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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' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The soul of American government is transparency – openness in the affairs of its three constitutional branches. Secret government intrusions on personal privacy are inimical to our democracy. "A government operating in the shadow of secrecy stands in complete opposition to

the society envisioned by the Framers of our Constitution." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 710 (6th Cir. 2002).

The shadow of secrecy, however, is precisely where defendants want to hide this litigation, where it would quietly die without a judicial determination whether the President of the United States has broken the law by conducting warrantless electronic surveillance outside the structure of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §1801 *et seq.*

The plaintiffs in this case were actual targets of warrantless surveillance. They know that because one of the defendants accidentally disclosed a document, filed under seal with this Court, which proves that plaintiffs were surveilled. Now, defendants ask this Court to dismiss this lawsuit pursuant to the state secrets privilege, an extraordinary and rarely-invoked common law evidentiary privilege which, in its most extreme form, allows outright dismissal where the litigation would require disclosure of state secrets and thus would jeopardize national security. Defendants contend this case cannot be litigated without them confirming or denying something they claim must be kept secret – whether plaintiffs were surveilled. *See* Memorandum of Points and Authorities in Support of the United States' Assertion of the Military and State Secrets Privilege and Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment (June 21, 2006) [Docket No. 59] [hereinafter, "Defs.' Dismissal Memo"].

How absurd. Plaintiffs *already know* they were surveilled. The government supplied the proof when it accidentally disclosed the document filed under seal.

Defendants' assertion of the state secrets privilege is a ruse. The pivotal pretrial issue is not whether this lawsuit should be dismissed to ensure the secrecy of plaintiffs' warrantless surveillance. It is no longer a secret. The pivotal pretrial issue is whether this Court should let

plaintiffs point to the sealed document to demonstrate their standing to sue under FISA. If plaintiffs are allowed to do so, this case can proceed to a determination on the merits of the legal theories defendants assert in support of their warrantless surveillance program. This Court can decide those legal issues without any need for defendants to disclose the facts they claim must remain secret – facts about defendants' motives for surveilling plaintiffs and the methods by which defendants did so. Those facts are irrelevant to the ultimate issue presented – whether the surveillance was unlawful.

Defendants' invocation of the state secrets privilege is not a legitimate effort to protect national security, but a continuation of their attempts in this case to upset the constitutional separation of powers and evade the judicial review that defendants rightly fear will lead to a determination that their warrantless surveillance program is unlawful.[1]

ARGUMENT

I. THIS COURT, NOT THE EXECUTIVE BRANCH, IS THE FINAL ARBITER OF DEFENDANTS' NATIONAL SECURITY CLAIMS.

A. Assertion of the state secrets privilege is subject to judicial review.

The state secrets privilege, where applicable, allows the government to refuse discovery of classified information that constitutes a military or state secret, after a formal claim of privilege by the head of the department that has control over the matter. *United States v. Reynolds*, 345 U.S. 1, 6, 10 (1953).

[1] Defendants call their program the "*Terrorist* Surveillance Program." Defs.' Dismissal Memo at 3, emphasis added. We prefer to call it the "*warrantless* surveillance program," for that more accurately describes what it is, and what it is not. It is conducted outside the structure of FISA, which prescribes warrant requirements for foreign intelligence surveillance, and it is not conducted subject to judicial oversight to ensure that it ensnares only terrorists.

In *Kasza v. Browner*, 133 F.3d 1159, 1165 (9th Cir. 1998), the Ninth Circuit explained the state secrets privilege as follows: The state secrets privilege is "a common law evidentiary privilege."[2] It "allows the government to deny discovery of military secrets" which, in the interest of national security, should not be divulged. *Id.* at 1165. The government can invoke the privilege with regard to "particular evidence," so that the privileged evidence "is completely removed from the case," which then "goes forward based on evidence not covered by the privilege." *Id.* Further, if the "very subject matter of the action" is a state secret, the court must "dismiss the plaintiff's action." *Id.* In the present case, defendants seek the latter – outright dismissal of this action.

Outright dismissal, however, has been called a "drastic remedy," *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985), and "draconian," *In re United States*, 872 F.2d 472, 477 (D.C. Cir. 1989). Most cases implicating the state secrets privilege proceed upon removal of the privileged evidence from the case. *See, e.g., DTM Research, L.L.C. v. AT&T Corp.,* 245 F.3d 327, 334 (4th Cir. 2001); *Ellsberg v. Mitchell*, 709 F.2d 51, 66-70 (D.C. Cir. 1983); *Jabara v. Webster*, 691 F.2d 272, 274 (6th Cir. 1982). Outright dismissal is appropriate "[o]nly when no amount of effort and care on the part of the court and the parties will safeguard privileged material." *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F. 2d 1236, 1244. (4th Cir. 1985).

