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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

AL-HARAMAIN ISLAMIC FOUNDATION, INC., *et al.*, Plaintiffs, v. GEORGE W. BUSH, *et al.*, Defendants.	No. CV 06-274-KI PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO OBJECTION TO FILING MATERIAL *EX PARTE* AND *IN CAMERA* **ORAL ARGUMENT REQUESTED**

INTRODUCTION

This memorandum, which replies to Defendants' Response To Plaintiffs' Opposition To Defendants' Lodging Of Material Ex Parte and In Camera ("Response"), addresses only the narrow issue that this Court has asked the parties to brief at this time: whether to allow

defendants to lodge *in camera* and *ex parte* a secret declaration in opposition to the Oregonian's motion to unseal the document that plaintiffs filed under seal with their complaint.

During the telephonic hearing of April 25, 2006, this Court said that *only* the lodging of the secret declaration – and not whether to grant the Oregonian's motion and unseal the underlying document – is to be addressed at this time. Transcript of Telephonic Conference Proceedings (Apr. 25, 2006) ("RT"), at 3, 4, 17, 20. Defendants' response, however, blurs the distinction between the secret declaration and the underlying document, insisting that the *document* must be kept under seal – a proposition on which plaintiffs currently take no position – without providing any justification for withholding the *declaration* from plaintiffs. In this reply memorandum, we re-focus the inquiry where it belongs – on the secret declaration and why its *in camera* and *ex parte* filing should be rejected unless the declaration is disclosed to plaintiffs' counsel.

ARGUMENT

I. DEFENDANTS STILL PRESENT NO FACTS TO JUSTIFY THE *IN CAMERA* AND *EX PARTE* FILING OF THEIR SECRET DECLARATION.

At the telephonic hearing, this Court ordered defendants, in their written response, to demonstrate *specific facts* to justify the *in camera* and *ex parte* filing of their secret declaration. The Court explained that defendants had presented "no specifics other than the facts that the document in question is classified and that disclosure would result in harm to the U.S. national interest. That's basically a conclusory statement that the Government has made." RT 18; *see also* RT 23-24 (repeating the court's request for further explanation why "the declaration" is classified).

Defendants have now responded by filing another secret declaration *in camera* and *ex parte*, again supported only by a conclusory statement in which they claim that "the document at

issue remains properly classified and cannot be publicly disclosed without harming national security." Response at 3. This is no better than defendants' previous conclusory statements. It, too, is insufficient to justify the *in camera* and *ex parte* filing.

Defendants also assert that "[t]he *sealed document* was classified because it contains information related to intelligence activities and intelligence sources and methods, as well as scientific, technological, or economic matters relating to the national security, which includes defense against transnational terrorism." Response at 10, emphasis added. This assertion merely parrots the secrecy classification categories prescribed by Executive Order 12958, sections 1.5(c) and (e) – again, without any supporting facts. In any event, this court asked defendants to explain the classification of their *declaration*, not the underlying document filed under seal. They have failed to do so.

At the telephonic hearing, the Court also asked defendants to consider "alternative procedures" to the *in camera* and *ex parte* filing of their secret declaration, such as redactions, protective orders, or security clearances for plaintiffs' counsel. RT 26. In their response, defendants state they "cannot agree to such alternative procedures," asserting that plaintiffs cannot be trusted to maintain secrecy. This mistrust is unreasonable in light of the fact that plaintiffs and their counsel voluntarily filed the document *under seal* and have never publicly disclosed its contents, thereby demonstrating their commitment to protecting national security. Plaintiffs' counsel, as officers of the court and loyal Americans, stand ready to comply with any alternative procedures this Court deems necessary to protect national security. If defendants will not agree to such procedures, this Court has no option but to reject the secret declaration.

II. THIS COURT MAY DISCLOSE DEFENDANTS' SECRET DECLARATION TO PLAINTIFFS AS NECESSARY TO DETERMINE WHETHER THE PRESIDENT'S WARRANTLESS ELECTRONIC SURVEILLANCE PROGRAM IS UNLAWFUL.

