IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Khaled El-Masri,	)
	)
Plaintiff,	)
	) Civil Action No.
v.	) 1:05cv1417-TSE-TRJ
	)
George Tenet, *et al.,*	)
	)
Defendants.	)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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INTRODUCTORY STATEMENT

The United States moves to dismiss this action, which raises profoundly substantial allegations of unlawful abduction, arbitrary detention, and torture, on the ground that any further legal proceedings may expose state secrets and jeopardize national security. This Court should view with skepticism the United States' overbroad and far-reaching assertions.

The rendition of plaintiff Khaled El-Masri to detention and interrogation in Afghanistan by agents of the United States represents the most widely known example of a publicly acknowledged program. In moving to dismiss at the pleading stage Mr. El-Masri's suit for damages, the United States seeks to protect the nation against disclosure of information that the entire world already knows. Government officials at the highest level have spoken publicly and repeatedly about the rendition program. And Mr. El-Masri's allegations – which are supported by abundant corroborating evidence – have been the subject of widespread media reports in the world's leading newspapers and news programs, many of them based on the accounts of government officials.

The common-law state secrets privilege, which the United States here invokes to extinguish altogether Mr. El-Masri's right of redress, is an evidentiary privilege, not an immunity doctrine. Its purpose is to block disclosure in litigation of information that will damage national security, and it is rare and "drastic" for invocation of the privilege to result in dismissal of an action. *Fitzgerald v. Penthouse Internat'l, Ltd.*, 776 F.2d, 1236, 1242 (4th Cir. 1985). Mr. El-Masri does not dispute that, during the course of litigation, there may well be relevant evidence that may be properly withheld pursuant to the

privilege. However, dismissal at this stage – before the named defendants have so much as answered Mr. El-Masri's complaint – would be unjust, unnecessary, and improper.

The United States contends that it can neither confirm nor deny allegations concerning its clandestine rendition program. In fact, as discussed below, it has done both, repeatedly – confirming the existence and parameters of the rendition program, and denying that the program is an instrument of coercive interrogation. Only in seeking to dismiss this action does the United States insist that it can neither admit the former nor deny the latter.

The Fourth Circuit has instructed that courts must use "creativity and care" in devising procedures that protect against disclosure of legitimate state secrets while safeguarding injured parties' right of access to Article III courts. *Fitzgerald,* 776 F.2d at 1238 n.3. This Court is plainly competent to make such determinations, and to formulate protective measures that permit this case to proceed. Should this Court decide otherwise, the United States will have succeeded, now and in the future, in shielding its most egregious conduct from legal redress.

STATEMENT OF FACTS

The events that form the basis of this litigation began when Khaled El-Masri, a German citizen of Lebanese descent, traveled by bus from his home near Neu Ulm, Germany, to Skopje, Macedonia, in the final days of 2003. Declaration of Khaled El-Masri in Support of Plaintiff's Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Masri Decl.") at ¶¶ 1-2, 6. After passing through several international border crossings without incident, Mr. El-Masri was detained at the Serbian-Macedonian border because of alleged irregularities with his

passport. *Id.* at ¶¶ 7-9. He was interrogated by Macedonian border officials, then transported to a hotel in Skopje. *Id.* at ¶¶ 11-14. Subsequent to his release in May, 2004, Mr. El-Masri was able to identify the hotel from website photographs as the Skopski Merak, and to identify photos of the room where he was held and of a waiter who served him food. *Id.* at ¶¶ 14, 17.

Over the course of three weeks, Mr. El-Masri was repeatedly interrogated about alleged contacts with Islamic extremists, and was denied any contact with the German Embassy, an attorney, or his family. *Id.* at ¶¶ 18-24. He was told that if he confessed to Al-Qaeda membership, he would be returned to Germany. *Id.* at ¶ 21. On the thirteenth day of confinement, Mr. El-Masri commenced a hunger strike, which continued until his departure from Macedonia. *Id.* at ¶ 24. After 23 days of detention, Mr. El-Masri was videotaped, blindfolded, and transported by vehicle to an airport. *Id.* at ¶¶ 25-27.

There, he was beaten, stripped naked, and thrown to the ground. *Id.* at ¶ 28. A hard object was forced into his anus. *Id.* When his blindfold was removed, he saw seven or eight men, dressed in black and hooded. *Id.* at ¶ 29. He was placed in a diaper and sweatsuit, blindfolded, shackled, and hurried to a plane, where he was chained spread-eagled to the floor. *Id.* at ¶¶ 30-31. He was injected with drugs and flown to Baghdad, then on to Kabul, Afghanistan, an itinerary that is confirmed by public flight records. *Id.* at ¶¶ 32-34. At some point prior to his departure, an exit stamp was placed in his passport, confirming that he left Macedonia on January 23, 2004. *Id.* at ¶ 81.

Upon arrival in Kabul, Mr. El-Masri was kicked and beaten and left in a filthy cell. *Id.* at ¶¶ 35-36. There he would be detained for more than four months. He was interrogated several times in Arabic about his alleged ties to 9/11 conspirators

Muhammed Atta and Ramzi Bin Al-Shibh and to other alleged extremists based in Germany. *Id.* at ¶¶ 43-46. American officials participated in his interrogations. *Id.* at ¶ 49. All of his requests to meet with a representative of the German government were refused. *Id.* at ¶ 46.

In March, Mr. El-Masri and several other inmates commenced a hunger strike. *Id.* at ¶ 47. After nearly four weeks without food, Mr. El-Masri was brought to meet with two American officials. *Id.* at ¶ 50. One of the Americans confirmed Mr. El-Masri's innocence, but insisted that only officials in Washington, D.C. could authorize his release. *Id.* at ¶ 52. Subsequent media reports confirm that senior officials in Washington, including defendant Tenet, were informed long before Mr. El-Masri's release that the United States had detained an innocent man. *Id*. at 53. Mr. El-Masri continued his hunger strike. On the evening of April 10, Mr. El-Masri was dragged from his room by hooded men and force-fed through a nasal tube. *Id.* at ¶ 55.

