

AGAIN ON THE AL-HARAMAIN STUFF

The WaPo has a front page article blaring about Obama's horrible record on state secrets.

I agree with the article that Obama's record on state secrets has been disappointing. But I'm really tired of reporting that misses key facts about the case. Here's the theme of the WaPo article.

The first signs [that Obama is "forsaking" campaign rhetoric about openness] have come just weeks into the new administration, in a case filed by an Oregon charity suspected of funding terrorism. President Obama's Justice Department not only sought to dismiss the lawsuit by arguing that it implicated "state secrets," but also escalated the standoff – proposing that government lawyers might take classified documents from the court's custody to keep the charity's representatives from reviewing them.

The article says that there is a "standoff" that Obama's DOJ has "escalated" that pertains to state secrets.

No.

As a reminder, the question that Vaughn Walker answered on January 5 was whether or not FISA pre-empted state secrets. Ultimately, Walker said it did, and he ruled that he would review the documents submitted in the case to determine whether al-Haramain was an aggrieved party that could sue the government for violating FISA. The Bush Administration appealed that decision—basically arguing that state secrets trumps FISA—and the Obama Administration supported that appeal.

They lost that appeal.

Now, if it were true that Obama were "escalating" a "standoff" about state secrets, then he would have appealed the 9th Circuit decision—I'm not a lawyer, but unless I'm wildly mistaken, that's how one "escalates" a legal matter. But Obama did not appeal that decision, meaning that Walker's decision that FISA trumps state secrets stands. With the 9th Circuit decision, this case moved onto the next stage of the proceedings, where Walker would look at the classified filings and made a decision about al-Haramain's standing. And, as far as the unclassified record in the case shows, that's where the case stands now (it's possible Walker has ruled and is allowing the Administration to do a classification review of his ruling, but my gut feel is that Walker hasn't decided yet).

And there's another hint that Obama is not "escalating" this "standoff"—one that we here at emptywheel appear to be the only people in creation that are remotely interested in. First, Obama admitted that some of the information submitted earlier in this suit was "inaccurate." And Obama's DOJ submitted four new filings that corrected this inaccuracy.

The Government's ex parte, in camera classified submissions also address an inaccuracy contained in a prior submission by the Government, the details of which involve classified information that cannot be set forth on the public record.

Not only did Obama's DOJ not appeal the 9th Circuit decision, but they provided additional information for Walker to review when he determines whether or not al-Haramain has standing!! If there were an "escalation" about any decision that had already been made, then why would Obama's DOJ be making sure Walker got everything he needed to do his review?

Now, Obama's DOJ has, undoubtedly, adopted Cheneyesque reasoning on the matter that is—or will shortly be—before the case: how to litigate

a case that involves information covered by state secrets (the 9th Circuit has already decided this information qualifies). As a reminder, in addition to ruling that FISA trumps state secrets back in January, Walker also started the process of determining how much information the al-Haramain lawyers needed and could be given to litigate this case. The government did the background check to give the al-Haramain lawyers access to classified information, but it determined that they did not have a "need to know" and so could not be cleared for the details of the program. Walker responded by asking both sides to brief whether he—the judge—gets to determine whether the lawyers have a need to know, or whether the executive branch gets to.

But Walker hasn't ruled on that issue yet!

So when the WaPo says,

In the al-Haramain case, Obama has not only maintained the Bush administration approach, but the dispute has intensified, with the Justice Department warning that if the judge does not change his mind, authorities could spirit away the top-secret documents.

It's nonsensical. The judge has not made up his mind yet, not about whether to show al-Haramain's lawyers the documents pertaining to the program or not (he has said only they would need access to his own rulings, though he has suggested they would likely need much more), so why would he have to change it?!?!?! Indeed, the filing in question talks prospectively—suggesting procedures they'd like Walker to follow once he makes up his mind.

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. [my emphasis]

See that bolded bit? That's proof that Obama knows well that Walker hasn't decided yet. It's proof that the issue under consideration now is no longer state secrets, directly, and instead whether the Courts or the executive branch decide which information can be revealed in

litigation.

What Obama's DOJ has asked for, basically, is that Walker not hand over the documents in this case without giving the Obama Administration an opportunity to appeal that decision.

Now, frankly, I'm all in favor of Walker's ruling being submitted publicly in the docket. It's time we get to learn whether Bush's warrantless wiretapping program was legal or not.

But effectively, what is going on now is what the legislation on state secrets proposes: that a judge first determines whether a plaintiff has standing, and then determines how to move forward with a suit involving such classified information. There are almost certainly going to be fights going forward about these classification issues. But that hasn't happened yet. Obama has threatened to escalate these issues regarding classification. But he hasn't done so yet.