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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

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO PREVENT PLAINTIFFS' ACCESS TO THE SEALED CLASSIFIED DOCUMENT

ORAL ARGUMENT REQUESTED

INTRODUCTION

The response of Plaintiffs Al-Haramain Islamic Foundation, *et al.*, to Defendants' Motion to Prevent Plaintiffs' Access to the Sealed Classified Document is largely an effort to divert attention from the real issues. Plaintiffs cite no authority in support of their underlying premise that private citizens who have *not* been determined to have a "need to know" classified information and who have *not* been cleared through a background investigation have a right to continued access to a highly classified document that should never have been disclosed to them in the first place. Instead, Plaintiffs seek to turn this into an issue of the Executive branch against the Judicial branch — that is, Defendants against the Court — through a misreading of precedent on the doctrine of separation of powers.

With overblown rhetoric, Plaintiffs contend that the Government seeks to assert "absolute" and "unfettered," indeed "monarchical," control over the sealed document. But it is not an affront to the Court, or a disregard of the role of the Judicial branch, for the United States to take the position that private parties may not have access to the Government's own document and the classified information contained therein merely because the document was inadvertently disclosed to these private parties, who then filed the document with the Court. Indeed, Defendants have shown proper regard for the role of the Judiciary in explaining why the document remains classified and why its disclosure would harm national security, and in requesting that the Court exercise its inherent authority to order the return of all copies of this inadvertently disclosed classified document.

Defendants therefore take no issue with the Court's access to this sealed document in order to exercise its constitutional role in this case. The law is clear, however, that the Executive

branch has the discretion to preclude Plaintiffs from access to classified material. The fact that such information accidentally found its way into Plaintiffs' hands, and thereafter into the Court's files, does not negate the Executive's discretion nor grant the Court the authority to make an access or security clearance determination with respect to classified information.

In any event, the Government has asserted a state secrets privilege claim over the sealed document. *See* Public Declaration of John D. Negroponte, Director of National Intelligence ¶ 11 ("I assert the privilege with respect to information pertaining to a sealed document before the Court . . . .") [hereinafter, "Public Negroponte Decl."].[1/] The Court can now evaluate that assertion and its impact on this case — including the impact on Plaintiffs' standing — without the need for Plaintiffs' continued access to the sealed classified document. As set forth below, Plaintiffs' arguments fail to support their right to or need for access to this document.

I. THE DOCTRINE OF SEPARATION OF POWERS DOES NOT VEST THIS COURT WITH EXCLUSIVE CONTROL OVER THE SEALED DOCUMENT; RATHER, THE EXECUTIVE BRANCH REMAINS RESPONSIBLE FOR THE PROTECTION AND CONTROL OF NATIONAL SECURITY INFORMATION.

Defendants acknowledge that the Court now has custody of an inadvertently disclosed classified document, despite previous efforts of Special Agents of the Federal Bureau of Investigation to retrieve all copies of this document.[2/] Plaintiffs are mistaken in arguing,

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[1] The Director of National Intelligence's public declaration is attached to both Defs.' Mem. in Support of Their Mot. to Dismiss and for Summ. J. (June 21, 2006) [Docket No. 59], and Defs.' Opp'n to Pls.' Mot. for Order Compelling Discovery (June 21, 2006) [Docket No. 55].

[2] *See* First Declaration of Frances R. Hourihan (Attach. 2 to Defs.' Resp. in Opp'n to the Oregonian's Motion to Intervene and to Unseal Records (Apr. 14, 2006) [Docket No. 24]; *see also* Supplemental Declaration of Frances R. Hourihan (Attach. 2 to Defs.' Mem. in Opp'n to Pls.' Opp'n to Defs.' Lodging of Material Ex Parte and In Camera (May 12, 2006) [Docket No. 32].

however, that by virtue of this custody, the doctrine of separation of powers now gives the Court the unilateral *authority* to grant a security clearance and therefore access to this document — that is, that the Court "alone has the power to determine whether, and under what conditions, to grant access to something in its files." *See* Pls.' Resp. to Defs.' Mot. to Prevent Pls.' Access to the Sealed Classified Document, at 3 (June 16, 2006) [Docket No. 49] (hereinafter, "Pls.' Resp."). Plaintiffs' remarkable claim is that, by virtue of their having filed with the Court a classified document that was inadvertently disclosed to them, the Executive Branch is powerless to seek to preclude disclosure of those classified materials. Such a rule would make no sense, would be inconsistent with settled law, and would offend the doctrine of separation of powers to disregard the Executive Branch's exclusive responsibility to protect and control classified information. The proper separation of powers balance is struck by the deferential scope of review courts apply to classification and state secrets determinations.

