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7  
8 **UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
9 **SAN FRANCISCO DIVISION**

10 \_\_\_\_\_  
11 IN RE NATIONAL SECURITY AGENCY  
TELECOMMUNICATIONS RECORDS  
12 LITIGATION  
\_\_\_\_\_

13 This Document Relates Only to:  
14 *Center for Constitutional Rights v. Obama*\*,  
15 (Case No. 07-cv-1115-VRW)  
\_\_\_\_\_

**No. 3:06-md-01791-VRW**

**PLAINTIFFS’**  
**MEMORANDUM IN SUPPORT OF**  
**MOTION FOR SUMMARY**  
**JUDGMENT AND IN**  
**OPPOSITION TO DEFENDANTS’**  
**MOTION TO DISMISS**  
in  
***Center for Constitutional Rights v.***  
***Obama (07-1115)***

Judge: Hon. Vaughn R. Walker  
Date: *(no hearing set)*  
Time:  
Courtroom: 6, 17th Floor

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\* The current President (and each other current occupant of an official defendant’s post) is automatically substituted in this official capacity suit pursuant to Fed. R. Civ. Proc. 25(d)(1).



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1 **INTRODUCTION**

2 It is useful to begin with what is *not* at issue in this case. As this Court has recognized,  
 3 Congress occupied the field of electronic surveillance with FISA. *Al-Haramain Islamic Founda-*  
 4 *tion, Inc. v. Bush*, 564 F. Supp. 2d 1109, 1116 (N.D. Cal. 2008). Congress made the wiretapping  
 5 statutes the “exclusive means by which electronic surveillance ... may be conducted,” and made  
 6 it a crime to violate these prohibitions.<sup>1</sup> Nonetheless, the NSA engaged in a secret program of sur-  
 7 veillance, aimed at international electronic communications with one end in the United States  
 8 where one party has some unspecified link to terrorist organizations, in violation of FISA. As set  
 9 forth in plaintiffs’ prior summary judgment papers,<sup>2</sup> the executive eventually confessed that this  
 10 surveillance took place without any warrant or judicial order, and without probable cause of crimi-  
 11 nal activity or that one party is an “agent of a foreign power.”<sup>3</sup> The Program concededly involved  
 12 surveillance regulated by FISA,<sup>4</sup> but without any form of judicial authorization or judicially super-  
 13 vised-minimization procedures in place.

14 In short, the NSA Program<sup>5</sup> was illegal—not just *ultra vires* but *criminally* illegal.<sup>6</sup> At least  
 15 until the passage of new statutory authorities in August 2007, the prior administration made rhe-  
 16 torical efforts to defend the legality of the original Program.<sup>7</sup> With the change in administration,  
 17 the government has expressly refused to take a position on the legality of the Program in a FOIA  
 18 action seeking access to records of surveillance for some of these same plaintiffs,<sup>8</sup> and in its motion

19 <sup>1</sup> Memorandum in Support of Plaintiffs’ Motion for Summary Judgment (Mar. 9, 2006), Doc.  
 20 # 16-3 (“SJ Mot.”), at 3-4 (quoting 18 U.S.C. § 2511(2)(f)).

21 <sup>2</sup> This Court has not ruled on the parties’ prior summary judgment motions.

22 <sup>3</sup> *See id.* at 7-8.

23 <sup>4</sup> *Id.* at 9 (quoting Attorney General Alberto Gonzales).

24 <sup>5</sup> As the Inspectors’ General “Unclassified Report on the President’s Surveillance Program,”  
 25 *available at* [www.dni.gov/reports/report\\_071309.pdf](http://www.dni.gov/reports/report_071309.pdf) (IG Report) and many other sources make  
 26 clear, the term “Terrorist Surveillance Program” was a euphemism concocted after the fact by the  
 27 Executive in December 2005 to conceal from the American people the true scope of the unlawful  
 28 surveillance activities the Executive was conducting. *See* IG Report at 1-2, 5-6, 36-37. There never  
 was any operational program called the Terrorist Surveillance Program.

<sup>6</sup> No court to reach the merits has found differently. *See ACLU v. NSA*, 438 F. Supp. 2d 754  
 (E.D. Mich. 2006) (later overturned on standing grounds); *Al-Haramain Islamic Foundation, Inc.*  
*v. Obama*, 2010 U.S. Dist. LEXIS 31287 (N.D. Cal. Mar. 31, 2010).

<sup>7</sup> *See* Supplemental Mem. in Opp. to Defs’ Mot. to Dismiss and in Support of Pls’ Mot. for  
 Summary Judgment (Jul. 10, 2007), Doc. # 13 (“Supp. Br.”) at 3-9.

<sup>8</sup> *See* Petition for a Writ of Certiorari, *Wilner v. NSA*, No. 09-1192 (U.S. filed Mar. 30, 2010)  
 at 11 (“At oral argument [in the Second Circuit on Oct. 9, 2009], the Government refused to make  
 any argument in defense of the legality of the NSA Program, stating ‘[w]e take no position on the

1 to dismiss and for summary judgment (Doc. # 39, “Gov’t Br.”), the government now makes no  
2 attempt whatsoever to defend the legality of the program.

3 Notwithstanding the constitutionally-based requirement (codified in both FISA and Title  
4 III) of minimization to protect privileged conversations, lawyers have every reason to believe that  
5 attorney-client communications have been intercepted by the program. The executive has acknowl-  
6 edged (in a submission to Congress) that attorneys are not categorically excluded from the defini-  
7 tions of surveillance targets under the NSA Program, *see* Assistant Attorney General William E.  
8 Moschella, *Responses to Joint Questions from House Judiciary Committee Minority Members*  
9 (Mar. 24, 2006), ¶45, *available at* <http://www.fas.org/irp/agency/doj/fisa/doj032406.pdf> (last vis-  
10 ited Jul. 24, 2010), and argued that it had a right to target them. Philip Shenon, *Lawyers Fear*  
11 *Monitoring in Cases on Terrorism*, N.Y. TIMES, Apr. 28, 2008, at A14. More than a year after the  
12 supposed deactivation of the Program, *The New York Times* reported that “[t]he Justice Department  
13 does not deny that the government has monitored phone calls and e-mail exchanges between law-  
14 yers and their clients as part of its terrorism investigations in the United States and overseas.” *Id.*  
15 The *Times* interviewed two senior Department of Justice officials who admitted that “they knew of  
16 ... a handful of terrorism cases ... in which the government might have monitored lawyer-client  
17 conversations.” *Id.* Although the government refuses to officially confirm whether it has actually  
18 eavesdropped on lawyers, *see id.* (quoting Transcript, *Al-Haramain Islamic Found., Inc. v. United*  
19 *States Dep’t of the Treasury*, CV-07-1155, at 31 (D. Or. Apr. 14, 2008)), this Court has granted  
20 summary judgment in a case alleging warrantless surveillance of phone calls between U.S. attor-  
21 neys and their clients. *Al-Haramain*, 2010 U.S. Dist. LEXIS 31287 at \*54-\*59.

22 Plaintiffs are the Center for Constitutional Rights and its lawyers and legal staff, who were,  
23 during the active span of the NSA Program, engaged in litigation challenging other unlawful con-  
24 duct by the same administration that carried out this criminally unlawful surveillance. Plaintiffs  
25 filed suit a few weeks after the executive acknowledged the Program’s existence and sought equi-  
26 table relief from the harm that the program caused to our constitutionally-protected interest in en-

27  
28 merits of the [legality of the] TSP.”), *available at* <http://ccrjustice.org/files/Wilner%20v%20NSA%20-%20cert%20petition%20-%20FINAL.pdf>.



1 gaging in litigation and communicating with clients, witnesses, fellow counsel and other litigation  
 2 participants. Because there is no longer any controversy over whether the Program was illegal,  
 3 plaintiffs are entitled to equitable relief as long as there is relief that can remedy our continuing  
 4 injuries from the illegal surveillance. There is, as set forth below.

## 6 I. Standing

7 Plaintiffs' original Summary Judgment motion (filed March 9, 2006) was premised on the  
 8 notion that the NSA Program was ongoing and based on the threat the Program posed to plaintiffs'  
 9 international electronic communications. In order to resolve those claims, which are still pending,<sup>9</sup>  
 10 this Court should demand a representation from the executive that it has renounced the right to  
 11 operate the NSA Program as described in plaintiffs' earlier summary judgment papers. If it fails to  
 12 do so, plaintiffs' earlier claims are not moot for the reasons stated in plaintiffs' supplemental brief  
 13 to this Court in 2007, and plaintiffs are entitled to a declaratory judgment that continued operation  
 14 of the Program is in fact illegal and appropriate injunctive relief. *See* Supp. Br. (Doc. # 13) at 2-10  
 15 (addressing government's mootness arguments).

16 Assuming for present purposes that the government provides such a representation,<sup>10</sup> plain-  
 17 tiffs' original complaint in this matter also includes the following prayers for relief, requesting that  
 18 the Court:

19 (b.) Order that Defendants disclose to Plaintiffs all unlawful surveillance of Plain-  
 20 tiffs' communications carried out pursuant to the program;

21 (c.) Order that all Defendants turn over to Plaintiffs all information and records in  
 22 their possession relating to Plaintiffs that were acquired through the warrantless sur-  
 23 veillance program or were the fruit of surveillance under the program, and subse-  
 24 quently destroy any such information and records in Defendants' possession; [and]  
 25 ...

26 (e.) Award such other relief as the Court may deem just and proper.

27 Even assuming the NSA Program challenged in plaintiffs' original summary judgment papers were  
 28 no longer in active operation with respect to continuing interception of communications, and there

<sup>9</sup> *See* Order, Doc. # 27 (Mar. 31, 2008) (terminating only plaintiffs' Motion for Leave to File Supplemental Complaint (Doc. # 19)).

<sup>10</sup> *Cf.* Gov't Br. at 1 (Program "was terminated three years ago," and "no longer exists").

1 were no risk of the executive reviving the Program, the relief set forth above is necessary to rem-  
2 edy the harms set forth in plaintiffs’ summary judgment papers. Specifically, the Court should or-  
3 der the government to destroy all surveillance data, derivative materials, and fruits thereof relating  
4 to surveillance of plaintiffs, and should order disclosure—which may take many forms, not neces-  
5 sarily limited to public disclosure, *see* Part V.2, *infra*—of the fact of surveillance to plaintiffs.

