THE DATA MINING SECRETS AND AL-HARAMAIN

There's a footnote in the latest al-Haramain filing that deserves further attention. It suggests the government continues to try to shield information on its larger wiretapping program by treating different aspects of it as separate programs entirely.

The Filing Refers to "TSP" Surveillance and Surveillance "Pursuant to Other Authorities"

Amidst the passage complaining (rightly, to a point) that al-Haramain's proposed protection order would give it access to "all information" the government held on the charity, it footnotes a discussion of the submissions included as part of its state secrets assertion.

> Similarly, paragraph 25 of plaintiffs' proposed protective order, which addresses counsel's "need to know" classified information, is also fundamentally flawed. This proposed provision states: "A plaintiff's counsel is presumed to have a 'need to know' all the information in the government's possession concerning the plaintiffs whom that counsel represents." See Pls. Proposed Order ¶ 25. Not only is this among the central issues in dispute in this case, as noted above, but, under this provision, plaintiffs would be presumed to have a "need to know" any and all classified information "concerning" plaintiffs. This could include all information concerning the Al-Haramain Islamic Foundation of Oregon—a designated global terrorist organization—as well as the information at issue in the Government's state secrets privilege assertion filed in this case, to the extent those

> submissions are deemed to "concern" the plaintiffs.6/ Plaintiffs would thus transform the inadvertent disclosure of a single document—which itself was subsequently excluded in this case by the Ninth Circuit—into a presumption entitling them to all information that may exist concerning them. Plaintiffs' response below does not recede from this sweeping demand for access. [my emphasis]

The footnote reads,

> 6. The Government's state secrets privilege assertion applies to a range of information beyond the sealed document, including whether or not the plaintiffs were subject to alleged surveillance not only on the Terrorist Surveillance Program challenged in this case, but pursuant to any other authority not at issue here, as well as information concerning the TSP, and the al Qaeda threat. See Public Declaration of John D. Negroponte. [my emphasis]

The Government Doesn't Want to Hand Over the New Filings

These two passages suggest several things. First, from a very practical perspective, they show the government is panicking over having to release the classified submissions the government itself submitted in this case, much more than they're panicking over having to (re)release the wiretap log that, after all, al-Haramain has already seen. I'll remind you that these submissions are probably the same submissions that the Obama administration had to correct. So what appears to have happened is that the Obama DOJ went back and provided a full description of the surveillance program at issue (after Bush's DOJ had presumably hidden key aspects of it). But now, they're trying to make sure those newly accurate submissions remain

hidden from al-Haramain. Which is consistent with my explanation for the panicked Cheneyesque filing Obama submitted. They seem to be worried about revealing details of the fuller program, not the wiretap log.

Now, this is where my sympathy for their objection to the al-Haramain demand for "all information" ends. While I think it unrealistic for al-Haramain to expect to get access to every piece of information the government holds on the charity, I do think it ought to have some description of the larger program of illegal wiretapping.

But then look at the content of these two passages: It objects to the release of the state secrets submissions (suggesting, unrealistically, that they might not "concern" al-Haramain), and then implies the submissions include information on whether al-Haramain was wiretapped under the "Terrorist Surveillance Program," whether it was surveilled under "any other authority not at issue here," and on the "TSP" and al Qaeda.

Jeppesen May Give the Circuit Reason to Consider State Secrets WRT the New Filings

That formula is key for two reasons. One, the government maintains that, in spite of the Jeppesen ruling, the 9th Circuit's ruling that state secrets had been properly invoked in this case continues to apply to all of the material submitted in the case, even though four declarations pertaining to that material weren't submitted until after the state secrets ruling! It said,

> 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.

The government wants to effectively grandfather

in the state secrets declaration to apply to information submitted after the 9th Circuit's ruling. And they also want to make sure that none of the new information can be discussed by al-Haramain's lawyers, even if that information is now in the public domain.

