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8

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION  
12

13 RAHINAH IBRAHIM, an individual,

14 Plaintiff

15 vs.

16 DEPARTMENT OF HOMELAND  
SECURITY, et al.,

17 Defendants,  
18

Case No.: C 06-0545 WHA

**PLAINTIFF’S BRIEF RE: SSI VERSUS  
SECRET STANDARDS**

Trial: December 2, 2013

Time: 7:30 a.m.

Ctrlm.: 8, 19th Floor

Judge: The Honorable William H. Alsup

Complaint Filed: January 27, 2006  
19

20  
21 **INTRODUCTION**

22 Plaintiff hereby responds to the Court’s request for submissions on the legal issue of the  
23 difference in standards for SSI versus secret, dated December 7, 2013. (Doc. # 657.) The  
24 following is a summary of the differences between SSI, classified information, and state secret  
25 privileged information.  
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	<b>SSI</b>	<b>Classified Information</b>	<b>State Secret</b>
<b>Legal Authority for Designation</b>	49 USC § 114(r).	Executive orders. Most recent is Exec. Order 13526, dated December 29, 2009.	<i>Totten v. United States</i> , 92 U.S. 105 (1876); <i>U.S. v. Reynolds</i> , 345 U.S. 1 (1953).
<b>Evidentiary privilege?</b>	Yes, a qualified statutory privilege that allows for disclosure of information in litigation. Sec. 525(d) of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295 (Oct. 4, 2006).	No. An executive decision to classify information is insufficient to establish that the information is privileged. <i>Mohamed v. Jeppesen Dataplan, Inc.</i> , 614 F.3d 1070, 1082 (2010).	Yes, absolute if upheld. Evidence completely removed from the case. <i>Jeppesen</i> , 614 F.3d at 1081-82.
<b>Who May Designate</b>	Under Secretary of TSA. 49 U.S.C. 114(r).	President, Vice-President, agency heads, and other officials designated by the President.	Head of department that has control over the matter, after actual personal consideration. <i>Jeppesen.</i> , 614 F.3d at 1080. Attorney General must also personally approve. Memorandum from the Attorney General (Sept. 23, 2009), available at <a href="http://www.justice.gov/opa/documents/state-secret-privileges.pdf">http://www.justice.gov/opa/documents/state-secret-privileges.pdf</a> .
<b>Court's Power to Review Designation and Order Access</b>	District court may review request for public access. <i>See, e.g., Gordon v. FBI</i> , 390 F. Supp. 2d 897 (N.D. Cal. 2004). Pursuant to Sec. 525(d) of 2007 Homeland Security Appropriations, court of appeals may review TSA order regarding disclosure to counsel or party. Homeland Security App. Act, 2007, <i>supra</i> .	Court may compel disclosure of classified information to counsel. <i>See, e.g., Al Odah v. United States</i> , 559 F.3d 539, 544-45 (D.C. Cir. 2009); Classified Information Procedures Act, 18 U.S.C. App. III, § 4.	Court must make independent determination whether the information is privileged. Court must sustain privilege when it is satisfied from all the circumstances of the case that there is a reasonable danger that compulsion of the evidence will expose matters which in the interest of national security should not be divulged. <i>Jeppesen</i> , 614 F.3d at 1081.

## ARGUMENT

### **I. THE COURT HAS THE POWER TO REVIEW THE ALLEGED STATE SECRETS INFORMATION AND MAKE APPROPRIATE ORDERS TO PROVIDE ACCESS TO COUNSEL OR A PARTY.**

As shown above, once information is designated SSI, it may nonetheless be disclosed to statutorily defined “covered persons” with a “need to know.” 49 C.F.R. §§ 1520.7, 1520.9, 1520.11. Section 525(d) of the Department of Homeland Security Appropriations Act of 2007

1 provides that where a party in a civil case demonstrates “substantial need of relevant SSI in the  
2 preparation of the party’s case” and where the party is “unable without undue hardship to obtain  
3 the substantial equivalent of the information by other means,” the party or party’s counsel shall  
4 be designated as a covered person under 49 C.F.R. § 1520.7. *See* Department of Homeland  
5 Security Appropriations Act of 2007, Pub. L. No. 109-295 § 525(d), 120 Stat. 1355, 1382 (Oct.  
6 4, 2006) (“Section 525”).

7 Plaintiff’s counsel has been cleared to view SSI since 2009. In addition, the parties  
8 agreed to an SSI protective order (Docket No. 421). Where a lawyer has the appropriate  
9 clearances, it is presumed that national security is not threatened by his or her review of the  
10 material. *Cf. Al Haramain Islamic Foundation, Inc. v. United States Dept. of the Treasury*, 686  
11 F.3d 965, 983 (9th Cir. 2012) (“[A] lawyer ... who has the appropriate security clearance ...  
12 does not implicate national security when viewing the classified material because, by definition,  
13 he or she has the appropriate security clearance.”)

