Nos. 11-15468 & 11-15535

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

Plaintiffs, Appellees and Cross-Appellants,

vs.

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

Defendants, Appellants and Cross-Appellees.

PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

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INTRODUCTION AND STATEMENT OF COUNSEL

Plaintiffs commenced this action, challenging the legality of President George W. Bush's so-called Terrorist Surveillance Program (TSP), to obtain a judicial pronouncement that warrantless wiretapping by the federal government in violation of the Foreign Intelligence Surveillance Act of 1978 (FISA) is unlawful. Instead, the panel's decision—finding sovereign immunity for such unlawful conduct—proclaims that the government can get away with it. Whether the federal government can violate FISA with impunity is a question of exceptional importance to the Nation, warranting a rehearing en banc. *See* FRAP 35(b)(1)(B).

Additionally, the panel's decision conflicts with two prior decisions by the same panel in 2011. *See In re Nat'l Sec. Agency Telecomms. Records Litig. ("Hepting")*, 671 F.3d 881, 899 (9th Cir. 2011); *Jewel v. National Security Agency*, 673 F.3d 902, 912 (9th Cir. 2011). In those prior decisions, the panel stated that although the FISA Amendments Act of 2008 (FAA) granted retroactive immunity to the telecommunications carriers that participated in the TSP, the plaintiffs could still sue the government actors and entities who perpetrated the wiretapping. Now, the panel holds that victims of warrantless wiretapping *cannot* sue the government perpetrators. En banc consideration is necessary to secure and maintain uniformity

of this Court's decisions—here, uniformity of multiple decisions by the same panel. *See* FRAP 35(b)(1)(A).

Finally, the panel's opinion misapprehends or overlooks several points of law and fact. *See* FRAP 40(a)(2). Most prominently, in finding that 50 U.S.C. § 1810 does not waive sovereign immunity for *collection* of information by warrantless electronic surveillance in violation of FISA, the opinion relies on a mistaken determination that, in contrast, 50 U.S.C. § 1806(a) authorizes a civil cause of action (for which sovereign immunity is waived) for the *use* of information collected by unlawful electronic surveillance. In actuality, § 1806(a) applies only to the unlawful use or disclosure of information that was *lawfully collected pursuant* to the provisions of FISA—which means § 1806(a) does *not* authorize a cause of action for the use of information that was *unlawfully collected in violation* of FISA, as occurred here.

The phrase in § 1806(a) that restricts the statute's scope is omitted from the panel's quotation of § 1806(a) by means of an ellipsis. *See* slip op. at 8791 n.3. The opinion thus relies on a misreading of § 1806(a) to hold that the federal government can violate FISA's warrant requirement with impunity.

In counsel's judgment, grounds exist for a panel rehearing because the panel has overlooked or misapprehended points of law and fact, FRAP 40(a)(2); and grounds exist for a rehearing en banc because the panel's decision conflicts with prior

decisions by the same panel, FRAP 35(b)(1)(A), and the proceeding involves a question of exceptional importance, FRAP 35(b)(1)(B).

BACKGROUND

Al-Haramain Islamic Foundation, Inc., and two of its lawyers, Wendell Belew and Asim Ghafoor, filed this lawsuit on February 28, 2006, alleging warrantless electronic surveillance under the TSP in violation of 50 U.S.C. § 1810. The defendants promptly asserted the state secrets privilege. After the district judge ruled that plaintiffs' counsel would be permitted to demonstrate Article III standing with *in camera* affidavits describing their memories of a top-secret document, defendants took an interlocutory appeal to this Court. *Al-Haramain Islamic Foundation, Inc. v. Bush ("Al-Haramain I")*, 507 F.3d 1190 (9th Cir. 2007).

On the interlocutory appeal in *Al-Haramain I*, defendants asserted sovereign immunity as well as the state secrets privilege, and the parties fully briefed the question of sovereign immunity. *See* Brief For Appellants in *Al-Haramain I* at 36-37; Brief of Appellees in *Al-Haramain I* at 38-41; Reply Brief for Appellants in *Al-Haramain I* at 15-17. This Court reversed the district judge's ruling—not because of sovereign immunity, but because the ruling had amounted to an improper "back door around" the state secrets privilege. *Al-Haramain I*, 507 F.3d at 1193. This Court's opinion in *Al-Haramain I* did not address the question of sovereign

immunity, even though it had been fully briefed.[1/] Instead, the Court remanded the case to the district judge for further proceedings to determine whether FISA preempts the state secrets privilege. *Id.* at 1206.

Five more years of litigation ensued (consuming some 3,000 more hours of time by plaintiffs' attorneys). The district judge rejected the claim of sovereign immunity and held that FISA preempts the state secrets privilege. *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 564 F. Supp. 2d 1109, 1124-25 (N.D. Cal. 2008). Plaintiffs abandoned their reliance on the top-secret document and presented non-classified evidence to demonstrate their Article III standing and defendants' liability under 50 U.S.C. § 1810. The district judge granted summary judgment for plaintiffs. *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 700 F. Supp. 2d 1182, 1202 (N.D. Cal. 2010). The judge dismissed, without leave to amend, a claim against one of the defendants, FBI Director Robert Mueller, in his individual capacity. *Id.* at 1203. The judge subsequently awarded statutory liquidated damages of $20,400 each to Belew

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[1/] During oral argument in the present appeal (*Al-Haramain II*) on June 1, 2012, Judge McKeown indicated she was unaware that the sovereign immunity issue had been before the panel in *Al-Haramain I*, stating "we did not have the sovereign immunity issue on the table" in 2007. Plaintiffs' initial brief in the present appeal, however, had advised the Court that "[d]efendants had previously asserted sovereign immunity in their 2007 briefing on the interlocutory appeal, but this Court's 2007 opinion did not address the point." Brief of Appellees and Cross-Appellants in *Al-Haramain II* at 16 n.4.

and Ghafoor, plus their attorney's fees and costs in the sum of $2,515,387. ER 17, 49.[2/]

Defendants appealed, challenging the district judge's rulings on sovereign immunity, FISA preemption, liability and damages. Belew and Ghafoor cross-appealed, challenging the ruling as to Mueller in his individual capacity.