The Ninth Circuit has counseled against excessive Judicial Branch deference to the Executive Branch where, as here, the Executive invokes the state secrets privilege as a basis for the extreme measure of outright dismissal: "State secrets privilege law prescribes that courts

[2] Thus, the privilege is not, as defendants claim elsewhere, "constitutionally based." *See* Defendants' Reply Memorandum in Support of Defendants' Motion to Prevent Plaintiffs' Access to the Sealed Classified Document (June 30, 2006) [Docket No. 64] [hereinafter, "Defs.' Reply Memorandum re Access"] at 18 n. 12.

must be sure that claims of paramount national security interest are presented in the manner that has been devised best to assure their validity and must consider whether there are alternatives to outright dismissal that could provide whatever assurances of secrecy are necessary. That counterweight role has been reserved for the judiciary. We must fulfill it with precision and care, lest we encourage . . . executive overreaching . . . ." *Doe v. Tenet*, 329 F.3d 1135, 1146 (9th Cir. 2003), *overruled on another point in Tenet v. Doe*, 544 U.S. 1 (2005).[3]

The Ninth Circuit's vision of the Judiciary's duty to scrutinize an assertion of the state secrets privilege is fully in accord with *Reynolds*, which said that "[j]udicial control over the evidence in a [state secrets privilege] case cannot be abdicated to the caprice of executive officers." *United States v. Reynolds*, 345 U.S. at 9-10. Many other courts have made similar pronouncements. *See, e.g., In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989) ("court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial rule"); *Molerio v. FBI*, 749 F.2d 815, 822 (D.C. Cir. 1984) ("To some degree at least, the validity of the government's assertion must be judicially assessed."); *Jabara v. Kelley*, 75 F.R.D. 475, 484 (E.D. Mich. 1977) (it is "the courts, and not the executive officer claiming the privilege, who must determine whether the claim is based on valid concerns").

[3] Defendants' Reply Memorandum re Access states that, because the Supreme Court reversed the Ninth Circuit's judgment in *Doe v. Tenet*, the Ninth Circuit's "discussion of the state secrets privilege in the context of that case is no longer good law." Defs.' Reply Memo re Access at 13. But the Supreme Court reversed the Ninth Circuit because it applied the balancing analysis of the state secrets privilege to an action that the Supreme Court held was categorically barred by a rule prohibiting lawsuits against the government based on covert espionage agreements, 544 U.S. at 10, not because of any error in the Ninth Circuit's pronouncements regarding state secrets privilege analysis. Those pronouncements are accurate and they remain good law.

Thus, "before approving the application of the privilege, the district court must be convinced . . . that there is a 'reasonable danger' that military or national secrets will be revealed . . . . [T]he greater the party's need for the evidence, the more deeply a court must probe to see whether state secrets are in fact at risk." *Doe v. Tenet*, 329 F.3d at 1152 (quoting *United States v. Reynolds*, 345 U.S. at 10-11). "[P]articularly where constitutional claims are at issue, the *Reynolds* inquiry requires courts to make every effort to ascertain whether the claims in question can be adjudicated while protecting the national security interests asserted." *Id.* at 1153.

As one commentator has observed, "[i]n the typical surveillance case, . . . there is reason to suspect that the executive has invoked the privilege to defeat the plaintiff's suit. The executive has relied on an expanded concept of national security to deny discovery of information that is insufficiently sensitive to require the absolute protection accorded by the privilege." Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?* 91 Yale L.J. 570, 578 (1981).

Given the consequences not only to plaintiffs, but also to the Nation, if this action is dismissed without a judicial determination whether defendants' warrantless surveillance program is unlawful, this Court should not defer unquestioningly to defendants' assertion of the state secrets privilege. Rather, the Court should "probe deeply" and "make every effort to ascertain" whether this action can be litigated without jeopardizing national security. *Doe v. Tenet*, 329 F.3d at 1152-53.

B. FISA supplants the state secrets privilege in electronic surveillance cases.

An assertion of the state secrets privilege should be scrutinized with particular care where, as here, the plaintiffs allege a private cause of action for unlawful electronic surveillance

under FISA, 50 U.S.C. §1810. That is because, under 50 U.S.C. §1806(f), when the Executive claims that disclosure of materials relating to electronic surveillance would jeopardize national security, the statute expressly vests the court with discretion to "disclose to the aggrieved person, under appropriate security procedures and protective orders," material that "is necessary to make an accurate determination of the legality of the surveillance." This provision effectively preempts the common law state secrets privilege by supplanting it with a *statutory* prescription for judicial determination of national security concerns in FISA proceedings, giving the court the tools it needs – "appropriate security procedures and protective orders," 50 U.S.C. §1806 (f) – to protect national security.[4]

"As the state secrets privilege is an evidentiary privilege rooted in federal common law, [citation], the relevant inquiry in deciding if [a statute] preempts the state secrets privilege 'is whether the statute "[speaks] *directly* to [the] question" otherwise answered by federal common law.'" *Kasza v. Browner,* 133 F.3d 1159, 1167 (9th Cir. 1998), emphasis in original (quoting *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236-37 (1985)). There is a presumption favoring retention of the privilege "'except when a statutory purpose to the contrary is evident.'" *Id.* (quoting *United States v. Texas*, 507 U.S. 529, 534 (1952)).

