**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,

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 and Chief of the Central Security Service,

Defendants.

Case No. 2:06cv10204

Hon. Anna Diggs Taylor

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

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**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

### Cases

**Statutes**

**Other Authorities**

## INTRODUCTION

The government has moved to dismiss this challenge to the legality of warrantless wiretapping by the National Security Agency (hereinafter "the Program"). Although it cloaks its motion in rhetoric about state secrets and presidential duties, the government's real purpose is clear. It seeks not simply to dismiss *this* case, but to prevent *any* court from reviewing whether the Program violates the law and the Constitution.[1] The government's theories would not only insulate warrantless wiretapping from court review, but by implication could immunize *any* action taken by the President in the "war on terror" – including torture and indefinite detention of Americans within our own borders. That view of extreme and unchecked executive power is fundamentally inconsistent with American democracy and should be rejected.

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[1] Indeed, the government is seeking dismissal of all cases challenging the NSA Program. *See* Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, *Center for Constitutional Rights v. Bush*, No. 06-cv-00313 (S.D.N.Y. filed Jan. 17, 2006); Defendants' Motion for an Extension of Time to Respond Both to the Complaint and Plaintiffs' Motion to Compel, *Al-Haramain Islamic Foundation v. Bush,* No. CV-06-274-KI (D. Ore. filed Feb. 28, 2006) ("Defendants intend to assert the state secrets privilege in response to both the Complaint and Plaintiffs' Motion to Compel"). It has also intervened with the intention to seek dismissal of lawsuits against telecommunications companies that aided the government in illegal wiretapping. *See* Memorandum of the United States in Support of the Military and State Secrets Privilege and Motion to Dismiss or in the Alternative, for Summary Judgment, *Hepting v. AT&T*, No. C-06-0672-VRW (N.D. Cal. filed Jan. 31, 2006); Statement of Interest of the United States in Support of AT&T's Motion for a Stay Pending Decision by the Judicial Panel on Multi-District Litigation, *Terkel v. AT&T*, No. 06 C 2837 (N.D. Ill. filed May 22, 2006) ("Assuming that the MDL Actions are transferred to and consolidated in a single district court, the United States intends to assert the military and state secrets privilege . . . in those actions and to seek their dismissal."). The government has also filed suit against the Attorney General of New Jersey to block subpoenas to officers of the telecom companies. *See United States v. Farber*, No. 3:06-cv-02683-SRC-TJB (D. N.J. filed June 14, 2006). Finally, in criminal cases alleging terrorism-related crimes, the government has refused to disclose whether it relied on NSA wiretaps. *See*, *e.g., United States v. Aref*, No. 04-cr-00402 (N.D.N.Y. filed Aug. 6, 2004); *United States v. Albanna*, No.1:02-cr-00255 (W.D.N.Y. filed Dec. 17, 2002).

As thoroughly explained in plaintiffs' reply brief, no additional facts are necessary or even relevant to the Court's resolution of the case. Plaintiffs neither seek nor require discovery to prevail in their motion for partial summary judgment because government officials have already admitted every fact necessary to resolve the motion. Approved by President Bush in the fall of 2001, the Program entails the interception, without a warrant or any judicial review, of the electronic communications of people inside the United States.[2] The interceptions are approved by an NSA "shift supervisor,"[3] without probable cause of any kind.[4] The government does not comply with the requirements of FISA, though it has conceded that the communications intercepted under the Program fall within the statute.[5] The only question before the Court is a purely legal one: whether the executive branch has the power under the Constitution to ignore the law.

While the government insists that more facts are necessary to defend the legality of executive conduct, *it refuses to supply those facts.* Instead, the government relies on the state secrets privilege – an evidentiary privilege – to seek dismissal of the entire case. Its view of the

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[2] SUF 1A (Exh. A at 1881); SUF 1B (Exh. B); SUF 11A (Exh. H); SUF 11B (Exh. B); SUF 11C (Exh. C); SUF 11D (Exh. B); SUF 2A (Exh. C); SUF 2B (Exh. D at 1889); SUF 2C (Exh. F); SUF 3A (Exh E); SUF 3B (Exh. F); SUF 3C (Exh. B); *see also Hearing on the Nomination of General Michael V. Hayden to be the Director of the Central Intelligence Agency Before the S. Select Comm. on Intelligence,* 109th Cong. 72 (2006). (Gen. Michael Hayden, describing an interception under the Program: "[W]e have bumped into the privacy rights of a protected person, okay? And no warrant is involved, okay? We — we don't go to a court.").

[3] SUF 13A (Exh. B); *see also* SUF 13B (Exh. H).

[4] SUF 6J (Exh. H); *see also* SUF 11C (Exh. C); SUF 6G (Exh. B) (emphasis added); SUF 6A (Exh. C); SUF 6I (Exh. C); SUF 6B (Exh. D at 1885); SUF 6C (Exh. A at 1881); SUF 6D (Exh. E); SUF 6E (Exh. F); SUF 6F (Exh. G); SUF 6H (Exh. C).

[5] *See* Govt. Br. 38; SUF 9 (Exh. B); SUF 10A (Exh. B); SUF 10B (Exh. C); SUF 10E (Exh. B); SUF 10F (Exh. C); SUF 10G (Exh. F).

state secrets privilege is unsupported by the case law and irrelevant to the court's consideration of plaintiffs' motion. As discussed fully below, dismissal based on state secrets is a rare and drastic remedy, proper only in two narrow circumstances, neither of which applies here. Because the government has admitted the existence of the Program and all of the facts required to decide its legality, there is no way to transform "the very subject matter" of the case into a state secret. Further, no additional facts – let alone privileged ones – are necessary or relevant to plaintiffs' claims or any valid defense. Dismissal would be premature at this juncture, even if the court determined that more facts *were* necessary for plaintiffs' case or the government's defense. If more facts were necessary, the court would have the duty to review carefully the specific evidence relied upon by the government and to disentangle and provide to plaintiffs all non-privileged evidence. Because the government's reliance on state secrets is improper and would confer a broad immunity on even the most egregious executive conduct, the government's motion to dismiss should be denied.

## I. The Government's Radical View Of The State Secrets Privilege Would Preclude Judicial Review And Immunize Executive Action.

Plaintiffs' prior briefs explain that the President violated the separation of powers by ignoring Congress' express prohibition in FISA of warrantless wiretapping. Pl. Opening Br. 17-25; Pl. Reply Br. 11-19. The government's broad view of the state secrets doctrine, if accepted, would present another serious violation of the separation of powers: it would immunize executive action from judicial scrutiny. Under the government's theory, the Executive could escape accountability for any illegal action by taking refuge in the state secrets doctrine. That view, like the government's view that it can ignore laws expressly passed by Congress to limit the President's authority, is unsupported by the Constitution and the case law. Courts have warned of the dangers of relying on the state secrets privilege to deny plaintiffs access to just one

discrete piece of relevant evidence, for example, in a tort case resulting from the crash of a military plane. *Reynolds v. United States,* 345 U.S. 1, 10-12 (1953). The harm from the government's radical expansion of the state secrets doctrine in cases like the present one is of an altogether greater magnitude. If accepted, it would upset the system of checks and balances that defines our system of government by preventing courts from reviewing executive actions that violate the law and the Constitution.

The executive branch cannot disable, by unilateral fiat, the power of Article III courts to be the ultimate arbiters of the law and the Constitution. *Cf. Marbury v. Madison*, 1 Cranch 137, 177 (1803) (it is "the province and duty of the judicial department to say what the law is"); *City of Boerne v. Flores,* 521 U.S. 507*,* 524 (1997) (the "power to interpret the Constitution in a case or controversy remains in the Judiciary"); *Legal Services Corp. v. Velazquez,* 531 U.S. 533, 545 (2001) ("Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy").[6] As Judge Merritt has stated: "Under no circumstances should the Judiciary become the handmaiden of the Executive. The independence of the Judiciary must be jealously guarded at all times against efforts . . . to erode its authority." *United States v. Smith,* 899 F.2d 564, 569 (6th Cir. 1990).

The Supreme Court has stated that "when the President takes official action, the Court has the authority to determine whether he has acted within the law." *Clinton v. Jones,* 520 U.S. 681, 703 (1997).[7] To allow the Executive to have the first and final say on the extent of its own

[6] *See also United States v. Morrison,* 529 U.S. 598, 616 n.7 (2000) ("No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text.").

[7] *See also Sterling v. Constantin*, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions," not matters for unilateral Executive decision).

power flies in the face of the most basic separation of powers principles. *Id.* at 699 ("The Framers built into the tripartite Federal Government…a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.") (internal quotation marks omitted); *Williams v. Taylor*, 529 U.S. 362, 378-79 (2000) ("At the core of [the judicial] power is the federal courts' independent responsibility – independent from its coequal branches in the Federal Government,…to interpret federal law.") (plurality); *Baker v. Carr*, 369 U.S. 186, 211 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.").

