

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

AMERICAN CIVIL LIBERTIES UNION; )  
AMERICAN CIVIL LIBERTIES UNION )  
FOUNDATION; AMERICAN CIVIL LIBERTIES )  
UNION OF MICHIGAN; COUNCIL ON )  
AMERICAN-ISLAMIC RELATIONS; )  
COUNCIL ON AMERICAN-ISLAMIC )  
RELATIONS MICHIGAN; GREENPEACE, INC.; )  
NATIONAL ASSOCIATION OF CRIMINAL )  
DEFENSE LAWYERS; JAMES BAMFORD; )  
LARRY DIAMOND; CHRISTOPHER )  
HITCHENS; TARA MCKELVEY; and )  
BARNETT R. RUBIN, )

Case No. 2:06-CV-10204

Hon. Anna Diggs Taylor

Plaintiffs, )

v. )

NATIONAL SECURITY AGENCY/CENTRAL )  
SECURITY SERVICE; AND LIEUTENANT )  
GENERAL KEITH B. ALEXANDER, in his )  
official capacity as Director of the National )  
Security Agency/Central Security Service )

Defendants. )

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**DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE,  
FOR SUMMARY JUDGMENT**

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## INTRODUCTION

(U) In the course of a thirty-eight page opposition brief (“Pls. Opp.”) that cites over one hundred cases, Plaintiffs spend very little time addressing how the state secrets privilege applies to the facts and circumstances of this case. Despite its length, Plaintiffs’ opposition fails to rebut the central points made in Defendants’ Motion to Dismiss or For Summary Judgment: state secrets are necessary to resolve Plaintiffs’ challenge to the Terrorist Surveillance Program (“TSP”) and the disclosure of such facts would cause grave harm to national security. Plaintiffs’ brief contains an extensive and highly rhetorical discussion of broad principles—often based on basic mis-characterizations of caselaw—that have no application to this case. Plaintiffs characterize Defendants’ position as “radical,” *see* Pls. Opp. at 3, 4, 7, claiming that Defendants seek to “immunize” all executive actions, including torture, from judicial scrutiny, *see id.* at 1, 3. And Plaintiffs claim that Defendants ask the Court to accede to the right of the Executive to operate by “unilateral fiat,” *see id.* at 4, and that any ruling by the Court in Defendants’ favor would render it a “handmaiden” of the Executive and constitute a “total abdication of the responsibilities of the judiciary,” *see id.* at 4, 5. Plaintiffs’ rhetoric is neither fair nor reasoned comment regarding Defendants’ position.

(U) First, Defendants’ position is based on an application of long-standing and well-recognized judicial authority which acknowledges that, in some circumstances, lawsuits must be dismissed where they inherently put at issue, and require the disclosure of, sensitive classified activities. The state secrets privilege is by no means a radical new doctrine, and its application here is well within the bounds of established precedent. The law has consistently struck a balance in favor of protecting the nation’s security in cases such as this.

(U) Second, Defendants do not ask the Court to abdicate its responsibilities. On the

contrary, in support of its privilege assertion, Defendants have provided the Court with broad details concerning the activities at issue in this lawsuit, how they are implicated by the specific claims in the case, and why the case cannot proceed without causing harm to national security. It is not an abdication of Court's responsibility to hold, for the reasons Defendants have demonstrated, that dismissal of this case is necessary to protect vital national security interests.

(U) Third, this is not a mere discovery dispute that tangentially touches on classified facts, as in so many of the cases on which Plaintiffs rely. This case challenges the lawfulness of a classified foreign intelligence surveillance program: Plaintiffs seek to enjoin the President from using a foreign intelligence tool he deems essential to protect the nation from a foreign attack by an enemy that has already struck the United States. Adjudicating such claims comes as close to core state secrets as could be imagined. Plaintiffs' contention that this subject matter does not implicate state secrets because the existence of that program has been acknowledged and has been defended publicly is specious. Whether the "very subject" of a lawsuit concerns state secrets turns not on whether some aspect of the matter can be publicly described, or on whether the challenged program is known to exist, but on the information that would be necessary to adjudicate the claims on the merits. State secrets cases involving mere discovery disputes are beside the point. The question presented by *this case* is whether the lawfulness of an ongoing, classified foreign intelligence surveillance program aimed at a current, serious threat to national security, can be judged without compromising the underlying facts of that program. Defendants have shown that it cannot.

(U) When Plaintiffs do address the issues in this case, their arguments fail. First, Plaintiffs now concede that they do not seek injunctive relief based on any surveillance of

“particular individuals.” Rather, they seek to invalidate the TSP “on its face” and, on this basis, claim they have standing. *See* Pls. Opp. at 24-25. This argument is quite wrong. In order to bring any lawsuit in federal court, a plaintiffs must demonstrate a personal injury caused by the challenged conduct. Yet Plaintiffs have abandoned any claim of direct injury as a result of the interception of their communications, and rely solely on allegations that the existence of the program has caused them and those with whom they communicate to change their practices. Plaintiffs’ unfounded speculation that a program which, on its face, is targeted at al Qaeda, necessarily covers *their* communications, including conversations on political and human rights issues with families and scholars overseas, or even attorney-client communications with terrorist suspects, is insufficient to establish standing. Further, any effort to actually put forward facts that would be relevant to Plaintiffs’ standing, by either confirming or denying surveillance, or explaining the nature of the program in order to evaluate Plaintiffs’ actions in response to it, would itself compromise key national security information.

(U) On the merits of their claims, Plaintiffs persist in contending that only “purely legal questions” are before the Court. *See* Pls. Opp. at 16. Plaintiffs argue that Congress alone has the authority to regulate foreign intelligence surveillance and, since that course was not followed here, then the President’s actions were unlawful. *See id.* at 25-29. But this simply assumes the answer to the ultimate issue in the case: whether Congress can impose any limitation it wishes on the President in this area or whether the President’s particular actions in establishing the TSP are within his authority. As Defendants have previously demonstrated, facts are necessary to assess the boundaries of the respective powers of Congress and the President at issue in this case, but these facts cannot be disclosed without harming national

security. Plaintiffs' position that there are no possible circumstances under which the President could authorize the surveillance of a foreign enemy such as al Qaeda outside of FISA, "no matter what kind of threat or emergency is posed," *see* Pls. Opp. at 27, is, Defendants submit, the radical and unsupported position.

(U) As to their Fourth Amendment claim, Plaintiffs contend that "the government must prove that the surveillance fits into an established exception to the warrant requirement – a purely legal question." *See* Pls. Opp. at 29. That is a non sequitur. Proof is not a "purely legal question" but a matter of evidence. Whether the TSP falls within a warrant exception for foreign intelligence surveillance, or for special law enforcement needs, turns on the nature of the threat and the particular ways in which the TSP is conducted, as does the ultimate Fourth Amendment question of whether the actions taken under the TSP are reasonable.

(U) Plaintiffs' last resort is to argue that their case not be dismissed because some other device could be imagined to salvage further proceedings. But courts have rejected the very procedures Plaintiffs suggest in dealing with the states secrets privilege, due to the risk they pose to national security. At bottom, this is a case in which a group of Plaintiffs, who cannot point to any direct action taken or threatened against them by the government, seek to enjoin a crucial Presidential effort to detect a foreign terrorist attack on the basis of their own speculative fear that they might be subject to the program. Moreover, Plaintiffs seek to do so based on a scant public record, while arguing that state secrets that would reveal the true nature of the program and threat that it addresses are irrelevant. Plaintiffs' position is wrong and should be rejected.