Defendants have not yet invoked the state secrets privilege in this case. That privilege, where applicable, allows the government to refuse discovery of classified information that constitutes a military or state secret, after a formal claim of privilege by the head of the department that has control over the matter. *United States v. Reynolds*, 345 U.S. 1, 6 (1953); *Kasza v. Browner*, 133 F.3d 1159, 1165 (9th Cir. 1998). Defendants' response cites numerous cases on the state secrets privilege, and defendants' recent objections to plaintiffs' discovery requests mention the state secrets privilege (as described in plaintiffs' motion to compel discovery, filed simultaneously with this reply), but defendants have not yet submitted any affidavits by their department heads formally claiming the privilege, which is essential to invoke it. *Doe v. Tenet*, 329 F.3d 1135, 1151 (9th Cir. 2003), *overruled on another point in Tenet v. Doe*, 544 U.S. 1 (2005). Therefore the state secrets doctrine cannot justify the *in camera* and *ex parte* filing of defendants' secret declaration.

Absent application of the state secrets privilege, the filing of defendants' declaration is governed by the statutory scheme under which plaintiffs have sued – the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801 *et seq.* – which (1) authorizes an *in camera* and *ex parte* filing "if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States," but (2) allows the Court to disclose portions of the filing to the plaintiffs if "such disclosure is necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. § 1806(f).

This provision in FISA allowing disclosure of defendants' secret declaration to plaintiffs is the authority that defendants insist does not exist. *See* Response at 3 ("Plaintiffs have cited no

authority to the contrary"). Defendants quote a statement in *National Council of Resistance of Iran v. Dep't of State ("NCRI")*, 251 F.3d 192, 208 (D.C. Cir. 2001), that the government "need not disclose the classified information to be presented *in camera* and *ex parte* to the court under the statute," Response at 14, but defendants neglect to mention that "the statute" in *NCRI* was not FISA but the Anti-Terrorism and Effective Death Penalty Act (AEDPA) which, unlike FISA, does not include a provision for disclosure of an *in camera* and *ex parte* filing as necessary to determine the illegality of government conduct. *See* 8 U.S.C. § 1189(b)(4).

Defendants have not submitted an affidavit by the Attorney General as required by FISA and thus have failed to invoke FISA's authorization for an *in camera* and *ex parte* filing. But even if defendants were to remedy the omission, this Court would still retain discretion under FISA to order disclosure as necessary to determine the ultimate issue in this lawsuit – whether the warrantless electronic surveillance of plaintiffs under the President's program was illegal. We believe this Court will be assisted in its exercise of that discretion by a prima facie showing that the President's program is indeed illegal.

We therefore proceed to make that prima facie showing of illegality – not for the purpose of obtaining a ruling on its merits at this time, but for the limited purpose of invoking the provisions of FISA authorizing disclosure of the secret declaration.

III. THERE ARE COMPELLING REASONS TO CONCLUDE THAT THE PRESIDENT'S WARRANTLESS ELECTRONIC SURVEILLANCE PROGRAM IS UNLAWFUL.

A. The Foreign Intelligence Surveillance Act (FISA) prohibits the President's program.

FISA provides a framework for the use of electronic surveillance to acquire foreign intelligence information in the effort to protect the Nation against international terrorism, sabotage, and attack by a foreign power or its agents. 50 U.S.C. § 1801(e)(1). FISA requires the

government to obtain a court order – that is, a warrant – in order to conduct electronic surveillance of a "United States person," meaning a citizen, resident alien or association of such persons. 50 U.S.C. § 1801(i). A federal officer must apply to a judge of the Foreign Intelligence Surveillance Court (FISC), which consists of 11 district court judges, for an order approving electronic surveillance under the provisions of FISA. 50 U.S.C. § 1804(a). The judge may issue the warrant upon a finding of "probable cause to believe that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power." 50 U.S.C. § 1805(a)(3).

Congress enacted FISA in 1978 as a response to past instances of abusive warrantless wiretapping by the National Security Agency (NSA) and the Central Intelligence Agency (CIA). As the House Permanent Select Committee on Intelligence explained at the time: "In the past several years, abuses of domestic national security surveillances have been disclosed. This evidence alone should demonstrate the inappropriateness of relying solely on executive branch discretion to safeguard civil liberties. . . . [T]he decision as to the standards governing when and how foreign intelligence electronic surveillance should be conducted . . . is one properly made by the political branches of Government together, not adopted by one branch on its own and with no regard for the other." H. Rep. No. 95-1283, at 21-22.