Allowing the Executive to violate the law and then avoid judicial scrutiny altogether by invoking the state secrets privilege as a bar to litigation would dangerously concentrate all executive, legislative, and judicial power in one branch of government. *See Duncan v. Kahanamoku,* 327 U.S. 304, 322 (1946) (stating that the framers "were opposed to government that placed in the hands of one man the power to make, interpret, and enforce the laws"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536-37 (2004) ("it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge"). To allow the state secrets doctrine to bar purely legal claims regarding the alleged authority of the President to violate the law would result in a total abdication of the responsibilities of the judiciary.[8]

[8] As District Judge Victor Marrero remarked in one case involving national security claims, "it is precisely times like these that demand heightened vigilance, especially by the judiciary, to ensure that, as a people and as a nation, we steer a principled course faithful and true to our still-honored

Courts are plainly competent to review cases implicating even the most sensitive national security issues, and have done so routinely.[9] In the past five years, in cases related to the same "war on terror" that the government invokes to preclude judicial review here, courts have decided whether the President can detain enemy combatants captured on the battlefield in Afghanistan and whether those captured are entitled to due process;[10] whether individuals detained at Guantanamo Bay can challenge their detention,[11] and whether the trial of detainees by military commissions passes constitutional muster.[12] Courts have required access to the testimony of enemy combatant witnesses;[13] decided whether, consistent with the Constitution, the FBI can unilaterally demand that Internet Service Providers turn over customer records related to national security investigations and gag them forever without judicial review;[14] whether the government can require closure of all post-9/11 deportation hearings for national

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founding values. The high stakes here pressing the scales thus compel the Court to strike the most sensitive judicial balance, calibrating by delicate increments toward a result that adequately protects national security without unduly sacrificing individual freedoms, that endeavors to do what is just for one and right for all." *Doe v. Ashcroft,* 334 F.Supp.2d 471, 478 (S.D.N.Y. 2004), *vacated on other grounds, Doe v. Gonzales*, --- F.3d ---, 2006 WL 1409351 (2d Cir. May 23, 2006).

[9] *See* Statement of Senator Muskie, 120 Cong. Rec. 17023 (1974) (referring to the "outworn myth that only those in possession of [] confidences can have the expertise to decide with whom and when to share their knowledge," in floor debate regarding standards for judicial review of claims under Exemption 1 of FOIA).

[10] *Hamdi,* 542 U.S. 507.

[11] *Rasul v. Bush,* 542 U.S. 466 (2004).

[12] *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *cert granted*, 74 USLW 3287 (U.S. Nov. 7, 2005) (No. 05-184).

[13] *United States v. Moussaoui*, 365 F.3d 292 (4th Cir. 2004).

[14] *Doe v. Ashcroft,* 334 F.Supp.2d 471; *Doe v. Gonzales,* 386 F.Supp.2d 66 (D. Conn. 2005), *appeal dismissed as moot,* --- F.3d ---, 2006 WL 1409351 (2d Cir. May 23, 2006).

security reasons;[15] and whether the government must disclose information about the treatment of detainees in Iraq, Afghanistan, and Guantanamo Bay.[16] Had the government urged its radical state secrets theory in these cases – all of which involve national security issues at least as sensitive as those presented in this case – important constitutional issues might never have been decided.

In the past, courts have determined whether the military can try individuals detained inside and outside zones of conflict, during times of hostility and peace;[17] whether the government could prevent newspapers from publishing the Pentagon Papers because it would allegedly harm national security;[18] whether the executive branch, in the name of national security, could deny passports to members of the Communist Party;[19] whether U.S. civilians outside of the country could be tried by court-martial;[20] whether the President could seize the steel mills during a labor dispute when he believed steel was needed to fight the Korean War;[21] whether the Executive could continue to detain a loyal Japanese-American citizen under a war-

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[15] *Detroit Free Press v. Ashcroft,* 303 F.3d 681 (6th Cir. 2002).

[16] *ACLU v. Dep't of Defense,* 389 F. Supp. 2d 547 (S.D.N.Y. 2005).

[17] *U. S. ex rel. Toth v. Quarles,* 350 U.S. 11 (1955) (court martial proceedings in Korea); *Madsen v. Kinsella,* 343 U.S. 341 (1952) (commissions in occupied Germany); *Ex parte Quirin,* 317 U.S. 1 (1942) (German saboteurs tried by military commission); *Duncan*, 327 U.S. 304 (military trial of civilians in Hawaii); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (civilian in Indiana tried by military commission).

[18] *New York Times Co. v. United States,* 503 U.S. 703 (1971).

[19] *Kent v. Dulles,* 357 U.S. 116 (1958).

[20] *Reid v. Covert,* 354 U.S. 1 (1957).

[21] *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952).

related executive order;[22] whether the President could block southern ports and seize ships bound for Confederate ports during Civil War;[23] and whether the President could authorize the seizure of ships on the high seas in a manner contrary to an act of Congress during a conflict with France.[24] If courts were able to decide these cases, nothing should preclude judicial review in this case.[25]

Courts have a special duty to review executive action that threatens fundamental liberties. As the Supreme Court recently emphasized, the Constitution "envisions a role for all three branches when individual liberties are at stake." *Hamdi,* 542 U.S. at 536; *see also Doe v. Gonzales,* 2006 WL 1409351, at *6 ("while everyone recognizes national security concerns are implicated when the government investigates terrorism within our Nation's borders, such concerns should be leavened with common sense so as not forever to trump the rights of the citizenry under the Constitution") (Cardamone, J., concurring). "[A] blind acceptance by the courts of the government's insistence on the need for secrecy . . . would impermissibly

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[22] *Ex parte Endo,* 323 U.S. 283 (1944).

[23] *The Prize Cases* (*The Amy Warwick*), 67 U.S. 635 (1862).

[24] *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

[25] Courts also routinely handle classified evidence in criminal cases, *see generally* Classified Information Procedures Act, 18 U.S.C. app. III § 1 *et seq* (hereinafter "CIPA"); *United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998) (reviewing classified materials in detail), decide whether to force disclosure of national security information in FOIA cases, *see, e.g., Halpern v. F.B.I.,* 181 F.3d 279 (2d Cir. 1999) (rejecting government's Exemption 1 claim), and review classification decisions to independently determine whether information is properly classified, *see, e.g., McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (requiring *de novo* judicial review of pre-publication classification determinations to ensure that information is properly classified and agency "explanations justify censorship with reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification"); *see also Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980) (requiring judicial review of pre-publication classification determinations). In determining whether information is properly classified, courts must evaluate whether its disclosure could be expected to cause varying levels of harm to the nation's security. E.O. 13292 (Mar. 25, 2003).

compromise the independence of the judiciary and open the door to possible abuse." *In re Washington Post Co. v. Soussoudis*, 807 F.2d 383, 392 (4th Cir. 1986).

The Court should assess the government's state secrets claim with these precedents and principles in mind. Ultimately, only the Court can ensure that plaintiffs are not unnecessarily denied their "constitutional right to have access to the courts to redress violations of [their] constitutional and statutory rights." *Spock v. United States*, 464 F. Supp. 510, 519 (S.D.N.Y. 1978). As the D.C. Circuit stated, "[m]eaningful access to the courts is a fundamental right of citizenship in this country. Indeed, all other legal rights would be illusory without it." *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982) (internal citations and quotations omitted). Courts have an active and important role to play in evaluating state secrets claims, particularly where dismissal is sought on the basis of the privilege. The Supreme Court has cautioned that judicial control in a case "cannot be abdicated to the caprice of executive officers." *Reynolds,* 345 U.S. at 9-10. It is "the courts, and not the executive officer claiming the privilege, who must determine whether the claim is based on valid concerns." *Jabara v. Kelley,* 75 F.R.D. 475, 484 (E.D. Mich. 1977); *see also In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989) ("a court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role"); *Ellsberg v. Mitchell,* 709 F.2d 51, 58 (D.C. Cir. 1983) ("[T]o ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine the instances of its invocation."); *Molerio v. F.B.I.*, 749 F.2d 815, 822 (D.C. Cir. 1984) ("[T]he validity of the government's assertion must be judicially assessed.").

Courts have not hesitated to reject state secrets claims where the invocation of the privilege was inappropriate or untimely. *See, e.g., Jabara,* 75 F.R.D. at 492-93 (rejecting

application of the privilege to "relevant factual information pertaining to the 'arrangement' by which the FBI had requested and obtained information about the plaintiff from the [NSA]," the "'general' manner such information was ultimately used by the FBI," and the name of the agency (NSA) that intercepted plaintiffs communications without a warrant); *In re United States,* 872 F.2d at 478 (rejecting premature and overbroad claim of privilege); *Ellsberg,* 709 F.2d at 60 (rejecting claim of privilege over name of Attorney General who authorized warrantless wiretapping, explaining that no "disruption of diplomatic relations or undesirable education of hostile intelligence analysts would result from naming the responsible officials"); *Spock*, 464 F. Supp. at 520. As the D.C. Circuit cautioned in *In re United States:* "Because evidentiary privileges by their very nature hinder the ascertainment of the truth, and may even torpedo it entirely, their exercise should in every instance be limited to their narrowest purpose." 872 F.2d at 478-79 (internal quotation marks omitted).

The vital role of the courts in evaluating the legality of executive conduct does not stop simply because the Executive claims unilaterally that its actions are too secret for court review. As the Supreme Court has cautioned, "The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic." *Cf. New York Times Co.,* 403 U.S. at 719 (Black, J. concurring). A proper understanding of the state secrets privilege shows that it provides no support for dismissal of this case, as discussed more fully below.

## II. The State Secrets Privilege Is A Narrowly Construed Evidentiary Privilege, Not An Immunity Doctrine.

The state secrets privilege is a common law evidentiary rule that permits the government to "block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security." *Ellsberg,* 709 F.2d at 56. It is employed to protect against disclosure of

information that will impair "the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments." *Id.* at 57; *Tenenbaum v. Simonini,* 372 F.3d 776, 777 (6th Cir. 2004); *Jabara,* 75 F.R.D. at 483. It is a rule of evidence, not of justiciability, and is intended to protect from disclosure only such evidence as would legitimately cause harm to national security. *Ellsberg*, 709 F.2d at 57 (the privilege may not be used to "shield any material not strictly necessary to prevent injury to national security . . . ."); *see also Reynolds,* 345 U.S. at 10 (there must be a "*reasonable* danger" that disclosure will harm national security) (emphasis added).

