No. 06-36083
(Consolidated with Nos. 06-17132, 06-17137)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AL-HARAMAIN ISLAMIC FOUNDATION, INC., et al.,
Plaintiffs - Appellees,

v.

GEORGE W. BUSH, et al.,
Defendants - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution:

Statutes:

Rules:

Legislative Materials:

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INTRODUCTION

Plaintiffs concede that, under *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998), dismissal is required if the very subject matter of their suit is a state secret. Br. 12. Plaintiffs argue that the TSP's *existence* is not a secret. Br. 21. However, while the fact that the TSP *existed* is not a secret, its methods, means, and targets have never been divulged, and any further disclosure of information regarding the TSP would jeopardize national security. ER 554. Even plaintiffs acknowledge that the TSP remains a "secret program." Br. 6. Thus, the very subject matter of plaintiffs'

case—whether plaintiffs were surveilled under the TSP (and, if so, whether that program was unlawful)—is a state secret.

Plaintiffs also claim to "know," based on the Classified Document that was inadvertently disclosed to them, that they were surveilled under the TSP. Br. 2, 23. Despite plaintiffs' claims of "proof that they were actual targets of warrantless surveillance," Br. 1, however, plaintiffs' argument confirms that they do not *know* whether they were surveilled, much less whether any such surveillance occurred under the TSP. See 8/29/06 Tr. 96-97. They are simply *inferring* as much, but such inferences are insufficient to overcome the state secrets privilege.

Plaintiffs' main point—nowhere accepted by the district court—is that, because the state secrets privilege prevents them from establishing whether they were surveilled under the TSP, the "burden" should "shift" to the Government to prove that the TSP did not intercept their communications. Br. 24. This assertion fundamentally misunderstands the privilege. Any such burden-shifting would eviscerate the privilege by requiring the Government to *prove* the very matters—including surveillance targets—whose secrecy the privilege is designed to *protect*. Thus, as illustrated by the Sixth Circuit's recent decision dismissing a challenge to the TSP for lack of jurisdiction, *ACLU v. NSA*, ___F.3d ___, 2007 WL 1952370 (July 6, 2007), a challenge to alleged Government surveillance must be dismissed for want of standing where, as here, the state secrets privilege prevents plaintiffs from

establishing—or the Government from refuting—that the plaintiffs' own communications were intercepted.

Plaintiffs also fail to refute our showing that this litigation must be dismissed because the state secrets privilege precludes adjudication of their claims on the merits. Litigation of plaintiffs' constitutional and statutory claims would require careful consideration of the facts and circumstances surrounding the TSP and any application of the TSP to plaintiffs (including facts concerning whether any surveillance constituted "electronic surveillance" within the meaning of FISA)—an inquiry foreclosed by the state secrets privilege.

Finally, there is no merit to plaintiffs' argument that Congress, in enacting a damages remedy under FISA, implicitly abrogated the constitutionally-based state secrets privilege in the electronic surveillance context. Even apart from the fact that the cited remedy does not apply against the Government, the district court properly declined to accept this novel contention, which finds no support in the statutory text, legislative history, or judicial precedent.

I. THIS CASE MUST BE DISMISSED BECAUSE ITS VERY SUBJECT MATTER IS A STATE SECRET.

A. Plaintiffs concede that, "if the 'very subject matter of the action' is a state secret, the court must 'dismiss the plaintiff's action.'" Br. 12 (quoting *Kasza*, 133 F.3d at 1166). But they argue that the very subject matter of this case is not a state

secret because the TSP "is no longer a secret" and "[t]he entire American public * * * now knows about the TSP." Br. 19, 21. Public disclosures about the TSP have been very general in nature, and highly limited in scope. The public knows that (1) the TSP existed, (2) it operated without warrants, and (3) it authorized interception of one-end foreign communications where there were reasonable grounds to believe that one communicant was a member or agent of al Qaeda or an affiliated organization. However, the Nation's highest-level intelligence officials have explained that, beyond this general background, "information about the program"—including identities of persons surveilled—"remains classified and could not be disclosed without revealing critical intelligence information, sources, and methods," and causing grave harm to national security. ER 560-62; see ER 554-55. Thus, plaintiffs continue to refer to the TSP—correctly—as "a secret program." Br. 6.[1/]

This Court has held that such Executive Branch judgments measuring threats to national security posed by the disclosure of sensitive information are entitled to the "utmost deference" in the state secrets context. *Kasza*, 133 F.3d at 1166. Plaintiffs ignore this controlling standard, and instead urge the Court to adopt the approach

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[1/] It is not unusual for the existence of an intelligence program to be generally known, but for its operational details to remain highly classified. For example, the existence of the general spy program at issue in *Tenet v. Doe*, 544 U.S. 1 (2005), was publicly known, see *id.* at 4 n.2, but its operational details remained secret. See Gov.Br. 30-31.

endorsed by the divided decision in *Doe v. Tenet*, 329 F.3d 1135 (9th Cir. 2003). Br. 12, 14. But *Doe* was unanimously *reversed* by the Supreme Court in *Tenet v. Doe*, 544 U.S. 1 (2005), and, in any event, it cited and quoted with approval *Kasza*'s "'utmost deference'" standard, which, it noted, could be satisfied with a "minimally coherent explanation" of the potential harm to national security. 329 F.3d at 1154. Regardless of the degree of deference owed to the Executive's national security determination, confirming or denying surveillance targets would cause obvious harm to intelligence-gathering activities.