There are three narrow exceptions to FISA's warrant requirement:

- The Attorney General may authorize emergency warrantless surveillance for up to 72 hours if necessary to get information "before an order authorizing such surveillance can with due diligence be obtained." 50 U.S.C. § 1805(f)(1). In such instances, a FISC judge must be informed of the decision to employ emergency electronic surveillance, and an application for a FISA warrant must be made "as soon as practicable" within the 72-hour period. 50 U.S.C. § 1805(f).

- The Attorney General may authorize warrantless electronic surveillance for up to one year upon certification that the surveillance is directed only at communications "between or among foreign powers" or non-spoken technical intelligence "from property or premises under the open and exclusive control of a foreign power." 50 U.S.C. § 1802(a)(1)(A).
- The President may authorize warrantless electronic surveillance "for a period not to exceed fifteen calendar days following a declaration of war by the Congress." 50 U.S.C. § 1811.

None of these three exceptions applies here. The President's warrantless electronic surveillance program has taken place entirely outside the framework of FISA.

FISA imposes criminal penalties for its violation, making it an offense to "engage[] in electronic surveillance under color of law except as authorized by statute." 50 U.S.C. § 1809(a)(1). The offense "is punishable by a fine of not more than $10,000 or imprisonment for not more than five years, or both." 50 U.S.C. § 1809(c). FISA also imposes civil liability for its violation. Victims of unlawful electronic surveillance "shall have a cause of action against any person who committed such violation" and may recover actual damages, punitive damages, and reasonable attorney's fees and costs. 50 U.S.C. § 1810.

In a "White Paper" issued earlier this year, the Department of Justice expressly concedes that, shortly after September 11, 2001, the President authorized a secret program to engage in warrantless domestic electronic surveillance for foreign intelligence where one party to the communication is outside the United States. U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described By the President* (Jan. 19,

2006). This program violates FISA, and thus invokes FISA's criminal and civil penalties, absent some other law that trumps FISA.

B. The 2001 Authorization for Use of Military Force does not trump FISA.

The Department of Justice's White Paper asserts two purported justifications for the President to ignore FISA. The first is the Authorization for Use of Military Force Against Terrorists (AUMF), issued by Congress on September 18, 2001, which states: "The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). The White Paper argues that because FISA makes it a crime to conduct electronic surveillance "except as authorized by statute," 50 U.S.C. § 1809(a)(1), and because the AUMF is a statute, the AUMF trumps FISA. There are at least four fatal flaws in this argument.

First, even if a statute like the AUMF could in theory trump FISA, the AUMF itself does not. The White Paper theorizes that, because the Supreme Court has interpreted the AUMF's phrase "necessary and appropriate force" as authorizing detention of enemy combatants captured on a battlefield abroad as a "fundamental incident of waging war," *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004), the AUMF should similarly be interpreted as authorizing domestic electronic surveillance as a fundamental incident of war. But *Hamdi* was limited to incidents of war *on the battlefield*, authorizing detention of persons who were "part of or supporting forces hostile to the United States or coalition partners *in Afghanistan and who engaged in an armed conflict against the United States there*." *Id.* at 516, emphasis added. *Hamdi* affords no excuse for domestic

electronic surveillance off the battlefield and outside the framework of FISA. Indeed, *Hamdi* itself admonished that "a state of war is not a blank check when it comes to the rights of the Nation's citizens." *Id.* at 536. And, given FISA's provisions for court-ordered electronic surveillance upon a simple showing of probable cause to believe a target is a foreign power or agent thereof, 50 U.S.C. § 1805(a)(3), and for 72-hour emergency warrantless surveillance, 50 U.S.C. § 1805(f), the President's program can hardly be considered "necessary" or "appropriate" within the meaning of the AUMF.

Second, even if *Hamdi* is interpreted so expansively as to bring domestic electronic surveillance within the AUMF, the President's program still violates FISA because the program exceeds the AUMF's scope. The AUMF authorizes military force against *the perpetrators of the 9/11 terrorist attacks* – specifically, those who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons . . . ." In contrast, the President's program, as described in the White Paper, sweeps more broadly to include anyone who currently is "linked to al Qaeda or related terrorist organizations," regardless of whether such persons had anything to do with the 9/11 terrorist attacks or al-Qaeda itself. This is a distinction with a difference, because Congress rejected an initial White House draft of the AUMF which would have granted the President power to reach beyond the 9/11 perpetrators and al-Qaeda by more broadly authorizing him "to deter and pre-empt any future acts of terrorism or aggression against the United States." *See* Cong. Rec., 107th Cong., 1st sess., Oct. 1, 2001, pp. S9949-S9955.

