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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JANE DOE et al.

Plaintiffs

-against-   05 Civ. 7939 (LTS)

CENTRAL INTELLIGENCE AGENCY et al.,

Defendants.

-- x

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS[1]

The defendant Central Intelligence Agency ("CIA") has invoked the state secrets privilege to seek the dismissal of plaintiffs' Jane Doe and her minor children's lawsuit.[2]

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[1] This document and its attachments have been reviewed by the CIA pursuant to a requirement agreed to by the undersigned counsel through an executed secrecy agreement to first submit all filings for a classification review, the exact process of which is being challenged in this case. Although not intended to contain any classified information, it may well be that the CIA redacts portions of this document under the alleged guise of secrecy. Therefore, the version filed with the Court may contain redactions. If that is the case, this Court can and must review the entire document in its unredacted form. Of course, federal district judges are exempt from routine security clearance processing and are authorized to review classified information. See DCID 1/19, ¶9.0 ("Judicial Branch Access to SCI").

[2] Jane Doe's spouse was an employee of the CIA, and as a result she was directly involved with intelligence activities and operations that caused her harm. Her spouse is not a party to this litigation.

This Opposition offers absolutely no substantive factual response to the CIA's Motion and for good reason. The CIA has unconstitutionally prevented the plaintiffs from providing the necessary relevant information to their counsel, despite his having been legally authorized by the CIA to receive such information. Moreover, even had the plaintiffs been in a position to convey the necessary relevant information the CIA has intentionally and unconstitutionally precluded the plaintiffs' counsel from drafting and filing a substantive Opposition brief for this Court's consideration.

Therefore, in light of the unconstitutional denial of the plaintiffs' First Amendment right to counsel and meaningful access to this Court, the CIA's Motion must be initially denied without a decision on the merits of the invocation of the privilege.

FACTUAL BACKGROUND

The specific facts that underlie the legal claims of the plaintiffs' Complaint and which would be responsive to the invocation of the state secrets privilege are irrelevant for the purposes of this Opposition. All that need be known is that the clients are overseas, and have been for years. Plaintiff Jane Doe executed a secrecy agreement with the CIA years ago and remains, therefore, bound by its terms. The CIA claims that the circumstances surrounding the substantive claims in this case are all classified. Until the CIA states differently or this, or another, Court rules otherwise, the plaintiffs and their counsel must abide by that determination for to do otherwise would risk potential civil or even criminal penalties for each of them. See Declaration of Mark S. Zaid, Esq. at ¶3(dated June 18, 2006)("Zaid Decl."), attached at Exhibit "1".

As a result of the CIA's classification position, the undersigned counsel cannot have an attorney-client telephone conversation with Jane Doe on substantive matters unless a secure government telephone line was utilized to protect any classified information from

unauthorized disclosure. The undersigned counsel, despite numerous requests to the CIA over the years to have one installed at his office, does not have access to such a telephone. Id. at ¶5. Of course, it would be a simple matter to use one of the CIA's secure phones for such a conversation (counsel faced similar circumstances in another case involving a different intelligence agency and access to a secure telephone was arranged), but the CIA refuses to permit it. Id. Nor can these conversations take place via e-mail either, for the very same reasons. Additionally, for reasons set forth in the Complaint that will not be repeated here, Jane Doe cannot travel outside of her country of residence for a face-to-face meeting with the undersigned.[3]

Furthermore, even if the undersigned was in possession of relevant substantive information that would permit a response to the CIA's Motion he could not utilize it given the CIA's current posture. By letter dated April 3, 2006, the plaintiffs' counsel set forth his concerns and requirements to abide by the CIA's rules so that he could file a substantive response to this Motion. See Exhibit "2"; Zaid Decl. at ¶4. The CIA declined to cooperate. It refuses to allow the undersigned to include any information in his Opposition brief that would be typed on counsel's computer and possibly be classified. Nor will it agree – despite the undersigned's willingness to do so and his having done so in other cases with the CIA – to allow use of a CIA computer at a secure facility. Id. at ¶¶6-7. In fact, the CIA will not even permit the undersigned to review an unredacted copy of the Complaint he drafted (counsel is not permitted to maintain a copy due to the classification concerns). Id. at ¶4

[3] Admittedly, one could argue that the undersigned counsel could travel to Jane Doe, but in light of the circumstances in their entirety this is an unreasonable alternative (and quite costly) and likely not even to make a difference based on the CIA's overall position.

