

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: MDL Docket No 06-1791 VRW

NATIONAL SECURITY AGENCY  
TELECOMMUNICATIONS RECORDS  
LITIGATION

---

Case No C 07-0109 VRW

This order pertains to:

AL-HARAMAIN ISLAMIC  
FOUNDATION, INC, an Oregon  
Nonprofit Corporation; WENDELL  
BELEW, a United States Citizen  
and Attorney at Law; ASIM  
GHAFOOR, a Unites States Citizen  
and Attorney at Law,

MEMORANDUM OF DECISION  
AND ORDER

Plaintiffs,

v

BARACK H OBAMA, President of the  
United States; NATIONAL SECURITY  
AGENCY and KEITH B ALEXANDER,  
its Director; OFFICE OF FOREIGN  
ASSETS CONTROL, an office of the  
United States Treasury, and ADAM  
J SZUBIN, its Director; FEDERAL  
BUREAU OF INVESTIGATION and  
ROBERT S MUELLER III, its  
Director, in his official and  
personal capacities,

Defendants.

---

SUMMARY OF DECISION

1  
2 Plaintiffs seek an order finding defendants civilly  
3 liable to them under section 1810 of the Foreign Intelligence  
4 Surveillance Act ("FISA"), 50 USC §§ 1801-71, for eavesdropping on  
5 their telephone conversations without a FISA warrant. In the  
6 course of lengthy proceedings in this court and the court of  
7 appeals, described more fully in the decision that follows, this  
8 court determined that: FISA affords civil remedies to "aggrieved  
9 persons" who can show they were subjected to warrantless domestic  
10 national security surveillance; FISA takes precedence over the  
11 state secrets privilege in this case; a prima facie case of  
12 unlawful electronic surveillance under FISA requires plaintiffs to  
13 present to the court specific facts based on non-classified  
14 evidence showing that they are "aggrieved persons"; and plaintiffs  
15 have met their burden of establishing their "aggrieved person"  
16 status using non-classified evidence. Because defendants denied  
17 plaintiffs' counsel access to any classified filings in the  
18 litigation, even after top secret clearances were obtained for  
19 plaintiffs' counsel and protective orders suitable for top secret  
20 documents proposed, the court directed the parties to conduct this  
21 phase of the litigation without classified evidence. Both  
22 plaintiffs' motion for summary judgment of liability and  
23 defendants' cross-motions for dismissal and for summary judgment  
24 were, therefore, based entirely on non-classified evidence.

25 The court now determines that plaintiffs have submitted,  
26 consistent with FRCP 56(d), sufficient non-classified evidence to  
27 establish standing on their FISA claim and to establish the absence  
28 of any genuine issue of material fact regarding their allegation of

1 unlawful electronic surveillance; plaintiffs are therefore entitled  
2 to summary judgment in their favor on those matters. Defendants'  
3 various legal arguments for dismissal and in opposition to  
4 plaintiffs' summary judgment motion lack merit: defendants have  
5 failed to meet their burden to come forward, in response to  
6 plaintiffs' prima facie case of electronic surveillance, with  
7 evidence that a FISA warrant was obtained, that plaintiffs were not  
8 surveilled or that the surveillance was otherwise lawful.

9           In the absence of a genuine issue of material fact  
10 whether plaintiffs were subjected to unlawful electronic  
11 surveillance within the purview of FISA and for the reasons fully  
12 set forth in the decision that follows, plaintiffs' motion for  
13 summary judgment on the issue of defendants' liability under FISA  
14 is GRANTED. Defendants' motion to dismiss the amended complaint  
15 for lack of jurisdiction is DENIED and defendants' cross-motion for  
16 summary judgment is DENIED. Because the court has determined that  
17 the sole defendant sued in both official and individual capacities  
18 acted wholly in his official capacity and not as an individual, the  
19 individual-capacity claims are DISMISSED.

20 \\  
21 \\  
22 \\  
23 \\  
24 \\  
25 \\  
26 \\  
27 \\  
28 \\

DECISION

1  
2 Contending that United States government officials acting  
3 without warrants intercepted and eavesdropped on their  
4 international telephone conversations, plaintiffs Al-Haramain  
5 Islamic Foundation, Inc, an Oregon nonprofit corporation ("Al-  
6 Haramain"), and Wendell Belew and Asim Ghafoor, individuals who  
7 allege they are United States citizens and attorneys for Al-  
8 Haramain, seek summary judgment of liability on their FISA claim.  
9 Doc #657/099.<sup>1</sup> Defendants, certain high-ranking government  
10 officials and associated government agencies, oppose plaintiffs'  
11 motion and bring their fourth motion for dismissal and/or summary  
12 judgment. Doc #668/103. In compliance with the court's orders of  
13 June 3 and June 5, 2009, Doc #643/096, the parties have presented  
14 only non-classified evidence to the court in support of these  
15 motions. Upon consideration of that evidence and the arguments  
16 presented by the parties, the court now GRANTS plaintiffs' motion  
17 and DENIES defendants' motions. The court on its own motion  
18 dismisses all claims against defendant FBI Director Robert Mueller  
19 in his individual capacity.

20  
21 I

22 Plaintiffs filed their lawsuit in the United States  
23 District Court for the District of Oregon on February 28, 2006.  
24 Their complaint alleged that plaintiffs had been subject to  
25 warrantless electronic surveillance and sought civil damages under  
26

---

27 <sup>1</sup> Documents will be cited both to the MDL docket number (No  
28 M 06-1791) and to the individual docket number (No C 07-0109) in the  
following format: Doc #xxx/yyy.

1 section 1810 of the Foreign Intelligence Surveillance Act, 50 USC  
2 §§ 1801-71 (West 2009) ("FISA"). Plaintiffs also alleged  
3 violations of the separation of powers principle, the First, Fourth  
4 and Sixth Amendments of the United States Constitution and the  
5 International Covenant on Civil and Political Rights. Along with  
6 their complaint, plaintiffs filed under seal a copy of what has  
7 been referred to throughout this litigation as the "Sealed  
8 Document," a classified document that had inadvertently been  
9 disclosed by defendant Office of Foreign Assets Control ("OFAC") to  
10 counsel for Al-Haramain as part of a production of unclassified  
11 documents relating to Al-Haramain's designation as a "Specially  
12 Designated Global Terrorist" ("SDGT") organization.<sup>2</sup> Al-Haramain  
13 Islamic Foundation, Inc v Bush, 451 F Supp 2d 1215, 1218 (D Or  
14 2006). The previous phases of this litigation largely focused on  
15 whether plaintiffs could use the Sealed Document.

16 Defendants filed their first motion for dismissal or for  
17 summary judgment, arguing that the Sealed Document could not be  
18 used in the litigation and that the common-law state secrets  
19 privilege ("SSP") required dismissal of the case. Id at 1217. The  
20 Oregon district court (King, J) denied the motion, explaining that  
21 "plaintiffs should have an opportunity to establish standing and  
22 make a prima facie case, even if they must do so in camera." Id at  
23 1226-27. The court noted that "plaintiffs need some information in  
24 the Sealed Document to establish their standing and a prima facie  
25 case, and they have no other available source for this

---

27 <sup>2</sup> Under Executive Order 13224, a SDGT designation authorizes the  
28 Department of the Treasury to block assets and prohibit transactions  
with designated individuals and organizations.

1 information," id at 1221, and that given defendants' many public  
2 acknowledgments of the warrantless electronic surveillance program  
3 beginning in 2005, the program itself was not a secret. Id at  
4 1221-23. Nonetheless, the court determined that the Sealed  
5 Document remained highly classified, ordered plaintiffs to hand  
6 over all copies of the Sealed Document to the court, refused media  
7 requests to unseal records and plainly contemplated maintaining the  
8 secrecy of the Sealed Document while proceeding with the  
9 litigation. Id at 1229, 1232.

10 The Oregon district court declined to reach the question  
11 whether "FISA preempts the [SSP]." Id at 1229. The court  
12 observed: "[t]o accept the government's argument that Section  
13 1806(f) is only applicable when the government intends to use  
14 information against a party would nullify FISA's private remedy  
15 [under section 1810] and would be contrary to the plain language of  
16 Section 1806(f)." Id at 1231. The court certified its other  
17 rulings for interlocutory appeal. During the pendency of the  
18 appeal, this case was reassigned by the Judicial Panel on  
19 Multidistrict Litigation (MDL) to the undersigned.

20 The court of appeals considered three issues on  
21 interlocutory review: (1) whether the very subject matter of the  
22 litigation is a state secret; (2) whether Al-Haramain can establish  
23 standing to bring suit, absent the Sealed Document; and (3) whether  
24 Al-Haramain can establish a prima facie case, and the government  
25 can defend against Al-Haramain's assertions, without resorting to  
26 state secrets. In a footnote, the court of appeals observed that  
27 the third issue had not been addressed by the district court. 507  
28 F3d at 1197 & n 4.

1           As to the first issue, the court of appeals held that  
2 while Al-Haramain's case involved privileged information, "that  
3 fact alone does not render the very subject matter of the action a  
4 state secret" and affirmed the district court's denial of dismissal  
5 on that basis. 507 F3d at 1201.