FISA speaks directly to the question of national security by vesting the courts with

[4] In Defendants' Reply Memorandum re Access, they say that section 1806(f) applies only to aggrieved persons as to whom "surveillance has been made known." Defs.' Reply Memo re Access at 15. That accurately describes the plaintiffs in this case, whose surveillance was made known to them as a result of OFAC's accidental disclosure of proof that they were surveilled. Defendants posit a further requirement that, for section 1806(f) to apply, the surveillance must be "acknowledged" by the government. Defs.' Reply Memo re Access at 16. But section 1806(f) says nothing of the sort. By its plain language, the statute applies whenever a "request is made by an aggrieved person . . . to . . . obtain materials relating to electronic surveillance . . . ." That language is more than broad enough to encompass the plaintiffs here.

control over materials relating to electronic surveillance, subject to "appropriate security procedures and protective orders." 50 U.S.C. §1806(f). And FISA's legislative history evinces congressional intent to supplant the state secrets privilege with FISA's statutory prescription for judicial oversight. As explained in a 1978 House Conference Report, the provision in section 1806(f) "for security measures and protective orders *ensures adequate protection* of national security interests." House Conference Report No. 95-1720 at 31-32 (Oct. 5, 1978) (emphasis added). Congress having determined that section 1806(f) adequately ensures protection of national security, the state secrets privilege becomes superfluous in FISA litigation.

If the courts were *not* vested with oversight over national security interests in FISA litigation, then Congress' prescription in section 1810 for a private FISA cause of action would be meaningless, for the Executive would be able to evade, at its whim, whatever private FISA actions it wishes merely by invoking the state secrets privilege. Congress cannot possibly have intended that. And the fact that the Executive might not *always* invoke the state secrets privilege in FISA cases does not mitigate the damage that would be done to FISA by rote application of the state secrets privilege upon "the caprice of executive officers." *United States v. Reynolds*, 345 U.S. at 9-10.

The situation here is analogous to *Halpern v. U.S.*, 258 F.2d 36 (2d Cir. 1958), a lawsuit arising under the Invention Secrecy Act, 35 U.S.C. §181 *et seq.*, which allowed the patent office to withhold a patent grant for inventions implicating national security, but also allowed inventors to sue for compensation if a patent was denied. When the plaintiff was denied a patent and sued for compensation, the government invoked the state secrets privilege. The Second Circuit rejected the assertion of the privilege because "the trial of cases involving patent applications

placed under a secrecy order will always involve matters within the scope of this privilege," and "[u]nless Congress has created rights which are completely illusory, existing only at the mercy of government officials, the Act must be viewed as waiving the privilege . . . dependent upon the availability and adequacy of other methods of protecting the overriding interest of national security during the course of a trial." *Id.* at 43.

Similarly here, a private FISA action "will always involve matters within the scope of" the state secrets privilege. *Id.* Unless section 1810 creates "rights which are completely illusory, existing only at the mercy of government officials," *id.*, FISA must be viewed as supplanting the common law state secrets privilege with FISA's statutory prescription for judicial oversight, vesting courts with the power to ensure national security with "appropriate security procedures and protective orders." 50 U.S.C. §1806(f).

II. THIS CASE CAN BE LITIGATED WITHOUT JEOPARDIZING NATIONAL SECURITY.

We next address the question whether there will be a threat to national security if this case is litigated. Defendants make two discrete arguments – that national security will be jeopardized if plaintiffs' *standing* is litigated, and that national security will be jeopardized if plaintiffs' *claims on the merits* are litigated. *See* Defs.' Dismissal Memo at 20. Both arguments are specious.

A. Plaintiffs' standing can be determined without any need for defendants to disclose secret facts confirming what plaintiffs already know – that they were surveilled.

Defendants' request for dismissal of this action on the threshold issue of plaintiffs' standing is based on the following proposition, set forth in heading "II.B" of Defendants' Dismissal Memorandum: **"Disclosure of Information That Would Confirm or Deny Whether**

Plaintiffs Have Been Targeted For Surveillance Would Harm National Security." Defs.' Dismissal Memo at 17 (bolding and capitalization in original).

The absurdity of this proposition lies in the simple fact that plaintiffs *already know* they have been targeted for surveillance. Because of OFAC's accidental disclosure of the sealed document, plaintiffs have seen incontrovertible proof of their warrantless surveillance, which thus is no longer clandestine. *Cf. Doe v. Tenet*, 329 F.3d at 1154 (in action by foreign spies against CIA for reneging on obligation to pay for espionage, any jeopardy to state secrets was "not self-evident" because "[i]t is widely known that the CIA contracts for spy services" and a letter from the CIA to plaintiffs admitting the relationship "could be evidence" that the relationship "is not now clandestine").

