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Nos. 06-17132, 06-17137 and No. 06-36083

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TASH HEPTING, *et al.*,
Plaintiffs-Appellees,
vs.
AT&T CORPORATION, *et al.*,
Defendants-Appellants.

TASH HEPTING, *et al.*,
Plaintiffs-Appellees,
vs.
UNITED STATES OF AMERICA,
Defendant-Intervenor-Appellant.

ON APPEAL FROM THE NORTHERN DISTRICT OF CALIFORNIA

AL-HARAMAIN ISLAMIC FOUNDATION, INC., *et al.*,
Plaintiffs-Appellees,
vs.
GEORGE W. BUSH,
Defendant-Appellant.

ON APPEAL FROM THE DISTRICT OF OREGON

BRIEF OF *AMICI CURIAE* NATIONAL SECURITY ARCHIVE, PROJECT ON GOVERNMENT OVERSIGHT, PROJECT ON GOVERNMENT SECRECY, PUBLIC CITIZEN, INC. AND THE RUTHERFORD INSTITUTE IN SUPPORT OF AFFIRMANCE AND HEPTING AND AL-HARAMAIN

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CORPORATE DISCLOSURE STATEMENT

All *amici curiae* are non-profit or not-for-profit entities. Insofar as Fed. R. App. P. 26.1 nevertheless requires a statement, *amici* note more particularly that:

1. The National Security Archive has no parent corporation and no publicly held corporation owns 10% or more of its stock.

2. The Project on Government Oversight has no parent corporation and no publicly held corporation owns 10% or more of its stock.

3. The Project on Government Secrecy is an initiative of the Federation of American Scientists, a non-profit entity that has no parent corporation. No publicly held corporation owns 10% or more of its stock.

4. Public Citizen, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

5. The Rutherford Institute has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST

Amici are non-profit, non-partisan, non-governmental organizations that work towards reasonable limits on government secrecy. They join here to oppose the government's overbroad use of the state secrets privilege, a common law doctrine that the government claims makes it immune from judicial review of an allegedly massive scheme of unconstitutional domestic spying. The government's extreme reading of the common law privilege would thwart government accountability, denying a forum for legitimate claims of government wrongdoing and undermining independent judicial review of executive action.[1]

The *National Security Archive* is an independent research institute and library located at the George Washington University that collects and publishes declassified documents, concerning United States foreign policy and national security matters, obtained through the Freedom of Information Act. The Archive works to defend and expand public access to government information, and is currently a plaintiff in a FOIA suit seeking records related to the legal and policy rationales for the warrantless wiretapping program at issue in this case.

The *Project on Government Oversight* (POGO) is an independent organization that investigates and exposes corruption and other misconduct to achieve a more accountable federal government. POGO works regularly with

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[1] All parties have consented to the filing of this amicus brief.

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inside sources and whistleblowers to expose evidence of governmental waste, fraud, and abuse. In recent years, POGO's investigations and outreach have addressed national security, inadequate whistleblower protections, and excessive government secrecy, among other issues.

The *Project on Government Secrecy* is an initiative of the *Federation of American Scientists*, an independent organization founded in 1945 by Manhattan Project scientists to perform policy research on science and national security. The Project works to promote public access to government information through investigative reporting, public education, and publication of unreleased government records.

Public Citizen, Inc., is a national public interest organization with approximately 100,000 members. Founded in 1971 and headquartered in Washington, D.C., Public Citizen appears before Congress, administrative agencies, and courts on a wide range of issues. In particular, Public Citizen promotes openness and democratic accountability in government by working for greater public access to government information and by opposing excessive government secrecy. Public Citizen also works to preserve access to the courts.

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. The Institute provides free legal representation to individuals whose civil liberties are threatened or infringed, and

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educates the public about constitutional and human rights issues. It has represented parties before the U.S. Supreme Court in numerous cases and currently handles over one hundred cases nationally.

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INTRODUCTION

Wigmore noted more than a century ago that "[t]he responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption." *See* 4 John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law § 2375, at 3341 (1905). Yet the government here aims to evade any scrutiny of an allegedly massive unconstitutional scheme by invoking a common law evidentiary privilege analyzed by Wigmore: the state secrets privilege. That privilege, properly applied, requires independent judges to balance competing claims to the public interest. While the privilege aims to prevent harm to national security, it also ensures that the executive branch does not invoke secrecy to cover up embarrassment or, worse yet, grave constitutional violations.

Amici are aware of no case that has ever required this Circuit or the U.S. Supreme Court to balance the public's interest in stopping an alleged nationwide scheme of unconstitutional governmental conduct against the government's interest in preventing potential harm to national security that might flow from confirmation of the unconstitutional program. To be sure, that careful weighing may not be necessary here, where the government program is already a matter of public knowledge. Nevertheless, a district court confronted with a governmental invocation of the state secrets privilege must take a series of careful steps, determining in turn whether the evidence is necessary to the case, whether it is

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secret or has been previously disclosed, whether disclosure of the evidence (if it is necessary and secret) would harm national security and, only if all of the above have been established, whether disclosure serves the public interest despite any potential harm.

