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## FAX TRANSMISSION COVER SHEET

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**Date:** July 2, 2007

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**Subject:** *Valerie Plame Wilson; Simon & Schuster, Inc. v. J. Michael McConnell, Director of National Intelligence; Central Intelligence Agency, et al., No. 07 CV 4595 (BSJ)*

**From:** David B. Smallman, Esq.

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**Message: Please see attached.**

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VIA FAX  
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July 2, 2007

Hon. Barbara S. Jones  
United States Courthouse  
500 Pearl Street, Room 620  
New York, NY 10007

Re: *Valerie Plame Wilson; Simon & Schuster, Inc. v. J. Michael McConnell, Director of National Intelligence; Central Intelligence Agency, et al.*, No. 07 CV 4595 (BSJ)

Dear Judge Jones:

My firm represents plaintiffs Valerie Plame Wilson and Simon & Schuster, Inc. and we write to inform the Court that the government defendants in the above-referenced action have designated a public domain “excerpt from the Congressional Record” as a “classified” document in the Administrative Record submitted by them in this proceeding. The Congressional Record excerpt was an exhibit to plaintiffs’ complaint and is part of the public judicial record, but does not appear in defendants’ *unclassified* Administrative Record even though it was an attachment to letters sent to defendant CIA and defendant McConnell. For the convenience of the Court, attached are (1) copies of pages E118-119 of the Congressional Record from January 16, 2007, which are understood by plaintiffs to comprise the excerpt referenced as “classified” by defendants; (2) the “Table of Contents for the Classified Administrative Record”; and (3) the “Notice of Filing of Classified Document.”<sup>1</sup> Because the Court is now considering entry of the parties’ proposed stipulation and protective order, plaintiffs respectfully bring to the Court’s attention two important issues in connection with the proposed stipulation and protective order.

First, plaintiffs expressly reserved their right to dispute that the government defendants could properly designate a public domain document, such as an excerpt from the Congressional Record, as part of the “Classified Administrative Record,” as opposed to the “Unclassified Administrative Record.” Plaintiffs therefore disagree with and oppose defendants’ designation

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<sup>1</sup> The first two documents are Exhibits “A-1” and “T” to the Declaration of David B. Smallman, made on June 28, 2007, in Support of the Motion of Valerie Plame Wilson and Simon & Schuster, Inc. for Summary Judgment and for a Permanent Injunction. The third document is Document No. 9 from the docket for Case 1:07-cv-04595-BSJ, filed 06/28/2007, and referenced in the letter to the Court from Assistant United States Attorney Benjamin Torrance dated June 28, 2007, a copy of which is also attached.

in this proceeding of an excerpt from the Congressional Record as a “classified” document (and reserve their right to challenge the designation and inclusion in the “Classified Administrative Record” of any other public domain document).

Second, to prevent confusion arising from entry of the proposed stipulation and protective order, and to avoid any unintended legal consequences arising from any possible perception that entry of the stipulation and protective order constitutes judicial endorsement of defendants’ filing of a public domain document as properly “classified,” it is within the Court’s discretion to ensure that the protective order is “clear, specific, and precise.” *United States v. Chalmers*, No. S5 05 Cr. 59 (DC), 2007 U.S. Dist. LEXIS 13640 (Feb. 27, 2007). Plaintiffs respectfully submit that the Court should ensure that the proposed stipulation and protective order cannot be construed so as to permit the government defendants to designate indisputably public domain documents, such as the Congressional Record, as part of the “Classified Administrative Record” or to preclude plaintiffs from introducing and relying upon unclassified public domain information obtained outside this proceeding, including the Congressional Record, for use as evidence in summary judgment or at trial.

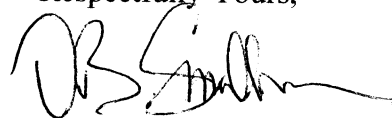
It is one thing for the government to assert that Ms. Wilson’s manuscript cannot be published in its present form because of CIA’s assertion that an annuity information letter sent in unclassified form by defendant CIA to Ms. Wilson in February 2006 nevertheless remains a classified secret. The ultimate propriety of defendant CIA’s clearance determination – which plaintiffs have claimed to be improper and in violation of, *inter alia*, the First Amendment – has been submitted to Your Honor for declaratory relief in accordance with the appropriate procedure for disputing the government defendants’ conduct. *See United States v. Snepp*, 897 F.2d 138, 141 n.2, 143 (D.C. Cir. 1990) (“only substitute for CIA clearance would be a judicial declaration that clearance had been improperly withheld”; “issue upon judicial review would seem to be simply whether or not the information was classified and, if so, whether or not, by prior disclosure it had come into the public domain.”) (quoting *United States v. Marchetti*, 466 F.2d 1309, 1318 (4<sup>th</sup> Cir. 1972)). Further to that end, plaintiffs have sought to cooperate with defendants’ counsel in seeking to safeguard, pending adjudication, certain information alleged to be “classified” by the government defendants. *See* 28 C.F.R. § 17.17 (a)(2) (“If a determination is made to produce classified information in a judicial proceeding in any manner, the assigned Department [of Justice] attorney shall take all steps necessary to ensure the cooperation of the court and, where appropriate, opposing counsel in safeguarding and retrieving the information pursuant to the provisions of this regulation”).

Here, however, pages E118-119 of the Congressional Record, published by Congress in connection with pending legislation, are indisputably in the public domain and no proper basis exists for defendants’ designation of public domain legislative materials as “classified” documents in the Administrative Record for this case. *See United States v. Casson*, 434 F.2d 415, 422 (D.C. Cir. 1970) (“the public are charged with knowledge of all the published

information concerning a congressional bill that is available during the entire legislative process. . . . [T]he Congressional Record and documents published by Congress prove that the bill and all its provisions were in the public domain . . .”).

It is also indisputable that the excerpt of the Congressional Record that defendants have designated as “classified” is no longer under government control. *See* Section 1.1 of Executive Order 13292, 32 C.F.R. 2002.12 (2003) (requiring information subject to classification to be “under the control of the United States Government”). As discussed more fully in plaintiffs’ opening brief for summary judgment and permanent injunction, on January 23, 2007, CIA’s director of Congressional Affairs, Christopher J. Walker, sent a letter to the Clerk, U.S. House of Representatives, Hon. Karen Haas, stating that “a February 10, 2006 letter from the Central Intelligence Agency included on page E119 of the January 12 [sic] Congressional Record (Extension of Remarks) . . . contains classified information that was not properly marked to reflect its national security classification.”<sup>2</sup> Notwithstanding CIA’s letter to Congress, a search that I conducted on the Thomas.gov website on July 1, 2007 demonstrates that page E119 (and E118) of the January 16, 2007 Congressional Record remain publicly available for anyone to download from the Internet. Copies of the July 1, 2007 search pages are attached.

Respectfully Yours,



David B. Smallman

Attachments

cc: All Counsel (via Fax and E-mail w/ Encls.)

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<sup>2</sup> CIA’s January 23, 2007 letter, which apparently meant to reference the January 16, 2007 Congressional Record, is attached for the convenience of the Court, and can also be located as Exhibit F to the Declaration of David B. Smallman submitted in support of plaintiffs’ motion for summary judgment and permanent injunction, and at Tab 19 in defendants’ Unclassified Administrative Record.

## **Exhibit A-1**