At around this time, Mr. El-Masri felt what he believed to be a minor earthquake. *Id.* at ¶ 56. Geological records confirm that in February and April, there were two minor earthquakes in the vicinity of Kabul. *Id.*

On May 16, Mr. El-Masri was visited by a uniformed German speaker who identified himself as "Sam." *Id*. at ¶ 59. "Sam" refused to say whether he had been sent by the German government, or whether the government knew about Mr. El-Masri's whereabouts. *Id.* Subsequent to his release, Mr. El-Masri identified "Sam" in a photograph and a police lineup as Gerhard Lehmann, a German intelligence officer. *Id.* at ¶ 61.

On May 28, 2004, Mr. El-Masri, accompanied by "Sam," was flown from Kabul to a country in Europe other than Germany. *Id.* at ¶¶ 66-71. He was placed, blindfolded, into a truck and driven for several hours through mountainous terrain. *Id.* at ¶¶ 72-74. He was given his belongings and told to walk down a path without turning back. *Id.* at ¶ 74. Soon thereafter, he was confronted by armed men who told him he was in Albania and transported him to Mother Theresa Airport in Tirana. *Id.* at ¶¶ 76-80. There, he was accompanied through customs and immigration controls and placed on a flight to Frankfurt. *Id.* at ¶ 80.

Upon his return to Germany, Mr. El-Masri contacted an attorney and related his story. *Id.* at ¶ 84. The attorney promptly reported Mr. El-Masri's allegations to the German government, thereby initiating a formal investigation by public prosecutors. Declaration of Manfred Gnjidic in Support of Plaintiff's Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Gnjidic Decl.") at ¶¶ 5-7. Pursuant to their investigation, German prosecutors obtained and tested a sample of Mr. El-Masri's hair, which proved consistent with his account of detention in a South-Asian country and deprivation of food for an extended period. *Id.* at ¶ 13. That investigation, as well as a German parliamentary investigation of Mr. El-Masri's allegations, is ongoing. *Id.* at ¶¶ 15-16.

ARGUMENT

I. Dismissal of this action at the pleading stage on the basis of the state secrets privilege is improper because the central facts are not state secrets.

The United States contends that this litigation must be halted at its very outset – before the named defendants have even responded – on the ground that "proceeding any

further in this matter would create an unacceptable degree of risk that information the revelation of which would damage the national security and international relations of the United States will be disclosed." Memorandum of Points and Authorities in Support of Intervenor United States' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Govt. Br.") at 1-2. As set forth below, dismissal at the pleading stage pursuant to an evidentiary privilege is almost always improper, particularly where, as here, the facts central to the litigation have been officially acknowledged or widely disseminated. To terminate Mr. El-Masri's right of redress in the name safeguarding information that is already known to the public would be to sacrifice his rights to a legal fiction.

A. Dismissal of this action on the basis of the state secrets privilege at the outset of the litigation would permit the government to convert a narrow evidentiary privilege into a broad immunity doctrine for the CIA.

The state secrets privilege is 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." *Ellsberg v. Mitchell,* 709 F.2d 51, 56 (D.C. Cir. 1983). It is employed to protect against disclosure of information that will impair "the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments." *In re Under Seal,* 945 F.3d 1285, 1287 n.2 (4th Cir.1991) (quoting *Ellsberg,* 709 F.2d at 57); *see also Sterling v. Tenet,* 416 F.3d 338, 346 (4th Cir. 2005). The privilege must be narrowly construed, and may not be used to "shield any material not strictly necessary to prevent injury to national security . . . ." *Ellsberg*, 709 F.2d at 58; *see also United States v. Reynolds,* 345 U.S. 1,

10 (1953) (there must be a "*reasonable* danger" that disclosure will harm national security) (emphasis added).

The Supreme Court has cautioned that the privilege is "not to be lightly invoked." *Reynolds,* 345 U.S. at 7. That is because of the "serious potential for defeating worthy claims for violations of rights that would otherwise be proved . . . ." *In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989). The Fourth Circuit has further emphasized that *dismissal* of a lawsuit on the basis of the state secrets privilege, and the resultant "denial of the forum provided under the Constitution for the resolution of disputes . . . is a drastic remedy." *Fitzgerald*, 776 F.2d at 1242. Accordingly, courts must use "creativity and care" to devise "procedures which would protect the privilege and yet allow the merits of the controversy to be decided in some form." *Id.* at 1238 n.3. Suits may be dismissed pursuant to the privilege "[o]nly when no amount of effort and care on the part of the court and the parties will safeguard privileged material." *Id.* at 1244.

The Supreme Court outlined the proper use of the state secrets privilege fifty years ago in *Reynolds v. United States,* 345 U.S. 1 (1953), and has not considered the doctrine in depth since then. In *Reynolds*, the 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 flight 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. *Id.* at 3. The Court first held that the privilege could be invoked only upon "a formal claim of privilege, lodged by the head

of the department which has control over the matter, after actual personal consideration by that officer." *Id*. at 7-8.[1]

The *Reynolds* Court then upheld the claim of privilege over the accident report, but did not dismiss the suit. Rather, it remanded the case for further proceedings, explaining:

> There is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident. Therefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets. Respondents were given a reasonable opportunity to do just that, when petitioner formally offered to make the surviving crew members available for examination. We think that offer should have been accepted.

