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19 **IN THE UNITED STATES DISTRICT COURT**
 20 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

21	IN RE NATIONAL SECURITY AGENCY)	MDL Docket No. 06-1791 VRW
22	TELECOMMUNICATIONS RECORDS)	
23	LITIGATION)	April 23, 2008; 10:00 a.m.
24	<u>This Document Relates Solely To:</u>)	MEMORANDUM IN OPPOSITION TO
25	<i>Al-Haramain Islamic Foundation, Inc., et al. v.</i>)	DEFENDANTS’ SECOND MOTION TO
26	<i>Bush, et al.</i> (C07-CV-0109-VRW))	DISMISS OR, IN THE ALTERNATIVE,
27)	FOR SUMMARY JUDGMENT
28)	<i>Al-Haramain Islamic Foundation, Inc., et</i>
)	<i>al., v. Bush, et al.</i>

MEMORANDUM IN OPPOSITION TO DEFENDANTS’ SECOND MOTION TO DISMISS, ETC.
 MDL DOCKET NO. 06-1791 VRW

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INTRODUCTION

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2 This lawsuit challenges defendants' warrantless electronic surveillance of Al-Haramain Islamic
3 Foundation, Inc. and two of its lawyers, Wendell Belew and Asim Ghafoor. The United States Court
4 of Appeals for the Ninth Circuit has remanded the case to this Court for a determination whether the
5 Foreign Intelligence Surveillance Act (FISA) preempts the state secrets privilege. If FISA preempts
6 the privilege, this Court can proceed to determine plaintiffs' standing and, thereafter, the merits of this
7 lawsuit.

8 FISA was enacted to curb governmental abuses of modern electronic surveillance capabilities
9 by requiring a warrant for the sort of eavesdropping to which plaintiffs were subjected. FISA created
10 an exclusive statutory framework for the domestic use of electronic surveillance to acquire foreign
11 intelligence information – and for litigating claims of unlawful surveillance – in order to prevent the
12 Executive Branch from unnecessarily intruding on civil liberties in the name of national security.

13 FISA strikes a balance between two potentially competing interests – protecting national
14 security and safeguarding civil liberties – by authorizing the courts to adjudicate claims of unlawful
15 surveillance within the protective framework of *ex parte* and *in camera* proceedings. In contrast, the
16 state secrets privilege – which permits exclusion of evidence from litigation or, in rare instances,
17 outright dismissal of a lawsuit when the government successfully asserts national security concerns
18 – abides no such balancing of interests, at the expense of civil liberties. FISA's protective framework
19 for litigating claims of unlawful surveillance preempts the state secrets privilege by embracing the
20 balancing of interests that the state secrets privilege eschews.

21 Preemption also results from the prescription of a private right of action for FISA violations,
22 which is wholly inconsistent with the state secrets privilege – for, absent such preemption, the
23 government could evade private lawsuits at will, making the private right completely illusory.
24 Congress cannot possibly have envisioned use of the state secrets privilege to subvert FISA's statutory
25 scheme for challenging unlawful surveillance.

26 Defendants claim the state secrets privilege is rooted in the Constitution, and thus any effort
27 by Congress to preempt the privilege is constitutionally suspect. The Ninth Circuit has said otherwise:
28 The privilege is one of federal common law. As such, it is subject to congressional preemption with

1 a comprehensive regulatory scheme like FISA. And even if the privilege is constitutionally based, that
2 just means the President and Congress have concurrent constitutional authority to regulate protection
3 of state secrets. According to the formulation set forth in *Youngstown Sheet and Tube Co. v. Sawyer*,
4 343 U.S. 579 (1952) for determining the parameters of such concurrent authority under our
5 Constitution’s separation of powers and its system of checks and balances, Congress can preempt the
6 privilege, even if it is constitutionally based, by enacting legislation like FISA that puts presidential
7 power at its lowest ebb.

8 Defendants claim the President has inherent power to disregard FISA entirely, but the
9 *Youngstown* formulation forecloses that claim. The President does *not* have inherent power to ignore
10 FISA. Congress having passed – and the 39th President having signed – laws regulating electronic
11 surveillance and prescribing security procedures for litigating claims of unlawful surveillance, the 43rd
12 President must follow those laws.

13 The protective statutory framework for FISA litigation enables this lawsuit to go forward, with
14 ample safeguards to protect national security, so that this Court can proceed to decide the merits of this
15 case.

16 **FACTUAL BACKGROUND**

17 **I. The FISA Context**

18 Congress enacted FISA in 1978 as a response to past instances of abusive warrantless
19 wiretapping by the National Security Agency (NSA) and the Central Intelligence Agency (CIA). *See*
20 H. REP. NO. 95-1283(I), at 21-22 (1978), Decl. of Jon B. Eisenberg, Ex. E; S. REP. NO. 95-604(I), at
21 7-8 (1977), Decl. of Jon B. Eisenberg, Ex. F.^{1/} FISA provides an exclusive framework for the domestic
22 use of electronic surveillance to acquire foreign intelligence information. *See* H. REP. NO. 95-1283(I),
23 *supra*, at 22 (FISA prescribes “the exclusive means by which electronic surveillance, as defined, could
24 be used for foreign intelligence purposes”), Decl. of Jon B. Eisenberg, Ex. E; S. REP. NO. 95-604(I),
25 *supra*, at 6 (FISA, combined with the Omnibus Crime Control and Safe Streets Act of 1968,
26 “constitutes the exclusive means by which electronic surveillance, as defined, . . . may be conducted;

27
28 ^{1/} All citations to the “Decl. of Jon B. Eisenberg” are to the declaration and exhibits filed
simultaneously with this memorandum.

1 the bill recognizes no inherent power of the President in this area”), Decl. of Jon B. Eisenberg, Ex. F.

2 With narrow exceptions not applicable here, FISA requires the government to obtain a court
3 order – that is, a warrant – in order to conduct electronic surveillance of a “United States person,”
4 meaning a citizen, resident alien or association of such persons. 50 U.S.C. § 1801(i). FISA imposes
5 criminal penalties for its violation, making it an offense to “engage[] in electronic surveillance under
6 color of law except as authorized by statute.” 50 U.S.C. § 1809(a)(1). FISA also imposes civil
7 liability for its violation. Victims of unlawful electronic surveillance “shall have a cause of action
8 against any person who committed such violation” and “shall be entitled to recover” actual damages,
9 punitive damages, and reasonable attorney’s fees and costs. 50 U.S.C. § 1810.

10 **II. The Warrantless Surveillance Program**

11 Shortly after the terrorist attacks of September 11, 2001, President Bush authorized a secret
12 program for the NSA to engage in warrantless electronic surveillance of international communications
13 into and out of the United States where the NSA believed that one of the participants was affiliated
14 with or working in support of al-Qaeda. President Bush regularly re-authorized the warrantless
15 surveillance program at 45-day intervals upon written certifications by the Department of Justice
16 (DOJ) until January 2007, when the program purportedly was suspended. The warrantless surveillance
17 program did not comply with the requirements of FISA. In a 42-page “White Paper” the DOJ issued
18 in January 2006, defendants have publicly asserted their legal justifications for the program. *See* U.S.
19 Dept. of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described*
20 *by the President* (Jan. 19, 2006), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthoriti>
21 [es.pdf](http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf), Decl. of Jon B. Eisenberg, Ex. A at 11-12, 34.

22 As of early March 2004, former Attorney General John Ashcroft and former Deputy Attorney
23 General James B. Comey had determined that the warrantless surveillance program was unlawful.
24 Decl. of Jon B. Eisenberg, Ex. A at 11-12, 33-34. During a meeting at the White House on March 9,
25 2004 – two days before the DOJ’s next 45-day written re-certification was due – Comey conveyed this
26 conclusion to Vice-President Dick Cheney and members of his and the President’s staffs, telling them
27 the DOJ would not re-certify the program. *Id.*, Ex. A at 11-12, 31, Ex. B at 2, 4. The Director of the

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1 Federal Bureau of Investigation (FBI), Robert S. Mueller III – one of the defendants in this case – also
2 harbored what he called “serious reservations” about the program’s legality. *Id.*, Ex. C at 27. On
3 March 10, 2004, while Ashcroft was hospitalized, two White House officials went to Ashcroft’s
4 bedside and attempted to obtain the written re-certification from Ashcroft, but he refused. *Id.*, Ex. A
5 at 10, 14. Nevertheless, despite the advice that the warrantless surveillance program as then
6 constituted was unlawful, the President did not direct Comey or the FBI to discontinue or suspend any
7 portion of the program. Instead, the program went ahead without the DOJ’s re-certification for a
8 period of several weeks – the precise time when the plaintiffs in the present case were subjected to
9 surveillance. *Id.*, Ex. A at 27-28, 32-33, 43, Ex. B at 4.

