SOME CLUES TO WHAT "INACCURATE" INFORMATION BUSH PROVIDED IN AL-HARAMAIN

As I reported earlier, Obama's DOJ just confessed that the information Judge Vaughn Walker has received in the al-Haramain suit was "inaccurate."

> The Government's ex parte, in camera classified submissions also address an inaccuracy contained in a prior submission by the Government, the details of which involve classified information that cannot be set forth on the public record.

This post will make some wildarsed guesses about what "inaccurate" information DOJ provided to Vaughn Walker. As I explain below, I think the new declarations admit to new aspects of the warrantless wiretap program in general (most likely the way the government used datamining to select surveillance targets) and/or they admit that warrantless wiretapping was used to get warrants otherwise presented as legal.

How al-Haramain Got Declared a Terrorist Organization

Before I explain why I believe that to be the case (and it is speculation, mind you), let me go back and explain two chronologies: how al-Haramain got designated a terrorist organization, and where the evolving description of the warrantless wiretapping program used in this suit came from.

The Office of Foreign Asset Control declaration included in this brief and this related al-Haramain complaint describes a little bit about

how al-Haramain was declared a terrorist organization. (OFAC is the entity that manages financial sanctions, including freezing the assets of terrorist groups. It is a named defendant on this suit.)

On February 18, 2004, citing an evidentiary brief included in the declaration (but never shown to al-Haramain), OFAC preliminarily froze al-Haramain's assets. That same day, federal agents searched al-Haramain's Oregon office.

From March through September, an Oregon law firm representing al-Haramain worked with OFAC to respond to the initial freezing of assets. OFAC provided these attorneys with unclassified materials purporting to explain the designation on April 23, 2004, July 23, 2004 and August 20, 2004. The two main pieces of evidence—culled from news articles and internet commentary often not even directly relating to the Oregon al-Haramin—pertained to allegedly inflammatory language included in Korans distributed by al-Haramain and charitable donations al-Haramain had made to Chechnya.

In addition to the unclassified information turned over, OFAC referenced—but never turned over—"classified documents that are not authorized for public disclosure."

The surveillance log at issue in this case was included (accidentally, the government says) in the batch of information handed over on August 20, 2004. In their original complaint, al-Haramain described the document as the "Control logs" from warrantless electronic surveillance of March and April 2004 conversations between directors of al-Haramain and al-Haramain's lawyers, Wendell Belew and Asim Ghafoor. NSA turned the log over to OFAC in May 2004 and (as stated) OFAC turned it over to al-Haramain in August 2004.

On September 8, 2004, based on the evidentiary brief included with the declaration (but never shown to al-Haramain), OFAC designated al-Haramain a Specially Designated Global Terrorist

(basically a super duper terrorist group with ties to al Qaeda).

All of this raises the question of what was in those two evidentiary briefs and the other classified materials not turned over to al-Haramain.

In al-Haramain's arguments that they are an aggrieved party under FISA, they have focused on information gathered after the raid on February 18, 2004. They argued that the only thing thing that differentiates OFAC's knowledge in February 2004, when they raided the Oregon office, and September 2004, when they designated al-Haramain a SDGT, was information collected in those illegal wiretaps. So they're saying that the key evidence came from wiretaps collected after February 18, 2004. (They may be saying this for a very good tactical reason, which is that the wiretap log they received started in March 2004, which means they want to tailor their description to the information they know exists.)

As far as I know, they've never seen any of the classified information OFAC referred to in summer 2004, nor the basis for the search in February 2004. So while they've got a description for why they were designated as a terrorist in September 2004, they haven't offered one for why they were raided in February 2004.

FBI Deputy Director John Pistole offered this explanation to the American Bankers Association (al-Haramain used this speech as part of its proof that it is an aggrieved person).

> Some of you may have heard of the Al Haramain Islamic Foundation. It was a charity based in Saudi Arabia, with branches all over the world. Its U.S. branch was established in Oregon in 1997 and in 1999, it registered as a 501(c)(3) charity.
>
> In 2000, the FBI discovered possible connections between Al Haramain and al

> Qaeda and began an investigation. We started where we often start—by following the money. And we uncovered criminal tax and money laundering violations.
>
> Al Haramain claimed that money was intended to purchase a house of prayer in Missouri—but in reality, the money was sent to Chechnya to support al Qaeda fighters.
>
> In 2004, the Treasury Department announced the designation of the U.S. branch of Al Haramain, as well as two of its leaders, and several other branch offices. In 2005, a federal grand jury indicted Al Haramain and two of its officers on charges of conspiring to defraud the U.S. government.
>
> We relied on BSA information and cooperation with financial institutions for both the predication and fulfillment of the investigation. Because of reporting requirements carried out by banks, we were able to pursue leads and find rock-solid evidence.
>
> Yes, we used other investigative tools—like records checks, surveillance, and interviews of various subjects. But it was the financial evidence that provided justification for the initial designation and then the criminal charges.