14 The state secrets privilege applies only if there is a reasonable danger that disclosure of  
15 the allegedly privileged material would harm the military or national security of the United  
16 States. *See United States v. Reynolds*, 345 U.S. 1, 10 (1953); *Mohamed v. Jeppesen Dataplan,*  
17 *Inc.*, 614 F.3d 1070, 1081-82 (9th Cir. 2010) (*citing Reynolds*, 345 U.S. at 10). The head of the  
18 department having control over the matter must formally assert the privilege after personal  
19 consideration, and must state with specificity the rationale of the claimed privilege. *Reynolds*,  
20 345 U.S. at 7-8, 10-11. Because it is so powerful, the state secrets privilege is not to be lightly  
21 invoked. *Id.* at 7, 11. Moreover, the privilege “may not be used to shield any material not  
22 strictly necessary to prevent injury to national security; and, whenever possible, sensitive  
23 information must be disentangled from nonsensitive information to allow for the release of the  
24 latter.” *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1038  
25 (1984).

26 Because the incentives to abuse the state secrets privilege are great, the importance of the  
27 Court’s role in evaluating whether a risk of injurious disclosure truly has been established cannot  
28 be emphasized enough. “Judicial control over the evidence in a case cannot be abdicated to the

1 caprice of executive officers.” *Reynolds*, 345 U.S. at 9-10. Despite these words of caution, the  
2 *Reynolds* case is a good example of the risk of abuse, since the accident report allegedly  
3 containing state secrets in that case did not actually contain any information that could be  
4 characterized accurately as military “secrets.” Barry Siegel, *Claim of Privilege: A Mysterious*  
5 *Plane Crash, a Landmark Supreme Court Case, and the Rise of State Secrets*, 237-44 (Harper  
6 Perennial 2009). Courts can and do reject the state secrets privilege, however. *See Republic*  
7 *Steel Corp. v. United States*, 3 Ct. Int’l Trade 117, 117-18 (1982) (privilege did not apply to two  
8 cables from the Department of Commerce to the American Embassy in Bucharest, Romania),  
9 *vacated as moot by Republic Steel Corp. v. United States*, 5 Ct. Int’l Trade 1 (1983); *Horn v.*  
10 *Huddle*, 636 F. Supp. 2d 10, 13-17 & n.2 (D.D.C. 2009) (noting case against CIA agent was  
11 reinstated due to the government’s fraud on the court in assertion of state secrets privilege, and  
12 conducting a more exacting inquiry due to history of misconduct), *vacated by Horn v. Huddle*,  
13 699 F. Supp. 2d 236, 238 (D.D.C. 2010); *see also Horn v. Huddle*, 647 F. Supp. 2d 66, 68-70  
14 (D.D.C. 2009) (denying the government’s motion for a stay pending appeal of the court’s  
15 determination that the government had not demonstrated the applicability of the state secrets  
16 privilege); *Halpern v. United States*, 258 F.2d 36, 43-44 (2d Cir. 1958) (holding *in camera* trial  
17 could be used to avoid divulging military secrets in patent dispute).

18 Defendants’ declarations filed in this action thus far fail to demonstrate that there is a  
19 reasonable danger a further response would “expose military matters which, in the interest of  
20 national security, should not be divulged,” *see Reynolds*, 345 U.S. at 10, or otherwise  
21 compromise national security. The portions of the supporting declarations that are available to  
22 Ibrahim’s counsel do not present specific arguments that disclosure in this case would reveal  
23 military matters implicating national security. *See also Reynolds*, 345 U.S. at 9 (requiring a risk  
24 of “injurious disclosure”). Instead, defendants’ declarations rely on abstract, hypothetical, “what  
25 if” scenarios that are not tied to the facts of this dispute. Defendants’ generalized arguments that  
26 harm would result from disclosure of intelligence-gathering methods or capabilities are not  
27 persuasive, because at least some of defendants’ terrorist investigation and watchlisting practices  
28 have been made known to the general public. (*See, e.g.* Exhibits 4, 58, 101, 102, 238, and 250;

1 *see also, e.g.*, Trevor Aaronson, *The Terror Factory: Inside the FBI's Manufactured War on*  
2 *Terrorism*, pp. 35-55, 206-17, 223-27 (Ig Publishing 2013) (discussing generally the FBI's  
3 policies and practices with respect to Muslim communities).) Defendants' previous declarations  
4 in support of the state secrets privilege inappropriately presume the correctness of their terrorist  
5 designations, despite evidence that defendants' databases are replete with errors. (*See, e.g.*, Exh.  
6 101, pp. TSC000409-410, TSC000469-475; Exh. 102, pp. TSC000096-97, TSC000100,  
7 TSC000105-107, TSC000109-112, TSC000157-158, TSC000170-171 & n.64; Exh. 508, pp.  
8 TSC000003, TSC000010, TSC000012-13.)

9       Moreover, given that plaintiff's counsel has already cleared background checks for  
10 sensitive security information, national security is not threatened by their review of any allegedly  
11 state secret information. The Court may overrule the state secrets privilege asserted by  
12 defendants and allow plaintiff or her counsel access to the information under appropriate  
13 protective orders.

