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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AL-HARAMAIN ISLAMIC FOUNDATION, INC., an Oregon Nonprofit Corporation, WENDELL BELEW, a U.S. Citizen and Attorney at Law, and ASIM GHAFOOR, a U.S. Citizen and Attorney at Law,

Plaintiffs,

v.

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

OREGONIAN PUBLISHING COMPANY'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO UNSEAL DOCUMENT

Oregonian Publishing Company, publisher of *The Oregonian*, a daily newspaper in Portland, and Ashbel Green, a reporter for *The Oregonian* (collectively, "Oregonian"), submit this reply memorandum in support of its motion to unseal the materials that plaintiffs submitted under seal in connection with their complaint.

In its memorandum in support of its motion to unseal, Oregonian stated that it "seeks disclosure of all documents that have been filed with this Court with respect to the current litigation. Oregonian does not know how many documents have been filed, or the nature and contents of those documents." (Oregonian's "Memorandum in Support," 3/17/06, at 2.)

In "Defendants' Response to The Oregonian's Motion to Intervene and to Unseal Records," dated April 14, 2006, the government stated that there is only one such document, and that it "is a highly classified government document." (Defendant's Response, 4/14/06, at 2.)

In "Defendants' Response to Plaintiffs' Opposition to Defendants' Lodging of Material Ex Pert and In Camera," dated May 12, 2006, the government stated that the document has been "classified as 'TOP SECRET.'" (Defendant's Response, 5/12/06, at 7.)

Regardless of the origin or derivation of the document in question, that document has now become a part of the records of this Court, and "[u]nder the first amendment, the press and the public have a presumed right of access to court proceedings and documents." *Oregonian Pub. Co. v. U.S. Dist. Court for Dist. of Oregon*, 920 F.2d 1462, 1464 (9th Cir. 1990), *cert. denied*, 501 U.S. 1210 (1991). "[J]udicial records are public documents almost by definition, and the public is entitled to access by default." *Kamakana v. City and County of Honolulu*, 2006 WL 1329926 at *5 (9th Cir., May 17, 2006) (No. 04-15241). "What happens in the federal courts is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government

claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification." *Hicklin Engineering, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006).

The government contends that it has overcome the presumption of access in this case, contending, in effect, that the document must remain secret "because we say so." Oregonian, of course, has not seen the document. But it urges the Court not to give uncritical acceptance to the government's statements.

As Oregonian stated in its memorandum in support of its motion to unseal, "the documents filed by plaintiffs may contain evidence of arguably unlawful conduct on the part of the U.S. Government against U.S. citizens." Oregonian Memorandum, 3/17/06, at 3. Plaintiffs have now submitted a memorandum setting out what they believe to be "a prima facie showing that the President's program [of warrantless electronic surveillance] is indeed illegal." Plaintiffs' Reply to Defendants' Response to Objection to Filing Material *Ex Parte* and *In Camera*, 5/21/06, at 5. The public interest in the disclosure of documents that reveal that the United States government is engaged in illegal activity is clear, and the government should not be permitted to prevent that disclosure simply by placing a "Top Secret" label on it. It is reasonable to assume that the government regards *all* of its illegal activities as "top secret," but the First Amendment right of access to court documents would mean very little if courts refused to allow the public to have access to documents containing evidence of government wrong-doing.

In opposing Oregonian's motion to unseal the document, defendants assert that "under the separation of powers established by the Constitution, the Executive Branch is responsible for the protection and control of national security information." Defendants' Response to Oregonian Motion, 4/14/06, at 9, citing *Department of Navy v. Egan*, 484 U.S. 518, 527, 108 S. Ct. 818, 98

L.Ed.2d 918 (1988). However, defendants have not cited any case in which the Supreme Court has held that the Executive Branch's discretion in such matters is *wholly* unfettered, or *wholly* immune from judicial review. "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." *United States v. Nixon*, 418 U.S. 683, 704, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (internal quotation marks and citation omitted).

Defendants contend that disclosure of the document "could reasonably be expected to cause exceptionally grave damage to the national security of the Unites States ***." Defendants' Response to Oregonian's Motion, 4/14/06, at 17. However, "the label of 'national security' may cover a multitude of sins," *Mitchell v. Forsyth*, 472 U.S. 511, 523, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), and "[t]he danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is *** real ***." *Id.* "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion).

"Since the September 11th attacks on the United States, government secrecy has dramatically increased." Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 Administrative Law Rev. 131, 133 (2006).

> "[T]he [federal] judiciary has largely failed to accept its critical role of monitoring and limiting secrecy. Case after case demonstrates the growth of judicial deference to government secrecy claims, which has evolved into a form of broad acceptance that is neither required by the Constitution nor intended by Congress."

Id. at 133.

The Fourth Circuit has counseled against a "blind acceptance by the courts of the government's insistence on the need for secrecy":

> "[T]roubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present. History teaches how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse."

In re Washington Post, 807 F.2d 383, 391-92 (4th Cir. 1986).

Defendants seek to justify the secrecy of the document (and apparently, indeed, to justify the entire program of warrantless electronic surveillance of American citizens) by invoking the President's declaration that "the threat of terrorist attacks constituted an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States." Defendants' Response to Oregonian's Motion, 4/14/06, citing Exec. Order No. 13,244. But the President's Executive Order did not repeal the Constitution, and in a time of national emergency greater than anything the nation currently faces, the Supreme Court wrote that the authors of the Constitution

> "foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield

> of its protection all classes of men, at all times, and under all circumstances."