Nor is the "utmost deference" standard undermined by the fact that the TSP no longer exists. See Br. 43. The Government has continued to assert the state secrets privilege regarding information concerning the TSP, even though TSP surveillance is longer authorized by the President or conducted by NSA. Disclosure of information regarding the methods and means of TSP surveillance, including targeting information, would continue to pose a serious threat to national security, in part because it could shed light on ongoing surveillance. See Public Declarations of J. Michael McConnell, Director of National Intelligence and Gen. Keith B. Alexander, Director, NSA, *In re NSA Telecomm. Records Litig.*, No. M:06-CV-1791 (N.D. Cal.) (May 25, 2007).

[REDACTED TEXT—PUBLIC TEXT CONTINUES ON PAGE 6]

B. Plaintiffs also argue that the very subject matter of this case is not a state secret as they "already know they were targeted for surveillance" under the TSP, because, they assert, the Classified Document they saw is "incontrovertible proof of their surveillance." Br. 22-23; see also Br. 2. This statement is the linchpin of their case, and it is flatly wrong. As our opening brief explained (at 19-24), plaintiffs do not *know* whether they were surveilled under the TSP. Rather, as they admitted in district court, and reiterate in this Court, plaintiffs *assume* they were surveilled, and further assume that any such surveillance took place under the TSP. See 8/29/06 Tr. 60:6-61:9, 96:20-97:2.

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C. Plaintiffs appear to recognize that, as far as they are aware, it is fully possible that they were not surveilled at all, or that any such surveillance was conducted under an authority other than the TSP, such as FISA. Br. 24; see also Gov.Br. 19-24. Relying on cases outside the states secrets context, however, plaintiffs contend that, because "[a]ny such facts * * * are peculiarly within the defendants' exclusive knowledge," the "burden shifts to defendants to prove that they had FISA warrants or that they learned of plaintiffs' communications by means other than surveilling the plaintiffs." Br. 24, 27. That argument is fundamentally mistaken.

Plaintiffs' inability to demonstrate that they were subjected to TSP surveillance—because the relevant information is encompassed by the state secrets privilege—does *not* impose upon the Government the burden to show that plaintiffs were not subjected to TSP surveillance. The Government is precluded from proving that plaintiffs were not subjected to TSP surveillance for the same reason that plaintiffs cannot show that they were subjected to such surveillance: Whether plaintiffs were subjected to surveillance is a state secret, and information tending to confirm or deny that fact is privileged. ER 554, 561. Under settled law, this litigation must proceed without that information, with the attendant consequence that the case must be dismissed because plaintiffs' standing to sue cannot be established,

or negated, absent resort to privileged information. See, *e.g.*, *Kasza*, 133 F.3d at 1166.[2/]

Moreover, none of plaintiffs' cases cited to support their "burden-shifting" theory even remotely involves either standing or the state secrets privilege.[3/] It is well-settled that the burden of establishing standing "remains *at all times* with the party invoking federal jurisdiction." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 655 (9th Cir. 2002) (emphasis added).

More importantly, plaintiffs' burden-shifting argument is inconsistent with settled state secrets jurisprudence requiring dismissal where, as here, the plaintiff cannot establish a prima facie case, or the defendant cannot mount a valid defense, without recourse to state secrets. *E.g.*, *Kasza*, 133 F.3d at 1166. Indeed, plaintiffs' burden-shifting argument would eviscerate the state secrets privilege because, by

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[2/] Even assuming plaintiffs' communications were intercepted, and even assuming any such interception occurred pursuant to the TSP, plaintiffs still do not know, and could not show without resort to state secrets, whether any such surveillance constituted "electronic surveillance" subject to the requirements of FISA. See Gov.Br. 23-24. As explained (*ibid.*),"'electronic surveillance' under FISA (50 U.S.C. 1801(f)) does not cover all types of foreign intelligence surveillance, but instead has a very particular and detailed definition. Plaintiffs thus can only speculate (at 25-27) that any alleged surveillance falls within this definition.

[3/] See Br. 24 (citing *Campbell v. United States*, 365 U.S. 85 (1961) (burden to produce witness in criminal prosecution); *United States v. Denver & Rio Grande R.R. Co.*, 191 U.S. 84 (1903) (burden on trespasser to show license to cut timber); *ITSI TV Prods., Inc. v. Agricultural Ass'ns*, 3 F.3d 1289, 1292 (9th Cir. 1993) (burden of proof where defendant claims it is an arm of the state)).

definition, the Government will always have unique knowledge of the underlying (national security) information when it invokes the privilege. Plaintiffs' burden-shifting theory merely validates the Government's position that proceeding with this litigation would necessarily risk disclosure of state secrets by requiring the Government to prove privileged matters, including surveillance targets.

The Sixth Circuit in *ACLU v. NSA* thus directed dismissal of a suit challenging the TSP, holding that the "proof needed either to make or negate" a showing that any plaintiff "has actually been wiretapped" is protected by the state secrets privilege, and "because the plaintiffs cannot show that they have been or will be subjected to surveillance personally, they clearly cannot establish standing." See 2007 WL 1952370, at *5, *7 (lead opinion); *id.* at *34, *38 (Gibbons, J., concurring). The D.C. Circuit's state secrets precedents similarly hold that plaintiffs' "inability to adduce proof of actual acquisition of their communications" renders them "incapable of making the showing necessary to establish their standing to seek relief." *Halkin v. Helms*, 690 F.2d 977, 998 (D.C. Cir. 1982) ("*Halkin II*"); *Ellsberg v. Mitchell*, 709 F.2d 51, 65 (D.C. Cir. 1983); see Gov.Br. 32-33.

