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13 **UNITED STATES DISTRICT COURT**  
 14 **NORTHERN DISTRICT OF CALIFORNIA**  
 15 **SAN FRANCISCO DIVISION**

16	)	<b>No. M:06-cv-01791-VRW</b>
17	)	<b>DEFENDANTS' NOTICE OF</b>
18	)	<b>MOTION AND MOTION TO DISMISS</b>
19	)	<b>OR, IN THE ALTERNATIVE, FOR</b>
20	)	<b>SUMMARY JUDGMENT</b>
21	)	
22	)	
23	)	
24	)	
25	)	
26	)	
27	)	
28	)	

IN RE NATIONAL SECURITY AGENCY  
 TELECOMMUNICATIONS RECORDS  
 LITIGATION

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This Document Relates Only To:  
*Shubert v. Bush,*  
**(Case No. 07-00693)**

Date: August 30, 2007  
 Courtroom: 6, 17th Floor  
 Time: 2 p.m.  
 Judge: Hon. Vaughn R. Walker

NOTICE OF MOTION

PLEASE TAKE NOTICE that, on August 30, 2007, before the Honorable Vaughn R. Walker, at 2 p.m., in Courtroom 6, 17<sup>th</sup> Floor of the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, the United States and the other Defendants sued in their official capacities in this action will present the accompanying motion to dismiss this action, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, or, in the alternative, for

1 summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

2 MOTION

3 Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, the United States and  
4 the other Defendants sued in their official capacity in this action, through their undersigned  
5 counsel, hereby move to dismiss this action or, in the alternative, pursuant to Rule 56 of the  
6 Federal Rules of Civil Procedure, for summary judgment. The grounds for this motion are that  
7 the United States' assertion of the military and state secrets privilege and of specified statutory  
8 privileges requires dismissal of this action, or, in the alternative, summary judgment in favor of  
9 the Defendants. The grounds for this motion are set forth further in: (i) the accompanying public  
10 Memorandum in Support of the State Secrets Privilege and the Motion to Dismiss or For  
11 Summary Judgement by the United States and the Official Capacity Defendants; (ii) a classified  
12 Memorandum in Support of the State Secrets Privilege and the Motion to Dismiss or For  
13 Summary Judgement by the United States and the Official Capacity Defendants that has been  
14 lodged for the Court's *in camera, ex parte* review; and (iii) the accompanying Public  
15 Declarations of J. Michael McConnell, Director of National Intelligence, and Keith B.  
16 Alexander, Director of the National Security Agency; and (iv) the classified Declarations of J.  
17 Michael McConnell, Director of National Intelligence, and Keith B. Alexander, Director of the  
18 National Security Agency, that have been lodged for the Court's *in camera, ex parte* review.

19 RELIEF REQUESTED

20 The United States and the other Defendants sued in their official capacities in this action  
21 request that this action be dismissed or, in the alternative, that summary judgment be entered for  
22 the Defendants.

1 DATED: May 25, 2007

Respectfully Submitted,

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13 **IN THE UNITED STATES DISTRICT COURT**  
 14 **NORTHERN DISTRICT OF CALIFORNIA**  
 15 **SAN FRANCISCO DIVISION**

16 IN RE NATIONAL SECURITY AGENCY )  
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 19 This Document Relates To: )  
 20 )  
 21 *Shubert v. Bush* )  
 (Case No. 07-00693) )  
 22 )  
 23 )

MDL Dkt. No. 06-1791-VRW

**MEMORANDUM IN SUPPORT  
 OF THE STATE SECRETS  
 PRIVILEGE AND THE  
 MOTION TO DISMISS OR FOR  
 SUMMARY JUDGMENT BY  
 THE UNITED STATES AND  
 THE OFFICIAL CAPACITY  
 DEFENDANTS**

Date: August 30, 2007  
 Time: 2:00 pm  
 Courtroom: 6  
 Hon. Vaughn R. Walker

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 26 *Shubert v. Bush* (Case No. 06-00693)  
 27 Memorandum in Support of State Secrets Privilege and the Motion to Dismiss or for  
 Summary Judgment by the United States and the Official Capacity Defendants  
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27 **Memorandum in Support of State Secrets Privilege and the Motion to Dismiss or for**  
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***Shubert v. Bush* (Case No. 06-00693)**  
**Memorandum in Support of State Secrets Privilege and the Motion to Dismiss or for**  
**Summary Judgment by the United States and the Official Capacity Defendants**

(U) INTRODUCTION<sup>1</sup>

1 (U) Plaintiffs in this action have filed a class action lawsuit against the United States, as  
2 well as the President and other officers of the United States in both their official and individual  
3 capacities, alleging that the President authorized the warrantless surveillance of “virtually every  
4 telephone, internet and/or email communication that has been sent from or received within the  
5 United States since 2001” — a “secret program to spy upon millions of innocent Americans.”  
6 *See Shubert* Amended Compl. ¶¶ 1-2 (MDL Dkt. 284). Plaintiffs are four individuals who  
7 reside in Brooklyn, New York, and their claims are based on allegations made in a December  
8 2005 article in *The New York Times*, as well as on statements made by President Bush that  
9 month regarding surveillance he authorized after the terrorist attacks of September 11, 2001.  
10 *See id.* ¶ 50.