Let it be perfectly clear that the plaintiffs are not, at this time, requesting the Court to compel the CIA to turn over any documents or release any classified information that is within the CIA's possession. Indeed, the plaintiffs are not seeking for the CIA to impart any information, classified or unclassified, verbal or written, to the undersigned counsel. What is at issue, instead, is for the CIA to cease impeding the plaintiffs' attorney-client relationship which would understandably involve the sharing of information in the possession of the plaintiffs with their counsel, and to require the CIA to facilitate the submission of plaintiffs' substantive response to its Motion. The undersigned counsel has been cleared to receive all such information up to the Secret level, and has already participated in substantive conversations with the CIA at their offices on the specific issues discussed in the Complaint. At no time, whether as a result of those substantive meetings or in relationship with the information set forth in the underlying Complaint, has the CIA ever claimed or asserted that the undersigned counsel was not in proper possession of the relevant information. Id. at ¶3.

Before the CIA's Motion can be decided upon its merits, the plaintiffs should be able to provide to this Court all relevant substantive facts for it to consider before it exercises its authority to eviscerate the only opportunity the plaintiffs have to pursue legal remedies.

ARGUMENT

The heart of this present dispute is not whether the CIA's invocation of the state secrets privilege was appropriate and the plaintiffs' case must be dismissed in its entirety at this early stage of the proceedings. Instead, it has been transformed by the CIA into a constitutional dispute over whether the First Amendment has been violated due to the

CIA's interference with the attorney-client relationship and deprivation of the plaintiffs' meaningful access to the courts.

Respectfully, this Court simply cannot yet determine the appropriateness of the CIA's invocation of the state secrets privilege until such time it first addresses the extent to which the plaintiffs are entitled to submit a substantive response for consideration.

However, in order to better understand the plaintiffs' First Amendment argument it is necessary to first set forth the well-established legal parameters that surround the state secrets privilege.

I. THIS COURT MUST NOT ABDICATE ITS RESPONSIBILITY TO ENSURE THE PLAINTIFF IS ENTITLED TO SUBSTANTIVELY CHALLENGE THE GOVERNMENT'S INVOCATION OF THE STATE SECRETS PRIVILEGE

"The state secrets privilege is a common law evidentiary rule that allows the government to withhold information from discovery when disclosure would be inimical to national security." Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991), citing In re U.S., 872 F.2d 472, 474 (D.C. Cir.), cert. denied, 110 S. Ct. 398 (1989). The privilege has its modern roots in the leading Supreme Court case of United States v. Reynolds, 345 U.S. 1 (1953), where the United States Air Force successfully dismissed a third party claim against a defense contractor that sought to expose allegedly classified information concerning an experimental aircraft. Id. at 7-8.

"Dismissal of a suit, and the consequent denial of a forum without giving the plaintiff [his] day in court, however, is indeed draconian. '[D]enial of the forum provided under the Constitution for the resolution of disputes, U.S. Const. art. III, § 2, is a drastic remedy that has rarely been invoked.'" In re U.S., 872 F.2d at 477, quoting Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1242 (4th Cir. 1985). Indeed the Supreme Court

warned that the assertion of the state secrets privilege is "not to be lightly invoked." Reynolds, 345 U.S. at 7.

Moreover, "[m]ere compliance with the formal requirement, however, is not enough." In re U.S., 872 F.2d at 475. "To some degree at least, the validity of the government's assertion must be judicially assessed." Molerio v. Federal Bureau of Investigation, 749 F.2d 815, 822 (D.C. Cir. 1984). The Court itself must assess the appropriateness of the government's invocation of privilege. "*Once the privilege has been formally claimed, the court must balance the 'executive's expertise in assessing privilege on the grounds of military or diplomatic security' against the mandate that a court 'not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role.'*" In re U.S., 872 F.2d at 475-476.

