UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOE, JANE ROE (MINOR), SUE DOE (MINOR), AND JAMES DOE (MINOR),	:	
Plaintiffs,	:	**ECF CASE**
- v.-	:	05 Civ. 7939 (LTS)
CENTRAL INTELLIGENCE AGENCY, PORTER GOSS, [AGENCY NAME REDACTED], AND UNITED STATES OF AMERICA,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF THE GOVERNMENT'S ASSERTION OF THE STATE SECRETS PRIVILEGE AND MOTION TO DISMISS

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Defendants the Central Intelligence Agency ("CIA"), Porter J. Goss, Director of the CIA, the United States of America, and a federal agency the identity of which is classified (collectively, the "Government") respectfully submit this memorandum of law in support of the Government's assertion of the state secrets privilege and motion to dismiss this action.

Preliminary Statement

The state secrets privilege is an absolute evidentiary privilege that enables the Government to withhold information in litigation where its disclosure, or risk of disclosure, in the litigation process would cause serious damage to the national security or foreign policy interests of the United States. The allegations in plaintiffs' complaint, the contents of which are largely classified, require the Government to invoke the state secrets privilege here.

As set forth in the unclassified declaration of CIA Director Porter J. Goss, after personally considering the matter, Director Goss formally asserts the state secrets privilege to protect

information that cannot be disclosed in litigation without jeopardizing the national security of the United States. Director Goss' unclassified declaration is supported by a classified declaration, submitted for ex parte, in camera review by the Court. These declarations, which are entitled to the "utmost deference" from this Court, Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 547 (2d Cir. 1991) (citation and internal quotation marks omitted), establish that disclosure of the information subject to the privilege could reasonably be expected to cause serious damage to the national security. The Court should therefore uphold the Government's assertion of the state secrets privilege in this case.

The result of Director Goss' formal assertion of the state secrets privilege, if deemed properly invoked by the Court after limited review, is to remove all privileged information from the litigation. Without the privileged information, this case cannot proceed and accordingly should be dismissed. The Government recognizes that dismissal based upon the state secrets privilege is an extraordinary remedy not to be invoked lightly. But the privileged information here is essential to the parties' respective claims and defenses, and so central to the case that any further litigation will threaten disclosure of privileged matters. See Zuckerbraun, 935 F.2d at 547-48; Sterling v. Tenet, 416 F.3d 338, 347-48 (4th Cir. 2005), cert. denied, 126 S. Ct. 1052 (2006). Dismissal is therefore necessary to protect the national security of the United States.

STATEMENT OF FACTS

A. The Complaint

On September 12, 2006, plaintiffs filed a redacted version of their complaint in the Southern District of New York. See Declaration of Sarah S. Normand dated March 29, 2006 ("Normand Decl."), Exh. A ("Complaint"). Prior to filing the Complaint, plaintiffs' counsel had

submitted an unredacted version to the CIA for classification review. Normand Decl. ¶ 4. The CIA subsequently provided plaintiffs' counsel with the version that ultimately was filed, from which all classified information has been redacted. Id.

The factual assertions in the Complaint consist largely of classified information. See Complaint ¶¶ 16-36. According to the unredacted, unclassified portion of the Complaint, plaintiff Jane Doe is the wife of a former employee of the CIA who remains in covert status. Id. ¶ 1. The other three plaintiffs are the minor children of Jane Doe and her husband. Id. ¶¶ 1, 15.[1] The Complaint alleges that Jane Doe's husband "was summarily separated from his CIA employment," for a reason that is classified, and "terminated immediately for unspecified reasons." Id. ¶ 27. Jane Doe and her husband and children allegedly "departed the United States for Foreign Country 'A,'" where they currently reside, id. ¶ 29, because the CIA has "refused to provide any assistance, medical or otherwise," id. ¶ 32.

The Complaint alleges that plaintiffs are unable to leave Foreign Country A, id. ¶¶ 33, 35, and that plaintiff Jane Doe "remains a virtual prisoner in her home," id. ¶ 35. She allegedly is "constantly fearful of eventual detection," for a reason that is classified. Id. Although plaintiff Jane Doe allegedly receives medical treatment and psychological counseling, she claims that the CIA has "demanded that she not disclose the basis for her apprehension to her medical professionals, while simultaneously refusing to provide her any alternative treatment." Id. Plaintiff Jane Doe alleges that she "suffers severe emotional distress producing physical symptoms from fear," and "lives in constant fear," although the reason for her alleged fear is classified. Id. ¶ 36.

