

1 JAMES R. WHITMAN (Wis. Bar No. 1036757)  
 Trial Attorney  
 2 United States Department of Justice  
 Civil Division, Torts Branch  
 3 P.O. Box 7146, Ben Franklin Station  
 Washington, DC 20044-7146  
 4 Tel: (202) 616-4169  
 Fax: (202) 616-4314  
 5 james.whitman@usdoj.gov

6 *Attorney for the Defendants Listed on the Signature Page*

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

9 \_\_\_\_\_ )  
 10 CAROLYN JEWEL, et al., )  
 11 Plaintiffs, )  
 12 v. )  
 13 NATIONAL SECURITY AGENCY, et al., )  
 14 Defendants. )

**No. 08-4373 VRW**  
  
**INDIVIDUAL CAPACITY  
 DEFENDANTS’ MOTION FOR  
 ADMINISTRATIVE RELIEF TO  
 ENLARGE THE TIME TO ANSWER  
 OR OTHERWISE RESPOND TO  
 PLAINTIFFS’ COMPLAINT**

15 Pursuant to Civil Local Rules 6-3 and 7-11, all Government defendants sued in their  
 16 individual capacity (George W. Bush, Richard B. Cheney, David S. Addington, Keith B.  
 17 Alexander, Michael V. Hayden, John D. McConnell, John D. Negroponte, Michael B. Mukasey,  
 18 Alberto R. Gonzales, and John D. Ashcroft) respectfully request that the Court enter an order that  
 19 they not be required to answer or otherwise respond to plaintiffs’ complaint until after there is a  
 20 determination that plaintiffs have standing to proceed in this action.<sup>1</sup>

21 On September 18, 2008, plaintiffs filed a complaint alleging violations of the  
 22 Constitution and various federal statutes arising out of alleged warrantless surveillance and  
 23 raising claims against the National Security Agency (“NSA”), the Department of Justice  
 24 (“DOJ”), and numerous Government officials in their official and individual capacities. See Doc  
 25

---

26  
 27 <sup>1</sup> By filing this motion, the individual capacity defendants do not waive, and expressly  
 28 reserve, all defenses available to them relating to all aspects of this action.

1 # 1. Upon plaintiffs' unopposed motion, the Court entered an order finding this case is related to  
2 Hepting v. AT&T Corp., No. 06-0672 VRW (N.D. Cal.), see Doc # 9, which itself is  
3 consolidated with other actions before this Court by Order of the Judicial Panel on Multidistrict  
4 Litigation, see In re Nat'l Sec. Agency Telecomm. Records Litig., MDL No. 06-1791 VRW  
5 (N.D. Cal.).

6 The individual capacity defendants originally were required to answer or otherwise  
7 respond to plaintiffs' complaint by February 2, 2009, based on the date plaintiffs effected service  
8 on those defendants. On January 30, 2009, however, the Court granted an unopposed motion  
9 filed by all defendants (in all capacities) for an extension of time to answer or otherwise respond  
10 to plaintiffs' complaint no later than today, April 3, 2009. See Doc # 17.

11 On this same date the federal agency and official capacity defendants (collectively  
12 referred to as the "United States") have filed the "Government Defendants' Motion to Dismiss  
13 and for Summary Judgment." In that motion the United States argues, among other things, that  
14 the state secrets and related statutory privileges require the exclusion of information necessary to  
15 litigate this case, including information necessary to litigate whether or not plaintiffs can  
16 establish their standing. If the Court grants the United States' motion, then plaintiffs will be  
17 unable to proceed with any of their claims against any of the defendants, including the individual  
18 capacity defendants. The Court therefore should not require the individual capacity defendants to  
19 answer or otherwise respond to plaintiffs' complaint until the issues identified in the United  
20 States' motion, including plaintiffs' standing to bring suit, have been resolved. Cf. El-Masri v.  
21 United States, 479 F.3d 296, 300-01, 304-13 (4th Cir. 2007) (finding that United States properly  
22 asserted state secrets privilege after intervening in case solely for that purpose and that all of  
23 plaintiff's claims, including individual capacity claim against the Director of the Central  
24 Intelligence Agency, should be dismissed on that basis without considering whether plaintiff had  
25 adequately pled his underlying claims).

26 That is in fact precisely the procedure being followed in Al-Haramain Islamic Found.,  
27 Inc. v. Bush, No. 07-109 VRW (N.D. Cal.), another case that has been consolidated with cases

1 related to this one. In Al-Haramain, the parties entered into a stipulation that the individual  
2 capacity defendant in that case (Robert S. Mueller III, the Director of the Federal Bureau of  
3 Investigation) would not be required to answer or otherwise respond to the plaintiffs' complaint  
4 "until after there is a determination that Plaintiffs have standing to proceed in [that] action." See  
5 Al-Haramain, No. 07-109 VRW Doc # 39 at 1.

6 As in Al-Haramain, the United States' assertion of the state secrets privilege poses unique  
7 challenges to the individual capacity defendants in this case. Because the United States has  
8 invoked that privilege, the individual capacity defendants have no access to information that is  
9 central to plaintiffs' allegations. Requiring these defendants, most of whom are no longer even  
10 in government service, to respond to plaintiffs' complaint without access to that evidence and  
11 before it is determined whether the United States has properly asserted the state secrets privilege  
12 over that evidence, would be extremely prejudicial to the individual capacity defendants and their  
13 ability to mount a complete defense. See El-Masri, 479 F.3d at 309-10 (dismissing individual  
14 capacity claims where United States asserted state secrets privilege in part because the individual  
15 capacity "defendants could not properly defend themselves without using privileged evidence").

16 Counsel for the individual capacity defendants has consulted with plaintiffs' counsel  
17 regarding the instant motion, and the latter indicated that plaintiffs would not agree to a  
18 stipulation in this case similar to the one entered in Al-Haramain and likely would oppose the  
19 motion at hand. The Court nevertheless should, for all of the reasons discussed above, enter an  
20 order with similar effect, to wit, that the individual capacity defendants need not answer or  
21 otherwise respond to plaintiffs' complaint until after it has been determined that plaintiffs have  
22 standing to bring suit.

1 Respectfully submitted this 3rd day of April, 2009,

2 MICHAEL F. HERTZ  
Acting Assistant Attorney General, Civil Division

3  
4 TIMOTHY P. GARREN  
Director, Torts Branch

5 ANDREA W. MCCARTHY  
Senior Trial Counsel, Torts Branch

6 /s/ James R. Whitman  
7 JAMES R. WHITMAN (Wis. Bar No. 1036757)  
Trial Attorney  
8 United States Department of Justice  
Civil Division, Torts Branch

9 Attorneys for George W. Bush, Richard B. Cheney, David S. Addington, Keith B. Alexander,  
10 Michael V. Hayden, John D. McConnell, John D. Negroponte, Michael B. Mukasey, Alberto R.  
Gonzales, and John D. Ashcroft, in their individual capacity

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28