Likewise, the entire American public now knows about defendants' warrantless surveillance program, thanks to the New York Times story in December 2005 exposing the program and the government's subsequent aggressive public relations campaign to justify the program. Thus, it can hardly be said that "the very subject matter" of this action is a state secret. *Kasza v. Browner*, 133 F.3d at 1165. Defendants cannot effectively "clos[e] the barn door after the horse has already bolted." *Doe v. Gonzales*, 449 F.3d 415, 423 (2d Cir. 2006) (Cardamome, J., concurring). Because the warrantless surveillance program "has received widespread publicity and has even been acknowledged by the President of the United States and other high-level government officials," any claim that state secrets are at risk in litigation challenging the legality of the program "is hard to fathom." *Turkmen v. Ashcroft*, No. 02-CV-2307, 2006 U.S. Dist. LEXIS 40675 (E.D.N.Y. May 30, 2006) at *20-*21; *see also Jabara v. Kelley*, 476 F.R.D. 475, 561 (E.D. Mich. 1977) (where report to Congress revealed that NSA had intercepted

communications, "it would be a farce to conclude" that the communications "remain a military or state secret").

It thus is nonsense for defendants to claim that national security would be jeopardized if defendants were to "confirm" what plaintiffs already know. Secret facts are not implicated here because the fact of plaintiffs' surveillance is no longer a secret to them.

Defendants are half wrong when they claim that "the very *goal* of this lawsuit is to obtain a determination as to whether NSA has undertaken any warrantless surveillance of Plaintiffs and, if so, whether that action was lawful . . . ." Defs.' Dismissal Memo at 5 (emphasis in original). Plaintiffs already know that they were surveilled. The goal of this lawsuit is simply to establish that the surveillance was unlawful.

Defendants rely on *Halkin v. Helms (Halkin II)*, 690 F.2d 977, 998 (D.C. Cir. 1982), quoting its holding that in that case the plaintiffs' "inability to adduce proof of actual acquisition of their communications" made them "incapable of making the showing necessary to establish their standing to seek relief." *See* Defs.' Dismissal Memo at 23. But in the present case, unlike in *Halkin II*, the plaintiffs *have adduced* proof of their actual surveillance – the sealed document on file with this Court. That distinction makes *Halkin II* inapposite.

The pivotal pretrial issue here is the *access* issue – that is, whether this Court should afford plaintiffs access to the sealed document so that they may rely on it to demonstrate their standing to sue as "aggrieved" persons under FISA, 50 U.S.C. §1810. If plaintiffs are given such access, their showing of standing will not require defendants to disclose any secret facts.

B. Plaintiffs' claims on the merits can be determined without any need for defendants to disclose their secret motives for violating FISA or the secret methods by which they did so.

Defendants' arguments for dismissal on the ground a merits decision would jeopardize national security, set forth in headings "II.A" and "II.C" of Defendants' Dismissal Memorandum, are twofold: (1) "**Disclosure of State Secrets Regarding the Al Qaeda Threat Would Harm National Security**," and (2) "**Disclosure of State Secrets Regarding the [Warrantless] Surveillance Program Would Harm National Security**." Defs.' Dismissal Memo at 16 & 19 (bolding and capitalization in original).

Defendants' first argument for evading a merits decision goes to their *motive* for violating FISA. They claim that "[t]he continuing and urgent al Qaeda threat is the *very reason* the United States is undertaking the intelligence activities implicated by this case," and "information concerning the nature and severity of the continuing al Qaeda terrorist threat," including "what the government may know about Al Qaeda's plans," cannot be disclosed without jeopardizing national security. Defs.' Dismissal Memo at 16 (emphasis added).

But secret information about the nature and severity of the al-Qaeda threat need not be disclosed *at all* in this action. The ultimate issue to be decided is whether defendants "intentionally" engaged in warrantless electronic surveillance. *See* 50 U.S.C. §§1809-1810. The "very reason" for defendants' conduct – that is, their motive – is irrelevant to the issue of their intent. *See, e.g., United States v. Lake*, 709 F.2d 43, 45 (11th Cir. 1983).

Thus, for example, in *Abraham v. County of Greenville*, 237 F.3d 386, 390-91 (4th Cir. 2001) – a civil action for unlawful electronic surveillance in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2511 *et seq.*, which governs electronic surveillance for criminal law enforcement – the Fourth Circuit held that a violation of Title III cannot be excused by the defendant's "good faith." And in *In re Pharmatrak, Inc.*, 329 F.3d 9,

23 (1st Cir. 2003) – a civil action for intentional interception of electronic communications in violation of the Electronic Communications Privacy Act, 18 U.S.C. §2511 *et seq.* – the First Circuit noted that "liability for intentionally engaging in prohibited conduct does not turn on an assessment of the merit of a party's motive."