The Supreme Court outlined the proper use of the state secrets privilege fifty years ago in *United States v. Reynolds,* 345 U.S. 1 (1953), and has not considered the doctrine in depth since then. In *Reynolds*, the family members of three civilians who died in the crash of a military plane in Georgia sued for damages. In response to a discovery request for the flight accident report, the government asserted the state secrets privilege, arguing that the report contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight. *Id.* at 3. The Court first held that the privilege could be invoked only upon "a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id*. at 7-8.[26]

The *Reynolds* Court then upheld the claim of privilege over the accident report, but did not dismiss the suit. Rather, it remanded the case for further proceedings, explaining:

> There is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident. Therefore, it should be possible

[26] Plaintiffs do not dispute that the public declaration of Director of National Intelligence John D. Negroponte satisfies the procedural requirements set forth in *Reynolds*. However, as discussed more fully below, the government's invocation of the privilege over the entire case, when additional evidence is unnecessary and irrelevant to the legal issues, is wholly improper. *See infra* Sections III. and IV.

> for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets. Respondents were given a reasonable opportunity to do just that, when petitioner formally offered to make the surviving crew members available for examination. We think that offer should have been accepted.

345 U.S. at 11. Upon remand, plaintiff's counsel deposed the surviving crew members, and the case was ultimately settled. *Id.*

The Supreme Court has cautioned that the privilege is "not to be lightly invoked," nor is it to be "lightly accepted." *Reynolds,* 345 U.S. at 7, 11; *see also Jabara,* 75 F.R.D. at 481. That is because of the "serious potential for defeating worthy claims for violations of rights that would otherwise be proved . . . ." *In re United States*, 872 F.2d at 476; *Jabara,* 75 F.R.D. at 481 ("consequences" of upholding a claim of state secrets privilege "are grave"). Even when the privilege has been properly invoked to deny access to evidence during discovery, courts have construed the privilege narrowly. *Jabara,* 75 F.R.D. at 480 ("claims of executive privilege . . . must be narrowly construed"); *In re Grand Jury Subpoena Dated August 9, 2000*, 218 F. Supp. 2d 544, 560 (S.D.N.Y. 2002) ("[T]he contours of the privilege for state secrets are narrow, and have been so defined in accord with uniquely American concerns for democracy, openness, and separation of powers."); *Spock,* 464 F. Supp. at 519. Courts have recognized that the privilege is more properly invoked on an item-by-item basis, and not with respect to overbroad categories of information. *See, e.g., In re United States,* 872 F.2d at 478 (rejecting the government's blanket assertion of the privilege to dismiss the case, reasoning that "an item-by-item determination of privilege will amply accommodate the Government's concerns").

In the majority of cases since *Reynolds,* courts in this circuit and elsewhere have considered the state secrets privilege in response to particular discovery requests, not as the basis for wholesale dismissal of legal claims concerning the facial legality of a government program.

*See, e.g., Jabara,* 75 F.R.D. at 478-79, 490 (privilege asserted in response to discovery requests).[27] Thus, the typical result of the successful invocation of the states secrets privilege is simply to remove the privileged evidence from the case but to permit the case to proceed.[28]

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[27] *See also DTM Research L.L.C. v. A.T. & T. Corp.*, 245 F.3d 327, 330 (4th Cir. 2001); *Bowles v. United States,* 950 F.2d 154, 156 (4th Cir. 1991); *In re Under Seal*, 945 F.2d 1285, 1287 (4th Cir. 1991); *Heine v. Raus,* 399 F.2d 785, 787 (4th Cir. 1968); *Tilden v. Tenet*, 140 F. Supp. 2d 623, 625 (E.D. Va. 2000); *ACLU v. Brown*, 619 F.2d 1170 (7th Cir. 1980) (en banc); *Linder v. Dep't of Defense*, 133 F.3d 17, 21 (D.C. Cir. 1998); *Northrop Corp. v. McDonnell Douglas Corp.,* 751 F.2d 395, 397 (D.C. Cir. 1984); *Ellsberg,* 709 F.2d at 54-55; *Halkin v. Helms*, 690 F.2d 977, 985 (D.C. Cir. 1982) (*"Halkin II"*); *Attorney General v. The Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1982); *Halkin v. Helms*, 598 F.2d 1, 4 (D.C. Cir. 1978) ("*Halkin I*"); *Virtual Defense and Dev. Int'l v. Republic of Moldova*, 133 F. Supp. 2d 9, 23 (D.D.C. 2001); *Crater Corp. v. Lucent Technologies, Inc.*, 255 F.3d 1361 (Fed. Cir. 2001); *Kinoy v. Mitchell*, 67 F.R.D. 1 (S.D.N.Y. 1975); *Yang v. Reno*, 157 F.R.D. 625 (M.D. Pa. 1994); *United States v. Koreh*, 144 F.R.D. 218 (D. N.J. 1992); *Zoltek Corp. v. United States*, 61 Fed. Cl. 12 (Fed. Cl. 2004); *Foster v. United States*, 12 Cl. Ct. 492 (Cl. Ct. 1987); *American Tel. & Tel. Co. v. United States*, 4 Cl. Ct. 157 (Cl. Ct. 1983); *Fitzgerald v. Penthouse Int'l, Ltd.,* 776 F.2d 1236, 1238 (4th Cir. 1985).

[28] Many other courts have allowed cases to proceed in some form, and often to a merits resolution, despite the invocation of the privilege. *See, e.g., Reynolds,* 345 U.S. at 11 (remanding for further discovery and normal proceedings); *DTM Research L.L.C.,* 245 F.3d at 334 (rejecting a "categorical rule mandating dismissal every time the state secrets privilege is validly invoked" in a litigation, and remanding the case for further proceedings after upholding a claim of privilege to quash a subpoena); *Heine*, 399 F.2d at 791 (upholding claim of privilege in defamation suit, but remanding for further discovery of non-privileged evidence); *Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982)(deciding case on merits despite prior successful claim of privilege); *The Irish People, Inc.*, 684 F.2d at 955 (upholding invocation of the privilege but declining to dismiss the case); *Ellsberg,* 709 F.2d 66-70 (upholding part of privilege claim but remanding for merits determination); *Monarch Assur. P.L.C. v United States,* 244 F.3d 1356, 1364 (Fed. Cir. 2001) (upholding CIA's privilege claim in contract action involving alleged financing of clandestine CIA activity, but remanding for further discovery because "the court was premature in its resolution of the difficult issue regarding the circumstances under which national security compels a total bar of an otherwise valid suit"); *Jabara,* 75 F.R.D. at 489, 493 (upholding part of privilege claim but dong forward with decision on the merits); *Barlow v. United States,* 53 Fed. Cl. 667 (Fed. Cl. 2002) (upholding privilege but remanding for trial on whistleblower retaliation claims by former CIA and DOD employee involving sensitive facts about CIA and nuclear weapons proliferation); *see also Spock*, 464 F. Supp. at 519 (S.D.N.Y. 1978) (rejecting as premature pre-discovery motion to dismiss Federal Tort Claims Act suit against the NSA on state secrets grounds); *Foster v. United States*, 12 Cl. Ct. 492 (Cl. Ct. 1987)(upholding privilege but declining to dismiss). Even in the *Halkin* litigation, the court allowed the parties to fight "the bulk of their dispute on the battlefield of discovery," *Halkin II,* 690 F.2d at 984, and did not dismiss the case out of hand.

Outright dismissal of a suit on the basis of the privilege, and the resultant "denial of the forum provided under the Constitution for the resolution of disputes . . . is a drastic remedy." *Fitzgerald*, 776 F.2d at 1242; *see also In re United States,* 872 F.2d at 477 ("[d]ismissal of a suit" on state secrets grounds at any point of the litigation "and the consequent denial of a forum without giving the plaintiff her day in court . . . is . . . draconian"); *Spock*, 464 F. Supp. at 519 ("An aggrieved party should not lightly be deprived of the constitutional right to petition the courts for relief.").

Accordingly, courts have refused to dismiss suits prematurely based on the government's unilateral assertion that state secrets are necessary and relevant to adjudicating all of the claims – particularly without first considering all non-privileged evidence. *See, e.g., In re United States,* 872 F. 2d. at 477; *Monarch Assur. P.L.C.*, 244 F.3d at 1364-65; *Spock*, 464 F. Supp. at 519. Similarly, courts have refused to dismiss cases based on the privilege where the purported state secrets are not relevant or necessary to the parties' claims or defenses, or where it appears that the parties can proceed with non-privileged evidence. *See, e.g., Clift v. United States*, 597 F.2d 826, 830 (2d. Cir. 1979) (remanding for further proceedings where plaintiff has "not conceded that without the requested documents he would be unable to proceed, however difficult it might be to do so"); *Heine,* 399 F.2d at 791 (upholding claim of privilege in defamation suit, but remanding for further discovery of non-privileged evidence); *Crater Corp. v. Lucent Technologies,* 423 F.3d at 1269 (reversing dismissal on the basis of the privilege where the non-privileged record was not sufficiently developed and the relevancy of any privileged evidence was unclear); *Monarch Assur. P.L.C.,* 244 F.3d at 1364 (reversing dismissal on state secrets grounds so that plaintiff could engage in further discovery to support claim with nonprivileged evidence); *see also Sigler v. LeVan,* 485 F. Supp. 185, 192-94, 199 (D. Md. 1980) (dismissing

replevin claim because it could not be litigated without revealing state secrets, but refusing to dismiss other claims because court was "not convinced that litigation [of those claims] would 'inevitably' lead to disclosure of the contents of the secret materials"). Thus, courts have routinely rejected a "categorical rule mandating dismissal whenever the state secrets privilege is validly invoked." *DTM Research L.L.C,* 245 F.3d at 334.