ARGUMENT

**I. (U) PLAINTIFFS INVOKE AUTHORITIES NOT APPLICABLE HERE AND MISREPRESENT THE NATURE AND IMPACT OF THE STATE SECRETS PRIVILEGE ON THIS CASE.**

(U) Plaintiffs begin their opposition by attempting to diminish the state secrets privilege itself, characterizing it as a mere “common law evidentiary rule” used “typically” to deal with discovery disputes. *See* Pls. Opp. at 10-15. While this is a transparent attempt to understate the importance of the privilege, and its applicability here, Plaintiffs ultimately acknowledge that the law requires precisely what Defendants have stated: a case must be dismissed where its very subject matter is a state secret, where state secrets are needed for a plaintiff to present their *prima facie* case, or where state secrets are necessary for defendants to present their defense. *See* (Public) Memorandum of Points and Authorities of the United States (hereafter “Defs. Mem.”) (Docket No. 34) at 16, 47-48. Each of these grounds applies here, and Plaintiffs’ arguments that dismissal can be avoided are unavailing.

(U) As a initial matter, Plaintiffs’ assertion that the state secrets privilege is a mere “rule of evidence, not of justiciability,” *see* Pls. Opp. at 11, is hardly an apt description. The Supreme Court has observed that this privilege derives from the President’s Article II powers to conduct foreign affairs and provide for the national defense. *United States v. Nixon*, 418 U.S. 683, 710 (1974). It is, moreover, an absolute privilege that cannot be overcome by a showing of need, *see United States v. Reynolds*, 345 U.S. 1, 11 (1953), and, accordingly, “heads the list” of privileges, *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978) (“*Halkin I*”), and is of “of the highest dignity and significance.” *El-Masri v. Tenet* (No. 1:05CV1417), 2006 WL 1391390 at \*4 (E.D. Va. May 12, 2006). Furthermore, the law is also clear that it is the effect of the invocation of

this privilege that determines whether a case may proceed. In particular, when state secrets are “central to the subject matter of the litigation that any attempt to proceed will threaten” their disclosure, or where state secrets are needed by the parties to address the claims, dismissal of the action is required. *See Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6<sup>th</sup> Cir.), *cert. denied*, 543 U.S. 1000 (2004). Thus, the privilege implicates far more than whether particular evidence must be protected from disclosure, but whether the case itself is appropriate for resolution.

(U) The fact that the typical result of privilege assertion in most cases may be simply to protect information from disclosure in discovery, *see* Pls. Opp. at 12-13 & nn. 27, 28, would neither be surprising nor dispositive here. It stands to reason that there would be more applications of the privilege in the context of particular discovery disputes, since few lawsuits are brought that directly challenge the lawfulness of classified activities, as this lawsuit does. In any event, the relative number of cases that are allowed to proceed, or instead are dismissed as a result of state secrets, has no bearing on whether, in a particular case, dismissal is required because state secrets are directly at issue. The federal reporter contains numerous cases in which state secrets required dismissal. *See Tenenbaum*, 372 F.3d at 777; *Sterling v. Tenet*, 416 F.3d 338, 347-48 (4th Cir.), *cert. denied*, 126 S. Ct. 10521 (2005); *Kasza v. Browner*, 133 F.3d 1159, 1167-68 (9th Cir.), *cert. denied*, 525 U.S. 967 (1998); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 1547 (2d Cir. 1991); *Weston v. Lockheed Missiles & Space Co.*, 881 F.2d 814, 816 (9th Cir. 1989); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc); *Molerio v. FBI*, 749 F.2d 815, 819, 822 (D.C. Cir. 1984); *El-Masri*, 2006 WL 1391390 at \*6; *Edmonds v. U.S. Department of Justice*, 323 F. Supp. 2d 65, 77-82 (D.D.C. 2004), *aff’d*, 161

Fed. Appx. 6, 045286 (D.C. Cir. May 6, 2005) (*per curiam* judgment), *cert. denied*, 126 S. Ct. 734 (2005); *Maxwell v. First National Bank of Maryland*, 143 F.R.D. 590, 598-99 (D. Md. 1992), *aff'd*, 998 F.2d 1009 (4<sup>th</sup> Cir. 1993), *cert. denied*, 510 U.S. 1091 (1994); *Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989) (all dismissing case on state secrets grounds).<sup>1</sup>

(U) Thus, the cases on which Plaintiffs rely to show that the state secrets privilege does not always require dismissal, particularly where only certain evidence needs to be protected in discovery, *see* Pls. Opp. at 13, n. 28 and 14, say nothing about whether this case may proceed.<sup>2</sup> Plaintiffs significantly overstate (or mischaracterize) this authority. For example,

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<sup>1</sup> (U) Indeed, two of the cases Plaintiffs cite as arising in a “discovery” context, *see* Pls. Opp. at 13 n.27, were in fact dismissed on state secret grounds. *See Fitzgerald*, 776 F.2d at 1241-44; *Tilden v. Tenet*, 140 F. Supp. 2d 623, 626-27 (E.D. Va. 2000).

<sup>2</sup> (U) A review of these cases demonstrates that *none* involved a challenge to the lawfulness of a classified foreign intelligence program, but concerned distinct legal claims (many not even against the government) that could proceed because the state secrets at issue were not among the evidence necessary to decide those claims. *See* Pls. Opp. at 13-15 and n. 27-28 (citing, *inter alia* *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1364-65 (Fed. Cir. 2001) (in contract dispute between private parties, state secrets claim upheld and case proceeds to discovery of *non-government* witnesses on claimed authority of individual to contract for government); *Crater Corporation v. Lucent Technologies*, 255 F.3d 1361, 1370-71 (Fed. Cir. 2001) (in patent infringement action between private parties, court of appeals finds that case could proceed because evidence protected by privilege was not relevant to decide the claims), *cert. denied*, 535 U.S. 1073 (2002); *AT&T v. United States*, 4 Cl. Ct. 157, 161-62 (Cl. Ct. 1983) (court upholds state secrets claim to protect cryptographic device and rules that if information about device does not become available before trial, the case will be dismissed); *Virtual Defense and Development International, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 9, 23 ( D.D.C. 2001) (in private contract dispute between consulting firm and Moldova over payment of commission on sale of jets to the United States, state secrets privilege issue arose solely over a classified State Department cable); *Foster v. United States*, 12 Cl. Ct. 492, 495-96 (Cl. Ct. 1987) (where state secrets assertion upheld to protect disclosure of information in a secret patent application, dismissal of action not addressed); *Barlow v. United States*, 53 Fed. Cl. 667, 684-88 (Fed. Cl. 2002) (investigation of whether relief due CIA “whistleblower” upon employment termination proceeds without need for underlying classified information on Pakistan nuclear weapons program which employee analyzed); *DTM Research L.L.C. v. AT&T Corp.*, 245 F.3d 327, 333-34 (4th Cir. 2001) (dispute involving mis-appropriation of trade secrets  
(continued...))

