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May 28, 2002

Via Facsimile Transmission And Regular Mail

Joseph Ostoyich, Esq.
Howrey Simon Arnold & White, LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202)383-6610

Re: Barlow v. United States, Congressional Reference No. 98-867X

Dear Mr. Ostoyich:

This is in response to the two letters I received from you on the afternoon of May 24, 2002. Your first letter was delivered via facsimile transmission at approximately 2:05 p.m., while the second letter was delivered at approximately 3:38 p.m. The tone of these letters, especially the second letter, is both unnecessary and unfounded. I address both letters in turn below.

I have confirmed that we are scheduled to meet at CIA Headquarters on Wednesday, May 29 at 4:00 p.m., to again address with the appropriate CIA personnel the invocation of the state secrets privilege in this case. I anticipate that you will be given a clear explanation regarding the redactions of the Kerr, Oehler, and Burke declarations based upon the state secrets privilege. You should ask for Bill Roes upon arriving at the CIA. I also request that Eric Andreas attend the briefing, in light of his involvement in this case and the pending trial.

Your assertion that Congressional staff members are entitled to receive all information under the parties' Protective Order only partially summarizes what I stated on this matter. I also indicated that I saw no reason why any Congressional staff member should have access to any of the information contained in the record of this case until the Court forwards its recommendation to Congress, in accordance with the procedures established under the congressional reference statute and regulations. Also, the state secrets privilege pertains to this trial record throughout the pendency of this case and, therefore, regardless of the security clearance an individual staff member may have, that staff member would not be entitled to review information protected by

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that privilege.

Regarding the remaining comments in the first letter, I note that the classification guidelines and scope of the state secrets privilege in this case have been explained to you repeatedly over the years. In particular, both I and the appropriate agency personnel have explained to you that the fact that information may be "in the public domain" does not establish that it is not protected information. Furthermore, the fact that former agency employees may have an incorrect understanding regarding the classification level of certain information does not call into question the proper classification decisions of the CIA personnel charged with guarding that information. Also, it is not clear that these former agency employees were aware of the Government's invocation of the state secrets privilege.

We, of course, agree with your general assertion that the state secrets privilege is not designed to protect the Government from embarrassment, nor to cover up potential illegalities. However, it is clear that the privilege has not been, and is not being, misapplied to prevent Mr. Barlow from corroborating his allegations. As we have consistently told both you and the Court, the state secrets privilege will preclude Mr. Barlow and other former agency personnel from addressing detailed information, such as dates, specific case names, or specific phrases. However, there is no reason to believe that Mr. Barlow will not be able to present his allegations in a meaningful way at trial. Indeed, you have already presented Mr. Barlow's allegations through your motion for summary judgment and corresponding proposed findings of fact. There are no grounds to suggest that Mr. Barlow will be precluded from presenting his relevant allegations at trial. This is especially true because practically all of the matters that involve the state secrets privilege are truly peripheral to the key issues that will be addressed at trial. The Court has made it very clear that it considers information about Mr. Barlow's work at the CIA to be only tangentially relevant, and that it will serve only as a means of providing context to his arguments about what occurred during his employment at the Department of Defense in 1989.

The tone of your second letter, following on the heels of your first letter, is baffling. In it, you ask me to "confirm in writing if it will be the Government's position at trial that all classified information (including Confidential and Secret information) is also state secrets privileged." You then assert that, if the answer to that question is answered in the affirmative, it "will make it difficult, if not impossible, for Mr. Barlow to have his day in court . . ." and "may also moot any need for our meeting with CIA personnel on Wednesday." This turn-about in your position within the course of less than two hours appears to constitute nothing more than an ill-conceived litigation tactic.

To be clear, virtually all of the classified information that could be relevant in this case is information over which the state secrets privilege has been invoked. This is certainly not news to you. As long ago as February 5, 2001, I clearly informed you that this was our position in addressing your request that certain depositions be reopened to be taken on a classified basis:

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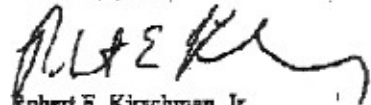
Finally, as I told James Fournier months ago, there is no basis to re-open the depositions of John Doe or Marvin C. upon a classified basis. The substance of such a classified deposition would be protected by the properly invoked state secrets privilege, so that the classified nature of the deposition would not result in any further substantive information being obtained by you.

Furthermore, since obtaining your secret clearance, you have received very little classified information regarding this case and thus should have been well aware that the great majority of the classified information in this case is protected by the state secrets privilege. There is, therefore, no basis for you to now assert for the first time - little more than a week before the trial in this case - that it will be "difficult, if not impossible, for Mr. Barlow to have his day in court." This posturing is ill-timed and appears to be nothing more than an attempt to obscure the weakness of Mr. Barlow's case with last minute procedural issues. I have enclosed my February 5, 2001 letter for your review.¹

It would be unfortunate if you do not avail yourself the opportunity to better understand the scope of the state secrets privilege at the May 29 meeting. Throughout this litigation, the United States has continually worked with you and the Court to provide you guidance concerning this issue. Often, you have either misunderstood or ignored this guidance. Consequently, I believe it is important that you attend the May 29 meeting.

Thank you for your attention to these matters. I anticipate that you and Mr. Andreas will be attending the meeting on May 29.

Very truly yours,



Robert E. Kirschman, Jr.
Assistant Director
Commercial Litigation Branch

¹ In that February 5, 2001 letter, I also reiterated to you that

information in this case does not have to be found within SCI channels or be classified at a Top Secret level in order to be subject to the state secrets privilege invoked in this case. The Government has not invoked the privilege based upon any particular classification or level of access, but rather upon the fact that release of the information could endanger highly sensitive intelligence sources and methods.