D. Even if plaintiffs knew whether they were surveilled under the TSP, requiring the Government to publicly confirm or deny any such surveillance would gravely harm national security, because, as the National Intelligence and NSA Directors explain in public and classified declarations, the public at large—including

the terrorists with which plaintiff al-Haramain has been linked—does not know whether such interception occurred, or, if it did occur, by what means. See ER 554, 562.

Indeed, courts have dismissed state secrets cases even though non-governmental parties (including plaintiffs) had access to evidence concerning matters protected by the privilege. Gov.Br. 27. Plaintiffs attempt to distinguish two of the four cases cited by the Government on this point—*Tenet* and *Totten v. United States*, 92 U.S. 105 (1875)—by claiming that they "were not state secrets cases," and represent only a "categorical bar" against suits based on alleged espionage agreements. Br. 30. The Supreme Court, however, has explained that the *Totten* bar applies (even before the state secrets *privilege* is formally invoked) in cases where it is "obvious that the action should never prevail over the privilege," *United States v. Reynolds*, 345 U.S. 1, 11 n.26 (1953); has applied the bar in "obvious" contexts beyond alleged espionage agreements, see *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 147 (1981) (nuclear weapons facility); and has rejected the view that "*Totten* developed merely a contract rule" for espionage agreements, *Tenet*, 544 U.S. at 8. *Totten* thus reflects a "general principle" concerning state secrets: "public policy forbids the maintenance of *any suit* in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as

confidential." *Totten*, 92 U.S. at 107 (emphasis added)); see also *Kasza*, 133 F.3d at 1170 (quoting *Totten* as state secrets principle).

Plaintiffs' view (Br. 33) that the district court may conduct *in camera* proceedings regarding standing and the merits of their claims also directly contradicts Supreme Court precedent. When the Government properly asserts the state secrets privilege, "the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." *Reynolds*, 345 U.S. at 10; accord *Sterling v. Tenet*, 416 F.3d 338, 343-44 (4th Cir. 2005). Once the privilege is properly invoked, it is "designed not merely to defeat the asserted claims, but to preclude judicial inquiry" into matters implicating state secrets. See *Tenet*, 544 U.S. at 6 n.4. Indeed, the panel majority in *Doe v. Tenet* reasoned that "*in camera* proceedings" were available in cases such as this to adjudicate the underlying claims, 329 F.3d at 1148-49 & n.8, 1152, over the dissent's view that *in camera* proceedings were unavailable to circumvent the state secrets privilege, see *id.* at 1164-65. In reversing that decision, the Supreme Court made clear that *in camera* proceedings are not appropriate, because of the risk of jeopardizing state secrets. See *Tenet*, 544 U.S. at 11; Gov.Br. 29.

The district court's conclusion that it can work around the privilege by means of an *in camera* proceeding is likewise fundamentally at odds with existing precedent, including *Kasza*, 133 F.3d at 1169-70. While a court, in appropriate circumstances,

may conduct an *in camera* review of the underlying materials in the course of passing upon the "basis for the claim of privilege," *ibid.*, no basis exists—and plaintiffs cite none—for conducting secret proceedings (much less issuing secret decisions) to adjudicate plaintiffs' standing or their merits claims. Moreover, as to standing in particular, plaintiffs' argument in favor of an *in camera* proceeding would provide no protection to the Government since, regardless of what took place during the proceeding, the outcome would signal to the world whether or not they were actually surveilled, given the settled rule that a plaintiff must show that his communications have been intercepted to have standing in this context.[4/]

[4/] The same flaw is reflected in plaintiffs' assertion that, "[i]f defendants truly had FISA warrants or learned of plaintiffs' communications other than by surveilling the plaintiffs, surely defendants would have told the district court in their secret filings, and the court would have dismissed this lawsuit without wasting anyone's time any further." Br. 24. "[C]onfirming that individuals are *not* the target of intelligence activities would cause harm to the national security. If the NSA denied allegations about intelligence targets in cases where such allegations were false, but remained silent in cases where the allegations were accurate, it would tend to reveal that the individuals in the latter cases were targets." ER 562; see ER 555.

II. PLAINTIFFS' STANDING CANNOT BE ESTABLISHED OR REFUTED WITHOUT RECOURSE TO STATE SECRETS.

A. Plaintiffs do not dispute that their standing to pursue equitable and monetary claims rests on their ability to prove that they were in fact surveilled under the TSP. See Br. 35-36; Gov.Br. 31-34. The Sixth Circuit in *ACLU* recently confirmed that standing requires proof that a plaintiff's own communications were intercepted. See p. 9, *supra*. Plaintiffs argue that the "the [Classified] Document" is "proof of their actual surveillance," and that they can establish the "fact of [their] surveillance" with "the Document and [their] sealed affidavits" recounting their recollection of it. Br. 35-36. However, as previously explained, plaintiffs do *not* know whether they have been surveilled, much less whether they have been surveilled under the TSP. Because the state secrets privilege bars plaintiffs from proving (and the Government from refuting) their allegations of surveillance, plaintiffs here—like the plaintiffs in *ACLU*—cannot establish standing.

B. Even assuming *arguendo* that plaintiffs could properly litigate their allegation of TSP surveillance in March and April 2004, they would—for different reasons—nevertheless be unable to carry their burden of establishing jurisdiction over their (prospective) claims for equitable relief and their (retrospective) claims for monetary relief. See Gov.Br. 35-37.

