THE GOVERNMENT DODGES AND WEAVES ON AL-HARAMAIN

While I agree with bmaz that the government response in al-Haramain repeats a lot of tired arguments, I'm utterly fascinated by the dodging and weaving they do to try to persuade Vaughn Walker not to impose sanctions on them. I'm fairly sure that Anthony Coppolino (the government lawyer in this) ended up canceling his Memorial Day plans last weekend and has been working on this dance ever since.

Before I explain why, understand the challenge. Normally, when the government invokes state secrets, the evidence in question is just removed from the case, as if it didn't exist. Walker has ruled that FISA trumps state secrets, and so he can review the evidence to see whether al-Haramain was illegally surveilled; he has also said that to proceed in the case, al-Haramain must have a means—via access to (at a minimum) Walker's rulings and possibly also the wiretap log and the government's declarations—to litigate the suit. But the government maintains the al-Haramain lawyers absolutely cannot see those documents. So Walker, last week, proposed just skipping the tedious litigation step, and just declaring that the government could not oppose al-Haramain's claim it had been illegally wiretapped, and proceeding to the penalty phase (mind you, as bmaz has pointed out, that'd involve other discovery claims, but let's put those aside for the moment). This filing is the government's attempt to continue to claim state secrets, even in a crime that Congress has specifically prohibited.

The government starts by focusing attention exclusively on whether it should be sanctioned for refusing al-Haramain's lawyers access to the documents in this case, and away from whether it should be sanctioned for illegally wiretapping al-Haramain. And it pretends that it has not

ignored Walker's order that they at least propose **some way** to litigate this.

> The Government regrets that the Court has now suggested that actions it has taken in this litigation may warrant sanctions. We respectfully but firmly disagree. As set forth more fully below, the imposition of discovery sanctions would be unjustified because the Government has not violated any Court order or otherwise acted in a manner warranting sanctions. The Government has merely declined voluntarily to agree to a protective order that would, in the Government's view, require disclosures that would irretrievably compromise important national security interests. That conduct cannot be a basis for sanctions.
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> [snip]
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> Thus, there is no basis for concluding under Fed. R. Civ. P. 37(b)(2) that the Government has failed to obey an order to provide discovery—much less for imposing a liability finding as a sanction.

By shifting attention away from the government's refusal to even propose a protective order and towards the fact that Walker has not yet ordered the government turn over the wiretap log, the government is hoping to invent a reason to appeal.

It then claims the central issue is a separation of powers issue on whether Walker can force the government to turn over material covered by state secrets to plaintiffs.

> The Government recognizes that the underlying dispute in this case raises the fundamental separation-of-powers question concerning whether the Court has the ultimate authority under the Foreign Intelligence Surveillance Act

> (FISA) to order the disclosure of state secrets to a private party over the Government's objection.

Perhaps I'm misreading Walker's proposed action from last week (lawyers, help me out here), but I think this misrepresents what is going on. Walker has proposed a way forward, after all, that doesn't require discovery. That way forward involves sanctions and the removal of the government's ability to claim it didn't wiretap al-Haramain. But it doesn't require discovery (with the caveat I made above). What the government appears to be ignoring is the possibility that a Judge can accept their state secrets claim, but at the same time prevent it from using it as a way to cover up its own crimes (which is, of course, the state secrets bills winding through Congress propose).

After having said it doesn't want to re-litigate Walker's decision that FISA trumps state secrets "in the context of the present discovery issue" (which is a load of horse shit if I ever saw one—that is precisely what they're trying to do, and they repeatedly bitch about it in this filing), it invokes the ruling the 9th made that the wiretap log in this case does qualify for state secrets. Perhaps not surprisingly, the government pretends that the declarations submitted to support the state secrets claim remain the ones that were submitted in 2007, though we know the declarations (though not the documents supporting the invocation itself) have been resubmitted to fix the inaccuracies they had under Bush.

