THE ROYCE LAMBERTH-VAUGHN WALKER GOLF MATCH

Call me crazy. But reading yesterday's Royce Lamberth opinion on the Richard Horn case (see bmaz' post for background) makes me think that Lamberth—Chief Judge for the DC District—and Vaughn Walker—Chief Judge for the 9th District—have been playing golf together recently at some Chief Judges August retreat or something. Because Lamberth's opinion could have been written by Walker in the al-Haramain case, except of course the underlying facts—but not the Obama Administration's legal stance—are totally different.

Here are the similarities:

Appeals Court Ruling in Favor of State Secrets Set Aside

In both cases, the Appeals Court in question at least partly ruled in favor of the government's State Secrets invocation only to have something set that aside. In the Horn case, it was the discovery that the CIA had been lying its ass off in its declarations for years. In the al-Haramain case, it was Walker's ruling that FISA trumped State Secrets.

This is of course the biggest difference between the underlying facts: the Appeals Court has already substantially rejected the State Secrets invocation in this particular case, whereas in al-Haramain, a statute has (at least for now) been ruled to set aside the State Secrets invocation. But the practical result is the same: the government is still, functionally, insisting on treating the litigation as if State Secrets still held and with that stance, basically arguing that executive authority over classification and secrecy trumps separation of powers.

Government Refusal to Acknowledge a Court Ruling

In order to proceed as if the State Secrets claim still held in each case, the government is simply proceeding as if the Court judgments have no authority. In al-Haramain, the government repeatedly refused to acknowledge Walker's decision that FISA did trump State Secrets, continuing on as if it still could protect all the information in the suit. In so doing, it was basically trying to negate the very idea that FISA restricted executive branch actions.

In Horn, the government is trying to claim privilege to prevent the plaintiff from making even a circumstantial case that the government illegally wiretapped him.

> Notably, the government's protective order, supposedly based on the assertions of privilege by Director Panetta, would not even allow the plaintiff to build a circumstantial case that U.S. Government eavesdropping equipment was used to eavesdrop on him, because the protective order would prohibit the plaintiff even from making this argument.
>
> [snip]
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> The government's interpretation of Panetta's assertion of the privilege, if sustained, would eviscerate the Court of Appeals decision that the very subject matter of Horn's action is not a state secret.

Lamberth's position is even stronger than Walker's, since the Appeals Court has already rejected part of the State Secrets invocation itself, whereas the 9th has not yet reviewed Walker's decision that FISA trumped State Secrets.

Nevertheless, the sheer stubborn refusal to recognize the legal authority of the Court's decision is the same.

The Assertion of Privilege Over Information

Known by Plaintiffs

And while the Horn case is not quite so absurd as the government's insistence that the plaintiffs in al-Haramain avoid any reference to knowledge gained from having looked at the wiretap log (their insistence that Horn not use knowledge gained as a DEA agent is more typical of a State Secrets case), there is the same assertion of claim over information the plaintiffs already know.

> Much of the information over which the government claims the privilege is already known to the plaintiff, the plaintiff's attorneys, and the defendants, as a review of the filings in the case makes evident.

(Though the defendants' lawyers do not know this information, Lamberth makes clear later.)

The Refusal to Grant "Need to Know"

In the al-Haramain case, Walker ordered way back in January for the government to get al-Haramain's lawyers cleared such that they could litigate the case going forward if and when Walker ruled that the Islamic charity had standing. But the government, even after it found al-Haramain's lawyers were eligible for clearance, refused to grant them the "need to know," thereby effectively denying them clearance the judge had ordered.

Similarly, one of the chief questions before Lamberth is whether the government can refuse to share classified information with lawyers in a suit simply by refusing to declare that they have a "need to know" the classified information.

> Does the Executive Branch have the exclusive right to determine whether counsel, who have been favorably adjudicated for access to classified information, have a need-to-know classified information within the

> context of litigation or can that be a judicial determination?

Absolutism on Authority over Classification

And, finally, there is the Addington-like absolutism on classification, a reading of *Navy v. Egan* to grant the executive unlimited power over classification, to answer "no" to the question Lamberth poses.

> Instead of refuting the Court's conclusion with reasoned analysis, the government merely argues that the Court does not have the power to conduct these CIPA-like proceedings because it would require the plaintiff and the defendants to discuss classified information with their attorneys, and the Court cannot order the Executive Branch to grant a security clearance to a particular individual because that decision "is committed by law to the appropriate agency of the Executive Branch."

Ultimately, Lamberth's opinion ends with the same exasperated impatience that Walker's did (though the CIA's past fraud in this case gives Lamberth rather more license to fully express that exasperation).

> If the intention of the government's continued obstinance in this case is to demonstrate to the Court that this case is simply impossible and cannot proceed in light of sensitive national security concerns and the interconnectedness of privileged and nonprivileged information, the government should save its theatrics for the Court of Appeals.

Both judges are, obviously, aware that these cases are going to be appealed. And both are framing their case for that eventuality.

Mind you, the similarity here is no accident and

it surely doesn't rely on some mythical golf game.

The underlying strategy here, on the part of the Obama Administration, is utterly linked, a gimmick intended to sustain State Secrets in positions where it would not apply and with that gimmick an attempt to put the federal government above the law. The obvious need to institute some process for limiting State Secrets exists in both Courts. And more importantly, the Obama Administration has to see the underlying similarities in these two cases (even setting aside that they're both about illegal wiretaping) and know if they budge on a seemingly innocuous case in Horn—even one for which the CIA is already in deep doo doo for—then their case in al-Haramain will fall apart (as if they need any help with that!) and with it their attempts to cover up Bush's (and John Brennan's) illegal wiretap program of millions of Americans.

That is, the urgency in the Horn case comes at least partly from the stakes in the al-Haramain case. And Lamberth appears to be very well aware that this case resonates closely with Walker's—though Lamberth's case is probably much safer for appeal. Oh, and don't forget that Lamberth was the Chief Judge on the FISA Court back when the Bush Administration was dicking over the court; he's no innocent bystander in the question of whether the government can blow off FISA.

But, on the off chance that Lamberth and Walker have been golfing of late, I do hope they enjoyed themselves.