1. Prospective Relief.

Plaintiffs cannot establish standing to seek prospective equitable relief because they cannot "demonstrate that they are 'realistically threatened by a repetition'" of the purported warrantless surveillance, *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006), by showing that they are "immediately in danger of sustaining" such an injury. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); see also Gov.Br. 35-36; *Scott*, 306 F.3d at 658 (injury must be "'*certainly* impending'" for declaratory relief). Plaintiffs do not dispute that they must make such a showing, and do not challenge the district court's conclusion that, while they claim to "know" their communications were intercepted in March and April 2004, they certainly "do not know whether their communications continue to be intercepted" (ER 573). See Br. 42-43. In other words, plaintiffs cannot demonstrate that they are in fact subject to the conduct about which they complain, and that deficiency is fatal to their standing.

Plaintiffs argue that, now that TSP surveillance has ended, this shortcoming may be cured with discovery to explore whether the Government is conducting "ongoing surveillance" of their communications. *Ibid.* However, the Director of National Intelligence asserted the state secrets privilege over information confirming or denying whether plaintiffs "have been subject to surveillance under the [TSP] or under *any other government program*" because, among other things, such information "tend[s] to reveal intelligence information, sources, and methods," thereby

"compromising those methods and severely undermining *intelligence activities in general*." ER 553-55 (emphasis added). This danger to national security extends well beyond the TSP itself since such disclosures tend to reveal the United States' intelligence capabilities more generally, including the sources, methods, and targets of ongoing surveillance. The district court thus properly held that confirming or denying any ongoing surveillance would pose a reasonable danger of harming national security (ER 573), a conclusion that applies directly to TSP surveillance and the Nation's ongoing foreign intelligence activities.

The Government has "no duty to reveal ongoing foreign intelligence surveillance," *ACLU Found. v. Barr*, 952 F.2d 457, 468 n.13 (D.C. Cir. 1991), and Congress has specified that no law "shall be construed to require the disclosure * * * of any information with respect to the activities" of the NSA. See 50 U.S.C. 402 note; p. 23, *infra*. Otherwise, terrorists and other subjects of such surveillance could utilize litigation to discover the Nation's surveillance targets and activities.

2. Damages.

As to plaintiff's retrospective damages claims, jurisdiction is lacking because the Government has not waived its sovereign immunity. See *Dunn & Black, P.S. v. United States*, ___ F.3d ___, 2007 WL 1989364, at *2 (9th Cir. 2007). Congress specified two damage remedies for FISA violations. Plaintiffs disavow the remedy "against the United States" in the Stored Communications Act (18 U.S.C. 2712).

They instead argue that they can obtain damages under 50 U.S.C. 1810, that § 1810 waives sovereign immunity because federal officials are "persons" who may be sued under § 1810, and that a suit (like this) against such officials in their official capacities is a "'suit against the United States.'" Br. 39-41, 42 n.5. That argument is mistaken.

Congress did not authorize suit against the United States as a "person" under § 1810 of FISA, because FISA defines "person" to mean, in pertinent part, "any *individual*, including any officer or employee of the Federal Government." 50 U.S.C. 1801(m) (emphasis added). While this provision may permit damage actions against certain officials in their *individual* capacities, it does not authorize actions against the Federal Government, which is clearly not an "individual." Because, as plaintiffs' admit, the broader term "'person' [does] not includ[e] the sovereign" (Br. 40 n.4), Congress's use of the narrower term "individual" does not either. By contrast, the Stored Communications Act expressly authorizes damage actions "against the United States" for certain FISA violations (but, significantly, not the alleged violations here). 18 U.S.C. 2712. Even if the meaning of "individual" were in doubt, any doubt would be resolved in favor of sovereign immunity, because a waiver of sovereign immunity "cannot be implied, but must be unequivocally expressed," and must "be strictly

construed, in terms of its scope, in favor of the sovereign." See *Dunn & Black*, *supra*.[5/]

Plaintiffs' suggestion (for the first time in this case) that their complaint might be construed as stating a damage claim against federal officials in their individual capacities (Br. 41) does not alleviate plaintiffs' jurisdictional difficulties. This case has never been an individual capacity suit because plaintiffs never served any potential individual defendant with a complaint and summons, and it is far too late to cure that defect. See Fed. R. Civ. P. 4(i)(2)(B), (m) (requiring actual service on federal officials "sued in an individual capacity" within 120 days of complaint). Accordingly, no individual officials have appeared in, or secured counsel for, these proceedings, and the district court would have lacked personal jurisdiction to consider any claims against them. See *Butcher's Union v. SDC Inv., Inc.*, 788 F.2d 535, 538 (9th Cir. 1986); *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999).

[5/] Plaintiffs incorrectly assert that the question of sovereign immunity is not before this Court. Br. 38. "[S]overeign immunity is a jurisdictional defect that may be asserted by the parties at any time or by the court *sua sponte*." *Pit River Home & Agr. Co-op. Ass'n v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994).

III. THE STATE SECRETS PRIVILEGE ALSO PRECLUDES LITIGATION OF THE MERITS OF PLAINTIFFS' CLAIMS.

Even if the very subject matter of this litigation were not a state secret, and even if plaintiffs could prove their standing without compromising state secrets, this case should have been dismissed because plaintiffs could not prove the elements of their claims, and the Government could not defend itself against such claims, without resort to state secrets. Our opening brief showed in particular that adjudication of plaintiffs' Fourth Amendment challenge would involve a reasonableness inquiry requiring a fact-specific analysis. Similarly, adjudication of plaintiffs' FISA claim, including consideration of whether the President acted within the scope of his constitutional authority and duty to surveil effectively the enemy during wartime and protect the nation from further attacks, would necessitate careful consideration of all relevant underlying facts and circumstances surrounding the TSP and any application of the TSP to the plaintiffs. See Gov.Br. 37-45. Litigation of the merits of plaintiffs' claims would therefore be barred by the state secrets privilege, because information regarding the TSP's "intelligence activities, sources, methods, or targets" can neither be confirmed nor denied. See ER 554, 561.