6 In contesting plaintiffs’ standing (Gov’t Br. at 7-13), the government says nothing new or  
7 specifically tailored to the disclosure and disgorgement claims because those claims are essentially  
8 equivalent for standing purposes to plaintiffs’ ongoing interception claims. The chill generated by  
9 the NSA Program resulted not just in a change in “methods of communication” (Gov’t Br. at 13)  
10 but a change in plaintiffs’ ability to litigate their cases most effectively and an effect on third par-  
11 ties (making them less likely to want to communicate or litigate with us). While the most obvious  
12 costs of the change in communications practices motivated by the existence of the Program were  
13 the expenses of “making personal visits to persons located overseas and taking other such precau-  
14 tions,”<sup>11</sup> plaintiffs also cited the need to “forego some communications altogether, and reserve oth-  
15 ers for in-person visits or other secure means of communication” and noted that the “need to com-  
16 municate by these less-efficient means often means that communications have to be delayed, and  
17 these delays in turn add to delays in securing relief for clients.”<sup>12</sup> In other words, the potential  
18 breach of confidentiality was a complication that made it more difficult to litigate efficiently.

19 Even four years ago, the “added expense and effort” created by the risk of surveillance un-  
20 der the Program was not just that of changing communications patterns, but also the burden im-  
21 posed by the need to take stock of the scope of the potential breach of confidentiality—for in-  
22 stance, plaintiffs were compelled by their professional responsibilities “to review and analyze all  
23 past international communications (back through late 2001 when the Program began) that may  
24 have involved sensitive matters in order to evaluate whether confidences may have been breached  
25 by Defendants’ illegal surveillance and whether measures ought to be taken in response.”<sup>13</sup> CCR

26  
27 <sup>11</sup> Plaintiffs’ Opposition to Defendants’ Motion to Dismiss (Jun. 30, 2006), Doc. # 16-5  
28 (“MTD Opp.”) at 4-5.

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.* at 5.

1 staffers must still be vigilant to the risk that the confidentiality of *past* privileged communications  
2 relevant to *current-day litigation decisions* was breached,<sup>14</sup> and conform their current communica-  
3 tions and litigation practices accordingly. Until the air is cleared by assurances that the government  
4 does not possess records of their confidential communications seized unlawfully under the Pro-  
5 gram, that injury will continue.<sup>15</sup>

6 In many respects, there is little to distinguish the risk of injury posed by ongoing surveil-  
7 lance of CCR's communications from the risk posed by past surveillance of conversations with  
8 individuals we still work with, where the government has retained records of the content of those  
9 communications. In light of the fact that records of such prior communications may be available to  
10 the government, responsible attorneys would still maintain caution in continuing those lines of  
11 conversation with potential litigation participants (witnesses, potential class members, overseas  
12 counsel, etc.). Those third parties might sensibly be hesitant to communicate freely with CCR  
13 staffers even absent a risk of current unlawful interception. Moreover, there is a tremendous risk  
14 posed by the fact that the government may have access to aspects of CCR's litigation strategy. That  
15 risk must be accounted for in any consideration of the future path any potentially-affected case may  
16 take, including settlement; ultimately, this can only hinder the ability of CCR to litigate such cases.

17 The risk that the government has retained records of prior NSA Program surveillance of  
18 CCR's communications creates a current risk that third parties who communicated with us previ-  
19 ously will now be less willing to do so, knowing that the government may have been listening in on  
20 those earlier calls. "One of the foreseeable professional injuries to Plaintiffs is that other individu-  
21 als—potential clients and professional contacts vital to their work—will no longer be willing to  
22 provide Plaintiffs with the information they need to engage in civil and human rights advocacy  
23 because of fear of the NSA Program." MTD Opp. (Doc. # 16-5) at 10. Plaintiffs cited one such  
24 example specifically, describing the reluctance of a potential class member to continue communi-

25 \_\_\_\_\_  
26 <sup>14</sup> Again, under FISA or any other *constitutional* statutory surveillance scheme, such commu-  
27 nications would ordinarily have been subject to judicially-supervised minimization requirements  
28 protecting privileged communications. *See* note 37, *infra*.

<sup>15</sup> As a result, various attorneys felt "compelled by their professional responsibilities to move  
for disclosure" relating to surveillance, either thru FOIA or resort to the judges in their cases. *Id.* at  
4.

1 cating electronically with a CCR staff attorney (*see* Meeropol Aff. (Doc. # 16-8) at ¶17). The class  
 2 action in question remains active, and it would be perfectly reasonable for that particular potential  
 3 class member, or others who were warned about the possibility of surveillance when they commu-  
 4 nicated with us while the Program was active, *id.* at ¶16, to remain wary of communicating with us  
 5 (electronically or otherwise), or participating in litigation, given that the confidentiality of past  
 6 communications cannot be assured.

7         Lawyers routinely take great care to maintain secrecy in identifying and investigating po-  
 8 tential clients and defense witnesses. The government’s continued retention of NSA Program inter-  
 9 cepts has the effect of informing every such otherwise-confidential source of information who we  
 10 spoke to while the Program was active that the United States government may be aware of their  
 11 identity and the substance of their communications with CCR. Add the complicating factor that  
 12 such potential clients, relatives of clients, fact and expert witnesses, and foreign counsel are located  
 13 overseas—at times in countries with close intelligence relationships with the United States and  
 14 lesser respect for human rights norms than we profess. Uncertainty about the confidentiality of past  
 15 communications with CCR can be expected to have a foreseeable (and perfectly reasonable) effect  
 16 on the behavior of such third parties that in turn causes concrete harm to CCR’s First Amendment  
 17 interest in litigating against the government, in precisely the same way that the “propaganda” label  
 18 that would have been attached to films Barry Keene intended to screen would have risked dimin-  
 19 ishing his reputation among members of the voting public in *Meese v. Keene*. *See* MTD Opp. (Doc.  
 20 # 16-5) at 6-7.<sup>16</sup>

21         The converse is also true: any responsible attorney would have to conform their behavior to  
 22 account for the possibility that potential clients and witnesses might be tainted by the possibility of

23 <sup>16</sup>         Third parties could reasonably fear a wide variety of consequences as a result of govern-  
 24 ment possession of the contents of past communications with CCR staff: they would be subject to  
 25 the ongoing risk that NSA will share such information with foreign government officials in the  
 26 future, even if it does not disclose criminal activity (*e.g.* that a potential client was engaged in pro-  
 27 democratic political organizing in opposition to a dictatorial foreign government), and may fear  
 28 that that information is more likely to be shared if they stay in touch with CCR; they may fear the  
 use of such privileged conversations in seeking authority for otherwise-lawful warrant orders, with  
 good reason given that this was reported to have happened, *see* Carol D. Leonnig, *Secret Court’s*  
*Judges Were Warned About NSA Spy Data*, WASH. POST (Feb. 9, 2006) (reporting reaction of Chief  
 FISC Judge Kollar-Kotelly to revelations of use of NSA Program surveillance in FISA applica-  
 tions), *etc.*

1 past government interception and retention of their communications with CCR. If the government  
2 has access to intercepted work-product communications with persons who we communicated with  
3 while the Program was active, CCR will have to exercise caution going forward in using such indi-  
4 viduals in litigation, whether by putting them on the stand, broaching certain subjects during testi-  
5 mony, or even using them (as clients or witnesses) in litigation at all. In short, the risk that records  
6 are retained from the NSA's non-judicially-minimized interceptions means we must take steps to  
7 ensure the government does not gain a litigation advantage from access to aspects of our litigation  
8 strategy, and that need for caution interferes with our ability to construct a case under the ordinary  
9 assumptions of confidentiality that underpin our adversary system of justice.

10 It is, of course, difficult to be specific about these kinds of vulnerabilities without knowing  
11 precisely what the government may know as a result of its unlawful surveillance. But seeking such  
12 knowledge is the point of this lawsuit. Clearly some duty to investigate breaches of confidentiality  
13 is an ethical obligation, as much as the duty to warn clients of the possibility of surveillance. *See,*  
14 *e.g.,* SJ Mot. (Doc. # 16-3) at 10-11 (describing professional imperative upon plaintiffs in this case  
15 to “evaluate whether confidences may have been breached by Defendants’ illegal surveillance and  
16 whether measures ought to be taken in response”); MTD Opp. (Doc. # 16-5) at 5-6 (same); Affir-  
17 mation of Prof. Steven Gillers (Doc. # 16-6) at ¶10 (“Intercepted communications may be exploited  
18 to the disadvantage of clients with no one the wiser. ... [W]hether intercepted communications are  
19 or are not ever used to the disadvantage of a client or otherwise is irrelevant. CCR has a duty to  
20 protect its clients’ secrets and confidences regardless of the use to which an interceptor may put the  
21 information. It is disclosure itself that is the evil against which lawyers must protect clients, regard-  
22 less of any additional consequences of the disclosure”). Plaintiffs are under a professional impera-  
23 tive to ensure that the government does not gain a litigation advantage from having access to confi-  
24 dential information about potential witnesses and litigation strategy, and simple caution cannot  
25 repair the injury entirely, only ameliorate it.<sup>17</sup> Nonetheless, as in *Keene*, 481 U.S. at 475, “the need

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<sup>17</sup> Again, it is difficult to be specific about these kinds of vulnerabilities without knowing  
what the government may know as a result of surveillance.

1 to take ... affirmative steps” to mitigate the risk of harm (including bringing this case) is itself suf-  
 2 ficient injury for standing purposes.

3 In short, it requires little imagination to see the continued risk of harm posed by the pro-  
 4 foundly intrusive surveillance the NSA carried out with abandon for at least 5 years to the attorneys  
 5 and legal staff who are plaintiffs in this matter. There is no logical basis for the idea that plaintiffs’  
 6 need for termination of surveillance was somehow greater during the Program’s pendency than  
 7 their need for disclosure and destruction of records today.

