

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN**

AMERICAN CIVIL LIBERTIES UNION,	)	
et al.,	)	
	)	
Plaintiffs,	)	Civil Action No. 06-10204
	)	Hon. Anna Diggs Taylor
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.	)	
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**DEFENDANTS’ REPLY IN SUPPORT OF MOTION FOR CLARIFICATION  
OF THE COURT’S ORDER OF MAY 31, 2006**

Defendants seek to clarify the Court’s Order of May 31, 2006, to the extent that it was based on the Court’s understanding that Defendants did not respond to Plaintiffs’ Motion for Partial Summary Judgment (“Plaintiffs’ Motion”) (Docket No. 4), or that it would be proper to decide Plaintiffs’ Motion before the threshold jurisdictional and evidentiary issues raised by the Government’s state secrets privilege assertion and Motion to Dismiss or for Summary Judgment (“Motion to Dismiss”) (Docket Nos. 34, 37, 38). As Defendants have explained, they responded to Plaintiffs’ Motion in the only way possible at this juncture; moreover, consideration of the state secrets privilege and its impact on the adjudication of Plaintiffs’ claims, including Plaintiffs’ inability to establish standing, should precede any attempt to decide the merits of Plaintiffs’ claims or Motion. Nothing in Plaintiffs’ Response to Defendants’ Motion for Clarification (Docket No. 48) demonstrates otherwise.

Plaintiffs’ Response is grounded entirely in the assumption that no facts are necessary to

the resolution of their pending Motion. *See also* Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment (Docket No. 47) (similarly arguing that facts are not necessary to the resolution of their partial summary judgment motion). Plaintiffs are wrong. Defendants' May 26 submissions—which Plaintiffs now seek to have considered after their Motion—explain precisely why facts protected by the state secrets privilege are necessary to adjudicate Plaintiffs' claims. More important for present purposes, Plaintiffs have it exactly backwards in proposing that the Court should decide the merits *before* deciding whether the facts necessary to decide the merits are available (and before deciding standing and jurisdiction). At the very least, the parties disagree whether facts are necessary to adjudicate Plaintiffs' claims, and the Court must resolve that dispute—and thus consider Defendants' May 26 submissions—before deciding whether this action may proceed.

As set forth in more detail in the unclassified Memorandum filed in support of Defendants' Motion to Dismiss (“Def. Mem.”), the merits of Plaintiffs' Motion cannot be adjudicated for at least three reasons. First, Plaintiffs require additional and privileged facts to *prove* their claims and, most particularly, to meet their burdens of demonstrating both their standing and the allegations necessary to their *prima facie* case. *See* Def. Mem. at 16-28. Second, Defendants cannot *defend* against Plaintiffs' claims or respond to the merits of Plaintiffs' Motion without invoking classified and privileged facts. *Id.* at 28-46. Plaintiffs do not respond to this point at all in their Response, but the decisional law relating to the state secrets privilege firmly establishes that dismissal of a plaintiff's claims is the appropriate result in just such a circumstance. *See Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991). Third, Plaintiffs' action must be dismissed—and Plaintiffs' Motion must be denied—because “the very subject matter of this action” is a state secret and puts at risk the disclosure of that information. *See* Def.

Mem. at 47-49 (citing, *inter alia*, *Zuckerbraun*, 935 F.2d at 547).

Plaintiffs' only argument is that all of their claims (and all of Defendants' defenses) can be adjudicated on the basis of public facts alone. The implication of this argument, of course, is that there are *no* privileged state secrets that are relevant to this case. Again, Plaintiffs are wrong, and quite clearly so—as a review of Defendants' Motion to Dismiss demonstrates. *See* Def. Mem. at 16-46. Moreover, Plaintiffs' position that this Court should adjudicate the merits of their case before making a determination as to whether the merits *can* proceed is simply unfounded. At the very least, the dispute between the parties on this point demonstrates that the Court must first decide whether state secrets are relevant and necessary to address Plaintiffs' claims before making any decision regarding the Plaintiffs' Motion and further proceedings in this case. The parties' motions are plainly related—and cannot be considered in isolation, as Plaintiffs suggest. Defendants' May 26 submissions directly respond to Plaintiffs' claims by asking the Court to *dismiss* Plaintiffs' claims.

The United States District Court for the Northern District of California recently rejected a position quite similar to the one Plaintiffs advance here. Order, *Hepting v. AT&T Corp.*, Civil No. 06-672 (N.D. Cal.) (Walker, C.J.) (June 6, 2006) (attached as Exhibit A). In that action, which also involves a challenge to alleged NSA surveillance activities, the Court ruled that the case cannot proceed in any fashion until it has considered the state secrets privilege assertion made by the United States. The Court reached this conclusion, moreover, even though the plaintiffs previously had moved for a preliminary injunction and claimed (like Plaintiffs do here) that they could make their *prima facie* case based solely on public facts. *See id.* at 1-3 (“agree[ing] with the government that the state secrets issue should be addressed first” and that “this case cannot proceed . . . until the court examines the classified documents to assess whether and to what extent the state secrets privilege applies,” notwithstanding “Plaintiffs' principal

argument . . . [that they] can make their prima facie case based solely on the public record”). That is all the Defendants seek here: consideration of their May 26 submissions before the merits of Plaintiffs’ claims and Motion are adjudicated.<sup>1</sup>

**CONCLUSION**

Accordingly, because Defendants’ May 26 submissions are the only possible response to Plaintiffs’ Motion at this juncture, and for the other reasons stated herein and in Defendants’ Motion for Clarification, Defendants respectfully request that the Court consider Defendants’ Motion to Dismiss in connection with any consideration of Plaintiffs’ Motion, and that the Court resolve the threshold issues raised by Defendants’ Motion prior to adjudicating the merits of Plaintiffs’ Motion.

Dated: June 7, 2006

Respectfully submitted,

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<sup>1</sup> Defendants respectfully submit that it would be most efficient to consider these issues at a single hearing after Plaintiffs have responded to Defendants’ Motion to Dismiss.

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