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American Civil Liberties Union

Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

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Chairman Nadler, Ranking Member Franks, and Members of the Subcommittee:

I am pleased to testify on behalf of the American Civil Liberties Union, its 53 affiliates and more than 500,000 members nationwide, to explain the ACLU's concern about an issue of critical importance to us, to this Subcommittee of the Committee on the Judiciary, and to all Americans concerned about the unchecked abuse of executive power: reform of the state secrets privilege. In doing so, we also take this opportunity to commend Chairman Nadler for crafting H.R. 5607, the State Secrets Protection Act, a bill that would put reasonable checks and balances on the executive branch, re-empower courts to exercise independent judgment in cases of national importance, and protect the rights of those seeking redress through our court system.

Over the years we have seen the state secrets privilege mutate from a common-law evidentiary rule that permits the government "to block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security,"[1] into an alternative form of immunity that is used more and more often to shield the government and its agents from accountability for systemic violations of the Constitution and core human rights principles. Since September 11, 2001, the Bush administration has altered fundamentally the manner in which the state secrets privilege is used, to the detriment of the rights of private litigants harmed by serious government misconduct, and the trust and confidence of the American people in our judicial system.

ACLU litigators challenging the Bush administration's illegal policies of warrantless surveillance, extraordinary rendition, and torture have been confronted by government assertions of the state secrets privilege at the initial phase of litigation, even before any evidence is produced or requested. Too often in these and other cases, courts have accepted government claims that the litigation must be dismissed on national security grounds without independently scrutinizing the evidence or allowing plaintiffs an opportunity to establish the truth of their allegations based on non-privileged information.

The untimely dismissal of these important lawsuits has undermined our constitutional system of checks and balances and weakened our national interest in having a government that is held accountable for its constitutional violations. The aggressive and expanding assertion of the privilege by the executive branch, coupled with the failure of the courts to exercise independent scrutiny over privilege claims, has allowed serious, ongoing abuses of executive power to go unchecked. Congress has the power and the duty to restore these checks and balances. We therefore urge you to pass H.R. 5607.

HISTORY OF THE PRIVILEGE

It has been more than half a century since the Supreme Court formally recognized the common-law state secrets privilege in *United States v. Reynolds*, a case that both establishes the legal framework for accepting a state secrets claim and serves as a cautionary tale for those judges inclined to accept the government's assertions as valid on their face.[ii] In *Reynolds*, family members of three civilians who died in the crash of a military plane in Georgia sued for damages. In response to a discovery request for the accident report, the government asserted the state secrets privilege, arguing that the report contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight.

Although the Supreme Court had not previously articulated rules governing the privilege, it emphasized that the privilege was "well established in the law of evidence,"[iii] and cited treatises, including John Henry Wigmore's *Evidence in Trials at Common Law*, as authority. Wigmore acknowledged that there "must be a privilege for *secrets of state, i.e.* matters whose disclosure would endanger the Nation's governmental requirements or its relations of friendship and profit with other nations."[iv] Yet he cautioned that the privilege "has been so often improperly invoked and so loosely misapplied that a strict definition of its legitimate limits must be made."[v] Such limits included, at a minimum, requiring the trial judge to scrutinize closely the evidence over which the government claimed the privilege:

> Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coordinate body of government share the confidence? The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege.[vi]

Noting that the government's privilege to resist discovery of "military and state secrets" was "not to be lightly invoked," the *Reynolds* Court required "a formal claim of privilege, lodged by the head of the department which had control over the matter, after actual personal consideration by that officer."[vii] Further, the Court suggested a balancing of interests, in which the greater the necessity for the allegedly privileged information in presenting the case, the more "a court should probe in satisfying itself that the occasion for invoking the privilege is appropriate."[viii] Like Wigmore, the *Reynolds* Court cautioned against ceding too much authority in the face of a claim of privilege: "[J]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[ix]

