

1 MICHAEL F. HERTZ
 Deputy Assistant Attorney General
 2 DOUGLAS N. LETTER
 Terrorism Litigation Counsel
 3 JOSEPH H. HUNT
 Director, Federal Programs Branch
 4 VINCENT M. GARVEY
 Deputy Branch Director
 5 ANTHONY J. COPPOLINO
 Special Litigation Counsel
 6 MARCIA BERMAN
 Senior Counsel
 7 PAUL E. AHERN
 Trial Attorney
 8 U.S. Department of Justice
 Civil Division, Federal Programs Branch
 9 20 Massachusetts Avenue, NW, Rm. 6102
 Washington, D.C. 20001
 10 Phone: (202) 514-4782—Fax: (202) 616-8460

11 *Attorneys for the Government Defendants*

12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA**
 14 **SAN FRANCISCO DIVISION**

16	IN RE NATIONAL SECURITY AGENCY)	No. M:06-CV-01791-VRW
	TELECOMMUNICATIONS RECORDS)	
17	LITIGATION)	GOVERNMENT DEFENDANTS'
)	NOTICE OF SUBMISSION TO
)	COURT OF APPEALS
18	<u>This Document Solely Relates To:</u>)	
)	Chief Judge Vaughn R. Walker
19	<i>Al-Haramain Islamic Foundation et al.</i>)	
	<i>v. Obama, et al.</i> (07-cv-109-VRW))	
20)	
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21)	
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22 On February 27, 2009, the Government Defendants submitted a report to this Court
 23 setting forth the results of its declassification review of information subject to the Government's
 24 state secrets and statutory privilege assertions in this case. *See* Dkt. 577/78.¹ That report
 25

26 _____
 27 ¹ The docket references are to the docket in MDL 06-cv-1791-VRW and for the *Al-*
 28 *Haramain* action (07-cv-00109-VRW) respectively.

1 indicated that the information subject to the Government's privilege assertions remains properly
2 classified. *See id.* The report also indicated that a prior submission by the Government in this
3 case contained an inaccuracy that did not alter the current classification determination of the
4 information subject to the Government's privilege assertions. *See id.* Because details concerning
5 the inaccurate submission are classified, the Government submitted four classified declarations
6 last February for the Court's *in camera, ex parte* review. *See* Dkts. 578-581; 79-82 (notices of
7 lodging four classified declarations).

8 On September 14, 2009, in connection with briefing on pending cross-motions for
9 summary judgment, the Government also submitted an unclassified declaration of the Director of
10 National Intelligence ("DNI"), Dennis C. Blair, stating that the DNI had reviewed the materials
11 submitted with the Government's declassification report and concurring that the inaccuracy at
12 issue did not alter the classification determinations in that report regarding the information
13 subject to the state secrets and statutory privilege assertions in this case. *See* Dkt. 672-1/105-1,
14 ¶ 1-5. The DNI also stated that "[b]ecause discussion of the details concerning this matter would
15 require the disclosure of properly classified information, I can make available to the Court for *in*
16 *camera, ex parte* review additional classified details that address this issue further." *Id.* ¶ 5.^{2/}

17 At the hearing on parties' pending cross-motions on September 23, 2009, the Government
18 raised the foregoing issue with the Court. *See* Transcript, 9/23/09, at 54:25-56:7. We noted that
19 the Court's June 5, 2009 Order (*see* Dkt. 643/96) inhibits the Government from submitting
20 classified information that we wished to bring to the Court's attention,^{3/} and that the Government
21 sought the opportunity to make a further classified submission by the DNI on the inaccuracy

22
23 ² This declaration was submitted with the Government's final reply brief in connection
24 with the pending cross-motions. The plaintiffs had raised the inaccuracy issue in their final
25 opposition/reply brief on the motions. *See* Dkt. 671/104 at 17, n.2.

26 ³ The Court's June 5 Order indicates that the submission of classified information in
27 response to plaintiffs' pending motion for summary judgment would trigger a protective order
28 under which the classified information would be disclosed to plaintiffs' counsel. *See* Dkt.
96/643. The Government continues to object to the entry of any such protective order and to any
disclosure of classified information to the plaintiffs' counsel.

1 issue solely for the Court's *ex parte, in camera* review. *See id.* at 55:1-21. The Government also
 2 noted that this submission would not be offered in response to plaintiffs' pending motion for
 3 summary judgment in order to prevail in this case, but to address the prior inaccuracy issue
 4 further. *See id.* at 56:2-5. The Government also indicated that it may advise the Court of
 5 Appeals of the circumstances surrounding the prior inaccuracy, and that we wanted to avoid a
 6 situation where this Court did not receive access to information available to the Court of
 7 Appeals. *See id.* at 55:22-25. The Court stated its appreciation that this issue had been called to
 8 its attention by the Government and took the matter under consideration. *See id.* at 57:18-22.

