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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

AL-HARAMAIN ISLAMIC FOUNDATION, INC., an Oregon Nonprofit Corporation, **et al.,** Plaintiffs, vs. **GEORGE W. BUSH**, President of the United States, et al. Defendants.	Case No. CV 06-274-KI PLAINTIFFS' MEMORANDUM OF LAW IN SUPORT OF MOTION FOR ORDER COMPELLING DISCOVERY

INTRODUCTION

Plaintiffs served interrogatories on defendants on April 10, 2006. Defendants have refused to answer even a single interrogatory. The interrogatories and defendants' objections are attached as Exhibit 1.

The interrogatories do not ask defendants to disclose information about the substance of their alleged electronic surveillance of plaintiffs. Instead, the interrogatories seek confirmation that such surveillance was conducted, the dates of the surveillance, and the absence of warrants from the Foreign Intelligence Surveillance Court or any other court. Defendants have publicly admitted they engaged in a program of warrantless electronic surveillance since the fall of 2001.[1] The fact that plaintiffs have been subject to such surveillance is the basis of this lawsuit and is demonstrated by the document submitted under seal. Thus, the interrogatories, which essentially seek confirmation of

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[1] President Bush, Radio Address (Dec. 17, 2005) (hereinafter *Bush Radio Address*), transcript available at: http://www.whitehouse.gov/news/releases/2005/12/20051217.html ("In the weeks following the terrorist attacks on our nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al Qaeda and related terrorist organizations."); Alberto Gonzales, *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence*, Dec. 19, 2005 (hereinafter *Gonzales/Hayden Press Briefing*) ("The President has authorized a program to engage in electronic surveillance"); *Press Conference of President Bush*, December 19, 2005, transcript available at: http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html (noting that "calls" are intercepted); Michael Hayden, *Gonzales/Hayden Press Briefing* ("The period of time in which we do this is, in most cases, far less than that which would be gained by getting a court order."); *Wartime Executive Power and the NSA's Surveillance Authority Before the Senate Judiciary Committee*, 109th Congress (Feb. 6, 2006) (Attorney General Gonzales: "[T]he program is triggered [by] a career professional at the NSA."); Alberto Gonzales, *Gonzales/Hayden Press Briefing* ("[T]he Supreme Court has long held that there are exceptions to the warrant requirement in—when special needs outside the law enforcement arena. And we think that that standard has been met here."); Alberto Gonzales, *Gonzales/Hayden Press Briefing* ("Now, in terms of legal authorities, the Foreign Intelligence Surveillance Act provides—requires a court order before engaging in this kind of surveillance that I've just discussed and the President announced on Saturday, unless there is somehow—there is—unless otherwise authorized by statute or by Congress. That's what the law requires.").

defendants' actions directed against plaintiffs, are clearly relevant to the issues in this suit.

Interrogatories 21-25 seek information about the decision to classify the document filed with the Court. Defendants have admitted the document was classified. *See* Defendants' Response to Plaintiffs' Opposition to Defendants' Lodging of Material Ex Parte and In Camera (May 23, 2006) [Docket Number 32] (Defs. Response) at 7 ("[T]he ODNI has concluded that the sealed document was clearly marked and properly classified as "TOP SECRET.") Defendants have also alluded to the reasons for the classification in Attachment 3 to Defs. Response, Declaration of John F. Hackett, ¶ 8 (May 12, 2006) ("Based upon my review of the information contained in the document filed under seal with the Court . . . I have concluded that the document contains information that either (1) pertains to intelligence activities and is derived from intelligence sources and methods, and/or (2) relates to the vulnerabilities and capabilities of systems, projects, and plans relating to the national security."). The purpose of interrogatories 21-25 is to get further information, under oath, about the classification decision which may lead to additional discovery by plaintiffs on this point. This is precisely what discovery is meant to accomplish under the federal rules.

STANDARD FOR DISCOVERY

Plaintiffs seek relief under Fed. R. Civ. P. 37(a), which authorizes a party to apply for an order to compel disclosure or discovery. "If a party fails to make a disclosure required by rule 26(a), any other party may move to compel disclosure and for appropriate sanctions." Fed. R. Civ. P. 37(a)(2)(A).