As the Supreme Court itself made quite clear, "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." Reynolds, 345 U.S. at 9-10 (emphasis added). "Without judicial control over the assertion of the privilege, the danger exists that the state secrets privilege will be asserted more frequently and sweepingly than necessary leaving individual litigants without recourse." NSN International Industry v. E.I. DuPont De Nemours, 140 F.R.D. 275, 278 (S.D.N.Y. 1991), citing Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983).[4] Although "utmost deference" is to be accorded to the executive's expertise, see United States v. Nixon, 418

[4] Recent events arising out of the Reynolds litigation fifty years after the Supreme Court heard the case reveals the dangers surrounding misuse and abuse of the privilege. See "*A 1953 case echoes in high court: The administration asks that fraud-on-court allegations be dismissed*", National Law Journal, June 10, 2003, at 5. See also "*The secret's out: 17th century doctrine invoked to challenge 1953 ruling based on Air Force's national security claim in fatal crash*", Miami Daily Business Review, Mar. 11, 2003 (recently declassified documents reveal Air Force lied to Supreme Court in Reynolds).

U.S. 683, 710 (1974), the government must show, and the court must separately confirm, that "the information poses a reasonable danger to secrets of state." Halkin v. Helms, 690 F.2d 977, 990 (D.C. Cir. 1982).[5]

Indeed, a close review of the Reynolds decision reveals that the Supreme Court intentionally chose not to impose any strict constraints upon a court's ability to question the invocation of the state secrets privilege. If an agency formally invokes the privilege, the district court then must undertake a serious and substantive review of the government's claims, and that would include consideration of the arguments and facts set forth by the plaintiffs.

> [T]he more compelling a litigant's showing of need for the information in question, the deeper "the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." ... [T]he more plausible and substantial the government's allegations of danger to national security, in the context of all the circumstances surrounding the case, the more deferential should be the judge's inquiry into the foundations and scope of the claim.

Reynolds, 345 U.S. at 10. Thus, it is very clear that the Supreme Court expected that lower courts would hear evidence from both parties and engage in a balancing inquiry to determine whether the privilege is applicable.[6] Therefore, in order for this Court to assess the appropriateness of the CIA's invocation, the plaintiffs are entitled to present to the

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[5] In such a case, the litigant must demonstrate that "the information is relevant to a material aspect of the litigant's case and that the litigant is unable to obtain the crucial data (or adequate substitute) from any other source." Ellsberg, 709 F.2d 51 at 59, 59 n.37. However, "the more compelling a litigant's showing of need for the information in question, the deeper 'the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate.'" Id. at 58-59 (citations omitted).

[6] One area of inquiry is whether the invocation is too broad. Black v. CIA, 62 F.3d 1115, 1119 (8th Cir. 1995).

Court any facts and arguments they believe relevant. It matters not what level of classification that information may or may not be.[7]

A. The CIA Is Unconstitutionally Interfering With The Plaintiffs' First Amendment Rights Which Must Preclude A Decision On The Appropriateness Of The State Secrets Privilege At This Time

Courts across this country have recognized an individual's First Amendment interest in communicating with an attorney. See e.g. Denius v. Dunlap, 209 F.3d 944, 953-954 (7th Cir. 2000); Jacobs v. Schiffer, 204 F.3d 259 (D.C. Cir. 2000); DeLoach v. Bevers, 922 F.2d 618, 620 (10th Cir. 1990); Martin v. Lauer, 686 F.2d 24, 32-33 (D.C. Cir. 1982); Cipriani v. Lycoming County Housing Authority, 177 F. Supp. 2d 303, 323-324 (M.D.Pa. 2001).