Rather, dismissal of claims (or an entire suit) on the basis of the privilege is proper only in two narrow circumstances that are not applicable here. First, dismissal may be proper if the "very subject matter" of the lawsuit is itself a state secret. *See DTM Research L.L.C.*, 245 F.3d at 333-34 ("unless the very question upon which the case turns is itself a state secret, or . . . 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, the plaintiff's case should be allowed to proceed . . . .") (internal quotation marks omitted). Second, a case may be dismissed on state secrets grounds if a court determines, after consideration of non-privileged evidence, that plaintiff cannot present a *prima facie* case, or that defendant cannot present a valid defense, without resort to privileged evidence. *Ellsberg*, 709 F. 2d at 64 n.55 (remanding where district court had dismissed case on basis of privilege but "did not even consider whether the plaintiffs were capable of making out a prima facie case without the privileged information."); *Molerio*, 749 F. 2d at 822, 826 (terminating suit only after evaluating plaintiffs' nonprivileged evidence and defendant's evidence). Even then, dismissal on the basis of the privilege is proper only if the Court determines that there is no alternative procedure that would protect secrets but still allow the claims to go forward in some way. Accordingly, courts must use "creativity and care" to devise "procedures which will protect the privilege and yet allow the merits of the controversy to be decided in some form." *Fitzgerald*, 776 F.2d at 1238 n.3. Suits may be dismissed pursuant to

the privilege "[o]nly when no amount of effort and care on the part of the court and the parties will safeguard privileged material." *Id.* at 1244.

## III. Dismissal Of This Action Is Improper Because The Very Subject Matter Of The Suit Is Not A State Secret.

The "very subject matter" of this suit is no state secret. Plaintiffs challenge a surveillance program the government has publicly acknowledged, described, and defended. The focus of this suit is not a secret at all – the question presented is a purely legal one about whether the National Security Agency broke the law and violated the Constitution by eavesdropping on Americans without a warrant. No court in this Circuit has *ever* dismissed a case because the very subject matter is a state secret, and other courts have characterized the doctrine as "narrow" and applied it very rarely. *See Fitzgerald,* 776 F.2d at 1241, 1243-44. The government's argument that the very subject matter of this case is a state secret is particularly absurd – it cannot "clos[e] the barn door after the horse has already bolted." *Doe v. Gonzales,* 2006 WL 1409351, at 6 (Cardamone, J., concurring). Indeed, a Magistrate Judge in the Eastern District of New York recently rejected a blanket secrecy argument pressed by the government, and ordered the government to disclose whether any conversations between plaintiffs and counsel had ever been intercepted or monitored by the government, including by the NSA. The Magistrate Judge observed that "the government's electronic surveillance of individuals suspected of links to terrorism has received widespread publicity and has even been acknowledged by the President of the United States and other high-level government officials," and that other forms of surveillance had also been documented, and concluded that "any claim that sensitive secrets would be revealed by the government's disclosure of whether conversations between plaintiffs and their counsel in [the] case were monitored [was] hard to fathom." *See Turkmen v. Ashcroft,* slip. op., 2006 WL 1517743, at * 4 (E.D.N.Y. May 30, 2006).

As the Supreme Court has recently held, there is a significant distinction between a matter that is covert and *unacknowledged,* and a matter that is covert but acknowledged: in the latter circumstance, even claims against intelligence services may proceed. *See Tenet v. Doe,* 544 U.S. 1, 9-10 (2005).[29] The government cannot legitimately keep secret what it has already acknowledged and is widely known. *See, e.g., Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1306 (1983) (the Court has not "permitted restrictions on the publication of information that would have been available to any member of the public"); *Snepp,* 444 U.S. at 513 n.8 (suggesting that government would have no interest in censoring information already "in the public domain"); *Virginia Dept. of State Police v. The Washington Post*, 386 F.3d 567, 579 (4th Cir. 2004) (holding that government had no compelling interest in keeping information sealed where the "information ha[d] already become a matter of public knowledge").[30]

Here, the government has not only acknowledged the existence and scope of the Program but has engaged in an aggressive public relations campaign to convince the American public that the NSA program is both lawful and necessary to protect national security. On January 19, 2006, the Department of Justice issued a 42-page White Paper discussing in detail its legal defenses

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[29] In an attempt to minimize the significance of its numerous admissions about the NSA Program, the government relies heavily on the recent decision in *El-Masri v. Tenet*, slip. op., 2006 WL 1391390 (E.D. Va. May 12, 2006), which plaintiffs believe was wrongly decided and is currently on appeal. That case is inapposite. There, the district court accepted the CIA's argument that it could neither admit nor deny allegations at the center of the plaintiff's case. Here, by contrast, every single fact upon which plaintiffs rely in their motion for partial summary judgment has been publicly confirmed by executive officials.

[30] *See also Smith v. Daily Mail Publ'g Co*., 443 U.S. 97, 103 (1979) (describing previous holding that "once the truthful information was publicly revealed or in the public domain the court could not constitutionally restrain its dissemination") (internal quotation marks omitted); *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972) (stating that the First Amendment "precludes…restraints with respect to information which is…officially disclosed"); *McGehee,* 718 F.2d at 1141 (noting that "[t]he government has no legitimate interest in censoring unclassified materials" or "information…derive[d] from public sources").

and justifications for the NSA Program. *See* Dep't of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) (*available at* http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf).[31] Government officials have publicly testified before Congress about the legality, scope, and basis for the NSA surveillance program four times.[32] Executive branch officials have also given numerous public speeches defending the legality of the Program. For example, President Bush has discussed and promoted the NSA Program at least eight times through radio addresses, at news conferences, and at public events.[33] Vice President Cheney has promoted the NSA Program during a commencement address at the U.S. Naval Academy and at four separate rallies for servicemen and

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[31] Plaintiffs do not contend, as the government suggests, Govt. Br. 29 n. 18, that the publication of the White Paper *precludes* the government from arguing that the case should be dismissed on the basis of the privilege; however, the publication and dissemination of the White Paper certainly discredits the notion that the legal questions presented here implicate such sensitive facts that the court cannot resolve the merits.

[32] *The Worldwide Terror Threat: Hearing Before the S. Select Comm. on Intelligence*, 109th Cong. (2006), *available at* 2006 WL 246499 (testimony of John Negroponte, Director of National Intelligence and Gen. Michael Hayden, then Principal Deputy Director of National Intelligence); *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006), *available at* 2006 WL 270364 (testimony of Alberto Gonzales, Att'y Gen. of the United States); *Oversight on the Department of Justice: Hearing Before the H. Comm. on the Judiciary*, 109th Cong. (2006), *available at* 2006 WL 896707 (testimony of Alberto Gonzales, Att'y Gen. of the United States); *Hearing on the Nomination of General Michael V. Hayden to be the Director of the Central Intelligence Agency Before the S. Select Comm. on Intelligence,* 109th Cong. (2006).

[33] The President's Radio Address, 41 WEEKLY COMP. PRES. DOC. 1880, 1881 (Dec. 17, 2005); President's News Conference, 41 WEEKLY COMP. PRES. DOC. 1885 (Dec. 19, 2005); Remarks on the War on Terror and a Question-and-Answer Session in Louisville, Kentucky, 42 WEEKLY COMP. PRES. DOC. 40, 46-47 (Jan. 11, 2006); Remarks on the War on Terror and a Question-and-Answer Session in Manhattan, Kansas, 42 WEEKLY COMP. PRES. DOC. 101, 109 (Jan. 23, 2006); Remarks Following a Visit to the National Security Agency at Fort Meade, Maryland, 42 WEEKLY COMP. PRES. DOC. 121, 122-23 (Jan. 25, 2006); The President's News Conference, 42 WEEKLY COMP. PRES. DOC. 125, 128-29 (Jan. 26, 2006); Remarks on the Terrorist Surveillance Program, 42 WEEKLY COMP. PRES. DOC. 911 (May 11, 2006); The President's Radio Address, 42 WEEKLY COMP. PRES. DOC. 926 (May 13, 2006).

servicewomen.[34] Administration officials have even participated in public web discussions in defense of the NSA Program.[35] The Program has also been widely discussed in Congress and in the media. Members of Congress have repeatedly discussed details about the NSA Program in press releases and in the media.[36] Over 250 editorials have been published on the subject in the nation's newspapers. In sum, the government has acknowledged the existence of the Program, described its scope, defended its legality, and engaged in a public campaign to convince the American public of the Program's necessity. The administration has ensured that its defense of the program receives the broadest possible public exposure. Having done those things, it cannot now insulate its actions from judicial oversight by arguing that the very subject matter of the case is a state secret.