345 U.S. at 11. Upon remand, plaintiff's counsel deposed the surviving crew members, and the case was ultimately settled. *Id.*

In the majority of cases since *Reynolds,* courts in this circuit and elsewhere have considered the state secrets privilege in response to particular discovery requests, not in support of a motion to dismiss an entire action prior to any discovery. *See, e.g., DTM Research L.L.C. v. A.T. & T. Corp.*, 245 F.3d 327, 330 (4th Cir. 2001); *Bowles v. United States,* 950 F.2d 154, 156 (4th Cir. 1991) (privilege invoked in response to plaintiffs' discovery requests); *In re Under Seal*, 945 F.2d at 1287 (privilege invoked after many depositions and other discovery had already occurred); *Fitzgerald,* 776 F.2d at 1238 (privilege invoked after discovery and on eve of trial); *Heine v. Raus,* 399 F.2d 785, 787 (4th Cir. 1968) (privilege invoked during discovery), *Tilden v. Tenet*, 140 F. Supp. 2d

[1] Plaintiff does not dispute that the public declaration of Director of Central Intelligence Porter Goss satisfies the procedural requirements set forth in *Reynolds*. However, as discussed more fully below, plaintiff emphatically contests the propriety of the government's invocation of the privilege with respect to the entire case, before defendants have answered and before any discovery.

623, 625 (E.D. Va. 2000) (privilege invoked in response to plaintiffs' discovery requests).[2] Thus, the typical result, even when the privilege has been successfully invoked, is to remove the privileged evidence from the case but to permit the case to proceed. Moreover, even when the privilege is invoked to deny access to evidence during discovery, courts have construed the privilege narrowly. *Ellsberg*, 709 F.2d at 57 ("[W]henever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter"); *In re Grand Jury Subpoena Dated August 9, 2000*, 218 F. Supp. 2d 544, 560 (S.D.N.Y. 2002) ("[T]he contours of the privilege for state secrets are narrow, and have been so defined in accord with uniquely American concerns for democracy, openness, and separation of powers.").

The Fourth Circuit has, on a number of occasions, upheld a claim of privilege in response to discovery requests or requests for a protective order but nonetheless allowed the case to proceed. Indeed, this circuit has rejected a "categorical rule mandating dismissal whenever the state secrets privilege is validly invoked." *DTM Research L.L.C,* 245 F.3d at 334*; see also Fitzgerald,* 776 F.2d at 1243 (rejecting district court's contention that *no* case in which individual alleges she was libeled as having engaged in espionage could proceed); *Heine,* 399 F.2d at 791 (upholding claim of privilege in

[2] *See also Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982); *ACLU v. Brown*, 619 F.2d 1170 (7th Cir. 1980) (en banc); *Linder v. Dep't of Defense*, 133 F.3d 17, 21 (D.C. Cir. 1998); *Northrop Corp. v. McDonnell Douglas Corp.,* 751 F.2d 395, 397, (D.C. Cir. 1984); *Ellsberg,* 709 F.2d at 54-55; *Halkin v. Helms*, 690 F.2d 977, 985 (D.C. Cir. 1982) (*"Halkin II"*); *Attorney General v. The Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1982); *Halkin v. Helms*, 598 F.2d 1, 4 (D.C. Cir. 1978) ("*Halkin I*"); *Virtual Defense and Dev. Int'l v. Republic of Moldova*, 133 F. Supp. 2d 9, 23 (D.D.C. 2001); *Crater Corp. v. Lucent Technologies, Inc.*, 255 F.3d 1361 (Fed. Cir. 2001); *Kinoy v. Mitchell*, 67 F.R.D. 1 (S.D.N.Y. 1975); *Yang v. Reno*, 157 F.R.D. 625 (M.D. Pa. 1994); *United States v. Koreh*, 144 F.R.D. 218 (D. N.J. 1992); *Zoltek Corp. v. United States*, 61 Fed. Cl. 12 (Fed. Cl. 2004); *Foster v. United States*, 12 Cl. Ct. 492 (Cl. Ct. 1987); *American Tel. & Tel. Co. v. United States*, 4 Cl. Ct. 157 (Cl. Ct. 1983).

defamation suit, but remanding for further discovery of non-privileged evidence); *see also Sigler v. LeVan,* 485 F. Supp. 185, 199 (D. Md. 1980) (dismissing replevin claim because it could not be litigated without revealing state secrets, but refusing to dismiss other claims because court was "not convinced that litigation [of those claims] would 'inevitably' lead to disclosure of the contents of the secret materials").

Numerous other courts have similarly declined to dismiss suits prematurely on the basis of the state secrets privilege prior to any discovery. For example, in *In re United States,* the D.C. Circuit refused "to dismiss the plaintiff's complaint merely on the basis of [the government's] unilateral assertion that privileged information lies at the core of th[e] case." 872 F. 2d. at 477. Rather, the court upheld the lower court's conclusion that "broad application of the privilege to all of petitioner's information, before the relevancy of that information has even been determined, was inappropriate at this early stage of the proceedings." *Id.* at 478; *see also Halkin II*, 690 F.2d at 984 (dismissing case for lack of standing as result of privilege only after parties had "fought the bulk of their dispute on the battlefield of discovery").[3]

That courts do not as a matter of course dismiss cases after upholding or accepting claims of privilege is true even where covert or clandestine CIA activity is part of or

[3] *See also Jabara v. Webster*, 691 F.2d 272 (upholding claim of state secrets with regard to Fourth Amendment claim, but deciding case on merits); *Ellsberg,* 709 F.2d at 65 (reversing partial dismissal on state secrets grounds because "dismissal of the relevant portion of the suit would be proper only if the plaintiffs were manifestly unable to make out a *prima facie* case without the [privileged] information"); *Halkin I,* 598 F.2d at 11 (upholding invocation of privilege but remanding case for further proceedings); *The Irish People, Inc.*, 684 F.2d at 955 (upholding invocation of privilege but declining to dismiss case); *Spock v. United States*, 464 F. Supp. 510, 519 (S.D.N.Y. 1978) (rejecting as premature pre-discovery motion to dismiss Federal Tort Claims Act suit on state secrets grounds); *Foster v. United States*, 12 Cl. Ct. 492 (upholding privilege but declining to dismiss).