6           The court of appeals determined that defendants had  
7 properly invoked the SSP and, based on Al-Haramain's "showing of  
8 necessity" or "admittedly substantial need for the document to  
9 establish its case," quoting United States v Reynolds, 345 US 1, 10  
10 (1953), conducted an in camera review of the Sealed Document. 507  
11 F3d at 1203. Based on that review, the court wrote: "We are  
12 satisfied that the basis for the privilege is exceptionally well  
13 documented" and that disclosure of "information concerning the  
14 Sealed Document and the means, sources and methods of intelligence  
15 gathering in the context of this case would undermine the  
16 government's capabilities and compromise national security." 507  
17 F3d at 1204. The court of appeals then held: "The Sealed  
18 Document, its contents, and any individuals' memories of its  
19 contents, even well-reasoned speculation as to its contents, are  
20 completely barred from further disclosure in this litigation by the  
21 common law [SSP]." Id.

22           The court of appeals next turned to the question of Al-  
23 Haramain's standing and determined that plaintiffs could not  
24 establish standing to proceed with their lawsuit without the Sealed  
25 Document because they could not establish a "concrete and  
26 particularized" injury-in-fact under the principles set forth in  
27 Lujan v Defenders of Wildlife, 504 US 555 (1992), unless the courts  
28 determined that FISA, rather than the SSP, governed this case:

1 "Al-Haramain cannot establish that it has standing, and its claims  
2 must be dismissed, unless FISA preempts the [SSP]." 507 F3d at  
3 1205. As noted above, the Oregon district court had declined to  
4 rule on this complex issue, which now had become pivotal to the  
5 fate of the litigation.

6 On the basis of the rule set forth in Singleton v Wulff,  
7 428 US 106 (1976), that a court of appeals should not ordinarily  
8 consider an issue not ruled on in the district court, the court of  
9 appeals declined to decide whether FISA preempts the SSP. Instead,  
10 writing that "the FISA issue remains central to Al-Haramain's  
11 ability to proceed with this lawsuit," it remanded the case to this  
12 court to consider that question "and for any proceedings collateral  
13 to that determination." 507 F3d at 1206. The court of appeals did  
14 not comment either on the likely consequences of a determination by  
15 this court that FISA preempted the SSP for this litigation in  
16 general or for the Sealed Document's role in this litigation in  
17 particular.

18 Following remand, defendants filed a second motion to  
19 dismiss plaintiffs' claims (Doc #432/017), asserting, inter alia,  
20 that: FISA did not preempt the SSP; the SSP presented  
21 insurmountable obstacles to plaintiffs' action; plaintiffs lacked  
22 standing to seek prospective relief; and the doctrine of sovereign  
23 immunity barred recovery under FISA's section 1810. Plaintiffs  
24 argued that FISA preempted the SSP and that dismissal would be  
25 improper. By order dated July 2, 2008, the court held that FISA's  
26 legislative history unequivocally established Congress's intent that  
27 FISA preempt or displace the SSP in cases within the reach of its  
28 provisions. In Re National Security Agency Telecommunications



1 Records Litigation ("In re NSA Telecom Litigation"), 564 F Supp 2d  
2 1109, 1124 (N D Cal 2008). The court noted, however, the  
3 substantial obstacles facing any litigant hoping to bring an action  
4 for damages under FISA's section 1810, which the court described as  
5 "not user-friendly." Id at 1136.

6 Specifically, the court noted, unlike the electronic  
7 surveillance carried out by federal law enforcement agencies under  
8 the general wiretap statute, Title III, 18 USC §§ 2510-22, much of  
9 the electronic surveillance undertaken for national security  
10 purposes does not result in criminal proceedings in which the  
11 existence of the surveillance evidence would be disclosed as a  
12 matter of course. Moreover, unlike Title III, FISA does not require  
13 that the target of an electronic surveillance ever be informed of  
14 its occurrence. The July 2 order detailed FISA's provisions  
15 requiring certain agencies to report periodically to Congress on the  
16 number of warrants applied for and other actions taken under FISA.  
17 The July 2 order, meanwhile, underscored the absence of any regular  
18 legal mechanism by which an individual who had been subject to  
19 electronic surveillance within FISA's purview could learn of the  
20 surveillance. 564 F Supp 2d at 1125-30.

21 A further obstacle to litigation under section 1810, the  
22 court noted, is "the lack of a practical vehicle for obtaining  
23 and/or using admissible evidence \* \* \* sufficient to establish  
24 standing to proceed as an aggrieved party and, later, to withstand  
25 motions for dismissal and/or summary judgment." 564 F Supp 2d at  
26 1131. The court, however, noted that FISA's section 1806(f)  
27 provides for United States district courts to conduct in camera  
28 reviews of "applications or orders or other materials relating to

1 electronic surveillance" in certain narrowly-defined circumstances  
2 "to determine whether the surveillance of the aggrieved person was  
3 lawfully authorized and conducted." 564 F Supp 2d at 1131 (quoting  
4 section 1806(f)). Hence, section 1806(f) could be used to discover  
5 evidence of electronic surveillance for purposes of establishing  
6 "aggrieved person" status within the meaning of FISA's  
7 section 1801(k) if an individual had a "colorable basis for  
8 believing he or she had been surveilled." 564 F Supp 2d at 1133.  
9 50 USC § 1801(k) defines an "aggrieved person" as "a person who is  
10 the target of an electronic surveillance or any other person whose  
11 communications or activities were subject to electronic  
12 surveillance." The court ruled that plaintiffs "must first  
13 establish 'aggrieved person' status without the use of the Sealed  
14 Document and may then bring a 'motion or request' under § 1806(f)  
15 \* \* \*." Id at 1134.

16 Noting that the civil liability provision of Title III (18  
17 USC § 2520) had been in effect for a decade when FISA was enacted  
18 and therefore could have served as a model had Congress intended  
19 FISA's civil liability provision to resemble Title III's, the court  
20 wrote that although "Congress enacted section 1810 in order to  
21 provide a private cause of action for unlawful surveillance, section  
22 1810 bears but faint resemblance to 18 USC section 2520. While the  
23 court must not interpret and apply FISA in a way that renders  
24 section 1810 superfluous \* \* \* the court must be wary of unwarranted  
25 interpretations of FISA that could make section 1810 a more robust  
26 remedy than Congress intended it to be." 564 F Supp 2d at 1135.  
27 Accordingly, the court determined that among approaches employed  
28 within the Ninth Circuit for making out a prima facie case of

1 electronic surveillance, the more stringent end of the spectrum was  
2 appropriate for FISA cases and that "plaintiffs' showing thus far  
3 with the Sealed Document excluded falls short of the mark." Id at  
4 1134-35. The court dismissed plaintiffs' complaint with leave to  
5 amend, explaining: "[t]o proceed with their FISA claim, plaintiffs  
6 must present to the court enough specifics based on non-classified  
7 evidence to establish their 'aggrieved person' status under FISA."  
8 Id.

9 Plaintiffs timely filed an amended pleading, the First  
10 Amended Complaint ("FAC"). Doc #458/035. It named generally the  
11 same defendants but replaced one office-holder with his replacement  
12 and specified that plaintiffs were suing one defendant in both his  
13 official and individual capacities.<sup>3</sup> Id at 1-2 & ¶¶ 7-13. The FAC  
14 retained the same six causes of action as the original complaint,  
15 including, as relevant here, one cause of action under FISA  
16 encompassing both a request under 50 USC § 1806(g) for suppression  
17 of evidence obtained through warrantless electronic surveillance and  
18 a claim for damages under section 1810. Doc #458/035 at 14.

19 The most noteworthy change in the FAC was the ten-fold  
20 expansion of plaintiffs' factual recitation, which newly detailed a  
21 number of public pronouncements by government officials and  
22 publicly-available press reports disclosing post-9/11 warrantless  
23 electronic surveillance activities, as well as events publicly known  
24 about these activities, such as a much-publicized hospital room  
25 confrontation between former Attorney General John Ashcroft and

---

26  
27 <sup>3</sup> Pursuant to FRCP 25(d), President Barack H Obama is now  
28 substituted for former President George W Bush because a suit against  
a government official in his or her official capacity is deemed to be  
against the current holder of the office.

1 then-White House counsel (later Attorney General) Alberto Gonzales.  
2 Id at 5. The FAC also recited a sequence of events pertaining  
3 directly to the government's investigations of Al-Haramain, a sine  
4 qua non, in the court's view, to establishing their "aggrieved  
5 person" status.

6 The FAC may be briefly summarized in the following two  
7 paragraphs:

8 Various government officials admitted the existence of a  
9 program of warrantless surveillance under which the NSA was  
10 authorized by the President to intercept certain international  
11 communications in which one party was outside the United States and  
12 one party was reasonably believed to be a member or agent of  
13 international terrorist network al-Qaeda or an affiliated terrorist  
14 organization. FAC ¶¶ 16-18. Al-Haramain's assets were blocked by  
15 the Treasury Department in February 2004 pending an investigation of  
16 "possible crimes relating to currency reporting and tax laws," but  
17 neither OFAC's press release nor March 2004 congressional testimony  
18 of a FBI official about the investigation suggested that Al-Haramain  
19 had links to al-Qaeda. FAC ¶¶ 24-26, 30. In June 2004, an OFAC  
20 official testified in Congress that in investigating terrorist  
21 financing, OFAC used classified information sources. FAC ¶ 28.

