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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AL-HARAMAIN ISLAMIC FOUNDATION, *et al.*,

Plaintiffs,

v.

GEORGE W. BUSH, *et al.*,

Defendants.

CV. 06-274- KI

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR ORDER COMPELLING DISCOVERY

PUBLIC VERSION

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(U) INTRODUCTION

(U) Through their First Set of Interrogatories, Plaintiffs Al-Haramain Islamic Foundation, *et al.*, seek confirmation that they have been subject to alleged electronic surveillance by the National Security Agency. *See* Pls.' Mot. for Order Compelling Discovery, Ex. 1 (May 22, 2006) [Docket Nos. 35 & 36] (hereinafter, "Pls.' Mem."). Plaintiffs assert that they do not want the "substance of their alleged electronic surveillance," but only (1) confirmation that such surveillance was conducted; (2) the dates of such surveillance; and (3) confirmation of the absence of warrants from the Foreign Intelligence Surveillance Court, or any other court. *See id.* at 2.

(U) Any response to these Interrogatories is precluded by the privilege protecting military and state secrets, *i.e.*, the "state secrets privilege." The state secrets privilege protects information vital to the Nation's security, and it has been properly invoked here by the appropriate agency head with control over these matters — the Director of National Intelligence. *See* Declaration of John D. Negroponte, Director of National Intelligence (both public and *in camera* versions, asserting state secrets and statutory privilege); *see also* Declaration of Lieutenant General Keith B. Alexander, Director, National Security Agency (both public and *in camera* versions, asserting statutory privilege); *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *Kasza v. Browner*, 133 F.3d 1159, 1165-66 (9th Cir.), *cert. denied*, 525 U.S. 967 (1998).

(U) In December 2005, the President publicly acknowledged that he authorized the National Security Agency to intercept the content of certain communications as to which there are reasonable grounds to believe that (1) the communication originated or terminated outside the United States, and (2) a party to such communication is a member of al Qaeda, a member of a group affiliated with al Qaeda, or an agent of al Qaeda or its affiliates. *See* Press Conference of President Bush (Dec. 19,

2005).[1/] However, whether or not an individual has been subject to surveillance under this "Terrorist Surveillance Program" ("TSP") remains a state secret. Moreover, Plaintiffs' asserted need for these answers in order to maintain their challenge to the TSP is insufficient to overcome Defendants' proper invocation of the state secrets privilege.

(U) Accordingly, Plaintiffs' Motion for Order Compelling Discovery must be denied.

(U) BACKGROUND

(U) Plaintiffs' Complaint in this action principally challenges the lawfulness of, and seeks to permanently enjoin, at least as applied to them, an intelligence-gathering program undertaken by the National Security Agency and described by the President in December 2005 as essential to detecting the threat of foreign terrorist attacks on the United States (the "Terrorist Surveillance Program"). *See* Compl. (Feb. 28, 2006) [Docket No. 1]. On April 10, 2006, Plaintiffs served their First Set of Interrogatories in support of their case. *See* Pls.' Mem., Ex. 1. In Interrogatories Nos. 1-20, Plaintiffs ask the following series of detailed questions as to each of the two individual Plaintiffs, Wendell Belew and Asim Ghafoor, as well as for the attorneys, directors, or officers of Al-Haramain Islamic Foundation ("AHF") in Oregon:

- Was "electronic surveillance" conducted of this individual from January 1, 1999 onward, by any of the Defendants?
- If "electronic surveillance" was conducted of this individual, list each date when such "electronic surveillance" was conducted.
- If "electronic surveillance" was conducted of this individual, list the specific Defendant or Defendants who conducted such surveillance.
- If "electronic surveillance" was conducted of this individual, was a warrant issued under the Foreign Intelligence Surveillance Act ("FISA") for each

[1] Available at http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html.

date when "electronic surveillance" was conducted?

- If "electronic surveillance" was conducted of this individual, and no warrant was issued pursuant to FISA, was a warrant issued by any court other than the FISA court, for each date when "electronic surveillance" was conducted?

See Pls.' Mem., Ex. 1 (Interrogatories Nos. 1-20).

