
# The State Secrets Privilege: National Security Information in Civil Litigation

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SUMMARY

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# The State Secrets Privilege: National Security Information in Civil Litigation

Over time, the Supreme Court of the United States has developed the common law doctrine known as the "state secrets privilege," which protects sensitive national security information from being disclosed in civil litigation. In particular, there are two seminal cases that discuss the privilege's applicability. First, in the 1876 case of *Totten v. United States*, the Court held that the judiciary lacks jurisdiction to hear a suit in which the underlying subject matter is a state secret if the suit "would inevitably lead to the disclosure of matters which the law itself regards as confidential." Second, based on the Court's 1953 decision in *Reynolds v. United States*, the Court has permitted the government to invoke the state secrets privilege more narrowly to protect only certain pieces of sensitive evidence if there is a reasonable danger that disclosure during litigation "will expose military matters which, in the interest of national security, should not be divulged."

A frequent question in litigation involving the state secrets doctrine is how far courts should scrutinize the government's assertions of the risk of disclosure once the privilege has been formally invoked. *Reynolds* recognized that it is the role of the judiciary to evaluate the validity of a claim of privilege, but it declined to require courts to automatically compel inspection of the underlying information. As the Court noted, "too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses." Therefore, although the privilege requires some deference to the executive branch, an independent evaluation of the claim of privilege is necessary so as not to abdicate control over evidence "to the caprice of executive officers." In light of this dilemma, the Court charted a middle course, employing a "formula of compromise" to balance the competing interests of oversight by the judiciary, the plaintiffs' need for the evidence, and national security interests.

During its October 2021 Term, the Supreme Court decided two cases involving the state secrets privilege. In *United States v. Zubaydah*, the Court determined that a court cannot declare that classified information apparently in the public domain is not subject to the state secrets privilege when the United States has not officially confirmed or denied such information. In *Federal Bureau of Investigation v. Fazaga*, the Court decided that certain Foreign Intelligence Surveillance Act of 1978 (FISA) provisions, which specifically require courts to review the underlying classified FISA applications and information to determine the lawfulness of surveillance, do not displace the traditional *Reynolds* privilege that protects information that would harm national security if disclosed.

In addition to discussing these two recent decisions, this report presents an overview of the protections afforded by the state secrets privilege, a discussion of some of the many unresolved issues associated with the privilege, and a selection of high-profile examples of how the privilege has been applied. Some examples of areas in which the government has invoked the privilege include electronic surveillance, government contract cases, employment cases, targeted killings, the terrorist screening database, extraordinary rendition, and a case involving alleged Saudi liability for the terrorist attacks of September 11, 2001. The report concludes by describing some considerations for Congress.

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The Supreme Court of the United States has long recognized a common law government privilege against the disclosure of state and military secrets in civil litigation known as the "state secrets privilege."[1] The United States has invoked this privilege in two broad categories of cases. First, beginning with the 1876 case of *Totten v. United States*, the government has argued that if the underlying subject matter of a lawsuit is a state secret, then the courts must dismiss the action for lack of jurisdiction.[2] In the second category of cases, the government has invoked the state secrets privilege to bar the disclosure or introduction of certain pieces of national security information into evidence based on the Court's 1953 decision in *Reynolds v. United States*.[3]

In its October 2021 Term, the Supreme Court considered two cases touching on different aspects of the state secrets doctrine. The first case, *United States v. Zubaydah*, asked whether a court can compel the depositions of former Central Intelligence Agency (CIA) contractors over the government's assertion of the state secrets privilege.[4] In the second case, *Federal Bureau of Investigation v. Fazaga*, the Court considered whether the Foreign Intelligence Surveillance Act of 1978 (FISA) displaced the common law state secrets privilege.[5] In both cases, which are discussed in more detail below, the Supreme Court upheld the government's assertion of the privilege.

This report presents an overview of the protections afforded by the state secrets privilege, a discussion of some of the many unresolved issues associated with the privilege, and a selection of high-profile examples of how the privilege has been applied in practice. The report also describes some considerations for Congress.

# *Totten v. United States*: State Secrets Subject Matter Jurisdictional Bar

The Supreme Court first recognized the state secrets privilege in the 1876 case of *Totten v. United States*.[6] *Totten* and its progeny determined that dismissal of an action is warranted when the "very subject matter" of the case is "a state secret" and, as a result, "litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets."[7]

*Totten* involved a breach of contract claim brought against the government by the estate of a former Union Civil War spy for compensation owed for secret wartime espionage services.[8] The Court dismissed the claim, articulating that "as a general principle, [] public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential."[9] The Court reasoned that "[t]he service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be

[1] Gen. Dynamics Corp. v. United States, 563 U.S. 478, 484 (2011).

[2] *Id.* at 486 (citing Totten v. United States, 92 U.S. 105 (1876)).

[3] *Id.* at 484-85 (citing Reynolds v. United States, 345 U.S. 1 (1953)).

[4] United States v. Husayn (Abu Zubaydah), 142 S. Ct. 959 (2022).

[5] Fed. Bureau of Investigation v. Fazaga, 142 S. Ct. 1051, 1060 (2022).

[6] 92 U.S. 105 (1876).

[7] Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1083, 1084 (9th Cir. 2010).

[8] *Id.*

[9] *Totten v. U.S.*, 92 U.S. at 107.

equally concealed."[10] Thus, under *Totten*, federal courts may not review controversies over secret espionage contracts. The Supreme Court affirmed the "*Totten* bar"[11] in *Tenet v. Doe*, a case involving a contract claim against the CIA brought by alleged Cold War spies.[12] In *Tenet*, the Court held that "*Totten* precludes judicial review in cases such as respondents' where success depends upon the existence of their secret espionage relationship with the [g]overnment."[13]

In 2011, the Supreme Court again applied the *Totten* bar to dismiss a suit against the United States but this time outside the context of espionage contracts. In *General Dynamics Corp. v. United States*, the federal government asserted the state secrets privilege to prevent the disclosure of sensitive stealth technology in a defense contract dispute with a government contractor who had set forth a prima facie valid affirmative defense to the government's allegation of breach of contract.[14] Citing *Totten* and *Tenet*, the Court stated: "We think a similar situation obtains here, and that the same consequence should follow."[15] Namely, that the underlying subject matter of the suit rendered it non-justiciable and that the parties must be left "where they stood when they knocked on the courthouse door."[16]

In extending *Totten* into this new context and in refusing to find an enforceable contract, the Court held that "[w]here liability depends upon the validity of a plausible . . . defense, and when full litigation of that defense 'would inevitably lead to the disclosure of' state secrets, neither party can obtain judicial relief."[17] The Court explained that "[b]oth parties—the [g]overnment no less than petitioners—must have assumed the risk that state secrets would prevent the adjudication of claims of inadequate performance."[18]

# *United States v. Reynolds*: State Secrets Evidentiary Privilege

The state secrets privilege has also been invoked to protect certain pieces of evidence from discovery. The Supreme Court first articulated the modern analytical framework of this evidentiary state secrets privilege in the 1953 case of *United States v. Reynolds*.[19] *Reynolds* involved multiple wrongful death claims against the government brought by the widows of three civilians who died aboard a military aircraft that crashed while testing secret electronic equipment.[20] The plaintiffs had sought discovery of the official post-incident report and survivors' statements that were in the possession of the U.S. Air Force.[21] The Air Force opposed disclosure of those documents, as the aircraft and its occupants were engaged in a "'highly secret mission of

[10] *Id.* at 106.

[11] The *Totten* bar has been labeled a "rule of non-justiciability, akin to a political question." Al-Haramain Islamic Found. Inc. v. Bush, 507 F.3d 1190, 1197 (9th Cir. 2007).

[12] 544 U.S. 1 (2005).

[13] *Id*. at 8.

[14] General Dynamics Corporation v. United States, 563 U.S. 478, 482 (2011).

[15] *Id*. at 486.

[16] *Id*. at 487.

[17] *Id*. at 486 (quoting Totten v. United States, 92 U.S. 105, (1876)).

[18] *Id.* at 491.

[19] 345 U.S. 1 (1953).

[20] *Id.* at 3.

[21] *Id.*

the Air Force'" at the time of the crash.[22] The federal district court ordered the Air Force to produce the documents so that it could independently determine whether they contained privileged information.[23] When the Air Force refused to provide the documents to the court, the district court ruled in favor of the plaintiffs on the issue of negligence,[24] and the U.S. Court of Appeals for the Third Circuit (Third Circuit) subsequently affirmed the district court's ruling.[25] The Supreme Court granted certiorari "[b]ecause an important question of the [g]overnment's privilege to resist discovery [was] involved."[26]

## Asserting the Privilege

The Court has stated that "*Reynolds* was about the admission of evidence."[27] In *Reynolds*, the Court identified several requirements to be met in order for the government to assert the privilege against revealing state secrets in litigation. The first requirement identified is a largely procedural hurdle to assure that the privilege is not "lightly invoked."[28] Nevertheless, this requirement is readily met through the written assertion of the privilege by the head of the department in control of the information in question after "personal consideration by that officer."[29] Second, the privilege belongs exclusively to the government and therefore cannot be validly asserted or waived by a private party.[30] In cases in which the government is not a party, but the nature of the claim is such that litigation could lead to the disclosure of evidence that would threaten national security, the government must intervene and assert the state secrets privilege.[31] The government's failure to formally assert the privilege has previously been excused because courts have held that strict adherence to the requirement would have had little or no benefit.[32] Finally, courts have held that the privilege may be raised at any time, including prospectively at the pleading stage of the litigation or during discovery in response to specific requests for information.[33]

## Evaluating the Validity of the Privilege

In addition to the aforementioned requirements, the Court in *Reynolds* held that courts "must determine whether the circumstances are appropriate for the claim of privilege, and yet do so

[22] *Id.* at 4-5. The Air Force did offer to make the surviving crew available for examination by the plaintiffs. *Id.* at 5.

[23] *Id.* at 5.

[24] *Id.*

[25] Reynolds v. United States, 192 F.2d 987 (3rd Cir. 1951).

[26] *Reynolds*, 345 U.S. at 2.

[27] General Dynamics Corp. v. United States, 563 U.S. 478, 485 (2011).

[28] *Reynolds*, 345 U.S. at 7.

[29] *Id*. at 8.

[30] *Id*. at 7 ("The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party.").

[31] In practice, it seems that government contractors have attempted to invoke the privilege on their own. *See*, Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 97 (2010).

[32] S*ee*, Clift v. U.S., 597 F.2d 826, 828-9 (2d Cir. 1979) (preventing discovery of documents in a patent infringement suit brought by the inventor of a cryptographic device against the government, where the director of the National Security Agency had submitted an affidavit stating that disclosing the contents of the documents would be a criminal violation but had not formally asserted the state secrets privilege, and where the court reasoned that imposition of the formal requirement would have had little or no benefit in this circumstance).

[33] Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1080 (9th Cir. 2010) ("The privilege may be asserted at any time, even at the pleading stage.").

without forcing a disclosure of the very thing the privilege is designed to protect."[34] In contrast to the requirement that the government formally assert the privilege, the requirement that the court evaluate the validity of the government's claim often "presents real difficulty."[35] The Court in *Reynolds* determined that the privilege should be found valid when a court is satisfied that there is a reasonable danger that disclosure "will expose military matters which, in the interest of national security, should not be divulged."[36] Accordingly, courts have held that the government "bears the burden of satisfying a reviewing court that the *Reynolds* reasonable-danger standard is met."[37] Moreover, although the Supreme Court's holding in *Reynolds* recognized that it is the role of the judiciary to evaluate the validity of a claim of privilege, the Court declined to require that courts automatically compel inspection of the underlying information.[38] Therefore, while the privilege requires some deference to the executive branch, an independent evaluation of the claim of privilege is necessary so as not to abdicate control over evidence "to the caprice of executive officers."[39] In light of this dilemma, the Court chose to chart a middle course, employing a "formula of compromise" to balance the competing interests of oversight by the judiciary, the plaintiffs' need for the evidence, and national security interests.[40]

How thoroughly a court reviews the government's assertion of the state secrets privilege varies. Generally, the depth of the inquiry corresponds to the court evaluating the opposing party's need for the information and the government's need to prevent disclosure.[41] As part of this balancing, a court may go so far as to require the production of the evidence in question for *in camera* review where the non-government party's need for the information is high.[42] Under other circumstances, however, the evidence may be less central to the plaintiffs' case such that the court may be satisfied that the evidence warrants protection based solely on the executive branch's assertions.[43] If a court can determine that the privilege is valid without *in camera* review, the Supreme Court has held that it should not further "jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."[44]

Whether a court may be satisfied without examining the underlying information will also be influenced by the amount of deference afforded to the government's representations regarding the evidence in question. In *Reynolds*, the Court specified that the necessity of the underlying information to the litigation will determine "how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate."[45] In the case of *Reynolds*, the Court explained that the Air Force had offered to make the surviving crew members available for examination by the plaintiffs.[46] Because of this alternative avenue of information, the Court was

[34] *Reynolds*, 345 U.S. at 8.