22 Between March and June 2004, several phone conversations  
23 took place between plaintiffs Belew and Ghafoor in the United States  
24 on the one hand and Soliman al-Buthi, a director of Al-Haramain  
25 located in Saudi Arabia, on the other; in these conversations, the  
26 participants made reference to various individuals associated with  
27 Osama bin-Laden, the founder of al-Qaeda. FAC ¶¶ 32-35. In  
28 September 2004, OFAC formally designated Al-Haramain as a SDGT

1 organization and, in a press release, specifically cited "direct  
2 links between the US branch [of Al-Haramain]" and Osama bin-Laden;  
3 this was the first "public claim of purported links between [] Al-  
4 Haramain and [] bin-Laden." FAC ¶¶ 30-35, 39-40. The FBI and the  
5 Treasury Department have stated publicly that they relied on  
6 classified information, including "surveillance" information, to  
7 designate Al-Haramain as a terrorist organization associated with  
8 al-Qaeda and bin-Laden. FAC ¶¶ 36-43. In testimony before Congress  
9 in 2006 and 2007, top intelligence officials including defendant  
10 Keith B Alexander stated that a FISA warrant is required before  
11 certain wire communications in the United States can be intercepted.  
12 FAC ¶ 48. In a separate criminal proceeding against Ali al-Timimi  
13 in 2005, the government disclosed that it had intercepted  
14 communications between al-Timimi and Al-Haramain's director  
15 al-Buthi. FAC ¶ 51.

16 The FAC's allegations also appear in the court's statement  
17 of material facts not genuinely at issue in section III B, infra.

18 On September 30, 2008, the parties filed cross-motions.  
19 Plaintiffs moved under FISA's section 1806(f) for discovery of  
20 evidence pertaining to the lawfulness of the alleged surveillance.  
21 Doc #472/046. Defendants brought their third motion to dismiss or,  
22 in the alternative, for summary judgment. Doc #475/049.

23 In support of their motion under section 1806(f), as noted  
24 above, plaintiffs submitted evidence substantiating the allegations  
25 of their FAC. In addition to numerous documents drawn from United  
26 States government websites and the websites of news organizations  
27 (exhibits to Doc #472-1/046-1, passim), plaintiffs submitted the  
28 sworn declarations of plaintiffs Belew and Ghafoor attesting to the

1 specifics and contents of the telephone conversations described in  
2 paragraphs 32 and 33 of the FAC. Doc ##472-6/046-6, 472-7/046-7.

3 Defendants' third motion to dismiss (Doc #475/049) largely  
4 ignored the court's prior rulings regarding FISA's displacement of  
5 the SSP in this case and the necessity of giving effect to Congress'  
6 intent in enacting FISA's section 1810. Instead, defendants  
7 reiterated standing arguments made previously (at 16-17), asserted  
8 that "the law does not support an attempt to adjudicate whether the  
9 plaintiffs are 'aggrieved persons' in the face of the Government's  
10 successful [SSP] assertion" (at 27-30) and contended that the  
11 adjudication of 'aggrieved person' status for any or all plaintiffs  
12 could not be accomplished without revealing information protected by  
13 the SSP. As for the standard required for a plaintiff to establish  
14 "aggrieved person" status under section 1810, defendants contended  
15 that only the government's frank admission of the unlawful  
16 electronic surveillance and active cooperation in the litigation  
17 against it under FISA would suffice. They also requested  
18 interlocutory appellate review of the court's orders following  
19 remand. Id at 31.

20 In its order of January 5, 2009, the court ruled that  
21 plaintiffs had made out a prima facie case that they are "aggrieved  
22 persons" who had been subjected to "electronic surveillance" within  
23 the meaning of section 1810. In doing so, the court employed the  
24 analysis and standard for establishing a prima facie case of  
25 electronic surveillance used by the Ninth Circuit in United States v  
26 Alter, 482 F2d 1016 (9th Cir 1973) (applying 18 USC § 3504(a)(1))  
27 and more recently by the DC Circuit in In re Sealed Case (Horn v  
28 Huddle), 494 F3d 139 (DC Cir 2007), a case in which, as in Al-

1 Haramain, the plaintiff sought damages under FISA's section 1810.

2 In re NSA Telecom Litigation, 595 F Supp 2d at 1083-84.

3           The court explained that the approach employed in Alter  
4 was appropriate in this case arising under FISA's section 1810 given  
5 the lack of precedent in the Ninth Circuit because the Alter test's  
6 "stringency makes it appropriate in cases arising in the somewhat  
7 more restrictive environment where national security dimensions are  
8 present." 595 F Supp 2d at 1084.

9           The court rejected defendants' contention that only when  
10 the government has openly acknowledged conducting warrantless  
11 electronic surveillance of an individual can that individual  
12 establish standing to sue:

13           The court declines to entertain further challenges to  
14 plaintiffs' standing; the July 2 order gave  
15 plaintiffs the opportunity to "amend their claim to  
16 establish that they are 'aggrieved persons' within  
17 the meaning of 50 USC § 1801(k)." Plaintiffs have  
18 alleged sufficient facts to withstand the  
19 government's motion to dismiss. To quote the Ninth  
20 Circuit in Alter, "[t]he [plaintiff] does not have to  
21 plead and prove his entire case to establish standing  
22 and to trigger the government's responsibility to  
23 affirm or deny." Contrary to defendants' assertions,  
24 proof of plaintiffs' claims is not necessary at this  
25 stage. The court has determined that the allegations  
26 "are sufficiently definite, specific, detailed, and  
27 nonconjectural, to enable the court to conclude that  
28 a substantial claim is presented."

22 595 F Supp 2d at 1085 (citations omitted). The court concluded:

23 "[w]ithout a doubt, plaintiffs have alleged enough to plead  
24 'aggrieved person' status so as to proceed to the next step in the  
25 proceedings under FISA's sections 1806(f) and 1810." Id at 1086.

26           The January 5 order announced several next steps in the  
27 litigation that were designed to prioritize two interests:

28 \\\

1 "protecting classified evidence from disclosure and enabling  
2 plaintiffs to prosecute their action." Id at 1089.

3 The court announced its intention to review the Sealed  
4 Document ex parte and in camera, then to issue an order stating  
5 whether plaintiffs could proceed — specifically, whether the Sealed  
6 Document established that plaintiffs were subject to electronic  
7 surveillance not authorized by FISA. The court explained:

8 As the court understands its obligation with regard  
9 to classified materials, only by placing and  
10 maintaining some or all of its future orders in this  
11 case under seal may the court avoid indirectly  
12 disclosing some aspect of the Sealed Document's  
13 contents. Unless counsel for plaintiffs are granted  
14 access to the court's rulings and, possibly, to at  
15 least some of defendants' classified filings,  
16 however, the entire remaining course of this  
17 litigation will be ex parte. This outcome would  
18 deprive plaintiffs of due process to an extent  
19 inconsistent with Congress's purpose in enacting  
20 FISA's sections 1806(f) and 1810.

21 595 F Supp 2d at 1089. The order directed the government to begin  
22 processing security clearances for members of plaintiffs' litigation  
23 team so that they would be able to read and respond to sealed  
24 portions of the court's future orders and, if necessary, some  
25 portion of defendants' classified filings.

26 The court also directed defendants to review their  
27 classified submissions to date and to determine whether the Sealed  
28 Document and/or any of defendants' classified submissions could be  
declassified. Upon completion of this review, defendants informed  
the court that nothing they had filed under seal during the three  
years in which the case had by then been pending could be  
declassified. Doc #577/078.

What followed were several months of which the defining  
feature was defendants' refusal to cooperate with the court's



1 orders punctuated by their unsuccessful attempts to obtain untimely  
2 appellate review. Expressing alarm that the January 5 order would  
3 result in the disclosure of privileged information without the  
4 opportunity for further review, defendants sought interlocutory and  
5 direct appeal. Doc #544/059; 545/060. The court denied  
6 defendants' request to certify the case for interlocutory review  
7 and the court of appeals dismissed defendants' appeal for lack of  
8 jurisdiction because no disclosure of classified information had  
9 been ordered by the court. Doc #562/071 and Al-Haramain Islamic  
10 Foundation, Inc v Obama, No 09-15266 (9th Cir February 27, 2009).

11 In response to the court's directive to "inform the court  
12 how [they intend] to comply with the January 5 order" (Doc #562/071  
13 at 3), defendants presented three similar-sounding alternatives,  
14 all of which appeared geared toward obtaining a stay of this  
15 court's proceedings pending review by the court of appeals. Doc  
16 #600/084 at 1-2. The court next ordered the parties to meet and  
17 confer regarding the entry of an appropriate protective order,  
18 noting that the United States District Court for the District of  
19 Columbia had successfully used protective orders for highly  
20 classified information in the In Re Guantánamo Bay Detainee  
21 Litigation, D DC No Misc 08-0442 TFH, and that defendants had given  
22 no reason why a such a protective order would not adequately  
23 protect the classified information at issue in this case. Id at 2.

