

UNITED STATES' RESPONSE TO PLAINTIFFS' EXHIBIT "D"

Summary

Plaintiffs assert that “[c]ourts have denied state secrets privilege claims, at least in part, dozens of times in a range of civil and criminal cases, including many outright denials.” Br. 4 (citing Br. Ex. D (Georgetown Law State Secrets Archive, available at <http://apps.law.georgetown.edu/state-secrets-archive/>)). This assertion is incorrect and the exhibit on which it relies is inaccurate. Plaintiffs’ Exhibit D is derived from a database maintained online by Georgetown University Law Center (“GULC”) of cases purportedly involving the disposition of state secrets matters in litigation. But plaintiffs have submitted only a portion of the database based apparently on their own use of the options available online to show cases where a purported state secrets privilege assertion was “denied” or “upheld in part and denied in part.” In other words, plaintiffs’ report from the database omits all cases where the privilege was upheld – cases that also are included in the GULC database. In addition, the cases where plaintiffs claim the privilege was denied in whole or part include several criminal cases, where the privilege is inapplicable as expressly held by *Reynolds*, and numerous cases where the Government *did not assert* the privilege. Ultimately, plaintiffs do not cite a single case in which a state secrets assertion actually made by the Government in civil litigation was finally rejected by courts reviewing the matter, and in which the privileged information at issue was ultimately ordered to be disclosed. The following table summarizes what happened in each case set forth in plaintiffs’ Exhibit D.

DATABASE LABEL: "SSP Disposition: Denied"

#	Case Citation	Actual Disposition of Case
1	Wunderly v. U.S. (7341)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs' Exhibit D correctly states, and the privilege was not "denied," as the exhibit incorrectly indicates. In this case, which predates <i>Reynolds</i> , the district court compelled production of a written statement by an Army officer regarding whether a driver was acting within the scope of his employment when he was involved in a motor vehicle accident, noting the Government's concession that no "military secrets, possibly protected by the scope of common law privilege, are involved." <i>Wunderly v. United States</i> , 8 F.R.D. 356, 357 (E.D. Pa. 1948).
2	Cresmer v. U.S. (9499)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs' Exhibit D correctly states, and the privilege was not "denied," as the exhibit incorrectly indicates. The case, which predates <i>Reynolds</i> , concerned a plane crash in Long Island, and the court reviewed a copy of an investigative report to ensure it contained no military or service secrets which would be detrimental to the interests of the Armed Forces or national security. <i>See Cresmer v. United States</i> , 9 F. Supp. 203 (E.D. N.Y. 1949). The court noted that absent a showing that military secrets were at issue, there was no basis for the government to thwart inquiry into the case. <i>Id.</i> at 204.
3	In re Grove (1368)	An assertion of the state secrets privilege was not adjudicated in this case. In this 1910 case between private parties (again, predating <i>Reynolds</i>), not only did the Government not invoke privilege to protect state secrets, but the Department of the Navy informed the court that it could take the documents at issue into evidence without harming the public interest. <i>In Re Grove</i> , 180 F. 62, 67-68 (3d Cir. 1910). Thus, the state secrets privilege was not "denied" in this case, as the chart incorrectly indicates.
4	U.S. ex rel Schwartz v. TRW, Inc. (CV 96-3065-RSWL (RCx))	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs' Exhibit D correctly states, and the privilege was not "denied," as the exhibit incorrectly indicates. The district court noted that the Government had not yet asserted the state secrets privilege and gave it sixty days to do so. <i>United States ex rel. Schwartz v. TRW, Inc.</i> , 211 F.R.D. 388, 393-94 (C.D. Cal. 2002).
5	In re Grand Jury Subpoena, Aug. 9, 2000 (M-1189)	The United States Government did not assert the state secrets privilege in this case. In this case, an unnamed foreign country tried to invoke the state secrets privilege in response to a grand jury subpoena that was served on a company that does business with the country, and the court concluded that the foreign country had failed to show that the information at issue is properly protected by the privilege. <i>In Re Grand Jury Subpoena dated August 9, 2000</i> , 218 F. Supp. 2d 544, 559-560 (S.D.N.Y. 2002).
6	Yang v. Reno (CV-93-1702)	The district court held that the Government had failed to satisfy threshold requirements for an assertion of the state secrets privilege, and provided the Government additional time to re-assert the state secrets privilege. <i>Yang v. Reno</i> , 157 F.R.D. 625, 635 (M.D. Pa. 1994). In this case, the privilege assertion was raised by the staff secretary for the National Security Council, not an agency head; the court found that the staff secretary had not reviewed the particular materials subject to the privilege and that the invocation lacked particularity regarding the material at issue and reasons for its protection. <i>Id.</i> at 634.