10 **III. Plaintiffs’ Surveillance**

11 In February 2004, defendant Office of Foreign Assets Control (OFAC) temporarily froze the
12 assets of plaintiff Al-Haramain Islamic Foundation, Inc., pending a proceeding to determine whether
13 to declare Al-Haramain a “Specially Designated Global Terrorist” organization. Decl. of Barbara C.
14 Hammerle ¶ 4.^{2/} On August 20, 2004, in the course of that proceeding, OFAC produced a group of
15 unclassified materials to Al-Haramain counsel Lynne Bernabei, who gave copies to five other Al-
16 Haramain lawyers, including plaintiffs Wendell Belew and Asim Ghafoor, and to Al-Haramain
17 directors Soliman al-Buthi and Pirouz Sedaghaty. Decl. of Frances R. Hourihan ¶¶ 3-8; Decl. of Lynne
18 Bernabei ¶¶ 4-6; Decl. of Wendell Belew ¶ 4; Decl. of Asim Ghafoor ¶ 4.

19 Also included in this production – evidently by accident – was a document (hereafter “the
20 Document”) bearing an extremely high top secret classification. Decl. of Frances R. Hourihan ¶ 4;
21 Suppl. Decl. of Frances R. Hourihan ¶¶ 4-5. In late August 2004, the FBI was notified of the
22 Document’s inadvertent disclosure. Decl. of Frances R. Hourihan ¶ 3; Suppl. Decl. of Frances R.
23 Hourihan ¶ 3. In mid-October 2004, FBI agents retrieved copies of the Document from all counsel.
24 Decl. of Frances R. Hourihan ¶ 7; Suppl. Decl. of Frances R. Hourihan ¶ 7; Decl. of Lynne Bernabei
25 ¶ 9; Decl. of Wendell Belew ¶¶ 5-6, Decl. of Asim Ghafoor ¶¶ 5-7. The FBI did not, however, contact

27 ^{2/} The declarations of Barbara C. Hammerle, Frances R. Hourihan, Lynne Bernabei, Wendell
28 Belew, and Asim Ghafoor cited in this memorandum are on file with this Court, having been filed
in connection with prior proceedings.

1 Al-Buthi or Sedaghaty, who were living overseas at the time. Decl. of Frances R. Hourihan ¶ 8. The
2 Document demonstrates that, in March and April of 2004 – during the period when the Attorney
3 General and other high governmental officials had determined that the warrantless surveillance
4 program was unlawful yet it went forward without certification – Al-Haramain and its attorneys were
5 subjected to warrantless electronic surveillance in violation of FISA.

6 Testimony by Director of National Intelligence Mike McConnell and NSA Director Keith
7 Alexander before the Senate Select Committee on Intelligence has confirmed that plaintiffs’
8 surveillance was within the scope of FISA’s requirement of a warrant. One of FISA’s definitions of
9 the types of “electronic surveillance” that invoke the warrant requirement is “the acquisition . . . of the
10 contents of any wire communication to or from a person in the United States . . . *if such acquisition*
11 *occurs in the United States*” 50 U.S.C. § 1801(f)(2) (emphasis added). McConnell and
12 Alexander explained that, because of technological innovations since FISA’s inception,
13 communications between persons located inside and outside the United States are now transmitted
14 over wire, and the interception of such communications occurs *in the United States*. Decl. of Jon B.
15 Eisenberg, Ex. D at 7-9, 22-23. Thus, according to McConnell, “when seeking to monitor foreign
16 persons suspected of involvement in terrorist activity who are physically located in foreign countries,
17 the intelligence community is required under today’s FISA [50 U.S.C. § 1801(f)(2)] to obtain a court
18 order to conduct surveillance.” *Id.*, Ex. D at 9. The communications at issue in this case occurred
19 between persons located inside and outside the United States. Those communications thus were
20 “electronic surveillance” within the scope of FISA.

21 The applicability of section 1801(f)(2) to this case was previously obscured by President
22 Bush’s assertion on December 19, 2005 – now known to be untrue – that “these calls are not
23 intercepted within the country.” *See* Excerpt from Press Conference of the President (Dec. 19, 2005),
24 *available at* <http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html>, Decl. of Jon B.
25 Eisenberg, Ex. J.

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1 **STATEMENT OF THE CASE**

2 **I. The *Al-Haramain* Complaint**

3 On February 28, 2006, plaintiffs Al-Haramain, Belew and Ghafoor filed a complaint in the
4 United States District Court for the District of Oregon alleging a private cause of action under FISA.
5 The complaint also alleges violations of the constitutional separation of powers, the First, Fourth and
6 Sixth Amendments, and the International Covenant on Civil and Political Rights.

7 The complaint alleges that defendants “have engaged in electronic surveillance of plaintiffs
8 without court orders.” Compl. ¶ 2. Specifically, the complaint alleges that in March and April 2004,
9 the NSA targeted and engaged in electronic surveillance of attorney-client communications between
10 a director or officer of Al-Haramain and its attorneys Belew and Ghafoor without obtaining a warrant
11 or otherwise complying with FISA, and that in May 2004 the NSA gave logs of those surveilled
12 communications to OFAC. *Id.*, ¶¶ 19-20. Along with the complaint, plaintiffs filed a copy of the
13 Document under seal with the Oregon district court in order to establish the fact of their surveillance
14 and thus their standing as “aggrieved” persons to assert a private cause of action under FISA.

15 **II. The State Secrets Privilege**

16 Defendants responded to this lawsuit by invoking the state secrets privilege, which – where
17 applicable – allows the government to refuse discovery of classified information that poses a risk to
18 national security if publicly disclosed. *United States v. Reynolds*, 345 U.S. 1, 6, 10 (1953). In *Kasza*
19 *v. Browner*, 133 F.3d 1159, 1165 (9th Cir. 1998), the Ninth Circuit explained the state secrets privilege
20 as follows: The state secrets privilege is “a common law evidentiary privilege.” *Id.* It “allows the
21 government to deny discovery of military secrets” which, in the interest of national security, should
22 not be divulged. *Id.* “Once the privilege is properly invoked and the court is satisfied as to the danger
23 of divulging state secrets, the privilege is absolute.” *Id.* at 1165-66. The government can invoke the
24 privilege with regard to “particular evidence,” so that the privileged evidence “is completely removed
25 from the case,” which then “goes forward based on evidence not covered by the privilege.” *Id.*
26 Further, if the “very subject matter of the action” is a state secret, the court must “dismiss the
27 plaintiff’s action.” *Id.*

28 //

1 **III. The Pretrial Motions and the Oregon District Court’s Decision**

2 Defendants filed a motion for dismissal of this action, or alternatively for summary judgment,
3 based on the state secrets privilege. They also filed a motion to bar plaintiffs from having access to
4 the Document. Plaintiffs responded that (1) FISA section 1806(f) preempts the state secrets privilege
5 and vests the district court with authority to permit use of the Document under secure conditions to
6 determine plaintiffs’ standing, and (2) even if the state secrets privilege applies here, it does not require
7 dismissal of this lawsuit.

8 In an opinion filed September 7, 2006, the Oregon district court declined to dismiss the action
9 or grant summary judgment based on the state secrets privilege, concluding that the warrantless
10 surveillance program is no longer a secret to the general public and, because of the Document’s
11 inadvertent disclosure, “it is not a secret to plaintiffs whether their communications have been
12 intercepted.” *Al-Haramain Islamic Foundation, Inc. v. Bush*, 451 F. Supp.2d 1215, 1222-23 (D. Ore.
13 2006). Instead, the judge said he would “permit plaintiffs to file *in camera* any affidavits attesting to
14 the contents of the document from their memories to support their standing in this case and to make
15 a *prima facie* case.” *Id.* at 1229.