central to the case, and even where plaintiffs do not ultimately prevail. For example, in *Heine v. Raus,* the Fourth Circuit considered the application of the privilege in a slander action brought by a person accused of being a KGB agent against a defendant who, it was later revealed, was a CIA employee acting under CIA orders when he spoke against the plaintiff. 399 F.2d at 787. Notwithstanding the government's invocation of the privilege, the defendant was deposed and, "in the presence of the Judge," the CIA General Counsel invoked the privilege "on a question by question basis." *Id.* Ultimately, the Fourth Circuit remanded the case for even more discovery. *Id.* at 791.[4]

Thus, the state secrets privilege is properly used as shield against disclosure of legitimately sensitive evidence, not as a sword to justify premature dismissal of legitimate claims. That the privilege should not be employed to bar claims at the outset of litigation is reinforced by the Supreme Court's recent decision in *Tenet v. Doe,* 544 U.S. 1 (2005), in which the Court expressly distinguished the *Totten* rule, which requires outright dismissal at the pleading stage of cases involving unacknowledged espionage agreements, from the *evidentiary* state secrets privilege, which may be invoked to prevent disclosure of specific evidence during discovery. *Id.* at 1237.

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[4] *See also Harbury v. Deutch,* No. 96-438 (D.D.C. Aug. 28, 2001), *Harbury v. Deutch,* No. 96-438 (D.D.C. March 13, 2001), *Harbury v. Deutch,* No. 96-438 (D.D.C. March 9, 2000) (permitting some common-law and international tort claims against alleged CIA defendants involving, *inter alia,* detention, torture, and execution, to proceed despite upholding CIA privilege claim over particular evidence); *Halkin II,* 690 F.2d at 984-85 (permitting some discovery in action relating to NSA and CIA covert spying, despite privilege claims); *Monarch Assurance P.L.C. v United States,* 244 F.3d 1356, 1364 (Fed. Cir. 2001) (upholding CIA's privilege claim in contract action involving alleged financing of clandestine CIA activity, but remanding for further discovery because "the court was premature in its resolution of the difficult issue regarding the circumstances under which national security compels a total bar of an otherwise valid suit"); *Barlow v. United States,* 53 Fed. Cl. 667 (Fed. Cl. 2002) (upholding privilege but remanding for trial on whistleblower retaliation claims by former CIA and DOD employee involving sensitive facts about CIA and nuclear weapons proliferation).

In the face of this wide-ranging authority, the United States advances a construction of the state secrets privilege that would create de facto immunity for CIA officials for even the most egregious and unlawful conduct. Certainly no court has ever dismissed worthy claims of torture and prolonged arbitrary detention on the basis of an evidentiary privilege. Yet, by the government's reasoning, the CIA's designation of a program as "clandestine" is alone sufficient to immunize its agents from liability for any injuries they inflict in the course of their duties. That never has been, and is not, the law.

The CIA has been held liable for unlawful activity in the past, even when the harm was caused during a covert program. For example, the Second Circuit upheld a finding that the CIA was liable to three individuals who were harmed when, through a covert operation that spanned 20 years, the CIA secretly opened mail sent from and received by U.S. citizens to and from the former Soviet Union. *Birnbaum v. United States,* 588 F.2d 319, 333 (2d Cir. 1978). The court also upheld a damage award against the CIA. *Id.*[5]

In litigation that spawned decades and ultimately proceeded to trial, a plaintiff who alleged that CIA agents had dropped LSD into his drink while he sat in a Paris café sued the United States and two named CIA agents, asserting tort and constitutional *Bivens* claims. *Kronisch v. United States,* 150 F.3d 112, 116 (2d Cir. 1998). During discovery, approximately "thirty thousand pages of documents," many heavily redacted, were disclosed. *Id.* at 120 n.3. The magistrate judge upheld the CIA's privilege claims, but the case proceeded through discovery and summary judgment. *Kronisch v. United*

[5] *See also Avery v. United States,* 434 F. Supp. 937 (D. Conn. 1977) (rejecting motion to dismiss claims relating to CIA covert mail opening program); *Cruikshank v. United States,* 431 F. Supp. 1355 (D.C. Haw. 1977) (same).

States, 1994 WL 524992, *10-11 (S.D.N.Y. Sept. 27, 1994) (upholding privilege claim asserted during discovery).[6] Thereafter, a three-week trial was conducted resulting in a judgment for the defendants. *Kronisch v. Gottlieb,* 213 F.3d 626 (2d Cir. 2000) (Table). Other similarly sensitive claims involving covert CIA or military activity have also proceeded to trial. *See, e.g., Barlow,* 53 Fed. Cl. 667; *Air-Sea Forwarders, Inc. v. Air Asia Co. Ltd.,* 88 F.2d 176 (9th Cir. 1989) (jury trial held on claims brought by alleged CIA cover company).

Similarly sensitive litigation against the CIA is currently pending, and has proceeded despite the CIA's successful invocation of the state secrets privilege to block certain sensitive discovery. Jennifer Harbury, the widow of a Guatemalan rebel leader who was allegedly captured, interrogated, tortured, and executed by CIA-trained Guatemalan forces at the behest of the CIA, sued the Agency and a number of named CIA officials and agents under the Federal Tort Claims Act and *Bivens.* Harbury sought discovery, most of which was successfully refused under the state secrets privilege. *Harbury v. Deutch,* No. 96-438 (D.D.C. Aug. 28, 2001). The district court, however, refused to dismiss some of Harbury's common-law and international tort claims against the CIA, which remain pending before the district court. *Harbury v. Deutch,* No. 96-438 (D.D.C. March 12, 2001); *Harbury v. Deutch,* No. 96-438 (D.D.C. March 9, 2000). Other sensitive cases concerning covert CIA activity have been permitted to proceed through discovery. *See, e.g., Orlikow v. U.S.,* 682 F. Supp. 77, 79, 87 (D.D.C. 1988) (refusing to grant defendants summary judgment on claims arising out of harm caused by

[6] The plaintiff's supporting evidence included a sealed and confidential declaration submitted on behalf of a former CIA agent who worked in Paris at the time the alleged victim was given LSD. *Kronisch v. United States,* 1997 WL 907994, *7 n.11 (S.D.N.Y Apr. 14, 1997), *vacated in part on other grounds,* 150 F.3d 112 (2d Cir. 1998).