Similarly here, the nature and severity of the al-Qaeda threat as the motive for defendants' warrantless surveillance program is irrelevant to the question whether defendants intentionally violated FISA. Defendants' attempt to justify their conduct is reminiscent of the proverbial plea of "guilty with an explanation." The "explanation" is irrelevant to the determination of guilt. The President may not violate the law, no matter what his motivations may be. Thus, defendants' liability for violating FISA can be determined without any disclosure of secret information about al-Qaeda.

Defendants' second argument for evading a merits decision goes to details of *how* plaintiffs were surveilled, not the *fact* of their surveillance. Defendants claim that information about the "means and methods" of their warrantless surveillance program, such as "how it actually operates in a given case," cannot be disclosed without jeopardizing national security. Defs.' Dismissal Memo at 19, citing *El-Masri v. Tenet*, 2006 WL 1391390 (E.D. Va. May 12, 2006) at *3.

But the determination whether defendants violated FISA does not require disclosure of any details about the manner of plaintiffs' surveillance – such as the technology by which their surveillance was accomplished or which telecommunications company or companies colluded in the deed – any more than a murder conviction requires proof of which finger the murderer used to pull the trigger. Thus, for example, in *United States v. United States District Court (Keith)*,

407 U.S. 297, 315-321 (1972), the Supreme Court did not have to delve into the details of how the FBI was conducting domestic intelligence surveillance in order to determine whether it was unlawful. *See also Doe v. Tenet*, 329 F.3d at 1154 ("the specifics of the Does' relationship with the CIA – such as the place and manner in which they were recruited, their contacts, and the nature of the espionage – should not need to be revealed").

That makes *El-Masri v. Tenet* inapposite, for in that case the district court found it necessary to dismiss the action in order to protect the secrecy of "operational details" concerning the "means and methods" of the challenged government conduct. Here, in contrast, this Court's determination of the lawfulness of defendants' warrantless surveillance program requires no disclosure of the program's operational details. The merits issues here are purely legal – whether the 2001 Authorization for Use of Military Force (AUMF) or inherent Presidential power trump FISA. *See* Plaintiffs' Sur-Response to Defendants' Response to Plaintiffs' Opposition to Filing Material *Ex Parte* and *In Camera* (May 22, 2006) [Docket No. 34] [hereinafter, "Pls.' Sur-Response re *Ex Parte* Filing"] at 5-13.

Indeed, Defendants' Dismissal Memorandum argues the merits issues without any apparent need to reveal state secrets, quite succinctly setting forth the government's various merits arguments. *See* Defs.' Dismissal Memo at 26-29. And earlier this year the Justice Department publicly presented those arguments in complete detail in a 42-page "White Paper" explaining the government's legal theories in support of the program – again, without any apparent need to reveal state secrets. *See* U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described By the President* (Jan. 19, 2006) (available at http://www.fas.org/irp/nsa/doj011906.pdf). Plainly, defendants think they

can try the merits issues in the court of public opinion without revealing state secrets. They can likewise do so in a court of law.

C. Any threat to national security can be avoided by removing privileged evidence from the case.

We continue to maintain, as we have throughout this litigation, that the sealed document was improperly classified to conceal defendants' unlawful conduct in violation of FISA, not for any legitimate national security purpose. *See* Pls.' Sur-Response re *Ex Parte* Filing at 13-15. Nothing in the substance of the document would threaten national security if revealed. The document's value to plaintiffs is in (1) its identification of plaintiffs as actual targets of the warrantless surveillance program, demonstrating their standing to sue, and (2) its bolstering of the inference that defendants had the requisite intent for a FISA violation. *See* Plaintiffs' Response to Defendants' Motion to Deny Access to Sealed Document (June 16, 2006) [Docket No. 49] [hereinafter, "Pls.' Response re Access Motion"] at 16-17. Such use of the document does not put national security at risk, because (1) plaintiffs know that they were surveilled, and (2) the American public knows that defendants have intentionally conducted warrantless surveillance outside the structure of FISA.

However, to whatever extent the sealed document might contain information that could legitimately be considered a privileged state secret, that information can be "completely removed from the case," which then can "go[] forward based on evidence not covered by the privilege." *Kasza v. Browner*, 133 F.3d at 1165. "[W]henever possible, sensitive information must be disentangled from nonsensitive information to allow for release of the latter." *Id.* at 1166; *see also Doe v. Tenet*, 329 F.3d at 1152 ("unprivileged material can and must be separated from the privileged material"). Plaintiffs' counsel stand ready to meet and confer with defense counsel to

produce a redaction of the sealed document that fully protects national security.