Rule 26 of the Federal Rules of Civil Procedure governs the scope of discovery. Specifically, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . ." Fed. R. Civ. P. 26(b)(1). As a general proposition, the Federal Rules of Civil Procedure concerning discovery are to be construed broadly. See generally 6 *Moore's Federal Practice* Section 26.41(1) (Matthew Bender 3d ed. 1997) (citing *Herbert v. Lando*, 441 U.S. 153, 177 (1979)). A valid discovery request need only "encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenhiemer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

ARGUMENT

1. Defendants' "Possible" State Secrets Objection

Defendants object to all of the interrogatories "because they purport to seek the disclosure of classified national security information that *could be* subject to a claim of state secrets privilege. . ." (*See* Exhibit 1, emphasis added). If that equivocal objection means defendants will formally assert the state secrets privilege in opposition to this motion, this court should reject that assertion.

The state secrets privilege, where applicable, allows the government to refuse discovery of classified information that constitutes a military or state secret, after a formal claim of privilege by the head of the department that has control over the matter. *United States v. Reynolds*, 345 U.S. 1, 6, 10 (1953). When the privilege is formally invoked, there must be some judicial assessment of its assertion. "Judicial control over the evidence in a [state secrets privilege] case cannot be abdicated to the caprice of

executive officers." *Id.* at 9-10. As the Ninth Circuit has commented, "courts must be sure that claims of paramount national security interest are presented in the manner that has been devised best to assure their validity . . . . That counterweight role has been reserved for the judiciary. We must fulfill it with precision and care, lest we encourage . . . executive overreaching." *Doe v. Tenet*, 329 F.3d 1135, 1146 (9th Cir. 2003), *overruled on another point* in *Tenet v. Doe*, 544 U.S. 1 (2005). "[B]efore approving the application of the privilege, the district court must be convinced by the Agency that there is a 'reasonable danger' that military or national secrets will be revealed. . . . [T]he greater the party's need for the evidence, the more deeply a court must probe to see whether state secrets are in fact at risk." *Id.* at 1152.

Courts must be especially vigilant where the state secrets privilege is invoked in a lawsuit asserting unlawful surveillance. "In the typical surveillance case, . . . there is reason to suspect that the executive has invoked the privilege to defeat the plaintiff's suit. The executive has relied on an expanded concept of national security to deny discovery of information that is insufficiently sensitive to require the absolute protection accorded by the privilege." Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?* 91 Yale L.J. 570, 578 (1981).

In the present case, there are multiple reasons why the state secrets privilege does not bar the discovery sought by plaintiffs.

First, at least so far, defendants have not properly invoked the privilege, having failed to present the required affidavits by their department heads. "[I]nsisting upon

compliance with the formalities established by the state secrets privilege" is essential "[i]f we are to inflict upon individuals otherwise protected by our laws, particularly the United States Constitution, the harsh remedy of dismissal to protect the rest of us . . . ." *Doe v. Tenet*, 329 F.3d at 1151.

Second, plaintiffs' interrogatories focus on demonstrating that warrantless surveillance actually occurred. Defendants argue that "[a]ny response to these Interrogatories would require Defendants to confirm or deny the existence of information in a manner that would reveal classified information or tend to reveal classified information." Defendants' Objections, p. 2. But as discussed above, defendants have already acknowledged that there has been warrantless electronic surveillance. Plaintiffs have a right to know whether that surveillance has been directed against their communications.

Third, a secrecy classification must be *proper* to invoke the state secrets privilege. As discussed in detail in plaintiffs' reply memorandum addressing defendants' *in camera* and *ex parte* filing of their secret declaration, filed simultaneously with this motion, there are compelling reasons to conclude that the secrecy classifications at issue in this case were intended to conceal unlawful activity and are thus improper under Executive Order 12958.

Plaintiffs' complaint asserts a civil cause of action created by Congress for violations of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. §1810. This cause of action would be meaningless if defendants could evade liability merely by

answering as they have: "We can't tell you if we've violated the law because that is classified."

This situation is analogous to *Halpern v. U.S.*, 258 F.2d 36 (2nd Cir. 1958). In *Halpern*, an inventor sued for damages resulting from an order of secrecy involving his application for a patent. Congress had enacted the Invention Secrecy Act (35 U.S.C. sections 181-188) to prevent dissemination of information contained in patent applications whenever the disclosure of such information could jeopardize national security. However, the Act also sought to encourage inventions with military value, so it provided certain remedies to those whose patents were pending under secrecy orders. In the litigation, the government asserted the state secrets privilege, an argument which the Second Circuit rejected:

> "Congress has created rights which it has authorized federal district courts to try. Inevitably, by their very nature, the trial of cases involving patent applications placed under a secrecy order will always involve matters within the scope of this privilege. Unless Congress has created rights which are completely illusory, existing only at the mercy of government officials, the act must be viewed as waiving the privilege. Of course, any such waiver is dependent upon the availability and adequacy of other methods of protecting the overriding interest of national security during the course of a trial."