The panel's decision—*Al-Haramain II*—reverses the district judge's ruling on sovereign immunity, holding that § 1810 "does not include an explicit waiver of immunity." Slip op. at 8784.[3/] The decision affirms the dismissal of the claim against Mueller individually without leave to amend. *Id.* at 8798. The decision does not address the other issues presented. *See id.* at 8788 n.2. In the panel's words, the decision "effectively brings to an end the plaintiffs' ongoing attempts to hold the Executive Branch responsible for intercepting telephone conversations without judicial authorization." *Id.* at 8784.

[2/] The panel's decision in *Al-Haramain II* misapprehends the nature of the award, stating "we reverse the district court's judgment awarding damages and attorney's fees *to Al-Haramain* under § 1810." Slip op. at 8784 (emphasis added). In fact, the award was only to Belew and Ghafoor. The district judge awarded no damages, fees or costs to Al-Haramain, *see* ER 17-18, and Al-Haramain did not appeal.

[3/] The panel's finding of sovereign immunity in *Al-Haramain II* makes the panel's decision in *Al-Haramain I* a nullity. *See Morongo Band of Mission Indians v. California State Board of Equalization*, 858 F.2d 1376, 1381 (9th Cir. 1988) (absent subject-matter jurisdiction, court lacks power to do anything other than dismiss the case).

ARGUMENT

I. PETITION FOR PANEL REHEARING

A. The Panel's Opinion Misapprehends the Scope of 50 U.S.C. § 1806(a), Which Does *Not* Provide a Cause of Action For Use of Information Acquired By Unlawful Electronic Surveillance.

The centerpiece of the panel's opinion is a determination that Congress intended to waive sovereign immunity for the *use* of information collected by unlawful electronic surveillance, but not for the *collection* itself. According to the opinion, FISA's provision of a cause of action against the government under 50 U.S.C. § 1806(a) (for which 18 U.S.C. § 2712(a) waives sovereign immunity) prohibits only the *use* of information collected through unlawful surveillance, thus demonstrating that Congress did not intend to waive sovereign immunity for unlawful *collection* when prescribing the civil cause of action in 50 U.S.C. § 1810. According to the panel, "Al-Haramain can bring a suit for damages against the United States for *use* of the collected information but cannot bring suit against the government for collection of the information itself," and "because governmental liability remains under § 1806, the district court's concern that FISA relief would become a dead letter is not valid." Slip op. at 8792-93 (emphasis in original).

The panel has misapprehended the scope of § 1806(a), which prohibits the unlawful use or disclosure of "[i]nformation acquired from an electronic surveillance *conducted pursuant to this subchapter*." 50 U.S.C. § 1806(a) (emphasis added).[4/] The phrase "conducted pursuant to this subchapter" restricts § 1806(a)'s scope to unlawful use or disclosure of information that was *lawfully collected* pursuant to the provisions of FISA—e.g., where authorized by a FISA warrant. Thus, the plaintiffs here could *not* have sued under § 1806(a), because they assert that their surveillance was *not* authorized by a FISA warrant and thus the information was *not* lawfully collected. Their only recourse was to sue for unlawful collection under § 1810. Yet the panel's opinion deprives them of that recourse, based on a misapprehension that they could have sued under § 1806(a).

This misapprehension may be explained by the incomplete manner in which the panel's opinion quotes § 1806(a): "'Information acquired from an electronic surveillance . . . may be used and disclosed by Federal officers and employees . . .

[4/] Section 1806(a) provides in full: "Information acquired from an electronic surveillance *conducted pursuant to this subchapter* concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures required by this subchapter. No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character. No information acquired from an electronic surveillance *pursuant to this subchapter* may be used or disclosed by Federal officers or employees except for lawful purposes." (Emphasis added.)

only in accordance with the minimization procedures required by this subchapter.'" Slip op. at 8791 n.3. The first ellipsis in this quotation omits § 1806(a)'s phrase "conducted pursuant to this subchapter"—the very phrase that restricts § 1806(a)'s scope to unlawful use or disclosure of information that was *lawfully collected*.

The district judge was right: If the federal government enjoys sovereign immunity from liability under § 1810 for unlawful collection of information, then FISA's prohibition of warrantless wiretapping by the federal government is indeed a dead letter. The panel's decision makes that prohibition a dead letter based on the mistaken belief that § 1806(a) authorizes a lawsuit for the use of such information. It does not.

Recognizing that it "may seem anomalous and even unfair" for FISA to afford a cause of action against the government for use of unlawfully-collected information but not for the collection itself, the panel's opinion states that "the policy judgment is one for Congress, not the courts." Slip op. at 8793. But a careful reading of § 1806(a)—including its phrase "conducted pursuant to this subchapter"—demonstrates that Congress did not make such an anomalous and unfair policy judgment. Nor should this Court.

B. The Panel's Opinion Overlooks Plaintiffs' Argument that FISA Waives Sovereign Immunity by Authorizing Action Against an "Entity," Which Includes Government Entities.

In finding no waiver of sovereign immunity, the panel's opinion focuses exclusively on plaintiffs' argument that FISA waives sovereign immunity by authorizing action against "any officer or employee of the Federal Government." 50 U.S.C. § 1801(m); *see* Brief of Appellees and Cross-Appellants in *Al-Haramain II* at 25-31. The opinion, however, overlooks a critical point of law: plaintiffs' alternative argument that FISA waives sovereign immunity by authorizing action against an "entity." 50 U.S.C. § 1801(m); *see* Brief of Appellees and Cross-Appellants in *Al-Haramain II* at 31-32.

In making this alternative argument, plaintiffs relied on decisions construing a subsequently-amended provision of the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2510 et seq., authorizing a cause of action against an "entity." Those decisions construed "entity" in that former provision of ECPA as including *government* entities. *See Adams v. City of Battle Creek*, 250 F.3d 980, 985 (6th Cir. 2001); *Organizacion JD Ltda. v. U.S. Dep't of Justice*, 18 F.3d 91, 94 (2d Cir. 1994). Plaintiffs posit that FISA should be likewise construed.

In responding to this argument, the government argued that those decisions had "mistakenly construed" the former ECPA provision. Reply Brief for Appellants and Brief for Cross-Appellees in *Al-Haramain II* at 11. This Court should decide that question—for, if those decisions were correct, then they support a finding here that FISA waives sovereign immunity from liability under § 1810.

