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## How lawyer navigates sea of secrecy in bizarre case

*Among the obstacles: responding to a filing he can't see and writing a brief with none of his notes at hand.*

August 15, 2007 | Henry Weinstein | Times Staff Writer

SAN FRANCISCO -- Oakland lawyer Jon Eisenberg calls the case of Al-Haramain Islamic Foundation v. George W. Bush the strangest he has ever handled. How strange? Eisenberg was required to write one of his briefs in a windowless government office, without notes or lawbooks, under the watchful eye of two federal security guards.

When he got hungry, one of the guards brought him a banana. And when he finished, a security official shredded all his drafts -- and even the banana peel, Eisenberg said.

The brief-writing session was just one facet of the extraordinary secrecy surrounding the Al-Haramain case, Eisenberg said. Al-Haramain is one of dozens of plaintiffs across the nation that have filed suit, claiming they were illegally spied on by the government as part of the war on terror.

In most of the cases, including Al-Haramain's, the government has contended that any disclosure about the surveillance program would reveal state secrets and has refused to say whether the plaintiffs were wire-tapped. It has then moved to dismiss the complaints.

But in the Al-Haramain case, the Treasury Department inadvertently disclosed National Security Agency call logs stamped "top secret" indicating that the charity and two of its attorneys had been surveilled. Last year, U.S. District Judge Garr King ruled that the logs -- referred to in the court papers as "The Document" -- gave the charity standing to sue in federal court.

Today, Eisenberg and Justice Department lawyer Thomas Bondy will each have 20 minutes to argue over King's decision before a three-judge panel of the U.S. 9th Circuit Court of Appeals. Although the argument will be conducted in public, much of the information in the case, including what was in "the Document," remains veiled in mystery.

Many of the government's motions have been filed under seal, and those lodged publicly contain gaps; one government brief reads: "REDACTED TEXT. PUBLIC TEXT CONTINUES ON PAGE 6."

Some of Eisenberg's briefs have been redacted as well, because they are considered too sensitive for the public to see. But although Justice Department lawyers can see Eisenberg's redactions, he isn't allowed to see theirs.

In the Al-Haramain case, Eisenberg has had to respond to a government filing he was not allowed to see.

Asked Monday if there was any way, under the government's interpretation of the law, that someone could contest the surveillance program, a senior Justice Department official replied, "In the current context, no."

Georgetown University constitutional law professor David Cole, who is not involved in this case but has represented individuals in similar situations, said the Al-Haramain case presented a daunting undertaking for a lawyer -- and a threat to the rule of law.

"The whole adversary system of American law is predicated on the notion that both sides get to see the facts and the law that is presented to the judge," Cole said. When one side cannot see all the material presented to the judges by the other side, the professor said, "it cuts out the heart of the adversarial system."

But Chapman University constitutional law professor John Eastman said these cases raised unusual problems because of their sensitive nature. "One thing that is at issue here," he said, "is: How do you secure classified information, including intelligence information during wartime, in a society that is normally, and otherwise, wide open?"

As he prepared for today's oral argument, Eisenberg also called the Al-Haramain case the most difficult of his 27-year legal career, which has included numerous arguments before the California Supreme Court. Eisenberg is the author of "The Right vs. the Right to Die," a nonfiction account of the Terri Schiavo case, in which he helped represent her husband, Michael Schiavo.

The Al-Haramain proceedings turned Kafkaesque in June, he said, when he was told he would have to write a brief in the government office.

The filing was in response to a Justice Department brief that was redacted, he said. In the public portion, a team of government lawyers asserted that the case should be dismissed because of the "state secrets" doctrine. They also contended that the call log does not prove that the plaintiffs were subjects of the NSA's warrantless wiretapping program.

Eisenberg vigorously disputed the public portion of the filing, saying that if the government prevailed, the case would "quietly die without a judicial determination of whether the president. . . has broken the law by conducting warrantless electronic surveillance in violation of the Foreign Intelligence Surveillance Act."

