IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMERGENCY MOTION UNDER 9TH CIR. R. 27-3

AL-HARAMAIN ISLAMIC FOUNDATION, INC., *et al.*,	)	
	)	
Plaintiffs/Appellees,	)	
	)	
v.	)	**No. 09-15266**
	)	
BARACK H. OBAMA, President of the United States, *et al.*,	)	
	)	
Defendants/Appellants.	)	

EMERGENCY MOTION FOR STAY PENDING APPEAL

MICHAEL F. HERTZ
Acting Assistant Attorney General

DOUGLAS N. LETTER
THOMAS M. BONDY
H. THOMAS BYRON III
Attorneys, Appellate Staff
Civil Division, Room 7513
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001
202-514-3602

Al-Haramain Islamic Foundation, Inc. v. Obama
No. 09-15266

9th Cir. R. 27-3 Certificate

I. Telephone Numbers And Office Addresses Of Attorneys:

Counsel for appellants:

Douglas N. Letter
202-514-3602
Douglas.Letter@usdoj.gov
Room 7513

Thomas M. Bondy
202-514-4825
Thomas.Bondy@usdoj.gov
Room 7535

H. Thomas Byron III
202-616-5367
H.Thomas.Byron@usdoj.gov
Room 7260

Mailing Address:

Appellate Staff, Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001
202-514-3602

Counsel for appellees:

Jon B. Eisenberg
1970 Broadway, Suite 1200
Oakland, CA 94612
(510) 452-2581
jon@eandhlaw.com

Lisa R. Jaskol
610 S. Ardmore Ave.
Los Angeles, CA 90005
(213) 385-2977
ljaskol@earthlink.net

Steven Goldberg
River Park Center, Suite 300
205 SE Spokane Street
Portland, OR 97202
(503) 445-4622
steven@stevengoldberglaw.com

Thomas H. Nelson
24525 E. Welches Road
Welches, OR 97067
(503) 622-3123
nelson@thnelson.com

J. Ashlee Albies
Steenson, Schumann, Tewksbury,
Creighton & Rose, P.C.
815 S.W. Second Ave.
Portland, OR 97204
(503) 221-1792
ashlee@sstcr.com

II. Facts showing the existence and nature of the claimed emergency:

The district court has ruled that it can disclose classified information to plaintiffs' counsel over the objection of the responsible Executive Branch officials with exclusive authority to control access to the national security information in this case. This dispute concerns classified national security information that this Court has held to be protected from disclosure by the state secrets privilege. See Al-Haramain Islamic Foundation v. Bush, 507 F.3d 1190, 1201-1205 (9th Cir. 2006). On remand from that earlier appeal, the district court has now held that a federal statute, the Foreign Intelligence Surveillance Act (FISA) displaces the state secrets privilege and authorizes a federal court to disclose classified information to attorneys who do not meet the standards for access to classified information, as set forth in the governing Executive Orders. That holding is error, as the text of FISA makes no such provision.

The district court has ruled that plaintiffs' counsel here should have access to the classified information at issue, which is also subject to the state secrets privilege. The court has ordered the Government to process security clearances for plaintiffs' counsel, and has set a deadline of February 27 for the Government to indicate how it intends to comply with the court's order that plaintiffs' counsel should have access to classified information. Plaintiffs have urged the district court to override the Executive Branch official's determination that plaintiffs' counsel do not have a "need to know" the classified information, and have asked the court to provide them with access to that information before this Court has an opportunity to rule on the merits of the Government's pending appeal.

A stay is necessary to preserve the status quo and to protect this Court's authority to review the merits of the district court's plan to unilaterally disclose classified information, which is in turn based on that court's determination that FISA displaces the state secrets privilege. That holding, which we contend is legally incorrect, is the subject of the Government's pending appeal

III. Notification and service of counsel:

Lead counsel for plaintiffs Jon B. Eisenberg was informed by email and telephone call at approximately 12:00 noon Eastern time on Friday, February 20, 2009. All counsel for plaintiffs listed above were served on that date by email and by Federal Express for overnight delivery.