C. The Panel's Opinion, in Addressing Plaintiffs' Analogy to the Waiver of Sovereign Immunity in Title VII, Overlooks Two Cited Circuit Court Decisions Finding Such Waiver Without Specification of the "United States."

The panel's opinion rejects plaintiffs' analogy to the waiver of sovereign immunity in Title VII of the Civil Right Act of 1964—which authorizes civil actions for employment discrimination against "the head" of certain departments, agencies, and units of the federal government, without specifying the "United States," 42 U.S.C. § 2000e-16(c)—because a Supreme Court case the plaintiffs cited "does not address sovereign immunity." *See* slip op. at 8795 n.5. But the panel's opinion overlooks the two circuit court cases the plaintiffs cited on this point, which *do* address sovereign immunity. *See* Brief of Appellees and Cross-Appellants in *Al-Haramain II* at 29. One of those cases holds that the cited provision of Title VII "is a clear expression of consent to suits against the United States . . . ." *Salazar v. Heckler*, 787 F.2d 527, 529 (10th Cir. 1986). The other case holds that "Congress

clearly has waived sovereign immunity from claims of retaliation" under Title VII. *Rochon v. Gonzales*, 438 F.3d 1211, 1216 (D.C. Cir. 2006). These overlooked cases provide support for a finding that FISA similarly waives sovereign immunity from liability under § 1810.

In finding no waiver of sovereign immunity, the panel relies on the absence of the words "United States" from FISA's definition of the word "person" in 50 U.S.C. § 1801(m). *See* slip op. at 8789 ("Glaringly missing from the definition is the 'United States.'"); 8791 ("contrasted against other provisions deemed sufficient to invoke waiver, the lack of an explicit waiver in § 1810 is stark, permitting suit only against a 'person,' without listing the 'United States.'"). *Salazar* and *Rochon* demonstrate, however, that the words "United States" are not required for a statute to waive sovereign immunity.

D. The Panel's Opinion Misapprehends the Legislative History of 18 U.S.C. § 2712, Which Only Indicates Intent to Reject the Addition of an Administrative Claim-Filing Requirement to 50 U.S.C. § 1810.

The panel's opinion, relying on the legislative history of 18 U.S.C. § 2712(a) to support the finding of sovereign immunity, misapprehends that legislative history as purportedly including a decision by Congress in 2001 to reject a proposal for § 1810 to waive sovereign immunity. *See* slip op. at 8792. The proposal would have

added a provision to § 1810 stating that "[a]ny action against the United States *shall be conducted under the procedures of the Federal Tort Claims Act*." *See* H.R. REP. No. 107-236, § 161(d) (2001) (emphasis added).

Had this proposal succeeded, it would have added a *new condition* to the filing of a civil action against the federal government for warrantless wiretapping in violation of FISA—the filing of a pre-lawsuit administrative claim as required by the Federal Tort Claims Act. *See* 28 U.S.C. § 2675. The proposed amendment recognized that § 1810 already created a cause of action against the United States, for the amendment was framed not as authorizing the cause of action but as prescribing how it is to be *conducted*. The most likely explanation for Congress's rejection of this proposal is that Congress did not wish to add the administrative claim-filing requirement to 50 U.S.C. § 1810—not that Congress intended to embrace sovereign immunity from liability under that statute.

E. The Panel's Opinion Overlooks the Additional Facts that Plaintiffs Would Allege Against Defendant Mueller If Given Leave to Amend.

The panel's opinion affirms the district judge's dismissal of the claim against FBI Director Robert Mueller in his individual capacity—*without leave to amend*—because the "bare-bones allegations against Mueller are insufficient to survive summary judgment" and "[t]he district court recognized that Al-Haramain

could not bring forth additional allegations that might breathe life into the otherwise deficient claim against Mueller." Slip op. at 8797-98. The panel's opinion overlooks additional facts plaintiffs can allege which would indeed breathe life into the claim against Mueller.

Mueller's dismissal is based on deficiency in the allegations of plaintiffs' First Amended Complaint filed on July 29, 2008. *See* ER 265. Since then, however, further information has come into the public domain demonstrating Mueller's *personal involvement* in the TSP. According to the Offices of Inspectors General's Unclassified Report on the President's Surveillance Program, dated July 10, 2009:

- On March 9, 2004, Mueller told Vice-President Cheney that if the President were to reauthorize the President's Surveillance Program (which included the TSP) without the approval of the Department of Justice, "Mueller responded, 'I could have a problem with that,' and that the FBI would 'have to review [the] legality of [the FBI's] continued participation in the program.'" *Id.* at 22 [SER 29].

- On March 12, 2004, Mueller "drafted by hand a letter stating, in part: '[A]fter reviewing the plain language of the FISA statute, and the order issued yesterday by the President . . . and in the absence of further clarification of the legality of the program from the Attorney General, I am forced to withdraw the FBI from participation in the program.'" *Id.* at 27 [SER 34].

- On March 12, 2004, when Mueller met with the President, Mueller "explained to the President that he had an 'independent obligation to the FBI and to DOJ to assure the legality of actions we undertook, and that a presidential order alone could not do that.'" *Id.* at 28 [SER 35].

This evidence (which plaintiffs brought to the panel's attention in a letter filed June 7, 2012, *see* Dkt. Entry 68-1) amply demonstrates Mueller's personal involvement in the TSP—from which he never withdrew the FBI's participation—sufficient to support a cause of action against him in his individual capacity. The Court should remand the case to the district court with instructions to grant leave to amend the complaint to allege these additional facts. *See Jewel*, 673 F.3d at 907 n.3 ("'Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment.'").[5/]

[5/] The panel's opinion states that the claim against Mueller "was nothing more than a sideshow, overshadowed by the core claims against the government," and "Al-Haramain never vigorously pursued its claims against Mueller." Slip op. at 8797. But the purpose of the claim against Mueller was to enable plaintiffs to challenge the TSP by proceeding against Mueller individually if the district judge were to find sovereign immunity. *See* Brief of Appellees and Cross-Appellants in *Al-Haramain II* at 77. Plaintiffs refrained from pursuing the claim against Mueller because the district judge did *not* find sovereign immunity. Now that this panel has ruled otherwise, plaintiffs' claim against Mueller is hardly a "sideshow," slip op. at 8797, but is the only avenue remaining for plaintiffs to challenge the TSP.