Courts have properly rejected privilege claims over information that has already been widely publicized. In *Spock,* for example, the court rejected the claim that the NSA could not admit or deny that plaintiffs' communications had been intercepted without harm to national

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[34] Vice President Richard Cheney, Commencement Address at the United States Naval Academy (May 26, 2006); Vice President Richard Cheney, Remarks at a Rally for the Troops at Fort Leavenworth (Jan. 6, 2006); Vice President Richard Cheney, Remarks at a Rally for the Troops at Charleston Air Force Base (Mar. 17, 2006); Vice President Richard Cheney, Remarks at a Rally for the Troops at Scott Air Force Base (March 21, 2006); Vice President Richard Cheney, Rally for the Troops at Fairchild Air Force Base (Apr. 17, 2006).

[35] In January 2006, for example, Attorney General Gonzales conducted a web discussion — part of the White House's online interactive forum called "Ask the White House"— where he answered questions from members of the public regarding the NSA program. Alberto Gonzales, "Ask the White House" (Jan. 25, 2006), http://www.whitehouse.gov/ask/20060125.html.

[36] *See, e.g.,* U.S. Representative Peter Hoekstra (R-MI) Holds a News Conference on the NSA Authorizations (Dec. 21, 2005), *available at* 2005 WL 3486002; Press Release, Senator Jay Rockefeller, Vice Chairman Rockefeller Reacts to Reports of NSA Intercept Program in United States (Dec. 19, 2005), *available at* http://www.senate.gov/~rockefeller/news/2005/pr121905a.html; Meet the Press with Tim Russert, Interview with Peter Hoekstra**,** Jane Harman**,** Pat Roberts & Tom Daschle (NBC television broadcast Feb. 12, 2006), transcript *available at* http://www.msnbc.msn.com/id/11272634/.

security, finding that this would "reveal[ ] no important state secret" particularly because it had already been disclosed in the *Washington Post*. 464 F. Supp. at 519. The court went on to hold that dismissal of plaintiffs' action was wholly inappropriate "where the only disclosure in issue [was] the admission or denial of the allegation that interception of communications occurred[,] an allegation which [had] already received widespread publicity…." Rather, the court found that "the abrogation of the plaintiff's right of access to the courts could undermine our country's historic commitment to the rule of law." *Id.* at 520. Similarly, in *Jabara,* the district court observed that where information over which the government asserted the privilege had been revealed in report to Congress – specifically that it was the NSA that had intercepted plaintiffs' communications – "it would be a farce to conclude" that information "remain[ed] a military or state secret." 75 F.R.D. at 493; *see also In re United States*, 872 F.2d at 478 (rejecting privilege claim, relying in part on prior release under FOIA of information relevant to litigation); *Ellsberg*, 709 F.2d at 61 (rejecting portion of privilege claim on ground that so much relevant information was already public); *see also Turkmen*, 2006 WL 1517743, at *4.

Contrary to the government's view, Govt. Br. 5, 47-48, the mere fact that this suit concerns a classified intelligence program does not transform the very subject matter of the suit into a state secret. No court has ever relied on the state secrets privilege to dismiss purely legal claims concerning the facial validity of a government surveillance program. Numerous cases that involve harms that flow from covert or clandestine programs or activity have been the subject of litigation, and often, even where the privilege is validly invoked over some evidence, the case has been allowed to proceed in some form.[37] Indeed, courts that have considered

[37] *See, e.g., Kronisch v. United States,* 150 F.3d 112, 116 (2d Cir. 1998); *Kronisch v. Gottlieb,* 213 F.3d 626 (2d Cir. 2000) (Table) (case involving CIA clandestine LSD program); *Birnbaum v. United States,* 588 F.2d 319 (2d Cir. 1978) (covert CIA mail opening program); *Heine,* 399

challenges to warrantless surveillance have not considered the "very subject matter" a state secret, even where the plaintiffs were challenging NSA surveillance. *See, e.g., Jabara v. Webster,* 691 F.2d 272 (deciding claims on the merits even where some aspects of case were state secrets); *Jabara,* 75 F.R.D. 475 (ruling on the privilege claims but no suggestion that the very subject matter was a state secret); *Ellsberg,* 709 F.2d 51 (remanding some claims for consideration on the merits, despite upholding privilege claims over particular evidence); *Halkin I*, 598 F.2d 1 (dismissing claims against the NSA only after discovery and not because the very subject matter was a state secret); *Spock,* 464 F. Supp. 510 (refusing to prematurely dismiss claims against the NSA on the basis of the privilege).

Indeed, the government's position that anything concerning foreign intelligence gathering is a state secret, unfit for judicial review, is undermined by FISA itself. FISA expressly provides a cause of action, and hence judicial review, of claims brought by those "aggrieved" in the course of FISA surveillance or by the unauthorized use of FISA surveillance. 50 U.S.C. § 1810.[38] When the government seeks to introduce FISA-obtained evidence in a criminal

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F.2d 785 (defamation case involving covert CIA spies); *Air-Sea Forwarders, Inc. v. Air Asia Co. Ltd.,* 88 F.2d 176 (9th Cir. 1989) (claims regarding CIA cover company); *Monarch Assur. P.L.C,* 244 F.3d at 1364 (claims involving covert CIA financing); *Avery v. United States,* 434 F. Supp. 937 (D. Conn. 1977) (CIA covert mail opening program); *Cruikshank v. United States,* 431 F. Supp. 1355 (D.C. Haw. 1977) (same); *Linder v. Calero-Portocarrero,* 180 F.R.D. 168, 176-77 (D.D.C. 1998) (claims for wrongful death of leaders of Nicaraguan Contra organizations); *Orlikow v. United States,* 682 F. Supp. 77, 79, 87 (D.D.C. 1988) (claims involving CIA's covert MKULTRA program); *Barlow v. United States,* 53 Fed. Cl. 667 (whistleblower claims involving facts about CIA and nuclear weapons proliferation).

[38] The statute provides that: "An aggrieved person, other than a foreign power or an agent of a foreign power . . . who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section 1809 of this title shall have a cause of action against any person who committed such violation and shall be entitled to recover" damages and attorneys fees. 50 U.S.C. § 1810.

proceeding or during a civil suit brought by an "aggrieved" individual, FISA requires the district courts to "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." 50 U.S.C. § 1806(f). If all foreign intelligence surveillance involved state secrets, the government could unilaterally eliminate any possibility for a remedy under FISA.[39]

Furthermore, numerous courts have adjudicated legal questions regarding foreign intelligence surveillance without confronting any state secrets problem. For example, courts have faced no evidentiary or state secrets obstacle in evaluating the constitutionality of FISA. *See, e.g., In re Sealed Case*, 310 F.3d 717 (Foreign Intel. Surv. Ct. of Review 2002); *United States v. Duggan,* 743 F.3d 59 (2d Cir. 1984); *United States v. Pelton,* 835 F.2d 1067 (4th Cir. 1987). Indeed, since 9/11, courts have evaluated the facial legality of government surveillance tools without any state secrets issues arising, and without any question regarding their authority to do so. *See, e.g., Doe v. Ashcroft,* 334 F.Supp.2d 471 (evaluating constitutionality of the national security letter power in counter-terrorism and counter-intelligence investigations); *Doe v. Gonzales,* 386 F. Supp. 2d 66 (same). To dismiss this case because the very subject matter is an alleged state secret would produce a perverse result: where Congress, by statute, authorizes the Executive to engage in foreign intelligence gathering, courts may review its legality and constitutionality, but where the executive branch secretly *violates* limits placed by Congress on executive eavesdropping, a court of law would be powerless to opine on its legality.

[39] *See ACLU v. Barr*, 952 F.2d 457, 470 (D.C. Cir. 1991) (noting that Congress "anticipated that issues regarding the legality of FISA-authorized surveillance would arise in civil proceedings and . . . empowered federal district courts to resolve those issues").

## IV. Neither Plaintiffs Nor Defendants Need State Secrets To Prove Or Defend Against Plaintiffs' Claims.

### A. Defendants Have No Valid Legal Defense That Requires Disclosure Of State Secrets.

As discussed in plaintiffs' reply brief, defendants have publicly conceded all of the facts necessary to decide plaintiffs' targeted wiretapping claims. At the very least, plaintiffs need no additional facts to establish a *prima facie* case on each of their legal claims, and thus dismissal on this basis is not appropriate. *See Ellsberg*, 709 F. 2d at 64 n.55 (remanding case where district court dismissed before determining if plaintiffs' could prove *prima facie* case with non-privileged evidence); *cf. In re United States,* 872 F.2d at 476 (where properly privileged information is "essential to establishing plaintiffs' prima facie case, dismissal is appropriate"). Defendants' primary argument, however, is that they cannot defend against plaintiffs' claims without state secrets. But a court may only dismiss a case on this basis if the court determines, after careful review and disclosure to plaintiffs of all non-privileged evidence, that defendants cannot make out a *valid* defense without disclosing state secrets. *See, e.g., Molerio,* 749 F.2d at 825-26 (granting summary judgment for defendants on one claim where privileged information provided a complete and valid defense); *In re United States,* 872 F.2d at 476 (dismissal appropriate where privileged information "would establish a valid defense to the claim"). Because defendants can offer no valid legal defense to the claims that would require disclosure of state secrets, its motion to dismiss must be denied.