So as Pistole explains it, the FBI moved from a money laundering investigated based in Saudi Arabia and eventually used surveillance to develop the evidence to declare al-Haramain in Oregon a terrorist group (and, incidentally, indict them—note Pistole says nothing about convictions or dismissed indictments).

The Descriptions of the Warrantless Wiretap Program Provided to Judges

Now, couple open questions about how al-Haramain was declared a terrorist group with the time and manner in which the government has explained to judges what the wiretap program is.

On December 16, 2005, the NYT broke the story of the warrantless wiretap program. In response, various Administration figures admitted to limited aspects of the program, describing the program as targeted at people with ties to Al Qaeda overseas with strong minimization of any material collected from Americans. In response to those disclosures, on February 28 2006, al-Haramain sued Bush and others for illegal warrantless wiretapping.

The first description of the illegal surveillance in this suit came from a copy of the log al-Haramain retained. They mentioned it in their February 28, 2006 complaint. And then, after getting approval from the Court, they submitted it under seal. DOJ submitted some kind of statement as well. On April 10, 2004, this material was moved to an SCI Facility in Seattle.

On May 12, 2006, in response to the judge's skepticism that the document and a subsequent government filing needed to be handled *ex parte*, DOJ submitted superseding *ex parte in camera* material, and filed a motion opposing efforts to unseal these documents.

Significantly (and I'll return to this), three of the four people who submitted new declarations on Friday night contributed to the May 12, 2006 filing: Anthony Coppolino (who was and still is the lead defense attorney in this case), Andrea Gacki (then working as a DOJ trial attorney focused on security issues and now serves as some sort of counsel for the OFAC), and John Hackett (who was and still is DNI's Director of Information Management Office, meaning he's in charge of keeping ODNI's secrets). Given that these three people have submitted new declarations (along with a new declaration from NSA), it suggests something about either the superseding materials or the

unclassified declaration was inaccurate.

The unclassified material in the May 12, 2006 filing did several things. First, using an FBI declaration, it rebutted the impression that the FBI had not started investigating how al-Haramain got the wiretap log for several months after it had received it; it did this to undermine the plaintiff's assertion that—since it took FBI two months to contact them to get their purportedly classified document back, it couldn't be all that classified.

Next, this filing attempted to provide a more detailed description of the document and underlying program in terms that will not compromise security. To do so, John Hackett reviewed both the wiretap log submitted by al-Haramain and the new classified superseding declaration (which is how we know the superseding declaration describes the program). He explains:

> I have reviewed both the document that was filed with the Court under seal by Plaintiffs in this case as well as a second classified declaration regarding this document, which I understand will be contemporaneously lodged ex parte and in camera with the Court and which I understand will supersede the previous classified declaration lodged ex parte and in camera, which I have not read. I further understand that the Court has instructed Defendants to make a public declaration with respect to the document at issue, if possible. Based upon my review of the document filed under seal with the Court, it is not possible to describe the document in a meaningful manner without revealing classified information, including classified sources and methods of intelligence. Therefore, in addition to this public declaration and the public declaration of the FBI and the Department of Treasury, a second declaration has been

> submitted for an in camera ex parte review that sets forth the nature of the document in a classified format.

In other words, Hackett is certifying that the document can't be described in unclassified form, and that the declaration submitted on May 12, 2006, with his declaration describes what the document is and how it fits in the larger program.

Using the FBI declaration and Hackett's, Gacki argued that the documents in question could not be released publicly.

On June 21, 2006, the Administration invoked state secrets, supported by classified and unclassified declarations from John Negroponte and Keith Alexander. In his declaration, Negroponte basically endorsed what Hackett had said in his May 12 declaration. At the same time as the government invoked state secrets, they fought discovery (including a bunch of questions targeted to finding out whether Bush had classified information to prevent discovery of a crime and a deposition of Barbara Hammerle, who had submitted OFAC's first description of the process by which al-Haramain was designated a terrorist group). The following day, everything got put on hold, pretty much for three years (until the case got moved to Vaughn Walker's court and the Appeals Court weighed in on state secrets).

On June 27, 2006, the government tried to get the suit consolidated with other state secrets cases in DC—and as part of that, they tried to have the original wiretap log transferred to DC.