II. PETITION FOR REHEARING EN BANC

A. This Proceeding Involves a Question of Exceptional Importance to the Nation: Whether the Executive Branch Is Immune From Civil Liability For Warrantless Wiretapping in Violation of FISA.

A rehearing en banc is warranted because this proceeding involves a question of exceptional importance to the Nation: whether the Executive Branch is immune from civil liability under 50 U.S.C. § 1810 and thus can violate FISA with impunity. *See* FRAP 35(b)(1)(B).

Plaintiffs commenced this action in 2006 to challenge the legality of the TSP—President George W. Bush's program of warrantless electronic surveillance—which flouted the provisions of FISA. Plaintiffs were buoyed by presidential candidate Barack Obama's 2007 pronouncement that "[w]arrantless surveillance of American citizens, in defiance of FISA, is unlawful and unconstitutional." Charlie Savage, *Barack Obama's Q&A*, BOSTON GLOBE (Dec. 20, 2007). Yet, once elected, President Obama effectively embraced the TSP by vigorously asserting the state secrets privilege in opposition to the dozens of lawsuits challenging President Bush's surveillance practices. To date, the federal government has succeeded in evading any sort of reckoning in the federal courts. Not a single one of those lawsuits has been adjudicated on its merits.

The present lawsuit is the last hope for holding the Executive Branch accountable for violating FISA through warrantless electronic surveillance. Yet the panel's opinion "effectively brings [that hope] to an end." Slip op. at 8784. The opinion, in proclaiming sovereign immunity, tells the Nation that the President can get away with unlawful conduct which violated an Act of Congress targeting that very conduct.

This would be a sorry end to a pivotal episode in American history. This case presents exceptionally important issues pertaining to the scope of presidential power and the state secrets privilege. If the case is to end without an adjudication of those issues or the TSP's legality, but instead with a determination that the Executive Branch enjoys sovereign immunity from any accountability for warrantless wiretapping under 50 U.S.C. § 1810, it should not be based on the fundamental misapprehension that a remedy exists for use of unlawfully-collected information under 50 U.S.C. § 1806(a), when in fact that statute provides no such remedy.

No federal appellate court has yet decided the profoundly important issue raised by the TSP: whether the President may violate an Act of Congress in the name of national security. This Court should grant a rehearing en banc to determine whether the President may evade that issue here by invoking sovereign immunity.

B. The Panel's Decision Conflicts With Two Decisions By the Same Panel in 2011.

Finally, we note that the panel's decision conflicts with two decisions by the same panel in 2011. In *Hepting*, 671 F.3d 881, which upheld the FAA's provision of retroactive immunity to the telecommunications carriers that participated in the TSP, the panel said that the FAA "does not foreclose relief against government actors and entities who are the primary players in the alleged wiretapping. Hepting retains an independent judicial avenue to address those claims." *Id.* at 899. The panel added, "Congress did not prohibit adjudication of Hepting's claims, it simply limited the universe of responsibility to government defendants." *Ibid.* Similarly, in *Jewel*, 673 F.3d 902, the panel said "Congress specifically envisioned plaintiffs challenging government surveillance under this statutory constellation." *Id.* at 912.

This view that the federal government may be sued for warrantless wiretapping in violation of FISA is borne out by the FAA's legislative history. The panel's *Hepting* decision itself quotes a Senate report on the FAA which states that the provision of retroactive immunity for the telecommunications carriers was not intended "to apply to, or in any way affect, pending or future suits against the Government as to the legality of the President's program." S. REP. 110-209 at 8 (2007) (quoted in *Hepting,* 671 F.3d at 899). Similarly, one of the FAA's proponents,

Senator Kit Bond, stated in a cloture debate that victims of warrantless wiretapping "can still sue the Government." 154 CONG. REC. 112, at S6470 (daily ed. July 9, 2008).

The focus in *Hepting* and *Jewel* was on *wiretapping* and *surveillance*, not on the *use* of the collected information, and the panel plainly stated that, in the FAA's wake, the plaintiffs could still sue the federal government for the unlawful collection. Yet in the present case the panel changes course and holds that the victims of warrantless wiretapping *cannot* sue the government perpetrators for the unlawful collection, due to sovereign immunity, but can only sue for unlawful use or disclosure.

Thus, en banc consideration is warranted because "the panel decision conflicts with a decision . . . of the court to which the petition is addressed . . . and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions," FRAP 35(b)(1)(A)—here, uniformity of multiple decisions by the same panel.

CONCLUSION

For the foregoing reasons, a panel rehearing and a rehearing en banc are both warranted.

August 29, 2012

Respectfully submitted,

/s/ Jon B. Eisenberg

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, I certify that the Petition for Panel Rehearing and For Rehearing En Banc is proportionately spaced, has a typeface of 14 points or more, and contains a total of 4,038 words.

August 29, 2012 By: /s/ Jon B. Eisenberg
Jon B. Eisenberg

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

Signature: s/ Jon B. Eisenberg

SLIP OPINION
AUGUST 7, 2012

Nos. 11-15468 & 11-15535

Al-Haramain Islamic Foundation, Inc., et al.

v.

Barack H. Obama, President of the United States of America, et al.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AL-HARAMAIN ISLAMIC FOUNDATION, INC., an Oregon Nonprofit Corporation; WENDELL BELEW, a U.S. Citizen and Attorney at Law; ASIM GHAFOOR, a U.S. Citizen and Attorney at Law,

Plaintiffs-Appellees,

v.

BARACK H. OBAMA, President of the United States, in his official capacity; NATIONAL SECURITY AGENCY; KEITH B. ALEXANDER, Director of NSA, in his official capacity; OFFICE OF FOREIGN ASSETS CONTROL, of the US Department of the Treasury; ADAM J. SZUBIN, Director of OFAC, in his official capacity; FEDERAL BUREAU OF INVESTIGATION; ROBERT S. MUELLER, III, Director of FBI, in his official capacity,

Defendants-Appellants.

No. 11-15468

D.C. No. 3:07-cv-00109-VRW

AL-HARAMAIN ISLAMIC FOUNDATION, INC., an Oregon Nonprofit Corporation,
Plaintiff,

and

WENDELL BELEW, a U.S. Citizen and Attorney at Law; ASIM GHAFOOR, a U.S. Citizen and Attorney at Law,
Plaintiffs-Appellants,

v.