A. The Executive Branch Remains Responsible for Controlling Access to Classified National Security Information.

Plaintiffs suggest that Defendants "do violence to the separation of powers by attempting to deny plaintiffs' counsel access to a document under Judicial control." *See* Pls.' Resp. at 5. But the distinction between classified information in "judicial custody," as opposed to "executive custody," does not alter the legal requirements as to how this information is controlled.

As Defendants have repeatedly noted, it is well established that, under the separation of powers established by the Constitution, the Executive Branch is responsible for the protection and control of national security information. *See Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The Supreme Court has held:

> [The President's] authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.

Id. By Executive Order, therefore, the President has instructed Executive agencies to strictly control classified information in their possession and to ensure that such information is disclosed only where an agency is able to determine that doing so is "'clearly consistent with the interests of the national security.'" *See* Exec. Order No. 12,958, 60 Fed. Reg. 19825 (Apr. 17, 1995), *as amended by* Exec. Order No. 13,292, 68 Fed. Reg. 15315 (Mar. 25, 2003); *see also Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990) (quoting *Egan*, 484 U.S. at 528), *cert. denied*, 499 U.S. 905 (1991).

Because the Executive has the constitutional responsibility to protect classified information, the decision to grant or deny access to such information lies within the discretion of the Executive. *See Egan*, 484 U.S. at 529; *Dorfmont*, 913 F.2d at 1401 ("The decision to grant or revoke a security clearance is committed to the discretion of the President by law."). Thus, the Supreme Court, as well as the Ninth Circuit, has recognized that federal courts lack jurisdiction to review the merits of a decision to grant or revoke a security clearance. *See Webster v. Doe*, 486 U.S. 592, 601 (1988); *Dorfmont*, 913 F.2d at 1401; *see also Guillot v. Garrett*, 970 F.2d 1320, 1324 (4th Cir. 1992) (noting that President has "exclusive constitutional authority over access to national security information"). The Supreme Court has thus held that "no one has a 'right' to a security clearance":

> The grant of a clearance requires an affirmative act of discretion on the part of the granting official. The general standard is that a

> clearance may be granted only when "clearly consistent with the interests of the national security." A clearance does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information.

Egan, 484 U.S. at 528 (citations omitted). This "predictive judgment . . . must be made by those with the necessary expertise in protecting classified information," and "the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." *See id.* at 529. Far from supporting Plaintiffs' argument that the Executive here is trying to intrude on power of the Judicial branch, Supreme Court precedent makes clear that it is the exclusive prerogative of the Executive to determine who may have access to classified information.

It is therefore unsurprising that Plaintiffs cite no authority for the proposition that the doctrine of separation of powers gives the Judiciary the power to determine who may have access to classified information. For example, in support of this position, Plaintiffs cite *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), in which the Supreme Court held that separation of powers principles envisioned a role for the Judiciary in reviewing a challenge to the detention of a U.S. citizen. *See id.* at 536. *Hamdi* has no application to the access issue presented here.[3/] But Defendants do not argue that separation of powers principles give the Judiciary no role in reviewing Plaintiffs' claims: the Court has before it Defendants' assertion of the state secrets

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[3] The Supreme Court in *Hamdi* did recognize that the conduct of military and national security affairs properly resides with the Executive, finding that, "[w]ithout doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them," *i.e.*, the Executive branch. *See id.* at 531 (citing *Egan*, 484 U.S. at 530).

privilege, and will assess whether that assertion requires dismissal of this case.[4/]

Plaintiffs also cite similarly inapposite cases discussing the Judiciary's "supervisory power" over its own files. But such power does not bestow in the Judiciary the authority to order disclosure of *everything* in those files, regardless of compelling reasons supporting non-disclosure. Rather, the "courts have inherent power, as an incident of their constitutional function, to control papers filed with the courts *within certain constitutional and other limitations*." *See In re Sealed Affidavit(s) to Search Warrants Executed on February 14, 1979*, 600 F.2d 1256, 1258 (9th Cir. 1979) (per curiam) (emphasis added).[5/] For example, Plaintiffs cite *Gambale v. Deutsche Bank AG*, 377 F.3d 133 (2d Cir. 2004), but there the Second Circuit found that disclosure of sealed documents could not occur in the presence of compelling reasons supporting the continued sealing of such documents. *See id.* at 140; *see also Nixon v. Warner*

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[4] Plaintiffs' citations to *Buckley v. Valeo*, 424 U.S. 1, 122 (1976), and *Loving v. United States*, 517 U.S. 748, 757 (1996), likewise do not support their argument that separation of powers principles compel the conclusion that the Executive Branch cannot "intrude" on the Judiciary's "control over things in court custody." *See* Pls.' Resp. at 3-4; *see also Buckley*, 424 U.S. at 118 (considering whether Congress, having given the Federal Election Commission broad rulemaking and enforcement powers, is thereby "precluded under the principle of separation of powers from vesting in itself the authority to appoint those who will exercise such authority"). Indeed, in discussing separation of powers in *Loving*, the Supreme Court noted that "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another," *see Loving*, 517 U.S. at 756 — such as, for example, the Executive's prerogative to control access to classified information.