16 The Oregon district court did not decide the issue whether FISA preempts the state secrets
17 privilege, saying “I decline to reach this very difficult question at this time, which involves whether
18 Congress preempted what the government asserts is a constitutionally-based privilege.” *Id.* at 1231.
19 The court noted, however, that defendants’ arguments against preemption “would nullify FISA’s
20 private remedy and would be contrary to the plain language of Section 1806(f).” *Id.*

21 **IV. The Ninth Circuit’s Decision**

22 The Ninth Circuit granted defendants’ request to permit an interlocutory appeal pursuant to 28
23 U.S.C. section 1292(b). Thereafter, the Judicial Panel on Multidistrict Litigation transferred the action
24 to this Court. On November 16, 2007, the Ninth Circuit reversed the Oregon district court’s decision
25 and ordered the case remanded to this Court for further proceedings. *Al-Haramain Islamic*
26 *Foundation, Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007). The Ninth Circuit held that the Oregon
27 district court properly determined the warrantless surveillance program is no longer a state secret, but
28 that the district court erred in permitting the plaintiffs to establish their standing by filing affidavits

1 describing the Document from memory, because the Document is a state secret and the district court’s
2 ruling was an improper “back door around” the state secrets privilege. *Id.* at 1193.

3 The Ninth Circuit did not decide whether FISA preempts the state secrets privilege. Noting
4 that this issue has now become “central to Al-Haramain’s ability to proceed with this lawsuit,” *id.* at
5 1205-06, the Ninth Circuit said: “Rather than consider the issue for the first time on appeal, we remand
6 to the district court to consider whether FISA preempts the state secrets privilege and for any
7 proceedings collateral to that determination.” *Id.* at 1206.^{3/}

8 ARGUMENT

9 I. FISA PREEMPTS THE COMMON LAW STATE SECRETS PRIVILEGE.

10 A. FISA Strikes a Balance Between Protecting National Security and Safeguarding 11 Civil Liberties.

12 We begin with the issue that the Ninth Circuit remanded for this Court’s decision: whether
13 FISA preempts the state secrets privilege. The answer is that FISA preempts the privilege via two
14 statutory provisions: FISA section 1810, which prescribes the private cause of action, and FISA section
15 1806(f), which prescribes security procedures for FISA litigation.

16 FISA’s legislative history demonstrates Congress’s intent to strike a balance between two
17 potentially competing interests – protecting national security and safeguarding civil liberties. Enacted
18 in the wake of governmental abuses of modern surveillance techniques, FISA is intended to restore
19 that balance by (1) prescribing an exclusive framework for the domestic use of electronic surveillance
20 to acquire foreign intelligence information, and (2) specifying the judiciary’s role in approving
21 proposed surveillance and determining the legality of past surveillance. After extensive deliberation
22 and debate, Congress concluded that protection of civil liberties requires comprehensive judicial
23 oversight of electronic surveillance conducted in the name of national security, as a check against
24 documented overreaching by the Executive Branch. A 1978 House Conference Report explained that
25 section 1806(f) “adequately protects the rights of the aggrieved person” and at the same time “ensures

26 ^{3/} The remanded issue is a pure question of law. Defendants, however, have lodged *in camera*
27 and *ex parte* a secret “Classified Supplemental Memorandum” in support of their second dismissal
28 motion. Absent some legitimate justification (which is difficult to imagine) for filing a secret
argument on a pure question of law, plaintiffs object to this secret filing.

1 adequate protection of national security interests.” H. CONF. REP. NO. 95-1720, at 32 (1978), Decl.
2 of Jon B. Eisenberg, Ex. G. Similarly, a Senate Judiciary Committee report called section 1806(f) “a
3 reasonable balance between an entirely in camera proceeding . . . and mandatory disclosure, which
4 might occasionally result in the wholesale revelation of sensitive foreign intelligence information.”
5 S. REP. NO. 95-604(I), *supra*, at 58, Decl. of Jon B. Eisenberg, Ex. F.

6 In this respect, FISA departs from the state secrets privilege, where the rule of outright
7 dismissal precludes any balancing of competing interests. *See Halkins v. Helms*, 690 F.2d 977, 997
8 n.71 (D.C. Cir. 1982) (“the state secrets privilege, being absolute, requires no such balancing”).
9 Section 1806(f), in contrast, embraces such balancing – and thereby preempts the state secrets privilege
10 – by prescribing a procedure whereby the courts can safeguard civil liberties by adjudicating claims
11 of unlawful surveillance yet protect national security by considering sensitive information *ex parte* and
12 *in camera*.

13 **B. The State Secrets Privilege is a Rule of Federal Common Law That Congress May**
14 **Preempt With a Comprehensive Regulatory Program.**

15 The threshold question is whether the state secrets privilege arises from the Constitution or
16 from federal common law. This question is important because the Supreme Court has prescribed a
17 special standard for determining preemption of federal common law, which differs from the standard
18 that would apply if the state secrets privilege were constitutionally based. The standard for
19 “determining if federal statutory law governs a question previously the subject of federal common law”
20 does not require “evidence of a clear and manifest purpose” to preempt – as does the standard for
21 determining whether federal law preempts state law. *Milwaukee v. Illinois*, 451 U.S. 304, 316-17
22 (1981). Rather, a federal statutory scheme can preempt federal common law, even without explicit
23 evidence of a clear and manifest purpose to do so, if Congress has “*occupied the field* through the
24 establishment of a *comprehensive regulatory program*.” *Id.* at 317 (emphasis added).

25 The Ninth Circuit has now implicitly resolved the question whether the state secrets privilege
26 is one of federal common law or is constitutionally based: Once again, as in *Kasza*, the Ninth Circuit
27 has plainly described the privilege as “a common law evidentiary privilege.” *Al-Haramain*, 507 F.3d
28 at 1196; *accord*, *Kasza*, 133 F.3d at 1167 (“the state secrets privilege is an evidentiary privilege rooted

1 in federal common law”); *Monarch Assur. P.L.C. v. U.S.*, 244 F.3d 1356, 1358 (Fed. Cir. 2001)
2 (“common-law state secrets privilege”); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546
3 (2d Cir. 1991) (“common law evidentiary rule”); *In re United States*, 872 F.2d 472, 474 (D.C. Cir.
4 1989) (same). That description is consistent with *Reynolds*, which said the privilege is “well
5 established in the *law of evidence*,” 345 U.S. at 6-7 (emphasis added), not in constitutional law. *See*
6 *also* Fed R. Evid. 501 notes of Committee on the Judiciary, H. Rep. No. 93-650 (describing “secrets
7 of state” privilege as one of nine “nonconstitutional privileges” the Supreme Court submitted to
8 Congress).

9 In this respect, the state secrets privilege differs from executive privilege, which the Supreme
10 Court has suggested is “inextricably rooted in the separation of powers under the Constitution.”
11 *United States v. Nixon*, 418 U.S. 683, 708 (1974). The Supreme Court has never said that the state
12 secrets privilege is similarly rooted in the constitutional separation of powers. Defendants rely on
13 *Nixon* for the proposition that “the state secrets privilege derives from the President’s authority under
14 Article II of the Constitution to protect national security,” Defs.’ Second Mo. To Dismiss etc. at 13,
15 but *Nixon* held nothing of the sort. *Nixon* did not adjudicate any issues regarding the state secrets
16 privilege.

17 As a federal common law privilege, the state secrets privilege may be displaced by statute.
18 *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (“Congress retains the ultimate authority to
19 modify or set aside any judicially created rules of evidence and procedure that are not required by the
20 Constitution”); *see also Tenet v. Doe*, 544 U.S. 1, 11 (2005) (Stevens, concurring) (“Congress can
21 modify the federal common-law rule”). And the privilege, as one of federal common law, may be
22 preempted by a “comprehensive regulatory program” like FISA. *Milwaukee v. Illinois*, 451 U.S. at
23 317. In *Milwaukee v. Illinois*, a statutory scheme regulating interstate water pollution preempted
24 federal common law on nuisance abatement, even without any mention of the federal common law in
25 legislative history, because “[t]he establishment of such a self-consciously comprehensive program
26 by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that
27 program with federal common law.” *Id.* at 319. Similarly here, FISA preempts the state secrets
28 privilege by occupying the entire field of foreign intelligence surveillance with a comprehensive

1 regulatory program that includes a warrant requirement and secure procedures for adjudicating civil
2 actions for FISA violations. As Senator Gaylord A. Nelson (one of FISA’s co-sponsors) explained
3 during floor debate, FISA “[a]long with the existing statute dealing with criminal wiretaps . . . *blankets*
4 *the field.*” 124 CONG. REC. 10,903-04 (1978) (emphasis added.) As the Ninth Circuit put it, FISA
5 “provides a *detailed regime* to determine whether surveillance ‘was lawfully authorized and
6 conducted.’” *Al-Haramain*, 507 F.3d at 1205 (emphasis added).

