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16 **UNITED STATES DISTRICT COURT**
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

18 RAHINAH IBRAHIM,

19 Plaintiff,

20 v.

21 DEPARTMENT OF HOMELAND
22 SECURITY, *et al.*,

23 Defendants.

No. 3:06-cv-0545 (WHA)

**DEFENDANTS' RESPONSE TO THE
COURT'S ORDER REQUESTING
BRIEFING ON ACCESS BY OPPOSING
COUNSEL TO CLASSIFIED
INFORMATION**

1 On December 18, 2013, this Court entered an order that provided as follows:

2 By DECEMBER 23 AT NOON, both sides shall submit briefing on
3 whether and how one or more of plaintiff's counsel could obtain a
4 clearance to review the classified submissions, including how long it
would take and whether plaintiff's counsel is willing to undertake the
process.

5 Dkt. 666. In this case, the state secrets privilege was properly invoked over certain classified
6 information by the Attorney General and the Director of National Intelligence. *See* Dkt. 471,
7 472. This Court independently evaluated and upheld the state secrets privilege assertion on April
8 19, 2013. As a result of the Court's decision, information covered by the state secrets privilege
9 is excluded from the case, and such information is not available to either party in further
10 litigation of the case. *See* April 19 Order on Classified Information. Because the information at
11 issue in the Court's December 18 order has been excluded from the case, there is no basis to
12 provide Plaintiff's counsel with a clearance and to allow access to this information.

13 In any event, and dispositively, the Executive Branch has the obligation and the plenary
14 discretion to protect national security by determining what information is classified and to whom
15 that information may be disclosed. As a result, any court order purporting to require that
16 Defendants grant Plaintiff's counsel a clearance and access to such information would be
17 contrary to law and subject to immediate appeal. As precedent dictates, Defendants' successful
18 invocation of the state secrets privilege means that the classified evidence must be excluded from
19 the case; and, as Defendants have previously argued, in the present circumstances, the privilege
20 requires judgment in Defendants' favor. *See United States v. Reynolds*, 345 U.S. 1, 7-10 (1953);
21 *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1082 (9th Cir. 2010) (en banc).

22 **I. There is No Basis for Opposing Counsel to Access Information Subject to a**
23 **Successful Assertion of the State Secrets Privilege.**

24 As Defendants' previous briefing has established, the state secrets privilege is a well-
25 established means of protecting classified national security information in litigation, rooted in the
26 President's Article II constitutional authority. Under binding Ninth Circuit precedent, "[o]nce
27 the [state secrets] privilege is properly invoked, and the court is satisfied as to the danger of
28

1 divulging state secrets, the privilege is absolute” *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th
2 Cir. 1998), and the information is thus excluded from the case. *See Jeppesen* 614 F.3d at 1079,
3 1082; *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007).

4 It follows that once the invocation of the state secrets privilege is upheld in a particular
5 matter, it cannot be overcome by the perceived need of a litigant to use the information; nor are
6 courts authorized to provide special procedures (such as the clearing of opposing counsel or the
7 imposition of protective orders) to allow for access by the opposing party to the excluded
8 information. A contrary result would defeat the purpose of invoking the privilege, and
9 undermine the protection of national security. *See El-Masri v. United States*, 479 F.3d 296, 311
10 (4th Cir. 2007) (holding that plaintiff’s suggestion “that the court ought to have received all the
11 state secrets evidence in camera and under seal, provided his counsel access to it pursuant to a
12 nondisclosure agreement (after arranging for necessary security clearances), and then conducted
13 an in camera trial” is “expressly foreclosed by *Reynolds*, the Supreme Court decision that
14 controls this entire field of inquiry”); *Sterling v. Tenet*, 416 F.3d 338, 344-49 (4th Cir. 2005)
15 (rejecting plaintiffs request to devise “special procedures” to allow his suit involving state secrets
16 to proceed, explaining that the Supreme Court in *United States v. Reynolds*, 345 U.S. 1 (1953),
17 “countenance[d]” that “[c]ourts are not required to play with fire and chance further disclosure –
18 inadvertent, mistaken, or even intentional – that would defeat the very purpose for which the
19 privilege exists”); *Jeppesen*, 614 F.3d at 1089 (admonishing district courts against attempting to
20 “wall off” secrets from disclosure using protective orders or restrictions on testimony “where the
21 relevant secrets are difficult or impossible to isolate and even efforts to define a boundary
22 between privileged and unprivileged evidence would risk disclosure by implication”); *see also In*
23 *re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989) (explaining that once a court has
24 determined that the state secrets privilege applies in a particular case, “the balance has already
25 been struck in favor of protecting secrets of state over the interest of a particular litigant”)
26 (internal citations omitted).