258 F.2d at 43.

Similarly, FISA's authorization for a civil action must be viewed as a Congressional restriction on the state secrets privilege in FISA actions, subject to "other methods of protecting the overriding interest of national security." *Id.* If defendants could invoke the privilege to thwart a FISA action entirely, then Congress's provision for

such actions would be meaningless. The government would be able to evade all FISA actions, since by their very nature they will always involve national security. That would contravene the Congressional intent underlying FISA.

Even if the state secrets privilege could be invoked here, the Supreme Court's opinion in *Reynolds* suggests the privilege should not be applied to allow defendants to avoid answering plaintiffs' interrogatories. *Reynolds* was a damages action by the widows of two civilian passengers on an Air Force flight that was testing secret electronic equipment. The government invoked the state secrets privilege and objected to providing a copy of the flight's accident report, but agreed to allow surviving crew members to be deposed and to testify regarding all matters except those of a classified nature. *Reynolds*, 345 U.S. at 5. The Court rejected plaintiffs' efforts to obtain the accident report, but justified that rejection in part on the offer to make the surviving crew members available for examination. *Id.* at 11. Defendants here have made no similar offer to confirm the fact of plaintiffs' warrantless surveillance that might justify application of the privilege.

2. **Defendants' Remaining Objections**

Defendants' remaining objections are general, and seem – on their face – inapplicable to plaintiffs' interrogatories. For example, general objection 6 (Ex. 1, p. 3) asserts that plaintiffs seek information "not within the possession or control of Defendants." Plaintiffs have no idea what this means. If neither the President, nor the NSA, nor the FBI, nor the CIA have information about whether plaintiffs were subject to warrantless electronic surveillance, who would have possession or control of this information?

In general objection 2, defendants assert that the information sought is protected "by the law enforcement privilege and investigatory files privilege. . ." (Ex. 1, pp. 2-3). Again, this objection is ambiguous. Plaintiffs have asserted that defendants' alleged actions are a crime under FISA. Do defendants mean to assert their Fifth Amendment privilege against self-incrimination? If so, that should be clearly stated.

In general objection 7 (Ex. 1, p. 3), defendants argue that the time frame for which plaintiffs seek information is too broad. Defendants have acknowledged that their program of warrantless electronic surveillance began in the Fall of 2001. See *Bush Radio Address, supra* fn 1. The time frame used by plaintiffs is reasonable given this admission.

CONCLUSION

The responses to interrogatories sought by plaintiffs are clearly relevant to their claims in this lawsuit. Although this case is still young, Defendants' objections are consistent with the positions they have already asserted in this action: Whether or not we violated the law, whether or not you have a claim for damages, we don't have to provide you anything because this lawsuit poses a grave threat to national security. If there is any threat to national security, it is the threat to openness, civil liberties, and separation of

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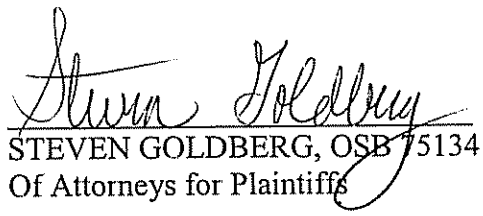
powers posed by defendants' actions. The court should order defendants to respond to the interrogatories.

DATED this 22nd day of May, 2006.

Respectfully submitted,



STEVEN GOLDBERG, OSB 75134
Of Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ORDER COMPELLING DISCOVERY upon the following:

Anthony J. Coppolino / Andrew Tannenbaum / Andrea Gacki
U.S. Dept. of Justice
P.O. Box 883, Rm. 6102
Washington D.C. 20044

Attorney for Defendant

_X_ by **MAILING** a full, true and correct copy in a sealed envelope, with postage paid, addressed to the above-named party at last known address, and deposited with U.S. Postal Service in Portland, Oregon on this date.

___ by **ELECTRONIC DELIVERY VIA E-MAIL** a full, true and correct copy to the above-named party(ies) to the last known e-mail address on this date via the Court CM/ECF electronic filing system.

___ by **FAXING** a full, true and correct copy to the above-named party to the fax listed above on this date. Said attorney's facsimile was operating at the time of service. The transmission was recorded and confirmed.

___ by **HAND DELIVERING** a full, true and correct copy to the above-named party by messenger service to the last known office address of said party.

___ by **OVERNIGHT COURIER** a full, true and correct copy to the above-named party in a sealed envelope, with courier fees paid to the last know office street address of said party.

DATED: May 22, 2006.

Steven Goldberg, OSB No. 75134