INTRODUCTION AND SUMMARY

The United States submits this emergency stay motion to foreclose the prospect of imminent disclosure of highly classified information that this Court has already held is protected from disclosure by the state secrets privilege. The district court has ruled that it will now adjudicate the very factual issue covered by the Government's privilege assertion, has ordered the Executive Branch to expeditiously process a security clearance for plaintiffs' attorneys in this case, and has made clear that it is doing so in order to disclose highly classified material to those attorneys, which the court believes is compelled by due process. Plaintiffs have explicitly urged the district court to disclose the classified information to their counsel, despite the determination by the Executive Branch that plaintiffs do not have the requisite "need to know" the information, and thus are not authorized to receive it.

Disclosure of the material at issue here would cause exceptionally grave harm to the national security and result in irreparable injury to the United States. Moreover, such disclosure by the district court of classified material over the objection of the Executive Branch would raise fundamental constitutional issues. A stay pending appeal is manifestly warranted so that this Court can undertake meaningful review of the district court's disclosure plans, which in turn are based on that court's mistaken conclusion that Congress sub silentio overrode the constitutionally based state secrets privilege through passage of the Foreign

Intelligence Surveillance Act ("FISA") (50 U.S.C. § 1801, et seq.). Accordingly, this Court should stay any proceedings by the district court that would result in disclosure of classified information.

Plaintiffs allege that they were subjected to warrantless electronic surveillance under the Terrorist Surveillance Program carried out by the National Security Agency. They claim that a highly classified sealed document that was inadvertently shown to them demonstrates that they had been unlawfully surveilled. In a 2007 decision, this Court held that the sealed document, and information regarding whether plaintiffs had indeed been subjected to surveillance, remain secret and highly classified, and were properly protected by the Government's assertion of the state secrets privilege. This Court remanded for the district court to consider plaintiffs' legal argument that Congress displaced the state secrets privilege in the electronic surveillance context by enacting FISA.

In July 2008, the district court held in an unprecedented decision that FISA did abrogate the state secrets privilege, even though nothing in the statute so indicates. The court subsequently applied that ruling here, ordering on January 5, 2009, that plaintiffs are entitled to pursue discovery into whether they had been subjected to surveillance. The court indicated that it would review the classified material in the record for the purpose of deciding whether the plaintiffs have been subject to the alleged surveillance, and concluded that due process forbids an ex parte proceeding.

Accordingly, the district court directed the Government to process security clearances for plaintiffs' counsel by February 13, 2009. The district court's order specifically contemplates that, once these private counsel have security clearances, they will be given access to highly classified information, despite the NSA Director's opposition.

The Government filed a notice of appeal and a stay motion in district court, and asked that court to enter a stay or interim stay no later than February 13, 2009, when the security clearance application process was ordered to be completed. On the afternoon of February 13, the district court denied the Government's stay request and confirmed its intention that "both parties have access to the material on which the court makes a decision." 2/19/09 Order at 2-3.

Under these circumstances, a stay pending appeal is necessary, prohibiting proceedings that will lead to disclosure of classified information by the district court. Such a stay will allow this matter to proceed in an orderly fashion, and prevent irreparable disclosure of sensitive, privileged information while the issues are litigated. The Government is prepared to pursue its appeal on an expedited schedule.

STATEMENT

A. The Terrorist Surveillance Program.

Following September 11, 2001, President Bush established the Terrorist Surveillance Program ("TSP"), authorizing the National Security Agency ("NSA") to intercept international communications into and out of the United States of persons

linked to al Qaeda or related terrorist organizations. NSA was authorized to intercept a communication under the TSP if one party to the communication was located outside the United States, and there was a reasonable basis to conclude that one party was a member of, or affiliated with, al Qaeda or a related organization. President Bush publicly acknowledged the TSP's existence in December 2005, but the program is no longer operative.

Details regarding how the TSP operated remain highly classified, and unauthorized disclosure of such information can be expected to cause exceptionally grave damage to national security. Thus, TSP-related information is classified at the Top Secret level and is subject to special access and handling procedures reserved for Sensitive Compartmented Information ("SCI") because it involves or derives from extraordinarily sensitive intelligence sources and methods.

B. Plaintiffs' Complaint And The District Court's 2006 Decision.

Plaintiffs – Al-Haramain Islamic Foundation, an Oregon corporation designated by the Treasury Department as a "Specially Designated Global Terrorist," and Wendell Belew and Asim Ghafoor, two attorneys affiliated with Al-Haramain – filed this action against the President, the NSA, and other federal agencies and officials. Plaintiffs alleged that they were subjected to warrantless electronic surveillance in violation of the First, Fourth, and Sixth Amendments, and FISA.

