Nos. 11-15468 & 11-15535

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

Plaintiffs, Appellees and Cross-Appellants,

vs.

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

Defendants, Appellants and Cross-Appellees.

BRIEF OF APPELLEES AND CROSS-APPELLANTS

EISENBERG AND HANCOCK, LLP
JON B. EISENBERG (CSB No. 88278)
WILLIAM N. HANCOCK (CSB No. 104501)
BEN FEUER (CSB No. 247502)
1970 Broadway, Suite 1200
Oakland, California 94612
(510) 452-2581 • FAX: (510) 452-3277

STEVEN GOLDBERG (OSB No. 75134)
River Park Center, Suite 300
205 SE Spokane Street
Portland, Oregon 97202
(503) 445-4622 • FAX: (503) 238-7501

THOMAS H. NELSON (OSB No. 78315)
P.O. Box 1211
20820 E. Glacier View Road
Welches, Oregon 97049
(503) 662-3123 • FAX: (503) 622-1438

J. ASHLEE ALBIES (OSB No.05184)
CREIGHTON & ROSE, PC
815 S.W. Second Ave., Suite 500
Portland, Oregon 97204
(503) 221-1792 • FAX: (503) 223-1516

ZAHA S. HASSAN (CSB No. 184696)
P.O. Box 1168
Lake Oswego, Oregon 97034
(360) 213-9737 • FAX: (866) 399-5575

LISA R. JASKOL (CSB No. 138769)
610 S. Ardmore Avenue
Los Angeles, California 90005
(213) 385-2977 • FAX: (213) 385-9089

Attorneys for Plaintiffs, Appellees and Cross-Appellants
WENDELL BELEW and ASIM GHAFOOR

CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for plaintiffs, appellees and cross-appellants states that plaintiff Al-Haramain Islamic Foundation, Inc. (which is not a party to this appeal and cross-appeal) is an Oregon corporation, with no parent or subsidiary, and that no publicly-held company owns 10 percent or more of Al-Haramain's stock.

September 14, 2011 By: /s/ Jon B. Eisenberg
Jon B. Eisenberg

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitution

Statutes, Rules and Regulations

Legislative History

Miscellaneous

INTRODUCTION

> *"[S]teps taken in the aftermath of 9/11 were both excessive and unlawful. Our government . . . approved secret electronic surveillance of American citizens . . . . These steps were wrong when they were initiated and they are wrong today. We owe the American people a reckoning."*
>
> Eric Holder, June 13, 2008[1/]

This case returns to this Court after an interlocutory appeal and remand in 2007 for a decision whether the Foreign Intelligence Surveillance Act (FISA) preempts the state secrets privilege. Although the district court initially found that FISA-prescribed security procedures preempt the state secrets privilege and enable this litigation to go forward on classified evidence, plaintiffs subsequently elected to proceed solely on *non-classified* evidence, which the court found sufficient to establish defendants' liability for violating FISA. Defendants now appeal a judgment awarding statutory liquidated damages and attorney's fees to plaintiffs Wendell Belew and Asim Ghafoor (but not to plaintiff Al-Haramain Islamic Foundation, Inc.).

The district court resolved this lawsuit in a manner far different than anyone anticipated in 2007— purely on public evidence. Plaintiffs proved their case without using the Sealed Document at issue in the 2007 interlocutory appeal, and defendants

---

[1/] Address to American Const. Society (June 13, 2008), http://www.youtube.com/watch?v=nbAzDx_d0MI&feature=relmfu (videotape at 1:40–2:31).

failed to present any rebuttal evidence (although FISA preemption of the state secrets privilege remains at issue because defendants claimed that the privilege excused their failure). The result is the reckoning that Mr. Holder said the American people are owed—a judgment confirming candidate Barack Obama's 2007 pronouncement that "[w]arrantless surveillance of American citizens, in defiance of FISA, is unlawful and unconstitutional." Charlie Savage, *Barack Obama's Q&A*, BOSTON GLOBE (Dec. 20, 2007).

This case has now been successfully adjudicated without any breach of state secrecy or harm to national security—without using the Sealed Document, and without revealing intelligence sources, methods, or operational details. By an exemplary act of judicial minimalism, the district court narrowly determined the bare fact of plaintiffs' warrantless electronic surveillance, based solely on public evidence. National security has been protected, while the rule of law has been vindicated. A more satisfactory conclusion of this litigation cannot be imagined.

STATEMENT OF JURISDICTION

Plaintiffs agree with defendants' statement of this Court's jurisdiction.

STATEMENT OF THE ISSUES

1. Does FISA waive federal sovereign immunity?

2. Does FISA preempt the state secrets privilege?

3. Was plaintiffs' non-classified evidence sufficient to prove their warrantless electronic surveillance?

4. Did the district court properly award counsel's full attorney's fees?

5. Did the district court err in dismissing defendant Mueller in his individual capacity?

STATEMENT OF FACTS

I. The FISA Context.

Congress enacted FISA in 1978 as a response to past instances of abusive warrantless wiretapping by the National Security Agency (NSA) and the Central Intelligence Agency (CIA). *See* H.R. REP. NO. 95-1283(I), at 21–22 (1978); S. REP. NO. 95-604(I), at 6 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 1308. FISA provides a framework for the domestic use of electronic surveillance to acquire "foreign intelligence information" as defined by FISA section 1801(e)(1). FISA generally requires the government to obtain a warrant to conduct "electronic

surveillance" (as defined by FISA section 1801(f)) of a "United States person" (which FISA section 1801(i) defines as a citizen, resident alien or association of such persons).

FISA imposes criminal penalties for its violation, 50 U.S.C. § 1809, as well as civil liability. Victims of unlawful electronic surveillance "shall have a cause of action against any person who committed such violation" and "shall be entitled to recover" liquidated or actual damages, punitive damages, and reasonable attorney's fees and costs. 50 U.S.C. § 1810.

II. The "Terrorist Surveillance Program" (TSP).

A. Public Admissions That Defendants Conducted Warrantless Electronic Surveillance.

Shortly after the terrorist attacks of September 11, 2001, President Bush authorized the NSA to secretly conduct warrantless electronic surveillance of international telecommunications, intercepting them domestically from routing stations located within the United States. Years later, President Bush, top Executive Branch officials, and the Department of Justice (DOJ) made public statements admitting that, under the newly-dubbed "Terrorist Surveillance Program" (TSP), the President authorized the NSA to intercept, without warrants, international communications, into and out of the United States, of persons believed to be "a

member of," "affiliated with," or "with known links to" al-Qaeda. Supplemental Excerpts of Record (SER) 52, 55, 57, 63, 65, 68.

The TSP was constructed on the Bush administration's theory that the President has "inherent constitutional authority" to disregard an Act of Congress in the name of national security.[2/] SER 169. It was part of a broader swath of intelligence-gathering activities now referred to collectively as the "President's Surveillance Program" (PSP). The PSP included the TSP as well as "Other Intelligence Activities" which, unlike the TSP, remain highly classified. *See* SER 11–13.

The Attorney General "certified" the TSP and Other Intelligence Activities in a single certification of the PSP, which was subsequently subject to re-certification every 45 days upon advice by the Office of Legal Counsel (OLC) whether the PSP could be re-certified "'as to form and legality.'" SER 12–13. The Attorney General's periodic re-certification was intended to give the PSP "'a sense of legitimacy,'" and was also desired for "'purely political considerations'" in that "the program would have value 'prospectively' in the event of congressional or inspector general reviews

---

[2/] This theory had its roots in Vice-President Dick Cheney's longstanding self-described "monarchical notions of prerogative" that the President may "on occasion . . . exceed the law." *See* REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR 465 (1987) (Minority Report, Dick Cheney, Ranking Republican), *available at* http://www.archive.org/stream/reportofcongress87unit#page/464/mode/2up.

of the program." SER 14.

B. Public Evidence That Defendants Knew the TSP Was Unlawful yet Continued It in 2004 Without the Attorney General's Re-Certification.

As of early March 2004, Deputy Attorney General James Comey and Attorney General John Ashcroft had determined that the TSP lacked legal support and that certain aspects of the Other Intelligence Activities should cease. SER 27–29, 43–44, 73, 81. During a meeting at the White House on March 9, 2004, two days before Ashcroft's periodic 45-day re-certification of the PSP was due, Comey told Vice-President Dick Cheney that the PSP could not be re-certified unless "certain intelligence activities" were "modified." SER 29–30, 72–73, 78–81, 85, 87.

On March 10, 2004, while Ashcroft was hospitalized, two White House officials went to his bedside and attempted to obtain the re-certification from him, but he refused. SER 31–32, 71, 75. His previous re-certification lapsed the next day. SER 79, 82. The PSP, including the TSP, continued to operate without Ashcroft's re-certification, and the FBI continued to participate in it, until Ashcroft re-certified it on May 6, 2004. SER 35–36, 79, 82, 87.

Comey had discussed "DOJ's concerns about the legality of the program" with FBI Director Robert Mueller on March 1, 2004. SER 28, 92. Mueller subsequently admitted in congressional testimony that, prior to the hospital incident, he had

"serious reservations about the warrantless wiretapping program"—i.e., the TSP. SER 91. Nevertheless, despite Mueller's concerns, he "decided not to direct the FBI to cease cooperating with the NSA in conjunction with the [PSP]." SER 35.

III. The Plaintiffs' Surveillance.

A. Public Evidence That in February 2004 Defendants Began Investigating Al-Haramain for Possible Crimes Relating to Currency Reporting and Tax Laws.

In a press release issued on February 19, 2004, the Treasury Department announced an investigation of plaintiff Al-Haramain Islamic Foundation, Inc.—the Oregon affiliate of the Saudi Arabia–based Al-Haramain Islamic Foundation—for possible crimes relating to currency reporting and tax laws. SER 106. The press release stated that OFAC had preliminarily blocked plaintiff Al-Haramain's assets during the pendency of the investigation. *Id.* The press release contained no mention of purported links between Al-Haramain and Osama bin-Laden.

In March 2004, FBI Assistant Director Gary Bald testified to Congress that the FBI's Terrorist Financing Operations Section (TFOS) was providing operational support for the Al-Haramain investigation. SER 100. The role of the TFOS in such investigations included acquisition of telecommunications data. SER 97.

B. Public Evidence That OFAC and the FBI Regularly Used TSP Information.

In June 2004, former OFAC Director Richard Newcomb testified to Congress that in conducting terrorist financing investigations, OFAC uses "classified . . . information sources." SER 120. In July 2007, defendant Mueller testified to Congress that in 2004 the FBI, under his direction, undertook activity using information produced by the NSA through the TSP. SER 92–93.

C. The Telephone Conversations in Which Plaintiffs Discussed Ghafoor's Representation of Persons Linked with Osama bin-Laden.

After the preliminary blocking of Al-Haramain's assets, Belew spoke over the telephone with one of Al-Haramain's directors, Soliman al-Buthi, on ten dates between March 10 and June 10, 2004. SER 171. Ghafoor spoke over the telephone with al-Buthi approximately daily from February 19 through February 29, 2004, and approximately weekly thereafter. SER 174. Belew and Ghafoor were located in Washington D.C.; al-Buthi was located in Saudi Arabia. SER 171, 174.

Al-Haramain and al-Buthi had been named among multiple defendants in a lawsuit filed against Saudi Arabian entities and citizens on behalf of victims of the September 11 terrorist attacks. Al-Buthi, coordinating the defense of individuals named in that lawsuit, contacted some of them and urged them to obtain legal

representation. Ghafoor undertook to represent several of them. SER 174. Belew undertook to provide other legal services. SER 171.

In these telephone conversations, al-Buthi mentioned by name numerous defendants whom Ghafoor undertook to represent—one of whom, Mohammad Jamal Khalifa, was a brother-in-law of Osama bin-Laden. Two other names al-Buthi mentioned were Safar al-Hawali and Salman al-Auda, clerics whom Osama bin-Laden claimed had inspired him. SER 174–75. The parties also discussed the payment of Belew's and Ghafoor's legal fees. SER 171–72, 175.

D. The September 2004 Designation of Al-Haramain As a Terrorist Organization.

On September 9, 2004, OFAC formally designated Al-Haramain as a Specially Designated Global Terrorist organization, thereby freezing Al-Haramain's assets. SER 126.

E. Public Evidence That the FBI Used Classified Information in the Al-Haramain Investigation.

Defendants admittedly used classified information in the investigation that led to Al-Haramain's terrorist designation. In a letter to Al-Haramain's lawyer Lynne Bernabei dated April 23, 2004, former OFAC Director Newcomb stated that OFAC was considering designating Al-Haramain as a terrorist organization based in part "on classified documents that are not authorized for public disclosure." SER 122. In a

follow-up letter to Bernabei dated July 23, 2004, Newcomb reiterated that OFAC was considering "classified information not being provided to you." SER 124. In a letter to Al-Haramain's attorneys dated February 6, 2008, OFAC confirmed its "use of classified information" in the 2004 investigation. SER 132.

F. The FBI's Public Admission That It Used Surveillance in the Al-Haramain Investigation.

On October 22, 2007, in a speech at a conference on money laundering, the text of which appears on the FBI's Internet website, FBI Deputy Director John Pistole publicly admitted that the FBI *used surveillance* in connection with the 2004 Al-Haramain investigation. Pistole stated: "Yes, we used other investigative tools – like records checks, surveillance, and interviews of various subjects. But it was the financial evidence that provided justification for the initial designation and then the criminal charges." SER 139.