BARACK H. OBAMA, President of the United States, in his official capacity; NATIONAL SECURITY AGENCY; KEITH B. ALEXANDER, Director of NSA, in his official capacity; OFFICE OF FOREIGN ASSETS CONTROL, of the US Department of the Treasury; ADAM J. SZUBIN, Director of OFAC, in his official capacity; FEDERAL BUREAU OF INVESTIGATION; ROBERT S. MUELLER, III, Director of FBI, in his official capacity,
Defendants-Appellees.

No. 11-15535

D.C. No. 3:07-cv-00109-VRW

OPINION

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted
June 1, 2012—Pasadena, California

Filed August 7, 2012

Before: Harry Pregerson, Michael Daly Hawkins, and M. Margaret McKeown, Circuit Judges.

Opinion by Judge McKeown

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OPINION

McKEOWN, Circuit Judge:

This case, which comes before us a second time, is one of many related to the United States government's Terrorist Surveillance Program, a program that "intercepted international communications into and out of the United States of persons alleged to have ties to Al Qaeda and other terrorist networks." *Al-Haramain Islamic Found. v. Bush* ("*Al-Haramain I*"), 507 F.3d 1190, 1192 (9th Cir. 2007). In the previous appeal, we determined that "the state secrets privilege d[id] not bar the very subject matter of th[e] action" and remanded to the district court to consider, among other issues, whether the Foreign Intelligence Surveillance Act (FISA) preempts the state secrets privilege. *Id.* at 1193. On remand, the district court held that FISA preempts or displaces the state secrets privilege, that the government implicitly waived sovereign immunity for damages under FISA's civil liability provision, 50 U.S.C. § 1810, and that two of the Al-Haramain plaintiffs were entitled to statutory damages and attorney's fees.

The threshold issue in this appeal is whether the district court erred in predicating the United States' liability for money damages on an implied waiver of sovereign immunity under § 1810. It is well understood that any waiver of sovereign immunity must be unequivocally expressed. Section 1810 does not include an explicit waiver of immunity, nor is it appropriate to imply such a waiver. Consequently, we reverse the district court's judgment awarding damages and attorney's fees to Al-Haramain under § 1810. We also affirm the dismissal of Robert Mueller, Director of the FBI, in his personal capacity.

This case effectively brings to an end the plaintiffs' ongoing attempts to hold the Executive Branch responsible for intercepting telephone conversations without judicial authorization. However, we cannot let that occur without comment on the government's recent, unfortunate argument that the plaintiffs have somehow engaged in "game-playing."

In early 2004, the Treasury Department announced an investigation of Al-Haramain Islamic Foundation, Inc. Then in late 2004, for the first time publicly alleged links to terrorism involving Al-Haramain. Also in 2004, the plaintiffs received a copy of a document from the Office of Foreign Assets Control (the "Sealed Document"), which may or may not have suggested certain of the plaintiffs or their lawyers had been electronically surveilled. In 2005, a *New York Times* article revealed that the National Security Agency "had obtained the cooperation of telecommunications companies to tap into a significant portion of the companies' telephone and e-mail traffic, both domestic and international."[1] Based on some or all of the above, the plaintiffs thought that they had been unlawfully surveilled, and in 2006 they filed suit.

[1]James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1.

Over the last six years, the plaintiffs have faced a moving and shrinking target. In 2008, Congress narrowed the list of potential defendants by granting telecommunications providers retroactive immunity. *See In re Nat'l Sec. Agency Telecomms. Records Litig.*, 671 F.3d 881, 891-93 (9th Cir. 2011) (describing 2008 amendments to FISA). Meanwhile, the evidentiary arsenal at the plaintiffs' disposal has been constantly in flux. On one hand, the Sealed Document was excluded, pending a determination whether the FISA preempted the State Secrets privilege in the telecommunications field. *See Al-Haramin I*, 507 F.3d 1190. On the other, the public evidence favorable to the plaintiffs grew to include the FBI admitting to having used surveillance in connection with its investigation of Al-Haramain, the Treasury Department acknowledging it intercepted 2003 telephone conversations involving an Al-Haramain member, and top Executive Branch officials testifying before Congress that most modern international communications are wired.

In light of the complex, ever-evolving nature of this litigation, and considering the significant infringement on individual liberties that would occur if the Executive Branch were to disregard congressionally-mandated procedures for obtaining judicial authorization of international wiretaps, the charge of "game-playing" lobbed by the government is as careless as it is inaccurate. Throughout, the plaintiffs have proposed ways of advancing their lawsuit without jeopardizing national security, ultimately going so far as to disclaim any reliance whatsoever on the Sealed Document. That their suit has ultimately failed does not in any way call into question the integrity with which they pursued it.

BACKGROUND

I. AL-HARAMAIN I

In *Al-Haramain I*, Al-Haramain Islamic Foundation and two of its lawyers (collectively "Al-Haramain") "claimed that

they were subject to warrantless electronic surveillance in 2004 in violation of the Foreign Intelligence Surveillance Act." 507 F.3d at 1193. At the core of the allegations stood "a classified 'Top Secret' document (the 'Sealed Document') that the government inadvertently gave to [the Al-Haramain organization] in 2004 during a proceeding to freeze the organization's assets." *Id.*

We held that the suit itself was not precluded by the state secrets privilege, although the privilege protected the Sealed Document. *Id.* Without the Sealed Document, the Al-Haramain organization could not establish that it suffered injury-in-fact and therefore did not have standing to bring suit. *Id.* at 1205. As to the attorney plaintiffs, we remanded to the district court to consider whether "FISA preempts the common law state secrets privilege." *Id.* at 1193.