Plaintiffs' assertion that *Jabara v. Webster*, 691 F.2d 272 (6<sup>th</sup> Cir. 1982), *cert. denied*, 464 U.S. 863 (1983), was decided on the merits after the state secrets privilege was asserted is highly misleading. In that case, the state secrets privilege was asserted, as here, over facts involving the acquisition by the National Security Agency ("NSA") of overseas telegraphic communications. *See Jabara v. Kelly*, 75 F.R.D. 475 (E.D. MI 1977). Once privilege was asserted, the case did *not* proceed on this topic. Instead, the case proceeded on a separate claim *as to which the state secrets privilege was not asserted*, namely whether the Federal Bureau of Investigation ("FBI") improperly received information from NSA. *See Jabara v. Kelly*, 476 F. Supp. 561 (E.D. Mi. 1979). Moreover, even as to that surviving claim, the Court of Appeals ultimately reversed a judgment in Plaintiffs' favor because Jabara had not challenged the NSA intercept program (which was protected by the state secrets privilege), and the transmission of information to the FBI did not violate the Fourth Amendment. *See Jabara v. Webster*, 691 F.2d at 277-279. Thus, the successful assertion of the state secrets privilege in that case did contribute to the dismissal

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<sup>2</sup>(...continued)

between two private companies could proceed where third party subpoenas to government quashed on state secrets grounds, since misappropriation claim could proceed without the evidence withheld)).

(U) Likewise, *Sigler v. LeVan*, 485 F. Supp. 185 (D. Md. 1980), arose out of the death of a government intelligence officer shortly after being interrogated for possessing highly classified government documents concerning NSA sources and methods. The court upheld the state secrets assertion and dismissed a claim related to the documents recovered by the government. *Id.* at 194. The court allowed a separate claim to proceed because the government had not yet asserted privilege over the relevant facts, specifically noting the possibility of dismissal based on further disclosures was not foreclosed. *Id.* at 199. Plaintiffs also misread *Attorney General of the United States v. The Irish People*, 684 F.2d 928 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1172 (1983). That case was brought *by the government* to require a foreign agent to register, and the court of appeals reversed dismissal of the government's case as a penalty for its protecting state secrets related to the Defendant. This scenario is inapposite here.

of the remaining merits claim.<sup>3</sup>

(U) Moreover, Plaintiffs' separate reference to cases where the merits of legal claims touching upon national security matters were addressed, *see* Pls. Opp. at 6-7 and n.10-24, serves only to demonstrate that the government has not routinely invoked the state secrets privilege to avoid review of important national security matters. It does not follow that because some cases involving national security policies may be adjudicated, this case can as well.<sup>4</sup> As Defendants have set forth, it is not possible to demonstrate that a classified foreign intelligence surveillance program targeted at a foreign terrorist enemy falls within the President's authority, and is carried out in conformance with the Constitution, without actually discussing the operation of that program in relation to the threat it seeks to address—and this inherently would require the disclosure of state secrets. *See In Camera, Ex Parte* Memorandum of Points and Authorities of the United States in Support of Motion to Dismiss or for Summary Judgment.

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<sup>3</sup> (U) Plaintiffs also neglect to follow *Clift v. United States*, 597 F.2d 826 (2<sup>nd</sup> Cir. 1979), to its conclusion. In that case, the state secrets privilege was upheld to protect information concerning cryptographic device, but the case was remanded in lieu of dismissal in the event facts about the system eventually become declassified. What Plaintiffs neglect to mention is that, 12 years later, the facts still a secret, the case was dismissed on state secret grounds. *See Clift v. United States*, 808 F. Supp. 101 (D. Conn. 1991).

<sup>4</sup> (U) Again, it bears noting Plaintiffs' citations are readily distinguishable. For example, several cases that Plaintiffs describe as examples of where "covert or clandestine" programs were subject to litigation involved decades-old, long since dormant and publicly disclosed programs, such as LSD experiments by the CIA in the 1950s, and the opening of mail to or from the Soviet Union between 1953 and 1973. *See* Pls. Opp. at 20, n.37 (citing *Kronisch v. United States*, 150 F.3d 112, 116 (2d Cir. 1998); *Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978); *Avery v. United States*, 434 F. Supp. 937 (D. Conn. 1977); *Cruikshank v. United States*, 431 F. Supp. 1355 (D. Hawaii 1977); *Orlikow v. United States*, 682 F. Supp. 77 (D.D.C. 1988)). None of these cases are comparable to protecting state secrets as to a current foreign intelligence program to detect the activities of a terrorist network that presently seeks to attack the United States.

**II. (U) THE STATE SECRETS PRIVILEGE REQUIRES DISMISSAL HERE.**

**1. (U) Whether the “Very Subject Matter” of this Case Implicates State Secrets Turns on the Nature of the Claims and What is Needed to Decide Them.**

(U) Plaintiffs next argue that the very subject matter of this suit is not a state secret because the existence of the TSP has been publicly acknowledged; the Department of Justice has produced a White Paper explaining its legality; and the President and Vice President have also publicly discussed and defended the program. *See* Pls. Opp. at 17-18. This argument fundamentally misapprehends the inquiry into whether the “subject of a lawsuit” is a state secret. The question is not whether the lawsuit concerns a matter that is publicly *known*—here, the existence of the Terrorist Surveillance Program—but, whether any attempt to adjudicate the merits of the claims would inherently put at issue state secrets.

(U) *Fitzgerald v. Penthouse Intl. Ltd.*, 776 F.2d at 1237, provides the best example. At issue there was an alleged libel that the plaintiff, who worked on a secret Navy program for training marine mammals was, sought to use his expertise for personal profit. *Id.* After determining that certain facts concerning the program were state secrets and must be protected, the court went on to analyze whether the case could proceed. Even though the existence of the program at issue was publicly known, *see id.* at 1242-43 (public declaration of the Secretary of the Navy describing marine mammal program), particular classified aspects of how the program operated would be inherently at issue in the case to adjudicate the alleged libel. The court observed that “due to the nature of the question presented in this action and the *proof required* by the parties to establish or refute the claim, the very subject of this litigation is itself a state secret.” *Id.* at 1243 (emphasis added). The court held that the subject of the case was a state secret because “the parties’ ability to prove the truth or falsity of the alleged libel” either risked

or depended on the disclosure of state secrets. *Id.*; *see also id.* at 1241-42 (“in some circumstances sensitive military secrets *will be so central to* the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters.”).

(U) Similarly, in *El-Masri*, the court rejected an argument that the government’s public affirmation of the existence of a program undercuts its assertion of privilege on the ground that there is a “critical distinction” between a general admission that a program exists and the admission or denial of the specific facts at issue in the case. *See* 2006 WL 1391390 at \*6. Once again, in deciding whether to dismiss, the court there looked beyond the existence of the program at issue to what facts would necessarily have to be proven in order to challenge the lawfulness of the secret program. *Id.* at 7.<sup>5</sup> This is the measure of whether the very subject of the case implicates state secrets, not whether the program at issue is known or the general topic has been discussed publicly. While this inquiry is similar to whether particular claims can proceed if evidence is excluded, it raises a broader question as to whether the case as a whole is suffused with state secrets such that any attempt to proceed will immediately implicate classified facts.<sup>6</sup>

(U) Again, none of the authority on which Plaintiffs rely alter the conclusion that state secrets are central to the subject matter of this case. Plaintiffs first attempt to distinguish this

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<sup>5</sup> (U) Plaintiffs attempt to distinguish *El-Masri* boils down the self-serving point that the facts on which *Plaintiffs* rely in this case are on the public record. *See* Pls. Opp. at 17, n.29.