1 Courts have uniformly rejected requests by parties in civil cases involving the state
2 secrets privilege to be permitted access to classified information presented to the court *ex parte*
3 and *in camera*. See, e.g., *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005) (denying private
4 counsel access to classified information in states secrets case); *Ellsberg v. Mitchell*, 709 F.2d 51,
5 61 (D.C. Cir. 1983) (explaining that the rule denying counsel access to classified information is
6 “well settled” and that “our nation’s security is too important to be entrusted to the good faith
7 and circumspection of a litigant’s lawyer . . . or to the coercive power of a protective order.”);
8 *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978) (rejecting argument that counsel should have
9 been permitted to participate in the *in camera* proceedings). Indeed, the D.C. Circuit has
10 rejected disclosure to private parties of classified information subject to the state secrets
11 privilege, even where, unlike here, counsel held security clearances. See *Northrop Corp. v.*
12 *McDonnell Douglas Corp.*, 751 F.2d 395, 401 (D.C. Cir. 1984).¹ Courts likewise reject
13 arguments for disclosure in cases involving classified information, even absent an assertion of
14 the state secrets privilege. See also *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003) (holding
15 that district court abused its discretion in finding First Amendment right for plaintiffs’ attorney to
16 receive access to classified information to assist the court in resolving the plaintiff’s challenge to
17 pre-publication classification review).

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19
20 ¹ *Horn v. Huddle*, 636 F. Supp. 2d 10, 13-17 & n.2 (D.D.C. 2009), does not support Plaintiff’s
21 claim that she or her counsel be permitted to access information covered by the state secrets
22 privilege. First, that opinion was vacated. See *Horn v. Huddle*, 699 F. Supp. 2d 236, 238-39
23 (D.D.C. 2010) (vacating opinion at 636 F. Supp. 2d 10 as a result of settlement and dismissing
24 the action with prejudice). Moreover, before the settlement, the Government had appealed the
25 district court’s order, which purported to make a need-to-know determination, and in conjunction
26 with that determination, to seek to compel the Executive Branch to grant security clearances and
27 authorize disclosure of classified information to counsel for plaintiff and defendants. The D.C.
28 Circuit granted a stay of the district court’s order pending appeal, and had set a schedule for
expedited briefing. See Case No. 09-5311, Document # 1205471 (D.C. Cir.). Both the
underlying district court case and the appeal were dismissed as a result of the settlement. See
Case No. 09-5311, Document #1241679 (D.C. Cir.); *Horn*, 699 F. Supp. at 238-39.

1 As addressed by the government’s recent filing (Dkt. 664),² the state secrets privilege is
2 grounded in the constitutional duty and prerogative of the Executive. Although its implications
3 may be viewed as harsh, insofar as information subject to the privilege may be excluded and
4 civil litigation terminated, *see Jeppesen*, 614 F.3d at 1079, 1082; *Al-Haramain Islamic Found.*,
5 507 F.3d at 1205, those results are required by precedent to protect the purpose of the privilege:
6 to ensure that civil litigation does not require the Executive to reveal classified national security
7 information – thereby harming national security interests –because a lawsuit has been filed.

8 **II. The Executive Branch Has the Obligation to Protect Classified Information,**
9 **as well as Plenary Discretion Over Access to Such Information.**

10 Although, as explained, there is no basis for Plaintiff or her counsel to have access to
11 classified information that has been excluded from the case, in any event, neither she nor her
12 counsel may access that information because they have not been authorized to do so by the
13 Executive, and the authority to determine who may have access to classified information “is
14 committed by law to the appropriate agency of the Executive Branch.” *See Dep’t of the Navy v.*
15 *Egan*, 484 U.S. 518, 527 (1988); *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990); *see*
16 *also* Exec. Order No. 12,968, 60 Fed. Reg. 40,245, 40,253 (Aug. 2, 1995); Exec. Order 13,467,
17 73 Fed. Reg. 38, 103 (June 30, 2008); Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29,
18 2009).

19 The grant of a security clearance requires the Executive Branch to make two
20 determinations: first, a favorable determination that an individual is trustworthy for access to

21 ² As also explained in Dkt. 664, Sensitive Security Information (“SSI”) is a separate category of
22 non-classified information created by Congress and governed by statutes and implementing
23 regulations. Nothing in these statutes and regulations has any bearing on the caselaw concerning
24 the state secrets privilege or the rules for access to classified information. That Plaintiff’s
25 counsel satisfied the statutory requirements for accessing SSI relevant to this case under the
26 terms of a protective order, and that the Court adhered to the statutory prohibition on disclosing
27 SSI to the public by closing the courtroom when SSI was discussed, is inapposite to the question
28 of whether Plaintiff’s counsel may access classified information excluded from this case
pursuant to the state secrets privilege.

