



EISENBERG AND HANCOCK, LLP

July 26, 2007

Ms. Cathy Catterson  
Clerk, United States Court of Appeals, Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103

Re: *Al-Haramain Islamic Foundation, Inc. v. Bush*, No. 06-36083  
**(Scheduled for oral argument on August 15, 2007)**

Dear Ms. Catterson:

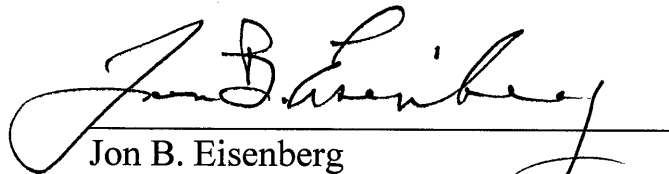
Pursuant to Federal Rule of Appellate Procedure 28(j), we call this Court's attention to *In re Sealed Case*, 2007 WL 2067029 (D.C. Cir. July 20, 2007), which held:

- Even when the government invokes the state secrets privilege in an action for unlawful surveillance, plaintiffs may prove their case by circumstantial evidence raising an *inference* of surveillance. *Sealed Case* at \*7; *compare* Reply Brief For Appellants at 2 (arguing "inferences are insufficient to overcome" state secrets privilege).
- Defendants cannot obtain outright dismissal under the state secrets privilege by asserting "any plausible or colorable defense" based on mere "conjecture." *Sealed Case* at \*9; *compare* Brief For Appellants at 20-22 (conjecture that defendants "might" or "could" have learned of plaintiffs' communications other than through TSP).
- Outright dismissal is improper absent a showing and finding of a "valid privileged defense." *Sealed Case* at \*10; *see* Brief Of Appellees at 24-25 (no showing in defendants' public or secret filings that defendants learned of communications other than through TSP).
- The substance of a document that recounts a conversation may create an inference that the conversation was intercepted and transcribed via surveillance. *Sealed Case* at 7; *see* Brief Of Appellees at 32 (substance of Document indicates plaintiffs were surveilled without FISA warrants).

- Courts may not shift to plaintiffs the defendant's burden of proving a valid defense "under the auspices" of the state secrets privilege. *Sealed Case* at \*9; compare Reply Brief For Appellants at 8-9 (arguing that requiring defendants to prove "valid defense" such as existence of FISA warrants "would eviscerate the state secrets privilege").

The court also noted that the government's expansive view of the state secrets privilege amounts to "a 'heads I win, tails you lose' approach to state secrets: whenever the plaintiff lacks information about his claim, the complaint must be dismissed for failure to make out a *prima facie* case, but *as soon as any information is acquired*, it becomes too risky to introduce the evidence at trial, also necessitating dismissal. . . . [N]either the Supreme Court nor this court has adopted such an all-or-nothing approach." *Sealed Case* at \*11 (emphasis added).

Respectfully submitted,



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