G. Public Evidence That Al-Haramain Director al-Buthi Had Previously Been Subjected to Electronic Surveillance.

A 2008 Treasury Department memorandum includes evidence that the government had conducted electronic surveillance of Al-Haramain director al-Buthi prior to 2004. The memorandum states that on February 1, 2003, the government surveilled four telephone conversations between al-Buthi and Ali al-Timimi, and that

these incidents of surveillance were disclosed during al-Timimi's 2005 trial on criminal charges. SER 165–66.

H. The Inference That Defendants Used Electronic Surveillance of Plaintiffs to Declare Links Between Al-Haramain and Osama bin-Laden.

In a press release issued on September 9, 2004—the day OFAC formally declared Al-Haramain to be a terrorist organization—the Treasury Department stated that the Al-Haramain investigation had shown "direct links between the U.S. branch [of Al-Haramain] and Usama bin Laden [sic]." SER 126. This press release was the first instance of a public claim of purported links between plaintiff Al-Haramain and Osama bin-Laden. The earlier press release of February 19, 2004, announcing the preliminary blocking of Al-Haramain's assets, did not mention Osama bin-Laden. *See* SER 106.

The timing and substance of Belew's and Ghafoor's 2004 telephone conversations with al-Buthi in which they discussed persons linked with Osama bin-Laden, during the period between Al-Haramain's preliminary assets-blocking order and the formal terrorist designation, along with Pistole's admission that the FBI used surveillance in the Al-Haramain investigation and the evidence that the government had surveilled al-Buthi in 2003, raise an inference that defendants conducted surveillance of Belew's and Ghafoor's telephone conversations and then relied on

that surveillance to declare links between Al-Haramain and Osama bin-Laden.

I. The Public Evidence That Plaintiffs' Surveillance Was Electronic.

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

Former Director of National Intelligence Mike McConnell and other top Executive Branch officials have testified to Congress that "[m]ost" telecommunications between the United States and abroad are transmitted by wire through routing stations located within the United States, from which the NSA intercepts such communications, so that their interception required a FISA warrant prior to the FISA Amendments Act of 2008, Pub. L. No. 110-261. SER 157; *see also* SER 145, 150–53, 159. This testimony demonstrates the probability that al-Buthi's 2004 telecommunications with Belew and Ghafoor were wire communications intercepted within the United States, so that their interception was "electronic surveillance" under FISA.

STATEMENT OF THE CASE

I. The Complaint and the Sealed Document.

On February 28, 2006, Al-Haramain, Belew and Ghafoor filed a complaint in the United States District Court for the District of Oregon alleging a civil cause of action under FISA section 1810. The complaint also alleged violations of the constitutional separation of powers, the First, Fourth and Sixth Amendments, and the International Covenant on Civil and Political Rights. ER 297–304.

Along with the complaint, plaintiffs filed under seal a copy of a document bearing a top secret classification—referred to throughout this litigation as the "Sealed Document"—for the purpose of establishing the fact of their surveillance and thus their standing to sue. OFAC had accidently given Al-Haramain's attorneys the Sealed Document during the course of document production in the 2004 OFAC proceedings. *See* ER 129–30.

II. Defendants' Assertion of the State Secrets Privilege.

Defendants filed a motion for dismissal, or alternatively for summary judgment, based on the state secrets privilege.[3/] The district court denied the motion, saying the

---

[3/] In support of the motion, defendants filed public and secret declarations asserting the privilege. ER 282–96. On November 9, 2009, defendants lodged with this Court a secret declaration which, according to defendants' public notice of the lodging, provides classified information addressing "an inaccuracy contained in a prior submission by the Government, the details of which involve classified

TSP was no longer a secret and the court would "permit plaintiffs to file *in camera* any affidavits attesting to the contents of the [Sealed Document] from their memories to support their standing in this case and to make a *prima facie* case." *Al-Haramain Islamic Foundation, Inc. v. Bush*, 451 F. Supp. 2d 1215, 1229 (D. Or. 2006) [ER 156].

III. The Interlocutory Appeal.

On an interlocutory appeal by defendants—during which the Judicial Panel on Multidistrict Litigation transferred the action to the Northern District of California to be litigated with dozens of other lawsuits arising from the PSP—this Court reversed and ordered the case remanded for further proceedings. *Al-Haramain*

---

information that cannot be set forth on the public record." This Court struck the lodging for lack of jurisdiction. *See* Order, No. 06-36083 (9th Cir. Nov. 23, 2009). Nevertheless, defendants now state: "Our November 2009 classified submission remains available for this Court's review, through the Court Security Officer." Appellants' Br. 35 n.5.

This so-called "inaccuracy" remains a mystery to plaintiffs, who have not had access to any of defendants' secret filings. But if the "inaccuracy" amounts to a *misrepresentation*, defendants may have forfeited judicial deference to their assertion of the state secrets privilege. *See Horn v. Huddle*, 636 F. Supp. 2d 10, 17 (D.D.C. 2009) (court refuses to give "a high degree of deference" to assertion of privilege because of government's "prior misrepresentations regarding the state secrets privilege in this case"), *vacated*, 699 F. Supp. 2d 236, 238 (D.D.C. 2010) (court states that, regardless of vacatur pursuant to settlement, opinion's "reasoning is unaltered, to the extent it is deemed persuasive by anyone"). If this Court were to determine that FISA does not preempt the state secrets privilege, plaintiffs would ask the Court to review the government's secret filings, including the November 2009 submission, to determine whether defendants have forfeited the privilege by misrepresentation.

Islamic Foundation, Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007) [ER 125]. This Court held that the district court properly determined the TSP is no longer a state secret but erred in permitting plaintiffs to file affidavits describing the Sealed Document from memory, because the Sealed Document itself is a state secret and the court's ruling was an improper "back door around" the state secrets privilege. *Id.* at 1193 [ER 128].

Plaintiffs had contended, among other things, that the state secrets privilege is preempted by FISA, which authorizes courts to "review in camera and ex parte," and disclose to an "aggrieved person, under appropriate security provisions and protective orders," materials relating to electronic surveillance for the purpose of determining whether the surveillance was unlawful. 50 U.S.C. § 1806(f). The Court did not rule on that contention, but said: "Rather than consider the issue for the first time on appeal, we remand to the district court to consider whether FISA preempts the state secrets privilege and for any proceedings collateral to that determination." 507 F.3d at 1206 [ER 141].

IV. The District Court's Rulings on FISA Preemption and Sovereign Immunity.

On July 2, 2008, upon remand to the Northern District of California and a second motion by defendants for dismissal or summary judgment, the district court

denied the motion and ruled that FISA "preempts or displaces the state secrets privilege, but only in cases within the reach of its provisions." *In re National Security Agency Telecommunications Records Litig.*, 564 F. Supp. 2d 1109, 1124 (N.D. Cal. 2008) [ER 96, 111]. The court rejected the notion that the President has inherent power to disregard FISA—in this context, to disregard FISA's preemption of the state secrets privilege:

> [T]he authority to protect national security information is neither exclusive nor absolute in the executive branch. When Congress acts to contravene the president's authority, federal courts must give effect to what Congress has required. . . . Whatever power the executive may otherwise have had in this regard, FISA limits the power of the executive branch to conduct such activities and it limits the executive branch's authority to assert the state secrets privilege in response to challenges to the legality of its foreign intelligence surveillance activities.

Id. at 1121 [ER 108].

Defendants' second dismissal motion asserted sovereign immunity as an independent basis for dismissal.[4/] The court also rejected this assertion, ruling that FISA waives sovereign immunity. *Id.* at 1125 [ER 112].

The court further ruled, however, that to use the Sealed Document, plaintiffs first had to demonstrate, using *non-classified* evidence, that they are "aggrieved

---

[4/] Defendants had previously asserted sovereign immunity in their 2007 briefing on the interlocutory appeal, but this Court's 2007 opinion did not address the point.

persons" within the meaning of section 1806(f). 564 F. Supp. 2d at 1135 [ER 122]. The court dismissed plaintiffs' claims with leave to amend their complaint to plead non-classified facts sufficient to establish "aggrieved person" status. *Id.* at 1137 [ER 124].

V. The Amended Complaint and the District Court's Ruling on "Aggrieved Person" Status.

Plaintiffs subsequently filed an amended complaint which pled the requisite non-classified information to establish "aggrieved person" status under section 1806(f). ER 265-81; *see supra* at 4–12. The amended complaint also specified that defendant Mueller was being sued in both his official and individual capacities. ER 267.

After filing the amended complaint, plaintiffs filed a motion to proceed under section 1806(f), and defendants filed a third motion for dismissal or summary judgment. On January 5, 2009, the court granted plaintiffs' motion and denied defendants' motion, ruling that "[w]ithout a doubt, plaintiffs have alleged enough to plead 'aggrieved person' status so as to proceed to the next step in proceedings under FISA's sections 1806(f) and 1810." *In re National Security Agency Telecommunications Records Litig.*, 595 F. Supp. 2d 1077, 1086 (N.D. Cal. 2009) [ER 82, 91]. The court ordered defendants to arrange for and process applications for

"top secret/sensitive compartmented information" (TS/SCI) security clearance by members of plaintiffs' litigation team, so that they could read and respond to sealed filings and rulings. *Id.* at 1089 [ER 94].

Defendants immediately filed a purported notice of appeal from the order of January 5, 2009. On February 27, 2009, this Court dismissed the purported appeal for lack of appellate jurisdiction. ER 81. Defendants also requested the district court to certify the order of January 5, 2009 for an interlocutory appeal. On February 13, 2009, the district court denied that request and ordered the government "to inform the court how it intends to comply with the January 5[, 2009] order." SER 181.

VI. Defendants' Refusals to Obey the District Court's Orders.

Thereafter, defendants embarked on a course of repeatedly defying the district court. Defendants found two of plaintiffs' attorneys suitable for TS/SCI security clearance but insisted they had no "need to know" the classified information. *See In re National Security Agency Telecommunications Records Litig.*, 700 F. Supp. 2d 1182, 1191 (N.D. Cal. 2010) [ER 51, 60]. In response to the court's order of February 13, 2009, defendants did nothing more than to propose several scenarios whereby there would be an immediate stay of district court proceedings and immediate appellate review. On April 20, 2009, the court rejected those proposals, noting the failure of defendants' previous attempts to proceed by direct or

interlocutory appeal. SER 176. The court ordered the parties to meet and confer to fashion a protective order to ensure the secrecy of the Sealed Document and other classified information as the case proceeded under section 1806(f). SER 176–78. Defendants, however, refused to agree to any terms of a protective order proposed by plaintiffs and refused to propose one of their own. ER 228–44.

On May 22, 2009, the court ordered defendants to show cause why they should not be sanctioned "for failing to obey the court's orders."[5/] ER 79. The court also ordered plaintiffs to submit a memorandum addressing whether, at that point, it had become feasible for them to move for summary judgment on the section 1810 claim, with or without the Sealed Document. ER 80.

[5/] Defendants insist there was no such failure on their part, and that the Executive has exclusive control over the "need-to-know" determination. *See* Appellants' Br. 57. But defendants' refusal to propose a protective order, which they could have done while asserting a continuing objection, was plainly defiant. As for their repudiation of the court's "need-to-know" determination, it was contrary to an executive order vesting such determinations in an "authorized holder of classified information," *see* Exec. Order No. 13,292 ("Classified National Security Information") § 6.1(z), 68 Fed. Reg. 15,315, 15,332 (2003), statutory and regulatory law making federal judges authorized holders of classified information, *see* 50 U.S.C. § 437; 32 C.F.R. § 154.16(d)(5) (1987), and case law vesting courts with supervisory power over their own records and files, *see, e.g.*, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978).

VII. The Summary Judgment of Liability.

By this point in the litigation, in light of information that had slowly trickled into the public domain since the case's onset, and particularly since the 2007 oral argument before this Court, it had become possible to demonstrate plaintiffs' warrantless electronic surveillance based solely on non-classified evidence, making the Sealed Document superfluous. Thus, in their memorandum submitted in response to the district court's order of May 22, 2009, plaintiffs proposed to proceed by motion for summary judgment of liability based solely on the existing record of non-classified evidence, whereby the court would adjudicate standing and liability without a protective order and without plaintiffs having access to the Sealed Document. *See* Doc. 91.

The district court accepted plaintiffs' proposal. In an order dated June 5, 2009, the court "continued" the order to show cause (which the court never again took up) and ordered plaintiffs to file a motion for summary judgment, stating: "Plaintiffs shall base their motion on non-classified evidence." ER 75–76. Plaintiffs thereafter moved for summary judgment of liability based on the non-classified evidence described in the amended complaint, and defendants filed a fourth motion for

dismissal or summary judgment.[6/]

On March 31, 2010, the court denied defendants' motion and granted summary judgment for plaintiffs on the issue of liability under FISA. *In re National Security Agency Telecommunications Records Litig.*, 700 F. Supp. 2d at 1202 [ER 71]. Rejecting defendants' challenge to the sufficiency of plaintiffs' non-classified evidence, the court concluded: "Alone, no single item of evidence is sufficient, but together the various pieces establish a prima facie case." *Id.* at 1199 [ER 68].