II. DISTRICT COURT PROCEEDINGS ON REMAND

On remand, the district court held extensive proceedings and issued multiple orders on the various remaining legal issues, including three published decisions. At the outset, the district court held that "FISA preempts or displaces the state secrets privilege . . . in cases within the reach of its provisions." *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 564 F. Supp. 2d 1109, 1124 (N.D. Cal. 2008). "This," the district court wrote, "is such a case." *Id.*

Concluding that § 1810 waives the United States' sovereign immunity, the district court denied the government's motion to dismiss for lack of jurisdiction. *Id.* at 1125. The court acknowledged that "[i]t is, of course true that section 1810 does not contain a waiver of sovereign immunity analogous to that in 18 U.S.C. section 2712(a) which expressly provides that the aggrieved persons may sue the United States for unlawful surveillance . . . ." *Id.* However, because "it is only such [federal] officers and employees acting in their official capacities that would engage in surveillance of the type con-

templated by FISA," the court feared that FISA would offer "scant, if any, relief" in the absence of a waiver. *Id.* Thus, it held that a waiver was "[i]mplicit in the remedy" under § 1810. *Id.*

In light of the Sealed Document, the court ruled it was necessary for the Al-Haramain plaintiffs to establish they were "aggrieved parties" under FISA using non-classified information. The district court dismissed the complaint with leave to amend the FISA claims, and Al-Haramain filed an amended complaint. The district court then concluded that "[w]ithout a doubt" the amended complaint "alleged enough to plead 'aggrieved person' status so as to proceed to the next step in proceedings under FISA's sections 1806(f) and 1810." *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 595 F. Supp. 2d 1077, 1086 (N.D. Cal. 2009). Moving to the merits, in its next ruling, "the court directed plaintiffs to move for summary judgment on their FISA claim relying only on non-classified evidence." *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 700 F. Supp. 2d 1182, 1192 (N.D. Cal. 2010). Al-Haramain did so and the government filed a cross-motion to dismiss and for summary judgment. The court denied the government's motion to dismiss for lack of jurisdiction, rejecting the argument that Al-Haramain lacked standing because the program under which it was surveilled had been terminated, and once again holding that § 1810 waived the United States' sovereign immunity. *Id.* at 1192-93.

On the merits, the district court granted summary judgment in favor of Al-Haramain with respect to governmental liability under FISA. *Id.* at 1202. Al-Haramain then accepted the court's invitation to voluntarily dismiss the remaining claims "in order to take the steps necessary for the entry of judgment on the FISA claim." *Id.* at 1203. The district court also dismissed claims against FBI Director Robert Mueller in his individual capacity. *Id.*

In a follow-up order on remedies, the court first denied damages to the Al-Haramain organization because it was a

"foreign power or an agent of a foreign power" under FISA's broad definition of that term, and therefore ineligible to recover damages under the statute. 50 U.S.C. § 1810. The two individual plaintiffs did not seek actual damages but were awarded liquidated damages of $20,400 each. The district court denied punitive damages and equitable relief. Finally, the court awarded the requested $2,515,387.09 in attorney's fees and $22,012.36 in costs. *See* 50 U.S.C. § 1810.

ANALYSIS

I. SOVEREIGN IMMUNITY

The key and dispositive issue on appeal is whether the government waived sovereign immunity under FISA's civil liability provision,[2] 50 U.S.C. § 1810. Contrary to the district court's reliance on implied waiver, "[a] waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (internal quotation marks omitted).

We have the benefit of the Supreme Court's most recent pronouncement in this area. Earlier this year, the Court interpreted the waiver provision of the Privacy Act of 1974, which, like FISA, protects individuals against the government's collection, use, and disclosure of information. *FAA v. Cooper*, 132 S.Ct. 1441, 1448 (2012). According to the Privacy Act, "the United States shall be liable to [an] individual in an amount equal to the sum of . . . actual damages." 5

[2] "[S]overeign immunity is a limitation on the district court's subject matter jurisdiction." *Adam v. Norton*, 636 F.3d 1190, 1192 n.2 (9th Cir. 2011). In light of our decision on sovereign immunity, we need not address the constitutional and prudential standing issues, nor the question of statutory standing, namely whether Al-Haramain meets the "aggrieved person" requirement of 50 U.S.C. § 1810. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (A "federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." (internal quotation marks omitted)).

U.S.C. § 552a(g)(4)(A). In determining that the *scope* of the immunity waiver "[did] not unequivocally authorize an award of damages for mental or emotional distress," *Cooper*, 132 S.Ct. at 1456, the Court reiterated the standard for sovereign immunity: "What we thus require is that the scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretive tools. If it is not, then we take the interpretation most favorable to the Government." *Id.* at 1448.

[1] In light of these principles we now consider § 1810, which was the basis on which the district court ordered relief and the section relied on by Al-Haramain. At oral argument, Al-Haramain confirmed that it was not proceeding under other sections of FISA. Al-Haramain argues that, as a result of purported illegal surveillance, it may bring a claim against the United States under § 1810, which states:

> An aggrieved person, . . . who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section 1809 of this title shall have a cause of action against any person who committed such violation . . . .

A "person" who may have committed the violation is defined as "any individual, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power." 50 U.S.C. § 1801(m). Glaringly missing from the definition is the "United States." An offense under § 1810 is predicated on a violation of § 1809, a criminal provision, which provides that:

> (a) A person is guilty of an offense if he intentionally
>
> (1) engages in electronic surveillance . . . except as authorized by . . . any express statutory authorization . . .

> (2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by . . . express statutory authorization . . . .
>
> . . .
>
> (d) There is Federal jurisdiction . . . if the person committing the offense was an officer or employee of the United States at the time the offense was committed.

In considering whether § 1810 encompasses a waiver of sovereign immunity, it is useful to benchmark the statutory language against other explicit waivers of sovereign immunity. The Federal Tort Claims Act provides the most prominent example: "The United States [is] liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674(b). However, Congress has used similarly explicit waiver provisions in other contexts. *See, e.g.*, 42 U.S.C. § 2000e-5(k) ("In any action or proceeding under this subchapter . . . the United States shall be liable for costs the same as a private person.") (unlawful employment practices); 46 U.S.C. § 30903(a) ("[A] civil action in admiralty in personam may be brought against the United States."); 26 U.S.C. § 7433(a) ("If . . . any officer or employee of the Internal Revenue Service . . . disregards any provision of this title . . . [a] taxpayer may bring a civil action for damages against the United States.").