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[1] Plaintiff Jane Doe's husband is not a party to the litigation. Complaint ¶¶ 1, 15.

The Complaint asserts causes of action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq.; the Privacy Act, 5 U.S.C. § 552a et seq.; and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-80, as well as constitutional tort claims under the First, Fifth, and Eighth Amendments to the U.S. Constitution. Complaint ¶¶ 37-57.

B. The Government's Assertion of the State Secrets Privilege

The Government asserts the state secrets privilege through the unclassified declaration of Porter J. Goss, Director of the Central Intelligence Agency, submitted herewith, see Normand Decl., Exh. B ("Declaration"), as well as the classified declaration of Director Goss ("Classified Declaration"), submitted ex parte and in camera. In his unclassified Declaration, Director Goss formally invokes the state secrets privilege to protect the classified information described in his Classified Declaration. Declaration ¶ 5. Director Goss has determined, after deliberation and personal consideration, that any disclosure of the classified information in his Classified Declaration reasonably could be expected to result in serious damage to the national security. Id. ¶ 6.

Director Goss has determined that the bases for his assertion of the state secrets privilege cannot be filed on the public court record, or in any sealed filing accessible to plaintiffs or their attorneys, without revealing the very information that he seeks to protect. Id. ¶ 7. Therefore, no identification or disclosure of the classified information protected by the claim of privilege can be placed on the court record. Id. Moreover, although the CIA has previously granted plaintiffs' attorneys limited security approvals and authorized them to have access to some, though not all, of the classified information that is described in the Classified Declaration, Director Goss has determined that neither plaintiffs nor their attorneys possess a "need to know" all the classified

information in the Classified Declaration, as set forth in Section 4.1(c) of Executive Order 12,958, which governs classified national security information. Declaration ¶¶ 8-11; see Executive Order 12,958, 60 Fed. Reg. 19,825, 19,836 (Apr. 17, 1995) ("need to know" defined as "a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function"). Thus, plaintiffs and their counsel are not authorized to have access to the Classified Declaration or to any of the classified information contained therein beyond that to which they have already been authorized to have access. Declaration ¶¶ 10-11.

Director Goss has further determined that the classified information described in his Classified Declaration is so integral to plaintiffs' claims that any further litigation of this matter would necessarily result in disclosure of classified information described in the Classified Declaration and protected by the claim of privilege. Id. ¶¶ 6, 12. Discovery or trial in this matter would necessarily risk disclosure of additional information beyond that to which plaintiffs and their attorneys have previously been authorized to have access. Id. ¶ 12. In addition, such proceedings would necessarily involve the participation of other individuals, such as witnesses and court personnel, thereby increasing the risk of unauthorized disclosure of classified information. Id. Director Goss has determined that no procedures exist that would adequately safeguard the sensitive classified information implicated in this case and prevent its unauthorized disclosure during the course of the litigation. Id.

In sum, Director Goss has determined that the consequences of disclosure to plaintiffs, their attorneys, or others involved in the litigation process are too great to permit disclosure of the information protected by the claim of privilege, even under protective measures that the

Court might be asked to enter. Id. ¶ 13. Director Goss thus asserts a formal claim of state secrets privilege to protect the information encompassed by the Classified Declaration from disclosure in this proceeding, including to plaintiffs or their attorneys. Id.

ARGUMENT

POINT I

THE COURT SHOULD UPHOLD THE GOVERNMENT'S ASSERTION OF THE STATE SECRETS PRIVILEGE

A. 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, 935 F.2d at 546; see also United States v. Reynolds, 345 U.S. 1, 6-7 (1953) (state secrets privilege "is well established in the law of evidence"); In re Under Seal, 945 F.2d 1285, 1287 n.2 (4th Cir. 1991) ("The common law recognizes a privilege for military and state secrets the disclosure of which would compromise [the] public interest."); Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 399 (D.C. Cir. 1984) ("The 'state secrets' privilege . . . is a privilege developed in common law protecting information vital to the nation's security or diplomatic relations.").