8 \* \* \*

9 Courts have recognized the continued maintenance of information in government records as  
 10 an injury sufficient to underlie standing in many contexts. *See, e.g., Church of Scientology v.*  
 11 *United States*, 506 U.S. 9, 12-13 (1992) (even post-compliance, plaintiff maintained standing to  
 12 challenge IRS’s retention of records turned over in response to subpoena); *Norman-Bloodsaw v.*  
 13 *Lawrence Berkeley Lab.*, 135 F.3d 1260, 1275 (9th Cir. 1998) (“Even if the continued storage,  
 14 against plaintiffs’ wishes, of intimate medical information that was allegedly taken from them by  
 15 unconstitutional means does not itself constitute a violation of law, it is clearly an ongoing ‘effect’  
 16 of the allegedly unconstitutional and discriminatory testing, and expungement of the test results  
 17 would be an appropriate remedy for the alleged violation.”).<sup>18</sup> Courts have, of course, recognized  
 18 that the harm posed by retention of *derivative* materials is sufficient to ground injury-in-fact as

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 20 <sup>18</sup> *See also Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999), (convicted sex offender with-  
 21 stood standing challenge to his claim that notification provisions of a registration statute were un-  
 22 constitutional, even though his registration information had never been made public; “status as a  
 23 convicted sex offender ... arguably results in an injury because he faces a specific threat of being  
 24 subject to the release of registry information every day.”); *Paton v. LaPrade*, 524 F.2d 862 (3rd  
 25 Cir. 1975) (“Paton has alleged sufficient injury to have standing to seek the expungement of her  
 26 file. Paton charges that her file possibly could endanger her future educational and employment  
 27 opportunities. ... As the district court aptly observed, ‘the existence of (the) records may at a later  
 28 time become a detriment to her.’ The threat that the file poses is analogous to the dangers inherent  
 in the maintenance of arrest files. In a case challenging the maintenance of arrest records, the plain-  
 tiff, as here, ‘cannot point with mathematical certainty to the exact consequences of his criminal  
 file’ but it ‘(is) clear that he has alleged a “cognizable legal injury.”’ The maintenance of such re-  
 cords results in ‘injuries and dangers’ that are ‘plain enough.’”); *Menard v. Saxbe*, 498 F.2d 1017,  
 1023 (D.C. Cir. 1974) (“Although Menard cannot point with mathematical certainty to the exact  
 consequences of his criminal file, we think it clear that he has alleged a ‘cognizable legal injury.’”);  
*Graham v. Jones*, 709 F. Supp. 969, 974 (D. Or. 1989) (suspected gang members had standing to  
 challenge police policy of retaining photos of them because retention put them “at risk of future  
 police harassment.”).

1 well. *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010) (“the district court concluded  
2 that Mayfield ‘continue[s] to suffer a present, on-going injury due to the government’s continued  
3 retention of derivative material from the FISA seizure.’ .... We agree”); *FTC v. Compagnie De*  
4 *Saint-Gobain-Pont-A-Moussan*, 636 F.2d 1300, 1327 (D.C. Cir. 1980) (ordering the FTC to return  
5 improperly subpoenaed documents, and that all “notes, extracts, or other records derived from such  
6 documents be destroyed.”).

## 7

## 8 **II. Remedial Power: Expungement**

9 As defendants acknowledge, Gov’t Br. at 21-23, federal courts have inherent Article III  
10 powers to order expungement. That is especially so where the remedy of expungement is essential  
11 to prevent corruption of the litigation process and the attendant undermining of the separation of  
12 powers. “Federal courts have the equitable power ‘to order the expungement of Government re-  
13 cords where necessary to vindicate rights secured by the Constitution or by statute,’” *Norman-*  
14 *Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1275 (9th Cir. 1998) (quoting *Chastain v.*  
15 *Kelley*, 510 F.2d 1232, 1235 (D.C. Cir. 1975));<sup>19</sup> the government concedes as much. See Gov’t Br.  
16 at 22 (quoting *Fendler v. United States Bureau of Prisons*, 846 F.2d 550, 554 (9th Cir. 1988)  
17 (same)). “Since the power to order expungement is, however, only an instance of the general power  
18 of the federal courts to fashion appropriate remedies to protect important legal rights,” it is not con-  
19 fined to cases involving criminal records. *Chastain*, 510 F.2d at 1235 (footnote omitted). “Ex-  
20 pungement, no less than any other equitable remedy, is one over which the trial judge exercises  
21 considerable discretion. It is a versatile tool: expungement of only some records, from some Gov-  
22 ernment files, may be enough, as may the placing of restrictions on how the information contained  
23 in the records may be used.” *Id.* at 1236; see also *Peters v. Hobby*, 349 U.S. 331, 349 (1955) (af-

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<sup>19</sup> “It is equally well-established that expungement of records is, in proper circumstances, a  
proper remedy in an action brought directly under the Constitution,” *Hobson v. Wilson*, 737 F.2d 1,  
65 (D.C. Cir. 1984), “regardless of whether or not the plaintiff may also have a *Bivens* action for  
damages.” *Reuber v. United States*, 750 F.2d 1039, 1061 (D.C. Cir. 1984).

1 firming expungement of disloyalty finding originating from what concurrence called “a broad, far-  
2 reaching espionage program,” *id.* at 350 (Black, J., concurring)).<sup>20</sup>

3 Federal courts have accordingly invoked their inherent powers as justification for ex-  
4 pungement orders without seeking to tie the power to impose the remedy to the source of the un-  
5 derlying claim. *Menard v. Saxbe*, 498 F.2d 1017, 1023 (D.C. Cir. 1974) (“The judicial remedy of  
6 expungement is inherent and is not dependent on express statutory provision, and it exists to vindi-  
7 cate substantial rights provided by statute as well as by organic law,” citing *United States v.*  
8 *McLeod*, 385 F.2d 734 (5th Cir. 1967)); *Paton v. LaPrade*, 524 F.2d 862 (3rd Cir. 1975); *cf. Cut-*  
9 *shall v. Sundquist*, 193 F.3d 466, 471 (6th Cir. 1999). Moreover, Congress has acknowledged that  
10 federal courts have the power to order any relief appropriate pursuant to a declaratory judgment.  
11 *See* 28 U.S.C. § 2202 (“Further necessary or proper relief based on a declaratory judgment or de-  
12 cree may be granted, after reasonable notice and hearing, against any adverse party whose rights  
13 have been determined by such judgment.”); *Doe v. United States Air Force*, 812 F.2d 738, 740-41  
14 (D.C. Cir. 1987) (expungement as an adjunct to declaratory relief might be appropriate in response  
15 to Fourth Amendment violation).<sup>21</sup>

16 The government’s only offered defense to the inherent judicial power argument is that the  
17 continued maintenance of any records of the criminally illegal government surveillance here does  
18 not pose a “real and immediate threat” to plaintiffs. Gov’t Br. at 22-23 (quoting *Fendler*). But in  
19 the two *Fendler* cases the government cites for that proposition, the plaintiff failed to show that  
20 expungement was “necessary” at all. *See Fendler v. United States Bureau of Prisons*, 846 F.2d at  
21 554 (rejecting expungement of presentence report for convict already on parole, in part because he  
22 could challenge its inaccuracies in future criminal proceeding if it were ever used in a way that  
23 harmed him; plaintiff thus failed to “show that expungement is necessary”); *Fendler v. United*

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25 <sup>20</sup> *Cf.* Federal Rule of Criminal Procedure 41(g) (“Motion to Return Property”), Advisory  
26 Committee Note on 1989 Amendments (“In some circumstances ... equitable considerations might  
justify an order requiring the government to return or destroy all copies of records that it has  
seized.”).

27 <sup>21</sup> The government claims that FISA does not authorize declaratory relief, Gov’t Br. at 21-22,  
28 but plaintiffs have plead their First Cause of Action as a claim under FISA and the APA. (Plaintiffs  
have denominated their other three claims as direct claims under the First and Fourth Amendments  
and the Separation of Powers. Relief under the Court’s inherent powers is appropriate to all four.)



1 *States Parole Com.*, 774 F.2d 975, 979 (9th Cir. 1985) (same: habeas process adequate and avail-  
 2 able for correction; expungement remedy therefore “is not necessary to vindicate [plaintiff’s]  
 3 rights”).<sup>22</sup> None of the cases cited involve plaintiffs challenging widespread, serious constitutional  
 4 violations that threaten to undermine the political process, the integrity of litigation, and the separa-  
 5 tion of powers on the scale of the NSA Program.

6 In contrast to the commonplace cases seeking expungement of individual arrest or criminal  
 7 records, the instant case challenges a massive program of criminally unlawful surveillance by the  
 8 government. It was brought by attorneys involved in litigating against that same government over  
 9 other illegal and embarrassing conduct, often evincing executive incompetence. The existence of  
 10 such surveillance makes it extraordinarily difficult to litigate effectively against other illegal activ-  
 11 ity of the previous administration (which, apparently, is something the current administration is  
 12 perfectly at ease with). Courts faced with government practices that pose a risk to the integrity of  
 13 the political process have asked simply whether the expungement is “necessary and appropriate in  
 14 order to preserve basic legal rights.” *Sullivan v. Murphy*, 478 F.2d 938, 968 (D.C. Cir. 1973); *see*  
 15 *also Menard v. Saxbe*, 498 F.2d 1017, 1023 n.13 (D.C. Cir. 1974) (citing *inter alia* arrest records  
 16 cases involving politically-motivated arrests). Courts asked to expunge information gathered in  
 17 violation of law should weigh that illegality heavily. *Cf. Paton v. LaPrade*, 524 F.2d 862, 869 (3d  
 18 Cir. 1975) (reviewing expungement order by applying balancing test weighing “adverse nature of  
 19 the information,” “the legality of the methods by which the information was compiled, the exist-  
 20 tence of statutes authorizing the compilation and maintenance, and prohibiting the destruction, of  
 21 the records, and the value of the records to the Government.”).

22 Notably, destruction/expungement could be ordered without any “disclosure” (in camera,  
 23 and possibly ex parte, or otherwise) of whether or not surveillance occurred in the first place.<sup>23</sup> The

24 <sup>22</sup> The government also cites the relatively trivial *United States v. Smith*, 940 F.2d 395, 396  
 25 (9th Cir. 1991) (per curiam), summarily reversing a district court’s expungement of a minor crimi-  
 26 nal infraction primarily because the convict sought to reenlist in the military, a goal which the dis-  
 27 trict court had found “laudable.”