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7	Norwood Actions (Norwood v. Raytheon Co.) (EP-04-CA-127-PRM)	This case was a products liability action between private parties. <i>Norwood v. Raytheon, Co.</i> , 237 F.R.D. 581 (W.D. Tex. 2006). An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert privilege, as the chart correctly notes, and the privilege was not “denied,” as the chart incorrectly indicates.
8	Stillman v. Department of Defense (01-1342(EGS))	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs’ Exhibit D correctly states, and the privilege was not “denied,” as the exhibit incorrectly indicates. Moreover, this district court decision was reversed on appeal. <i>See Stillman v. C.I.A.</i> , 319 F.3d 546 (D.C. Cir. 2003). This case concerned a challenge to “prepublication” review requirements imposed by the Government on an individual who had access to classified information before he was permitted to publish a book. Specifically at issue was plaintiff’s motion to compel access by his counsel to classified information. The district court’s decision to grant such access in this context was reversed. <i>See id.</i> The ultimate resolution of the case on remand did not involve the state secrets privilege. <i>See Stillman v. C.I.A.</i> , 517 F. Supp. 2d 32 (D. D.C. 2007) (rejecting First Amendment challenge to prepublication review requirements and finding the Government had properly applied those requirements to classified information at issue).
9	Doe v. Tenet (01-35419)	This Ninth Circuit decision was reversed by the Supreme Court, <i>Tenet v. Doe</i> , 544 U.S. 1 (2005), which held that this challenge brought by foreign nationals claiming that the CIA reneged on financial obligations must be dismissed under the doctrine of <i>Totten v. United States</i> , 92 U.S. 105 (1876). Thus, dismissal on national security grounds was ultimately upheld, not “denied” as plaintiffs’ Exhibit D indicates.
10	Richmark Corp. v. Timber Falling Consultants (91-35966, 91-36059)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs’ Exhibit D correctly states, and the privilege was not “denied,” as the exhibit incorrectly indicates. This case concerned the interaction between the discovery rules in federal court and the “State Secrecy Laws” of the People’s Republic of China (the “PRC”). <i>Richmark Corp. v. Timber Falling Consultants</i> , 959 F.2d 1468, 1471 (9th Cir. 1992) (affirming the district court’s discovery and contempt orders against a Chinese corporation, “conclud[ing] in the circumstances of this case that the PRC’s laws limiting disclosure cannot excuse [the corporation’s] failure to comply with the district court’s orders”). There is no apparent connection with state secrets privilege law in the United States.
11	U.S. v. Schneiderman (22131)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs’ Exhibit D correctly states, and the privilege was not “denied,” as the exhibit incorrectly indicates. This is a 1952 criminal case (predating <i>Reynolds</i>) in which the district court held that the Government had waived its right to protect the identity of confidential informants by questioning its own witness at trial regarding the identities of individuals present at certain meetings. <i>United States v. Schneiderman</i> , 106 F. Supp. 731, 737 (S.D. Cal. 1952). The court further noted that the Government wished to proceed with the prosecution and did not seek to withdraw the witness testimony at issue: “the Government in effect concedes that no ‘secrets of State’ or other confidential information of importance is here involved.” <i>Id.</i> at 738.

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12	U.S. v. Coplon (86)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs' Exhibit D correctly states, and the privilege was not "denied," as the exhibit incorrectly indicates. This is a 1950 criminal case (again predating <i>Reynolds</i>) in which the Second Circuit held that the Government cannot rely in a criminal case on evidence it withholds as a state secret: "[T]he prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such 'state secrets' as might be relevant to the defen[s]e." <i>United States v. Coplon</i> , 185 F.2d 629, 638 (2d Cir. 1951). The Supreme Court in <i>Reynolds</i> reached the same conclusion, see <i>United States v. Reynolds</i> , 345 U.S. 1, 12 (1953). This holding has no bearing on civil litigation where the state secrets privilege is asserted. <i>See id.</i>
13	Hester, et al. v. Vision Airlines (2:09-cv-00117)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs' Exhibit D correctly states, and the privilege was not "denied," as the exhibit incorrectly indicates. In this suit between private parties, the state secrets privilege is simply not at issue. <i>See Hester v. Vision</i> , 2010 WL 4553449 (D. Nev. 2010).
14	Kinoy v. Mitchell (70 Civ. 5698)	In this suit regarding electronic surveillance of telephone conversations, the court declined to recognize the state secrets privilege until the Government provided a declaration that clearly established that the Attorney General was asserting the privilege based on personal consideration. <i>Kinoy v. Mitchell</i> , 67 F.R.D. 1, 9-10 (S.D.N.Y. 1975). The court also declined to accept a separate (non-state secrets) privilege assertion to protect information concerning a domestic security investigation absent a further showing by the Government. <i>See id.</i> at 10-14.
15	Elson v. Bowen (Dist Court) (5438)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, and the privilege was not "denied," as Exhibit D incorrectly indicates. This case is a decision by the Nevada Supreme Court, upholding a state court order that FBI agents testify in a case involving alleged illegal electronic surveillance at hotels, where the trial judge determined that the information to be solicited did not involve government security or privileged information. <i>Elson v. Bowen</i> , 436 P.2d 12, 16-17 (Nev. 1967). The U.S. Attorney General had instructed agents not to answer selected questions based on executive privilege, but there is no indication that state secrets privilege was formally invoked or decided.
16	Al-Quraishi v. Nakhla (PJM 08-1696)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs' Exhibit D correctly states, and the privilege was not "denied," as the exhibit incorrectly indicates. This case involved tort and other claims brought by previously detained Iraqi citizens against a military contractor. <i>See Al-Quraishi v. Nakhla</i> , 728 F. Supp. 2d 702 (D. Md. 2010). In pertinent part, the district court held that it was premature to dismiss the case on political question grounds based on the chance that discovery may "bump up" against issues of confidentiality. The court noted that the state secrets doctrine, which allows for dismissal of suits which would expose classified information, must be asserted by the United States. <i>See id.</i> at 733.