24 Next, after the United States completed suitability  
25 determinations for two of plaintiffs' attorneys and found them  
26 suitable for top secret/secure compartmented information ("TS/SCI")  
27 clearances, government officials in one or more defendant agencies,  
28 including defendant Keith B Alexander, refused to cooperate with

1 the court's orders, asserting that plaintiffs' attorneys did not  
2 "need to know" the information that the court had determined  
3 plaintiffs attorneys would need in order to participate in the  
4 litigation. Declaration of Ariane E Cherlenko [NSA] in Support of  
5 Defendants' Motion of Stay Pending Appeal and for Certification of  
6 an Interlocutory Appeal, Doc #545-1/060-1 at 5. Moreover,  
7 according to the parties' joint submission regarding a protective  
8 order (Doc #626/089 at 35), defendants refused to agree to any  
9 terms of the protective order proposed by plaintiffs and refused to  
10 propose one of their own. Doc #630/090 at 3.

11           The court ordered defendants to show cause why, as a  
12 sanction for failing to obey the court's orders: (1) defendants  
13 should not be prohibited, under FRCP 37(b)(2)(ii), from opposing  
14 the liability component of plaintiffs' claim under 50 USC § 1810 —  
15 that is, from denying that plaintiffs are "aggrieved persons" who  
16 had been subjected to electronic surveillance; and (2) the court  
17 should not deem liability under 50 USC § 1810 established and  
18 proceed to determine the amount of damages to be awarded to  
19 plaintiffs. The court also ordered plaintiffs to submit a  
20 memorandum addressing whether it would be appropriate for them to  
21 file a motion for summary judgment on their FISA claim. Doc  
22 #630/090 at 3.

23           After hearing argument on the order to show cause, the  
24 court directed plaintiffs to move for summary judgment on their  
25 FISA claim relying only on non-classified evidence. See Doc  
26 #643/096. It further ordered that if and only if defendants were  
27 to rely upon the Sealed Document or other classified evidence in  
28 response, the court would enter a protective order and produce such

1 classified evidence to plaintiffs' counsel who have obtained  
2 security clearances. Id.

3 The instant cross-motions ensued.

4

5 II

6 Turning first to defendants' motion to dismiss,  
7 defendants move under Rule 12(b)(1) for dismissal of plaintiffs'  
8 FAC arguing that: (1) plaintiffs lack standing to obtain  
9 prospective declaratory or injunctive relief with respect to  
10 alleged warrantless surveillance under the Terrorist Surveillance  
11 Program ("TSP") because the TSP lapsed or was terminated in January  
12 2007 and (2) the court lacks jurisdiction to review plaintiffs'  
13 claim for retrospective damages against the United States under  
14 section 1810 of FISA, because section 1810 assertedly does not  
15 expressly waive the sovereign immunity of the United States.

16 Defendants' first argument for dismissal attacks  
17 plaintiffs' non-FISA claims, arguing that these claims seek only  
18 "prospective declaratory and injunctive relief against alleged TSP  
19 surveillance" and that such relief is not available because the TSP  
20 ended in January 2007. Doc #668/103 at 18-19. This mootness  
21 argument is essentially a re-tread of standing arguments made in  
22 March 2008 that were also based on the TSP's purported January 2007  
23 termination. Doc #432/017 at 17. Defendants further assert:  
24 "declaratory and injunctive relief are equitable and should for  
25 similar reasons be denied as a prudential matter." Doc #668/103 at  
26 19. But defendants' argument rests on a mistaken premise;  
27 plaintiffs' prayer for relief seeks various items of equitable  
28 relief, but most are not predicated on the continued existence of

1 the TSP or other wiretapping activities. Doc #458/035 at 16.  
2 Plaintiffs seek, for example, a declaration that defendants'  
3 warrantless surveillance of plaintiffs "is" unlawful, which may be  
4 construed to encompass past surveillance; and orders requiring  
5 defendants to turn over to plaintiffs, purge and/or destroy files  
6 and records containing information obtained by means of unlawful  
7 electronic surveillance. Defendants do not explain what prudential  
8 considerations would prohibit such equitable relief, and the court  
9 is aware of none.

10 Defendants' second argument for dismissal is a familiar  
11 one; indeed, defendants admit that they have made it before, noting  
12 that "the Government respectfully and briefly preserves its  
13 position that Section 1810 of the FISA does not waive the sovereign  
14 immunity of the United States." Doc #668/103. The court  
15 considered and ruled on this issue in its order of July 2, 2008:

16 It is, of course, true that section 1810 does not  
17 contain a waiver of sovereign immunity analogous to  
18 that in 18 USC section 2712(a) which expressly  
19 provides that aggrieved persons may sue the United  
20 States for unlawful surveillance in violation of Title  
21 III. But FISA directs its prohibitions to "Federal  
22 officers and employees" (see, e g, 50 USC §§ 1806,  
23 1825, 1845) and it is only such officers and employees  
24 acting in their official capacities that would engage  
25 in surveillance of the type contemplated by FISA. The  
26 remedial provision of FISA in section 1810 would  
27 afford scant, if any, relief if it did not lie against  
28 such "Federal officers and employees" carrying out  
their official functions. Implicit in the remedy that  
section 1810 provides is a waiver of sovereign  
immunity.

25 In re NSA Telecom Litigation, 564 F Supp 2d at 1125. The court's  
26 view of this issue has not changed.

27 Accordingly, the motion to dismiss for lack of  
28 jurisdiction is DENIED.

1 III

2 The parties' cross-motions for summary judgment present  
3 more substantial questions. Rule 56(a) of the Federal Rules of  
4 Civil Procedure provides: "A party claiming relief may move, with  
5 or without supporting affidavits, for summary judgment on all or  
6 part of the claim." Rule 56(d)(2) provides: "An interlocutory  
7 summary judgment may be rendered on liability alone, even if there  
8 is a genuine issue on the amount of damages." Rule 56(d)(1),  
9 moreover, provides that "the court should, to the extent  
10 practicable, determine what material facts are not genuinely at  
11 issue."

12 Plaintiffs' motion seeks summary adjudication of two  
13 issues: (1) plaintiffs' Article III standing and (2) defendants'  
14 liability under FISA's civil liability provision, 50 USC § 1810.  
15 Doc #657/099. Defendants cross-move for summary judgment on  
16 plaintiffs' FISA claim and "any remaining claim," arguing that:  
17 (1) the Ninth Circuit's mandate in this case "forecloses"  
18 plaintiffs' motion; (2) plaintiffs' evidence is too conjectural or  
19 circumstantial to establish that plaintiffs are "aggrieved persons"  
20 for FISA purposes; and (3) all other potentially relevant evidence  
21 — including whether the government possessed a FISA warrant  
22 authorizing surveillance of plaintiffs — is barred from disclosure  
23 by operation of the SSP. Doc #668/103.

24 Of particular note concerning these motions is the  
25 principle that: "[W]hen parties make cross-motions for summary  
26 judgment, they are not thereby relieved from filing materials in  
27 opposition to the other party's motion." William W Schwarzer, Alan  
28 Hirsch & David J Barrans, The Analysis and Decision of Summary

1 Judgment Motions: A Monograph on Rule 56 of the Federal Rules of  
2 Civil Procedure 74 (Federal Judicial Center 1991).

3  
4 A

5 Plaintiffs have submitted twenty-eight public documents  
6 and two declarations as evidence in support of their motion.  
7 Defendants had submitted many of the same documents in support of  
8 their third motion to dismiss and for summary judgment (Doc  
9 #475/049) (see section III B, infra) and plaintiffs had submitted  
10 all but two of the items in support of plaintiffs' motion for  
11 discovery under FISA section 1806(f) (see declaration of Jon B  
12 Eisenberg in support of motion pursuant to 50 USC § 1806(f) to  
13 discover or obtain material relating to electronic surveillance,  
14 Doc #472-1/046-1). Not previously submitted are the government's  
15 so-called "white paper" by the United States Department of Justice  
16 dated January 19, 2006 under the heading "Legal Authorities  
17 Supporting the Activities of the [NSA] Described by the President"  
18 (Declaration of Jon B Eisenberg ("Eisenberg Decl") Exh AA, Doc  
19 #657-5/099-5) and the amicus brief submitted in ACLU v NSA, 493 F2d  
20 644 (6th Cir 2007), by the Center for National Security Studies and  
21 the Constitution Project (Eisenberg Decl Exh BB, Doc #657-5/099-5).  
22 These new items do not bear specifically on defendants' alleged  
23 surveillance of Al-Haramain. Plaintiffs also submit the  
24 declarations of plaintiffs Asim Ghafoor and Wendell Belew (Doc ##  
25 657/099-6; 657/099-7). The substance of these declarations is  
26 identical to that of the Ghafoor and Belew declarations submitted  
27 in support of plaintiffs' motion under section 1806(f). Doc ##472-  
28 6/046-6; 472-7/046-7.



1 because the Sealed Document, which Al-Haramain  
2 alleges proves that its members were unlawfully  
3 surveilled, is protected by the [SSP]. At oral  
4 argument, counsel for Al-Haramain essentially  
5 conceded that Al-Haramain cannot establish standing  
6 without reference to the Sealed Document. When asked  
7 if there is data or information beyond the Sealed  
8 Document that would support standing, counsel offered  
9 up no options, hypothetical or otherwise. Thus,  
10 Al-Haramain has indicated that its ability to  
11 establish injury in fact hinges entirely on a  
12 privileged document. It is not sufficient for  
13 Al-Haramain to speculate that it might be subject to  
14 surveillance under the TSP simply because it has been  
15 designated a "[SDGT]."

