THE LATEST STATE SECRETS CLAIM

Yes, I know, I've been so preoccupied trying to save my state from JP Morgan Chase that I have not yet commented on the Obama Administration's latest Cheneyesque invocation of state secrets, in the EFF/Jewel case. Of course, that means some smart lawyers have already beat up the filing on legal grounds. So I thought I'd focus my attention on tactical issues.

Three Interlocking Cases

Before I do that though, let's review what this suit is and what else is going on. As Glenn pointed out, EFF filed this suit after Jello Jay Rockefeller, the patron saint of the awful FISA Amendment Act last year (and a big Obama backer), claimed during deliberations on that bill that,

> …lawsuits against the government can go forward. There is little doubt that the government was operating in, at best, a legal gray area. If administration officials abused their power or improperly violated the privacy of innocent people, they must be held accountable. That is exactly why we rejected the White House's year-long push for blanket immunity covering government officials.

Now, I don't believe for a millisecond that Jello Jay actually **intended** for lawsuits to go forward—he was, instead, trying to dismiss opposition to immunity—but nevertheless, the legislative record on FISA now reflects that the bill's sponsor thinks citizens should be able to sue those who illegally wiretapped.

Meanwhile, of course, there are two decisions still pending (as far as we know) before the judge in this case, Vaughn Walker. The first is the al-Haramain suit, in which the 9th Circuit

already decided the warrantless wiretap program was a properly invoked state secret, but in which al-Haramain's suit will probably go forward because Walker ruled the charity had proved it was an aggrieved party without the materials over which Bush invoked state secrets. Now (again, as far as we know), Walker is looking at the wiretap log and the other classified briefs submitted in the case, and deciding whether al-Haramain has standing (and therefore, whether the Bush Administration violated FISA). If and when Walker rules that the Bush Administration did violate FISA, there will be a giant fight over whether he, or the Administration, gets to decide which documents in that case will be made public and/or available to al-Haramain's lawyers. (Contrary to almost all the reporting in the case, Walker has not yet decided whether or not he would require the government to hand over the wiretap logs and other briefs decribing the warrantless wiretap program.)

Finally, there's the second pending decision—the EFF challenge to the immunity provision in FAA. Walker has suggested that he thinks Congress may not have provided specific enough instructions for the AG on how to certify which telecom should receive immunity. Thus, the legislative record from the FAA fight—the same legislative record in which Jello Jay said Americans should be able to sue their government for illegally wiretapping—has already been and will continue to be one of the central issues in the immunity challenge.

To sum up, Walker is deciding these four interlocking issues about the warrantless wiretapping cases all at the same time:

- Whether the Bush Administration violated FISA when wiretapping al-Haramain (and by association, with the wiretap program in general)

- Whether he can or should make materials submitted in the al-Haramain case public or available to al-Haramain's lawyers so that case can move forward
- Whether the same Congress that said "lawsuits against the government can go forward" provided specific enough instructions ot to the Attorney General to support immunity for telecoms
- Whether, in spite of what Jello Jay said, the Administration is still somehow immune from suit for illegally wiretapping

It's this context, I believe, that explains why Obama Administration lawyers wrote what the lawyers all agree was one crappy-ass brief.

The State Secrets Invocation

From the perspective of the Administration trying to juggle these four issues, I think the state secrets invocation is the least exciting of these issues. While the invocation of state secrets here is a fresh invocation, it still pertains to a program the 9th Circuit has already ruled on in al-Haramain. The government brief highlights this decision with cherry-picked quotations:

> "[W]e acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena").

> [snip]
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> Moreover, the Ninth Circuit has made clear that the focal point of review is whether the Government has identified a reasonable danger to national security—not a court's own assessment as to whether information is a secret or its disclosure would cause harm. See Al-Haramain, 507 F.3d at 1203 ("[J]udicial intuition . . . is no substitute for documented risks and threats posed by the potential disclosure of national security information.") **[ed: trust me—they're warming up this quotation for their next fight in the al-Haramain case itself]**
>
> [snip]
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> The Ninth Circuit has recognized that "a bright line does not always separate the subject matter of the lawsuit from the information necessary to establish a prima facie case," and that "in some cases there may be no dividing line."
>
> [snip]
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> Al-Haramain itself was such a case. The Ninth Circuit held that the "very subject matter of the case" was not a state secret based on several public disclosures by the Government as to the existence of the Terrorist Surveillance Program. See 507 F.3d at 1197-1200. But the court nonetheless held that the case would have to be dismissed on the ground that the state secrets privilege precluded plaintiffs from establishing their standing (unless the FISA preempted that privilege). In Al-Haramain, the Ninth Circuit upheld the Government's assertion of the state secrets privilege (unless otherwise preempted by FISA) and found that it foreclosed plaintiffs there from establishing their standing as a factual

> matter.