As a manifestation of the President's Article II powers to conduct foreign affairs and provide for the national defense, state secrets is "a privilege protected by constitutional principles of separation of powers." In re United States, 872 F.2d 472, 482 (D.C. Cir. 1989). "The various harms, against which protection is sought by invocation of the privilege, include impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and

disruption of diplomatic relations with foreign governments." Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983) (footnote omitted). The state secrets privilege belongs exclusively to the executive branch. Zuckerbraun, 935 F.2d at 546; see also, e.g., Trulock v. Lee, 66 Fed. Appx. 472, 2003 WL 21267827 (4th Cir. 2003); Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236 (4th Cir. 1985); Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268 (4th Cir. 1980) (en banc).

The elements of a state secrets assertion were set forth in the seminal case of Reynolds v. United States, 345 U.S. at 7-8. The Government may invoke the privilege by making a "[1] formal claim of privilege, [2] lodged by the head of the department which has control over the matter, after [3] actual personal consideration by that officer." Id. (footnotes omitted). The assertion of the privilege is thus a policy decision made at the highest level of the agency concerned that disclosure of the information at issue would be harmful to national security or foreign relations. Halkin v. Helms, 690 F.2d 977, 996 (D.C. Cir. 1982) ("Halkin II").

Once the state secrets privilege is formally asserted, "the scope of judicial review is quite narrow." Kronisch v. United States, No. 83 Civ. 2458, 1994 WL 524992, at *10 (S.D.N.Y. Sept. 27, 1994), aff'd, 1995 WL 303625 (S.D.N.Y. May 18, 1995), aff'd, 150 F.3d 112 (2d Cir. 1998); Tilden v. Tenet, 140 F. Supp. 2d 623, 626 (E.D. Va. 2000) ("Once the privilege is invoked, the role of the court is a limited one."). "[A]lthough the privilege is not to be lightly invoked, the court must accord the 'utmost deference' to the executive's determination of the impact of disclosure on military or diplomatic security." Zuckerbraun, 935 F.2d at 547 (citation omitted) (quoting Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978) ("Halkin I")). As the Supreme Court made clear in Reynolds, in evaluating an assertion of the state secrets privilege, the sole determination for the court is whether, "from all the circumstances of the case, . . . there is a

reasonable danger that compulsion of the evidence will expose military [or other] matters which, in the interest of national security, should not be divulged." Reynolds, 345 U.S. at 10; Zuckerbraun, 935 F.2d at 546-47 ("A court before which the privilege is asserted must assess the validity of the claim of privilege, satisfying itself that there is a reasonable danger that disclosure of the particular facts in litigation will jeopardize national security.").

"In making this assessment, . . . the court must not 'forc[e] a disclosure of the very thing the privilege is designed to protect.'" Zuckerbraun, 935 F.2d at 547 (quoting Reynolds, 345 U.S. at 8) (alteration in original); Sterling, 416 F.3d at 343-44. It is well settled, moreover, that a court may review classified submissions ex parte and in camera to determine whether the state secrets privilege has been properly invoked. See, e.g., Sterling, 416 F.3d at 347 (upholding state secrets assertion based upon classified declaration reviewed by district court in camera); Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65, 75-76 (D.D.C. 2004) (noting appropriateness of asserting privilege with less specificity on public record where Government submits classified submissions with greater particularity), aff'd, 2005 WL 3696301 (D.C. Cir. May 6, 2005).

While a party's litigation need for particular information may be relevant in determining "how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate," Reynolds, 345 U.S. at 11; see also Kronisch, 1994 WL 524992, at *11; Clift v. United States, 808 F. Supp. 101, 106 (D. Conn. 1991), "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake," Reynolds, 345 U.S. at 11. Thus, in evaluating a claim of state secrets privilege, courts do not balance the interests of the Government in protecting its secrets against the interests of a

litigant in obtaining a remedy for an alleged injury. That balance has already been struck in favor of protection of state secrets. See id. at 10-11; Northrop, 751 F.2d at 399 (state secrets privilege "cannot be compromised by any showing of need on the part of the party seeking the information . . . a party's need for the information is not a factor in considering whether the privilege will apply"); accord Sterling, 416 F.3d at 343, 345; Ellsberg, 709 F.2d at 57; Halkin II, 690 F.2d at 990.

