09-15266

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs and Appellees,

vs.

BARACK H. OBAMA, President of the United States, et al.,

Defendants and Appellants.

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION AND OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for appellees states that appellee Al-Haramain Islamic Foundation, Inc. is an Oregon corporation, with no parent or subsidiary, and that no publicly-held company owns 10 percent or more of Al-Haramain's stock.

February 23, 2009 By: /s/ Jon B. Eisenberg
Jon B. Eisenberg

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INTRODUCTION

Defendants purport to appeal an interlocutory order determining that plaintiffs may proceed under the Foreign Intelligence Surveillance Act (FISA) – specifically, 50 U.S.C. section 1806(f) – to demonstrate their Article III standing to prosecute their private cause of action under 50 U.S.C. section 1810 for warrantless electronic surveillance in violation of FISA. Defendants also seek an emergency stay of those proceedings below. Plaintiffs hereby oppose defendants' request for an emergency stay, and plaintiffs move to dismiss the appeal for lack of appellate jurisdiction.

None of defendants' theories of appellate jurisdiction can sustain this appeal. The interlocutory order is not appealable under the collateral order doctrine; it is not appealable as an injunction; and defendants have not filed anything resembling a petition for writ of mandamus.

The request for an emergency stay is predicated on defendants' unwarranted fear that the district judge will do grave harm to the Nation's security by publicly disclosing sensitive classified information in the course of adjudicating plaintiffs' standing. Section 1806(f), however, gives the judge authority to employ appropriate security measures as this case moves forward, and he has amply assured that he will use those measures effectively to protect national security.

Ultimately, defendants propose that the district court can *never* adjudicate plaintiffs' standing because to do so would confirm a secret fact – the fact of

plaintiffs' unlawful surveillance (or not) – which is protected from disclosure by the state secrets privilege. That proposition collapses, however, if FISA *preempts* the state secrets privilege. The district court has ruled that FISA *does* preempt the state secrets privilege – an issue this Court remanded to the district court in 2007. For this case to proceed expeditiously to an adjudication of standing upon the district court's FISA preemption ruling is consistent with this Court's remand order.

BACKGROUND

On November 16, 2007, the Court remanded this case to Judge Vaughn R. Walker "to consider whether FISA preempts the state secrets privilege and for any proceedings collateral to that determination." *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1206 (9th Cir. 2007). On July 2, 2008, Judge Walker ruled that FISA preempts the state secrets privilege and dismissed plaintiffs' complaint with leave to amend – specifically, to plead non-classified facts sufficient to establish "aggrieved person" status under section 1806(f). *In re National Security Agency Telecommunications Records Litigation*, 564 F.Supp.2d 1109, 1111, 1135 (N.D. Cal. 2008). Plaintiffs subsequently filed a First Amended Complaint which amply pleads the requisite non-classified information. *See* Doc. #35 at 4-14.

On January 5, 2009, Judge Walker ruled that "[w]ithout a doubt, plaintiffs have alleged enough to plead 'aggrieved person' status so as to proceed to the next step in proceedings under FISA's sections 1806(f) and 1810." Doc. #57 at 18. Judge Walker

prescribed several measures to be taken in order to facilitate going forward with an adjudication of plaintiffs' Article III standing. *See* Doc. #57 at 24-25.

On January 16, 2009, defendants filed a notice of appeal from the order of January 5, 2009. Doc. #59. Three days later, defendants moved for certification of an interlocutory appeal from that order pursuant to 28 U.S.C. section 1292(b). Doc. #60. On February 13, 2009, Judge Walker denied such certification and directed the government "not later than February 27, 2009 to inform the court how it intends to comply with the January 5 order." Doc. #71 at 3.

Defendants have filed with this Court an "Emergency Motion For Stay Pending Appeal" (hereafter "Emerg. Mo."), seeking a stay of "any district court proceedings that will lead to disclosure of classified information." Emerg. Mo. at 20. Defendants assert three theories of jurisdiction to review the January 5, 2009 order: the "final collateral order" doctrine, appealability as an injunction under 28 U.S.C. section 1292(a)(1), and this Court's mandamus jurisdiction. *See* Emerg. Mo. at 20, n. 3.

ARGUMENT

I. THE DISTRICT COURT'S ORDER IS NOT APPEALABLE UNDER THE "FINAL COLLATERAL ORDER" DOCTRINE.

The "final collateral order" doctrine permits a direct appeal from an interlocutory order if (1) the order "conclusively determine[s]" a disputed question, (2) the question is "completely separate from the merits of the action" and is not

"enmeshed in the factual and legal issues comprising the plaintiff's cause of action," and (3) the order is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978) (emphasis and internal quotation marks omitted). The January 5, 2009 order is not appealable under this doctrine unless all three requirements are met.

A. The Ruling Denying Defendants' Motion to Dismiss This Action For Lack of Standing is Not a Final Collateral Order.

The district court's order has two elements. The first element is a ruling denying defendants' third motion to dismiss this action for purported lack of standing. The law is well settled that this ruling is not appealable under the collateral order doctrine because "the issue of standing is not effectively unreviewable on appeal from a final judgment and, thus, fails the last prong of the collateral order doctrine." *Summit Medical Associates, P.C. v. Pryor*, 180 F.3d 1326, 1334 (11th Cir. 1999).

B. The Ruling Allowing Plaintiffs to Proceed Under 50 U.S.C. § 1806(f) is Not a Final Collateral Order.

The second element of the district court's order is the ruling allowing plaintiffs to proceed under section 1806(f). This ruling is not appealable under the collateral order doctrine because it fails both the first and second prongs of the doctrine.

1. The Ruling is Not "Final" Because it Does Not Conclusively Determine How the District Court Will Proceed Regarding Possible Disclosure of Classified Information.

The ruling allowing plaintiffs to proceed under section 1806(f) fails the first prong of the collateral order doctrine because it is not *final*, in that it does not "conclusively determine" how the case will proceed. *See Coopers & Lybrand,* 437 U.S. at 468. Specifically, the ruling leaves unsettled, for the time being, the questions of how and to what extent plaintiffs' counsel will be granted access to classified information. The order states that (1) "[t]he court's next steps will be to prioritize two interests: protecting classified evidence from disclosure and enabling plaintiffs to prosecute their action," (2) "the court will review the Sealed Document ex parte and in camera," and (3) due process might "possibly" require plaintiffs' counsel to have access "to at least some of defendants' classified filings." Doc. #57 at 23.

Thus, nothing is yet conclusive with regard to how the district court will proceed. The section 1806(f) proceedings below are still in midstream, which is not an appropriate time for appellate review under the collateral order doctrine.

2. The Ruling is Not "Collateral" Because it is Enmeshed in the Merits Issue.

The district court's section 1806(f) ruling fails the second prong of the collateral order doctrine because the ruling is an integral step leading to adjudication of the ultimate question in proceedings under section 1806(f) – whether the plaintiffs'

surveillance was lawful – and as such is not "completely separate from the merits of the action." *Coopers & Lybrand,* 437 U.S. at 468. To the contrary, the district court's ruling is "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 469. In section 1806(f) proceedings, the district court may "determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." 50 U.S.C. § 1806(f). That issue is hardly collateral to the merits issue in this case, but *is* the merits issue.

II. THE DISTRICT COURT'S ORDER IS NOT APPEALABLE AS AN INJUNCTION UNDER 28 U.S.C. § 1292(a)(1).

Under 28 U.S.C. section 1292(a)(1), direct appeal lies from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." Although the January 5, 2009 order does not purport to grant an injunction, an order not labeled an "injunction" may be appealable under section 1292(a)(1) if it has the "practical effect" of granting an injunction. An order has such practical effect if "it is (1) 'directed to a party,' (2) 'enforceable by contempt,' and (3) 'designed to accord or protect "some or all of the substantive relief sought by a complaint" in more than a preliminary fashion.'" *United States v. Cal-Almond, Inc.*, 102 F.3d 999, 1002 (9th Cir. 1996). In contrast, an order is not appealable as an injunction if it merely "regulates the conduct of the litigation." *Gon v. First State Ins. Co.*, 871 F.2d 863, 865 (9th Cir. 1989).

A. To the Limited Extent That the Order is Directed to Defendants, the Appeal is Mooted by Defendants' Compliance With the Order.

An order is directed to a party for purposes of appealability under section 1292(a)(1) if the order compels the party to take action. *See Alsea Valley Alliance v. Department of Commerce*, 358 F3d 1181, 1186 (9th Cir. 2004). The January 5, 2009 order requires defendants to take some action, but only the following: (1) to arrange for the Department of Justice Litigation Security Section to make the Sealed Document available for the court's in camera review, (2) to arrange for plaintiffs' attorneys to apply for Top Secret/Sensitive Compartmented Information(SCI) security clearance and to expedite their processing, and (3) to determine whether any of the classified filings in this case may be declassified and to file a report on the outcome of that determination. Doc. #57 at 24-25.

Defendants have complied with or are in the process of complying with all those directives. Defendants have advised the district court that the Sealed Document is available for the court's inspection. Defendants have processed applications by plaintiffs' counsel for security clearance, and two of plaintiffs' attorneys have been granted security clearance. Defendants have advised the district court that they will file their report on declassification on or before February 27, 2009. Thus, to the limited extent that the district court's order is directed to defendants, this appeal is mooted by their compliance with the court's directives. *See, e.g., Christian Knights*

of the Ku Klux Klan v. District of Columbia, 972 F.2d 365, 369 (D.C. Cir. 1992) (injunction appeal is mooted by compliance). Such mootness deprives this Court of whatever jurisdiction it might have had under section 1292(a)(1). *See North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (mootness is jurisdictional).

Nothing in the district court's order other than the directives with which defendants are complying requires defendants to take any other action. Notably, the order does not require defendants to disclose classified information to plaintiffs' counsel. Nor will the district court require such disclosure by defendants at any future time. If the district court later decides to give plaintiffs' counsel access to the Sealed Document and/or to disclose to plaintiffs' counsel any of the information in defendants' classified filings, such disclosure will be *by the district court*, not by defendants under court order; thus, the ruling will not be appealable as an injunction under section 1292(a)(1), because it will not require any action by defendants.

B. The Order is Not Designed to Accord or Protect Any of the Substantive Relief Sought.

The district court's order is not appealable as an injunction for the additional reason that it is not "'designed to accord or protect "some or all of the substantive relief sought by a complaint."'" *Cal-Almond*, 102 F.3d at 1002. Rather, it merely "regulates the conduct of the litigation," *Gon*, 871 F.2d at 865, by prescribing procedures to facilitate plaintiffs' showing of standing.

"To qualify as an 'injunction' under § 1292(a)(1), a district court order must grant at least part of the ultimate, coercive relief sought by the moving party." *Henrietta D. v. Giuliani*, 246 F.3d 176, 182 (2d Cir. 2001). The order here does no such thing. Plaintiffs' First Amended Complaint seeks (in addition to damages) coercive relief in the form of an order that defendants (1) "disclose . . . all unlawful surveillance of plaintiffs' communications," (2) "turn over" material relating to plaintiffs that was acquired by or the fruit of such surveillance, and (3) "purge" from defendants' files all information that was acquired by or the fruit of such surveillance. Doc. #35 at 16. The district court's order does not grant any of this coercive relief. It does not order defendants to "disclose" or "turn over" anything to plaintiffs or to "purge" anything from defendants' files.

The order simply allows this case to proceed under section 1806(f), without conclusively determining *how* the case will proceed. "It is well settled that an order of the district court that merely continues a case and does not reach the merits of parties' opposing claims is merely a step in the processing of a case and does not fall within the range of interlocutory orders appealable under 28 U.S.C. § 1292(a)(1)." *Frutiger v. Hamilton Central School District*, 928 F.2d 68, 72 (2d Cir. 1991).

III. DEFENDANTS HAVE NOT INVOKED THIS COURT'S MANDAMUS JURISDICTION.

The only other ground defendants assert as a basis for appellate jurisdiction is

this Court's mandamus jurisdiction. Defendants have not, however, filed a petition for writ of mandamus or anything that might be appropriately treated as a mandamus petition. Thus, exercise of mandamus jurisdiction at this time would be premature.

IV. THE DISTRICT COURT'S JULY 2, 2008 RULING ON FISA PREEMPTION CANNOT BE REVIEWED ON APPEAL FROM THE ORDER OF JANUARY 5, 2009.

The primary purpose of defendants' purported appeal from the district court's January 5, 2009 decision to proceed under section 1806(f) is to challenge the district court's previous ruling on July 2, 2008 that FISA preempts the state secrets privilege. *See* Emerg. Mo. at 15-17. But even if this Court were to conclude that it has jurisdiction at this time to review the order of January 5, 2009, the Court would lack pendent jurisdiction to review the FISA preemption ruling of July 2, 2008.

On an appeal under the collateral order doctrine or section 1292(a)(1), the appellate court cannot exercise pendent jurisdiction over previous interlocutory rulings unless "the rulings are inextricably intertwined with, or necessary to ensure meaningful review of, decisions that are properly before the court on interlocutory appeal." *Burlington Northern & Santa Fe Railway Company v. Vaughn*, 509 F.3d 1085, 1093 (9th Cir. 2007). "These requirements are narrowly construed, setting 'a very high bar' for the exercise of pendent appellate jurisdiction." *Id.* at 1093. "'Two issues are not "inextricably intertwined" if we must apply different legal standards to each issue.'" *Meredith v. Oregon*, 321 F.3d 807, 814 (9th Cir. 2003). Pendent

jurisdiction is not "necessary to ensure meaningful review of" the appealed ruling unless the pendent decision has "much more than a tangential relationship" to the appealed ruling. *Poulos v. Caesar's World, Inc.*, 379 F.3d 654, 669 (9th Cir. 2004). "Rare is the ruling that is 'inextricably intertwined' or 'necessary to ensure meaningful review of' decisions that are properly before us on interlocutory appeal." *Id.* (permissive appeal from denial of class certification).

The district court's previous FISA preemption decision is not that "rare"ruling. The substantive issue addressed in the July 2, 2008 ruling on FISA preemption and the procedural issues addressed in the January 5, 2009 ruling on how to proceed under section 1806(f) implicate wholly different legal standards and thus are not inextricably intertwined. FISA preemption bears only a tangential relationship to the determination of how to proceed under section 1806(f), because the law of preemption has no relevance to that determination. The time has not yet arrived for this Court's review of Judge Walker's FISA preemption ruling.

V. EVEN IF THIS COURT HAS JURISDICTION, NO EMERGENCY STAY IS NECESSARY.

A. A Stay is Not Necessary Because the District Court Has Given Ample Assurance That it Will Use the Security Procedures Prescribed by 50 U.S.C. § 1806(f) to Protect National Security as This Case Moves Forward.

Even if this Court were to conclude that it has jurisdiction, the Court should deny an emergency stay because there is no danger that Judge Walker will do harm

to the Nation's security by publicly disclosing sensitive classified information as the case moves forward under section 1806(f). To the contrary, Judge Walker's order of January 5, 2009 gives ample assurance that he will take all measures necessary to protect national security, using the "appropriate security procedures and protective orders" authorized by section 1806(f). The order states:

> The court has carefully considered the logistical problems and process concerns that attend considering classified evidence and issuing rulings based thereon. Measures necessary to limit the disclosure of classified or other secret evidence must in some manner restrict the participation of parties who do not control the secret evidence and of the press and the public at large. The court's next steps will prioritize two interests: protecting classified evidence from disclosure and enabling plaintiffs to prosecute their action. Unfortunately, the important interests of the press and the public in this case cannot be given equal priority without compromising other interests.