7 Thus, it is inconsequential that, as defendants argue, FISA’s “legislative history does not even
8 mention the state secrets privilege.” Defs.’ Second Mo. To Dismiss etc. at 19. It may be true that
9 FISA’s legislative history does not explicitly mention the state secrets privilege by name, but Congress
10 plainly intended to create a comprehensive regulatory program that includes a statutory scheme for
11 challenging unlawful surveillance. And if the privilege is one of federal common law, then it is
12 preempted by this comprehensive regulatory program.

13 **C. FISA’s Comprehensive Regulatory Program Speaks Directly to Protection of**
14 **National Security in FISA Litigation.**

15 The specific preemption inquiry is whether FISA’s comprehensive regulatory program
16 ““[speaks] *directly* to [the] question” otherwise answered by federal common law.”” *Kasza*, 133 F.3d
17 at 1167 (emphasis in original) (quoting *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236-
18 37 (1985)). The question, simply put, is whether FISA speaks directly to protection of national
19 security in FISA litigation. Two sub-issues are presented: (1) Does FISA speak directly to security
20 procedures and rules of disclosure that are otherwise prescribed by the state secrets privilege? (2)
21 Does FISA speak directly to the rule of outright dismissal that is otherwise prescribed by the state
22 secrets privilege? The answer in both instances is *yes*.

23 **1. FISA Section 1806(f) Speaks Directly to Security Procedures and Rules of**
24 **Disclosure.**

25 On the first sub-issue, FISA section 1806(f) speaks directly to security procedures and rules
26 of disclosure by prescribing rules for judicial determination and protection of national security
27 concerns where, as here, a private cause of action is alleged under FISA section 1810. This regime
28 speaks directly to use and disclosure that would otherwise be governed by the state secrets privilege.
It speaks directly to secure use of the Document in the present case to demonstrate plaintiffs’ standing.

1 And its application “notwithstanding any other law,” 50 U.S.C. § 1806(f), means the state secrets
2 privilege is preempted.

3 Plaintiffs invoked section 1806(f)’s security regime by opposing defendants’ motion to bar
4 plaintiffs from having access to the Document. Section 1806(f) authorizes this Court to review the
5 Document *in camera* and *ex parte* to determine plaintiffs’ standing. Further, section 1806(f)
6 authorizes this Court, in its discretion, to give plaintiffs access to the Document under appropriate
7 security procedures and protective orders – e.g., redaction of sensitive information from the Document
8 – for purposes of counsel’s discussion of the Document in subsequent argument before this Court on
9 the issue of standing. *See* 50 U.S.C. § 1806(f) (court may disclose to aggrieved parties underlying
10 documentation “under appropriate security procedures and protective orders . . . where such disclosure
11 is necessary to make an accurate determination of the legality of the surveillance”).

12 This case is unusual in that the aggrieved parties are plaintiffs in a civil action rather than
13 defendants in a criminal action, and the Attorney General never filed the prescribed affidavit. But
14 nothing in section 1806(f) restricts its application to either circumstance. By its plain language, section
15 1806(f) applies whenever a “request is made by an aggrieved person . . . to . . . obtain materials relating
16 to electronic surveillance . . .” That language is more than broad enough to encompass the plaintiffs
17 here, to the extent they sought access to the Document. That is why the Oregon district court
18 concluded that defendants’ arguments against preemption “would be contrary to the plain language
19 of Section 1806(f).” *Al-Haramain*, 451 F. Supp.2d at 1231.^{4/}

20 Moreover, Congress envisioned the statute’s application in civil actions and/or where, as here,

21
22 ^{4/} Defendants contend section 1806(f) applies only to electronic surveillance undertaken
23 pursuant to FISA because of the presence of the phrase “under this chapter” in section 1806(f). *See*
24 *Defs.’ Second Mo. To Dismiss etc.* at 17 n.16 (also citing similar language elsewhere in section
25 1806). But that phrase modifies only section 1806(f)’s provision regarding motions and requests “to
26 discover, obtain, or suppress evidence or information *obtained or derived from* electronic
27 surveillance.” 50 U.S.C. § 1806(f) (emphasis added). Plaintiffs rely not on that provision, but on
28 section 1806(f)’s entirely separate provision regarding motions and requests “to discover or obtain
applications or orders or other materials *relating to* electronic surveillance,” 50 U.S.C. § 1806(f)
(emphasis added), which includes no “under this chapter” restriction. Indeed, if section 1806(f)
applied only to surveillance that was lawfully undertaken pursuant to FISA, then the statute’s
provisions for determining whether surveillance was “lawfully authorized and conducted,” 50 U.S.C.
§ 1806(f), would be meaningless, because the statute would apply only to lawful surveillance.

1 the Attorney General does not file an affidavit asserting harm to national security. The 1978 House
2 Conference Report expressed agreement among the members of Congress “that an *in camera* and *ex*
3 *parte* proceeding is appropriate for determining the lawfulness of electronic surveillance in both
4 criminal *and civil cases*.” H. CONF. REP. NO. 95-1720, *supra*, at 32 (emphasis added), Decl. of Jon
5 B. Eisenberg, Ex. G. And a 1978 Senate Intelligence Committee report stated that where “no such
6 assertion is made [in an Attorney General’s affidavit] the Committee envisions that mandatory
7 disclosure of the application and order, and discretionary disclosure of other surveillance materials,
8 would be available to the [aggrieved party].” S. REP. NO. 95-701, at 63 (1978), Decl. of Jon B.
9 Eisenberg, Ex. H; *accord*, S. REP. NO. 95-604(I), *supra*, at 57, Decl. of Jon B. Eisenberg, Ex. F. FISA
10 gives the President a choice between unrestricted disclosure and an Attorney General’s affidavit – not
11 a choice between unrestricted disclosure and invocation of the state secrets privilege as an end run
12 around an Attorney General’s affidavit.

13 FISA’s legislative history evinces congressional intent to displace the state secrets privilege
14 with the regime prescribed by section 1806(f). The 1978 House Conference Report declared that “an
15 *in camera* and *ex parte* proceeding is appropriate for determining the lawfulness of electronic
16 surveillance[.]” H. REP. NO. 95-1720, *supra*, at 32, Decl. of Jon B. Eisenberg, Ex. G. The Senate
17 Judiciary Committee said with regard to section 1806(f) that when the legality of surveillance is at
18 issue, “it is this procedure ‘notwithstanding any other law’ that must be used to resolve the question.”
19 S. REP. NO. 96-604(I), *supra*, at 57, Decl. of Jon B. Eisenberg, Ex. F; *accord*, S. REP. NO. 95-701,
20 *supra*, at 63, Decl. of Jon B. Eisenberg, Ex. H; H. REP. NO. 95-1283(I), *supra*, at 91, Decl. of Jon B.
21 Eisenberg, Ex. E.

22 More broadly, FISA’s legislative history demonstrates that FISA was meant to curb unfettered
23 electronic surveillance by the Executive Branch via “an exclusive charter for the conduct of electronic
24 surveillance in the United States” and “effective substantive and procedural controls” which “regulate
25 the exercise” of presidential authority to conduct foreign intelligence electronic surveillance. S. REP.
26 No. 96-604(I), *supra*, at 15-16, Decl. of Jon B. Eisenberg, Ex. F; *accord*, H. REP. NO. 95-1283(I),
27 *supra*, at 24 (“Congress has the power to regulate the conduct of such surveillance by legislating a
28 reasonable procedure, which then becomes the exclusive means by which surveillance may be

1 conducted”), Decl. of Jon B. Eisenberg, Ex. E. Senator Nelson explained that FISA is intended to
2 “represent the sole authority for national security electronic surveillance in the United States” and
3 “insures executive accountability,” which “is a striking departure from the pattern of the past in which
4 ‘deniability’ was often built into the system to insure that responsibility for intelligence abuses could
5 not be traced” 124 CONG. REC. 10,903-04 (1978). Thus, FISA departs from the state secrets
6 privilege by replacing its absolute rule of outright dismissal – in effect, deniability by silence – with
7 statutory provisions for protecting national security while holding the Executive Branch accountable
8 for intelligence abuses.

9 In short, the security regime prescribed by section 1806(f) applies in this case *notwithstanding*
10 *the state secrets privilege*. Congress having determined (and the 39th President having agreed) that
11 section 1806(f) adequately ensures protection of national security, *see* H. CONF. REP. No. 95-1720,
12 *supra*, at 32, Decl. of Jon B. Eisenberg, Ex. G, the rules of disclosure prescribed by the state secrets
13 privilege become superfluous in FISA litigation.

