

ATTACHMENT C

DEFENDANTS' RESPONSE
TO THE OREGONIAN'S
MOTION TO INTERVENE AND
TO UNSEAL RECORDS

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AL-HARAMAIN ISLAMIC)
FOUNDATION, INC., an Oregon)
non-profit corporation,)
WENDELL BELEW, a U.S. Citizen)
and Attorney at Law, and ASIM)
GHAFOOR, a U.S. Citizen and)
Attorney at Law,)

Plaintiffs,)

vs.)

GEORGE W. BUSH, President of)
the United States; NATIONAL)
SECURITY AGENCY and KEITH B.)
ALEXANDER, its Director;)
OFFICE OF FOREIGN ASSETS)
CONTROL, an office of the)
United States Treasury and)
ROBERT W. WERNER, its)
Director; FEDERAL BUREAU OF)
INVESTIGATION and ROBERT S.)
MUELLER III, its Director,)

Defendants.)

No. CV-06-274-KI

March 21, 2006

Portland, Oregon

Telephone Conference

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE GARR M. KING

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

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4 FOR THE PLAINTIFFS: Mr. Steven Goldberg
5 Goldberg Mechanic Stuart & Gibson,
6 LLP
621 S.W. Morrison Street, Suite 1450
Portland, OR 97205

7 Ms. Jessica Ashlee Albies
8 Attorney at Law
P.O. Box 42604
9 Portland, OR 97242

10 FOR THE DEFENDANTS: Mr. Anthony J. Coppolino
11 Mr. Andrew H. Tannenbaum
12 U.S. Department of Justice
20 Massachusetts Avenue, NW
13 Room 6102
Washington, DC 20530

14 Mr. James Sutherland
15 United States Attorney's Office
701 High Street
16 Eugene, OR 97401

17 Mr. Baron C. Sheldahl
18 United States Attorney's Office
1000 S.W. Third Avenue, Suite 600
19 Portland, OR 97204

20 ALSO PRESENT: Mr. Steve Borgen

21
22 COURT REPORTER: Bonita J. Alexander, CSR, RMR, CRR
23 United States District Courthouse
24 1000 S.W. Third Ave., Room 301
25 Portland, OR 97204
(503) 326-8188

(P R O C E E D I N G S)

1 THE CLERK: Good morning, counsel.

2 Mr. Borgen, can you hear me?

3 MR. BORGEN: Yes, I'm here.

4 THE CLERK: Mr. Coppolino.

5 MR. COPPOLINO: I'm here.

6 THE CLERK: Mr. Tannenbaum.

7 MR. TANNENBAUM: Yes.

8 THE CLERK: Mr. Sutherland.

9 MR. SUTHERLAND: Yes.

10 THE CLERK: Mr. Sheldahl.

11 MR. SHELDAHL: Yes.

12 THE CLERK: And Mr. Goldberg.

13 MR. GOLDBERG: Yes. And Ms. Ashlee Albies is also
14 here.

15 THE CLERK: Ms. Albies.

16 MS. ALBIES: Yes.

17 THE CLERK: Thank you.

18 Your Honor, this is the time set for a telephone
19 conference in Civil Case 06-274-KI, Al-Haramain Islamic
20 Foundation, Inc. v. Bush, et al.

21 Counsel, there is a court reporter present, so
22 please be sure to state your name before you speak.

23 And here is Judge King.

24 THE COURT: Good morning, everyone. We're having
25

1 this conference to discuss further the issue of the document
2 filed under seal. I met with Mr. Borgen this morning.
3 Mr. Borgen, as you know, is the national -- or the regional
4 security specialist. He works, of course, for the U.S.
5 Attorney's Office, the executive office of the U.S.
6 Attorney's.

7 He has, in my office, in my presence, seen the
8 document in question, and he has advised me of the
9 classification of that document. And it has been indicated
10 to me that that document has to be placed in an SCI
11 facility. My understanding is that there is such a facility
12 in the FBI office in Portland, and there is a facility in
13 the U.S. Attorney's Office in Seattle. So basically,
14 Mr. Borgen is taking the position that I am required to
15 place that in one of those two facilities.

