

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

2006 MAR -8 P 3:42

CLERK US DISTRICT COURT  
ALEXANDRIA, VIRGINIA

Khaled El-Masri, )  
)  
Plaintiff, )  
v. )  
)  
George Tenet, *et al.*, )  
)  
Defendants )  
\_\_\_\_\_ )

Case No. 1:05-cv-1417-TSE-TRJ

UNITED STATES' STATEMENT OF INTEREST,  
ASSERTION OF A FORMAL CLAIM OF STATE SECRETS PRIVILEGE,  
AND  
REQUEST FOR EXPEDITED CONSIDERATION

The United States of America, by its undersigned attorneys acting pursuant to 28 U.S.C. § 517, states its interest in this civil proceeding.

1. The Director of the Central Intelligence Agency, Porter J. Goss, asserts the state secrets privilege in this case. His formal claim of privilege is attached. *See* March 7, 2006 Claim of State Secrets Privilege. Director Goss has determined that the full scope of the privilege may not be addressed in a public, unclassified filing and requests that the Court consider his separate classified declaration. *Id.* ¶ 9. The Agreed Order of this Court provides that the named defendants must respond to the complaint by March 13, 2006. Feb.15, 2006 Agreed Order. By that date, the United States will move to intervene in these proceedings for the purpose of asserting the defense predicated upon the doctrine of state secrets and move for dismissal.

2. Expedited review of the classified declaration also is requested by the Director for reasons that only may be articulated *in camera, ex parte*:

I respectfully request that the Court consider this declaration and, more particularly, my classified declaration discussed below, before this case proceeds further. At my

instruction, a motion for an immediate stay of proceedings is being filed in conjunction with the filing of this claim of privilege.

Claim of State Secrets Privilege ¶ 2. In this regard, the Court's attention particularly is directed to paragraphs 10-18 of the Director's classified submission.

The United States urges the Court to assent to this request for expedited review "before this case proceeds further" (*id.*), in deference to the judgment of a cabinet officer of a coordinate branch of government who has been entrusted with responsibility over matters relating to national security. *See Sterling v. Tenet*, 413 F.3d 338, 347 (4th Cir. 2005) (quoting *CIA v. Sims*, 471 U.S. 159, 178 (1985)). In the event the Court accedes to the request of the Director, Department of Justice Security Officer Christine E. Gunning, at the Court's direction, will deliver the classified *in camera* declaration to the Court.<sup>1</sup> A notice of *in camera* submission will be filed by the United States reflecting delivery to the Court.<sup>2</sup>

3. Director Goss also requests an immediate stay of proceedings. Claim of State Secrets Privilege ¶ 2. A stay is warranted under this Circuit's jurisprudence in view of the CIA Director's determination that further proceedings would jeopardize the national security interests addressed in his classified declaration. *Id.* ¶ 10. *See Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F. 2d 1236, 1243 (4th Cir. 1985) ("Once the state secrets privilege has been properly invoked, the district court must consider whether and how the case may proceed in light of the privilege.").

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<sup>1</sup> In view of the sensitive nature of the Director's classified submission, that document is not being filed with the Clerk under seal pursuant to Local Civil Rule 5, Local Rules for the United States District Court for the Eastern District of Virginia. The United States requests that the Court permit the classified document to be maintained by the Department of Justice Security Officer in an appropriate secure facility under the Court's seal, subject to the Court's further direction.

<sup>2</sup> Where a formal claim of state secrets privilege has been asserted by the appropriate agency head, this Circuit recognizes that consideration by the district court of classified matters proffered by the agency head in support of that claim *in camera, ex parte* is appropriate as a matter of law. *Sterling*, 416 F. 3d at 345.

The United States' separate motion for a stay is being filed in conjunction with the Statement of Interest this date. An immediate stay is requested to preserve the status quo, pending consideration of any response to that motion filed by the parties to this litigation.