28 <sup>23</sup> Destruction is not the only option that could satisfy plaintiffs’ interests here. *Cf. Sullivan v.*  
*Murphy*, 478 F.2d 938, 973 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 880 (“It may be, however, that  
 measures short of physically destroying the records in question will prove adequate to assure com-  
 plete and effective relief. For example, an order placing the original documents under seal and pro-  
 hibiting disclosure of their contents, except upon further order of the District Court ... may provide

1 government claims that “balancing the relevant interests [for purposes of determining whether ex-  
 2 punctionment is appropriate] would require disclosure of whether or not plaintiffs were in fact subject  
 3 to surveillance ... and what [such surveillance records] might indicate,” Gov’t Br. at 23. Again,  
 4 that defies credulity: illegal, warrantless, non-minimized surveillance of attorneys is *per se* harmful  
 5 and there is no plausible argument that such records should ever be retained, regardless of whether  
 6 this Court also orders some form of disclosure of those records.<sup>24</sup>

7 Nothing in FISA stands in the way of the destruction of such surveillance records. As this  
 8 Court has noted, FISA expressly contemplated destruction of surveillance records, “the idea being  
 9 that to allow destruction [of records] would better protect the privacy of individuals surveilled than  
 10 to require preservation” (in contrast to Title III). *Al-Haramain*, 564 F. Supp. 2d at 1131; *id.* at  
 11 1126-27. Moreover, the government has admitted that when NSA violated its own rules with re-  
 12 spect to targeting criteria of the “TSP,” it destroyed the content of the intercept (but did preserve a  
 13 record of the violation). *See Al-Haramain v. Bush*, 507 F.3d 1190, 1199 (9th Cir. 2007) (quoting  
 14 General Hayden).

### 15 16 **III. Remedial Power: Disclosure**

17 This Court has determined that “FISA preempts or displaces the state secrets privilege ... in  
 18 cases within the reach of its provisions.” *Al-Haramain*, 564 F. Supp. 2d at 1124. As plaintiffs have  
 19 long argued, *see* MTD Opp. (Doc. # 16-5) at 28-29, the privilege courts have recognized is a com-  
 20 mon-law evidentiary rule subject to abrogation by statute, and FISA itself contains language that

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21 a remedy reasonably equivalent to expungement in terms of protection of plaintiffs’ rights.”);  
 22 *Church of Scientology v. United States*, 506 U.S. 9, 13 n.6 (1992).

23 In a similar vein, should this Court order expungement from government files without some  
 24 form of disclosure (to the court, to other judges, or to the plaintiffs), it might be appropriate to or-  
 25 der a set kept in storage unavailable to the government (“quarantined” as we say in our proposed  
 26 order) for the purposes of the historical record (pending eventual declassification of the Program).

24  
25 To the extent the records are inseparably commingled with information from other intelli-  
 26 gence sources, courts have held that the government bears the hardship created by the impossibility  
 27 of separation. *See, e.g., Sullivan v. Murphy*, 478 F.2d 938, 970 (D.C. Cir. 1973).

26  
27 To the extent that the government argues that it may be futile to destroy records since the  
 28 court cannot erase the memories of intelligence officials who first heard the intercepts in question,  
 the Supreme Court has considered and rejected this argument, finding the “partial” remedy of de-  
 struction of records sufficient to undergird standing. *See Church of Scientology v. United States*,  
 506 U.S. 9, 12-13, 13 n.6 (1992).

1 makes clear that federal judges have authority to look past executive secrecy determinations and  
 2 examine underlying evidence. So, to the extent the government claims that the privilege forecloses  
 3 identification and examination of specific items of evidence required to fully set forth a valid legal  
 4 defense, *see* Part V.3, *infra*, that argument is foreclosed by FISA.

5 As to remedy,<sup>25</sup> once the Court has established the illegality of the NSA Program, plaintiffs  
 6 believe the inherent equitable powers of the Court enable it to order disclosure of records of sur-  
 7 veillance in any of the manners proposed below, Part V.2, *infra*. This Court has already decided, in  
 8 the context of the *damages* action in *Al-Haramain* (where the state secrets privilege was applied  
 9 preliminarily to a single item of evidence apparently necessary to establish both liability and the  
 10 scope of liability for purposes of damages, *see* 595 F. Supp. 2d at 1089), that FISA § 1806(f) pre-  
 11 empts the privilege and permits disclosure, at least to the Court, of such evidence when necessary  
 12 to determine liability and damages in civil damages cases. Section 1806(f) provides in pertinent  
 13 part:

14 whenever *any motion or request* is made by an aggrieved person pursuant to any  
 15 other statute or rule of the United States or any State before any court ... of the  
 16 United States ... to discover or obtain applications or orders or other *materials re-*  
 17 *lating to electronic surveillance* ... the United States district court ... shall, *notwith-*  
 18 *standing any other law*, if the Attorney General files an affidavit under oath that  
 19 disclosure or an adversary hearing would harm the national security of the United  
 20 States, *review in camera and ex parte* ... such other materials relating to the surveil-  
 21 lance as may be necessary to *determine whether the surveillance of the aggrieved*  
 22 *person was lawfully authorized and conducted*. In making this determination, *the*  
 23 *court may disclose to the aggrieved person*, under appropriate security procedures  
 24 and protective orders, portions of *the application, order, or other materials* relating  
 25 to the surveillance *only* where such disclosure is *necessary to make an accurate de-*  
 26 *termination of the legality* of the surveillance.

27 50 U.S.C. § 1806(f) (emphasis added). As the reconciliation history of the House and Senate ver-  
 28 sions of this language makes clear, *see* Amici Curiae Mem. of MDL Plaintiffs (Doc. # 440 in No.

25 Defendants claim (Gov't Br. at 20) that there is no authority for the equitable relief plain-  
 tiffs seek here. Sovereign immunity is not an issue in this case, which seeks only equitable relief  
 against defendants in their official capacities. Plaintiffs' claims are denominated as direct constitu-  
 tional claims with the exception of claim 1, the FISA claim, which is also denominated as a claim  
 under the Administrative Procedure Act, 5 U.S.C. § 702. Courts have recognized surveillance  
 without legal authority as agency action outside of law for purposes of waving sovereign immunity  
 for relief "other than money damages." *See, e.g., Presbyterian Church (USA)*, 870 F.2d at 523-26  
 (reversing on availability of declaratory and injunctive relief); *cf. Menard v. Mitchell*, 430 F.2d  
 486, 494-95 (D.C. Cir. 1970) ("discretion" to maintain arrest records in FBI files "assuming it ex-  
 ists, may not be without limit."); *see also* Supp. Br. (Doc. # 13) at 25-26. Alternatively, such a  
 waiver is implicit in FISA. *See Al-Haramain*, 564 F. Supp. 2d at 1124-25.

1 3:06-md-1791) at 11-13, this language applies in both civil and criminal cases, as this Court has  
2 already decided in *Al-Haramain*, 564 F. Supp. 2d at 1133-34. Plaintiffs therefore believe this Court  
3 could use the § 1806(f) procedure to govern the remedial phase of this case.<sup>26</sup>

4 The government argues that the state secrets privilege affects not just the liability determi-  
5 nation and the ability to grant the disclosure remedy, but the more preliminary inquiry into stand-  
6 ing. For the reasons set forth in Part IV, *infra*, actual evidence of surveillance is not necessary to  
7 establish plaintiffs' standing. However, to the extent that this Court accepts the government's ar-  
8 gument, § 1806(f) could govern additional proceedings to resolve the standing inquiry. *See Al-*  
9 *Haramain*, 564 F. Supp. 2d at 1133-34 ("The court disagrees with defendants' proposed limitation  
10 of section 1806(f) to cases in which the government has acknowledged the surveillance at issue.").  
11 In that event, plaintiffs should be allowed to proceed if they can show a colorable basis for belief  
12 that they were subjected to electronic surveillance under the Program. *See MDL Plaintiffs' Amicus*  
13 (Doc. # 440 in No. 3:06-md-1791) at 14-17. Moreover, to the extent this Court believes plaintiffs  
14 must instead marshal evidence sufficient to generate a prima facie case of actual surveillance (*see*  
15 *Al-Haramain*, 564 F. Supp. 2d at 1134-35; 595 F. Supp. 2d at 1084-87), in order to be considered  
16 "aggrieved persons" for purposes of this § 1806(f) inquiry, plaintiffs should be allowed to make  
17 that showing with circumstantial evidence and reasonable inferences therefrom. *See id.* at 1085  
18 ("[plaintiff] does not have to plead and prove his entire case to establish standing and to trigger the  
19 government's responsibility to affirm or deny." (quoting *United States v. Alter*, 482 F.2d 1016,  
20 1026 (9th Cir. 1973))).

21  
22  
23 <sup>26</sup> The government suggests that FOIA is "the proper vehicle for plaintiffs' disclosure re-  
24 quest," and that plaintiffs are somehow trying to "circumvent the FOIA" with their instant disclo-  
25 sure demand. Gov't Br. at 23. FOIA is a disclosure statute which strikes a balance between harms  
26 and benefits of open disclosure of information to the general public. There is no reason to think that  
27 that same policy balancing should apply to the determination to investigate and expunge criminally  
28 illegal surveillance in violation of the separation of powers, as happened here. That is especially so  
given that alternatives to full, public disclosure exist here. Moreover, FOIA does not take into ac-  
count the identity of the requester (and thus cannot accord weight to the special harms posed by  
surveillance of attorneys), nor, according to the government, does FOIA account for the illegality  
of surveillance in considering whether Exemptions 1 and 3 apply to exclude surveillance records  
from disclosure. *See* Brief for Appellees, *Wilner v. NSA*, No. 08-4726-cv (2d Cir. Jan. 30, 2009) at  
29, 32-37.

1           Indeed, plaintiffs have already shown the following: they are part of a small group of attor-  
 2 neys litigating cases involving persons the executive suspects (often without basis) of involvement  
 3 with terrorism; their international communications in the course of litigating these cases fit the an-  
 4 nounced criteria for NSA Program intercepts; the government has conspicuously disdained to offer  
 5 assurances that privileged communications with attorneys were outside the scope of the program in  
 6 the face of direct questioning about the subject from Congress (*see supra* page 2), and government  
 7 officials have told the media that attorney-client calls were intercepted<sup>27</sup> (which *Al-Haramain* now  
 8 appears to prove was the case); and finally, FISA had been an effective and permissive tool for the  
 9 government since its enactment,<sup>28</sup> rendering it suspect that the government would route around it,  
 10 unless the motivation for doing so were illicit and unconstitutional—*e.g.* a desire to conduct non-  
 11 judicially minimized surveillance of attorney communications.