<sup>6</sup> (U) As the government has noted, public discussion in the Department of Justice White Paper about the program does not disclose classified aspects of the program implicated by the claims. *See* Defs. Mem. at 29, n.18. Neither, of course, do public remarks by the President and Vice President in defense of the program. The notion that an effort by the President or Vice President to explain the TSP to the American people would foreclose dismissal on state secrets grounds is obviously meritless.

case from *Tenet v. Doe*, 544 U.S. 1, 125 S. Ct. 1230 (2005), where the Supreme Court recently reaffirmed *Totten v. United States*, 92 U.S. 105 (1875). Plaintiffs argue that only where activities are “unacknowledged” does the very subject of the lawsuit involve a state secret. *See* Pls. Opp. at 17. This is not correct. *Totten* and *Tenet* involved a particular type of classified activity deserving of special protection – secret espionage relationships between the government and another party. The *Totten* rule was not merely an “early expression” of the state secrets evidentiary privilege under *United States v. Reynolds*, but a “categorical bar” to claims challenging such relationships. *Tenet*, 544 U.S. at 9. But, as *Fitzgerald* demonstrates, this is not the only type of case where courts have found dismissal is required because the “very subject” of the case is a state secret. For example, the Court in *Kasza v. Browner*, found that the “very subject” of the case required dismissal, even though a classified espionage relationship was not at issue, but facts about an Air Force facility. *See* 133 F.3d at 1170; *see also El-Masri v. Tenet*, 2006 WL 1391390 at \*6 (finding “very subject” of case, a classified CIA program, was a state secret).

(U) Plaintiffs also are mistaken in their contention that the “very subject” of the case is not a state secrets because information about the matter is already in the public domain. *See* Pls. Opp. at 17. Even when alleged facts have been the “subject of widespread media and public speculation” based on “[u]nofficial leaks and public surmise,” those alleged facts are not actually established in the public domain. *See Afshar v. Department of State*, 702 F.2d 1125, 1130-31 (D.C. Cir. 1983); *see also Fitzgerald*, 776 F.2d at 1242-43 (affirming dismissal because subject was state secret despite published article on the matter); *National Lawyers Guild v. Attorney General*, 96 F.R.D. 390 (S.D.N.Y. 1982) (“disclosure of an intelligence method or goal in a

generalized way does not preclude protection of an intelligence method or goal which relates to a particular time and place and a particular target”); *see also Frugone v. Central Intelligence Agency*, 169 F.3d 772, 774 (D.C. Cir. 1999) (court refused to deem “official” a disclosure made by someone other than the agency from which the information is being sought); *Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir. 1982) (“[B]are discussions by this court and the Congress of [the NSA’s] methods generally cannot be equated with disclosure by the agency itself of its methods of information gathering”); *Public Citizen v. Department of State*, 11 F.3d 198, 201 (D.C. Cir. 1993) (an agency official does not waive FOIA exemption 1 by publicly discussing the general subject matter of documents which are otherwise properly exempt from disclosure under that exemption); *Edmonds v. Federal Bureau of Investigation*, 272 F. Supp.2d 35, 49 ( D.D.C. 2003) (since the statements in the press were made by anonymous sources, even documents containing identical information may properly be withheld because “release would amount to official confirmation or acknowledgment of their accuracy”) (quoting *Washington Post v. United States Dep’t of Defense*, 766 F. Supp. 1, 7-8 (D.D.C. 1991)).<sup>7</sup>

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<sup>7</sup> (U) Plaintiffs’ statement that the state secrets privilege was “rejected” in three cases due to prior publication is wrong. *See* Pls. Opp. at 19-20. In *Jabara*, the court upheld every aspect of the privilege claim as to NSA surveillance except the identity of the agency itself, which had been published in a Senate report. *See* 75 F.R.D. at 493. Likewise, the court in *In re United States* did not “reject” a state secrets assertion based on a prior FOIA disclosure, but remanded for the district court to consider the information as to which privilege was claimed on an item-by-item basis in light of its dated nature. *See* 872 F.2d at 478. Also, the court in *Ellsberg* did not reject the privilege claim on the ground that information about the matter was public, but stated that the government should make as much of a public record as possible as to what was and was not privileged and why. *See* 709 F.2d at 61, 64. Plaintiffs’ reliance on *McGehee v. Casey*, *see* Pls. Opp. at 17 n.30, is also inapposite. That case stands for the obvious proposition the CIA’s contractual agreement with its employees not to publish classified information does “not extend to unclassified materials or to information obtained [by the employee] from public sources.” *See* 718 F.2d 1137, 1141 & n.9 (4th Cir. 1983). Indeed, the government’s republication reviews of such articles, books, and other materials “do not constitute official

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(U) Plaintiffs' reliance on the district court's decision in *Spock v. United States*, 464 F. Supp. 510 (S.D.N.Y. 1978), *see* Pls. Opp. at 19, is also unavailing. *Spock* involved a complaint whose allegations concerned a surveillance program that had terminated years before the court's decision. *See id.* at 513 n.4, 517. The government specifically conceded that all of the complaint's allegations about the defunct program had become "a matter of public knowledge," except for the allegation that the plaintiff's own communications had been intercepted. *Id.* at 519. Concluding that the state secrets privilege was "rooted in the constitutional separation of powers" and "in the Article II powers of the executive," the court largely upheld the Executive's invocation of the privilege based on its *in camera, ex parte* review of a governmental affidavit. *Id.* at 518 & n.10. The court, however, accepted the plaintiff's assertion that the "one factual admission or denial" concerning whether the plaintiff's own communications were intercepted would "reveal no important state secret" and that the government's concern about "disclos[ing] additional information as the action progressed [was] somewhat premature" since the plaintiff indicated he could move for summary judgment if that single allegation were admitted. *Id.* at 519, 520. The court thus declined to dismiss the case where the "only" disclosure at issue was the bare admission or denial of a single allegation that, in the court's view and in the particular circumstances of that case, would not have caused harm

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<sup>7</sup>(...continued)

disclosures" because that review neither confirms nor denies the accuracy of the text, *see Schlesinger v. CIA*, 591 F. Supp. 60, 66 (D.D.C. 1984) (citing authority), and, for that reason, the factual assertions in such publications are not entitled to any "presumption of reliability." *See Washington Post*, 766 F. Supp. at 11-12. Finally, in *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303 (1983), Justice Brennan (writing as a Circuit Justice and not for the Supreme Court as Plaintiffs' citation suggests), stayed an order that permanently enjoined the press from publishing the names of the jurors in a criminal trial, observing that this information would have been available to any member of the public who attended an open proceeding in a criminal trial." *See id.* at 1306.

to the national security.<sup>8</sup> These narrow facts in *Spock* differ markedly from this case, where Plaintiffs challenge an ongoing terrorist surveillance program and seek to compel the government to confirm or deny the scope of its surveillance activities.<sup>9</sup>

(U) Finally, Plaintiffs claim that other courts have adjudicated legal questions concerning foreign intelligence surveillance without confronting the state secrets privilege. *See* Pls. Opp. at 22. This, of course, demonstrates that the government has not asserted the state secrets privilege in all such cases. In any event, the mere fact that other cases touch on the subject of foreign intelligence surveillance without implicating the state secrets privilege has no bearing on whether *this case* could be adjudicated absent state secrets. *See, e.g., In re Sealed Case*, 310 F.3d 717, 721-746 (For. Intel. Surv. Rev. 2002) (court reviewed FISA's statutory

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<sup>8</sup> (U) To the extent that the district court's decision in *Spock* could be read to imply that dismissal of a civil action is not a valid remedy to protect state secrets, such a notion has clearly been rejected by later cases, including in the circuit where *Spock* was decided. *See Zuckerbraun v. General Dynamics Corp.*, 935 F.2d at 547 (dismissal is "require[d]" in cases where invocation of the state secrets privilege "precludes access to evidence necessary for the plaintiff to state a prima facie claim," or "hampers the defendant in establishing a valid defense").

