

**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 and Chief of the Central Security Service,

Defendants.

Case No. 2:06-cv-10204

Hon. Anna Diggs Taylor

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR  
CLARIFICATION OF THE COURT'S ORDER OF MAY 31, 2006**

Plaintiffs hereby respond to defendants' motion, filed June 2, 2006, for clarification of this Court's order rejecting defendants' motion to stay consideration of plaintiffs' motion for partial summary judgment.

In their motion, defendants contend that this Court is obliged to consider the state secrets claim as a threshold question before reaching the merits of plaintiffs' motion for partial summary judgment. Defendants' Motion for Clarification at 6-7. Defendants' conclusion in this regard, however, depends on the erroneous assumption that this Court

needs more facts before it can adjudicate the jurisdictional and merits questions raised by plaintiffs' motion.

As plaintiffs explained in their Memorandum filed on March 9, 2006, and as further discussed in their Reply filed today, no further facts are needed to resolve plaintiffs' motion for partial summary judgment. Because plaintiffs are entitled to partial summary judgment without the introduction of additional facts, defendants' state secrets claim need not be reached at all with respect to this portion of the case. The state secrets doctrine is an evidentiary privilege, *Ellsberg v. Mitchell*, 709 F.2d 51, 56 (D.C. Cir. 1983), and it simply has no relevance here, where plaintiffs' pending motion is based entirely upon facts that defendants have already conceded and that are widely known to the public.

This Court's sequencing of the issues in its May 31 order is perfectly logical. The issue before the Court on June 12 is whether plaintiffs are entitled to partial summary judgment, a determination that turns on whether the record already before the Court includes all the facts necessary to entitle the plaintiffs to judgment as a matter of law. Then, under the remainder of the terms of the Court's May 31 order, defendants may at argument on July 10 press their claim that, should the Court conclude that additional facts are necessary, those facts are protected by the state secrets privilege.

For these reasons, plaintiffs do not believe that any clarification of the Court's May 31 Order is necessary.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 5, 2006, I caused to be electronically filed Plaintiffs' Response to Defendants' Motion for Clarification with the Clerk of the Court using the ECF system, which will send notification of such filing to the following: Anthony J. Copolino, Department of Justice and Andrew Tannenbaum, Department of Justice.

s/ Ann Beeson  
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