## 14       **II. DUE PROCESS REQUIRES DISCLOSURE OF ANY AND ALL PURPORTED** 15       **BASES FOR DEFENDANTS' ACTIONS.**

16       In this case, Ibrahim's due process, stigma plus, and equal protection claims, and her  
17 claim under the Administrative Procedure Act, challenge the government's assertion that she is a  
18 terrorist or associated with terrorism. Due process requires that defendants provide adequate  
19 notice of the purported bases for their designation, including any classified information that is  
20 required to enable Ibrahim to respond to the accusations against her. *See Kaur v. Holder*, 561  
21 F.3d 957, 961-62 (9th Cir. 2009) (use of secret evidence violated applicable regulations as well  
22 as due process); *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d  
23 637, 658-60 (N.D. Ohio 2010); *see also American-Arab Anti-Discrimination Comm. v. Reno*, 70  
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1 F.3d 1045, 1069-70 (9th Cir. 1995), *superseded in part by statute on other grounds as discussed*  
 2 *in* 525 U.S. 471, 475-76 (1999).<sup>1</sup>

3 Defendants urge the Court to resolve the case without requiring disclosure of documents  
 4 and other information they allege are “classified.” Here, however, the purported basis for  
 5 Ibrahim’s TSDB designation is highly relevant to her due process, stigma plus,<sup>2</sup> equal protection,  
 6 and APA claims. Defendants’ argument also ignores the fact that the government may be  
 7 required to disclose, summarize, or declassify classified information if it is necessary for  
 8 meaningful judicial review. *See, e.g., Al Odah v. United States*, 559 F.3d 539, 544–45 (D.C. Cir.  
 9 2009) (discussing the standard under which courts may compel disclosure of classified  
 10 information); *United States v. Abuhamra*, 389 F.3d 309, 329, 331 (2d Cir. 2004) (alternate  
 11 summary disclosure procedure); *KindHearts*, 710 F. Supp. 2d at 657–60 (proposing, out of  
 12 concern for due process, an *ex parte, in camera* meeting with the government to determine  
 13 whether classified evidence is capable of further declassification or adequate summarization, and  
 14 further, that the government “expeditiously declassify and/or summarize whatever classified  
 15 information [the court] find[s] will give KindHearts constitutionally adequate notice”) (emphasis  
 16 added).

17 Here, to provide constitutionally adequate notice and opportunity to rebut the accusations  
 18 that led to Ibrahim’s blacklisting, defendants must disclose all of the reasons why they took the  
 19 actions they did. Otherwise, Ibrahim is forced to guess at the reasons for her placement on  
 20 various different watchlists from 2004 to the present, which necessarily prejudices her ability to  
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 25 <sup>1</sup> *See also Rafeedie v. INS*, 880 F.2d 506, 523-24 (D.C. Cir. 1989) (“The Government cannot  
 26 assert as an argument against procedural safeguards that the accused is guilty as charged. The  
 27 whole point of due process is that the facts must be determined according to certain procedures  
 that have been agreed upon in advance for reasons of enduring policy divorced from the  
 exigencies of any particular case.”).

28 <sup>2</sup> *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002) (elements of  
 stigma plus claim include a stigmatizing statement, the accuracy of which is contested).

1 rebut defendants' accusations that she is a terrorist or somehow associated with terrorism. *See*  
2 *Gete v. I.N.S.*, 121 F.3d 1285, 1297 (9th Cir. 1997) ("... without knowing the exact reasons for  
3 the seizure, as well as the particular statutory provisions and regulations they are accused of  
4 having violated," individuals whose vehicles were seized "may not be able to clear up simple  
5 misunderstandings or rebut erroneous inferences drawn by the INS."). As the *KindHearts* court  
6 pointed out:

7           The rationale for requiring such disclosure is that, otherwise, an individual or  
8           entity accused of terrorist connections, 'like Joseph K. in *The Trial*[,] . . . [can  
9           prevail only if he can] prove that he is not a terrorist regardless of what might be  
10           implied by the Government's confidential information. It is difficult to imagine  
11           how even someone innocent of all wrongdoing can meet such a burden.'

12 *KindHearts*, 710 F. Supp. 2d at 659 (quoting *Rafeedie*, 880 F.2d at 516 (D.C. Cir. 1989)).

13 **CONCLUSION**

14           Ibrahim objects to defendants' late attempts to rely on state secrets evidence for dismissal  
15 of this case. If the Court entertains defendants' state secrets arguments, Ibrahim respectfully  
16 requests that this Court carefully scrutinize defendants' claim that the state secrets privilege  
17 applies, and reject any application of the doctrine where state and military secrets are not truly  
18 implicated. Plaintiff also requests that the Court order appropriate access to plaintiff and her  
19 counsel if the Court allows defendants to rely on such evidence. Plaintiff further requests the  
20 opportunity to rebut any state secrets evidence relied upon by defendants.

21 DATED: December 13, 2013

McMANIS FAULKNER

22 /s/ Elizabeth Pipkin

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