Dated: 3/8/06

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this date, a true copy of the foregoing was served on the following by first class mail addressed to:

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**ATTACHMENT**  
**A**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA

KHALED EL-MASRI, )  
 )  
 Plaintiff, )  
 )  
 v. ) 1:05-cv-01417-TSE-TRJ  
 )  
 GEORGE J. TENET, et al., )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**FORMAL CLAIM OF STATE SECRETS PRIVILEGE BY  
PORTER J. GOSS, DIRECTOR, CENTRAL INTELLIGENCE AGENCY**

I, PORTER J. GOSS, hereby declare and state:

1. I am the Director of the Central Intelligence Agency (CIA) and have served in this capacity since 21 April 2005. I represented the 14th Congressional District of Florida as a Member of the U.S. House of Representatives from 3 January 1989 to 23 September 2004. During that time, I served on the Permanent Select Committee on Intelligence of the U.S. House of Representatives (HPSCI) from February 1995 until August 2004. From February 1997 until the President of the United States announced his intention to nominate me as Director of Central Intelligence (DCI) in September 2004, I served as Chairman of the HPSCI. I was confirmed by the Senate as DCI on 23 September 2004, was sworn in as DCI on 24 September 2004, and served in that capacity until 21 April 2005, when the Director of National Intelligence (DNI) was sworn into office. Prior to my service in the U.S. House of Representatives, I served as an officer of

the CIA in the Directorate of Plans and Programs, the predecessor to the Directorate of Operations.

2. This declaration is a formal claim of the state secrets privilege. I respectfully request that the Court consider this declaration and, more particularly, my classified declaration discussed below before this case proceeds further. At my request, the Department of Justice (DOJ) is filing a motion for an immediate stay of proceedings in conjunction with the filing of this claim of privilege.

3. I make the following statements based upon my personal knowledge, as well as upon information made available to me in my official capacity.

4. The CIA was established by section 104(a) of the National Security Act of 1947 (Act), as amended, 50 U.S.C. § 403-4. Pursuant to section 104(b) of the Act, 50 U.S.C. § 403-4(b), the function of the CIA is to assist the Director of the CIA (DCIA) in carrying out his assigned responsibilities. Section 104A of the Act, 50 U.S.C. § 403-4a, established the position of DCIA, whose duties and responsibilities include serving as head of the CIA and collecting information through human sources and by other appropriate means, correlating and evaluating intelligence related to the national security and providing appropriate dissemination of such intelligence, providing overall direction for coordination of the collection of national intelligence outside the United States through human sources by elements of the intelligence community authorized to

undertake such collection, and performing such other functions and duties related to intelligence affecting the national security as the President, or the DNI, may direct. A more particularized statement of the authorities of the DCIA and the CIA is set forth in sections 1.5 and 1.8 of Executive Order 12333.<sup>1</sup>

5. Under the direction of the DNI pursuant to section 102A(i) of the Act, 50 U.S.C. § 403-1(i), and in accordance with section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 403g, and sections 1.3(a)(5) and 1.5(h) of Executive Order 12333, I additionally am responsible for protecting CIA sources and methods from unauthorized disclosure.

6. Through the exercise of my official duties, I have been advised of this litigation. I understand that the plaintiff alleges that he was detained by officials of the Government of Macedonia; that those officials handed him over to CIA officials; that those CIA officials transported him to Afghanistan; that Afghan and CIA officials detained and interrogated him; that the conditions of his confinement were inhumane and his interrogation was coercive; and that after several months he was released in Albania. I am further advised that plaintiff seeks money damages in his lawsuit from former DCI George J. Tenet and three corporate defendants. I also

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<sup>1</sup> Executive Order 12333, as amended, 3 C.F.R. 200 (1981), *reprinted in* 50 U.S.C.A. § 401 note at 21 (Supp. 2005), and as amended by Executive Order 13284, 68 Fed. Reg. 4,077 (Jan. 28, 2003).



understand that the complaint refers to unnamed individuals who are said to be employees of the CIA or of the corporate defendants, and who the plaintiff states he will try to identify and name as additional defendants.

7. Central to this case is the allegation that the CIA conducted a clandestine foreign intelligence activity. By their very nature, clandestine intelligence activities are not acknowledged by the United States. When there are allegations that the CIA is involved in clandestine activities, the United States can neither confirm nor deny those allegations. There is a pragmatic reason why this is necessary, that is, to protect classified intelligence sources and methods from unauthorized disclosure and thereby avoid damage to the national security and our nation's conduct of foreign affairs, a position which I understand my predecessors have taken since the CIA's inception and one which also reflects my personal judgment.