These holdings are buttressed by long-standing Supreme Court precedent that recognized a constitutional right of unfettered access to counsel. The First Amendment prohibits, for example, the government from interfering with collective action by individuals to seek legal advice and retain legal counsel. See United Transp. Union v. State Bar of Mich., 401 U.S. 576, 585-86 (1971); United Mine Workers of Am. v. Illinois State Bar Ass'n, 389 U.S. 217, 221-22 (1967); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1, 6 (1964); NAACP v. Button, 371 U.S. 415, 429-30 (1963). So too, logically, is an individual's ability to consult with counsel on legal matters constitutionally grounded. See Bates v. State Bar of Ariz., 433 U.S. 350, 376 n.32 (1977);

[7] Indeed, the more "classified" the information is that the plaintiffs would ostensibly file (and by no means are the plaintiffs conceding any submitted information would be classified), perhaps the more weight the CIA's arguments would likely receive. If the case is then dismissed, so be it. The plaintiffs would have at least been able to provide some semblance of substantive arguments to this Court as to why the CIA's Motion should not be granted on its merits.

see also Trainmen, 377 U.S. at 7 ("A State could not ... infringe in any way the right of individuals and the public to be fairly represented in lawsuits....").[8]

Furthermore, the right to obtain legal advice applies equally to legal representation acquired for any purpose. See United Mine Workers, 389 U.S. at 223; Button, 371 U.S. at 419-20. That is, the First Amendment protects the right of an individual or group to consult with an attorney on *any* legal matter. Dunlap, 209 F.3d at 954.

1. The CIA's Restriction On Counsel's Ability To Speak With His Clients And Submit A Substantive Response To Their Motion Deprives The Plaintiffs From Any Meaningful Right Of Access To The Courts

The First Amendment interest in speaking freely to counsel is "interwoven" with the fundamental and constitutionally protected right of access to the courts. Martin, 686 F.2d at 32. Without the right of access to the courts, "all other legal rights would be illusory." Id., citing Adams v. Carlson, 488 F.2d 619, 630 (7th Cir. 1973). Meaningful access to the courts is contingent on the ability of an attorney to give sound legal advice, and "restrictions on speech between attorneys and their clients directly undermine the ability of attorneys to offer sound legal advice." Id. See also Porter v. Califano, 592 F.2d 770, 780 (5th Cir. 1979)("Meaningful access to the courts is a fundamental right of citizenship in this country."). Clients have an undeniable right to retain counsel to ascertain their legal rights. See Potashnick v. Port City Construction Co., 609 F.2d 1101, 1117-19 (5th Cir.), cert. denied, 449 U.S. 820 (1980).

[8] The Second Circuit Court of Appeals has apparently never addressed the issue directly. However, in Board of Education of the City of New York et al. v. Nysuist et al., 590 F.2d 1241 (2nd Cir. 1979), it did discuss several of the relevant Supreme Court decisions in an apparent favorable light, at least to the extent of acknowledging the accepted premise without any attempt to contradict the analysis or decisions. Id. at 1244.

From a legal comparison, the present matter is quite similar to that of a prison censoring or withholding prisoner mail to and from the courts or counsel. It is well-settled that "interference with legal mail implicates a prison inmate's rights to access to the courts and free speech as guaranteed by the First and Fourteenth Amendments to the U.S. Constitution." Davis v. Goord, 320 F.3d 346, 351 (2nd Cir. 2003).[9] In addition to the right of access to the courts, a prisoner's right to the free flow of incoming and outgoing mail is protected by the First Amendment. See Heimerle v. Attorney General, 753 F.2d 10, 12-13 (2d Cir. 1985); Hudson v. Greiner, 2000 U.S. Dist. LEXIS 17913, No. 99 Civ. 12339, 2000 WL 1838324, at * 5 (S.D.N.Y. Dec. 13, 2000). That this legal right was factually determined with respect to prisoners is irrelevant as this is not a discussion of the Sixth Amendment right to counsel in criminal matters. It concerns the Government's actions to interfere with the attorney-client relationship and impede an individual's access to the courts.