Despite these cautions, the *Reynolds* Court sustained the government's claim of privilege over the accident report without ever looking at it. It did not, however, dismiss the lawsuit. Instead, the Court allowed the suit to proceed using alternative non-classified information (testimony from the crash survivors) as a substitute for the accident report, and the case eventually settled. The declassification of the accident report many decades later highlighted the importance of independent judicial review. There were no national security or military secrets; there was, on the other hand, compelling evidence of the government's negligence.[x]

The Supreme Court has not directly addressed the scope or application of the privilege since *Reynolds*. In the intervening years, the privilege has slipped loose from its evidentiary moorings. No longer is the privilege invoked solely with respect to discrete and allegedly secret evidence; rather, the government now routinely invokes the privilege at the pleading stage, before any evidentiary disputes have arisen. *Reynolds*' instruction that courts are to weigh a plaintiff's showing of need for particular evidence in determining how deeply to probe the government's claim of privilege is rendered wholly meaningless when the privilege is invoked before any request for evidence has been made. Moreover, the government has invoked the privilege with greater frequency;[xi] in cases of greater national significance;[xii] and in a manner that seeks to transform it from an evidentiary privilege into an immunity doctrine, thereby "neutraliz[ing] constitutional constraints on executive powers."[xiii]

Since September 11, 2001, the government has invoked the privilege frequently in cases that present serious and plausible allegations of grave executive misconduct. It sought to foreclose judicial review of the National Security Agency's warrantless surveillance of United States citizens in contravention of the Foreign Intelligence Surveillance Act, the NSA's warrantless data mining of calls and e-mails, and various telecommunication companies' participation in the NSA's surveillance activities.[xiv] It has invoked the privilege to terminate a whistleblower suit brought by a former FBI translator who was fired after reporting serious security breaches and possible espionage within the Bureau.[xv] And, it has invoked the privilege to seek dismissal of suits challenging the government's seizure, transfer, and torture of innocent foreign citizens.[xvi]

In *Tenet v. Doe*, the Supreme Court clarified the distinction between the evidentiary state secrets privilege, which may be invoked to prevent disclosure of specific evidence during discovery, and the so-called *Totten* rule, which requires outright dismissal at the pleading stage of cases involving unacknowledged espionage agreements.[xvii] As the Court explained, the *Totten* rule is a "unique and categorical . . . bar – a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry."[xviii] By contrast, the Court noted, the state secrets privilege deals with evidence, not justiciability.[xix] Nevertheless, some courts have permitted the government to invoke the evidentiary state secrets privilege to terminate litigation even before there is any evidence at issue.

There is substantial confusion in the lower courts regarding both *when* the privilege properly may be invoked, and *what* precisely the privilege may be invoked to

protect. The *Reynolds* Court considered whether the privilege had been properly invoked during discovery, at a stage of the litigation when *actual evidence* was at issue.[xx] Consistent with *Reynolds,* some lower courts have properly rejected pre-discovery, categorical assertions of the privilege, holding that the privilege must be asserted on an item-by-item basis with respect to particular disputed evidence.[xxi] Other courts, however, have permitted the government to invoke the privilege at the pleading stage, with respect to entire *categories* of information – or even the entire subject matter of the action – before evidentiary disputes arose.[xxii]

There is also a wide divergence among the lower courts regarding how deeply a court must probe the government's claim of privilege, and what, exactly, the court must examine in assessing a privilege claim and its consequences. Some courts have held that the government's state secrets claim must be afforded the most extreme form of deference.[xxiii] Other courts properly have scrutinized the government's privilege claim with more rigor – insisting on a meaningful judicial role in assessing the reasonable risk of harm to national security should purported state secrets be disclosed.[xxiv]

This confusion as to the proper judicial role has particularly dire consequences when a successful claim of privilege results in dismissal of the entire lawsuit. Some courts correctly have held that where dismissal might result from a successful invocation of the privilege, the court must examine the *actual* evidence as to which the government has invoked the privilege before making any determination about the applicability of the privilege or dismissal.[xxv] Other courts have refused or declined to examine the allegedly privileged evidence, relying solely on secret affidavits submitted by the government.[xxvi]

Legislative action to narrow the scope of the state secrets privilege and standardize the judicial process for evaluating privilege claims is needed to resolve this confusion in the courts and to bring uniformity to a too often flawed process that is increasingly denying justice to private litigants in cases of significant national interest.