Defendants insist such redaction would be ineffective because "[a]ny effort to 'work around' classified facts as the case proceeds could tend to reveal and risk the disclosure of state secrets, particularly those crucial details that go to the ultimate issues in the case." Defs.' Dismissal Memo at 37. Defendants rely on the "mosaic" theory of the state secrets privilege, which extends the privilege to "seemingly innocuous information" that "is part of a classified mosaic," where "[t]housands 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." *Kasza v. Browner*, 133 F.3d at 1166; *see* Defs.' Dismissal Memo at 11-12, 37. But the mosaic theory cannot apply here, for the reasons explained above: (1) the determination of plaintiffs' standing will not require defendants to reveal anything (seemingly innocuous or otherwise) that plaintiffs do not already know, and (2) the merits decision will not require defendants to reveal anything (seemingly innocuous or otherwise) regarding their motives for violating FISA or the means by which they did so.

The Sixth Circuit has warned against abuse of the mosaic theory: "The Government could use its 'mosaic intelligence' argument as a justification to . . . operate in virtual secrecy in all matters dealing, even remotely, with 'national security' . . . ." *Detroit Free Press v. Ashcroft*, 303 F.3d at 709-10. A law review commentator likewise warns that the mosaic theory is "ripe for agency opportunity and abuse. This is the casuistry, and the slippery slope, lurking in the background of the mosaic theory – a creative agency can justify almost any withholding under it. Indeed, anecdotal accounts suggest that executive officials gravitate to the mosaic theory precisely when they know their case for withholding documents is weak." Pozen, *The Mosaic*

Theory, National Security, and the Freedom of Information Act, 115 Yale L.J. 628, 672 (2005). That seems to be what is happening here.

Defendants assert the mosaic theory because the sealed document is "seemingly innocuous." *Kasza v. Browner*, 133 F.3d at 1166. But the mosaic theory does not work here because the document is not just *seemingly* innocuous, it *is* innocuous – except for the fact that it reveals an actual and actionable violation of FISA.

III. THE STATUTORY PROTECTIONS ASSERTED BY DEFENDANTS ARE INAPPLICABLE.

Defendants assert two statutory protections for national security information which afford protection against required disclosure of any information about NSA activities, 50 U.S.C. §402, and require the Director of National Intelligence (DNI) to protect intelligence "sources and methods" from unauthorized disclosure, 50 U.S.C. §403-1(i)(1). *See* Defs.' Dismissal Memo at 38-40.

Neither of these statutory protections is implicated here for the same reason this case does not implicate the state secrets privilege, which is no broader than the statutory protections. Plaintiffs' standing can be determined without any need to disclose the fact that they were surveilled, which *has already* been disclosed, and plaintiffs' claims on the merits can be determined without any need to know defendants' secret "sources or methods," which *need not* be disclosed. This case can be fully and fairly litigated without any disclosure against which defendants have statutory protection.

No precedent supports the use of these statutory protections as grounds for dismissing a lawsuit based on any sort of evidentiary privilege, and they were not so used in the cases cited by defendants. *See Snepp v. U.S.*, 444 U.S. 507, 509, n. 3 (1980) (nondisclosure statute gave CIA

authority to create standard employment agreement requiring prepublication review); *CIA v. Sims*, 471 U.S. 159, 167-68 (1985) (nondisclosure statute allowed withholding of documents requested under Freedom of Information Act); *Fitzgibbon v. CIA*, 911 F.2d 755, 760-61 (D.C. Cir. 1990) (same); *Linder v. NSA*, 94 F.3d 693, 695-96 (D.C. Cir. 1996) (third-party subpoena quashed). Moreover, the application of these statutory protections requires far more factual specificity than the merely conclusory justifications defendants offer for outright dismissal of this action. *See Founding Church of Scientology, etc. v. Nat. Sec. Agency*, 610 F.2d 824, 831 (D.C. Cir. 1979) (affidavit was "far too conclusory" to support summary judgment based on privilege against required disclosure of NSA information).

IV. WHETHER DEFENDANTS VIOLATED FISA BY SURVEILLING PLAINTIFFS WITHOUT A WARRANT IS AN ADJUDICATORY QUESTION FOR THIS COURT, NOT A POLICY QUESTION FOR CONGRESS.

According to defendants, the resolution of plaintiffs' claims on the merits "must be left to the political branches of government." Defs.' Dismissal Memo at 38. Defendants confuse policy-making with adjudication.

Congress makes national policy. "The essentials of the legislative function are the determination of legislative policy and its formulation and promulgation as a defined and binding rule of conduct." *Yakus v. U.S.*, 321 U.S. 414, 424 (1944). "It is the peculiar province of the legislature to prescribe general rules for the government of society . . . ." *Fletcher v. Peck*, 6 Cranch 87 (1810). By enacting FISA in the wake of an unfortunate history of abusive warrantless wiretapping by the NSA and the CIA, Congress adopted a national policy imposing warrant requirements for electronic surveillance. *See* Pls.' Sur-Response re *Ex Parte* Filing at 6.

The courts, in contrast, adjudicate whether the law has been violated. This is a function of "the constitutional equilibrium created by the separation of the legislative power to make general law from the judicial power to apply that law in particular cases." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 224 (1995). The role of this Court in the present case is to decide whether defendants violated FISA when they surveilled plaintiffs without a warrant. That task is adjudicatory, not political, and it is properly performed by the Judiciary, not by the political branches of government.