11 (U) The President stated in December 2005 that he had authorized the National Security  
12 Agency (“NSA”) to conduct a limited surveillance program directed at “one-end” international  
13 communications to or from the United States as to which reasonable grounds existed to believe  
14 that one of the communicants was a member or agent of al Qaeda or an affiliated terrorist  
15 organization (referred to as the “Terrorist Surveillance Program” or “TSP”). *See Hepting v.*  
16 *AT&T* 439 F. Supp. 2d 974, 987 (N.D. Cal. 2006) (appeal pending) (taking judicial notice of the  
17 President’s statements) (citing The White House, *President Bush’s Discusses NSA Surveillance*  
18 *Program* (May 11, 2006), <http://www.whitehouse.gov/news/releases/2006/05/2006511-1.html>)  
19 (hereinafter “5/11/06 Statement”).<sup>2</sup> The President also stated that the surveillance he authorized  
20

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21 <sup>1</sup> (U) Classification markings in this memorandum are in accordance with the marking  
22 system described in the *In Camera, Ex Parte* Classified Declaration of Lt. Gen. Keith B.  
23 Alexander, Director, National Security Agency submitted in this case (“*In Camera* Alexander  
24 Decl.”).

25 <sup>2</sup> (U) As the Attorney General announced in January 2007, as a result of orders issued  
26 by the Foreign Intelligence Surveillance Court (“FISC”) on January 10, 2007, any electronic  
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1 after 9/11 did not involve the interception of purely domestic calls in the United States and that  
2 the Government is “not mining or trolling through the personal lives of millions of Americans.”  
3 *Hepting*, 439 F. Supp. 2d at 987 (citing 5/11/06 Statement).

4 (U) Plaintiffs nonetheless allege that the NSA monitors the content of purely domestic  
5 telephone and Internet communications of people inside the United States, as well as of millions  
6 of international telephone and Internet communications of people inside the United States, *see*  
7 *Shubert* Amended Compl. ¶¶ 59-62, and that the NSA then analyzes the content of these  
8 communications through key word searches, such as “jihad,” “Iraq,” and “Bush is a criminal,” or  
9 “whatever words or phrases the United States Government deems of interest,” and then may  
10 “target these Americans for even further interception, search and seizure, and electronic  
11 surveillance.” *See id.* ¶¶ 71-72. Plaintiffs claim that they have personally suffered an injury  
12 under the alleged surveillance program because they each “regularly make phone calls and send  
13 email both within the United States, and outside the United States,” specifically to the United  
14 Kingdom, France, Italy, Egypt, the Netherlands, and Norway. *See id.* ¶¶ 5-8. Thus, the  
15 Plaintiffs allege, “each of the named plaintiffs were [sic] . . . subject to the unlawful interception,  
16 search and seizure, and electronic surveillance of the contents of their phone and internet  
17 communications.” *Shubert* Amended Compl. ¶ 87.

18 (U) Notably, Plaintiffs do not allege that they communicate with individuals who may  
19 be members or agents of al Qaeda or affiliated terrorist organizations, and thus, do not allege  
20 that they fall within the scope of the TSP as described by the President. Instead, their claim is  
21 based on an unfounded and highly speculative allegation that the surveillance authorized by the  
22 President extends well beyond the TSP to a “dragnet” surveillance on the content of

23 \_\_\_\_\_  
24 surveillance that was occurring under the TSP is now being conducted subject to the approval  
25 of the FISC, and the President has not renewed his authorization of the TSP. *See* Notice of the  
26 United States of Attorney General’s Letter to Congress, MDL Dkt. 127.

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1 communications of millions of Americans. *See Shubert* Amended Compl. ¶ 4.

2 (U) As in the *Hepting* and *Verizon* actions currently pending before this Court, highly  
3 classified information is so central to the litigation of Plaintiffs' claims that the very subject  
4 matter of this case is a state secret. *See Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998).  
5 Litigation of Plaintiffs' claims inherently requires the disclosure of whether or not alleged NSA  
6 activities are occurring and, if so, facts about their operations, making it impossible to proceed  
7 on any front without the disclosure of classified intelligence information, activities, sources, and  
8 methods.

9 (U) As a threshold matter, for example, adjudication of the case obviously requires  
10 disclosure of whether or not the Plaintiffs themselves have personally been subject to any  
11 alleged NSA surveillance activity; Plaintiffs' standing and the very jurisdiction of the Court  
12 cannot be established without such evidence. But, as two of the Nation's top intelligence  
13 officers attest, any attempt to confirm or deny such facts would require the disclosure of  
14 information relating to the activities of the NSA that has been classified at the highest levels  
15 because of the substantial damage to national security that would result from its disclosure.  
16 *See* Public Declaration of J. Michael McConnell, Director of National Intelligence ("Public  
17 McConnell Decl.") ¶ 3; Public Declaration of Keith B. Alexander, Director, National Security  
18 Agency ("Public Alexander Decl.") ¶ 3.