The court dismissed all claims against Mueller in his individual capacity, concluding that "the nature of the wrongdoing by governmental actors alleged and established herein is official rather than individual or personal." 700 F. Supp. 2d at 1203 [ER 72]. The court also ordered plaintiffs to either take steps to prosecute their

---

[6/] Meanwhile, in late 2009, the DOJ announced new policies for invoking the state secrets privilege. *See* Memorandum from Attorney General to Heads of Executive Departments and Agencies on Policies and Procedures Governing Invocation of the State Secrets Privilege (Sept. 23, 2009), http://www.justice.gov/opa/documents/state-secret-privileges.pdf. Unlike *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010), where the government advised this Court that the DOJ "had reviewed the assertion of privilege in [that] case and determined that it was appropriate under the newly announced policies," *id.* at 1077, defendants in the present case have made no such pronouncement, and evidently the DOJ has *not* reviewed the assertion of privilege in this case under the new policies. We submit that the Bush administration's 2006 assertion of the privilege could not pass muster under the new DOJ policies, given that the Sealed Document is now out of the case and plaintiffs have proceeded to judgment solely on non-classified evidence.

non-FISA claims or request dismissal of those claims. *Id.* at 1203–04 [ER 72–73].

VIII. The Final Judgment Awarding Damages and Attorney's Fees.

After the court granted summary judgment, plaintiffs requested dismissal of their non-FISA claims, *see* ER 13, and proceeded to litigate damages and attorney's fees. Each of the three plaintiffs sought the following: (1) liquidated damages, at the rate of $100 per day as prescribed by 50 U.S.C. section 1810(a), for warrantless electronic surveillance during the 204-day period between Al-Haramain's preliminary asset-blocking order and its formal terrorist designation—a total of $20,400 per plaintiff; (2) punitive damages in the sum of $183,600 per plaintiff; and (3) reasonable attorney's fees and litigation costs. *See* ER 12–14.

On December 21, 2010, the court ruled that "plaintiffs Ghafoor and Belew shall each recover liquidated damages in the amount of $20,400." ER 17. The court declined to award punitive damages. ER 22–31. The court awarded $2,515,387 in attorney's fees to Belew and Ghafoor, plus $22,012 in litigation costs. ER 49.

The court ruled that damages, attorney's fees and costs are *not* recoverable by Al-Haramain, due to OFAC's determination "that Al-Haramain provided aid and support to terrorist organizations . . . coupled with the fact that Al-Haramain was designated a [terrorist] organization." ER 18. The court reasoned as follows: Section 1810 authorizes recovery by aggrieved persons "other than a foreign power

or an agent of a foreign power, as defined in section 1801(a) or (b)(a)(A) of this title"; section 1801(a)(4) defines "foreign power" as including "a group engaged in international terrorism or activities in preparation therefor"; and OFAC's terrorism determination and designation for Al-Haramain demonstrate that it is a foreign power within the meaning of section 1801(a)(4) and thus is precluded from recovery under section 1810. ER 17–18, 22, 32.

IX. The Appeal and Cross-Appeal.

Defendants filed a timely appeal. ER 165–66. Belew and Ghafoor (but not Al-Haramain) filed a timely cross-appeal. ER 161–62. The purpose of the cross-appeal is solely protective, to obtain appellate review of the dismissal of all claims against Mueller in his individual capacity *if* (and *only* if) this Court were to reverse based on a finding of sovereign immunity.

SUMMARY OF ARGUMENT

I. FISA waives sovereign immunity in two separate and independent ways: by authorizing a civil action against "any officer or employee of the Federal Government," and by authorizing action against an "entity." 50 U.S.C. § 1801(m). This waiver is not merely implicit; it is unequivocal.

II. FISA preempts the state secrets privilege in civil actions for FISA violations. The state secrets privilege is a common law evidentiary rule which lacks

constitutional provenance. Federal common law can be preempted by a comprehensive regulatory program that speaks directly to the question at issue. FISA is a comprehensive regulatory program that speaks directly to protection of national security in FISA litigation, and as such it preempts the state secrets privilege.

III. The district court properly found liability based on public evidence. A FISA violation may be proven with circumstantial evidence raising a reasonable inference of warrantless electronic surveillance. Plaintiffs presented sufficient proof of a FISA violation, consisting of direct and circumstantial evidence raising a reasonable inference that defendants conducted warrantless electronic surveillance of Belew's and Ghafoor's telecommunications in 2004.

IV. The district court properly awarded all attorney's fees. Civil-rights plaintiffs may be awarded full statutorily-authorized attorney's fees where, as here, successful and unsuccessful claims are related and the litigation has achieved excellent results.

V. If this Court determines that FISA does not waive sovereign immunity, the Court should adjudicate the cross-appeal and remand the case for further proceedings against defendant Mueller individually.

ARGUMENT

I. FISA WAIVES SOVEREIGN IMMUNITY.

A. FISA Unequivocally Waives Sovereign Immunity by Authorizing Action Against "Any Officer or Employee of the Federal Government."

Defendants' lead argument is that the judgment must be reversed because FISA does not waive sovereign immunity. A waiver of sovereign immunity "must be unequivocally expressed in statutory text and will not be implied." *Lane v. Pena,* 518 U.S. 187, 192 (1996) (citation omitted).

FISA, however, unequivocally waives sovereign immunity via the combined provisions of section 1810, which authorizes a civil action against any "person" who commits unlawful electronic surveillance, and section 1801(m), which defines a "person" as "any individual, *including any officer or employee of the Federal Government*, or any group, entity, association, corporation, or foreign power" (emphasis added).

"The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii v. Gordon,* 373 U.S. 57, 58 (1963). FISA authorizes civil actions against federal officers and employees; and, as the district court explained, "it is only such officers and employees *acting in their official capacities* that would engage in surveillance

of the type contemplated by FISA." 564 F. Supp. 2d at 1125 [ER 112] (emphasis added). That is because Congress enacted FISA to restrict warrantless wiretapping by *the federal government*—i.e., by the sovereign. *See supra* at 3–4. Congress intended a judgment of liability for warrantless wiretapping by federal officers and employees to operate against the sovereign, meaning the authorization to sue them was intended to waive sovereign immunity.

It would be strange indeed if FISA did *not* waive sovereign immunity, given the reason for FISA's existence. Absent such waiver, FISA would only authorize a civil action for the odd (perhaps virtually impossible) instance of FISA-defined electronic surveillance by a rogue federal employee acting individually or by a non-federal actor, which would be a meager device for attacking the broader problem that FISA was meant to address. Just as Congress "does not, one might say, hide elephants in mouseholes," *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001), Congress does not hunt elephants with mousetraps. Sovereign immunity would make section 1810 effectively a dead letter.

The district court made this point when commenting: "The remedial provision of FISA in section 1810 would afford scant, if any, relief if it did not lie against such 'Federal officers and employees' carrying out their official functions. Implicit in the remedy that section 1810 provides is a waiver of sovereign immunity." 564 F. Supp.

2d at 1125 [ER 112]. According to defendants, however, this comment indicates the court wrongly imposed liability based on an *implicit* rather than unequivocal waiver of sovereign immunity. *See* Appellants' Br. (AB) 23, 25–26. Not so. The judge simply acknowledged a necessary implication from the remedy prescribed *in section 1810*. The unequivocal waiver of sovereign immunity appears not in section 1810, but in section 1801(m)'s definition of a "person" who can be held liable under section 1810. The operative language of waiver is in the explicit definition of "person" to include "any officer or employee of the Federal Government," 50 U.S.C. § 1801(m), which overcomes the presumption that the statutory term "person" does not ordinarily include the sovereign. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 780–81 (2000) (presumption may be disregarded "upon some affirmative showing of statutory intent to the contrary").

In any case, sovereign immunity is a legal issue which this Court reviews *de novo*. Whatever the district court might have meant by its use of the word "implicit" is irrelevant to this Court's decision. *De novo* review should yield the conclusion that FISA *unequivocally* waives sovereign immunity.

Defendants contend the definition in section 1801(m) "refers most naturally to federal officers or employees in their *individual* capacities." AB 24–25 (emphasis in original). The contrary is true. If Congress had intended to so restrict section

1801(m)'s scope, it would not have been necessary for the statute to include the phrase "including any officer or employee of the Federal Government," because the statute already defines "person" as "any individual," 50 U.S.C. § 1801(m), which encompasses federal officers and employees in their *individual* capacities. Defendants' statutory construction would make surplusage of the phrase "including any officer or employee of the Federal Government" and is thus to be avoided. "It is a well-established principle of statutory construction that 'legislative enactments should not be construed to render their provisions mere surplusage.'" *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002) (quoting *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997)). "In construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The phrase "including any officer or employee of the Federal Government" can be given effect only if it is construed as meaning in their *official* capacities, thus waiving sovereign immunity.

Defendants also point to the absence of any reference to "the United States" in section 1801(m). *See* AB 23–26. But sovereign immunity can be waived without express reference to "the United States." For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(c), which authorizes civil actions for employment

discrimination against "the head" of certain departments, agencies, and units of the federal government, does not specify "the United States," yet the statute "is a clear expression of consent to suits against the United States." *Salazar v. Heckler*, 787 F.2d 527, 529 (10th Cir. 1986); *accord Rochon v. Gonzales*, 438 F.3d 1211, 1215-16 (D.C. Cir. 2006); *see Brown v. General Servs. Admin.*, 425 U.S. 820, 826–29 (1976) (Congress intended § 2000e-16(c) to supersede pre-enactment case law holding actions for federal employment discrimination were barred by sovereign immunity). If section 2000e-16(c) can waive sovereign immunity by authorizing an employment discrimination lawsuit against "the head" of a federal entity, then so can FISA waive sovereign immunity by authorizing a civil action against "any officer or employee of the Federal Government."

Similarly, defendants contrast section 1810 with 18 U.S.C. section 2712(a), which authorizes lawsuits against "the United States" for various statutory violations that include provisions of FISA *other* than section 1810. *See* AB 27–28. In fact, the comparison to section 2712(a) assists plaintiffs, not defendants. Section 2712(a) waives sovereign immunity for violations of three provisions of FISA that prohibit certain activity by "Federal officers and employees." 50 U.S.C. §§ 1806(a), 1825(a) & 1845(a). By authorizing lawsuits against "the United States" for conduct by "Federal officers and employees," section 2712(a) recognizes that these federal

officers and employees are acting in their *official* capacities, consistent with the general rule that "relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii v. Gordon,* 373 U.S. at 58. As the district court observed, "it is only such officers and employees acting in their official capacities that would engage in surveillance of the type contemplated by FISA." 564 F. Supp. 2d at 1125 [ER 112].[7/]

Defendants argue that because section 1810 prescribes civil liability for "any person" who has committed a "violation of section 1809," which is a criminal provision, the United States cannot be subjected to civil liability because, according to defendants, "the United States is not a 'person' who may be guilty of a crime." AB 26. But *federal officers and employees* acting in their official capacities *can* be guilty of a crime and thus may be held liable under section 1810. Such liability necessarily extends to the United States, because "any lawsuit . . . against an officer of the United States in his or her official capacity is considered an action against the United States." *Balser v. Dep't of Justice*, 327 F.3d 903, 907 (9th Cir. 2003). Section 1810's reference to section 1809 was evidently intended simply as a device to incorporate

---

[7/] Defendants seem to find special significance in the fact that section 2712(a) "conspicuously" omits "the violations alleged in this case." AB 27. But the reason why section 2712(a) does not authorize a civil action for violating section 1810 is simply that *section 1810 itself* authorizes the civil action.

section 1809(a)'s detailed descriptions of prohibited conduct without cluttering section 1810 with repetitive language, rather than any sort of restriction on section 1801(m)'s provisions as to who can be sued.

B. FISA Unequivocally Waives Sovereign Immunity by Authorizing Action Against an "Entity."

There is a separate and independent reason why FISA waives sovereign immunity: Section 1801(m) also defines a "person" to include any "entity" without excluding "the United States"— as does, for example, a provision of the Electronic Communications Privacy Act (ECPA) authorizing a cause of action against a "person or entity, *other than the United States*." *See* 18 U.S.C. § 2520(a) (emphasis added). Had Congress meant to exclude "the United States" from the scope of "entity" in section 1801(m), Congress would have done so in the manner of ECPA.

The ECPA provision as amended in 1986 formerly authorized lawsuits against an "entity" *without* excluding "the United States," which the circuit courts had construed to mean that the authorization *included* governmental entities. *See Adams v. City of Battle Creek*, 250 F.3d 980, 985 (6th Cir. 2001); *Organizacion JD Ltda. v. U.S. Dep't of Justice*, 18 F.3d 91, 94 (2d Cir. 1994). The USA PATRIOT Act of 2001 amended this provision to add "other than the United States" after "entity." *See* Pub. L. No. 107-56, 115 Stat. 272 at § 223(a)(1). If the word "entity," standing alone,

had not included the United States, that amendment would have been unnecessary. *See Williams v. City of Tulsa*, 393 F. Supp. 2d 1124, 1132–33 (N.D. Okla. 2005) (2001 amendment evinces Congress's understanding that 1986 version "created governmental liability"). In contrast, the USA PATRIOT Act left FISA's reference to "entity" in section 1801(m) *unchanged*, thus preserving the meaning of "entity" in section 1801(m) as including the United States.