#### 12

#### 13 **IV. The government’s general objections to plaintiffs’ standing**

14           The government repeats (Gov’t Br. at 5-13) many of its previous arguments against stand-  
 15 ing for injuries premised on the chilling effect of the NSA Program. Plaintiffs have responded to  
 16 those arguments at length elsewhere and incorporate those arguments here. *See* MTD Opp. (Doc.  
 17 # 16-5) at 2-13; SJ Reply (Doc. # 16-10) at 1-8; Supp. Br. (Doc. # 13) at 10-25. To summarize,  
 18 *Laird v. Tatum* and subsequent chilling-effect cases show a concern about the “objectivity” of two  
 19 elements of the analysis: First, that the fear causing plaintiffs to be deterred from acting should be  
 20 “objectively reasonable”; and second, that the harm asserted be something tangible—something  
 21 objective in that sense, beyond mere psychological injury or the like, but instead what is referred to  
 22 as “concrete harm” in many subsequent Supreme Court pronouncements on standing.<sup>29</sup> *Laird* em-  
 23 phatically does *not* stand for the proposition that courts will refuse to entertain standing based on  
 24 any injury where the most proximate cause is the action of the plaintiffs themselves<sup>30</sup> or the fore-

25 <sup>27</sup> Shenon, *Lawyers Fear Monitoring in Cases on Terrorism*, N.Y. TIMES, *supra* page 2 (“It’s  
 26 not as if we’re targeting the lawyer for surveillance. It’s not like we’re eager to violate lawyer-  
 27 client privilege. The lawyer is just one of the people whose calls from the suspect are being swept  
 28 up.”)

<sup>28</sup> *See* SJ Mot. (Doc. # 16-3) at 19-21, 28-30.

<sup>29</sup> *See* Supp. Br. (Doc. # 13) at 15.

<sup>30</sup> *Cf.* Gov’t Br. at 10 (characterizing injuries as “self-imposed”).

1 seeable voluntary reactions of third parties (*see, e.g., Meese v. Keene*), or is based on any contin-  
2 gent injury (including by definition all future injury or risk of harm).

3 The government again tries to limit the universe of viable chilling effect cases to those  
4 where a plaintiff is “‘regulated, constrained, or compelled directly by the government’s own ac-  
5 tions, instead of by his or her own subjective chill.’” Gov’t Br. at 9 (quoting *ACLU v. NSA*, 493  
6 F.3d 644, 661 (6th Cir. 2007) (opinion of Batchelder, J.));<sup>31</sup> *see id.* at 7-10. The government made  
7 this argument before Judge Lynch in the Southern District of New York and plaintiffs’ responded  
8 to it in their SJ Reply (Doc. # 16-10) at 1-4. Transfer of the instant case to this district settled the  
9 issue, for in the Ninth Circuit, *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 522  
10 (9th Cir. 1989) controls the question, definitively rejecting the notion that government action must  
11 reach the level of “‘coercive action’” before standing may be found in chilling effect cases.

12 The crux of the government’s position on standing is that only evidence of actual surveil-  
13 lance is sufficient to underlie standing—even when the government has acknowledged conducting  
14 a massive surveillance program in bald violation of an act of Congress. The paradox of that posi-  
15 tion is neatly illustrated by the government’s reliance on the D.C. Circuit cases *Halkin v. Helms*  
16 and *United Presbyterian Church v. Reagan*. Both cases were distinguished at length during the oral  
17 argument before Judge Lynch. *See* Tr. of Oral Argument, *CCR v. Bush*, No. 06-cv-313 (S.D.N.Y.  
18 Sept. 5, 2006) at 32-37; *see also* Tr. of Oral Argument, *CCR v. Bush*, No. 07-cv-1115 (N.D. Cal.  
19 Aug. 7, 2007) at 46-50; MTD Opp. (Doc. # 16-5) at 32-34.

20 *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984) (*UPC*) was a chal-  
21 lenge to a 1981 executive order that set forth procedures for the division of labor between the FBI  
22 and other foreign intelligence agencies in carrying out surveillance. The Order is reproduced in  
23 Judge Scalia’s opinion; although it makes no mention of the authority for such surveillance, it  
24 seems on its face that most of it related to operational procedures for agencies seeking FISA war-  
25 rants. Nowhere does the Order set forth any warrantless wiretapping procedures, and in fact it was  
26 ostensibly designed to *eliminate* illegal surveillance (in the wake of the Church Committee (*see,*

27  
28 <sup>31</sup> Plaintiffs’ extensive response to the Sixth Circuit opinions in *ACLU v. NSA* is given in their  
Supp Br. (Doc. # 13) at 10-26.

1 e.g., 738 F.2d at 1382 n.3). While plaintiffs claimed they experienced chilling effects from the fact  
 2 that the order might govern the process for making them targets under FISA, they made absolutely  
 3 no claim against FISA itself. The only allegations of illegality they made related to government  
 4 actions *prior* to the Order that their claims were directed at, as the District Court opinion makes  
 5 clear.<sup>32</sup> Nor were the *UPC* plaintiffs a group especially vulnerable to warrantless surveillance be-  
 6 cause of the risk of legally-recognized communications privileges being violated, as in the instant  
 7 case.<sup>33</sup> Plaintiffs' failure there was not that they did not show they were *actual targets* of an illegal  
 8 program. Rather, they failed to make *any plausible claim of illegality*, no less any other showing of  
 9 being affected by the practices at issue. Like the *Laird* plaintiffs, the *UPC* plaintiffs were worried  
 10 about how a lawful system might be put to unlawful uses against them in the future.

11 *Halkin v. Helms (Halkin II)*, 690 F.2d 977 (D.C. Cir. 1982), the final chapter in litigation  
 12 that had been drawn out for years, similarly lacked allegations of illegality or special vulnerability  
 13 to harm. By the time of the *Halkin II* opinion, the only claims that remained were that plaintiffs'  
 14 international communications might be intercepted under some not-yet-extant successor to the  
 15 NSA's MINARET program<sup>34</sup> because their names might be put on watchlists and passed on to  
 16 NSA by other agencies. The only prospective claims (for equitable relief) in *Halkin II* related to  
 17 such future submission of watchlists to the NSA. *Id.* at 997. The D.C. Circuit held that mere for-  
 18 warding of watchlists from one agency to another could not be a Fourth Amendment violation, and  
 19 that plaintiffs could not prove that anything *illegal* happened after the forwarding. In *Halkin II*

20  
 21 <sup>32</sup> See *United Presbyterian Church v. Reagan*, 557 F. Supp. 61, 63 (D.D.C. 1982) ("Plaintiffs  
 22 in this case have failed to allege any such redressable concrete injury attributable to Executive Or-  
 23 der 12333. They allege 'fear' and 'concern' that they 'may be targeted' for intelligence-gathering  
 24 activities, but introduce no evidence to support their claim—beyond allegations that some of the  
 25 plaintiffs had been subject to possibly illegal surveillance for past activities, in the past before the  
 26 Order was promulgated. Nor do they make any allegations to support the assumption that any intel-  
 27 ligence-gathering activities that may take place pursuant to the Order in the future will be illegal.  
 28 Plaintiff has conceded at oral argument that much of the activity authorized by the Order is well  
 within the strictures of the Constitution and laws of the United States.")

25 <sup>33</sup> The *UPC* plaintiff group were political and religious activists, journalists, and academics.  
 26 The original complaint in the National Archives does not indicate that there were any attorneys in  
 27 the group; although apparently one individual plaintiff (Severina Rivera) was in fact an attorney,  
 the complaint makes absolutely no mention of that fact. See Complaint, *UPC v. Reagan*, Civil Ac-  
 tion No. 82-1824 (D.D.C. Jun. 30, 1982), at ¶¶ 60-61.

28 <sup>34</sup> Under project MINARET, NSA intercepted electronic communications of US Citizens  
 whose names were on watchlists and passed those intercepts on to the FBI, DOD, *etc.*

1 there was also no claim that the plaintiffs were *especially vulnerable* to harm from the existence of  
 2 a surveillance program in the same way that plaintiffs in our case are (e.g., the difficulty of *func-*  
 3 *tioning as attorneys* because of the complained-of watchlisting). *See id.* at 998 n.78 (plaintiffs  
 4 “cannot demonstrate any injury – past, present, or future” from watchlisting).

5 Seen as chilling effect cases, *Halkin* and *United Presbyterian Church* fail both halves of the  
 6 *Laird* test, first because plaintiffs made no allegations of gross illegality that would have rendered  
 7 it objectively reasonable to fear the surveillance,<sup>35</sup> and second because plaintiffs failed to allege  
 8 that they experienced concrete, objective harm or that they were especially vulnerable to harm (e.g.  
 9 that they were attorneys whose communications were subject to legal privilege). The two cases do  
 10 not establish a blanket rule that persons chilled by a surveillance program must assert that they  
 11 were targets of the surveillance in order to maintain standing, even in the D.C. Circuit where they  
 12 are binding, and there is certainly no such rule in the Ninth Circuit.

13 Plaintiffs’ claims do not present a “generalized grievance” for two reasons: (1) minimiza-  
 14 tion creates special fears for attorneys<sup>36</sup> (as opposed to other persons whose privileges against sur-  
 15 veillance have not been constitutionalized<sup>37</sup>); (2) the program here creates special risk of surveil-  
 16 lance for the small subset of attorneys who routinely engage in electronic communications that fit  
 17 the profile of calls and emails subject to the NSA Program. *Cf. Jewel v. United States*, 2010 U.S.  
 18 Dist. LEXIS 5110 (N.D. Cal. Jan. 21, 2010) (dismissing for failure to “allege[] an injury that is  
 19 sufficiently particular to those plaintiffs or to a distinct group to which those plaintiffs belong”).

20  
 21 <sup>35</sup> This threshold determination that there is a plausible claim of illegality is important because  
 22 it shapes how reasonable the fear of the government action is. As plaintiffs here noted in their  
 23 MTD Opp. (Doc. # 16-5) at 9-10, cases like *Berlin Democratic Club*, *Jabara*, *Riggs v Albuquerque*,  
 24 and *Philadelphia Society of Friends* all hold that substantial claims of illegality can be a major  
 25 factor in finding standing based on chilling effect. Simply put, it is more “objectively” reasonable  
 26 (under *Laird*) to fear injury from *patently lawless* actions that the government admits having car-  
 27 ried out.

28 <sup>36</sup> The lack of judicially-supervised minimization, recording and retention of privileged con-  
 29 versations under the NSA Program makes surveillance of privileged conversations a risk not pre-  
 30 sent with FISA surveillance. On the importance of minimization to plaintiffs’ standing claims, *see*  
 31 Supp. Br. (Doc. # 13) at 16-18; MTD Opp. (Doc. # 16-5) at 11-12; SJ Reply (Doc. # 16-10) at 5-6;  
 32 Tr. of Oral Argument, *CCR v. Bush*, No. 06-cv-313 (S.D.N.Y. Sept. 5, 2006) at 16-18.

<sup>37</sup> The government has conceded before the Foreign Intelligence Surveillance Court of Re-  
 33 view in *In re Sealed Case* that courts have constitutionalized the minimization requirement. *See*  
 34 Supplemental Brief of the United States, Appendix A: Comparison of FISA and Title III, *In re*  
 35 *Sealed Case*, No. 02-001 (FIS Ct. of Review filed Sep. 25, 2002) at 1 n.1.