#### 1. Defendants Cannot Defeat Plaintiffs' Standing By Invoking State Secrets.

Plaintiffs have established their standing to sue based on uncontested evidence that they are suffering concrete harm to their professional activities as a result of the NSA Program. Pl. Reply Br. 2-8. For the reasons stated in plaintiffs' reply brief, defendants' arguments regarding

standing are incorrect as a matter of law. Nevertheless, defendants make two arguments to defeat plaintiffs standing that they insist would require disclosure of state secrets. First, they argue that they could defeat plaintiffs' standing by providing the court with details that would prove that plaintiffs' communications do not fall within the scope of the NSA spying program. Govt. Br. 25. Second, they argue that they could defeat plaintiffs' standing by proving that plaintiffs' communications have not in fact been targeted. *Id.*

These defenses are invalid and would fail to defeat standing even if additional facts were introduced to support them. The government has already conceded that the Program targets members of al-Qaeda, members of groups "affiliated with al-Qaeda," and agents of al-Qaeda and its affiliates. Govt. Br. 1. Accordingly, the communications of attorney plaintiffs who represent individuals the government suspects of being members of al-Qaeda or affiliates of al-Qaeda plainly fall within the scope of the program. Pl. Reply. 8 n.14, 9-10. Moreover, even if the government could present evidence that none of the attorney plaintiffs' communications had thus far been intercepted under the Program, that would not prove that these plaintiffs' communications are not likely to be intercepted in the future. Rather, many of the 13,000 defense attorneys who are members of plaintiff National Association of Criminal Defense Lawyers will continue to represent clients who fall directly within the scope of the Program. There are no additional facts that the government could produce – privileged or otherwise – that would defeat plaintiffs' standing.

Defendants rely heavily on the D.C. Circuit's decisions in the *Halkin* litigation to defeat plaintiffs' standing. The *Halkin* cases, however, were quite different from this case in a number of respects. First, the *Halkin* plaintiffs were actually *required* to prove that they had been wiretapped to prevail on their damages claims; plaintiffs seek no damages here. *Cf. Halkin I,*

598 F.2d at 6 (noting that "the acquisition of the plaintiffs' communications [was] a fact vital to their claims"); *Halkin II,* 690 F.2d at 990; *see also Ellsberg*, 709 F.2d at 53 (plaintiffs seeking damages). Second, the *Halkin* plaintiffs sought an injunction to stop surveillance of *particular individuals* — an injunction that would have been meaningless absent proof that each plaintiff had been wiretapped. *Halkin* I, 598 F.2d at 3; *Halkin II,* 690 F.2d at 981; *see also Jabara v. Kelley,* 476 F.Supp. 561 (E.D. Mich. 1979), *vacated on other grounds in* 691 F.2d 272 (6th Cir. 1982). By contrast, plaintiffs here seek to invalidate a surveillance program that on its face is contrary to law. Finally, and most importantly, unlike *Halkin*, plaintiffs here have provided the court with evidence that the Program is causing concrete and ongoing harm to their ability to carry out their professional duties. Unlike the plaintiffs in *Halkin,* plaintiffs here have already demonstrated concrete injuries without reference to any state secret – harms that will continue regardless of whether plaintiffs are actually being wiretapped. Pl. Reply Br. 7-8.

**2. No State Secrets Could Support A Valid Defense To The Administrative Procedures Act and Separation of Powers Claims.**

As plainly articulated in plaintiffs' prior briefs, the government admits that it is engaging in warrantless surveillance that is expressly prohibited by FISA. The question for the Court is whether, as a matter of law, the Executive has authority to do so. The government has offered only two defenses, neither of which is valid or could be supported with facts alleged to be state secrets: that Congress, through the Authorization to Use Military Force (AUMF), authorized the President to engage in warrantless wiretapping of Americans on American soil, and that FISA is an unconstitutional encroachment on the President's inherent authority to engage in warrantless wiretapping.

With regard to the AUMF defense, the question the Court must decide is whether, as a matter of law, the AUMF authorized warrantless NSA surveillance of Americans. As plaintiffs

argued in their reply, the government's AUMF defense turns on statutory construction, not facts – privileged or otherwise. Pl. Reply Br.12. It is plain that Congress did not intend the general AUMF to repeal the very specific FISA requirements. *Id.*; *see also* Pl. Opening Br. 14-15. Because no set of facts, hypothetical or real, could bring warrantless wiretapping of Americans on American soil within the scope of the AUMF, the state secrets privilege should not prevent resolution of this defense. *Id.* 13. Furthermore, courts have answered legal questions involving the laws of war, incidents of war, and even actions on the battlefield without resort to state secrets and without causing harm to national security. *See, e.g., Hamdi,* 542 U.S. 507; *Madsen v. Kinsella,* 343 U.S. 341; *Ex parte Quirin,* 317 U.S. 1 (1942); *Dooley v. United States,* 182 U.S. 222 (1901); *The Prize Cases,* 67 U.S. 635; *Mitchell v. Harmony,* 54 U.S. (13 How.) 115, 133 (1851).

The government's effort to avoid judicial review of its broad defense of executive power by categorically invoking the state secrets privilege fares no better. Defendants posit that a more detailed explanation of "what the President has done and why" would support its view that the President had inherent authority to violate FISA. Govt. Br. 30. Specifically, the government contends that the court cannot resolve the legal and constitutional questions in the case without a plethora of facts about the specific al-Qaeda threat, the scope of the Program, and the operational details of the surveillance – all of which, it argues, are subject to the state secrets privilege. To the contrary, none of these facts could provide any valid defense to plaintiffs' claims as a matter of law.

The government suggests that state secrets about "the specific threat facing the Nation and the particular actions taken by the President to meet that threat" would support its claim of inherent authority and provide a valid defense to plaintiffs' claims. Govt. Br. 3. However, as

plaintiffs' have made clear elsewhere, the President has no authority to violate the law, no matter what his motivations may be, and no matter what kind of threat or emergency is posed. Pl. Reply Br. 13-14; Pl. Opening Br. 23-25. The Constitution simply does not grant the President any emergency powers to ignore the law. Pl. Reply Br. 15-16. Details regarding the specific nature of the al-Qaeda threat, whether privileged or not, therefore provide no defense to the President's action. Similarly, the Supreme Court in *Youngstown* needed no facts about the specific threats posed by the Korean War or the precise need for steel to determine that the President exceeded his authority when he seized the steel mills. The Supreme Court in *Little v. Bareme* needed no information about the particular conflict between the United States and France, or about the specific danger posed by ships coming from France, to hold that the President had no authority to seize such ships. Those cases, like the present case, presented a pure question of law regarding the separation of powers.

The government also suggests that facts regarding why the FISA process was insufficient to meet the threat of terrorism – despite the successful use of FISA to wiretap terrorists and spies for almost 30 years, including during times of war or emergency – would somehow provide a defense to plaintiffs' claims. Govt. Br. 38; *see also* Pl. Opening Br. 15-16 (pointing out that only four of the almost 19,000 FISA applications submitted to the FISA court have ever been rejected). However, under our constitutional system, if the President was dissatisfied with FISA's ability to meet the al-Qaeda threat, the appropriate course of action was to ask Congress to change the law, not to design and authorize a secret surveillance program that violates the law. As numerous justices expressed in *Youngstown,* where Congress lays out a procedure for the President to follow during a crisis, the President must follow that procedure. *See* Pl. Reply Br. 17. Indeed, in the immediate aftermath of the 9/11 attacks, the Executive branch *did* successfully

seek numerous specific changes to FISA. *See* Pl. Opening Br. 14-15. No specific facts regarding the Executive's dissatisfaction with FISA can possibly provide a valid defense to plaintiffs' claims.

The government next argues that privileged information about the technical details of NSA surveillance would support its defense. Govt. Br. 36-37. Those details are irrelevant to the question of whether the President violated the law and the Constitution when he authorized such surveillance *without a warrant*. Pl. Reply Br. 11, 15-16. Similarly, in *Keith,* the Supreme Court did not delve into the details of how the FBI was conducting domestic intelligence surveillance. The question was a purely legal one – whether the Constitution required a warrant. *See, e.g., United States v. United States District Court,* 407 U.S. 297, 315-21 (1972) (hereinafter "*Keith*"). Finally, the government argues that privileged information about precisely who the Program targets would bolster its defense, suggesting that the Program is closely tied to "the conduct of a military campaign." Govt. Br. 36. But those details are irrelevant because Congress specifically intended for FISA to regulate electronic surveillance of Americans on American soil – regardless of who they are – *even in times of war or emergency.* Pl. Reply Br. 16; Pl. Opening Br. 13. Indeed, the House Conference Report on FISA explains that Congress granted the President authority to engage in warrantless wiretapping after a declaration of war for 15 days to "allow time for consideration of any amendment to [FISA] that may be appropriate during a wartime emergency." H.R. CONF. REP. NO. 95-1720, at 16 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4048, 4063. No details about the precise targets of the surveillance can alter the fact that the President lacked authority under FISA to engage in surveillance without a warrant.

Ultimately, under either theory of executive power advanced by the parties, the Court needs no more facts to resolve whether the President has "inherent" authority to ignore the law.

Either the President has the authority to break the law or he does not. Under the plaintiffs' theory, the President has no authority to violate FISA or the Constitution, and details about the al-Qaeda threat and the operation of the Program are irrelevant. Pl. Reply Br. 12-19. Under the government's theory, the President has the unilateral authority to violate the law to meet any situation he deems an emergency or threat. Under either theory, no more facts are needed and thus no state secrets are implicated.

**2. No State Secrets Could Support An Exception To The Fourth Amendment's Warrant Requirement.**

Plaintiffs' Fourth Amendment claim can also be resolved exclusively on the basis of the non-privileged and public evidence already before the court. The key facts are these: (1) the government has conceded that the NSA is intercepting one-end domestic communications without a warrant or prior judicial approval of any kind, and (2) almost 30 years of experience with FISA has proven that prior judicial approval of foreign intelligence surveillance is practicable, workable, and successful. There are no facts – state secrets or otherwise – that would provide defendants with a valid defense to plaintiffs' Fourth Amendment claim. Warrantless wiretapping is *per se* unreasonable under the Fourth Amendment. *See* Pl. Reply 20.