By authorizing lawsuits against an "entity" without exception, FISA authorizes lawsuits against the United States and thus waives sovereign immunity.

C. Defendants' Charge of Inconsistency in the District Court's Decision is Unavailing.

Defendants contend the district court's reasoning is internally inconsistent to the extent the court found that FISA waives sovereign immunity for compensatory and liquidated damages but not for punitive damages. *See* ER 25. According to defendants, "the same proposition holds equally true" for all damages. AB 29. We agree. If FISA waives sovereign immunity for compensatory and liquidated damages, so it must for punitive damages; and vice versa.

But this does not mean, as defendants claim, that FISA waives sovereign immunity for *no* such damages; it means FISA waives sovereign immunity for *all* such damages. The waiver of sovereign immunity for punitive damages occurs by

virtue of section 1810(b)'s express specification of "punitive damages" as being recoverable against a "person," meaning a federal officer or employee (among others). In contrast, the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, provides that the United States shall be liable for tort claims "but shall not be liable . . . for punitive damages." 28 U.S.C. § 2674. This express exclusion in the Federal Tort Claims Act demonstrates that Congress knows how to exclude punitive damages from a waiver of sovereign immunity, but declined to do so in FISA, which thus waives sovereign immunity for *all* damages—compensatory, liquidated and punitive. (Plaintiffs' cross-appeal does not, however, seek punitive damages, because plaintiffs have elected not to challenge the district court's alternative ruling that the facts of this case do not warrant punitive damages. *See* ER 26–31.)

Defendants also contend the district court's reasoning was internally inconsistent to the extent the court found that FISA does not waive sovereign immunity for prejudgment interest. *See* AB 29–30. There is no inconsistency here. Unlike punitive damages, which FISA addresses, FISA is silent regarding prejudgment interest. This silence excludes prejudgment interest from the waiver of sovereign immunity.[8/]

[8/] The Federal Tort Claims Act expressly excludes prejudgment interest from its waiver of sovereign immunity. 28 U.S.C. § 2674 (providing that United States shall be liable for tort claims "but shall not be liable for interest prior to judgment"). FISA

II. FISA PREEMPTS THE STATE SECRETS PRIVILEGE.

A. FISA Strikes a Balance Between Protecting National Security and Safeguarding Civil Liberties.

We turn now to the issue this Court remanded for the district court's decision: whether FISA preempts the state secrets privilege.[9/] The answer is that FISA preempts the privilege in FISA litigation via two statutory provisions: section 1810, which prescribes the civil action, and section 1806(f), which prescribes security procedures for FISA litigation.

FISA's legislative history demonstrates Congress's intent to strike a balance between two potentially competing interests—protecting national security and safeguarding civil liberties. Enacted in the wake of the federal government's abuses of modern surveillance techniques, FISA is intended to restore that balance by (1) prescribing an exclusive framework for domestic use of electronic surveillance to

---

achieves the same result by silence—i.e., by specifying damages and attorney's fees but *not* prejudgment interest.

9/ FISA preemption is at issue on this appeal even though, as we demonstrate below, plaintiffs' non-classified evidence was sufficient and defendants presented no rebuttal evidence. *See infra* at 60–74. Defendants argued below that they need not present rebuttal evidence because of the element of the state secrets privilege that requires dismissal if the need to assert the privilege prevents defendants from using information that would provide a valid defense. *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *see* Doc. #103 at 2, 34. FISA preemption remains at issue because that argument is unavailable to defendants if FISA preempts the privilege.

acquire foreign intelligence information, and (2) specifying the judiciary's role in approving proposed surveillance and determining the legality of past surveillance. After extensive deliberation and debate, Congress concluded that protection of civil liberties requires comprehensive judicial oversight of electronic surveillance conducted in the name of national security, as a check against documented overreaching by the Executive Branch. A 1978 House Conference Report on FISA explained that FISA section 1806(f) "adequately protects the rights of the aggrieved person" and at the same time "ensures adequate protection of national security interests." H.R. CONF. REP. NO. 95-1720, at 32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4063. Similarly, a Senate Judiciary Committee report on FISA called section 1806(f) "a reasonable balance between an entirely in camera proceeding . . . and mandatory disclosure, which might occasionally result in the wholesale revelation of sensitive foreign intelligence information." S. REP. NO. 95-604(I), *supra*, at 58.

FISA departs from the state secrets privilege, which precludes any balancing of competing interests to allow disclosure of classified evidence. *See Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *Halkin v. Helms*, 690 F.2d 977, 997, fn. 71 (D.C. Cir. 1982). Section 1806(f) embraces such balancing—and thereby preempts the state secrets privilege in FISA litigation—by prescribing a process whereby courts can safeguard civil liberties by adjudicating claims of unlawful

surveillance yet protect national security with procedures for secure disclosure.

B. The Traditional Standards for Deciding the Preemption Issue Depend on Whether the State Secrets Privilege Is of Common Law or Constitutional Provenance.

A threshold question is whether the state secrets privilege has its provenance in federal common law or the Constitution. This question arises because the Supreme Court has traditionally prescribed a special standard for determining preemption of federal common law, which differs from the standard defendants contend would apply if the state secrets privilege were constitutionally based. A federal statutory scheme can preempt federal common law, without "evidence of a clear and manifest purpose" to do so, if Congress has occupied the field with a *comprehensive regulatory program*, *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981), that *speaks directly* to the matter at issue, *American Elec. Power Co., Inc. v. Connecticut*, 564 U.S. ___, 131 S.Ct. 2527, 2537 (2011). In contrast, defendants contend the state secrets privilege derives from Article II of the Constitution, so that FISA preemption should require a "clear statement" of preemptive intent. *See* AB 31.

1. The State Secrets Privilege Is a Common Law Evidentiary Rule Which Lacks Constitutional Provenance.

The state secrets privilege is of common law rather than constitutional provenance. It derives from the common law of England and Scotland. *See* William

G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 92-101 (2005).

The seminal state secrets decision in *United States v. Reynolds*, 345 U.S. 1 (1953), relied largely on English case law to prescribe the privilege's contours. *See id.* at 7–8 (citing *Duncan v. Cammel, Laird & Co., Ltd.*, [1942] App. Cas. 624, 638). *Reynolds* also cited a handful of U.S. decisions which demonstrate that the state secrets privilege "is well established in the law of evidence." *Id.* at 6–7. Nowhere did *Reynolds* state that the privilege has a constitutional provenance.[10/]

Many subsequent decisions—including three by this Court—have described the state secrets privilege *only* as a common law evidentiary rule. *See Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077 (9th Cir. 2010); *Doe v. Central Intelligence Agency*, 576 F.3d 95, 101 (2d Cir. 2009); *Al-Haramain*, 507 F.3d at 1196 [ER 131]; *In re Sealed Case*, 494 F.3d 139, 142 (D.C. Cir. 2007); *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1358 (Fed. Cir. 2001); *Kasza,* 133

[10/] *Reynolds* characterized as having "constitutional overtones" the government's argument that "executive department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest," as to which the government claimed "an inherent executive power which is protected in the constitutional system of separation of power," as well as the respondents' argument that "the executive's power to withhold documents was waived by the Tort Claims Act." *Reynolds*, 345 U.S. at 6 & n.9. However, the Court found it "unnecessary to pass upon" those arguments, "there being a narrower ground for decision." *Id.* at 6.

F.3d at 1167; *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991); *In re United States of America*, 872 F.2d 472, 474 (D.C. Cir. 1989).

In *Jeppesen Dataplan*, where this Court upheld an assertion of the state secrets privilege, a six-judge majority of an eleven-judge en banc panel stated that the privilege is "a judge-made doctrine." 614 F.3d at 1092. That statement appeared in the following context:

> *For all the reasons the dissent articulates*—including the impact on human rights, the importance of constitutional protections *and the constraints of a judge-made doctrine*—we do not reach our decision lightly or without close and skeptical scrutiny of the record and the government's case for secrecy and dismissal.

Id. (emphasis added). The dissent described the state secrets privilege as "a judicial construct *without foundation in the Constitution*." *Id.* at 1094 (Hawkins, J., dissenting) (emphasis added). Thus, the majority endorsed the dissent's articulation of the state secrets privilege as *lacking a constitutional basis*. All eleven members of the en banc panel agreed with that articulation.

The Supreme Court effectively laid this issue to rest in *General Dynamics Corp. v. United States*, 563 U.S. ___, 131 S.Ct. 1900 (2011), which declared a rule of nonjusticiability where state secrets would be revealed by litigating a contractor's defense to government allegations of breach of contract. In a unanimous opinion, the Court said *Reynolds* "decided a purely evidentiary dispute by applying evidentiary

rules." *Id.* at 1906. The Court characterized its decision in *General Dynamics* as "a common-law opinion, which, after the fashion of the common law, is subject to further refinement where relevant factors significantly different from those before us here counsel a different outcome." *Id.* at 1909. And the Court called the state secrets privilege itself simply an "evidentiary privilege." *Id.* at 1910. Thus, not only did the Court describe *Reynolds* restrictively as a common law pronouncement, the Court made clear that *General Dynamics* was likewise a common law pronouncement.

Defendants rely on *El-Masri v. United States*, 479 F.3d 296 (2d Cir. 2007), which said: "Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities." *Id.* at 303. *El-Masri* quoted a dictum in *United States v. Nixon*, 418 U.S. 683, 710 (1974), which characterizes the protection of "'military or diplomatic secrets'" as being within "'areas of Art. II duties [where] the courts have traditionally shown the utmost deference to Presidential responsibilities.'" *El-Masri*, 479 F.3d at 303 (quoting *Nixon*, 418 U.S. at 710).

Nixon, however, adjudicated an invocation of *executive* privilege, deciding nothing with regard to the state secrets privilege. Its dictum merely describes a confluence of the state secrets privilege and Article II duties in the context of civil

litigation, where the privilege, like any other rule of federal common law, is a means at the President's disposal in the exercise of executive power.

The state secrets privilege is of no more constitutional provenance than any other rule of federal common law. The Judiciary implements those common-law rules as a necessary adjunct of its Article III power to adjudicate cases and controversies, even though the content of those common law rules is not compelled or determined by the Constitution. Thus, the Executive is free to assert the state secrets privilege, just as the Executive is free to assert any other privilege or rule of procedure in furtherance of Article II duties, but it is up to the courts to define the privilege and control its application.

The district court in the present case made this point when observing that "*Reynolds* itself, holding that the state secrets privilege is part of the federal common law, leaves little room for defendants' argument that the state secrets privilege is actually rooted in the [C]onstitution." 564 F. Supp. 2d at 1123 [ER 110]. The court noted that "all rules of federal common law have some grounding in the Constitution," in that '[f]ederal common law implements the federal Constitution and statutes, and is conditioned by them.'" *Id.* (quoting *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring)). "Accordingly, all rules of federal common law perform a function of constitutional significance." *Id.* The court

concluded, however, that this feature of the federal common law does not imbue it with a constitutional provenance: "Article II might be nothing more than the source of federal policy that courts look to when applying the common law state secrets privilege. But constitutionally-inspired deference to the executive branch is not the same as constitutional law." *Id.* at 1124 [ER 111].

In other words, executive protection of state secrets is an Article II power, but invocation of the state secrets privilege as a means for protecting national security is not the invocation of a constitutionally-compelled rule. Rather, the state secrets privilege is a common law evidentiary rule inspired by policy considerations that predate the Constitution. It is not enshrined in Article II, even though the Executive may invoke it in the course of performing Article II responsibilities.

The state secrets privilege is not mentioned anywhere in Article II. Indeed, the Constitution has nothing to say about secrecy of any sort, other than to give Congress the power to keep its proceedings secret. *See* U.S. CONST., art. I, § 5, cl. 3. The provenance of the state secrets privilege lies in the common law, not the Constitution.

2. Federal Common Law Can Be Preempted By a Comprehensive Regulatory Program That Speaks Directly to the Question at Issue.

As a federal common law rule, the state secrets privilege can be displaced by statute. *Dickerson v. United States*, 530 U.S. 428, 437 (2000). Preemption can occur

if "Congress has *occupied the field* through the establishment of a *comprehensive regulatory program*." *Milwaukee v. Illinois*, 451 U.S. at 317 (emphasis added); *accord American Elec. Power*, 131 S.Ct. at 2538. The specific inquiry is whether Congress has enacted a comprehensive regulatory program that "'speak[s] directly to [the] question' at issue." *American Elec. Power*, 131 S.Ct. at 2537 (alteration in original) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)); *accord Kasza,* 133 F.3d at 1167.

Defendants cite *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983) and other cases for the proposition that "'[t]he common law . . . ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'" AB 32 (quoting *Norfolk Redevelopment*). But that is the rule for preemption of *state* common law. *See, e.g., Norfolk Redevelopment*, 464 U.S. at 42 (requiring clear and explicit intent to alter *state* common-law rules governing utility relocation expenses). The rule for preemption of *federal* common law differs. "Legislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law.'" *Americen Elec. Power*, 131 S.Ct. at 2537 (alteration in original) (quoting *Milwaukee v. Illinois*, 451 U.S. at 317). For preemption of *federal* common law, all that is required is that the

legislation speaks directly to the question at issue. *Id.*; *accord Kasza*, 133 F.3d at 1167.

C. FISA Is a Comprehensive Regulatory Program That Speaks Directly to Protection of National Security in FISA Litigation.