While the government's cherry-picked quotations are not always on point, and in some places they have to hedge carefully on al-Haramain and other cases that have come before Walker, the invocation of state secrets is to a significant degree an attempt to set Walker, in his current mood, against the Walker (and 9th Circuit), that was much more sympathetic to the government's claims earlier in these cases.

But there's a huge problem—two of them, actually—with trying to get rid of this suit solely by invoking state secrets.

First, the government didn't appeal Walker's ruling made in July 2008 that FISA trumped state secrets if al-Haramain showed aggrieved status without the wiretap log. That's what they tried to appeal in January, when the Appeals Court said it had no jurisdiction. So they're left repeatedly stating that they don't buy Walker's ruling that FISA trumps state secrets.

> Defendants recognizes that the Court found an "[i]mplicit" waiver of sovereign immunity under 50 U.S.C. § 1810 in Al-Haramain Islamic Foundation, Inc. v. Bush, 564 F. Supp. 2d 1109, 1124-25 (N.D. Cal. 2008). But the Government respectfully disagrees with the Court's conclusion and, for the record of this case, expressly reserve its position that Section 1810 contains no waiver of sovereign immunity to bring a damages claim against the United States.
>
> [snip]
>
> The Government recognizes that the Ninth Circuit in Al-Haramain remanded for consideration of whether the state secrets privilege is preempted by the Foreign Intelligence Surveillance Act, see Al-Haramain, 507 F.3d at 1205-06, and that this Court has ruled that the

> privilege is preempted by the FISA, see Al-Haramain, 564 F. Supp. 2d at 1115-125. As set forth below, the Government expressly preserves its position that the FISA does not preempt the state secrets privilege or other statutory privileges.
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> [snip]
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> Again, the Government preserves its position that FISA Section 1806(f) does not preempt the state secrets privilege or authorize a court to invoke its procedures in order to adjudicate whether or not a party has in fact been subject to surveillance and has standing.
>
> [plus one much longer reservation starting on page 24]

They're reserving the right to appeal this ruling, from the al-Haramain case, in this suit. But in this suit, at least, they're swimming upstream, having screwed up last summer.

Now, as Mary has explained, in the al-Haramain case too they can circle back around to this issue. But at that point, it may well be too late, if not for al-Haramain, then for the other suits.

After all, while Walker may never be able to release descriptions of the program publicly in the al-Haramain suit (frankly, I think he won't really try), he may well rule that the wiretapping was illegal. And that may well change the calculus of the other two suits—one that is assessing whether or not Congress was specific enough in its immunity amendments, and the other based on the premise that if the government broke the law, Jello Jay said, then people should be allowed to sue. If, in a set of cases consolidated under Walker, he rules that the wiretap program was illegal even when used against a suspected terrorist organization, then can he rule out suits for citizens about whom

there was absolutely zero probable cause? (And note, by this time, Walker will already know what information was collected on average citizens.) In other words, if and when Walker finds the program illegal in one case—regardless of whether he can share those details with the plaintiffs—then it presents problems for the government with the other two suits presented together.

Absolute Immunity

Which is why, I think, the government has now pulled absolute immunity out of its arse.

Here, Anonymous Liberal's assessment of the Administration's misrepresentation of the law is very helpful (you legal types can tell me whether you agree with his reading—I'm interested in his take from a tactical perspective).

> As I understand it, the DOJ is arguing that sovereign immunity has not been waived with respect to claims (such as the ones at issue in *Jewel*) that do not involve allegations of improper government disclosure of information.
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> [snip]
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> The other provision, section 2712, states:
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> > Any person who is aggrieved by any willful violation of this chapter or of chapter 119 of this title or of sections 106(a), 305(a), or 405(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) may commence an action in United States District Court against the United States to recover money damages.
>
> Now according to the DOJ's brief, section 2712 should be interpreted very

> narrowly as only waiving sovereign immunity with respect to instances in which the government improperly discloses someone's personal information or records (which the plaintiffs in the EFF suit do not allege). But as you can see, there's nothing at all in the statutory language that would limit the waiver in that way. Section 2712 authorizes anyone who is "aggrieved" by a violation of any of the various relevant statutes (including FISA) to bring a claim for money damages against the United States. Can't someone be "aggrieved" by being illegally spied upon, even if the government never publicly releases the information it gathered? This argument just doesn't make any sense to me.

At least as AL reads it, the government is erroneously claiming that Congress only waived sovereign immunity in FISA in cases in which the government improperly released information. In al-Haramain, of course, the government improperly released information from the wiretapping (albeit to the targets of the wiretapping themselves and, at least according to the FBI, by mistake). But for all us average citizens whose telecom data has been sucked up in an office in San Francisco, the government has made no such release. So, it seems, the government is trying to invent a way to reclaim the power of state secrets even if Walker's ruling—that FISA trumps state secrets—remains and if Walker rules the entire program to be illegal.