Doc. #57 at 22-23. Judge Walker's subsequent order of February 13, 2009 reiterates that "the court is fully aware of its obligations with regard to classified information." Doc. #71 at 2. Thus, there is no prospect of an imminent and irreparable public disclosure of sensitive information – not if Judge Walker uses, as he has assured he will, the security measures authorized by Congress in section 1806(f).

Plaintiffs are mindful of this Court's previous determination that the basis for defendants' assertion of the state secrets privilege "is exceptionally well documented" and that "disclosure of information concerning the Sealed Document and the means, sources and methods of intelligence gathering in the context of this case would undermine the government's intelligence capabilities and compromise national

security." *Al-Haramain*, 507 F.3d at 1203-04. But the Court made that determination within the context of the *state secrets privilege*, under which, "if seemingly innocuous information is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure and the court *cannot order the government to disentangle this information from other classified information*." *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (emphasis added.) If the state secrets privilege were to apply to this case, this Court has indicated that the district court would not be permitted to disentangle portions of the Sealed Document that are safe to disclose and allow plaintiffs to use those portions to demonstrate standing, but would have to exclude the Sealed Document entirely. In contrast, under section 1806(f), such disentanglement *is* permitted, through the use of "appropriate security procedures and protective orders." 50 U.S.C. § 1806(f).

Judge Walker has made clear that he will use those security measures as necessary to protect the Nation's security. For example, he can allow plaintiffs' counsel to use a redacted version of the Sealed Document to establish standing, whereby any sensitive portions of the document that are not safe to disclose will be shielded from public view, and he can issue protective orders that bind plaintiffs' counsel to confidentiality. There is no danger that plaintiffs' counsel will disclose anything Judge Walker directs them not to disclose; their security clearance means

the FBI has determined that they are persons "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, . . . and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Order No. 12968, § 3.1(b) (1995). Indeed, throughout three years of litigating this case, plaintiffs and their counsel have scrupulously taken care not to disclose the contents of the Sealed Document. Thus, in the forthcoming proceedings under section 1806(f), there is no danger of any public disclosure – by Judge Walker or plaintiffs' counsel – of the sensitive information that caused this Court to rule as it did in 2007.

Judge Walker has done nothing more than what was contemplated in this Court's 2007 decision to remand for a determination on FISA preemption "and for any proceedings collateral to that determination." *Al-Haramain*, 507 F.3d at 1206. Implicit in that decision is the assumption that section 1806(f) *can* be employed effectively to protect national security in this case – otherwise, the remand would have been pointless. Judge Walker has demonstrated that he *will* use section 1806(f) effectively to protect national security here. The proceedings under section 1806(f) with which Judge Walker will now go forward are the "collateral proceedings" this Court envisioned in 2007.

In the 2007 proceedings before this Court, defendants insisted it was essential

to national security that they "neither confirm nor deny whether plaintiffs had been surveilled under the TSP or any other intelligence-gathering program." Brief For Appellants at 6. Even now, defendants continue to insist that "[e]ven a bare conclusion of whether or not plaintiffs were subject to surveillance . . . would cause exceptionally grave harm to the national security." Emerg. Mo. at 13. Yet, on October 22, 2007, in a public speech that now appears on the FBI's official Internet website, FBI Deputy Director John Pistole *acknowledged* that the FBI used surveillance in the 2004 investigation of Al-Haramain. *See* Doc. #35 at 11. If a high FBI official can publicly acknowledge such surveillance without harming national security, then surely Judge Walker can adjudicate the mere fact of surveillance without harming national security.

B. There is Little Likelihood of Success on the Merits of This Purported Appeal.

Defendants have failed to sustain their burden of demonstrating a likelihood of success on the merits sufficient to justify an emergency stay. In this regard, defendants make two substantive arguments: they would be likely to succeed in challenging Judge Walker's authority to give plaintiffs' counsel access to the classified documents on file with the district court, and they would be likely to succeed in challenging Judge Walker's determination that FISA preempts the state secrets privilege. Defendants are wrong on both points.

1. The District Court is Authorized to Give Plaintiffs' Counsel Access to Classified Filings Under the Court's Control.

Now that plaintiffs' counsel have been given security clearance, they may be given access to the classified filings if it is determined that they have a "need to know" any information contained in those filings. *See* Exec. Order No. 13,292, § 4.1(a)(3) (2003). Judge Walker has the authority to make that "need to know" determination. Defendants are not likely to succeed in showing otherwise.

Executive Order No. 13,292 defines "need to know" as "a determination *made by an authorized holder of classified information* that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized government function." Exec. Order No. 13,292, § 6.1(z) (2003) (emphasis added). This provision means *the district court* may make the "need to know" determination here, because the court is an "authorized holder" of the classified filings in this case. According to Department of Defense regulations, "Members of . . the Federal judiciary . . . do not require personnel security clearances. They may be granted access to DoD classified information to the extent necessary to adjudicate cases being heard before these individual courts." DoD 5200.2-R, § C3.4.4.5 (1987). Congress has declared that executive orders and regulations pertaining to security clearances "shall not apply to . . . Federal judges appointed by the President." 50 U.S.C. § 437. Thus, the applicable regulatory and statutory law makes the district

court an "authorized holder" of the classified filings here, as the court needs no security clearance and plainly needs access to the filings in order to adjudicate this case. The Executive Branch's own regulations give the court, as an "authorized holder," the power to make the "need to know" determination.

Because of the constitutional separation of powers, it could not be any other way. "Every court has supervisory power over its own records and files . . . ." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). "So long as they remain under the aegis of the court, they are superintended by judges who have dominion over the court." *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 141 (2d Cir. 2004). The supervisory power of the courts over their files is "an incident of their constitutional function." *In re Sealed Affidavit(s) To Search Warrants Executed On February 14, 1979*, 600 F.2d 1256, 1257 (9th Cir. 1979). Control over the classified filings in this case is a Judicial Branch power which the Executive Branch cannot impair or intrude upon by operation of executive orders or agency regulations. *See United States v. Pollard*, 416 F.3d 48, 58-59 (D.C. Cir. 2005) (Rogers, J., concurring and dissenting) (district court had power to determine counsel's "need to know" classified information contained in documents that had been "filed with the district court," because otherwise the court "would be in the untenable position of lacking jurisdiction over motions that relate to documents that were filed with it and over which it has continuing control").

2. Section 1806(f) Preempts the State Secrets Privilege.

Defendants similarly have little likelihood of success on the issue of FISA preemption (which is not yet reviewable by this Court).

This Court has plainly described the state secrets privilege as "a common law evidentiary privilege." *Al-Haramain*, 507 F.3d at 1196. A federal statutory scheme like FISA can preempt federal common law like the state secrets privilege, even without explicit evidence of a clear and manifest purpose to do so, if "Congress has "*occupied the field* through the establishment of a *comprehensive regulatory program*." *Milwaukee v. Illinois*, 451 U.S. 304, 316-17 (1981) (emphasis added).

FISA preempts the state secrets privilege by occupying the entire field of foreign intelligence surveillance with a comprehensive regulatory program that includes a warrant requirement and secure procedures for adjudicating civil actions for FISA violations. As Senator Gaylord A. Nelson (one of FISA's co-sponsors) explained during floor debate, FISA "[a]long with the existing statute dealing with criminal wiretaps . . . *blankets the field*." 124 CONG. REC. 10,903-04 (1978) (emphasis added). As this Court put it in 2007, FISA "provides a *detailed regime* to determine whether surveillance 'was lawfully authorized and conducted.'" *Al-Haramain*, 507 F.3d at 1205 (emphasis added).

The specific preemption inquiry is whether FISA's comprehensive regulatory

program "'"[speaks] *directly* to [the] question" otherwise answered by federal common law.'" *Kasza,* 133 F.3d at 1167 (emphasis in original). The question, simply put, is whether FISA speaks directly to protecting national security in FISA litigation. Two sub-issues are presented: (1) Does FISA speak directly to security procedures and rules of disclosure that are otherwise prescribed by the state secrets privilege? (2) Does FISA speak directly to the rule of outright dismissal that is otherwise prescribed by the state secrets privilege? Both answers are *yes*.

On the first sub-issue, section 1806(f) speaks directly to security procedures and rules of disclosure by prescribing rules for judicial determination and protection of national security concerns where, as here, a private cause of action is alleged under section 1810. This regime speaks directly to use and disclosure that would otherwise be governed by the state secrets privilege. It speaks directly to secure use of the Sealed Document in the present case to demonstrate plaintiffs' standing. And its application "notwithstanding any other law," 50 U.S.C. § 1806(f), means the state secrets privilege is preempted. FISA departs from the state secrets privilege by replacing its absolute rule of outright dismissal – in effect, deniability by silence – with statutory provisions for protecting national security while holding the Executive Branch accountable for intelligence abuses.

On the second sub-issue – whether FISA speaks directly to the rule of outright dismissal within the state secrets privilege – section 1810, by prescribing a private

right of action for FISA violations despite the otherwise secret nature of FISA proceedings, displaces the rule of outright dismissal, which is wholly inconsistent with the very notion of a private FISA action. If section 1810 did *not* displace the rule of outright dismissal, then Congress's prescription of a private FISA action would be meaningless, for the President would be able to evade any private FISA action merely by invoking the state secrets privilege. Yet that is defendants' position here – that section 1810 is a nullity because the President says so. That position is inimical to the rule of law that prevails in America.

CONCLUSION

For the foregoing reasons, this Court should deny an emergency stay and dismiss the appeal for lack of jurisdiction.

February 23, 2009

Respectfully submitted,

/s/ Jon B. Eisenberg

Jon B. Eisenberg, J. Ashlee Albies, Steven Goldberg, Lisa R. Jaskol, William N. Hancock, Zaha S. Hassan, & Thomas H. Nelson

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STATEMENT OF RELATED CASE

This Court previously adjudicated an interlocutory appeal in this case in No. 06-36083, *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007).

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 27(d)(2), this Motion By Appellees To Dismiss Appeal For Lack Of Jurisdiction is proportionately spaced, has a typeface of 14 points or more, and consists of 20 pages.

February 23, 2009 By: /s/ Jon B. Eisenberg
Jon B. Eisenberg

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2009, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants.

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION This Document Relates Solely To: *Al-Haramain Islamic Foundation, Inc., et al. v. Bush, et al.* (C07-CV-0109-VRW) **AL-HARAMAIN ISLAMIC FOUNDATION, INC., an Oregon Nonprofit Corporation; WENDELL BELEW, a U.S. Citizen and Attorney at Law; ASIM GHAFOOR, a U.S. Citizen and Attorney at Law,** Plaintiffs, vs. **GEORGE W. BUSH, President of the United States; NATIONAL SECURITY**	MDL Docket No. 06-1791 **FIRST AMENDED COMPLAINT** (Violations of Foreign Intelligence Surveillance Act, Separation of Powers, Fourth Amendment, First Amendment, Sixth Amendment, and International Covenant on Civil and Political Rights)

AGENCY and KEITH B. ALEXANDER, its Director; OFFICE OF FOREIGN ASSETS CONTROL, an office of the United States Treasury, and ADAM J. SZUBIN, its Director; FEDERAL BUREAU OF INVESTIGATION and ROBERT S. MUELLER III, its Director, in his official and personal capacities. Defendants.	)	

INTRODUCTION

1. This is an action for damages and injunctive relief concerning an illegal and unconstitutional program of electronic surveillance of United States citizens and entities. This action also seeks to enjoin the use of evidence obtained through this surveillance in proceedings in which defendant Office of Foreign Assets Control (OFAC) has designated plaintiff Al-Haramain Islamic Foundation, Inc. ("Al-Haramain Oregon") as a terrorist organization.

2. Defendants have engaged in electronic surveillance of plaintiffs without court orders, in violation of clear statutory mandates provided in the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. §§ 1801-62, and provisions of the United States Constitution.

3. Defendants have used illegal surveillance to harm plaintiffs as set forth more specifically in the body of this Complaint.

PARTIES

4. Plaintiff Al-Haramain Oregon is an Oregon nonprofit corporation whose headquarters were established in Ashland, Oregon. Plaintiff Al-Haramain Oregon currently owns real property in Springfield, Missouri. Plaintiff Al-Haramain Oregon formerly owned real property in Ashland, Oregon. Defendant OFAC has sold the Ashland property at auction and has frozen the proceeds of the sale.

5. Plaintiff Wendell Belew is a citizen of the United States and an attorney at law who has had business and other relationships with plaintiff Al-Haramain Oregon.

6. Plaintiff Asim Ghafoor is a citizen of the United States and an attorney at law who has had business and other relationships with plaintiff Al-Haramain Oregon.

7. Defendant George W. Bush is President of the United States.

8. Defendant National Security Agency (NSA) is an agency of the United States.

9. Defendant Keith B. Alexander is Director of defendant NSA.

10. Defendant OFAC is an office of the Department of the Treasury of the United States.

11. Defendant Adam J. Szubin is Director of OFAC.

12. Defendant Federal Bureau of Investigation (FBI) is a federal police and intelligence agency.

13. Defendant Robert S. Mueller III is Director of the FBI and was Director at all times relevant to this Amended Complaint. Defendant Mueller is being sued in his official and personal capacities.

JURISDICTION AND VENUE

14. This court has jurisdiction under 28 U.S.C. § 1331.

15. Plaintiffs filed this action in the United States District Court for the District of Oregon, a proper venue because (a) one of the plaintiffs is an Oregon corporation that owned real property in Oregon and (b) defendants' actions caused harm in Oregon. The Judicial Panel on Multidistrict Litigation transferred this action to the United States District Court for the Northern District of California on December 15, 2006, as part of *In re National Security Agency Telecommunications Records Litigation*, MDL Docket No. 06-1791-VRW.

STATEMENT OF FACTS

16. Shortly after the terrorist attacks of September 11, 2001, defendants commenced a program of warrantless electronic surveillance of international telecommunications, intercepting them domestically from routing stations located within the United States.

17. The warrantless surveillance program did not comply with the requirements of FISA.

18. Current and former employees and representatives of the United States government have made the following public statements about the nature of the warrantless surveillance program:

a. In a radio address on December 17, 2005, defendant Bush stated that the warrantless surveillance program intercepted "international communications of people with known links to Al Qaida [sic] and related terrorist organizations."

b. During a press conference on December 19, 2005, defendant Bush stated that the warrantless surveillance program encompasses "those that are known al Qaeda ties and/or affiliates [sic]."

c. During the press conference of December 19, 2005, defendant Bush further stated that "we must be able to act fast and to detect these conversations" and the warrantless surveillance program "enables us to move faster and quicker" than under FISA and provides "the ability to move quickly to detect."

d. In a press briefing on December 19, 2005, Attorney General Alberto Gonzales publicly stated that, under the warrantless surveillance program, the executive branch conducted warrantless electronic surveillance outside the structure of FISA where "one party to the communication is outside the United States" and "we have a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda."

e. On December 19, 2005, in written answers to questions from the Senate Judiciary Committee, defendant Alexander publicly stated that, under the warrantless surveillance program, the executive branch conducted warrantless electronic surveillance outside the structure of FISA "where one party is outside the United States and there are reasonable grounds to believe that at least one party is a member or agent of al Qaeda or an affiliated terrorist organization."

f. A "White Paper" issued by the Department of Justice on January 19, 2006, stated that under the warrantless surveillance program the President authorized the NSA "to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations."

g. On January 10, 2007 former Deputy Assistant Attorney General John Yoo stated on National Public Radio that under the warrantless surveillance program "the National Security Agency intercepts communications from abroad coming into the United States where someone on the calls is a suspected member of Al Qaeda," and that the surveillance occurred without "individualized suspicion."

