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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' RESPONSE TO DEFENDANTS' MOTION TO DENY ACCESS TO SEALED DOCUMENT

ORAL ARGUMENT REQUESTED

INTRODUCTION

This Court has asked the parties to brief the question whether plaintiffs' counsel should be given access to a document they have filed under seal with the complaint in this case. The Court has also asked both sides to submit proposed protective orders and address possible

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safeguards for consideration in the event the Court decides that plaintiffs' counsel are entitled to access.

Defendants have responded by filing a "Motion to Prevent Plaintiff's Access to the Sealed Classified Document" (May 26, 2006) [Docket No. 39] and "Memorandum in Support of Defendants' Motion" (May 26, 2006) [Docket No. 40] ("Defendants' Motion" and "Defendants' Memorandum," respectively). Defendants have not, however, complied with the Court's request to submit proposed protective orders and address possible safeguards. Instead, defendants insist that this Court is powerless to grant access to plaintiffs' counsel.

According to defendants, Executive control over the document is absolute, unfettered, and unreviewable, a matter of "exclusive prerogative" that "resides entirely within the Executive Branch's power and discretion." Defendants' Memorandum at 3, 17. This vision of the constitutional separation of powers, however, would weaken the Judiciary's status in national security cases to an extent wholly at odds with the Constitution's treatment of the Legislative, Executive, and Judicial branches of government as co-equals, with "a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

Defendants are wrong to arrogate monarchical control over this document, impervious to judicial review. The power of judicial review encompasses classification decisions, which courts may determine are intended to conceal unlawful conduct and are therefore improper – which is the situation here. Further, courts may require access to classified documents as necessary to determine constitutional issues – which also is the situation here. And because defense counsel evidently have access to the document, the constitutional guarantee of due process requires that plaintiffs' counsel also be given such access, so that they may have a fair opportunity to demonstrate plaintiffs' standing to prosecute this lawsuit – which the document establishes.

In claiming that the constitutional separation of powers gives control over the document exclusively to the Executive branch without review by the Judicial branch, defendants have it backwards. Because the document is now in this Court's possession, the separation of powers makes *defendants* unable to dictate to the Court how it shall superintend the document. This Court alone has the power to determine whether, and under what conditions, to grant access to something in its files.

Defendants wrongly imply that plaintiffs Wendell Belew and Asim Ghafoor previously failed to comply with the FBI's instructions regarding their copies of the document. This brief sets the record straight, explaining that Belew and Ghafoor did precisely as they were told.

With this brief, plaintiffs have submitted a proposed protective order which contains multiple provisions that will amply safeguard the document against public disclosure. With those safeguards in place, the Foreign Intelligence Surveillance Act (FISA) authorizes this Court to grant plaintiffs' counsel access to the document.

ARGUMENT

I. THE CONSTITUTIONAL SEPARATION OF POWERS VESTS THIS COURT WITH EXCLUSIVE CONTROL OVER THE DOCUMENT.

A. The Executive branch cannot intrude on Judicial branch control over things in court custody.

Defendants' access motion correctly identifies the pivotal legal doctrine here as the constitutional separation of powers. *See* Defendants' Memorandum at 10. Yet it is precisely that doctrine which vests this Court, not defendants, with the decision whether plaintiffs' counsel should be given access to the document *and* which prohibits defendants from usurping that decision.

The Framers of the Constitution regarded the separation of powers as "a self-executing

safeguard against the encroachment or aggrandizement of one branch [of government] at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). "[T]he separation of powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States*, 517 U.S. 748, 757 (1996). By their motion to prevent access, defendants are seeking to impair this Court's performance of its constitutional duties by wielding control over a document in the Court's files.

The critical point is that the document is now in *this Court's custody*, not the exclusive custody of defendants, by virtue of its having been filed with the Court. "Every court has supervisory power over its own records and files." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). "So long as they remain under the aegis of the court, they are superintended by the judges who have dominion over the court." *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 141 (2d Cir. 2004).