19 (U) Even assuming jurisdiction could be established without these secret facts—and it  
20 cannot—operational facts concerning the TSP that would demonstrate that it was in fact limited  
21 to one-end al Qaeda-related communications, as well as other facts showing that no "dragnet"  
22 such as that alleged is otherwise undertaken by the NSA, would be required to address and  
23 disprove Plaintiffs' surveillance claim on the merits. As this Court has previously recognized,  
24 the Government has specifically denied that the TSP was a "dragnet" on the content of the  
25 communications of millions of Americans as Plaintiffs allege. *See Hepting*, 439 F. Supp. 2d at

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1 996. But any attempt by the Government to *prove* that fact, in other words to “prove a  
2 negative”—*i.e.*, that the TSP was not such a “dragnet” and that the NSA has not otherwise  
3 engaged in such an alleged “dragnet”—would require disclosure of the nature of the classified  
4 intelligence activities actually undertaken by the NSA. Under prevailing law governing the  
5 assertion of the state secrets privilege, accordingly, dismissal of Plaintiffs’ claims against the  
6 Federal Defendants in their official and individual capacities is required.<sup>3</sup>

7 **[REDACTED TEXT]**

8 (U) Accordingly, as in *Hepting* and the *Verizon* cases, the DNI, in conjunction with the  
9 Director of the NSA, asserts the state secrets privilege and statutory privileges to protect against  
10 the disclosure of several categories of information at issue in this case. *See* Public McConnell  
11 Decl. ¶ 11; Public Alexander Decl. ¶ 12. Here, these privilege assertions extend to: (1) whether  
12 or not Plaintiffs have been subject to any of the alleged activities; and (2) other information  
13 concerning any alleged NSA intelligence activities, sources, or methods, including (a) facts  
14 demonstrating that the TSP was limited to al Qaeda-related one-end foreign communications and  
15 that the NSA does not undertake the “dragnet” of content surveillance that Plaintiffs allege;  
16 (b) facts that would tend to confirm or deny the existence of any other NSA activity that might  
17 needed in order to rebut Plaintiffs’ speculative allegations; and (c) facts that would tend to  
18 confirm or deny any alleged relationship between the NSA and any telecommunications carrier.

19 (U) In deciding a state secrets privilege assertion, the Court, first, must determine  
20 whether the United States has put forward reasonable grounds to conclude that disclosure or

21 \_\_\_\_\_  
22 <sup>3</sup> (U) This motion is brought by the United States and by the Federal Defendants in  
23 their official capacities, as only the United States can assert the state secrets privilege.  
24 However, because state secrets would be needed to address the claims against the individual  
25 capacity Defendants as well, the Court should dismiss all claims in this case. (The Plaintiffs  
26 and Defendants in their individual capacities have agreed to defer the individual capacity claims  
27 until the state secrets privilege issue is decided.)

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1 confirmation of the information at issue would harm national security. *See United States v.*  
2 *Reynolds*, 345 U.S. 1, 10 (1953); *Kasza*, 133 F.3d at 1166. The Court is required to lend the  
3 “utmost deference” to the Executive’s judgment on the matter. *Kasza*, 133 F.3d at 1166. As set  
4 forth herein, the DNI and NSA Director amply demonstrate that disclosure of the privileged  
5 information at issue in this case risks exceptionally grave harm to the national security and, thus,  
6 that it must be excluded from further proceedings in this litigation. For the Court to find  
7 otherwise, it must conclude that the Director of National Intelligence’s judgment about the harm  
8 of disclosure has no reasonable basis—a conclusion that we respectfully submit would be  
9 entirely unfounded.

10 (U) Second, the state secrets privilege requires a court to consider whether the case can  
11 proceed by examining the role that state secrets would play in further proceedings. That is, a  
12 court must “look ahead” to whether the privileged information would be needed to litigate  
13 various issues that will arise at future stages of the case—not merely whether the case can  
14 proceed past the pleadings stage. Because privileged information would be central to  
15 adjudicating all issues in this action—including fundamental questions regarding the Court’s  
16 jurisdiction, as well as a variety of merits issues—well-established authority requires that this  
17 case must be dismissed at the outset. *See generally Kasza, supra.*

18 (U) The United States is mindful that the denial of a forum for the resolution of disputes  
19 can be a “drastic remedy.” *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236, 1243 (4th Cir.  
20 1985). But it is well established that “the state secrets doctrine finds the greater public  
21 good—ultimately the less harsh remedy—to be dismissal.” *Kasza*, 133 F.3d at 1167 (quoting  
22 *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1144 (5th Cir. 1992)). This is the “required”  
23 result even where allegations of unlawful or unconstitutional actions are at issue. *Halkin v.*  
24 *Helms* (“*Halkin II*”), 690 F.2d 977, 1001 (D.C. Cir. 1982). The Plaintiffs’ interests are not the  
25 only ones at stake, and proceeding to litigate this dispute would lead to a harsh result of another