19. On May 15, 2007, in testimony before the Senate Judiciary Committee, and on May 22,

2007, in written answers to follow-up questions by Senator Patrick Leahy, former Deputy Attorney General James B. Comey stated as follows:

a. As of early March of 2004, Comey and Attorney General John Ashcroft had determined that the warrantless surveillance program was unlawful.

b. During a meeting at the White House on March 9, 2004, two days before the Department of Justice's next 45-day written re-certification of the program was due, Comey told Vice-President Dick Cheney and members of his and defendant Bush's staffs that the Department of Justice had concluded that the warrantless surveillance program was unlawful and that the Department of Justice would not re-certify the program.

c. On March 10, 2004, while Ashcroft was hospitalized, two White House officials went to Ashcroft's bedside and attempted to obtain the written certification from Ashcroft, but he refused.

d. Despite the advice that the warrantless surveillance program as then constituted was unlawful, defendant Bush did not direct Comey or the FBI to discontinue or suspend any portion of the program.

e.. On March 11, 2004, the Department of Justice's certification of the warrantless surveillance program lapsed without re-certification.

f. The warrantless surveillance program continued to operate without the Department of Justice's re-certification for a period of several weeks following March 11, 2004.

g. On or about March 10, 2004, several high government officials, among them defendant Mueller, threatened to resign because of concerns about the legality of the warrantless surveillance program.

20. On July 26, 2007, defendant Mueller testified before the House Judiciary Committee as follows:

a. Prior to the incident at Ashcroft's bedside described in paragraph 19(c) above, Mueller had "serious reservations about the warrantless wiretapping program."

b. At or near the time of the incident at Ashcroft's bedside described in paragraph 19(c) above, during conversations between Comey and defendant Mueller, Comey "expressed

concerns about the legality of the program."

21. On January 17, 2007, Attorney General Gonzales announced in a letter to Senators Patrick Leahy and Arlen Specter that the President "has determined not to authorize the Terrorist Surveillance Program when the current authorization expires." The letter further stated, however, that despite the program's suspension it "fully complies with the law."

22. On May 1, 2007, in testimony before the Senate Intelligence Committee, Director of National Intelligence Michael McConnell refused to assure Senator Russ Feingold that defendants would not in the future conduct warrantless electronic surveillance outside the structure of FISA, saying "that would be the President's call."

23. As a result of, among other things, the public statements by Attorney General Gonzales and Director of National Intelligence McConnell described in paragraphs 21 and 22 above, it is not clear that defendants' unlawful behavior could not reasonably be expected to recur.

24. On August 1, 2002, Treasury Department Deputy Secretary Kenneth W. Dam testified before the Senate Committee on Banking, Housing and Urban Affairs, Subcommittee on International Trade and Finance, as follows:

a. In October of 2001, the Treasury Department created "Operation Green Quest" to track financing of terrorist activities, especially by charitable organizations.

b. Among the targets of Operation Green Quest were foreign branches of Al-Haramain Islamic Foundation, which was headquartered in Saudi Arabia.

25. On March 4, 2004, FBI Counterterrorism Division Acting Assistant Director Gary M. Bald testified before the Senate Caucus on International Narcotics Control as follows:

a. In April of 2002, the FBI created its Terrorist Financing Operations Section (TFOS) in order to combine the FBI's expertise in conducting complex criminal financial investigations with advanced technologies and to develop cooperation and coordination among law enforcement and intelligence agencies.

b. On May 13, 2003, through a Memorandum of Understanding between the Department of Justice and the Department of Homeland Security, the FBI was designated as the lead agency to investigate terrorist financing, and the TFOS replaced Operation Green Quest.

c. The TFOS subsequently participated in joint operations with the Treasury Department to investigate potential terrorist-related financial transactions. With the cooperation of domestic and foreign intelligence agencies, the TFOS acquired, analyzed and disseminated classified electronic intelligence data produced by advanced foreign intelligence technologies, including telecommunications data from sources in government and private industry.

d. The TFOS took over the investigation of Al-Haramain Islamic Foundation "pertaining to terrorist financing."

e. On February 18, 2004, the FBI executed a search warrant on plaintiff Al-Haramain Oregon's office in Ashland, Oregon.

f. The TFOS provided operational support, including document and data analysis, in the investigation of plaintiff Al-Haramain Oregon.

26. In his Senate testimony of March 4, 2004, Bald made no mention of purported links between plaintiff Al-Haramain Oregon and Osama bin-Laden.

27. On September 25, 2003, FBI Deputy Director (at that time Counterterrorism Division Assistant Director) John S. Pistole testified before the Senate Committee on Banking, Housing and Urban Affairs that the TFOS "has access to data and information" from "the Intelligence Community" and has "[t]he ability to access and obtain this type of information in a time sensitive and urgent manner."

28. On June 16, 2004, OFAC Director R. Richard Newcomb testified before the House Financial Services Subcommittee on Oversight and Investigations that in conducting investigations of terrorist financing, OFAC officers use "classified . . . information sources."

29. On July 26, 2007, defendant Mueller testified before the House Judiciary Committee that in 2004 the FBI, under his direction, undertook activity using information produced by the NSA through the warrantless surveillance program.

30. In a press release issued on February 19, 2004, the Treasury Department announced that OFAC had blocked plaintiff Al-Haramain Oregon's assets pending an investigation of possible crimes relating to currency reporting and tax laws.

31. The Treasury Department's press release of February 19, 2004, made no mention of

purported links between plaintiff Al-Haramain Oregon and Osama bin-Laden.

32. During the period of time immediately following the blocking of plaintiff Al-Haramain Oregon's assets on February 19, 2004, plaintiff Belew spoke over the telephone with one of Al-Haramain Oregon's directors, Soliman al-Buthi, on the following dates: March 10, 11 and 25, April 16, May 13, 22 and 26, and June 1, 2 and 10, 2004. Belew was located in Washington D.C.; al-Buthi was located in Riyadh, Saudi Arabia. The telephone number that Belew used was 202-255-3808. The telephone numbers that al-Buthi used were 96655457679, 96656414004 and 966505457679.

33. During the period of time immediately following the blocking of plaintiff Al-Haramain Oregon's assets on February 19, 2004, plaintiff Ghafoor spoke over the telephone with al-Buthi approximately daily from February 19 through February 29, 2004 and approximately weekly thereafter. Ghafoor was located in Washington D.C.; al-Buthi was located in Riyadh, Saudi Arabia. The telephone numbers that Ghafoor used were 202-390-5390 and 202-497-2219. The telephone numbers that al-Buthi used were 966505457679 and 96656414004.

34. Plaintiff Al-Haramain Oregon and al-Buthi had been named among multiple defendants in *Burnett, et al. v. Al Baraka Investment and Development Corporation, et al.*, a lawsuit filed against Saudi Arabian entities and citizens on behalf of victims of the terrorist attacks of September 11, 2001. Al-Buthi was attempting to coordinate the defense of individuals named in the *Burnett* lawsuit and the payment of their legal fees. Al-Buthi contacted some of those individuals and urged them to obtain legal representation to prevent entry of default judgments against them. Ghafoor undertook to represent several of the individuals whom al-Buthi contacted. Belew undertook to provide legal services in connection with the formation and operation of a lobbying organization for Islamic charities, the Friends of Charities Association (FOCA).

35. Wholly independent of any classified written documentation, including the sealed document that was filed simultaneously with the initial complaint in this action, plaintiffs Belew and Ghafoor recall the substance of the telephone conversations described in paragraphs 32 and 33 above that took place during the several weeks following March 11, 2004, when the warrantless surveillance program continued to operate without the Department of Justice's re-certification as described in paragraph 19 above, as follows:

a. In the telephone conversations between Belew and al-Buthi, the parties discussed issues relating to the operation of FOCA, including the form and content of bills for payment of FOCA's attorney fees to Belew and others. On one occasion, they discussed the fact that a check to Belew from FOCA could not be negotiated because it lacked part of its routing code.

b. In the telephone conversations between Ghafoor and al-Buthi, al-Buthi mentioned by name numerous defendants whom Ghafoor had undertaken to represent in the *Burnett* lawsuit filed on behalf of the September 11 victims.

c. One of the names al-Buthi mentioned in the telephone conversations with Ghafoor was Mohammad Jamal Khalifa, who was married to one of Osama bin-Laden's sisters.

d. Two other names al-Buthi mentioned in the telephone conversations with Ghafoor were Safar al-Hawali and Salman al-Auda, clerics whom Osama bin-Laden claimed had inspired him.

e. In the telephone conversations between Ghafoor and al-Buthi, the parties also discussed issues relating to payment of Ghafoor's legal fees as defense counsel in the *Burnett* lawsuit, including the following: who would pay the fees; replenishment of Ghafoor's retainer; the possibility of using a credit card to pay the legal fees; and a system for payment of the fees by check, whereby clients would make payments to al-Buthi, who would deposit those payments in his personal bank account and then send cashier's checks to Ghafoor.

36. In a letter to plaintiff Al-Haramain Oregon's lawyer Lynne Bernabei dated April 23, 2004, OFAC Director Newcomb stated that OFAC was considering designating plaintiff Al-Haramain Oregon as a Specially Designated Global Terrorist (SDGT) organization based on unclassified information "and on classified documents that are not authorized for public disclosure."

37. In a follow-up letter to Bernabei dated July 23, 2004, Newcomb reiterated that OFAC was considering "classified information not being provided to you" in determining whether to designate plaintiff Al-Haramain Oregon as an SDGT organization.

38. On September 9, 2004, OFAC declared plaintiff Al-Haramain Oregon to be an SDGT organization.

39. In a press release issued on September 9, 2004, the Treasury Department stated that the

investigation of plaintiff Al-Haramain Oregon showed "direct links between the U.S. branch [of Al-Haramain] and Usama bin Laden."

40. The Treasury Department's press release of September 9, 2004, was the first instance of a public claim of purported links between plaintiff Al-Haramain Oregon and Osama bin-Laden.

41. In a public declaration filed in this litigation, dated May 10, 2006, FBI Special Agent Frances R. Hourihan stated that a classified document "was related to the terrorist designation" of plaintiff Al-Haramain Oregon.

42. On October 22, 2007, in a speech at a conference of the American Bankers Association and American Bar Association on money laundering, the text of which appears on the FBI's official Internet website, FBI Deputy Director Pistole stated that the FBI "used . . . surveillance" in connection with defendant OFAC's 2004 investigation of plaintiff Al-Haramain Oregon.

43. In FBI Deputy Director Pistole's speech of October 22, 2007, he further stated that, although the FBI used surveillance in connection with defendant OFAC's 2004 investigation of plaintiff Al-Haramain Oregon, "it was the financial evidence" provided by financial institutions "that provided justification for the initial designation" of plaintiff Al-Haramain Oregon.

44. In a document filed in *United States v. Sedaghaty*, No. CR 05-600008-1 on August 21, 2007, the United States Attorney for the District of Oregon referred to the February 19, 2004 order blocking plaintiff Al-Haramain Oregon's assets as a "preliminary designation of AHIF-US" and referred to the September 9, 2004 order declaring plaintiff Al-Haramain Oregon to be an SDGT as "a formal designation of AHIF-US."

45. The October 22, 2007 speech referenced in paragraphs 42 and 43 above and the document referenced in paragraph 44 above together demonstrate that defendant OFAC relied primarily on evidence provided by financial institutions and not on surveillance evidence to issue the February 19, 2004 assets-blocking order against plaintiff Al-Haramain Oregon, which FBI Deputy Director Pistole called "an initial designation" and the United States Attorney called "a preliminary designation," and then relied on surveillance evidence to issue the September 9, 2004 SDGT designation, which the United States Attorney called "a formal designation."

46. The October 22, 2007 speech referenced in paragraphs 42 and 43 above, in which FBI

Deputy Direcctor Pistole stated that the FBI "used . . . surveillance" in connection with defendant OFAC's 2004 investigation of plaintiff Al-Haramain Oregon, contradicts and supersedes (1) defendants' prior assertion in their Brief for Appellants filed in the Ninth Circuit Court of Appeals in this litigation on June 6, 2007 that the government "could neither confirm nor deny whether plaintiffs had been surveilled under the TSP or any other intelligence-gathering program," and (2) defendants' prior assertion in their Reply Brief for Appellants filed in the Ninth Circuit on July 20, 2007 that "plaintiffs do *not* know whether they have been surveilled, much less whether they have been surveilled under the TSP" (original italics). Through this speech and its posting on defendant FBI's official Internet website, defendant FBI has now confirmed to plaintiffs and the public at large that plaintiffs were surveilled.

47. In a letter to plaintiff Al-Haramain Oregon's attorneys Lynne Bernabei and Thomas Nelson dated February 6, 2008, OFAC confirmed its "use of classified information" in the Al-Haramain Oregon investigation.

48. The following public statements by government officials demonstrate that the telecommunications between al-Buthi and plaintiffs Belew and Ghafoor described in paragraphs 32 and 33 above were wire communications and were intercepted by defendants within the United States:

a. On July 26, 2006, defendant Alexander and CIA Director Michael Hayden testified before the Senate Judiciary Committee that telecommunications between the United States and abroad pass through routing stations located within the United States from which the NSA intercepts such telecommunications.

b. On May 1, 2007, Director of National Intelligence McConnell testified before the Senate Select Intelligence Committee that interception of surveilled electronic communications between the United States and abroad occurs within the United States and thus requires a warrant under FISA.

c. On September 20, 2007, McConnell testified before the House Select Intelligence Committee that "[t]oday . . . [m]ost international communications are on a wire, fiber optical cable," and "on a wire, in the United States, equals a warrant requirement [under FISA] even if it was against a foreign person located overseas."

d. On September 20, 2007, Assistant Attorney General Kenneth Wainstein testified before the House Select Intelligence Committee that "[a]s a result of the revolutions in telecommunications technology over the last 29 years, much of the international communications traffic is now conducted over fiber optic cables which qualify as wire communications under the [FISA] statute."

e. On August 2, 2007, House Minority Leader John Boehner acknowledged on a Fox News broadcast that the NSA would be required to obtain a FISA warrant to conduct electronic surveillance of international telecommunications which are intercepted from routing stations located in New York and California.

49. On June 12, 2006, during a district court hearing in *American Civil Liberties Union v. National Security Agency*, 493 F.3d 644 (6th Cir. 2007), Department of Justice Special Litigation Counsel Anthony Coppolino told the district judge that "attorneys who would represent terrorist clients . . . come closer to being in the ballpark with the terrorist surveillance program."

50. In a brief defendants filed in the Ninth Circuit Court of Appeals in this case on June 6, 2007, defendants described plaintiffs Al-Haramain Oregon, Belew and Ghafoor as "a terrorist organization and two lawyers affiliated with it."