B. The Privilege Has Been Properly Invoked Here

As set forth in the unclassified Declaration of Director Goss, and in the Classified Declaration submitted ex parte and in camera, the Government has properly invoked the state secrets privilege in this case. A formal claim of privilege has been asserted by the head of the agency based upon his personal consideration of the matter. See Declaration ¶¶ 5, 13. Director Goss has determined that the bases for his assertion of the state secrets privilege cannot be filed on the public court record, or in a sealed filing accessible to plaintiffs or their attorneys, without revealing the very information that he seeks to protect. Id. ¶ 7. Accordingly, the Government is constrained not to describe in this memorandum of law the reasons underlying the assertion of privilege. The Classified Declaration, however, sets forth in detail the factual bases for Director Goss' determination that disclosure of the classified information in his declaration, even to plaintiffs and their attorneys, as well as others involved in the litigation process, reasonably could be expected to cause serious damage to the national security. See id. ¶¶ 6, 8-13. This determination is entitled to the "utmost deference," Zuckerbraun, 935 F.2d at 547 (citation and internal quotation marks omitted), and the Court accordingly should uphold the Government's assertion of the state secrets privilege.

POINT II

THE COURT SHOULD DISMISS THE COMPLAINT BASED UPON THE STATE SECRETS PRIVILEGE

A. Dismissal Is Warranted Where Privileged Information Is Required to Prosecute or Defend a Claim, or Where the Privileged Information Is So Central to the Case That Any Further Litigation Would Threaten Disclosure of Privileged Matters

"Once properly invoked, the effect of the [state secrets] privilege is to exclude the [privileged] evidence from the case." Zuckerbraun, 935 F.2d at 546; see also Clift, 808 F. Supp. at 107 (upon successful invocation of privilege, "[a]t the least, the privilege removes the sensitive information from the case completely"). Upon a proper assertion of the privilege, the court must determine the effect on the litigation of the unavailability of the protected information. Halkin II, 690 F.2d at 991; Clift, 808 F. Supp. at 107; see also Tilden, 140 F. Supp. 2d at 626 ("It is not for a court to second-guess the assertion of the privilege. The only question is how or whether the case can proceed without the information.").

"In some cases, the effect of an invocation of the privilege may be so drastic as to require dismissal [of the action]." Zuckerbraun, 935 F.2d at 547. First, dismissal is warranted if the unavailability of the privileged information precludes either plaintiffs or defendants from presenting their respective claims or defenses. See id.; Trulock, 66 Fed. Appx. at 476; Edmonds, 323 F. Supp. 2d at 77-78; Clift, 808 F. Supp. at 107. "Thus, if proper assertion of the privilege precludes access to evidence necessary . . . to state a prima facie claim," or "so hampers [a party] in establishing a valid defense that the trier [of fact] is likely to reach an erroneous conclusion," then "dismissal is appropriate." Zuckerbraun, 935 F.2d at 547.

Second, "in some circumstances [state] secrets will be so central to the subject matter of

the litigation that any attempt to proceed will threaten disclosure of the privileged matters." Fitzgerald, 776 F.2d at 1241-42; see also Sterling, 416 F.3d at 347-48 ("We have long recognized that when the very subject of the litigation is itself a state secret, which provides no way that the case could be tried without compromising sensitive military secrets, a district court may properly dismiss the plaintiff's case." (citations, alterations, and internal quotation marks omitted)); Bareford v. General Dynamics Corp., 973 F.2d 1138, 1143 (5th Cir. 1992) ("The state secret doctrine justifies dismissal when privileged material is central 'to the very question upon which a decision must be rendered.'" (quoting Fitzgerald, 776 F.2d at 1244)); accord Bowles v. United States, 950 F.2d 154, 156 (4th Cir. 1991); Clift, 808 F. Supp. at 107.

In such cases, as the Fourth Circuit has explained,

> [i]n examining witnesses with personal knowledge of relevant military secrets, the parties would have every incentive to probe dangerously close to the state secrets themselves. In these circumstances, state secrets could be compromised even without direct disclosure by a witness.