16 Now, I recall that Mr. Goldberg has indicated a
17 reluctance or an objection to having that left in the office
18 or under the control of the FBI because it is a defendant in
19 the case.

20 It looks like, Mr. Goldberg, that we are faced
21 with placing this in one of the two facilities. What's your
22 position at this time?

23 MR. GOLDBERG: Your Honor, first of all, can I ask
24 the Court, have you personally reviewed the document at this
25 time?

1 THE COURT: I have seen the document, yes.

2 MR. GOLDBERG: Okay. My understanding is that --
3 and I base this on a conversation I had this morning with
4 Steve Wax, who is the federal defender in Oregon. And what
5 I've been doing is trying to call other attorneys to get a
6 sense of how -- whether in other cases they've been involved
7 in where classified documents were involved, how they have
8 dealt with it in the past. Mr. Wax advised me that there
9 is -- my understanding is that Mr. Borgen actually works for
10 the U.S. Attorney's Office, or is assigned as part of the
11 U.S. Attorney's Office. There's also another separate
12 section within the Justice Department called the litigation
13 security section, which is in -- I think headquartered in
14 D.C., and which also works more as a neutral party --
15 although I'm not trying to imply any concern about
16 Mr. Borgen -- regarding dealing with classified documents.

17 And the question is whether or not it's possible
18 to create basically a SCIF or an SCI facility within the
19 courthouse that would satisfy the concerns of all of the
20 parties involved. We continue to have significant concerns
21 about it being left with the FBI, given the fact that the
22 FBI again is a defendant in this lawsuit. If what the Court
23 is saying is true, then that leaves the alternative of
24 moving it to Seattle, which creates obviously logistical
25 problems for everyone involved.

1 But I'm wondering if -- my understanding is that
2 the litigation security section can be called, again it's a
3 neutral party, they're often contacted in both criminal --
4 generally criminal and probably some civil cases, like
5 they've been dealing with the documents related to the
6 Guantanamo litigation, which is something Mr. Wax is
7 familiar with, and whether it's possible to set up a SCIF
8 within the courthouse, given the fact that the courthouse
9 does have security at this point, and whether there's
10 something more that can be done, akin to bringing in a safe
11 or whatever, that may satisfy the requirement of this being
12 in a SCIF.

13 THE COURT: There is also the possibility -- and
14 this is what Mr. Borgen mentioned to me -- of discussing
15 this with the originator of the document to determine
16 whether it can be declassified or redacted -- I'm not quite
17 sure what all can be done at this point -- and perhaps
18 reduce the security requirements.

19 MR. GOLDBERG: This is Goldberg again. Obviously,
20 that sounds like a terrific idea.

21 THE COURT: Now, at this point I need to discuss
22 two things before we go forward. Does plaintiff have a copy
23 of this document?

24 MR. GOLDBERG: None of the attorneys involved with
25 the case have copies of the document. All of the copies

1 have been destroyed and we've sealed the only remaining
2 document with the Court.

3 THE COURT: You said "none of the attorneys."
4 Does your client representative have it?

5 MR. GOLDBERG: Your Honor, I have a problem --

6 THE COURT: You may have a problem answering that.

7 MR. GOLDBERG: -- answering anything that may
8 implicate attorney-client privilege.

9 THE COURT: All right. But you're indicating that
10 the attorneys do not have a copy. Any copies you have --

11 MR. GOLDBERG: Any copies which any of the
12 attorneys have related to this case have now been destroyed.

13 THE COURT: All right. Now, the defendants
14 obviously want a copy of this. What is the proposal as to
15 how they are to receive a copy either now or in the future?