CIA front organizations that implemented part of notorious CIA MKULTRA program, noting that CIA had admitted facts about covert program); *Linder v. Calero-Portocarrero,* 180 F.R.D. 168, 176-77 (D.D.C. 1998) (modifying, but requiring CIA to comply with, third-party subpoena in wrongful death action against alleged leaders of Nicaraguan Contra organizations).[7]

As the Supreme Court has observed, lawsuits "attacking the hiring and promotion policies of the Agency are routinely entertained in federal court," despite the CIA's stated objection to litigants' "'rummaging around' in the Agency's affairs to the detriment of national security." *Webster v. Doe,* 486 U.S. 592, 604 (1988). In *Webster*, the Court held that it had jurisdiction to review a constitutional challenge brought by a former employee of the CIA who had been terminated and found ineligible for a security clearance on the ground that his sexual orientation was considered a security threat. In so holding, the Court rejected the government's argument that review of such claims was precluded, and stressed the need to avoid the "serious constitutional question that would arise if . . . [Doe was denied] any judicial forum for a colorable constitutional claim." *Webster,* 486 U.S. at 603.[8] The Court emphasized the district court's "latitude to control any discovery

[7] Even CIA decisions as sensitive as security-clearance related actions have been subjected to judicial review. *See, e.g., Dubbs v. C.I.A.*, 866 F.2d 1114 (9th Cir. 1989) (reviewing contract employee's constitutional challenge to CIA's denial of higher security clearance because her sexuality was considered security risk, and remanding questions about whether CIA security clearance policies were discriminatory).

[8] Because of the peculiar nature of state secrets litigation, in which the specific grounds upon which the privilege is invoked appear only in ex parte submissions, plaintiff is unaware of the particular factors that required dismissal in *Sterling v. Tenet, supra,* an employment discrimination case, notwithstanding the Supreme Court's instructions in *Webster.* In any event, the vast amount of publicly available and officially acknowledged information about this case, *see infra* Section I.B, distinguishes Mr. El-Masri's case from *Sterling*.

process which may be instituted so as to balance [a plaintiff's] need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Id*. at 604.[9]

Despite this history of judicial review of CIA action, the government, in moving to terminate this action at the pleading stage, effectively seeks to remove a wide range of its activities from any judicial scrutiny. The Supreme Court has cautioned that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Reynolds,* 345 U.S. at 9-10. At the pleading stage, "before the relevancy of [privileged] information has . . . been determined," neither the court nor the parties can confidently predict whether privileged evidence will be necessary to the litigation. *In re United States,* 872 F.2d at 478. Accordingly, as discussed more fully below, only in two situations is dismissal of suits on state secrets grounds appropriate: where the very subject matter of the suit is a state secret, *see infra* Section I. B., or where a court determines, *after discovery*, that one of the parties is unable to prove or validly defend against a claim without relying on privileged evidence, s*ee infra* Section III. Because the former situation is inapplicable and the latter cannot yet be determined, this case should not be dismissed on the basis of the government's premature and overbroad claim of privilege.

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[9] *See also Hutchinson v. C.I.A.,* 393 F.3d 226 (D.C. Cir. 2005) (allowing Privacy Act and due process claims brought by CIA imagery analyst against the CIA and Director Tenet to proceed through discovery, but ultimately granting summary judgment for defendants); *Peary v. Goss,* 365 F. Supp. 2d 713 (E.D. Va. 2005) (dismissing employment action by CIA employee involved in covert intelligence collection after discovery completed); *Roberta B. v. United States,* 61 Fed. Cl. 631 (Fed. Cl. 2004) (denying government's motion to dismiss claim brought by former CIA employee for unpaid travel expenses).

B. Dismissal of this action would be improper because the central facts of the case have been widely disseminated and are not state secrets.

Dismissal of a case on state secrets grounds *prior to discovery* is proper only in an extremely narrow category of cases in which the very subject matter of the suit is a state secret. As the Fourth Circuit has held, "unless the very question upon which the case turns is itself a state secret, or . . . sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters, the plaintiff's case should be allowed to proceed . . . ." *DTM Research L.L.C.*, 245 F.3d at 334 (internal quotation marks omitted); *see also Sterling,* 416 F.3d at 347-48 ("[W]hen the very subject of the litigation is itself a state secret, which provides no way that case could be tried without compromising sensitive military secrets, a district court may properly dismiss the plaintiff's case.") (internal quotation marks omitted). The Fourth Circuit has described as "narrow" the category of cases that may be dismissed because of the "centrality of the privileged material," or because "the very subject matter of the litigation is itself a state secret." *Fitzgerald,* 776 F.2d at 1243-44.

The central facts of this case are not state secrets, and do not become so simply because the Agency insists otherwise. Far too many facts about this case, and about the CIA's rendition program in general, have been officially acknowledged or made public for the United States plausibly to contend that it "can neither confirm nor deny [Mr. El-Masri's] allegations" without "damage to the national security and our nation's conduct of foreign affairs . . . ." Formal Claim of State Secrets Privilege by Porter J. Goss, at ¶ 7. As a matter of law and common sense, the government cannot legitimately keep secret what is already widely known. *See, e.g., Capital Cities Media, Inc. v. Toole*, 463 U.S.

1303, 1306 (1983) (noting that Court has not "permitted restrictions on the publication of information that would have been available to any member of the public"); *Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980) (suggesting that government would have no interest in censoring information already "in the public domain"); *Virginia Dept. of State Police v. The Washington Post*, 386 F.3d 567, 579 (4th Cir. 2004) (holding that government had no compelling interest in keeping information sealed where the "information ha[d] already become a matter of public knowledge").[10]

On numerous occasions and in varied settings, government officials have confirmed the existence of the rendition program and described its parameters. For example, on December 5, 2005 – in highly publicized comments delivered the day before this litigation was commenced – Secretary of State Condoleezza Rice heralded the rendition program as "a vital tool in combating transnational terrorism," to be employed when, "for some reason, the local government cannot detain or prosecute a suspect, and traditional extradition is not a good option." Declaration of Steven Macpherson Watt in Support of Plaintiff's Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Watt Decl.") ¶ 4 and Exh. A. In those instances, the Secretary explained, "the United States and other countries have used 'renditions' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice."