(U) Plaintiffs further served Interrogatories concerning the sealed classified document at issue in this case, asking: (1) on what date the decision was made "to classify as SCI (sensitive compartmented information)" this document; (2) which government officials or employees made this decision as to the SCI designation; (3) on what date was the decision made to classify this document "in a classification category additional to the SCI classification"; (4) which government officials or employees made the decision on the overall classification of the document; and (5) what was the reason for classifying the sealed document. *See* Pls.' Mem., Ex. 1 (Interrogatories Nos. 20-25).

(U) On May 10, 2006, Defendants timely objected to Plaintiffs' First Set of Interrogatories, asserting *inter alia* that each Interrogatory purported to seek the production of classified national security information that could be subject to a claim of state secrets privilege, or subject to other applicable statutory privileges, including 50 U.S.C. § 403-1(i)(1). *See* Pls.' Mem., Ex. 1. Plaintiffs thereupon filed a Motion for Order Compelling Discovery. In response to that motion, and in support of the Government's Motion to Dismiss, Defendants have asserted the military and state secrets privilege to protect from disclosure information that would tend to confirm or deny the information that Plaintiffs seek regarding (i) their alleged surveillance and (ii) information related to the sealed classified document at issue in this case.

(U) ARGUMENT

I. (U) ANY RESPONSE TO PLAINTIFFS' FIRST SET OF INTERROGATORIES WOULD REVEAL PRIVILEGED STATE SECRETS.

A. (U) The State Secrets Privilege Bars Use of Privileged Information, Regardless of a Litigant's Need.

(U) "The state secrets privilege is a common law evidentiary privilege that allows the government to deny discovery of military secrets." *Kasza*, 133 F.3d at 1165. The ability of the Executive to protect military or state secrets from disclosure has been recognized from the earliest days of the Republic. *See Totten v. United States*, 92 U.S. 105, 107 (1875); *United States v. Burr*, 25 F. Cas. 30, 37-38 (C.C.D. Va. 1807); *see also Reynolds*, 345 U.S. at 6-7. The privilege derives from the President's Article II powers to conduct foreign affairs and provide for the national defense. *See United States v. Nixon*, 418 U.S. 683, 710 (1974). Accordingly, it "must head the list" of evidentiary privileges. *See Halkin v. Helms* ("*Halkin I*"), 598 F.2d 1, 7 (D.C. Cir. 1978); *El-Masri v. Tenet*, __ F. Supp. 2d __, No. 1:05cv1417, 2006 WL 1391390, at *3 (E.D. Va. May 12, 2006) ("Given the vitally important purposes it serves, it is clear that while the state secrets privilege is commonly referred to as 'evidentiary' in nature, it is in fact a privilege of the highest dignity and significance.").

(U) The Ninth Circuit has held that "[t]he government may use the state secrets privilege to withhold a broad range of information. Although 'whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter,' *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir.1983), courts recognize the inherent limitations in trying to separate classified and unclassified information." *Kasza*, 133 F.3d at 1166. The privilege therefore extends to protect information that, on its face, may appear innocuous, but which in a larger context

could reveal sensitive classified information:

> It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.

Halkin I, 598 F.2d at 8. As the Ninth Circuit has further held, "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*, 133 F.3d at 1166.

(U) An assertion of the state secrets privilege must be accorded the "'utmost deference,' and the court's review of the claim of privilege is narrow." *See Kasza*, 133 F.3d at 1165-66. Aside from ensuring that the privilege has been properly invoked as a procedural matter, the sole determination for the Court is whether, "under the particular circumstances of the case, 'there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.'" *See id.* at 1166 (quoting *Reynolds*, 345 U.S. at 10). Thus, in assessing whether to uphold a claim of privilege, courts do not balance the respective needs of the parties for the information. Rather, once the privilege is properly invoked and the Court is satisfied that there is a reasonable danger that national security would be harmed by the disclosure of state secrets, the privilege is absolute:

> Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.