[35] *Id.*

[36] *Id.* at 10.

[37] El-Masri v. U.S., 479 F.3d 296, 305 (4th Cir. 2007).

[38] *Reynolds*, 345 U.S. at 11.

[39] *Id.* at 9-10.

[40] *Id.* at 9.

[41] *Id.* at 11 ("Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted . . . .").

[42] *E.g.*, Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978) (holding that *in camera* review of evidence was proper given that plaintiffs' suit depended upon the information).

[43] *E.g.*, *Reynolds*, 345 U.S. at 11 (holding that availability of non-privileged alternative evidence undercut need for *in camera* review to evaluate validity of invocation of state secrets privilege).

[44] *Id.* at 10.

[45] *Id.* at 11.

[46] *Id.* at 5.

satisfied that the privilege was valid based primarily upon representations made by the government regarding the contents of the documents.[47] Conversely, less deference to the government's representations may be warranted where a private litigant has a strong need for the information.[48]

When possible, courts have attempted to "disentangle" privileged evidence from non-privileged evidence to allow for the non-sensitive information's release.[49] One way to protect privileged information without excluding non-privileged evidence is to redact sensitive portions of a document rather than barring the entire piece of evidence. Some courts have questioned the prudence of using redaction to protect portions of documents that qualify for protection under the privilege out of a concern that pieces of "seemingly innocuous" information can create a "mosaic" through which protected information may be deduced.[50] The "mosaic theory" is based on the principle that federal judges are not properly equipped to determine which pieces of information, when taken together, could result in the disclosure "of the very thing the privilege is designed to protect."[51] Adherence to the mosaic theory may result in greater judicial deference to the assertions of intelligence agencies.[52]

## The Effect of the Privilege

If the privilege is appropriately invoked under *Reynolds*, it is absolute, and the disclosure of the underlying information cannot be compelled by the court. Significant controversy has arisen with respect to the question of how a case should proceed in light of a successful claim of privilege. Courts have varied greatly in their willingness to either dismiss a claim in its entirety or allow a case to proceed "with no consequences save those resulting from the loss of evidence."[53] Some courts have taken a more restrained view, holding that the privilege protects only specific pieces of privileged evidence, while others have taken a more expansive view, holding that the privilege,

[47] *Id*. at 11. Years later, the daughter of one of the deceased civilians discovered the declassified accident report on the internet and filed with other plaintiffs a motion for leave to file a petition for a writ of *error coram nobis* with the Supreme Court, arguing that the government committed fraud on the Court and alleging that the accident report did not contain any information about secret equipment or activities. *See* Herring v. United States, 424 F.3d 384, 388 (3d Cir. 2005). The Supreme Court denied the motion. *In re* Herring, 539 U.S. 940 (2003). The plaintiffs then filed their case with the district court, which granted the government's motion to dismiss, in part on the basis of the court's view that "against this political and technical backdrop, it seems that the accident investigation report may have reasonably contained sufficient intelligence, if not about the secret equipment or mission, then about ongoing developments in Air Force technical engineering, to warrant an assertion of the military secrets privilege." Herring v. United States, 2004 WL 2040272, at *9 (E.D. Penn. 2004). The Third Circuit affirmed, holding that because there was an "obviously reasonable truthful interpretation of the statements made by the Air Force," there was no fraud upon the court. *Herring*, 424 F.3d at 392, cert. denied, 547 U.S. 1123 (2006).

[48] *See, e.g.*, Molerio v. FBI, 749 F.2d 815, 822 (D.C. Cir. 1984) (*in camera* examination of classified information was appropriate where it was central to litigation); Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1203-04 (9th Cir. 2007) ("We reviewed the Sealed Document *in camera* because of [plaintiff's] admittedly substantial need for the document to establish its case.").

[49] Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983).

[50] Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998) ("[I]f seemingly innocuous information is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure and the court cannot order the government to disentangle this information from other information.").

[51] *Reynolds*, 345 U.S. at 8.

[52] *Ellsberg*, 709 F.2d at 57 n. 31 (citing the fact that modern foreign intelligence gathering "is more akin to the construction of a mosaic" as one of several factors that "limit judicial competence to evaluate the executive's predictions of the harms likely to result from disclosure").

[53] *Al-Haramain Islamic Found.*, 507 F.3d at 1204 (citing *Ellsberg*, 709 F.2d at 64).

with its constitutional underpinnings, often requires deference to the executive branch's assertions, which may lead to dismissal.[54] Whether the assertion of the state secrets privilege is fatal to a particular suit or merely excludes privileged evidence from introduction or discovery during litigation is a question that is highly dependent upon the specific facts of the case and, in the absence of Supreme Court precedent, whether there is binding appellate precedent for the particular circuit in which the case is brought.

Pursuant to existing state secrets privilege jurisprudence, the valid invocation of the privilege may generally result in the outright dismissal of the case in three circumstances. First, a case may be dismissed if a plaintiff cannot establish a prima facie case without the protected evidence. For example, in *Halkin v. Helms*, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) was confronted with a claim of privilege regarding the National Security Agency's (NSA's) alleged interception of international communications to and from persons who had been targeted by the CIA.[55] After deciding that the claim of privilege was valid, the D.C. Circuit affirmed the protection of that information from discovery.[56] Although some non-privileged evidence that the plaintiffs were targeted by the CIA existed, the court dismissed the suit after deciding that the plaintiffs would not be able to establish a prima facie case of unlawful electronic surveillance without the privileged information.[57] Although depriving litigants of an opportunity to obtain redress may seem like a harsh result, some courts have characterized dismissal to protect the greater good as the less harsh remedy.[58]

Second, a case may also be dismissed where the privilege deprives a litigant of evidence necessary to establish a valid defense.[59] In *Molerio v. Federal Bureau of Investigation*, a job seeker alleged that the Federal Bureau of Investigation (FBI) had disqualified him based upon his father's political ties to socialist organizations in violation of the applicant's and his father's First Amendment rights.[60] In response, the FBI asserted that it had a lawful reason to disqualify the plaintiff but claimed that its reason was protected by the state secrets privilege.[61] After reviewing the FBI's claim *in camera*, the D.C. Circuit agreed that the evidence of a nondiscriminatory reason was protected and that its exclusion would deprive the FBI of an available defense.[62] Therefore, the dismissal of that action was required once the privilege was determined to be valid.[63]

Third, a court may conclude that a case must be dismissed where the "privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure."[64] For example, in *Sterling v. Tenet*, the U.S. Court of Appeals for the Fourth Circuit

[54] *Compare*, *Ellsberg*, 708 F.2d at 64-65 (reversing a lower court dismissal under the privilege) *with* El-Masri v. U.S., 479 F.3d 296, 305 (4th Cir. 2007) (dismissing the claim in light of a valid assertion of the privilege).

[55] Halkin v. Helms, 598 U.S. 1, 4-5 (D.C. Cir. 1978).

[56] *Id.* at 9.

[57] *Id.* at 10.

[58] Kasza v. Browner, 133 F.3d 1159, 1167 (9th Cir. 1998) (citing Bareford v. General Dynamics Corp, 973 F.2d 1138, 1144 (5th Cir 1992), *cert. denied*, 507 U.S. 1029 (1993)).

[59] *See, e.g.*, Edmonds v. U.S., 323 F. Supp. 2d 65, 77-79 (D.D.C. July 6, 2004).

[60] Molerio v. FBI, 749 F.2d 815, 824-825 (D.C. Cir. 1984).

[61] *Id.* at 820.

[62] *Id.* at 821-22.

[63] *Id.* at 825-26.

[64] El-Masri v. United States, 479 F.3d 296, 308 (4th Cir. 2007) (citing Sterling v. Tenet, 416 F.3d 338, 347-348 (4th Cir. 2005)).

held that a racial discrimination suit brought by a covert CIA officer against the agency would necessarily center around the methods and operations of the CIA and must be dismissed as a result.[65]

Given the relatively limited number of decisions in this area, there may be some uncertainty regarding what the effect of the privilege will be. For example, in 2017, the Department of Homeland Security (DHS) issued a binding operational directive requiring federal agencies to remove software directly or indirectly supplied by a specific cybersecurity company from all federal information systems based on concerns that such software posed a security risk.[66] The excluded company sued DHS, alleging that the directive had been issued in violation of the Administrative Procedure Act (APA) because, *inter alia*, the directive was arbitrary, capricious, and unsupported by substantial evidence.[67] In the context of APA challenges, courts review agency decisions based on the information that the agency had considered at the time it made the decision.[68] In this case, plaintiffs alleged that DHS had stated that its decision was based on only unclassified information but stated that it had also reviewed classified information that supported its decision.[69] The suit was ultimately dismissed on jurisdictional grounds before the court could address the merits of the plaintiffs' APA claims,[70] but it may still pose questions about what the proper resolution should have been if the government had invoked the state secrets doctrine with respect to information that might otherwise have been included in the administrative record.

Assuming the court found the invocation of the privilege to be valid, it could be argued that the excision of such information from the administrative record is in tension with the principle that the court "should have before it neither more nor less information than did the agency when it made its decision" and that the decision should therefore be remanded to the agency because "the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it."[71] Alternatively, if the privileged information is central to the agency's justification for its decision, removal of the information may deprive the agency of a valid defense to the APA challenge, and it could be argued that the suit should consequently be dismissed pursuant to *Molerio v. FBI*.[72] Given this uncertainty, these questions may be an area in which future state secrets privilege litigation will focus.

[65] Sterling v. Tenet, 416 F.3d at 348.

[66] 82 Fed. Reg. 43,782 (Sept. 19, 2017).

[67] Memorandum of Law in Support of Plaintiffs' Application for Preliminary Injunction, Kaspersky Lab, Inc. v. DHS, No. 17-CV-02697 at 4 (Jan. 17, 2018) [hereinafter "*Kaspersky* Motion"].

[68] IMS, P.C. v. Alvarez, 129 F.3d 618, 623 (D.C. Cir. 1997) ("It is a widely accepted principle of administrative law that the courts base their review of an agency's actions on the materials that were before the agency at the time its decision was made."); Walter O. Boswell Mem'l Hosp. v. Heckler, 749 F.2d 788, 792 (D.C. Cir. 1984) ("If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision.").

[69] *Kaspersky* Motion, *supra* note 67, at 7.

[70] The challenge to the DHS directive was consolidated with a separate suit challenging Section 1634 of the 2018 National Defense Authorization Act, P.L. 115-91, which similarly excluded plaintiffs' software from federal information systems. Kaspersky Lab, Inc. v. DHS, 909 F.3d 446, 453 (D.C. Cir. 2018). After holding that Section 1634 was not unconstitutional, the court dismissed the plaintiffs' challenge to DHS directive because invalidating the directive alone would not provide any redress for the plaintiffs. *Id.* at 453.

[71] Walter O. Boswell Mem'l Hosp. v. Heckler, 749 F.2d 788, 792 (D.C. Cir. 1984).

[72] *See Molerio v. FBI*, *supra* note 60.

# Preemption of the State Secrets Privilege

Courts frequently describe the evidentiary state secrets privilege as a common law doctrine that has arisen through a series of judicial decisions.[73] At the same time, Congress has also enacted statutory provisions similarly addressing the use of or access to classified information in civil litigation, frequently alongside provisions authorizing private litigants to seek judicial review of actions the government has taken that may have been informed or based upon classified information.[74] The Supreme Court has recognized that Congress may abrogate common law principles through statutory enactments, where the statute "speak[s] directly" to the question addressed by common law.[75] Therefore, questions may arise as to whether these congressional enactments have otherwise affected the government's ability to invoke the common law state secrets privilege.

In *FBI v. Fazaga*, decided on March 4, 2022, the Supreme Court held that Congress did not displace the common law state secrets privilege by enacting legislation specifically addressing how national security information should be handled by courts in certain civil actions.[76] The specific civil action involved in *Fazaga* arose in the context of FISA.[77] FISA provides a statutory framework to authorize the collection of foreign intelligence information via electronic surveillance but also provides a civil remedy for an "aggrieved person . . . who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of

[73] *E.g.*, Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1196 (9th Cir. 2007); *In re* Sealed Case, 494 F.3d 139, 142 (D.C. Cir. 2007); *El-Masri*, 479 F.3d at 303; Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991). Though described as a common law doctrine, courts have frequently indicated that the state secrets privilege is also rooted in the "Art[icle] II duties" allocated to the President by the Constitution. United States v. Nixon, 418 U.S. 683, 710 (1974). *See also El-Masri*, 479 F.3d at 303 ("Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities."); Department of the Navy v. Egan, 484 U.S. 518, 527 (1988) ("[The President's] authority to classify *and control* access to information bearing on national security . . . flows primarily from this Constitutional investment of power in the President . . . .") (emphasis added).