8. Confirming the existence of an alleged clandestine intelligence activity would reveal the very classified information sought to be protected from disclosure. The United States does not, however, have the luxury of denying unfounded allegations of clandestine intelligence activities without serious adverse consequence. The denial of CIA involvement may, by itself, provide the informed intelligence analyst useful information about the CIA's capabilities and the scope and thrust of CIA activities. Even where that is not the case, the United States cannot simply deny the existence of such

activities where none exist. If that were the policy, the United States' failure to deny such activities in other circumstances would be tantamount to an admission of such clandestine activities in these other circumstances. Therefore, the United States and current and former CIA officers, such as Director Tenet, must take the consistent position of refusing to confirm or deny allegations relating to unacknowledged intelligence activities.

9. With these considerations in mind, I hereby submit this declaration to formally assert a claim of state secrets privilege. I make this claim of state secrets privilege in my capacity as head of the CIA, after personal consideration of the matter. In view of the allegations of CIA involvement, parties in this case have a special incentive to probe the CIA's foreign intelligence interests, authorities, and methods generally, and seek information and evidence to establish or refute claims and defenses. The information that underlies my judgment that special procedures are not adequate to protect these sensitive matters cannot be described on the public record and, accordingly, is included in a separate, classified declaration.

10. In connection with my formal assertion of the state secrets privilege, I have considered the extent to which the bases for my assertion could be filed on the public record. After careful consideration, I have determined that no further information regarding the bases for my claim of privilege can be disclosed on the public record without revealing the very

information I seek to protect. The full scope of the information protected by the claim of privilege is itself privileged from disclosure. Accordingly, my description of the scope of information protected by the privilege and the bases for my determination are contained in my classified declaration, which is submitted for this Court's in camera, ex parte review as a part of this claim of privilege. I have asked DOJ to seek an immediate stay of these proceedings to permit the Court the opportunity to consider my assertion of state secrets privilege before the defendants are required to respond to the complaint or any other proceedings occur in this case.

11. I have requested government attorneys to seek dismissal of this case in view of this claim of state secrets privilege. I recognize that dismissal is an extreme form of relief. Nevertheless, I have asked DOJ to seek dismissal of this case because, after consulting with CIA and DOJ officials, I have determined that there are no adequate means to allow this case to proceed while protecting the national security interests addressed in my separate classified declaration.

12. My classified declaration will be delivered to a DOJ Security Officer who will assist in delivery and storage as the Court may require. In this regard, it is my understanding that the Classified Information Procedures Act (CIPA) does not govern this civil proceeding, and the DOJ Security Officer will not perform the additional responsibilities as a Court Security Officer under the Chief Justice's CIPA guidelines.

13. In consideration of my responsibility as DCIA to protect CIA activities, sources, and methods, I have determined that neither plaintiff nor his attorneys possess the need-to-know required to access the classified information described in this declaration. Section 4.1 of Executive Order 12958 provides that "[a] person may have access to classified information provided that:

- (1) a favorable determination of eligibility for access has been made by an agency head or the agency head's designee;
- (2) the person has signed an approved nondisclosure agreement; and
- (3) the person has a need-to-know the information."

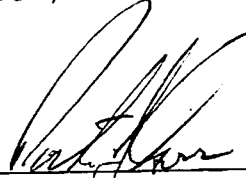
Section 6.1(z) defines "need-to-know" as "a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized government function." I understand that one or more of the attorneys representing the plaintiff may have been granted limited access to certain classified national security information in connection with their representation of detainees who have brought petitions for writs of habeas corpus based upon their detention by the U.S. military at the U.S. Naval Station Guantanamo Bay, Cuba. The Executive Branch's decision to grant such attorneys limited access to certain classified information directly relating to particular petitioners did not displace the DCIA's obligation to protect intelligence sources and methods

from unauthorized disclosure. The substance of the information disclosed to petitioners' counsel in those proceedings, while classified, related only to the detainees on whose behalf the attorneys are appearing.

\* \* \* \*

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 8<sup>TH</sup> day of March, 2006.



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Porter J. Goss  
Director  
Central Intelligence Agency