Defendants say "the President has determined that the current threat to the United States demands that signals intelligence be carried out *with a speed and methodology that cannot be achieved by seeking judicial approval* through the traditional FISA process for the interception of individual communications." Defs.' Dismissal Memo at 29 (emphasis added). And they say "the President's decision *not to cede control* over this vital intelligence collection effort to the potential delays and uncertainties of a judicial process is well-supported and consistent with the President's statutory and constitutional authority." *Id.* at 30 (emphasis added).

Thus, according to defendants, the President may ignore Congress's prescription of judicial control over electronic surveillance whenever he thinks intelligence cannot be effectively gathered in the manner FISA prescribes. But if that is true, then the President also may ignore the Judiciary – indeed, he may ignore *this Court's judgment* in the present case – as he deems necessary to protect national security. That is a frightening prospect, and it does not bode well for the future of the constitutional separation of powers, for it concentrates too much power in the Executive Branch. "Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to

avoid." *Hamdan v. Rumsfeld*, ___ U.S. ___, 2006 WL 1764793 at *42 (June 29, 2006) (Kennedy, J., concurring).

Whether FISA enables the President to meet the terrorist threat with sufficient speed – and whether the "special needs" asserted by defendants should justify dispensing with FISA's warrant requirement, *see* Defs.' Dismissal Memo at 31 – are policy questions which Congress has already addressed by increasing the period during which the Attorney General may authorize emergency warrantless surveillance, *see* 50 U.S.C. §1805(f), from 24 hours to 72 hours. *See* 115 Stat. 1394, §314(a)(2)(B) (Dec. 28, 2001). If defendants feel they need more time to get a warrant – or should not have to get a warrant at all – they should tell Congress, not this Court.

The question presented here – whether defendants violated FISA in its present form by surveilling plaintiffs without a warrant – is purely adjudicatory, and it is properly adjudicated *only* by the Judiciary.

V. *HAMDAN V. RUMSFELD* FORETELLS THAT DEFENDANTS WILL LOSE ON THE MERITS.

We next call this Court's attention to a new Supreme Court decision indicating that defendants' arguments on the merits of this lawsuit are destined for failure.

In *Hamdan v. Rumsfeld*, ___ U.S. ___, 2006 WL 1764793 (June 29, 2006), the Supreme Court held that military commissions established to try Guantanamo Bay detainees violate federal law and the Geneva Conventions. *Hamdan* rejected the theories that defendants assert here in support of their warrantless surveillance program – that it is within the scope of the 2001 Authorization for Use of Military Force (AUMF) and inherent President power. *See* Pls.' Sur-Response re *Ex Parte* Filing at 5-13.

The key point in *Hamdan* was that a federal statutory scheme, the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §801 *et seq.*, prescribes a structure and procedures for trying the Guantanamo Bay detainees – just as FISA prescribes a structure and procedures for conducting foreign intelligence surveillance. *Hamdan* held that neither the AUMF nor inherent Presidential power authorize military commissions outside the structure of the UCMJ – just as we contend that neither the AUMF nor inherent Presidential power authorize warrantless surveillance outside the structure of FISA. With regard to the AUMF, "there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in . . . the UCMJ." *Hamdan v. Rumsfeld*, 2006 WL 1764793 at *21. With regard to inherent Presidential power, "[w]hether or not the President has independent power, absent congressional authorization to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers" through the UCMJ. *Id.* at *21, n. 23.

Justice Kennedy's concurring opinion in *Hamdan* further explains why inherent Presidential power does not trump the UCMJ: Through the UCMJ, "Congress, in the proper exercise of its powers as an independent branch of government . . . has . . . set limits on the President's authority." *Id.* at *41 (Kennedy, J., concurring). *Hamdan* "is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional action." *Id.* Under Justice Jackson's formulation in the *Steel Seizure Case*, *see* Pls.' Sur-Response re *Ex Parte* Filing at 11, Congress has, by expressing its will in the UCMJ, put inherent Presidential power over the manner of trying the Guantanamo Bay detainees at "its lowest ebb." *Id.* at *42.

Similarly here, Congress has, by expressing its will in FISA, put inherent Presidential power over authorization of foreign intelligence surveillance at its lowest ebb.

"Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment." *Id.* at *41. FISA, too, is the result of a deliberate and reflective process engaging both of the political branches, from its 1978 inception to its recent amendments. It cannot be trumped by a Presidential power grab wholly at odds with the constitutional separation of powers.

VI. PLAINTIFFS' COUNSEL SHOULD BE GIVEN ACCESS TO DEFENDANTS' NEW *EX PARTE* DECLARATIONS.

Finally, we again object to defendants' filing of declarations *in camera* and *ex parte*. Defendants previously filed a secret declaration in response to the Oregonian Publishing Company's motion, to which we objected. *See* Plaintiffs' Memorandum in Opposition to Defendants' Lodging of Material *Ex Parte* and *In Camera* (April 24, 2006) [Docket No. 30]. Now, defendants have done so again in connection with their dismissal motion, with the *in camera* and *ex parte* filings of secret declarations by Director of National Intelligence John D. Negroponte and National Security Director Lieutenant General Keith B. Alexander.