> Plaintiffs have advised the court that they intend to rely on the sealed document and the sealed Declaration of Thomas Nelson filed in this case in their responses to defendants' Motion to Transfer to the Joint Panel on Multidistrict Litigation ("JPML"). In the Motion to Transfer, defendants seek

> to have this case transferred to the U.S. District Court for the District of Columbia for consolidation with other cases in which defendants are asserting the state secrets privilege. Plaintiffs have requested that the sealed document and sealed Declaration be made available to the JPML. Defendants are hereby ordered to make copies, using secure means, of both the sealed document and sealed Declaration which are currently held in the SCIF in Portland, to retain the originals in the Portland SCIF, and to transfer the copies by secure means to the appropriate security officer in the U.S. District Court for the District of Columbia for placement in a SCIF to which that court has access. Defendants have represented that the copies can thereafter be transferred securely to a SCIF accessible by the JPML within 24 hours of the JPML's request for the documents in advance of the scheduled argument in Chicago.

Instead, Judge ordered them to make copies.

On August 3, 2006, in preparation for finally deciding what to do with the wiretap log, Judge King ordered it to be delivered to Portland. On August 14, Gacki announced that the case had been moved to Vaughn Walker's court on August 9. (In other words, in August 2006, Judge King got very close to reviewing the document, but then technical and tactical issues put off that review for another two and a half years.) The parties spent the next several months squabbling, but finally, in December 2006, the case was moved to Vaughn Walker's Court and at the same time appealed. That all landed in Vaughn Walker's Court on January 9, 2007.

On March 18, 2008 Bush's DOJ entered additional classified filings. But aside from those filings, there is no record (that I see) of any additional classified submissions in the case.

As laid out yesterday, on January 5, 2009, Judge Walker ruled that he will (finally) review the classified documents to see whether al-Haramain was illegally wiretapped. He ordered the government to get him the documents by January 19, 2009 (that is, before Bush left office). And on January 19, Bush's Dead-Enders confirmed that "the Sealed Document at issue in this case has been lodged previously in this action with the appropriate court security officers."

All of this is a really elaborate way of saying that on May 12, 2006, the government made a representation to Judge Garr King about the nature of the surveillance of al-Haramain. On January 19, 2009, Bush's Dead-Enders made a representation to Vaughn Walker that that same representation was basically the classified information in question.

And then, on Friday night, after it became clear that a Judge would finally look at the documents and assess whether the wiretap log (and the classified declarations describing it) constitute illegal wiretapping, the government admitted that that (presumably) May 12, 2006 set of declarations is inaccurate.

The New Declarations

Now, to review, the government submitted four declarations on Friday (after submitting a filing saying, "we really really really really don't want you to share this with plaintiffs"). They came from:

- Anthony J. Coppolino of the Department of Justice
- Joseph J. Brand of the National Security Agency
- John F. Hackett of the Office of the Director of National Intelligence
- Andrea M. Gacki of the Department of the Treasury,

> Office of Foreign Assets Control (note, Gacki had previously served as a DOJ defense attorney on this case, representing FBI)

Anthony Coppolino is the lead defense attorney on this suit. He's obviously got to submit a declaration, since any "inaccurate" information is ultimately his responsibility.

Joseph Brand at least was (and I assume still is) Associate Director of NSA. It makes sense to have a declaration from him, since we've always been led to believe that this program was primarily an NSA program. Though note: the Director of National Intelligence is not a defendant in this suit.

John Hackett is DNI's Director of Information Management Office—the guy tasked with keep ODNI's information and programs secret. As described above, he submitted a declaration on May 12, 2006 regarding the classified status of the wiretap log. He also asserted he had not read the first classified filing submitted by the government.

Finally, Andrea Gacki was a DOJ trial attorney who was very active during the first discussions about the classified status of the wiretap document and appears to have been the author of the May 12, 2006 filing. Just as significantly, though, she has since moved (presumably in a counsel role) to the Office of Foreign Asset Control at Treasury. At one level, it is unsurprising that she—now apparently a OFAC employee and no longer a defense attorney in this case—is submitting a declaration, as OFAC is one the agencies named as defendants in this suit. But (particularly given the absence of a declaration specifically from FBI), it does suggest this new information pertains either especially to OFAC or to the things Gacki did while more actively involved in the case in 2006.

One very important note about these new declarations. As bmaz pointed out via email, the declarations were submitted not just in the al-Haramain suit, but also in the consolidated case (in which Judge Walker is deciding whether retroactive immunity is constitutional). That means these declarations either amend earlier declarations in the consolidated suit or have bearing on it. This probably means that the declarations relate to the program in general, and not to any specific details about the al-Haramain suit (probably ruling out, for example, that the "inaccuracy" pertains to whether or not Hackett read the government's first brief, or whether the document was really turned over accidentally, which would otherwise be possibilities).

Al-Haramain and Thomas Tamm's Description of the Warrantless Wiretap Program

As I said above, when al-Haramin filed this suit in early 2006, the revelations about the program (and, importantly, the official statements on it) focused more on the wiretapping of Americans with ties to al Qaeda. There was little talk (none official) of datamining and little talk (none official) of the laundering of information gathered using illegal wiretaps to then get legal warrants and admissible evidence.