In the context of illegal wiretapping, Congress has explicitly confirmed robust judicial supervision of this balancing process, explicitly establishing a scheme for independent judicial review of executive claims to secrecy. FISA directs courts to review sensitive information *in camera* and *ex parte* to determine whether surveillance was authorized and legally conducted. Disclosure to the plaintiff of the evidence is also explicitly permitted, "under appropriate security procedures and protective orders," whenever "such disclosure is necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. § 1806(f) (2006).

The district court in *Hepting* correctly determined, after reviewing classified documents *in camera* and existing public disclosures, that the government's wiretapping program is "hardly a secret." But even when a government program is secret, a court must still weigh the costs and benefits of disclosure, bearing in mind ways to reduce or eliminate any harmful effects of disclosure. The perilous shield of state secrecy should be given judicial imprimatur only when a court

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balances the national security risks of disclosure against the harm of closing the courthouse doors to allegedly unconstitutional action.

Without that judicial balancing, the state secrets privilege would allow the government to shield from judicial scrutiny even programs that plainly flout the Constitution, such as systematic torture or widespread summary executions. That the government's theory of state secrets would put such horrors beyond the reach of the judiciary indicates just how wrong the position is.

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ARGUMENT

I. The State Secrets Privilege Requires Independent Judicial Balancing

At its core, "[t]he state secrets privilege is a common law evidentiary privilege that allows the government to deny discovery of military secrets." *Kasza v. Browner*, 133 F.3d 1159, 1165 (9th Cir. 1998). When the government properly invokes the state secrets privilege, a court must be convinced "as to the danger of divulging state secrets" before it upholds the privilege. *Id.* at 1166. This requires a court to determine whether the allegedly secret material is necessary for the resolution of the case, and whether the material is, in fact, secret.

But even if a court finds the material to be both necessary and secret, the state secrets privilege should not preclude a court from inquiring into whether the public good outweighs any harm to national security that disclosure might cause. As the Supreme Court explained in the case that established the modern state secrets privilege, "the court *itself must determine* whether the circumstances are appropriate for the claim of privilege." *Reynolds v. United States*, 345 U.S. 1, 8 (1953) (emphasis added).

Courts have not always hewn closely to the Supreme Court's instructions in *Reynolds*, most notably where they have spoken of the "utmost deference" putatively owed to executive claims of privilege. *See, e.g.*, *Halkin v. Helms*, 589 F.2d 1, 9 (D.C. Cir. 1978); *Kasza*, 133 F.3d at 1166. Yet *Reynolds* clearly directed

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a district court confronted with an executive claim of privilege to "[satisfy] *itself* that the occasion for invoking the privilege is appropriate." 345 U.S. at 11 (emphasis added); *see also Kasza*, 133 F.3d at 1166 ("[T]he court must be satisfied that under the particular circumstances of the case, there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.") (internal quotations omitted). Any doubt on that score should have been settled in 2005, when the Supreme Court made plain that *Reynolds* "set out a balancing approach for courts to apply in resolving Government claims of privilege." *Tenet v. Doe*, 544 U.S. 1, 9 (2005). This "formula of compromise," if given its full meaning, should direct courts to follow that balancing approach – i.e., to weigh the need for the evidence sought against the "danger that compulsion of the evidence" might bring. *Reynolds,* 345 U.S. at 9-11.

Nothing about this balancing approach to the state secrets privilege should be surprising. "Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances." *United States v. Nixon*, 418 U.S. 683, 708-10 (1974); *id.* at 710 (stating that because evidentiary privileges act "in derogation of the search for the truth," they are "not lightly created nor expansively construed"); *see also University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990) (same); *United States v. Aaron Burr*, 25 Fed. Cas. 187,

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192 (C.C.D.Va. 1807) (exercising judicial power to determine whether presidential claim of privilege had merit and whether executive claim of secrecy should yield to rights of criminal defendant) (Marshall, C.J.). The duty of a district court to "itself determine" whether the executive's assertion of secrecy survives the necessary "balancing approach" is rooted in one of our nation's most fundamental tenets: the need for judicial independence to protect against executive overreaching.

A. The court must determine the necessity of disclosure.

The first step in the state secrets inquiry is for the court to determine to what extent the evidence claimed to be privileged is necessary to the case. *Reynolds*, 345 U.S. at 11 ("In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate.").

Evidence available through other means may not be "necessary." *Reynolds*, 345 U.S. at 11 ("Here, necessity was greatly minimized by an available alternative . . . ."). The same is true when a case can proceed without the evidence in question. *Cf. American Civil Liberties Union v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754, 765 (E.D. Mich. 2006)), *appeal pending,* Nos. 06-2095, 06-2140 (6th Cir.). Where the evidence is not necessary, as was the case in *Reynolds,* a court need proceed no further. *See Reynolds*, 345 U.S. at 11 (noting that due to

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plaintiff's "dubious showing of necessity," a "showdown on the claim of the privilege" was not necessary).