1. FISA Prescribes Security Procedures and Rules of Disclosure for FISA Actions.

In *Milwaukee v. Illinois*, a statutory scheme regulating interstate water pollution preempted federal common law on nuisance abatement, even without any mention of the federal common law in legislative history, because "[t]he establishment of such a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." 451 U.S. at 319.

Similarly here, FISA preempts the state secrets privilege in FISA litigation by occupying the entire field of foreign intelligence electronic surveillance with a comprehensive regulatory program that includes a warrant requirement, criminal and civil penalties for FISA violations, and secure procedures for adjudicating civil actions for FISA violations. *Cf. American Elec. Power*, 131 S.Ct. at 2537–38 (Clean Air Act preempts federal common law nuisance claims against carbon-dioxide emitters by providing "multiple avenues of enforcement," including administrative

action and penalties, criminal penalties, and civil enforcement actions). FISA provides for judicial review *before* surveillance occurs, through the warrant requirement, as well as *after* surveillance occurs, through proceedings in which section 1806(f) authorizes the court to review national security evidence under secure conditions as necessary to determine the legality of the surveillance. Sections 1806(f) and 1810 are essential elements of the statutory scheme, with section 1806(f) providing the practical means by which the civil liability Congress created to help achieve FISA's purpose can be litigated without endangering national security.

As Senator Gaylord Nelson (one of FISA's co-sponsors) explained during floor debate, FISA "[a]long with the existing statute dealing with criminal wiretaps . . . *blankets the field*" of domestic electronic surveillance. 124 CONG. REC. 10,903 (1978) (emphasis added). As this Court put it in the previous interlocutory appeal in this case, FISA "provides a *detailed regime* to determine whether surveillance 'was lawfully authorized and conducted.'" 507 F.3d at 1205 [ER 140] (emphasis added).

Thus, as the district court concluded: "Congress through FISA established a comprehensive, detailed program to regulate foreign intelligence surveillance in the domestic context." 564 F. Supp. 2d at 1118 [ER 105]. Further, Congress has declared that the provisions of FISA, along with provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 governing electronic

surveillance for criminal law enforcement, are to be the *exclusive means* by which such surveillance may be conducted. *Id.* at 1116 [ER 103]; *see* 18 U.S.C. § 2511(2)(f). Consequently, FISA preempts the state secrets privilege "in the context of matters within FISA's purview." 564 F. Supp. 2d at 1118 [ER 105].

The specific preemption inquiry here is whether FISA's comprehensive regulatory program *speaks directly* to protection of national security in FISA litigation. *American Elec. Power*, 131 S.Ct. at 2537. Section 1806(f) does so by prescribing rules for judicial determination and protection of national security concerns where, as here, a civil cause of action is alleged under section 1810. Section 1806(f) authorizes courts to review sensitive national security information *in camera* and *ex parte* and to disclose such information with appropriate security procedures and protective orders for purposes of litigating the legality of the challenged surveillance. This regime speaks directly to use and disclosure that would otherwise be governed by the state secrets privilege. Its application "notwithstanding any other law," 50 U.S.C. § 1806(f), means the state secrets privilege is preempted.

FISA's legislative history evinces congressional intent to displace the state secrets privilege with the regime section 1806(f) prescribes. The 1978 House Conference Report on FISA declared that section 1806(f) is meant to ensure "adequate protection of national security interests" in FISA litigation, and section

1806(f)'s "*in camera* and *ex parte* proceeding is appropriate for determining the lawfulness of electronic surveillance[.]" H. R. CONF. REP. NO. 95-1720, at 32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3973. The Senate Judiciary Committee said section 1806(f) is meant to prevent "wholesale revelation of sensitive foreign intelligence information," and when the legality of surveillance is at issue "it is this procedure 'notwithstanding any other law' that must be used to resolve the question." S. REP. NO. 95-604(I), *supra*, at 57; *accord* S. REP. NO. 95-701, at 63 (1978); H.R. REP. NO. 95-1283(I), *supra*, at 91.

The Senate's "Church Committee" report on past wiretapping abuse, recommending civil remedies to deter future abuse, presaged section 1806(f)'s preemption of the state secrets privilege in anticipating that "courts will be able to fashion discovery procedures, including inspection of material in chambers, and to issue orders as the interests of justice require, to allow plaintiffs with substantial claims to uncover enough factual material to argue their case, while protecting the secrecy of governmental information in which there is a legitimate security interest." S. REP. NO. 94-755, *Book II: Intelligence Activities and the Rights of Americans*, at 337 (1976), *available at* http://www.aarclibrary.org/publib/church/reports/book2/html/ChurchB2_0177a.htm.

FISA's legislative history demonstrates that FISA was meant to curb unfettered

electronic surveillance by the Executive Branch via "an exclusive charter for the conduct of electronic surveillance in the United States" and "effective substantive and procedural controls" which "regulate the exercise" of presidential authority to conduct foreign intelligence electronic surveillance. S. REP. NO. 96-604(I), *supra*, at 15-16; *accord*, H.R. REP. NO. 95-1283(I), *supra*, at 24. Senator Nelson explained that FISA is intended to "represent the sole authority for national security electronic surveillance in the United States" and "insures executive accountability," which "is a striking departure from the pattern of the past in which 'deniability' was often built into the system to insure that responsibility for intelligence abuses could not be traced . . . ." 124 CONG. REC., *supra*, at 10,903–04. Thus, FISA departs from the state secrets privilege's judge-made procedures for thwarting litigation, replacing them with statutory provisions that protect national security while enabling litigation to go forward under secure conditions so that the Executive Branch may be held accountable for intelligence abuses.

Section 1810 speaks directly against the state secrets privilege by prescribing the civil FISA action despite the otherwise secret nature of FISA proceedings. If the Executive Branch need only invoke the privilege to thwart a civil FISA action, then section 1810 would be effectively meaningless.

The situation here is analogous to *Halpern v. United States*, 258 F.2d 36 (2d

Cir. 1958), a lawsuit arising under the Invention Secrecy Act, 35 U.S.C. § 181, which allowed the patent office to withhold a patent grant for inventions implicating national security, but also allowed inventors to sue for compensation if a patent was denied. When the plaintiff was denied a patent and sued for compensation, the government invoked the state secrets privilege. The Second Circuit rejected the assertion of the privilege because "the trial of cases involving patent applications placed under a secrecy order will always involve matters within the scope of this privilege," and "[u]nless Congress has created rights which are completely illusory, existing only at the mercy of government officials, the Act must be viewed as waiving the privilege." *Halpern*, 258 F.2d at 43.

Similarly here, a civil FISA action generally involves matters that normally would be within the scope of the state secrets privilege. *Halpern*, 258 F.2d at 43. Unless section 1810 creates "rights which are completely illusory, existing only at the mercy of government officials," *id.*, FISA must be viewed as preempting the state secrets privilege, vesting courts with the power to ensure national security with *in camera* and *ex parte* review plus disclosure to the plaintiff "under appropriate security procedures and protective orders." 50 U.S.C. §1806(f). That is why defendants are wrong when they proclaim that "whether any of the plaintiffs in this case is an 'aggrieved person'" under section 1810 "is among the very information

protected by" the state secrets privilege. AB 38. If that were true, section 1810 would be toothless.

Defendants insist that *ex parte* and *in camera* review in FISA actions is "too great a risk to national security." AB 40. But that is a policy question, and Congress has said otherwise in section 1806(f).

It is inconsequential for purposes of preemption that, as defendants point out, FISA does not explicitly mention the state secrets privilege by name. *See* AB 31. The pertinent inquiry is "not whether Congress has *affirmatively* proscribed the use of federal common law," but simply whether the legislation speaks directly to the question at issue. *Milwaukee v. Illinois*, 451 U.S. at 315 (emphasis added). Thus, in *Halpern*, 258 F.2d 36, the Invention Secrecy Act preempted the state secrets privilege without mentioning it. Similarly, in *Milwaukee v. Illinois*, 451 U.S. 304, federal legislation regulating interstate water pollution preempted federal common law on nuisance abatement of such pollution without mentioning the federal common law. And in *American Elec. Power*, 131 S.Ct. 2527, the Clean Air Act preempted federal common law on nuisance abatement of carbon-dioxide emissions without mentioning the federal common law. There is nothing unusual in the way FISA preempts the state secrets privilege—simply by speaking directly to the question at issue.

2. FISA Is a Clear Statement of Congress's Intent to Preempt the State Secrets Privilege.

Even if the state secrets privilege were of constitutional provenance and defendants were right in claiming that preemption would require a "clear statement" of preemptive intent, the result would be the same here, because FISA's legislative history and its purpose, *see supra* at 3, 34–35, 44, 45–47, clearly demonstrate such intent.

3. Federal Rule of Evidence 501 Independently Authorizes FISA Preemption.

Independent of the traditional standards for deciding the preemption issue, Federal Rule of Evidence 501 authorizes FISA preemption of the state secrets privilege via Rule 501's provision that, "*Except as otherwise . . . provided by Act of Congress* . . . , the privilege of a . . . government . . . shall be governed by the principles of the common law . . . ." (Emphasis added). Here, an Act of Congress—section 1806(f)—provides for security procedures in FISA litigation, thus invoking the "[e]xcept as provided" clause of Rule 501 so that the protection of national security in FISA litigation is not "governed by the principles of the common law." Fed. R. Evid. 501; *see* H. R. REP. NO. 93-650 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082 (explaining that Rule 501 encompasses the "secrets of state" privilege).

Thus, FISA preemption of the state secrets privilege does not even require the

traditional signposts for preemption of federal common law. According to Rule 501, all that is needed is an Act of Congress which "otherwise . . . provide[s]"—that is, which provides, other than the state secrets privilege, for the protection of national security in FISA litigation. Section 1806(f) so provides.

D. Defendants' and Washington Legal Foundation's Efforts to Restrict Section 1806(f)'s Scope Are Unavailing.

1. Section 1806(f) Is Not Restricted to Situations Where the Government Seeks to Use Surveillance Against a Defendant.

Defendants assert that section 1806(f) applies only "where the Government seeks to use surveillance against someone." AB 43. This statement relies on an overly restrictive construction of section 1806(f).

Section 1806(f) applies, in part, where the government gives notice under section 1806(c)-(d) that it intends to use surveillance-based information against a defendant or where a defendant moves under section 1806(e) to suppress the use of surveillance-based information—that is, in criminal cases. That does not mean those are the *only* situations where section 1806(f) applies. The 1978 Senate Intelligence Committee report explains that "the procedures set out in [section 1806(f)] apply *whatever the underlying rule or statute* referred to in the motion" invoking section 1806(f). S. REP. NO. 95-701, *supra*, at 63 (emphasis added). This explanation

demonstrates that section 1806(f) was intended also to apply in civil actions under section 1810, as indicated by the committee's use of the broad phrase "whatever the underlying rule or statute."

Thus, while it is true, as defendants point out, that section 1806(f) preserves the government's option to dismiss a criminal prosecution rather than disclose information about surveillance, *see* AB 42, that does not mean the statute was intended *only* to preserve that option. FISA's legislative history tells us that section 1806(f) also applies to section 1810 actions.

2. Section 1806(f) Is Not Restricted to Cases in Which the Attorney General Files an Affidavit.

Amicus curiae Washington Legal Foundation (WLF) argues a point that defendants do not—that section 1806(f)'s application is purportedly restricted to cases in which the Attorney General files an affidavit asserting national security concerns. *See* Br. for Amici Curiae WLF et al. (WLF Br.) 14–15, 28–30. WLF relies on section 1806(f)'s statement that the district court shall review materials *in camera* and *ex parte* "if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States."

But nothing in section 1806(f) makes its application dependent in all cases on such an affidavit. Nor would it make sense for defendants to be able to thwart

proceedings under section 1806(f) by simply refusing to file an affidavit. By its plain language, section 1806(f) applies whenever a "request is made by an aggrieved person pursuant to any other statue or rule . . . to . . . obtain materials relating to electronic surveillance . . . ." That language is broad enough to encompass situations where no affidavit is filed. And the phrase "pursuant to any other statute or rule," *id.*, makes clear that section 1806(f) applies to requests made in civil actions brought under section 1810.

Moreover, Congress plainly envisioned that section 1806(f) can apply despite the absence of an Attorney General affidavit. The 1978 Senate Intelligence Committee report on FISA stated that where "no such assertion is made [in an Attorney General affidavit] the Committee envisions that mandatory disclosure of the application and order, and discretionary disclosure of other surveillance materials, would be available to the [aggrieved party]." S. REP. NO. 95-701, *supra*, at 63; *accord*, S. REP. NO. 95-604(I), *supra*, at 57. As the district court put it, the word "if" preceding the words "the Attorney General files an affidavit" in section 1806(f) simply means that *in camera* and *ex parte* review becomes mandatory in such circumstances, not that the absence of an Attorney General affidavit "necessarily stop[s] the process in its tracks." 595 F. Supp. 2d at 1088 [ER 93].

3. Discovery Under Section 1806(f) Is Not At Issue Here.

Defendants insist that section 1806(f) does not apply where "someone merely seeks on a freestanding basis to discover whether there has been surveillance in the first place." AB 43. But that was not the situation here. In moving for summary judgment, plaintiffs were not seeking to *discover* whether they had been surveilled; they were seeking to use non-classified evidence already in their possession to *prove* they were surveilled. Thus, defendants are wrong when they claim that plaintiffs "seek disclosure of information (regarding whether and to what extent they may have been subjected to surveillance) . . . ." *Id.* n.6. Such disclosure has become unnecessary, given the wealth of information that government officials gradually made public.

