DOJ CIRCUMVENTS JUDGE WALKER; ATTEMPTS TO FURTHER CORRECT PREVIOUS FALSITIES

In what can only be described as a curious filing, the US Government, through the DOJ has submitted a pleading to the 9th Circuit Court of Appeals in the previously terminated *al-Haramain* appeal originally filed in 2006. In this appeal, on November 16, 2007, the 9th generally upheld the government's state secrets assertion, but remanded the case to Judge Walker "to consider whether FISA preempts the state secrets privilege and for any proceedings collateral to that determination." (Walker has so ruled and those proceedings are indeed ongoing and awaiting the Court's decision of Plaintiffs' Motion For Summary Judgment). The 9th Circuit's mandate issued on January 16, 2008.

The new submission filed in the 9th Circuit is nothing short of a brazen attempt to subvert Judge Walker's trial court authority and jurisdiction by an end run, and is entitled *"NOTICE OF LODGING OF IN CAMERA, EX PARTE DECLARATION OF DIRECTOR OF NATIONAL INTELLIGENCE"*

> The Government hereby respectfully notifies the Court and counsel that it is lodging today with the Court Security Officer copies of an in camera, ex parte classified declaration, dated November 8, 2009, of the Director of National Intelligence, Dennis C. Blair.
>
> We are making the lodging because an issue arose regarding an inaccuracy in an earlier Government submission in the district court that was part of the record before this Court in an

> interlocutory appeal in this matter bearing the above caption. The case has been remanded to the district court and an appeal is no longer pending before this Court. The lodging does not call for any action by this Court but is intended to ensure that this Court is informed of the earlier inaccuracy and has available to it classified details with respect to the issue. The Government has informed the district court of the issue, has offered to make available to that court additional classified details in camera, ex parte, and is informing that court that the Government is making the lodging in this Court.

Here is the document. Now the government had just submitted an unclassified declaration of ODNI Blair to the trial court in September, and references said declaration in their new little filing, but does not seem to attach it. Instead, they submit a new classified ex parte declaration from Blair.

> Because the inaccuracy was in an earlier Government submission that was part of the record when the case came before this Court on interlocutory appeal, we are today lodging with the Court Security Officer copies of an in camera, ex parte classified declaration, dated November 8, 2009, of Director of National Intelligence Blair. That declaration provides additional classified information regarding the matter. As noted, the lodging ensures that this Court is informed of the issue and has available to it classified details concerning the issue.

Well now, it would seem that Jon Eisenberg has struck a raw nerve with his putative entry into the *Horn v. Huddle* case as an amicicus urging Royce Lamberth to leave his opinions in place

and in force. After having been blistered by Royce Lamberth, former Chief Judge of the FISA Court, for dishonesty in state secrets assertion declarations, the government is not only trying to wipe that away in *Horn v. Huddle*, but suddenly seems to be somewhat apoplectic about their acknowledged "inaccuracies" in their previous state secret submissions to Judge Walker in *al-Haramain*.

Funny how after Eisenberg included a little footnote about the ever slow dribbling out of corrections of "inaccuracies" by the recalcitrant government in *al-Haramain* in his reply brief on Motion For Summary Judgment:

> In addition to the gradual public disclosure of non-classified evidence of plaintiffs' electronic surveillance, something else of note has happened since the Ninth Circuit proceedings: On February 27, 2009, defendants filed classified declarations with this Court purporting to "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." Government Defendants' Report On Declassification Review at 2, Doc. #78 at 2. This "inaccuracy" remains a mystery to plaintiffs, who have not yet had access to those classified filings. But if the inaccuracy amounts to a misrepresentation, the Court should find that defendants have forfeited judicial deference to their assertion of the state secrets privilege. See Horn v. Huddle, ___ F.Supp.2d ___, ___ (2009 WL 2144131 at *4) (D.D.C. July 16, 2009) (court refuses to give "a high degree of deference" to of government's "prior misrepresentations regarding the state secrets privilege in this case").

the government is all of a sudden beside themselves and running to settle *Horn v. Huddle*,

trying to clean up their dishonest mess in their *al-Haramain* declarations and desperately trying to circumvent Vaughn Walker. Kind of makes you wonder what the inaccuracies are, and how egregious they are, to motivate such clumsy tap dancing by the DOJ.

What a shock, the government now wants to clean things up a little more when, but only when, their ass is in the wringer. So worried in fact that they decided to bypass, and completely insult, Judge Walker, and the attendant possibility that he would take a cue from Judge Lamberth, be taken aback by the DOJ contrivances and shenanigans, and order disclosure to al-Haramains' attorney Eisenberg. Instead, they contrived the disingenuous artifice of going straight to the 9th. A court that has no current jurisdiction. In a 2006 appellate case that has been long closed.

Eisenberg, on behalf of al-Haramain, is having none of it, and has already filed a Motion To Strike the government's filing.

> This Court should not allow a filing or lodging in a case where the Court's appellate jurisdiction is terminated.

Even more significant is the dead on description of what the government is trying to pull with their stunt:

> Another reason why this Court should strike DNI Blair's secret declaration is that it is not currently before the district court, as Judge Walker has not yet ruled on defendants' request for permission to submit the declaration in the district court ex parte and in camera. In effect, by lodging the declaration in this Court now, in advance of the appeal that is sure to follow Judge Walker's final judgment in thiscase, defendants have unilaterally enlarged the future record on that appeal to include material that is not

> yet and may never be before Judge Walker. This maneuver violates the general rule precluding enlargement of the record to include material that was not before the district court.
>
> By lodging DNA Blair's secret declaration in this Court at this time, defendants are attempting to perpetrate a subterfuge by which they would bypass Judge Walker, subvert his June 5, 2009 order that further secret filings by defendants will be disclosed under a protective order to plaintiffs' security-cleared counsel, and create a bizarre situation where this Court would have exclusive access to evidence not presented to Judge Walker or accessible to plaintiffs' security cleared counsel pursuant to Judge Walker's order. This Court should not countenance such gamesmanship. (Citations omitted)

Indeed, the 9th Circuit should definitely not countenance such raw and disingenuous gaming of the courts by the government. And neither should Judge Vaughn Walker.

The too cute by a half games and hide the ball schemes by the Department of Justice, whether under Bush or Obama, just never stop. If it were not for disingenuous lawyering, the DOJ would have no lawyering at all it seems.