14 2. FISA Section 1810 Speaks Directly Against Outright Dismissal.

15 On the second sub-issue – whether FISA speaks directly to the rule of outright dismissal within
16 the state secrets privilege – FISA section 1810, by prescribing a private right of action for FISA
17 violations despite the otherwise secret nature of FISA proceedings, plainly displaces the rule of
18 outright dismissal, which is wholly inconsistent with the very notion of a private FISA action. If
19 section 1810 did *not* displace the rule of outright dismissal, then Congress’s prescription of a private
20 FISA action would be meaningless, for the President would be able to evade any private FISA action
21 merely by invoking the state secrets privilege.^{5/}

22 The situation here is analogous to *Halpern v. U.S.*, 258 F.2d 36 (2d Cir. 1958), a lawsuit arising
23 under the Invention Secrecy Act, 35 U.S.C. § 181, which allowed the patent office to withhold a patent
24 grant for inventions implicating national security, but also allowed inventors to sue for compensation
25 if a patent was denied. When the plaintiff was denied a patent and sued for compensation, the

26
27 ^{5/} The same is true of other private causes of action prescribed for unlawful electronic
28 surveillance. *See, e.g.*, 18 U.S.C. § 2520(a); 18 U.S.C. § 2707(a); 47 U.S.C. § 605(e)(3)(A). Each
of those private rights would be meaningless if they could be subverted merely by invocation of the
state secrets privilege.

1 government invoked the state secrets privilege. The Second Circuit rejected the assertion of the
2 privilege because “the trial of cases involving patent applications placed under a secrecy order will
3 always involve matters within the scope of this privilege,” and “[u]nless Congress has created rights
4 which are completely illusory, existing only at the mercy of government officials, the Act must be
5 viewed as waiving the privilege . . . dependent upon the availability and adequacy of other methods
6 of protecting the overriding interest of national security during the course of a trial.” *Halpern*, 258
7 F.2d at 43.

8 Similarly here, a private FISA action generally involves matters that normally would be within
9 the scope of the state secrets privilege. *Id.* Unless section 1810 creates “rights which are completely
10 illusory, existing only at the mercy of government officials,” *id.*, FISA must be viewed as preempting
11 the state secrets privilege, vesting courts with the power to ensure national security with *in camera* and
12 *ex parte* review plus “appropriate security procedures and protective orders.” 50 U.S.C. §1806(f).

13 **D. FISA Section 1806(f) is Not Limited to “Acknowledged” Surveillance.**

14 Defendants contend section 1806(f) cannot preempt the state secrets privilege because the
15 statute applies only “where the Government has *acknowledged* the existence of electronic
16 surveillance.” Defs.’ Second Mo. To Dismiss etc. at 2 (emphasis added); *see also id.* at 13, 17.
17 Generally speaking, section 1806(f) is invoked in four circumstances: (1) when the government gives
18 notice under section 1806(c)-(d) that it intends to use surveillance-based information against a
19 defendant, (2) when a defendant moves under section 1806(e) to suppress surveillance-based
20 information, (3) when an aggrieved person makes a “motion or request” to “to discover or obtain
21 applications or orders or other materials relating to electronic surveillance,” and (4) when an aggrieved
22 person makes a “motion or request” to “discover, obtain, or suppress evidence or information obtained
23 or derived from electronic surveillance under this chapter.” 50 U.S.C. § 1806(f). According to
24 defendants, “each of the circumstances in which Section 1806(f) applies is premised on the fact that
25 electronic surveillance has already been acknowledged by the Government.” Defs’ Second Mo. To
26 Dismiss etc. at 17.

27 Defendants are wrong. Admittedly, the first two circumstances necessarily involve
28 acknowledged surveillance, because the government seeks to use surveillance-based information in

1 a proceeding the government has initiated. But the third circumstance – which is the circumstance of
2 the present case – is *not* necessarily restricted to government-initiated proceedings but can include civil
3 actions initiated *against* the government under FISA section 1810. (The same is true of the fourth
4 circumstance.) Nothing in section 1806(f) expressly or impliedly injects a requirement in the third
5 circumstance that the governmental must “acknowledge” the challenged surveillance for section
6 1806(f) to be invoked. Such language simply is not there. And if defendants truly mean to suggest
7 that section 1806(f) is restricted to government-initiated proceedings, they are wrong in light of 18
8 U.S.C. § 2712(b)(4), which makes the security procedures set forth in section 1806(f) applicable to
9 lawsuits that are prosecuted *against* the government under 18 U.S.C. § 2712(a).

10 A close reading of section 1806(f) drives the point home. Within the context of this case, the
11 statute states in pertinent part: “Whenever any . . . request is made by an aggrieved person . . . to obtain
12 . . . materials relating to electronic surveillance . . . the United States district court . . . shall . . . review
13 in camera and ex parte the . . . materials . . . as may be necessary to determine whether the surveillance
14 of the aggrieved person was lawfully authorized and conducted” 50 U.S.C. § 1806(f). The
15 present case invokes this language because plaintiffs, by opposing defendants’ motion to bar plaintiffs
16 from having access to the Document, have made a request to obtain material relating to electronic
17 surveillance – the Document, which plaintiffs have already seen – for use in demonstrating their
18 standing to prosecute a civil action under FISA section 1810. Upon plaintiffs’ request, section 1806(f)
19 expressly authorizes this Court to review the Document *in camera* and *ex parte* in the course of
20 determining whether plaintiffs were surveilled unlawfully. One searches in vain for anything in the
21 statute that says this language applies only if the government “acknowledges” the surveillance or in
22 government-initiated proceedings.^{6/}

24 ^{6/} Absent anything in the language of section 1806(f) that supports the interpretation defendants
25 urge, they seek refuge in the canon of statutory construction *noscitur a sociis*. See Defs.’ Second
26 Mo. To Dismiss etc. at 18 n.17. This canon – in English, “it is known by its associates” – counsels
27 that “the meaning of an unclear word or phrase should be determined by the words immediately
28 surrounding it.” BLACK’S LAW DICTIONARY 1084 (7th ed. 1999). The canon, however, is invoked
only where statutory language is *unclear*. *Id.* Nothing in the language of section 1806(f) is unclear.
See generally *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 380
(2006) (rejecting assertion of *noscitur a sociis* because “uncritical use of interpretative rules is

1 Defendants argue that a request to obtain material relating to electronic surveillance is
2 necessarily “predicated on *disclosed* surveillance,” Defs.’ Second Mo. To Dismiss etc. at 17 (emphasis
3 added), because of the statute’s requirement that the request be “made by an aggrieved party.” 50
4 U.S.C. § 1806(f). Whether defendants are right about this is beside the point here, because plaintiffs’
5 surveillance *was* disclosed to them, albeit inadvertently. Surveilled plaintiffs in a civil action under
6 section 1810 certainly know they are aggrieved if the surveillance is disclosed to them, regardless of
7 how the disclosure occurs. That is the situation here. Defendants wrongly equate *disclosure* with
8 *acknowledgment*. The two are not the same thing. Disclosure can be accidental, without being
9 acknowledged. The present case demonstrates this: Even though defendants refuse to acknowledge
10 the fact of plaintiffs’ surveillance, it was nevertheless disclosed to them when OFAC accidentally gave
11 the Document to Al-Haramain counsel Lynne Bernabei.

12 Thus, plaintiffs do not advance, and this Court need not reach, the “radical theory” of which
13 defendants warn – that section 1806(f) might allow “litigants in any case to discover *whether* they are
14 even subject to any surveillance.” Defs.’ Second Mo. To Dismiss etc. at 18 (emphasis in original); see
15 also *id.* at 19 (“this very lawsuit is effectively an effort to compel the Government to provide notice
16 of whether or not alleged surveillance has occurred”). Nor, as defendants claim, *id.* at 18-19, does this
17 case invoke *ACLU Foundation v. Barr*, 952 F.2d 457 (D.C. Cir. 1991), which observed that the
18 government “has no duty to reveal ongoing foreign intelligence surveillance,” *id.* at 468 n.13, and
19 cannot be “forced to admit or deny such allegations,” *id.* at 468. Plaintiffs do not seek any revelation
20 or admission by defendants as to *whether* plaintiffs were subjected to surveillance. The Document
21 demonstrates that they *were*. This Court need only read the Document to know that. Plaintiffs seek
22 no disclosure at all. Thus, the anti-disclosure provision of the National Security Agency Act of 1959,
23 on which defendants also rely, *see* Defs.’ Second Mo. To Dismiss etc. at 21-22, is irrelevant here.

