



EISENBERG AND HANCOCK, LLP

August 30, 2007

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

Re: *Al-Haramain Islamic Foundation, Inc. v. Bush*, No. 06-36083
(Argued on August 15, 2007)

Dear Ms. Catterson:

Pursuant to Federal Rule of Appellate Procedure 28(j), we apprise the Court of authorities that have come to our attention since oral argument.

During argument, Judge McKeown analogized the state secrets privilege to the attorney-client privilege. Upon reflection, we believe a better analogy is to the government's privilege to withhold an informer's identity, in that both privileges are similarly limited by their purposes.

The purpose of the informer's privilege is to encourage informers to speak freely by preserving anonymity. Thus, "once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable." *Roviaro v. United States*, 353 U.S. 53, 60 (1957). Similar reasoning applies here. Now that the Document has been disclosed to plaintiffs, they have had the opportunity to change their behavior, and thus the national security purpose for applying the state secrets privilege, as asserted in the Negroonte and Alexander declarations, no longer exists. *See Halpern v. United States*, 258 F.2d 36, 44 (2d Cir. 1958) (similar to informer's privilege, state secrets privilege is inapplicable when disclosure will not endanger national security).

The purpose of the attorney-client privilege, in contrast, is to encourage full and frank communication between counsel and client. *Gomez v. Vernon*, 255 F.3d 1118, 1131 (9th Cir. 2001). That purpose may be furthered by applying the privilege even in cases of inadvertent disclosure. Moreover, the privilege may be waived by inadvertent disclosure, depending on the circumstances. *Id.* Among the factors to be considered are "the reasonableness of precautions taken to prevent disclosure," "the extent of the disclosure," and "the overriding issue of fairness." *Alldread v. City of*

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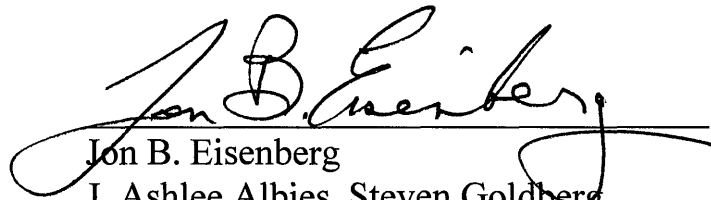
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Grenada, 988 F.2d 1425, 1433 (5th Cir. 1993). Here, the government's carelessness in handling the Document is self-evident; the disclosure was widespread, reaching lawyers, a newspaper reporter, and overseas recipients; and fairness dictates that plaintiffs be permitted to use the Document to establish the standing necessary to vindicate the violation of their statutory and constitutional rights. If the attorney-client privilege were at issue here, it likely would be treated as waived.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jon B. Eisenberg", with a long horizontal flourish extending to the right.

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