THE LATEST AL-HARAMAIN FILING

First, let me say that the breathless reporting on the latest al-Haramain filing is totally overblown. As I said when Judge Walker ordered the al-Haramain and government to attempt to come up with a protective order under which the case can proceed, it was always unlikely that they would be able to do so.

> The government and al-Haramain have been squabbling about access for months now, there's no reason to expect them to be able to come to a resolution, even if Walker pointed them to an approach he seems to think will work.

Guess what? This latest is, as expected, a continuation of the same squabble that the parties have been engaged in since January 5. Yes, the government continues to insist Walker's January 5 ruling—that FISA trumps state secrets—is wrong. But the al-Haramain lawyers are also pulling some fast ones with their submission. Which suggests that Walker is going to have to finally rule one way or another on what access al-Haramain should have, the government will try to appeal, and we'll be waiting on the 9th Circuit again.

Walker's Order and al-Haramain's Response

Back on April 17, Judge Walker pointed to a protective order being used in the Gitmo habeas petition cases, suggesting that the parties here adopt a similar protective order. So al-Haramain, appearing to follow Walker's order to a T, did just that, submitted a protective order based on the Gitmo one.

But, as the government fairly pointed out, al-Haramain made some key changes in the order. First, whereas the Gitmo order allowed the government to refuse to disclose information and, ultimately, to release a detainee rather

than disclose that information, the al-Haramain proposed order gave the government no such way to refuse to disclose information.

> Plaintiffs' proposed order also deletes another sentence from paragraph 49(b) of the Guantanamo order which states that: "Nothing herein prohibits the government from submitting classified information to the Court in camera or ex parte in these proceedings or entitles petitioners or petitioners' counsel access to such submissions or information." See id. Elimination of this provision would further foreclose the Government's authority to control the use and disclosure of classified information in this case.

(Al-Haramain, incidentally, simply replaces this passage with a phrase not limiting government "remedial action" if information does get leaked, which if they were willing to go to jail to liberate information on the warrantless wiretap program would pretty much expose the program in its entirety.) It also reversed the structure of "need to know" for the al-Haramain protective order, forcing the goverment to petition any time it wanted to withhold something from al-Haramain rather than allowing the government the ability to determine whether to turn over any particular piece of evidence. These two objections are consistent with the government's overall insistence that the executive must retain the ability to dispose of classified information—and I expect these two issues to be at the center of any appeal that arises out of this case. The government is still making an argument David Addington would love, and I suspect they won't win the argument in the end (but then what do I know?). They will, however, spend a lot of time making their argument.

Then there's the clause that al-Haramain doesn't amend from the protective order in the Gitmo case, which even I found to be breathtaking. Al-

Haramain kept in a clause that reads,

> A plaintiffs' counsel is presumed to have a "need to know" all the information in the government's possession concerning the plaintiffs whom that counsel represents.

Remember, rightly or wrongly, the government maintains that al-Haramain is a terrorist organization with ties to al Qaeda, and has active criminal proceedings against the organization. By picking up language intended for and specific to a habeas petition, al-Haramain demands expansive discovery that would moot discovery in several other active cases (not to mention general intelligence collection). While the totality of the information the government has on al-Haramain might become pertinent were the government to claim it had adequate probable cause to wiretap al-Haramain in 2004, the government has not made that argument, at least not publicly (and besides, it seems that such information would be limited to what the government had in possession when it first wiretapped al-Haramain illegally). So I am sympathetic with the government claim that this provision of the protective order goes too far.

The Jeppesen Dataplan Decision

A more interesting dispute concerns each side's treatment of the 9th Circuit's recent decision on Jeppesen Dataplan, which ruled the government can only assert state secrets over evidence that remains secret. Al-Haramain asserts that if information has become public, then the government can't prevent al-Haramain from discussing it by invoking state secrets.

> Defendants object to the reference in paragraph 28 to the Ninth Circuit's recent opinion in Mohamed v. Jeppesen Dataplan. Plaintiffs have included that reference, however, because of the numerous relevant public disclosures by

> the government and by the news media about the TSP and the plaintiffs' surveillance — before this case was filed and during the course of the litigation — much of which is no longer secret.

The government, however, maintains that since the 9th Circuit has already ruled that they properly invoked state secrets in this case, they can control the information that gets released.