Based on the development of the state secrets privilege, and in light of the First Amendment interests at stake, it is important to state once again the four principles that appear to guide judicial review of a state secrets privilege claim. First, the government must demonstrate to the judge a "reasonable danger" that injury to the national interest will result from the disclosure at issue. See Reynolds, 345 U.S. at 10; Ellsberg, 709 F.2d at 58. Second, "even the most compelling necessity cannot overcome the claim of

[9] The D.C. Circuit noted in Martin that impairment of communications between attorneys and their clients may be unconstitutional as a denial of the right of access to the courts under other Amendments than just the First. 686 F.2d at 33. See e.g., Potashnick, 609 F.2d at 1117-19 (trial court's instructions to counsel barring discussions with party-witness invalid under the Fifth Amendment); Taylor v. Sterrett, 532 F.2d 462, 473-75 (5th Cir. 1976)(mail from inmates to attorneys may not be opened).

privilege if the court is ultimately satisfied that military secrets are at stake." Reynolds, 345 U.S. at 11. Third, "the more plausible and substantial the government's allegations of danger to national security, in the context of all the circumstances surrounding the case, the more deferential should be the judge's inquiry into the foundations and scope of the claim." Ellsberg, 709 F.2d at 59. Fourth, "the more compelling a litigant's showing of need for the information in question, the deeper 'the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate.'" Reynolds, 345 U.S. at 11.

The undersigned counsel has been legally authorized by the CIA to receive information, even that which is classified, from the plaintiffs. The plaintiffs wish to provide counsel with relevant and important information, and for counsel to convey that information to this Court in order to try and defeat the CIA's invocation of the state secrets privilege. However, the CIA is interfering with the wishes of the plaintiffs and preventing them from speaking with their counsel and precluding their counsel from providing this Court with relevant information on the behalf of the plaintiffs. See Zaid Decl. at *passim*, attached at Exhibit "1"; Exhibit "2".

Applying the four state secrets guidelines established above, how is this Court genuinely and fairly to assess the sufficiency or appropriateness of the CIA's invocation if it cannot consider through review of the opposing viewpoint whether *a "reasonable danger"* will result from the disclosure at issue, Reynolds, 345 U.S. at 10 (emphasis added), or whether "it is *ultimately satisfied* that military secrets are at stake," id. at 11 (emphasis added), or whether the CIA's allegations are "*plausible and substantial* … in the context of all the circumstances surrounding the case," Ellsberg, 709 F.2d at 59 (emphasis added), or, finally, *how compelling the plaintiffs' need might be* to justify

having this court "probe" to satisfy "itself that the occasion for invoking the privilege is appropriate." Reynolds, 345 U.S. at 11.

Four years ago the CIA proffered the same arguments it does today to the late Honorable Allen Schwartz for application of the state secrets privilege in Sterling v. Tenet, 01 Civ. 8073 (S.D.N.Y.), and they were rejected. Why? Because Judge Schwartz ensured that Sterling's First Amendment rights were protected by considering all relevant substantive information he had to offer as to why the CIA's invocation of the privilege was inappropriate. See Exhibit "3" at 4-8.[10]

To rule without a substantive contribution by the plaintiffs is to ignore the very scripture decried by the Supreme Court in creating the privilege in the first place when it warned "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." Reynolds, 345 U.S. at 9-10.

B. The CIA's Purported National Security Interests Do Not Outweigh The Strength Of The Plaintiffs' First Amendment Right To Submit A Substantive Opposition To This Court

It is true that none of the cases cited above that clearly establish the First Amendment interests that permeate this case address the question of the appropriate balance between an individual's right to consult with counsel and the government's interest in protecting national security information. However, the strength of the interest asserted by the

[10] Judge Schwartz held that the CIA's invocation of the privilege was "inappropriate". See Exhibit "3" at 8. The undersigned counsel was also counsel for Sterling and was, as in this case, privy to much of the information the CIA claimed constituted a state secret. That information was lawfully conveyed to Judge Schwartz in an Opposition brief and obviously was persuasive to the Court. Nevertheless, the CIA refused to agree with the Judge's implicit, if not explicit, ruling that the specific information was unclassified. In fact, it subsequently classified not only the majority of the undersigned counsel's brief (which led to the CIA reprimanding counsel for utilizing his computer for drafting a "classified" document) but conveniently also all the reasoning Judge Schwartz set forth in his decision for why the privilege was inappropriately invoked.