51. Prior to 2004, defendants had conducted electronic surveillance of al-Buthi as revealed by a memorandum dated February 6, 2008, to defendant Szubin from Treasury Department Office of Intelligence and Analysis Deputy Assistant Secretary Howard Mendelsohn, which states the following:

a. On February 1, 2003, the United States government conducted electronic surveillance of four telephone conversations between al-Buthi and Ali al-Timimi.

b. These four incidents of surveillance were publicly disclosed during al-Timimi's 2005 trial for allegedly soliciting persons to levy war against the United States.

52. With regard to the telephone conversations described in paragraph 35 above, in which plaintiff Ghafoor and al-Buthi discussed Ghafoor's legal representation, in the *Burnett* lawsuit, of a brother-in-law of Osama bin-Laden and clerics who had inspired Osama bin-Laden, as well as payment of Ghafoor's legal fees, and plaintiff Belew and al-Buthi discussed bills for and payment of FOCA's attorney fees:

a. Defendants conducted electronic surveillance of those telephone conversations within the meaning of FISA, 50 U.S.C. § 1801(f)(2), which defines "electronic surveillance" in pertinent part as "the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States."

b. Defendants did not obtain a court order (i.e., a warrant) pursuant to FISA authorizing such electronic surveillance and did not otherwise follow the procedures prescribed by FISA.

c. Defendants did not give plaintiffs notice of or obtain their consent to the surveillance.

d. Defendant OFAC relied on its purported understanding of what the surveillance disclosed to declare that plaintiff Al-Haramain Oregon had links to Osama bin-Laden and the financing of terrorism.

e. Defendant OFAC relied on its purported understanding of what the surveillance disclosed to formally declare plaintiff Al-Haramain Oregon an SDGT organization.

f. Plaintiffs Al-Haramain Oregon, Belew and Ghafoor are aggrieved persons within the meaning of FISA, 50 U.S.C. § 1801(k), which defines "aggrieved person" in pertinent part as a "person whose communications or activities were subject to electronic surveillance."

53. Plaintiff Al-Haramain Oregon's SDGT designation has resulted in severe financial hardship and other harm to plaintiff Al-Haramain Oregon.

54. As a result of defendants' actions, plaintiff Al-Haramain Oregon has been irreparably damaged insofar as its assets have been frozen, preventing it from engaging in the charitable and humanitarian efforts for which it was organized.

55. As a result of defendants' actions, plaintiffs Belew and Ghafoor have been irreparably damaged insofar as their abilities to represent their clients have been hindered and interfered with, and have been chilled, by defendants' illegal and unconstitutional actions.

56. All of the factual allegations in paragraphs 16 through 55 above are based on non-classified evidence.

FIRST CLAIM FOR RELIEF

(Foreign Intelligence Surveillance Act)

57. Plaintiffs incorporate by reference each and every allegation in the preceding paragraphs as if set forth fully herein.

58. Defendants' engagement in electronic surveillance to monitor conversations between and among plaintiffs without obtaining prior court authorization, and defendants' subsequent use of the information obtained against plaintiffs, is in violation of the civil and criminal provisions of FISA. As a result, all evidence obtained by this illegal surveillance must be suppressed pursuant to 50 USC § 1806(g). Further, plaintiffs are entitled to liquidated and punitive damages pursuant to 50 USC § 1810.

SECOND CLAIM FOR RELIEF

(Separation of Powers)

59. Plaintiffs incorporate by reference each and every allegation in the preceding paragraphs as if set forth fully herein.

60. By carrying out their program of unlawful warrantless surveillance, defendants have acted in excess of the President's Article II authority (i) by failing to take care to execute the laws, and instead have violated those laws, (ii) by acting in contravention of clear statutory dictates in an area in which Congress has Article I authority to regulate, and (iii) by engaging in the conduct described above where Congress has specifically prohibited the President and other defendants from engaging in such conduct.

THIRD CLAIM FOR RELIEF

(Fourth Amendment Violations)

61. Plaintiffs incorporate by reference each and every allegation in the preceding paragraphs as if set forth fully herein.

62. Defendants have carried out unreasonable surveillance of plaintiffs' private telephone, email, and other electronic communications without probable cause or warrants in violation of the Fourth Amendment to the United States Constitution. Defendant Mueller is liable for this constitutional violation in both his official and personal capacities under *Bivens v. Six Unknown*

Named Agents, 403 U.S. 488 (1971).

FOURTH CLAIM FOR RELIEF

(First Amendment Violations)

63. Plaintiffs incorporate by reference each and every allegation in the preceding paragraphs as if set forth fully herein.

64. Defendants, by carrying out and/or asserting the right to carry out their program of unlawful warrantless surveillance, have impaired plaintiff Al-Haramain Oregon's ability to obtain legal advice, to join together for the purpose of legal and religious activity, to freely form attorney-client relationships, and to petition the government of the United States for redress of grievances, all of which are modes of expression and association protected under the First Amendment of the United States Constitution. Defendant Mueller is liable for this constitutional violation in both his official and personal capacities under *Bivens v. Six Unknown Named Agents*, 403 U.S. 488 (1971).

FIFTH CLAIM FOR RELIEF

(Sixth Amendment Violations)

65. Plaintiffs incorporate by reference each and every allegation in the preceding paragraphs as if set forth fully herein.

66. Defendants have carried out unreasonable surveillance of plaintiffs' private telephone, email, and other electronic communications without probable cause or warrants in violation of the Sixth Amendment to the United States Constitution. Defendant Mueller is liable for this constitutional violation in both his official and personal capacities under *Bivens v. Six Unknown Named Agents*, 403 U.S. 488 (1971).

SIXTH CLAIM FOR RELIEF

(Violation of International Covenant on Civil and Political Rights)

67. Plaintiffs incorporate by reference each and every allegation in the preceding paragraphs as if set forth fully herein.

68. On June 25, 2002, the United States Congress ratified the International Convention for the Suppression of the Financing of Terrorism ("Convention"). Article 17 of the Convention requires the United States to comply with international human rights law in "any measures" taken pursuant to

the Convention. One of the measures pursuant to the Convention is the International Covenant on Civil and Political Rights ("International Covenant") which guarantees the right to privacy. Article 17 of the International Covenant provides:

a. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

b. Everyone has the right to the protection of the law against such interference or attacks.

PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court:

1. Declare that defendants' warrantless surveillance of plaintiffs is unlawful and unconstitutional, and enjoin any such warrantless surveillance;

2. Order defendants to disclose to plaintiffs all unlawful surveillance of plaintiffs' communications carried out pursuant to the illegal program;

3. Order defendants to turn over to plaintiffs all information and records in their possession relating to plaintiffs that were acquired through the warrantless surveillance program or were the fruit of surveillance under the program, and subsequently destroy and make no further use of any such information and records in defendants' possession;

4. Order defendant OFAC to purge all information acquired from such program from its files as well as all fruits of such information and make no further use of any such information;

5. Award plaintiffs individually liquidated damages of $1,000 or $100 per day for each violation as specified in FISA;

6. Award plaintiffs individually punitive damages of $1,000,000;

7. Award costs, including an award of attorneys' fees under FISA;

8. Award costs, including an award of attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A);

9. Award such other relief as the Court may deem just and proper.

DATED this 29th day of July, 2008.

/s/ Jon B. Eisenberg
Jon B. Eisenberg, Calif. Bar No. 88278
William N. Hancock, Calif. Bar No. 104501
Steven Goldberg, Ore. Bar No. 75134
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Attorneys for Plaintiffs Al-Haramain Islamic Foundation, Inc., Wendell Belew, and Asim Ghafoor

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE:

NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION

MDL Docket No 06-1791 VRW

ORDER

This order pertains to:

Al-Haramain Islamic Foundation et al v Bush et al (C 07-0109 VRW),

/

On November 16, 2007, the court of appeals remanded this case for this court to consider whether the Foreign Intelligence Surveillance Act, 50 USC §§ 1801-71, ("FISA") "preempts the state secrets privilege and for any proceedings collateral to that determination." Al-Haramain Islamic Foundation, Inc v Bush, 507 F3d 1190, 1206 (9th Cir 2007). This court entertained briefing and held a hearing on that issue and, on July 2, 2008, issued a ruling that: (1) FISA preempts the state secrets privilege in connection with electronic surveillance for intelligence purposes and would appear to displace the state secrets privilege for purposes of plaintiffs' claims; and (2) FISA did not appear to provide plaintiffs with a viable remedy unless they could show that they were "aggrieved persons" within the meaning of FISA. In re

National Security Agency Telecommunications Records Litigation, 564 F Supp 2d 1109, 1111 (N D Cal 2008). The court dismissed the complaint with leave to amend. Plaintiffs timely filed an amended pleading (Doc #458/35[1]) and defendants, for the third time, moved to dismiss (Doc #475/49). Plaintiffs simultaneously filed a motion to "discover or obtain material relating to electronic surveillance" under 50 USC § 1806(f) (Doc #472/46), which defendants oppose (Doc #496/50).

This pair of cross-motions picks up, at least in theory, where the court's July 2, 2008 order left off. At issue on these cross-motions is the adequacy of the first amended complaint (Doc #35/458)("FAC") to enable plaintiffs to proceed with their suit. Accordingly, the court's discussion will address the motions together.[2]

I

As with the original complaint, plaintiffs are the Al-Haramain Islamic Foundation, Inc, an Oregon non-profit corporation ("Al-Haramain Oregon"), and two of its individual attorneys, Wendell Belew and Asim Ghafoor, both United States citizens ("plaintiffs"). Plaintiffs sue generally the same defendants but replace one office-holder with his replacement, make minor punctuation and wording changes and specify that they are suing one

[1] Documents will cited both to the MDL docket number (No M 06-1791) and to the individual docket number (No C 07-0109) in the following format: Doc #xxx/yy.

[2] These motions do not implicate the recent amendments to FISA enacted after the July 2 order (FISA Amendments Act of 2008, Pub L No 110-261, 122 Stat 2436 (FISAAA), enacted July 10, 2008).

defendant in both his official and personal capacities: "George W Bush, President of the United States, National Security Agency and Keith B Alexander, its Director; Office of Foreign Assets Control, an office of the United States Treasury, and Adam J Szubin, its Director; Federal Bureau of Investigation and Robert S Mueller, III, its Director, in his official and personal capacities" ("defendants").

The FAC retains the same six causes of action as the original complaint. First, plaintiffs allege a cause of action under FISA that encompasses both a request, under 50 USC § 1806(g), for suppression of evidence obtained through warrantless electronic surveillance and a claim for damages under § 1810. Doc #458/35 at 14. Then, plaintiffs allege violations of the following Constitutional provisions: the "separation of powers" principle (i e, that the executive branch has exceeded its authority under Article II); the Fourth Amendment through warrantless surveillance of plaintiffs' electronic communications; the First Amendment through warrantless surveillance, impairing plaintiffs' "ability to obtain legal advice, to freely form attorney-client relationships, and to petition the government * * * for redress of grievances * * *"; and the Sixth Amendment through surveillance of plaintiffs' electronic communications without probable cause or warrants. Id at 14-15. And finally, plaintiffs allege violations of the International Covenant on Civil and Political Rights. Id at 15-16.

In drafting the FAC, plaintiffs have greatly expanded their factual recitation, which now runs to ten pages (id at 3-12), up from a little over one page. The FAC recites in considerable detail a number of public pronouncements of government officials

about the Terrorist Surveillance Project ("TSP") and its surveillance activities as well as events publicly known about the TSP including a much-publicized hospital room confrontation between former Attorney General John Ashcroft and then-White House counsel (later Attorney General) Alberto Gonzales (id at 5).

Of more specific relevance to plaintiffs' effort to allege sufficient facts to establish their "aggrieved person" status, the FAC also recites a sequence of events pertaining directly to the government's investigations of Al-Haramain Oregon. A slightly abbreviated version of these allegations follows:

On August 1, 2002, Treasury Department Deputy Secretary Kenneth W Dam testified in Congress that, in October of 2001, the Treasury Department created "Operation Green Quest" to track financing of terrorist activities, one of the targets of which were foreign branches of the Saudi Arabia-based Al-Haramain Islamic Foundation. ¶ 24.

On March 4, 2004, FBI Counterterrorism Division Acting Assistant Director Gary M Bald testified in Congress that: in April of 2002, the FBI created its Terrorist Financing Operations Section (TFOS); on May 13, 2003, through a Memorandum of Understanding between the Department of Justice and the Department of Homeland Security, the FBI was designated as the lead Department to investigate potential terrorist-related financial transactions; the TFOS acquired, analyzed and disseminated classified electronic intelligence data, including telecommunications data from sources in government and private industry; TFOS took over the investigation of Al-Haramain Islamic Foundation "pertaining to terrorist financing"; on February 18, 2004, the FBI executed a

search warrant on plaintiff Al-Haramain Oregon's office in Ashland, Oregon; and TFOS provided operational support, including document and data analysis, in the investigation of plaintiff Al-Haramain Oregon. ¶ 25. Bald's March 4, 2004 testimony included no mention of purported links between plaintiff Al-Haramain Oregon and Osama bin-Laden. ¶ 26.

On September 25, 2003, FBI Deputy Director John S Pistole testified in Congress that the TFOS "has access to data and information" from "the Intelligence Community" and has "[t]he ability to access and obtain this type of information in a time sensitive and urgent manner." ¶ 27.

On June 16, 2004, OFAC Director R Richard Newcomb testified in Congress that in conducting investigations of terrorist financing, OFAC officers use "classified * * * information sources." ¶ 28.

On July 26, 2007, defendant Mueller testified before the House Judiciary Committee that in 2004 the FBI, under his direction, undertook activity using information produced by the NSA through the warrantless surveillance program.

On February 19, 2004, the Treasury Department issued a press release announcing that OFAC had blocked Al-Haramain Oregon's assets pending an investigation of possible crimes relating to currency reporting and tax laws; the document contained no mention of purported links between plaintiff Al-Haramain Oregon and Osama bin-Laden. ¶¶ 30-31.

Soon after the blocking of plaintiff Al-Haramain Oregon's assets on February 19, 2004, plaintiff Belew spoke by telephone with Soliman al-Buthi (alleged to be one of Al-Haramain Oregon's

directors) on the following dates: March 10, 11 and 25, April 16, May 13, 22 and 26, and June 1, 2 and 10, 2004. Belew was located in Washington DC; al-Buthi was located in Riyadh, Saudi Arabia. During the same period, plaintiff Ghafoor spoke by telephone with al-Buthi approximately daily from February 19 through February 29, 2004 and approximately weekly thereafter. Ghafoor was located in Washington DC; al-Buthi was located in Riyadh, Saudi Arabia. (The FAC includes the telephone numbers used in the telephone calls referred to in this paragraph.) ¶¶ 34-35.

In the telephone conversations between Belew and al-Buthi, the parties discussed issues relating to the legal representation of defendants, including Al-Haramain Oregon, named in a lawsuit brought by victims of the September 11, 2001 attacks. Names al-Buthi mentioned in the telephone conversations with Ghafoor included Mohammad Jamal Khalifa, who was married to one of Osama bin-Laden's sisters, and Safar al-Hawali and Salman al-Auda, clerics whom Osama bin-Laden claimed had inspired him. In the telephone conversations between Ghafoor and al-Buthi, the parties also discussed logistical issues relating to payment of Ghafoor's legal fees as defense counsel in the lawsuit. Id.