Where the government engages in warrantless wiretapping, it must prove that the surveillance fits into an established exception to the warrant requirement – a purely legal question. *See* Pl. Reply 20. The Supreme Court in *Keith* rejected as a matter of law an exception to the warrant requirement for domestic intelligence surveillance without delving into specific aspects of the government's domestic surveillance program. 407 U.S. 297. Neither *Keith* nor pre-FISA cases that considered whether there was a foreign intelligence exception to the warrant requirement suggested that state secrets posed a bar to resolution of the purely legal claims. *Cf. id.*; *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); *United States*

*v. Brown,* 484 F.2d 418 (5th Cir. 1973); *see also Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (suggesting in dicta that there was no foreign intelligence exception to the warrant requirement). Similarly, privileged facts are unnecessary to determine whether warrantless wiretapping is justified by "special needs" or is otherwise reasonable. As plaintiffs demonstrated in their reply, no additional facts – privileged or otherwise – could bring NSA spying into the special needs exception. *See* Pl. Reply 22. Furthermore, the question of whether warrantless spying is reasonable requires no more facts, as *Keith* itself held. *Id.* The fact that FISA has worked for nearly thirty years alone refutes the government's defenses.

In *Ellsberg,* the D.C. Circuit rejected the government's argument that state secrets necessarily prevented the government from arguing that there was a foreign intelligence exception to the warrant requirement. The court stated that there was "no reason to relieve those who authorize and conduct [warrantless foreign intelligence taps] of the burden of showing that they come within the exemption." 709 F.2d at 68. As the court explained,

> In many such situations, the government would be able (as it has been here) to refuse to disclose any details of the circumstances surrounding the surveillance by invoking its state secrets privilege. The result would be to deny the plaintiffs access to all of the information they need to dispute the government's characterization of the nature and purpose of the surveillance. And the net effect would be to immunize, not only all wiretaps legitimately falling within the hypothesized 'foreign agent' exemption, but all other surveillance conducted with equipment or under circumstances sufficiently sensitive to permit assertion of the state secrets privilege. *We find such consequences unacceptable.*

*Id.* at 68 (emphasis added). In fact, the court went on to note that such a consequence "might call into question the very existence of the foreign agent exception." *Id.* Accordingly, because the defendants had not yet made any showing regarding the existence and application of any foreign intelligence exception to the warrant requirement, the court refused to dismiss those claims and remanded to the district court. *Id.* The court noted that the remaining questions were primarily

"questions of law" that could be resolved *in camera* if necessary. *Id.* at 69; *see also Jabara,* 691 F.2d at 276 (referring to the district court's conclusion that because "defendants had divulged the interception and later transmittal to the FBI . . . the state secret[s] privilege was no impediment to the adjudication of [plaintiffs'] fourth amendment claim"); *Jabara,* 75 F.R.D. at 489 (after upholding Attorney General's claim of privilege, pointing out that the "matter ha[d] not ended" because the court still had to determine "whether the warrantless electronic surveillances . . . comp[lied] with the commands of the Fourth Amendment"); *id.* at 493 (same, with regard to privilege claim by Secretary of Defense).

**3. Defendants Have No Valid Defense To Plaintiffs' First Amendment Claim That Would Require State Secrets.**

As plaintiffs have established in their previous briefs in this case, the NSA spying program violates the First Amendment for two reasons. First, it permits the NSA to obtain constitutionally protected speech without any judicial oversight, and thus does not comply with procedural safeguards necessary to safeguard First Amendment rights. *See* Pl. Opening Br. 40-42. Because the government has already conceded that the Program involves no judicial oversight, there is no set of facts, privileged or otherwise, that could provide a valid legal defense. Similarly, no state secrets could transform warrantless wiretapping into a less restrictive alternative than FISA, which has worked for decades to address the government's interest. *See* Pl. Reply 23-34.

**B. Even If The Court Believes That Defendants Require More Facts To Assert A Valid Defense, Dismissal At This Stage Would Be Improper.**

As discussed above and in plaintiffs' reply brief, no additional facts, let alone privileged facts, are necessary for the Court to decide the pure questions of law presented in plaintiffs' motion for partial summary judgment. Nonetheless, if the Court ultimately determines that more

facts are necessary for plaintiffs' case or the government's defenses, it should still reject defendants' motion to dismiss the case at this juncture. Dismissal on the basis of the state secrets privilege is appropriate only where the Court is satisfied that it is impossible for the parties to prove their claims and valid defenses with non-privileged evidence and that no alternative to dismissal could protect any legitimate secrets in the case. *Ellsberg,* 709 F.2d at 64 n.55, 65; *see supra* at Section II. The Court cannot adequately make this determination on the basis of the government's unilateral and categorical assertion that it cannot defend itself without state secrets.[40] Indeed, courts are obligated to carefully scrutinize and probe deeply any claim of state secrets privilege, particularly where the government is urging dismissal. *See Reynolds,* 345 U.S. at 11 (the plaintiff's need for allegedly privileged information "will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate."); *ACLU v. Brown,* 619 F.2d at 1173 (en banc) ("the privilege should not be lightly accepted where there is a strong showing of need by the requesting party"); *Jabara,* 75 F.R.D. at 479 (stating that the Court had "given the most careful consideration to each claim of privilege to insure that it is exercised with utmost fairness and caution").

Rather than dismissing the suit at this stage, the Court should first rigorously evaluate the breadth and propriety of the government's privilege claim over whole categories of information. The Court should require the government to be as specific as possible about the particular evidence that is privileged, the necessity of that evidence to a valid defense, and the reason its

[40] If the Court determines that plaintiffs need more facts to prove their *prima facie* case, which even the government does not seriously contend, dismissal would not be appropriate. The Court could easily structure a limited and controlled discovery process to resolve discrete factual questions. Defendants, of course, would retain the ability to assert the privilege over particular pieces of information. *See, e.g., Jabara,* 75 F.R.D. at 478, 483, 485, 490 (providing some discovery, including the admission that plaintiffs had been surveilled, despite invocation of the privilege over other evidence).

disclosure would harm the nation. Broad generalities about national security should not suffice.[41] At this stage, the Court should be skeptical of the government's claim that blanket and categorical secrecy is necessary. *Turkmen,* 2006 WL 1517743, at * 4; *see also Doe v. Gonzales,* 2006 WL 1409351, at *5 ( "[u]nending secrecy of actions taken by government officials may . . . serve as a cover for possible official misconduct") (Cardamone, J., concurring). It is hard to imagine, even if defendants *did* need more evidence to support their defenses, that every aspect of the threat posed by al-Qaeda and every technical detail about NSA spying would be both relevant to a valid defense and a state secret.

Because the government is seeking dismissal – a dire consequence – the Court should also require the government to produce the actual evidence that it alleges is privileged. *See, e.g., Ellsberg,* 709 F.2d at 59 n.37 ( "[w]hen a litigant must lose if the claim is upheld and the government's assertions are dubious in view of the nature of the information requested and the circumstances surrounding the case, careful *in camera* examination of the material is not only appropriate, but obligatory.") (internal citations omitted); *Jabara,* 75 F.R.D. at 486, 491 (examining materials underlying both the Secretary of Defense and Attorney General's privilege claims *in camera*); *ACLU v. Brown,* 619 F.2d at 1173 ("a party's showing of need often compels the district court to conduct an *in camera* review of documents allegedly covered by the privilege in order to determine whether the records are properly classified," and remarking that "[a]ny other rule would permit the Government to classify documents just to avoid their production even though there is need for their production and no true need for secrecy"). This way, the Court can evaluate whether the claim of privilege is proper, whether the information is properly

[41] *In re United States,* 872 F.2d at 478 (noting that "an item-by-item determination of privilege will amply accommodate the Government's concerns"); *see also National Lawyers Guild v. Attorney General*, 96 F.R.D. 390, 403 (S.D.N.Y. 1982) (holding that privilege must be asserted on an document-by-document basis).

classified, and whether disclosure of information will legitimately cause harm to national security, *with reference to the actual evidence*.[42] Examining the evidence underlying the privilege claim is particularly vital in this case because if plaintiffs are foreclosed from seeking a remedy in this Court, the illegal spying program is likely to remain in operation indefinitely.

Indeed, in other cases challenging unlawful surveillance, the government has disclosed evidence to support plaintiffs' claims. In *Jabara,* for example, "the government divulged in the open record that NSA did intercept and later turn over to the FBI [plaintiffs'] communications." *Jabara,* 691 F.2d at 275 n.5; *see also id.* at 276 (describing district court's conclusion that because "defendants had divulged the interception and later transmittal to the FBI . . . the state secret[s] privilege was no impediment to the adjudication of [plaintiffs' fourth amendment claim"); *Ellsberg,* 709 F.2d at 53-55 (refusing to dismiss claims where the government had admitted to warrantless wiretapping and remanding for consideration of the merits in some form).