9 \* \* \*

10 Because we affirm the district court's conclusion  
11 that the Sealed Document, along with data concerning  
12 surveillance, are privileged, and conclude that no  
13 testimony attesting to individuals' memories of the  
14 document may be admitted to establish the contents of  
15 the document, Al-Haramain cannot establish that it  
16 has standing, and its claims must be dismissed,  
17 unless FISA preempts the [SSP].

15 Al-Haramain, 507 F3d at 1205.

16 Defendants' enthusiasm for these passages is  
17 understandable, but the court does not agree that plaintiffs are  
18 now "foreclosed" from attempting to establish standing without the  
19 Sealed Document. It is apparent from the opinion that the court of  
20 appeals, having asked plaintiffs' counsel whether the Sealed  
21 Document was necessary for plaintiffs to establish standing, simply  
22 did not contemplate plaintiffs' later attempt, in light of newly-  
23 available public evidence, to build a non-classified evidentiary  
24 basis for their suit.

25 During oral argument on the instant cross-motions, the  
26 court asked plaintiffs' attorney about the apparent discrepancy  
27 between his representation to the court of appeals in August 2007  
28 that plaintiffs required the Sealed Document to establish standing



1 and his contention in the district court in 2009 that plaintiffs  
2 could establish standing without classified evidence of any kind.

3 At oral argument counsel for Al-Haramain  
4 essentially conceded that Al-Haramain cannot  
5 establish standing without reference to the Sealed  
6 Document. What's the background of that? And what  
7 is the effect of that statement for purpose[s] of  
8 the standing determination here?

9 RT September 23, 2009, as amended Doc #712/114<sup>4</sup> at 26-27.

10 Plaintiffs' counsel responded that he had not attempted to marshal  
11 public evidence because the Oregon district court had ruled that  
12 plaintiffs could use the Sealed Document. Counsel went on to  
13 explain that there were two crucial pieces of public evidence that  
14 he had not discovered as of the August 2007 oral argument: (1) a  
15 speech given on October 22, 2007 by FBI Deputy Director John S  
16 Pistole to the American Banker's Association stating that, in  
17 developing OFAC's case against Al-Haramain, "we used other  
18 investigative tools — like records checks, surveillance, and  
19 interviews of various subjects" (see Eisenberg Decl Exh S, Doc  
20 #657-3/099-3 at 51) and (2) "the testimony by members of the Bush  
21 administration before Congress that told us how they intercept  
22 communications, which is they do it on a wire from routing stations  
23 within the United States, which makes it electronic surveillance  
24 within the meaning of FISA \* \* \*." Doc #712/114 at 28. Counsel  
25 further expressed doubt that the court of appeals could have

---

26 <sup>4</sup> The original transcript of the September 23, 2009 hearing was  
27 filed on October 6, 2009 (Doc #711/107). At the stipulated request  
28 of the parties, the transcript was corrected and an amended version  
of the transcript was filed on February 22, 2010 (Doc #712/114).  
Citations herein to the record of proceedings at the September 23,  
2009 hearing are to the amended transcript.

1 anticipated that the FBI would "post on the FBI's website an  
2 admission like that." Id at 29.

3           Simply put, to deem plaintiffs "foreclosed" by part IV of  
4 the court of appeals' 2007 opinion from building their case with  
5 later-disclosed, publicly-available evidence — especially in light  
6 of defendants' intransigence following the court's January 5, 2009  
7 order and the limited progress made to date along the normal arc of  
8 civil litigation — would violate basic concepts of due process in  
9 our system of justice. Defendants' reading of part IV of the court  
10 of appeals' opinion fails to account for these circumstances and  
11 would lead to a crabbed result the court of appeals could not have  
12 contemplated or intended.

13  
14   2

15           Defendants' second major contention in opposition to  
16 plaintiffs' motion is that defendants cannot — and therefore  
17 should not be required to — respond to plaintiffs' prima facie  
18 case by showing that "plaintiffs' alleged electronic surveillance  
19 was authorized by a FISA warrant, or \* \* \* plaintiffs were not in  
20 fact electronically surveilled." Doc #668/103 at 10. "[T]his,"  
21 defendants argue, "is precisely what was precluded by the Ninth  
22 Circuit when it squarely held that 'information as to whether the  
23 government surveilled [plaintiffs]' is protected by the [SSP] and  
24 is categorically barred from use in this litigation." Id, quoting  
25 Al-Haramain, 507 F3d at 1203-04. Defendants' reading of the court  
26 of appeals' opinion would require the court to impose a result  
27 contrary to the intent of Congress in enacting FISA and, indeed,  
28 \\

1 contrary to the court of appeals' interpretation of FISA in Al-  
2 Haramain.

3 Under defendants' theory, executive branch officials may  
4 treat FISA as optional and freely employ the SSP to evade FISA, a  
5 statute enacted specifically to rein in and create a judicial check  
6 for executive-branch abuses of surveillance authority. For  
7 example, the House Report on FISA noted: "In the past several  
8 years, abuses of domestic national security surveillances have been  
9 disclosed. This evidence alone should demonstrate the  
10 inappropriateness of relying solely on [E]xecutive branch  
11 discretion to safeguard civil liberties." Foreign Intelligence  
12 Surveillance Act of 1978, H R Rep No 95-1283 Part I at 21. See  
13 also In Re NSA Telecom Litigation, 564 F Supp 2d at 1117-24.

14 Perhaps sensitive to the obvious potential for  
15 governmental abuse and overreaching inherent in defendants' theory  
16 of unfettered executive-branch discretion, defendants protest that  
17 "the Government does not rely on an assertion of the [SSP] to cover-  
18 up alleged unlawful conduct." Doc #668/103 at 37. Rather, they  
19 assert, it does so because "[d]isclosure of whether or not  
20 communications related to al Qaeda have been intercepted, when, how,  
21 of who [sic], and under what authority would reveal methods by which  
22 the government has or has not monitored certain communications  
23 related to that organization." Id. By "under what authority,"  
24 presumably, defendants mean "whether or not pursuant to a FISA  
25 warrant" — the very heart of the cause of action under 50 USC  
26 § 1810. This fact — the presence or absence of a FISA warrant —  
27 is something defendants assert may be cloaked by the SSP,  
28 notwithstanding this court's July 2008 determination, pursuant to

1 the court of appeals' remand instructions, that FISA displaces the  
2 SSP in cases within the reach of its provisions and that "this is  
3 such a case." In re NSA Telecom Litigation, 564 F Supp 2d at 1124.

4 In an impressive display of argumentative acrobatics,  
5 defendants contend, in essence, that the court's orders of June 3  
6 and June 5, 2009 setting the rules for these cross-motions make  
7 FISA inapplicable and that "the Ninth Circuit's rulings on the  
8 privilege assertion therefore control the summary judgment motions  
9 now before the Court." Doc #672/105 at 6. In other words,  
10 defendants contend, this is not a FISA case and defendants are  
11 therefore free to hide behind the SSP all facts that could help  
12 plaintiffs' case. In so contending, defendants take a flying leap  
13 and miss by a wide margin. Defendants forewent the opportunity to  
14 invoke the section 1806(f) procedures Congress created in order for  
15 executive branch agencies to establish "the legality of the  
16 surveillance," including whether a FISA warrant for the  
17 surveillance existed. Rather, in response to plaintiffs' motion  
18 under section 1806(f), defendants declined to make the submissions  
19 provided for by that section and instead asserted:

20 The discretion to invoke Section 1806(f) belongs to  
21 the Attorney General, and under the present  
22 circumstances — where there has been no final  
23 determination that those procedures apply in this case  
24 to overcome the Government's successful assertion of  
25 privilege and where serious harm to national security  
26 is at stake — the Attorney General has not done so.

24 Doc #499/051 at 26-27 and 595 F Supp 2d at 1088. Similarly,  
25 defendants could readily have availed themselves of the court's  
26 processes to present a single, case-dispositive item of evidence at  
27 one of a number of stages of this multi-year litigation: a FISA  
28 warrant. They never did so, and now illogically assert that the

1 existence of a FISA warrant is a fact within the province of the  
2 SSP, not FISA.

3 But the court of appeals' opinion contemplated that the  
4 case would move forward under FISA if FISA were deemed to displace  
5 the SSP. The court of appeals did not contemplate that the  
6 judicial process should be intentionally stymied by defendants'  
7 tactical avoidance of FISA:

8 Under FISA, 50 USC §§ 1801 et seq, if an "aggrieved  
9 person" requests discovery of materials relating to  
10 electronic surveillance, and the Attorney General  
11 files an affidavit stating that the disclosure of  
12 such information would harm the national security of  
13 the United States, a district court may review in  
14 camera and ex parte the materials "as may be  
15 necessary to determine whether the surveillance of  
16 the aggrieved person was lawfully authorized and  
17 conducted." 50 USC § 1806(f). The statute further  
18 provides that the court may disclose to the aggrieved  
19 person, using protective orders, portions of the  
20 materials "where such disclosure is necessary to make  
21 an accurate determination of the legality of the  
22 surveillance." Id. The statute, unlike the common  
23 law [SSP], provides a detailed regime to determine  
24 whether surveillance "was lawfully authorized and  
25 conducted." Id.