In a letter to Al-Haramain Oregon's lawyer Lynne Bernabei dated April 23, 2004, OFAC Director Newcomb stated that OFAC was considering designating Al-Haramain Oregon as a Specially Designated Global Terrorist (SDGT) organization based on unclassified information "and on classified documents that are not authorized for public disclosure." ¶ 36. In a follow-up letter to Bernabei dated July 23, 2004, Newcomb reiterated that OFAC was considering "classified information not being provided to you" in

determining whether to designate Al-Haramain Oregon as an SDGT organization. ¶ 37. On September 9, 2004, OFAC declared plaintiff Al-Haramain Oregon to be an SDGT organization. ¶ 38.

In a press release issued on September 9, 2004, the Treasury Department stated that the investigation of Al-Haramain Oregon showed "direct links between the US branch [of Al-Haramain] and Usama bin Laden"; this was the first public claim of purported links between Al-Haramain Oregon and Osama bin-Laden. ¶¶ 39-40.

In a public declaration filed in this litigation dated May 10, 2006, FBI Special Agent Frances R Hourihan stated that a classified document "was related to the terrorist designation" of Al-Haramain Oregon.

On October 22, 2007, in a speech at a conference of the American Bankers Association and American Bar Association on money laundering, the text of which appears on the FBI's official Internet website, FBI Deputy Director Pistole stated that the FBI "used * * * surveillance" in connection with defendant OFAC's 2004 investigation of Al-Haramain Oregon but that "it was the financial evidence" provided by financial institutions "that provided justification for the initial designation" of Al-Haramain Oregon. ¶¶ 42-43. A court document filed by the United States Attorney for the District of Oregon on August 21, 2007 referred to the February 19, 2004 asset-blocking order as a "preliminary designation" and the September 9, 2004 order as "a formal designation." ¶ 44.

To allege that the above-referenced telecommunications between al-Buthi and plaintiffs Belew and Ghafoor were wire communications and were intercepted by defendants within the United States, plaintiffs cite in their FAC several public statements by

government officials, including: July 26, 2006 testimony by defendant Alexander and CIA Director Michael Hayden that telecommunications between the United States and abroad pass through routing stations located within the United States from which the NSA intercepts such telecommunications; May 1, 2007 testimony by Director of National Intelligence Mike McConnell that interception of surveilled electronic communications between the United States and abroad occurs within the United States and thus requires a warrant under FISA; September 20, 2007 testimony by McConnell testified before the House Select Intelligence Committee that "[t]oday * * * [m]ost international communications are on a wire, fiber optical cable," and "on a wire, in the United States, equals a warrant requirement [under FISA] even if it was against a foreign person located overseas." ¶ 48a-c.

A memorandum dated February 6, 2008, to defendant Szubin from Treasury Department Office of Intelligence and Analysis Deputy Assistant Secretary Howard Mendelsohn, which was publicly disclosed during a 2005 trial, acknowledged electronic surveillance of four of Al-Buthi's telephone calls with an individual unrelated to this case on February 1, 2003. ¶ 51.

In support of their motion under § 1806(f), plaintiffs submit evidence substantiating the allegations of their FAC. In addition to numerous documents drawn from United States government websites and the websites of news organizations (Exhibits to Doc #472-1/46-1, passim), plaintiffs submit the sworn declarations of plaintiffs Wendell Belew and Asim Ghafoor attesting to the specifics and contents of the telephone conversations described in paragraphs 32 and 33 of the FAC. Doc ##472-6/46-6, 472-7/46-7.

II

Defendants' papers attack the sufficiency of plaintiffs' allegations in their FAC and the evidence presented in their motion under § 1806(f) to establish that they are "aggrieved persons" under FISA and thereby have standing to utilize the special procedures set forth in § 1806(f) of FISA to investigate the alleged warrantless surveillance and to seek civil remedies under § 1810. An "aggrieved person" under FISA is defined in 50 USC §1801(k) as the "target of an electronic surveillance" or a person "whose communications or activities were subject to electronic surveillance." Defendants contend that "nothing in the [FAC] comes close to establishing that plaintiffs are 'aggrieved persons' under FISA and thus have standing to proceed under Section 1806(f) to litigate any claim." Doc #475/49 at 6.

Plaintiffs' motion, by contrast, asserts that the FAC presents "abundant unclassified information demonstrating plaintiffs' electronic surveillance in March and April of 2004" and, on that basis, seeks a determination of "aggrieved person" status under FISA. Plaintiffs also "propose several possible security measures by which plaintiffs can safely be given access to portions of" the classified document that was accidentally revealed to plaintiffs during discovery and returned under orders of the Oregon District Court (the "Sealed Document") and which has been the subject of considerable attention in this litigation. Doc #472/46 at 5-6.

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A

Both FISA sections under which plaintiffs seek to proceed, §§ 1810 and 1806(f), are available only to "aggrieved persons" as defined in 50 USC § 1801(k). The court's July 2 order discussed the lack of precedents under FISA and devoted considerable space to opinions applying 18 USC § 3504(a)(1), governing litigation concerning sources of evidence. 564 F Supp 2d at 1133-35. The Ninth Circuit's standards under § 3504(a)(1), while not directly transferrable to FISA, appear to afford a source of relevant analysis to use by analogy in interpreting FISA, subject to that statute's national-security-oriented context:

> The flexible or case-specific standards articulated by the Ninth Circuit for establishing aggrieved status under section 3504(a)(1), while certainly relevant, do not appear directly transferrable to the standing inquiry for an "aggrieved person" under FISA. While attempting a precise definition of such a standard is beyond the scope of this order, it is certain that plaintiffs' showing thus far with the Sealed Document excluded falls short of the mark.
>
> Plaintiff amici hint at the proper showing when they refer to "independent evidence disclosing that plaintiffs have been surveilled" and a "rich lode of disclosure to support their claims" in various of the MDL cases. ***
>
> To proceed with their FISA claim, plaintiffs must present to the court enough specifics based on non-classified evidence to establish their "aggrieved person" status under FISA.

Id at 1135.

Defendants' opening brief (Doc #475/49) largely fails to engage with the question posed by the court, instead reiterating standing arguments made previously (at 16-17) and asserting that "the law does not support an attempt to adjudicate whether the plaintiffs are 'aggrieved persons' in the face of the Government's successful state secrets privilege assertion" (at 27-30).

Defendants advance one apparently new argument in this regard: that the adjudication of "aggrieved person" status for any or all plaintiffs cannot be accomplished without revealing information protected by the state secrets privilege ("SSP"). This argument rests on the unsupported assertion that "[t]he Court cannot exercise jurisdiction based on anything less than the actual facts" (id at 28), presumably in contrast to inferences from other facts (on which defendants contend the FAC exclusively relies). Defendants' position boils down to this: only affirmative confirmation by the government or equally probative evidence will meet the "aggrieved person" test; the government is not required to confirm surveillance and the information is not otherwise available without invading the SSP. In defendants' view, therefore, plaintiffs simply cannot proceed on their claim without the government's active cooperation —— and the government has evinced no intention of cooperating here.

Defendants' stance does not acknowledge the court's ruling in the July 2, 2008 order that FISA "preempts" or displaces the SSP for matters within its purview and that, while obstacles abound, canons of construction require that the court avoid interpreting and applying FISA in a way that renders FISA's § 1810 superfluous. Accordingly, the court ruled, there must be some legally sufficient way to allege that one is an "aggrieved person" under § 1801(k) so as to survive a motion to dismiss. Of note, defendants also continue to maintain, notwithstanding the July 2 rulings, that the SSP requires dismissal and that FISA does not preempt the SSP. They also suggest that appellate review of the preemption ruling and several of the issues implicated in the

instant motions might be "appropriate" if the court decides to proceed under § 1806(f). Doc #475/49 at 31. (Plaintiffs counter that an interlocutory appeal of the preemption question would not be timely. Doc #496/50 at 28).

Plaintiffs urge the court to adopt the Ninth Circuit's prima facie approach under 18 USC § 3504(a)(1) set forth in United States v Alter, 482 F2d 1016 (9th Cir 1973), that is, that a prima facie case of electronic surveillance requires "evidence specifically connecting them with the surveillance —— i e showing that they were surveilled" without requiring that they "plead and prove [their] entire case." Plaintiffs further suggest that the prima facie case does not require the determination of any contested facts but rather is "a one-sided affair —— the plaintiff's side." Doc #472/46 at 20.

Plaintiffs also point to the DC Circuit's recent decision in In Re Sealed Case, 494 F 3d 139 (DC Cir 2007), which reversed the district court's dismissal of a Bivens action by a Drug Enforcement Agency employee based on the government's assertion of the SSP. The district court had concluded that the plaintiff's unclassified allegations of electronic eavesdropping in violation of the Fourth Amendment were insufficient to establish a prima facie case. Id at 147. The DC Circuit upheld the dismissal as to a defendant called "Defendant II" of whom the court wrote "nothing about this person would be admissible in evidence at trial," but reversed the dismissal as to defendant Huddle, noting that although plaintiff's case "is premised on circumstantial evidence 'as in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence.'" Id. Plaintiffs accordingly argue that

circumstantial evidence of electronic surveillance should be sufficient to establish a prima facie case. The court agrees with plaintiffs that this approach comports with the intent of Congress in enacting FISA as well as concepts of due process which are especially challenging —— but nonetheless especially important —— to uphold in cases with national security implications and classified evidence.

Plaintiffs articulate their proposed standard, in summary, as follows: "plaintiffs' burden of proving their 'aggrieved person' status is to produce unclassified prima facie evidence, direct and/or circumstantial, sufficient to raise a reasonable inference on a preponderance of the evidence that they were subjected to electronic surveillance." Doc #472/46 at 19.

Defendants attack plaintiffs' proposed prima facie case approach by suggesting, as to plaintiffs' motion, that "no court has ever used Section 1806(f) in this manner" and that it would "open a floodgate of litigation whereby anyone who believes he can 'infer' from 'circumstantial evidence' that he was subject to electronic surveillance could compel a response by the Attorney General under Section 1806(f) and seek discovery of the matter through ex parte, in camera proceedings." Doc # 499/51 at 12-13. These points are without merit.

The lack of precedents for plaintiffs' proposed approach is not meaningful given the low volume of FISA litigation in the thirty years since FISA was first enacted. It is, moreover, unlikely that this court's order allowing plaintiffs to proceed will prompt a "flood" of litigants to initiate FISA litigation as a means of learning about suspected unlawful surveillance of them by

the government. And finally, the court has ruled that allegations sufficient to allege electronic surveillance under FISA must be, to some degree, particularized and specific, a ruling that discourages weakly-supported claims of electronic surveillance. In re National Security Agency, 564 F Supp 2d at 1135.

In Alter, the Ninth Circuit specifically noted the competing considerations and special challenges for courts in cases of alleged electronic surveillance:

> We * * * seek to create a sound balance among the competing demands of constitutional safeguards protecting the witness and the need for orderly grand jury processing. We do not overlook the intrinsic difficulty in identifying the owner of an invisible ear; nor do we discount the need to protect the Government from unwarranted burdens in responding to ill-founded suspicions of electronic surveillance.

482 F2d at 1026. The prima facie approach employed by the Ninth Circuit fairly balances the important competing considerations at work in electronic surveillance cases. Its stringency makes it appropriate in cases arising in the somewhat more restrictive litigation environment where national security dimensions are present. The DC Circuit's recent use of a prima facie approach in such a case underscores that this is a proper manner in which to proceed. In re Sealed Case,494 F 3d 139. It appears consistent, moreover, with the intent of Congress in enacting FISA's sections 1810 and 1806(f).

B

Defendants devote considerable space to their argument that plaintiffs have not established "Article III standing." E g, Doc #475/49 at 17. In support of this contention, they largely re-

hash and re-purpose the standing arguments made in support of their previous two motions to dismiss.

The court will limit its discussion of this issue to defendants' reliance on Alderman v United States, 394 US 165 (1969), which they cite in all of their briefs on these motions in support of their contention that plaintiffs lack standing. Doc #475/49 at 17; Doc # 499/51 at 9, 10, 26 and 27; Doc #516/54 at 9. In Alderman, the Supreme Court considered, in connection with legal challenges brought under the Fourth Amendment, "the question of standing to object to the Government's use of the fruits of illegal surveillance" in criminal prosecutions. Id at 169. Explaining that "[w]e adhere to * * * the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted," the Court held that the Fourth Amendment protects not only the private conversations of individuals subjected to illegal electronic surveillance, but also the owner of the premises upon which the surveillance occurs. While the Court made mention of the then-recently-enacted **Omnibus Crime Control and Safe Streets Act of 1968 codified at chapter 119 of Title 18 of the United States Code, 18 USC §§ 2510-22** ("Title III"), Alderman did not arise under Title III.

The footnote about standing that defendants repeatedly cite on the instant motions merely amplified the statement in the text of Alderman that "Congress or state legislatures may extend the exclusionary rule and provide that illegally seized evidence is inadmissible against anyone for any purpose," with the observation that Congress had not provided for such an expansion of standing to suppress illegally intercepted communications in Title III. Id at

175 & n9. Defendants' reliance on Alderman is somewhat baffling because here, the individuals who were allegedly subjected to the warrantless electronic surveillance are parties to the lawsuit and are specifically seeking relief under provisions of FISA intended to provide remedies to individuals subjected to warrantless electronic surveillance. The disposition in Alderman further undermines defendants' broader contention that only acknowledged warrantless surveillance confers standing: the Court remanded the cases to the district court for "a hearing, findings, and conclusions" whether there was electronic surveillance that violated the Fourth Amendment rights of any of the petitioners and, if so, as to the relevance of the surveillance evidence to the criminal conviction at issue. Id at 186.

The court declines to entertain further challenges to plaintiffs' standing; the July 2 order (at 1137) gave plaintiffs the opportunity to "amend their claim to establish that they are 'aggrieved persons' within the meaning of 50 USC § 1801(k)." Plaintiffs have alleged sufficient facts to withstand the government's motion to dismiss. To quote the Ninth Circuit in Alter, "[t]he [plaintiff] does not have to plead and prove his entire case to establish standing and to trigger the government's responsibility to affirm or deny." 482 F2d at 1026. Contrary to defendants' assertions, proof of plaintiffs' claims is not necessary at this stage. The court has determined that the allegations "are sufficiently definite, specific, detailed, and nonconjectural, to enable the court to conclude that a substantial claim is presented." Id at 1025.

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C

Defendants summarize plaintiffs' allegations thusly, asserting that they are "obviously" insufficient "under any standard":

> the sum and substance of plaintiffs' factual allegations are that: (i) the [TSP] targeted communications with individuals reasonably believed to be associated with al Qaeda; (ii) in February 2004, the Government blocked the assets of AHIF-Oregon based on its association with terrorist organizations; (iii) in March and April of 2004, plaintiffs Belew and Ghafoor talked on the phone with an officer of AHIF-Oregon in Saudi Arabia (Mr al-Buthe [sic]) about, inter alia, persons linked to bin-Laden; (iv) in the September 2004 designation of AHIF-Oregon, [OFAC] cited the organization's direct links to bin-Laden as a basis for the designation; (v) the OFAC designation was based in part on classified evidence; and (vi) the FBI stated it had used surveillance in an investigation of the Al-Haramain Islamic Foundation. Plaintiffs specifically allege that interception of their conversations in March and April 2004 formed the basis of the September 2004 designation, and that any such interception was electronic surveillance as defined by the FISA conducted without a warrant under the TSP.

Doc #516/54 at 12 (citations to briefs omitted).