[74] *E.g.*, 8 U.S.C. § 1189(c)(2) (providing that government may submit classified information *ex parte* and *in camera* during judicial review of government's designation of foreign terrorist organizations); 8 U.S.C. § 1536(a)(2)(B) (providing that a judge may consider classified information *in camera* and *ex parte* in alien terrorist removal hearing); 21 U.S.C. § 1903(i) (providing that classified information may be submitted *ex parte* and *in camera* in any judicial review of sanctions imposed on significant foreign narcotics traffickers); 31 U.S.C. § 5318A(f) (providing that classified information may be submitted *ex parte* and *in camera* in any judicial review of a finding that a financial institution is of primary money laundering concern); 41 U.S.C. § 1327(b)(4)(B)(iii) (requiring classified information to be submitted *in camera* and *ex parte* in petitions for judicial review of orders excluding sources or covered articles from the federal acquisition supply chain); 50 U.S.C. § 1702(c) (providing that classified information may be submitted *ex parte* and *in camera* in any judicial review of sanctions imposed under International Emergency Economic Powers Act); 50 U.S.C. § 1806(f) (requiring court to review FISA applications and other information *in camera* and *ex parte* to determine whether surveillance was lawfully authorized and conducted); and 50 U.S.C. § 4565(e) (providing that civil actions challenging findings or actions of the Committee on Foreign Investment in the United States (CFIUS) may be brought only in the D.C. Circuit, but that classified information in the administrative record shall be submitted *ex parte* and *in camera*, and maintained under seal, if the court determines that such information is necessary to resolve the challenge).

[75] United States v. Texas, 507 U.S. 529, 534 (1993) (explaining that "Congress does not write upon a clean slate" and that the presumption in favor of retaining common law applies to federal and state common law); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) (holding that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar [legal] principles, except when a statutory purpose to the contrary is evident").

[76] Fed. Bureau of Investigation v. Fazaga, 142 S. Ct. 1051, 1060 (2022).

[77] 50 U.S.C. §§ 1801-1885c.

such person has been disclosed or used" in violation of federal law.[78] *Aggrieved person* is defined under FISA to include not just the target of electronic surveillance but "any other person whose communications or activities were subject to electronic surveillance."[79]

Because of the sensitive national security information likely to be included in the affidavits and supporting documentation accompanying a FISA application, the statute provides special procedures to be used when courts are asked to evaluate the legality of a FISA order.[80] For example, if a criminal prosecution is based on information collected through FISA surveillance, the defendant may challenge the lawfulness of that collection and seek to suppress the resulting evidence. In addition to requiring the government to provide notice to "aggrieved person[s]" that FISA information is intended to be used against them,[81] the statute directs that the court

> shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review *in camera* and *ex parte* the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.[82]

Thus, FISA creates a process in which the government may utilize information collected under FISA in "any trial, hearing, or other proceeding" against a private person "while withholding materials related to that surveillance . . . in the interests of national security" and also "allow[ing] an aggrieved person to challenge the government's use of such evidence and have a court evaluate the lawfulness of the government's actions."[83] In these cases, FISA generally requires the government to make the choice to "either disclose the material or forgo the use of surveillance-based evidence."[84]

The plaintiffs in *Fazaga* alleged that various covert FBI surveillance activities targeting them violated FISA.[85] The government invoked the state secrets privilege and sought to prevent the disclosure or introduction of, among other things, information about the reasons the FBI may have targeted plaintiffs for investigation.[86] Pursuant to *Reynolds*, the district court considered declarations made by the relevant government officials to determine whether the privilege had been validly invoked but did not examine the underlying evidence itself.[87] Based on these

[78] 50 U.S.C. § 1810.

[79] 50 U.S.C. § 1801(k).

[80] 50 U.S.C. § 1806(f).

[81] 50 U.S.C. § 1806(c).

[82] *Id.* (emphasis added)

[83] Wikimedia Found. v. Nat'l Sec. Agency, 14 F.4th 276, 300 (4th Cir. 2021).

[84] *Id.* at 301 (citing S. REP. NO. 95-701, at 65). Some federal statutes that also address litigation involving classified information in civil litigation expressly waive application of these FISA provisions with respect to those cases. *E.g.*, 41 U.S.C. § 1327(b)(4)(B)(iii)(IV) (FISA provisions regarding notice, suppression, and *ex parte* and *in camera* review do not apply in actions challenging orders excluding sources or covered articles from the federal acquisition supply chain) and 50 U.S.C. § 4565(e)(4) (FISA use of information provisions shall not apply in civil challenges to CFIUS actions or findings).

[85] *Fazaga*, 142 S. Ct. at 1058.

[86] Id. at 1058-59.

[87] *Fazaga v. FBI*, 884 F.Supp. 2d 1022, 1039-42 (C.D. Cal. 2012).

declarations, the district court found the privilege to be validly invoked and subsequently dismissed the suit for failure to establish a prima facie case.[88] On appeal, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) held that "the district court should have relied on FISA's alternative procedures for handling national security information" which require the court to examine the FISA application and other material *in camera* and *ex parte*.[89] Specifically, the Ninth Circuit held that Congress had displaced the common law *Reynolds* state secrets privilege as applied to electronic surveillance within FISA's purview.[90]

The Supreme Court unanimously reversed the Ninth Circuit, holding that Congress had not displaced the state secrets privilege when it enacted FISA's procedures for handling national security information.[91] The Court identified two main reasons for its holding. First, in light of the general presumption against repeal of common law, the Court found FISA's textual silence with respect to the state secrets privilege to be "strong evidence that the availability of the privilege was not altered in any way."[92]

Second, the Court held that the state secrets privilege was not incompatible with FISA's procedures for handling national security information.[93] Specifically, the Court held that the state secrets privilege and FISA "(1) require courts to conduct different inquiries, (2) authorize courts to award different forms of relief, and (3) direct the parties and the courts to follow different procedures."[94] With respect to the nature of the courts' inquiry, the Court explained that FISA's procedures are mainly concerned with the legality of surveillance while the state secrets privilege requires courts to consider whether disclosure would harm national security.[95] Similarly, the Court held that a court cannot provide any relief under FISA if it determines that the surveillance was lawful,[96] whereas a court may "order the disclosure of lawfully obtained evidence if it finds that disclosure would not affect national security."[97] Lastly, relating to procedure, the Court explained that FISA requires the Attorney General to request *in camera* and *ex parte* review of surveillance applications and information, while the state secrets privilege may be invoked by the head of the department that has control over the matter.[98]

The Court's decision in *Fazaga* was limited to the question of whether FISA displaced the state secrets privilege.[99] Consequently, the Court did not express an opinion on whether FISA's procedures are applicable only in suits brought *by* the United States, nor did the Court opine on what the appropriate remedy should be in light of the invocation of the state secrets privilege in

[88] *Id.* at 1049.

[89] Fazaga v. Federal Bureau of Investigation, 965 F.3d 1015, 1039, 1052 (9th Cir. 2020).

[90] *Id.* at 1039-40, 1043-48.

[91] Fed. Bureau of Investigation v. Fazaga, 142 S. Ct. 1051, 1056 (2022).

[92] *Id.* at 1060-61.

[93] *Id.* at 1061.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 1062.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 1056.

this case (i.e., dismissal or simple exclusion of the privileged evidence).[100] As a result, the case has been remanded to the Ninth Circuit to resolve those questions.[101]

Although the Court's decision was specific to FISA, its reasoning would likely be applicable to other statutes that similarly address how the government must submit classified information to courts in the context of suits challenging some government action. For example, the Federal Acquisition Supply Chain Security Act of 2018 (FASCSA) established a Federal Acquisition Security Council to identify and address supply chain risks to federal information technology.[102] Among other things, FASCSA authorizes the Secretaries of Homeland Security and Defense and the Director of National Intelligence to issue orders excluding or removing sources and covered articles from agency procurement actions and information systems.[103] Sources subject to such an order may seek judicial review of the order in the United States Court of Appeals for the D.C. Circuit.[104] FASCSA provides that during such review, the government may include classified information in the administrative record and shall submit such information *ex parte* and *in camera* for the court to determine whether it supports the challenged order.[105] Based on the Supreme Court's decision in *Fazaga*, it could be argued that this provision of FASCSA does not displace the state secrets privilege. This view would rely on FASCSA's classified information provision, like FISA's, which does not expressly state an intent to displace the common law state secret privilege and is also primarily concerned with the court's evaluation of the legality of the underlying government action rather than the risk to national security by disclosure.

# Deference to the Executive Branch

The government has argued that courts should afford the "utmost deference" to its assertion of the state secrets privilege.[106] That argument was at the center of the case involving Zayn Al-Abidin Muhammad Husayn (also known as Abu Zubaydah). Abu Zubaydah is currently a detainee at the U.S. Naval Station at Guantanamo Bay, Cuba, and was the first suspected Al Qaeda detainee rendered into CIA custody at various "black sites" abroad for interrogation, including allegedly at "Detention Site Blue" in Poland, from December 2002 to September 2003.[107] He sought depositions from two former CIA contractors who helped devise the CIA's "Enhanced Interrogation Program" for submission to prosecutors in Krakow, Poland, to assist in a criminal investigation of Polish officials' "alleged complicity in claimed unlawful detention and torture of Zubaydah."[108] The district court granted the application for discovery, and the United States filed

[100] *Id.* at 1062-63. The respondents in *Fazaga* had argued that they could still state a claim using non-privileged evidence from witnesses and public statements made by the FBI's own informant. Brief for Respondents, Fazaga v. FBI, No. 20-828, at 26 (Sept. 21, 2021). The effects of upholding the government's assertion of the state secrets privilege is discussed in more detail, *supra* at "The Effect of the Privilege".

[101] *Fazaga*, 142 S. Ct. at 1063.

[102] 41 U.S.C. §§ 1321-1328.

[103] *Id.* § 1323(c).

[104] *Id.* § 1327(b).

[105] *Id.* § 1327(b)(4)(B)(iii).

[106] See, e.g., Kasva v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998) (holding that the state secrets privilege "is accorded the 'utmost deference' and the court's review of the claim of privilege is narrow").

[107] *In re* Zayn Al-Abidin Muhammad Husayn, 2018 WL 11150135, *1 (E.D. Wash. Feb. 21, 2018).

[108] *Id.* Abu Zubaydah states he has a right under Polish law to submit information in support of criminal investigations and seeks to acquire testimony pursuant to 28 U.S.C. § 1782.

a motion to intervene and to quash the subpoenas shortly after the court issued its order, arguing, among other things, that the state secrets privilege bars the requested discovery.[109]

The government argued that the requested discovery was "predicated on a singular allegation that the United States can neither confirm nor deny without risking significant harm to national security—that is, whether or not the CIA conducted detention and interrogation operations in Poland or with the assistance of the Polish Government" and argued that the entire line of inquiry was foreclosed.[110] The government further argued that the court should preclude discovery "in its entirety."[111] Abu Zubaydah countered that the former contractors could provide valuable evidence without confirming the location of the detention site or the cooperation of any particular government[112] and have done so in another case without opposition from the government.[113] The district court held that the *Reynolds* privilege, rather than the *Totten* bar, applied.[114]

Citing the European Court of Human Right's (ECHR's) findings, the Polish government investigations, and the acknowledgement by the former President of Poland that Poland hosted a CIA detention site, the district court found unconvincing the government's argument that "acknowledging, or denying, the fact the CIA was involved with a facility in Poland poses an exceptionally grave risk to national security."[115] The court further determined that, although confirming or denying Poland's involvement would aid in Poland's investigation, providing other operational details about Poland's role could pose an exceptional risk to national security.[116] The court stated that even seemingly innocuous facts could form a "mosaic" that could prove damaging.[117] Accordingly, the court concluded that the deposition could not move forward without potential risk to national security.[118]

A divided panel of the Ninth Circuit reversed the district court's decision.[119] The majority defined its task as a balance between the obligation to provide deference to executive branch decisions regarding national security[120] and the "'obligation to review the [claim of state secrets privilege] with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege.'"[121]

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[109] *Id*. The state secrets assertion was properly supported by a declaration of CIA Director Michael Pompeo with the approval of the Attorney General. *Id.* at *5. The declaration asserted the privilege with respect to "1) information identifying individuals involved with the Program; 2) information regarding foreign government cooperation with CIA; 3) information concerning the operation and location of clandestine overseas CIA facilities; 4) information regarding capture and transfer of detainees; 5) intelligence information about detainees and terrorist organizations, including intelligence obtained from interrogations; 6) information concerning intelligence sources and methods; and 7) information concerning the CIA's internal structure and administration." *Id*. at *6.