THE ACLU CASES

The ACLU has been involved in a series of high-profile cases in recent years in which the government has invoked the state secrets privilege in response to allegations of serious government misconduct. These cases serve more than just the narrow personal interests of the litigants; they serve the national interest by seeking a judicial determination that the government has acted unlawfully. Since *Marbury v. Madison* in 1803, it has been the role of the courts to determine what the law is. The misuse of the privilege to dismiss these cases at the pleading stage does damage to the body politic as a whole, and not just to the rights of the litigants.

EXTRAORDINARY RENDITION, TORTURE

Khaled El-Masri, a German citizen of Lebanese descent, was forcibly abducted while on holiday in Macedonia in late 2003. After being detained incommunicado by Macedonian authorities for 23 days, he was handed over to United States agents, then beaten, drugged, and transported to a secret CIA-run prison in Afghanistan. While in

Afghanistan he was subjected to inhumane conditions and coercive interrogation and was detained without charge or public disclosure for several months. Five months after his abduction, Mr. El-Masri was deposited at night, without explanation, on a hill in Albania. Mr. El-Masri suffered this abuse and imprisonment at the hands of U.S. government agents due to a simple case of mistaken identity.

Mr. El-Masri's ordeal received prominent coverage throughout the world and was reported on the front pages of the United States' leading newspapers and on its leading news programs. German and European authorities began official investigations of Mr. El-Masri's allegations. Moreover, on numerous occasions and in varied settings, U.S. government officials have publicly confirmed the existence of the rendition program and described its parameters. For example,
the government has acknowledged that the CIA is the lead agency in conducting renditions for the United States in public testimony before the 9/11 Commission of Inquiry. Christopher Kojm, who served as Deputy Assistant Secretary for Intelligence Policy and Coordination in the State Department's Bureau of Intelligence and Research from 1998 until February 2003, described the CIA's role in coordinating with foreign government intelligence agencies to effect renditions, stating that the agency "plays an active role, sometimes calling upon the support of other agencies for logistical or transportation assistance" but remaining the "main player" in the process.[xxvii] Similarly, former CIA Director George Tenet, in his own written testimony to the 9/11 Joint Inquiry Committee, described the CIA's role in some seventy pre-9/11 renditions and elaborated on a number of specific examples of CIA involvement in renditions.[xxviii] Even President Bush has publicly confirmed the widely known fact that the CIA has operated detention and interrogation facilities in other nations, as well as the identities of fourteen specific individuals who have been held in CIA custody.[xxix]

On December 6, 2005, Mr. El-Masri filed suit against former Director of Central Intelligence George Tenet, three private aviation companies, and several unnamed defendants, seeking compensatory and punitive damages for his unlawful abduction, arbitrary detention, and torture by agents of the United States.[xxx] Mr. El-Masri alleged violations of the Fifth Amendment to the U.S. Constitution as well as customary international law prohibiting prolonged arbitrary detention; cruel, inhuman, or degrading treatment; and torture, which are enforceable in U.S. courts pursuant to the Alien Tort Statute.[xxxi] Although not named as a defendant, the United States government intervened before the named defendants had answered the complaint, and before discovery had commenced, for the purpose of seeking dismissal of the suit pursuant to the evidentiary state secrets privilege. In a public affidavit submitted with the motion, then-CIA director Porter Goss maintained that "[w]hen there are allegations that the CIA is involved in clandestine activities, the United States can neither confirm nor deny those allegations," and accordingly Mr. El-Masri's suit must be dismissed.[xxxii]

The district court held oral argument on the United States' motion on May 12, 2006, and despite the wealth of evidence already in the public record, the United States' motion to dismiss was granted that same day.[xxxiii] Mr. El-Masri thereafter appealed to the U.S. Court of the Appeals for the Fourth Circuit. On March 2, 2007, the court of appeals

upheld the dismissal of Mr. El-Masri's suit, holding that state secrets were "central" both to Mr. El-Masri's claims and to the defendants' likely defenses, and thus that the case could not be litigated without disclosure of state secrets.[xxxiv]

