9TH CIRCUIT: NO WAY TO PUNISH THE GOVERNMENT IF THEY ILLEGALLY COLLECT (BUT DON'T USE) YOUR TELECOMMUNICATIONS

As Josh Gerstein just reported, the 9th Circuit has thrown out a decision against the government in the al-Haramain wiretapping suit. While they don't comment on Judge Vaughn Walker's judgement that al-Haramain had standing and had proven they had been spied on, the panel ultimately held that for the alleged actions—collecting al-Haramain's telecommunications—the government has sovereign immunity. Al-Haramain can only sue individuals, not the government.

The ruling sucks for al-Haramain. But it has larger implications. Effectively, the 9th Circuit is saying there's no way to hold the government accountable for simply collecting your telecommunications illegally; you can only hold them accountable if they use that information in a trial.

It distinguishes those two activities this way, pointing to language that specifically invokes the United States as a defendant in case of 1806 (use in an official proceeding) but not 1810 (collection).

> Contrasting § 1810 liability, for which sovereign immunity is not explicitly waived, with § 1806 liability, for which it is, also illuminates congressional purpose. Liability under the two sections, while similar in its reach, is not identical. Section 1806, combined with 18 U.S.C. § 2712, renders the United States liable only for the "use[ ] and disclos[ure]" of information "by Federal officers and employees" in an

> unlawful manner. Section 1810, by contrast, also creates liability for the actual collection of the information in the first place, targeting "electronic surveillance or . . . disclos[ure] or use[ ]" of that information. (emphasis added). Under this scheme, Al-Haramain can bring a suit for damages against the United States for use of the collected information, but cannot bring suit against the government for collection of the information itself. Cf. ACLU v. NSA, 493 F.3d 644, 671 (6th Cir. 2007) (Lead Opinion of Batchelder, J.) (noting that FISA potentially allows limitless information collection upon issuance of warrant, but limits use and dissemination of information under, inter alia, § 1806(a)). Although such a structure may seem anomalous and even unfair, the policy judgment is one for Congress, not the courts. Also, because governmental liability remains under § 1806, the district court's concern that FISA relief would become a dead letter is not valid. See In re Nat'l Sec. Agency Telecomms. Records Litig., 564 F. Supp. 2d at 1125.
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> Congress can and did waive sovereign immunity with respect to violations for which it wished to render the United States liable. It deliberately did not waive immunity with respect to § 1810, and the district court erred by imputing an implied waiver. Al Haramain's suit for damages against the United States may not proceed under § 1810.

Because al-Haramain, at a time when Vaughn Walker was using 1810 to get by the government's State Secrets invocation, said "it was not proceeding under other sections of FISA," its existing claim is limited to 1810. The government used the information collected—in a

secret process that ended up declaring al-Haramain a terrorist supporter—but not in a trial, and therefore not in a way al-Haramain can easily hold the government liable for.

The implication, of course, is that all the rest of the collection the government engages in—of all of us, not just al-Haramain—also escapes all accountability. So long as the government never uses the information itself—even if the entire rest of their case is based on illegally collected information (as it was in, at a minimum, al-Haramain's terrorist designation)—a person cannot hold the government itself responsible.

The people who can be held accountable? The non-governmental or non law enforcement persons who conduct the surveillance.

But of course, they—the telecoms—have already been granted immunity.