And there's a hint that the government tried—then backed off plans—to use improperly collected evidence with al-Haramain. On February 17, 2005 (just days after Alberto Gonzales was confirmed as Attorney General), it indicted al-Haramain and two of its officers. It then dismissed those charges on August 4, 2005 (just days before Jim Comey's last day). In fact, this seems to be precisely the "criminal tax and money laundering violations" Pistole pointed to as their "success" with al-Haramain.

Given that fact, and given the questions about why al-Haramain was declared a terrorist organization, consider one of the most detailed recent descriptions of the warrantless wiretap program, from Thomas Tamm.

> **In the spring of 2004**, Tamm had just finished a yearlong stint at a Justice Department unit handling wiretaps of suspected terrorists and spies—a unit so sensitive that employees are required to put their hands through a biometric scanner to check their fingerprints upon entering. While there, **Tamm stumbled upon the existence of a highly classified National Security Agency program that seemed to be eavesdropping on U.S. citizens**. The unit had special rules that appeared to be hiding the NSA activities from a panel of federal judges who are required to approve such surveillance. When Tamm started asking questions, his supervisors told him to drop the subject. He says one volunteered that "the program" (as it was commonly called within the office) was "probably illegal."
>
> [snip]
>
> But after arriving at OIPR, Tamm learned about an unusual arrangement by which **some wiretap requests were handled under special procedures**. These requests, which could be signed only by the attorney general, went directly to the chief judge and none other. It was unclear to Tamm what was being hidden from the other 10 judges on the court (as well as the deputy attorney general, who could sign all other FISA warrants). All that Tamm knew was that the "A.G.-only" wiretap requests involved intelligence gleaned from something that was obliquely referred to within OIPR as "the program."
>
> [snip]
>
> The NSA identified domestic targets based on leads that were often derived from the seizure of Qaeda computers and cell phones overseas. If, for example, a Qaeda cell phone seized in Pakistan had

> dialed a phone number in the United States, the NSA would target the U.S. phone number—which would then lead agents to look at other numbers in the United States and abroad called by the targeted phone. Other parts of the program were far more sweeping. The NSA, with the secret cooperation of U.S. telecommunications companies, had begun collecting vast amounts of information about the phone and e-mail records of American citizens. **Separately, the NSA was also able to access, for the first time, massive volumes of personal financial records—such as credit-card transactions, wire transfers and bank withdrawals—that were being reported to the Treasury Department by financial institutions**. These included millions of "suspicious-activity reports," or SARS, according to two former Treasury officials who declined to be identified talking about sensitive programs. (It was one such report that tipped FBI agents to former New York governor Eliot Spitzer's use of prostitutes.) **These records were fed into NSA supercomputers for the purpose of "data mining"—looking for links or patterns that might (or might not) suggest terrorist activity**.

Tamm—and others—have revealed that the NSA was mining financial data to identify potential terrorist targets. And then using such targets to get special wiretap requests that bypassed normal approval methods.

And then, Tamm describes, the government would disguise that information and use it—as if it were legally gathered information—to conduct further investigation.

> But all this created a huge legal quandary. Intelligence gathered by the extralegal phone eavesdropping could never be used in a criminal court. So after the NSA would identify potential

> targets inside the United States, **counterterrorism officials would in some instances try to figure out ways to use that information to get legitimate FISA warrants**—giving the cases a judicial stamp of approval.
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> It's unclear to what extent Tamm's office was aware of the origins of some of the information it was getting. But Tamm was puzzled by the unusual procedures—which sidestepped the normal FISA process—for requesting wiretaps on cases that involved program intelligence. He began pushing his supervisors to explain what was going on. Tamm says he found the whole thing especially curious since there was nothing in the special "program" wiretap requests that seemed any different from all the others. They looked and read the same. It seemed to Tamm there was a reason for this: **the intelligence that came from the program was being disguised**. He didn't understand why. But whenever Tamm would ask questions about this within OIPR, "nobody wanted to talk about it."

We know they were using financial data in their warrantless wiretap program. And we know they were trying to launder information they had collected illegally so they could use it in prosecutions.

What we don't know—aside from John Pistole's statement that they used financial data—is what drew the government to freeze al-Haramain's assets on February 18, 2004. Al-Haramain has good reason to believe they were illegally wiretapped in March and April, 2004. But that doesn't mean they weren't illegally wiretapped before then. And that doesn't mean the government didn't use the fruits of those wiretaps as the basis for their raid of al-Haramain's office on February 18, 2004.

Which is what I suspect (wildarsed guess, of course) was the nature of the "inaccurate" information provided back in May 2006. I'm guessing that Obama's DOJ has finally admitted that the warrantless wiretapping was not just wiretapping Osama bin Laden's friends in the US, that they were datamining financial data to identify targets, and then laundering the information gotten out of such eavesdropping to try to get legally admissible evidence.