Reynolds, 345 U.S. at 11; *Kasza*, 133 F.3d at 1166; *see also In re Under Seal*, 945 F.2d 1285, 1287

(4th Cir. 1991) ("Upon proper invocation by the head of the affected department, the privilege renders the information unavailable regardless of the other party's need in furtherance of the action."); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984) ("It is an absolute privilege which, when properly asserted, cannot be compromised by any showing of need on the part of the party seeking the information."); *Ellsberg*, 709 F.2d at 57 ("When properly invoked, the state secrets privilege is absolute. No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege.").[2/]

(U) The absolute nature of the state secrets privilege applies to exclude the evidence regardless of the nature or significance of the claim at issue, including where constitutional claims are at stake. *See Halkin I*, 598 F.2d at 5, 10; *Halkin v. Helms* ("*Halkin II*"), 690 F.2d 977, 981 (D.C. Cir. 1982) (state secrets protected in constitutional challenge to alleged unlawful surveillance); *Molerio v. Fed. Bureau of Investigation*, 749 F.2d 815 (D.C. Cir. 1984) (state secrets protected where First Amendment associational rights at issue); *El-Masri*, 2006 WL 1391390 (state secrets protected in constitutional tort challenge to alleged unlawful rendition by CIA). The Court may

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[2] **(U)** On the well-established point of law that the state secrets privilege is absolute once the Court has satisfied itself that there is a reasonable danger that national security would be harmed by the disclosure of state secrets, *see Kasza*, 133 F.3d at 1166, Plaintiffs cite no authority to the contrary. Plaintiffs inexplicably ignore *Kasza*, however, and for this point instead cite dicta from Ninth Circuit precedent that was reversed by the Supreme Court. *See* Pls.' Mem. at 5-6. Plaintiffs extensively quote from *Doe v. Tenet*, 329 F.3d 1135 (9th Cir. 2003), *reversed*, 544 U.S. 1 (2005), to supply the standard that courts must apply in reviewing the assertion of the state secrets privilege. In reviewing *Doe v. Tenet*, however, the Supreme Court specifically held that the Ninth Circuit erred in applying the analysis of the state secrets privilege to "the distinct class of cases that depend upon clandestine spy relationships," and thus any discussion of the state secrets privilege in the context of that case is dicta. *See Tenet v. Doe*, 544 U.S. 1, 10 (2005) ("There is, in short, no basis for respondents' and the Court of Appeals' view that the *Totten* bar has been reduced to an example of the state secrets privilege.")

consider the necessity of the information to the case only in connection with assessing the sufficiency of the Government's showing that there is a reasonable danger that disclosure of the information at issue would harm national security. "[T]he more plausible and substantial the Government's allegations of danger to national security, in the context of all the circumstances surrounding the case, the more deferential should be the judge's inquiry into the foundations and scope of the claim." *Ellsberg*, 709 F.2d at 59.

(U) Judicial review of whether the claim of privilege has been properly asserted and supported does not require the submission of classified information to the Court for *in camera, ex parte* review. *See Zuckerbraun*, 935 F.2d at 548. In particular, where it is possible to satisfy the Court, from all the circumstances of the case, that there is a reasonable danger that disclosure of the evidence will expose state secrets which, in the interest of national security, should not be divulged, "the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." *Reynolds*, 345 U.S. at 8. Nonetheless, "[e]laborating the basis for the claim of [state secrets] privilege through *in camera* submissions is unexceptionable." *Kasza*, 133 F.3d at 1169 ("In sum, *in camera* review of both classified declarations was an appropriate means to resolve the applicability and scope of the state secrets privilege. No further disclosure or explanation is required."); *see also Hepting v. AT&T Corp.*, slip op., No. C-06-672-VRW, 2006 WL 1581965, at *3 (N.D. Cal. June 6, 2006) ("Although *ex parte, in camera* review is extraordinary, this form of review is the norm when state secrets are at issue.").

B. (U) Defendants Have Properly Asserted the State Secrets Privilege Against Plaintiffs' First Set of Interrogatories, and Its Claim of Privilege Should Be Upheld.