9 On November 9, 2009, the Government filed a notice of lodging with the Court of
 10 Appeals for the Ninth Circuit indicating that the Government had lodged with court security
 11 officers an *in camera, ex parte* classified declaration of DNI Blair that addresses the inaccuracy
 12 in a prior submission. *See* Exhibit No. 1 (attached hereto). The Government also lodged for the
 13 Court of Appeals the classified materials that had been made available to this Court in February
 14 2009. The Government remains willing to make the DNI's classified declaration available to this
 15 Court as well solely for *in camera, ex parte* review.

16 Dated: November 10, 2009

Respectfully Submitted,

17 MICHAEL F. HERTZ
 Deputy Assistant Attorney General

18 DOUGLAS N. LETTER
 Terrorism Litigation Counsel

19 JOSEPH H. HUNT
 Director, Federal Programs Branch

20 VINCENT M. GARVEY
 Deputy Branch Director

21 s/ Anthony J. Coppolino
 ANTHONY J. COPPOLINO
 Special Litigation Counsel

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 Trial Attorney

U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW, Rm. 6102
Washington, D.C. 20001
Phone: (202) 514-4782—Fax: (202) 616-8460

Attorneys for the Government Defendants

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 13 **UNITED STATES DISTRICT COURT**
 14 **NORTHERN DISTRICT OF CALIFORNIA**
 15 **SAN FRANCISCO DIVISION**

16	IN RE NATIONAL SECURITY AGENCY)	No. M:06-CV-01791-VRW
	TELECOMMUNICATIONS RECORDS)	
17	LITIGATION)	EXHIBIT NO. 1 TO GOVERNMENT
)	DEFENDANTS' NOTICE OF
18	<u>This Document Solely Relates To:</u>)	SUBMISSION TO COURT OF
)	APPEALS
19	<i>Al-Haramain Islamic Foundation et al.</i>)	Chief Judge Vaughn R. Walker
	<i>v. Obama, et al.</i> (07-cv-109-VRW))	
20)	
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21)	
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U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, N.W. Room 7513
Washington, D.C. 20530-0001

November 9, 2009

BY FEDEX

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

Attention: Molly C. Dwyer, Clerk of Court

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

Dear Ms. Dwyer:

Please find enclosed for filing an original and four copies of the Government's "Notice of Lodging" in the above-captioned matter.

We would appreciate it if you would circulate copies of this filing to the panel that was assigned to this case (Judges Pregerson, Hawkins, and McKeown).

Thank you very much for your cooperation in this matter.

Respectfully submitted,

BETH S. BRINKMANN
Deputy Assistant Attorney General

DOUGLAS N. LETTER

(202)514-3602

THOMAS M. BONDY

(202)514-4825

Attorneys, Appellate Staff

Civil Division, Room 7513

U.S. Department of Justice

950 Pennsylvania Ave., N.W.

Washington, D.C. 20530

A handwritten signature in black ink, appearing to read "Thomas M. Bondy".

cc: Mr. Jon B. Eisenberg, Esq. (BY FEDEX)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AL-HARAMAIN ISLAMIC)
FOUNDATION, INC., <i>et al.</i> ,)
)
Plaintiffs/Appellees,)
)
v.)
)
GEORGE W. BUSH, President of the)
United States, <i>et al.</i> ,)
)
Defendants/Appellants.)
)
)

No. 06-36083

**NOTICE OF LODGING OF *IN CAMERA, EX PARTE*
DECLARATION OF DIRECTOR OF NATIONAL INTELLIGENCE**

The Government hereby respectfully notifies the Court and counsel that it is lodging today with the Court Security Officer copies of an in camera, ex parte classified declaration, dated November 8, 2009, of the Director of National Intelligence, Dennis C. Blair.

We are making the lodging because an issue arose regarding an inaccuracy in an earlier Government submission in the district court that was part of the record before this Court in an interlocutory appeal in this matter bearing the above caption. The case has been remanded to the district court and an appeal is no longer pending before this Court. The lodging does not call for any action by this Court but is

intended to ensure that this Court is informed of the earlier inaccuracy and has available to it classified details with respect to the issue. The Government has informed the district court of the issue, has offered to make available to that court additional classified details in camera, ex parte, and is informing that court that the Government is making the lodging in this Court.

1. Plaintiffs allege that they were unlawfully subjected to surveillance in connection with the now-defunct Terrorist Surveillance Program (“TSP”), the existence of which was publicly disclosed by President Bush in December 2005. The TSP ceased operation in January 2007.