[110] In re *Husayn*, 2018 WL 11150135, at *3 (quoting government submission).

[111] *Id.*

[112] *Id.* at *4.

[113] *Id.*

[114] *Id.* at *6.

[115] *Id.*

[116] *Id.*

[117] *Id.* at *9.

[118] *Id.* (citing Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998) ("If seemingly innocuous information is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure and the court cannot order the government to disentangle this information from other classified information.")).

[119] Husayn v. Mitchell, 938 F.3d 1123, 1138 (9th Cir. 2019).

[120] *Id.* at 1131 (citing Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1203 (9th Cir. 2007)).

[121] *Id.* at 1132 (quoting *Al-Haramain*, 507 F.3d at 1203).

Although the majority agreed with the lower court that much of the information Abu Zubaydah sought—including the identities and roles of foreign individuals involved with the detention facility—was protected by state secrets privilege,[122] it concluded that the district court's effort to disentangle privileged information from non-privileged information was insufficient.[123] The majority disputed the CIA director's contention that absence of official confirmation is "the key to preserving an 'important element of doubt about the veracity of the information,'"[124] arguing that the statements of former contractors, who are not agents of the government, cannot serve as official verification of anything.[125] Moreover, the majority held that there was little danger in exposing information that was already in the public realm.[126] The majority also found it significant that Polish investigators were indirectly seeking the information, undercutting the director's argument that the trust of foreign partners was at stake.[127] Finally, the majority emphasized "the importance of striking 'an appropriate balance . . . between protecting national security matters and preserving an open court system,'"[128] opining that "[w]hile it is essential to guard the courts from becoming conduits for undermining the executive branch's control over information related to national security, these concerns do not apply when the alleged state secret is no secret at all, but rather a matter that is sensitive or embarrassing to the government."[129]

The court remanded the case to the lower court with instructions to make an effort to disentangle non-privileged information that could be subject to deposition.[130] The majority emphasized the limited nature of its holding, suggesting that the lower court might yet conclude that disentanglement is impossible and quash the subpoena.[131] The dissent argued that the court should have provided greater deference to the CIA director.[132]

The Ninth Circuit denied rehearing en banc over the dissent of 12 judges.[133] Three concurring judges opined that rehearing was unnecessary given the narrowness of the panel decision, which

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[122] *Id.* at 1133.

[123] *Id.* at 1136.

[124] *Id.* at 1133.

[125] *Id.*

[126] *Id.* (agreeing with the district court and petitioners that "in order to be a 'state secret,' a fact must first be a 'secret'").

[127] *Id.*

[128] *Id.* (quoting *Al-Haramain*, 507 F.3d at 1203).

[129] *Id.*

[130] *Id.* at 1137.

[131] *Id.* ("[I]f, upon reviewing disputed discovery and meaningfully engaging the panoply of tools at its disposal, the district court determines that it is not possible to disentangle the privileged from nonprivileged, it may again conclude that dismissal is appropriate at step three of the *Reynolds* analysis. However, the district court may not skip directly to dismissal without doing more.").

[132] *Id.* at 1138 (Gould, C.J., dissenting).

[133] Husayn v. Mitchell, 965 F.3d 775 (9th Cir. 2020). The dissent criticized the panel opinion based on its opinion that

> The serious legal errors in the majority opinion, and the national security risks those errors portend, qualified this case for en banc review. The majority opinion treats information that is core state secrets material as fair game in discovery; it vitiates the state secrets privilege because of information that is supposedly in the public domain; it fails to give deference to the CIA Director on matters uniquely within his national security expertise; and it discounted the government's valid national security concerns because the discovery was only sought against government contractors—even though these contractors were the architects of the CIA's interrogation program and discovery of them is effectively discovery of the government itself.

*Id.* at 785 (Bress, C.J., dissenting from denial of rehearing en banc).

it characterized as enforcing the three-step *Reynolds* inquiry. The dissent also objected that the district court's efforts to disentangle non-privileged information in this context would be "fraught with peril" and would themselves pose a risk to national security.[134]

In *United States v. Abu Zubaydah*, the government asked the Supreme Court to overturn the Ninth Circuit decision.[135] In the opening brief to the Court, the government urged the Court to find that the Ninth Circuit should have deferred to the CIA director, who declared that any information the contractors could provide would risk harm to U.S. national security, and should have quashed the subpoena in its entirety.[136] Specifically, the government's brief focused on its objection to the measure of deference the court below paid to the CIA's declaration regarding the continued top secret nature of the CIA's involvement with foreign partners during its clandestine detention and interrogation program.[137] The government argued that the discovery statute for foreign proceedings does not permit discovery in this context because information central to the foreign proceeding is subject to a "legally applicable privilege."[138] In this context, the government contended that the *Reynolds* test suggests that discovery of sensitive information destined for a foreign tribunal should be denied based on a "facially plausible risk to the national security."[139] The government thus objected to the Ninth Circuit's "skeptical" review based on its own supposition about what is "public knowledge,"[140] highlighting the difference between official and nonofficial disclosures.[141] Specifically, the government rejected the notion that former CIA contractors are private parties not in a position to reveal state secrets[142] and rebuffed the Ninth Circuit's underestimation of the importance of providing U.S. intelligence partners "with an assurance of confidentiality that is as absolute as possible."[143]

In response, Abu Zubaydah and his attorney characterized the government's position as a demand for blind deference from the judiciary whenever the government asserts the state secrets privilege,[144] in effect imposing a complete bar on cases in their entirety even when some non-privileged information is sought.[145] They argued that the Ninth Circuit properly applied the *Reynolds* balancing test in this case[146] and that the narrow question before the Supreme Court is

> whether the district court may order Mitchell and Jessen to testify (as they have done twice before) about nonprivileged information; or if, instead, the Government may prohibit disclosure of even nonprivileged information by invoking the state secrets doctrine.[147]

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[134] *Id.* at 791.

[135] United States v. Zayn al-Abidin Muhammad Husayn, aka Abu Zubaydah, No. 20-827 (U.S.).

[136] Brief for the United States, Abu Zubaydah, No. 20-827 (U.S. Jul. 2, 2021).

[137] Brief for the United States at 22, United States v. Abu Zubaydah, No. 20-827 (U.S. Jul. 2, 2021).

[138] *Id.* (citing 28 U.S.C. § 1782(a)).

[139] *Id.* at 40.

[140] *Id.* at 19-20.

[141] *Id.* at 30 ("The state-secrets privilege 'belongs to the Government' alone and cannot be 'waived by a private party.'") (citing *Reynolds*, 345 U.S. at 7).

[142] *Id.* at 26.

[143] *Id.* at 27.

[144] Reply Brief of Respondents Abu Zubaydah and Joseph Margulies at 41, United States v. Abu Zubaydah, No. 20-827 (U.S. Aug. 13, 2021).

[145] *Id.* at 46.

[146] *Id.* at 45-46.

[147] *Id.* at 2.

Abu Zubaydah emphasized that the information sought through deposition is similar to information the former contractors have already provided without the government's invocation of the state secrets privilege.[148] They argued that Polish investigators already had sufficient information to conclude that Abu Zubaydah was detained in Poland.[149] In any event, they argued, there is no danger of "official confirmation" because the witnesses are not agents of the government.[150] Disputing the government's contention that the context of obtaining information for a foreign tribunal requires enhanced deference,[151] the respondents argued that Abu Zubaydah's inability to communicate with the outside world shows a strong necessity for the testimony requiring more careful judicial review.[152]

The Supreme Court found in favor of the government and remanded the case with instructions to dismiss the discovery request,[153] apparently without prejudice,[154] although there was not complete consensus on the rationale.[155] Justice Breyer, writing for a majority, characterized the issue as a "narrow evidentiary dispute" predicated on the questions for which Abu Zubaydah had initially sought depositions exactly as presented.[156] The majority concluded that these questions, as written, relied on or would inevitably lead to a conclusion that the mistreatment occurred in Poland.[157] The majority agreed with the government that the former CIA contractors were in a position to confirm or deny secret evidence[158] and agreed with the government's contention that such confirmation or denial would pose a threat to national security[159] notwithstanding the fact that relevant information was already in the public domain.[160]

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[148] *Id.* at 27.

[149] *Id.* at 12 (citing the ECHR's finding of "'abundant and coherent circumstantial evidence' leading to the 'inevitab[le]' conclusion that 'Poland knew of the nature and purposes of the CIA's activities on its territory at the material time,' and that 'Poland cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory'") (quoting Judgment in Husayn (Abu Zubaydah) v. Poland, No. 7511/13, European Court of Human Rights, at 567, ¶444).

[150] *Id.* at 37.

[151] *Id.* at 40-41.

[152] *Id.* at 39-40.

[153] United States v. Husayn (Abu Zubaydah), 142 S. Ct. 959 (2022).

[154] *Id.* at 972 (plurality opinion) ("[W]e need not and do not here decide whether a different discovery request filed by Zubaydah might avoid the problems that preclude further litigation regarding the requests at issue here."); *id.* at 972 (majority) ("We reverse the judgment of the Ninth Circuit and remand the case with instructions to dismiss Zubaydah's *current* application.) (emphasis added).

[155] Although five justices agreed that the government had made a sufficient case that the identity of cooperating foreign intelligence services is properly subject to the state secrets doctrine, one justice (Justice Kagan) disagreed with the result of dismissal and would have remanded the case to the district court, *id.*at 983 (Kagan, J., concurring in part and dissenting in part). Two justices (Justices Kavanaugh and Barrett) joined in a partial concurrence that suggested an alternate interpretation of *Reynolds*, *id.* at 982-83 (Kavanaugh, J. concurring in part) (setting forth understanding of the *Reynolds* process but emphasizing deference to the executive branch). Two justices (Justices Thomas and Alito) agreed with the majority's decision to dismiss the discovery request, but disagreed with the rationale and concurred in the result, *id.* at 973 (Thomas, J., concurring in part and concurring in the judgment). Two justices (Justices Gorsuch and Sotomayor) dissented, *id.* at 985 (Gorsuch, J., dissenting).

[156] *Id.* at 967-68.

[157] *Id.* at 968.

[158] *Id.* at 970-71 ("Given [these CIA contractors'] central role in the relevant events, we believe that their confirmation (or denial) of the information Zubaydah seeks would be tantamount to a disclosure from the CIA itself.").

[159] *Id.* at 968-69 (quoting CIA director's assertion that "confirm[ing] the existence of . . . a [clandestine] relationship [with a foreign intelligence service] would 'breach' the [mutual] trust and have 'serious negative consequences,' including jeopardizing 'relationships with other foreign intelligence or security services'").

[160] *Id.* at 969 ("Confirmation by . . . an insider is different in kind from speculation in the press or even by foreign

Having confirmed that information pointing to Poland as one site where Abu Zubaydah was tortured was subject to the state secrets doctrine, a majority considered Abu Zubaydah's need for the depositions.[161] The majority interpreted Abu Zubaydah's argument that he did not necessarily need to elicit evidence establishing the location of the detention site as a concession that his need for the depositions was relatively insignificant.[162] By emphasizing the narrow nature of the decision, the majority avoided making broad pronouncements regarding the level of deference courts owe the executive branch in evaluating assertions of the state secrets privilege or defining circumstances where a court might find it appropriate to examine evidence to disentangle privileged information from information that can safely be disclosed.

Justice Thomas, joined by Justice Alito, filed an opinion disagreeing with respect to most of the opinion, but joined the opinion remanding the case and dismissing the discovery request.[163] Justice Thomas would have begun the inquiry with an evaluation of "the showing of necessity . . . made" by Abu Zubaydah and only then if necessary ask whether there is a "reasonable danger" that "military secrets are at stake."[164] Declaring Abu Zubaydah to be a terrorist,[165] Justice Thomas emphasized that Abu Zubaydah "does not request this discovery for his own use. . . [but rather because] Polish prosecutors asked Zubaydah to file a discovery application after the United States repeatedly declined the prosecutors' requests for information regarding CIA operations at an alleged detention site in Poland."[166] He argued the majority's application of the *Reynolds* test, by evaluating the government's claim of privilege first, "undermines the 'utmost deference' owed to the Executive's national-security judgments."[167]

Justice Thomas's evaluation of Abu Zubaydah's need for the depositions concluded that there were three reasons Abu Zubaydah "failed to prove any nontrivial need for his requested discovery."[168] First, he argued the depositions would not provide Abu Zubaydah with meaningful relief because they would amount to "discovery on behalf of foreign authorities to help them prosecute foreign nationals who allegedly committed crimes in a foreign country."[169] Second, he argued Abu Zubaydah has "failed to pursue 'an available alternative'" by not asking to submit a statement himself to the Polish prosecutors.[170] Third, he argued that Abu Zubaydah clarified that he did not "need evidence about Poland specifically and seeks discovery only regarding the conditions of his confinement while in CIA custody."[171] Accordingly, he argued that Abu Zubaydah's "dubious showing of necessity" alone required dismissal of the suit.[172]

Justice Kagan filed an opinion concurring in part and dissenting in part, agreeing that the government has a substantial interest in maintaining secrecy regarding the location where Abu

courts because it leaves virtually no doubt as to the veracity of the information that has been confirmed.").