Plaintiffs contend that facts are not germane to the merits of this case and that the merits issues are "purely legal." Br. 43-47. According to plaintiffs, the Government's arguments pertain only to the Government's "good faith" and proper

"motives," which, plaintiffs believe, are irrelevant. *Ibid.* Plaintiffs miss the point. The constitutional and statutory claims that form the basis for plaintiffs' suit cannot be litigated without reference to the actual nature and scope of the activity that plaintiffs seek to challenge, but the pertinent facts necessary for any adjudication of the legality of that activity—*e.g.*, information regarding the actual contours, operation, and application of the TSP—fall within the heartland of the state secrets privilege. See ER 554, 561. In addition, the central premise of plaintiffs' FISA claims—that they were subjected to "electronic surveillance" within the meaning of FISA—itself cannot be litigated without reference to numerous privileged facts. See Gov.Br. 23-24. The state secrets privilege therefore prevents an adjudication of the merits. See *ibid.*; *Halkin II*, 690 F.2d at 1000, 1003 n.96.

Plaintiffs incorrectly insist (Br. 47-48) that the Government's reliance on public legal arguments shows that state secrets are not necessary to the Government's defense. While providing background legal principles, our opening brief explicitly argued and showed that, even if plaintiffs were deemed to have standing to challenge the TSP, no such challenge could be assessed on its merits without a precise understanding of the TSP and the threat it was designed to address, and "the facts relevant to that inquiry are protected from disclosure by the state secrets privilege." Gov.Br. 41, 44-45. And, of course, the Government's public briefs have been

redacted; we have filed non-public briefs referring to highly sensitive classified information relevant to the issues presented.

Plaintiffs' presentation is similarly awry in asserting that the Justice Department's "White Paper" (available at http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf) touching upon the general legal framework for the TSP demonstrates that the TSP may properly be the subject of courtroom litigation. See Br. 47-48. The White Paper discusses the legality of the TSP only in broad generalities without reference to evidence protected by the state secrets privilege, expressly noting that "a full explanation of the basis for" the program "*cannot be given in an unclassified document.*" White Paper at 34 n.18 (emphasis added). Given the gravity of the constitutional issues plaintiffs raise—including the scope of the President's inherent authority to conduct foreign intelligence surveillance in wartime—full adjudication of these issues would require a nuanced understanding and analysis of all surrounding facts, including any facts pertaining to these plaintiffs in particular. Because it is not possible to conduct such an analysis without revealing extraordinarily sensitive state secrets that could cause grievous injury to the Nation, this action must be dismissed.

IV. CONGRESS HAS NOT ABROGATED THE STATE SECRETS PRIVILEGE.

Finally, plaintiffs press a novel and far-reaching argument that the district court did not reach and no court has ever accepted: that Congress abrogated the state secrets privilege in the context of damage actions brought against the United States under FISA. Br. 48-62; ER 580. In plaintiffs' view, "where, as here, a plaintiff alleges a private cause of action under [§ 1810 of] FISA, the state secrets privilege is supplanted by FISA," and the United States is limited to the *in camera* procedures set forth in 50 U.S.C. 1806(f). Br. 49. This argument is contradicted by the text and legislative history of FISA, as well as by settled rules of statutory construction.

A. First, the predicate for plaintiffs' theory is incorrect. Cf. Br. 49, 56. Section 1810 of FISA does not create a cause of action against the United States for money damages. See pp. 15-17, *supra*. Plaintiffs' privilege-preemption argument thus fails at the outset.

B. Even assuming *arguendo* that § 1810 authorizes damage actions against the United States, Congress did not purport to supplant the state secrets privilege with the procedure described in 50 U.S.C. 1806(f). At the very least, clear statutory language would be needed to attempt to displace the privilege, and § 1806(f) contains no such text.

1. For several reasons, Congress could not abrogate the privilege without (at a minimum) clearly stating such intent. First, the privilege is grounded in the Constitution. See Gov.Br. 15. While plaintiffs assert that, unlike the constitutionally-based "executive privilege," the state secrets privilege is merely a creature of common law (Br. 61), the Supreme Court has, to the contrary, explained that the privilege for "military or diplomatic secrets" derives from the Executive's core "Art. II duties," and, as such, must be given "utmost deference" by Courts—deference even *beyond* that appropriate in the executive privilege context. *United States v. Nixon*, 418 U.S. 683, 710 (1974).[6/]

Serious constitutional questions would thus arise if § 1806(f) of FISA were read to abrogate the privilege, impairing the President's ability to protect vital military and intelligence secrets from public disclosure. The constitutional avoidance doctrine requires that § 1806(f) be read to avoid such difficulties "unless such construction is plainly contrary to the intent of Congress." See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The "clear statement doctrine" similarly requires reading § 1806(f) not to interfere with the President's powers unless Congress has made clear an intent to

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[6/] Plaintiffs rely only on *Kasza* (Br. 50, 61), which noted the privilege's common law origin, but had no occasion to address its additional constitutional dimension.

confront the ensuing constitutional questions. See *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991). Such an intent is utterly absent from FISA.