Third, post-9/11 Congressional amendments to FISA demonstrate that Congress never intended to authorize foreign intelligence electronic surveillance outside the framework of FISA. Congress has twice amended FISA to accommodate post-9/11 needs – first by deleting a former

requirement for certification that the primary purpose of a surveillance is to gather foreign intelligence information, 115 Stat. 272, §§ 206-108, 214-218, 504, 1003 (Oct. 26, 2001), and then by increasing the emergency warrantless surveillance period from 24 hours to 72 hours, 115 Stat. 1394, § 314(a)(2)(B) (Dec. 28, 2001). Yet Congress has never amended FISA to delete its warrant provisions, thus confirming that those provisions are intended to remain fully operational in governing foreign intelligence electronic surveillance, without being subverted by the AUMF.

Fourth, the legislative history of FISA demonstrates that section 1890(a)(1)'s disclaimer of criminal liability for electronic surveillance "as authorized by statute" was intended to refer only to two statutory schemes – FISA itself and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*, which governs electronic surveillance for criminal law enforcement. As the House Permanent Select Committee on Intelligence explained in its 1978 report on FISA, section 1890(a)(1) makes it a crime to engage in electronic surveillance "except as specifically authorized *in chapter 119 of title III* [of the Omnibus Crime Control and Safe Streets Act of 1968] *and this title*." H. Rep. No. 95-1283(I), at 96, emphasis added. Thus, the phrase "as authorized by statute" does not refer to statutes *other* than FISA and Title III, such as the AUMF. The White Paper's contrary construction of section 1809(a)(1) contradicts a statutory prescription that FISA and Title III "shall be the *exclusive* means by which electronic surveillance . . . may be conducted." 18 U.S.C. § 2511(f), emphasis added.

C. Inherent presidential power does not trump FISA.

The White Paper's second argument for ignoring FISA is a radically expansive claim of inherent presidential power to conduct warrantless domestic electronic surveillance for foreign intelligence purposes. This argument, too, is fatally flawed.

In *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952) – commonly called the *Steel Seizure Case* – Justice Robert Jackson's concurring opinion prescribed a formulation for determining the extent of presidential power according to our Constitution's system of checks and balances. Justice Jackson observed that the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Id.* at 635. Thus, the extent of presidential power depends on the presence or absence of Congressional action:

- "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 587.
- "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 589.
- "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* at 637.

This formulation is not tossed aside in times of war. "Whatever power the United States Constitution envisions for the Executive in exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. at 536. Here, presidential

power is at its "lowest ebb" because Congress has expressly prohibited electronic surveillance outside the framework of FISA and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, by making FISA and Title III "the *exclusive means* by which electronic surveillance . . . may be conducted." 18 U.S.C. § 2511(f), emphasis added. This provision, added to Title III when FISA was enacted, replaced a pre-1978 provision, former 18 U.S.C. § 2511(3), which had stated that the President retained power "to obtain foreign intelligence information deemed essential to the security of the United States." *See* S. Rep. No. 95-604(I), at 64.

By repealing the former provision ceding foreign intelligence surveillance power to the President and replacing it with a provision making FISA and Title III the exclusive means for domestic electronic surveillance, Congress has restricted the President's exercise of the inherent power he claims. "The President's ability to unfurl the banner of foreign affairs and use it to cloak sweeping investigative activities was brought to an end." *United States v. Andonian*, 735 F.Supp. 1469, 1474 (C.D. Cal. 1990), *aff'd and remanded on other grounds*, 29 F.3d 634 (9th Cir. 1994), *cert. denied*, 513 U.S. 1128. "The exclusivity clause makes it impossible for the President to 'opt-out' of the [FISA] legislative scheme by retreating to his 'inherent' Executive sovereignty over foreign affairs." *Id.*

Legislative history demonstrates that this curtailing of presidential power is precisely what Congress intended when enacting FISA. The House Conference Report on FISA said: "The intent of the conferees is to apply the [lowest ebb] standard set forth in" the *Steel Seizure Case*. H. Conf. Rep. No. 95-1720, at 35. The Senate Judiciary Committee said: "The basis for this legislation is the understanding . . . that even if the President has an 'inherent' constitutional power to authorize warrantless surveillance for foreign intelligence purposes, Congress has the

power to regulate the exercise of this authority by legislating a reasonable warrant procedure governing foreign intelligence surveillance." S. Rep. No. 95-604(I), at 16.

