

HOLDER'S CATCH-22 ON THE AL-HARAMAIN RULING

Michael Isikoff reports that—as I suspected—DOJ would very much like to accept the Vaughn Walker ruling and be done with George Bush's illegal wiretap program. But the Department of Justice led by a guy who got paid a lot of money to help Chiquita's rich white Republican executives avoid criminal liability for their support of a terrorist organization is worried about the significance of paying a civil penalty to al-Haramain, which the government still considers a terrorist organization.

Of all the tricky decisions Attorney General Eric Holder is facing right now, here's one that has lawyers at the Justice Department *really* scratching their heads. All things being equal, they would love nothing more than to let stand a federal judge's recent decision that President Bush's warrantless wiretapping program was illegal, thereby avoiding further legal skirmishes over one of the Bush administration's most divisive legacies. But unless they appeal last month's landmark decision by U.S. Judge Vaughan Walker, the U.S. government may be forced to pay damages into the bank account of one of the plaintiffs in the case: an Islamic charity that has been formally declared a Global Terrorist Organization.

Can the Justice Department pay money to a terrorist organization? And if it did, would it be committing the federal crime of providing "material support" to terrorists?

[snip]

... even a symbolic payment to a defunct organization's frozen bank account could

be problematic, potentially undermining a linchpin of the U.S. government's anti-terrorist efforts.

I think Isikoff misses one important wrinkle to this dilemma, though.

As al-Haramain has made clear from the beginning, what got the organization put on the terrorist list in the first place was probably a conversation in which one of its lawyers mentioned Osama bin Laden's brother-in-law. It's likely, in other words, that al-Haramain Oregon is only on the terrorist list because of a conversation that was illegally wiretapped.

Here's how Vaughn Walker synthesized the argument in his ruling from last January.

On February 19, 2004, the Treasury Department issued a press release announcing that OFAC had blocked Al-Haramain Oregon's assets pending an investigation of possible crimes relating to currency reporting and tax laws; the document contained no mention of purported links between plaintiff Al-Haramain Oregon and Osama bin-Laden. ¶¶ 30-31.

Soon after the blocking of plaintiff Al-Haramain Oregon's assets on February 19, 2004, plaintiff Belew spoke by telephone with Soliman al-Buthi (alleged to be one of Al-Haramain Oregon's directors) on the following dates: March 10, 11 and 25, April 16, May 13, 22 and 26, and June 1, 2 and 10, 2004. Belew was located in Washington DC; al-Buthi was located in Riyadh, Saudi Arabia. During the same period, plaintiff Ghafoor spoke by telephone with al-Buthi approximately daily from February 19 through February 29, 2004 and approximately weekly thereafter. Ghafoor was located in Washington DC; al-Buthi was located in Riyadh, Saudi Arabia. (The FAC includes

the telephone numbers used in the telephone calls referred to in this paragraph.) ¶¶ 34-35.

In the telephone conversations between Belew and al- Buthi, the parties discussed issues relating to the legal representation of defendants, including Al-Haramain Oregon, named in a lawsuit brought by victims of the September 11, 2001 attacks. Names al-Buthi mentioned in the telephone conversations with Ghafoor included Mohammad Jamal Khalifa, who was married to one of Osama bin-Laden's sisters, and Safar al-Hawali and Salman al-Auda, clerics whom Osama bin-Laden claimed had inspired him. In the telephone conversations between Ghafoor and al-Buthi, the parties also discussed logistical issues relating to payment of Ghafoor's legal fees as defense counsel in the lawsuit. Id.

In a letter to Al-Haramain Oregon's lawyer Lynne Bernabei dated April 23, 2004, OFAC Director Newcomb stated that OFAC was considering designating Al-Haramain Oregon as a Specially Designated Global Terrorist (SDGT) organization based on unclassified information "and on classified documents that are not authorized for public disclosure." ¶ 36. In a follow-up letter to Bernabei dated July 23, 2004, Newcomb reiterated that OFAC was considering "classified information not being provided to you" in determining whether to designate Al-Haramain Oregon as an SDGT organization. ¶ 37. On September 9, 2004, OFAC declared plaintiff Al-Haramain Oregon to be an SDGT organization. ¶ 38.

In a press release issued on September 9, 2004, the Treasury Department stated that the investigation of Al-Haramain Oregon showed "direct links between the

US branch [of Al-Haramain] and Usama bin Laden"; this was the first public claim of purported links between Al-Haramain Oregon and Osama bin-Laden. ¶¶ 39-40.

That is, al-Haramain has always suggested that the only evidence that got al-Haramain named a terrorist organization in the first place (and, if I'm not mistaken, distinguished al-Haramain Oregon from al-Haramain Saudi Arabia, which was never designated a terrorist organization) was a series of conversations in which people with ties to Osama bin Laden were mentioned. And those conversations are precisely the conversations that, if this decision were accepted, would be declared illegal.

Of course, al-Haramain should have had an opportunity to challenge whether mentioning Osama bin Laden's brother-in-law and two clerics is enough to get you declared a terrorist organization. But to allow them to do that, DOJ would first have to admit that's what they've based the claim on in the first place. And that would involve turning over interrogation materials that Walker is about to declare illegal. (And, incidentally, it would reveal one of the things the Bush and Obama Administrations wanted to hide behind their State Secrets invocations in the first place, whether or not the government was listening in on those conversations.)

Perhaps the easiest answer to this "dilemma" would be to take al-Haramain Oregon (which, after all, is defunct) off the terrorist list, and give the organization the measly \$200,000 the government would owe it with this ruling. But they can't do that, because it would be an admission of how dicey their claims were in the first place.

In short, like many of the cases against the detainees at Gitmo, the case against al-Haramain is based on illegal evidence that potentially isn't strong enough to hold up in court in any case. And as with the detainees, deciding the

terrorist designation was wrong would involve admitting that the evidence was illegal and/or weak in the first place.

It's not just that DOJ would have to pay a defunct organization still designated as a terrorist organization. It would have to pay an organization that is only designated as a terrorist organization because it was illegally wiretapped and therefore couldn't fight the charges against it.

That's a nifty little dilemma Bush's illegal counter-terrorism programs have left DOJ with, huh?