The court does not find fault with defendants' summary but disagrees with defendants' sense of the applicable legal standard. Defendants seem to agree that legislative history and precedents defining "aggrieved person" from the Title III context may be relevant to the FISA context (Doc #475/49 at 17 n 3), but argue that "Congress incorporated Article III standing requirements in any determination as to whether a party is an 'aggrieved person' under the FISA" (Doc #516/54 at 7) and assert that "the relevant case law makes clear that Congress intended that 'aggrieved persons' would be solely those litigants that meet Article III standing requirements to pursue Fourth Amendment claims." Id at 5. Tellingly, defendants in their reply brief consistently refer to

their motion as a "summary judgment motion" and argue that plaintiffs cannot sustain their burden on "summary judgment" based on the allegations of the FAC. Defendants are getting ahead of themselves.

Defendants attack plaintiffs' FAC by asserting that plaintiffs seek to proceed with the lawsuit based on "reasonable inferences" and "logical probabilities" but that they cannot avoid summary judgment because "their evidence does not actually establish that they were subject to the alleged warrantless surveillance that they challenge in this case." Id at 11. At oral argument, moreover, counsel for defendants contended that the only way a litigant can sufficiently establish aggrieved person status at the pleading stage is for the government to have admitted the unlawful surveillance. Transcript of hearing held December 2, 2008, Doc #532 at 5-17.

Without a doubt, plaintiffs have alleged enough to plead "aggrieved person" status so as to proceed to the next step in proceedings under FISA's sections 1806(f) and 1810. While the court is presented with a legal problem almost totally without directly relevant precedents, to find plaintiffs' showing inadequate would effectively render those provisions of FISA without effect, an outcome the court is required to attempt to avoid. See In re National Security Agency, 564 F Supp 2d at 1135 ("While the court must not interpret and apply FISA in way that renders section 1810 superfluous, Dole Food Co v Patrickson, 538 US 468, 476-77, 123 S Ct 1655 (2003), the court must be wary of unwarranted interpretations of FISA that would make section 1810 a more robust remedy than Congress intended it to be.") More

importantly, moreover, plaintiffs' showing is legally sufficient under the analogous principles set forth in Alter and In re Sealed Case.

IV

Because plaintiffs have succeeded in alleging that they are "aggrieved persons" under FISA, their request under § 1806(f) is timely. Section 1806(f), discussed at some length in the court's July 2 order (564 F Supp at 1131), is as follows:

> 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.

Plaintiffs propose several approaches for the court to allow plaintiffs to discover information about the legality of the electronic surveillance under § 1806(f):

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> (1) allow plaintiffs to examine a redacted version of the Sealed Document that allows them to see anything indicating whether defendants intercepted plaintiffs' international telecommunications in March and April of 2004 and lacked a warrant to do so;
>
> (2) impose a protective order prohibiting disclosure of any of the Sealed Document's contents;
>
> (3) one or more of plaintiffs' counsel may obtain security clearances prior to examining the Sealed Document (plaintiffs note that precedent exists for this approach, pointing to attorneys at the Center for Constitutional Rights who are involved in Guantanamo Bay detention litigation and attaching the declaration of one such attorney, Shayana Kadidal, describing the process of obtaining Top Secret/Sensitive Compartmented Information ("TS/SCI") clearance for work on those cases (Doc #472-8/46-8)); and
>
> (4) because they have already seen the Sealed Document, plaintiffs' need would be satisfied by the court "simply acknowledging [its] existence and permitting [plaintiffs] to access portions of it and then reference it —— e g, in a sealed memorandum of points and authorities —— in our arguments on subsequent proceedings to determine plaintiffs' standing.

Doc # 472/46 at 27.

In their opposition, defendants do not fully engage with plaintiffs' motion, but rather seem to hold themselves aloof from it:

> [A]side from the fact that plaintiffs have failed to establish their standing to proceed as "aggrieved persons" under the FISA, their motion should also be denied because Section 1806(f) does not apply in this case —— and should not be applied —— for all the reasons previously set forth by the Government. Specifically, the Government holds to its position that Section 1806(f) of the FISA does not preempt the state secrets privilege, but applies solely where the Government has acknowledged the existence of surveillance in proceedings where the lawfulness of evidence being used against someone is at issue.

Doc #499/51 at 24. Defendants have not lodged classified declarations with their opposition as seems to be called for by § 1806(f) upon the filing of a motion or request by an aggrieved

person. Defendants, rather, assert that

> The discretion to invoke Section 1806(f) belongs to the Attorney General, and under the present circumstances —— where there has been no final determination that those procedures apply in this case to overcome the Government's successful assertion of privilege and where serious harm to national security is at stake —— the Attorney General has not done so. Section 1806(f) does not grant the Court jurisdiction to invoke those procedures on its own to decide a claim or grant a moving party access to classified information, and any such proceedings would raise would raise serious constitutional concerns.

Id at 26-27, citing Department of the Navy v Egan, 484 US 518, 529 (1988) for the proposition that "the protection of national security information lies within the discretion of the President under Article II)." Of note, the court specifically rejected this very reading of Egan in its July 2 order. See 564 F Supp 2d at 1121.

Defendants simply continue to insist that § 1806(f) discovery may not be used to litigate the issue of standing; rather, they argue, plaintiffs have failed to establish their "Article III standing" and their case must now be dismissed. But defendants' contention that plaintiffs must prove more than they have in order to avail themselves of section 1806(f) conflicts with the express primary purpose of in camera review under § 1806(f): "to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." § 1806(f).

In reply, plaintiffs call attention to the circular nature of the government's position on their motion:

> Do defendants mean to assert their theory of unfettered presidential power over matters of national security —— the very theory plaintiffs seek to challenge in this case —— as a basis for disregarding this court's FISA preemption ruling and defying the current access proceedings under section 1806(f)? So it seems.

Doc #515/53 at 17. So it seems to the court also.

It appears from defendants' response to plaintiffs' motion that defendants believe they can prevent the court from taking any action under 1806(f) by simply declining to act.

But the statute is more logically susceptible to another, plainer reading: the occurrence of the action by the Attorney General described in the clause beginning with "if" makes mandatory on the district court (as signaled by the verb "shall") the in camera/ex parte review provided for in the rest of the sentence. The non-occurrence of the Attorney General's action does not necessarily stop the process in its tracks as defendants seem to contend. Rather, a more plausible reading is that it leaves the court free to order discovery of the materials or information sought by the "aggrieved person" in whatever manner it deems consistent with section 1806(f)'s text and purpose. Nothing in the statute prohibits the court from exercising its discretion to conduct an in camera/ex parte review following the plaintiff's motion and entering other orders appropriate to advance the litigation if the Attorney General declines to act.

V

For the reasons stated herein, defendants' motion to dismiss or, in the alternative, for summary judgment (Doc #475/49), is DENIED. Plaintiffs' motion pursuant to 50 USC § 1806(f) is GRANTED (Doc #472/46).

The court has carefully considered the logistical problems and process concerns that attend considering classified evidence and issuing rulings based thereon. Measures necessary to

limit the disclosure of classified or other secret evidence must in some manner restrict the participation of parties who do not control the secret evidence and of the press and the public at large. The court's next steps will prioritize two interests: protecting classified evidence from disclosure and enabling plaintiffs to prosecute their action. Unfortunately, the important interests of the press and the public in this case cannot be given equal priority without compromising the other interests.

To be more specific, the court will review the Sealed Document ex parte and in camera. The court will then issue an order regarding whether plaintiffs may proceed —— that is, whether the Sealed Document establishes that plaintiffs were subject to electronic surveillance not authorized by FISA. As the court understands its obligation with regard to classified materials, only by placing and maintaining some or all of its future orders in this case under seal may the court avoid indirectly disclosing some aspect of the Sealed Document's contents. Unless counsel for plaintiffs are granted access to the court's rulings and, possibly, to at least some of defendants' classified filings, however, the entire remaining course of this litigation will be ex parte. This outcome would deprive plaintiffs of due process to an extent inconsistent with Congress's purpose in enacting FISA's sections 1806(f) and 1810. Accordingly, this order provides for members of plaintiffs' litigation team to obtain the security clearances necessary to be able to litigate the case, including, but not limited to, reading and responding to the court's future orders.

Given the difficulties attendant to the use of classified material in litigation, it is timely at this juncture for

defendants to review their classified submissions to date in this litigation and to determine whether the Sealed Document and/or any of defendants' classified submissions may now be declassified. Accordingly, the court now directs defendants to undertake such a review.

The next steps in this case will be as follows:

1. Within fourteen (14) days of the date of this order, defendants shall arrange for the court security officer/security specialist assigned to this case in the Litigation Security Section of the United States Department of Justice to make the Sealed Document available for the court's in camera review. If the Sealed Document has been included in any previous classified filing in this matter, defendants shall so indicate in a letter to the court.

2. Defendants shall arrange for Jon B Eisenberg, lead attorney for plaintiffs herein and up to two additional members of plaintiffs' litigation team to apply for TS/SCI clearance and shall expedite the processing of such clearances so as to complete them no later than Friday, February 13, 2009. Defendants shall authorize the court security officer/security specialist referred to in paragraph 1 to keep the court apprised of the status of these clearances. Failure to comply fully and in good faith with the requirements of this paragraph will result in an order to show cause re: sanctions.

3. Defendants shall review the Sealed Document and their classified submissions to date in this litigation and determine whether the Sealed Document and/or any of defendants' classified submissions may be declassified, take all necessary steps to declassify those that they have determined may be declassified and,

no later than forty-five (45) days from the date of this order, serve and file a report of the outcome of that review.

4. The parties shall appear for a further case management conference on a date to be determined by the deputy clerk within the month of January 2009. Counsel should be prepared to discuss adjudication of any and all issues that may be conducted without resort to classified information, as well as those issues that may require such information. Counsel shall, after conferring, submit brief statements of their respective plans or a joint plan, if they agree to one.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION	No. M:06-CV-01791-VRW
This Document Solely Relates To:	**DEFENDANTS' NOTICE OF MOTION AND MOTION FOR A STAY PENDING APPEAL AND FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL**
Al-Haramain Islamic Foundation et al. v. Bush, et al. (07-CV-109-VRW)	Date: April 9, 2009 Time: 2:30 pm Courtroom: 6, 17th Floor
	Honorable Vaughn R. Walker

PLEASE TAKE NOTICE that on April 9, 2009, or a date sooner to be determined by the Court, the defendants sued in their official capacity ("Government Defendants") hereby move for a stay pending appeal in this action of the Court's Order of January 5, 2009 (Dkt. 57) (07-cv-109-VRW) and, in addition, pursuant to 28 U.S.C. § 1292(b), for certification of interlocutory appeal of that Order. This motion is supported by the accompanying memorandum of points and authorities and the Declaration of Ariane E. Cerlenko, National Security Agency. The Government Defendants are conferring with the plaintiffs on a schedule for shortening the time

for this motion to be heard. The Government requests that, in light of the Court's Order, this motion be heard well before the Court's next available motion date. The Government will address this issue with the Court at the case management conference scheduled for January 23, 2009, or file a stipulation if agreement is reached on a schedule, or file an administrative motion to shorten time to consider this motion.

Dated: January 19, 2009

Respectfully Submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION	No. M:06-CV-01791-VRW
This Document Solely Relates To:	**DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF A MOTION FOR STAY PENDING APPEAL AND FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)**
Al-Haramain Islamic Foundation et al. v. Bush, et al. (07-CV-109-VRW)	Date: April 9, 2009 Time: 2:30 pm Courtroom: 6, 17th Floor Honorable Vaughn R. Walker

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1. Whether the Court should stay its January 5, 2009 Order pending direct appeal.

2. Whether the Court should certify its January 5, 2009 Order for interlocutory review pursuant to 28 U.S.C. § 1292(b).

INTRODUCTION

On January 5, 2009, the Court issued an Order denying the Government's Third Motion to Dismiss or for Summary Judgment and granting Plaintiffs' motion for discovery under Section 1806(f) of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1806(f). *See* January 2009 Order, Dkt. 57 (07-cv-109-VRW). In sum, the Court ordered that plaintiffs had established sufficient grounds at the pleading stage for the case to proceed under Section 1806(f), and made two central rulings regarding those further proceedings.

First, the Court held that it would now undertake *ex parte*, *in camera* review of the classified Sealed Document that has been at issue in this case and then "issue an order regarding whether plaintiffs may proceed—that is, whether the Sealed Document establishes that plaintiffs were subject to electronic surveillance not authorized by FISA." Slip Op. at 23. Second, the Court stated that "[u]nless counsel for plaintiffs are granted access to the court's rulings and, possibly, to at least some of defendants' classified filings, however, the entire remaining course of this litigation will be *ex parte*," and held that "[t]his will deprive plaintiffs due process to an extent inconsistent with Congress's purpose in enacting FISA's sections 1806(f) and 1810." Slip Op. at 23. Accordingly, the Court's Order also "provides for members of plaintiff's litigation team to obtain the security clearances necessary to litigate the case." *Id*. The Court directed the Government to arrange for plaintiffs' counsel to apply for clearances and to expedite the process to be completed by February 13, 2009. *Id*. at 24. The Court also directed the Government to conduct a declassification review of the Sealed Document at issue in this case as well as the Government's prior classified filings in this action. *Id.*

On January 16, 2009, the Government noticed an appeal of the Court's January 2009 Order. *See* Dkt. 59 (07-cv-109-VRW). The Government now respectfully moves for a stay pending disposition of this appeal. The Court's Order involves issues of first impression and extraordinary significance. The Court has held that it will now proceed under a provision of the FISA that it believes preempts the state secrets privilege in order to decide the very issue protected by that successful privilege assertion—whether or not the plaintiffs were subject to

alleged unlawful surveillance. The Court has also indicated its intent to use a classified document to make this determination that otherwise has been excluded from this case under the state secrets privilege, and that due process requires that plaintiffs' counsel be granted security clearances to obtain access to the classified information needed to litigate this case. Not only do these issues raise profound constitutional questions of first impression, but further proceedings ordered by the Court would inherently risk or require disclosure of information subject to the Government's privilege assertion, including highly sensitive information provided in support of the privilege assertion itself.

The law is clear that a district court should not proceed in a manner that threatens to negate a privilege assertion (let alone a successful one) without permitting further review. Since the Government is now seeking an appeal on the matter, we respectfully submit that the proper and prudent course is for the Court to stay its hand on further proceedings to avoid any alteration of the status quo while an appeal is pending, as well as irreparable harm to the Government's successful privilege assertion in the meantime.

In addition, although the Government believes that firm grounds for an appeal now exist, the significance of the issues at hand would also warrant the Court's certification of interlocutory review under 28 U.S.C. § 1292(b) to further ensure that appellate review occurs at this critical time in the case.

BACKGROUND

A. Pre-Remand Proceedings

Plaintiffs—Al-Haramain Islamic Foundation of Oregon and two U.S. citizens—allege that in 2004 they were subject to warrantless foreign intelligence surveillance by the NSA authorized by the President after the September 11, 2001 attacks, *see* Complaint ¶¶ 5, 6, 19 and Amended Compl. ¶¶ 16-22, 48, and that a terrorist organization designation by the Department of Treasury was based in part on evidence derived from the alleged surveillance, *see* Compl. ¶¶ 1, 18; Am. Compl. ¶¶ 1, 24-30. Plaintiffs sought to rely upon the inadvertent release of the Sealed Document to support their allegations. In June 2006, the Director of National

Intelligence ("DNI") asserted the state secrets privilege over information implicated by this case. In September 2006, Judge King of the District of Oregon upheld the Government's state secrets privilege assertion with respect to any information confirming or denying whether plaintiffs' communications have been or continue to be intercepted—except with respect to any prior communications allegedly reflected in the Sealed Document. *See Al-Haramain v. Bush*, 451 F. Supp. 2d 1215, 1224 (D. Or. 2006), *rev'd*, 507 F.3d 1190 (9th Cir. 2007). Judge King therefore declined to dismiss the case, but certified his decision for interlocutory review. The Government appealed to the Ninth Circuit, which granted the petition for review. *See* December 21, 2006 Order, Dkt. 96 (Civ. 06-274-KI) (D. Or.).