The district court concluded that "El-Masri's private interests must give way to the national interest in preserving state secrets." But, there is no national security interest served in having U.S. government agents kidnap, render, torture, abuse, and illegally detain the wrong person. To the contrary, the allegations questioned our government's commitment to core legal values. In an amicus brief filed in support of El-Masri's appeal to the Fourth Circuit, ten former U.S. diplomats warned that denial of a forum for El-Masri would undermine U.S. standing in the world community and the ability to obtain foreign government cooperation essential to combating terrorism, and thereby undermine our national security.[xxxv] On January 31, 2007 a German court issued arrest warrants for 13 unnamed CIA agents believed to have participated in the El-Masri abduction and rendition.[xxxvi]

The ACLU recently filed another federal lawsuit on behalf of five victims of the U.S. government's unlawful extraordinary rendition program. The lawsuit charges that Jeppesen Dataplan, Inc., a subsidiary of the Boeing Company, knowingly provided direct flight services to the CIA that enabled the clandestine transportation of Binyam Mohamed, Abou Elkassim Britel, Ahmed Agiza, Mohamed Farag Ahmad Bashmilah, and Bisher al-Rawi to secret overseas locations where they were subjected to torture and other forms of cruel, inhuman and degrading treatment.[xxxvii] Jeppesen's involvement in the transfer of the plaintiffs and other terrorism suspects to countries where they faced brutal torture is a matter of public record, confirmed by documentary evidence and eyewitness testimony, including a sworn declaration by a former Jeppesen employee who was told by a senior company official of the profits derived from the CIA's "torture flights." Nevertheless, on October 19, 2007 the government moved to intervene and filed a motion to dismiss based on CIA Director Michael Hayden's formal invocation of the state secrets privilege as grounds for dismissal. On February 13, 2008, the case was dismissed.[xxxviii] Plaintiffs' appeal is now pending before the U.S. Court of Appeals for the Ninth Circuit.

NATIONAL SECURITY AGENCY WARRANTLESS SURVEILLANCE

In December of 2005 the *New York Times* revealed that shortly after the 9/11 attacks the NSA began conducting warrantless domestic eavesdropping in violation of the Foreign Intelligence Surveillance Act (FISA).[xxxix] The Bush administration acknowledged approving this surveillance as part of a program it called the Terrorist Surveillance Program (TSP). Subsequent articles in the *Times* and *USAToday* alleged that major telecommunications companies "working under contract to the NSA" were also providing the domestic call data of millions of Americans to the government for "social network analysis."[xl]

The ACLU sued the NSA on behalf of a group of journalists, academics, attorneys and non-profit organizations, alleging that their routine communication with

individuals in the Middle East made them likely victims of the NSA's warrantless wiretapping program.[xli] The plaintiffs alleged the NSA program violated the Fourth Amendment, FISA, and other federal laws. They also alleged that they suffered real injury as a result of the NSA's warrantless surveillance program because the program forced them to make other, more costly arrangements to communicate with clients, sources, and colleagues in order to maintain confidentiality. The government filed a motion to dismiss prior to discovery, arguing the matter could not be explored in litigation because evidence supporting the NSA program qualifies for the state secrets privilege. U.S. District Judge Anna Diggs Taylor found that the ACLU's challenge to the program could proceed based solely on the government's public acknowledgement of the warrantless wiretapping program, and ruled the NSA program unconstitutional.

In July 2007, the U.S. Court of Appeals for the Sixth Circuit dismissed the case, ruling that the state secrets privilege made it impossible for plaintiffs to know for certain whether they had been wiretapped by the NSA, and that the existence of that uncertainty deprived them of standing to sue.[xlii] It is a classic Catch-22 that enabled the government to avoid accountability for its illegal program by labeling it a secret. The state secrets privilege was not designed to give the executive a blank check to violate the law.