[5] Plaintiffs also cite *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458 (10th Cir. 1980), which holds that "[i]t is beyond question that this Court has discretionary power to control and seal, if necessary, records and files in its possession," *see id.* at 461. The Tenth Circuit noted in a footnote that "[t]here are no statutes or rules that would seem to limit or preclude the exercise of this power," by which the Tenth Circuit meant the court's "discretionary power to control and seal, if necessary, records and files in its possession." *See id.* at 461 n.1. Plaintiffs quote this language out of context as if to suggest that there are "no statutes or rules that would seem to limit or preclude" *the Judiciary's supervisory power over its files*. *See* Pls.' Resp. at 4.

Communications, Inc., 435 U.S. 589, 598 (1978) ("It is uncontested, however, that the right to inspect and copy judicial records is not absolute.").

Plaintiffs moreover fail to recognize that in many cases in which courts have rejected demands that opposing counsel or parties be permitted access to classified materials, those classified materials had already been lodged with the Court, and were therefore already in so-called "Judicial custody." *See* Pls.' Resp. at 5. For example, in considering the assertion of the state secrets privilege, the Fourth Circuit denied plaintiffs' request for special accommodations regarding the classified information that the Court had reviewed — such as by, *inter alia*, giving private counsel access to classified information — because it gave "rise to added opportunity for leaked information." *See Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1052 (2006). The classified information in *Sterling* was certainly in "Judicial custody," and yet the Fourth Circuit did not purport to exercise control over plaintiff's access to that material.

Likewise, in *Hayden v. National Security Agency*, 608 F.2d 1381 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980), the National Security Agency "submitted a twenty-page affidavit, classified 'Top Secret,'" in support of its assertion that certain classified materials were exempt from disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. *See id.* at 1383. This classified information was within "Judicial custody," but the D.C. Circuit nevertheless held that it would be inappropriate to allow plaintiffs' counsel to have access to this classified material when such counsel did not have a security clearance:

> We agree that a court has inherent discretionary power to allow such access where appropriate; but it is not appropriate, and not possible without grave risk, to allow access to classified defense-related material to counsel who lack security clearance, unless a

> court has already determined pursuant to FOIA procedures that the material should be publicly disclosed.

See id. at 1385-86; *see also National Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 208-09 (D.C. Cir. 2001) (ordering that notice be provided to certain entities of an impending designation as a "Foreign Terrorist Organization," but finding that "[t]he notice . . . need not disclose the classified information to be presented *in camera* and *ex parte* to the court under the statute. *This is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect.*" (emphasis added)); *Patterson v. Fed. Bureau of Investigation*, 893 F.2d 595, 600 (3d Cir.) ("We can appreciate [plaintiff's] objections to the anomalous situation of having to defend against a motion for summary judgment without being privy to the very documents necessary for such a defense. . . . However, the remedy for the unfairness is an *in camera* examination by the trial court of the withheld documents and any supporting or explanatory affidavits."), *cert. denied*, 498 U.S. 812 (1990); *Salisbury v. United States*, 690 F.2d 966, 973-74 & n.3 (D.C. Cir. 1982) ("In any FOIA case in which considerations of national security mandate *in camera* proceedings, the District Court may act to exclude outside counsel when necessary for secrecy or other reasons.").