26 \* \* \*

27 [T]he FISA issue remains central to Al-Haramain's  
28 ability to proceed with this lawsuit.

29 Al-Haramain, 507 F3d at 1205-06.

30 At oral argument, plaintiffs' counsel argued that the  
31 burden was on defendants to show that they had a warrant because,  
32 given that the TSP was in place "in order to evade FISA, \* \* \* why  
33 on earth would [defendants] get a FISA warrant to perform  
34 surveillance that they believed they had no need to get a FISA  
35 warrant for?" and because knowledge of the existence or non-  
36 existence of a FISA warrant was "within [defendants'] exclusive  
37

38 \\

1 knowledge." Doc #712/114 at 8. The court finds merit in these  
2 arguments.

3 In summary, because FISA displaces the SSP in cases  
4 within its purview, the existence of a FISA warrant is a fact that  
5 cannot be concealed through the device of the SSP in FISA  
6 litigation for the reasons stated in the court's July 8, 2008  
7 order, 564 F Supp 2d 1109. Plaintiffs have made out a prima facie  
8 case and defendants have foregone multiple opportunities to show  
9 that a warrant existed, including specifically rejecting the method  
10 created by Congress for this very purpose. Defendants' possession  
11 of the exclusive knowledge whether or not a FISA warrant was  
12 obtained, moreover, creates such grave equitable concerns that  
13 defendants must be deemed estopped from arguing that a warrant  
14 might have existed or, conversely, must be deemed to have admitted  
15 that no warrant existed. The court now determines, in light of all  
16 the aforementioned points and the procedural history of this case,  
17 that there is no genuine issue of material fact whether a warrant  
18 was obtained for the electronic surveillance of plaintiffs. For  
19 purposes of this litigation, there was no such warrant for the  
20 electronic surveillance of any of plaintiffs.

21  
22 3

23 Defendants' third argument is essentially to quarrel with  
24 the court's finding that plaintiffs have made out a prima facie  
25 case of electronic surveillance, asserting that plaintiffs'  
26 "evidence falls far short of establishing that the Government  
27 conducted warrantless electronic surveillance under the TSP of  
28 \\

1 plaintiffs' conversations in March and April 2004." Doc #668/103  
2 at 28.

3           Because defendants' argument rests on a faulty  
4 understanding of the parties' burdens as discussed in the preceding  
5 section, a lengthy discussion of these points is not warranted.  
6 The following discussion of defendants' handling of certain items  
7 of evidence is included for the sake of completeness and is  
8 intended to be illustrative. Plaintiffs must — and have — put  
9 forward enough evidence to establish a prima facie case that they  
10 were subjected to warrantless electronic surveillance.

11           Among plaintiffs' exhibits is a memorandum from Howard  
12 Mendelsohn, Deputy Assistant Secretary at the Department of the  
13 Treasury to defendant Adam J Szubin, Director of OFAC, dated  
14 February 6, 2008. Eisenberg Decl Exh Z, Doc #657-4/099-4. This  
15 lengthy, redacted document bearing the words "Top Secret" at the  
16 top has a stated subject of "redesignation of Al-Haramain Islamic  
17 Foundation locations in the United States (AHF-OREGON) and AHF  
18 official Soliman AL-BUTHE pursuant to [Executive Order] 13224." Id  
19 at 126. In it, Soliman al-Buthe (referred elsewhere in the record  
20 as "Al-Buthi") is described as "the Treasurer of AHF-OREGON." Id  
21 at 127. The document states that "AL-BUTHE was intercepted in some  
22 four conversations with Al-Timimi" on February 1, 2003. Id at 131.  
23 Al-Buthi, meanwhile, is alleged in the FAC to be a director of Al-  
24 Haramain (Doc #458/035 ¶ 34) and the individual whose conversations  
25 with Ghafoor and Belew plaintiffs allege were intercepted by means  
26 of electronic surveillance in March and April 2004. Id at ¶¶ 32,  
27 33 and Ghafoor & Belew Decls, Doc ##657-6/099-6, 657-7/099-7.  
28 These documents buttress each other, as does the published speech

1 by John Pistole to the American Bankers' Association admitting  
2 "surveillance" of Al-Haramain Oregon. Eisenberg Decl Exh S, Doc  
3 #657-3/099-3.

4 Defendants attack as insufficient each item of evidence  
5 individually, ignoring the cumulative impact of the various  
6 documents. As to the Pistole speech, they quibble: "The mere  
7 statement that 'surveillance [] was used' in investigating the  
8 connections between al Qaeda and [Al-Haramain Islamic Foundation's]  
9 worldwide activities establishes nothing as to who, where, when,  
10 and how any such surveillance was directed." Doc #668/103 at 32.  
11 As to the al-Buthi/al-Timimi intercepts, defendants write: "That  
12 Mr Al-Timimi was the target of interception and was overheard  
13 speaking with Mr Al-Buthe \* \* \* does not indicate that any of the  
14 named plaintiffs in this case were the target of or subject to  
15 surveillance, or where or how any such surveillance had occurred,  
16 including whether or not it was warrantless surveillance on a wire  
17 in the United States or authorized under FISA." Id at 32.

18 This argument ignores that one need not be a target of  
19 electronic surveillance to be an "aggrieved person" under FISA's  
20 section 1801(k) but may be "any other person whose communications  
21 or activities were subject to electronic surveillance." Section  
22 1801(k) is quoted in section I, supra. It also ignores that Al-  
23 Haramain is the primary plaintiff in this action and surveillance  
24 of one of its officers or directors amounts to surveillance of Al-  
25 Haramain. And there is the further point that, even assuming  
26 arguendo that al-Timimi was the original target of surveillance, a  
27 productive wiretap of al-Timimi's conversations with al-Buthi would  
28 have led to separate electronic surveillance of al-Buthi beginning



1 in early 2003. This inference lends credence to the allegations of  
2 Belew and Ghafoor that their conversations with al-Buthi in 2004  
3 were wiretapped.

4 At oral argument, defendants' counsel commented rather  
5 obliquely about the al-Buthi/al-Timimi intercept memorandum that  
6 "[t]his demonstrates that the surveillance that may have been at  
7 issue in this case did not, in fact, have to be of an individual  
8 associated with Al-Haramain, could have been of someone else, could  
9 have been other sources." Doc #712/114 at 34. Counsel then  
10 asserted "[t]hat surveillance \* \* \* could well have been authorized  
11 by the FISA. I actually believe that it was." Id. Further  
12 embellishing their attempts to create an aura of uncertainty and  
13 mystery around plaintiffs' prima facie evidence, defendants note:  
14 "even if the plaintiffs had been subject to surveillance (which  
15 itself is not established by the evidence cited), nothing  
16 establishes how such surveillance may have occurred." Doc #668/103  
17 at 29.

18 Defendants have also attacked plaintiffs' prima facie  
19 case by arguing that some of the documents, including the al-  
20 Buthi/al-Timimi intercept memorandum, demonstrate that links  
21 between Al-Haramain and al-Qaeda were suspected or known well  
22 before September 2004, the date on which OFAC designated Al-  
23 Haramain as a SDGT organization and publicly announced a connection  
24 between it and Osama bin-Laden. See, for example, Defendants'  
25 Third Motion to Dismiss, Doc #475/049 at 23. But later-disclosed,  
26 formerly Top Secret information about secret investigations before  
27 2004 cannot refute plaintiffs' assertion that at no time before  
28 September 2004 did the government publicly assert that Al-Haramain

1 had links to Osama bin-Laden, a fact that suggests recently-  
2 acquired information in which the government had great confidence.  
3 Alone, no single item of evidence is sufficient, but together the  
4 various pieces establish a prima facie case.

5 Defendants' nit-picking of each item of plaintiffs'  
6 evidence, their remarkable insinuation (unsupported by any evidence  
7 of their own) that the al-Buthi/al-Timimi intercepts might have  
8 been pursuant to a FISA warrant and their insistence that they need  
9 proffer nothing in response to plaintiffs' prima facie case do not  
10 amount to an effective opposition to plaintiffs' motion for summary  
11 judgment.

12  
13 B

14 The parties' submissions establish that there is no  
15 genuine issue as to the following material facts. These facts,  
16 most of which are summarized from plaintiffs' pleadings in the FAC,  
17 are annotated with citations to plaintiffs' evidence and, in many  
18 cases, with citations to identical evidence previously submitted to  
19 the court by defendants with their third motion to dismiss  
20 purportedly for calling attention to "the inadequacy of plaintiffs'  
21 evidence." Doc #475/049 at 18 n 4. Defendants have not disputed  
22 the authenticity or accuracy of the items of evidence they  
23 submitted with the motion to dismiss nor the veracity or  
24 credibility of any statements in declarations for the truth of any  
25 matter asserted therein; rather, they have challenged the  
26 inferences that could properly be drawn. The court rejected  
27 defendants' legal arguments in its order dated January 5, 2009 (595  
28 F Supp 2d 1077) and above.