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17	Halpern v. United States (24701)	<i>Halpern v. United States</i> , 253 F.2d 36 (2d Cir. 1958), is discussed at length in the Government’s memorandum of law. In sum, the court’s holding that the Inventions Secrecy Act waived the state secrets privilege has been substantially eroded by subsequent case law. In <i>Clift v. United States</i> , another case involving the same Act and the state secrets privilege, the Second Circuit expressly declined to follow <i>Halpern</i> where the state secrets privilege was asserted as to information not known to the inventor party. 597 F.2d 826, 829 (2d Cir. 1979). And, on remand in <i>Clift</i> , the district court upheld the state secrets assertion and dismissed the case on that basis. See <i>Clift v. United States</i> , 808 F. Supp. 101, 109-11 (D. Conn. 1991).
18	Nolan Law Group v. Boeing Co. (09-8056)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs’ Exhibit D correctly states, and the privilege was not “denied,” as the exhibit incorrectly indicates. This case was a lien action between private parties in state court that arose out of the crash of a helicopter manufactured by Boeing. Boeing removed the case to federal court and, in connection with litigating a motion to remand the case back to state court, argued that the state secrets privilege would be an applicable federal defense. The court held, <i>inter alia</i> , that this privilege was not Boeing’s to raise, and remanded the case. There is no indication the Government appeared in the matter or asserted the state secrets privilege. <i>Nolan Law Group v. Boeing Co.</i> , 2010 WL 1253970 (N.D. Ill. 2010).
19	Zimmerman v. Poindexter (730)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs’ Exhibit D correctly states, and the privilege was not “denied,” as the exhibit incorrectly indicates. The district court in this case (which predated <i>Reynolds</i>) ordered the Army to produce certain FBI files in its possession that had been withheld on the basis of a blanket assertion of privilege against disclosure. <i>Zimmerman v. Poindexter</i> , 74 F. Supp. 933, 935-36 (D. Haw. 1947). There is no indication that the court ordered or permitted the disclosure of national security information.
20	O’Keefe v. Boeing Corporation	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs’ Exhibit D incorrectly states, and the privilege was not “denied,” again as incorrectly indicated. This case was a wrongful death action between private parties arising out of the crash of an Air Force B-52 aircraft. The decision at issue involved a discovery demand for various Air Force accident reports concerning the crash. Notably, however, the case makes clear that the privilege asserted by the Air Force to protect the documents “is not that relating to diplomatic secrets of state, nor that relating to ‘military secrets’ such as was considered in <i>United States v. Reynolds</i> , 345 U.S. 1, 6 (1953).” <i>O’Keefe v. Boeing Co.</i> , 338 F.R.D. 85 (S.D.N.Y. 1965).
21	Nixon v. Sirica (73-1962, 73-1967, 73-1989)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs’ Exhibit D correctly states, and the privilege was not “denied,” as the exhibit incorrectly indicates. This action was brought by a special prosecutor against President Nixon for failing to produce certain tape recordings in response to a grand jury subpoena. <i>Nixon v. Sirica</i> , 487 F.2d 700 (D.C. Cir. 1973). The court cites <i>Reynolds</i> for the proposition that the court itself must determine whether the circumstances are appropriate for the claim of privilege. <i>Id.</i> at 714. But no state secrets assertion was at issue or denied.

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22	Roviaro v. U.S. (No. 58)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs' Exhibit D correctly states, and the privilege was not "denied," as the exhibit incorrectly indicates. This case was a direct appeal in a criminal case in which the Supreme Court held that the district court had committed reversible error by permitting the Government to withhold the identity of an undercover employee who was a material witness to the charged crime but who was not called by the Government to testify at trial. The privilege at issue is the so-called "informer's privilege," not the state secrets privilege. <i>Roviaro v. United States</i> , 353 U.S. 53, 59 (1957).
23	In re Subpoena Served Upon Eugene M. ZUCKERT (Misc. No. 7-61)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs' Exhibit D correctly states, and the privilege was not "denied," as the exhibit incorrectly indicates. This action concerned a motion of the Secretary of the Air Force to quash a subpoena in an action arising out of injuries sustained by plaintiff when a B-25 on which he was serving as navigator crashed. <i>In re Subpoena Served Upon Eugene M. Zuckert, Secretary of the Air Force</i> , 28 F.R.D. 29 (D.D.C. 1961). The district court denied the motion to quash, noting that the Secretary had not even read the subject report and that in the "present posture of the instant matter no claim of privilege has been asserted or is being decided." <i>Id.</i> at 33. The court also noted that an interrogatory response indicated that "as to whether any military or state secrets are involved in the Report the Secretary's predecessor replied that 'no classified material is contained in the Report'". <i>Id.</i> ("This answer suggests, therefore, that there is not involved the matter of a privilege against revealing military secrets—a privilege which is well established in the law of evidence.").
24	Cambell v. Eastland (No. 19057)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, and the privilege was not "denied," as Exhibit D incorrectly indicates. The case concerned a discovery dispute in an action against the IRS to refund taxes. <i>See Campbell v. Eastland</i> , 307 F.2d 478 (5th Cir. 1962). It appears that the IRS opposed production of certain investigative reports of special agents, which "probably" included information protected by the "informer's privilege." The court observed that if any such material were in the reports at issue it should have been protected by the court's discovery order. The court also observed that executive privilege was "narrowly confined to matters affecting the national security, such as military and state secrets," and that there was no basis for such a claim in that case. <i>See id.</i> at 486.
25	Bernstein v. U.S. (5704, 5705.)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs' Exhibit D correctly states, and the privilege was not "denied," as the exhibit incorrectly indicates. This case was an action brought by the Government for fraud under the Surplus Property Act of 1944. <i>See Bernstein v. United States</i> , 256 F.2d 697 (10th Cir. 1958). The decision appears to focus on remedy issues. Addressing an issue of discovery of a particular report, the court stated: "Certainly if the report was relevant and not privileged, <i>see United States v. Reynolds</i> , [345 U.S. 1 (1953)] . . . it was a proper subject for production . . ." <i>See</i> 526 F.2d at 703.