This supervisory power of the courts over their files is "an incident of their constitutional function." *In re Sealed Affidavit(s) To Search Warrants Executed on February 14, 1979*, 600 F.2d 1256, 1257 (9th Cir. 1979); *see also Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 461 n. 1 (10th Cir. 1980) ("There are no statutes or rules that seem to limit or preclude the exercise of this power."). Thus, control over things like this document in the Judicial branch's custody is a Judicial power which the Executive cannot impair.

In effect, the constitutional separation of powers creates a zone of asylum for court filings, protected from intrusion by the Executive and Legislative branches of government. An apt analogy is the way American embassies provide asylum for political dissidents. Like the Hungarian anti-communist Jozsef Cardinal Mindszenty, who found refuge in the American Embassy in Budapest from 1956 to 1971, safe from the Hungarian government, this document

revealing unlawful Executive conduct has found refuge in this Court's files, safe from the defendants whose unlawful conduct the document reveals.

Defendants' motion is reminiscent of the FBI's recent intrusion into the halls of Congress to seize files concerning a member of Congress under FBI investigation, provoking an uproar on both sides of the aisle. Congress is resisting that intrusion as violating the separation of Executive and Legislative powers. Similarly, this Court should resist the Executive's attempted intrusion on Judicial power here by dictating who shall have access to the Court's files.

B. Defendants' authorities on Executive control over classified documents in Executive custody are inapposite.

Defendants' motion cites numerous cases for the proposition that, because of the constitutional separation of powers, the Judiciary cannot order the Executive to grant a person access to classified documents in Executive custody. *See* Defendants' Memorandum at 10-11. That proposition, and those cases cited, are completely off the mark because plaintiffs are seeking access to something in Judicial custody, not Executive custody.

Defendants have the separation of powers issue backwards. The question here is not one of Judicial interference with Executive power – that is, whether this Court would violate the separation of powers by ordering defendants to grant plaintiffs' counsel access to a document under Executive control. The question is one of Executive interference with Judicial power – that is, whether defendants do violence to the separation of powers by attempting to deny plaintiffs' counsel access to a document under Judicial control. The answer to the latter question – the one presented here – is plainly yes.

C. This Court's access ruling will have judicial immunity.

At the March 21, 2006 teleconference in this case, when defense counsel first sought control over the document via its proposed seizure by the FBI, this Court asked defense counsel:

"What if I say I will not deliver it to the FBI, Mr. Coppolino?" Transcript of Teleconference at 16 (March 21, 2006) [Docket No. 11]. The answer was simple: Defendants could have done nothing about it, other than to launch, then and there, a losing separation-of-powers battle between the Executive and Judicial branches of government. Defense counsel wisely retreated, asking only that the document be "secured in a proper fashion" and telling the Court "we obviously don't want to have any kind of a confrontation with you." *Id.*

Now, defendants have renewed their collision course with the separation of powers, seeking to impair this Court in the performance of its constitutional duties by controlling access to a document in the Court's files. The Court might similarly ask: "What if I rule that plaintiffs' counsel may have access to the document?" The answer is that the ruling will be a judicial act protected by the immunity afforded the Judicial branch of government, which is essential to the "independence without which no judiciary can be either respectable or useful." *Bradley v. Fisher*, 80 U.S. 335, 347 (1871) ("it is a general principle of the highest importance to the proper administration of justice that a Judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions"); *see also Forrester v. White*, 484 U.S. 219, 227 (1978). Defendants can do nothing except mount an appellate challenge to the ruling and continue their assault on the separation of powers in the Ninth Circuit.

II. WHATEVER CONTROL DEFENDANTS MIGHT RETAIN OVER THE DOCUMENT IS SUBJECT TO JUDICIAL REVIEW.

If this Court were to determine that defendants somehow retain some vestige of control over the document even after it has found refuge in the Judicial branch, the Court would then have to determine the extent to which Executive control is subject to judicial review. Defendants contend that extent is zero – that is, they have all the power and this Court has none. They are wrong. Case authority establishes both that courts may determine the propriety of a document's

classification and that courts may require access to classified documents as is necessary to adjudicate constitutional issues.