24 In short, plaintiffs seek to use what has already been disclosed to them – the Document itself
25
26

27 _____
28 especially risky in making sense of a complicated statute . . . where technical definitions are worked
out with great effort in the legislative process”).

1 – to establish their standing to obtain an adjudication whether their surveillance was unlawful.²⁷

2 **II. EVEN IF THE STATE SECRETS PRIVILEGE IS CONSTITUTIONALLY BASED,**
3 **FISA STILL PREEMPTS THE PRIVILEGE THROUGH CONGRESS’S EXERCISE**
4 **OF CONCURRENT CONSTITUTIONAL AUTHORITY.**

5 **A. Congress Has Constitutional Authority to Regulate Protection of State Secrets.**

6 If this Court determines – despite the Ninth Circuit’s pronouncement – that the state secrets
7 privilege *is* constitutionally based, then different legal standards are invoked for determining the
8 question of preemption, because that means the President and Congress have *concurrent* constitutional
9 authority over protection of state secrets. The presence of such concurrent constitutional authority
10 invokes the standards set forth in *Youngstown Sheet and Tube Co.*, 343 U.S. 579 – commonly called
11 the *Steel Seizure Case* – for determining the parameters of such authority according to our
12 Constitution’s separation of powers and its system of checks and balance.

13 The threshold question is whether Congress has constitutional authority to regulate protection
14 of state secrets. The answer is *yes*. Congress’s authority to do so has multiple roots in the following
15 powers prescribed by Article I, Section 8 of the Constitution:

- 16 • to “provide for the . . . general welfare of the United States.” *Id.*, cl. 1.
- 17 • to “constitute tribunals inferior to the Supreme Court.” *Id.*, cl. 9.
- 18 • to “make all laws which shall be necessary and proper for carrying into
19 execution the foregoing powers.” *Id.*, cl. 18.

20 ²⁷ Defendants insist that plaintiffs’ counsel “conceded” in oral argument before the Oregon
21 district court that “plaintiffs do not ‘already know’ whether they were subject to alleged warrantless
22 surveillance under the TSP in 2004.” Defs.’ Second Mo. To Dismiss etc. at 23 n.20. But counsel
23 was merely addressing the question whether plaintiffs’ surveillance was *warrantless*, at an early
24 stage in this litigation when a discovery motion was pending. Within the context of that pending
25 discovery motion, counsel pointed out that “the simple” way of determining the warrantless nature
26 of the surveillance would be through discovery. Tr., 8/29/06, at 60. Counsel did not mean to suggest
27 that discovery was *essential* to establish the warrantless nature of the surveillance. As this litigation
28 has subsequently unfolded, we have demonstrated in public and sealed filings how the Document
and other materials show the warrantless nature of the surveillance, and that, as a matter of law,
because the nature of the surveillance is peculiarly within defendants’ exclusive knowledge, the
burden shifts to defendants to prove the surveillance was *not* warrantless. *See, e.g., Campbell v.*
United States, 365 U.S. 85, 96 (1961); *United States v. Denver & Rio Grande Railroad Company*,
191 U.S. 84, 92 (1903); *ITSI TV Productions, Inc. v. Agricultural Associations*, 3 F.3d 1289, 1292
(9th Cir. 1993).

1 Further, to the extent defendants might claim that the state secrets privilege is rooted in the
2 President’s Article II authority as commander-in-chief of the Army and Navy, such authority is subject
3 to Congress’s Article I power to “make rules for the government and regulation of the land and naval
4 forces.” *Id.*, cl. 14; *see Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006).

5 Congressional power to regulate protection of state secrets is also rooted in Article III, Section
6 2 of the Constitution, which subjects the jurisdiction of the federal courts to “such regulations as the
7 Congress shall make.” *Id.*, cl. 2. The Constitution also invests Congress with broad authority “to deal
8 with foreign affairs,” *Afroyim v. Rusk*, 387 U.S. 253, 256 (1967), and “to legislate to protect civil and
9 individual liberties,” *Shelton v. United States*, 404 F.2d 1292, 1298 n.17 (D.C. Cir. 1968).

10 Congress’s constitutional authority to regulate protection of state secrets is multi-faceted. If
11 there is any constitutional underpinning for the state secrets privilege, it is checked and balanced by
12 concurrent congressional constitutional authority.

13 **B. The President Lacks Inherent Power to Disregard Congressional Preemption of**
14 **the State Secrets Privilege.**

15 Defendants claim that if the state secrets privilege is constitutionally based, any effort by
16 Congress to preempt the privilege would “raise serious constitutional concerns.” *Defs.’ Second Mo.*
17 *To Dismiss etc.* at 14. Without expressly saying so, defendants are asserting a theory of “inherent”
18 presidential power set forth in the White Paper issued by the DOJ in January 2006, which claims the
19 President has constitutional authority to disregard FISA in the name of national security. *See Decl.*
20 *of Jon B. Eisenberg, Ex. I at 6-10.* Defendants are wrong. Even if the privilege is constitutionally
21 based, that just means the President and Congress have concurrent constitutional authority over
22 protection of state secrets. And where Congress has exercised its concurrent authority – here, by
23 displacing the state secrets privilege in FISA litigation – the President does *not* have inherent power
24 to disregard Congress.

25 Justice Robert Jackson’s concurring opinion in the *Steel Seizure Case* prescribed a formulation
26 for determining the extent of presidential power where Congress and the President share concurrent
27 constitutional authority. Justice Jackson observed that the Constitution “enjoins upon its branches
28 separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but

1 fluctuate, depending upon their disjunction or conjunction with those of Congress.” 343 U.S. at 635.

2 Thus, the extent of presidential power frequently depends on the presence or absence of congressional
3 action:

- 4 • “When the President acts pursuant to an express or implied
5 authorization of Congress, his authority is at its maximum, for it
6 includes all that he possesses in his own right plus all that Congress can
7 delegate.” *Id.*
- 8 • “When the President acts in absence of either a congressional grant or
9 denial of authority, he can only rely upon his own independent powers,
10 but there is a zone of twilight in which he and Congress may have
11 concurrent authority, or in which its distribution is uncertain.” *Id.* at
12 637.
- 13 • “When the President takes measures incompatible with the expressed
14 or implied will of Congress, his power is at its lowest ebb, for then he
15 can rely only upon his own constitutional powers minus any
16 constitutional powers of Congress over the matter.” *Id.*

17 This formulation is not tossed aside in times of war. “Whatever power the United States
18 Constitution envisions for the Executive in exchanges with other nations or with enemy organizations
19 in times of conflict, it most assuredly envisions a role for all three branches when individual liberties
20 are at stake.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004). “[T]he greatest security against tyranny
21 . . . lies not in a hermetic division among the Branches, but in a carefully crafted system of checked
22 and balanced power within each Branch.” *Mistretta v. United States*, 488 U.S. 361, 381 (1989).
23 Hanging in the balance is “the equilibrium established by our constitutional system” between three
24 separate but interdependent branches of government. *Youngstown*, 343 U.S. at 638 (Jackson, J.,
25 concurring).

26 Here, presidential power is at its “lowest ebb” because section 1806(f) expressly prescribes a
27 protocol for the courts to follow when addressing executive assertions of national security concerns
28 in FISA litigation, in order to strike a balance between potentially competing interests in protecting
national security and safeguarding civil liberties. As the Ninth Circuit in this case observed, “[t]he
statute, unlike the common law state secrets privilege, provides a detailed regime to determine whether
surveillance ‘was lawfully authorized and conducted.’” *Al-Haramain*, 507 F.3d at 1205.

“The controlling fact here is that Congress, within its constitutionally delegated power, has
prescribed for the President procedures . . . for his use in meeting the present type of emergency.”

1 *Youngstown*, 343 U.S. at 660 (Burton, J., concurring); *see also id.* at 662 (Clark, J., concurring)
2 (“where Congress has laid down specific procedures to deal with the type of crisis confronting the
3 President, he must follow those procedures in meeting the crisis”). Legislative history indicates that,
4 when enacting FISA, Congress intended to curtail presidential power by prescribing these statutory
5 procedures for determining assertions of national security concerns in FISA litigation. The 1978
6 House Conference Report said: “The intent of the conferees is to apply the [lowest ebb] standard set
7 forth in” the *Steel Seizure Case*. H. CONF. REP. NO. 95-1720, *supra*, at 35, Decl. of Jon B. Eisenberg,
8 Ex. G.