#	Case Citation	Actual Disposition of Case
26	In re UNITED STATES of America (87-5383)	This case did involve an assertion of the state secrets privilege by the United States, but it is incorrect to say that assertion was finally denied by the courts. <i>See In re United States</i> , 872 F.2d 472 (D.C. Cir. 1989). The case involved a tort claim against the United States related to alleged injuries caused by an FBI investigation. The Government sought dismissal at the pleading stage based on the state secrets privilege. The district court “did not reject the Government’s assertion of privilege” but did deny the motion to dismiss on that basis. <i>See id.</i> at 477. In denying mandamus, the Court of Appeals noted that the information at issue was highly dated (concerning Government’s activities of 20 to 30 years ago) and that mandamus was unnecessary because an item-by-item determination of states secrets privilege by district court would accommodate the Government’s concerns. <i>See id.</i> at 478-80. The court also observed that “the state secrets question in this case largely turns on the facts of the case.” <i>Id.</i> at 479.
27	In re Extradition of Smyth (CR 92-152)	This case did not involve an assertion of the state secrets privilege by the United States Government, as Exhibit D suggests, but by the government of the United Kingdom. <i>See Matter of Extradition of Smyth</i> , 826 F. Supp. 316, 322 (N.D. Cal. 1993). The case involved a discovery dispute arising out of a UK request to extradite an Irish national to serve the remainder of his sentence. The district court found that the U.K. had met its burden in establishing the state secrets privilege with respect to certain UK reports, <i>see id.</i> at 322, but had not made a sufficient showing of privilege as to other documents. The decision was ultimately reversed on other grounds. <i>Matter of Requested Extradition of Smyth</i> , 61 F.3d 711 (9th Cir. 1995).
28	Virtual Defense and Development International v. Republic of Moldova (98-161)	In a lawsuit between private parties concerning a breach of contract related to the sale of Soviet-designed MIG aircraft to the United States, the plaintiff issued a subpoena to the State Department for the production of a classified cable. <i>Virtual Def. & Dev. Int’l v. Republic of Moldova</i> , 133 F. Supp. 2d 9 (D.D.C. 2001). After an <i>in camera</i> review of the classified cable over which the United States had asserted the state secrets privilege, the district court requested declassification of two sentences. The State Department agreed to declassify the two sentences, and the newly declassified sentences were disclosed. <i>Id.</i> at 24.
29	Jade Trading LLC v. U.S. (03-2164T)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs’ Exhibit D notes, and the privilege was not “denied,” as the exhibit incorrectly indicates. In this action brought by taxpayers against the IRS, the district court determined that the IRS had failed to properly assert the deliberative process privilege because the privilege was not invoked by the head of the agency. <i>Jade Trading LLC v. United States</i> , 65 Fed. Cl. 487, 497 (Fed. Cl. 2005).
30	Abdel-Hafiz v. Fox Entertainment Group (096 204518 04)	This matter arose in Texas state court. Exhibit D states that United States was not a party and did not assert the state secrets privilege. Documentation of the matter is inadequate. The Georgetown University Law Center database describes the case as follows: “Muslim FBI agent brought defamation action against television network and host of television news show concerning broadcast of statements about agent’s alleged refusal to wear a recording device in terrorist investigations of other Muslims. Defendants argued in their motion for summary judgment that the case could not proceed because the Justice Department refused to respond to critical discovery requests by “invoking various ‘privileges’ including the state secrets doctrine.” Without explicitly referencing this argument, the Court denied Defendants’ motion for summary judgment. The order was reversed on appeal again without reference to the state secrets argument.”

#	Case Citation	Actual Disposition of Case
31	Eastman Kodak v. Speasl (05-039164)	Exhibit D indicates that the Government did not assert the state secrets privilege in this case, and documentation of the matter is inadequate. The sparse information in the GULC database indicates that the matter was a dispute that arose in California state court involving Mirage Systems Inc., a defense contractor during the late 1980s and early 1990s. A purported pleading in the database indicates that Mirage sought to protect classified information in a discovery dispute in October 2007. The database also includes a purported decision by the court on discovery disputes dated April 2007 – five months before the Mirage filing – and that decision does not appear to reference or concern the state secrets privilege or classified information.
32	McMahon v. Presidential Airways, Inc. (6:05-cv-1002-Orl-28JGG)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs' Exhibit D correctly states, and the privilege was not "denied," as the exhibit incorrectly indicates. This case was a suit between private parties concerning the crash of an aircraft carrying U.S. soldiers in Afghanistan operated by a civilian contractor. <i>McMahon v. Presidential Airways, Inc.</i> , 460 F. Supp. 2d 1315 (M.D. Fla. 2006). No issue in the case concerns an assertion of the state secrets privilege.
33	Porter v. Ray (05-13923)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs' Exhibit D correctly states, and the privilege was not "denied," as the exhibit incorrectly indicates. This case was a lawsuit between current and former prisoners and the Georgia Board of Pardons and Paroles. <i>Porter v. Ray</i> , 461 F.3d 1315 (11th Cir. 2006). The case addressed a discovery dispute concerning confidential parole files. <i>Id.</i> at 1324. The Federal Government played no role in the case, and no state secrets issue exists in this litigation.
34	Amason v. KBR, Inc. (4:2005-cv-03029)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs' Exhibit D correctly states, and the privilege was not "denied," as the exhibit incorrectly indicates. Documentation of the matter is inadequate. Sparse information in the GULC database indicates this matter was a lawsuit between private parties (including a defense contractor) arising out of a motor vehicle accident in the Green Zone of Baghdad where U.S. officials lived and worked during the Iraq war. In litigating a motion to remand the case to state court, the plaintiff's purported filing makes passing reference to an argument by defendants that "state secrets" presented a ground for maintaining the action in federal court. The database contains no other indication that the state secrets privilege was at issue, let alone litigated and "denied" in this case.
35	Hepting v. AT&T Corp. (C-06-672)	<i>Hepting v. AT&T Corp.</i> , 439 F. Supp. 2d 974 (N.D. Cal. 2006), is an interlocutory decision that did not finally resolve the state secrets privilege issues in that litigation. Plaintiffs brought claims against AT&T alleging it had assisted the Government in intelligence activities. The district court denied the Government's motion to dismiss claims against AT&T on state secrets grounds, finding that it was premature to conclude that the privilege would bar evidence necessary for plaintiffs' <i>prima facie</i> case or for AT&T's defense. Based on certain public disclosures by the Government and AT&T, the court determined that it could not conclude there was a reasonable danger of harm to national security in maintaining the suit. <i>See id.</i> at 994. The case was certified for interlocutory appeal, and later dismissed without reaching a final decision on the impact of the state secrets privilege, when Congress interceded and barred a cause of action against telecommunications companies alleged to have assisted the U.S. intelligence community. <i>See In re Nat'l Sec. Agency Telecomms.</i> , 671 F.3d 881 (9th Cir. 2011).