[10] *See also Smith v. Daily Mail Publ'g Co*., 443 U.S. 97, 103 (1979) (noting previous holding that "once the truthful information was publicly revealed or in the public domain the court could not constitutionally restrain its dissemination") (internal quotation marks omitted); *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972) (noting that First Amendment "precludes . . . restraints with respect to information which is . . . officially disclosed"); *McGehee v. Casey*, 718 F.2d 1137, 1141 (D.C. Cir. 1983) (noting that "[t]he government has no legitimate interest in censoring unclassified materials" or "information . . . derive[d] from public sources").

Id. However, she continued, the "United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured." *Id.*

Accordingly, in a single statement, Secretary Rice both confirmed *and* denied allegations at the heart of Mr. El-Masri's complaint. The following day, in response to a press inquiry about Mr. El-Masri's allegations in particular, Secretary Rice insisted: "When and if mistakes are made, we work very hard and as quickly as possible to rectify them. Any policy will sometimes have mistakes and it is our promise to our partners that should that be the case, that we will do everything that we can to rectify those mistakes. I believe that this will be handled in the proper courts here in Germany *and if necessary in American courts as well*." Watt Decl. ¶ 5 and Exh. B (emphasis added).

Nor is it a state secret that the CIA is the lead agency in conducting renditions for the United States government. In public testimony before the 9/11 Commission of Inquiry, Christopher Kojm, who from 1998 until February, 2003 served as Deputy Assistant Secretary for Intelligence Policy and Coordination in the State Department's Bureau of Intelligence and Research, described the CIA's role in liaising 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. Watt Decl. ¶ 9 and Exh. E. Similarly, Defendant Tenet, in his own written testimony to the 9/11 Commission, described the CIA's role in some 70 pre-9/11 renditions, and elaborated on a number of specific examples of CIA involvement in renditions, including assisting "another foreign partner in the rendition of a senior Bin Laden associate" and assisting

the Jordanian government in "render[ing] to justice" "terrorist cells that planned to attack religious sites and tourist hotels."[11] Watt Decl. ¶ 10 and Exh. F. Current CIA Director Porter Goss, whose declarations form the basis for the government's motion, has also spoken publicly about the CIA's role in renditions. In response to questions about rendition from the Senate Armed Services Committee, Mr. Goss asserted:

> [O]n the subject of transferring dangerous terrorists and how that all comes about, there are obviously a number of equities involved. We have liaison sources, we have our other government agencies. The idea of moving people around, transferring people for criminal or other reasons, by government agencies is not new. For us in the intelligence business, the idea of helping out dealing with terrorists has been around for about 20 years. And we do have policies and programs on how to do it. We also have liaison partners who make requests of us, and we try to respect not only the sovereign rights of other countries, but all of the conventions and our own laws and, of course, the Constitution. And as far as I know, we do that.

Watt Decl. ¶ 13 and Exh. I. Once again, in a single statement, the Director conceded that the Agency engages in "transfers" of "terrorists," and denied that it does so in violation of the U.S. and international law.[12]

Prominent media reports relating the circumstances of Mr. El-Masri's rendition are too numerous to assemble and include several hundred newspaper articles as well as

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[11] Based upon the testimony taken and written statements received, the 9/11 Commission staff developed initial findings that they later made available to the public. Under the heading "Rendition," these findings reveal that officials of the CIA, FBI, State Department, and foreign governments cooperated in the rendition of suspected terrorists. Specifically, they conclude that "the CIA helps to catch and send [the suspect] to the United States or a third country," and that renditions were "an important component of U.S. counterterrorism policy throughout the period leading up to 9/11" and "are still widely used today." Watt Decl. ¶ 12, *Staff Statement No. 7, National Commission on Terrorist Attacks Upon the United States*, at 2-3, (Exh. H).

[12] Former CIA agents and operatives have described the rendition program in far greater detail. Watt Decl. ¶ 14-15, *Interview of Michael Scheuer*, PBS Frontline, (Oct. 18, 2005) (Exh. J); Michael Scheuer, *A Fine Rendition*, NEW YORK TIMES, (March 11, 2005), at A23 (Exh. J); *Transcript of "File on Four" – Rendition,* BBC, (Feb. 8, 2005) (Exh. K).

segments on the nation's leading television news programs. In addition to widely disseminating Mr. El-Masri's allegations of kidnapping, detention, and abuse, these news reports have revealed a vast amount of information about the CIA's behind-the-scenes machinations during Mr. El-Masri's ordeal, and even about the actual aircraft employed to transport Mr. El-Masri to detention in Afghanistan. *See, e.g.,* Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, (December 4, 2005), A1 (describing in detail decision-making process during Mr. El-Masri's rendition, including internal CIA discussions and role of German and Macedonian governments); Don Van Natta, Jr. & Souad Mekhennet, *German's Claim of Kidnapping Brings Investigation of U.S. Link*, NEW YORK TIMES (Jan. 9, 2005) (first comprehensive account of Mr. El-Masri's story in U.S., describing his rendition and alleged involvement of CIA); *CIA Flying Suspects to Torture,? 60 Minutes* (CBS television broadcast), (March 6, 2005) (discussing rendition program and Mr. El-Masri's case, and describing U.S. modus operandi for renditions, in which "masked men in an unmarked jet seize their target, cut off his clothes, put him in a blindfold and jumpsuit, tranquilize him and fly him away.").[13] Finally, it is almost certain that a great deal of additional information about the rendition program and Mr. El-Masri's case will be made public in the near future, when inter-governmental inquiries in the Council of Europe and European Parliament, as well as separate criminal investigations and public inquiries in 18 countries, including

[13] *See also* Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, (Feb. 14 and 21, 2005), (providing comprehensive accounting of rendition program from its initial inception to present); Michael Hirsh, Mark Hosenball and John Barry, *Aboard Air CIA*, NEWSWEEK, (February 28, 2005), (describing Mr. El-Masri's rendition and CIA's broader rendition program). The articles cited above, and several others, are attached as Exhibit X to the Watt Decl. ¶ 26.

