OBAMA DOJ CONTINUES TO FLIMFLAM JUDGE LAMBERTH ON STATE SECRETS

The state secrets doctrine was born on the wings of fraud and lies by the US government in the case of *US v. Reynolds* in 1953. As Congress struggles to rein in the unbridled use of the doctrine to cover up illegality by the Executive Branch (see here, here and here), it is a good idea to keep focus on just how addicted the Executive Branch has become to this unitary ability to quash inquiry into their malfeasance.

It took over four decades for the outright lie in *Reynolds* to surface and be exposed. The government was well on their way to covering up their similar dishonesty in *Horn v. Huddle* for decades, if not eternity, when a relentless plaintiff was finally able to demonstrate to Judge Royce Lamberth the fraud being perpetrated upon the court, nearly a decade after the original state secrets assertion. After giving the government multiple opportunities to come clean, Judge Lamberth blistered the DOJ with an opinion literally finding their acts a fraud upon the court.

After being exposed on the record by Judge Lamberth, the government suddenly decided to settle with the plaintiff, with a non-disclosure and no admission of wrongdoing agreement of course, and then moved the court to vacate its rulings against them. The DOJ literally wants to erase the record of their fraud.

But not everybody is quite so excited about the thought of the DOJ wiping the record of their time worn proclivity to dishonesty in state secrets assertions. It important for there to be such a record, with written opinions of the court behind it, because the government is still out there seeking to shirk accountability for

illegality and Constitutional malfeasance in critically important cases such as *al-Haramain* and *Jeppesen*.

In this regard, the attorney for al-Haramain, Jon Eisenberg, has just taken the extraordinary step of seeking leave to file an amicus brief to Judge Lamberth in the *Horn v. Huddle* case objecting to the government's attempt to vacate the court's opinions. The amicus filing by Eisenberg is brief, but a thing of beauty. And he nails the government for continuing dishonesty with the court by pointing out how the DOJ unethically failed to cite to the court directly adverse authority to their arguments in seeking to vacate the previous opinions.

> The purpose of this brief is to apprise the Court of legal authorities – as to which the United States's vacatur motion is silent – that are directly adverse to the United States's position and support this Court's denial of the motion.
> ….
> The United States contends there is "minimal" value in leaving this Court's opinions "extant," because they are interlocutory and thus are "non-precedential." See United States's Motion, Dkt. #508, at 6. But a district court's interlocutory opinions, while lacking precedential value, are hardly valueless. In Fraser, 98 F. Supp. 2d at 791, the court refused vacatur of opinions concerning interlocutory issues because "there can be little doubt that, like the appeals court opinion in Bancorp, opinions on such matters are a valuable resource for litigants and courts," especially where the opinions address "questions of first impression."
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> That is the situation here. The opinions that the United States wants vacated concern questions of first impression – whether a district court may decline to give a high degree of deference to an

> assertion of the state secrets privilege where the government has previously made misrepresentations to the court regarding the privilege (the opinion of July 16, 2009), and whether a district court may decide whether counsel who have been favorably adjudicated for access to classified information have a "need to know" the information within the context of pending litigation (the opinion of August 26, 2009). The opinions will be a valuable resource for litigants and courts as these issues arise in other cases. In fact, the opinions have already proved to be a valuable resource in Al-Haramain Islamic Foundation, Inc. v. Obama, where the plaintiffs (amici curiae in the present case) have cited them in briefing on a pending motion for partial summary judgment. See Al-Haramain Islamic Foundation, Inc. v. Obama, MDL Docket No. 06-1701 VRW (N.D. Cal.), Plaintiffs' Reply to Government Defs.' Opp. to Pls.' Motion for
> Partial Summ. Judg., Dkt. #104, at 13 n. 2 & 17 n. 3.

Get that? After perpetrating a fraud on Judge Lamberth's court, and being caught redhanded, the Obama DOJ files a brief that fails to disclose directly adverse authority, which is fundamentally unethical. It never stops on the pernicious dishonesty and outright fraud when the government is involved in state secret assertions; that was the case in the outset with *US v. Reynolds*, and that is the case now.

And you have to wonder why, at this point, Judge Lamberth would possibly be interested in granting the government's wish to wash their hands here. It was Judge Lamberth, and his court, the fraud was directly perpetrated on, and that is the very conduct seeking to be escaped from by the settlement and motion to vacate. If not for having been caught, the fraud

would still be ongoing. Justice, and the sanctity of the court, require Judge Lamberth to leave those opinions in place (not to mention the authority Eisenberg cites in the amicus filing); it would not be right to give the government the ability to wash away the opinion record of such outrageous perfidy when other litigants across the country are facing potentially similar circumstances.

Judge Lamberth should leave his opinions in place and let them have whatever value they may for other litigants, as a message to Congress, and, most of all, support for other judges, like Judge Vaughn Walker, trying to wrangle with an obstreperous and obstructionistic Department of Justice and US government. Quite frankly, after all the disingenuous conduct perpetrated by the DOJ in covering up the violations of the executive branch, the court should still impose stiff sanctions on the government as was being contemplated by the court in *Horn v. Huddle* before settlement; but, at a minimum, the court should send a message that such conduct will not be tolerated by leaving its opinions in place and in force.