16 MR. COPPOLINO: Your Honor, Anthony Coppolino,
17 Department of Justice, Civil Division, in Washington.

18 Your Honor, I think the most secure manner of
19 doing that would be to have the court security officer,
20 Mr. Borgen, take custody of the document, and then through
21 some security means, perhaps a secure fax, provide us a
22 copy. I think a secure fax would probably suffice.

23 THE COURT: Well, first, Mr. Goldberg, do you have
24 any objection to the defendants being provided a copy?
25 Let's leave for a moment how it's going to happen.

1 MR. GOLDBERG: Not at all.

2 THE COURT: Do you have any objection to
3 Mr. Borgen taking control of this document and providing a
4 copy to the defendants?

5 MR. GOLDBERG: My understanding is that we're
6 talking about the document that you have --

7 THE COURT: Yes.

8 MR. GOLDBERG: -- under seal.

9 THE COURT: Under seal.

10 MR. GOLDBERG: So the document would be released
11 to Mr. Borgen?

12 THE COURT: It's a two-step process. We have to
13 get a copy to the Government, and they're proposing that
14 Mr. Borgen take it, make a copy of it, and fax it to them in
15 a secure way. Then we have to get to the next step of where
16 it goes as soon as he's made a copy of it.

17 MR. GOLDBERG: I have no problem with Mr. Borgen.

18 THE COURT: Mr. Borgen, today I will, if you will
19 come to my office, you can make a -- take the document, make
20 a copy of it, and it will be your responsibility to get a
21 copy of that to Mr. Coppolino in whatever secure fashion you
22 deem appropriate.

23 Then we have to go to the next step. So what
24 you're proposing, Mr. Goldberg, would require contacting the
25 litigation security section. When can that be accomplished?

1 Does anybody have any idea?

2 MR. GOLDBERG: I have the name of a person who I
3 believe is the director of that section. I've not spoken to
4 him, and I have a phone number for that section. So --

5 THE COURT: Here's what I want to see happen.
6 Because I'm leaving tomorrow morning, although I'll be
7 available by phone, I want to have this document that was
8 filed under seal in a secure place, and it may well be that
9 we will have to deliver it to Mr. Borgen to deliver it to
10 the SCI facility in Seattle. I recognize that takes some
11 effort at this point, but at least that can be accomplished.

12 Now, if the litigation security section can come
13 up with a new method, or if the originator will declassify
14 or redact part of it, then we can move it from that Seattle
15 facility to whatever facility we select.

16 I'm acknowledging Mr. Goldberg's objection to
17 placing it with the FBI. They are a defendant in the case.
18 I have no aspirations -- nothing -- not aspirations, that's
19 not the word, but I'm not indicating there would be any
20 problem with them, but they are a defendant so I don't think
21 it's appropriate that they have custody of it.

22 So that's what I'm suggesting at this point.

23 Mr. Borgen, what is your response to that?

24 MR. BORGEN: I can satisfy that, sir.

25 MR. SUTHERLAND: This is Jim Sutherland, Your

1 Honor.

2 Just so we understand, Mr. Borgen would take
3 custody of the document, make arrangements for a copy to be
4 made available to Mr. Coppolino's office in Washington,
5 D.C., and then he would take it directly to the SCIF in
6 Seattle?

7 THE COURT: That's right. But this would be a
8 temporary arrangement until we have an opportunity to talk
9 to the litigation security section and the originator, to
10 see if something less secure would be satisfactory, or if
11 there is a way. My preference is to have this within the
12 control of the Court in a secure fashion.

13 MR. COPPOLINO: Your Honor, this is Anthony
14 Coppolino with the civil division again in Washington.

15 If the Court would allow me, I'd like to speak to
16 a couple of these issues.

17 THE COURT: All right.

18 MR. COPPOLINO: First of all, with respect to the
19 litigation security group, I am familiar with that group. I
20 believe they're even housed in my own building. My
21 understanding was that a contact had been made with the
22 Court by a representative of that group and that the
23 litigation security group has, in effect, deputized
24 Mr. Borgen, who does -- who performs precisely the same
25 function that they do in the Portland area. And so for all

1 intents and purposes, there is no distinction between the
2 role that he plays and the role that the litigation security
3 group plays here in the Justice Department headquarters.