1 classified information and, second, a separate determination “within the executive branch” that
2 that an individual has a demonstrated “need-to-know” classified information – that is, the
3 individual “requires access to specific classified information in order to perform or assist in a
4 lawful and authorized governmental function.” See Exec. Order No. 13,526, 2009 WL 6066991,
5 75 FR 707 (Dec. 29, 2009), §§ 4.1(a)(3), 6.1(dd).³ As the Ninth Circuit has recognized, both
6 determinations are committed to the plenary discretion of the Executive Branch. See *Dorfmont*,
7 913 F.2d at 1401 (A “federal court is ‘an outside nonexpert body’” which has “no more business
8 reviewing the merits of a decision to grant or revoke a security clearance” than any other
9 “outside nonexpert body.”) (citing *Egan*, 484 U.S. at 529); see also, e.g., *Brazil v. U.S. Dept. of*
10 *Navy*, 66 F.3d 193, 196 (9th Cir. 1995) (“Thus in *Dorfmont* we held broadly that judicial review,
11 like outside administrative review, of security clearance decisions was precluded”).⁴ As courts
12 have explained, it is the constitutional duty and prerogative of the Executive Branch to determine
13 what constitutes an acceptable margin of error in assessing the potential risk of allowing access
14 to classified information. *Egan*, 484 U.S. at 527, 529 (quoting *CIA v. Sims*, 471 U.S.159, 170
15 (1985)). This duty and prerogative rely on the executive’s unique expertise in these assessments.
16

17 ³ The clearance process also requires a background check and a suitability determination, among
18 other factors. See Exec. Order. 12,968, § 1.2.

19 ⁴ To the extent that Plaintiff relies on it to argue that she should be granted access to classified
20 information, *Al Haramain Islamic Found., Inc. v. U.S. Dep’t. of Treasury*, 686 F.3d 965, 980
21 (9th Cir. 2012), is inapplicable. First, *Al Haramain* did not involve the state secrets privilege,
22 which as discussed above, requires absolute exclusion of the information covered by the
23 privilege. Second, in *Al Haramain*, the Ninth Circuit considered a challenge to the
24 Government’s designation of Al-Haramain as an organization that supports Al-Qaeda based on a
25 record that included classified information filed *ex parte* and *in camera*. 686 F.3d at 985. Here,
26 the Defendants have not and are not relying on the classified information to present a record to
27 the Court that would result in a decision on the merits. Indeed, the *ex parte* submissions
28 Defendants have recently submitted were required by the Court (Dkt. 652) – Defendants did not
seek to file them. Finally, although the Ninth Circuit noted that a review of classified
information by an opposing counsel already bearing a security clearance could, in some
unspecified future circumstances be a means by which the government could provide additional
process, the court declined to grant plaintiff’s counsel access to the classified information in the
administrative record supporting the Al Haramain designation, which was upheld by both the
district and appellate courts. *Id.* at 983-84.

1 It is therefore dispositive that the Government has not granted Plaintiff’s counsel access to the
2 classified information at issue in this case.

3 The Executive’s determination about which persons may access classified information,
4 and under what circumstances, is “sensitive and inherently discretionary.” *Dorfmont*, 913 F.2d
5 at 1401 (quoting *Egan*, 484 U.S. at 527); *see also Brazil*, 66 F.3d at 196 (“At the core of *Egan's*
6 deference to the national security mission is the recognition that security clearance
7 determinations are ‘sensitive and inherently discretionary’ exercises, entrusted by law to the
8 Executive.”) (quoting *Egan*, 484 U.S. at 527-29); *see also NY Times Co. v. United States*, 403
9 U.S. 713, 728-29 (1971) (Stewart, J., concurring) (“If the Constitution gives the Executive a
10 large degree of unshared power in the conduct of foreign affairs and the maintenance of our
11 national defense, then under the Constitution the Executive must have the largely unshared duty
12 to determine and preserve the degree of internal security necessary to exercise that power
13 successfully.”). As the Supreme Court has recognized, “reasons . . . too obvious to call for
14 enlarged discussion,” dictate that the protection of classified information must be committed to
15 the broad discretion of the responsible Executive agency, including decisions about who may
16 access such information. *Egan*, 484 U.S. at 529. “Predictive judgments” about whether
17 someone “might compromise sensitive information” involves the determination of “what
18 constitutes an acceptable margin of error in assessing the potential risk” and thus “must be made
19 by those with the necessary experience in protecting classified information.” *Id.* at 528-29.