<sup>9</sup> (U) The legal basis for the district court's conclusion that admitting or denying whether the *Spock* plaintiff had been surveilled is not clear from its opinion. The court's *in camera, ex parte* review of the government's affidavit may underlie its ruling that "no important state secret" was involved with respect to this particular individual and a defunct, publicly disclosed program. *See* 464 F. Supp. at 519. But to the extent *Spock* might be read as ruling that newspaper reporting of an alleged fact renders the state secret privilege inapplicable to that fact, *id.* at 519, 520, *Spock* was wrongly decided. Such a rule would improperly place national security decisions in the hands of reporters whose sources often speculate as to government activity and whose reporting in any event will not always be presumed accurate or reliable by the public, and would require the United States to officially confirm or deny such reporting when the government has not previously done so. That outcome would largely eviscerate the state secrets privilege and is contrary to more recent, authoritative decisions which affirm the government's right to protect national security information if the government has not officially disclosed the precise information to the public. *See, e.g., Afshar*, 702 F.2d at 1130-31; *Hudson River Sloop Clearwater, Inc. v. Department of Navy*, 891 F.2d 414, 421-22 (2d Cir. 1989); *Fitzgerald*, 776 F.2d at 1242-43.

language to determine whether the statute requires the government to demonstrate that its primary purpose in conducting electronic surveillance is not criminal prosecution and also to determine whether the statute violated the Fourth Amendment); *United States v. Duggan*, 743 F.3d 59, 69-76 (2d Cir. 1984) (court reviewed language of FISA to determine constitutionality of that act); *United States v. Pelton*, 835 F.2d 1067, 1074-1075 (4th Cir. 1987) (same). What is at issue here is whether an intelligence program is injuring these Plaintiffs and is being operated in accordance with the law, and these are fact issues that implicate state secrets.

**2. (U) Plaintiffs' Allegations Are Insufficient to Establish Their Standing and, Alternatively, State Secrets Would be Necessary to Determine if Plaintiffs Have Standing.**

(U) Plaintiffs' opposition presents additional grounds for finding that the Plaintiffs lack standing. As set forth in Defendants' opening brief, Plaintiffs' Complaint does not sufficiently allege a basis for Plaintiffs' standing. *See* Def. MSJ at 18-25. For example, Plaintiffs' assertion that they are subject to surveillance under the TSP because they talk to family, friends, journalist and scholarly sources overseas about current events and politics,<sup>10</sup> are so far beyond the scope of the alleged surveillance program at issue, which Plaintiffs concede targets the communications of al Qaeda, *see* Pls. Opp. at 24, that their allegations of standing on these grounds are without any foundation. Quite rightly, Plaintiffs appear to have abandoned this basis of standing in their opposition and focus on whether Plaintiff attorneys who represent

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<sup>10</sup> (U) *See* Compl. ¶¶ 79, 81, 82 (Plaintiff Saleh); ¶88 (Plaintiff Adbrabboh); ¶ 95 (Plaintiff Ayad); ¶¶ 114-116 (Plaintiff Hassan); ¶ 158 (Plaintiff Bamford); ¶¶ 164-67 (Plaintiff Diamond); ¶¶ 171-173 (Plaintiff Hitchens); ¶¶ 174-182 (Plaintiff McKelvey); ¶¶ 183-191 (Plaintiff Rubin) (all alleging the existence of the program has inhibited their ability communicate with family, friends, and scholarly or journalist contacts about topics that might allegedly trigger monitoring by the government such as the war in Iraq, terrorism, Israeli-Palestinian issues, human rights in China and Baluchistan); *see* also ¶ 123 (Plaintiff Greenpeace alleging they fear surveillance has based on past protest activities).

terrorist suspects have standing on the theory that they have modified their professional practices. *See id.* Even as to these Attorneys, Plaintiffs are merely speculating that they “plainly fall within the scope of the program.” *See id.* The fact that some people may be more likely subject to surveillance, or that a program might generally authorize surveillance of terrorists, is still too remote a basis on which to claim that the government has imposed a regulatory or proscriptive requirement that has caused any injury to Plaintiffs, or imminently threatens to cause injury. *See* Defs. Mem. at 23 (citing *United Presbyterian v. Reagan*, 738 F.2d 1375, 1380 (D.C. Cir. 1984)).

(U) Beyond this, Plaintiffs are simply wrong that classified facts concerning the actual conduct of the TSP would have no bearing on their standing. Foremost among the factual issues implicated is that the government would not be able to confirm or deny any allegation of direct injury of caused by surveillance without disclosing crucial information about who is and is not targeted, and the scope of the program in general. *See* Defs. Mem. at 25-28. As Defendants have noted, courts have dismissed identical challenges to alleged surveillance on state secrets grounds. *See id.* at 25-28 (citing *Halkin I*, supra, 598 F.2d at 8-9 and *Halkin v. Helms*, 690 F.2d 977, 1001 (D.C. Cir. 1982) (*Halkin II*)).

(U) Plaintiffs’ attempt to distinguish the *Halkin* cases on the ground that they do not seek an injunction to stop the surveillance of *particular individuals*, *see* Pls. Opp. at 25 (original emphasis), only makes their standing problem worse. Plaintiffs argue that they have standing because they seek to invalidate the TSP “on its face” as contrary to law. *See id.* Further, they claim they have provided concrete evidence of injury to their professional duties that the Plaintiffs in the *Halkin* cases did not. *See id.*

(U) This argument is, first, a key concession that Plaintiffs are no longer alleging

personal injury as targets of surveillance under the TSP. In their Complaint, several of the Plaintiffs do allege that are personally being surveilled under the TSP,<sup>11</sup> and this is the very kind of injury the *Halkin* plaintiffs alleged, and which the courts there found could not be confirmed or denied due without the disclosure of state secrets. Since Plaintiffs now appear to abandon this claim of direct injury caused by the TSP, their basis for standing becomes even more attenuated.