1 While “[t]he courts do not want to be viewed as a panacea for all of society’s ills,” *id.* at \*21,  
2 surely the threat to the separation of powers posed by executive surveillance in violation of clear  
3 Congressional criminal sanctions, affecting attorneys engaged in the task of ensuring executive  
4 accountability by bringing claims before the judiciary, is one worthy of special attention from the  
5 federal courts.

6       There is nothing formulaic about standing analysis. Rather, courts have decided these cases  
7 by asking if the injury is real, looking beyond word formulae and rough analogies to cases past to  
8 ask whether the policies underlying the standing requirement are being served. Those policies in-  
9 clude preserving the separation of powers—by avoiding advisory opinions, on the one hand, but  
10 also by not refraining from refereeing between the political branches when there is no alternative to  
11 doing so, and by preserving individual rights against the government. That is particularly important  
12 when the courts are called on to ensure the continuing vitality of public-interest litigation of consti-  
13 tutional issues, which is the very interest plaintiffs claim injury to. Nor would recognizing the  
14 standing of these plaintiffs “open a floodgate of litigation” (*Al-Haramain*, 595 F. Supp. 2d at  
15 1084 (quoting government brief); here, plaintiffs have very specific claims of vulnerability to the  
16 harm complained of, and belong to a very narrow class of persons capable of making such claims  
17 (lawyers routinely litigating international terrorism cases). Courts have also been concerned to en-  
18 sure zealous advocacy by only hearing genuinely adverse controversies; surely, four years and 370  
19 pages of briefing into this litigation, that interest has been satisfied here.

20       Ultimately the flaw in the government’s highly-constrained view of the causality require-  
21 ment is to assume that the standing inquiry in a chilling-effect case like this can ever be addressed  
22 algebraically. There will always be an element of judgment involved in a finding of causation in a  
23 case involving allegations of chilling effect. As the Supreme Court put it in *Allen v. Wright*:

24       Determining standing in a particular case may be facilitated by clarifying principles  
25 or even clear rules developed in prior cases. Typically, however, the standing in-  
26 quiry requires careful judicial examination of a complaint’s allegations to ascertain  
27 whether the particular plaintiff is entitled to an adjudication of the particular claims  
28 asserted. Is the injury too abstract, or otherwise not appropriate, to be considered ju-  
dicially cognizable? Is the line of causation between the illegal conduct and injury  
too attenuated? Is the prospect of obtaining relief from the injury as a result of a fa-  
vorable ruling too speculative?

1 *Allen*, 468 U.S. 737, 752 (1984). None of that is the case here.

2  
3 **V. State secrets privilege**

4 The government's prior claim that the very subject matter of this litigation—the NSA Pro-  
5 gram—constitutes a state secret has since been disposed of by the Ninth Circuit, *see Al-Haramain*,  
6 507 F.3d at 1200 (“the government’s many attempts to assuage citizens’ fears [by describing the  
7 Program publicly]... now doom the government's assertion that the very subject matter of this liti-  
8 gation, the existence of a warrantless surveillance program, is barred by the state secrets privi-  
9 lege”); *see also Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 991 (N.D. Cal. 2006) (distinguishing  
10 surveillance contract cases such as *Totten*); *cf. Mohammed v. Jeppesen Dataplan, Inc.*, 579 F.3d  
11 943, 954-55 (9th Cir. 2009) (same), *vacated, en banc pending*.<sup>38</sup> That leaves two remaining lines of  
12 argument for the government: first, that the state secrets privilege makes it impossible for plaintiffs  
13 to confirm that they were actually surveilled (supposedly affecting both standing and remedy), and  
14 second, that the privilege denies the government evidence relevant to specific legal defenses.

15  
16 **1. Actual surveillance is not necessary to establish standing in chilling-effect cases**

17 As noted earlier, see Part IV, *supra*, there is no reason to believe disclosure of actual sur-  
18 veillance is categorically necessary to establish standing in chilling effect cases.<sup>39</sup> The govern-  
19 ment’s argument is, as this court noted, a circular one, *Al-Haramain*, 564 F. Supp. 2d at 1124, es-  
20 pecially ironic in light of the fact that this Court has held, correctly, that FISA preempts the state  
21 secrets privilege:

22 Given the possibility that the executive branch might again engage in warrantless  
23 surveillance and then assert national security secrecy in order to mask its conduct,  
24 Congress [in passing FISA] intended for the executive branch to relinquish its near-  
total control over whether *the fact of unlawful surveillance* could be protected as a  
secret.

25  
26 <sup>38</sup> Plaintiffs preserve their prior arguments in response to the government’s position, *see, e.g.*,  
MTD Opp. (Doc. # 16-5) at 13-31 and more specifically at 21-27.

27 <sup>39</sup> The Tenth Circuit reversed a dismissal on standing grounds in a case where a number of  
28 plaintiffs (including attorneys) brought suit without knowing whether or not they were targets of  
the surveillance in question. *See Riggs v. Albuquerque*, 916 F.2d 582 (10th Cir. 1990) (cited in  
MTD Opp. (Doc. # 16-5) at 8-9).

1 *Al-Haramain*, 564 F. Supp. 2d at 1123. This Court has already rejected the government’s “pro-  
 2 posed limitation of section 1806(f) to cases in which the government has acknowledged the surveil-  
 3 lance at issue.” 564 F. Supp. 2d at 1133-34; *see also* Amicus Br. of MDL Plaintiffs (Doc. # 440 in  
 4 No. 3:06-md-1791) at 13-14.

5  
 6 **2. Public disclosure is not essential to remedy the injury here**

7 Just as actual knowledge of the fact of surveillance is not necessary to establish standing,  
 8 full, public disclosure of the fact of surveillance might not be necessary to remedy the injuries  
 9 claimed here. As plaintiffs noted in their first round of state secrets briefing in this case, MTD Opp.  
 10 (Doc. # 16-5) at 48-49, lower courts have been

11 admonished ... to use “creativity and care” to devise “procedures which would pro-  
 12 tect the privilege and yet allow the merits of the controversy to be decided in some  
 13 form.” *Fitzgerald [v. Penthouse Int’l]*, 776 F.2d [1236,] 1238 n.3 [(4th Cir. 1985)].  
 14 Thus, courts faced with privilege claims have stated that, if necessary, the Court can  
 15 “delve more deeply than it might ordinarily into marshalling the evidence on both  
 16 sides” in order to protect potentially sensitive information. *Irish People*, 684 F.2d at  
 17 955; *Ellsberg*, 709 F.2d at 69 (directing in camera review of evidence); *Heine*, 399  
 18 F.2d at 791 (same). The Court itself, after examination of the evidence, may make  
 19 “representative findings of fact from the files” and provide summaries of the infor-  
 20 mation, in a manner that would not compromise the privilege. *Irish People*, 684  
 21 F.2d at 954. The Court could even pose questions about the merits to the govern-  
 22 ment. [*United States v. Ehrlichman*, 376 F. Supp. 29, 32 n.1 (D.D.C. 1974) (“courts  
 23 have broad authority to inquire into national security matters so long as proper safe-  
 24 guards are applied to avoid unwarranted disclosures”); *see also In re United States*,  
 25 872 F.2d at 480 (upon rejecting a premature privilege claim noting its “confidence  
 26 that [the district court could] police the litigation so as not to compromise national  
 27 security.”).]

28 Other courts have suggested that an appropriate alternative to dismissal  
 merely on the basis of the privilege—but as a last resort—is in camera examination  
 of the [sensitive] evidence ..., and a determination on the merits. In *Molerio*, for ex-  
 ample, the court evaluated the privileged and non-privileged evidence and resolved  
 the claims on the merits. *See* 749 F.2d at 825; *see also Halpern*, 258 F.2d at 41. In  
*Ellsberg*, after holding that the government could not use the state secrets privilege  
 to avoid its burden to prove that the warrantless surveillance at issue fit into the war-  
 rant exception, the court suggested that such questions of law could, if necessary,  
 easily “be resolved by the trial judge through the use of appropriate in camera pro-  
 cedures.” 709 F.2d at 69. Courts have been particularly “willing to order in camera  
 inspection where there has been a suggestion of illegality by the government.” 26  
 WRIGHT & GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5671 (2d ed. 1992) at 734  
 (citing *ACLU v. Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980) (en banc)). The *Ells-  
 berg* court emphasized that “this procedure should be used only as a last resort,” be-  
 cause “[e]x parte, in camera resolution of dispositive issues should be avoided  
 whenever possible.” 709 F.2d at 69 n.78; *but see* WRIGHT & GRAHAM § 5671 at 734  
 (“many of [the countervailing arguments against in camera proceedings] would be

1 resolved or weakened if courts did not automatically assume that every in camera  
2 hearing had to be ex parte as well.”).[]

3 While some of these alternatives are extreme, any alternative would be pref-  
4 erable to the dismissal of this case and the elimination of any possibility of resolu-  
5 tion on the merits of Plaintiffs’ targeted wiretapping claims. “Only when no amount  
6 of effort and care on the part of the court and the parties will safeguard privileged  
7 material is dismissal [on state secrets grounds] warranted.” *Fitzgerald*, 776 F.2d at  
8 1244.

9 Fortunately, since the last time this case was argued before this Court, several counsel at CCR,  
10 including the undersigned, have acquired TOP SECRET//SENSITIVE COMPARTMENTED IN-  
11 FORMATION (TS//SCI) security clearance from the Justice Department in relation to our  
12 Guantánamo litigation (*see* MDL Doc. # 472-8), and have had over two years of experience with  
13 the protocols for handling such information. Counsel could thus assist the Court with review of any  
14 documents “disclosed” in camera. *Cf. Al-Haramain*, 595 F. Supp. 2d at 1089 (conducting “entire  
15 remaining course of this litigation ... ex parte ... would deprive plaintiffs of due process to an ex-  
16 tent inconsistent with Congress’s purpose in enacting FISA[.]”); *id.* at 1089-90 (ordering govern-  
17 ment to process plaintiffs’ counsel for TS//SCI clearance).

