CORRECTING THE CONFUSED AL-HARAMAIN REPORTING

I've gotten so many links to really confused reporting on what happened in the al-Haramain case on Friday (see here, here, and here, for starters), that I'm going to take the trouble of trying to correct it.

But before I do that, to those perpetuating these confused reports, let me say this:

> You guys have all totally missed the plot!!
>
> You have gotten completely distracted by utterly predictable squabbling about how this will move forward.
>
> You have missed the fact that DOJ just admitted that Bush ~~lied~~ provided "inaccurate" information to the Courts, and that DOJ has just submitted new material that presumably corrects that ~~lie~~ "inaccurate" information.

Shew. Sorry about that.

Now the confusion in question stems from the way Judge Walker wrote his January 5 order, which basically said two things. It:

1. Ruled that he—Judge Walker—would read the secret material in question and decide whether al-Haramain was an aggrieved party (and therefore whether Bush broke the law).
2. Ruled that the government should take the first steps (doing a classification

> review and getting al-Haramain's lawyers a security clearance) of addressing how to move forward with this case given the classified nature of the information involved.

I wish Walker hadn't written his ruling like that, because it caused the opportunity for this confusion, but since I'm not a federal judge, I can't do much about that.

But note: Walker did not rule that the government had to give al-Haramain any classified information.

Unfortunately, the two sides focused their briefing on the confusing, second, aspect of Walker's ruling. Al-Haramain, for some very good tactical reasons, said,

> Judge Walker can order you to give us this classified information.
>
> Judge Walker can decide we have the "need to know" and as a result grant us security clearances.

And DOJ, for some very good tactical but ethically suspect reasons, then pretended that Judge Walker had said what, in fact, only al-Haramain had said.

> Judge Walker did order us to give al-Haramain this classified information.
>
> Judge Walker did order that he can decide that al-Haramain has the "need to know."

Now, as it turns out, DOJ had a secret.

Back on (probably) May 12, 2006, when the government told Garr King (the judge who had this before Walker) what they had been doing with al-Haramain, they provided "inaccurate"

information. I suspect they only told King about part of what they were doing to al-Haramain, probably leaving out details about data mining and earlier wiretapping and laundering poison fruit to get warrants. And during this whole back-and-forth in the last two months, DOJ knew that. I presume that Obama's appointees discovered that little detail, probably before February 11. So one of the reasons (I suspect) DOJ conflated what al-Haramain was saying ("Judge Walker can ordered the government to give al-Haramain classified information") with what Judge Walker had said and therefore utterly misrepresented what Walker had said ("Judge Walker did order the government to give al-Haramain this classified information") is because they wanted to increase the urgency of their appeal so that they might win an immediate stay. If they won a stay, after all, it might put off indefinitely that time when they would have to confess to their earlier inaccuracy.

It's the kind of tactic you probably tried a lot when you were nine, when you tried to put off the time you had to confess you had been bad to your mother.

I'm not saying that's defensible in the least. But I do think that explains the hysteria of their arguments in January and February.

Luckily, the 9th Circuit didn't fall for DOJ's tricks. They rejected the appeal.

But all that means is that they agree Judge Walker should read that classified information and decide whethter al-Haramain is an aggrieved party. Since Walker never ordered that the government must give al-Haramain classified information or that the he, Vaughn Walker, had decided that al-Haramain had a "need to know" this information and therefore could get a security clearance, the Appeals Court's rejection of the government's appeal didn't say the government had to turn over this information.

And there's very good proof that the government

knows that—and has accepted the Appeals Court's rejection of their appeal (and is not defying the Appeals Court). On the night the Appeals Court rejected their appeal, the government finally corrected the inaccurate information that Bush had provided the Courts (probably) three years ago. In other words, they gave Walker more to review, so that he could conduct that review with complete information. They did not defy his order, backed by the Appeals Court, that he would conduct a review.

For those of you wondering why Walker hasn't yet ruled on this, btw, remember that he was at an undisclosed location over the weekend, and then came back to find that he had unexpected new homework to do—to read the four new declarations, presumably about the program. I also expect those declarations provide some totally new problems for him to consider, such as whether data mining of Americans constitutes electronic surveillance.

[Hey Vaughn Walker's clerks!! If you happen to be researching whether Congress has ever weighed in on whether the government can do this kind of data mining on its citizens, please read this post. It shows that at precisely the time Congress was successfully defunding such data mining (it passed into law, though Bush did include an onerous signing statement, so maybe we'll finally get to litigate signing statements too!!), Jello Jay Rockefeller told Cheney that he considered this program's data mining aspects to be the same data mining Congress was defunding. So Congress made it very clear—in the Appropriations for DOD for 2004, the year in question (hahahahaha!!)—that they didn't want the Administration doing any of this data mining.]

Now, don't get me wrong. I consider DOJ's brief from Friday to be a horrible example of Cheneyesque reasonsing. But also understand what's going on here. They're not defying the Appeals Court. They're not defying any order that Walker has already made. They are saying

that if he orders them to turn over the information on the program, they will appeal.

But also consider the context, which explains their increasing hysteria about the classified information. We're no longer talking about Walker ordering the government to turn over a document to al-Haramain they've already seen. We're talking about those four new declarations, which presumably describe the warrantless wiretapping program in much more detail. Now, I don't believe the government should conduct massive data mining and wiretapping of its citizens in total secret, but a majority of the members of the last Congress (including our current President) do. Furthermore, DOJ may or may not believe that al-Haramain has ties to al Qaeda. I do think some of the questions DOJ has threatened to appeal (whether a judge can order that litigants get the nation's biggest secrets, whether a judge has the authority to grant security clearances if the government refuses) are worth some discussion—though I wish it were a measured, honest discussion.

What's going on is that the government has finally turned over real details (though who knows whether they're complete, given the "inaccurate" information they did not correct for three years?) on the warrantless wiretapping program. At precisely the moment that it is at most risk of being made public.