government to counterbalance plaintiff's First Amendment interests does not negate the implication of plaintiffs' interests here.[11]

The strength of the government's interest varies according to the nature of the information and the likelihood of public dissemination. Thus, the government's interest in nondisclosure is generally greater when a specific statute, which is not present here, prohibits dissemination of information. See e.g., 5 U.S.C. § 552b (Privacy Act); 18 U.S.C. § 1905 (Trade Secrets Act). The interest is perhaps greatest when the government information concerns national secrets, as it allegedly does in this case. See Snepp v. United States, 444 U.S. 507, 509 (1980)("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.").[12]

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[11] There is only one known case where a court specifically addressed whether the Government's refusal to allow a plaintiff to share allegedly classified information with his counsel violated the First Amendment. In a 106-page opinion the U.S. District Court for the District of Columbia ultimately concluded that it would "not allow the government to cloak its violations of plaintiff's First Amendment rights in a blanket of national security." Stillman v. Dep't of Defense et al, 209 F.Supp.2d 185, 231 (D.D.C. 2002). While it is true this decision was reversed on appeal by the D.C. Circuit, it was decided upon procedural grounds and did not address the District Court's substantive analysis. Stillman v. Central Intelligence Agency et al, 319 F.3d 546 (2003).

[12] "It has long been clear that the First Amendment does not provide a federal employee seeking legal advice regarding a dispute with *carte blanche* authority to disclose any and all confidential government information to the employee's attorney, but rather that the scope of the First Amendment right is determined by balancing the employee's interests in communication with the government's interest in preventing communication." Jacobs, 204 F.3d at 265; accord Martin, 686 F.2d at 31. Once again the similarity between the legal nuances of this case and that of restrictions imposed on prisoners' mail emerges. That action is justified only when it "furthers one or more of the substantial governmental interests of security, order, and rehabilitation . . .[and] must be no greater than is

But any argument advanced by the CIA that national security interests necessarily outweighs the First Amendment simply would not reflect the law. If this argument were true, the list of First Amendment cases that would have been decided differently is long. See e.g., New York Times Co. v. United States, 403 U.S. 713 (1971).

The plaintiffs' ability to receive sound advice from counsel, as well as the ability to impart relevant information to counsel in order to further their legal interests, has been infringed by the CIA's denial of meaningful access to plaintiffs' attorney. The plaintiffs are unable to speak freely with their attorney due to unreasonable restrictions imposed by the CIA and are being precluded from submitting a substantive response to the CIA's Motion due to intentional impediments designed to prevent counsel from drafting such a response. See Zaid Decl. at *passim*, attached at Exhibit "1".

As the Supreme Court has recognized, "the first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." Upjohn Co. v. United States, 449 U.S. 383, 390-91 (1981). Indeed, the plaintiffs have a "legitimate interest in an early assessment of [their] legal rights." Id. It is a basic principle of First Amendment law that "any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity…." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

In determining the balance that is to be applied to resolve the First Amendment dispute it is irrelevant that this matter deals with the sharing of classified information between plaintiff and counsel. The fact that information may be classified only speaks to

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necessary or essential to the protection of the particular governmental interest involved." Washington v. James, 782 F.2d 1134, 1139 (2d Cir. 1986)(internal citations and quotation marks omitted).

the legality of whether the plaintiffs can properly or lawfully share the information with counsel, i.e., is counsel entitled to receive the information. That answer is unequivocally in the affirmative. The undersigned has been explicitly authorized by the CIA to receive classified information up to the Secret level from the plaintiffs. This has never been in question. Indeed, the very existence of the Complaint in this case, as well as all the classification review procedures that this Court has witnessed the plaintiffs' documents go through, demonstrates that the undersigned was authorized to receive classified information. See Zaid Decl. at *passim*, attached at Exhibit "1".