NATIONAL SECURITY WHISTLEBLOWER

Sibel Edmonds, a 32-year-old Turkish-American, was hired as a translator by the FBI shortly after the terrorist attacks of September 11, 2001 because of her knowledge of Middle Eastern languages. She was fired less than a year later in March 2002 in retaliation for reporting to her supervisors about shoddy work and security breaches that could have had serious implications for our national security. Edmonds sued to contest her firing in July 2002. Rather than deny the truth of Edmonds' assertions, the government invoked the state secrets privilege in arguing that her case raised such sensitive issues that the court was required to dismiss it without even considering whether the claims had merit. On July 6, 2004, Judge Reggie Walton in the U.S. District Court for the District of Columbia dismissed Edmonds' case, citing the government's state secrets privilege. The ACLU represented Edmonds in her appeal of that ruling.[xliii]

A few days before the appeals court heard Edmonds' case, the Inspector General published an unclassified summary of its investigation of her claims.[xliv] The summary vindicated Edmonds. It stated that "many of [Edmonds'] allegations were supported, that the FBI did not take them seriously enough, and that her allegations were, in fact, the most significant factor in the FBI's decision to terminate her services."[xlv] The Inspector General urged the FBI to conduct a thorough investigation of Edmonds' allegations. It stated that "the FBI did not, and still has not, conducted such an investigation."[xlvi] It is difficult to see how ignoring and suppressing a whistleblower's complaint about security breaches within the FBI protects the national security.

In the appeals court, the government continued to argue that the state secrets privilege deprived the judiciary of the right to hear Edmonds' claims. In fact, the appeals court closed the arguments to the press and general public.[xlvii] Even Edmonds and her

attorneys were forbidden from hearing the government present part of its argument. In a one-line opinion containing no explanation for its decision, the appeals court agreed with the government and dismissed Edmonds' case. Edmonds asked the Supreme Court to review her case, but it declined.[xlviii]

THE STATE SECRET PROTECTION ACT (H.R. 5607)

The State Secret Protection Act (H.R. 5607) takes great strides toward restoring essential constitutional checks on executive power. H.R. 5607 restores the states secrets privilege to its common law origin as an evidentiary privilege by prohibiting the dismissal of cases prior to discovery. H.R. 5607 also ensures independent judicial review of government state secrets claims by requiring courts to examine the evidence for which the privilege is claimed and make their own assessments of whether disclosure of the information would reasonably pose a significant risk to national security.

Courts have long experience in handling national security information responsibly and assessing its appropriate use in the judicial process. If history is any guide, there is no reason to believe that courts will lightly disagree with the government's assessment of national security risks. But the Supreme Court's historic decision to allow publication of the Pentagon Papers provides a vivid illustration of the importance of maintaining a vital and independent judicial role in national security cases as a constitutional safety valve against over-classification and excessive secrecy.[xlix]

Congress has recognized as much in the Classified Information Protection Act,[l] the Freedom of Information Act,[li] and the Foreign Intelligence Surveillance Act.[lii] Under each of these statutes, courts are charged with the responsibility of weighing the government's national security claims in a specific litigation context – whether it is a defendant's claim under CIPA that national security evidence is critical to his or her criminal defense, the government's claim under FOIA that the release of government documents will jeopardize national security, or the claim of an aggrieved individual suing to redress an alleged violation of FISA.

Like these other statutes, H.R. 5607 concerns a quintessential judicial determination – the admissibility of evidence – and is designed to ensure that those decisions are made by judges, not executive branch officials. By codifying the state secrets privilege, H.R. 5607 will bring needed clarity and balance to an area of the law that is now desperately in need of both. It will accomplish this in several critical ways.

First, H.R. 5607 requires judges to look at the evidence that the government is seeking to shield by invoking the state secrets privilege, unless the evidence is too voluminous, in which case the court can review a representative sample. This will address the too-frequent practice of relying exclusively on the government's affidavits in ruling on the state secrets privilege. The bill also places the burden of proof on the government that is trying to keep evidence secret, which is where it belongs.

Second, H.R.5607 recognizes that judges can and should give due deference to the expert opinion of government officials without deferring entirely or abdicating their role as judges to make an independent assessment of the evidence. In order to assure that the court's decision is an informed one, the bill encourages the maximum participation possible by opposing counsel, and gives courts the authority to appoint a special master or independent expert to advise the court in appropriate circumstances.