[2] We need not comb the United States Code for disparate examples of sovereign immunity waivers; such examples are available closer to home within FISA. Congress included explicit waivers with respect to certain sections of FISA as part of the USA PATRIOT Act, 18 U.S.C. § 2712(a), which states in relevant part:

> Any person who is aggrieved by any willful violation of . . . sections 106(a), 305(a), or 405(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) may commence an action in United States District Court against the United States to recover money damages.[3]

This section underscores the importance of considering the statutory scheme as a whole. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (internal quotation marks omitted)). Congress well understood how to express a sovereign immunity waiver in the context of FISA. Admittedly, magic words, such as "an action against the United States," are not required to deduce a waiver of sovereign immunity. In certain circumstances, the Supreme Court has determined the existence of a waiver, by using "the other traditional tools of statutory construction." *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008). Nonetheless, contrasted against other provisions deemed sufficient to invoke waiver, the lack of an explicit waiver in § 1810 is stark, permitting suit only against a "person," without listing the "United States." Just as the term "damages" was deemed ambiguous and thus limited sovereign immunity under the Privacy Act, *Cooper*, 132 S.Ct at 1456, so too is the term "person" ambiguous vis-a-vis governmental liability. Because there "is a plausible interpretation of the statute that would not allow money damages against the government," any ambiguity is construed "in favor of the sovereign." *Id.* at 1444, 1448.

[3]These sections of FISA correspond to 50 U.S.C. § 1806(a) ("Information acquired from an electronic surveillance . . . may be used and disclosed by Federal officers and employees . . . only in accordance with the minimization procedures required by this subchapter."); § 1825(a) (information acquired as a result of a physical search); § 1845(a) (information collected through "the use of a pen register or trap and trace device").

Although our decision is grounded solely in the text of the statute itself, the legislative history surrounding 18 U.S.C. § 2712(a) further "confirms what we have concluded from the text alone." *Mohamad v. Palestinian Auth.*, 132 S.Ct. 1702, 1710 (2012); *see Levin v. United States*, 663 F.3d 1059, 1063 (9th Cir. 2011) (considering legislative history to confirm that the Gonzales Act does not waive sovereign immunity). Because FISA did not, on its own terms, waive sovereign immunity, an initial version of the PATRIOT Act proposed a sovereign immunity waiver for violations of § 1810. *See* H.R. Rep. No. 107-236, at 12-13, 42 (2001) (proposing to amend § 1810 to provide a remedy for its violation under the Federal Tort Claims Act). This proposed amendment to § 1810 was deleted the very next day; instead, a waiver of sovereign immunity was incorporated into 18 U.S.C. § 2712. While § 2712 creates United States liability for certain FISA violations such as those of 50 U.S.C. § 1806, it does not include claims under § 1810.[4] Thus, our conclusion is consistent with congressional consideration and later rejection of an immunity waiver for violations of § 1810.

[3] Contrasting § 1810 liability, for which sovereign immunity is not explicitly waived, with § 1806 liability, for which it is, also illuminates congressional purpose. Liability under the two sections, while similar in its reach, is not identical. Section 1806, combined with 18 U.S.C. § 2712, renders the United States liable only for the "use[ ] and disclos[ure]" of information "by Federal officers and employees" in an unlawful manner. Section 1810, by contrast, also creates liability for the actual collection of the information in the first place, targeting "electronic surveillance *or* . . . disclos[ure] or use[ ]" of that information. (emphasis added). Under this scheme, Al-Haramain can bring a suit for damages against the

[4]Al-Haramain argues that since 50 U.S.C. § 1810, unlike 18 U.S.C. § 2520, does not specifically state that the United States is exempt from suit, immunity is waived. This improperly turns the presumption against waiver on its head.

United States for *use* of the collected information, but cannot bring suit against the government for collection of the information itself. *Cf. ACLU v. NSA*, 493 F.3d 644, 671 (6th Cir. 2007) (Lead Opinion of Batchelder, J.) (noting that FISA potentially allows limitless information collection upon issuance of warrant, but limits use and dissemination of information under, *inter alia*, § 1806(a)). Although such a structure may seem anomalous and even unfair, the policy judgment is one for Congress, not the courts. Also, because governmental liability remains under § 1806, the district court's concern that FISA relief would become a dead letter is not valid. *See In re Nat'l Sec. Agency Telecomms. Records Litig.*, 564 F. Supp. 2d at 1125.

Consistent with the congressional scheme, unlike 50 U.S.C. §§ 1806, 1825 and 1845, § 1810 has not been incorporated into the waiver of sovereign immunity in 18 U.S.C. § 2712, or elsewhere. Nor does liability under § 1810 come with the procedures that accompany such actions against the United States. Section 2712(b) sets out detailed procedures by which a claim may be filed against the United States, referring to Federal Tort Claims Act requirements, as well as to FISA. Paragraph (b)(4) states:

> Notwithstanding any other provision of law, the procedures set forth in section 106(f), 305(g), or 405(f) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) shall be the exclusive means by which materials governed by those sections may be reviewed.

Subsection (f) sets out in camera and ex parte procedures—suit against the United States can only proceed with these protections. It would be anomalous to the point of absurdity for Congress, on one hand, to carefully and explicitly waive sovereign immunity with respect to certain FISA sections, set out detailed procedures for suits pursuant to that waiver, and then

on the other, cavalierly imply a sovereign immunity waiver with respect to § 1810 by rendering liable any "person."

Al-Haramain reads volumes into the definition of a "person." Section 1801(m) defines "person" to mean "any individual, including any officer or employee of the Federal Government." That section is then incorporated into § 1810, which renders "any person" subject to suit for unlawful surveillance. Although the government urges that "person" applies to federal employees in only their personal capacities, Al-Haramain argues that if § 1801 stripped federal employees of immunity in only their personal capacities, it would be redundant: the term "individual" already covers employees in their personal capacities. Therefore, according to Al-Haramain, § 1801's reference to federal employees must target employees in their official capacities for money damages, which is tantamount to a waiver of sovereign immunity.

Al-Haramain's interpretation of the term "person" is problematic both in the context of § 1810 and the statute as a whole. Subsection 1801(m) is a definitional provision, in which "person" is defined to include both "individuals" and, more specifically, "employees and officers of the Federal Government." The provision does not impose liability on its own terms, and is therefore not concerned with personal versus official liability. That this definitional phrase is not directed to the individual's capacity becomes clear when looking at the statute as a whole. The term "person" is used in multiple locations within FISA to refer to a multitude of entities: potential plaintiffs, defendants, and even third parties. Inserting that definition in various appropriate subsections demonstrates that the definitional section is not targeted to the issue of personal versus official capacity, nor can such capacity be inferred. For example, § 1802(a)(1)(B), which speaks to surveillance without a warrant, excludes "communications to which a United States person is a party." Applications for court orders reference "the persons, facilities, or places specified on the application." 50 U.S.C. § 1804(a)(4). In certain sit-

uations the Attorney General must consider the "threat of death or serious bodily harm to any person." *Id.* § 1806(i). Similarly, the term is used throughout in reference to "aggrieved person." *See, e.g.,* § 1806(d); § 1810.