Ex parte Milligan, 71 U.S. (4 Wall.) 2, 120-21, 18 L.Ed. 281 (1866). The Court in *Milligan* went on to say, in words quoted by the plurality in *Hamdi v. Rumsfeld*, that the Framers "knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that *unlimited power, wherever lodged at such a time, was especially hazardous to freemen*." *Milligan*, 71 U.S. at 125, quoted in *Hamdi*, 542 U.S. at 530-31 (emphasis added).

The Court's words in *Milligan* cannot be emphasized too strongly: "The Constitution of the United States is a law for rulers and people, equally in war and in peace ***." The First Amendment operates during times of war as well as during times of peace, and the presumption of access to court documents that exists under that Amendment means that this Court must evaluate very carefully the defendants' contention that the label of "Top Secret" justifies the continued sealing of the document at issue here. The Supreme Court has made it clear that courts need not, and should not, accept at face value an assertion by the Executive Branch that a particular document is too sensitive to be disclosed to the public. In *Department of Air Force v. Rose*, 425 U.S. 352, 96 S. Ct. 1592, 48 L.Ed.2d 11 (1976), certain law review editors filed a Freedom of Information Act request with the United States Air Force, asking it to disclose case summaries of ethics hearings at the Air Force Academy. The government denied the request, on the ground, *inter alia*, that the case summaries constituted "personnel ** files" that were exempt from disclosure under FOIA. The Supreme Court held that the courts should not give deference to the government's decision to place a particular document in a personnel file as a means of shielding it from disclosure:

> "Congressional concern for the protection of the kind of confidential personal data usually included in a personnel file is abundantly clear. But Congress also made clear that nonconfidential matter was not to be insulated from disclosure merely because it was stored by an agency in its 'personnel' files."

Department of Air Force v. Rose, 425 U.S. at 372.

By the same token, neither the President nor anyone else in the Executive Branch should be permitted to insulate from disclosure a document that is not truly secret, simply by placing a "Top Secret" stamp on it. Placing someone's grocery list in a personnel file does not make it a personnel record, and labeling a document "top secret" does not necessarily make it so. What, after all, is "secret" about the document in this case? It is no secret that the National Security Agency has eavesdropped on Americans; the President has stated publicly that he ordered the NSA to do so,[1] and "[the] program has been the subject of considerable recent media attention." *In re Grand Jury Investigation*, 2006 WL 908595, *1 & *7 (E.D. Va. 2006). Nor is it any secret that the NSA eavesdropped on the plaintiffs in this case:

> "According to a source familiar with the case, the records indicate that the National Security Agency intercepted several conversations in March and April 2004 between al-Haramain's director, who was in Saudi Arabia, and two U.S. citizens in Washington who were working as lawyers for the organization."[2]

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[1] Plaintiffs have provided citations to a number of statements from the President and other government officials acknowledging the existence of the warrantless surveillance program. Plaintiffs' Memorandum of Law in Support of Motion for Order Compelling Discovery (5/22/06) at 1 fn. 1.

[2] Carol D. Leonnig and Mary Beth Sheridan, "Saudi Group Alleges Wiretapping by U.S.: Defunct Charity's Suit Details Eavesdropping," *The Washington Post*, Mar. 2, 2006, at A1, available online at http://www.washingtonpost.com/wp-dyn/content/article/2006/03/01/AR2006030102585.html?sub=AR (visited March 13, 2006).

The particular contents of the document are not secret, either—at least not to the plaintiffs, who presumably are aware of the contents of their own conversations. If there are specific facts stated in the course of those conversations that would endanger national security if they were revealed, then redaction is the appropriate remedy, not blanket sealing. *Phoenix Newspapers, Inc. v. United States Dist. Court*, 156 F.3d 940, 950-51 (9th Cir. 1998) (court must consider redaction as alternative to sealing of court document); *Seattle Times v. United States District Court*, 845 F.2d 1513, 1518 (9th Cir. 1988) (same). There is, however, no reason to redact something that is already public knowledge. *Kamakana*, 2006 WL 1329926 at *8 (district court properly denied redaction where "many names or references for which the United States sought redaction were either already publicly available or were available in other documents being produced to the Honolulu Advertiser").

Access to court documents is an essential component of an accountable government. The citizens of this nation want to trust their government, and that trust depends in large part upon the government being openly accountable for its decisions, actions and mistakes. When the government operates in secret or refuses to disclose information to the public, it deprives the public of its ability to oversee and hold the government accountable. Just last year, the Secretary of Defense himself acknowledged that the government's penchant for secrecy is excessive: "I have long believed that too much material is classified across the federal government as a general rule ***." Fuchs, *supra*, 58 Administrative Law Rev. at 133, quoting Donald Rumsfeld, "War of the Worlds," *Wall St. J.*, July 18, 2005, at A12. The judiciary stands as an essential check on the Executive Branch's desire to shield too much of its conduct behind a veil of secrecy.

It appears to Oregonian that the plaintiffs have already made a showing sufficient to support a conclusion that the document at issue here, which is part of this Court's records, should be disclosed to the public. If the federal government has committed crimes against citizens of this country, the public is entitled to know about it. Oregonian recognizes, however, that the Court's decision as to whether or not to unseal the document in response to Oregonian's motion may be so intertwined with the merits of plaintiffs' case that a decision on Oregonian's motion may be premature. If the Court determines that it cannot decide Oregonian's motion without deciding the merits of the case, then Oregonian requests the Court to hold its motion in abeyance pending further developments in the case.

DATED: May 22, 2006.

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CERTIFICATE OF SERVICE

I hereby certified that I served the foregoing **OREGONIAN PUBLISHING COMPANY'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO UNSEAL DOCUMENT** on the following named persons as listed on the date indicated below by:

- ☐ mailing with postage prepaid
- ☐ hand delivery
- ☐ facsimile transmission
- ☐ overnight delivery
- ☐ email
- ☒ notice of electronic filing using the Cm/ECF system

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