1           1. During or after the fall of 2001, President  
2 George W Bush authorized the NSA to intercept  
3 international communications into and out of the United  
4 States of persons linked to "al-Qaeda or related  
5 terrorist organizations." United States Department of  
6 Justice, "Legal Authorities Supporting the Activities of  
7 the National Security Agency Described by the  
8 President," January 19, 2006 (Eisenberg Decl Exh AA, Doc  
9 #657-5/099-5 at 6).

10           2. In October 2001, the Treasury Department  
11 created "Operation Green Quest" to track financing of  
12 terrorist activities, one of the targets of which were  
13 foreign branches of the Saudi Arabia-based Al-Haramain  
14 Islamic Foundation, a fact admitted by Treasury  
15 Department Deputy Secretary Kenneth W Dam in testimony  
16 before Congress on August 1, 2002. FAC ¶ 24. Exhibit 5  
17 to Defendants' Third Motion to Dismiss or, in the  
18 Alternative, for Summary Judgment ("Defs' 3rd MTD Exh  
19 5"), Doc #475-2/049-2 at 157, 159.

20           3. In April 2002, the FBI created its Terrorist  
21 Financing Operations Section ("TFOS"), as admitted by  
22 FBI Counterterrorism Division Acting Assistant Director  
23 Gary M Bald in testimony before Congress on March 4,  
24 2004; Eisenberg Decl Exh J, Doc #657-3/099-3 at 2; on  
25 May 13, 2003, through a Memorandum of Understanding  
26 between the Department of Justice and the Department of  
27 Homeland Security, the FBI was designated as the lead  
28 department to investigate potential terrorist-related

1 financial transactions; id at 4; the TFOS acquired,  
2 analyzed and disseminated data and information,  
3 including telecommunications data from a variety of  
4 sources, including "Internet Service Providers, the  
5 Telecommunications Industry," among others; id at 4;  
6 TFOS took over the investigation of Al-Haramain Islamic  
7 Foundation "pertaining to terrorist financing;" id at 7;  
8 in February 2004, the FBI executed a search warrant on  
9 plaintiff Al-Haramain's office in Ashland, Oregon and  
10 TFOS provided operational support, including document  
11 and data analysis, in the investigation of plaintiff Al-  
12 Haramain. FAC ¶ 25. Eisenberg Decl Exh J, Doc #657-  
13 3/099-3 at 7; Defs' 3rd MTD Exh 6, Doc #475-2/049-2 at  
14 164-66, 168. Bald's March 4, 2004 testimony included no  
15 mention of purported links between plaintiff Al-Haramain  
16 and Osama bin-Laden. FAC ¶ 26. Eisenberg Decl Exh J,  
17 Doc #657-3/099-3 at 7; Doc #475-2 at 168.

18 4. TFOS "has access to data and information" from  
19 "the Intelligence Community" and has "[t]he ability to  
20 access and obtain this type of information in a time  
21 sensitive and urgent manner" as admitted by FBI Deputy  
22 Director John S Pistole in testimony before Congress on  
23 September 25, 2003. FAC ¶ 27. Eisenberg Decl Exh L,  
24 Doc #657-3/099-3 at 18.

25 5. In conducting investigations of terrorist  
26 financing, OFAC officers use "classified \* \* \*  
27 information sources" as admitted by OFAC Director R  
28 Richard Newcomb in testimony before Congress on June 16,

1 2004. FAC ¶ 28. Eisenberg Decl Exh M, Doc #657-3/099-3  
2 at 27; Defs' 3rd MTD Exh 8, Doc #475-2/049-2 at 199.

3 6. In 2004 the FBI, under the direction of  
4 defendant Mueller, undertook activity using information  
5 produced by the NSA through the warrantless surveillance  
6 program as admitted by defendant Mueller in testimony  
7 before the House Judiciary Committee on July 26, 2007.

8 FAC ¶ 27. Eisenberg Decl Exh I, Doc #657-2/099-2 at 43;  
9 Defs' 3rd MTD Exh 2, Doc #475-2/049-2 at 81.

10 7. The FBI's search warrant on Al-Haramain's  
11 Ashland, Oregon, office was executed on February 18,  
12 2004. Eisenberg Decl Exh Z, Doc #657-4/099-4 at 33;  
13 Defs' 3rd MTD Exh 19, Doc #475-3/049-3 at 213. On  
14 February 19, 2004, the Treasury Department's OFAC  
15 blocked Al-Haramain's assets pending an investigation of  
16 possible crimes relating to currency reporting and tax  
17 laws as admitted in a press release of that date by the  
18 Treasury Department's Office of Public Affairs; the  
19 press release contained no mention of purported links  
20 between plaintiff Al-Haramain and Osama bin-Laden. FAC  
21 ¶¶ 30-31. Eisenberg Decl Exh K, Doc #657-3/099-3 at 13;  
22 Defs' 3rd MTD Exh 9, Doc #475-2/049-2 at 208.

23 8. Soliman al-Buthi was subjected to electronic  
24 surveillance by one or more United States government  
25 entities during telephone conversations with al-Timimi  
26 on February 1, 2003. Eisenberg Decl Exh Z, Doc #657-  
27 4/099-4 at 36-37; Defs' 3rd MTD Exh 19, Doc #475-3/049-3  
28

1 at 216-17. Soliman al-Buthi was a senior official of  
2 Al-Haramain in 2003. FAC ¶ 32; Doc #475-3/049-3 at 213.

3 9. Soon after the blocking of plaintiff Al-  
4 Haramain's assets on February 19, 2004, plaintiff Belew  
5 spoke by telephone with Soliman al-Buthi on the  
6 following dates: March 10, 11 and 25, April 16, May 13,  
7 22 and 26, and June 1, 2 and 10, 2004. Belew was  
8 located in Washington DC; al-Buthi was located in  
9 Riyadh, Saudi Arabia. During the same period, plaintiff  
10 Ghafoor spoke by telephone with al-Buthi approximately  
11 daily from February 19 through February 29, 2004 and  
12 approximately weekly thereafter. Ghafoor was located in  
13 Washington DC; al-Buthi was located in Riyadh, Saudi  
14 Arabia. (The FAC includes the telephone numbers used in  
15 the telephone calls referred to in this paragraph.) FAC  
16 ¶¶ 34-35. Declarations of Asim Ghafoor, Doc #657-6/099-  
17 6 and Wendell Belew, Doc #657-7/099-7.

18 10. In the telephone conversations between Belew  
19 and al-Buthi, the parties discussed issues relating to  
20 the legal representation of defendants, including Al-  
21 Haramain, named in a lawsuit brought by victims of the  
22 September 11, 2001 attacks. Names al-Buthi mentioned in  
23 the telephone conversations with Ghafoor included  
24 Mohammad Jamal Khalifa, spouse of one of Osama bin-  
25 Laden's sisters, and Safar al-Hawali and Salman al-Auda,  
26 clerics whom Osama bin-Laden claimed had inspired him.  
27 In the telephone conversations between Ghafoor and al-  
28 Buthi, the parties also discussed logistical issues

1 relating to payment of Ghafoor's legal fees as defense  
2 counsel in the lawsuit. Ghafoor & Belew Decls, Doc  
3 ##657-6/099-6, 657-7/099-7.

4 11. In a letter to Al-Haramain's lawyer Lynne  
5 Bernabei dated April 23, 2004, OFAC Director Newcomb  
6 stated that OFAC was considering designating Al-Haramain  
7 as a SDGT organization based on unclassified information  
8 "and on classified documents that are not authorized for  
9 public disclosure." FAC ¶ 36. Eisenberg Decl Exh N,  
10 Doc #657-3/099-3 at 29; Defs' 3rd MTD Exh 10, Doc #475-  
11 2/049-2 at 210. In a follow-up letter to Bernabei dated  
12 July 23, 2004, Newcomb reiterated that OFAC was  
13 considering "classified information not being provided  
14 to you" in determining whether to designate Al-Haramain  
15 as an SDGT organization. ¶ 37. Eisenberg Decl Exh O,  
16 Doc #657-3/099-3 at 31; Defs' 3rd MTD Exh 11, Doc #475-  
17 2/049-2 at 212. On September 9, 2004, OFAC declared  
18 plaintiff Al-Haramain to be an SDGT organization. FAC  
19 ¶ 38. Eisenberg Decl Exh P, Doc #657-3/099-3 at 33;  
20 Defs' 3rd MTD Exh 12, Doc #475-2/049-2 at 214.

21 12. In a press release issued on September 9,  
22 2004, the Treasury Department stated that the  
23 investigation of Al-Haramain showed "direct links  
24 between the US branch [of Al-Haramain] and Usama bin  
25 Laden"; this was the first public claim of purported  
26 links between Al-Haramain and Osama bin-Laden. FAC  
27 ¶¶ 39-40. Eisenberg Decl Exh P, Doc #657-3/099-3 at 33;  
28 Defs' 3rd MTD Exh 12, Doc #475-2/049-2 at 214.