Second, in addition to its constitutional foundation, the state secrets privilege has deep common-law roots, *Kasza*, 133 F.3d at 1167, and thus "'ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'" *Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983); *Kasza*, *supra*. Therefore, even apart from of its constitutional dimensions, the privilege could not be overriden without, at a minimum, a "clear and explicit" statement, absent in FISA.

Third, as noted above, Section 6 of the National Security Agency Act of 1959 mandates that "nothing in this Act or *any other law* * * * *shall be construed* to require the disclosure * * * of any information with respect to the activities" of the NSA. See 50 U.S.C. 402 note (emphasis added). This anti-disclosure provision is "absolute" (*Linder v. NSA*, 94 F.3d 693, 698 (D.C. Cir. 1996)), and its "plain text unequivocally demonstrates that Congress intended to prevent" the radical interpretation of FISA that plaintiffs advance. See *California v. United States*, 215 F.3d 1005, 1009 n.3, 1011& n.4 (9th Cir. 2000) (construing similar text).

2. Nothing in FISA explicitly abrogates the state secrets privilege. Far from reflecting the requisite clear intent to do so, Section 1806(f) simply provides aggrieved persons with a shield against the Government's affirmative use of

information obtained from disclosed electronic surveillance. Located within FISA's provision governing the Government's "[u]se of information" obtained from surveillance (50 U.S.C. 1806), subsection (f) applies only to three situations in which the potential use of surveillance-based information in legal proceedings against an aggrieved person requires a judicial determination of whether the underlying surveillance was lawful:

> (1) the Government provides notice "pursuant to subsection (c) or (d)" of § 1806 that it "intends to enter into evidence or otherwise use or disclose" surveillance-based information in judicial or administrative proceedings against an aggrieved person (see § 1806(c), (d));
>
> (2) the "aggrieved person" moves "pursuant to subsection (e)" of § 1806 in such proceedings to suppress the "evidence obtained or derived from [an] electronic surveillance" (see § 1806(e)); or
>
> (3) the "aggrieved person" moves "pursuant to any other statute or rule" either to "discover or obtain" "applications or orders or other materials relating to electronic surveillance;" or to discover, obtain, or suppress "evidence or information obtained or derived from electronic surveillance."

See 50 U.S.C. 1806(f); see also *ACLU Found.*, 952 F.2d at 462.

Each of these three limits rests on the premise that the Government has disclosed the fact of electronic surveillance in legal proceedings where it might use surveillance-based evidence. The Government's notice under § 1806(c) or (d) of its intent to use such evidence necessarily discloses the fact of surveillance. Similarly,

a motion to suppress such surveillance-based evidence under § 1806(e) is made only after the Government reveals surveillance in proceedings.

Finally, Section 1806 governs the Government's "[u]se of information" obtained from surveillance generally, and, because the other contexts to which Congress applied subsection (f) concern the Government's use of surveillance-based information in legal proceedings, the established canon of *noscitur a sociis* indicates that this final category in subsection (f) is similarly limited. See *Washington Dep't of Soc. & Health Servs. v. Estate of Keffeler*, 537 U.S. 371, 384-85 (2003); *Adams v. United States*, 420 F.3d 1049, 1053-54 (9th Cir. 2005) (where "'several items in a list shar[e] an attribute,'" this canon "'counsels in favor of interpreting the other items as possessing that attribute as well'").

This interpretive rule not only is "'wisely applied'" here to "'avoid the giving of unintended breadth to the Acts of Congress,'" *Estate of Keffeler*, *supra*, but also to effectuate the careful "balance" that Congress intended to strike in § 1806(f) between an aggrieved person's "ability to defend himself" against the Government's invocation of the legal process, and the need to protect "sensitive foreign intelligence information." See S. Rep. No. 95-701, at 64 (1978); cf. H.R. Conf. Rep. No. 95-1720, at 31-32 (1978) (adopting Senate's framework for § 1806(f)). Congress explained that "notice [of surveillance] to the surveillance target"—and the subsequent use of "*[i]n camera* procedures" to test the legality of disclosed surveillance—would be

inappropriate "*unless the fruits are to be used against him in legal proceedings*." S. Rep. No. 95-701, at 11-12 (emphasis added). And, even if a court orders disclosure under § 1806(f), Congress gave the Government a choice: "either disclose the material or forgo the use of the surveillance-based evidence." *Id.* at 65. That choice exists only when the Government uses such evidence as a sword.

Thus, when the Government affirmatively seeks to use surveillance-based information in legal proceedings, it cannot invoke the state secrets privilege over that evidence and its affirmative use of such information opens the door to defense motions aimed at testing the legality of the underlying surveillance. When the Attorney General (or his subordinates) "files an affidavit * * * that disclosure or an adversary hearing" on such motions would harm national security (§ 1806(f)), Section 1806(f) provides an *in camera* process to give the defendant an adequate opportunity to present a defense, while safeguarding sensitive information concerning the surveillance that the Government itself has opted to disclose. That balance between defendants' rights to challenge surveillance used against them, and the Government's need for confidentiality, is inapposite when the Government does not seek to use surveillance against a person.[7/]

[7/] Plaintiffs do not dispute that § 1806(f) applies only when the Government has disclosed the fact of surveillance. Br. 54. We thus do not repeat our discussion of § 1806(f)'s limited application to motions filed by "aggrieved persons" and the (continued...)