18 In the alternative, the Court could receive the information ex parte in camera (in much the  
19 same way that the Court has treated the Sealed Document in *Al-Haramain*, *see* 595 F. Supp. 2d at  
20 1089). Any number of processes could then take place, depending on what was disclosed. The  
21 Court could selectively (and confidentially) bring in cleared counsel—either the undersigned or  
22 plaintiffs who are counsel on individual cases that the disclosed surveillance records relate to, pur-  
23 suant to appropriate conditions.<sup>40</sup> Alternately, this Court could inform the district judges handling  
24 other litigation matters to which disclosed surveillance was relevant, in order to allow those judges  
25 to decide on a further course of action—perhaps along the model of the certification Judges Gold  
26 and Gleeson required in *Turkmen v. Ashcroft*. Magistrate Judge Gold’s initial ruling was noted in  
27 briefs in this case.<sup>41</sup> *See Turkmen v. Ashcroft*, No. 02-CV-2307, 2006 U.S. Dist. LEXIS 40675 at  
28 \*20-\*21 (E.D.N.Y. May 30, 2006) (Gold, M.J.) (rejecting blanket secrecy argument pressed by the

<sup>40</sup> *See* MTD Opp. (Doc. # 16-5) at 47 n.43 (citing cases describing sealing and protective or-  
ders and secure discovery locations, as well as use of special masters and in camera trials as means  
for dealing with sensitive information); *id.* at 48 n.44 (citing cases where counsel had or acquired  
clearances).

<sup>41</sup> Of course, there may not always be another case to which surveillance of attorney-client  
communications is relevant.

1 government, and ordering the government to disclose whether any conversations between plain-  
 2 tiffs' counsel (including a named plaintiff in this lawsuit) and their clients had been intercepted or  
 3 monitored by the government, including by the NSA, and stating "any claim that sensitive secrets  
 4 would be revealed by the government's disclosure of whether conversations between plaintiffs and  
 5 their counsel in [the] case were monitored is hard to fathom."). That order was subsequently modi-  
 6 fied by Judge Gleeson, whose analysis is worth quoting at length:

7 it is a cardinal rule of litigation that one side may not eavesdrop on the other's privi-  
 8 leged attorney-client communications. Litigation involving officials of the executive  
 9 branch of government is no exception. I also agree with Judge Gold that, because of  
 10 the unusual circumstances of this case, the plaintiffs' request for further assurance  
 11 that the rule has not been violated in this case is reasonable. First, the government  
 12 has claimed the authority—indeed, the necessity—to monitor suspected terrorists  
 13 abroad making electronic communications into the United States, and to do so with-  
 out any judicial oversight. Second, the plaintiffs were detained in the United States  
 for months based on the government's suspicion that they were involved in terrorist  
 activity.... [R]egardless whether the plaintiffs are actually involved in terrorist ac-  
 tivity—they emphatically state that they are not—they have reason to believe that  
 the government thinks they are, and that they are therefore being monitored when  
 they call the United States.

\* \* \*

14 I recognize that this case involves certain high-level officials [with intelli-  
 15 gence responsibilities that may conflict with litigation responsibilities]. ... However,  
 16 the vast majority of the government officials involved in these cases—lawyers for  
 17 the Civil Division of the Department of Justice and defendants and witnesses from  
 18 the Bureau of Prisons with knowledge relevant to the plaintiffs' remaining condi-  
 19 tions-of-confinement claims—have no such duties and therefore no "need to know"  
 20 whatever information the NSA may have gleaned from possible intercepts of the  
 21 plaintiffs' attorney-client communications. ... For the government to say that these  
 22 latter officials, whose duties do not include the gathering or analysis of foreign intel-  
 23 ligence, have not lately been involved in the gathering or analysis of foreign intelli-  
 24 gence, is a revelation our national security can easily withstand. Moreover, it would  
 25 not reveal classified information to say that the Department of Justice has been  
 26 scrupulous in walling off the government officials who are involved in this litigation  
 27 from exposure to TSP surveillance or knowledge derived from such surveillance.  
 28 The Department has rightfully espoused that procedure as its policy [during argu-  
 ment on this motion in this proceeding], and the plaintiffs are entitled to the gov-  
 ernment's representation that it has made good on it.

... [Accordingly,] defendants are directed to state, within 14 days of this or-  
 der, whether any defendant, any likely witness or any member of the trial team  
 (which includes all attorneys and support staff, and any supervisors or other indi-  
 viduals who are providing guidance or advice or exercising decision-making author-  
 ity in connection with the defense of these actions) has knowledge (or had knowl-  
 edge in the past) of the substance of any intercepted confidential communications  
 between the plaintiffs and their attorneys.

In matters this important and sensitive, it seems to me prudent to take small  
 steps. Accordingly, if in my judgment further action is warranted based on the in-  
 formation in the *ex parte* submission, the defendants will be given *ex parte* notice  
 and an opportunity to be heard *ex parte*.

1 As soon as practicable after the completion of my review, including my re-  
2 view of any subsequent *ex parte* submission directed pursuant to the preceding  
3 paragraph, the plaintiffs will be given either (1) assurance by the Court that the  
4 United States' representation that no TSP intercepts of the plaintiffs will be used in  
the defense of this action has been fully substantiated, or (2) notice of any remedial  
action that has been taken and an opportunity to be heard as to the necessity of fur-  
ther measures.

5 Order, Doc. # 455, *Turkmen v. Ashcroft*, No. 02-CV-2307 (E.D.N.Y. Oct. 3, 2006) (Gleeson,  
6 U.S.D.J.) at 2-6; 2006 U.S. Dist. LEXIS 95913 at \*8-\*14. Notably, the government complied  
7 rather than appealing. Judge Gleeson ultimately issued a public order<sup>42</sup> noting his satisfaction that  
8 no "likely witness or ... member of the trial team" in *Turkmen* had "knowledge ... of the substance  
9 of any intercepted confidential communications between the plaintiffs and their attorneys." *Id.* at 5.

10 The judiciary is perfectly well-suited to consider and decide these issues. Indeed, *Congress*  
11 determined that the Judiciary was the appropriate branch to exercise oversight of electronic surveil-  
12 lance. Both the House and the Senate considered the same arguments the government now raises  
13 here: the Judiciary is ill-suited for this oversight role because of judges' alleged lack of experience  
14 in matters of foreign policy and national security, and the national security will be harmed if secret  
15 information pertaining to matters of national security is used in litigation, even in camera and ex  
16 parte. *See, e.g., Electronic Surveillance for National Security Purposes, Hearings Before the Sub-*  
17 *comms. on Criminal Laws and Procedures and Constitutional Rights of the S. Comm. on the Judi-*  
18 *ciary*, 93rd Cong., 255 (1974); H.R. Rep. No. 95-1283 at 25 (1978). These arguments were soundly  
19 rejected by a strong majority in Congress. The legislative record is replete with expressions of  
20 Congress' firm view that the government's need for secrecy in matters of national security simply  
21 did *not* trump the need for judicial oversight of its electronic surveillance activities. *See S. Rep. No.*  
22 *94-1035 at 79* ("We believe that these same issues—secrecy and emergency, judicial competence  
23 and purpose—do not call for any different result in the case of foreign intelligence collection  
24 through electronic surveillance."); *Foreign Intelligence Surveillance Act of 1977, Hearings on S.*  
25 *1566 Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary,*  
26 *95th Cong., at 2728 (1977)* (Attorney General Bell asserting that "[t]he most leakproof branch of

27  
28 <sup>42</sup> *See* Order, Doc. # 573, *Turkmen v. Ashcroft*, No. 02-CV-2307 (E.D.N.Y. Dec. 6, 2006)  
(Gleeson, U.S.D.J.).

1 the Government is the judiciary.... I have seen intelligence matters in the courts.... I have great  
 2 confidence in the courts,” and Senator Orrin Hatch replying, “I do also.”).

3  
 4 **3. The government has not alluded to any valid defense that could justify invocation of  
 the privilege, nor identified specific items of evidence required for any such defense**

5 As a general matter, this Court should not accept a generic, categorical assertion from the  
 6 government that it cannot defend this action without access to evidence protected by the state se-  
 7 crets privilege. Doing so would allow the government a back door to asserting the “very subject  
 8 matter” claims regarding the NSA Program that were rejected by the Ninth Circuit. Instead, defen-  
 9 dants here must be required to identify specific items of evidence that would be essential to specific  
 10 defenses. *Cf. Hepting*, 439 F. Supp. 2d at 994 (declining to dismiss on generic “evidence necessary  
 11 ... to raise a valid defense” claim).<sup>43</sup> Moreover, the Ninth Circuit and others have adopted a re-  
 12 quirement that the asserted defense must be not merely hypothetical or colorable, but a *valid* de-  
 13 fense. *See Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *In re Sealed Case*, 494 F.3d  
 14 139, 149 (D.C. Cir. 2007) (citing 2d, 5th and 6th Cir. cases and noting: “In other contexts, this  
 15 court has consistently equated ‘valid’ with meritorious and dispositive. ... Simply put, a valid de-  
 16 fense’ in a civil case ‘prohibits recover[y]’”); *cf.* Gov’t Br. at 16. That requirement obviously im-  
 17 plies a great deal of specificity.

18 The government has to our knowledge only proposed two defenses on the merits during the  
 19 course of this litigation. The first is the claim that the September 18, 2001 Authorization to Use  
 20 Military Force (AUMF) somehow authorized the executive to carry out surveillance in furtherance  
 21 of it within the field of electronic surveillance otherwise exclusively regulated by FISA and Title  
 22 III. That argument was rendered insupportable in the wake of the *Hamdan* decision. *See* MSJ Opp.  
 23 (Doc. # 16-5) at 34-36 (“The majority opinion in *Hamdan* stated that ‘there is nothing in the text or  
 24 legislative history of the AUMF even hinting that Congress intended to expand or alter the authori-  
 25 zation set forth in Article 21 of the [Uniform Code of Military Justice].’ [*Hamdan v. Rumsfeld*, 548

26  
 27 <sup>43</sup> *See also In re United States*, 872 F.2d 472, 478 (D.C. Cir. 1989) (rejecting categorical, pre-  
 28 discovery privilege claim because “an item-by-item determination of privilege will amply accom-  
 modate the Government’s concerns”); *Nat’l Lawyers Guild v. Att’y General*, 96 F.R.D. 390, 403  
 (S.D.N.Y. 1982) (privilege must be asserted on document-by-document basis)

1 U.S. 557, 594 (2006)]...there is similarly ‘nothing ... even hinting’ at a Congressional intent to  
2 change [the FISA] scheme[, which is as comprehensive as the UCMJ scheme for military trials,] in  
3 the text or legislative history of the AUMF”); *id.* at 52.

