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August 7, 2007

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

Re: *Al-Haramain Islamic Foundation, Inc. v. Bush*, No. 06-36083.

Dear Ms. Catterson:

We respectfully respond to plaintiffs' submission regarding *In re Sealed Case*, No.04-5313 (D.C.Cir. July 20, 2007). The Government does not agree with that decision, and is considering seeking further review. In any event, *In re Sealed Case* does not support plaintiffs.

Plaintiff in *In re Sealed Case* alleged unlawful wiretapping based on a classified 1993 cable, material parts of which had since been declassified and made public. Plaintiff also relied on other unclassified and unprivileged materials. The court of appeals upheld the assertion of the state secrets privilege over classified portions of a pertinent Inspector General report, but held that plaintiff was entitled to proceed with the litigation based on the public evidence, which the record showed could be segregated without risk to national security. Slip op. 9-11.

This case is different in every respect. Plaintiffs here allege unlawful electronic surveillance based on a Sealed Document that has never been made public in whole or in part, is and remains classified in full, is encompassed by the state secrets privilege, and "is non-segregable" (ER 529). *In re Sealed Case* does not suggest that a plaintiff may overcome the state secrets privilege based on purported inferences from the alleged recollection of a document that remains wholly classified, cannot be segregated, and is itself protected by the state secrets privilege.

Although they must show they were surveilled to have standing, plaintiffs' brief argues that because the state secrets privilege prevents them from establishing that they were surveilled, the burden shifts to the Government to prove that the TSP did not intercept their communications.

Nothing in *In re Sealed Case* departs from the settled rule that the burden of establishing standing “remains at all times with the party invoking federal jurisdiction.” *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 655 (9th Cir. 2002).

Nor does *In re Sealed Case* support the argument that standing may be litigated in a secret, *in camera* proceeding. The risk of disclosure of state secrets is too great to permit even *in camera* adjudication of such secrets. *Tenet v. Doe*, 544 U.S. 1, 11 (2005).

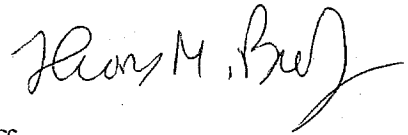
Respectfully submitted,

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