Without any legitimate basis for evading FISA, the President's warrantless electronic surveillance program violates Congress's clear statutory mandate designed to prevent abuses of executive power.

IV. THIS COURT MAY INFER THAT THE DECLARATION WAS IMPROPERLY CLASSIFIED TO CONCEAL UNLAWFUL CONDUCT.

An essential premise of defendants' response is their assertion that the secret declaration and underlying document were "properly classified" under Executive Order 12958. Response at 3, 8, 18. But section 1.8(a) of Executive Order 12958 provides that "[i]n no case shall information be classified in order to . . . conceal violations of law . . . ." If acts of warrantless surveillance under the President's program are violations of law, then the classification of defendants' secret declaration is improper if this court determines that the classification was intended to conceal such violations. *Cf. ACLU v. Department of Defense*, 389 F.Supp.2d 547, 564 (S.D.N.Y. 2005) (*de novo* judicial review of propriety of classification in FOIA litigation).

"Culpable intent can be inferred from the defendant's conduct and from the surrounding circumstances." *U.S. v. Labrada-Bustamante*, 428 F.3d 1252, 1260 (9th Cir. 2004). Here, intent to conceal violations of law can be inferred from the following comment by Attorney General Alberto Gonzales at a December 2005 press conference: "We've had discussions with members of Congress . . . about whether or not we could get an amendment to FISA [to authorize warrantless electronic surveillance], and we were advised that that was not likely to be – that was not something we could likely get, certainly not without jeopardizing the existence of the program, and therefore, killing the program." Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden (Dec. 19, 2005). This extraordinary public admission –

that defendants chose not to seek an amendment to FISA but secretly went forward with their program anyway *because they knew Congress would not allow it* – raises a compelling inference that defendants knew the program was prohibited by FISA and thus have perpetrated blanket classifications of documents, including those in the present case, in order to conceal their unlawful conduct.

Defendants' intent to conceal violations of law can also be inferred from Senator Jay Rockefeller's revelation that the few members of Congress who were previously told of the President's secret program were prohibited from discussing it with legal counsel, who would certainly have advised them of the program's unlawfulness. *See* Press Release, "Vice Chairman Rockefeller Reacts To Reports of NSA Intercept Program in United States" (Dec. 19, 2005).

The executive frequently makes improper secrecy classifications. At a 2004 Congressional hearing, a senior defense department official admitted that some 50 percent of classification decisions are unnecessary over-classifications. Hearing before the Subcomm. on Nat'l Sec., Emerging Threats and Int'l Relations of the House Comm. on Gov't Reform Hearing, 108th Cong. 82 (2004). In 2003, former CIA director Porter Goss told the 9/11 Commission that "we overclassify very badly." P. Goss, Remarks before the Nat'l Comm. on Terrorist Attacks upon the United States (May 22, 2003). Former Solicitor General Erwin Griswold has written that "there is massive overclassification" and "the principal concern of the classifiers is not with national security, but with government embarrassment of one sort or another." E. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, Wash. Post, Feb. 15, 1989, at A25. Indeed, in the seminal 1953 Supreme Court case establishing the state secrets privilege, *United States v. Reynolds*, where the government successfully resisted discovery of an Air Force flight accident report that the government claimed contained detailed information about secret

electronic military equipment, it was publicly revealed some 50 years later that the report had contained no such information. *Herring v. United States*, No. 03-CV-5500-LDD, 2004 U.S. Dist. LEXIS 18545, at *17, *26 (E.D. Pa. Sept. 10, 2004).

V. NATIONAL SECURITY WILL NOT BE DAMAGED BY ESTABLISHING THE CONCEDED FACT OF WARRANTLESS SURVEILLANCE.

Defendants insist that public disclosure of information in the sealed document could "cause exceptionally grave damage to United States national security" in that the "[r]elease of even innocuous-seeming information poses the substantial risk that our adversaries would be able to piece this information together with other sensitive information and essentially facilitate the study of this document by those who seek to harm United States national security interests." Response at 7, 10-11.