Third, as a direct response to the increasing tendency of the government to seek, and courts to grant, motions to dismiss at the outset of litigation based on the state secrets privilege, H.R. 5607 restores the state secrets privilege to its proper evidentiary role by providing that a case shall not be dismissed until the opposing party has had "a full opportunity" to complete discovery of non-privileged evidence and to litigate his or her claims based on that evidence.

Fourth, borrowing from CIPA, H.R. 5607 empowers courts to order the production of a non-privileged substitute, if feasible, for the withheld evidence in cases where the privilege is upheld. If a non-privileged substitute is not feasible under the circumstances, the bill allows courts to "make appropriate orders in the interest of justice," including finding for or against a party on a factual or legal issue.

CONCLUSION

Time and again, the government has sought dismissal at the pleading stage based on the state secrets privilege, and the privilege as asserted by the government and as construed by the courts has often permitted dismissal of these suits on the basis of a government affidavit alone – without any judicial examination of the purportedly privileged evidence and sometimes only after ex parte hearings. Accordingly, a broad range of executive misconduct has been shielded from judicial review. Employed as it has been in these cases, the privilege permits the executive to render a case non-justiciable – without producing specific privileged evidence, without having to justify its claims by reference to those specific facts that will be necessary and relevant to adjudicate the case, and without having to submit its claims to even modified adversarial testing. These qualitative and quantitative shifts in the government's use – and the courts' acceptance – of the state secrets privilege warrant legislative action to correct this imbalance of power and rein in unconstitutional executive practices that are antithetical to the values of a democratic society. The ACLU therefore supports H.R. 5607, and urges its enactment as soon as possible.

[1] Ellsberg v. Mitchell, 709 F.2d 51, 56 (D.C. Cir. 1983); *See also*, United States v. Reynolds, 345 U.S. 1, 10 (1953); Tenenbaum v. Simonini, 372 F.3d 776, 777 (6th Cir. 2004).
[ii] Reynolds, 345 U.S. 1 (1953).
[iii] *Id*, at 6-7.
[iv] 8 John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW §2212a (3d e. 1940)(emphasis in original).
[v] *Id*.
[vi] Id, at § 2379.
[vii] Reynolds, 345 U.S. 1, 7-8.
[viii] *Id*, at 11.
[ix] *Id*, at 9-10.
[x] *See*, Herring v. United States, Civil Action No. 03-5500 (LDD) (E.D. Pa. Sept. 10, 2004).
[xi] Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939 (2007) ("The Bush Administration has raised the privilege in twenty-eight percent more cases per year than in the previous decade, and has sought dismissal in ninety-two percent more cases per year than in the previous decade.")
[xii] Editorial, Too Many Secrets, N.Y. Times, Mar. 10, 2007, at A12, available at: http://www.nytimes.com/2007/03/10/opinion/10sat2.html?ex=1331182800&en=023b94ae28666f34&ei=5090&partner=rssuserland&emc=rss ("It is a challenge to keep track of all the ways the Bush administration is eroding constitutional protections, but one that should get more attention is its abuse of the state secrets doctrine.").
[xiii] Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 581 (1982).
[xiv] *See*, Hepting v. AT&T Corp., 439 F.Supp. 2d 974 (N.D. Cal. 2006), *appeal docketed*, No. 06-17137 (9th Cir. Nov. 9, 2006); Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006), *rev'd* 507 F.3d 1190 (9th Cir. 2007); ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated* 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 128 S.Ct. 1334 (2008); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006).
[xv] Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65 (D.D.C. 2004), 161 Fed.Appx. 6 (D.C.Cir. 2005), *cert. denied*, 546 U.S. 1031 (2005).
[xvi] *See*, El-Masri,437 F.Supp.2d 530 (E.D.Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S.Ct. 373 (2007); Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissed on other grounds); Mohamed v. Jeppesen Dataplan, Inc., 539 F.Supp.2d 1128 (N.D.Ca. 2008), *appeal docketed*, No. 08-15693 (9th Cir).
[xvii] Tenet v. Doe, 544 U.S. 1 (2005).
[xviii] *Id*, at 6.
[xix] *Id.* at 9, 10.
[xx] Reynolds, 345 U.S. at 3.
[xxi] *See, e.g.*, In re United States, 872 F.2d 472, 478 (D.C. Cir. 1989) (rejecting categorical, prediscovery privilege claim because "an item-by-item determination of privilege [would] amply accommodate the Government's concerns"); Hepting, 439 F. Supp. 2d at 994 (N.D. Cal. 2006) (refusing to assess effect of pleading stage, categorical assertion of the privilege in suit challenging phone company's involvement in warrantless surveillance, preferring to assess the privilege "in light of the facts."); Nat'l Lawyers Guild v. Att'y General, 96 F.R.D. 390, 403 (S.D.N.Y. 1982) (holding privilege must be asserted on document-by-document basis).
[xxii] *See, e.g.*,Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991) (finding privilege properly asserted at pleading stage over all information pertaining to ship's defense system and rules of engagement); Sterling v. Tenet, 416 F.3d 338, 345-46 (4th Cir. 2005) (upholding pre-answer invocation of privilege over categories of information related to plaintiff's employment as well as alleged discrimination by CIA); Black v. United States, 62 F.3d 1115, 1117, 1119 (8th Cir. 1995); Terkel, 441 F. Supp. 2d at 918.