In a similar vein, WLF contends the district court erred by treating section 1806(f) as granting discovery rights when the court ruled, on January 5, 2009, that plaintiffs had alleged sufficient non-classified information to proceed under section 1806(f). *See* WLF Br. 15–16, 29–31. But WLF has overlooked the fact that, after that ruling, plaintiffs elected to proceed solely on non-classified evidence, *not* under section 1806(f). Thus, the January 5, 2009 ruling is not at issue on this appeal, and this Court need not decide whether and to what extent section 1806(f) confers

discovery rights on plaintiffs who are proceeding under section 1806(f). For the same reason, this Court need not decide whether, as defendants contend, the district court erred in suggesting that due process would require disclosure of classified materials to plaintiffs' counsel, *see* AB 58–61, because plaintiffs ultimately sought no such disclosure. *See Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 445 (1988) ("long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them").

If, however, this Court were to reverse on the ground the non-classified evidence was insufficient to support the judgment, *see infra* at 60–67, it would become necessary on remand for the district court to return to proceedings under section 1806(f) for plaintiffs' use of the Sealed Document under secure conditions as the district court previously prescribed, with a protective order for secure disclosure to counsel possessing TS/SCI security clearance.

E. Even Absent FISA Preemption, Defendants Cannot Prevail Because They Failed to Rebut Plaintiffs' Evidence by Making an *In Camera* Proffer of a Valid Defense.

If this Court were to determine that FISA does *not* preempt the state secrets privilege, so that the law of state secrets applies here, the district court's judgment should still be affirmed, because defendants failed to rebut plaintiffs' case with an *in*

camera proffer of a valid defense.[11/]

Once plaintiffs proved their case with non-privileged evidence, the focus of this lawsuit shifted to the question whether privileged evidence could establish a valid defense. Where a plaintiff's case can be made with non-privileged evidence, the state secrets privilege, if applicable, requires dismissal of the lawsuit if the need to assert the privilege prevents the use of privileged information that would provide a valid defense. *Kasza*, 133 F.3d at 1166.

To obtain such a dismissal under the law of state secrets, however, the defendant must make an *in camera* proffer of a valid defense. "[T]he district court may properly dismiss a complaint because of the unavailability of a defense when the district court determines from appropriately tailored *in camera* review of the privileged record that the truthful state of affairs would deny a defendant a valid defense that would likely cause a trier of fact to reach an erroneous result." *In re Sealed Case*, 494 F.3d at 151 (citations omitted). "If the defendant proffers a valid

---

[11/] The Court need not address this issue if the Court determines that FISA preempts the state secrets privilege. Conversely, the Court need not address FISA preemption if the Court determines that, even under the law of state secrets, the judgment must be affirmed because defendants failed to make an *in camera* proffer of a valid defense. Given the importance of the FISA preemption issue, we ask the Court to give primacy to that issue and to address defendants' failure to proffer a valid defense under the law of state secrets *only* if the Court finds no FISA preemption.

defense that the district court verifies upon its review of state secrets evidence, then the case must be dismissed." *Id.* at 153; *accord Molerio v. Federal Bureau of Investigation*, 749 F.2d 815, 825 (D.C. Cir. 1984) (dismissal where defendants submitted *in camera* affidavit demonstrating privileged defense to lawsuit); *Ellsberg v. Mitchell*, 709 F.2d 51, 69 (D.C. Cir. 1983) (statement that, on remand, question whether defendants had a defense to plaintiffs' prima facie case "could be resolved by the trial judge through use of appropriate *in camera* procedures").

The Supreme Court recently described the type of showing required to demonstrate a valid defense: The defendant must proffer "enough evidence to survive summary judgment." *General Dynamics,* 131 S.Ct. at 1910 (in government-contracting disputes, state secrets privilege "is the option of last resort," available "only where it precludes a valid defense . . . , and only where both sides have enough evidence to survive summary judgment but too many of the relevant facts remain obscured by the state-secrets privilege to enable a reliable judgment").

After plaintiffs proved their case with non-classified evidence, defendants argued below that the case must be dismissed (absent FISA preemption) because the state secrets privilege foreclosed the disclosure of defenses such as the existence of a FISA warrant for plaintiffs' surveillance. *See* Doc. 103 at 2, 34. But defendants failed to make the requisite *in camera* proffer of a valid defense, flatly refusing to

make *any* proffer of evidence sufficient to survive summary judgment, whether *in camera* (and presumably *ex parte*) as prescribed for litigation in cases governed by the state secrets privilege or pursuant to procedures prescribed by section 1806(f) for litigation in FISA cases (with possible disclosure to plaintiffs' counsel under secure conditions). As the district court noted, "defendants could readily have availed themselves of the court's processes to present a single, case-dispositive item of evidence at one of a number of stages of this multi-year litigation: a FISA warrant. They never did so . . . ." 700 F. Supp. 2d at 1196 [ER 65]. Their failure to proffer a valid defense, even after plaintiffs proved their case with non-classified evidence, means defendants have failed to bring this lawsuit within the state secrets privilege even absent FISA preemption.

F. Defendants Have Forfeited Any Claim That the President Has Inherent Power to Disregard FISA.

Finally, we note that defendants do not challenge the district court's ruling that the President lacks inherent power to disregard FISA's preemption of the state secrets privilege. *See* 564 F. Supp. 2d at 1121 [ER 108]; *supra* at 16. Thus, for purposes of this appeal, defendants have forfeited any claim of inherent power to disregard FISA. *See, e.g., Independent Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003). More broadly, defendants have abandoned any defense of the TSP's purported

theoretical underpinning that the President may disregard an Act of Congress in the name of national security.

This forfeiture should come as no surprise. Top officials in the Obama administration had conspicuously repudiated the inherent power theory before taking office. *See* Donald Verrilli (now Solicitor General) et al., Brief for Amici Curiae Center for National Security Studies and the Constitution Project, *American Civil Liberties Union v. National Security Agency*, 493 F.3d 644 (6th Cir. 2007), 2006 WL 4055623, at *2 & *15 (inherent power theory is "particularly dangerous because it comes at the expense of both Congress's and the judiciary's powers to defend the individual liberties of Americans"); Neal Kumar Katyal (now Principal Deputy Solicitor General), *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 117 (2006) ("overblown assertions" of inherent power "risk lawlessness in the name of national security"); Eric Holder (now Attorney General), Address to American Const. Society (June 13, 2008), http://www.youtube.com/watch?v=6CKycFGJOUs&feature=relmfu (videotape at 3:41–3:52) ("We must utilize and enhance our intelligence collection capabilities to identify and root out terrorists, but we must also comply with the law. We must also comply with FISA.").

III. THE DISTRICT COURT PROPERLY FOUND LIABILITY BASED ON PUBLIC EVIDENCE.

A. A FISA Violation May Be Proven With Circumstantial Evidence Raising a Reasonable Inference of Warrantless Electronic Surveillance.

Defendants challenge as "improperly speculative" the inference of warrantless electronic surveillance arising from the public evidence plaintiffs presented. AB 48. The law is clear, however, that a FISA violation may be proven with circumstantial evidence raising a reasonable inference of warrantless electronic surveillance.

In re Sealed Case explains the overarching principle that a showing of unlawful electronic surveillance may be made with *circumstantial evidence*. *See In re Sealed Case*, 494 F.3d at 147 ("Although [the plaintiff's] case is premised on circumstantial evidence, 'as in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence.'") (quoting *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983)). The evidence is sufficient if it raises a *reasonable inference* of electronic surveillance. *Id.* (plaintiff was able to present unprivileged evidence "that creates an inference" of eavesdropping, evidence from which a jury could "reasonably infer that eavesdropping had occurred").

Another overarching principle, that the showing of electronic surveillance may be made by a *preponderance* of the evidence, appears in *American Civil Liberties*

Union v. National Security Agency, 493 F.3d 644 (6th Cir. 2007), which held that the plaintiffs failed to demonstrate standing because "[t]he evidence establishes only a *possibility*—not a *probability* or certainty—that [their] communications might be intercepted." *Id.* at 674–75 (second emphasis added). "Probability"—the minimum showing the court required—means by a preponderance of the evidence.

Under these standards, plaintiffs presented sufficient evidence to demonstrate both their Article III standing and defendants' liability under section 1810.

B. Plaintiffs Presented Sufficient Proof of Their Warrantless Electronic Surveillance.

1. Direct and Circumstantial Evidence Demonstrates Surveillance of Belew's and Ghafoor's Telecommunications with al-Buthi.

Since the onset of this litigation, the public record has become replete with evidence of plaintiffs' surveillance. Much of this evidence is circumstantial, but not all of it: On October 22, 2007, FBI Deputy Director Pistole publicly *admitted*, in his speech posted on the FBI's Internet website, that defendants used surveillance in the 2004 investigation of Al-Haramain. *See supra* at 10.

Pistole did not, however, say *who* or *what* was surveilled. For that piece of the puzzle we must turn to other public evidence, which makes the case that the surveillance Pistole admitted included Belew's and Ghafoor's 2004 telephone

conversations with al-Buthi. Public statements by defendants and other government officials, and declarations filed by Belew and Ghafoor, demonstrate the following:

- Under the TSP, the NSA surveilled international telecommunications into and out of the United States. *See supra* at 4–5.

- Upon the preliminary order blocking Al-Haramain's assets on February 19, 2004, defendants announced in a press release that they had begun investigating Al-Haramain, mentioning only possible crimes relating to currency and tax laws—with no mention of Osama bin-Laden. *See supra* at 7.

- In the course of this investigation, defendants used classified information provided by the FBI, which at that time was regularly using telecommunications data produced by the NSA under the TSP. *See supra* at 7–8.

- During this investigation, Belew and Ghafoor participated in international telecommunications with al-Buthi in which they discussed

Ghafoor's representations of Al-Haramain and several persons linked with Osama bin-Laden. *See supra* at 8–9.

- Subsequently, on September 9, 2004, upon Al-Haramain's formal designation as a terrorist organization, defendants declared publicly that the investigation had shown "direct links" between Al-Haramain and Osama bin-Laden—the first instance of a claim of such links. *See supra* at 11.

- Defendants had conducted electronic surveillance of al-Buthi in 2003. *See supra* at 10–11.

This unclassified evidence raises the following inference: Defendants surveilled *Belew's and Ghafoor's telecommunications with al-Buthi in 2004*, relying on that surveillance to issue the formal designation of Al-Haramain as a terrorist organization based on purported "direct links" with Osama bin-Laden.

This is not improper speculation; it is a reasonable inference of the sort that courts commonly indulge in resolving questions of fact. Defendants cryptically suggest (without having presented any supporting evidence under the security

provisions of section 1806(f)) that "information" might also have "come to the Government's attention" in other ways. AB 48. But that does not dispel the inference that *one* of the ways information came to defendants' attention was through surveillance of Belew's and Ghafoor's telecommunications with al-Buthi.[12/]

2. Public Statements by Government Officials Demonstrate the Probability That Plaintiffs' Surveillance Was Electronic.

The electronic nature of plaintiffs' surveillance is demonstrated by public statements of top Executive Branch officials concerning how telecommunications between the United States and abroad are transmitted and intercepted: "Most" are transmitted by wire through routing stations located within the United States from which they are intercepted. *See supra* at 12. Their acquisition is thus "electronic"

[12/] As for defendants' suggestion that plaintiffs' surveillance may have been conducted "abroad" by "foreign intelligence services" which then "forward[ed] information to their American counterparts," AB 48—i.e., that the TSP might have been *outsourced* to another country—even then, defendants could still be held liable on the ground the perpetrators were willful participants in joint action with defendants under color of law. *See Brunette v. Humane Soc'y of Ventura County*, 294 F.3d 1205, 1210 (9th Cir. 2002). Defendants are liable for such "joint action" surveillance if it was "electronic" by virtue of acquisition in the United States. *See* 50 U.S.C. § 1801(f)(2). The law treats the place of a telecommunication's acquisition as the location of the telephones as well as the listening post. *See United States v. Luong*, 471 F.3d 1107, 1109 (9th Cir. 2006); *United States v. Ramirez*, 112 F.3d 849, 852 (7th Cir. 1997); *United States v. Denman*, 100 F.3d 399, 402-03 (5th Cir. 1996); *United States v. Rodriguez*, 968 F.2d 130, 136 (2d Cir. 1992). Thus, even if plaintiffs' electronic surveillance were outsourced, it still would have violated FISA, because Belew's and Ghafoor's telephones were located in the United States.

under FISA's definition of electronic surveillance as the acquisition of a "wire communication . . . if such acquisition occurs in the United States." 50 U.S.C. § 1801(f)(2).

These public statements do not indicate that *all* surveilled telecommunications between the United States and abroad are transmitted by wire and intercepted domestically. But that is not necessary for plaintiffs to make the case that their surveillance was electronic. The case need only be made by a *preponderance of the evidence*, which means a *probability*—not a certainty—that plaintiffs' telecommunications were transmitted by wire and intercepted domestically. If that is how *most* such telecommunications are transmitted and intercepted, then it is probable that is how *plaintiffs'* telecommunications were transmitted and intercepted.