France, Italy, Spain, Sweden, the United Kingdom, and Germany, are completed. Watt Decl., ¶ 20 and Exh. R.

No court has ever found the very subject matter of a suit to be a state secret where the suit involved an officially acknowledged program. Indeed, courts have properly rejected privilege claims over evidence and information that has "already received widespread publicity." *Spock,* 464 F. Supp. at 519; *see also In re United States*, 872 F.2d at 478 (rejecting privilege claim, relying in part on prior release under FOIA of information relevant to litigation); *Ellsberg*, 709 F.2d at 61 (rejecting portion of privilege claim on ground that so much relevant information was already public). Because the rendition program is officially acknowledged, it cannot be that the very subject matter of this suit – a rendition and its consequences – is by definition a state secret. *Cf. Ellsberg*, 709 F.2d at 55 (noting that where government had made certain admissions, it appropriately refrained from asserting the privilege over that information); *Jabara v. Kelley,* 75 F.R.D. 475, 493 (E.D. Mich. 1977) (observing that where information over which government asserted privilege had been revealed in report to Congress, "it would be a farce to conclude" that information "remain[ed] a military or state secret").[14]

In light of the vast amount of public and officially acknowledged information about the rendition program, the United States' insistence that the CIA "cannot admit or deny allegations of clandestine activities overseas" is at best overstated. Govt. Br. at 6. As the Supreme Court has recently held, there is a significant distinction between a matter that is covert and *unacknowledged,* and a matter that is covert but acknowledged:

[14] The sheer amount of public information about this case, much of it derived from official sources, starkly distinguishes Mr. El-Masri's claims from those in *Sterling*, one of the principal cases upon which the United States relies.

in the latter circumstance, even claims against the CIA may proceed. *See Tenet,* 125 S. Ct. at 1237 (distinguishing *Webster* and *Totten*).

Like other courts faced with overbroad assertions of the state secrets privilege prior to discovery, this Court should reject the unsupported assertion that the very nature of this case compels immediate dismissal, and instead require the government to assert the privilege on an item-by-item basis during discovery. Acknowledging the potential danger to our system of justice, another district court properly rejected the government's demand that a case be dismissed pursuant to the privilege:

> The relief sought by the Government goes beyond the traditional remedies fashioned by the courts in order to protect state secrets or other classified information . . . . [T]he Government seeks to foreclose the plaintiff at the pleading stage. Such a result would be unfair and not in keeping with the basic constitutional tenets of this country. Here, where the only disclosure in issue is the admission or denial of the allegation that interception of communications occurred – an allegation which has already received widespread publicity – the abrogation of the plaintiff's right of access to the courts would undermine our country's historic commitment to the rule of law.

Spock, 464 F. Supp. at 519-520*; see also In re United States*, 872 F. 2d at 478; *Monarch Assur. P.L.C.*, 244 F.3d 1356. Because the very subject matter of this litigation is not a state secret, the case should not be dismissed at this early stage.

C. Before this court can dismiss plaintiff's claims on the basis of the privilege, it must carefully assess the validity of the privilege claim, examine the underlying evidence, and ensure that no nonsensitive evidence can be disentangled from the evidence that reasonably causes harm to national security.

The government's invocation of the privilege must be carefully scrutinized. The Fourth Circuit has admonished that "[t]he understandable sense of unfairness which a litigant [against whom the privilege is invoked] experiences is unnecessarily exacerbated

when a district court acts with undue haste to dismiss a case." *Fitzgerald,* 776 F.2d at 1238 n.3. It is "the court" – not the executive – that is "the final arbiter of the propriety of [the] invocation" of the privilege. *In re Under Seal,* 945 F.2d at 1288; *see also Reynolds,* 345 U.S. at 9-10; *In re United States,* 872 F.2d at 475 (noting that "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 58 ("[T]o ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine the instances of its invocation."); *Molerio v. F.B.I.*, 749 F.2d 815, 822 (D.C. Cir. 1984) ("[T]he validity of the government's assertion must be judicially assessed.").

As the Supreme Court recently emphasized, the Constitution "envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004). "[A] blind acceptance by the courts of the government's insistence on the need for secrecy . . . would impermissibly compromise the independence of the judiciary and open the door to possible abuse." *In re Washington Post Co. v. Soussoudis*, 807 F.2d 383, 392 (4th Cir. 1986). Because dismissal at the pleading stage deprives a plaintiff of any access to a judicial forum before the validity of his claims has been assessed, the court must take special care in probing the government's asserted justifications.

The extent of the plaintiff's need for allegedly privileged information "will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." *Reynolds,* 345 U.S. at 11. The Fourth Circuit has instructed that "the more compelling a litigant's showing of need for the information in

question, the deeper the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." *In re Under Seal,* 945 F.2d at 1288 (internal citation and quotation marks omitted); *see also Sterling*, 416 F.3d at 343. Indeed, where the government is urging the dismissal of an entire lawsuit at its very outset, through broad and general claims about the need for absolute secrecy, the plaintiff's need is at its apex, and the court should probe as deeply as possible before depriving a plaintiff of any judicial forum in which to present his claims. Moreover, before dismissing an action pursuant to the privilege, the court must make every effort to ensure that "sensitive information . . . [is] disentangled from nonsensitive information to allow for the release of the latter." *Ellsberg*, 709 F.2d at 57; *In re United States,* 872 F. 2d at 479 (court of appeals was "unconvinced that district court would be unable to 'disentangle' the sensitive from the nonsensitive information as the case unfold[ed]").