As part of their effort to show that they were subjected to surveillance, plaintiffs sought to rely upon a classified Sealed Document that was inadvertently disclosed to them during an administrative process in which plaintiff Al-Haramain Islamic Foundation, Inc., was designated as a “Specially Designated Global Terrorist.” In the district court, the Government formally asserted the state secrets privilege (and two statutory privileges) with respect to several categories of information, including whether plaintiffs have been subjected to surveillance under any authority, including as alleged under the TSP; information concerning operational details of the TSP; and information contained in and pertaining to the Sealed Document. The Government argued that the state secrets privilege legally precludes

this litigation and, in particular, precludes litigation over whether plaintiffs have standing to sue and over the merits of plaintiffs' claims.

The district court declined to dismiss the case on state secrets grounds and the Government brought an interlocutory appeal under 28 U.S.C. § 1292(b). This Court reversed and remanded. This Court upheld the Government's assertion of the state secrets privilege, ruling that the privilege was properly invoked by the Government and that it encompasses any information tending to reveal, *inter alia*, whether plaintiffs have been subject to alleged surveillance, and the information reflected in the Sealed Document. This Court remanded the case to the district court to consider plaintiffs' argument that the state secrets privilege was, in this context, displaced by the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801, *et seq.* Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007).

2. The litigation of this case continues on remand in the district court. In January 2009, the district court ordered the "Defendants [to] review the Sealed Document and their classified submissions to date in this litigation and determine whether the Sealed Document and/or any of the defendants' classified submissions may be declassified, take all necessary steps to declassify those that they have determined may be declassified," and "serve and file a report of the outcome of that review." Order, In re: National Security Agency Telecommunications Records Litigation, MDL Docket No. 06-1791-VRW (Jan. 5, 2009), at pp. 24-25.

The Government conducted the declassification review as ordered and filed the required report in the district court in February 2009, accompanied by both public declarations and ex parte, in camera classified declarations. Government Defendants' Report On Declassification Review, In re: National Security Agency Telecommunications Records Litigation, MDL Docket No. 06-1791-VRW (Case 07-cv-109) (Feb. 27, 2009). In the report, the Government stated, "as set forth in the attached public declarations, that the classified information at issue in this case remains classified and is not subject to declassification under" the applicable Executive Order. Id. at p. 2. The Government further stated in the report that "[t]he Government's ex parte, in camera classified submissions also address an inaccuracy contained in a prior submission by the Government, the details of which involve classified information that cannot be set forth on the public record. The matter does not alter the current classification determination submitted herewith." Ibid.

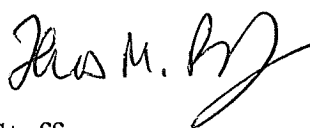
In connection with later pleadings filed in the district court in September 2009, the Government submitted an unclassified declaration of the current Director of National Intelligence, Dennis C. Blair, that addresses the same inaccuracy in the prior submission. Declaration of Dennis C. Blair, Director of National Intelligence (Sept. 14, 2009). Director Blair stated in that unclassified September 2009 declaration that he had specifically reviewed "the information submitted to the Court that addresses the inaccuracy contained in a prior submission in this case by the Government. As

to that particular issue, I concur with the conclusion stated by the Government in its declassification review report that the inaccuracy at issue does not alter the classification determinations made in that report by the ODNI and the NSA regarding information subject to the state secrets privilege and the statutory privilege assertions in this case. Because discussion of the details concerning this matter would require the disclosure of properly classified information, I can make available to the Court for in camera, ex parte review additional classified details that address this issue further.” Id., ¶5.

3. Because the inaccuracy was in an earlier Government submission that was part of the record when the case came before this Court on interlocutory appeal, we are today lodging with the Court Security Officer copies of an in camera, ex parte classified declaration, dated November 8, 2009, of Director of National Intelligence Blair. That declaration provides additional classified information regarding the matter. As noted, the lodging ensures that this Court is informed of the issue and has available to it classified details concerning the issue.

Respectfully submitted,

BETH S. BRINKMANN
Deputy Assistant Attorney General

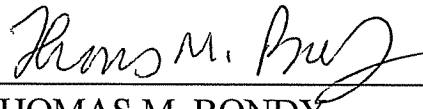
DOUGLAS N. LETTER
(202)514-3602
THOMAS M. BONDY 
(202)514-4825
Attorneys, Appellate Staff
Civil Division, Room 7513
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

NOVEMBER 2009

CERTIFICATE OF SERVICE

I certify that on this 9th day of November, 2009, I served the foregoing notice of lodging by overnight Federal Express delivery to the following counsel:

Jon B. Eisenberg, Esq.
Eisenberg & Hancock, LLP
1970 Broadway, Suite 1200
Oakland, CA 94612
510-452-2581
jon@eandhlaw.com



THOMAS M. BONDY
Attorney for Defendants-Appellants
(202)514-4825