Thus, Al-Haramain's redundancy argument cannot seriously be that, as to sovereign immunity, the government's interpretation would render the text of § 1801(m) redundant in its own right; rather, the claim is that the text of § 1801(m) *becomes* redundant when incorporated into § 1810. Al-Haramain would therefore require Congress to foresee and prevent redundancy upon *incorporation* of § 1801, a general definitional section, into § 1810. In light of the multitudinous contexts in which the term "person" is used, this turducken approach takes the presumption against redundancy too far.

If Congress shared Al-Haramain's aversion to the potential redundancy of the term "employees and officers of the federal government," its behavior with respect to other sections of the statute is inexplicable. Section 1806 directly addresses the actions of "Federal officers or employees" without the intercession of § 1801(m). Nonetheless, 18 U.S.C. § 2712 is not content with providing only a cause of action under § 1806; rather, it *also* and *explicitly* waives sovereign immunity. This structure strongly points to the conclusion that the reference to "Federal officers or employees" in § 1806—and certainly in § 1810 via § 1801(m)—does not, by itself, waive sovereign immunity.[5]

[5]Al-Haramain also notes that courts have inferred a sovereign immunity waiver in Title VII because the statute renders department heads liable; it contends that the reference to federal employees in FISA is analogous to Title VII's reference to heads of departments. *Brown v. General Services Administration*, upon which Al-Haramain relies, concerns administrative exhaustion requirements and does not address sovereign immunity. 425 U.S. 820, 831-33 (1976). Later Supreme Court precedent directly undermines Al-Haramain's argument. *See Lane v. Peña*, 518 U.S. 187, 193-95 (1996) (declining to read a liability provision pertaining to "Federal provider[s] of . . . assistance" as broadly waiving governmental immunity).

Apart from the absence of an explicit grant of sovereign immunity and the stark contrast between § 1810 and other FISA provisions, the relationship between § 1809 and § 1810 further supports our conclusion. Section 1810 liability is premised upon a "violation of section 1809." In turn, a violation of § 1809 is a criminal offense, and occurs when "[a] person intentionally . . . engages in electronic surveillance under color of law" in a manner that violates certain statutory provisions.

[4] In other words, to be liable under § 1809 and § 1810, a "person" must be subject to criminal prosecution. Accordingly, to accept Al-Haramain's argument that § 1810 allows proceeding against a government employee in his official capacity, we must also suppose that a criminal prosecution may be maintained against an office, rather than an individual, under § 1809. This is unprecedented. We do not deny, as Al-Haramain argues, that there is precedent for prosecuting employees as *individuals* for actions taken in their official capacities. *See generally Maryland v. Soper*, 270 U.S. 9 (1926); *Tennessee v. Davis*, 100 U.S. 257 (1879); Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 Yale L.J. 2195 (2003). However, imposing criminal penalties against an office for actions of the officeholder is a different ball game: just as an officeholder is nominally replaced by his successor in a civil "official capacity suit" as a defendant, under Al-Haramain's interpretation, a successor in office could be *criminally* prosecuted for actions of his predecessor. Such an approach is "patently absurd." *United States v. Singleton*, 165 F.3d 1297, 1299-1300 (10th Cir. 1999) (statute criminalizing the offer of a reward in exchange for testimony could not extend to the United States or an employee in her official capacity). Therefore, we do not interpret the reference to "person" in § 1810 to mean that a government employee is liable in his official capacity. *See also United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941) (not-

ing in a criminal antitrust action that "in common usage, the term 'person' does not include the sovereign").

[5] Congress can and did waive sovereign immunity with respect to violations for which it wished to render the United States liable. It deliberately did not waive immunity with respect to § 1810, and the district court erred by imputing an implied waiver. Al Haramain's suit for damages against the United States may not proceed under § 1810.

II. PERSONAL LIABILITY OF FBI DIRECTOR MUELLER

During the many years this case was litigated in the district court, Al-Haramain's suit against FBI Director Mueller in his individual capacity was nothing more than a sideshow, overshadowed by the core claims against the government. Al-Haramain never vigorously pursued its claims against Mueller. Rather, in a hearing at the district court, Al-Haramain emphasized that "we believe Mr. Mueller is a corollary we needn't get to." *In re Nat'l Sec. Agency Telecomms. Records Litig.,* 700 F. Supp. 2d at 1203. When the district court finally reached the issue of Mueller's individual liability, it noted that Mueller was "the only defendant against whom plaintiffs seek to proceed in an individual capacity." *Id*. The district court then dismissed, without leave to amend, all claims against Mueller in his individual capacity because "the nature of the wrongdoing by governmental actors alleged and established herein is official rather than individual or personal." *Id.*

[6] Al-Haramain's bare-bones allegations against Mueller are insufficient to survive summary judgment. The allegations, in their entirety, consist of two simple statements: Mueller "threatened to resign because of concerns about the legality of the warrantless surveillance program;" and "Mueller testified before the House Judiciary Committee that in 2004 the FBI, under his direction, undertook activity using information produced by the NSA through the warrantless surveillance program." These allegations do not appropriately

allege a claim under FISA. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." (internal quotations and citations omitted)). Al-Haramain's allegations against Mueller are significantly less concrete than those found insufficient in *Iqbal*. *See id.* at 680-81. The district court recognized that Al-Haramain could not bring forth additional allegations that might breathe life into the otherwise deficient claim against Mueller. On appeal, Al-Haramain does nothing to dispel that conclusion. The district court did not abuse its discretion in dismissing the claims against Mueller without leave to amend.

CONCLUSION

[7] Because there is no explicit waiver of sovereign immunity, we reverse the district court's determination that § 1810 waives sovereign immunity. As a consequence, we vacate the judgment in favor of Al-Haramain, including the judgment for liquidated damages, attorney's fees, and costs. We affirm the dismissal of claims against Mueller in his individual capacity.

AFFIRMED IN PART, REVERSED IN PART, AND JUDGMENT VACATED. The parties shall bear their own costs on appeal.

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

Signature: s/ Jon B. Eisenberg