Indeed, if Plaintiffs' "Judicial custody" argument were credited, the Executive branch would lose control over access to *any* classified information filed with the Court, including the very *ex parte, in camera* declarations that support the Government's state secrets assertion. No court has ever suggested that the mere act of filing of classified information with a court transfers control to the Judicial branch with respect to access decisions as to classified information. In sum, Plaintiffs' act of filing an inadvertently disclosed classified document with

the Court did not give the Court power to grant a security clearance to Plaintiffs, which is the only way Plaintiffs may have access to classified information such as this sealed document.[6/]

B. Courts Are to Accord Great Deference to the Executive's Exercise of Authority over National Security Affairs.

In the absence of any authority in support of their position that the Court has the power to order access to classified information, Plaintiffs nevertheless assert that the Court has the power to assess the propriety of the classification of the sealed document. *See* Pls.' Resp. at 7-9. Although courts have engaged in limited judicial review of classification decisions, the proper standard of review is to give great deference to the Executive's classification decision. It is through this standard of review that the separation of powers balance is properly struck between the Court and the Executive branch. For example, in evaluating the state secrets privilege, the Court's role is to assess whether the Executive branch's judgment that harm could result from disclosure is reasonable, and if necessary, to seek additional reasons for that conclusion — not to make a *de novo* judgment that information is not classified or that its disclosure would pose no harm.

Here, in the exercise of authority over national security affairs, the Executive has determined that the sealed classified document should not be publicly disclosed and that Plaintiffs should not have access to the document, notwithstanding the inadvertent disclosure

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[6] Plaintiffs also assert that, whatever the Court's ruling on Defendants' Motion to Prevent Plaintiffs' Access to the Sealed Classified Document, the Court's ruling would have "judicial immunity," and "Defendants can do nothing except mount an appellate challenge to the ruling." *See* Pls.' Resp. at 6. This appears to be an unseemly invitation for the Court to disregard the law on the Executive branch's responsibility in this area. We are confident that the Court will follow the proper law and standards of review in evaluating the Executive branch's classification and state secrets' determinations as to this document.

that unfortunately put this document in the hands of Plaintiffs. Moreover, the Executive has now asserted the state secrets privilege as to this document. *See* Public Negroponte Decl. ¶ 11. The Supreme Court has held that, "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." *See Egan*, 484 U.S. at 530. Thus, the Ninth Circuit has held that 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 v. Browner*, 133 F.3d 1159, 1165-66 (9th Cir.), *cert. denied*, 525 U.S. 967 (1998); *see also Central Intelligence Agency v. Sims*, 471 U.S. 159, 176 (1985) (finding that judgments concerning the disclosure of intelligence information are "complex political, historical, and psychological judgments" appropriately made by the Executive branch).[7/] 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 Kasza*, 133 F.3d at 1166 (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)).

Even if this were a mere FOIA case, judicial review over exemptions for classified information is likewise highly deferential, *see, e.g.*, *Halperin v. Central Intelligence Agency*, 629

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[7] Plaintiffs are wrong in arguing, *see* Pls.' Resp. at 15, that the disclosure of seemingly innocuous information, which might reveal information as part of a classified "mosaic," is a doctrine exclusively associated with the state secrets privilege. *See Salisbury*, 690 F.2d at 971 (acknowledging, in a FOIA case, the "mosaic-like nature of intelligence gathering"); *cf. Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003) (noting, in a FOIA case, that "courts have relied on similar mosaic arguments in the context of national security"), *cert. denied*, 540 U.S. 1104 (2004). In any event, the states secrets privilege has now been asserted as to this document. *See* Public Negroponte Decl. ¶ 11.

F.2d 144, 148 (D.C. Cir. 1980), as courts inquire only into whether the agency has complied with classification procedures established by the relevant Executive order and whether the agency has withheld only such material as conforms to the order's substantive criteria for classification. *See King v. U.S. Dep't of Justice*, 830 F.2d 210, 214 (D.C. Cir. 1987). But in no event should the Court credit the views of the Plaintiffs themselves as to whether granting them access to the document poses any risk to national security. In Plaintiffs' view, the "substantive contents" of this document "are relatively benign and do not implicate national security concerns." *See* Pls.' Resp. at 13, 15. But Plaintiffs simply lack a "broader understanding of what may expose classified information and confidential sources," *see Snepp v. United States*, 444 U.S. 507, 512 (1980), and in any event have their own private interests as litigants. As the Fourth Circuit has held, not even the courts — let alone private, non-governmental parties such as Plaintiffs — are in a position to assess the degree of harm to national security:

> There is a practical reason for avoidance of judicial review of secrecy classifications. The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.

United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).[8/]

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[8] Plaintiffs further assert that the Court has the power to determine "whether a document's classification was improper because [it was] intended to conceal unlawful conduct." *See* Pls.' Resp. at 7. As previously noted in opposition to Plaintiffs' Motion for an Order Compelling Discovery, Plaintiffs' argument that the sealed document here must be disclosed as improperly classified is meritless. *See* Defs' Opp'n to Pls.' Mot. for Order Compelling Discovery at 13-15 (June 21, 2006) [Docket No. 55]. Moreover, none of the cases Plaintiffs cite (continued...)