* * * * *

Plaintiffs appear to object to the entire foundation of the state secrets privilege and the notion that some national security matters may be beyond judicial review. See Br. 1, 62. But, as discussed, the state secrets doctrine is deeply rooted in our constitutional and common law fabric; the Supreme Court has rejected the argument that the unavailability of judicial review provides a basis for disregarding fundamental limits on judicial authority, see *Schlesinger v. Reservists Comm. To Stop The War*, 418 U.S. 208, 227 (1974); and, as shown above, the privilege is fully applicable in this case.

---

[7] (...continued)
related text supporting this conclusion. See *Hepting* Gov. Reply Br. at 24-27 (consolidated with *Al-Haramain*). Similarly, while plaintiffs contend that the inadvertent release of the Classified Document "disclosed" that plaintiffs were surveilled (Br. 54), plaintiffs do *not* actually know whether they were subjected to surveillance, let alone "electronic surveillance" as defined by FISA, as discussed above.

CONCLUSION

For the foregoing reasons, and those in our opening brief, the district court's decision should be reversed and this case dismissed.

Respectfully submitted,

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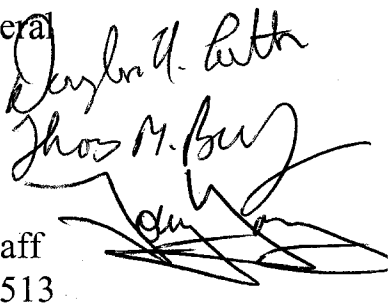


JULY 2007

ADDENDUM

ADDENDUM TABLE OF CONTENTS

Page

Foreign Intelligence Surveillance Act of 1978, as amended
50 U.S.C. 1801-1871

50 U.S.C. 1801

§ 1801. Definitions

As used in this subchapter:

* * * *

(g) "Attorney General" means the Attorney General of the United States (or Acting Attorney General), the Deputy Attorney General, or, upon the designation of the Attorney General, the Assistant Attorney General designated as the Assistant Attorney General for National Security under section 507A of title 28, United States Code.

* * * *

(k) "Aggrieved person" means a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance.

* * * *

(m) "Person" means any individual, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power.

* * * *

50 U.S.C. 1806

§ 1806. Use of information

* * * *

(c) Notification by United States

Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.

(d) Notification by States or political subdivisions

Whenever any State or political subdivision thereof intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of a State or a political subdivision thereof, against an aggrieved person any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter, the State or political subdivision thereof shall notify the aggrieved person, the court or other authority in which the information is to be disclosed or used, and the Attorney General that the State or political subdivision thereof intends to so disclose or so use such information.

(e) Motion to suppress

Any person against whom evidence obtained or derived from an electronic surveillance to which he is an aggrieved person is to be, or has been, introduced or otherwise used or disclosed in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the evidence obtained or derived from such electronic surveillance on the grounds that–

(1) the information was unlawfully acquired; or

(2) the surveillance was not made in conformity with an order of authorization or approval.

Such a motion shall be made before the trial, hearing, or other proceeding unless there was no opportunity to make such a motion or the person was not aware of the grounds of the motion.

(f) In camera and ex parte review by district court

Whenever a court or other authority is notified pursuant to subsection (c) or (d) of this section, or whenever a motion is made pursuant to subsection (e) of this section, or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter, the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, 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. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

(g) Suppression of evidence; denial of motion

If the United States district court pursuant to subsection (f) of this section determines that the surveillance was not lawfully authorized or conducted, it shall, in accordance with the requirements of law, suppress the evidence which was unlawfully obtained or derived from electronic surveillance of the aggrieved person or otherwise grant the motion of the aggrieved person. If the court determines that the surveillance was lawfully authorized and conducted, it shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure.

* * * *

(j) Notification of emergency employment of electronic surveillance; contents; postponement, suspension or elimination

If an emergency employment of electronic surveillance is authorized under section 1805(e) of this title and a subsequent order approving the surveillance is not obtained, the judge shall cause to be served on any United States person named in the application and on such other United States persons subject to electronic surveillance as the judge may determine in his discretion it is in the interest of justice to serve, notice of–

(1) the fact of the application;
(2) the period of the surveillance; and
(3) the fact that during the period information was or was not obtained.

On an ex parte showing of good cause to the judge the serving of the notice required by this subsection may be postponed or suspended for a period not to exceed ninety days. Thereafter, on a further ex parte showing of good cause, the court shall forego ordering the serving of the notice required under this subsection.

* * * *

National Security Agency Act of 1959
Pub. L. No. 86-36, 73 Stat. 63

* * * *

Sec. 6. (a) Except as provided in subsection (b) of this section, nothing in this Act or any other law (including, but not limited to, the first section and section 2 of the Act of August 28, 1935 (5 U.S.C. 654)) shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.

(b) The reporting requirements of section 1582 of title 10, United States Code, shall apply to positions established in the National Security Agency in the manner provided by section 4 of this Act.

* * * *

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AL-HARAMAIN ISLAMIC FOUNDATION, INC., an Oregon nonprofit corporation, et al., Plaintiffs, vs. GEORGE W. BUSH, President of the United States, et al., Defendants.	No. CV-06-274-KI August 29, 2006 Portland, Oregon

MOTION HEARING

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE GARR M. KING

UNITED STATES DISTRICT COURT JUDGE

acceptable way of us getting around this problem. We are not looking to have this document released to the public. That's a different issue that Mr. Hinkle is addressing, and we take no position on that. It's simply not in our interest. It's irrelevant to what we want.

THE COURT: Let me ask you -- this may be way ahead of it -- how are you going to show that any surveillance in this case was warrantless?