Fitzgerald, 776 F.2d at 1243; see also Farnsworth Cannon, 635 F.2d at 281 ("In an attempt to make out a prima facie case during an actual trial, the plaintiff and its lawyers would have every incentive to probe as close to the core secrets as the trial judge would permit. Such probing in open court would inevitably be revealing."). This problem is exacerbated by the fact that "the trial lawyers would remain unaware of the scope of exclusion of information determined to be state secrets." Farnsworth Cannon, 635 F.2d at 281. Thus,

> [i]nformation within the possession of the parties on the periphery of the suppression order would not be readily recognized by counsel, unaware of the specific contents of the affidavit [asserting the state secrets privilege], as being secret or clearly having been suppressed by the general order of the district court.

Id.

Moreover, while it is true that "whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter," Ellsberg, 709 F.2d at 57, "courts recognize the inherent limitations in trying to separate classified and unclassified information," Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998). Information that may seem innocuous in isolation may be highly sensitive when viewed in conjunction with other evidence. See Halkin I, 598 F.2d at 8 (noting that "[t]housands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate"); United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir. 1972) (noting that "[t]he significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context."). Where "seemingly innocuous information is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure[,] and the court cannot order the government to disentangle this information from other classified information." Kasza, 133 F.3d at 1166.

For all of these reasons, in cases where state secrets are so central to the parties' allegations that any further litigation would threaten disclosure of privileged information, the action should be dismissed. See, e.g., Sterling, 416 F.3d at 347 ("dismissal follows inevitably where the sum and substance of the case involves state secrets"); Trulock, 66 Fed. Appx. at 476 ("[I]f state secrets are critical to the resolution of core factual questions in the case, it should be dismissed."); Kasza, 133 F.3d at 1166 ("[I]f the 'very subject matter of the action' is a state secret, then the court should dismiss the . . . action based solely on the invocation of the state

secrets privilege." (quoting Reynolds, 345 U.S. at 11 n.26)); Bareford, 973 F.2d at 1140 (affirming dismissal where "plaintiffs would be unable to prove their case without classified information and . . . the very subject matter of the trial is a state secret"); Bowles, 950 F.2d at 156 ("If the case cannot be tried without compromising sensitive foreign policy secrets, the case must be dismissed."); Fitzgerald, 776 F.2d at 1243 (affirming dismissal of action where "the very subject of this litigation is itself a state secret," and "there was simply no way this particular case could be tried without compromising sensitive military secrets"); Farnsworth Cannon, 635 F.2d at 281 ("It is evident that any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation."); Tilden, 140 F. Supp. 2d at 627 ("there is no way in which this lawsuit can proceed without disclosing state secrets").

B. Dismissal Is Warranted in This Case

Application of the state secrets privilege in this case necessitates dismissal of the Complaint in its entirety, both because the parties cannot present their respective claims and defenses without relying upon privileged information, and because the privileged state secrets are so central to this case that any further litigation would threaten disclosure of privileged matters.[2]

[2] The Second Circuit has noted that, at least where the effect of the invocation of the privilege is to prevent the plaintiff from establishing a prima facie case, "dismissal is probably most appropriate under Rule 56." Zuckerbraun, 935 F.2d at 547. The Government contends that dismissal is warranted in this case not only because plaintiffs cannot establish a prima facie case without relying upon privileged information, but also because privileged information is essential to the Government's defenses and is so central to the litigation that any further litigation would risk disclosure of privileged matters. To the extent the Court treats the Government's motion as one for summary judgment pursuant to Rule 56, the Government respectfully requests that it not be required to submit a statement pursuant to Local Civil Rule

1. Privileged Information Is Essential to the Parties' Respective Claims and Defenses

Each of plaintiffs' claims, and the Government's defenses thereto, necessarily implicates information subject to the state secrets privilege. Plaintiffs' claim under the APA asserts that "[t]he complained of acts and omissions . . . have violated [classified] portions of CIA regulations providing for the integrity of its [redacted], the protection [redacted] and the treatment of its employees, in violation of 5 U.S.C. §§ 706(1) & (2)(A)-(D)." Complaint ¶ 38 (second brackets in original). The Complaint thus reflects that the CIA conduct alleged to have violated CIA regulations, from which any APA claim would arise, is classified. As the unclassified and classified Goss Declarations make clear, this information is subject to the claim of state secrets privilege asserted in this case. See Declaration ¶¶ 5, 13 (asserting privilege over all classified information described in Classified Declaration). The relief sought by plaintiffs under the APA is also classified and subject to the claim of privilege. See Complaint ¶ 40; Declaration ¶¶ 5, 13.