A. This Court may determine the propriety of the document's classification.

Defendants assert repeatedly in their access motion that the document was "properly" classified. *See* Defendants' Memorandum at 3, 4, 9. But as plaintiffs previously explained, *see* Plaintiffs' Sur-Response to Defendants' Response to Plaintiffs' Opposition to Filing of Material Ex Parte and In Camera (May 22, 2006) [Docket No. 34] at 13-15, this Court has power to determine whether a document's classification was improper because intended to conceal unlawful conduct. *See* Executive Order 12958, § 1.8(a) ("[i]n no case shall information be classified in order to . . . conceal violations of law"); *Snepp v. United States*, 444 U.S. 507, 513 n. 8 (1980) (approving pre-publication classification procedure that was "subject to judicial review"); *McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983) ("courts must assure themselves that the reasons for classification are rational and plausible ones"); *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982) (*de novo* judicial review of propriety of classification in FOIA litigation); *ACLU v. Department of Defense*, 389 F.Supp.2d 547, 564 (S.D.N.Y. 2005) (same); *American Library Association v. Faurer*, 631 F.Supp. 416, 423 (D.D.C. 1986) (*de novo* judicial review of classification decision in action seeking access to library documents).

The mere invocation of "national security" is not in itself enough to justify withholding information. *Coldiron v. Dep't of Justice*, 310 F.Supp.2d 44, 53 (D.D.C. 2004). Courts need not "blindly accept the conclusory assertions of the government which are not supported by the evidence." *Dunaway v. Webster*, 519 F.Supp. 1059, 1066 (N.D. Cal. 1981). Yet that is all defendants offer in their quest to deny plaintiffs' counsel access to this document. They merely

repeat, once again, their unsupported conclusory assertion that this litigation threatens national security. *See* Defendants' Memorandum at 9.

If defendants retain any control over the document, this Court must decide whether the document was improperly classified to conceal unlawful conduct, and thus, necessarily, whether the President's warrantless electronic surveillance program is unlawful – which is the *last* thing defendants want decided. Perhaps that is why, in making this motion, they have not asserted the so-called state secrets privilege for the document, evidently hoping to evade the Judicial oversight invoked by an assertion of that privilege. *See United States v. Reynolds*, 345 U.S. 1, 10 (1953) ("Judicial control over the evidence in a [state secrets privilege] case cannot be abdicated to the caprice of Executive officers"). But that tactic cannot work for purposes of this motion because, regardless of the state secrets privilege, this Court may determine the propriety of the document's classification.

In any case, resolution of defendants' access motion does not require this Court to determine that the document was improperly classified, since the constitutional separation of powers gives the Court control over the document as part of its files, free from intrusion by defendants.

B. This Court may require access to the document as necessary to determine constitutional issues.

Whatever vestige of control defendants might retain over access to the document is also subject to judicial review for denial of plaintiffs' constitutional rights. *See Webster v. Doe*, 486 U.S. 592, 604 (1988) (court may balance litigant's need for access to proof supporting constitutional claim against government's interest in protecting classified information). "Particularly where constitutional claims are at issue," courts must "make every effort to ascertain whether the claims in question can be adjudicated while protecting the national

security." *Doe v. Tenet*, 329 F.3d 1135, 1153 (9th Cir. 2003), *overruled on another point* in *Tenet v. Doe*, 544 U.S. 1 (2005). "[W]here constitutional issues are raised, the courts must consider the full panoply of alternative litigation methods . . . before concluding that the only alternative is to dismiss the case and thereby deny the plaintiff's claimed constitutional rights." *Id.* Thus, attorney access to evidence may be afforded "in a manner that avoids public exposure of any secret information," employing safeguards such as "using *in camera* proceedings, sealing records, and requiring security clearances for court personnel and attorneys with access to the court records." *Id.* at 1148.

The unpublished opinion defendants cite for their proposition that this Court lacks power to review their determinations regarding access to classified documents, *In re United States*, 1 F.3d 1251 (Table), 1993 WL 262656 (Fed. Cir. 1993), *see* Defendants' Memorandum at 10, is inapposite for two reasons. First, unlike here, the issue in *In re United States* was not *whether* the plaintiffs' representatives should have access to classified material, but *how many* individuals should have access – the government limited the number to 10, while the plaintiffs wanted 17 to have access. *In re United States*, 1993 WL 262656 at *1-*3. Defendants in the present case want to *completely deprive* plaintiffs of access to the document, rather than limit the number of individuals with such access. Second, unlike here, the plaintiffs' need for access in *In re United States* was not constitutionally based. Plaintiffs' complaint asserts, in addition to violation of FISA, infringement of their constitutional rights under the First, Fourth and Sixth Amendments. This Court should grant their attorneys safeguarded access to the document as necessary to determine those issues.