4 And I can assure you further that whatever
5 conclusions he has reached with respect to the
6 classification and necessary storage of the document would
7 only be reiterated by Department of Justice officials in
8 Washington once they review the document. However, if it
9 please the Court, I'll have that document reviewed by the
10 litigation security group as soon as I receive it to confirm
11 Mr. Borgen's determination.

12 Secondly, with respect to secure storage, I
13 understand Your Honor would acknowledge the plaintiffs'
14 objections. I would just observe, however, that the FBI is
15 a defendant in many cases and that doesn't make them
16 untrustworthy to hold documents in secure facilities, nor
17 does it alleviate the requirement that they be held in
18 secure facilities. We can provide some assurances to the
19 Court that even if it is held in a secure facility in
20 Portland, that would in no way prejudice the case because,
21 of course, the document can be filed in a closed envelope.
22 We could perhaps even make an arrangement where the Court
23 were to sign the seal on the document to determine if it's
24 been opened, would be an option as well, and I don't believe
25 there's any particular justification or any basis to their

1 objection that the FBI cannot be trusted in some way with
2 this document. There's going to be, I can assure the Court,
3 no alteration of it or anything that would diminish the
4 Court's ability to review the matter based on this document.

5 So -- and the option of building a SCIF is, for
6 the Court, is quite plainly in our view a nonstarter because
7 those facilities cost thousands, if not millions, and take
8 months and months to create.

9 The option of redacting the document of classified
10 information is a viable option, but it would, of course,
11 involve blacking out large portions of the document, and I'm
12 not sure what purpose that ultimately serves. But we would
13 be happy to explore that option as well, Your Honor.

14 THE COURT: Well, the other option is to determine
15 if the originator of the document can declassify it or
16 reduce its classification.

17 MR. COPPOLINO: I can certainly make that inquiry
18 and report back to the Court on that, Your Honor but --

19 THE COURT: Doesn't Mr. Borgen -- well, I
20 shouldn't say that. Mr. Borgen indicated that he could do
21 that.

22 MR. COPPOLINO: Right. I think that's not likely
23 to be a solution at this stage, Your Honor, without
24 redactions of the document to the point where the content
25 wouldn't be -- would not be understandable.

1 But in any event, my position I would just like to
2 present to the Court is I think it would be appropriate to
3 store it in the Portland FBI SCIF. I think we could do so
4 in a manner that in no way prejudices the Court's review or
5 the plaintiffs', and I don't think that really it's a matter
6 of any particular concern.

7 THE COURT: Well, the issue of concern depends on
8 your perspective.

9 Mr. Goldberg, let's assume that the litigation
10 security section is not going to be able to do anything less
11 than indicating that this should go into one of the present
12 facilities either in Portland or Seattle. Let's assume that
13 the originator does not declassify it or it cannot be
14 redacted, so that we're faced with placing this in a SCIF
15 either in Portland or in Seattle. Do you want to rethink
16 your position regarding the FBI SCIF, given that it's a
17 question of access both by the Court as necessary, by you as
18 necessary, and by the other parties?

19 MR. GOLDBERG: I certainly don't want to create
20 unnecessary logistical problems for anyone here, but I don't
21 know if I'm ready to respond to that as quickly as the -- at
22 least immediately at this point. I think that the Court --
23 Can I ask a question of Mr. Borgen?

24 THE COURT: Yes. Go ahead.

25 MR. GOLDBERG: Is that okay?

1 THE COURT: Yes.

2 MR. GOLDBERG: Mr. Borgen, is it possible, from
3 what Mr. Coppolino said, given the security that already
4 exists in the federal courthouse here, is there any
5 possibility of a room within the courthouse being basically
6 turned into a SCIF or somehow modified into a SCIF without
7 there being a huge production around it?