3. Circumstantial Evidence Raises a Reasonable Inference That There Was No Warrant For Plaintiffs' Surveillance.

The circumstances of this case and the nature of the TSP raise a reasonable inference that there was no FISA warrant for plaintiffs' electronic surveillance. Al-Buthi was a director of the Oregon affiliate of the Saudi Arabia–based Al-Haramain Islamic Foundation, other affiliates of which the government had previously considered to be connected to al-Qaeda. *See* Doc. 103 at 30 (defendants' assertion in opposition to summary judgment that other Al-Haramain branches had

"connections" to al-Qaeda). This put al-Buthi squarely within the scope of the TSP—a *warrantless* surveillance program targeting persons believed to be "affiliated with" al-Qaeda. *See supra* at 4–5. Moreover, the public record demonstrates that defendants used classified information provided by the FBI during the Al-Haramain investigation, and that the FBI was regularly using telecommunications data provided by the NSA under the warrantless TSP. It is thus reasonable to infer, from all the circumstantial evidence, that plaintiffs' surveillance occurred under the TSP and, consequently, was warrantless.

Even if the evidence had not been sufficient to raise the reasonable inference that plaintiffs' electronic surveillance was warrantless, defendants would still have had the burden to present any evidence of a FISA warrant, because such evidence is within defendants' *exclusive knowledge*—a point the parties litigated below and as to which the district court said it "finds merit." 700 F. Supp. 2d at 1197 [ER 66]. It is well-settled that the burden of proof shifts when facts are "peculiarly within the knowledge" of defendant. *Shaffer v. Weast*, 546 U.S. 49, 60 (2005). "[A]ll else being equal, the burden is better placed on the party with easier access to relevant information." *National Communications Assn. v. AT&T Corp.*, 238 F.3d 124, 130 (2d Cir. 2001). Defendants failed to sustain this shifted burden by producing evidence of a FISA warrant, which means "we must presume it does not exist."

United States v. Denver & Rio Grande R.R. Co., 191 U.S. 84, 92 (1903). Defendants have forfeited any contrary argument by failing to challenge the district court's ruling in this regard, as to which their brief is silent. *See, e.g.*, *Independent Towers of Wash.*, 350 F.3d at 929.

C. The Judgment is Consistent With This Court's 2007 Decision.

Defendants also contend the district court's reliance on public evidence was "inconsistent" with this Court's 2007 decision. AB 45–46. Not so. On remand, the district court was free to do "'anything not foreclosed by [this Court's] mandate.'" *United States v. Kellington*, 217 F.3d 1084, 1092 (9th Cir. 2000). "'Courts are often confronted with issues that were never considered by the remanding court.'" *Id.* at 1093 (quoting *Biggins v. Hazen Paper Co.*, 111 F.3d 205, 209 (1st Cir. 1997)). The district court could properly allow plaintiffs to file an amended complaint absent any contrary directive by this Court. *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986).

The question here is whether this Court, in its 2007 decision, considered and intended to foreclose the possibility that plaintiffs could establish their standing and prove their case without the Sealed Document, using only non-classified evidence. The answer plainly is *no*. At the time of that decision, nobody—not this Court, not

the defendants, not even the plaintiffs—had conceived that it might be possible for the case to go forward without the Sealed Document. Plaintiffs had no reason to try until July 2008, when the district court ruled that they could not use the Sealed Document under section 1806(f) unless they could demonstrate their "aggrieved person" status with non-classified evidence.[13/] *See supra* at 16–17. Plaintiffs' subsequent reliance on non-classified evidence was consistent with this Court's 2007 decision to the extent it acknowledged that "litigation can proceed . . . if the plaintiffs can prove 'the essential facts' of their claims without resort to material touching upon military secrets.'" 507 F.3d at 1204 [ER 39] (quoting *Reynolds*, 345 U.S. at 11).

Defendants seem to contend this lawsuit is effectively *nonjusticiable* because any evidence of a FISA warrant or its absence would be a secret, and the adjudication of the existence or absence of a FISA warrant would harm national security. *See* AB 49–51. But FISA says otherwise, by virtue of section 1810, which *authorizes* such adjudication in a civil action for warrantless electronic surveillance. In authorizing

---

[13/] It is thus inconsequential that, as defendants point out, much of the public evidence was available prior to this Court's 2007 decision, *see* AB 21, since the district court did not require such evidence until 2008. Moreover, several crucial items of evidence did not surface until after the August 2007 oral argument before this court, including Pistole's October 2007 admission of surveillance, SER 139, McConnell's September 2007 testimony as to how most telecommunications between the United States and abroad are transmitted and intercepted, SER 157, and the 2008 Treasury Department memorandum indicating that defendants had previously surveilled al-Buthi, SER 165–66.

the civil action, Congress made a policy decision that such adjudication, protected as necessary by the security provisions of section 1806(f), would *not* harm national security. And, indeed, inherent in this Court's 2007 remand order is the assumption that the case *is* justiciable if FISA preempts the state secrets privilege.

WLF contends the district court's adjudication is inconsistent with this Court's 2007 decision because, according to WLF, this Court made "findings" that "adjudication of Appellees' FISA claims would risk serious damage to national security." WLF Br. 14. That is not what this Court found. Rather, the Court said the defendants' secret declarations "underscore that disclosure of information concerning *the Sealed Document* and the *means, sources and methods of intelligence gathering* in the context of this case would undermine the government's intelligence capabilities and compromise national security." 507 F.3d at 1204 [ER 139] (emphasis added). With plaintiffs' subsequent reliance solely on public evidence, this case has been successfully adjudicated without risking any disclosure of secret information concerning the Sealed Document or means, sources and methods of intelligence gathering, which is entirely consistent with this Court's concerns in 2007.

D. The District Court Did Not "Penalize" Defendants.

The district court granted summary judgment of liability because defendants failed to rebut plaintiffs' case using section 1806(f)'s security procedures. *See* 700 F.

Supp. 2d at 1197 [ER 66]. Defendants contend that, in doing so, the court "effectively penalized the government for refusing to waive the state secrets privilege." AB 55. Not so. Defendants' failure was not a refusal to waive the state secrets privilege, but rather the failure to rebut plaintiffs' evidence using section 1806(f), which meant Federal Rule of Civil Procedure 56(e) authorized summary judgment. *See* 700 F. Supp. 2d at 1194 [ER 63] (defendants "declined to submit anything to the court squarely addressing plaintiffs' prima facie case of electronic surveillance"). The state secrets privilege is beside the point if section 1806(f) preempts it with procedures that enabled defendants to rebut plaintiffs' case under secure conditions—which defendants failed to do.

Defendants challenge the district court's comment that they "must be deemed estopped from arguing that a warrant might have existed for plaintiffs' surveillance." 700 F. Supp. 2d at 1197 [ER 66]. Defendants cite *Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984), and *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 419-34 (1990), for the proposition that the Government cannot be subjected to estoppel. *See* AB 56. But *Heckler* said only that the Government will not be estopped to "enforce the law because [of] the conduct of its agents." *Heckler*, 467 U.S. at 60. *Richmond* said only that "the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized." *Richmond*, 496 U.S.

at 426. Neither is the situation in the present case: The Government is not being prevented from enforcing the law, and plaintiffs' money remedy is statutorily authorized. The Supreme Court has repeatedly declined to declare a broad rule that an estoppel may not run against the Government in any circumstances. *See Heckler*, 467 U.S. at 60; *Richmond*, 496 U.S. at 427.

What occurred here was not an "estoppel" in the narrow sense of "[a] bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true." BLACK'S LAW DICTIONARY 628 (9th ed. 2009). Rather, the district court found liability because plaintiffs presented sufficient evidence that defendants failed to rebut. Defendants say this finding "ultimately resembles the entry of a default judgment against the United States" in violation of Federal Rule of Civil Procedure 55(d). *See* AB 57–58. But the law says otherwise: A judgment based on prima facie evidence that defendant failed to rebut "is on the merits and not a default judgment" within the meaning of Rule 55(d). *Giampaoli v. Califano*, 628 F.2d 1190, 1196 (9th Cir. 1980). Rule 55(d) is "directed at defaults in the narrow sense of the government's failure to answer or otherwise move against a complaint," *id.* at 1194, and "does not apply once the plaintiff has presented a prima facie case and thereby shifted the burden of proof to the

government," *id.* at 1195–96.[14/]

WLF claims that defendants had no choice but to forfeit any rebuttal of plaintiffs' evidence rather than "releasing information whose disclosure compromises national security." WLF Br. 27. But WLF overlooks the fact that any such "disclosure" would have been restricted to the two of plaintiffs' attorneys whom defendants found suitable for security clearance (something that happens commonly, for example, in the Guantánamo Bay detainee proceedings). *See* ER 76 & *supra* at 18. Those suitability findings mean defendants have determined that those attorneys are persons "whose personal and professional history affirmatively indicate[] loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Order No. 12,968, § 3.1(b), 60 Fed. Reg. 40,245, 40,250 (1995). Even defendants must concede that plaintiffs' TS/SCI-cleared counsel could be trusted to maintain the secrecy of a classified filing disclosed to them under the security provisions of section

---

[14/] WLF seems to be laboring under a misapprehension that the district court granted summary judgment as a "sanction" for defendants' noncompliance with the court's order of January 5, 2009. *See* WLF Br. 8–9. The summary judgment was not a sanction, however, but a decision on the merits resulting from defendants' failure to rebut plaintiffs' evidence.

1806(f)—just as plaintiffs' counsel have maintained the secrecy of the Sealed Document throughout the course of this litigation.

Defendants state "the court's approach cannot be reconciled with the terms of the FISA itself" because the court "presented the Government with the option of employing relevant classified information, but only at the peril of exposing such information to *plaintiffs* and/or their counsel." AB 54 (emphasis added). That statement is wrong. The court did not propose to disclose classified information to the *plaintiffs*, but only "to those of plaintiffs' counsel who have obtained top-secret/sensitive compartmented information clearances (Messrs Eisenberg and Goldberg) for their review." ER 76; *see also* ER 222 (statement in plaintiffs' proposed protective order that TS/SCI-cleared counsel "shall not disclose the contents of any classified documents or information" to any unauthorized persons). There was never any "peril" of disclosure to plaintiffs.

Moreover, FISA expressly makes an order "granting disclosure" of classified materials under section 1806(f) "final" and thus *directly appealable*. 50 U.S.C. § 1806(h). Defendants could have averted the "peril" of which they now complain—improper disclosure of classified materials—simply by immediately appealing any disclosure order pursuant to section 1806(h). *See* ER 228–29 (defendants' response to district court's order of April 17, 2009, asserting that "an

order that classified information be disclosed to plaintiffs' counsel or an actual disclosure would be appealable"). Specifically, defendants might have chosen to appeal the district court's order of June 5, 2009 to the extent it stated that if they relied on classified evidence to oppose summary judgment the court would "enter a protective order" and disclose the evidence to plaintiffs' TS/SCI-cleared counsel under section 1806(f). *See* ER 75–76. Defendants did not do so.[15/] Alternatively, defendants could have immediately appealed any subsequent protective order for disclosure of the evidence, thus averting the so-called "peril."

IV. THE DISTRICT COURT PROPERLY AWARDED THE FULL AMOUNT OF PLAINTIFFS' ATTORNEY'S FEES.

Finally, defendants contend the attorney's fees award is excessive in light of plaintiffs' purportedly "'limited'" success and "the relatively small amount of liquidated damages awarded." AB 61–62. It is well settled, however, that plaintiffs may be awarded full statutorily-authorized attorney's fees if successful and

---

[15/] Defendants state that they sought an interlocutory appeal "[a]fter the district court indicated its intent to share classified information with plaintiffs' counsel." AB 55. That statement is inaccurate. The district court indicated in its order of January 5, 2009 only that in future proceedings under section 1806(f) the court might "possibly" grant plaintiffs' counsel secure access to classified filings. 595 F. Supp. 2d at 1089 [ER 94]. The court did not actually make the operative disclosure order until June 5, 2009. Thus, defendants' pursuit of direct and certified appeals from the order of January 5, 2009, *see supra* at 18, was premature. Defendants never appealed the order of June 5, 2009, which was where the operative disclosure ruling appeared.

unsuccessful claims are "related" and the litigation has achieved "excellent results." *Hensley v. Eckerhart*, 461 U.S. 424, 434–35 (1983). "A plaintiff may obtain excellent results without receiving all the relief requested." *Webb v. Sloan*, 330 F.3d 1158, 1168 (9th Cir. 2003). That is the situation here.

Claims are *related* if they "involve a common core of facts" or are "based on related legal theories." *Hensley*, 461 U.S. at 435. As the district court correctly observed, all plaintiffs' claims, successful or not, were "based on the same instances of the government's illegal wiretapping of plaintiffs, and each sought to vindicate plaintiffs' legal and constitutional rights against claims of expanded executive power." ER 44.

Further, this litigation has achieved excellent results, against daunting odds. As the district court observed: "Plaintiffs here stand alone among the dozens of plaintiffs in this consolidated [multi-district] litigation that have had any success in pursuing claims against the government. The government has fiercely litigated this case from the beginning and has used every available tactic in defense." ER 46. "Plaintiffs' success in obtaining damages under FISA must . . . be viewed as a vindication of constitutional rights that serves the greater public interest." ER 45–46.

