UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; COUNCIL ON AMERICAN-ISLAMIC RELATIONS MICHIGAN; GREENPEACE, INC.; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA MCKELVEY; and BARNETT R. RUBIN, Plaintiffs, v. NATIONAL SECURITY AGENCY/CENTRAL SECURITY SERVICE; AND LIEUTENANT GENERAL KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency/Central Security Service Defendants.	Case No. 2:06-cv-10204 Hon. Anna Diggs Taylor

DEFENDANTS' MOTION FOR CLARIFICATION OF
THE COURT'S ORDER OF MAY 31, 2006

On May 31, 2006, the Court denied Defendants' Motion to Stay Consideration of Plaintiffs' Motion for Partial Summary Judgment ("Defendants' Stay Motion") and ordered that Plaintiffs' Motion for Partial Summary Judgment ("Plaintiffs' Motion) be heard as scheduled on June 12, 2006. In its Order, the Court stated that Defendants "filed no response" to Plaintiffs' Motion, but further stated that Defendants may appear at the June 12 hearing and "argue against

it." The Court separately scheduled further briefing and a hearing on Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Defendants' Motion to Dismiss"), which is based on the United States' assertion of the military and state secrets privilege (hereafter "state secrets privilege") and other statutory privileges.

To the extent that the Court's denial of Defendants' Stay Motion was simply intended to preserve the June 12 hearing date and to schedule a second hearing on Defendants' motions, Defendants of course have no objection to addressing the issues on both occasions. To the extent, however, that the Court's denial of a stay was based on the understanding that Defendants did not respond to Plaintiffs' Motion, or upon the Court's determination that it would be proper to decide Plaintiffs' Motion, which seeks judgment on the merits, before the threshold jurisdictional and evidentiary issues raised by Defendants' Motion to Dismiss, then Defendants seek clarification of the Court's May 31 Order.

First, Defendants respectfully submit that their Motion to Dismiss and Motion to Stay—both of which were based upon the United States' assertion of the state secrets privilege—were the appropriate response to Plaintiffs' Motion. Indeed, Defendants' submissions were the only response possible at this juncture. Defendants' submissions explain in detail why Plaintiffs' Motion cannot and should not be granted in light of the state secrets assertion, which prevents the disclosure of facts material not only to Plaintiffs' standing—and, thus, the Court's jurisdiction in this case—but also to adjudicating Plaintiffs' claims on the merits. Defendants' submission was not fashioned an "opposition" to the merits of Plaintiffs' Motion because Defendants are unable to respond to the merits without disclosing privileged and classified material facts. Nonetheless, Defendants' submissions constitute an extensive, detailed,

and highly specific response to Plaintiffs' Motion and explain not only why each claim cannot be adjudicated, but also why this case should be dismissed (and, therefore, why Plaintiffs' Motion could not be granted). *See, e.g.*, Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss ("Def. Mem."), Docket No. 34, at 28-46. Defendants thus respectfully submit that their submissions should be considered in connection with Plaintiffs' Motion.

Second, Defendants do not read the Court's denial of Defendants' Stay Motion as a substantive determination that the merits of Plaintiffs' Motion could be resolved before reaching the issues raised by Defendants' Motion to Dismiss, but Defendants seek clarification on this point. As indicated, Defendants' Motion to Dismiss raises fundamental issues as to whether, in light of the privilege assertions, Plaintiffs can establish their standing (which is required for this Court to have jurisdiction under Article III of the Constitution) and whether their claims can be adjudicated absent privileged state secrets. Defendants did not seek a stay of Plaintiffs' Motion in order to jockey for a tactical advantage or in an attempt to unduly delay these proceedings. Rather, consideration of the issues raised by Defendants logically precedes any attempt to decide the merits of Plaintiffs' claims. The fact that Plaintiffs filed their Motion before Defendants had responded to the Complaint does not support the notion that Plaintiffs' Motion can be resolved before considering Defendants' privilege assertions and Motion to Dismiss, which as noted above provide the only response to Plaintiffs' Motion that is appropriate at this time. Such a course would put the ultimate merits of Plaintiffs' claims before critical, threshold jurisdictional

and evidentiary issues.[1]

In sum, Defendants request that the Court consider Defendants' submissions, which on their face respond at length to Plaintiffs' Motion, in connection with the June 12 hearing, and that the Court not reach the merits of Plaintiffs' Motion until after resolving the threshold issues raised by Defendants' submissions. While Defendants believe it might be more efficient to address the motions of all parties at one hearing (after Plaintiffs have had a chance to respond to Defendants' Motion to Dismiss), Defendants will obviously be prepared to address the arguments in their submissions at the June 12 hearing.