That's particularly bogus considering the way they're making a distinction between the "TSP" and surveillance "pursuant to any other authority not at issue here." If the government wants to treat "TSP" as distinct from (say) the data mining aspect of the program, and if they never bothered to admit to the data mining aspect of the program in their first go-around with the 9th (and in fact made false representations to the Courts in order to hide that), then can they really claim the earlier affirmation of their state secrets invocation extends to the other parts of the program? Particularly given the public description of the program Russell Tice has since given?

Call me crazy, but these two passages seem like a bad attempt to prevent any review of the data mining (say) aspect of the program they failed to reveal to the 9th the last time they had it review state secrets. (No wonder they're panicked about the Jeppesen decision).

They're Gaming the Multiple Authorities in This Case

The other reason the distinction between "TSP" and surveillance "pursuant to other authority" they're making here is important is because of something that the FISCR ruling made available earlier this year revealed. The larger surveillance program, at least under the Protect America Act and (given Sheldon Whitehouse's focus on 12333 wrt Pixie Dust) almost certainly during the program's earlier incarnation, consists of wiretapping authorized under one part of the law and other things (probably including data mining) authorized under other aspects of the law.

As I showed in this post, at least under PAA,

the government claimed it fulfilled probable cause under the Fourth Amendment not through PAA itself, but through a provision in EO 12333 which states,

> The Attorney General hereby is delegated the power to approve the use for intelligence purposes, within the United States or against a United States person abroad, of any technique for which a warrant would be required if undertaken for law enforcement purposes, provided that such techniques shall not be undertaken unless the Attorney General has determined in each case that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power.

In other words, the only thing the government used to overcome Fourth Amendment protections was to have the Attorney General say surveillance was directed against "an agent of a foreign power" (which, given the government's claim that al-Haramain is a terrorist organization, would be an easy bar to pass in the al-Haramain case).

Then, the government fulfilled the particularity required under the Fourth Amendment through other means—means which, in the FISCR ruling, remain entirely and extensively redacted. I believe (though it's a wildarsed guess) those redactions hide discussion of data mining.

So FISCR ruled that PAA, plus an AG certification under 12333 that the targets of wiretapping were an agent of a foreign power, plus these redacted procedures which may or may not be data mining to select particular targets, did not violate the Fourth Amendment.

But we know that PAA was designed to make TSP legal. Which suggests that if the government is making a distinction in the latest al-Haramain filing between TSP and other surveillance, it is probably trying to cordon off what I suspect is

the data mining they used to select Al-Haramain as a target.

Which, if I'm right, means they're trying to do in the al-Haramain case what they did in the case reviewed by FISCR—completely shielding the data mining aspects which are the really illegal and capricious parts of the program, so that the litigation in al-Haramain moving forward will rule solely on whether the wiretap itself was legal, not on the underlying selection process.

My Wildarsed Summary

So here's my wildarsed summary of what is going on. Remember—this is all a guess (albeit an educated one).

1. When Bush's DOJ submitted declarations describing this program in 2006, they did not describe the underlying process by which they picked targets, significantly, data mining.
2. Their invocation of state secrets covers only the aspects of the program they admitted to in 2006.
3. Obama's DOJ was no longer willing to present a less than honest description of what the program was to the Court, so they submitted four new declarations describing these other aspects of the program (and started making crazy claims about how much they control this information).
4. They thought they'd get away

with it until Jeppesen (taken in tandem with Russell Tice's recent declarations) made it possible that their older state secrets ruling might not apply to this new information.

5. Now, they're simultaneously arguing that their earlier state secrets invocation applies to everything at issue here, and that al-Haramain can't have the now-accurate submissions because they don't pertain to the narrowly-defined wiretapping at issue in this case.

Obviously, I don't think they can get away with it (but then, I'm a DFH blogger, NAL). Furthermore, if al-Haramain pursues one obvious route—challenging the state secrets claim over the newly submitted declarations—it might give the panel that originally ruled on the state secrets issue cause to review these new declarations, which might, in turn, cause them to recall how inaccurate those first declarations were (though keep in mind, they don't have those declarations any more, they've been withdrawn, so they'd be working from memory).

Like I said, no wonder they're panicking.