#	Case Citation	Actual Disposition of Case
36	Al-Haramain Islamic Foundation, Inc., et al. v. Bush, et al. (3:07-cv-00109)	In <i>Al-Haramain Islamic Found., Inc. v. Bush</i> , 507 F.3d 1190 (9th Cir. 2007), the Court of Appeals for the Ninth Circuit upheld the Government's assertion of the state secrets privilege as to whether plaintiffs had been subject to alleged surveillance, including as to a classified document that had been inadvertently disclosed to plaintiffs. <i>See id.</i> at 1202-05. The court also held that the case must be dismissed because plaintiffs could not establish standing as a result of the privilege assertion, unless the privilege was "preempted" by 50 U.S.C. § 1806(f), and remanded that latter question. <i>See id.</i> at 1205-06. The district court's subsequent entry of judgment for plaintiffs in this case was also later reversed by the Ninth Circuit. <i>See Al-Haramain Islamic Found. v. Obama</i> , 690 F.3d 1089 (9th Cir. 2012). Accordingly, the state secrets privilege was not "denied" in whole or part in this case or found to be preempted by statute.
37	Vance v. Rumsfeld (10-1687, 10-2442)	A panel of the Seventh Circuit affirmed the district court's denial of a motion to dismiss plaintiffs' <i>Bivens</i> claims, and noted that classified information might become an issue later in the litigation. <i>Vance v. Rumsfeld</i> , 653 F.3d 591, 618 (7th Cir. 2011). The panel's decision regarding the availability of a <i>Bivens</i> claim was reversed by the Seventh Circuit sitting <i>en banc</i> . 701 F.3d 193 (7th Cir. 2012) (<i>en banc</i>). Thus, the Government did not assert the state secrets privilege in this case.

DATABASE LABEL: "SSP Disposition: Upheld in Part, Denied in Part"

#	Case Citation	Actual Disposition of the Case
1	Jabara v. Kelly (39065)	In this action against the Government for damages arising out of alleged unlawful wiretaps, the district court upheld state secrets assertions by both the Attorney General and the Secretary of Defense. <i>See Jabara v. Kelly</i> , 75 F.R.D. 475 (E.D. Mich. 1977)
2	<i>Ellsberg v. Mitchell</i> (82-1085)	<i>Ellsberg v. Mitchell</i> , 709 F.2d 51 (D.C. Cir. 1983), is addressed at length in the Government's memorandum of law. In sum, the Court of Appeals for the District of Columbia Circuit upheld an assertion of the state secrets privilege with respect to all information regarding alleged surveillance, except the identities of the Attorneys General who authorized the alleged surveillance. <i>Id.</i> at 59-60. The court rejected demands for strict procedural requirements in ruling on the privilege. <i>See id.</i> at 60-63. The court upheld dismissal of all claims with regard to the plaintiffs who had not been the subject of acknowledged surveillance, and remanded as to the plaintiffs who had been the subject of acknowledged surveillance. <i>Id.</i> at 65
3	Rahman v. Chertoff (05 C 3761)	This case involved a challenged on Fourth Amendment and other grounds to stops and searches of plaintiffs at U.S. borders. An assertion of the state secrets privilege during discovery over certain investigative information was granted and denied in part by a Magistrate Judge. <i>Rahman v. Chertoff</i> , 2008 WL 4534407 (N.D. Ill. Apr. 2008). That ruling was stayed pending further review by the district court, <i>id.</i> at *11, and overtaken by subsequent proceedings in the case. The Court of Appeals for the Seventh Circuit reversed the district court's certification of a class. <i>Rahman v. Chertoff</i> , 530 F.3d 622 (7th Cir. 2008). On remand, the district court dismissed plaintiffs' core claims in the case. <i>Rahman v. Chertoff</i> , 2010 WL 1335434 (N.D. Ill. 2010). The outcome of the case thus did not reach final resolution of the state secrets privilege issues.