[161] *Id.* at 971.

[162] *Id.*

[163] *Id.* at 973 (Thomas, J., concurring in part and concurring in the judgment).

[164] *Id.* (citing *Reynolds*, 345 U.S. at 10).

[165] *Id.* at 974.

[166] *Id.* at 974-75.

[167] *Id.* at 977 (citing Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988)).

[168] *Id.* at 981.

[169] *Id.*

[170] *Id.*

[171] *Id.* at 982.

[172] *Id.*

Zubaydah was held in order to protect relationships with foreign intelligence partners[173] but would have permitted Abu Zubaydah to rephrase his deposition questions to avoid implicating Poland. Justice Kagan would have permitted the district court to segregate "classified information about location while giving Zubaydah access to unclassified information about detention conditions and interrogation methods."[174]

Justice Gorsuch, joined by Justice Sotomayor, dissented, writing:

> There comes a point where we should not be ignorant as judges of what we know to be true as citizens. This case takes us well past that point. Zubaydah seeks information about his torture at the hands of the CIA. The events in question took place two decades ago. They have long been declassified. Official reports have been published, books written, and movies made about them. Still, the government seeks to have this suit dismissed on the ground it implicates a state secret—and today the Court acquiesces in that request. Ending this suit may shield the government from some further modest measure of embarrassment. But respectfully, we should not pretend it will safeguard any secret.[175]

Justice Gorsuch first set forth what is already known about Abu Zubaydah's treatment[176] but argued that this information is missing relevant facts regarding Abu Zubaydah's treatment during the time he was allegedly detained in Poland.[177] He observed that Abu Zubaydah seeks that information pursuant to statute "for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation,"[178] and had sought an accommodation at the district court to avoid mentioning the location of the mistreatment.[179] Arguing that the breadth of the initial deposition request is now "beside the point,"[180] Justice Gorsuch contended that information helpful to Abu Zubaydah could be elicited using code words and other familiar mechanisms to protect classified information.[181]

Justice Gorsuch argued that accommodating both the government's and Abu Zubaydah's needs would not interfere in the constitutional separation of powers.[182] Setting forth evidence of possible misuse of the state secrets doctrine in the past,[183] Justice Gorsuch wrote that the Court need not "add fuel to that fire by abdicating any pretense of an independent judicial inquiry into the propriety of a claim of privilege and extending instead 'utmost deference' to the Executive's mere assertion of one."[184]

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[173] *Id.* at 983 (Kagan, J. concurring in part and dissenting in part).

[174] *Id.*

[175] *Id.* at 985 (Gorsuch, J., dissenting) (internal citations omitted).

[176] *Id.* at 985-87 (discussing Senate Select Committee on Intelligence report executive summary and other public information).

[177] *Id.* at 987-88.

[178] *Id.* at 988 (citing 28 U.S.C. § 1782).

[179] *Id.*

[180] *Id.* at 989.

[181] *Id.* at 990 ("What worked before, the government submits, cannot work again. Unlike previous lawsuits, this one alone must be dismissed at its outset.").

[182] *Id.* at 991 ("[W]hen the Executive seeks to withhold every man's evidence from a judicial proceeding thanks to the powers it enjoys under Article II, that claim must be carefully assessed against the competing powers Articles I and III have vested in Congress and the Judiciary.").

[183] *Id.* at 991-94.

[184] *Id.* at 994.

Framing the *Reynolds* test as one that both "guarantees a degree of independent judicial review [and] seeks to respect the Executive's specially assigned constitutional responsibilities in the field of foreign affairs," Justice Gorsuch explained his view that courts should "often [review] the evidence supporting the government's claim of privilege *in camera*."[185] He observed that "the state secrets privilege protects the government from the duty to supply certain evidence, but it does not prevent a litigant from insisting that the government produce nonprivileged evidence in its possession."[186] Charging the majority with accepting the government's conclusory assertions with respect to the dangers of revealing such information, Justice Gorsuch asserted that the Court had shifted the burden of proof to Abu Zubaydah to prove the opposite.[187] The government, he wrote, "has not carried its burden of showing" that this case, if allowed to continue, would endanger relationships with foreign intelligence partners.[188]

Even assuming that disclosure of the detention site would expose state secrets, Justice Gorsuch argued that the majority's worry that deposing the CIA interrogators might lead them to "*inadvertently* disclose the location of their activities" was insufficient to justify dismissing the entire case, given the tools available to avoid such an outcome.[189] In the end, Justice Gorsuch saw no reason to force Abu Zubaydah to file a new lawsuit to get the depositions he needs,[190] and he charged that the only real reason for the government to have this case dismissed in its entirety is to "impede the Polish criminal investigation and avoid (or at least delay) further embarrassment for past misdeeds."[191]

# Other Examples of the State Secrets Privilege

The United States has invoked the state secrets privilege in a wide array of cases, many of which have resulted in the outright dismissal of the plaintiffs' claims. This section of the report provides a brief overview of a selection of recent high-profile uses of the privilege.

## Electronic Surveillance

The state secrets privilege has played a large role in litigation arising from the Terrorist Surveillance Program (TSP). The TSP was a program, established during the George W. Bush Administration, that authorized the NSA to intercept various communications involving U.S. persons within the United States without first obtaining warrants under FISA.[192] After the program was revealed in 2005, dozens of claims were filed challenging its legality. Most of these claims were filed against private telecommunications companies that had provided the NSA with telephone communication records, while others were filed against the NSA itself and individual government officials.[193] Given the sensitive nature of NSA's surveillance activities, the federal

[185] *Id.*

[186] *Id.* at 995.

[187] *Id.* at 997.

[188] *Id.*

[189] *Id.* at 998-99.

[190] *Id.* at 1001.

[191] *Id.*

[192] See, CRS Report R44457, *Surveillance of Foreigners Outside the United States Under Section 702 of the Foreign Intelligence Surveillance Act (FISA)*, by Edward C. Liu.

[193] *Compare*, Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Ca. 2006), *with* Al-Haramain Islamic Foundation, Inc. v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006).

government intervened in a majority of these cases filed against telecommunications companies, invoked the state secrets privilege, and asked that the cases be dismissed. These early assertions of the privilege saw little success. For example, in *Hepting* v. *AT&T Corp*., the district court denied the government's motion to dismiss under the state secrets privilege.[194] The court reasoned that the *Totten* bar was inapplicable under the facts of the case and that the "very subject matter" of the case was "hardly a secret."[195] The court explained that because of the broad public disclosures by AT&T and the government relating to the TSP, it could not conclude "that merely maintaining this action create[d] a 'reasonable danger' of harming national security."[196] The court declined to "defer to a blanket assertion of secrecy."[197]

In 2008, Congress passed the FISA Amendments Act (FAA),[198] which granted the telecommunications companies retroactive immunity for assistance provided to NSA under the TSP.[199] Accordingly, federal courts have dismissed most of the TSP-related claims filed against telecommunications companies pursuant to the protections provided in the FAA.[200]

Challenges to the TSP program filed against the NSA or government officials, however, were not impeded by the immunity granted to telecommunications companies under the FAA. Perhaps the preeminent existing challenge to the TSP is *Al-Haramain Islamic Foundation v. Bush*.[201] *Al-Haramain* involves a claim by a Muslim charity—designated as a terrorist organization by the United Nations—alleging that the NSA violated statutory, constitutional, and international law by intercepting communications through the TSP and providing those records to the Office of Foreign Assets Control (OFAC) of the Department of the Treasury, which subsequently froze Al-Haramain's assets.[202] Whereas other plaintiffs had struggled to obtain standing to challenge the TSP,[203] OFAC had inadvertently provided the Al-Haramain Islamic Foundation with a classified "top secret" document during the proceedings to freeze the organization's assets that allegedly proved that the foundation had been subject to NSA surveillance.[204] In response to the complaint, the government asserted the state secrets privilege both narrowly, with respect to the top secret document, and generally, arguing that the case must be dismissed as the "very subject matter" of the proceeding was a state secret.[205] The district court denied the government's motion to dismiss, holding that although the state secrets privilege was validly invoked and protected certain documents, the privilege did not require dismissal of the suit in its entirety.[206] Al-Haramain had also argued that the state secrets privilege was preempted by statutory provisions of FISA

[194] 439 F. Supp. 2d 974, 980 (N.D. Ca. 2006).

[195] *Id*. at 994.

[196] *Id*.

[197] *Id*. at 995.

[198] P.L. 110-261 (110th Cong.) (2008).

[199] Under the FAA, a claim may not be maintained against a party for "providing assistance to an element of the intelligence community, and shall be promptly dismissed, if the Attorney General certifies" that the defendant provided assistance in connection with the TSP and was given written assurances that the program was authorized by the President and determined to be lawful or that the alleged assistance was not in fact provided. 50 U.S.C. § 1885a.

[200] See, e.g., *In re* Nat'l Sec. Agency Telecomm. Records Litig., 671 F.3d 881, 893-94 (9th Cir. 2011).

[201] 507 F.3d 1190 (9th Cir. 2007).

[202] *Id*. at 1193-1195.

[203] *See*, *e.g.*, ACLU v. NSA, 93 F.3d 644 (6th Cir. 2007) (dismissing plaintiffs challenge to the TSP for lack of standing).

[204] Al-Haramain Islamic Foundation Inc. v. Bush, 507 F.3d 1190, 1193 (9th Cir. 2007).

[205] *Id*. at 1195.

[206] Al-Haramain Islamic Foundation Inc. v. Bush, 451 F. Supp. 2d 1215, 1221-27 (D. Or. 2006).

establishing procedures for a court to review FISA materials *in camera*, but the district court declined to rule on this question.[207]

On an interlocutory appeal, the Ninth Circuit rejected the government's motion to dismiss the case on the grounds that the subject matter of the claim was a state secret but accepted the government's assertion of the privilege with respect to the top secret document inadvertently disclosed to Al-Haramain.[208] The court held that enough was known about the TSP, including confirmation of the program by a number of government officials, that "the subject matter of Al-Haramain's lawsuit can be discussed . . . without disturbing the dark waters of privileged information."[209] Thus, the court held that dismissal under the state secrets privilege at such an "early stage" was not warranted.[210] The court further concluded, after *in camera* review of the top secret document, that "disclosure of information concerning the [secret document] … would undermine the government's intelligence capabilities and compromise national security."[211] Therefore, the court held that the document itself was protected by the privilege and unavailable to the plaintiffs.[212]

While the court in *Al-Haramain* did not dismiss the case under the state secrets privilege, it did determine that without the top secret document, the plaintiffs could not show the "concrete and particularized" injury necessary to establish standing.[213] In short, the court determined that, without the secret document, Al-Haramain could not prove that it had actually been a subject of TSP surveillance. The court therefore dismissed the claim for lack of standing.[214] Procedurally, this dismissal meant that the question of whether FISA preempted the state secrets privilege was now central to Al-Haramain's ability to proceed with its suit, and the Ninth Circuit remanded the case to the district court to address that issue.[215] Although the district court subsequently held that FISA did preempt the state secrets privilege,[216] the suit was ultimately dismissed after the Ninth Circuit held that the government had not waived sovereign immunity and vacated the district court's decision.[217]

## Government Contractors

The United States commonly intervenes in civil claims brought against government contractors, especially military contractors, in order to protect state secrets.[218] For example, the federal

[207] *Id.* at 1231.

[208] Al-Haramain Islamic Foundation Inc., 507 F.3d at 1193 ("[W]e agree with the district court that the state secrets privilege does not bar the very subject matter of this action. After *in camera* review and consideration of the government's documentation of its national security claim, we also agree that the Sealed Document is protected by the state secrets privilege.").

[209] *Id*. at 1198.

[210] *Id*.

[211] *Id.* at 1204.

[212] *Id*. at 1204.

[213] *Id*. at 1205.

[214] *Id.* at 1205.

[215] *Id.* at 1205-06.

[216] In re Nat'l Sec. Agency Telecomm. Records Litig., 564 F. Supp. 2d 1109, 1124 (N.D. Cal. 2008).

[217] Al-Haramain Islamic Foundation, Inc. v. Obama, 705 F.3d 845, 855 (9th Cir. 2012).