4 The second defense suggested by earlier government papers consists in the idea that there is  
5 somehow an inherent and *exclusive* Article II presidential surveillance power (*i.e.* an area of sur-  
6 veillance power under *exclusive* control of the executive, not subject to Congressional restriction or  
7 regulation), the parameters of which the NSA Program might fit into—but that to explain how the  
8 NSA Program would fit into this box of exclusively executive surveillance powers would require  
9 explaining in detail the targeting criteria of the Program, at some level of detail that remains secret.  
10 *Cf.* Legal Authorities Supporting the Activities of the National Security Agency as Described by  
11 the President (Jan. 19, 2006) (“White Paper”), *available at* [http://www.justice.gov/opa/whitepap-](http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf)  
12 [eronnsalegalauthorities.pdf](http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf), at 31, 35 (analogizing to supposedly-exclusive presidential power to  
13 direct troop movements in concluding that FISA would be unconstitutional if applied to prohibit  
14 program); *Al-Haramain*, 564 F. Supp. 2d at 1121 (describing government allusion to issue of  
15 FISA’s constitutionality at oral argument). Whether or not the new administration still adheres to  
16 this idea, it lacks historical foundation.

17 As an initial matter, there is no presidential power that trumps the congressional power to  
18 regulate details of military conduct (including the conduct of the NSA, which is part of DOD). *See*  
19 *generally* Saikrishna Prakash, *The Separation and Overlap of War and Military Powers*, 87 Tex. L.  
20 Rev. 299, 350-51 (2008) (while it may seem reasonable to assert presidential autonomy over an  
21 exclusive field of military operations, “when we broaden the inquiry and use text, structure, and  
22 early history as guideposts, we see that this robust conception is mistaken. ... early Congresses  
23 regularly regulated operations, deciding such mundane matters as training and tactics, and such  
24 vital questions as the type of war to fight and the men and material that could be used to wage war.  
25 Legislators apparently did not believe that the Constitution left all operational details to the sole  
26 discretion of the Commander in Chief ... text, structure, and history suggest that when congress-  
27 sional and presidential rules clash, the former prevails”); *id.* at 386 (concluding that “the President  
28 lacks exclusive control over any military subject matter”); Shayana Kadidal, *Does Congress Have*



1 *the Power to Limit the President’s Conduct of Detentions, Interrogations, and Surveillance in the*  
2 *Context of War?*, 11 N.Y.C.L. Rev. 23 (2007) (same); SJ Mot. (Doc. # 16-3) at 27; SJ Reply (Doc.  
3 # 16-10) at 13 n.17. Thus, the idea that such an uncheckable, exclusive executive war power can  
4 then be extended from tactical movements on the battlefield to the field of electronic surveillance  
5 fails at birth—because no such exclusive, unregulable power exists on the battlefield.

6 As the Supreme Court has recognized repeatedly, the war powers are “powers granted  
7 *jointly* to the President and Congress.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006) (emphasis  
8 added). When Congress affirmatively exercises these powers, the Executive’s power is at its “low-  
9 est ebb,” in the classic tripartite formulation of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S.  
10 579, 637 (1952) (Jackson, J., concurring), where “[c]ourts can sustain exclusive presidential con-  
11 trol in such a case only by disabling the Congress from acting upon the subject,” *id.* at 637-38.  
12 Throughout our history, the Supreme Court has reaffirmed Congress’ power to “make Rules for the  
13 Government and Regulation” of the Executive’s war powers. *See, e.g., Little v. Barreme*, 6 U.S.  
14 170, 178-79 (1804) (because Congress had imposed limitations on searches and seizures by naval  
15 vessels during war, Executive could not authorize searches and seizures beyond the scope of what  
16 Congress authorized); *see also* SJ Mot. (Doc. # 16-3) at 21-28.

17 This Court has recognized that the “exclusive means” provision was intended to ““put[] to  
18 rest the notion that Congress recognizes an inherent Presidential power to conduct such surveil-  
19 lances in the United States outside of” FISA and Title III. *Al-Haramain*, 564 F. Supp. 2d at 1116  
20 (quoting SSCI report). Moreover, this Court has already rejected the notion that the President main-  
21 tained some uncheckable Article II power to conduct surveillance in the field otherwise occupied  
22 by FISA:

23 Congress appears clearly to have intended to—and did—establish the exclusive  
24 means for foreign intelligence surveillance activities to be conducted. Whatever  
25 power the executive may otherwise have had in this regard, FISA limits the power  
26 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.

27 *Al-Haramain*, 564 F. Supp. 2d at 1121. In other words, the argument that FISA is unconstitutional  
28 to the extent it trenches on this nebulous Article II surveillance power has already been foreclosed

1 by this Court. As far as counsel can determine, the Obama administration has not yet to date as-  
 2 serted such an argument (which appears to have first originated with a still-classified OLC memo  
 3 authored by John Yoo, *see* IG Report at 13 (“we do not believe that Congress may restrict the  
 4 President’s inherent constitutional powers”) (quoting Nov. 2, 2001 OLC memo)).<sup>44</sup> In any event,  
 5 in order to claim that the state secrets privilege preempts the ability to present a defense to this ac-  
 6 tion,<sup>45</sup> the government must clearly articulate a *valid* defense. Neither the AUMF nor the “exclu-  
 7 sive executive power” argument qualifies.<sup>46</sup>

8  
 9 **4. The privilege should be interpreted to preserve the separation of powers, particularly  
 where Congress has criminalized certain executive conduct**

10 It bears repeating, four years after the initial shock of the government revelation of the NSA  
 11 Program’s existence, that this case deals with clearly criminal surveillance. The executive official  
 12 defendants here have no defense on the merits to refute the criminal illegality of the Program that  
 13 they are now even willing to allude to before this Court. The fact that that is so greatly reinforces  
 14 the case for judicial inquiry into the fact *vel non* of surveillance—whether as part of the standing or  
 15 the remedial inquiries here.

16 *Reynolds* models the privilege on the Fifth Amendment privilege, which is far from abso-  
 17 lute, allowing disclosure to be forced in exchange for immunity from penalty.<sup>47</sup> That a procedure  
 18 based on such a privilege has been invoked to halt *damages* cases—where Congress is always free  
 19 to fund a remedy via private bill, past a veto if necessary<sup>48</sup>—is not as injurious to the separation of  
 20 powers as a denial of injunctive relief here would be. We have already noted that “[c]ourts have

21  
 22 <sup>44</sup> As a Senator, the President in fact voted in favor of the FISA Amendments Act, so such a  
 position would be curious to say the least.

23 <sup>45</sup> Notably, even if these were colorably valid defenses, other courts have managed to adjudi-  
 24 cate questions about the constitutionality of surveillance authorities without encountering irremedi-  
 (each citing cases).

25 <sup>46</sup> Indeed, defending a patently illegal program on the hypothetical notion that some unstated  
 defense backed up by secret factual evidence exists comes perilously close to “defend[ing] an in-  
 26 vocation of the privilege in order to ... conceal violations of the law, ” exactly what the new  
 Holder Policy (Doc. # 38-3, *Shubert v. United States*, Case No. 3:07-cv-693) governing executive  
 27 assertions of the privilege says the Justice Department will no longer do.

<sup>47</sup> *See Kastigar v. United States*, 406 U.S. 441 (1972).

28 <sup>48</sup> *Cf. El Masri v. Tenet*, 437 F. Supp. 2d 530, 541 (E.D. Va. 2006) (apparently suggesting  
 such a remedy if plaintiff’s allegations are true).

1 been particularly ‘willing to order in camera inspection where there has been a suggestion of ille-  
2 gality by the government.’” MTD Opp. (Doc. # 16-5) at 49 (quoting 26 WRIGHT & GRAHAM, FED-  
3 ERAL PRACTICE & PROCEDURE § 5671 (2d ed. 1992) at 734 (citing *ACLU v. Brown*, 619 F.2d 1170,  
4 1173 (7th Cir. 1980) (en banc))). In the context of the crime-fraud exception to the attorney-client  
5 privilege, the Supreme Court has allowed the process of piercing the privilege to begin with a  
6 prima facie showing that the information claimed as confidential was communicated in furtherance  
7 of crime or fraud, and has expressly approved of *in camera* examination of allegedly privileged  
8 materials. *See United States v. Zolin*, 491 U.S. 554 (1989).

9 Notably, neither of the main cases on which the government relies for its notion that proof  
10 of actual surveillance is essential to chilling-effect standing contains any plausible allegation of  
11 illegality (criminal or otherwise) of the challenged surveillance practices. *See* Part IV, *supra* (dis-  
12 cussing *United Presbyterian Church and Halkin*); *cf. Hepting*, 439 F. Supp. 2d at 993-94 (“no case  
13 dismissed because its ‘very subject matter’ was a state secret involved ongoing, widespread viola-  
14 tions of individual constitutional rights, as plaintiffs allege here.”).

## 16 CONCLUSION

17 In the wake of Watergate and decades of politically-motivated surveillance abuses, Con-  
18 gress, expressing the will of the American people, passed FISA to ensure that electronic surveil-  
19 lance would always be subject to a judicial check. The government today—four years and a presi-  
20 dential election since the revelation of the Program’s existence—refuses to defend the legality of  
21 the NSA Program, with good reason. In the wake of FISA, there is no viable legal argument that  
22 the Program was lawful—indeed, the only arguments of any sort remaining are that Congress cov-  
23 ertly overturned FISA with the AUMF or that FISA itself is unconstitutional, neither of which the  
24 government now appears willing to assert on the record, and neither of which is remotely defensi-  
25 ble on the merits. This case thus raises the question of whether the state secrets privilege requires  
26 the dismissal of an action challenging a program that the executive does not even contest was ille-  
27 gal and criminal. Leaving this particular group of plaintiffs—civil rights attorneys litigating cases  
28 challenging a vast array of unlawful executive policies originating in the same weeks after 9/11

1 that gave birth to the Program—without a remedy threatens to undermine the very judicial structure  
2 on which every other aspect of the constitutional separation of powers and the rule of law depends.

3 There is absolutely nothing that would risk disclosure of official secrets to have the Court  
4 order the government to destroy (or quarantine) all records of surveillance of plaintiffs under the  
5 Program and report back to the Court certifying that it had done so. At a bare minimum, this Court  
6 should order such relief. Nor would in camera disclosure, as proposed above, followed by appro-  
7 priate, incremental remedial steps under the close control of this Court, harm the national security.  
8 Indeed, both would vindicate the system of judicial review in which both this Court and plaintiffs  
9 play a vital part.

10 Respectfully submitted,

11 \_\_\_\_\_  
12 /s/sdk

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