Indeed, the then CIA Director Porter Goss conceded that plaintiffs' counsel is aware of at least some of the alleged classified information that is contained even within his own declaration that allegedly supports the dismissal of this case. Memorandum of Law in Support of the Government's Assertion of the State Secrets Privilege and Motion to Dismiss at 4 (dated March 29, 2006). [13] Of course, Director Goss claims that plaintiffs' counsel is not aware of *all* the alleged classified information that underlies the CIA's arguments. Id. at 5. In actuality he no more knows whether that assertion is true than were plaintiffs' counsel to claim he *is* aware of all the information contained within Director Goss's declaration. Neither knows the true substantive knowledge of the other.[14] Of course, the constitutional dispute here does not involve whether plaintiffs' counsel

[13] The old adage that "knowledge is power" is quite apropos for cases involving the invocation of the state secrets privilege. In most cases, if not almost every case, counsel is not aware of the vast majority of the allegedly classified information that is asserted to be subject to the privilege. The more "classified" information that counsel possesses the easier that information's classification status can be challenged, and the more likely the appropriateness of the invocation can be disproved thereby resulting in the rare denial of the Government's Motion.

[14] In fact, the two attorneys that comprise the law firm representing the plaintiffs have been representing covert employees of the Intelligence Community, and in particular the

should be afforded access to the classified declaration submitted by Director Goss, which the CIA does oppose. Indeed, the CIA makes it clear that the alleged classified information that pertains to the substantive aspects of this dispute cannot be filed on the public record. Id. at 4. However, neither the plaintiffs nor their counsel are seeking either access to Director Goss's declaration or to file classified information on the public record.[15]

The CIA may, as it did during one or more of the status conferences, imply or even outright argue that the plaintiffs are not permitted to file a brief that knowingly contains "classified" information. There is not one case, at least not that is known to the plaintiffs' counsel nor ever cited by the CIA, that holds that plaintiffs are not permitted to set forth whatever information, including that which is classified, they desire in an opposing brief in a state secrets case (that brief, of course, would be drafted on a CIA secure computer). Indeed, as explained throughout this brief, the First Amendment permits it.

Of course, it may well be that the CIA elects to classify in its entirety the briefs that would be submitted by the plaintiffs. That fact, or classification perception of the CIA, does not eliminate the lawful right the plaintiffs have to seek a fair and independent review of their arguments. Indeed, should significant portions of the brief be ultimately deemed properly classified then perhaps it is arguable the CIA's Motion to Dismiss is

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CIA, for more than a decade. They have had more than 100 cases involving the CIA alone, much of which has led to their obtaining authorized access to classified information. Moreover, they have repeatedly informed the CIA that unauthorized TS/SCI information is either routinely provided to them or due to their frequent representation of covert CIA employees they have been able to piece together information obtained from one client as being relevant to the employment situation of another.

[15] However, this Court, of course, would be permitted to review and consider the unredacted document, just as with the Complaint, and that would fully satisfy the plaintiffs.

justified. But that is a decision that must come *after* the review of the plaintiffs' substantive position, not before.[16]

Candidly, the Constitution does not require this Court to rule in favor of the plaintiffs on the merits of their case or compel the CIA to withdraw its invocation. It does compel this Court and the CIA to facilitate communications between the undersigned counsel and the plaintiffs so as to permit fair and legitimate participation in this litigation.

CONCLUSION

This Court should respectfully always keep in mind that this dispute does not involve deciding whether the plaintiffs' counsel should have greater access to classified information for which he is not explicitly authorized by the CIA to receive. The dispute is over whether the CIA is unconstitutionally preventing the plaintiff from sharing relevant information with counsel, as well as then preventing counsel from sharing that information, coupled with legal arguments, to this Court.

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[16] Moreover, the CIA claims that the privilege is appropriate even before discovery (and certainly a trial) to prevent "disclosure of additional information *beyond that* to which plaintiffs and their attorneys have previously been authorized to have access." Id. at 5 (emphasis added). Again, this is not what the plaintiffs are seeking through this Opposition and assertions that the CIA has violated the First Amendment.

For the foregoing reasons, the defendant's Motion should be denied.

Date: June 19, 2006

Respectfully submitted,

/s/

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