[218] *See, e.g.*, McDonnell Douglas Corp. v. U.S., 567 F.3d 1340 (Fed. Cir. 2009); Crater Corp. v. Lucent Technologies, 423 F.3d 1260 (Fed. Cir. 2005); DTM Research, L.L.C. v. AT&T Corp., 245 F.3d 327 (4th Cir. 2001). The government's intervention in previously discussed extraordinary rendition and electronic surveillance cases could also

government intervened and asserted the state secrets privilege in a 2008 tort case against Raytheon brought by the estate of a deceased U.S. Navy lieutenant.

In *White v. Raytheon*, the wife of Navy combat pilot Nathan White alleged that a malfunction in Raytheon's Patriot Air and Missile Defense System was responsible for the death of her husband, who had been killed when a wayward Patriot missile struck his F/A-18 fighter plane.[219] During discovery, the United States intervened to assert the state secrets privilege through a declaration filed by the Secretary of the Army.[220] The declaration asserted that any disclosure of "technical information regarding the design, performance, functional characteristics, and vulnerabilities, of the PATRIOT Missile system" along with any disclosure of the "rules of engagement authorized for, and military operational orders applicable" to the missile system would jeopardize national security.[221] The Secretary also provided the court with a classified supplemental declaration that further elaborated on the impact of disclosing information specific to the case.[222] After the district court judge's *in camera* review of the supplemental declaration, the judge held that, although the plaintiff could potentially make out a *prima facie* case absent the privileged information, there was "no practical means by which Raytheon could be permitted to mount a fair defense without revealing state secrets."[223] The court thus concluded that it had "no alternative but to order the case dismissed."[224]

The Supreme Court case *General Dynamic Corporation v. United States* involved government contractors and the invocation of the state secrets privilege by the federal government.[225] This case combined two lower court cases and centered around a contract entered into in 1988 to design and build a new stealth capable, carrier-based A-12 Avenger.[226] By 1990, General Dynamics and McDonnell Douglas had fallen behind in the project and had missed required deadlines, which resulted in the Navy terminating the contract in 1991.[227] As a result of the default termination, the Navy demanded that the contractors return $1.35 billion in progress payments.[228] Although the Navy terminated the contract, it was the contractors who initiated litigation under the Contract Disputes Act.[229] Filing with the U.S. Court of Federal Claims, the contractors argued that a lack of cooperation and support from the Pentagon had caused the project delays—resulting in a termination of convenience, rather than a termination for default.[230]

One of the contractors' chief arguments was that by not providing the companies access to its existing stealth technology, as it had allegedly promised,[231] the Navy had breached its duty to

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be considered government contractor cases.

[219] White v. Raytheon Co., No. 07-10222, 2008 WL 5273290, *1 (D. Ma. Dec. 17, 2008).

[220] *Id.* at *1.

[221] *Id*. at *1-2.

[222] *Id*. at *5.

[223] *Id*.

[224] *Id*.

[225] Gen. Dynamics Corp. v. United States, 563 U.S. 478 (2011).

[226] *Id.* at 480-81.

[227] *See*, McDonnell Douglas Corp. v. U.S., 567 F.3d 1340 (Fed. Cir. 2009).

[228] McDonnell Douglas Corp. v. U.S., 323 F.3d 1006, 1011 (Fed. Cir. 2003).

[229] 41 U.S.C. § 609(a).

[230] *See*, McDonnell Douglas Corp. v. U.S., 35 Fed. Cl. 358 (1996). Whether the contract was terminated for "default" or "convenience" governs the recovery available to the government, including the return of the progress payments at issue in this case.

[231] Petition for Certiorari, Nos. 091298 and 09-1302 (U.S. filed April 23, 2010) at 2.

"disclose critical information to a contractor that [was] necessary to prevent the contractor from unknowingly pursuing a ruinous course of action."[232] By withholding its "superior knowledge" of stealth technology, the contractors asserted that it was the Navy that had caused the default.[233] The Navy maintained that the contract was terminated due to default by the contractors.[234]

The federal government also responded by invoking the state secrets privilege, arguing that "the government could not have an implied duty to reveal classified information pertinent to the A-12 program that would threaten national security."[235] Ultimately, after a series of decisions by the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) ruling for and against the federal government, the Federal Circuit determined that the federal government had properly terminated the contract for default.[236]

The Supreme Court vacated the Federal Circuit's decision and remanded proceedings.[237] The Court granted the petition for *writ of certiorari* to consider "what remedy is proper when, to protect state secrets, a court dismisses a Government contractor's prima facie valid affirmative defense to the Government's allegations of contractual breach."[238] In its opinion, the Court first distinguished *General Dynamics* from *Reynolds*, which it noted "was about the admission of evidence."[239] In contrast, the Court explained that "the state-secrets issue [in *General Dynamics*] raises something quite different from a mere evidentiary point."[240] Specifically, the Court held that, like in *Totten* and *Tenet*, "[e]very document request or question to a witness would risk further disclosure, since both sides have an incentive to probe up to the boundaries of state secrets. State secrets can also be indirectly disclosed. Each assertion of the privilege can provide another clue about the Government's covert programs or capabilities."[241] Therefore, the Court held that "[w]here liability depends upon the validity of a plausible superior-knowledge defense, and when full litigation of that defense would inevitably lead to the disclosure of' state secrets, neither party can obtain judicial relief."[242] In holding that neither the government's claim nor the contractors' defense could be "judicially determined" in light of the valid assertion of the privilege, the Court's opinion focused solely on the consequence of invoking the privilege in the context of this case, rather than an examination of whether invoking the privilege was proper.[243]

In crafting a remedy in this case, the Court held, as it did in *Totten* and *Tenet*, that following the government's invocation of state secret privilege, the parties must be left "where they stood when they knocked on the courthouse door."[244] Thus, the government could not claim the $1.35 billion in progress payments, and the contractor could not pursue its claim for damages under the theory that "superior knowledge" was withheld.[245] The Court, in an attempt to limit the future

[232] McDonnell Douglas Corp. v. U.S., 323 F.3d 1006 (Fed Cir. 2003).

[233] See id. at 1011-12, 1018-21.

[234] *Id.* at 1015.

[235] McDonnell Douglas Corp. v. U.S., 182 F.3d 1319 (Fed. Cir. 1999).

[236] *See*, McDonnell Douglas Corp. v. U.S., 567 F.3d 1340 (Fed. Cir. 2009).

[237] General Dynamics Corp. v. U.S., 563 U.S. 478 (2011).

[238] *Id*. at 480.

[239] *General Dynamics*, 563 U.S. at 485.

[240] *Id.*

[241] *Id.* at 487.

[242] *Id.* at 486.

[243] *Id.*at 487-88.

[244] *Id*. at 487.

[245] *Id.* at 488-91. The Court admitted, "Neither side will be entirely happy with the resolution we reach today." *Id*. at

application of its opinion in the state secrets context, declared that its decision "clarifie[d] the consequences of [the privilege's] use only where it precludes a valid defense in Government-contracting disputes, and only where both sides have enough evidence to survive summary judgment but too many of the relevant facts remain obscured by the state-secrets privilege to enable a reliable judgment."[246]

## Employment Cases

The state secrets privilege also arises in employment-related claims against national security agencies.[247] The federal government has generally argued that these cases threatened to disclose "intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments."[248] *Sterling v. Tenet*, for example, involved a racial discrimination claim brought against the director of the CIA.[249] Jeffrey Sterling, a CIA operations officer, alleged that he was subject to unlawful discriminatory practices during his employment at the CIA in violation of Title VII of the Civil Rights Act.[250] In response, the CIA invoked the state secrets privilege and asked the district court to dismiss the case, relying on an unclassified and a classified declaration submitted by then-CIA Director George Tenet that alleged that litigating the factual issues of the claim would "compromise CIA sources and methods, threaten the safety of intelligence sources, and adversely affect foreign relations."[251] The district court granted the CIA's motion to dismiss, concluding that the state secrets privilege "barred the evidence that would be necessary to state a *prima facie* claim."[252]

On appeal, the Fourth Circuit upheld the dismissal. The court asserted that Sterling could not prove employment discrimination "without exposing at least some classified details of the covert employment that gives context to his claims."[253] In dismissing the claim, the Fourth Circuit took a broad view of the consequences of a claim in which the "very subject matter" is itself a state secret, holding that "dismissal follows inevitably when the sum and substance of the case involves state secrets."[254]

The Fourth Circuit echoed its *Sterling* decision in *Abilt v. CIA*, affirming the dismissal of a lawsuit alleging disability discrimination by the CIA.[255] Jacob E. Abilt, a covert CIA employee, brought an action in district court based on Title VII and the Rehabilitation Act,[256] claiming that

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[246] *Id*. at 492.

[247] *See*, *e.g.*, Jane Doe v. CIA, 576 F.3d 95 (2d Cir. 2009); Edmonds v. DOJ, 323 F. Supp. 2d 65 (D.D.C. 2004).

[248] Sterling v. Tenet, 416 F.3d 338, 346 (4th Cir. 2005).

[249] *Id*.

[250] *Id*. at 341.

[251] *Id*. at 345-46.

[252] *Id*. at 342.

[253] *Id*. at 346. "Proof of these allegations would require inquiry into state secrets such as the operational objectives and long-term missions of different agents, the relative job performance of these agents, details of how such performance is measured, and the organizational structure of CIA intelligence gathering." *Id*. at 347.

[254] *Id*. at 347. Sterling was subsequently indicted and convicted for unauthorized disclosure of national defense information. *See*, Former CIA Officer Sentenced to 42 Months in Prison for Leaking Classified Information and Obstruction of Justice, May 11, 2015. *Available at* https://www.justice.gov/opa/pr/former-cia-officer-sentenced-42-months-prison-leaking-classified-information-and-obstruction.

[255] *See* Abilt v. Central Intelligence Agency, 848 F.3d 305, 316-17 (4th Cir. 2017).

[256] Rehabilitation Act of 1973, P.L. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§791-94g (2018)).

the CIA discriminated against him by denying him opportunities to serve abroad and in a war zone due to his narcolepsy.[257] He also alleged that the CIA failed to accommodate his disability and retaliated against him for filing an administrative complaint alleging discrimination.[258] The government moved to dismiss and submitted in support a declaration from then-CIA Director John O. Brennan that asserted the state secrets privilege with respect to information concerning specific CIA programs and activities on which Abilt worked and information concerning the CIA's employment of Abilt, his coworkers, and his supervisors.[259] The district court granted the government's motion and dismissed the case.[260]

On appeal, the Fourth Circuit explained the three-step analysis it applies to resolve a claim of state secrets privilege.[261] The court must first ascertain whether the procedural requirements under *Reynolds* were met.[262] Next, the court must determine whether the information for which the privilege is sought in fact qualifies for it.[263] Finally, if the first two steps are answered affirmatively, the court must decide how the matter should proceed in light of the successful privilege claim.[264]

Citing a prior Fourth Circuit decision that had held that the state secrets privilege "performs a function of constitutional significance,"[265] the court explained that the executive branch's determination regarding the threat to national security posed by the possible disclosure of information is entitled to the "utmost deference."[266] The court also explained that each invocation of the privilege must be critically examined "to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary."[267] This examination must nevertheless be conducted in such a way that does not "forc[e] a disclosure of the very thing the privilege is designed to protect."[268] Moreover, the court does not take into consideration the plaintiff's need for the information in order to make his case.[269] Rather, the court considers whether the "sum and substance" of the case involves state secrets, in which case dismissal inevitably follows.[270]

The court identified three circumstances in which the privileged information is central to the case that dismissal is required:

> First, dismissal is required if the plaintiff cannot prove the prima facie elements of his or her claim without privileged evidence. Second, even if the plaintiff can prove a prima facie

[257] *Abilt*, 848 F.3d at 309-10.

[258] *Id.*

[259] Abilt v. Central Intelligence Agency, No. 14-CV-01626, 2015 WL 12765992, at *6 (E.D. Va. 2015).

[260] *Id.* at *13.

[261] *Abilt*, 848 F.3d at 311 (citing El-Masri v. United States, 479 F.3d 296, 304 (4th Cir. 2007)).

[262] *Id.*

[263] *Id.*

[264] *Id.*

[265] *Id.* at 312 (explaining that the privilege "allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities") (citing *El-Masri*, 479 F.3d at 303). The *El-Masri* decision is discussed in more detail below at "Extraordinary Rendition."

[266] *Id.* (citing United States v. Nixon, 418 U.S. 683, 710 (1974)).

[267] *Id.* (citing Ellsberg v. Mitchell, 709 F.2d 51, 58 (D.C. Cir. 1983)).

[268] *Id.* at 313 (citing *Reynolds*, 345 U.S. at 7-8).

