DOJ: CALLING OUT GOVERNMENT LIES WOULD ENDANGER NATIONAL SECURITY

The government argues that, in spite of the fact that Saifullah Paracha's Gitmo Detainee Assessment Brief was leaked in April, his lawyer, David Remes, cannot talk about it. Because if he did, we might conclude the DAB was real.

> Granting Petitioner's request could also be detrimental to the interests of national security, given the access to classified information that petitioners' counsel enjoy but that members of the public at large do not. Reliance on the purported detainee assessments leaked to WikiLeaks in unclassified public writings by habeas counsel known to have access to classified information could be taken as implicit authentication of the reports and the information contained therein.

Of course, no one really doubts that it is real. But the government will claim that this public information remains classified to make sure Remes can't mention the information. Remes can only represent his client, I guess, in court, not in the public sphere.

The problem, of course, is that the file contains obvious problems—if not out and out lies, then at least one gross misrepresentation, to wit: the government claims that Aafia Siddiqui "was detained in Afghanistan in mid-July 2008" (see Detainee assessment (the Scribd like embed at the link), page 5).

There are certainly other areas Remes would be interested in discussing and having the freedom to argue to the public on behalf of his client,

because that is not only what defense lawyers are supposed to do, but are ethically required to do, in order to provide a zealous representation for their client.

The real extent of the conundrum this places Remes, and similarly situated Gitmo counsel, in is demonstrated by this from the Blog of Legal Times at the National Law Journal:

> Remes, the department said, cannot have unrestricted use of the documents that the government refuses to confirm or deny are authentic assessments of detainees. DOJ's submission (PDF) expands on the scope of the guidance the department issued this month to lawyers in Guantanamo habeas cases.
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> In court papers, the DOJ theme is clear: the Justice Department over and over refused to confirm or deny that any individual WikiLeaks document is an official government record.
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> "Unfettered public use, dissemination, or discussion of these documents by cleared counsel could be interpreted as confirmation (or denial) of the documents' contents by an individual in a position of knowledge, with corresponding harm to national security," DOJ Civil Division attorney Kristina Wolfe said in court papers.
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> The government, Wolfe said, cannot acknowledge the authenticity of one document and then refuse to substantiate another document. The "very act of refusal would in effect reveal the information the government seeks to protect—the authenticity of the purportedly classified document," Wolfe said.

This is beyond absurd, the DOJ is refusing to admit or deny, and is wantonly limiting the ability of lawyers to use, something the entire

world is in on. They are treating the information like it is secret material under a *Glomar* exception to FOIA. And they do not even have the honesty to admit that is what they are doing, probably because an actual *Glomar* discussion would make them look like idiots. For those unfamiliar with Glomar, here is a description from the recent case of *Wilner v. NSA*:

> The NSA and DOJ served and filed so-called Glomar responses—neither confirming nor denying the existence of such records—pursuant to FOIA Exemptions 1 and 3. Whether, as a general matter, agencies may invoke the Glomar doctrine and whether, in particular, the NSA may invoke the Glomar doctrine in response to a FOIA request for records obtained under the Terrorist Surveillance Program ("TSP") are both questions of first impression for our Court.
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> We affirm the judgment of the District Court upholding the NSA's Glomar response and hold that: (1) a Glomar response is available to agencies as a valid response to FOIA requests; (2) an agency may issue a Glomar response to FOIA requests seeking information obtained pursuant to a "publicly acknowledged" intelligence program such as the TSP, **at least when the existence of such information has not already been publicly disclosed**; (3) the NSA properly invoked the Glomar doctrine in response to plaintiffs' request for information pursuant to FOIA Exemption 3; (4) the government's affidavits sufficiently allege the necessity of a Glomar response in this case, making it unnecessary for us to review or to require the District Court to review ex parte and in camera any classified affidavits that the NSA might proffer in support of its Glomar response; and (5) we find no evidence in the record that

> the NSA invoked Glomar for the purpose of concealing activities that violate the Constitution or are otherwise illegal. We agree with counsel for all parties that we need not reach the legality of the underlying TSP because that question is outside of the scope of this FOIA action.

And, see, that is what is wrong with this craven charade by the DOJ – the information is about as publicly disclosed and known as could be imaginable under the circumstances. Not to mention that many of the activities the Gitmo Habeas counsel like Remes want to discuss freely are activities that are precisely those that "violate the Constitution or are otherwise illegal".

The other thing of note, especially to readers of this blog, was the somewhat desperate attempt to distinguish the judgment of Judge Vaughn Walker in *al-Haramain v. Bush* (see page 7 here) by referring to that part of *al-Haramain* that discussed not-public classified information instead of the critical part of the opinion that was based on information well within the public sphere, such as the WikiLeaks material now is.

No matter how you look at this attempt to suppress and ignore the WikiLeaks material, it is bizarre and somewhat comical. The WikiLeaks Gitmo Detainee files genie is out of the bottle; it would behoove the US government to join the battle and arguments on the merits and facts instead of trying to cram the genie back in and play hide the bottle.

[Editor's Note: This post was started by Marcy, but finished by bmaz; so we are both responsible, whether good or bad!]