9 The present situation is not the first time that this President has made an expansive claim of
10 executive power as a basis for ignoring congressional legislation. The President did so in *Hamdan v.*
11 *Rumsfeld*, *supra*, which held that military commissions established to try Guantanamo Bay detainees
12 violated the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 801, which prescribed a structure
13 and procedures for trying the detainees. In rejecting an attempt to evade the UCMJ based on a claim
14 of unfettered presidential power, the Supreme Court observed: “Whether or not the President has
15 independent power, absent congressional authorization to convene military commissions, he may not
16 disregard limitations that Congress has, in proper exercise of its own war powers, placed on his
17 powers” through the UCMJ. *Hamdan*, 126 S.Ct. at 2774 n.23. Likewise here, the President may not
18 disregard limitations that Congress placed on executive power when it prescribed a protocol for the
19 courts to follow when addressing executive assertions of national security concerns in FISA litigation.

20 Justice Kennedy’s concurring opinion in *Hamdan* further explained why inherent Presidential
21 power did not trump the UCMJ: Through the UCMJ, “Congress, in the proper exercise of its powers
22 as an independent branch of government . . . has . . . set limits on the President’s authority.” *Id.* at
23 2799 (Kennedy, J., concurring). *Hamdan* “is not a case, then, where the Executive can assert some
24 unilateral authority to fill a void left by congressional action.” *Id.* Under Justice Jackson’s
25 formulation in the *Steel Seizure Case*, Congress had, by expressing its will in the UCMJ, put inherent
26 presidential power over the manner of trying the Guantanamo Bay detainees at “its lowest ebb.” *Id.*
27 at 2800. Similarly here, Congress has, by expressing its will in FISA, put at “its lowest ebb” the
28 President’s power to evade responsibility for intelligence abuses by invoking the state secrets privilege.

1 “Where a statute provides the conditions for the exercise of governmental power, its
2 requirements are the result of a deliberative and reflective process engaging both of the political
3 branches. Respect for laws derived from the customary operation of the Executive and Legislative
4 Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by
5 reliance on standards tested over time and insulated from the pressures of the moment.” *Id.* at 2799.
6 FISA, too, is the result of a deliberate and reflective process engaging both of the political branches.
7 Its provisions cannot be trumped by a presidential power grab wholly at odds with the constitutional
8 separation of powers. “The Framers ‘built into the tripartate Federal Government . . . a self-executing
9 safeguard against the encroachment or aggrandizement of one branch at the expense of another.’”
10 *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)); *see*
11 THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers . . . in the same hands .
12 . . . may justly be pronounced the very definition of tyranny.”). Under our system of government, the
13 President is not free to ignore laws properly enacted by Congress. *See United States v. Nixon*, 418 U.S.
14 at 715 (the President is not “above the law”).

15 This is true even in times of war or emergency: “Emergency does not create power. Emergency
16 does not increase granted power or remove or diminish the restrictions imposed upon power granted
17 or reserved. . . . [E]ven the war power does not remove constitutional limitations safeguarding essential
18 liberties.” *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 425-26 (1934). As Justice Jackson
19 explained in the *Steel Seizure Case*, “emergency powers are consistent with free government only
20 when their control is lodged elsewhere than in the Executive who exercises them. That is the
21 safeguard that would be nullified by our adoption of the ‘inherent powers’ formula.” 343 U.S. at 652.

22 In short, even if the state secrets privilege is constitutionally based, it is preempted by
23 Congress’s exercise, through FISA, of concurrent constitutional authority to regulate protection of state
24 secrets, which puts presidential power at its lowest ebb.

25 **III. THE NINTH CIRCUIT DID NOT PRECLUDE ADJUDICATION OF THE FACT OF**
26 **PLAINTIFFS’ SURVEILLANCE.**

27 Defendants insist this Court cannot adjudicate plaintiffs’ standing because the Ninth Circuit
28 purportedly has “found that harm to national security would result from disclosure of whether or not

1 plaintiffs were subject to alleged surveillance,” Defs.’ Second Mo. To Dismiss etc. at 2, and a
2 determination that plaintiffs were surveilled would “thus cause the very harm to national security
3 identified by the Court of Appeals,” *id.* at 23. Defendants mischaracterize the Ninth Circuit’s opinion.
4 Here is what the opinion actually says: “[D]isclosure of *information* concerning the Sealed Document
5 and the *means, sources and methods* of intelligence gathering in the context of this case would
6 undermine the government’s intelligence capabilities and compromise national security.” *Al-*
7 *Haramain*, 507 F.3d at 1204 (emphasis added). Thus, the opinion bars disclosure of *information* about
8 the *means, sources and methods* of plaintiffs’ surveillance – not the *mere fact* of their surveillance,
9 which is all that will be litigated if this Court determines that FISA preempts the state secrets privilege.

10 As defendants correctly observe, the Ninth Circuit concluded that “information as to whether
11 the government surveilled Al-Haramain,” *id.* at 1203, and “data concerning surveillance,” *id.* at 1205,
12 are within the state secrets privilege. Defs.’ Second Mo. To Dismiss etc. at 6. But that does not
13 necessarily preclude adjudication of the fact of plaintiffs’ surveillance. As the Ninth Circuit explained,
14 it means only that “Al-Haramain cannot establish that it has standing, and its claims must be
15 dismissed, *unless FISA preempts the state secrets privilege.*” *Al-Haramain*, 507 F.3d at 1205
16 (emphasis added). Conversely, if FISA *does* preempt the privilege, plaintiffs *can* establish standing
17 – i.e., this Court *can* adjudicate whether plaintiffs were surveilled.

18 Plaintiffs have consistently agreed that information concerning the means, sources and methods
19 of the warrantless surveillance program should not be made public in this litigation. Plaintiffs seek
20 only this Court’s recognition of the mere fact of their surveillance for purposes of establishing their
21 standing to sue under FISA section 1810. Plainly, the Ninth Circuit did not think such an adjudication
22 would harm national security, or the court would not have remanded this case for a determination
23 whether FISA preempts the state secrets privilege and thus enables plaintiffs “to proceed with this
24 lawsuit.” *Al-Haramain*, 507 F.3d at 1205-06.

25 The security procedures prescribed by section 1806(f) guard against the sort of harm to national
26 security with which the Ninth Circuit was concerned. In contrast with the “all or nothing” approach
27 of the state secrets privilege – where any threat of harm is met with the blunt instrument of outright
28 dismissal – FISA opts for a balanced approach that ensures national security while at the same time

1 safeguarding civil liberties.

2 **IV. DEFENDANTS PREMATURELY ASSERT SOVEREIGN IMMUNITY, WHICH IN**
3 **ANY EVENT DOES NOT BAR THIS ACTION.**

4 Defendants contend this Court cannot decide the issue that the Ninth Circuit has remanded for
5 decision – whether FISA preempts the state secrets privilege – without first deciding whether FISA
6 waives federal sovereign immunity. Evidently the Ninth Circuit thought otherwise: Defendants
7 asserted federal sovereign immunity in the Ninth Circuit, *see* Br. for Appellants at 36-37, but the Ninth
8 Circuit ignored that assertion and said nothing about sovereign immunity in its opinion and remand
9 order. Further, at the case management conference of February 7, 2008, this Court instructed the
10 parties to “proceed with further briefing of the preemption or the 1806(f) issue in *Al-Haramain* only,”
11 Tr., 2/7/08, at 43 – despite defense counsel’s insistence that the Court must first address the “threshold
12 jurisdictional issue[]” of sovereign immunity which purportedly “would foreclose even reaching the
13 1806(f) issue at all,” *id.* at 19-20. As this Court observed at the hearing: “My job is to do what the
14 Court of Appeals tells me to do.” *Id.* at 19. The Court of Appeals has told this Court to decide
15 whether FISA preempts the state secrets privilege.

16 If this Court nevertheless decides to address sovereign immunity at this time, the Court should
17 conclude that sovereign immunity does not deprive plaintiffs of their right to recover damages. The
18 rule for waiver of federal sovereign immunity is that the waiver “must be unequivocally expressed in
19 statutory text.” *Lane v. Pena*, 518 U.S. 187, 192 (1996). Lawsuits for damages against federal
20 employees in their official capacities “cannot be maintained unless Congress has explicitly waived the
21 sovereign immunity of the United States.” *Multi Denominational Ministry of Cannabis and Rastafari,*
22 *Inc. v. Gonzales*, 474 F. Supp.2d 1133, 1140 (N.D. Cal. 2007). FISA explicitly and unequivocally
23 waives federal sovereign immunity via section 1810, which prescribes a cause of action for damages
24 against any “person” who commits unlawful electronic surveillance in violation of section 1809, and
25 section 1801(m), which defines a “person” as including any “entity” and thus the United States.

