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APPEALS COURT DISMISSES CHALLENGE TO TERRORIST SURVEILLANCE PROGRAM

(Al-Haramain Islamic Found. v. Obama)

The U.S. Court of Appeals for the Ninth Circuit this week dismissed a challenge to the federal government's Terrorist Surveillance Program (TSP), filed by an Islamic charity that has been determined to have ties to al-Qaeda. A federal district court had allowed the case to go forward and ultimately entered a \$2.6 million judgment against the government, in favor of two individuals who claimed they were illegally subjected to electronic surveillance. The Ninth Circuit reversed on the grounds that the federal government enjoyed sovereign immunity from such suits.

The decision was a victory for the Washington Legal Foundation (WLF), which filed a brief in support of the federal government *in Al-Haramain Islamic Foundation, Inc. v. Obama*. WLF argued that the Executive Branch has convincingly demonstrated that allowing the case to go forward would create unacceptable risks that highly classified information would be disclosed, and that the disclosure would cause serious damage to national security. WLF further argued that when Congress adopted the Foreign Intelligence Surveillance Act (FISA) in 1978, it never intended to abrogate the state secrets doctrine in electronic surveillance cases. Because it dismissed the case on sovereign immunity grounds, the appeals court did not need to reach the arguments raised by WLF.

"The judicial branch is simply not the appropriate forum for airing these types of issues," said WLF Chief Counsel Richard Samp following the appeals court's decision. "Those who disagree with the TSP should take their concerns to Congress or the Executive Branch. The National Security Agency (NSA) could not maintain the confidentiality of its affairs if those who oppose its policies were free to air their opposition in an open courtroom," Samp said.

The chief plaintiff was the Al-Haramain Islamic Foundation, a charity based in Saudi Arabia with offices throughout the world. The other two plaintiffs were U.S.-based lawyers for Al-Haramain. They contended that they were the targets of NSA electronic surveillance in 2004, and that the surveillance violated FISA because the NSA failed to obtain a warrant. They sought damages and an injunction against future violations.

The district court conceded that the plaintiffs could not demonstrate conclusively that they had been subjected to warrantless surveillance. But it concluded that they had submitted sufficient evidence to create a prima facie case of surveillance. It also rejected the U.S.'s state secrets defense, holding that Congress, when it adopted FISA in 1978, intended to preempt the state secrets doctrine in the area of electronic surveillance. The court ordered the United States to submit all relevant evidence to the court, to allow it to determine whether the U.S. had violated FISA. When the U.S. continued to press the state secrets doctrine and refused to turn classified documents over to the court, the district court entered what amounted to a \$2.6 million default judgment against the government. The appeals court's ruling vacates that judgment.

The court ruled that the United States should never be deemed to have waived its sovereign immunity from suits seeking damages unless Congress passes a statute containing a clear and express waiver. Because no such statute exists in this case, the court ruled that it must presume that there has been no waiver and thus that it must dismiss the lawsuit.

In its brief urging that the decision below should be overturned and the case dismissed, WLF argued that the plaintiffs lacked standing to sue – because they could not demonstrate that they suffered an injury as a result of the government surveillance. They did not even know with any degree of certainty that any surveillance actually took place. WLF also argued that there was no evidence that Congress, when it adopted FISA in 1978, intended to preempt the state secrets doctrine in electronic surveillance cases.

WLF filed its brief on behalf of itself, three retired military officers, and two organizations. The retired officers are James J. Carey, Rear Admiral, U.S. Navy (Ret.); Norman T. Saunders, Rear Admiral, U.S. Coast Guard (Ret.); and Thomas L. Hemingway, Brigadier General, U.S. Air Force (Ret.). The organizations are the Allied Educational Foundation and the National Defense Committee.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 states. It devotes a considerable portion of its resources to promoting America's national security.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site.