The Government formally asserted the state secrets privilege, and moved for

dismissal or summary judgment. Public and classified declarations of the Director of National Intelligence and the Director of NSA explained that the Government could neither confirm nor deny whether plaintiffs had been surveilled, and that litigation of plaintiffs' claims threatened disclosure of intelligence sources and methods, which would cause exceptionally grave harm to national security.

In September 2006, the district court found that the heads of the relevant departments had properly invoked the state secrets privilege. 451 F. Supp. 2d 1215, 1221. But that court nevertheless attempted to allow the case to proceed through in camera filings. Id. at 1229. The court based that ruling on the fact that plaintiffs had seen a classified document ("Sealed Document"), which, they claim, showed that they had been surveilled, and which had been inadvertently disclosed by a Treasury Department employee in a stack of material.[1/]

C. This Court's Reversal And Remand.

This Court reversed and remanded the district court's decision. 507 F.3d 1190. This Court held that the Government had properly invoked the state secrets privilege, and the Court sustained the privilege assertion as to operational details concerning the NSA program, including specifically whether plaintiffs had been subjected to

---

[1/] On December 15, 2006, the Judicial Panel on Multidistrict Litigation transferred this case from the District of Oregon to the Northern District of California, where it is now part of the multidistrict litigation proceeding in In re NSA Telecomm. Records Litig., MDL No. 06-1791 (N.D. Cal.).

surveillance. 507 F.3d at 1201-05. In so doing, the Court concluded that the Government's state secrets assertion, which explained that divulging whether particular persons had or had not been subjected to surveillance would threaten grave harm to national security, was "exceptionally well documented," and demonstrated that disclosure would "compromise national security." Id. at 1203-04. This Court also agreed that the inadvertent disclosure of the (promptly retrieved) Sealed Document did not vitiate the state secrets privilege, and that the contents of that document remain privileged. Id. at 1204-05.

Having endorsed the Government's state secrets position, this Court concluded that dismissal of the case would be required unless FISA had displaced the state secrets privilege. Id. at 1205. The Court remanded for the district court to determine that issue in the first instance.

D. The District Court's Rulings On Remand, And The Government's Notice Of Appeal And Stay Motion.

1. Following remand, in July 2008, the district court dismissed plaintiffs' complaint, but gave them an opportunity to file an amended complaint that might demonstrate that they were "aggrieved persons" under FISA. The court permitted that step based on its view that FISA "preempts the state secrets privilege in connection with electronic surveillance for intelligence purposes," 564 F. Supp. 2d 1109, 1111, and that Congress meant to "displace federal common law rules such as the state

secrets privilege with regard to matters within FISA's purview." Id. at 1120. Specifically, the court held that the statutory "in camera procedure described in FISA's section 1806(f) applies to preempt the [state secrets] protocol." Id. at 1119.

2. After plaintiffs filed an amended complaint, the Government again moved to dismiss, and plaintiffs sought discovery under section 1806(f). The district court on January 5, 2009, ruled that plaintiffs may establish a prima facie case based on unclassified, circumstantial allegations that might permit an inference that they had been subjected to electronic surveillance. 1/5/09 Order at 13. The court found the amended complaint sufficient to allege plaintiffs' status as aggrieved persons, and concluded that section 1806(f) therefore provides a means for allowing plaintiffs discovery. The court stated that it will review the Sealed Document that was the subject of the state secrets privilege claim, and will "issue an order regarding whether plaintiffs may proceed – that is, whether the Sealed Document establishes that plaintiffs were subject to electronic surveillance not authorized by FISA." Id. at 23. That order, as well as other future orders, may be issued under seal to "avoid indirectly disclosing some aspect of the Sealed Document's contents." Ibid.

However, the court concluded that proceeding ex parte would deprive plaintiffs of due process, and therefore "provide[d] for members of plaintiffs' litigation team to obtain the security clearances necessary to be able to litigate the case, including, but not limited to, reading and responding to the court's future orders." 1/5/09 Order

at 23. The court directed that plaintiffs' counsel must be allowed "to apply for TS/SCI clearance and [the Government] shall expedite the processing of such clearances so as to complete them no later than Friday, February 13, 2009." Id. at 24.