In November 2007, the Ninth Circuit reversed the denial of the Government Defendants' motion to dismiss and upheld the Government's state secrets privilege assertion to protect from disclosure information concerning whether or not the plaintiffs had been subject to the alleged surveillance, as well information contained in the Sealed Document. *See Al-Haramain*, 507 F.3d at 1202-04. The Ninth Circuit held that, without the privileged information, plaintiffs could not establish their standing to litigate their claims. *See id.* at 1205. The Ninth Circuit's decision did not pertain solely to the use of the Sealed Document in this case. Rather, it covered information concerning "whether Al-Haramain was subject to surveillance." *See id*. at 1202 (identifying these two separate state secret privilege issues and resolving both in the Government's favor). The Court of Appeals remanded for the district court to consider a separate issue—whether the FISA preempts the state secrets privilege. *See id*. at 1205.

B. Initial Remand Proceedings & July 2008 Order

Following the remand, the Government moved to dismiss or for summary judgment raising both threshold jurisdictional issues and the FISA preemption issue. Specifically, the Government argued that the lapse of the TSP in January 2007 meant that plaintiffs could not establish standing to obtain prospective declaratory and/or injunctive relief, and also that sovereign immunity barred plaintiffs' retrospective claim for damages against the United States under 50 U.S.C. § 1810. *See* Defs. 2d MSJ Mem. (Dkt. 17) at 6-12. The Government also

argued that the FISA does not preempt the state secrets privilege, and that Section 1806(f) of the FISA applies to cases where the Government's use of evidence based on acknowledged electronic surveillance is at issue. The Government also argued that FISA Section 1806(f) cannot be read to compel the Government to disclose (or risk the disclosure of) information concerning intelligence sources and methods that the Government chooses to protect. *Id.* at 12-24.

By Order dated July 2, 2008, the Court held that it had jurisdiction to proceed and that the FISA preempts the state secrets privilege. *See Al-Haramain v. Bush*, 564 F. Supp. 2d 1109 (N.D. Cal. 2008). But the Court also held that a "a litigant must first establish himself as an 'aggrieved person' before seeking to make a 'motion or request'" under Section1806(f). *See id.* at 1134. The Court also precluded plaintiffs' attempt to make this showing through the use of the classified Sealed Document that had been inadvertently disclosed to them. *See id*. at 1135. The Court stated that "[t]o proceed with their FISA claim, plaintiffs must present to the court enough specifics based on non-classified evidence to establish their 'aggrieved person' status under FISA." *Id*. The Court then dismissed the complaint without prejudice and permitted plaintiffs to amend within thirty days.

C. Plaintiffs' Amended Complaint & Proceedings Concerning that Complaint

After the July 2008 Order, plaintiffs amended their complaint, *see* Dkt. 35 (07-109-VRW), and relied principally on various public statements and reports in an attempt to establish with public evidence that they were subject to alleged surveillance in violation of FISA. In response, the Government filed a Third Motion to Dismiss and/or for Summary Judgment and argued that plaintiffs had not established they were subject to surveillance but, instead, had relied upon speculation and unfounded inferences that did not remotely demonstrate that any of the plaintiffs has been subject to the alleged warrantless surveillance they challenge.

In particular, the Government argued that nothing in the Amended Complaint establishes the communications of these plaintiffs were intercepted, or if they were, that they were intercepted through electronic surveillance on a wire in the United States under the TSP without

a warrant in violation of the FISA. Accordingly, the Government argued that plaintiffs did not meet their burden of proof to establish Article III standing at the summary judgment stage. The Government also reiterated its argument that the FISA did not preempt the state secrets privilege and that Section 1806(f) proceedings could not be used to determine whether a party had been subject to alleged surveillance. *See* Defs. 3d MSJ Mem. (Dkt. 49) at 9-24.[1/] Plaintiffs opposed the Government's motion and cross-moved for discovery under Section 1806(f), arguing principally that they need only present a *prima facie* case based on circumstantial evidence that would create a reasonable inference of "aggrieved" party status under the FISA, *see* 50 U.S.C. § 1801(k), in order to employ Section 1806(f) procedures.

D. The January 2009 Order

On January 5, 2009, the Court denied the Government's motion and ordered further proceedings. The Court reiterated its earlier holding "that FISA 'preempts or displaces the SSP for matters within its purview." January 2009 Order (Dkt. 57) at 11. The Court also concluded that Government acknowledgment of surveillance was not required to establish standing because a complaint can survive a motion to dismiss if plaintiffs can establish a prima facie case, based on unclassified evidence (even if circumstantial), that permits a reasonable inference that they were subject to electronic surveillance. *Id.* at 13. The Court found the amended complaint sufficient to allege plaintiffs' status as aggrieved persons, concluding that to do otherwise "would effectively render [applicable] provisions of FISA without effect, an outcome the court is required to attempt to avoid." *Id.* at 18. Moreover, despite the absence of an Attorney General determination to invoke Section 1806(f), the Court has resolved to proceed on the ground that nothing in FISA "prohibits the court from exercising its discretion to conduct an *in camera*, *ex parte* review following the plaintiffs' motion and entering other orders appropriate to advance

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[1] The Government also requested the Court to certify this case for interlocutory appeal if it intended to proceed under Section 1806(f), *see* Defs. 3d MSJ Mem. (Dkt. 49 at 25 n.15; Defs. 3d MSJ Reply (Dkt. 54) at 14; Defs. Opp. § 1806(f) Mot. (Dkt. 51) at 23-24. The Court's January 2009 Order did not address that request, which we reiterate herein now that the Court has actually issued a decision on the matter.

the litigation if the Attorney General declines to act." *Id.* at 22.

With respect to how the case would now proceed, the Court stated that it had "carefully considered the logistical problems and process concerns that attend considering classified evidence and issuing rulings based thereon," January 2009 Order at 22, and that it would review, *ex parte*, *in camera*, the Sealed Document that was the subject of the state secrets privilege claim and "will then issue an order regarding whether plaintiffs may proceed—that is, whether the Sealed Document establishes that plaintiffs were subject to electronic surveillance not authorized by FISA." *Id.* at 23.[2] The Court also stated that, "[a]s it understands its obligations with regard to classified materials, only by placing and maintaining some of all of its future orders in this case under seal may the court avoid indirectly disclosing some aspect of the Sealed Document's contents." *Id.* The Court then went on to state that "[u]nless counsel for plaintiffs are granted access to the court's rulings and, possibly, to at least some of defendants' classified filings, however, the entire remaining course of this litigation will be *ex parte*," and that "[t]his will deprive plaintiffs due process to an extent inconsistent with Congress's purpose in enacting FISA's sections 1806(f) and 1810." *Id.* Accordingly, the Court ordered "members of plaintiffs' litigation team to obtain the security clearances necessary to be able to litigate the case, including, but not limited to, reading and responding to the court's future orders." *Id.* The Court directed the Government to arrange for plaintiffs' counsel "to apply for TS/SCI clearance and [that it] shall expedite the processing of such clearances so as to complete them no later than Friday, February 13, 2009."[3] *Id.* at 24. The Court also directed the Government to review all previous classified filings to determine whether any materials may now be declassified and report back to the Court within 45 days (*i.e.*, by February 19, 2009). *Id.* at 23-24.

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[2] The Court ordered that the Government arrange for its review of the document within 14 days of its Order. *See* Slip Op. at 24. By letter to the Court dated January 19, 2009, the Government confirmed that the document had previously been lodged with court security officers.

[3] As ordered by the Court, the Government has consulted with DOJ court security officers regarding the Court's Order and arranged for plaintiffs to apply for a security clearance. The Government has also commenced the declassification review process.

ARGUMENT

I. A STAY PENDING APPEAL IS WARRANTED HERE.

"In deciding whether to issue a stay pending appeal, the court considers '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *See Humane Soc. of the United States v. Gutierrez*, 527 F.3d 788, 789-90 (9th Cir. 2008) (quoting *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008)). The court weighs these factors along "a single continuum": at one end of the continuum, the moving party is required to demonstrate probable success on the merits and the possibility of irreparable harm, and at the other end, the party is required to show that serious questions have been raised and the balance of hardships tips sharply in the moving party's favor. *Artukovic v. Rison*, 784 F.2d 1354, 1355 (9th Cir. 1986). This standard for a stay pending appeal is satisfied here. Extremely serious questions of law—indeed, questions of constitutional dimension—are presented, the Court's decision is unprecedented, and the balance of hardships decidedly tips in the Government's favor.

The Court's Order has two principal effects. First, the Court ordered that it will now review, initially *ex parte*, the Sealed Document which the Ninth Circuit excluded under the Government's privilege assertion, and then proceed to decide the very fact question that is also barred from adjudication under the privilege—whether the plaintiffs were subject to the alleged surveillance. *See* January 2009 Order at 23. Second, the Court has held that due process requires that, for plaintiffs' counsel to litigate the case, they must obtain security clearances for access to certain classified information, including the heretofore Sealed Document, court orders and possibly the Government's classified filings in this case. Both holdings raise serious questions of law and would subject the Government to irreparable harm.

A. The Court's Order Raises Serious Questions of Constitutional Significance.

The unprecedented nature and significance of the Court's Order should be apparent. The Court will now adjudicate and decide the precise matter at issue in the Government's privilege assertion, and reinsert into the case information that has been excluded under the privilege, utilizing a statutory provision that has never been applied in the circumstances presented here. No court has held that an assertion of the state secrets privilege is preempted by statutory law—an issue that is plainly of constitutional dimension because the judgment made by Executive branch officials responsible for national security matters to protect certain information is rooted in the Article II powers of the President. *See United States v. Nixon*, 418 U.S. 683, 710-11 (1974) (state secrets privilege based on constitutional authority of the President to protect national security). In addition, Section 1806(f) of the Foreign Intelligence Surveillance Act has never previously been applied in the manner in which the Court is now proceeding: where the Attorney General has not invoked the provision to protect against the disclosure of sensitive information in an adjudication concerning the use of surveillance evidence. In particular, the question of whether Section 1806(f) can be used to decide whether a party has actually been subject to alleged unlawful surveillance is one of first impression. Moreover, in applying Section 1806(f), courts have consistently declined to grant counsel for a private party discovery of classified information even where the use of acknowledged surveillance evidence is being adjudicated. *See United States v. Warsame*, 547 F. Supp. 2d 982, 987 (D. Minn. 2008); *United States v. Abu-Jihaad*, 531 F. Supp. 2d 299, 310 (D. Conn. 2008).[4/]

Thus, the next proceedings in this case clearly will take the matter into uncharted waters, and the first element for a stay pending appeal is easily met.

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[4] As we have previously set forth, the circumstances in which Section 1806(f) may authorize access to classified information by a private litigant seeking discovery under this provision applies where the Government is using FISA-derived evidence against that party, typically to convict them of a crime and imprison them. And even in this circumstance, Congress intended that the Government may still choose to protect, rather than disclose, intelligence sources and methods by withdrawing use of the evidence. *See* Defs.' 1806(f) Opp. (Dk 51) at 9-10, 21-22 n.14 The Court is set to apply Section 1806(f) in a wholly novel manner.

B. The Government Faces Irreparable Harm Under the Order.

Aside from the clear significance of the issues at stake, the Government faces irreparable harm from further proceedings under the Court's Order. While the Court has indicated that its review of the document will initially be *ex parte*, it "understands its obligations with regard to classified materials to extend to avoiding direct or indirect disclosure of the document's "content." *See id.* With respect, this reflects too narrow a view of the Government's successful privilege assertion. The Ninth Circuit sustained the Government's privilege assertion not merely as to the "content" of the sealed document but over *the fact of* whether or not plaintiffs had been subject to the alleged surveillance, and excluded use of the Sealed Document to address that issue, including any *memory* of the document that plaintiffs may have. *See Al-Haramain*, 507 F.3d at 1202-03.[5/] Thus, an order that merely seeks to protect the substance of the document's content, but which addresses whether the plaintiffs are "aggrieved" and the case can proceed, would inherently reveal privileged information.

Also, as we have previously set forth, *see* Defs. 2d MSJ Mem. (Dkt. 17) at 23-24, efforts to proceed *ex parte* on the most basic issue of standing is fraught with peril and ultimately risks or necessarily will lead to the disclosure of information protected under the state secrets privilege. The most basic fact of whether or not this litigation may or may not proceed upon a determination of standing cannot effectively be sealed from the public or the plaintiffs for the duration of the litigation. If the Court were to find, upon its *ex parte* review, that none of the plaintiffs are aggrieved parties, the case obviously could not proceed, but such a holding would reveal to plaintiffs and the public at large information that is protected by the state secrets privilege— namely, that certain individuals were not subject to alleged surveillance.

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[5] *See Al-Haramain*, 507 F.3d at 1202 (identifying these two separate state secret privilege issues and resolving both in the Government's favor); *see also id.* at 1203 ("[W]e conclude that the Sealed Document is protected by the state secrets privilege, *along with the information as to whether the government surveilled Al-Haramain.*") (emphasis added); *id.* (addressing the question of "whether Al-Haramain has been subject to NSA surveillance" and holding that "judicial intuition about this proposition is no substitute for documented risks and threats posed by the potential disclosure of national security information").

Conversely, if the case did proceed, it could do so only as to an aggrieved party, which would confirm that a plaintiff *was* subject to surveillance. Indeed, if the actual facts were that just one of the plaintiffs had been subject to alleged surveillance, any such differentiation likewise could not be disclosed because it would inherently reveal intelligence information as to who was and was not a subject of interest, which communications were and were not of intelligence interest, and which modes of communication may or may not have been subject to surveillance. *See Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978). Under the unique circumstances of this case, the Court's finding that the state secrets privilege has been preempted, and that the question of standing may now be adjudicated, even initially *ex parte*, is tantamount to risking or requiring the destruction of the privilege before appellate review.[6/]

As Chief Judge Kozinski recently remarked in *In re Copley Press*, 518 F.3d 1022 (9th Cir. 2008), "[s]ecrecy is a one-way street: Once information is published [or disclosed], it cannot be made secret again," and thus it is plain that such orders of disclosure are "effectively unreviewable on appeal from a final judgment.'" *Id.* at 1025 (citations omitted). Indeed, "an appeal after disclosure of the privileged communication [or information] is an inadequate remedy." *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1491 (9th Cir. 1989). Any disclosure that results even upon the Court's attempt at a sealed *ex parte* review could "mak[e] the issue of privilege effectively moot." *United States v. Philip Morris Inc.*, 314 F.3d 612, 619 (D.C. Cir. 2003). "Disclosure followed by appeal after final judgment is obviously not adequate in [privilege] cases—the cat is out of the bag." *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998). While the Court may believe that it is proceeding adequately to protect national security interests under the procedures of Section 1806(f), further review of whether those procedures even apply is required before a successful national security privilege is put at risk or negated. *See Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005) ("[c]ourts are not required to play with

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[6] Of course, as discussed below, the Court does not contemplate that such proceedings would be entirely *ex parte*, and thus, at a minium, the Government would face the loss of its privilege assertion through disclosures contemplated by the Court's Order to the plaintiffs' counsel.

fire and chance further disclosure—inadvertent, mistaken, or even intentional—that would defeat the very purpose for which the privilege exists."), *cert. denied*, 546 U.S. 1093 (2006).