8 MR. BORGEN: No. There is no way to avoid that.

9 MR. GOLDBERG: What is the particular attributes
10 of a SCIF?

11 MR. COPPOLINO: Your Honor, I'm not sure he's
12 going to be permitted to answer all of the details of that
13 question. This is Mr. Coppolino speaking.

14 THE COURT: He can speak generally, can't he,
15 Mr. Coppolino?

16 MR. COPPOLINO: If he can state it without
17 disclosing any classified information, he can attempt to do
18 so without objection from me.

19 THE COURT: All right. Go ahead, Mr. Borgen.

20 MR. BORGEN: The facility itself has structural
21 hardening, there's building access that have to be modified,
22 alarms. And as he pointed out, it's about 30,000 to
23 \$100,000 to build a SCIF, and it takes months, too.

24 THE COURT: It does not sound practical to do
25 that. And Mr. Goldberg, I think we're going to have to

1 decide between Seattle and Portland.

2 MR. GOLDBERG: I understand.

3 Can I clarify? The facility in Seattle, where --
4 is that facility an independent facility or where is that
5 facility located?

6 THE COURT: It's in the U.S. Attorney's Office, as
7 I understand it.

8 MR. SHELDAHL: Yes.

9 MR. GOLDBERG: And the FBI office here is in the
10 federal building or where is the FBI office?

11 MR. SHELDAHL: It's in the Crown Plaza. It's a
12 private leased space.

13 MR. GOLDBERG: And so the SCIF is in the private
14 leased space -- at that private leased space?

15 MR. SHELDAHL: Barry Sheldahl with the United
16 States. The answer is yes.

17 MR. COPPOLINO: Your Honor, this is Mr. Coppolino
18 again. I would just make two quick observations: One, the
19 storage of this is, first of all, within the discretion of
20 the United States government, the executive branch, as to
21 where it is stored; number two, we seek to store it in a
22 location that is convenient to the Court for obtaining the
23 document and showing it to you, and I hardly think that
24 Seattle is going to be convenient to the Court. And I
25 reiterate, there is no prejudice to the plaintiff if the

1 matter is secured properly in the FBI. We can make some
2 arrangements and ensure that it is opened only by the Court.

3 THE COURT: What if I say I will not deliver it to
4 the FBI, Mr. Coppolino?

5 MR. COPPOLINO: Well, your Honor, we obviously
6 don't want to have any kind of a confrontation with you, we
7 want to work this out, but it has to be secured in a proper
8 fashion. And I respect the Court's, you know, authority in
9 the matter, but on the other hand, I also would have to
10 reiterate that it has to be secured properly. And we would
11 like to ask the Court to defer to our authority over the
12 document just for purposes of storage while accommodating
13 the Court's interest.

14 MR. GOLDBERG: This is Goldberg. If I could make
15 one comment. The federal regulation which applies to this
16 specific -- to the handling of these documents in civil
17 proceedings, which is 17 -- section 17.17. It's 28 C.F.R.
18 section 17.17. Paragraph 4 specifically talks about a court
19 facility which would be the one to provide the appropriate
20 safeguarding.

21 So it does not sound to me, there's no definition
22 of court facility there, and again, I understand it needs to
23 be in a SCIF, but again, the concern with the FBI facility
24 here is that, number one, I don't believe it's a court
25 facility under the terms of the regulation; number two,

1 we're dealing with a defendant; and number three, we're
2 dealing with a document that may involve criminal behavior
3 by that defendant. So given all of those, you know --
4 again, I'm concerned about expressing too much logistical
5 concern here, but at the same time, I don't think the
6 concerns that we are expressing are unreasonable, given the
7 issues involved in this particular case.

8 My suggestion, Your Honor, might be -- and this
9 may create some immediate logistical problem -- might be,
10 number one, to have the document stored in the Seattle
11 facility, at least, as you indicated, on a temporary basis,
12 number one.