Where, however, no alternative means exist, and adjudication of the claims rests squarely on the availability of the evidence in question, the "showdown" must occur, and the traditional caution in accepting claims of privilege comes to the fore: the "claim of privilege should not lightly be accepted." *Reynolds*, 345 U.S. at 11; *see also Ellsberg v. Mitchell*, 709 F.2d 51, 59 n.37 (D.C. Cir. 1983) ("When a litigant must lose if the claim is upheld and the government's assertions are dubious in view of the nature of the information requested and the circumstances surrounding the case, careful in camera examination of the material is not only appropriate, but obligatory.") (internal citations omitted).

B. The court must evaluate the putative secret.

If a court concludes that the evidence claimed to be privileged is necessary to the resolution of the case, it must then determine whether the information is, in fact, secret and what risk, if any, disclosure would entail. This will usually require a court to review, *in camera*, the government's *ex parte* justifications for invoking the privilege. *See, e.g.*, *Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995), *cert. denied*, 517 U.S. 1154 (1996) ("Our independent in camera ex parte review of the government's state secrets claim similarly convinces us that it was not overbroad."); *Kasza*, 133 F.3d at 1170 (finding only after *in camera* review of

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government's classified submissions "that release of such information would reasonably endanger national security interests"). Still, "whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter." *Kasza*, 133 F.3d at 1166 (quoting *Ellsberg*, 709 F.2d at 57). "Often, through creativity and care," a court can fashion "procedures which will protect the privilege and yet allow the merits of the controversy to be decided in some form." *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1238 n.3 (4th Cir. 1985).

As with its evaluation of necessity, a district court must independently evaluate the alleged secrecy of evidence and the danger that disclosure may cause. *See Reynolds*, 345 U.S. at 9-10 ("[J]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."). For the privilege to apply, a court must satisfy itself that the information is not merely classified, sensitive, or embarrassing. Rather, "[a] court before which the privilege is asserted must assess the validity of the claim of privilege, satisfying itself that there is a reasonable danger that disclosure of the particular facts in litigation will jeopardize national security." *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546-47 (2d Cir. 1991). Whenever there is any doubt, the court should use all tools at its disposal, including *in camera* review, to determine what material may be disclosed and what should be withheld. *See, e.g.*, *Kerr v. United States District Court*, 426

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U.S. 394, 405-06 (1976) ("It is settled that in camera procedures are an appropriate means to resolve disputed issues of privilege.").[2]

Upon reviewing the evidence, the court must assess whether disclosure would be harmful. "[T]he privilege may not be used to shield any material not strictly necessary to prevent injury to national security . . . ." *Ellsberg*, 709 F.2d at 57. Where the information sought is generic or descriptive, rather than specific or highly detailed, courts should be particularly hesitant to find an overriding threat to national security. *See, e.g.*, In re *Grand Jury Subpoena*, 438 F.3d 1141, 1174 (D.C. Cir. 2006) (Tatel, J., concurring) ("Despite the necessary secrecy of intelligence-gathering methods, it seems hard to imagine how the harm in leaking generic descriptions of such a program could outweigh the benefit of informing the public . . . .").

Similarly, where the government has previously released some or all of the information sought, as in both *Hepting* and *Al-Haramain*, an assertion of the need

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[2] The state secrets privilege's balancing approach established in *Reynolds* stands in stark contrast to the Supreme Court's quite different, bright-line approach to contracts with covert agents, first articulated in *United States v. Totten*, 92 U.S. 105, 107 (1876). As the Supreme Court held in 2005, the "*Totten* rule" – which precludes spies from bringing "cases of contract for secret services with the government," *id.* at 108 – is "unique and categorical." *Tenet*, 544 U.S. at 10 (limiting *Totten* exclusively to "distinct class of cases that depend upon clandestine spy relationships."). *Tenet* explicitly distinguished between *Totten*'s categorical rule and the "state secrets privilege and the more frequent use of *in camera* judicial proceedings," which by design do not "provide the absolute protection we found necessary in enunciating the *Totten* rule." *Id.* at 11.

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for secrecy should be met by the court with skepticism. *See American Civil Liberties Union v. Nat'l Sec. Agency*, 438 F. Supp. 2d. 754 (E.D. Mich. 2006), (finding that sufficient information about NSA warrantless surveillance program had been made public to proceed to merits of plaintiff's claim without any risk to national security). And where, as in both *Hepting* and *Al-Haramain*, secrets have been previously released by other entities involved in the alleged illegal activities, the continuing need for secrecy should be very carefully scrutinized. *See Hepting v. AT&T*, 439 F. Supp. 2d. 974, 994 (N.D. Cal. 2006) ("[T]he very subject matter of this action is hardly a secret. . . . [P]ublic disclosures by the government and AT&T indicate that AT&T is assisting the government to implement some kind of surveillance program.").