[269] *Id.* ("[N]o attempt is made to balance the need for secrecy of the privileged information against a party's need for the information's disclosure; a court's determination that a piece of evidence is a privileged state secret removes it from the proceedings entirely.") (citing *El-Masri*, 479 F.3d at 306).

[270] *Id.* (citing *Sterling*, 416 F.3d at 347).

> case without resort to privileged information, the case should be dismissed if "the defendants could not properly defend themselves without using privileged evidence." Finally, dismissal is appropriate where further litigation would present an unjustifiable risk of disclosure.[271]

Applying these principles, the court agreed with the district court that the CIA director had properly invoked the privilege and found there to be little doubt that the information he certified as requiring protection met the "reasonable danger" standard established by *Reynolds*.[272] Turning to its analysis of how the litigation should proceed in light of the information placed off limits by the privilege, the court determined that the circumstances called for dismissal because the CIA would be unable to defend its actions as proper without the use of the privileged information.[273] The court explained that

> even if the CIA could, as Abilt suggests, proffer a legitimate nondiscriminatory reason for its actions without resort to privileged information, in properly litigating that reason, Abilt would be entitled to probe deeper into the CIA's justifications "through cross-examination of the [CIA]'s witnesses." In doing so, Abilt "would have every incentive to probe as close to the core secrets as the trial judge would permit." "Such probing . . . would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation."[274]

Acknowledging the unfairness of the resulting dismissal to the plaintiff, the court found the "fundamental principle of access to court must bow to the fact that a nation without sound intelligence is a nation at risk."[275]

In *Doe v. CIA*, the U.S. Court of Appeals for the Second Circuit (Second Circuit) addressed a constitutional challenge to the actions that the CIA took to invoke the state secrets privilege and move for dismissal of a case,[276] which the plaintiff argued effectively denied her access to the courts.[277] Specifically, the plaintiff (who was the wife of a former CIA employee who remained in covert status), argued that the CIA denied her counsel access to secure communications and facilities to enable the preparation of an opposition to the CIA's motion to dismiss in violation of her constitutional rights under the First Amendment.[278] The Second Circuit disagreed, citing *Reynolds* for the proposition that "plaintiffs have no right of access to material that the government contends contains state secrets prior to the district court's adjudication of that contention."[279] Furthermore, the court found that even though the plaintiff already knew some of the information for which the CIA sought to invoke the state secrets privilege, she did not have the right to use it to oppose that invocation in the district court.[280] To permit plaintiffs to use the information to oppose the assertion of privilege, according to the court, "may present a danger of '[i]nadvertent disclosure'—through a leak, for example, or through a failure or mis-use of the secure media that plaintiffs' counsel seeks to use, or even through over-disclosure to the district

[271] *Id.* at 314 (internal citations and quotations omitted).

[272] *Id.*

[273] *Id.* at 315-16.

[274] *Id.* at 317 (citations omitted).

[275] *Id.* at 317-18 (citing *Sterling*, 416 F.3d at 348).

[276] Doe v. Central Intelligence Agency, 576 F.3d 95, 101 (2d Cir. 2009).

[277] *Id.* at 105. The plaintiff did not dispute that the state secrets privilege had been properly invoked or applied. *Id.*

[278] *Id.*

[279] *Id.* at 106 (citing *Reynolds*, 345 U.S. at 8).

[280] *Id.*

court *in camera*—which is precisely 'the sort of risk that *Reynolds* attempts to avoid.'"[281] Consequently, the court held that the challenge failed on the merits.

In *Roule v. Petraeus*, a former covert CIA employee brought a Title VII action against the CIA alleging discrimination based on the race and national origin of his wife, which he claimed resulted in the denial of work opportunities and advancement.[282] The government moved to stay the case while internal deliberations regarding whether to invoke the state secrets privilege were underway and objected to providing discovery with respect to information that "may be" covered by the privilege.[283]

In support of its motion to stay the proceedings, the government cited the multi-level Department of Justice (DOJ) procedures it follows before claiming the state secrets privilege in court.[284] According to the procedures, the DOJ invokes the state secrets privilege "only to the extent necessary to protect against the risk of significant harm to national security" and "will not defend an invocation of the privilege to conceal violations of the law, prevent embarrassment to any person, organization, or agency of the United States government, restrain competition, or prevent or delay the release of information that would not reasonably be expected to cause significant harm to national security."[285] The plaintiff argued that any more delay in the case while these procedures advanced would harm his ability to make his case due to the increasing possibility that witnesses would become unavailable or their memories would fade.[286] The government also challenged the plaintiff's discovery request, asserting that classified information is not discoverable in civil cases and that such discovery would pose a risk of harm.[287] The judge agreed with the plaintiff, finding that discovery could continue with protective procedures designed to prevent disclosures, for example, by "redacting classified facts or replacing the names of covert employees with pseudonyms."[288] The judge characterized the government's approach as "ask[ing] the court to trust the process blindly without any further information[,]" which she found to be "inconsistent with the court's obligation to critically examine instances of the government's invocation of the state secrets privilege."[289] The court declined to order the stay based on the record then before it, finding "the possibility that the government 'may'" invoke the privilege insufficient to stay the case or discovery.[290] Accordingly, where the government has not formally invoked the state secrets privilege under *Reynolds*, it may be possible for litigation to advance using protecting measures.

[281] *Id.* (citing *Sterling*, 416 F.3d at 348).

[282] Roule v. Petraeus, No. 10-04632, 2012 WL 2367873, at *1 (N.D. Cal. 2012).

[283] *Id*.

[284] *Id.* at *3. The procedures are available at http://www.justice.gov/sites/default/files/opa/legacy/2009/09/23/state-secret-privileges.pdf.

[285] *Roule*, at *3.

[286] *Id.* at *4-5.

[287] *Id.* at *5.

[288] *Id.*

[289] *Id.* at *6 (citing Ellsberg v. Mitchell, 709 F.2d 51, 58 (D.C. Cir. 1983); Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1080 (9th Cir. 2010) (en banc ), *cert. denied*, 563 U.S. 1002 (2011)).

[290] *Id.* at *1.

## Targeted Killing

In *Al-Aulaqi v. Obama*, the father of a U.S.-born Yemeni cleric and Specially Designated Global Terrorist[291] brought a claim against the federal government challenging his son's alleged inclusion on a so-called CIA target kill list.[292] The plaintiff argued that inclusion on the CIA list meant his son was "subject to a standing order that permits the CIA or [Joint Special Operations Command] to kill him without regard to whether" lethal force was lawful under the circumstances, thus in violation of the Fourth and Fifth Amendments of the U.S. Constitution.[293] The federal government responded by arguing that the plaintiff lacked standing to bring the claim on behalf of his son; that the claim was barred by the political question doctrine; and, in the alternative, that the claim should be dismissed under the state secrets privilege on the grounds that "specific categories of information properly protected against disclosure by the privilege would be necessary to litigate each of plaintiff's claims."[294]

In support of the government's claim of privilege, the Director of National Intelligence, the director of the CIA, and the Secretary of Defense submitted declarations asserting that disclosure of certain evidence connected to the case could cause "exceptionally grave damage to the national security of the United States."[295] Specifically, the government asserted that the litigation could lead to the disclosure of "information needed to address whether or not, or under what circumstances, the United States may target a particular foreign terrorist organization and its senior leadership" and "criteria governing the use of lethal force."[296] In addition to the public declarations, the government also provided the court with supplemental confidential declarations for *in camera* review.[297]

The district court ultimately dismissed the case without reaching the state secrets privilege claim, finding that the plaintiff lacked standing and that his claims were non-justiciable under the political question doctrine.[298] The court seemed to imply that dismissal would have been warranted under the privilege, noting in dicta that "given the nature of the state secrets assessment here based on careful judicial review of classified submissions to which neither plaintiff nor his counsel have access, there is little that plaintiff can offer with respect to this issue."[299]

## Terrorist Screening Database

The state secrets privilege has also arisen in claims associated with the Terrorist Screening Database (TSDB). For example, in *Rahman v. Chertoff*, a federal district court rejected the government's claim of privilege.[300] *Rahman* involved a claim by a class of plaintiffs for wrongful

[291] 727 F. Supp. 2d 1 (D.D.C. 2010). The government alleges that Al-Aulaqi has significant ties to terrorist groups. *Id.* at 10.

[292] *Id*. at 11.

[293] *Id*. at 11-12. The plaintiff also brought "a statutory claim under the Alien Tort Statute . . . alleging that the United States'[] 'policy of targeted killings violates treaty and customary international law.'" *Id.* at 12.

[294] *Id*. at 53.

[295] *See*, Declaration in Support Formal Claim of State Secrets Privilege, James R. Clapper, Director of National Intelligence, Al-Aulaqi v. Obama, No. 10-cv-1469 (D.D.C. 2010).

[296] *Al-Aulaqi*, 727 F. Supp. 2d at 53.

[297] Id. at 53, n.15.

[298] *Id*. at 54.

[299] *Id*.

[300] Rahman v. Chertoff, No. 05 C 3761, 2008 U.S. Dist. LEXIS 32356 (N.D. Ill. Apr. 16, 2008).

detention stemming from repeated encounters with law enforcement while crossing the border. In an effort to prove that they were "misidentified" or "overclassified," the plaintiffs sought to obtain evidence proving their existence in the TSDB.[301] Citing national security concerns, the federal government asserted the state secrets privilege with respect to any information "tending to confirm or deny whether the plaintiffs are now or ever have been listed in the TSDB."[302] In support of the claim, the government argued that if an individual who was engaged in terrorist activity had knowledge of whether he was included on the TSDB, that person may "alter the nature or extent of his terrorism-related activity, or take new precautions against surveillance, . . . change his appearance or acquire false identification to avoid detection, . . . [or] even go into hiding."[303]

The federal district court rejected the government claim of privilege and ordered that the information related to the TSDB be disclosed to plaintiffs pursuant to a protective order.[304] In reaching its decision, the court determined that the plaintiffs had made a strong showing of necessity to obtain the information and that the defendants had "failed to establish that, under all the circumstances of this case, disclosure of that information would create a reasonable danger of jeopardizing national security."[305] The court noted that the government had raised only "general concerns" and declined to accept the government's assertion that knowledge of one's TSDB status would allow one to alter their activity so as to avoid surveillance.[306] The court concluded that where a plaintiff has "been stopped at border entries on numerous occasions . . . there is little force to the argument that revealing their TSDB status will alert [the] plaintiffs for the first time that they have been under government scrutiny."[307]

## Extraordinary Rendition

Two cases from the Fourth Circuit and the Ninth Circuit can be viewed as exemplifying the varied conclusions federal courts have reached in ostensibly similar cases. Both cases involved civil claims against various government officials and private transportation companies associated with the government's extraordinary rendition program. "Extraordinary rendition" has been described as a program administered by the CIA "to gather intelligence by apprehending foreign nationals suspected of involvement in terrorist activities and transferring them in secret to foreign countries for detention and interrogation."[308] The first case, *El-Masri v. United States*, involved a claim by Khaled El-Masri against the CIA and a number of private transportation companies alleging that the defendants unlawfully detained and interrogated him in violation of the U.S. Constitution and international law.[309] El-Masri, a German citizen, alleged he had been detained in

[301] *Id*. at *4.

[302] *Id*. at *17.

[303] *Id*. at *23. The government also argued that disclosure of the requested information could "reveal sources and methods" of gathering intelligence. *Id*. at *24.

[304] *Id*. at *33-34. The government had also asserted the privilege with respect to the disclosure of the contents of FBI investigative files, and agency policy and procedure documents. The court determined that much of the FBI files were protected but that the court would require *in camera* review to separate protected information from responsive, non-protected information. *Id.* at *41-42. The court held that the policy and procedure documents were fully protected. *Id*. at *42-47.

[305] *Id*. at *34.

[306] *Id.* at *25.

[307] *Id*. at *26.

[308] Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1073 (9th Cir. 2010).

[309] El-Masri v. U.S., 479 F.3d 296, 299 (4th Cir. 2007).