Plaintiffs' Privacy Act claim similarly relies upon classified, privileged information. That claim alleges that the Government "wilfully and intentionally failed to maintain accurate, timely and complete records pertaining to plaintiff [redacted], so as to ensure fairness to Plaintiff in violation of 5 U.S.C. § 552a(e)(5)." Complaint ¶¶ 43-44. The redactions in the Complaint demonstrate, however, that the very nature of the records that plaintiffs allege to have been improperly maintained is classified and thus privileged. Id.; Declaration ¶¶ 5, 13. Plaintiffs could not possibly establish a prima facie case of violation of the Privacy Act, nor could the

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56.1, as the facts underlying the Government's motion are largely classified and cannot be described in the court record. See Declaration ¶ 7.

Government mount a defense, without identifying the records at issue, not to mention the allegedly improper conduct and any damages flowing therefrom. See Complaint ¶¶ 15-36, 43-44; Declaration ¶¶ 5, 13.

Plaintiffs' FTCA claims, too, are entirely dependent upon privileged information. Indeed, one of their causes of action cannot even be named without reference to classified and thus privileged information. Complaint ¶ 53; Declaration ¶¶ 5, 13. In the absence of privileged information, plaintiffs cannot establish the nature of the duty owed, nor the manner in which the Government allegedly breached such duty, nor any damages suffered as a result of the Government's alleged negligence. Plaintiffs cannot show, for example, in what way the Government allegedly has negligently endangered their life or safety, Complaint ¶ 54, effected a false light invasion of privacy, id. ¶ 55,[3] inflicted emotional distress, id. ¶ 56, or interfered with their prospective economic opportunity, id. ¶ 57. Privileged information is thus essential to plaintiffs' FTCA claims.

As to plaintiffs' constitutional claims, Complaint ¶¶ 5, 45-49, as a threshold matter, this Court lacks jurisdiction over such claims because the United States has not waived its sovereign immunity for suits alleging constitutional torts against its agencies or its officials. See King v. Simpson, 189 F.3d 284, 287 (2d Cir. 1999) ("Congress has not waived the government's

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[3] This cause of action may also be dismissed for failure to state a claim upon which relief may be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). The tort of false light invasion of privacy is not recognized under New York law. See Messenger v. Gruner + Jahr Printing & Publ'g, 94 N.Y.2d 436, 448 (2002); Howell v. New York Post Co., 81 N.Y.2d 115, 123-24 (1993); see also Complaint ¶¶ 7, 51 (alleging that the "complained of acts and omissions have occurred within and/or had their operative effect in the State of New York," and that if the "United States were a private person, it would be liable to Plaintiffs in accordance with the law of the State of New York").

sovereign immunity . . . from lawsuits based on constitutional claims."); Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d Cir. 1994) (suits against the United States for constitutional torts "[a]re properly dismissed for want of subject matter jurisdiction" because "such suits are . . . barred under the doctrine of sovereign immunity"). Plaintiffs allege claims against the United States, two federal agencies, and Director Goss in his official capacity. Complaint ¶¶ 2, 10-11. Such claims are barred by sovereign immunity. See Robinson, 21 F.3d at 510 (affirming dismissal for lack of jurisdiction of constitutional tort claims against federal agency and federal officers sued in official capacities). In any event, plaintiffs' constitutional claims are based upon the same alleged "acts and omissions," Complaint ¶¶ 46-49, as their other claims. That alleged conduct necessarily implicates classified and therefore privileged information. See Complaint ¶¶ 15-36; Declaration ¶¶ 5, 13.

Thus, the Government's assertion of the state secrets privilege in this case "precludes access to evidence necessary" to establish the parties' respective claims and defenses. Zuckerbraun, 935 F.2d at 547. The Complaint accordingly should be dismissed. See id.; Trulock, 66 Fed. Appx. at 476; Edmonds, 323 F. Supp. 2d at 77-78; Clift, 808 F. Supp. at 107.

