

EXHIBIT #2

GOVERNMENT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND GOVERNMENT'S FOURTH MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AL-HARAMAIN ISLAMIC FOUNDATION,)	
INC., an Oregon nonprofit)	
corporation, et al.,)	
)	
Plaintiffs,)	No. CV-06-274-KI
)	
vs.)	August 29, 2006
)	
GEORGE W. BUSH, President of the)	Portland, Oregon
United States, et al.,)	
)	
Defendants.)	

MOTION HEARING

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE GARR M. KING
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

1
2 FOR THE PLAINTIFFS: Steven Goldberg
3 Attorney at Law
4 621 S. W. Morrison
5 Suite 1450
6 Portland, OR 97205
7
8 Jon B. Eisenberg
9 Attorney at Law
10 1970 Broadway
11 Suite 1200
12 Oakland, CA 94612
13
14 Jessica Ashlee Albies
15 Law Office of J. Ashlee Albies
16 621 S.W. Alder Street
17 Suite 621
18 Portland, OR 97205
19
20 Thomas H. Nelson
21 Zaha S. Hassan
22 Thomas H. Nelson & Associates
23 825 N.E. Multnomah Street
24 Suite 925
25 Portland, OR 97232-2150
26
27 Lisa R. Jaskol
28 Attorney at Law
29 15760 Ventura Boulevard
30 18th Floor
31 Encino, CA 91436
32
33 FOR THE DEFENDANTS: Anthony J. Coppolino
34 U.S. Department of Justice
35 20 Massachusetts Avenue, NW
36 Room 6102
37 Washington, DC 20530
38
39 Andrea Marie Gacki
40 U.S. Department of Justice
41 20 Massachusetts Avenue, NW
42 Room 7334
43 Washington, DC 20001
44
45 Andrew H. Tannenbaum
46 U.S. Department of Justice
47 20 Massachusetts Avenue, NW
48 P. O. Box 883
49 Washington, DC 20044

1 acceptable way of us getting around this problem. We are
2 not looking to have this document released to the public.
3 That's a different issue that Mr. Hinkle is addressing,
4 and we take no position on that. It's simply not in our
5 interest. It's irrelevant to what we want.

6 THE COURT: Let me ask you -- this may be way
7 ahead of it -- how are you going to show that any
8 surveillance in this case was warrantless?

9 MR. EISENBERG: That is a very interesting
10 question, and we pondered that a lot. I would like to
11 think that if they had a FISA warrant, that Mr. Coppolino
12 would have told us quite a while back, so we wouldn't be
13 wasting any more time.

14 THE COURT: Well, Mr. Coppolino may feel that's a
15 state secret or at least the people who instruct
16 Mr. Coppolino may feel that's a state secret.

17 MR. EISENBERG: It could be, and then we have a
18 bit of a problem.

19 I believe the simple way, how do we know it was
20 warrantless? Discovery. And that really is just about,
21 I think, the only thing in our motion for discovery,
22 which Mr. Goldberg will address -- it's not the only. It
23 stands above all others. It's an essential link in our
24 case, but it's a simple one. I think the simple answer
25 is we ask them, "Did you have a FISA warrant?"

1 Now, why do we --

2 THE COURT: I suspect they are going to refuse to
3 answer. Then I have to make a determination as to
4 whether I'm going to require them to answer. And in
5 doing that, I have to determine whether or not the answer
6 would divulge a state secret.

7 MR. EISENBERG: I wonder if you could imply from
8 their refusal to answer that they didn't have one. We
9 have a problem, don't we?

10 But look at what Congress has told us. Congress
11 has told us in 50 U.S. Code 1810(a) -- that's FISA --
12 "An aggrieved person who has been subject to electronic
13 surveillance in violation of FISA shall have a cause of
14 action against any person who committed such a
15 violation."

16 Now, if the Government has the right to keep
17 secret forever that there was a violation of FISA, then
18 what meaning does Section 1810 have? It has none. That
19 remedy doesn't mean a thing if they can avoid liability
20 for violating FISA by refusing to tell us whether they
21 got a warrant.

22 THE COURT: Well, is there anything in the public
23 record, any statements made that you think you could rely
24 on to show that in this case the surveillance was
25 warrantless?

1 Now, the TSP program, I think there is a public
2 record, statements by the president that he authorized
3 warrantless surveillance. But do you know that this was
4 a TSP surveillance?