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1 kind—one that could potentially cause harm to the security of all Americans. *See El-Masri v.*  
2 *Tenet*, 437 F. Supp. 2d 530, 539 (E.D. Va. 2006) (“private interests must give way to the  
3 national interest in preserving state secrets”), *aff’d* 479 F.3d 296 (4th Cir. 2007). The conclusion  
4 of the Nation’s top intelligence officers that this action cannot proceed without causing grave  
5 damage to the national security of the United States must be given utmost deference by this  
6 Court. Accordingly, Defendants’ motion to dismiss this action in its entirety or, in the  
7 alternative, for summary judgment, should be granted.

## 8 (U) BACKGROUND

### 9 A. (U) The Plaintiffs’ Claims

10 (U) Plaintiffs allege that the NSA intercepts “virtually every telephone, internet and/or  
11 email communication that has been sent from or received within the United States since 2001,”  
12 *Shubert Amended Compl.* ¶ 1. They claim that the President has authorized a “secret program to  
13 spy upon millions of Americans,” *id.* ¶ 2, and that, as a result, “hundreds of millions of phone,  
14 email, and internet communications by U.S. persons have been intercepted, searched and seized,  
15 and subjected to electronic surveillance by government spy computers at the NSA.” *Id.* ¶ 80.  
16 Plaintiffs allege that the “interception, search and seizure, and electronic surveillance” of  
17 international telephone and email communications, as well as “purely domestic” telephone and  
18 Internet communications, *see id.* ¶¶ 56-67, are all part of the “Spying Program,” *id.* ¶ 2, that  
19 Plaintiffs contend constitutes an “illegal, covert, dragnet spying operation.” *Id.* ¶ 4.

20 (U) Plaintiffs’ Amended Complaint alleges injury only in the form of interception of the  
21 “contents” of their communications. *See, e.g., Shubert Amended Compl.* ¶ 87. It does not raise  
22 a cause of action, similar to those present in several other actions before this Court, based on the  
23 allegation that NSA collects information *about* Plaintiffs’ communications.<sup>4</sup> In any event, as

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24  
25 <sup>4</sup> (U) Plaintiffs’ Amended Complaint refers in one instance to the alleged collection of  
26 telephone “call data” records, *see Shubert Amended Compl.* ¶ 58, but Plaintiffs do not raise a  
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1 this Court and two other courts have held, the Government has neither confirmed nor denied the  
2 existence of any alleged records collection activities; any information confirming or denying any  
3 alleged records collection activities cannot be disclosed without harming the national security;  
4 and the Government has asserted the state secrets privilege with respect to any such allegations.  
5 *Hepting*, 439 F. Supp. 2d at 997-98; *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 917 (N.D. Ill.  
6 2006); *ACLU v. NSA*, 438 F. Supp. 2d 754, 765 (E.D. Mich. 2006) (appeal pending).

7 (U) Viewed as a whole, therefore, Plaintiffs' statutory and constitutional claims against  
8 the United States and the named federal officials in their official and individual capacities, raise  
9 three issues for resolution:

- 10 (1) (U) Whether the named Plaintiffs have been aggrieved by any alleged  
11 actions taken against them by the Defendants;  
12 (2) (U) Whether the NSA engaged in the "dragnet" collection of the content  
13 of "hundreds of millions" of telephone, email and Internet  
14 communications, both international and "purely domestic"; and  
15 (3) (U) Whether such an alleged "dragnet" collection of the content of  
16 telephone, Internet, and email communications, if true, was unlawful.

17 **B. (U) The United States' State Secrets Privilege Assertion.**

18 (U) In response to the allegations raised in this lawsuit, and as in the other lawsuits  
19 pending before this Court challenging the NSA's activities after 9/11, the DNI, supported by the  
20 Director of the NSA, assert the state secrets privilege, and both officials assert statutory  
21 privileges, to protect against the disclosure of several categories of information described herein,  
22 including:

- 23 A. (U) Information that may tend to confirm or deny whether the  
24 Plaintiffs have been subject to any alleged NSA intelligence  
25 activity that may be at issue in this matter;  
26 B. (U) Information concerning NSA intelligence activities, sources,  
27 or methods, including:

28 \_\_\_\_\_  
cause of action challenging any alleged records collection activity. *See id.* ¶¶ 97-112.

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1 (1) (U) Information concerning the scope and operation of the  
2 Terrorist Surveillance Program, including information that may be  
3 needed to demonstrate that the TSP was limited to one-end foreign  
al Qaeda-related communications and that the NSA does not  
otherwise engage in the content surveillance dragnet that the  
Plaintiffs allege; and

4 (2) (U) Any other information concerning NSA intelligence activities,  
5 sources, or methods that would be necessary to adjudicate the  
6 Plaintiffs' claims, including, to the extent applicable, information  
that would tend to confirm or deny whether the NSA collects large  
quantities of communication records information; and

7 C. (U) Information that may tend to confirm or deny whether  
8 Verizon/MCI, AT&T, or any other telecommunications carrier has  
assisted the NSA with the alleged intelligence activities.