Plaintiffs do not, however, seek public disclosure of the document, which they themselves filed under seal in order to guard against any such risk. Plaintiffs have no desire to disseminate the document's *contents* if the government legitimately believes such dissemination would harm national security interests. The document's value to plaintiffs is in its confirmation that *plaintiffs were targets of the President's warrantless electronic surveillance program* – which establishes their standing to prosecute this lawsuit.

The President's program is no secret anymore. The Department of Justice, Attorney General Gonzales, former NSA director General Michael Hayden, and the President himself (in a radio address on December 16, 2005) have publicly admitted the program's existence. National security will not be damaged by establishing the conceded fact of the program's existence and identifying three of its victims. Plaintiffs do not seek to use the document for any other reason, and do not seek the disclosure of its contents at this time.

Defendants claim the assessment of national security interests "is reserved exclusively for the Executive" without any judicial oversight. Response at 13. But the Supreme Court has made clear that, even when the state secrets privilege is invoked, there must be some judicial assessment of a national security claim. *United States v. Reynolds*, 345 U.S. at 9-10 ("Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."). As the Ninth Circuit has observed, "courts must be sure that claims of paramount national security interest are presented in the manner that has been devised best to assure their validity . . . . That counterweight role has been reserved for the judiciary. We must fulfill it with precision and care, let we encourage . . . executive overreaching . . . ." *Doe v. Tenet*, 329 F.3d at 1146. And "the greater the party's need for the evidence, the more deeply a court must probe to see whether state secrets are in fact at risk." *Id.* at 1152.

VI. THIS LAWSUIT IS THE NATION'S BEST HOPE FOR A JUDICIAL DETERMINATION WHETHER THE PRESIDENT'S PROGRAM IS UNLAWFUL.

Let us be frank about what defendants are trying to do. This case is unique among the various pending lawsuits challenging the President's warrantless electronic surveillance program in that *only these plaintiffs* possess incontrovertible proof – the document filed under seal – that they were victims of the President's program and thus have standing to sue as "aggrieved person[s]" who were "subjected to an electronic surveillance . . . in violation of" FISA. 50 U.S.C. § 1810. Defendants will likely resist the other pending lawsuits by challenging those plaintiffs' standing, but they cannot do so here in the face of the sealed document. Thus, defendants' first order of business here is to deprive plaintiffs of access to the document and thereby prevent them from showing standing. Failing that, we anticipate that defendants will next attempt to invoke the state secrets privilege and its rule authorizing outright dismissal of an

action where "the very subject matter of the action" is a state secret. See *Kasza v. Browner*, 133 F.3d at 1166. Defendants know they must at all costs try to evade a decision of this case on its merits, on which they surely will lose.

Our constitutional system of checks and balances provides for judicial determination of the burning national issue whether the President's warrantless electronic surveillance program is unlawful. This lawsuit is currently America's best hope for that issue to be decided. It should not be strangled in its crib.

CONCLUSION

Secret court filings are repugnant to a free society. "The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts." *Abourezk v. Reagan*, 785 F.2d 1043, 1060 (D.C. Cir. 1986). "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (Frankfurter, J., concurring). As this Court commented during the April 25 telephonic hearing, "to the extent it can be done without compromising national security, a litigant has a right to know the legal and factual positions taken by the Government so they can respond to them," and judges "should avoid, if possible, receiving secret declarations from one side and basing decisions on facts or arguments not disclosed to the other side." (RT 22.) That, in a nutshell, is why this Court should reject defendants' secret declaration.

It has been said that "successful free societies are built on certain common foundations – rule of law, freedom of speech, freedom of assembly, a free economy, and freedom to worship. . . . Societies that do not lay these foundations risk backsliding into tyranny. When our coalition arrived in Iraq, we found a nation where . . . secret courts meted out repression instead of

justice." This warning about "secret courts" was sounded by the lead defendant in this lawsuit – President George W. Bush – in a speech he gave just three days before the New York Times revealed his warrantless electronic surveillance program. *See* Centre Daily Times (State College, PA), 2005 WLNR 19969736 (Dec. 13, 2005). Truer words were never spoken. But in resisting tyranny we must be careful not to become what we are fighting.

DATED: May 22, 2006

Respectfully submitted,

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