Furthermore, as we next demonstrate, access in and of itself is constitutionally required as a matter of due process.

III. DUE PROCESS REQUIRES THAT PLAINTIFFS' COUNSEL BE GIVEN ACCESS TO THE DOCUMENT.

A. Plaintiffs must be afforded a fair opportunity to demonstrate standing.

The Fifth Amendment requires "[n]otice and an opportunity to be heard," which are the "hallmarks of procedural due process." *Guenther v. Comm'r of Internal Revenue*, 889 F.2d 882, 884 (9th Cir. 1989), *appeal after remand*, 939 F.2d 758 (9th Cir. 1991); *see LaChance v. Erickson*, 522 U.S. 262, 266 (1998); *U.S. v. Alisal Water Corp.*, 431 F.3d 643, 657 (9th Cir. 2005). A plaintiff's opportunity to be heard is unconstitutionally impaired when only defense counsel are given access to evidence before the court. Because "[t]he openness of Judicial proceedings serves to preserve both the appearance and the reality of fairness," the "main rule" is that "a court may not dispose of the merits of a case" based on secret filings available to one litigant but not the other. *Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986). "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Joint Anti-Fascists Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring).

The document at issue here removes a potential obstacle – the question of standing – to this Court's determination whether the President's warrantless electronic surveillance program is unlawful. The document confirms that plaintiffs were surveilled without a warrant and thus are aggrieved. Plaintiffs would be denied a civil remedy that Congress has expressly prescribed in FISA, 50 U.S.C. § 1810 – and thus plaintiffs would be denied due process – if they could not use the document to show their standing to obtain that remedy.

B. Because defense counsel have access to the document, plaintiffs' counsel too must have access.

The unfairness to plaintiffs that would result from refusing their counsel access to the

document is underscored by the fact that defense counsel evidently can freely review the document. This Court has asked defendants to tell the Court "what access the defense has to [the document], has had to it and expects to have in the future." Transcript of Teleconference at 10-11 (Apr. 7, 2006) [Docket No. 22]. In response, defense counsel say that "government counsel must have access to such material in order to defend these agencies" and "[s]uch is the case here." Defendants' Memorandum at 14-15 n. 10. Thus, defense counsel effectively admit that they have access to the document. To deny plaintiffs' counsel the same access would unconstitutionally impair their ability to establish the standing that paves the way to a hearing on the merits of this case.[1]

We next demonstrate how access is not just constitutionally compelled but also statutorily authorized.

IV. THE FOREIGN INTELLIGENCE SURVEILLANCE ACT AUTHORIZES THIS COURT TO GRANT PLAINTIFFS' COUNSEL ACCESS TO THE DOCUMENT.

A. Section 1806(f) affords this Court discretion to grant access.

Section 1806(f) of FISA, 50 U.S.C. § 1801 *et seq.*, expressly authorizes this Court to

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[1] Defendants may have an additional unfair tactical advantage here, aside from free access to the document: It seems quite possible they are monitoring privileged communications among plaintiffs' counsel regarding this litigation. A newspaper article describing a recent hearing in another lawsuit challenging the President's warrantless electronic surveillance program reports an alarming comment by Anthony J. Coppolino, counsel for defendants in that case and here: "Mr. Coppolino indicated that some plaintiffs may have more reason to be concerned than others. Lawyers who represent suspected terrorists, he said, 'come closer to being in the ballpark of the terrorist [warrantless] surveillance program.'" Adam Liptak, *U.S. Asks Judge to Drop Suit on N.S.A. Spying*, New York Times, June 13, 2006, at A15. If any of the plaintiffs are, in defendants' view, "suspected terrorists," then defendants must view plaintiffs' counsel as "lawyers who represent suspected terrorists" and who therefore are "closer to being in the ballpark" of warrantless electronic surveillance. Mr. Coppolino has all but identified plaintiffs' counsel as likely targets of warrantless surveillance – which means defendants may be surveilling counsel's email and telephone communications regarding this litigation. It goes without saying that we object to such unlawful conduct, and we ask the Court to request defendants to confirm or deny that it is happening here.

grant the access that due process requires.