Frankly, if the government hadn't consolidated the wiretapping suits, they needn't have bothered. Because, except for al-Haramain, no one else (except for maybe Lawrence Wright) would ever be able to get past the hurdle of proving aggrieved status with state secrets in place. But if a judge can review filings to determine aggrieved status, and this particular

judge just happens to be reading—as we speak—a bunch of filings describing the program, and if said judge realizes that the wiretapping not just of al-Haramain, but the underlying claim to reasonable cause under the Fourth Amendment, is totally illegal, then what happens?

Standing and the "Dragnet" Surveillance

Which is why I find the way the government's focus on the plaintiff's "dragnet" claim to be so fascinating.

Recall that the al-Haramain suit focuses primarily on the allegation that the government—having collected signals in whatever manner and established reasonable cause in whatever manner—wiretapped a number of named individuals. That suit is about the end product of the warrantless wiretap program, in which the government, having identified targets through whatever means that fell short of FISA's probable cause, then wiretapped those targets without approval from the FISC.

But Jewel focuses on the first part of the warrantless wiretap program, the large scale collection of telecom signals and the subsequent data-mining of those signals to identify potential targets for wiretapping.

And, as a reminder, I suspect that the "inaccurate information" that the Bush Administration may have submitted pertained to the data-mining aspect of this program.

With that in mind, read this passage, written by lawyers who are trying to keep the dragnet off limits, writing to a judge who now probably has read a description of the dragnet and may already be contemplating whether the dragnet—in addition to the more particularized wiretapping of the al-Haramain lawyers—is legal.

> It bears emphasis that plaintiffs' allegation of a "dragnet" of surveillance by the NSA—the alleged interception of communication content and records of millions of domestic and

> international communications made by ordinary Americans, see, e.g. Compl. ¶ 7—does not establish their standing. Even if that allegation were sufficient to avoid dismissal on the pleadings, plaintiffs would be required to demonstrate that they personally have been subject to the alleged communications dragnet, and the information relevant to doing so is properly protected by the state secrets privilege. Plaintiffs cannot establish the existence of an alleged content dragnet (previously denied by the Government, see Hepting, 439 F. Supp. 2d at 996), or its application to them personally without the disclosure of NSA intelligence sources and methods. Similarly, plaintiffs cannot establish standing based on allegations that records concerning their communications were collected as part of (or apart from) the alleged communications dragnet. As this Court noted in Hepting, "the government has neither confirmed nor denied whether it monitors communication records and has never publicly disclosed whether [such a program] actually exists," see 493 F. Supp. 2d at 997, and the Court further recognized, in barring discovery on this claim in Hepting, that:
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> > Revealing that a communication records program exists might encourage that terrorist to switch to less efficient but less detectable forms of communication. And revealing that such a program does not exist might encourage a terrorist to use AT&T services when he would have done so otherwise.
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> Id.; accord, Terkel, 441 F. Supp. 2d at

> 917. The Government's privilege assertion as to this allegation again demonstrates the exceptional harm to national security that would result from any further proceedings on this allegation. For this reason, plaintiffs cannot sustain their burden of showing that such a program exists, much less satisfy their burden of establishing standing by showing that their communication records were collected under such an alleged program.

The government quotes Walker himself, writing in a case in which plaintiffs had not yet proved they were an aggrieved party, in an attempt to argue that in this suit, too, plaintiffs would never be able to prove their standing, and therefore never be able to get to a point where a judge could review their status as an aggrieved party under FISA

But all that pretends that they can time-transport back a few years, to a time when Walker hadn't already reviewed details about this dragnet to assess its legality.

It's like they're saying, "even though **we** know and **you** know that there is a dragnet, the plaintiff's assertion of such does not give them standing, so you can't rule that they are included in a dragnet, even if you've already seen the proof that they are."

Now, frankly, I have no idea whether Walker can use his review of documents in the al-Haramain case to give the plaintiffs in Jewel standing. If his upcoming ruling said, "al-Haramain was illegally wiretapped, but in addition, the dragnet of innocent US person data is a gross violation of the Fourth Amedment," he might be able to, but if his ruling were limited to the March wiretaps of al-Haramain, it'd be a lot harder to do so.

But I suspect that the filings correcting the "inaccurate" information Bush submitted lay out

this data-mining stuff in an attempt to prove reasonable suspicion with al-Haramain, which would then make the data-mining a central question of whether or not al-Haramain was legally wiretapped. To defend themselves in al-Haramain (and to stave off contempt charges), they may have been put in a position that made this suit a lot harder to defend.

In any case, though, this Obama DOJ appears to have thrown the desperate "absolute immunity" claim in here as a way to try to minimize the damage of all these factors collapsing in on themselves. That doesn't mean it'll work. Nor does it make it even remotely honorable.