Courts can use special techniques to avoid inadvertently disclosing properly protected information when assessing the purported national security effects of a disclosure. Those methods include an item-by-item review of evidence *in camera*, In re *United States*, 872 F.2d 472, 479 (D.C. Cir. 1989), and the designation of a special master to examine documents and evaluate a claimed FOIA exemption. *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973); *see also Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983) (encouraging "procedural innovation" in addressing state secrets issues); *Al-Haramain Islamic Foundation v. Bush*, 451 F.Supp.2d 1215, 1233 (D. Ore. 2006) (suggesting appointment of national security

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expert with security clearance as special master to assist in assessing effects of disclosure). In In re *United States Dep't of Defense*, 848 F.2d 232 (D.C. Cir. 1988), the D.C. Circuit affirmed the appointment of a special master to create a sample of withheld intelligence records and to summarize the parties' arguments. Despite the government's claim that 14,000 pages of records concerning the Iran hostage rescue mission were classified, the special master's work resulted in the production of "several key documents," *Wash. Post v. United States Dep't of Defense*, 789 F. Supp. 423, 425 (D.D.C. 1992), not the wholesale hiding of documents that the government preferred.

Courts employ protective procedures not only to evaluate governmental assertions of the harm of disclosure, but also to minimize the possible harm that disclosure might otherwise have. *See, e.g.*, *Molerio v. F.B.I.*, 749 F.2d 815, 822-26 (D.C. Cir. 1984) (reaching merits of motion for summary judgment through reliance on privileged material submitted *in camera*); *Halpern v. United States*, 258 F.2d 36, 43-44 (2d Cir. 1958) (ordering *in camera* trial where inventor claimed damages from withholding of patent under secrecy order pursuant to Invention Secrecy Act); *cf. Kasza*, 133 F.3d at 1170 (finding that "[n]o protective procedure [could] salvage [the plaintiff's] suit").

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C. The court must balance the public interest in disclosure and adjudication against the national security interest.

If a court determines that the plaintiff has made a strong showing of necessity and that the evidence is not only secret but also potentially harmful if disclosed, the court should balance the potential harm against the public interest in disclosure, an interest that necessarily includes the adjudication of allegations of unconstitutional executive conduct. Neither the Supreme Court nor the Ninth Circuit has ever addressed an invocation of the common law state secrets privilege in a case alleging unconstitutional executive conduct, let alone unconstitutional executive conduct on a massive scale.[3] But the Supreme Court's instructions in *Reynolds*, reinforced by *Tenet*, and read in light of the federal judiciary's constitutional role as a check on the executive branch, make clear that a court can determine whether the "occasion for invoking the privilege is appropriate" only after independently balancing the interest in disclosure and adjudication against the potential harm to security. *Reynolds*, 345 U.S. at 11.[4]

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[3] The overwhelming majority of invocations of the state secrets privilege have involved a suit in ordinary tort or contract, *e.g.*, *Reynolds; Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547-48 (2d Cir 1991) (wrongful death claim); *Fitzgerald v Penthouse Int'l*, 776 F2d 1236, 1242-43 (4th Cir 1985) (libel claim), or a suit brought under a federal statute, *e.g.*, *Kasza*, 133 F3d at 1162-63, 1170 (Resource Conservation and Recovery Act claim); *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir 2005) (Title VII claim); *Halpern v United States*, 258 F.2d 36, 44 (2d Cir 1958) (patent-related claim).

[4] The Ninth Circuit may have placed undue emphasis on the observation in *Reynolds* that "even the most compelling necessity cannot overcome the claim of

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The judicial balancing required by the state secrets privilege is compelled by the principle that, whenever possible, courts should allow adjudication to proceed. *See, e.g.*, *Fitzgerald*, 776 F.2d at 1242 ("[D]enial of the forum provided under the Constitution for resolution of disputes is a drastic remedy that has rarely been invoked."). This axiom is particularly forceful where non-frivolous allegations of grave constitutional violations make judicial review particularly important. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 603 (1988) (refusing to construe statute to "deny any judicial forum for a colorable constitutional claim" and allowing claims against CIA to proceed); *see also Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) (rejecting government's argument that highly specific language of Detainee Treatment Act could strip detainees of power to raise constitutional claims and allowing claims against Secretary of Defense to proceed); *Hepting*, 439 F. Supp. 2d at 995 (recognizing that "the state secrets privilege has its limits" and that "the court . . . takes seriously its constitutional duty to adjudicate the disputes that come before it").

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privilege if the court is ultimately satisfied that military secrets are at stake." *See Kasza*, 133 F.3d at 1166 (quoting *Reynolds*, 345 U.S. at 11). The Supreme Court's dicta does not prohibit the balancing approach to the state secrets privilege advanced here. As noted above, the plaintiff in *Reynolds* did not make any showing of necessity, and more importantly, the quoted dicta occurred in a case that did not involve a constitutional claim, let alone an allegation, as here, of extensive governmental wrongdoing. As the late Chief Justice Rehnquist recently clarified, the holding in *Reynolds* "set out a balancing approach for courts to apply in resolving Government claims of privilege." *Tenet*, 544 U.S. at 9.