[xxiii] *See, e.g.*, Zuckerbraun, 935 F.2d at 547; Sterling, 416 F.3d at 349 (accepting government's pleading-stage claim that state secrets would be revealed if plaintiff's suit were allowed to proceed, holding that court was "neither authorized nor qualified to inquire further"); Kasza, 133 F.3d at 1166 (holding that government's privilege claim is owed "utmost deference").

[xxiv] *See, e.g.*, In re United States, 872 F.2d at 475 ("[A] court must not merely unthinkingly ratify the Executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role."); Ellsberg, 709 F.2d at 60 (rejecting claim of privilege over name of Attorney General who authorized unlawful wiretapping, explaining that no "disruption of diplomatic relations or undesirable education of hostile intelligence analysts would result from naming the responsible officials"); Hepting, 439 F. Supp. 2d at 995 (holding that "to defer to a blanket assertion of secrecy" would be "to abdicate" judicial duty, where "the very subject matter of [the] litigation ha[d] been so publicly aired"); Al-Haramain, 451 F. Supp. 2d at 1224 (rejecting government's overbroad secrecy argument, stating that "no harm to the national security would occur if plaintiffs are able to prove the general point that they were subject to surveillance . . . without publicly disclosing any other information").

[xxv] *See, e.g.*, Ellsberg, 709 F.2d at 59 n.37 (when litigant must lose if privilege claim is upheld, "careful *in camera* examination of the material is not only appropriate . . . but obligatory"); ACLU v. Brown, 619 F.2d 1170, 1173 (7th Cir. 1980).

[xxvi] *See, e.g.*, Sterling, 416 F.3d at 344 (finding "affidavits or declarations" from government were sufficient to assess privilege claim even where asserted to sustain dismissal, and holding that in camera review of allegedly privileged evidence not required); Black, 62 F.3d at 1119 (examining only government declarations); Kasza, 133 F.3d at 1170 (same).

[xxvii] *Intelligence Policy and National Policy Coordination: Hearing of the National Commission on Terrorist Attacks Upon the United States*, Mar. 24, 2004, *available at* http://govinfo.library.unt.edu/911/archive/hearing8/9-11Commission_Hearing_2004-03-24.htm

[xxviii] *Written Statement for the Record of the Director of Central Intelligence Before the Joint Inquiry Committee*, Oct. 17, 2002, *available at http://www.intelcenter.com/resource/2002/tenet-17-Oct-02.pdf*

[xxix] Statement of President George W. Bush, President Discusses Creation of Military Commissions to Try Suspected Terrorists, Office of the White House Press Secretary, (Sept. 6, 2006) at: http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html

[xxx] El-Masri v. Tenet, 437 F.Supp.2d 530 (E.D.Va. 2006).