Section 1806(f) applies, in pertinent part, "[w]henever any motion or request is made by an aggrieved person . . . to . . . obtain . . . materials relating to electronic surveillance or to . . . obtain . . . information obtained or derived from electronic surveillance under this chapter . . . ." If the Attorney General files an affidavit asserting that access to such materials would harm national security, the statute allows the Court to review the materials *in camera* and *ex parte*. The statute also gives the Court discretion to afford opposing counsel access to the materials: "[T]he court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the . . . materials" as "is necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. § 1806(f). The decision whether to allow such disclosure "is made by a district judge on a case by case basis." *In re Sealed Case*, 310 F.3d 717, 741 n. 24 (For. Intel. Surv. Rev. 2002).

Defendants claim "the decision to grant or deny access to [national security] information rests exclusively within the discretion of the Executive." Defendants' Memorandum at 10. For that proposition, they cite *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988). But *Egan* makes clear that Congress, too, has a role to play in controlling access to national security information. According to *Egan*, "*unless Congress specifically has provided otherwise*, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 530, emphasis added. In the present case, Congress has specifically provided for Judicial control over access to this document via section 1806(f), which expressly affords this Court discretion to grant plaintiffs' counsel access to the document as is necessary to determine the legality of the President's warrantless electronic surveillance program.

Plaintiffs previously asserted section 1806(f) at pages 4-5 of Plaintiffs' Sur-Response to Defendants' Response to Plaintiffs' Opposition to Filing of Material Ex Parte and In Camera (May 22, 2006) [Docket No. 34] concerning defendants' secret declaration. Defendants, in their responsive sur-reply, said nothing at all about section 1806(f). Do they mean to tacitly concede that the statute applies here? If so, then this Court may freely grant plaintiffs' counsel access to the document, since the Attorney General has not filed an affidavit seeking to prevent such access; and even if the Attorney General were to file such an affidavit, section 1806(f) still gives this Court discretion to afford plaintiffs' counsel access to the document.

If, however, defendants take the position that the statute does *not* apply here because the document does not contain "information obtained or derived from electronic surveillance under this chapter," 50 U.S.C. § 1806(f), then defendants will have effectively conceded that plaintiffs were surveilled outside the structure of FISA – that is, without a warrant – thus establishing plaintiffs' standing to prosecute this lawsuit. We invite defendants to say whether they think section 1806(f) applies here. If it does, it gives this Court discretion to grant plaintiffs' counsel access to the document and to any other related material regarding the surveillance of plaintiffs; if it does not, then plaintiffs must have been surveilled without a warrant and thus have standing to sue defendants for violating FISA and infringing plaintiffs' constitutional rights.

B. Granting access poses no risk to national security.

This Court should exercise its discretion to grant plaintiffs' counsel access to the document "under appropriate security procedures and protective orders," 50 U.S.C. § 1806(f), because such access, appropriately safeguarded, poses no risk to national security.

Defendants contend access poses a "considerable risk" of the document's "further disclosure." Defendants' Memorandum at 9. That contention is absurd in light of the facts that

(1) in the 20 months since the FBI retrieved copies of the document, its contents have never been publicly disclosed, and (2) plaintiffs were careful to prevent public disclosure by filing the document with this Court under seal. If there were any risk of further disclosure, it would have already happened.

Defendants claim that "[p]roviding private counsel access to classified information presents a considerable risk that classified information will be deliberately disclosed to their clients, who themselves may be persons who pose security risks." Defendants' Memorandum at 15. That claim too is nonsense, since the document has already been disclosed to clients Wendell Belew and Asim Ghafoor, who possessed it for two months before promptly turning it over to the FBI agents on request. And defendants are wrong to imply that Belew and Ghafoor failed to comply with the FBI's instructions. *See* Defendants' Memorandum at 3, 6. They gave the FBI their copies, both paper and electronic, and since then have complied fully with the FBI's instructions; specifically, they "have not disseminated that document to any person in any way." Belew Decl. ¶ 6 (Exhibit 2); Ghafoor Decl. ¶ 7 (Exhibit 3). Neither was the source of the copy filed with this Court.

