STATE SECRETS SANTA AND SCOTUS

Amid all the holiday hustle, bustle and, on at least some of the lame duck session accomplishments, success of Barack Obama, it is good to keep in mind what a lump of coal his administration has been on civil liberties and privacy. Nothing has been more emblematic of the cancer they have been in this regard than the posture they have relentlessly fought for on unfettered and unilateral ability of the Executive Branch to impose the state secrets doctrine to shield the government from litigation, even when it is concealing blatant and wholesale government criminality.

Just three days ago, the final judgment in *al-Haramain* was entered by Judge Vaughn Walker, and it was a good one. But, lest it be forgotten, the government basically refused to defend in that case, belligerently asserting that they were entitled to dismissal on the states secrets doctrine. That will be the government's hard nosed basis for appeal to the 9th Circuit and, eventually, presumably the Supreme Court. Recently in the 9th Circuit the horrid *en banc* decision in *Mohamed v. Jeppesen* was entered granting nearly unfettered state secrets powers to the Executive and which the ACLU filed a petition for certiorari earlier this month. Both of these cases will likely hit the Supreme Court in 2011, with *Jeppesen* obviously further ahead in the process.

So, 2011 is going to be a busy and critical year for state secrets litigation in the Supreme Court, but those are just the two cases you likely know about; there is another case, actually two related cases combined, already racked and ready in the queue when the Supremes return to work in January. The cases are *General Dynamics v. US* and *Boeing Company v. US*, and they are not classic state secrets cases, but may well be used as a back door by the government to advance their unrestrained use of

the doctrine. Lyle Denniston briefly summarized the nature of the cases:

> General Dynamics and Boeing had a fixed-price contract to build an aircraft carrier-based version of the "stealth" fighter plane, but ran into difficulty meeting deadlines and producing models. They contended that they needed access to secret technology about the land-based "stealth" fighter, but the Navy would not release that to them. Ultimately, the Navy ended their contract. Their appeals, which the Court will hear together in one hour of argument, contend that it violated their constitutional right to due process to deny them a chance to defend themselves against the Navy's claims that they botched the job.

These cases are set for combined oral argument before the Supreme Court on the morning of January 18, 2011. From Lyle's description, it is pretty easy to see why litigants and observers of the civil liberties line of cases involving state secrets might be worried about a back door setting and expansion of the state secrets doctrine.

And so they are. In a little known amicus brief filed not long before Thanksgiving, al-Haramain lead attorney Jon Eisenberg and EFF trail counsel Cindy Cohn, who represents the plaintiffs in the *Hepting* and *Jewel* litigations, that were part of the consolidated NDCA multi-district litigation (MDL), but were dismissed as a result of the aggressive assertion of state secrets by the Bush and Obama Administrations, the Supreme Court has been asked to refrain from addressing state secrets in the General Dynamics/Boeing consideration.

> Amici curiae anticipate that, if the Al-Haramain defendants choose to appeal the yet-to-be-rendered final judgment in that case, one of the questions

> presented on the appeal will be whether the state- secrets privilege has a constitutional basis in Article II. Amici curiae likewise anticipate that, in the pre- sent consolidated cases, the United States will argue in its merits briefing, as it did in opposition to certio- rari, that the state-secrets privilege has a constitu- tional basis in Article II. If the Court's opinion includes a dictum addressing this question, it could affect the Ninth Circuit's decision of an appeal (if there is one) in the Al-Haramain case.
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> In the present consolidated cases, neither the Court of Federal Claims nor the Court of Appeals for the Federal Circuit addressed the issue of whether the state-secrets privilege has a constitutional basis in Article II. Nevertheless, the United States has raised this issue in its opposition to certiorari, asserting that "[t]he state secrets privilege is deeply rooted in both 'the law of evidence,' and the Executive's 'Art[icle] II duties' to protect 'military or diplomatic secrets. Amici curiae anticipate that the United States may do so again in its merits briefing. (citations omitted)

In short, amici al-Haramain and EFF are arguing that state secrets was not an appellate issue relied on below, nor accepted for review at the Supreme Court and that, despite the Obama DOJ trying to inject it, the Court should ignore it. The amici feel that, should the Supreme Court address the constitutionality and applicability of the state secrets doctrine, it should be in a case where it is properly pled and before the court on the merits. They are right.

The problem, of course, is that the Roberts Court has demonstrated a remarkable ability to just reshape cases to suit their whims to form

the law and precedent to their desire, to wit the *Citizens United* decision. This fear is undoubtedly exactly what is behind the interjection of the amicus brief in *General Dynamics/Boeing*. The rest of the brief, contained in Section II, is a fantastic description of the history and nature of the state secrets privilege from its inception in *US v. Reynolds*, why the privilege is evidentiary as opposed to constitutional in basis, and is well worth the read.

All I want from Santa and Christmas is for the Supreme Court to exercise some judicial restraint and not use General Dynamics/Boeing as a convenient mule to reset state secrets law ahead of the far more politically sensitive *Jeppesen* and *al-Haramain* cases that much more appropriately suit the merits of the issue. One thing is certain, directly contrary to the man he claimed to be when running for office, Mr. Obama will have his Acting Solicitor General, Neal Katyal, cravenly arguing for just such an injection and consideration of state secrets.