20 Circumstances in which clearances have been extended to opposing counsel in civil
21 litigation are very rare. The Guantanamo habeas cases involve challenges to the lawfulness of
22 detention, and therefore procedures agreed to by the Government in those cases would not apply
23 here. Such litigation involves detainees’ liberty interests in being free from custodial detention,
24 and in that unique circumstance, the Government consented to a protective order that in part
25 regulates habeas counsel’s access to sensitive and classified information (including such
26 information known by the detainees themselves), and in part allows counsel access to the secure
27 Guantanamo Bay facility. *See In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442, 2009
28

1 WL 50155 (D.D.C. Jan 9, 2009); *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174
2 (D.D.C. 2004). There is no parallel in this case. Plaintiff is not in custody, nor does this case
3 raise practical issues concerning access to a secure military facility. Moreover, and critically, the
4 court did not order the disclosure of classified information in the Guantanamo context; rather, the
5 Government agreed to it, subject to detailed constraints, given the unique circumstances noted
6 above. Those same reasons to grant habeas counsel access to some classified information in
7 Guantanamo habeas cases do not apply here.

8 Likewise, procedures applicable to the use of classified information in criminal cases do
9 not apply here. This is not a criminal case. In the criminal context, Congress has specifically
10 passed legislation – the Classified Information Procedures Act (“CIPA”), 18 U.S.C. app. 3 –
11 which governs such use. By its plain terms, however, CIPA has no application to civil cases.
12 *See* CIPA, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C. App. III) (“An act to
13 provide certain pretrial, trial and appellate procedures for criminal cases involving classified
14 information.”). As the Supreme Court observed in *Reynolds*, there are critical differences
15 between civil litigation and criminal prosecutions. In the latter, the Government may, as a last
16 resort, choose to withdraw evidence, dismiss charges, or dismiss an indictment rather than
17 disclose classified information. Thus, in a criminal case, “the Government can invoke its
18 evidentiary privileges only at the price of letting the defendant go free.” *United States v.*
19 *Reynolds*, 345 U.S. 1, 12 (1953); *see also* 18 U.S.C. App. 3 §§ 7(a), 6(e) (CIPA provisions
20 stating that if a court orders disclosure of classified information in a criminal case, the
21 Government may seek an interlocutory appeal, or cause the court to dismiss an indictment). This
22 principle, however, “has no application in a civil forum where the [g]overnment is not the
23 moving party, but is a defendant only on terms to which it has consented.” *Reynolds*, 345 U.S. at
24 12; *see also Jeppesen*, 614 F.3d at 1077, n.3 (noting broader application of state secrets privilege
25 to civil cases).

1 **III. Any Order Requiring Access to Classified Information by Plaintiff or Her**
2 **Counsel Would be Immediately Appealable.**

3 Circuit precedent makes clear that any order providing for the disclosure of state secrets
4 should be subject to immediate appellate review. As the Ninth Circuit has explained, “[s]ecrecy
5 is a one-way street: Once information is published [or disclosed], it cannot be made secret
6 again,” and thus an order of disclosure is “effectively unreviewable on appeal from a final
7 judgment.” *In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008); *see also Admiral Ins.*
8 *Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1491 (9th Cir. 1989) (“[A]ppeal after disclosure of the
9 privileged communication [or information] is an inadequate remedy”); *Islamic Shura Council of*
10 *S. Cal. v. FBI*, 635 F.3d 1160, 1164-65 (9th Cir. 2011) (providing for mandamus relief where
11 disclosure required by district court’s order in a Freedom of Information Act case “w[ould] make
12 the information permanently public in a way that [would] not be correctable later on appeal[.]”).
13 Accordingly, if the Court were to order Defendants to provide Plaintiff’s counsel with a security
14 clearance and access to classified information, Defendants would request and require an
15 immediate stay to consider options for appellate review.

16 **IV. Judgment Must Be Entered for Defendants.**

17 The recent trial and the parties’ post-trial submissions conclusively establish that this case
18 cannot proceed to judgment on the merits in light of the information excluded by the state secrets
19 privilege. As the Ninth Circuit noted in *Jeppesen*, “it may be impossible to proceed with the
20 litigation because -- privileged evidence being inseparable from nonprivileged information that
21 will be necessary to the claims or defenses -- litigating the case to a judgment on the merits
22 would present an unacceptable risk of disclosing state secrets.” 614 F.3d at 1083. This case has
23 clearly reached this point. Plaintiff demands judgment in her favor based on a set of allegedly
24 unlawful and improperly-motivated Government actions regarding her purported placement in
25 the TSDB, the denial of her visa, and whether or not she was the subject of an investigation. As
26 Defendants have explained in their submissions to the Court, they are unable to fully present
27 their defense as it relates to Plaintiff’s allegations without relying on the information excluded
28 from the case under the state secrets privilege, and thus the record before the Court is necessarily

1 incomplete. The fact that the privileged information has been excluded from the case means that
2 the Court may not reach the merits of Plaintiff's claims. Accordingly, under applicable caselaw,
3 judgment should be entered for Defendants.

4 Dated: December 23, 2013

Respectfully submitted,

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