As defendants concede, they never interviewed Soliman al-Buthi and Pirouz Sedaghaty, *see* Defendants' Memorandum at 5 n. 5 – even though Lynne Bernabei, one of the attorneys for Al-Haramain Islamic Foundation, Inc., had informed the FBI when she returned her copy of the document that al-Buthi and Sedaghaty also had copies. *See* Bernabei Decl. ¶ 9 (Exhibit 1). Thus, defendants never asked al-Buthi and Sedaghaty to return their copies of the document.

Defendants quote one of their declarants, John F. Hackett, for the proposition that "[f]urther disclosure would entail widespread distribution of and attention to the document." Defendants' Memorandum at 9; *see* Hackett Decl. ¶ 12. But Hackett was speaking only of the

purported danger from disclosing the document to the news media pursuant to the Oregonian's motion to unseal the document, not of any danger from granting access to plaintiffs' counsel.

Defendants also quote an assertion in Hackett's declaration that "[e]ven the release of what might appear to the untrained eye as innocuous information poses the substantial risk that our adversaries will be able to piece together sensitive information from other sources." Hackett Decl. ¶ 12; *see* Defendants' Memorandum at 9. This assertion echoes the "mosaic" theory of the state secrets privilege, which holds that "if seemingly innocuous information is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure and the court cannot order the government to disentangle this information from other classified information." *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998). But because defendants have not yet asserted the state secrets privilege – and, specifically, have made no showing that the innocuous information in this document should be treated as part of a classified mosaic – the mosaic theory is not yet before this Court, so we do not address it here.

Defendants claim that plaintiffs' counsel have "described the document in inappropriate ways" by saying it is relatively benign and does not implicate national security concerns. *See* Defendants' Memorandum at 6. These are hardly inappropriate descriptions, however, for they reveal nothing of the document's physical appearance or contents. They are merely non-informational conclusions, which this Court can draw for itself by reviewing the document.

For the Court's convenience, because the document is currently being held off-site in a sensitive compartmented information facility (SCIF) at the FBI's Portland office, plaintiffs' counsel Thomas H. Nelson files herewith under seal his declaration describing the document as he recalls seeing it. Mr. Nelson's declaration confirms that the document's substantive contents are relatively benign and do not implicate national security concerns. *See* Nelson Decl. ¶ 3

(Exhibit 4). It also explains how the document suggests defendants understood that the President's warrantless electronic surveillance program violates FISA. *See id.* ¶ 4.

Finally, defendants say they would refuse access even to "an individual [who] appears trustworthy and otherwise meets background eligibility requirements for access." Defendants' Memorandum at 12. That statement demonstrates defendants are not really worried about the trustworthiness of plaintiffs' counsel. The only "considerable risk" about which defendants are worried is that this Court will reach the merits of this case and determine that the President's warrantless electronic surveillance program is unlawful.

V. ACCESS IS ESSENTIAL TO THIS COURT'S DETERMINATION OF PLAINTIFFS' STANDING.

A. Defendants' refusal to concede that plaintiffs were surveilled without a warrant makes access to the document essential to show standing.

Plaintiffs previously stated, at page 15 of their reply memorandum concerning defendants' secret declaration, that they need access to the document for the purpose of confirming the existence of the President's warrantless electronic surveillance program and "identifying three of its victims," and that they "do not seek to use the document for any other reason." Defendants say in their access motion that they take this to mean "neither Plaintiffs nor their counsel has any apparent need for continued access to the *contents* of the document." Defendants' Memorandum at 18 (emphasis in original).

Plaintiffs meant nothing of the sort. Their counsel need access to the document's contents precisely *because* the document identifies the plaintiffs as victims of warrantless electronic surveillance – a fact which defendants say in their access motion they "do not concede." Defendants' Memorandum at 19. That refusal to concede is precisely why plaintiffs' counsel need access.