Macedonia; turned over to the CIA; flown to Afghanistan, where he was held in a CIA facility; and then flown to Albania, where he was released.[310] During his ordeal, El-Masri also alleged he was "beaten, drugged, bound, and blindfolded during transport; confined in a small, unsanitary cell; interrogated several times, and consistently prevented from communicating with anyone outside the detention facility."[311]

The second case, *Mohamed v. Jeppesen Dataplan, Inc.*, involved a claim by five plaintiffs against Jeppesen Dataplan, Inc. for violations of the Alien Tort Statute stemming from the company's role in providing transportation services for the extraordinary rendition program.[312] The plaintiffs alleged that Jeppesen Dataplan, Inc. "provided flight planning and logistical support services to the aircraft and crew on all of the flights transporting the five plaintiffs among their various locations of detention and torture."[313] In both *El-Masri* and *Jeppesen*, the government asserted the state secrets privilege and argued that the suits should be dismissed because the issues involved in the lawsuits could not be litigated without risking disclosure of privileged information.[314]

In *El-Masri*, the Fourth Circuit, citing both *Totten* and *Reynolds*, asserted that "the Supreme Court has recognized that some matters are so pervaded by state secrets as to be incapable of judicial resolution once the privilege has been invoked."[315] Although the court recognized that *Totten* has "come to primarily represent a somewhat narrower principal—a categorical bar on actions to enforce secret contracts for espionage," the court concluded more broadly that *Totten* rested on the general proposition that "a cause cannot be maintained if its trial would inevitably lead to the disclosure of privileged information."[316] In the court's opinion, any attempt by El-Masri to prove or disprove the allegations in the complaint would necessarily involve disclosing the internal organization and procedures of the CIA, as well as secret contracts with transportation companies.[317] The circuit court thus determined that because the "central facts . . . that form the subject matter of El-Masri's claim [] remain state secrets," the court was required to dismiss the suit upon the successful invocation of the privilege by the government.[318] The Supreme Court declined to review the *El-Masri* decision.[319]

In reaching its decision, the Fourth Circuit emphasized the notion that while the privilege had been developed as a common law evidentiary privilege, the state secrets privilege performs a "function of constitutional significance."[320] The Fourth Circuit opinion contains express language

[310] *Id.* at 300.

[311] *Id*.

[312] Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943 (9th Cir. 2009).

[313] *Id*. at 951.

[314] *El-Masri*, 479 F.3d at 301. In *Jeppesen*, the federal government was not initially a defendant but intervened in the case to assert the privilege and simultaneously moved to dismiss. Mohamed v. Jeppesen Dataplan, 539 F. Supp. 2d 1128, 1132-1133 (N.D. Cal. 2008).

[315] *El-Masri*, 479 F.3d at 306.

[316] *Id*.

[317] *Id.* at 309.

[318] *Id*. at 311.

[319] 552 U.S. 947 (2007).

[320] *Id*. at 303 (explaining that *Reynolds* allowed the Court "to avoid the constitutional conflict that might have arisen had the judiciary demanded the Executive disclose highly sensitive military secrets," and that the Court in *United States v. Nixon* "articulated the [state secrets] doctrine's constitutional dimension, observing that the state secrets privilege provides exceptionally strong protection because it concerns 'areas of Art. II duties'") (citations omitted).

asserting that the state secrets privilege "has a firm foundation in the Constitution, in addition to its basis in the common law of evidence."[321]

In contrast, the Ninth Circuit in *Mohamed v. Jeppesen Dataplan, Inc.* initially held that the state secrets privilege excluded privileged evidence only from discovery or admission at trial and did not require the dismissal of the complaint at the pleadings stage.[322] In characterizing *Totten* and *Reynolds*, the Ninth Circuit noted that "two parallel strands of the state secrets doctrine have emerged from its relatively thin history."[323] The opinion distinguished between the *Reynolds* privilege and the *Totten* bar, recognizing that dismissal under the *Reynolds* privilege was proper only when the privileged evidence prevented the plaintiff from establishing a *prima facie* case or the defendant from establishing a valid defense.[324] "Neither does any Ninth Circuit or Supreme Court case law," concluded the court, "indicate that the 'very subject matter' of any other kind of law suit is a state secret, apart from the limited factual context of *Totten* itself."[325] Limiting *Totten* to its facts, the Ninth Circuit refused to countenance any expansion of "*Totten's* uncompromising dismissal rule beyond secret agreements with the government."[326]

The Ninth Circuit in an en banc decision reversed its prior ruling.[327] While criticizing the Fourth Circuit's decision in *El-Masri* as an "erroneous conflation" of the *Totten* bar's "very subject matter" inquiry with the *Reynolds* privilege, and expressly criticizing *Totten* as an ambiguous "judge-made doctrine with extremely harsh consequences," the court determined that dismissal was nonetheless required under *Reynolds*, and not *Totten*, as there was "no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets."[328]

In recognizing this third category of cases requiring dismissal under *Reynolds*, the Ninth Circuit noted that there exists a point in which "the *Reynolds* privilege converges with the *Totten* bar" to form a "continuum of analysis."[329] According to the court, included in the circumstances under which *Reynolds* merges with *Totten* is any case in which litigation would potentially result in an "unacceptable risk of disclosing state secrets."[330] The Supreme Court declined to review the case.[331]

## 9/11 Litigation

The government has used the state secrets doctrine to claim that certain information pertaining to FBI investigations is privileged and thus not subject to discovery in a lawsuit by 9/11 victims against Saudi Arabia and certain of its charities and officials for their alleged involvement or

[321] *Id*. at 304.

[322] Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943 (9th Cir. 2009).

[323] *Id*. at 952.

[324] *Id*. at 958 ("Thus, within the *Reynolds* framework, dismissal is justified if and only if specific privileged evidence is itself indispensable to establishing either the truth of the plaintiff's allegations or a valid defense that would otherwise be available to the defendant.").

[325] *Id*. at 954.

[326] *Id*.

[327] Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1087 (9th Cir. 2010).

[328] *Id*. at 1084, 1087.

[329] *Id*. at 1083, 1089.

[330] *Id*. at 1079.

[331] 563 U.S. 1002 (2011).

support of the 9/11 attacks.[332] In 2020, then-Attorney General William Barr filed a declaration with the court asserting the privilege with respect to FBI information that (1) "would indicate that a particular individual or entity is or was the subject of a national security investigation," (2) "would reveal the reasons a particular individual or entity is or was the subject of a national security investigation and information obtained as a result of that investigation," (3) "would reveal sensitive sources and methods used in a national security investigation," and (4) is "received from a foreign government with the understanding that it and the nature of the information sharing and cooperation between the FBI and foreign partners in a national security investigation will remain confidential."[333]

Plaintiffs urged the magistrate judge to reject the assertion of the privilege on the grounds that it had not been timely filed and they did not believe the Attorney General had personally reviewed the information sought to be withheld.[334] The magistrate judge found no requirement for the government to assert any privilege prior to the plaintiffs' submission of a motion to compel.[335] The judge also accepted at face value the Attorney General's declaration that the assertion was based on his review of relevant information and found it to be supported by the detailed classified declaration of a subordinate.[336] Recognizing that the plaintiffs were not in a position to review the classified information themselves to rebut the decision, the judge stated, "*In camera* examination 'is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure'"[337] and explained that "[i]n national security cases, some sacrifice to the ideals of the full adversary process are inevitable."[338]

The plaintiffs also argued that the FBI investigation of Saudi nationals on U.S. territory is essentially a domestic criminal matter and does not entail national security concerns.[339] The FBI responded that "the September 11 attacks, perpetrated by a foreign terrorist organization, are inarguably a matter related to the national security of the United States."[340] Noting the considerable authority the executive branch has over classified information, the magistrate judge agreed with the FBI.[341] The district court judge overseeing the litigation adopted the magistrate's opinion.[342]

The Biden Administration has reported that the FBI investigation is completed and promised to review the privileged information to determine what can be produced for plaintiffs.[343] The first

[332] *In re* Terrorist Attacks of September 11, 2001, No. 03-MDL-1570 (S.D.N.Y.).

[333] Declaration of William P. Barr, *In re* Terrorist Attacks of September 11, 2001, No. 03-MDL-1570 (S.D.N.Y. Apr. 13, 2021), ECF No. 6412. The document indicates it is the second such declaration with respect to these categories of information.

[334] *See In re* Terrorist Attacks of September 11, 2001, No. 03-MDL-1570, 2020 WL 6161732 at *3-4 (S.D.N.Y. Oct. 21, 2020).

[335] *Id.* at *3.

[336] *Id.*.at *5.

[337] *Id.*, at *6 (quoting Vaughn v. Rosen, 484 F.2d 820, 825 (D.C. Cir. 1973)).

[338] *Id.* (quoting Military Audit Project v. Casey, 656 F.2d 724, 751 (D.C. Cir. 1981)) (alteration in original).

[339] *Id.* at *7.

[340] *Id.* at *6.

[341] *Id.* (citing Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988)).

[342] *See* Memorandum Decision and Order, *In re* Terrorist Attacks of September 11, 2001, No. 03-MDL-1570, 2021 WL 1841469 (S.D. N.Y. May 6, 2021).

[343] Katie Rogers, et al., *U.S. Signals It Will Release Some Still-Secret Files on Saudi Arabia and 9/11*, N.Y. TIMES, (Aug. 9, 2021), https://www.nytimes.com/2021/08/09/us/politics/sept-11-saudi-arabia-biden.html.

relevant document pertaining to the involvement of Saudi nationals in the September 11 attacks was released on September 11, 2021.[344]

# Considerations for Congress

In 2009, then-Attorney General Eric Holder issued a memorandum providing guidance for executive branch invocations of the state secrets privilege.[345] The guidelines state that "the U.S. Government will invoke the privilege in court only when genuine and significant harm to national defense or foreign relations is at stake and only to the extent necessary to safeguard those interests."[346] DOJ has stated that it will defend invocation of the privilege only when the "agency seeking to assert the privilege makes a sufficient showing that assertion of the privilege is necessary to protect information the unauthorized disclosure of which reasonably could be expected to cause significant harm to the national defense or foreign relations," including classified information and nonpublic unclassified information that could damage national security if disclosed.[347] DOJ's stated policy is to invoke the privilege narrowly, seeking dismissal only where necessary to guard national security.[348] The privilege is not to be invoked to conceal wrongdoing, inefficiency, administrative error, or embarrassment or for delay or other improper reasons.[349] The memorandum creates a review committee to assess assertions of the privilege and provides recommendations to the Attorney General, whose approval is necessary for the assertion to go forward.[350]

Congress has the power to legislate on matters involving discovery, evidentiary rules and standards, and court process.[351] On the other hand, classified information is a subject over which courts have tended to grant broad deference to the President, citing his constitutional authority.[352] Although invocations of the state secrets privilege are relatively rare,[353] they may have stark results for civil litigants.[354] Congress may review whether this process is effective in balancing

[344] Devlin Barrett, *FBI releases 9/11 investigation document that scrutinized Saudis*, WASH. POST, (Sep. 12, 2021), https://www.washingtonpost.com/national-security/fbi-911-document-declassified/2021/09/12/fa37b584-13c9-11ec-9589-31ac3173c2e5_story.html.

[345] Memorandum from the Attorney General to Heads of Executive Departments and Agencies, *Policies and Procedures Governing Invocation of the State Secrets Privilege* (Sep. 23, 2009), http://www.justice.gov/archive/opa/documents/state-secret-privileges.pdf.

[346] *Id.* at 1.

[347] *Id.*

[348] *Id.*

[349] *Id.* at 2.

[350] *Id.* at 2-3.

[351] For more information, see CRS In Focus IF11557, *Congress, the Judiciary, and Civil and Criminal Procedure*, by Joanna R. Lampe.

[352] *See, e.g.*, Department of the Navy v. Egan, 484 U.S. 518, 527 (1988) ("[The President's] authority to classify and control access to information bearing on national security . . . flows primarily from this Constitutional investment of power in the President and exists quite apart from any explicit congressional grant") (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 890 (1961)). The Court has suggested, however, that it might intervene where Congress has provided contravening legislation. *Egan* at 530 ("Thus, *unless Congress specifically has provided otherwise*, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.") (emphasis added).

[353] *See* Anthony John Trenga, *What Judges Say and Do in Deciding National Security Cases: The Example of the State Secrets Privilege*, 9 HARV. NAT. SEC. J. 1, n.20 (2018).

[354] *See* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1306-07 (2007) (demonstrating frequency of dismissals of entire cases based on the state secrets privilege).

litigants' needs against the legitimate need to safeguard national security and whether the process reflects congressional priorities. Congress may also consider codifying the process, enacting new or revised standards, or providing explicit guidance for courts to apply in evaluating assertions of the state secrets privilege.[355] For example, Congress may consider adopting civil procedural rules akin to the Classified Information Procedures Act,[356] which provides a means for making substitutions for classified materials for use in criminal trials, either by defendants or by the prosecution.[357]

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## Disclaimer



[355] For an analysis of an earlier Senate bill to reform the use of the state secrets privilege, see generally Robert M. Chesney, *Legislative Reform of the State Secrets Privilege*, 13 ROGER WILLIAMS U. L. REV. 443 (2008) (analyzing the State Secrets Protection Act, S. 2533, 110th Cong. (2008)).

[356] P.L. 96-456, 94 Stat. 2025 (1980), codified at 18 U.S.C. app. 3 §§ 1-16.

[357] For more information, see CRS Report R41742, *Protecting Classified Information and the Rights of Criminal Defendants: The Classified Information Procedures Act*, by Edward C. Liu.