3. The Government quickly filed a notice of appeal and sought a stay pending appeal; out of an abundance of caution, we also requested certification under 28 U.S.C. § 1292(b). With the stay motion, the Government filed a declaration of NSA's Associate General Counsel advising that "subsequent to the [district court's] January 5, 2009, Order, the NSA Director has reviewed the matter and has determined that plaintiffs' counsel do not have the requisite 'need to know' and therefore should not receive access to the NSA information at issue in this case." Cerlenko Decl. ¶2 .[2/]

On February 13, the district court denied the requested stay, and denied the section 1292(b) petition. In the order denying the stay, the court confirmed its intention to disclose classified information to plaintiffs' counsel. See 2/13/09 Order at 2 ("the January 5 order provided for plaintiffs' counsel to obtain top secret/sensitive compartmented information security clearances"); ibid. (quoting transcript of January 23 hearing concerning intent to "proceed in a judicial fashion; and by that I mean a fashion in which both parties have access to the material upon

---

[2/] As directed by the district court, the Government is undertaking a review of the classified status of information at issue in this case. That review is expected to confirm that the key information remains classified.

which the court makes a decision").

The order denying the stay also indicated that the district court does not intend to proceed before February 27, 2009, the deadline for the Government to indicate how it intends to comply with the Court's Order that plaintiffs' counsel be given access to the classified information at issue. See id. at 3. That, however, is the central issue on appeal. Plaintiffs – following the district court's denial of a stay – have urged the district court to disclose to their attorneys the information at issue here, which remains classified and subject to the state secrets privilege. Plaintiffs contend that the Government relinquished its control over further disclosure of classified information when it submitted a filing to an Article III court for the purpose of asserting and explaining the state secrets privilege. That argument is incorrect, and should be addressed by this Court before any disclosure takes place. A stay is necessary to ensure that no irreparable harm resulting from disclosure results before this Court has an opportunity to address these fundamental issues concerning the separation of powers and the protection of national security.

ARGUMENT

"In deciding whether to issue a stay pending appeal, th[is] [C]ourt considers (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the

proceeding; and (4) where the public interest lies." Humane Society v. Gutierrez, 527 F.3d 788, 789-90 (9th Cir. 2008) (internal quotation marks omitted). The Court weighs these factors along a "single continuum": at one end of the spectrum, the moving party is required to demonstrate probable success on the merits and the possibility of irreparable harm; at the other end, the party is required to show that serious questions have been raised and the balance of hardships tips sharply in the moving party's favor. Artukovic v. Rison, 784 F.2d 1354, 1355 (9th Cir. 1986). These standards are amply satisfied here. The prospect of imminent disclosure of highly classified, privileged information threatens exceptionally grave harm to the national security, and irreparable injury to the United States, whereas a pause in further trial court proceedings while this Court considers the important issues raised by the district court's January 5 order would not cause any harm to plaintiffs. Moreover, the district court's ruling is unprecedented and raises serious legal questions, and the balance of hardships militates strongly in the Government's favor.

I. BALANCE OF HARMS AND THE PUBLIC INTEREST.

The United States faces a clear threat of irreparable harm in the absence of a stay. The district court has ruled that it will now determine whether plaintiffs have been subject to alleged surveillance and, for that purpose, has directed the Executive Branch to expedite security clearances for three of plaintiffs' attorneys. The court's order threatens to disclose classified national security information over the objection

of the Executive and in the face of a determination by the responsible agency that plaintiffs' attorneys do not have a need to know the classified information. Moreover, the classified information at issue is subject to the state secrets privilege, which this Court has upheld in an earlier appeal. See 507 F.3d at 1201-05.

This Court has repeatedly recognized that a district court's order requiring the disclosure of privileged material is often "irreparable by any subsequent appeal," In re Napster, Inc. Copyright Litigation, 479 F.3d 1078, 1088 (9th Cir. 2007), and that clearly is the case here. Indeed, the Supreme Court and other courts have repeatedly recognized that disclosure of classified information over the objection of the Executive constitutes irreparable injury to national security. See, e.g., Snepp v. United States, 444 U.S. 507, 513 (1980). The grant of a security clearance and the authority to determine who or how many persons shall have access to classified information, "is committed by law to the appropriate agency of the Executive Branch," and "flows primarily from [a] constitutional investment of power in the President." Department of the Navy v. Egan, 484 U.S. 518, 526-27 (1988). The district court's usurpation of that power threatens the Executive's authority and responsibility to protect national security information from unauthorized disclosure.