We object to the filing of these new secret declarations for the same reasons we objected to the filing of the secret declaration in response to the Oregonian Publishing Company's motion and to defendants' attempt to deny plaintiffs' counsel access to the sealed document. Defendants

have presented *no* facts, let alone compelling facts, *see Guenther v. Comm'r of Internal Revenue (Guenther II)*, 939 F.2d 758, 760 (9th Cir. 1991), that might justify the secret filing of their new declarations, just as they previously failed to present facts justifying the secret filing of their declaration opposing the Oregonian Publishing Company's motion. *See* Pls.' Sur-Response re *Ex Parte* Filing at 2-3. The due process right of "an opportunity to be heard," *Guenther v. Comm'r of Internal Revenue (Guenther I)*, 889 F.2d 882, 884 (9th Cir. 1989), requires that plaintiffs be shown the declarations to enable a full and fair challenge to the assertions in the declarations. *See* Pls.' Response re Access Motion at 10-11. Under FISA, 50 U.S.C. §1806(f), this Court may disclose the secret declarations to plaintiffs as necessary to determine whether defendants' warrantless surveillance program is unlawful. *See id.* at 11-13; Pls.' Sur-Response re *Ex Parte* Filing at 4-5.

The Supreme Court's decision in *Hamdan v. Rumsfeld* counsels against denying access to the secret declarations as well as the sealed document. In *Hamdan*, two features of the military commissions that made them unlawful were that the accused and his counsel could be excluded from trial and that they could "be denied access to evidence" for no other reason than that the evidence was classified or the government claimed it concerned national security interests. *Hamdan v. Rumsfeld*, 2006 WL 1764793 at *30, *33-*35. Such restrictions violate a fundamental principle of human rights – "that an accused must, absent disruptive conduct or consent, be present for his trial and *must be privy to the evidence against him*." *Id.* at *39 (emphasis added). "It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." *Crawford v. Washington*, 541 U.S. 36, 49 (2004) (quoted in *Hamdan v. Rumsfeld*, 2006 WL 1764793 at *39,

n. 67). Similarly here, defendants seek to deny plaintiffs' counsel access to evidence – the sealed document and defendants' secret declarations – on the ground the evidence is classified and purportedly concerns national security interests. Such denial of access to evidence – in effect, a secret trial – is as odious as the secret proceedings held unlawful in *Hamdan v. Rumsfeld*.

CONCLUSION

Defendants proclaim the "greater public good" they say would come from dismissal of this lawsuit without a determination whether their warrantless surveillance program is unlawful. Defs.' Dismissal Memo at 38. But there is no greater public good than ensuring that America's highest officeholder is faithful to the law of the land. In fighting the war on terror, "the Executive is bound to comply with the Rule of Law." *Hamdan v. Rumsfeld*, 2006 WL 1764793 at *40. This lawsuit is intended to ensure such compliance.

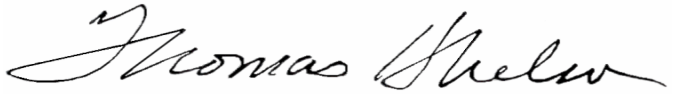
Defendants say "the clearest example of the potential risks" to national security from this litigation is in the recent "chain of events" where a court clerk accidentally mishandled a declaration filed under seal. Defs.' Dismissal Memo at 37. To be sure, a secret as big as defendants' warrantless surveillance program is difficult to keep from the American people. Indeed, it was OFAC's own bungling in May 2004 that caused the document to fall into plaintiffs' hands, and it was the New York Times story exposing the warrantless surveillance program in December 2005 that caused plaintiffs to understand what the document meant – that they had been surveilled without a warrant. But these events – OFAC's accidental disclosure, the New York Times story, and the clerk's mistake – show that, whether by accident or by design, a truth this important will eventually emerge from the shadows. The lesson here is not

that this Court should support defendants in their attempts to keep secrets at the expense of the rule of law, but that conduct so inimical to the Nation's values as defendants' warrantless surveillance program *cannot* be kept secret as long as America remains a free and open society.

This is how lawbreaking often unravels – starting with a little mistake, such as the bungling by the Watergate burglars which eventually revealed unlawful Executive conduct and led to FISA's enactment. OFAC's little mistake in May 2004 has brought to light the defendants' targeting of plaintiffs in the warrantless surveillance program. All that remains is for the Judiciary to determine whether plaintiffs' warrantless surveillance was unlawful, which this Court can decide without jeopardizing national security.

Plaintiffs request that Defendants' Motion to Dismiss be denied.

Respectfully submitted,



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