Perhaps the most telling indicator of the significance of plaintiffs' success is the zeal with which defendants have continued to litigate this case on appeal.

As for defendants' comment about "the relatively small amount of liquidated damages awarded," AB 62, the Supreme Court has rejected the proposition that fee awards "should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (plurality opinion). "Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Id.* Thus, as this Court recently explained, "[a] rule of proportionality is inappropriate . . . because it fails to recognize the nature of many, if not most, civil rights cases . . . ." *McCown v. City of Fontana*, 565 F.3d 1097, 1104 (9th Cir. 2009).

WLF complains about a large judgment being imposed against the United States for violating "the rights of an Islamic charity." WLF Br. 27. The judgment is *not*, however, for violating the rights of Al-Haramain, whom the district court ruled is not entitled to recover under section 1810—a ruling that Al-Haramain has not appealed. The judgment is for violating the rights of *two American lawyers*—Wendell Belew and Asim Ghafoor.

V. IF THIS COURT DETERMINES THAT FISA DOES NOT WAIVE SOVEREIGN IMMUNITY, THE COURT SHOULD ADJUDICATE THE CROSS-APPEAL AND REMAND THE CASE FOR FURTHER PROCEEDINGS AGAINST DEFENDANT MUELLER INDIVIDUALLY.

Belew and Ghafoor have filed a cross-appeal which is solely protective, to be operative *only* if this Court determines that FISA does not waive sovereign immunity. *See supra* at 23. If the Court rejects defendants' assertion of sovereign immunity, plaintiffs respectfully request the Court to treat the cross-appeal as abandoned. If, however, the Court determines that sovereign immunity is not waived, plaintiffs submit the following argument on the cross-appeal.

Defendants asserted sovereign immunity in the district court when they filed their second motion for dismissal or summary judgment. In response, plaintiffs moved for an order extending time to serve defendants in their individual capacities, which the court granted. *See* 564 F. Supp. 2d at 1136–37 [ER 123–24]. After plaintiffs filed their amended complaint, which specified that defendant Mueller (and *only* Mueller) was being sued in both his official and individual capacities, *see* ER 267, plaintiffs served Mueller in his individual capacity. *See* Docs. 37–41. Plaintiffs' purpose in doing so was to enable this litigation to proceed against Mueller individually if the district court were to find sovereign immunity.

Once the court ruled that FISA waives sovereign immunity, plaintiffs deemed

it unnecessary to pursue an individual-capacity claim against Mueller, and thus they advised the court in their summary judgment motion that it did not address Mueller's "personal liability." Doc. 99 at 39 n.5. At the hearing on the motion, plaintiffs' counsel explained that "we are prepared to wait on Mr. Mueller until the final adjudication in this case, straight through on appeal because really at this point we believe Mr. Mueller is a corollary we needn't get to." Reporter's Transcript of Sept. 23, 2009 at 26.

In granting summary judgment, having rejected defendants' assertion of sovereign immunity, the district court dismissed all claims against Mueller in his individual capacity *because* of the ruling on sovereign immunity, in which the court concluded that FISA violations are necessarily committed by federal officers and employees acting in their official capacities. 700 F. Supp. 2d at 1192, 1203 [ER 61, 72]. Thus, if this Court were to disagree with the district court on this point and rule that FISA does *not* waive sovereign immunity, such a ruling would undermine the district court's basis for dismissing Mueller individually.

To the extent Mueller is sued in his individual capacity, he could enjoy only *qualified* immunity, which affords immunity from liability for civil damages only insofar as the challenged conduct "does not violate clearly established statutory or constitutional rights of which *a reasonable person would have known*." *Harlow v.*

Fitzgerald, 457 U.S. 800, 818 (1982) (emphasis added). The law does "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. ___,131 S.Ct. 2074, 2083 (2011). "'The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Ammons v. State of Wash. Dep't of Soc. & Health* Servs., No. 09-36130, 2011 WL 3606538, at *4 (9th Cir. 2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

Much of plaintiffs' surveillance occurred during the period in 2004 when the TSP continued unabated without the Attorney General's re-certification—that is, without any purported assurance of legality. *See supra* at 6–7. Absent the Attorney General's re-certification during that period, Mueller cannot reasonably have believed that the TSP as then constituted was lawful.

Morever, even with the Attorney General's re-certifications before and after that period, no reasonable person would have believed that the President had inherent power to violate FISA. Existing precedent—specifically, *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952)—placed it beyond debate that FISA has reduced presidential power over foreign intelligence surveillance to its "lowest ebb," *see id.* at 635 (Jackson, J., concurring), establishing an exclusive statutory scheme

which the President lacks inherent power to disregard. *See United States v. Andonian*, 735 F. Supp. 1469, 1474 (C.D. Cal. 1990) ("The exclusivity clause makes it impossible for the President to 'op-out' of the [FISA] legislative scheme by retreating to his 'inherent' Executive sovereignty over foreign affairs."), *aff'd and remanded on other grounds*, 29 F.3d 634 (9th Cir. 1994). Defendants have forfeited any contrary argument. *See supra* at 58–59.

The government has stated that the Attorney General's certification and re-certifications were intended only to give the PSP "'a *sense* of legitimacy" and were motivated by "'purely *political* considerations.'" SER 14 (emphasis added). They did not and could not make the TSP legal. Indeed, Mueller admitted that he had "serious reservations" about the TSP.[16/] SER 91.

This is prima facie evidence that a reasonable person would have known—and Mueller *actually knew*—that the TSP was unlawful, so that he cannot claim qualified immunity. *See al-Kidd*, 131 S.Ct. at 2084 ("When properly applied, [qualified immunity] protects 'all but the plainly incompetent or those who *knowingly violate the law*.'") (emphasis added) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

[16/] In denying punitive damages, the district court commented that the concerns of Ashcroft, Comey and Mueller regarding the PSP "focused primarily" on the Other Intelligence Activities rather than the TSP. ER 30. That comment was inaccurate. Mueller testified that he had "serious reservations" *specifically* about "the warrantless wiretapping program"—i.e., the TSP. *See supra* at 6–7.

Consequently, if this Court determines that FISA does not waive sovereign immunity, the Court should, on plaintiffs' cross-appeal, remand the case for further proceedings against Mueller in his individual capacity, wherein the district court may adjudicate any assertion of qualified immunity.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment. If, however, the Court reverses the judgment based on a finding of sovereign immunity, the Court should remand the case for further proceedings against defendant Mueller in his individual capacity.

September 14, 2011

Respectfully submitted,

/s/ Jon B. Eisenberg

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

Attorneys for Plaintiffs, Appellees and Cross-Appellants **Wendell Belew and Asim Ghafoor**

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellees and cross-appellants Wendell Belew and Asim Ghafoor, by and through their counsel of record, hereby certify that they are aware of the following related cases pending in this Court: *Hepting v. AT&T Corp.,* No. 09-16676; *McMurray v. Verizon Communications, Inc.*, No. 09-17133; *Jewel v. National Security Agency*, No. 10-15616; *Shubert v. Obama*, No. 10-15638; and *Center for Constitutional Rights v. Obama*, No. 11-15956.

September 14, 2011 By: /s/ Jon B. Eisenberg
Jon B. Eisenberg

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, I certify that the Brief of Appellees and Cross-Appellants is proportionately spaced, has a typeface of 14 points or more, and contains a total of 17,829 words. *See* Order, Nos. 11-15469 & 11-15535 (9th Cir. Aug. 1, 2011) (enlarging word-count limit for this brief by 1,400 words to 17,900 words).

September 14, 2011 By: /s/ Jon B. Eisenberg
Jon B. Eisenberg

STATUTORY ADDENDUM

1. **50 U.S.C. § 1801**
2. **50 U.S.C. § 1804**
3. **50 U.S.C. § 1805**
4. **50 U.S.C. § 1806**
5. **50 U.S.C. § 1809**
6. **50 U.S.C. § 1810**

50 U.S.C. § 1801. Definitions

As used in this subchapter:

(a) "Foreign power" means--

(1) a foreign government or any component thereof, whether or not recognized by the United States;

(2) a faction of a foreign nation or nations, not substantially composed of United States persons;

(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;

(4) a group engaged in international terrorism or activities in preparation therefor;

(5) a foreign-based political organization, not substantially composed of United States persons;

(6) an entity that is directed and controlled by a foreign government or governments; or

(7) an entity not substantially composed of United States persons that is engaged in the international proliferation of weapons of mass destruction.

* * * * *

(e) "Foreign intelligence information" means--

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against--

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to--

(A) the national defense or the security of the United States; or

(B) the conduct of the foreign affairs of the United States.

(f) "Electronic surveillance" means--

(1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;

(2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(I) of Title 18;

(3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or

(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

* * * * *

(i) "United States person" means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(2) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section.

* * * * *

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

50 U.S.C. § 1804. Applications for court orders

(a) Submission by Federal officer; approval of Attorney General; contents

Each application for an order approving electronic surveillance under this subchapter shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under section 1803 of this title. Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this subchapter. It shall include–

(1) the identity of the Federal officer making the application;

(2) the authority conferred on the Attorney General by the President of the United States and the approval of the Attorney General to make the application;

(3) the identity, if known, or a description of the specific target of the electronic surveillance;

(4) a statement of the facts and circumstances relied upon by the applicant to justify his belief that--

> **(A)** the target of the electronic surveillance is a foreign power or an agent of a foreign power; and
>
> **(B)** each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;

(5) a statement of the proposed minimization procedures;

(6) a detailed description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance;

(7) a certification or certifications by the Assistant to the President for National Security Affairs or an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate--

> **(A)** that the certifying official deems the information sought to be foreign intelligence information;
>
> **(B)** that a significant purpose of the surveillance is to obtain foreign intelligence information;
>
> **(C)** that such information cannot reasonably be obtained by normal investigative techniques;
>
> **(D)** that designates the type of foreign intelligence information being

sought according to the categories described in section 1801(e) of this title; and

(E) including a statement of the basis for the certification that--

(i) the information sought is the type of foreign intelligence information designated; and

(ii) such information cannot reasonably be obtained by normal investigative techniques;

(8) a statement of the means by which the surveillance will be effected and a statement whether physical entry is required to effect the surveillance;

(9) a statement of the facts concerning all previous applications that have been made to any judge under this subchapter involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application;

(10) a statement of the period of time for which the electronic surveillance is required to be maintained, and if the nature of the intelligence gathering is such that the approval of the use of electronic surveillance under this subchapter should not automatically terminate when the described type of information has first been obtained, a description of facts supporting the belief that additional information of the same type will be obtained thereafter; and

(11) whenever more than one electronic, mechanical or other surveillance device is to be used with respect to a particular proposed electronic surveillance, the coverage of the devices involved and what minimization procedures apply to information acquired by each device.

* * * * *

50 U.S.C. § 1805. Issuance of order

(a) Necessary findings

Upon an application made pursuant to Section 1804 of this title, the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance if he finds that--

> **(1)** the President has authorized the Attorney General to approve applications for electronic surveillance for foreign intelligence information;
>
> **(2)** the application has been made by a Federal officer and approved by the Attorney General;
>
> **(3)** on the basis of the facts submitted by the applicant there is probable cause to believe that--
>
> > **(A)** the target of the electronic surveillance is a foreign power or an agent of a foreign power: *Provided*, That no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States; and
> >
> > **(B)** each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;
>
> **(4)** the proposed minimization procedures meet the definition of minimization procedures under section 1801(h) of this title; and
>
> **(5)** the application which has been filed contains all statements and certifications required by section 1804 of this title and, if the target is a United States person, the certification or certifications are not clearly erroneous on the basis of the statement made under section 1804(a)(7)(E) of this title and any other information furnished under section 1804(d) of this title.

* * * * *

50 U.S.C. § 1806. Use of information

* * * * *

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

Whenever a court or other authority is notified pursuant to subsection (c) or (d) of this section, or whenever a motion is made pursuant to subsection (e) of this section, or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter, the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

* * * * *

(h) Finality of orders

Orders granting motions or requests under subsection (g) of this section, decisions under this section that electronic surveillance was not lawfully authorized or conducted, and orders of the United States district court requiring review or granting disclosure of applications, orders, or other materials relating to a surveillance shall be final orders and binding upon all courts of the United States and the several States except a United States court of appeals and the Supreme Court.

50 U.S.C. § 1809. Criminal sanctions

(a) Prohibited activities

A person is guilty of an offense if he intentionally–

> **(1)** engages in electronic surveillance under color of law except as authorized by statute; or
>
> **(2)** discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute.

* * * * *

(c) Penalties

An offense described in this section is punishable by a fine of not more than $10,000 or imprisonment for not more than five years, or both.

50 U.S.C. § 1810. Civil liability

An aggrieved person, other than a foreign power or an agent of a foreign power, as defined in section 1801(a) or (b)(1)A) of this title, respectively, 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–

> **(a)** actual damages, but not less than liquidated damages of $1,000 or $100 per day for each day of violation, whichever is greater;
>
> **(b)** punitive damages; and
>
> **(c)** reasonable attorney's fees and other investigation and litigation costs reasonably incurred.

9th Circuit Case Number(s) 11-15468 & 11-15535

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Sep 14, 2011 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /s/ Jon B. Eisenberg

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)