Where a district court has ordered or threatened the disclosure of otherwise protected information, a stay pending appeal is necessary to protect both the information and the authority of the appellate court to exercise meaningful review.

See, e.g., Providence Journal Co. v. FBI, 595 F.2d 889, 890 (1st Cir. 1979) ("Once the documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time. The status quo could never be restored").

Here, the district court has held that FISA permits the court to disclose classified information to plaintiffs' attorneys, and plaintiffs continue to urge such disclosure prior to this Court's review. The court plans to rule on "whether the Sealed Document establishes that plaintiffs were subject to electronic surveillance not authorized by FISA." 1/5/09 Order at 23. And the court recently re-emphasized its view that "both parties [should] have access to the material upon which the court makes a decision." 2/13/09 Order at 3. Any such determination by the court would reveal classified, privileged information. As this Court recognized, "the Sealed Document is protected by the state secrets privilege, along with the information as to whether the government surveilled Al-Haramain." 507 F.3d at 1203; see also ibid. ("the basis for the privilege is exceptionally well documented").

The district court has suggested that orders addressing classified information might be issued under seal, but the very process set by that court for determining whether plaintiffs have been subject to alleged surveillance, and thus whether they have standing, would inherently risk or require the disclosure of privileged information in further proceedings. And the court has also made clear that it intends to reveal any order concerning standing (and other, unspecified classified

information) to plaintiffs' counsel. See 1/5/09 Order at 23 ("this order provides for members of plaintiffs' litigation team to obtain the security clearances necessary to be able to litigate the case, including, but not limited to, reading and responding to the court's future orders"; "counsel for plaintiffs [must be] granted access to the court's rulings and, possibly, to at least some of defendants' classified filings"); 2/13/09 Order at 2-3 (indicating intention that "both parties have access to the material upon which the court makes a decision"). Even a bare conclusion of whether or not plaintiffs were subjected to surveillance, in the context of a determination of whether plaintiffs have standing, would risk disclosure of classified and privileged information, and would cause exceptionally grave harm to the national security.

Moreover, revealing any such information to plaintiffs' counsel (let alone to the public) would not only contravene the state secrets privilege upheld by this Court, but also the governing executive order, which establishes that, before classified information can be disclosed to an individual, three independent conditions must be satisfied: First, the relevant Executive agency must determine that the recipient is trustworthy. Second, the recipient must sign an approved non-disclosure agreement. And, third, the recipient must have a "need to know" the classified information. See Exec. Order 12958, 60 Fed. Reg. 19825 (Apr. 17, 1995), as amended by Exec. Order 13292, 68 Fed. Reg. 15315, 15324 (Mar. 25, 2003). The need-to-know standard is satisfied only if the responsible Executive Branch agency determines that the

"prospective recipient requires access to specific classified information to perform or assist in a lawful and authorized governmental function." 68 Fed. Reg. 15322.

Here, the responsible Executive Branch official – the NSA Director – has determined that plaintiffs' counsel do not have a need to know the classified information at issue. See Cerlenko Decl. ¶ 9. Indeed, "disclosure of this information would cause exceptional harm to national security." Ibid. A district court decision overriding that determination would infringe upon the Executive's exclusive authority to control access to the national security information in this case. The risk of such disclosure is imminent: the Court has ordered the Government to state, by February 27, 2009, how it will comply with the court's access order.

On the other side of the scale, the effect of a stay on plaintiffs and the district court will be negligible. Plaintiffs would suffer no harm from a stay. The only effect would be to delay the district court proceedings while this Court considers the Government's appeal. Cf. Providence Journal, 595 F.2d at 890 ("the granting of a stay will be detrimental to the Journal (and to the public's interest in disclosure) only to the extent that it postpones the moment of disclosure assuming the Journal prevails by whatever period of time may be required for us to hear and decide the appeals"). Especially in light of the unprecedented nature of the district court's underlying ruling that FISA displaces the state secrets privilege, such a delay would be unexceptional. And any delay would potentially be quite short, as the Government

is amenable to an expedited briefing and argument schedule. The public interest would similarly be served by a stay pending appeal, which would safeguard national security information from improper disclosure until this Court has an opportunity to review the novel questions raised by the district court's rulings.

