Similarly here, Judge Walker has discretion to make that determination.

(Someone's been reading their bmaz.)

Lawyers Get to See Classified Information Their Clients Need for Their Defense

Then, in a ruling that came out earlier this week, Judge Gladys Kessler held that a person with active concerns (not just a legal case, but also an OIG investigation) must be able to share classified information with his lawyer, even if the executive branch tries to prevent that.

So the whole principal, cherished by Dick Cheney and David Addington as if it were their own children, that the Executive gets ultimate say over what is and what is not classified is crumbling.

Back to al-Haramain: Obama Argues against Article III Review

And in that environment, just hours after the Appeals Court ruled that Judge Walker can review the wiretap log that says al-Haramain was illegally wiretapped to affirm that is the case, the Obama/Dead-Enders are back, trying to prevent Judge Walker from deciding how to deal with classified information going forward.

Read the whole thing. But honestly. this stuff has gone from crappy to pathetic.

> The Court has indicated that it rejects the Government's reading of Egan, and presumably the related authorities the Government has marshaled. See January 5 Order at 21. The Court notes that under Egan, courts should not intrude upon the authority of the Executive in military and national security affairs "unless Congress specifically has provided otherwise." Egan, 484 U.S. at 530; July 2 Order, 564 F. Supp. 2d 1109, 1121 (N.D. Cal. 2008). The Government

> respectfully submits that Congress has not specifically provided authority, in Section 1806(f) or in any other statute, for courts to ignore the determination of the Executive Branch agency responsible for classified information, determine for themselves whether a person has a need to know such information, and thus grant access to classified information.
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> Plaintiffs urge the Court to ignore the decision of the Director of NSA and to make its own finding about whether counsel has a need to know. Plaintiffs assert that because the Court does not need a security clearance to access classified information, and because such information is contained in the Court's files, the Court is an "authorized holder" of classified information under the Executive Order (Pls. Supp. CMR at 3). This argument is seriously mistaken, based on both the Constitution's allocation of authority to control classified information, and on the text of the Executive Order.
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> **The mere fact that the Executive branch voluntarily provided the Court with access to classified information, for purposes of deciding the state secrets privilege or other related matters, does not grant the court authority to, in turn, disclose classified information to a litigant over the Government's objection**. In particular, the fact that Article III judges are not required to undergo security clearance processing each time they are provided access to classified information likewise does not vest in them authority to make access determinations themselves. Egan makes clear that the authority to control access to classified information is based on the President's Article II powers under the Constitution and,

> whatever role Congress may have in regulating in this area, Article II does not grant the Judicial Branch authority to make determinations that usurp the President's Article II powers. Thus, reading "authorized holder" under the Executive Order to include a Judicial officer, and allowing such an officer to overrule the Executive's determinations, would itself be contrary to the authority outlined above.
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> Moreover, this is a flawed interpretation of the Executive Order itself. **The Executive Order makes clear that the authority to determine a person's need to know is the authority to determine access, because need to know is the final requirement before access is granted.** See E.O. § 4.1(a). Thus, an authorized holder of classified information is one who may grant access under the terms of the Executive Order itself. The Order makes clear that originating agencies should have final say over another agency's decision to disclose information, see id. at § 4.1(c), and that these same protections apply even when information is disseminated outside the Executive Branch. See id. at § 4.1(e). The Order also provides that "[a]uthorized holders" may challenge the classification status of information "in accordance with agency procedures," including a right to appeal to an interagency panel composed of senior Executive Branch officials. Id. §§ 1.8, 5.3(a). These procedural requirements demonstrate that Executive Branch officials are the authorized holders of classified information under the Executive Order and are subject to the determinations made by other Executive Branch officials. To the extent the Executive Order is unclear on this issue, the Executive's longstanding

> resolution of that question would be entitled to substantial deference and controlling weight by this Court. See Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945).
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> Accordingly, plaintiffs' contention that Court is an authorized holder under the Executive Order and may determine counsel's need to know or grant access to classified information is clearly wrong. And even if the Court were permitted to determine counsel's need to know, the law is abundantly clear that it must defer to the constitutional role of the Executive in controlling classified information.

Why are these guys still talking about an Executive Order?!?!?!

Not only do they ignore al-Haramain's argument—culled from the "wisdom" of David Addington—that entities that are not "agencies" do not have to comply with Executive Orders. But why the fuck would an Executive Order—which is not a law but, as the term implies, an Executive Order—bind a non-Executive entity regarding information it created? This whole passage, read in the context of the wholesale rollback on Executive claims to have exclusive control over classified information just reeks of desperation. Not to mention an acceptance of Cheney's contention that we have fewer than one—or even two—branches of government.

To be fair, this is the argument that rightly ought to take place, just as Walker rules and things (presumably) will move forward on the al-Haramain suit. Still, it's a desperate attempt to make *Navy v. Egan* say something it doesn't say—one more worthy of Bush's Dead-Enders than Obama's lawyers.

Walker's Imminent Ruling

So what does this mean for Walker's imminent ruling on whether Bush broke the law? Dunno—but I'm sure glad he has absented himself to go rule, rather than be distracted by this stuff. The big question is whether the Obama/Dead-Ender Administration believes that simply announcing that al-Haramain has a case—that they were wiretapped illegally—constitutes classified information.

It shouldn't. And even more, it shouldn't count as classified information controlled by the Executive (it is, after all, all that Judge Walker has said he'll definitely make available to plaintiff's going forward—**his** orders). But we'll see whether they'll try to prevent Walker's publication of his ruling, come Monday. If this is all the Obama/Dead-Ender Administration tries to do to prevent Walker from announcing that Bush broke the law, we may be ahead of the game.

And meanwhile, Cheney is no doubt weeping about the way his overreach on executive power is in the process of—in Nixonian fashion—rolling back previously unchallenged executive powers.