13 Number two, understanding that the Court is going
14 to be gone, perhaps we can do a conference call,
15 Mr. Coppolino or whoever and myself, with someone from the
16 litigation security section, as well as Mr. Borgen, and see
17 if there's some other way of dealing with it within Portland
18 other than at the FBI facility. We'll know that then by the
19 time the Court returns, and then, you know, if there's no
20 other alternative here -- and again, I'm not trying to -- I
21 don't doubt what Mr. Coppolino is saying, but again, my
22 understanding is that the litigation security system, at
23 least from what I've been told, is a more neutral body.

24 Assuming that there are no other alternatives,
25 then we'll obviously agree to reconsider our position, and

1 it may be that there is no alternative, and then it becomes
2 a question of what conditions are surrounding placement of
3 it in the FBI facility and who has access to it, et cetera.

4 I don't know if we have time to deal with that
5 today, given the Court's leaving. Maybe the best solution
6 might be to move it to Seattle, keep it there at least for
7 the next couple of weeks, give us more time to talk to the
8 litigation security section, and then have a conference when
9 the -- with the Court after you return and then make a final
10 determination as to where it should be kept.

11 MR. COPPOLINO: Your Honor, this is Mr. Coppolino.
12 I can certainly go along with that. If it please the Court,
13 we can move the document to Seattle temporarily. I will
14 confer with the litigation support group about its storage
15 further. I will also confer with the originator of the
16 document regarding classification status and redactions, and
17 we can confer again with the Court when you return.

18 The only -- so I could agree to all that, Your
19 Honor. The only additional point I would raise, unrelated
20 to this issue of storage, is with respect to the issue of
21 return of the document, I am concerned about the
22 representation made there that the document may still be
23 possessed by the plaintiffs, if not their counsel, and we
24 would expect to want to present that issue further to the
25 Court to ensure that all copies in the custody of the

1 plaintiffs are returned to the Government or to the Court.

2 THE COURT: I don't think there was a
3 representation. I think there was an indication that he
4 could not answer the question based on attorney-client
5 privilege. So at this point it is an issue that can be
6 raised in the future.

7 All right. Mr. Borgen, I will deliver the
8 document to you today, and with instructions to deliver it
9 and place it in the SCIF in Seattle. And this is understood
10 that this is a temporary arrangement while the inquiries are
11 made that we've discussed, and the Court will revisit this
12 when I returned.

13 Now, do you anticipate anybody needing to get
14 in -- to get that document between now and the time I
15 return?

16 MR. COPPOLINO: I do not, Your Honor. This is
17 Mr. Coppolino.

18 MR. GOLDBERG: Plaintiffs does not.

19 Judge, may I clarify one point?

20 THE COURT: Yes.

21 MR. GOLDBERG: In terms of the contact with the
22 litigation security section, can I participate? Can I call
23 them or be involved in that contact with Mr. Coppolino?

24 THE COURT: Well, I think it's the best way to do
25 it, is to have a joint call. Mr. Coppolino can certainly

1 call them separately, but I think that it would be helpful
2 for you to have a joint call, and certainly you can contact
3 them separately as well if Mr. Coppolino doesn't want to
4 have a joint call. I'm going to allow both of you to
5 contact them, and suggest that you do it jointly.

6 MR. SUTHERLAND: Your Honor, this is Jim
7 Sutherland. May I walk up with Mr. Borgen now and pick up
8 the document?

9 THE COURT: Yes.

10 Thank you.

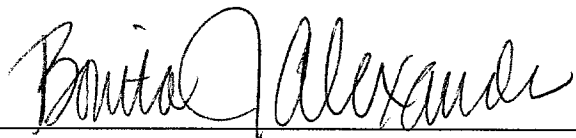
11 MR. COPPOLINO: Thank you, Your Honor.

12 (Proceedings concluded.)
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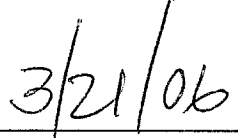
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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature is not certified.



BONITA J. ALEXANDER, CSR, RMR, CRR
Official Court Reporter



DATE