9 See Public McConnell Decl. ¶ 11; Public Alexander Decl. ¶ 12.

10 (U) The DNI and NSA Director first assert the state secrets and statutory privileges as to  
11 information that would tend to confirm or deny whether Plaintiffs have been subject to any  
12 alleged intelligence activities. See Public McConnell Decl. ¶ 13; Public Alexander Decl. ¶ 14.

13 In particular, efforts to prove whether specific individuals were targets of alleged NSA activities  
14 would either reveal who is subject to investigative interest—helping that person to evade  
15 surveillance—or who is not—revealing the scope of intelligence activities as well as secure  
16 channels for communication, and potentially revealing actual targets in other cases. Public  
17 McConnell Decl. ¶ 13; Public Alexander Decl. ¶ 14.

18 [REDACTED TEXT]

19 (U) Second, the DNI and NSA Director assert privilege over information concerning the  
20 alleged intelligence activities themselves. As already noted, disproving Plaintiffs' allegation of a  
21 content surveillance "dragnet" would require demonstrating what the United States *is* doing.

22 Such an inquiry would entail proving publicly that the acknowledged TSP is not a "dragnet" of  
23 domestic communications, thereby revealing specific classified information about the TSP that  
24 the DNI and NSA Director have explained must be protected. Adjudicating Plaintiffs' claim  
25 would also require the disclosure of other NSA intelligence methods in order to confirm that the

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1 alleged “dragnet” is not occurring. *See* Public McConnell Decl. ¶¶ 14-15; Public Alexander  
2 Decl. ¶¶ 15-17.

3 **[REDACTED TEXT]**

4 (U) In addition, the DNI and NSA Director assert privilege over facts that would tend to  
5 confirm or deny whether Verizon, AT&T or any other telecommunications carrier has assisted  
6 the NSA with any particular alleged intelligence collection activity, as Plaintiffs claim. *See*  
7 *Shubert* Amended Compl. ¶¶ 5-8, 70-72; Public McConnell Decl. ¶ 16; Public Alexander Decl.  
8 ¶ 18. The DNI has determined that disclosure of any information that would tend to confirm or  
9 deny an alleged classified intelligence relationship between the NSA and any  
10 telecommunications carrier would cause exceptionally grave harm to national security.  
11 *See* Public McConnell Decl. ¶ 16. Confirming or denying such allegations, for instance, would  
12 reveal to foreign adversaries whether or not NSA utilizes particular intelligence sources and  
13 methods and, thus, either compromise actual sources and methods or disclose that the NSA does  
14 not utilize a particular source or method. *Id.* The harms to national security that would result  
15 from such a disclosure are amply demonstrated by the DNI and NSA Director in their *in camera*,  
16 *ex parte* submissions and are certainly reasonable when weighed against the broad national  
17 security interests in detecting and preventing another catastrophic terrorist attack on the United  
18 States.

19 **[REDACTED TEXT]**

20 (U) Finally, because the Plaintiffs’ claims arise from allegations that the NSA began to  
21 undertake certain intelligence activities after the 9/11 attacks by al Qaeda, *see, e.g., Shubert*  
22 Amended Compl. ¶¶ 4-8, 21, the DNI has asserted privilege over sensitive intelligence  
23 information about the al Qaeda threat. *See* Public McConnell Decl. ¶ 12. If the Government  
24 was required to defend the lawfulness of a particular intelligence activity (for example, the  
25 acknowledged Terrorist Surveillance Program), specific information about the threat that the

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1 activity seeks to address—the severity and exigency of the threat, and the nature and scope of  
2 enemy tactics that the NSA seeks to counter—would all be relevant evidence, but not available.

3 (U) In the course of their privilege assertions over these categories of information, the  
4 DNI and NSA Director have set forth more than reasonable grounds to demonstrate that  
5 disclosure of the privileged information at issue would harm national security. These  
6 experienced intelligence officials, who are entrusted with protecting the national security of the  
7 United States, have also demonstrated why the very subject matter of this case must be  
8 considered a state secret, and thus why litigation of this case cannot proceed.

9 (U) **ARGUMENT**

10 (U) The resolution of this case is governed by clear principles. If the facts needed to  
11 adjudicate the question of Plaintiffs' standing, such as whether or not they are subject to the  
12 alleged surveillance activities, cannot be disclosed without reasonable danger of harm to the  
13 national security, the case must be dismissed. If facts concerning the existence and operation of  
14 intelligence sources and methods are needed to adjudicate the merits of Plaintiffs' claims, the  
15 case must be dismissed. As set forth below, the United States has demonstrated that each of  
16 these categories of information is needed to decide this case, but the disclosure of that  
17 information reasonably would be expected to cause harm to the national security. In these  
18 circumstances, the Court must grant the United States' motion.