MR. EISENBERG: That is a very interesting question, and we pondered that a lot. I would like to think that if they had a FISA warrant, that Mr. Coppolino would have told us quite a while back, so we wouldn't be wasting any more time.

THE COURT: Well, Mr. Coppolino may feel that's a state secret or at least the people who instruct Mr. Coppolino may feel that's a state secret.

MR. EISENBERG: It could be, and then we have a bit of a problem.

I believe the simple way, how do we know it was warrantless? Discovery. And that really is just about, I think, the only thing in our motion for discovery, which Mr. Goldberg will address -- it's not the only. It stands above all others. It's an essential link in our case, but it's a simple one. I think the simple answer is we ask them, "Did you have a FISA warrant?"

Now, why do we --

THE COURT: I suspect they are going to refuse to answer. Then I have to make a determination as to whether I'm going to require them to answer. And in doing that, I have to determine whether or not the answer would divulge a state secret.

MR. EISENBERG: I wonder if you could imply from their refusal to answer that they didn't have one. We have a problem, don't we?

But look at what Congress has told us. Congress has told us in 50 U.S. Code 1810(a) -- that's FISA -- "An aggrieved person who has been subject to electronic surveillance in violation of FISA shall have a cause of action against any person who committed such a violation."

Now, if the Government has the right to keep secret forever that there was a violation of FISA, then what meaning does Section 1810 have? It has none. That remedy doesn't mean a thing if they can avoid liability for violating FISA by refusing to tell us whether they got a warrant.

THE COURT: Well, is there anything in the public record, any statements made that you think you could rely on to show that in this case the surveillance was warrantless?

Now, the TSP program, I think there is a public record, statements by the president that he authorized warrantless surveillance. But do you know that this was a TSP surveillance?

MR. EISENBERG: Well, here's what I can tell you. And again, now, I have to be a little careful.

THE COURT: Yes. You have to be very careful.

MR. EISENBERG: So what I'm going to do is read from the record. That's all I'm going to do. I'll start with the Complaint, paragraph 19, paraphrasing: In March and April of 2004, Defendant National Security Agency conducted warrantless surveillance of conversations between Plaintiff Al-Haramain and Plaintiffs Belew and Ghafoor. Paragraph 20: In May 2004, Defendant NSA gave Defendant OFAC, Office of Foreign Assets and Control, logs of these conversations.

Frances Hourihan's declaration -- she filed two, and I'm quoting from the second one, paragraph 4: In August 2004, OFAC inadvertently gave Al-Haramain's attorneys the sealed document filed with the Complaint in this case. In paragraph 5, she said it was related to the terrorist designation. And that's referring to the designation as a specifically designated global terrorist.

The Hackett declaration, paragraphs 5 and 8, the

second Hackett declaration, says that the sealed document is a United States Government report that pertains to intelligence activities and is derived from intelligence sources.

And then finally, I'll read to you from our response, plaintiffs' response to defendants' motion to deny access to the document, page 10: The document confirms that plaintiffs were surveilled without a warrant and thus are aggrieved.

And the best I can offer you, Your Honor, in light of the sensitivity of the situation we have before us, is the conclusion that I just read to you based on the points in the record that I just read to you. We believe that there is enough in this record to support certainly a strong inference that there was warrantless surveillance in this case. We've alleged it; and I believe for purposes of this hearing, our allegations are to be taken as true.

THE COURT: And you believe that's true of both the individual plaintiffs as well as the foundation? Do they stand in any different status --

MR. EISENBERG: Yes.

THE COURT: -- as far as you're concerned?

MR. EISENBERG: They do. They do. I'm not sure what I can say. Let me put it this way, treading very

information.

Certainly if you had questions as to our classified submissions, we'd be happy to answer them for you and to engage in that. But we think there is no way to proceed in this case without running straight into state secrets.

Thank you.

THE COURT: All right. Thank you.

Any response?

MR. EISENBERG: One minute, Your Honor.

THE COURT: All right. One minute.

MR. EISENBERG: Just responding to one point: Do we admit that we don't know whether there was a warrant for the surveillance in this case? No, we do not admit that. Our position is that the public statements in this case, the documentary evidence presented to this Court in the form of declarations, and the document itself demonstrate that there was no warrant. That's why we commenced this litigation.

If there had been a warrant in this case, I have to assume that the Government would have told Your Honor in the secret declarations that we are not privy to. And I am going to have to assume further, Your Honor, in light of what has transpired here today, that the Government has not told Your Honor in classified

confidence that there were no -- that there were warrants in this case.

I think Mr. Hinkle is right: It seems to be true to a moral certainty that there were no warrants. That's what the warrantless surveillance program is all about. So I think we can get beyond that and, hopefully, working together, find a solution around some of the unusual obstacles in this case and get to a decision on the merits.

THE COURT: Okay. Thank you.

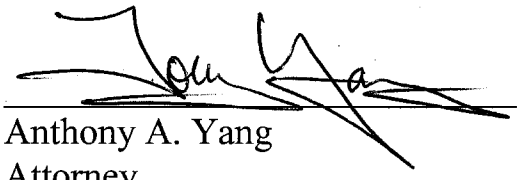
The presentations have been excellent and very helpful to the Court. I expect to have an opinion for you sometime next week. Thank you.

THE CLERK: Court is adjourned.

(Proceedings concluded.)

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief is in compliance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The public and classified versions of this brief contain no more than 7,000 words, and were prepared in 14-point Times New Roman font using Corel WordPerfect 12.0.



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