(U) It cannot be disputed that Defendants properly have asserted the state secrets privilege in response to Plaintiffs' Motion for Order Compelling Discovery. Defendants hereby lodge, in support of the state secrets privilege, both public and *in camera* declarations from the Director of National Intelligence ("DNI"), John D. Negroponte, as well as both public and *in camera* declarations from the Director of the National Security Agency ("NSA"), Lieutenant General Keith B. Alexander. *See Reynolds*, 345 U.S. at 7-8 (requiring that a "formal claim of privilege [be] lodged by the head of the department which has control over the matter, after actual personal consideration by that officer").[3/]

(U) Through these declarations, Defendants have demonstrated that there is a reasonable danger that disclosure of the information implicated by Plaintiffs' First Set of Interrogatories would harm the national security of the United States. *See, e.g.*, Attach. 1, Public Declaration of John D. Negroponte, DNI, ¶¶ 9-15; Attach. 2, Public Declaration of Lt. Gen. Alexander, Director, NSA, ¶¶ 7-10. With respect to Interrogatory Nos. 1-20, in which Plaintiffs seek confirmation or denial of whether they were subject to warrantless interceptions by the NSA, asserting that such information does not constitute a state secret, this case is strikingly similar to *Halkin I*, in which the court upheld the state secrets privilege as to "'mere fact of interception' of their communications." *See Halkin*

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[3] **(U)** As set forth in Defendants' Notice of Lodging of *In Camera, Ex Parte* Materials, filed contemporaneously with this Opposition, the classified declarations of John D. Negroponte, DNI, and Lieutenant General Keith B. Alexander, Director, NSA, as well as the separately lodged memorandum for the Court's *in camera, ex parte* consideration, are currently stored in a proper secure location by the Department of Justice and are available for review by the Court upon request.

I, 598 F.2d at 8. The D.C. Circuit found plaintiffs' arguments against the state secrets privilege "naive," stating:

> A number of inferences flow from the confirmation or denial of acquisition of a particular individual's international communications. Obviously the individual himself and any foreign organizations with which he has communicated would know what circuits were used. Further, any foreign government or organization that has dealt with a plaintiff whose communications are known to have been acquired would at the very least be alerted that its communications might have been compromised or that it might itself be a target. If a foreign government or organization has communicated with a number of the plaintiffs in this action, identification of which plaintiffs' communications were and which were not acquired could provide valuable information as to what circuits were monitored and what methods of acquisition were employed. Disclosure of the identities of senders or recipients of acquired messages would enable foreign governments or organizations to extrapolate the focus and concerns of our nation's intelligence agencies.

Id. at 8. The D.C. Circuit accordingly found that "[t]here is a 'reasonable danger' that confirmation or denial that a particular plaintiff's communications have been acquired would disclose NSA capabilities and other valuable intelligence information to a sophisticated intelligence analyst." *See id.* at 10 (quoting *Reynolds*, 345 U.S. at 10).

[REDACTED TEXT]

(U) Moreover, contrary to Plaintiffs' assertion that "defendants have already acknowledged that there has been warrantless electronic surveillance," *see* Pls.' Mem. at 6, the mere fact that the TSP is a publicly acknowledged program does not undercut the state secrets privilege here as to the classified aspects of that program. Indeed, in the recent *El-Masri* decision, the district court dismissed claims relating to an alleged unlawful "rendition" program, noting that even where there might be "public affirmation of the existence of" a program, there is a "critical distinction," between an admission that a program exists and the admission or denial of the specific facts at issue. *See El-*

Masri, 2006 WL 1391390, at *6. "A general admission provides no details as to the means and methods" involved in the program, and such "operational details" are "validly claimed as state secrets." *Id.*

(U) In sum, each of the foregoing categories of information is subject to the assertion of the state secrets privilege by DNI Negroponte, and he and NSA Director Lt. Gen. Alexander have amply demonstrated a reasoned basis that disclosure of this information could reasonably cause exceptionally grave damage to the national security and, therefore, that this information cannot be provided in response to Plaintiffs' First Set of Interrogatories.

II. (U) ANY RESPONSE TO PLAINTIFFS' FIRST SET OF INTERROGATORIES IS ALSO PROTECTED BY APPLICABLE STATUTORY PRIVILEGES.

(U) Two statutory protections also apply to the information responsive to Plaintiffs' First Set of Interrogatories as described herein, and both statutory privileges have been properly invoked here as well. First, Section 6 of the National Security Agency Act of 1959, Pub. L. No. 86-36, § 6, 73 Stat. 63, 64, *codified at* 50 U.S.C. § 402 note, provides:

> [N]othing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency.