II. LIKELIHOOD OF SUCCESS ON THE MERITS.

A. The district court's January 5 order threatening disclosure of classified information to plaintiffs' counsel is premised on the court's unprecedented conclusion that FISA implicitly abrogates the state secrets privilege, which is grounded in the Executive's constitutional responsibility to protect the national security. See El-Masri v. United States, 479 F.3d 296, 303-04 (4th Cir. 2007) (citing United States v. Nixon, 418 U.S. 683, 710 (1974)). That ruling is wrong on the merits. Serious constitutional questions would arise if FISA were read to displace the privilege, impairing the President's ability to protect military and intelligence secrets from improper disclosure. And the courts will not read a statute to attempt to interfere with the President's constitutional authority unless Congress has made clear in the statutory text its intent to do so. See Armstrong v. Bush, 924 F.2d 282, 289 (D.C. Cir. 1991) ("When Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear."). Moreover, the constitutional avoidance doctrine requires that a statute be construed to avoid such difficulties "unless such construction is plainly contrary to the intent

of Congress." See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. Council, 485 U.S. 568, 575 (1988).

The state secrets privilege also has deep common-law roots, Kasza v. Browner, 133 F.3d 1159, 1167 (9th Cir. 1998), and thus "'ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'" Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co., 464 U.S. 30, 35 (1983); Kasza, 133 F.3d 1167-68. Thus, even apart from of its constitutional dimensions, the privilege could not be deemed overriden without, at a minimum, a "clear and explicit" expression of such a Congressional intent.

Nothing in FISA comes even close to explicitly overriding the state secrets privilege. Far from reflecting the requisite clear intent to do so, section 1806(f) simply provides aggrieved persons with a shield against the Government's affirmative use of information obtained from disclosed electronic surveillance. Located within FISA's provision governing the Government's "[u]se of information" obtained from surveillance (50 U.S.C. § 1806), subsection (f) applies only to three situations in which the potential use of surveillance-based information in legal proceedings against an aggrieved person requires a judicial determination of whether the underlying surveillance was lawful. See 50 U.S.C. § 1806(f)(1), (2), (3). Accordingly, the text of section 1806(f) itself makes clear that its procedure for an in camera, ex parte judicial determination of the legality of relevant surveillance applies only when the

Attorney General himself invokes that procedure to facilitate governmental use of information derived from such surveillance in legal proceedings.

Through FISA, Congress intended to strike a careful "balance" between an aggrieved person's "ability to defend himself" against the Government's invocation of the legal process, and the need to protect "sensitive foreign intelligence information." S. Rep. No. 95-701, at 64 (1978). Congress explained that "notice [of surveillance] to the surveillance target" – and the subsequent use of in camera procedures to test the legality of disclosed surveillance – would be inappropriate "unless the fruits are to be used against him in legal proceedings." Id. at 11-12 (emphasis added). And, even if a court orders disclosure under section 1806(f), Congress gave the Government a choice: "either disclose the material or forgo the use of the surveillance-based evidence." Id. at 65. That choice exists only when the Government uses such evidence as a sword. The district court's holding here that FISA provides a vehicle for persons to discover whether they have been subjected to NSA surveillance, based on their own allegations of surveillance – notwithstanding the state secrets privilege and the Executive's constitutional authority to control access to classified information – is without basis in FISA's text and history.

B. The district court's plan to disclose classified and privileged national security information is also contrary to controlling legal authority. As discussed already, control over the dissemination of classified information is constitutionally

committed to the Executive. And a determination of trustworthiness or access eligibility (the first step in the security clearance process) does not entitle anyone to actually receive particular classified information.

The authority "to classify and control access to information bearing on national security" is constitutionally vested in the President as head of the Executive Branch and as Commander in Chief. See Egan, 484 U.S. at 526-27 (1988); see also, e.g., Brazil v. Dept. of Navy, 66 F.3d 193, 196 (9th Cir. 1995) ("security clearance determinations are 'sensitive and inherently discretionary' exercises, entrusted by law to the Executive" (quoting Egan); "The decision to grant or revoke a security clearance is committed to the discretion of the President by law.").

Under the governing executive order, federal agencies must "ensure that the number of persons granted access to classified information is limited to the minimum consistent with operational and security requirements and needs." 68 Fed. Reg 15330. Consistent with this directive, agencies may not authorize access to classified information unless the responsible Executive Branch official finds a need to know the information. Such a determination depends on a finding that the "prospective recipient requires access to specific classified information to perform or assist in a lawful and authorized governmental function." 68 Fed. Reg. 15332.