#	Case Citation	Actual Disposition of the Case
4	Int'l Action Center v. United States (01-72 (GK))	Exhibit D indicates that the Government asserted the state secrets privilege in this case, which was purportedly upheld and denied in part. Documentation of the matter is inadequate. A published decision indicates that this action was brought by political groups alleging their First Amendment rights were violated during a presidential inauguration. <i>Int'l Action Center v. United States</i> , 207 F.R.D. 1 (D.D.C. 2002). The published decision concerned plaintiffs' motion for a protective order to deny the Government access to certain information and does not concern the state secrets privilege. An unpublished decision on the GULC database dated August 2002 addresses plaintiffs' motion to compel discovery from the federal defendants. The court ruled that the Government had not formally asserted any applicable privilege, including the state secrets privilege, and referred the matter to a magistrate judge. An assertion of the state secrets privilege was not ruled upon by the court in that decision.
5	The Wright and the Papoose (13146)	This 1932 decision (predating <i>Reynolds</i>) did not involve an adjudication of the state secrets privilege. The case appears to concern a libel action arising out of the collision of a Naval vessel and private ship, and a demand for discovery of information from a United States Naval Court of Inquiry. <i>The Wright</i> , 2 F. Supp. 43, 45 (S.D.N.Y. 1932). The district court granted a motion for disclosure regarding confirmation of whether certain individuals testified before a Naval Court of Inquiry and production of portions of certain reports that concerned the collision made in the regular course of duty or employment by the crew of the Naval ship. The court noted that there was nothing to indicate that the ordered disclosures would require "publication [of] any information held in secrecy or in any other way be an injury to the government." <i>Id.</i> at 44.
6	Monarch Assurance P.L.C. v. U.S. (99-5052)	In this breach of contract action, plaintiffs alleged that the United States failed to compensate them for actions to support a CIA clandestine operation, and the central issue was whether such payments had been properly authorized by an agent of the Government. <i>Monarch Assur. P.L.C. v. United States</i> , 244 F.3d 1356, 1365 (Fed. Cir. 2001). The district court denied discovery of government witnesses based on the CIA's assertion of the state secrets privilege and dismissed the case. The Court of Appeals for the Federal Circuit affirmed the denial of discovery as to government witnesses on state secrets grounds, but reversed on dismissal and remanded the case to give plaintiffs a limited opportunity for discovery of non-government witnesses in an effort to prove their claim.
7	United States v. Haugen (C-3950)	This matter was a criminal case (predating <i>Reynolds</i>) that does not concern an assertion of the state secrets privilege. The Government indicted the defendant for fraud in connection with alleged counterfeiting of meal tickets for workmen employed at a defense project in Hanford, Washington. <i>United States v. Haugen</i> , 58 F. Supp. 436 (D.D.C. 1944). Because the purpose of the defense project was a military secret, the Government refused to produce a copy of the contract governing how the commissary furnished meals and, instead, offered oral testimony about the contract. <i>See id.</i> at 440. The district court dismissed the indictment the ground that oral testimony about the commissary contract was insufficient and the Government did not otherwise prove elements of the alleged fraud. <i>Id.</i>
8	U.S. v. Smith (82-5240)	This was case a criminal matter that does not concern an assertion of the state secrets privilege but the application of CIPA procedures. <i>United States v. Smith</i> , 780 F.2d 1102 (4th Cir. 1985). The defendant in this espionage matter sought disclosure of classified information as part of his defense. The district court held that the information was relevant and admissible, and the Government appealed. After a panel of the Court of Appeals for the Fourth Circuit affirmed, the matter was reviewed <i>en banc</i> and the Court of Appeals held that prior to the admission of classified information, the district court must engage in a balancing test weighing the Government's interest in nondisclosure against defendant's need.

#	Case Citation	Actual Disposition of the Case
9	Spock v. U.S. (76 Civ. 4457 (VLB))	<i>Spock v. United States</i> , 464 F. Supp. 510 (S.D.N.Y. 1978), involved allegations of unlawful interception of the plaintiff's communications. The district court held that the state secrets privilege had been sufficiently established, but denied a motion to dismiss the case where the only disclosure at issue was the bare admission or denial of a single allegation -- whether the plaintiff's own communications were intercepted. <i>Id.</i> at 518-20. The court reasoned that disclosure of this fact would reveal no important secrets because it had previously been disclosed in a newspaper. <i>Id.</i> at 519. The reasoning of <i>Spock</i> has not been followed in more recent cases. <i>See Al-Haramain Islamic Found., Inc. v. Bush</i> , 507 F.3d 1190 (9th Cir. 2007) (upholding state secrets privilege as to whether plaintiffs had been subject to alleged surveillance despite inadvertent disclosure of a classified document); <i>Terkel v. AT&T Corp.</i> , 441 F. Supp. 2d 899, 914 (N.D. Ill. 2006) ("[I]t would undermine the important public policy objectives underlying the state secrets privilege if the government's hand could be forced by unconfirmed allegations in the press or by anonymous leakers whose disclosures have not been confirmed.").
10	Al-Haramain Islamic Foundation v. Bush (06-36083)	The district court decision cited in Exhibit D, which addressed the state secrets privilege, was reversed on appeal. The district court's decision contemplated sharing a classified document subject to a privilege assertion with plaintiffs' counsel on the ground that it had been inadvertently disclosed previously. The Court of Appeals for the Ninth Circuit reversed, and held that the state secrets privilege assertion required dismissal of the case, unless the privilege was "preempted" by 50 U.S.C. § 1806(f), and remanded that question. <i>See id.</i> at 1202-06. The district court's subsequent entry of judgment for plaintiffs in this case was also later reversed by the Ninth Circuit. <i>See Al-Haramain Islamic Found. v. Obama</i> , 690 F.3d 1089 (9th Cir. 2012). Accordingly, the state secrets privilege was not "denied" in whole or part in this case or found to be preempted by statute.
11	Hudson River Sloop Clearwater, Inc. v. Department of the Navy (CV-86-3292)	This lawsuit concerned whether the Navy had properly conducted an environmental impact review under the National Environmental Policy Act ("NEPA") concerning an alleged proposal to deploy nuclear weapons on ships based in New York Harbor. <i>See Hudson River Sloop Clearwater, Inc. v. Dep't of Navy</i> , 659 F. Supp. 674, 687 (E.D.N.Y.1987); <i>Hudson River Sloop Clearwater, Inc. v. Department of Navy</i> , 991 F.2d 414 (2d Cir. 1989). Pursuant to the <i>Totten</i> doctrine, the district court dismissed a claim that the Navy violated NEPA by failing to consider classified aspects of its proposal in its internal deliberations on the environmental issues. <i>See</i> 991 F.2d at 417. The Court of Appeals for the Second Circuit affirmed on alternative statutory grounds, and rejected plaintiffs' demand for access to classified information in order to set forth a <i>prima facie</i> case. <i>See id.</i> at 423.
12	Committee for Nuclear Responsibility Inc. v. Seaborg (71-1854)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs' Exhibit D correctly states, and the privilege was not "upheld in part, denied in part," as the chart incorrectly indicates. The case concerned a discovery dispute over documents related to nuclear testing, over which the Government claimed privilege. The court ordered the Government to submit the contested documents for <i>in camera</i> inspection, after excising all materials reflecting military and diplomatic secrets as distinguished from possible environmental hazards of the nuclear test. <i>See Comm. for Nuclear Responsibility Inc. v. Seaborg</i> , 463 F.2d 790, 792 (D.C. Cir. 1971) (noting the government's interest in confidentiality is plain where documents make reference to secret material, but plaintiffs did not seek that material and the government was not required to produce secret material).