> Related to the foregoing, the Government has other objections to plaintiffs' proposed order. For example, plaintiffs' proposed order would link the determination of what information is "not a secret" to the process described in Mohamed v. Jeppesen Dataplan, ___ F.3d ___, 2009 WL 1119516, (9th Cir. 2009), concerning adjudication of the state secrets privilege. See Pls. Proposed Order ¶ 28. But this approach makes little sense, not only because Jeppesen may be subject to further review, but because the Government's state secrets privilege assertion in this case has already been upheld. The question of what is "a secret" for purposes of the state secrets at issue in this case has been resolved by the Ninth Circuit's decision in Al-Haramain.

IANAL, so I honestly don't know how Jeppesen will be applied to this case. But I'm certain it will affect the case, and particularly limit the government's ability to cordon off information about—say—data mining, which is in the public domain but was never formally admitted by George Bush.

In fact, the government's assertion that the classified filings in this case should remain secret (when they almost certainly describe the entirety of what they've done with al-Haramain

and therefore should be disclosed to al-Haramain in at least redacted form) suggests that's one piece of information they'd like to hide even if and when this case moves forward.

Government Impatience to Appeal Again

That said, al-Haramain is correct that the government is not engaging in good faith—suggesting a protective order—with Walker's prior ruling. As the government repeatedly states in this filing, they just want Walker to hurry up and make an order that they can properly appeal. Here's how al-Haramain portrays this impatience.

> The second scheme appears above, in the "Government Defendants' Opposition To Protective Order," where defendants ask this Court to "enter an order directing disclosure" so as to create appellate jurisdiction under 50 U.S.C. section 1806(h), which prescribes finality of an order directing disclosure of materials relating to surveillance. The problem with this scheme is that plaintiffs are not requesting, and this Court need not grant, an "order directing disclosure" by defendants. For this case to resume forward progress, the Court can simply adopt a protective order under which the Court will afford plaintiffs access to the classified filings, the most of important of which – the Sealed Document – has already been disclosed to plaintiffs. No "order directing disclosure" is necessary. By seeking an "order directing disclosure," defendants are attempting to create appellate jurisdiction by manipulating this Court into the language of section 1806(h). That, too, is improper. "A party may not engage in manipulation either to create appellate jurisdiction or to prevent it." American States Ins. Co., 318 F.3d at 885.

Now, I'll leave it to the lawyers to explain when the government will have another proper opportunity to appeal (after the one they ignored last summer). But there is a underlying issue. Al-Haramain has suggested repeatedly that Walker has already decided to give it access to classified materials. The government is here asking for Walker to hurry up and make such a decision so it can appeal. But that sort of proves the point: Walker simply hasn't decided yet what's going to happen with the classified information in this case.

Ultimately, though, the key disagreement comes back to the government's disagreement with Walker—on the decision that they failed to appeal last year. They're arguing that Walker can't just say: "Al-Haramain was illegally wiretapped," utterly ignoring Walker's January 5 ruling.

> Finally, we disagree with plaintiffs' suggestion below that the Court may simply decide whether or not the plaintiffs have standing—a disclosure expressly foreclosed by the Ninth Circuit's ruling on the state secrets privilege—before any further appeal.

Meanwhile, among the three sets of suggestions al-Haramain makes is that Walker just get around to declaring the wiretapping illegal.

> The second option is one that plaintiffs have previously proposed – that the Court simply proceed to determine that plaintiffs were subjected to warrantless electronic surveillance and thus have standing to prosecute this action. Now that the Court has reviewed the Sealed Document, and in consideration of plaintiffs' previous arguments on how the unclassified and classified evidence demonstrates plaintiffs' standing, this Court is sufficiently well-positioned to find standing.

Walker will probably just rule on a protective order. But I wouldn't exclude the possibility that he's going to make this ruling, and make it publicly.

The State Secrets Bills

One more point about all this. Consider the background of recent larger discussions about state secrets. In mid-April, Walker suggested a fairly expansive protection order modeled on the Gitmo habeas cases. On April 28, the 9th sharply curtailed the government's invocation of state secrets in Jeppesen Dataplan. The following day, Obama said he was considering fixing state secrets, pretending (unconvincingly) he had been planning to do so all along. Yet the state secrets legislation proposed in both the House and the Senate takes a very different approach than that proposed by Judge Walker—advocating the use of a substitution process akin to that used in the CIPA process.

Whatever Walker rules in this dispute, it will, eventually, be appealed. And meanwhile, Obama will continue to work with Congress to water down their proposal to come up with a less bad option (for the expansive executive power) than the plan Walker seems to favor or that the 9th seems to be heading towards.

So while it'd be nice to have Walker declare the warrantless wiretap program illegal once and for all, for the near future the debate is going to focus on a quickly evolving status of state secrets, and it's going to be a debate that plays out in San Francisco (with both this case and Jeppesen) and in DC.