Plaintiffs also continue to cite to reversed Ninth Circuit precedent in support of the erroneous proposition that their constitutional claims somehow erode Defendants' assertion of the state secrets privilege. Plaintiffs cite to *Doe v. Tenet*, 329 F.3d 1135 (9th Cir. 2003), *rev'd*, 544 U.S. 1 (2005), to suggest that the fact that they have pled constitutional claims weighs in favor of granting them access to the sealed document, as to which Defendants have asserted the state secrets privilege. But in reviewing *Doe v. Tenet*, 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 no longer good law. *See Tenet v. Doe*, 544 U.S. 1, 10 (2005). In fact, the absolute nature of the state secrets privilege applies to exclude evidence regardless of the nature or significance of the claim at issue, including where constitutional claims are at stake. *See, e.g., Halkin v. Helms* ("*Halkin I*"), 598 F.2d 1, 5, 10 (D.C. Cir. 1978); *Halkin v. Helms* ("*Halkin II*"), 690 F.2d 977, 981 (D.C. Cir. 1982) (finding state secrets protected in constitutional challenge to alleged unlawful surveillance). In addition, the law is clear that, regardless of the nature of their claims, neither Plaintiffs nor their counsel may have access to the classified information as to which Defendants have asserted the state secrets privilege. *See, e.g., Sterling*, 416 F.3d at 348 ("At best, special accommodations give rise to added opportunity for leaked information. At worst, that information would become public,

[8](...continued)
actually supports the proposition that the Court has the authority to release classified information based on a determination that it was classified in order to conceal unlawful conduct. *See, e.g., American Civil Liberties Union v. Dep't of Defense*, 389 F. Supp. 2d 547, 564 (S.D.N.Y. 2005) ("Clearly, the need for such deference is particularly acute in the area of national security.").

placing covert agents and intelligence sources alike at grave personal risk.").[9/]

Thus, the highly deferential review that the Court must accord to Defendants' assertion of the state secrets privilege provides Plaintiffs with no right of access to the sealed classified document. Particularly while this assertion of privilege is pending, Plaintiffs should not be given access to this document. *See United States v. Providence Journal Co.*, 820 F.2d 1342, 1351 (1st Cir. 1986) (finding an order to preserve "the status quo" of non-disclosure, "while allowing the court a full opportunity to assess the issues," was "proper in most instances, and indeed to follow any other course of action would often be irresponsible"), *cert. dismissed*, 485 U.S. 693 (1988). The United States has determined that the document remains classified and, absent a change in that determination, it cannot be shared with uncleared parties such as Plaintiffs. *See* Exec. Order No. 12,958, § 4.1, *as amended by* Exec. Order No. 13,292.[10/]

II. THE FOREIGN INTELLIGENCE SURVEILLANCE ACT DOES NOT AUTHORIZE THIS COURT TO GRANT PLAINTIFFS' COUNSEL ACCESS TO THE DOCUMENT.

Plaintiffs also incorrectly contend that the Foreign Intelligence Surveillance Act of 1978

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[9] The case of *In re United States*, 1 F.3d 1251 (Table), 1993 WL 262656 (Fed. Cir. 1993), fully supports Defendants' position in this case. Although the Executive of its own power chose to permit a limited number of non-government personnel, who were working on or defending work done on "two classified and compartmented Air Force programs," to have access to classified information, *see id.* at *1, such a "need to know" is not present here, especially in light of the fact that, as explained *infra* Section III, Plaintiffs have no need for continued access to the sealed document. The key holding of *In re United States* is that the U.S. Court of Federal Claims *had no power* to order the Executive to grant opposing counsel, or any other person, access to classified information, *see id.* at *9, just as this Court has no such power.

[10] Plaintiffs' argument that principles of due process establish their right to access to classified information, *see* Pls.' Resp. at 10-11, lacks merit for all the reasons previously set forth in Defs.' Resp. to Pls.' Opp'n to Defs.' Lodging of Material Ex Parte and In Camera, at 11-17 (May 12, 2006) [Docket No. 32].

("FISA"), *as amended*, 50 U.S.C. § 1806(f), affords the Court the discretion to grant them access to the classified sealed document. *See* Pls.' Resp. at 11-13. This provision of the FISA has no applicability in this case for a number of reasons. Most notably, Section 1806(f) was enacted for the benefit of the Government, and it is procedural in nature. It authorizes district courts, at the request of the Government, to protect classified information through *in camera*, *ex parte* review when a person has demanded discovery of FISA applications, orders, or related materials, or moves to suppress FISA-obtained or -derived information.