5 MR. EISENBERG: Well, here's what I can tell you.
6 And again, now, I have to be a little careful.

7 THE COURT: Yes. You have to be very careful.

8 MR. EISENBERG: So what I'm going to do is read
9 from the record. That's all I'm going to do. I'll start
10 with the Complaint, paragraph 19, paraphrasing: In March
11 and April of 2004, Defendant National Security Agency
12 conducted warrantless surveillance of conversations
13 between Plaintiff Al-Haramain and Plaintiffs Belew and
14 Ghafoor. Paragraph 20: In May 2004, Defendant NSA gave
15 Defendant OFAC, Office of Foreign Assets and Control,
16 logs of these conversations.

17 Frances Hourihan's declaration -- she filed two,
18 and I'm quoting from the second one, paragraph 4: In
19 August 2004, OFAC inadvertently gave Al-Haramain's
20 attorneys the sealed document filed with the Complaint in
21 this case. In paragraph 5, she said it was related to
22 the terrorist designation. And that's referring to the
23 designation as a specifically designated global
24 terrorist.

25 The Hackett declaration, paragraphs 5 and 8, the

1 second Hackett declaration, says that the sealed document
2 is a United States Government report that pertains to
3 intelligence activities and is derived from intelligence
4 sources.

5 And then finally, I'll read to you from our
6 response, plaintiffs' response to defendants' motion to
7 deny access to the document, page 10: The document
8 confirms that plaintiffs were surveilled without a
9 warrant and thus are aggrieved.

10 And the best I can offer you, Your Honor, in
11 light of the sensitivity of the situation we have before
12 us, is the conclusion that I just read to you based on
13 the points in the record that I just read to you. We
14 believe that there is enough in this record to support
15 certainly a strong inference that there was warrantless
16 surveillance in this case. We've alleged it; and I
17 believe for purposes of this hearing, our allegations are
18 to be taken as true.

19 THE COURT: And you believe that's true of both
20 the individual plaintiffs as well as the foundation? Do
21 they stand in any different status --

22 MR. EISENBERG: Yes.

23 THE COURT: -- as far as you're concerned?

24 MR. EISENBERG: They do. They do. I'm not sure
25 what I can say. Let me put it this way, treading very

1 lightly.

2 Mr. Coppolino, you shut me up if I'm not treading
3 lightly enough, please.

4 I believe that whatever gaps are in the record
5 may be supplemented with declarations by Mr. Belew and
6 Ghafoor, and we're prepared to fill those gaps with
7 declarations.

8 THE COURT: All right. Go ahead.

9 MR. EISENBERG: I'm almost done, actually. I'd
10 like to -- let's move down to the second level on the
11 right-hand side of my chart: The Court controls access
12 to the document.

13 This document is now in the Court's custody,
14 bringing it within the Court's supervisory power. The
15 Ninth Circuit, in the *In re Sealed Affidavits* case in
16 1999 -- 1979, pardon me, said the supervisory power of
17 the courts over their files is an incident of their
18 constitutional function.

19 Now, that means separation of powers. Under the
20 constitutional separation of powers, this Court has
21 supervisory control over that document. We're not in a
22 situation where the executive has exclusive control over
23 it. They have control over it to the extent they've held
24 on to it and they've classified it. We don't question
25 their power to classify, although we do question the

1 information.

2 Certainly if you had questions as to our
3 classified submissions, we'd be happy to answer them for
4 you and to engage in that. But we think there is no way
5 to proceed in this case without running straight into
6 state secrets.

7 Thank you.

8 THE COURT: All right. Thank you.

9 Any response?

10 MR. EISENBERG: One minute, Your Honor.

11 THE COURT: All right. One minute.

12 MR. EISENBERG: Just responding to one point: Do
13 we admit that we don't know whether there was a warrant
14 for the surveillance in this case? No, we do not admit
15 that. Our position is that the public statements in this
16 case, the documentary evidence presented to this Court in
17 the form of declarations, and the document itself
18 demonstrate that there was no warrant. That's why we
19 commenced this litigation.

20 If there had been a warrant in this case, I have
21 to assume that the Government would have told Your Honor
22 in the secret declarations that we are not privy to. And
23 I am going to have to assume further, Your Honor, in
24 light of what has transpired here today, that the
25 Government has not told Your Honor in classified

1 confidence that there were no -- that there were warrants
2 in this case.

3 I think Mr. Hinkle is right: It seems to be true
4 to a moral certainty that there were no warrants. That's
5 what the warrantless surveillance program is all about.
6 So I think we can get beyond that and, hopefully, working
7 together, find a solution around some of the unusual
8 obstacles in this case and get to a decision on the
9 merits.

10 THE COURT: Okay. Thank you.

11 The presentations have been excellent and very
12 helpful to the Court. I expect to have an opinion for
13 you sometime next week. Thank you.

14 THE CLERK: Court is adjourned.

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

Nancy M. Walker

NANCY M. WALKER, CSR, RMR, CRR
Official Court Reporter
Oregon CSR No. 90-0091

9-8-06

DATE