> Indeed, the Ninth Circuit has already concluded, after conducting "a very careful" review of those explanations, that the basis for the privilege was "exceptionally well documented."

Then, curiously, the government includes this detail, describing a review "after" the decision from the 9th, that sustained the claim of state

secrets.

> Furthermore, even after the Ninth Circuit issued its decision, an additional review was conducted at the highest levels of the Department of Justice to determine whether continued invocation of the privilege was warranted in response to the plaintiffs' claims under FISA.

Most likely, this was a review under Eric Holder, given his claim that they have reviewed the state secrets claims that Bush made. But I wonder whether it's also an attempt to claim they've reviewed the documents since they corrected Bush's lies and that they believe those, too, are covered under state secrets? As if that's the same as review by the 9th.

Then, in the section laying out their version of the history of this case (which is a different version than the one Walker himself wrote just one week ago), the government tries to pretend that—in addition to ordering the government to do things in preparation for a ruling from him on how to move forward in the case, he didn't also ask for proposals from them on how to do so.

> But the Court again did not order the disclosure of classified information to plaintiffs' counsel. Rather, the Court ordered only that "members of plaintiffs' litigation team . . . obtain the security clearances necessary to be able to litigate the case, including, but not limited to, reading and responding to the court's future orders." Id. The Court directed the Government to arrange for plaintiffs' counsel "to apply for TS/SCI clearance and [that it] shall expedite the processing of such clearances so as to complete them no later than Friday, February 13, 2009."

They do this so they can maintain the fiction that Walker hasn't been ordering them to come up with some way to litigate this, so they can further claim that they haven't blown off any of his orders.

Though in a refreshing switch, they at least admit that Walker ruled that FISA preempts state secrets back in July, a ruling they did not appeal.

> On July 2, 2008, the Court denied the Government's second dispositive motion and concluded, inter alia, that FISA Section 1806 preempts the state secrets privilege. See In re: Nat'l Security Agency Telecomm. Records Litig., Al-Haramain Islamic Found. v. Bush, 564 F. Supp. 2d 1109, 1115-25 (N.D. Cal. July 2, 2008). In its ruling, the Court did not direct that classified information be made available to plaintiffs' counsel for further Section 1806(f) proceedings. On the contrary, the Court held that plaintiffs must first establish their standing.

Note the trick though: they're trying to make standing a separate issue so as to excuse their own failure to appeal this when they should have. Which brings us to my favorite passage in the entire filing.

> The Government's privilege assertion has successfully protected facts that would be relevant to whether or not plaintiffs have standing, and whether the Government is liable for the claims alleged.

See how it glides seamlessly from standing to liability? It does so, of course, on a program that involves massive collection and data mining of telecom signals. Frankly, given everything before Walker, we're probably no longer talking "standing," because you've got standing and so

do I and Walker has seen proof of it. And frankly, does so in a filing in which the government has at least rhetorically accepted Walker's ruling the FISA trumps state secrets (meaning it shouldn't be able to shield liability).

So ultimately, they're stuck, once again, begging Walker to hand them some reason to appeal so they can get a second bite at using state secrets to hide their own criminality.

> For these reasons, as set forth further below, the imposition of Rule 37(b)(2) discovery sanctions would be improper in this case, and the Government respectfully urges the Court to pursue a way forward that balances the interests of all sides by allowing appellate review of the significant questions at hand before the Government's privilege assertion is negated. Specifically, the Government respectfully requests that this Court reconsider its decision not to certify the case for interlocutory appeal. If the Court is not willing to do so, then the Government suggests that the way to obtain resolution of this dispute would be for the Court to issue an order over the Government's objection concerning the disclosure of classified information to the plaintiffs' counsel, and then for the Government to consider its options for appellate review of such an order.

This is a far more sophisticated argument than they've been using (Walker's discussion of sanctions seems to have cleared Coppolino's head a bit). But it's still a beg to get state secrets back long after Walker said they couldn't use state secrets to hide their own crime.