The procedures set forth in Section 1806(f) apply where the Government intends to use the fruits of FISA surveillance "against" an "aggrieved person." *See* 50 U.S.C. § 1806(c), (e) & (f). The statute itself, and caselaw construing this section, make clear, however, that an "aggrieved person" is someone as to whom FISA surveillance has been made known, typically in a criminal proceeding, *see, e.g., United States v. Ott*, 827 F.2d 473, 474 (1987), and is a mechanism for dealing with motions to suppress or discovery demands related to that acknowledged surveillance — not for discovering whether surveillance has occurred in the first place. *See ACLU Foundation v. Barr*, 952 F.2d 457, 468-69 & n.13 (D.C. Cir. 1991) ("The government makes this point, with which we agree, that under FISA it has no duty to reveal ongoing foreign intelligence surveillance.") (citing S. Rep. 95-604, Pt. 1, 95th Cong., 1st Sess., at 59 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3960-61); *In re Grand Jury Investigation*, __ F. Supp. 2d __, No. 04GJ4381, 2006 WL 908595, at *6 (E.D. Va. Apr. 6, 2006) (finding that, in grand jury proceedings, neither the non-target witness nor the potential target was entitled to notice under the FISA of whether there was any warrantless National Security Agency electronic surveillance of the potential target).

Section 1806(f)'s applicability to these limited circumstances is confirmed by its very terms, which apply in three specific contexts: *first*, when a governmental entity gives notice under Section 1806(c) or (d) that it intends to use evidence obtained or derived from FISA surveillance against the aggrieved person; *second*, when the aggrieved person seeks to suppress that evidence under Section 1806(e); and *third*, when the aggrieved person moves or requests "to discover or obtain FISA applications, orders or other materials" related to the surveillance or the evidence or information derived from the surveillance. *See* 50 U.S.C. § 1806(f); *cf. id.* § 1804(a) (FISA applications); *id.* § 1805 (orders); *id.* § 1804(c), (d) (discussing other materials related to surveillance).

Section 1806(f) thus applies when there has been acknowledged surveillance under FISA, and where the Government intends to use the fruits of such surveillance against an aggrieved person, which is not the case here. It is an affirmative grant of authority that requires the district court to conduct an *in camera, ex parte* review at the request of the Attorney General, but such review occurs in those limited circumstances in which Section 1806(f) applies — namely, when surveillance is already acknowledged.

For example, in *United States v. Hammoud*, 381 F.3d 316, 331-32 (4th Cir. 2004), *reaffirmed*, 405 F.3d 1034 (4th Cir. 2005), the defendant moved to suppress recorded telephone conversions that were obtained through a FISA wiretap. Pursuant to Section 1806(f), the court reviewed the FISA applications and supporting materials *in camera* and *ex parte*, and concluded that there was probable cause to believe that the target of the FISA collection was an agent of a foreign power, and denied the motion to suppress. *See id.* Likewise, in *United States v. Squillacote*, 221 F.3d 542, 552 (4th Cir. 2000), *cert. denied*, 532 U.S. 971 (2001), the defendants

also sought to suppress the fruits of the FISA surveillance. *See id*. at 553. Pursuant to Section 1806(f), the Attorney General filed an affidavit under oath that disclosure or an adversarial hearing would harm the national security of the United States, and the district court reviewed the FISA applications and other materials *in camera* and *ex parte* without disclosing the material to the defendants. *See id.* at 553-54. The court found the surveillance lawful, and the Fourth Circuit agreed after reviewing the matter *de novo*. *See id.* at 554; *see also, e.g., United States v. Johnson*, 952 F.2d 565, 571-73 (1st Cir.) (upholding legality of FISA surveillance used against defendants at trial), *cert. denied*, 506 U.S. 816 (1992).[11/]

Here, of course, the very threshold question of whether or not Plaintiffs have been subject to surveillance is a state secret. *See* Public Negroponte Decl. ¶ 11(iii) ("I assert privilege with respect to information that would tend to confirm or deny whether the Plaintiffs in this action have been subject to surveillance under the Terrorist Surveillance Program or under any other government program . . . ."). Thus, contrary to Plaintiffs' suggestion, because the Government cannot confirm or deny whether the Plaintiffs were subject to surveillance under FISA or otherwise, the facts that trigger the use of Section 1806(f) are unavailable. Accordingly, Section 1806 has nothing to do with this case.