While the Court of Appeals remanded this case for consideration of whether the privilege was preempted, it did not direct an outcome on this issue nor imply that, if the privilege were preempted, the information at issue should be disclosed or put at risk of disclosure in further proceedings without further review. The Ninth Circuit recognized that disclosure of "information concerning the Sealed Document and the means, sources and methods of intelligence gathering in the context of this case would undermine the government's intelligence capabilities and compromise national security." *Al-Haramain*, 507 F.3d at 1203-04. That court could not have meant that such harm be risked or incurred before further review of *whether* the FISA preempts the privilege. While that review is now being sought, no steps should be taken that may compromise the privilege assertion in the meantime.

C. The Court's Determination that Due Process Requires Access by Plaintiffs' Counsel to Classified Information Also Poses Irreparable Harm to the Government.

The January 2009 Order poses irreparable harm to the Government's interests in another respect: it specifically provides for the disclosure of classified information by the Court to the plaintiffs in Section 1806(f) proceedings—that is, for a *direct* abrogation of the Government's privilege assertion. The Order "provides for members of plaintiffs' litigation team to obtain the security clearances necessary to litigate the case." January 2009 Order at 23. This aspect of the Order is based on the Court's conclusion that due process requires that plaintiffs obtain access to classified information to litigate their claims under Section 1806(f). *See id.* Furthermore, the Court has held that it—not the Executive branch—will now control that process. The Court concluded that Section 1806(f) "leaves the court free to order discovery of materials or information sought by the 'aggrieved person' in whatever manner it deems consistent with section 1806(f)'s text and purpose." *Id*. at 22. And, citing its July 2008 decision, the Court again rejected the Government's contention that, under *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988), the Executive branch, not the Court, controls access to classified

information. *See* January 2009 Order at 21. Indeed, the Court expressly held that "*Egan* recognizes that the authority to protect national security information is neither exclusive nor absolute in the executive branch." *Al-Haramain*, 564 F. Supp. 2d at 1121 (citing language in *Egan* courts have been reluctant to intrude upon Executive authority "unless Congress specifically has provided otherwise") (citing *Egan*, 484 U.S. at 530). But even if *Egan* is read to reflect the general principle that Congress may attempt to expressly preempt executive authority by statute, whether that has occurred here is the very issue in dispute at this stage of the case. And to avoid the extraordinary constitutional concern of a court disclosing classified information over the Executive's express objection and, indeed, *successful* privilege assertion, any such disclosure should not occur without further review of the legal underpinnings of the Court's Order.[7/]

Moreover, under Executive branch procedures, the granting of a security clearance, by itself, is not sufficient to permit a person (such as plaintiffs' counsel) to obtain access to classified information, as the Court's Order contemplates. Rather, under applicable Executive Orders, even if a person is found to be "suitable" to receive access to classified information after an investigation of their background and, thus, is granted a "security clearance," the agency that originates the information at issue must make a separate "need-to-know" determination that actually grants access to classified information. *See* Defs. 1806(f) Opp. (Dkt. 51) at 22 (citing *Egan*, 484 U.S. at 529 ("the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to decide who may have access to it.") and *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990)). *See*

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[7] In particular, the key issue in dispute on the issue of access by plaintiffs' counsel is whether the proviso in Section 1806(f) that a district 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, *see* 50 U.S.C. § 1806(f), applies in the present circumstances or solely where, as the Government contends, where the use evidence of acknowledged surveillance against a party is at issue. Given the significance of this dispute, the Court should not seek to use this provision to disclose information to the plaintiffs's counsel pending appeal.

Declaration of Ariane E. Cerlenko, National Security Agency, ¶¶ 3-7 (describing clearance process and separate access determination by the NSA even if a person is deemed suitable to receive classified information). Only where an agency official with appropriate authority separately concludes that an individual has a demonstrated "need to know" classified information in connection with the performance of a "governmental function" that is "lawful and authorized" by the agency will a person be given access to classified information. *See* Exec. Ord. 12,958, §§ 4.1(a), 4.2(a), 5.4(d)(5), 6.1(z), 60 Fed. Reg. 19825 (Apr. 17, 1995), as amended by Exec. Ord. 13,292, 68 Fed. Reg. 15315 (Mar. 25, 2003).[8] Thus, under normal clearance procedures, the NSA would decide—not the Court—whether the plaintiffs' counsel should receive access to any classified NSA information. *See* Cerlenko Decl. ¶¶ 5-7. And in this particular case, consistent with the Government's successful privilege assertion, the NSA Director has determined, subsequent to the Court's January 2009 Order, that neither plaintiffs nor their counsel have a need for access to classified NSA information that has been (or would be) excluded under the state secrets privilege assertion. *See* Cerlenko Decl. ¶ 9. The NSA Director has further determined that it does not serve a governmental function, within the meaning of the Executive Order, to disclose the classified NSA information at issue in this case simply to assist the plaintiffs' counsel in representing the interests of private parties who have filed suit against the NSA and who seek to obtain disclosure of information related to NSA intelligence sources and methods. *Id.*

In lieu of a process and access determination controlled by the Executive branch, the Court has now determined that due process requires that plaintiffs have access to classified information, and that Section 1806(f) grants *the Court* authority to make that determination. Thus, once plaintiffs' counsel may be determined to be "suitable" for classified information, they can obtain access under the Court's Order over the Government's longstanding objection and in

[8] In making this determination, the President has instructed federal agencies to "ensure that the number of persons granted access to classified information is limited to the minimum consistent with operational and security requirements and needs." *See* Exec. Ord. § 5.4(d)(5)(B).

the face of a successful privilege assertion. Plainly, any disclosure of classified information to the plaintiffs' counsel would irreparably harm, indeed, would negate, the Government's privilege assertion before any further appellate review. *See Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) ("Once the documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time. The status quo could never be restored"). Indeed, the Court's Order contemplates that plaintiffs may receive access not only to the sealed document but to new and additional classified information contained in the Government's classified filings in this case—information that was prepared for and provided to the Court solely for *ex parte* review. *See* Cerlenko Decl. ¶ 8.[9/]

Again recognizing that the Court views the law differently, we respectfully request a stay for appellate review before the Court proceeds further, in order to avoid the harms identified and extraordinarily serious constitutional issues arising from the Court granting access to the Executive Branch's classified information. The key focus in deciding a motion for a stay pending appeal should be the consequences of a failure to stay if the Court is ultimately reversed. Here, any disclosures to the plaintiffs would be fundamentally in error and compromise the Government's privilege assertion if the Court of Appeals views the preemption question differently.

For the foregoing reasons, a stay pending appeal is warranted here.[10/]

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[9] The fact that the Court has not yet disclosed classified information to the plaintiffs is irrelevant for purposes of finding irreparable harm. The Court has clearly ordered that *ex parte* proceedings would conflict with due process, that the plaintiffs' counsel must obtain clearances, and that the Court may determine under the FISA whether to grant access. If the Court's Order is not stayed and reviewed, then at any point in future proceedings access to highly sensitive information, including in the Government's prior privilege assertions could be disclosed outside of the Government's control. The Government cannot wait until any actual physical disclosure of classified information occurs through a Court order or by some other means before seeking a stay, and is not required to do so.

[10] If the Court declines to grant a complete stay pending appeal, the Government also asks for a limited stay while we pursue a stay in the Court of Appeals.

II. CERTIFICATION OF THE JANUARY 2009 ORDER IS WARRANTED.

While the Government believes it has firm grounds for a direct appeal of the Court's Order,[11/] we also request that the Court certify its Order for interlocutory appeal. The matters at issue are of such significance, and the need for appellate review so apparent under the circumstances, that such review should also be certified by the Court.

Interlocutory appeal is warranted when the Court finds that an order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The 1292(b) certification inquiry has been broken into three steps: (1) the matter at issue must be a controlling question of law; (2) there must be substantial grounds for a difference of opinion; and (3) an immediate appeal may materially advance the ultimate termination of the litigation. *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1981). These three factors should be applied flexibly and viewed together, *see* Wright, Miller & Cooper, FED. PRAC. & PRO. § 3930 at 422 (3d ed. 1999), for Section 1292(b) represents the "contemporary view that interlocutory appeals involving important and controlling questions of law are a useful means of expediting litigation." *Tidewater Oil Co. v. United States*, 409 U.S. 151, 179 (1972).

The Court's January 2009 Order meets this standard. Whether the case should now proceed under the FISA on the ground that it preempts the state secrets privilege is a controlling issue of law because, if the Court is reversed, this case will be dismissed under the Ninth Circuit's prior ruling in this case. There is, moreover, a substantial ground for difference of opinion as to the Court's Order. The Court itself has recognized that there are no cases applying Section 1806(f) in the context presented by this case. Moreover, immediate appeal would

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[11] The Government believes that several possible grounds exist for appealing the Court's Order under 28 U.S.C. § 1292, including under the collateral order and mandamus doctrines, but as set forth herein, we submit another appropriate course would be for the Court to certify the case to ensure review of the significant questions at hand before irreparable harm to the Government's successful privilege assertion is put at risk or actually results.

materially advance the termination of litigation by either resulting in its disposition without any further proceedings that may compromise the Government's privilege assertion, or by providing guidance as to how to proceed in unprecedented circumstances. Certification also would be consistent with the Court's action in the *Hepting* case, where it certified a threshold question as to whether the case could even proceed. *Hepting v. AT&T*, 439 F. Supp. 2d 974, 1011 (N.D. Cal. 2006) ("[G]iven that the state secrets issues resolved herein represent controlling questions of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance ultimate termination of the litigation, the court certifies this order for the parties to apply for an immediate appeal pursuant to 28 U.S.C. § 1292(b).").

Finally, 1292(b) certification is particularly appropriate given that a successful privilege assertion is at issue in this case. Interlocutory appeals are generally appropriate to address—even outside the national-security context—the assertedly inappropriate disclosure of sealed or privileged documents. *See In re Copley Press*, 518 F.3d at 1025; *Philip Morris Inc.*, 314 F.3d at 619. In contrast, post-judgment appellate review will not be an adequate remedy for any irreparable harm imposed on the Government by the further proceedings contemplated by the Court's Order. Given the substantial dispute concerning the fundamental legal framework of this case, the most prudent and expeditious course would be for the Court to certify its January 2009 Order now for interlocutory review.

CONCLUSION

For the foregoing reasons, the Court should stay further proceedings pending direct appeal by the Government Defendants and certify its January 5, 2009 Order for appeal.

Dated: January 19, 2009

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE:

NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION

MDL Docket No 06-1791 VRW

ORDER

This order pertains to:

Al-Haramain Islamic Foundation et al v Bush et al (C-07-0109 VRW),

/

The United States has sought to appeal as of right, pursuant to 29 USC § 1291 and also seeks an order certifying the court's January 5, 2009 order for an interlocutory appeal pursuant to 28 USC § 1292(b) and staying proceedings in this court pending the outcome of such an appeal. Doc # 545/60. The stated purpose of such a stay is "to ensure that no disclosures [of classified material] occur in the meantime." Doc #560/70 at 6.

The United States noticed these motions for April 9, 2009, but at a January 23, 2009 case management conference herein, the court established a shortened briefing schedule and vacated the April 9 hearing date pending further orders of the court. Under the schedule established by the court, the United States' reply brief was due on February 13. Instead, the United States filed its

reply brief on February 11 and included therein the following:

> The Government respectfully requests that the Court indicate how it will proceed by 3 pm on February 13, 2009. In order to protect its interests, the Government plans to seek relief from the Ninth Circuit before the close of business that day in the absence of relief from this Court.

Doc #560/70 at 6-7.

First, the January 5 order is not a "final decision" and, therefore, not appealable pursuant to 28 USC § 1291. Second, the court is fully aware of its obligations with regard to classified information. The court's January 5 order stated that it would prioritize two interests: "protecting classified evidence from disclosure and enabling plaintiffs to prosecute their action." Doc #537/57 at 23. The court then entered orders designed to make it possible for the court to determine whether plaintiffs had been subject to unlawful electronic surveillance and, crucially, to enter an order under seal regarding the outcome of that determination. To that end, the January 5 order provided for plaintiffs' counsel to obtain top secret/sensitive compartmented information security clearances.

The court understands that the background investigation of two of plaintiffs' counsel have been completed and "favorably adjudicated" although clearances for these individuals have not been issued. At the January 23 hearing herein, the court stated:

> I have no intention of reviewing the sealed document [containing classified information] until we get all of these pieces in place so that we can proceed in a judicial fashion; and by that I mean a fashion in which both parties have access to the material upon which the court makes a decision.

RT (Doc #532) at 34.

The court seeks from the government implementation of the steps necessary to afford that "both parties have access to the material upon which the court makes a decision." That is the procedure the January 5 order seeks to put in place. That order is, therefore, entirely interlocutory and an "immediate appeal will not materially advance ultimate termination of the litigation." An appeal under 28 USC § 1292(b) and stay are not appropriate and are, therefore, DENIED.

The government is DIRECTED not later than February 27, 2009 to inform the court how it intends to comply with the January 5 order.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION *This Document Solely Relates To*: AL-HARAMAIN ISLAMIC FOUNDATION OF OREGON, INC.; WENDELL BELEW; ASIM GHAFOOR, Plaintiffs, v. GEORGE W. BUSH, President of the United States, in his official capacity; NATIONAL SECURITY AGENCY ("NSA"); KEITH B. ALEXANDER, Director of NSA, in his official capacity; OFFICE OF FOREIGN ASSETS CONTROL of the U.S. Department of the Treasury ("OFAC"); ADAM J. SZUBIN, Director of OFAC, in his official capacity; FEDERAL BUREAU OF INVESTIGATION ("FBI"); and ROBERT S. MUELLER III, Director of FBI, in his official capacity. Defendants.	No. M:06-CV-01791-VRW **NOTICE OF APPEAL** ***Al-Haramain Islamic Foundation of Oregon, Inc. et al., v. Bush, et al.* (07-CV-00109-VRW)**

NOTICE OF APPEAL

Pursuant to Federal Rules of Appellate Procedure 3 and 4(a)(1)(B), notice is given that the Government Defendants in the above-captioned case—George W. Bush, the President of the United States, in his official capacity; the National Security Agency ("NSA"); Keith B. Alexander, Director of NSA, in his official capacity; the Office of Foreign Assets Control of the U.S. Department of the Treasury ("OFAC"); Adam J. Szubin, Director of OFAC, in his official capacity; the Federal Bureau of Investigation ("FBI"); and Robert S. Mueller III, Director of FBI, in his official capacity—hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order of the Court entered on January 5, 2009 in the above referenced action, *Al-Haramain Islamic Foundation of Oregon, et al., v. Bush, et al.* (07-cv-109-VRW). *See* Docket No. 57 in Civil Action 3:07-cv-109 and Docket No. 537 in Civil Action M:06-cv-1791.

Dated: January 16, 2009

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