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If mere assertion of the privilege is always allowed to preclude adjudication of constitutional claims, "the privilege becomes a shield behind which the government may insulate unlawful behavior from scrutiny and redress by citizens." *Halkin*, 598 F.2d at 13 (Bazelon, J., dissenting from denial of rehearing *en banc*). *Cf. American Civil Liberties Union v. Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980) ("Any other rule would permit the Government to classify documents just to avoid their production . . . .); *Vaughn*, 484 F.2d at 823 (finding that in Freedom of Information Act, Congress put an "overwhelming emphasis on disclosure").[5]

To be sure, the balancing of interests may be easy "when disclosure would be *inimical* to national security." *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d at 546 (emphasis added) (finding that it was "self-evident that disclosure of secret data and tactics concerning the weapons systems of the most technically advanced and heavily relied upon of our nation's warships may reasonably be viewed as inimical to national security" and therefore not admissible under the "common law evidentiary rule" of the state secrets doctrine). But whether or not it is easy, balancing is always *necessary*. Ensuring independent review of the legality of

[5] The need for independent judicial review of the asserted privilege is also crucial in light of the rapidly increasing use of the state secrets privilege in recent years. *See* William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 Pol. Sci. Q. 85, 101-02 (2005) (quantifying historic uses); *see also* Scott Shane, *Invoking Secrets Privilege Becomes a More Popular Legal Tactic by U.S.*, N.Y. Times, June 4, 2006, at A32 (noting increase in executive invocations of the privilege).

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executive branch action is at the core of a government of separate and limited powers, particularly where the government claims a privilege specifically to avoid judicial scrutiny. *Dellums v. Powell*, 561 F.2d 242, 245 (D.C. Cir. 1977) ("It is the province and duty of the judiciary to say what the law is with respect to the claim of privilege in a particular case, even when the claim is one of presidential privilege.") (citations omitted); *see also* Fed. R. Evid. 104(a) ("Preliminary questions concerning . . . the existence of a privilege . . . shall be determined *by the court*.") (emphasis added). Only a court can determine whether the "occasion for invoking the privilege is appropriate." *Reynolds*, 345 U.S. at 11; *see also Kinoy v. Mitchell*, 67 F.R.D. 1, 17 (S.D.N.Y. 1975) ("The Court, not the executive officer claiming privilege, makes the judgment whether to uphold or override the claim.").

Although the executive branch may be well-positioned to evaluate national security, it "possesses no special expertise that would justify judicial deference to [the executive branch's] judgments about the relative magnitude of [constitutional] interests." In re *Grand Jury Subpoena*, 438 F.3d 1141, 1175 (D.C. Cir. 2006) (Tatel, J., concurring). While the executive inevitably errs on the side of secrecy, the judiciary appropriately balances competing interests.[6] As Wigmore put it,

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[6] *See also Comm. for Nuclear Responsibility v. Seaborg*, 463 F.2d 788, 794 (D.C. Cir. 1971) ("[N]o executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task [of determining applicability of a privilege]. Otherwise the head of an executive department would have the power on his own say so to cover up all

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"[t]he lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it is to shield his wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the judge." Wigmore, § 2376, at 3345.[7]

* * *

The need for independent judicial balancing is critical in situations where, as here, the government seeks to invoke the state secrets privilege to prevent the adjudication of a claim of warrantless surveillance. In such cases, the traditional role of Article III courts in reviewing executive action could be thwarted both *before* and *after* the challenged governmental conduct. First, because warrantless wiretapping involves no application for a warrant or FISA order, the opportunity for *ex ante* judicial review to ensure compliance with the Fourth Amendment is

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evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law.").

[7] The history of executive invocation of the state secrets privilege confirms the need for independent judicial balancing. *See* Erwin N. Griswold, *Secrets Not Worth Keeping*, Wash. Post, Feb. 15, 1989, at A25 (admitting that, as Solicitor General, Griswold had never seen "any trace of a threat to the national security" in the *Pentagon Papers* case, and that despite arguing in a brief to the Supreme Court that publication would pose "grave and immediate danger to the security of the United States," the principal concern "[was] not with national security, but rather with governmental embarrassment"); Louis Fisher, In the Name of National Security: Unchecked Presidential Power and the *Reynolds* Case 166-69 (2006) (documenting the fact that the government knew that the information withheld in *Reynolds* posed no threat to national security).