2. Privileged Information Is So Central to the Case That Any Further Litigation Would Threaten Disclosure

Dismissal is also warranted because privileged information is so central to the subject matter of this case that any further litigation would threaten disclosure of privileged matters. At the heart of plaintiffs' Complaint is the allegation that plaintiff Jane Doe supposedly is a "virtual prisoner in her home, constantly fearful of eventual detection." Complaint ¶ 35. As detailed in the Classified Declaration, however, the facts and circumstances relating to this claim are

privileged. See Declaration ¶¶ 5, 13. "The very subject matter of this action is thus a state secret." Zuckerbraun, 935 F.2d at 547-48 (citing Reynolds, 345 U.S. at 11 n.26, and Totten v. United States, 92 U.S. 105 (1875)).

As Director Goss has determined, moreover, the classified information described in the Classified Declaration "is so integral to the plaintiffs' claims that any further litigation of this matter would necessarily result in the disclosure of such classified information." Declaration ¶ 6. The Government is constrained not to describe in the public court record, even in a sealed filing accessible to plaintiffs or their attorneys, the bases of the assertion of the state secrets privilege. Id. ¶ 7. However, the Classified Declaration submitted for the Court's ex parte, in camera review demonstrates why information subject to the state secrets privilege is "so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters." Fitzgerald, 776 F.2d at 1241-42.

The Government is "mindful that the invocation of the state secrets privilege in this case will deny [plaintiffs] a forum under Article III of the Constitution for adjudication of [their] claim[s]." Tilden, 140 F. Supp. 2d at 627. The Government further recognizes that dismissal is a drastic remedy, which is warranted "[o]nly when no amount of effort and care on the part of the [C]ourt and parties will safeguard privileged material." Fitzgerald, 776 F.2d at 1244. Here, however, "there are no safeguards that this Court could take that would adequately protect the state secrets in question." Tilden, 140 F. Supp. 2d at 627; see Declaration ¶¶ 12-13.

Because the information subject to the privilege is not at the periphery of the case, protecting it from disclosure during discovery or at trial would not be as simple as advising the Court of a few discrete classified facts, subjects, or words that could not be inquired into.

Attempting to identify what could not be disclosed would itself be revealing. See Fitzgerald, 776 F.2d at 1243; Farnsworth Cannon, 635 F.2d at 281. Indeed, because counsel would not have knowledge of the precise contours of the Government's assertion of privilege, Farnsworth Cannon, 635 F.2d at 281; Declaration ¶ 7, information that otherwise might not appear to be sensitive may nevertheless disclose, or risk disclosure of, privileged information. See Kasza, 133 F.3d at 1166. Moreover, given the centrality of the privileged information to the issues in dispute in the case, counsel would have "every incentive to probe dangerously close to the state secrets themselves." Fitzgerald, 776 F.2d at 1243.

Courts have recognized the potentially harsh result that dismissal imposes on individual litigants. As the Fourth Circuit observed in Fitzgerald:

> When the state secrets privilege is validly asserted, the result is unfairness to individual litigants -- through the loss of important evidence or dismissal of a case -- in order to protect a greater public value. . . . Where . . . the very question upon which the case turns is itself a state secret, . . . the litigant will often find himself without a forum to redress his grievances. The burden of protection of a public value falls upon him alone.

776 F.2d at 1238 n.3, quoted in Sterling, 416 F.3d at 348. When the Government's interest in maintaining the confidentiality of state secrets conflicts with a litigant's interest in pursuing a claim in federal court, the interest of the private litigant must give way. See Sterling, 416 F.3d at 348 ("[T]here can be no doubt that, in limited circumstances like these, the fundamental principle of access to court must bow to the fact that a nation without sound intelligence is a nation at risk."). Where, as here, the privileged information is at the heart of the case, such that discovery or trial threatens disclosure of information subject to the state secrets privilege, see Declaration ¶ 6, "the state secret doctrine finds the greater public good -- ultimately the less harsh remedy --

to be dismissal." Bareford, 973 F.2d at 1144; accord Kasza, 133 F.3d at 1167.

CONCLUSION

For the foregoing reasons, the Court should uphold the Government's assertion of the state secrets privilege and dismiss the Complaint.

Dated: New York, New York
March 29, 2006

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