BACKGROUND

Plaintiffs filed their Complaint in this action on January 17, 2006, and Defendants' response was initially due on March 20, 2006. On March 9, 2006, before Defendants were even required to respond to the Complaint, Plaintiffs filed their Motion for Partial Summary Judgment. Two business days thereafter, Defendants moved for an extension of time to respond to the Complaint and summary judgment motion. *See* Docket No. 9. Defendants explained that the additional time was necessary because, *inter alia*, Plaintiffs' claims implicated highly classified information, and any decision regarding the protection of that information through an assertion of the state secrets privilege had to be made by the head of the agency with control over

[1] In a similar circumstance, the district court in *Hepting, et al. v. AT&T, et al*., Civil Action No. 06-672 (N.D. Cal.), recently postponed a hearing on the plaintiffs' motion for a preliminary injunction against AT&T (for its alleged cooperation with the NSA), pending consideration of the United States' state secrets assertion in that case. The district court cancelled the preliminary injunction hearing even though the plaintiffs had filed their motion before the United States had moved to intervene and asserted its privilege, and it instead set a hearing on, *inter alia*, the threshold state secrets issues raised by the United States in its motion to dismiss or, in the alternative, for summary judgment.

the matter after actual personal consideration by that officer. S*ee United States v. Reynolds*, 345 U.S. 1 (1953). The Court granted that extension, as well as a subsequent extension of one week, *see* Docket No. 30, allowing Defendants until May 26, 2006, to respond to Plaintiffs' Complaint and motion. Notably, Defendants did not indicate in either extension motion that their submissions would entail a response to the *merits* of Plaintiffs' claims or Motion. Nor could Defendants have made such a representation at that time without preempting the personal consideration that the Director of National Intelligence, John D. Negroponte, would be giving to the privilege issues.

Defendants filed their responses on May 26, 2006, in the form of a formal assertion of the state secrets privilege by Director Negroponte; statutory privilege assertions by Director Negroponte and the Signals Intelligence Director of the National Security Agency, Major General Richard J. Quirk; a Motion to Dismiss or, in the Alternative, for Summary Judgment; and a Motion to Stay. Defendants' submissions included classified and unclassified memoranda of law, and classified and unclassified declarations by Director Negroponte and Major General Quirk. Through those submissions, Defendants explained that state secrets at the heart of this case must be protected from disclosure and that this case cannot proceed without such privileged information, which is necessary to adjudicate Plaintiffs' claims. *See* Def. Mem. at 16-46. In particular, Defendants noted that Plaintiffs cannot prove their standing to maintain this action, *id.* at 16-28, or the merits of their claims, *id.* at 28-46, and that Defendants cannot adequately defend against Plaintiffs' claims or Motion, *id.*, without information subject to the state secrets privilege. Defendants further noted that these threshold issues, which go to the Court's jurisdiction and the availability of material evidence, should be considered before adjudication of

Plaintiffs' Motion, which seeks a judgment on the merits. *Id.* at 51-52.

DISCUSSION

From the outset of this case, Plaintiffs have clearly desired to reach the merits of their claims as quickly as possible, including by moving for summary judgment before Defendants were even required to respond to the Complaint. Where the disclosure of highly classified intelligence information is at stake, however, eager litigants cannot short-circuit the appropriate and well-established process for protecting such information and for determining whether a case can proceed in the absence of such information. As courts have consistently recognized, the United States has an "absolute right" to protect information in the interest of national security, and that right must be respected. *E.g.*, *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982).