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foreclosed. *Cf. United States v. United States District Court (Keith)*, 407 U.S. 297, 321 (1972) (upholding Fourth Amendment requirement of judicial approval before beginning domestic intelligence surveillance). Second, the government's invocation of the state secrets privilege, if left unbalanced, could prevent courts from reviewing the conduct *ex ante*. As the Supreme Court has repeatedly made clear, our Constitution grants the government no such zone of unreviewable power over the nation's people. "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

II. Courts are Competent to Conduct the Independent Judicial Balancing Required by the State Secrets Privilege

Although the executive branch often argues that courts are not competent to consider national security claims, the judiciary has extensive experience considering government invocations of secrecy in a host of related contexts. Most notably, Congress has recognized the necessity of judicial review of claims of illegal wiretapping in the very context this case presents: alleged violations of the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. §§1801-1811, 1821-29, 1841-46, 1861-62 (2006). Under FISA, courts are empowered to

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adjudicate claims that may require the use of the most sensitive national security information, the disclosure of which could result in harm to national security. And U.S. courts are not alone in adjudicating national security cases. The experience of our democratic allies confronting terrorist threats confirms that balancing the harms of secrecy and disclosure is an appropriate judicial function, regularly and safely exercised.

A. Federal courts are competent to assess and minimize the national security effect of disclosure.

There is no reason to believe that national security matters are too subtle or complex for judicial evaluation. *See United States v. United States District Court* (*Keith*), 407 U.S. 297, 320 (1972) ("We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation."); *Zweibon v. Mitchell*, 516 F.2d 594, 641 (D.C. Cir. 1975), *cert. denied,* 425 U.S. 944 (1976) ("[W]e do not believe federal judges will be 'insensitive to or uncomprehending of the issues involved in' foreign security cases . . . .").

Recognizing this judicial competence, Congress has extended the judiciary's powers to make judgments affecting national security. Under the Freedom of Information Act (FOIA), for instance, Congress authorized courts to determine whether the government has properly classified information. *See* 5 U.S.C. § 552(a)(4)(B) & (b)(1) (2002); *Ray v. Turner*, 587 F.2d 1187, 1191-95 (D.C. Cir. 1978) (describing *de novo* review procedures required by FOIA). When it

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amended FOIA in 1974, Congress "stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security." *Ray*, 587 F.2d at 1194.

Similarly, under the FISA, Article III judges must independently review the government's assertion that electronic surveillance is needed for foreign intelligence purposes. *See* 50 U.S.C. § 1805 (2006). To obtain a FISA warrant, the executive must disclose sensitive national security information to the FISA court and convince the judges that the requirements for issuing the warrant have been met. *Id.* Moreover, FISA empowers all federal district courts, not just the special FISA court, to review highly sensitive information *in camera* and *ex parte* to determine whether the surveillance was authorized and conducted in accordance with FISA. *See* 50 U.S.C. § 1806(f) (2006).

Finally, the Classified Information Procedures Act (CIPA), 18 U.S.C. app., empowers federal judges to craft special procedures to determine whether and to what extent classified information may be used at trial. *See generally United States v. Pappas*, 94 F.3d 795, 799 (2d Cir. 1996). Section 4 of CIPA, which allows for defense discovery of classified information, explicitly provides courts with discretion to deny government requests to delete specific data from classified materials or substitute summaries or stipulations of facts. 18 U.S.C. app. § 4.

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When § 4 of CIPA is invoked, a judge must determine the relevance of the information in light of the asserted need for information and any claimed government privilege. *See, e.g., United States v. Sarkissian*, 841 F.2d 959 (9th Cir. 1988) (holding that in deciding whether to disclose confidential material submitted by the government in criminal prosecution pursuant to CIPA, the judge was free to balance defendant's need for documents against national security concerns).[8]

B. Congress entrusted courts to adjudicate claims of illegal wiretapping despite potential harm to national security.

Not only has Congress entrusted courts with the adjudication of multiple matters involving national security, it has specifically authorized judicial review of claims of illegal wiretapping involving foreign intelligence. Under the FISA, "[a]n aggrieved person . . . who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of [50 U.S.C. § 1809] shall have a cause of action . . . ." 50 U.S.C. § 1810. Congress has thus empowered courts to hear claims of illegal wiretapping in spite of any potential harm to national security that may flow from the adjudication of such claims.

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[8] Section 6 of CIPA also provides for pretrial hearings on admissibility of classified evidence, 18 U.S.C. app. § 6, during which the judge must determine the relevance of the classified information, *id.* § 6(a), and the adequacy of substitutions offered by the government in lieu of classified documents. *Id.* § 6(c).