#	Case Citation	Actual Disposition of the Case
13	Boeing Airplane Company v. Coggeshall (14958, 15311, 15312)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs' Exhibit D correctly states, and the privilege was not "upheld in part, denied in part," as the chart incorrectly indicates. This case was a subpoena matter in which the court enforced the production of documents "where no military or state secrets were involved." <i>See Boeing Airplane Co. v. Coggeshall</i> , 280 F.2d 654, 660-70 (D.C. Cir. 1960) ("Investigatory or factual reports not containing military or state secrets – and the Government does not suggest that any such secrets are here involved – have not, ordinarily, without more, supported claims of privilege."). The court's observation that alleged privileged documents may be reviewed <i>in camera</i> , <i>id.</i> at 662, therefore did not arise in a state secrets case.
14	Gravel v. U.S. (Nos. 71-1017, 71-1026)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs' Exhibit D incorrectly states, and the privilege was not "upheld in part, denied in part," as the chart incorrectly indicates. The referenced case is a Supreme Court decision concerning whether staff of a United States Senator could be compelled to testify before a grand jury concerning the disclosure of the Pentagon Papers under the Speech or Debate Clause. <i>See Gravel v. United States</i> , 408 U.S. 606 (1972).
15	Civil Aeronautics Board v. United Airlines (No. 75 C 1216)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs' Exhibit D incorrectly states, and the privilege was not "upheld in part, denied in part," as the chart incorrectly indicates. The case concerns a demand for documents by the Civil Aeronautics Board from United Airlines. <i>See Civil Aeronautics Board v. United Airlines</i> , 299 F. Supp. 1324 (N.D. Ill. 1975). United opposed the demand, in part noting that the statutory authority did not permit the CAB to obtain any documents related to national security. <i>See id.</i> at 1326. But the court noted that no mention is made of the national security issue in the briefs, and that any such privilege assertion would have to be raised by the Government. <i>See id.</i> at 1326 n. 8.
16	HOLY SPIRIT ASSOCIATIO N FOR THE UNIFICATIO N OF WORLD CHRISTIANIT Y v. CENTRAL INTELLIGEN CE AGENCY (79-2143, 79- 2202)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as plaintiffs' Exhibit D correctly states, and the privilege was not "upheld in part; denied in part," as the exhibit incorrectly indicates. First, the Government never invoked the state secrets privilege because this was a Freedom of Information Act ("FOIA") case, <i>see Holy Spirit Ass'n of the Unification of World Christianity v. CIA</i> , 636 F.2d 883 (D.C. Cir. 1981), and FOIA provides statutory procedures that allow courts to address the Government's protection of classified material <i>ex parte</i> and <i>in camera</i> . Second, the decision from the D.C. Circuit, which upheld a district court decision ordering the CIA to disclose certain documents that were requested under the FOIA, was vacated by the Supreme Court insofar as it affirms the decision of the district court requiring the disclosure of the six documents in question and remanded with directions that this aspect of the case be dismissed as moot. <i>CIA v. Holy Spirit Ass'n of the Unification of World Christianity</i> , 455 U.S. 997 (1982).

#	Case Citation	Actual Disposition of the Case
17	UNITED STATES v. FELT (Crim. No. 78-00179)	This case was a criminal prosecution in which defendants sought production of FBI documents obtained from foreign intelligence sources in order to establish a defense. The case preceded the enactment of CIPA in 1980, <i>see</i> Pub. L. 96-456, § 1, Oct. 15, 1980, 94 Stat. 2025, and the Government utilized a state secrets privilege assertion in order to protect the documents at issue on national security grounds. <i>See United States v. Felt</i> , 491 F. Supp. 179, 183-84 (D.D.C. 1979). The district court held that <i>in camera, ex parte</i> review was appropriate, and that the defendants' interest in two documents was sufficient to require production with redactions under a protective order, but that dismissal of the indictment was not warranted. <i>See id.</i> at 184-87.
18	Peck v. U.S. (76 Civ. 983)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, and the privilege was not "upheld in part; denied in part," as Exhibit D incorrectly indicates. This lawsuit was a damages action against Government officials allegedly resulting from an assault during a civil rights march. <i>Peck v. United States</i> , 514 F. Supp. 210 (S.D.N.Y. 1981). At issue was plaintiffs' demand for a Department of Justice report. The court examined whether the Government had properly invoked the official information privilege, not the state secrets privilege. <i>Id.</i> at 212.
19	Dunaway v. Webster (C-77-0907)	This is a FOIA case involving national security information. <i>See Dunaway v. Webster</i> , 519 F. Supp. 1059 (N.D. Cal. 1981) No state secrets privilege issue is presented in this case.
20	Attorney General of the U.S. v. the Irish People Inc. (76-1518)	The district court decision cited on Exhibit D was reversed by the Court of Appeals for the D.C. Circuit. <i>See Attorney General of the United States v. The Irish People</i> , 684 F.2d 928 (D.C. Cir. 1982). The D.C. Circuit reversed the district court's dismissal of a selective prosecution action brought by the Government in which the Government asserted the state secrets privilege to protect certain information. <i>See id.</i> at 949-53 (addressing circumstances in which affirmative civil action brought by Government may proceed where state secrets privilege has been asserted).
21	Kinoy v. Mitchell (No. 70 Civ. 5698.)	In this suit regarding electronic surveillance of telephone conversations, the Court declined to recognize the state secrets privilege until the Government provided a declaration that clearly established that the Attorney General was asserting the privilege based on personal consideration. <i>Kinoy v. Mitchell</i> , 67 F.R.D. 1, 10 (S.D.N.Y. 1975).
22	Horn v. Huddle (94-1756-RCL)	As noted in the Government's brief, this decision has been vacated. <i>Horn v. Huddle</i> , 699 F. Supp. 2d 236, 238 (D.D.C. 2010).
23	Northrop Grunman Corp. v. U.S. (96-760C)	In this action brought by an Air Force contractor against the United States for breach of contract, the court held that the plaintiff could not use classified information or unredacted classified documents to depose a former Air Force official. <i>Northrop Grumman Corp. v. United States</i> , 75 Fed. Cl. 761, 768 (Fed. Cl. 2007). It does not appear that the Government asserted the state secrets privilege in the discovery matter at issue.

