

NOT SEEING STORM TROOPERS, NOT SCRATCHING MY HEAD

David Kravets suggests that everyone talking about the Cheney-esque brief DOJ submitted in the al-Haramain suit last Friday has been scratching their heads.

Legal scholars, the blogosphere and the twitterati have been scratching their heads for a week following the Obama administration's assertion that it might "withdraw" (.pdf) classified documents at the center of a closely watched spy case.

Some are wondering whether the feds will use storm-trooper-like tactics to remove the data from the case.

Just for the record, I am not scratching my head. Nor am I, for that matter, seeing storm troopers.

As a reminder (I've already laid this out here for the head scratchers), here is what happened.

1. The Ninth Circuit refused the Administration appeal of Judge Walker's ruling that he should review the wiretap log to see if it shows al-Haramain has standing (meaning that Bush broke the law). This set up the next step, which is that Walker would review the document, which is where we're at now.
2. Faced with the prospect of a judge looking at the

representations the Bush Administration made about the program three years ago, DOJ first said, "please don't disclose anything without checking with us first." (Okay, admittedly they said this using Cheney-esque language.)

3. Then, they confessed that Bush had ~~lied~~ submitted inaccurate information and presumably (in the form of four declarations, three of them from the people who first described this program to the Court) corrected that inaccuracy.

Now, keep a few things in mind. First, with the declarations submitted on Friday, there is presumably a somewhat detailed and maybe even accurate description of the warrantless wiretap program (as well as a description of how Bush ~~lied~~ submitted inaccurate information) in the hands of Judge Walker.

Second, DOJ has claimed (though not proven the case) that al-Haramain has ties to terrorist organizations. I don't know whether this is true or not, whether they believe this or not, or whether this is just residual fear-mongering left over from the Bush Administration, but for the sake of argument, let's pretend that at least some of the people involved believe that al-Haramain has ties to al Qaeda.

DOJ is now faced with the prospect that because someone fucked up by handing al-Haramain something they didn't mean it to have, they are about to enter into legal proceedings that might result in al-Haramain's lawyers, almost alone of anyone in the US, seeing the details of the

warrentless wiretap program. Mind you, DOJ did not (as it might have) appeal the Ninth Circuit's decision that Walker should read the documents. Rather, by all appearances, they took steps to make sure what Walker will review is accurate (giving him more information) and are now waiting for his next move.

From that, we get storm troopers and head scratching.

And one more thing. DOJ used a lot of Cheneyesque language in its brief, I'll grant you that. But tell me how you get storm troopers from this?

Accordingly, the Government respectfully proposes that the Court utilize the following procedures. First, if the Court proceeds on an ex parte, in camera basis to review the Sealed Document in order to address the issue of standing, then regardless of how the Court would then intend to rule, the Government requests that the Court provide notice to the Government of any order it would place on the public record, so that the Government may conduct a classification review and determine whether to appeal before any information over which the Government claims privilege is disclosed to the public.³ Second, if the Court directs the Government to determine that plaintiffs' counsel have a need to know classified information, or overturns the Government's rejection of counsel's need to know, or in any way directs the Government to grant counsel access to such information, the Government requests that proceedings be stayed before any disclosure of classified information pursuant to such an order, so that the Government may consider whether to appeal. If the Court intends to itself grant access to classified information directly to the plaintiffs' counsel, the Government requests that

the Court again provide advance notice of any such order, as well as an ex parte, in camera description of the information it intends to disclose, to enable the Government to either make its own determination about whether counsel has a need to know, or to withdraw that information from submission to the Court and use in this case. If the Court rejects either action by the Government, the Government again requests that the Court stay proceedings while the Government considers whether to appeal any such order.⁴

DOJ is basically saying:

1. Let us look at your ruling before you publish it so we can see if there is classified information in the ruling and decide if we will appeal before you publish that classified info in the docket.
2. Before you decide you get to decide whether to give "need to know" to al-Haramain, give us the chance to appeal your decision on classification issues (remember, the Ninth did not rule on this issue last Friday).
3. Before you hand any of this over to al-Haramain, give us the chance to appeal your decision on classification issues.

To a large degree, this is very much an

admission that we're in a new stage of litigation over how to proceed from here (assuming Walker rules that al-Haramain is an aggrieved party). This was going to happen in any case. (Mind you, in DOJ's hysteria, they seem to have forgotten that Courts carry out negotiations all the time on how to litigate cases with classified information, and they even seem to have forgotten that Judge Walker has been downright patient in the face of DOJ's arrogance.)

But it's also a plea (albeit one that gets downright Cheneyesque later on) for the Judge not to give one of the country's biggest secrets to lawyers for what DOJ claims is a group with ties to terrorism without giving the government one more shot at an appeal.

(One more note: now that I've read this passage, I wonder whether Walker has made his decision and obliged their first request—that they get to review the decision and decide whether or not to appeal. So we may not see his decision for some time, though I would hope that that would at least get noticed in the docket.)