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The very purpose of this FISA cause of action is to ensure that the governmental instinct to invoke secrecy cannot be used to shield illegal invasions of privacy from judicial review. *See* H. Rep. No. 95-1283(I), at 21 (June 8, 1978) ("In the past several years, abuses of domestic national security surveillances have been disclosed. This evidence alone should demonstrate the inappropriateness of relying solely on executive branch discretion to safeguard civil liberties."); S. Rep. No. 95-701, 1978 U.S.C.C.A.N. 3973, 4032-33 (Mar. 14, 1978) (stating that there was "firm evidence that foreign intelligence surveillances involved abuses and that checks upon the exercise of these clandestine methods were clearly necessary"); S. Rep. No. 94-1035, at 9 (July 15, 1976) (stating that FISA "goes a long way in striking a fair and just balance between protection of national security and protection of personal liberties"). In short, Congress specifically considered the national security interests at stake when a plaintiff alleges illegal foreign intelligence wiretapping, and concluded that the public interest in preventing such illegal wiretapping outweighs the potential risk to security that disclosure of the illegal action might cause.

In accord with that determination, Congress gave courts specific procedures to use when balancing the competing public interests in security, on the one hand, and preventing governmental illegality, on the other. FISA empowers courts to consider "in camera and ex parte the application, order, and such other materials

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relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." 50 U.S.C. § 1806(f).[9] The court may also "disclose to the aggrieved person, under appropriate security procedures and protective orders" such evidence "where such disclosure is necessary to make an accurate determination of the legality of the surveillance." *Id.*

Congress empowered courts to employ these specialized discovery procedures to allow for the full adjudication of claims while minimizing risks to national security. *See* H.R. Conf. Rep. No. 95-1720, 1978 U.S.C.C.A.N. 4048, 4061 (Oct. 5, 1978) ("[T]he conferees also agree that the standard for disclosure in the Senate bill adequately protects the rights of the aggrieved person, and that the provision for security measures and protective orders ensures adequate protection of national security interests"); S. Rep. No. 95-701, 1978 U.S.C.C.A.N. 3973, 4032-33 (Mar. 14, 1978) (calling the special discovery procedures "a reasonable balance between an entirely in camera proceeding . . . and mandatory disclosure,

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[9] Indeed, FISA requires courts to review in camera *all* relevant materials in the government's possession. 50 U.S.C. 1806(f) (The court "*shall*, *notwithstanding any other law*, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted.") (emphasis added). *Cf. Reynolds*, 345 U.S. at 11 (suggesting court may determine which materials government must produce).

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which might occasionally result in the wholesale revelation of sensitive foreign intelligence information").

Therefore, in the context of alleged illegal wiretapping, Congress has spoken directly to the competence of courts to conduct the judicial balancing that is needed when the government invokes the state secrets privilege. The private cause of action created under FISA removes any doubt that Congress intended courts to adjudicate these claims. Even if the common law state secrets privilege were not interpreted to require such balancing, Congress' enactment of FISA trumps the common law evidentiary privilege. That is because evidentiary privileges, including the state secrets privilege, are preempted by Congress when a statute "speaks directly to the question otherwise answered by federal common law." *Kasza*, 133 F.3d at 1167 (internal citations omitted). Viewing FISA as anything but a Congressional directive to courts to adjudicate claims of illegal wiretapping would render the private cause of action it created "completely illusory, existing only at the mercy of government officials." *Halpern v. United States*, 258 F.2d 36, 43 (2d Cir. 1958).

Even if the state secrets privilege were viewed as a constitutionally derived power of the executive branch – a view at odds with the privilege's common law history and its long expostulation by courts and commentators, *see, e.g.*, In re *United States*, 872 F.2d at 474 – the power would coexist with Congress' powers.

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Here, where Congress has expressly permitted adjudication, the executive power to invoke the state secrets privilege would thus be at its "lowest ebb," H.R. Conf. Rep. 95-1720 (1978) at 35, *reprinted in* 1978 U.S.C.C.A.N. 4048, 4064 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)), and that is a tide too low to hide review of the conduct alleged here.

C. The courts of our democratic allies employ independent judicial balancing in the state secrets context.

Courts around the world have recognized the need for searching and independent judicial review when the executive uses secrecy to thwart judicial review of significant allegations of wrongdoing. Prominent among them are our democratic allies who have long confronted terrorist threats, allies whose courts have closely scrutinized executive invocations of secrecy with competence and care.

In the United Kingdom, the analogous "crown privilege" has evolved from an earlier absolute privilege, *see, e.g.*, *Duncan v. Cammell*, [1942] A.C. 624, 639 (H.L.), into an evidentiary privilege subject to judicial review and balancing. In *Conway v. Rimmer* [1968] A.C. 910, 933 (H.L.), the House of Lords made clear that judicial review of government claims to crown privilege is essential:

> It is not conceded that there is any case in which the Minister is the final arbiter as to the privilege claimed. . . . [T]he duty is on the judge to determine the question. The court has power to overrule a ministerial objection. . . . Unless the detriment to the public interest threatened by production is so great that no other consideration should prevail, the court

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> must weigh the interests of justice against the possible harm to the public interest.