#	Case Citation	Actual Disposition of the Case
24	D.T.M. Research L.L.C. v. AT&T Corp. (00-1450)	In this dispute between private companies over the alleged misappropriation of trade secrets, the district court upheld an assertion of the state secrets privilege by the Government (as an intervenor) over certain technical information. The Government does not appear to have sought dismissal based on the privilege, but defendant AT&T claimed it could not defend absent the privileged information. On interlocutory appeal, the court held that it appeared the case could proceed to a fair trial because it appeared the evidence protected from discovery was not central to the question of whether AT&T was liable for misappropriating trade secrets. <i>DTM Research L.L.C. v. AT&T Corp.</i> , 245 F.3d 327, 333-34 (4th Cir. 2001).
25	In re Sealed Case (Horn v. Huddle) (04-5313)	In this case, the D.C. Circuit upheld the district court's determination that the Government had properly invoked the state secrets privilege and the privileged material should be excluded from the case. The Court reversed the district court's decision that the privilege required dismissal of the case. <i>In re Sealed Case</i> , 494 F.3d 139 (D.C. Cir. 2007). This case is discussed in more detail in the Government's brief.
26	American Civil Liberties Union v. National Security Agency (06-CV-10204)	In this decision, the district Court upheld the Government's assertion of the state secrets privilege, <i>see ACLU v. Nat'l Sec. Agency</i> , 438 F. Supp. 2d 754, 764 (E.D. Mi. 2006), but declined to dismiss the case on state secrets grounds finding plaintiffs had adduced sufficient public evidence to obtain judgment on the merits, <i>see id.</i> at 765. The district court's decision entering judgment for plaintiffs was reversed on appeal. <i>See ACLU v. Nat'l Sec. Agency</i> , 493 F.3d 644 (6th Cir. 2007).
27	In re National Security Agency Telecommunications Records Litigation (MDL Litigation) (06-1791-VRW)	This entry in the database refers primarily to <i>In re National Security Agency Telecommunications Records Litigation</i> , 700 F. Supp. 2d 1182 (N.D. Cal. 2010), which sets forth the district court's judgment of liability in <i>Al-Haramain Islamic Foundation v. Obama</i> , <i>see no. 28 infra</i> , which was subsequently reversed by the Ninth Circuit. <i>See Al-Haramain Islamic Found. v. Obama</i> , 690 F.3d 1089 (9th Cir. 2012). Thus, this litigation did not result in the denial of the Government's state secrets privilege assertion or a finding that the privilege was preempted by statute. The database refers to other civil actions in the MDL proceeding, including actions against the Government that were dismissed on standing grounds or are still pending in the N.D. Cal.

#	Case Citation	Actual Disposition of the Case
28	Al-Haramain Islamic Foundation v. Bush (06-0274)	The district court decision cited in plaintiffs' Exhibit D, which addressed the state secrets privilege, was reversed on appeal. The district court's decision contemplated sharing certain classified information subject to a privilege assertion with plaintiffs' counsel on the ground that it had been inadvertently disclosed previously. <i>Al-Haramain Islamic Found., Inc. v. Bush</i> , 451 F. Supp. 2d 1215, 1229 (D. Or. 2006). The Court of Appeals for the Ninth Circuit reversed, and held that state secrets privilege assertion required dismissal of the case, unless the privilege was "preempted" by 50 U.S.C. § 1806(f), and remanded that question. <i>See</i> 507 F.3d 1190, 1202-06 (9th Cir. 2007). The district court's subsequent entry of judgment for plaintiffs in this case was also later reversed by the Ninth Circuit. <i>See Al-Haramain Islamic Found. v. Obama</i> , 690 F.3d 1089 (9th Cir. 2012). Accordingly, the state secrets privilege was not "denied" in whole or part in this case or found to be preempted by statute.
29	M. Akifur v. Rahman v. Chertoff (07-3430)	<i>See</i> no. 3 <i>supra</i> for <i>Rahman v. Chertoff</i> . The decision referenced in this entry on plaintiffs' Exhibit D is the Seventh Circuit decision reversing the district court's grant of class certification. It expressly does not concern the district court's rulings on the Government's assertion of the state secrets privilege. <i>See Rahman v. Chertoff</i> , 530 F.3d 622, 625 (7th Cir. 2008).
30	Doe v. Rumsfeld (1:08-CV-1902)	An assertion of the state secrets privilege was not adjudicated in this case. The Government did not assert the state secrets privilege, as Exhibit D correctly states, and the privilege was not "upheld in part; denied in part," as Exhibit D incorrectly indicates. This case was a <i>Bivens</i> action against senior official brought by a detainee in Iraq. <i>See Doe v. Rumsfeld</i> , 800 F. Supp. 2d 94 (D.D.C. 2011). In holding that a <i>Bivens</i> action was not precluded by special factors, that court noted that the state secrets doctrine was available to the Government to protect national security information and to seek dismissal if necessary. <i>See id.</i> at 111. The district court decision cited in Exhibit D was later reversed. <i>See Doe v. Rumsfeld</i> , 683 F.3d 390 (D.C. Cir. 2012).