Accordingly, Director Negroponte's assertion of the state secrets privilege must, at the very least, be considered as a threshold issue before Defendants can be required to respond to the merits of any claim implicating privileged information. Indeed, because the defense of this action would require classified facts, that defense cannot be made "without forcing a disclosure of the very thing the privilege is designed to protect." *Reynolds*, 345 U.S. at 8; *accord Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991); *Jabara v. Kelley*, 75 F.R.D. 475, 484, 486 (E.D. Mich. 1977). In order to prevent forcing that type of disclosure, courts have held that dismissal of an action (or, alternatively, summary judgment for the Government), rather than a presentation of a defense, is required if (1) state secrets are necessary for the plaintiff to prove its claims; (2) the state secrets privilege deprives the defendant of information necessary to defend against the claims; *or* (3) the "very subject matter of the action" is a state secret. *See, e.g.*, *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *Zuckerbraun*,

935 F.2d at 547.

This is the fundamental issue presented by Defendants' Motion to Dismiss. As explained in Defendants' classified and unclassified briefs, all three elements listed above—including that Defendants cannot respond to Plaintiffs' Motion without classified and privileged facts—are satisfied here and, accordingly, this case cannot proceed. Defendants, moreover, did not merely make a general presentation on this issue, but tracked each of the claims asserted in the Complaint and Plaintiffs' Motion and explained in detail why each claim cannot be adjudicated without state secrets (and thus why Plaintiffs' Motion must be denied). *See* Def. Mem. at 28-46. In this key respect, Defendants' May 26 submissions constitute their response—indeed, are Defendants' only possible response at this juncture if the state secrets privilege is to be given any effect—to Plaintiffs' Motion.

Defendants also note that declining to adjudicate the merits at this stage is consistent with other fundamental principles. For example, one significant (indeed, dispositive) result of the state secrets assertion is that Plaintiffs cannot prove their standing to maintain this action. It is well established that the Court must consider jurisdictional issues such as standing before proceeding to the merits of any claim. *See, e.g., Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of the case."). Moreover, just recently, the Supreme Court held that a court should first consider threshold issues raised by the applicability of a rule barring adjudication relating to secret espionage agreements—a principle equally applicable to the state secrets privilege. *See Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005). Judicial economy and constitutional avoidance principles also warrant initial consideration of

Defendants' submissions. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (noting the Supreme Court's "deeply rooted commitment not to pass on questions of constitutionality unless adjudication of the constitutional issue is necessary.") (internal quotation marks omitted).

Finally, Defendants' submission is consistent with Federal Rule of Civil Procedure 56(f), which expressly contemplates deferring adjudication of the merits of a summary judgment motion where it appears "from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition." In such circumstances, "the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had *or may make such other order as is just*." Fed. R. Civ. P. 56(f) (emphasis added). Here, the classified and unclassified declarations of Director Negroponte and Major General Quirk clearly explain that Defendants cannot present facts "essential to justify [their] opposition," because to do so would require disclosing the very information that the state secrets privilege is designed to protect, *see Reynolds*, 345 U.S. at 8, and would thereby result in exceptionally grave damage to the national security. Thus, in this respect as well, Defendants' submissions demonstrate why Plaintiffs' Motion could not be granted. As the D.C. Circuit has held, deciding the merits of a claim of unconstitutional warrantless foreign intelligence surveillance without the type of acts subject to the state secrets privilege here would be "tantamount to the issuance of an advisory opinion." *Halkin*, 690 F.2d at 1000.

CONCLUSION

Accordingly, because Defendants' submissions filed in support of their privilege assertions and Motion to Dismiss are the only response to Plaintiffs' Motion possible at this juncture, and for the other foregoing reasons, Defendants respectfully request that the Court consider Defendants' submissions in connection with any consideration of Plaintiffs' Motion, and that the Court resolve the threshold issues raised by Defendants' submissions prior to adjudicating the merits of Plaintiffs' Motion.

Dated: June 2, 2006

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

CARL J. NICHOLS
Deputy Assistant Attorney General

JOSEPH H. HUNT
Director, Federal Programs Branch

s/ *Anthony J. Coppolino*
ANTHONY J. COPPOLINO
Special Litigation Counsel

s/ *Andrew H. Tannenbaum*
ANDREW H. TANNENBAUM
Trial Attorney
U.S. Department of Justice, Civil Division
P.O. Box 883
20 Massachusetts Avenue, NW
Washington, DC 20044
(202) 514-4782 (tel)
(202) 616-8460 (fax)
Counsel for Defendants