As for what was in the sealed part of the government brief, Eisenberg said, "I could only guess," but he decided to write a response based on his knowledge of the case and his hunches. For a week, he said, "I thought a lot about what I wanted to draft and tried to commit it all to

memory," since he would not be allowed to bring in notes. "That was a challenge. . . . And, yes. . . I was trying to guess at what the government had argued in the secret portions of its 9th Circuit brief and decide how to respond to something I'd never seen. That was a new experience for me."

In a public brief, Eisenberg described cryptically what happened June 26, when he and his co-counsel Steve Goldberg had to write their sealed response brief under what he called "highly unusual and objectionable restrictions imposed by the government." The conditions included preventing them from bringing notes or law books to the drafting session, and barring one of their co-counsel from participating, the brief said. Justice Department lawyer Anthony J. Coppolino sent Eisenberg a letter, denying that the government had attempted to prevent a third lawyer from being present at the briefing session. He also said he "was disappointed by" Eisenberg's characterizations, given "the accommodations that the court security officer went out of her way to make for you."

"Given our many discussions over the past 17 months, it should hardly come as a surprise to you that the classified information at issue has to be treated in accordance with federal requirements," Coppolino said.

He added, "Those requirements are why, just like us, you cannot process the information on your personal computers, store it in your individual homes or offices, or file it merely 'under seal' with unauthorized personnel in unapproved facilities."

Eisenberg, in a series of interviews, gave a more detailed account of the brief-drafting session. The morning of the session, the attorney said, he and Goldberg arrived at the federal courthouse in downtown San Francisco and were met by Justice Department security officer Erin Hogarty in the lobby. She escorted them upstairs to one of the floors used by the U.S. attorney's office. "They were very gracious. They showed us to our special little hush-hush room," Eisenberg recalled.

The room, he said, was windowless, about 8 feet by 10 feet, "lined with wood and metal bookcases which had been completely emptied." The room had a telephone, tables, desk chairs, a laptop computer and a printer.

He and Goldberg had to turn over their cellphones and the batteries from their laptop computers, Eisenberg recalled.

The two men were forbidden from bringing any lawbooks into the room, Eisenberg said. However, he said they were permitted to bring in photocopies of the Foreign Intelligence Surveillance Act of 1978, the law that plaintiffs contend was violated by the wire-tapping program.

As they began composing, two government security guards stood outside the room. Eisenberg said he left twice to go to the bathroom. "Near lunchtime, I started getting hungry. Goldberg stuck his head out the door and told Hogarty. She gave me a banana. . . . She's very nice."

At another point, Eisenberg said, "Hogarty warned us that she could hear our voices inside the room, so we should speak more quietly."

Asked if he had ever before had to write a brief without any notes or lawbooks, Eisenberg responded, "Of course not. Under any other circumstances, that would be malpractice."

Three hours later, "I signed each copy of the brief. I placed them on the table side-by-side, and put the banana peel above them and the earlier drafts to the right of the banana peel," Eisenberg said. "We called in Hogarty. I told her, 'Here's everything, even the banana peel.'"

"We were not allowed to keep a copy of what we wrote," he said. "We were allowed to print out five copies of the final document: one for each judge, one for the government attorneys, and one to be retained" in a Justice Department-supervised safe, Eisenberg said.

Hogarty "said she'd shred the early drafts and the banana peel. Then she collated everything and gave us back our cellphones and my computer battery," Eisenberg recalled. "We thanked her for everything and left the courthouse."

Asked for his thoughts about the experience, Eisenberg quoted his July 3 public brief: "The soul of America's government is transparency -- openness in the affairs of its three constitutional branches." Weeks after Eisenberg filed his two briefs, the public one and the sealed one, the government filed reply briefs -- one public and one under seal. Eisenberg and his colleagues have seen only the public brief.

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