19 **I. (U) WHERE STATE SECRETS ARE NEEDED TO RESOLVE A CASE, THE  
20 MATTER MUST BE DISMISSED.**

21 **A. (U) The State Secrets Privilege Bars Use of Privileged Information In  
22 Litigation.**

23 (U) The ability of the executive to protect military or state secrets from disclosure has  
24 been recognized from the earliest days of the Republic. *See Totten v. United States*, 92 U.S. 105  
25 (1875); *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807); *United States v. Reynolds*, 345  
26 U.S. 1 (1953); *see Kasza*, 133 F.3d 1165-66 (discussing cases). “Although the state secrets

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1 privilege was developed at common law, it performs a function of constitutional significance”  
2 because the privilege derives from the President’s Article II powers to conduct foreign affairs  
3 and provide for the national defense. *El-Masri v. United States*, 479 F.3d 296, 303-04 (4th Cir.  
4 2007) (citing, *inter alia*, *United States v. Nixon*, 418 U.S. 683, 710-11 (1974)). The Supreme  
5 Court has also clearly recognized that the protection of national security information is within  
6 the “Executive’s constitutional mandate.” *Dept. Of the Navy v. Egan*, 484 U.S. 518, 527  
7 (1988)). Thus the state secrets privilege has a “firm foundation in the Constitution, in addition  
8 to its basis in the common law of evidence.” *El-Masri*, 479 F.3d at 304.

9 (U) (1) *Procedural Requirements*: As a procedural matter, “[t]he privilege belongs to  
10 the Government and must be asserted by it; it can neither be claimed nor waived by a private  
11 party.” *Reynolds*, 345 U.S. at 7; *see also Kasza*, 133 F.3d at 1165. “There must be a formal  
12 claim of privilege, lodged by the head of the department which has control over the matter, after  
13 actual personal consideration by the officer.” *Reynolds*, 345 U.S. at 7-8 (footnotes omitted).  
14 Thus, the responsible agency head must personally consider the matter and formally assert the  
15 claim of privilege.

16 (U) (2) *Information Covered*: The privilege protects a broad range of state secrets,  
17 including information that would result in “impairment of the nation’s defense capabilities,  
18 disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic  
19 relations with foreign Governments.” *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983)  
20 (footnotes omitted); *accord Kasza*, 133 F.3d at 1166 (“[T]he Government may use the state  
21 secrets privilege to withhold a broad range of information;”); *see also Halkin II*, 690 F.2d at 990  
22 (state secrets privilege protects intelligence sources and methods involved in NSA surveillance).  
23 In addition, the privilege extends to protect information that, on its face, may appear innocuous  
24 but, in a larger context, could reveal sensitive classified information. *Kasza*, 133 F.3d at 1166.

25 It requires little reflection to understand that the business of foreign intelligence  
gathering in this age of computer technology is more akin to the construction of a

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1 mosaic than it is to the management of a cloak and dagger affair. Thousands of  
2 bits and pieces of seemingly innocuous information can be analyzed and fitted  
into place to reveal with startling clarity how the unseen whole must operate.

3 *Halkin v. Helms* (“*Halkin P*”), 598 F.2d 1, 8 (D.C. Cir. 1978). “Accordingly, if seemingly  
4 innocuous information is part of a classified mosaic, the state secrets privilege may be invoked  
5 to bar its disclosure and the court cannot order the Government to disentangle this information  
6 from other classified information.” *Kasza*, 133 F.3d at 1166.

7 (U) (3) *Standard of Review*: An assertion of the state secrets privilege “must be  
8 accorded the ‘utmost deference’ and the court’s review of the claim of privilege is narrow.”  
9 *Kasza*, 133 F.3d at 1166. Aside from ensuring that the privilege has been properly invoked as a  
10 procedural matter, the sole determination for the court is whether, “under the particular  
11 circumstances of the case, ‘there is a reasonable danger that compulsion of the evidence will  
12 expose military matters which, in the interest of national security, should not be divulged.’”  
13 *Kasza*, 133 F.3d at 1166 (quoting *Reynolds*, 345 U.S. at 10); see also *In re United States*, 872  
14 F.2d 472, 475-76 (D.C. Cir. 1989); *Tilden v. Tenet*, 140 F. Supp. 2d 623, 626 (E.D. Va. 2000).  
15 The Court is not permitted to substitute its judgment for the judgment of the most senior  
16 members of the intelligence community. As the Fourth Circuit recently held, deference to the  
17 Government’s judgment as to when confirmation or disclosure of information would reasonably  
18 endanger national security is appropriate “not only for constitutional reasons, but also practical  
19 ones: the Executive and the intelligence agencies under his control occupy a position superior  
20 to that of the courts in evaluating the consequences of a release of sensitive information.” *El-*  
21 *Masri*, 479 F.3d at 305.