The district court has rejected both the premise of Executive control and the applicable procedures under the governing executive orders. 1/5/09 Order at 21. The

court directed the Government to "expedite the processing of [security] clearances" for three of plaintiffs' counsel. Id. at 24; 2/13/09 Order at 2 ("the January 5 order provided for plaintiffs' counsel to obtain top secret/sensitive compartmented information security clearances"). And the court concluded that it can itself provide access to classified information, notwithstanding the Executive's determination that there is no need to know. See 1/5/09 Order at 23 ("this order provides for members of plaintiffs' litigation team to obtain the security clearances necessary to be able to litigate the case, including, but not limited to, reading and responding to the court's future orders"); 2/13/09 Order at 2-3 ("both parties [will] have access to the material upon which the court makes a decision"). Those steps misapprehend the constitutional allocation of authority to control classified information.

Because the information at issue here is subject to the state secrets privilege, the district court's determination is doubly mistaken. Even counsel with a security clearance are not entitled to access privileged state and military secrets. See Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 401-02 (D.C. Cir. 1984). Thus, even apart from the district court's disregard of Executive control, the court committed legal error in concluding that it can direct that privileged information be revealed to plaintiffs' counsel on the basis of a security clearance trustworthiness determination. As Northrop explained, "[t]he trustworthiness of the litigants * * * is not always dispositive in cases such as this." 751 F.2d at 401. Harm to national

security cannot be avoided merely by limiting "disclosure * * * to participants with adequate security clearances." Ibid.; see also id. at 402 ("Regardless of the availability of protective orders or 'need-to-know' mechanisms, we believe that the district court acted within reason when it decided that this disclosure would present a danger of harm to foreign relations and national security.").[3/]

CONCLUSION

This Court should stay pending appeal any district court proceedings that will lead to disclosure of classified information.

[3/] Plaintiffs argued below that this Court lacks jurisdiction to hear the Government's appeal. That argument is incorrect and in any event provides no basis to deny a stay, which would preserve the status quo and this Court's authority to determine its own jurisdiction. The district court has ruled that the Executive's power to invoke the state secrets privilege is preempted by FISA, and that due process requires disclosure of privileged information to plaintiffs' counsel. Those rulings warrant a stay on their own terms, and any questions regarding appellate jurisdiction can be aired in the parties' merits briefing. Multiple grounds for appellate jurisdiction exist here: The collateral-order doctrine generally applies where privileged information is ordered disclosed and the privilege is sufficiently important. See In re Napster, 479 F.3d at 1088-89. An order is also appealable where it has the practical effect of granting an injunction, has serious or irreparable consequences, and can be effectively challenged only by immediate appeal. Negrete v. Allianz Life Ins. Co., 523 F.3d 1091, 1097 (9th Cir. 2008); Orange County Airport Hotel Assocs. v. HSBC Ltd., 52 F.3d 821, 825-26 (9th Cir. 1995). In the extraordinary circumstances presented by this case, mandamus jurisdiction would also be appropriate. See United States v. Austin, 416 F.3d 1016, 1024 (9th Cir. 2005). The Government in its briefing intends to invoke all three jurisdictional bases for appeal.

Respectfully submitted,

MICHAEL F. HERTZ
Acting Assistant Attorney General

DOUGLAS N. LETTER
THOMAS M. BONDY
H. THOMAS BYRON III
Attorneys, Appellate Staff
Civil Division, Room 7513
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001
202-514-3602

FEBRUARY 2009

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2009, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Lisa R. Jaskol
610 S. Ardmore Ave.
Los Angeles, CA 90005
(213) 385-2977
ljaskol@earthlink.net

Thomas H. Nelson
24525 E. Welches Road
Welches, OR 97067
(503) 622-3123
nelson@thnelson.com

Steven Goldberg
River Park Center, Suite 300
205 SE Spokane Street
Portland, OR 97202
(503) 445-4622
steven@stevengoldberglaw.com

J. Ashlee Albies
Steenson, Schumann, Tewksbury, Creighton & Rose, P.C.
815 S.W. Second Ave.
Portland, OR 97204
(503) 221-1792
ashlee@sstcr.com

____
H. Thomas Byron III
Attorney