Conway v. Rimmer [1968] A.C. 910, 918 (H.L.). While national security is one aspect of the "public interest," and can prevail over disclosure, *see, e.g.*, *Air Canada v. Secretary of State for Trade*, [1983] 2 A.C. 394, 408 (H.L.), it is only one of many factors that the court must consider. *See id.* at 490 (recasting "crown privilege" as "public interest immunity," and holding that a balance must be struck between security concerns and "the public interest in the administration of justice").[10]

Ireland likewise requires judicial review of any governmental invocation of the privilege. In *Murphy v Dublin Corp.*, [1972] I.R. 215, the Supreme Court of Ireland held that the government must allow for *in camera* review of sensitive information, and in *Ambiorix Ltd. v. Minister for the Environment (No. 1)*, [1992] 1 I.R. 277, it held that when public interests in production and confidentiality conflict, "it is the judicial power which will decide which public interest will prevail." *Id* at 283. The public interest can thus require even the production of "unquestionably confidential, sensitive documents." *Gormley v. Ireland*, [1993] 2

[10] Canada and Australia have similar "public interest immunity" exceptions. *See* Canada Evidence Act, R.S.C. 1985, c. C-5, s. 38.06 (requiring judicial balancing of societal need for evidence against societal harm from disclosure); *Sankey v Whitlam*, [1977] 142 CLR 1, 1-2 (finding that Australian "public interest immunity" requires balancing "the need for secrecy against the need to produce the documents in the interests of justice and production may be withheld only when that is necessary in the public interest.").

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I.R. 75, 78 (rejecting government claim of executive privilege because public interest in adjudication outweighed government interest in preventing disclosure).

In Israel, the national security privilege is similarly subject to judicial review. *See* Israel Evidence Ordinance (New Version) 5371–1971 § 45 (allowing challenge to privilege when the "need to reveal . . . in order to do justice outweighs the interest not to reveal"). Israeli courts show a strong inclination to proceed with the adjudication of claims in which the government has asserted the national security privilege. *See, e.g.*, H.C.J. 322/81 *Machol v. District Commissioner of Jerusalem* [1983] IsrSC 37(1) 789 (summarized in 19 Isr. L. Rev. 527 (1984)) (denying government claim of privilege, and instead crafting *in camera* procedures to allow case to go forward); *see also* H.C.J. 8102/03 *MK Zahava Gal-On et al. v. Minister of Defense* [2004] (holding that the state was obliged to respond with a solution that would allow the petitions to be adjudicated).

Indeed, the Israel Supreme Court has rejected government efforts to keep specific interrogation methods secret. In *Public Committee Against Torture v. Israel* [1999], H.C.J. 5100/94, the Court openly considered challenges to various methods of coercive interrogation used by the General Security Service despite government requests that the evidence be limited to *in camera* review. *Id.* ¶ 8. While recognizing the substantial national security concerns involved, the Court

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refused to allow the privilege to "consign [Israel's] fight against terrorism to the twilight shadows of the law." *Id.* at ¶ 40.[11]

In short, courts in each allied nation review executive claims of privilege in cases involving significant allegations of governmental wrongdoing by balancing the public interest in disclosure against the risk to national security. Here, as there, courts can and should exercise the traditional judicial role of carefully weighing competing claims to the public interest in determining whether the executive's invocation of the state secrets privilege should be upheld.

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[11] Spain too uses a balancing approach to state secrets claims. *See* STS, Apr. 4, 1997 (J.T.S. No. 726); STS, Apr. 4, 1997 (J.T.S. No. 634); STS, Apr. 4, 1997 (J.T.S. No. 602) (requiring disclosure of documents pertaining to a government counterterrorism operation despite the executive's statutory authority to classify the documents because the Spanish constitution guarantees the "right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests" and "the certainty that the rule of law shall prevail, the accountability of public authorities, and the prohibition of arbitrary action of public authorities").

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CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of the defendants' motions to dismiss in both *Hepting* and *Al-Haramain*.

Respectfully submitted,

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Pursuant to Fed. R. App. P. 32(a)(7)(C), 29(d) and 9th Cir. R. 32-1, the foregoing *amicus* brief is proportionally spaced using Microsoft Word 2002, has a typeface of 14 points, and contains 6,954 words.

Dated: May 2nd, 2007 (s) 

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I hereby certify that on this 2nd day of May an original and 15 copies of the brief of *amici curiae* National Security Archive, Project on Government Oversight, Project on Government Secrecy, Public Citizen, Inc. and The Rutherford Institute were placed in Federal Express Overnight Carrier for delivery to the Clerk of the United States Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, California 94103-1526. I further certify that on this same date, two (2) copies of the brief were placed in U.S. First-class mail, postage prepaid to the following counsel of record:

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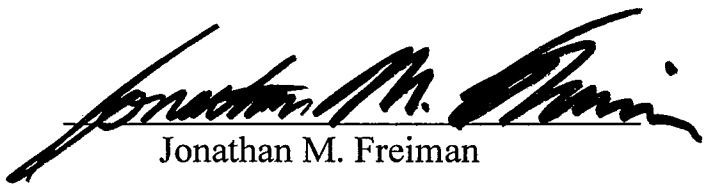

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