22 (U) Notably, cases in which the state secrets privilege has been upheld have rejected the  
23 contention that certain information is “not a secret” because it could readily be deduced from  
24 other information. For example, in *Kasza*, the widow of an individual who worked at a  
25 classified government facility argued it was absurd to assert privilege over the very *existence* of

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1 hazardous waste at that facility. *See Kasza*, 133 F.3d at 1165. Yet the Government's assertion  
2 of privilege over this fact was upheld despite the existence of reliable public facts that tended to  
3 confirm it (for example, the health conditions of plaintiffs who worked at the facility, which  
4 would be well known to family, friends, and physicians). Indeed, the court in *Kasza* found that  
5 the privilege could protect *unclassified* information that might, in combination with other facts,  
6 reveal classified information. *See id.* at 1168. Similarly, in *Halkin II*, the court upheld the  
7 Government's state secrets privilege assertion over whether the plaintiffs had been subject to  
8 surveillance in the face of plaintiffs' contention that information placed in the public domain by  
9 former CIA officials in books reviewed in advance for classification by the CIA had disclosed  
10 particular facts about their allegations. *See Halkin II*, 690 F.2d at 994. And in the recent *El-*  
11 *Masri* decision, the Fourth Circuit upheld the Government's state secrets privilege assertion as  
12 to facts concerning an alleged CIA rendition program despite the fact that the plaintiff was a  
13 witness to his own alleged detention, interrogation, and conditions of confinement, and had  
14 spoken publicly about those issues. *See* 479 F.3d at 308-10. In each of these cases, the court  
15 examined the reasons advanced by the Government as to why disclosure of information as to  
16 which privilege was asserted would cause harm to national security, and did not attempt to  
17 ascertain whether something was a secret by taking judicial notice of purportedly reliable public  
18 sources. As the D.C. Circuit observed in *Halkin II*:

19           Whatever the truth may be, it remains either unrevealed or unconfirmed. We  
20           cannot assume, as the appellants would have us, that the CIA has nothing left to  
21           hide. To the contrary, the record before us suggests either that the CIA still has  
                  something to hide or that it wishes to hide from our adversaries the fact that it has  
                  nothing to hide.

22 *See* 690 F.2d at 994 n.63 (citing *Military Audit Project v. Casey*, 656 F.2d 724, 744-45 (D.C.  
23 Cir. 1981)).

24           (U) In addition, in assessing whether to uphold a claim of privilege, the court does not  
25 balance the respective needs of the parties for the information. Rather, “[o]nce the privilege is

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1 properly invoked and the court is satisfied that there is a reasonable danger that national security  
2 would be harmed by the disclosure of state secrets, the privilege is absolute[.]” *Kasza*, 133 F.3d  
3 at 1166; *see also In re Under Seal*, 945 F.2d 1285, 1287 n.2 (4th Cir. 1991) (state secrets  
4 privilege “renders the information unavailable regardless of the other party’s need in furtherance  
5 of the action”); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir.  
6 1984) (state secrets privilege “cannot be compromised by any showing of need on the part of the  
7 party seeking the information”); *Ellsberg*, 709 F.2d at 57 (“When properly invoked, the state  
8 secrets privilege is absolute. No competing public or private interest can be advanced to compel  
9 disclosure of information found to be protected by a claim of privilege.”). A court may consider  
10 the necessity of the information to the case only in connection with assessing the sufficiency of  
11 the Government’s showing that there is a reasonable danger that disclosure of the information at  
12 issue would harm national security. Where there is a strong showing of necessity, the claim of  
13 privilege should not be lightly accepted, but even the most compelling necessity cannot  
14 overcome the claim of privilege if the court ultimately is satisfied that military secrets are at  
15 stake. *Reynolds*, 345 U.S. at 11; *Kasza*, 133 F.3d at 1166.<sup>5</sup>

16 **B. (U) Where State Secrets Are Central to the Resolution of a Case or**  
17 **Needed to Litigate the Claims and Defenses, the Case Cannot**  
18 **Proceed.**

19 (U) Once the Court has upheld a claim of the state secrets privilege, the evidence and  
20 information identified in the privilege assertion is “completely removed from the case,” *Kasza*,  
21 133 F.3d at 1166, and the Court must undertake a separate inquiry to determine the  
22 consequences of this exclusion on further proceedings. *Fitzgerald*, 776 F.2d at 1243 (“[O]nce

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23 <sup>5</sup> (U) Judicial review of whether the claim of privilege has been properly asserted and  
24 supported does not require the submission of classified information to the court *for in camera*,  
25 *ex parte* review. Nonetheless, the submission of classified declarations for *in camera*, *ex parte*  
26 review is “unexceptional” in cases where the state secrets privilege is invoked. *Kasza*, 133 F.3d  
27 at 1169 (citing *Black v. United States*, 62 F.3d 1115 (8th Cir. 1995)).