To the extent that any non-privileged information can be disentangled from privileged information, it should be shared with plaintiffs. The Court should make every effort to ensure that "sensitive information . . . [is] disentangled from nonsensitive information to allow for the release of the latter." *Ellsberg*, 709 F.2d at 57; *see also In re United States,* 872 F. 2d at 479 (court of appeals was "unconvinced that district court would be unable to 'disentangle' the sensitive from the nonsensitive information as the case unfold[ed]"). There is nothing radical

[42] Again, courts are empowered and competent, and indeed in this circumstance obligated, to ensure that information is properly classified. In evaluating allegedly classified information, the Court should remain mindful that the Executive's tendency to excessively and unnecessarily classify documents is well-known and well-documented. *See generally* Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information,* Wash. Post, Feb. 15, 1989 at A25; *see also* Meredith Fuchs, *Judging Secrets: The Role the Courts Should Play in Preventing Unnecessary Secrecy,* 58 Admin. L. Rev. 131, 133-34 (2006).

about sharing with plaintiffs any and all non-privileged evidence, even where other evidence may be legitimately privileged.[43] The Court has many mechanisms available for safeguarding non-privileged but ultimately sensitive evidence from unauthorized disclosure if need be.[44] Indeed, even where evidence introduced in civil proceedings is *classified*, the government has granted clearance to attorneys and permitted them to see the evidence on numerous occasions.[45]

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[43] Courts have, where applicable, routinely allowed nonsensitive discovery to proceed even after upholding a claim of privilege over certain evidence. *Reynolds,* 345 U.S. at 11 (upholding privilege claim but remanding for deposition because it would "be possible . . . to adduce the essential facts as to causation without resort to material touching upon military secrets"); *Monarch Assur. P.L.C.*, 244 F.3d at 1364 (upholding privilege but remanding because discovery had been unduly limited); *Crater Corp.,* 255 F.3d at 1365 (government provided some discovery despite invocation of the privilege); *In re Under Seal*, 945 F.2d at 1287 (same); *Patterson v. FBI*, 893 F.2d 595, 598 (3d Cir. 1990) (same); *Ellsberg*, 709 F.2d at 54 (same); *The Irish People, Inc.*, 684 F.2d at 931 (same); *Halkin I*, 598 F. 2d at 6 (same).

[44] In civil cases, courts often utilize seals, protective orders, or discovery in secure locations in order to protect any sensitive information in civil proceedings. *In re Under Seal,* 945 F.2d at 1287; *Heine,* 399 F.2d at 787; *Air-Sea Forwarders, Inc. v. United States,* 39 Fed. Cl. at 436-37; *In re Guantanamo Detainee Cases,* 344 F. Supp. 2d 174 (D.D.C. 2004); *United States v. Lockheed Martin Corp.,* 1998 WL 306755 (D.D.C. May 29, 1998). In addition, courts routinely protect classified information used in criminal proceedings through protective orders. *See, e.g.,* 18 U.S.C. app. III § 3; *United States v. Pappas,* 94 F.3d 795, 797 (2d Cir. 1996); *United States v. Musa*, 833 F. Supp. 752, 758-61 (E.D. Mo. 1993); *United States v. Rezaq*, 899 F. Supp. 697, 708 (D.D.C. 1995). Courts have also appointed special masters, *Loral Corp. v. McDonnell Douglas Corp,* 558 F.2d 1130, 1132 (2d Cir. 1977), and even held *in camera* trials, *Halpern v. United States*, 258 F.2d 36, 41 (2d Cir. 1958).

[45] *See, e.g., In re Guantanamo Detainee Cases,* 344 F. Supp. 2d at 179-80 (noting in protective order that "counsel for petitioners in these cases are presumed to have a 'need to know' information both in their own cases and in related cases pending before this Court."); *Al Odah v. U.S.,* 346 F. Supp. 2d 1, 14 (D.D.C. 2004) (noting counsel in three Guantanamo *habeas* cases would be "required to have a security clearance at the level appropriate for the level of knowledge the Government believes is possessed by the detainee, and would be prohibited from sharing with the detainee any classified material learned from other sources"); *United States v. Lockheed Martin Corp.,* 1998 WL 306755, at *5 (issuing protective order stating that "defendant's identification of an individual as someone required for the defense of this litigation will establish a 'need to know' for access to the specific classified information"); *see also Doe v. Tenet*, 329 F.3d 1135, 1148 (9th Cir. 2003), *rev'd on other grounds*, 125 S.Ct. 1230 (2005) (noting that plaintiffs' counsel had received security clearance from CIA to aid in representing alleged covert CIA agents); *In re United States,* 1993 WL 262656, at *2-3 (Fed. Cir. Apr. 19,

The inquiry should not end even if the Court ultimately determines that defendants cannot prove a valid defense without privileged evidence. The Fourth Circuit has admonished that courts must use "creativity and care" to devise "procedures which would protect the privilege and yet allow the merits of the controversy to be decided in some form." *Fitzgerald,* 776 F.2d at 1238 n.3. Thus, courts faced with privilege claims have stated that, if necessary, the Court can "delve more deeply than it might ordinarily into marshalling the evidence on both sides" in order to protect potentially sensitive information. *The Irish People,* 684 F.2d at 955; *Ellsberg,* 709 F.2d at 69 (directing *in camera* review of evidence); *Heine,* 399 F.2d at 791 (same). The Court itself, after examination of the evidence, may make "representative findings of fact from the files" and provide summaries of the information, in a manner that would not compromise the privilege. *Irish People,* 684 F.2d at 954. The Court could even pose questions about the merits to the government.[46]

Other courts have suggested that an appropriate alternative to dismissal merely on the basis of the privilege – but as a last resort – is *in camera* examination of the evidence that purportedly supports the government's defense, and a determination on the merits. In *Molerio,* for example, the court evaluated the privileged and non-privileged evidence and resolved the claims on the merits. *Molerio,* 749 F.2d at 825; *see also Halpern*, 258 F.2d at 41. In *Ellsberg,* after holding that the government could not use the state secrets privilege to avoid its burden to prove that the warrantless surveillance at issue fit into the warrant exception, the court suggested

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1993) (acknowledging that government had granted clearance to numerous counsel in civil litigation).

[46] *See also United States v. Ehrlichman*, 376 F. Supp. 29, 32 n.1 (D.D.C. 1974) ("courts have broad authority to inquire into national security matters so long as proper safeguards are applied to avoid unwarranted disclosures"); *see also In re United States,* 872 F.2d at 480 (upon rejecting a premature privilege claim noting its "confidence that [the district court could] police the litigation so as not to compromise national security.").

that such questions of law could, if necessary, easily "be resolved by the trial judge through the use of appropriate *in camera* procedures." 709 F.2d at 69. The court emphasized that "this procedure should be used only as a last resort," because "[*e*]*x parte, in camera* resolution of dispositive issues should be avoided whenever possible." *Id.* at 69 n.78.

While some of these alternatives are extreme, *any* alternative would be preferable to the dismissal of this case and the elimination of any possibility of resolution on the merits of plaintiffs' targeted wiretapping claims. "Only when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal [on state secrets grounds] warranted." *Fitzgerald* 776 F.2d at 1244. If the Court believes that defendants may need privileged information for a valid defense — and plaintiffs emphatically believe that defendants do not — any of these alternatives to dismissal are available to the Court.[47]

**V. The Statutory Privileges Provide No Basis For Dismissal of this Action.**

The government's attempt to use statutory privileges as a basis for dismissal of this action is yet another example of the government's overreaching in an effort to avoid judicial scrutiny and accountability. Plaintiffs have found no precedent to support the use of the NSA non-disclosure statute, or the DNI non-disclosure statute or its predecessor (50 U.S.C. § 403(c)(1), as an affirmative basis for dismissing a lawsuit. Rather, both statutory privileges are typically invoked to justify withholding documents requested under the Freedom of Information Act (FOIA), *see, e.g., Hayden v. NSA,* 608 F.2d 1381 (D.C. Cir. 1979) (NSA statute invoked to withhold information under the FOIA); *Weberman v. NSA*, 490 F. Supp. 9 (S.D.N.Y. 1980)

[47] Because plaintiffs' datamining claims fall outside the scope of plaintiffs' motion for partial summary judgment and have not even moved beyond the pleading stage, dismissal of those claims is clearly improper prior to discovery, an assessment of what evidence is necessary or even relevant to those claims, the review and provision to plaintiffs of non-privileged evidence, and consideration of alternatives to dismissal. *See supra* at 13-14.

(same); *ACLU v. Dep't of Defense*, 389 F.Supp.2d 547 (predecessor to DNI statute invoked to withhold information under FOIA), and only occasionally to block discovery of discrete pieces of information in civil litigation, *see, e.g., Linder v. NSA*, 94 F.3d 693 (D.C. Cir. 1996) (NSA statute invoked to quash third-party subpoena). Moreover, the non-disclosure statutes have no application here because plaintiffs are not seeking discovery and do not seek disclosure of any evidence.[48] Plaintiffs seek no information about intelligence methods or sources. Finally, defendants cannot assert statutory privileges over information they have already disclosed. *See supra* 16-21.

## CONCLUSION

For the forgoing reasons, this Court should deny defendants' motion to dismiss or for summary judgment, and should grant plaintiffs' motion for partial summary judgment.

Respectfully submitted,

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[48] Even if the privilege had some application here, at least one appellate court has suggested that it applies only where the "activity" the NSA seeks to protect is authorized by statute and otherwise lawful. *Hayden,* 608 F.2d at 1389. That is not the case here.

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June 20, 2006

**CERTIFICATE OF SERVICE**

I hereby certify that on June 20, 2006, I electronically filed Plaintiffs' Opposition to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment using the ECF system, which will send notification of such filing to Anthony J. Coppolino, Department of Justice and Andrew Tannenbaum, Department of Justice.

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