

DEVELOPING ARGUMENTS ABOUT CLASSIFIED INFORMATION IN THE AL-HARAMAIN LITIGATION

There have been a number of moves in the al-Haramain suit, some of which I'll review in more detail when I get back to work in earnest in Monday. But for now, there are three details I wanted to point out that reflect changing ground with regards to classification in the suit, just as the government files an appeal.

The Dead-Enders Admit Walker Didn't Order Them to Declassify the Wiretap Log

The first comes in this government request for more time to respond to Judge Walker's order, filed on Friday. In it, the dead-enders reverse a claim they made in January. Yesterday, they said,

In its Order of January 5, 2009, the Court directed the Government Defendants to "review the Sealed Document and their classified submissions to date in this litigation and determine whether the Sealed Document and/or any of defendants' classified submissions may be declassified, take all necessary steps to declassify those that they have determined may be declassified and, no later than forty-five (45) days from the date of this order, serve and file a report of the outcome of that review."

They specifically say that the review includes the stuff at issue in this suit—primarily the wiretap log that shows that al-Haramain was wiretapped illegally.

The Government can report today, as we indicated in a filing made on February 11, 2009, that we expect the relevant information at issue in the privilege assertion to remain classified.

Funny. These same dead-enders claimed, on January 22, that Walker had ordered them to get security clearances for al-Haramain's lawyers so they could have access to the wiretap log, suggesting Walker had already ordered that access.

Second, the Court has held that **due process requires** that, for plaintiffs' counsel to litigate the case, they must obtain security clearances for **access to certain classified information, including the heretofore Sealed Document**, court orders and possibly the Government's classified filings in this case. Both holdings raise serious questions of law and would subject the Government to irreparable harm. [my emphasis]

The January 22 claim was a total misrepresentation of Judge Walker's order, so I'm not surprised that the dead-enders are now asserting that they have simply been ordered to do a review—and (with their assertion that the log remains classified) that they retain ability to determine whether the document is classified or not. But the dead-enders have backed off one of their more egregious claims.

Like Dick Cheney, an Article III Court Is Not an "Agency"

Meanwhile, on Thursday, al-Haramain submitted a filing that explains that while two lawyers for the plaintiffs have been deemed **eligible** for clearance to review the documents in the case, DOJ insists it can refuse them clearance by claiming they don't have a need to now that information. Al-Haramain makes two responses

that will make things interesting going forward.

First, in a move that parallels one that David Addington tried after his Fourth Branch claims were laughed to smithereens, al-Haramain argues that Judge Walker is not bound by the Executive Orders on classification since those orders only cover executive branch agencies.

Even if the Executive Branch could control a federal judge's disclosure of classified court filings to persons with security clearance, Executive Order No. 13,292 does not purport to do so, but merely states that "[a]n agency shall not disclose information originally classified by another agency without its authorization." Exec. Order No. 13,292, § 4.1(c) (2003) (emphasis added). A federal court is not such an "agency." Executive Order No. 13,292 makes this clear in defining "agency" as "any 'Executive agency,' as defined in 5 U.S.C. [§] 105; any 'Military department' as defined in 5 U.S.C. [§] 102; and any other entity within the executive branch that comes into the possession of classified information."

Of course, the Courts really are a branch of their own. And so—the al-Haramain lawyers argue—since Judge Walker currently has possession of the wiretap log and the filings in the case, he has the authority to decide whether they have the need to know what is in the filings pertaining to this case.

The Review Should Work Like CIPA

Then they make a move that is perhaps even smarter. They argue that decisions about access to documents covered by state secrets should work just like CIPA works.

Analogous authority under the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3, which governs a criminal defendant's access to classified

information, is consistent with the notion of judicial authority to determine the "need to know" with regard to classified information that is under a court's control. The provision of CIPA governing discovery of classified information by defendants, 18 U.S.C. App. 3, § 4, "gives the court the authority to regulate the access to classified information of persons assisting the defense."

Aside from being common sense, this argument plays right into arguments members of Congress are making in their bills to limit state secrets claims from ending litigation.

The bipartisan State Secret Protection Act is modeled on existing protections and procedures for handling secret evidence. Specifically, the bill would require a court to make an independent assessment of the privilege claim, and would allow evidence to be withheld only if "public disclosure of the evidence that the government seeks to protect would be reasonably likely to cause significant harm to the national defense or diplomatic relations of the United States."

Under the bill, when this standard is met, a judge must protect the evidence from harmful disclosure, and shall consider whether a non-privileged substitute can be created that would prevent an unnecessary dismissal of the claims. The sponsors noted that through reasonable and uniform procedures and standards, their bill would strengthen national security and the rule of law, and would help restore checks and balances. [my emphasis]

In other words, al-Haramain is taking this suit in precisely the direction Congress would take

it.

I have no idea whether these arguments will work—Judge Walker has ordered the government to respond to al-Haramain's arguments about who gets to limit the access to classified information in this case. And with the government's appeal of the classification question, the whole thing is headed for the 9th Circuit in any case. But the question of who got to decide whether or not al-Haramain got to review these filings and the wiretap log has been unresolved since Walker's January 5 order. With al-Haramain's arguments, it bring the litigation squarely to the question of how these questions get resolved.