26 The key point here is that section 1801(m) specifies “entity” *without excluding “the United*
27 *States”* – as do, for example, provisions of the Electronic Communications Privacy Act (ECPA). *See*
28 18 U.S.C. § 2520(a) (authorizing cause of action against a “person or entity, other than the United

1 States”); § 2707(a) (same). Had Congress meant to exclude “the United States” from the scope of
2 “entity” in section 1801(m), Congress could have done so in the manner of ECPA. Indeed, a majority
3 of decisions construed a prior version of one of these ECPA provisions, which did *not* exclude “the
4 United States,” as *including* governmental entities. *See, e.g., Adams v. City of Battle Creek*, 250 F.3d
5 980, 985 (6th Cir. 2001); *Organizacion JD Ltda. v. U.S. Dept. of Justice*, 18 F.3d 91, 94 (2d Cir. 1994).
6 Defendants do not mention those decisions, but instead rely on *Asmar v. U.S. Dept. of Treasury*, 680
7 F.Supp. 248, 250 (E.D. Mich. 1987), which opined that the former ECPA provision did *not* include
8 government entities. *See* Defs.’ Second Mo. To Dismiss etc. at 11-12. *Asmar*, however, stated the
9 minority view, which the Ninth Circuit subsequently rejected. *See Adams*, 250 F.3d at 985.

10 FISA also defines “person” as including “any officer or employee of the Federal Government.”
11 50 U.S.C. § 1801(m). An action against federal officers and employees in their official capacities “is
12 considered a suit against the United States.” *Multi Denominational Ministry*, 474 F. Supp.2d at 1140;
13 *accord, Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985); *Burgos v. Milton*, 709 F.2d 1, 2
14 (1st Cir. 1983). By prescribing civil liability for federal officers or employees – and hence the United
15 States – FISA waives federal sovereign immunity separate and apart from the “entity” definition,
16 despite the absence of any express specification of “the United States.” *Cf. Salazar v. Heckler*, 787
17 F.2d 527, 529 (10th Cir. 1986) (Title VII of Civil Rights Act of 1974, which authorizes civil actions
18 for employment discrimination by specifying “the head” of an offending federal entity as defendant,
19 *see* 42 U.S.C. § 2000e-16(c), waives sovereign immunity despite failure to specify “the United
20 States”); *accord, Rochon v. Gonzales*, 438 F.3d 1211, 1215-16 (D.C. Cir. 2006). Defendants posit that
21 the word “individual” at the outset of section 1801(m) means FISA authorizes civil actions against
22 federal employees only in their individual capacities. *See* Defs’ Second Mo. To Dismiss etc. at 10.
23 But if “individual” in section 1801(m) modifies the subsequent phrase “any officer or employee of the
24 Federal Government,” then “individual” also must modify the subsequent phrase “any group, entity,
25 association, corporation, or foreign power,” and that surely cannot be so.^{8/}

26
27 ^{8/} In contrast, 42 U.S.C. section 1983 does not waive federal sovereign immunity in civil rights
28 actions by authorizing an action against a “person,” because there is no reason in section 1983 to
depart from the “common usage” of the term “person” as not including the sovereign. *See Will v.*

1 Defendants also argue that section 1810 does not waive sovereign immunity because it does
2 not contain language similar to 18 U.S.C. § 2712(a), which expressly states that aggrieved persons may
3 sue “the United States” for various statutory violations that include specified provisions of FISA other
4 than section 1810. *See* Defs.’ Second Mo. To Dismiss etc. at 10. But the comparison with section
5 2712(a) actually assists plaintiffs, not defendants. The three provisions of FISA as to which section
6 2712(a) waives sovereign immunity all prohibit certain activity by “Federal officers and employees.”
7 50 U.S.C. §§ 1806(a), 1825(a) & 1845(a). By authorizing lawsuits against “the United States” for
8 activity by “Federal officers and employees,” section 2712(a) equates the two, reflecting the notion that
9 a lawsuit against federal officers and employees in their official capacities – as to which section 1810
10 waives sovereign immunity via the definition of “person” in section 1801(m) as including “Federal
11 officer and employees” – is considered a suit against the United States. Section 2712(a) states
12 explicitly what sections 1801(m) and 1810 state necessarily.

13 Even if defendants could invoke sovereign immunity in their official capacities, they cannot
14 do so in their personal capacities. *See Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985); *Butz v.*
15 *Economou*, 438 U.S. 478, 501 (1978). Plaintiffs’ complaint may be characterized as alleging both
16 official and personal capacity liability. *See Graham*, 473 U.S. at 167 n.14 (where complaint does not
17 specify whether defendants are sued in official or personal capacities or both, course of proceedings
18 typically will indicate nature of liability sought to be imposed). And to the extent defendants are being
19 sued in their personal capacities, they could enjoy only qualified immunity, which does not apply if
20 they “discharge their duties in a way that is known to them to violate the United States Constitution
21 or in a manner that they should know transgresses a clearly established constitutional rule.” *Butz*, 438
22 U.S. at 507. Given that at least some of plaintiffs’ surveillance occurred at a time when the warrantless
23 surveillance program continued unabated without DOJ certification, despite former Attorney General
24 Ashcroft’s admonitions that the program was unlawful and defendant Mueller’s “serious reservations”

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Michigan Dept. of State Police, 491 U.S. 58, 64 (1989). FISA differs from section 1983 by giving
28 “person” a special *legal* definition – including “any officer or employee of the Federal Government”
and “any group, entity, association, corporation, or foreign power,” 50 U.S.C. § 1801(m) – which
transcends common usage.

1 about its legality, *see supra* at 3-4, defendants cannot claim qualified immunity.^{9/}

2 As for defendants' claim that plaintiffs lack standing to obtain prospective relief because the
3 warrantless surveillance program has ceased, *see* Defs.' Second Mo. To Dismiss etc. at 7, that
4 argument is meritless because defendants have insisted that the President retains power to conduct
5 warrantless electronic surveillance outside the framework of FISA. *See, e.g.*, Letter from Attorney
6 General Alberto R. Gonzales to Senator Patrick Leahy (Jan. 17, 2007) (announcing suspension of
7 warrantless surveillance program "[a]lthough, as we have previously explained, [it] fully complies with
8 the law"), Decl. of Jon B. Eisenberg, Ex. K. This means defendants cannot sustain their "stringent"
9 burden of making it "absolutely clear that the allegedly wrongful behavior could not reasonably be
10 expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528
11 U.S. 167, 189-90 (2000). The "heavy burden of persuading" the court that the challenged conduct
12 cannot reasonably be expected to recur "*lies with the party asserting mootness.*" *Adarand*
13 *Constructors, Inc. v. Slater*, 528 U.S. 216, 221-22 (2000) (emphasis in original); *accord, Friends of the*
14 *Earth*, 528 U.S. at 189 ("formidable burden" rests with defendant).

15 Defendants should not be allowed to have it both ways, evading prospective relief by
16 suspending the warrantless surveillance program while simultaneously claiming power to resume the
17 program at any time. Absent any assurance by defendants that they will not resume their FISA
18 violations, it is anything but clear that the misconduct could not reasonably be expected to recur. *See,*
19 *e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 (vagueness challenge to
20 ordinance repealed during litigation not moot because repeal "would not preclude [the city] from
21 reenacting precisely the same language if the District Court's judgment were vacated").

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26 ^{9/} Plaintiffs have not yet served the defendants individually. Defendants claim "it is far too late
27 to cure that defect." Defs.' Second Mo. To Dismiss etc. at 9 n.8. Defendants are wrong. Upon a
28 showing of "good cause for the failure," this Court may "extend the time for service for an
appropriate period." Fed. R.Civ. P. 4(m). Plaintiffs shortly will request leave to serve the defendants
individually upon an extension of the time for such service.

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CONCLUSION

For the foregoing reasons, this Court should deny defendants' motion and proceed to determine plaintiffs' standing and, thereafter, the merits of this lawsuit.

DATED this 28th day of March, 2008.

/s/ Jon B. Eisenberg
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