(U) Plaintiffs proceed to argue that they have standing because they are challenging the TSP “on its face.” *See* Pls. Opp. at 25. This is a specious basis on which to claim standing. A “facial” challenge seeks to invalidate a law *in toto*, as to parties that are not before the court. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 n.3 (1981). The showing necessary for such an injunction is extremely heavy: with few exceptions, a facial challenge must be rejected unless there exists no set of circumstances in which the statute can constitutionally be applied. *See, e.g., United States v. Salerno*, 481 U.S. 739, 745 (1987). Even for facial challenges, however, a plaintiff must still have standing in his own right and cannot merely vindicate the claims of others. *See, e.g., Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984) (where plaintiff raises facial challenge on behalf of non-parties, the “crucial question” in determining whether case-or-controversy exists is whether plaintiff establishes his own injury-in-fact). The mere invocation of the facial challenge doctrine in no way relieves a plaintiff from alleging personal injury. Beyond this, Plaintiffs’ Complaint presents no grounds for treating this case as a “facial challenge,” since Plaintiffs’ allegations of injury to their own professional duties as a result of the TSP would in no way support

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<sup>11</sup> (U) *See, e.g.* Compl. ¶¶ 71, 76, 80, 87, 94, 115, 122, 146 (Plaintiffs ACLU, ACLU-Michigan, Saleh, Abdrabboh, Ayad, Hassan, Greenpeace, Swor allege they have well-founded belief they are currently being intercepted).

invalidation of the TSP *in toto*, including as to al Qaeda agents. The law is clear that injunctive relief may be no broader than necessary to provide relief to the parties before the court, *Califano v. Yamaski*, 442 U.S. 682, 700-702 (1979), and Plaintiffs could not, through their own claims of injury, invalidate the TSP in other applications. Thus, any claim that they have standing because this is a “facial” challenge is entirely unfounded as a matter of law.

(U) This leaves, as the sole basis for their standing, Plaintiffs’ claim of injury to their professional associations allegedly caused by fear that they, and those with whom they communicate, might be subject to surveillance under the TSP. *See* Pls. Opp. at 23 (citing Plaintiffs’ Reply Memorandum in Support of Plaintiffs’ Motion for Partial Summary Judgment at 2-8) (“Pls. Reply”). Defendants have explained that this basis of injury constitutes no more than an alleged “chilling effect” based on speculative fears that the TSP subjects the Plaintiffs to surveillance and is foreclosed by *Laird v. Tatum*, 408 U.S. 1 (1972). *See* Defs. Mem. at 18-25. Plaintiffs attempt to distinguish this authority (in their prior reply brief) by citing several cases in which the courts found that a claim of injury involved “something more” than a claimed chilling effect based on the existence of system of investigation. *See* Pls. Reply at 4-5. once again, Plaintiffs misconstrue the very authority on which they rely. As Justice (then Judge) Stephen Breyer explained in *Ozonoff v. Berzak*, 744 F.2d 224, 229 (1st Cir. 1984), the “something more” that would support standing beyond a claimed “chilling effect” is not whether the Plaintiffs merely allege more of an injury, but whether *the government* has taken some additional action against the Plaintiffs. Obviously, a plaintiff can always attempt to allege “something more” than merely being chilled by a program, as Plaintiffs have tried here. But the core issue of standing is whether some government action actually caused the alleged harm. Here, the “something more”

Plaintiffs allege is their own subjective reaction to the existence of the TSP—a change in their own conduct in communicating with people. This is precisely the same claim of injury as alleged in *Laird*—that the existence of a surveillance program had a “present inhibiting effect” on Plaintiffs’ ability to communication. *See* 408 U.S. at 9. It is the manifestation of the alleged chill, and is not a distinct injury. All of the cases that Plaintiffs cite in which the Court found that standing was not precluded by *Laird* involved a direct action against the plaintiff by the government. *See* Pls. Reply at 5-6.<sup>12</sup>

(U) Moreover, Plaintiffs’ allegation that third parties with whom Plaintiffs deal have reacted negatively to the mere existence of the TSP and, thus communicate differently with Plaintiffs, further weakens any basis for standing here. Since the speculative chill of the Plaintiffs would not be sufficient for standing under *Laird*, certainly that of other non-parties would not be as well.<sup>13</sup>

(U) In sum, Plaintiffs now recede from any allegation of direct injury of surveillance,

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<sup>12</sup> (U) *See Clark v. Library of Congress*, 750 F.2d 89, 93 (D.C. Cir. 1984) (*Laird* inapplicable because plaintiff was in fact investigated and suffered injury of non-promotion); *Paton v. La Prade*, 524 F.2d 862, 868 (3d Cir. 1975) (*Laird* inapplicable because student was actually investigated, not merely challenging system of investigation out of fear it might encompass her); *Ozonoff v. Berzak*, 744 F.2d at 229 (*Laird* inapplicable because requirement of loyalty oath to work for international organization was applicable to plaintiff and had a direct proscriptive effect to bar his application absent compliance).

<sup>13</sup> (U) Once again cases cited in Plaintiffs’ reply involving alleged injuries resulting from the impact of a policy on third parties are clearly inapposite. *See Presbyterian Church v. United States*, 870 F.2d 518, 522 (9<sup>th</sup> Cir. 1989) (church suffered actual injury in decreased attendance and participation when government actually entered church to conduct surveillance); *Meese v. Keane*, 481 U.S. 465, 475 (1987) (Plaintiff state legislator had standing to challenge requirement that foreign film he exhibited be labeled political propaganda because injury to his reputation in the community was traceable to this requirement imposed on him); *Friends of the Earth v. Laidlaw Env'tl. Servs. Inc.*, 528 U.S. 167, 181-83 (2000) (association had standing to sue alleged polluter because their own members lived near river and suffered ill effects of pollution).

as well as their theory that merely talking overseas about political topics supports an injury under the TSP, and rely for their standing on the notion that any group of citizens can bring a “facial” challenge to have a government program reviewed, and that their own decision to change practices in reaction to the existence of the TSP is enough for standing. None of this withstands scrutiny. In any event, to the extent facts are necessary to address Plaintiffs’ standing, the government cannot confirm or deny any surveillance, nor describe program details for an assessment of whether Plaintiffs’ reaction to the program is reasonable.

**3. (U) Plaintiffs’ Claims Raise Significant Fact Issues, and the Evidence Needed to Address Those Claims Are Subject to the State Secrets Privilege.**

(U) Turning to their claims on the merits, Plaintiffs assert that defendants have “no valid legal defense” that requires the disclosure of state secrets, either as to claims challenging whether the President has authority to establish the TSP, or whether the program complies with the Fourth Amendment. As set forth below, this contention is untenable.

**A. (U) Plaintiffs’ Challenge to the President’s Authority Raises Significant Fact Issues and State Secrets Are Necessary to Resolve This Claim.**

(U) The beginning and end of Plaintiffs’ analysis on the President’s authority is that the Foreign Intelligence Surveillance Act (“FISA”), 50 U.S.C. §1804 *et seq.*, governs the matter definitively— indeed, that it covers every possible circumstance in which the President wishes to direct foreign intelligence surveillance. Therefore, Plaintiffs argue, the President has no authority to proceed otherwise “no matter what his motivations may be, and no matter what kind of threat or emergency is posed.” *See* Pls. Opp. at 26-27. Plaintiffs’ position does not even allow for the possibility that there are reasonable grounds to debate whether and to what extent the President and Congress share authority in this area, and where the line between their

respective powers may be in a given situation. The background on this issue set forth in Defendants' opening brief, demonstrates that, far from being a settled proposition, the courts and Congress itself have recognized that the President does have authority in the area of foreign intelligence surveillance.