Moreover, these statutory procedures do not preclude the assertion of a broader constitutionally based "state secrets" privilege in any given case, which may include the very

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[11] *See* S. Rep. 95-604, Pt. 1, 95th Cong., 1st Sess. 1977, at 57, *reprinted in* 1978 U.S.C.C.A.N. 3904, 3958 ("The special procedures in [section 1806(f)] cannot be invoked until they are triggered by a government affidavit that disclosure or an adversary hearing would harm the national security of the United States."); *see also United States v. Ott*, 827 F.2d 473, 477 (9th Cir. 1987) ("Congress has a legitimate interest in authorizing the Attorney General to invoke procedures designed to ensure that sensitive security information is not unnecessarily disseminated to *anyone* not involved in the surveillance operation in question . . . .").

fact of surveillance itself, as caselaw construing the provision makes clear. The text of Section 1806, like the rest of the FISA, contains no mention of the state secrets privilege, and there certainly is no indication that Congress intended to limit that privilege.[12/] Rather, this provision is a statutory tool for the Government to use as a shield in specific settings to protect classified information that arises in a dispute over such surveillance, independent of whether the Government also raises another shield to the disclosure of classified information, namely the state secrets privilege. Section 1806(f) is clearly not a weapon that can be brandished against the Government by anyone claiming they have been subject to surveillance in order to defeat the proper assertion of the state secrets privilege and gain access to highly classified facts.[13/]

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[12] It is well established that when Congress seeks to restrict or regulate the constitutionally based powers of the Executive through legislation, it must make that intention clear. *See Swan v. Clinton,* 100 F.3d 973, 981 (D.C. Cir. 1996); *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) (citing *United States v. Bass*, 404 U.S. 336, 350 (1971)); *see also Public Citizen v. Dep't of Justice*, 491 U.S. 440, 466 (1989). As the Supreme Court has noted, "[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bass*, 404 U.S. at 350. Moreover, courts have repeatedly held that statutes will not be read to overcome the common law without a clear congressional expression of an intent to do. *See Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Telephone Co.*, 464 U.S. 30, 35-36 (1983); *see also United States v. Texas*, 507 U.S. 529, 533 (1993). Further, the notion that this provision could trump an assertion of the constitutionally based state secrets privilege and force the disclosure of alleged surveillance would raise profound constitutional issues that can and should be avoided by interpreting this provision precisely as it is written and applied — that is, as a tool for the government to use to protect classified information in a particular setting. *See Public Citizen*, 491 U.S. at 466 ("It has long been an axiom of statutory interpretation that 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'") (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988)).

[13] Further, Plaintiffs' assertion that the Court should enter a protective order pursuant to § 1806(f) because Plaintiffs have been "careful to prevent public disclosure" is fatally

(continued...)

III. IN LIGHT OF THE COURT'S ACCESS TO THE SEALED CLASSIFIED DOCUMENT, PLAINTIFFS' PROPOSED ACCESS IS UNNECESSARY AS WELL AS IMPROPER.

Having failed to establish a right to classified information, Plaintiffs proceed to disingenously claim that they need access to the sealed classified document in order to establish, *inter alia*, that they have standing in this case. *See* Pls.' Resp. at 16-17. As a side note, Plaintiffs cannot seek to claim a right to information to establish standing when this information is the subject of Defendants' invocation of the state secrets privilege, and when Plaintiffs should not even have this information in the first place. Nevertheless, Plaintiffs remain free to make any allegations and assert any arguments in support of their standing, or any other argument, as they deem appropriate, and the Court has the power to review the sealed classified document in order to assess Plaintiffs' claims and arguments. Plaintiffs have no further need for access to this document.

Nor should Plaintiffs' proposed protective order be given any consideration. At an early

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[13](...continued)
undermined by the fact that counsel for Plaintiffs undertook to describe a highly classified document, *see* Declaration of Thomas Nelson; *see also* Pls.' Resp. at 15-16, and then filed it without regard to security procedures by depositing it in an envelope in the Clerk's office. Given the many preceding teleconferences the Court had held on the proper maintenance of classified information — which the Declaration of Thomas Nelson is — it was inexcusable for Plaintiffs to disregard such security procedures, or to fail to ask Defense counsel about the proper security procedures in advance of filing this declaration.