1           13. In a public declaration filed in this  
2 litigation dated May 10, 2006, FBI Special Agent Frances  
3 R Hourihan stated that "the classified document that was  
4 inadvertently disclosed by a government employee without  
5 proper authorization" (i e, the Sealed Document) "was  
6 related to the terrorist designation" of Al-Haramain.  
7 FAC ¶ 41. Eisenberg Decl Exh Q, Doc #657-3/099-3 at 36-  
8 37.

9           14. FBI Deputy Director Pistole acknowledged that  
10 the FBI "used \* \* \* surveillance" in connection with  
11 defendant OFAC's 2004 investigation of Al-Haramain but  
12 stated that "it was the financial evidence" provided by  
13 financial institutions "that provided justification for  
14 the initial designation" of Al-Haramain, in a speech  
15 delivered by Mr Pistole on October 22, 2007 at a  
16 conference of the American Bankers Association and  
17 American Bar Association on money laundering, the text  
18 of which appears on the FBI's official Internet website.  
19 FAC ¶¶ 42-43. Eisenberg Decl Exh S, Doc #657-3/099-3 at  
20 51; Defs' 3rd MTD Exh 13, Doc #475-3/049-3 at 6. A  
21 court document filed by the United States Attorney for  
22 the District of Oregon on August 21, 2007 referred to  
23 the February 19, 2004 asset-blocking order as a  
24 "preliminary designation" and the September 9, 2004  
25 order as "a formal designation." FAC ¶ 44. Eisenberg  
26 Decl Exh U, Doc #657-4/099-4 at 8.

27           15. To allege that the above-referenced  
28 telecommunications between al-Buthi and plaintiffs Belew



1 and Ghafoor were wire communications and were  
2 intercepted by defendants within the United States,  
3 plaintiffs cite to several public statements by  
4 government officials that most international  
5 communications today are "on a wire" and therefore  
6 subject to FISA's warrant requirements, including: July  
7 26, 2006 testimony by defendant Alexander and CIA  
8 Director Michael Hayden (Eisenberg Decl Exh V, Doc #657-  
9 4/099-4 at 12 (see also id Exh W at 19-20); Defs' 3rd MTD  
10 Exh 15, Doc #475-3/049-3 at 23); May 1, 2007 testimony  
11 by Director of National Intelligence Michael McConnell  
12 (Eisenberg Decl Exh W, Doc #657-4/099-4 at 16-18); and  
13 September 20, 2007 testimony by McConnell before the  
14 House Select Intelligence Committee: "[t]oday \* \* \*  
15 [m]ost international communications are on a wire, fiber  
16 optical cable," and "on a wire, in the United States,  
17 equals a warrant requirement [under FISA] even if it was  
18 against a foreign person located overseas." FAC ¶ 48a-  
19 c. Eisenberg Decl Exh X, Doc #657-4/099-4 at 24; Defs'  
20 3rd MTD Exh 16, Doc #475-3/049-3 at 60-61.

21 16. A memorandum dated February 6, 2008, to  
22 defendant Szubin from Treasury Department Office of  
23 Intelligence and Analysis Deputy Assistant Secretary  
24 Howard Mendelsohn, which was publicly disclosed during a  
25 2005 trial, acknowledged electronic surveillance of four  
26 of al-Buthi's telephone calls on February 1, 2003. FAC  
27 ¶ 51. Eisenberg Decl Exh Z, Doc #657-4/099-4 at 32-38;  
28 Defs' 3rd MTD Exh 19, Doc #475-3/049-3 at 216-17.

1           Because defendants have failed to establish the existence  
2 of a genuine issue of material fact warranting denial of  
3 plaintiffs' motion for summary judgment on the issue of defendants'  
4 liability under FISA, plaintiffs' motion must be, and hereby is,  
5 GRANTED. Defendants' motion for summary judgment is DENIED.  
6

7   IV

8           Among the unresolved minor issues in this litigation is  
9 that of the liability of defendant FBI Director Robert S Mueller  
10 III in his individual, as opposed to official, capacity. The  
11 original complaint did not specify whether the four individual  
12 defendants were sued in their individual, as opposed to official,  
13 capacities but plaintiffs later asserted that "a nonspecific  
14 complaint may be characterized as alleging both official and  
15 personal capacity liability" and sought to serve defendants in  
16 their individual capacities some two years after filing the  
17 complaint. Doc #447/030. In its July 2008 order dismissing the  
18 complaint, the court granted plaintiffs leave, if they chose to  
19 amend their pleading, to serve "all unserved defendants" with their  
20 amended complaint within fifteen days of filing it with the court.  
21 564 F Supp 2d at 1137.

22           In the FAC, defendant Mueller is the only individual  
23 defendant named "in his official and personal capacities." Doc  
24 #458/035 at 1, 2. Shortly after the FAC was filed, plaintiffs  
25 filed an acknowledgement of service relating to defendant Mueller  
26 (Doc #463/041) and counsel appeared for defendant Mueller in his  
27 individual capacity (Doc # 460/037). There were no similar filings  
28 relating to the other individual defendants and no subsequent

1 discussion of proceedings against any individual defendant but  
2 Mueller in the individual capacity. Mueller is therefore the only  
3 defendant against whom plaintiffs seek to proceed in an individual  
4 capacity.

5 In a footnote to their moving papers, plaintiffs merely  
6 note that their motion does not "address the personal liability of  
7 defendant [Mueller], who, by agreement of the parties, has not yet  
8 made an appearance in this action." Doc #657/099 at 39 n 5. At  
9 oral argument, plaintiffs' counsel stated "at this point we believe  
10 Mr Mueller is a corollary we needn't get to" and "we really don't  
11 see any need to pursue that avenue." Doc #712/114 at 26. The  
12 court sees no reason to allow this issue to be held open for future  
13 proceedings. The court concludes that the nature of the wrongdoing  
14 by governmental actors alleged and established herein is official  
15 rather than individual or personal. See discussion in section II,  
16 supra. The specific factual allegations against defendant Mueller,  
17 moreover, plainly concern actions taken in his official capacity:  
18 the FAC alleges that Mueller testified before Congress that he had  
19 had "serious reservations about the warrantless wiretapping  
20 program." Doc #458/035 at 5.

21 Accordingly, the court now DISMISSES without leave to  
22 amend all claims in the FAC as to defendant Mueller in his  
23 individual capacity. Defendant Mueller will remain a party to this  
24 action only in his official capacity.

25  
26 V

27 Finally, the court turns to plaintiffs' request that the  
28 court make two rulings on the substantive matters before it on

1 these cross-motions — one based on the public evidence presented,  
2 and an alternate ruling based on its in camera review of the Sealed  
3 Document. Doc #671/104 at 6. At oral argument, counsel argued  
4 that only with the alternate ruling would the court have made a  
5 complete record for appellate review. Doc #712/114 at 10-15.  
6 While the court recognizes the merit of counsel's argument, it has  
7 concluded that including an alternative ruling based on the Sealed  
8 Document would complicate the record unduly and, perhaps, be  
9 perceived as unfair to defendants (who have refrained from  
10 submitting classified evidence in connection with this round of  
11 briefing). Accordingly, the request to consider the Sealed  
12 Document in connection with these cross-motions is DENIED.

13  
14 VI

15 Having prevailed on their motion for summary judgment of  
16 liability on their FISA claim, plaintiffs now face a decision  
17 regarding the course of the remaining proceedings in this case.  
18 They may either: (1) take steps to prosecute the remaining claims  
19 in the FAC or (2) they may voluntarily dismiss those claims in  
20 order to take the steps necessary for the entry of judgment on the  
21 FISA claim. Plaintiffs shall advise the court, no later than April  
22 16, 2010 and in the manner set forth below, of their election.

23 Should plaintiffs elect the first course — to pursue  
24 their remaining claims in lieu of seeking entry of judgment — they  
25 shall, by April 16, 2010, contact the clerk to obtain a date for a  
26 case management conference to be held not later than May 28, 2010.

27 Should plaintiffs choose the second course, they shall  
28 submit a request for dismissal of their remaining claims together

1 with a proposed form of judgment reflecting: their computation of  
2 damages under 50 USC § 1810 consistent with counsel's statements at  
3 oral argument (Doc #712/114 at 24-25) and that statute; their  
4 entitlement to attorney fees "and other investigation and  
5 litigation costs" under section 1810(c); and the items of equitable  
6 relief sought in the FAC to which they believe they are entitled  
7 under this order. If plaintiffs believe that further proceedings  
8 are required in order for the court to determine the quantum of  
9 damages or other specifics of the judgment, they shall so advise  
10 the court in a separate written request accompanying their proposed  
11 form of judgment.

12 Defendants may submit an alternative proposed form of  
13 judgment or a written response to plaintiffs' submissions within  
14 fourteen days after plaintiffs file their proposed form of  
15 judgment. Following entry of judgment herein, plaintiffs' motion  
16 for attorney fees and costs shall be filed in accordance with FRCP  
17 54(d) and Civil Local Rule 54.

18 The parties are admonished that all future submissions to  
19 the court shall comply with paragraph 1.4 of the undersigned  
20 judge's standing order: "Chambers copies \* \* \* must include on  
21 each page the running header created by the ECF system."  
22

23 IT IS SO ORDERED.  
24

25 

26 \_\_\_\_\_  
27 VAUGHN R WALKER  
28 United States District Chief Judge