(U) To briefly reiterate, the President's most basic duty under the Constitution is to protect the nation from attack. *See, e.g., The Prize Cases*, 67 U.S. at 635 (1862); *Ex parte Quirin*, 317 U.S. 1, 28 (1942). Seeking to detect the presence and activities of a foreign enemy in the United States that threatens to attack again is also undoubtedly within the President's authority. *See Totten v. United States*, 92 U.S. at 106; *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *Tatum v. Laird*, 444 F.2d at 952-53 (gathering intelligence within the President's constitutional authority). *See* Defs. Mem. at 32. Courts have also recognized the inherent authority of the President to conduct foreign intelligence surveillance. *See id.* at 33. Congress itself recognize that it was treading on Presidential authority in enacting the FISA. *Id.* at 32-33. Moreover, the FISA itself creates an exception from criminal sanctions if surveillance is authorized by other law, and the Authorization for the Use of Military Force ("AUMF") granted the President broad power specifically to detect and stop al Qaeda attacks in the United States. *Id.* at 32. Based on all these considerations, the question here is whether the President acted within his statutory and constitutional authority in establishing the TSP. That question cannot be answered by mere reference to one factor – the existence of the FISA.

(U) Indeed, Plaintiffs themselves put facts at issue, arguing that the success of FISA over the years is proof that FISA would be sufficient for the present national security crisis posed

by al Qaeda. *See* Pls. Opp. at 27; Pls. Reply at 20-22. Plaintiffs have no way of knowing whether that is so, however, in light of the particular exigency and enemy tactics at issue. Inevitably, to demonstrate that the President has acted within his authority in relation to the specific threat the nation faces would plainly require delving into the background of that threat and the specific actions to meet it.

**[REDACTED TEXT]**

**B. (U) Plaintiffs' Fourth Amendment Claim Raises Significant Fact Issues and State Secrets Are Necessary to Resolve This Claim.**

(U) Plaintiffs take the same absolute position in arguing that their Fourth Amendment claim requires no facts to resolve. They argue that “warrantless wiretapping is *per se* unreasonable” under the Fourth Amendment. That, again, is not the law. Numerous courts have held otherwise, and in 2003 the FISA Court of Review itself stated that “it took for granted” that the President has his own authority in this area. *See In re Sealed Case*, 310 F.3d at 742. Thus, the issue is not whether warrantless wiretapping for foreign intelligence purposes is ever permissible but in what circumstances. In other Fourth Amendment contexts, the need for a warrant turns on the particular exigencies of the situation. *See* Defs. Mem. at 34. Indeed, in a case Plaintiffs themselves cited, *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967), the Supreme Court held that exigent circumstances made it “imperative” that the police search a premises without a warrant, holding that the Fourth Amendment does not require law enforcement to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. *See id.* That, of course, is a fact question that turns on the exigency of the situation and whether obtaining a warrant in particular circumstances is impractical and would undermine vital law enforcement efforts.

(U) Once again, Plaintiffs' argument suggests, inadvertently, that facts are at issue as to this claim. They state that the government "must prove that the surveillance fits into an established exception to the warrant requirement . . . ." *See* Pls. Opp. at 29. Defendants agree that this is what would be at issue if the case proceeded. But this is an issue of proof, not purely a legal question, as Plaintiffs contend. *See id.* Proof is a matter of evidence, and the evidence that would demonstrate that a warrant requirement would be impractical to detect the movements of al Qaeda, in the face of their tactics and in response to the exigent threat posed, cannot be placed upon the public record.

[REDACTED]

(U) Plaintiffs' reliance on *United States v. United States District Court*, 407 U.S. 297 (1972) (the "*Keith*" case), is misplaced. The *Keith* case expressly reserved the issue of the President's authority as for foreign intelligence surveillance, and this is an area where the specific factual context is of greater significance, *id.* at 321-22, since the lawfulness of foreign intelligence surveillance requires ascertaining precisely where the line between presidential and congressional authority may be in a particular case. Indeed, even in *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) in which a plurality suggested that the warrant requirement would apply even as to foreign intelligence gathering, the court specifically noted that the target at issue in that particular case was a *domestic* organization, indicating that their conclusion as to the President's powers might be different if a foreign power was being targeted. *See* 516 F.2d at 651 ("we are only presented with a case in which foreign threats of retaliation against individual citizens abroad were provoked by the actions of the domestic organization which was subsequently wiretapped, rather than a case in which the

wiretapped organization acted in collaboration with, or as the agent of, the foreign power from which the threat emanated.”)

(U) Plaintiffs’ assertion that the court in *Ellsberg v. Mitchell* “rejected the government’s argument that state secrets necessarily prevented the government from arguing there was a foreign exception to the warrant requirement,” *see* Pls. Opp. at 30, once again wrenches out of context what the court said and did. First, with respect to those plaintiffs whom the government in *Ellsberg* had not admitted overhearing, the court found they lack an essential element of their proof of standing and that dismissal of their claims was proper. *See* 709 F.2d at 65. Only with respect to those as to whom surveillance was confirmed did the divided panel remand the case for further consideration of the Fourth Amendment issue in a highly narrow context. The particular claims at issue were *Bivens* claims alleging that individual officers of the government violated the plaintiffs’ Fourth Amendment rights. The court believed a remand was possible because all that needed to occur was the submission of a classified declaration describing what these officers did to demonstrate whether they had qualified immunity. *See id.* at 69. The court noted that, where the ascertainment of qualified immunity is at issue, “[s]ome factual judgments will still be required, but they will be more circumscribed and manageable” and “[o]nce an official’s conduct has been ascertained, the determinative question will be what rules were ‘clearly established’ at the time he acted.” *Id.* Through the use of an *in camera* submission, “[t]he judge would thus need only to determine whether clearly established doctrine proscribed such conduct at the time it was undertaken” and “such a determination would seem to be possible without the aid of arguments of counsel.” *Id.*

(U) Accordingly, the *Ellsberg* remand was highly limited in scope, and the case does

not stand for the proposition that the merits of constitutional claims can be decided through *in camera* procedures even after the assertion of the state secrets privilege. To the extent it may be read so broadly, then *Ellsberg* is not consistent with state secrets authority which makes clear that, where classified information is necessary to resolve a case, the case must be dismissed. *See Halkin I, Halkin II, Molerio, El-Masri, Edmonds supra* (dismissing constitutional claims on state secrets grounds); *see also Ellsberg*, 709 F.2d at 70 (MacKinnon, C.J. concurring in part and dissenting in part) (“because the claims of state secrets privilege have been sustained, I can envision no scenario whatsoever in which the district court could resolve on the public record the factual question whether these taps fall within the foreign agent exception.”<sup>14</sup>)

**III. (U) ALTERNATIVES TO DISMISSAL THAT PLAINTIFFS SUGGEST ARE UNSUPPORTED IN LAW AND UNWORKABLE HERE.**

(U) Finally, Plaintiffs urge the Court to consider various procedural alternatives to dismissal. *See* Pls. Opp. at 31-37. Defendants agree that the Court may “carefully scrutinize” the government’s claim of privilege, and note that we have already set forth for the Court, as specifically as possible, the particular evidence that is privileged, the relevance of that evidence to a valid defense, and the reason disclosure of the information at issue would harm national security. *See* Pls. Opp. at 32-33. Beyond this, however, the procedural mechanisms suggested by Plaintiffs are not available in a case such as this.