Even if Plaintiffs' counsel had had the Executive's authorization to process and distribute this classified declaration — which they definitely did not — access to highly classified and sensitive FISA applications, orders, and related materials does not at all depend upon whether counsel has a security clearance. Rather, it depends upon whether disclosure is necessary for the court to make an accurate determination of the legality of the surveillance and whether counsel has a "need to know." *See Ott*, 827 F.2d at 477; *United States v. Bin Laden*, 126 F. Supp. 2d 264, 287 n.27 (S.D.N.Y. 2001); *see also* Exec. Order No. 12,958, § 6.1(z), *as amended by* Exec. Order No. 13,292 (requiring that a "need to know" determination be made prior to the disclosure of classified information to anyone, including those who possess a security clearance).

stage of this litigation, and only at Plaintiffs' suggestion, the Court requested proposed protective orders from both parties. But this request was made before the Court had been fully presented with legal discussion governing access to classified information. As this case has progressed, it has become clear that a protective order is not feasible. Thus, Defendants did not "ignore" the request, *see* Pls.' Resp. at 17, but as Defendants have previously argued, Plaintiffs can have no access to classified information, even under the terms of a protective order, unless the Executive has determined that they have a "need to know" classified information and unless they have submitted to the appropriate background investigation. *See, e.g.*, Exec. Order No. 12,958 § 5.4(d)(5)(A), *as amended by* Exec. Order No. 13,292. Even if the Executive had granted such access to Plaintiffs or their counsel — which is not the case — the U.S. Courts of Appeals have agreed with the Executive that providing classified information to private counsel, even under the terms of a protective order, is presumed to carry an inherent and unacceptable risk of unauthorized disclosure. *See, e.g*., *Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983) (finding that the rule denying access to classified information to private counsel is "well settled"), *cert. denied*, 465 U.S. 1038 (1984); *see also In re United States*, 1 F.3d 1251 (Table), 1993 WL 262656, at *6 (Fed. Cir. 1993) (holding that "the deciding official must weigh the importance of the information, the harm from disclosure, the acceptable level of risk to national security, and the potential for leaks or disclosures, including purely inadvertent ones"). As the D.C. Circuit has held in a case concerning the state secrets privilege, "[p]rotective orders cannot prevent inadvertent disclosure nor reduce the damage to the security of the nation which may result." *Halkin I*, 598 F.2d at 7 (finding that the risk of inadvertent disclosure by private counsel justifies exclusion of counsel from access to classified materials). Plaintiffs' proposed protective

order — which is based on an inapposite criminal case involving a statute that does not apply here[14/] — must be rejected as unworkable.

IV. THE COURT HAS THE AUTHORITY TO ORDER THE RETURN OF ALL COPIES OF THE SEALED CLASSIFIED DOCUMENT.

Lest Plaintiffs distract too much from the merits of Defendants' Motion to Prevent Plaintiffs' Access to the Sealed Classified Document, not only should Plaintiffs be deprived of any further access to the sealed document in the Court's possession, but the Court should exercise its inherent authority to order the return of all copies of the document. The Judicial branch shares responsibility for protecting national security not only by deferring to the Executive Branch's expertise in this area but also by taking its own appropriate measures to protect classified information. *See Sims*, 471 U.S. at 176, 180; *see also Egan*, 484 U.S. at 526-27. For example, in *Pfeiffer v. Central Intelligence Agency*, 60 F.3d 861 (D.C. Cir. 1995), a former CIA employee, upon his retirement, wrongly took with him a draft report that he had written regarding the agency's internal investigation into the Bay of Pigs Operation, which contained classified information. *See id.* at 862. The Government demanded it back. *See id.* The D.C. Circuit found that this draft report had not been released through any authorized means

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[14] Plaintiffs assert that they based their proposed protective order on *United States v. Musa*, 833 F. Supp. 752 (E.D. Mo. 1993). *See* Pls.' Resp. at 18. Notwithstanding the overall impropriety of proposing a protective order for information to which they cannot have access, Plaintiffs' reliance on *Musa* for the form of a protective order is all the more improper for two more reasons: (1) *Musa* was a criminal prosecution involving discovery pursuant to the Classified Information Procedures Act ("CIPA"), *see Musa*, 833 F. Supp. at 753-54, which does not apply to this civil case, *see* CIPA, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C. App. 3) ("An act to provide certain pretrial, trial and appellate procedures for *criminal cases* involving classified information.") (emphasis added); and (2) Plaintiffs once again rely on invalid Ninth Circuit precedent in remarking that *Musa* was "cited with approval" in *Doe v. Tenet*, 329 F.3d 1135, 1148 (9th Cir. 2003), *rev'd*, 544 U.S. 1 (2005).

and that it remained the property of the United States and, as such, should properly be returned to the United States. *See id.* at 865 (finding, *inter alia*, that plaintiff "has no more legal right to the copy of the report that he took from the Agency than he has to take a book from the bookstore of the Government Printing Office without paying for it"). Likewise, Plaintiffs should be ordered to return all copies of the sealed classified document to the United States.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' Motion to Prevent Plaintiffs' Access to the Sealed Classified Document.

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