[xxxi] 28 U.S.C. § 1350.

[xxxii] See Petition for a Writ of Certiorari at 9, 2007 WL 1624819, (Appellate Petition, Motion and Filing), El-Masri v. U.S., 128 S. Ct. 373 (U.S. 2007) (No. 06-1613), *available at* http://www.fas.org/sgp/jud/statesec/elmasri-cert.pdf

[xxxiii] El-Masri v. Tenet, 437 F.Supp.2d 530, 532-34 (E.D.Va. May 12, 2006).

[xxxiv] El-Masri v. U.S., 479 F.3d 296, 313 (4th Cir. 2007) *cert. denied*, 128 S. Ct. 373 (U.S. 2007).

[xxxv] Brief Amicus Curiae of Former United States Diplomats Supporting Plaintiff-Appellant and Reversal, El-Masri v. Tenet, 437 F.Supp.2d 530, 532-34 (E.D.Va. May 12, 2006), (No. 06-1667) *available at*: http://www.aclu.org/safefree/rendition/asset_upload_file638_26287.pdf

[xxxvi] Mark Landler, *German Court Seeks Arrests of 13 CIA Agents*, N.Y. TIMES, Jan. 31, 2007, *available at*: http://www.nytimes.com/2007/01/31/world/europe/31cnd-germany.html?ref=europe

[xxxvii] Mohamed et al, v. Jeppesen Dataplan, Inc., Civil Action No. 5:07-cv-02798-JW, (United States District Court for the Northern District of California), (May 30, 2007).

[xxxviii] Mohamed v. Jeppesen Dataplan, Inc., 539 F.Supp.2d 1128 (N.D.Ca. 2008), *appeal docketed*, No. 08-15693 (9th Cir.).

[xxxix] James Risen and Eric Lichtblau, *Bush lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, *available at* http://www.nytimes.com/2005/12/16/politics/16program.html?ei=5090&en=e32072d786623ac1&ex=1292389200.

[xl] Leslie Cauley, *NSA has Massive Database of Americans' Phone Calls*, USATODAY, May 11, 2006, at 1A, *available at* http://www.usatoday.com/news/washington/2006-05-10-nsa_x.htm. See also, James Risen and Eric Lichtblau, *Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. Times, Dec. 24, 2005.

[xli] ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

[xlii] ACLU v. NSA, 467 F.3d 590, 591 (6th Cir. 2006).
[xliii] *See* Edmonds v. U.S. Dept. of Justice, 323 F.Supp.2d 65, (D.D.C. Jul 06, 2004), *aff'd* 161 Fed.Appx. 6, (D.C.Cir. May 06, 2005) (NO. 04-5286); Reply Brief for the Plaintiff-Appellant, 2005 WL 622960, (Appellate Brief), (C.A.D.C. Mar. 10, 2005) (NO. 04-5286).
[xliv] U.S. DEPARTMENT OF JUSTICE OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FBI'S ACTIONS IN CONNECTION WITH THE ALLEGATIONS RAISED BY CONTRACT LINGUIST SIBEL EDMONDS, (Unclassified Summary, January 2005).
[xlv] *Id*, at 31.
[xlvi] *Id*, at 34.
[xlvii] Petition for a Writ of Certiorari, 2005 WL 1902125, (Appellate Petition, Motion and Filing), Edmonds v. U.S. Dept. of Justice, 546 U.S. 1031, 126 S.Ct. 734, (U.S. Nov 28, 2005) (NO. 05-190), *available at* http://www.justacitizen.com/articles_documents/edmonds%20cert[1].%20petition.pdf
[xlviii] Edmonds v. U.S. Dept. of Justice, 546 U.S. 1031, 126 S.Ct. 734, (U.S. Nov 28, 2005) (NO. 05-190) .
[xlix] New York Times Co. v. United States, 403 U.S. 713 (1971).
[l] Classified Information Procedures Act, 18 U.S.C. app.
[li] Freedom of Information Act, 5 U.S.C. § 552.
[lii] Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801, et. seq.