Id. Section 6 reflects a "congressional judgment that in order to preserve national security, information elucidating the subjects specified ought to be safe from forced exposure." *See Founding Church of Scientology v. Nat'l Security Agency*, 610 F.2d 1381, 1389 (D.C. Cir. 1979). In enacting Section 6, Congress was "fully aware of the 'unique and sensitive' activities of the [NSA] which require 'extreme security measures.'" *Hayden v. Nat'l Security Agency*, 308 F.2d 1381, 1390 (D.C. Cir. 1979) (citing legislative history). Thus, "[t]he protection afforded by section 6 is, by its very

terms, absolute." *Linder v. Nat'l Security Agency*, 94 F.3d 693, 698 (D.C. Cir. 1996).

(U) The second applicable statutory privilege is Section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004), *codified at* 50 U.S.C. § 403-1(i)(1). This statute requires the Director of National Intelligence to protect intelligence sources and methods from unauthorized disclosure. The authority to protect intelligence sources and methods from disclosure is rooted in the "practical necessities of modern intelligence gathering," *see Fitzgibbon v. Central Intelligence Agency*, 911 F.2d 755, 761 (D.C. Cir. 1990), and has been described by the Supreme Court as both "sweeping," *see Central Intelligence Agency v. Sims*, 471 U.S. 159, 169 (1985), and "wideranging," *see Snepp v. United States*, 444 U.S. 507, 509 (1980). Sources and methods constitute "the heart of all intelligence operations," *Sims*, 471 U.S. at 167, and "[i]t is the responsibility of the [intelligence community], not that of the judiciary to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the . . . intelligence-gathering process." *See id.* at 180.

(U) These statutory privileges have been properly asserted as to any intelligence-related information, sources and methods implicated by Plaintiffs' First Set of Interrogatories, and the information covered by these claims is at least co-extensive with the assertion of the state secrets privilege by the DNI. *See* Public Declaration of John D. Negroponte, DNI, ¶¶ 10, 15; Public Declaration of Lt. Gen. Alexander, Director, NSA, ¶ 6.

III. (U) PLAINTIFFS HAVE NO BASIS ON WHICH TO ASSERT THAT THE FACTS RESPONSIVE TO THEIR INTERROGATORIES WERE IMPROPERLY CLASSIFIED "IN ORDER TO CONCEAL UNLAWFUL ACTIVITY."

(U) Plaintiffs nevertheless assert that, simply because they have alleged that the TSP as an intelligence program operates in violation of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 *et seq.*, the state secrets privilege cannot be properly invoked here because "there are compelling reasons to conclude that the secrecy classifications at issue in this case were intended to conceal unlawful activity and are thus improper under Executive Order No. 12,958." *See* Pls.' Mem. at 6.

(U) Plaintiffs rely on nothing more than speculation in implying that Defendants have improperly classified information responsive to their First Set of Interrogatories "in order to . . . conceal violations of law." The mere allegation of wrongdoing does not negate the need to protect state secrets; nor do such bare allegations require declassification of the information responsive to Plaintiffs' First Set of Interrogatories. Defendants, as government officials, are presumed to act in good faith, and Plaintiffs must present well-nigh irrefragable proof to the contrary in order to prevail on this issue, *see Knotts v. United States*, 121 F. Supp. 630, 632 (Ct. Cl. 1954), which they have not. Here, the classified submissions provided by the Government clearly demonstrate that the assertion of the state secrets privilege serves to protect highly significant national security matters.

(U) Plaintiffs moreover misconstrue the relevant language of this Executive Order, which provides that "[i]n no case shall information be classified *in order to* . . . conceal violations of law, inefficiency, or administrative error." Exec. Order No. 12,958, § 1.7(a) (emphasis added), *as amended by* Exec. Order No. 13,292. This provision of Exec. Order No. 12,958 applies where the *very purpose* of classification is to conceal wrongdoing — it does not bar protection of state secrets

