

AL-HARAMAIN ISLAMIC
FOUNDATION, INC., *et al.*,

V.

Defendants/Appellants.

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.

1. Plaintiffs allege that they were unlawfully subjected to surveillance in connection with the now-defunct Terrorist Surveillance Program (“TSP”), the existence of which was publicly disclosed by President Bush in December 2005. The TSP ceased operation in January 2007.

As part of their effort to show that they were subjected to surveillance, plaintiffs sought to rely upon a classified Sealed Document that was inadvertently disclosed to them during an administrative process in which plaintiff Al-Haramain Islamic Foundation, Inc., was designated as a “Specially Designated Global Terrorist.” In the district court, the Government formally asserted the state secrets privilege (and two statutory privileges) with respect to several categories of information, including whether plaintiffs have been subjected to surveillance under any authority, including as alleged under the TSP; information concerning operational details of the TSP; and information contained in and pertaining to the Sealed Document. The Government argued that the state secrets privilege legally precludes

this litigation and, in particular, precludes litigation over whether plaintiffs have standing to sue and over the merits of plaintiffs' claims.

The district court declined to dismiss the case on state secrets grounds and the Government brought an interlocutory appeal under 28 U.S.C. § 1292(b). This Court reversed and remanded. This Court upheld the Government's assertion of the state secrets privilege, ruling that the privilege was properly invoked by the Government and that it encompasses any information tending to reveal, inter alia, whether plaintiffs have been subject to alleged surveillance, and the information reflected in the Sealed Document. This Court remanded the case to the district court to consider plaintiffs' argument that the state secrets privilege was, in this context, displaced by the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801, et seq. Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007).

2. The litigation of this case continues on remand in the district court. In January 2009, the district court ordered the "Defendants [to] review the Sealed Document and their classified submissions to date in this litigation and determine whether the Sealed Document and/or any of the defendants' classified submissions may be declassified, take all necessary steps to declassify those that they have determined may be declassified," and "serve and file a report of the outcome of that review." Order, In re: National Security Agency Telecommunications Records Litigation, MDL Docket No. 06-1791-VRW (Jan. 5, 2009), at pp. 24-25.

The Government conducted the declassification review as ordered and filed the required report in the district court in February 2009, accompanied by both public declarations and ex parte, in camera classified declarations. Government Defendants' Report On Declassification Review, In re: National Security Agency Telecommunications Records Litigation, MDL Docket No. 06-1791-VRW (Case 07-cv-109) (Feb. 27, 2009). In the report, the Government stated, "as set forth in the attached public declarations, that the classified information at issue in this case remains classified and is not subject to declassification under" the applicable Executive Order. Id. at p. 2. The Government further stated in the report that "[t]he Government's ex parte, in camera classified submissions also 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. The matter does not alter the current classification determination submitted herewith." Ibid.

In connection with later pleadings filed in the district court in September 2009, the Government submitted an unclassified declaration of the current Director of National Intelligence, Dennis C. Blair, that addresses the same inaccuracy in the prior submission. Declaration of Dennis C. Blair, Director of National Intelligence (Sept. 14, 2009). Director Blair stated in that unclassified September 2009 declaration that he had specifically reviewed "the information submitted to the Court that addresses the inaccuracy contained in a prior submission in this case by the Government. As

to that particular issue, I concur with the conclusion stated by the Government in its declassification review report that the inaccuracy at issue does not alter the classification determinations made in that report by the ODNI and the NSA regarding information subject to the state secrets privilege and the statutory privilege assertions in this case. Because discussion of the details concerning this matter would require the disclosure of properly classified information, I can make available to the Court for in camera, ex parte review additional classified details that address this issue further.” Id., ¶5.

3. 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.

Respectfully submitted,

BETH S. BRINKMANN

Deputy Assistant Attorney General

DOUGLAS N. LETTER

(202)514-3602

THOMAS M. BONDY

(202)514-4825

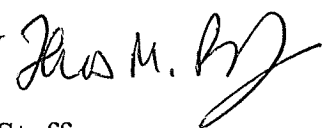
Attorneys, Appellate Staff

Civil Division, Room 7513

U.S. Department of Justice

950 Pennsylvania Ave., N.W.

Washington, D.C. 20530

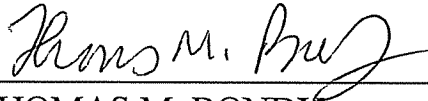
A handwritten signature in black ink, appearing to read "Thos M. Bondy", is written over the printed name and phone number of Thomas M. Bondy.

NOVEMBER 2009

CERTIFICATE OF SERVICE

I certify that on this 9th day of November, 2009, I served the foregoing notice of lodging by overnight Federal Express delivery to the following counsel:

Jon B. Eisenberg, Esq.
Eisenberg & Hancock, LLP
1970 Broadway, Suite 1200
Oakland, CA 94612
510-452-2581
jon@eandhlaw.com



THOMAS M. BONDY
Attorney for Defendants-Appellants
(202)514-4825