(U) First, the law is clear that Plaintiffs’ counsel are not to be granted security clearances authorizing their access to classified information under protective orders, particularly

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<sup>14</sup> (U) Plaintiffs’ suggestion that *Jabara* permitted the Fourth Amendment claim to proceed despite a state secrets claim is wholly misleading. That claim had nothing to do with an initial state secrets assertion by NSA as to the fact of interception, and ultimately the Fourth Amendment was dismissed in part because the court presumed the NSA surveillance was lawful. *See Jabara v. Webster*, 691 F.2d at 277-279.

where the states secrets privilege has been asserted. The rationale for this rule is that “our nation’s security is too important to be entrusted to the good faith and circumspection of a litigant’s lawyer . . . or to the coercive power of a protective order.” *Ellsberg*, 709 F.2d at 61 (rule denying private counsel access to classified information is “well settled”); *see also Halkin I*, 598 F.2d at 7 (“It is not to slight judges, lawyers, or anyone else to suggest that any such disclosure carries with it the serious risk that highly sensitive information may be compromised”) (quoting *Knopf, Inc. v. Colby*, 509 F.2d 1362 (4th Cir. 1975)); *Weberman v. NSA*, 668 F.2d 676, 678 (2d Cir. 1982) (risk presented by giving private counsel access to classified information outweighs benefit of adversarial proceedings); *Jabara*, 75 F.R.D. at 486 (“plaintiff and his legal representative should be denied access to classified in camera exhibits submitted in support of the (privilege) claims”). Indeed, the Supreme Court in *Reynolds* indicated that the court itself “should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.” *See* 345 U.S. at 10.

(U) Beyond this, Plaintiffs propose other procedures to facilitate their access to sensitive information concerning the case, such as protective orders and stipulated findings or summaries of facts. *See* Pls. Opp. at 35-36. As one court aptly observed, however,

Such procedures, whatever they might be, still entail considerable risk. Inadvertent disclosure during the course of a trial-or even in camera-is precisely the sort of risk that *Reynolds* attempts to avoid. At best, special accommodations give rise to added opportunity for leaked information. At worst, that information would become public, placing covert agents and intelligence sources alike at grave personal risk.

*Sterling v. Tenet*, 416 F.3d at 348; *see also Halkin I*, 598 F.2d at 7 (protective orders “cannot

prevent inadvertent disclosure nor reduce the damage to the security of the nation which may result.”). Moreover, such measures would effectively convert the state secrets privilege from an absolute protection of state secrets regardless of a litigant’s need, to a qualified one where some information is shared based on need. This is not the law.<sup>15</sup>

(U) Likewise, Plaintiffs’ brief contention that Section 1806(f) of the FISA, 50 U.S.C. § 1806(f), authorizes judicial review of the merits of their claims is wrong. *See* Pls. Opp. at 21-22. That provision was enacted for the benefit of the government and is procedural in nature. The statute itself, and case law construing this section, make clear that it applies to someone as to whom FISA surveillance has been made known, typically in a criminal proceeding, *see, e.g., United States v. Ott*, 827 F.2d 473, 474 (9th Cir. 1987); *United States v. Hammoud*, 381 F.3d 316, 331-32 (4th Cir. 2004), *vacated and remanded on other grounds*, 543 U.S. 1097 (2005); *United States v. Squillacote*, 221 F.3d 542, 552 (4th Cir. 2000), *cert. denied*, 532 U.S. 971 (2001). The provision is a mechanism for dealing with motions to suppress or discovery demands related to that acknowledged surveillance – not for discovering whether surveillance has occurred in the first place. Section 1806(f) allows the district court to conduct *in camera, ex parte* proceedings at the request of the Attorney General, notwithstanding any other law that might preclude such proceedings, but *only* in those limited circumstances in which Section

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<sup>15</sup> (U) The idea of stipulations or summaries of classified facts, in particular, has little to commend it. Such an effort to “work around” classified facts through stipulations or substitutions would be suggestive of what the underlying facts are—and thus risk disclosure, *see Halkin I*, 598 F.2d at 8 (even bits and pieces of seemingly innocuous facts can be analyzed and fitted into place to reveal “how the unseen whole must operate.”). Alternatively, the stipulated facts would be so general as to lead to a decision based on facts that are materially inaccurate or incomplete, in effect an advisory opinion. *Halkin II*, 690 F.2d at 1001; *see also Molerio*, 749 F.2d at 825 (it would be a “mockery of justice” to allow a case to proceed to the merits based on erroneous assumptions as to the actual facts protected by the state secrets privilege).

1806(f) applies. Indeed, the ACLU has already been told by one court that the provision is not a mechanism for discovering in the first instance whether surveillance is occurring in order to then challenge its lawfulness. *See ACLU Foundation v. Barr*, 952 F.2d 457, 468-69 & n. 13(D.C. Cir. 1991) (“[t]he government makes this point, with which we agree, that under FISA it has no duty to reveal ongoing foreign intelligence surveillance”) (citing S. Rep. No. 604, pt. 1, 95th Cong. 1st Sess. at 59, U.S.C.C.A.N. 1978, at pp. 3960-61); *see also In re Grand Jury Investigation*, \_\_\_ F. Supp. \_\_\_, 2006 WL 908595, \*6 (E.D. Va. 2006) (in grand jury proceedings, neither the non-target witness nor the potential target were entitled to notice under the FISA of whether there was any warrantless NSA electronic surveillance of the potential target).<sup>16</sup>

(U) As a last resort, Plaintiffs contend that the Court should engage in merits determination based on classified evidence, *in camera, ex parte*. *See* Pls. Opp. at 36-37. This is not the established procedure for resolving state secrets claims. Rather, the law is clear that, where classified information is necessary to resolve a case, dismissal, not a secret merits determination, is required. *Tennenbaum v. Simonini*, 372 F.3d 776, 777 (6<sup>th</sup> Cir. 2004).

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<sup>16</sup> (U) Plaintiffs point to a number of criminal cases, for which the Classified Information Procedures Act, 18 U.S.C. § app. 3 § 1 *et seq.* (“CIPA”), provides opposing counsel with limited access to classified materials in carefully circumscribed instances. *See United States v. Pappas*, 94 F.3d 795, 799-800 (2d Cir. 1996); *United States v. Rezaq*, 156 F.R.D. 514, 524, vacated in part on reconsid. on other grounds, 899 F. Supp. 697 (D.D.C. 1995); *United States v. Musa*, 833 F. Supp. 752, 753-54 (E.D. Mo. 1993); *cf.* 18 U.S.C. App. 3 § 3 (“[u]pon motion of the United States ... in any criminal case”) and § 5 (“involving the criminal prosecution of such defendant”). No similar statute applies in civil cases like this one, and Plaintiffs’ citation to this authority is irrelevant. Moreover, the reasons that CIPA applies in a criminal setting do not exist in a civil setting. Where the very liberty or life of a criminal defendant is at stake, and classified information is relevant to that determination, there is a need for procedures to ensure that due process is provided to that criminal defendant. Yet even CIPA does not require the government to declassify anything, and the government can still choose to protect classified information in the criminal setting, although it might have to decline prosecution. On the civil side, the presumption is reversed: if classified information is needed to resolve the case, the plaintiff’s interest must give way to the national security interest.

CONCLUSION

For the foregoing reasons, the Court should uphold the assertion of the state secrets privilege and related statutory privileges by the United States, and grant Defendants' Motion to Dismiss or, in the Alternative, for summary judgment.

Dated: June 30, 2006

Respectfully submitted,

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