even where alleged unlawful activities are at issue. In *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472 (D.C. Cir. 1980), for example, the FBI's surveillance of Dr. Martin Luther King, Jr. "strayed beyond the bounds of its initial lawful security aim." *See id.* at 483. The D.C. Circuit, however, found that "the FBI's systematic program to harass Dr. King" did "not preclude the possibility that the actual surveillance documents and the Task Force materials that comment upon those documents may nevertheless contain information of a sensitive nature, the disclosure of which could compromise legitimate secrecy needs." *See id.* The D.C. Circuit thus determined that the "sufficiency or accuracy of the information . . . has not been undermined by any evidence of agency bad faith or by any concrete evidence in the record to the contrary," and that "the bare assertion that the Task Force summaries cannot contain information of a sensitive nature because the overall purpose of the FBI's original investigation of Dr. King was unrelated to a legitimate national security aim will not suffice." *See id.* Thus, taking Plaintiffs' challenge to the TSP as an example, even where Plaintiffs allege that the TSP "strayed beyond the bounds of its initial security aim," or that its "overall purpose . . . was unrelated to a legitimate national security aim," information derived pursuant to the TSP would still be properly classified and subject to the state secrets privilege where disclosure of that information would harm national security. *See also Arabian Shield Development Co. v. Central Intelligence Agency*, No. 3-98-CV-0624-BD, 1999 WL 118796, at *4 (N.D. Tex. Feb. 26, 1999) ("Section 1.8 [of Exec. Order No. 12,958] thus prohibits an agency from classifying documents as a ruse when they could not otherwise be withheld from public disclosure. It does not prevent the classification of national security information merely because it might *reveal* criminal or tortious acts."), *aff'd*, 208 F.3d 1007 (5th Cir.), *cert. denied*, 531 U.S. 872 (2000).

(U) Thus, the fact that the lawfulness of TSP surveillance is at issue in no way compels the

conclusion that the state secrets applicable to this program — and whose disclosure would harm national security — cannot be protected. *See* Exec. Order No. 12,958, § 1.7, *as amended by* Exec. Order No. 13,292. As demonstrated in the classified declarations lodged in support of Defendants' assertion of the state secrets privilege, all of the facts responsive to Plaintiffs' First Set of Interrogatories were properly classified because disclosure would harm national security, not in order to conceal a violation of law.

IV. (U) THE COURT SHOULD RESOLVE THE SCOPE OF THE GOVERNMENT'S INVOCATION OF THE STATE SECRETS PRIVILEGE IN THIS CASE BEFORE RESOLVING DISCOVERY DISPUTES SUCH AS THIS.

(U) Finally, notwithstanding Plaintiffs' wish to resolve discovery disputes in advance of any response they might make to Defendants' Motion to Dismiss, Defendants' assertion of the state secrets privilege should be considered as a threshold issue in this entire case before the resolution of any discovery disputes such as this. *See Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65, 77 (D.D.C. 2004) ("Once the government has properly invoked the state secrets privilege, the inquiry shifts to the application of the privilege to the case at hand."), *aff'd*, 161 Fed. Appx. 6 (D.C. Cir.), *cert. denied*, 126 S. Ct. 734 (2005). Because the defense of this action would require classified facts, that defense cannot be made "without forcing a disclosure of the very thing the privilege is designed to protect." *See Reynolds*, 345 U.S. at 8; *accord Zuckerbraun*, 935 F.2d at 547. In order to prevent forcing that type of disclosure, courts have held that dismissal of an action (or, alternatively, summary judgment for the Government), rather than a presentation of a defense, is required if (1) state secrets are necessary for Plaintiffs to prove their claims (as Plaintiffs indeed claim here); (2) the state secrets privilege deprives the defendant of information necessary to defend against the claims; *or* (3) the "very subject matter of the action" is a state secret. *See, e.g., Kasza*,

133 F.3d at 1166; *Zuckerbraun*, 935 F.2d at 547.

(U) As the district court recently held in a different challenge to the TSP, in *Hepting v. AT&T Corp.*, slip op., No. C-06-672-VRW, 2006 WL 1581965 (N.D. Cal. June 6, 2006), "[t]he state secrets issue might resolve the case, discovery or further motion practice might inadvertently cause state secrets to be revealed and [the] defense might be hindered until the scope of the privilege is clarified. Hence, the court agrees with the government that the state secrets issue should be addressed first." *See id.* at *1. Likewise, at the outset, this Court should resolve Defendants' assertion of the state secrets privilege as to this entire case, not merely as to the pending discovery requests.

CONCLUSION

(U) For the foregoing reasons, the Court must deny Plaintiffs' Motion for Order Compelling Discovery.

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Respectfully submitted,

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