Plaintiffs also need the document to help make their showing of defendants' culpable intent. As plaintiffs previously explained, *see* Plaintiffs' Sur-Response to Defendants' Response to Plaintiffs' Opposition to Filing of Material Ex Parte and In Camera (May 22, 2006) [Docket No. 32] at 13-14, this Court may infer from public comments by Attorney General Alberto Gonzales (admitting that defendants chose not to ask Congress to amend FISA to allow their warrantless surveillance because they knew Congress would not allow it) and Senator Jay Rockefeller (revealing that the few members of Congress who were previously told of the warrantless surveillance were prohibited from discussing it with legal counsel) that defendants knew they were violating FISA. The document bolsters that inference. *See* Nelson Decl. ¶ 4 (Exhibit 4).

B. Defendants' refusal to submit a proposed protective order or address possible safeguards leaves this Court no choice but to grant access with whatever safeguards the Court deems suitable.

During the April 7, 2006 teleconference, the Court asked both sets of parties to submit proposed protective orders in the event the Court determines that plaintiffs' counsel are entitled to access. Transcript of Teleconference at 8-9 (April 7, 2007) [Docket No. 22]. The Court also noted that "the cases indicate that the court can fashion creative solutions in the interest of justice for classified information problems." *Id.* at 22-23. The Court mentioned various possible safeguards, including redactions, protective orders, a security clearance for plaintiffs' lead attorney, and "[a] statement [by defendants] admitting . . . facts relevant to the claims being made by the plaintiff that the classified information would tend to prove." *Id.* at 24.

Defendants have essentially ignored the Court's request. They have not submitted a proposed protective order. They have not addressed the possible safeguards suggested by the Court. They refuse even to consider security clearances for plaintiffs' counsel. *See* Defendants'

Memorandum at 9, 12, 17. They leave this Court no choice but to grant plaintiffs' counsel access to the document with whatever safeguards the Court deems suitable.

With this brief, plaintiffs have submitted a proposed protective order, attached as Exhibit 5, based on the opinion in *United States v. Musa*, 833 F.Supp. 752 (E.D. Mo. 1993), which the Ninth Circuit cited with approval in *Doe v. Tenet*, 329 F.3d at 1148. This proposed protective order includes (1) a provision that the document and any notes containing classified information will not be removed from its secure repository; (2) a requirement that any pleadings discussing the document's contents shall be filed under seal; (3) a prohibition against disclosure of the document to unauthorized persons; and (4) a provision for punishment of plaintiffs' counsel by contempt proceedings and criminal prosecution in the event of an unauthorized disclosure.

These are ample safeguards. The threat of imprisonment is alone quite enough to ensure against the document's further disclosure by plaintiffs' counsel, separate and apart from the seriousness with which they take their responsibilities as officers of the Court and loyal Americans. And Mr. Nelson's declaration shows how it is possible to redact the document so as to prevent any threat to national security. *See* Nelson Decl. ¶ 5 (Exhibit 4).

There could be a simple resolution to defendants' access motion, in this Court's suggestion of "[a] statement [by defendants] admitting . . . facts relevant to the claims being made by the plaintiff that the classified information would tend to prove." Transcript of Teleconference at 24 (Apr. 7, 2006) [Docket No. 22]. If defendants were to submit a statement admitting that they conducted warrantless electronic surveillance of the plaintiffs, knowing that FISA required a warrant, then plaintiffs would cede access to the document. Unfortunately, such resolution seems unlikely, given defendants' insistence in their access motion that they will not concede what the document proves.

CONCLUSION

There is no mistaking defendants' agenda, which is to prevent plaintiffs from using the document to prove standing – and thus to evade this Court's determination whether the President's warrantless electronic surveillance program is unlawful. That would be a national tragedy. According to defendants, access to the document can be justified only by a "need to know" its contents. Defendants' Memorandum at 13. We submit that the Nation has a "need to know" whether the President, the NSA and the FBI have been routinely violating federal law requiring a warrant for electronic surveillance of Americans. Plaintiffs' counsel must have access to the document to pave the way to a Judicial determination of this profoundly important issue.

DATED: June 16, 2006

Respectfully submitted,

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