

# “REASONABLE GROUNDS TO CONCLUDE”

In honor of what appears to be warrantless wiretap day here at emptywheel, I've got myself lost in some hopeless weeds. Among other things, I decided to compare the unclassified declarations DNI and NSA submitted in the ACLU case on May 27, 2006 (I'm not positive, but I think they submitted identical declarations in the other pending warrantless wiretap cases) with those submitted in the al-Haramain case on June 21, 2006. (Note, in both cases, classified filings were submitted at the same time, but we don't get to see those.)

Here they are:

**ACLU:** DNI John Negroponte declaration, Major General Richard Quirk (NSA) declaration

**al-Haramain:** DNI John Negroponte declaration, Lieutenant General Keith Alexander (NSA) declaration

As you'll see, these declarations are almost the same in many respects, though subtly different particularly in how they discuss the warrantless wiretap program and whether or not they can disclose that someone has been wiretapped.

For the moment, I'm most interested in how they describe the warrantless wiretap program.

In the ACLU case (and the CCR case), the government claimed,

... President of United States authorized the NSA to utilize its SIGINT capabilities to collect certain "one-end foreign" communications where one party is associated with the al Qaeda terrorist organization ...

In the al-Haramain case a month later, the

government said,

... President of United States authorized the NSA to utilize its SIGINT capabilities to collect certain international communications originating or terminating in the United States where there was reasonable grounds to conclude that one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization.

In a case where no one had proof they'd been tapped, NSA and DNI claimed that they were only using the program where "one party is associated with" al Qaeda. But in a case where the plaintiff knew they had been tapped, the government weakened their claim to "reasonable grounds to conclude ... one party is a member or agent of al Qaeda or an affiliated terrorist organization."

How much, in the month longer it took them to invoke state secrets in al-Haramain, do you think they pondered the possibility that a judge would demand proof that al-Haramain "is associated with" al Qaeda?

And yes, I'm waiting for William Ockham and MadDog to explain what they make of the switch from "one-end foreign" to "international communications originating or terminating in the United States." My guess is that they knew they had tapped US persons overseas talking to al-Haramain.