1 the state secrets privilege has been properly invoked, the district court must consider whether  
2 and how the case may proceed in light of the privilege.”); *see also El-Masri*, 479 F.3d at 304  
3 (“the ultimate question to be resolved is how the matter should proceed in light of the successful  
4 privilege claim”). This inquiry requires the Court to “look ahead” to evaluate whether  
5 privileged evidence is needed to resolve any issue raised by the case.<sup>6</sup>

6 (U) First, the case must be dismissed if the state secrets “will be so central to the subject  
7 matter of the litigation that any attempt to proceed will threaten disclosure of the privileged  
8 matters.” *Fitzgerald*, 776 F.2d at 1241-42. In such circumstances, as the court held in *Kasza*,  
9 the “very subject matter” of the action is a state secret and “the court should dismiss the  
10 plaintiff’s action based solely on the invocation of the state secrets privilege.” *Kasza*, 133 F.3d  
11 at 1166 (citing *Reynolds*, 345 U.S. at 11 n.26).<sup>7</sup> The “very subject matter” inquiry concerns  
12 whether the “central facts”—*i.e.*, “those facts that are *essential to prosecuting the action or*  
13 *defending against it*”—are state secrets. *El-Masri*, 479 F.3d at 308 (emphasis added). “It is  
14 clear from precedent that the ‘central facts’ or ‘very subject matter’ of a civil proceeding, for  
15 purposes of [a] dismissal analysis, are those facts necessary to litigate it—not merely to discuss  
16 it in general terms.” *Id.* at 310. In *Kasza*, for example, the Ninth Circuit held that the “very  
17 subject matter” of the case was a state secret because the specific information needed to  
18 adjudicate the plaintiffs’ claims was protected by the privilege assertion. *See Kasza*, 133 F.3d at

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19  
20 <sup>6</sup> (U) *See El-Masri*, 479 F.3d at 308-10 (conducting prospective assessment of what  
21 state secrets would be needed as evidence if civil action were to proceed); *Sterling v. Tenet*, 416  
22 F.3d 338, 346-47 (4th Cir. 2005) (same), *cert. denied*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 1052 (2006);  
23 *Edmonds v. U.S. Dept. of Justice*, 323 F. Supp. 2d 65, 79-81 (D.D.C. 2004) (same), *aff’d* 161  
24 Fed. Appx. 6 (D.C. Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 734 (2005); *Maxwell v. First*  
*Nat’l Bank of Maryland*, 143 F.R.D. 590, 599 (D. Md. 1992) (same), *aff’d* 998 F.2d 1009 (4th  
Cir. 1993); *Clift v. United States*, 808 F. Supp. 101, 108 (D. Conn. 1991) (same).

25 <sup>7</sup> (U) *See also El-Masri*, 479 F.3d at 308; *Sterling*, 416 F.3d at 345; *Edmonds*, 323 F.  
26 Supp. 2d at 77-82; *Maxwell*, 143 F.R.D. at 598-99.

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1 1170. Similarly, in *Fitzgerald*, the court held that the very subject matter of that case was a state  
2 secret “due to the nature of the question presented in this action *and the proof required* by the  
3 parties to establish or refute the claim.” 776 F.2d at 1237 (emphasis added). Likewise, in  
4 *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991), a case concerning  
5 whether a missile defense system aboard a U.S. Navy frigate malfunctioned, the very subject  
6 matter of the case was a state secret because facts central to proceeding, including how the  
7 system worked, were not available. *See id.* at 547-48.<sup>8</sup>

8 (U) Even if some information about a government activity is publicly acknowledged,  
9 the very subject matter of the case can be a state secret. The *Fitzgerald* case provides a good  
10 example. At issue in that case was an alleged libel that the plaintiff, who worked on a secret  
11 Navy program for training marine mammals, sought to use his expertise for personal profit. *See*  
12 776 F.2d at 1237. After determining that certain facts concerning the program were state  
13 secrets which required protection, the Fourth Circuit went on to analyze whether the case could  
14 proceed. Even though the existence of the program was publicly known, *see id.* at 1242-43  
15 (public declaration of the Secretary of the Navy describing marine mammal program), classified  
16 aspects of how the program operated would have been inherently at issue in any adjudication of  
17 the alleged libel and, thus, the Court held that the “very subject of this litigation is itself a state  
18 secret.” *Id.* at 1243.

19 (U) Even if the very subject matter of an action is not a state secret, the case still must be  
20 dismissed if the plaintiff cannot make out a *prima facie* case in support of its claims absent the  
21 excluded state secrets. *See Kasza*, 133 F.3d at 1166; *Halkin II*, 690 F.2d at 998-99; *Fitzgerald*,

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22 <sup>8</sup> (U) Similarly, in *Sterling*, a case concerning whether a former CIA officer had been  
23 discriminated against on the basis of race, the “very subject matter” in that case was a state  
24 secret because facts concerning the officer’s assignments and CIA operations were essential to  
25 decide the case. *See* 416 F.3d at 345-46. And in *Clift*, the subject matter of the case—a patent  
26 dispute over a cryptographic device—was a state secret because the evidence needed to decide  
27 the case was privileged. 808 F. Supp. at 111.