In evaluating the government's claim of privilege, this Court must require the government to be as specific as possible about the particular evidence that is privileged and the reason why its disclosure would harm the nation; broad generalities about national security should not suffice. Further, this Court should examine the evidence underlying the privilege claim in order to evaluate whether the claim of privilege is proper. This is particularly vital in this case because, unlike the plaintiff in *Sterling*, Mr. El-Masri has no recourse to administrative procedures through which to seek redress from the CIA. *Sterling,* 416 F.3d at 348.

This Court is plainly competent to make an independent assessment of the government's claims of privilege and must determine on its own whether further litigation would reasonably cause danger to national security, or simply cause

embarrassment to the United States. *See* Statement of Senator Muskie, 120 Cong. Rec. 17023 (1974) (noting the "outworn myth that only those in possession of [] confidences can have the expertise to decide with whom and when to share their knowledge," in floor debate regarding standards for judicial review of claims under Exemption 1 of FOIA). Indeed, courts have not hesitated to reject state secrets claims where the invocation of the privilege was inappropriate or untimely. *See, e.g., In re United States,* 872 F.2d at 478; *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 responsible officials"); *Spock*, 464 F. Supp. at 520.

Article III courts are routinely charged with making sensitive national security determinations – and the government routinely insists that courts have little or no role in evaluating executive assertions of secrecy. For example, courts review classification determinations to determine whether the executive has properly shielded information from public disclosure. *See, e.g., McGehee*, 718 F.2d at 1148 (requiring *de novo* judicial review of pre-publication classification determinations to ensure that information is properly classified and agency "explanations justify censorship with reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification"); *see also Snepp*, 444 U.S. at 513 n. 8 (1980) (requiring judicial review of pre-publication classification determinations). In determining whether information is properly classified, courts must evaluate, *inter alia,* whether its disclosure could be expected to cause varying levels of harm to the nation's security. E.O. 13292 (Mar. 25, 2003). Courts make similar determinations when evaluating Exemption 1

claims in FOIA litigation. *See, e.g., Halpern v. F.B.I.,* 181 F.3d 279 (2d Cir. 1999) (rejecting government's Exemption 1 claim). Here, the United States seeks greater judicial deference to a determination with harsher consequences – outright dismissal of potentially worthy and claims of torture and abuse – than in those situations where the courts routinely make the most sensitive judgments.[15]

The recent litigation in this district over accused 9/11 conspirator Zacarias Moussaoui's access to potentially exculpatory testimony from al Qaeda leaders in CIA custody provides an instructive example of both the government's extravagant security claims, and the judiciary's ability to balance the government's legitimate needs against a private litigant's right to a fair proceeding. At issue was Moussaoui's attempt to gain access to "enemy combatant witnesses" in order to depose them under Federal Rule of Criminal Procedure 15. *United States v. Moussaoui,* 382 F.3d 453, 456 (4th Cir. 2004). After the government refused to produce the witnesses, and the district court imposed sanctions by eliminating the possibility of a death sentence, the government appealed, insisting that the depositions "would irretrievably cripple painstaking efforts for securing the flow of information," and that "the courts [were] in no position to second guess such Executive Branch judgments." Brief of Petitioner-Appellant, *United States v. Moussaoui,* 2003 WL 22519704, at *27 (Oct. 21, 2003). The government argued there, as it argues here, that "[e]ven the smallest piece of information . . . may prove to be the key that makes sense of a web of information collected from myriad other sources." *Id.* at *43.

[15] In addition, courts routinely deal with classified information in criminal cases. The Classified Information Procedures Act ("CIPA") sets forth a comprehensive regime for safeguarding classified information in litigation. *See generally* CIPA, 18 U.S.C. app. III § 1 *et seq*. Under CIPA, courts review and consider classified material as a matter of course. *See, e.g., United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998) (reviewing classified materials in detail).

Writing for the Court, Chief Judge Wilkins observed that the dispute presented "questions that test the commitment of this nation to an independent judiciary, to the constitutional guarantee of a fair trial . . ., and to the protection of our citizens against additional terrorist attacks." *Moussaoui,* 382 F.3d at 456. Notwithstanding the government's dire warnings about the "irreparable harm" that would flow from "any form of access" to the enemy combatant witnesses, 2003 WL 22519704, at *42-43, the Fourth Circuit rejected the government's proposal to provide the defense with "a series of statements" derived, presumably, from interrogation summaries. *Moussaoui,* 382 F.3d at 477.[16] Instead, the Court instructed the district court to devise a procedure for Moussaoui to submit written questions to the combatant witnesses. *Id.* at 479-81. At trial last month, the transcribed responses of several named al Qaeda detainees were read aloud in open court. *See, e.g.,* CNN, *Al Qaeda Witnesses Saw Moussaoui as a Bumbler,* March 28, 2006, *available at* http://www.cnn.com/2006/LAW/03/28/moussaoui/index.html.[17]

In evaluating the government's claim of privilege in this matter, this Court should rigorously evaluate how confirming or denying that Mr. El-Masri was a victim of an officially acknowledged program would do lasting harm to national security. As in *Spock,* where the government policy of wiretapping American citizens had been officially

[16] Although redactions to the court's opinion render unclear the precise contents of the government's proposal, both context and subsequent events provide guidance. Similarly, although the opinion describes the enemy combatant witnesses as "Witness A," "Witness B," etc., numerous published reports and subsequently released transcripts have identified them as Khaled Sheikh Mohammed, Ramzi Binalshibh, and other alleged 9/11 conspirators.

[17] In another piece of legal fiction with echoes in the current case, the government apparently would "neither confirm nor deny that the witnesses were" in United States' custody. *Moussaoui,* 382 F.3d 464 n.15. Although the apparent reference to "custody" is redacted, the sentence appears in the midst of a discussion of custody and judicial process power and makes no sense otherwise. *See id.* and accompanying text.

acknowledged, and the plaintiff's involvement had been reported in the *Washington Post*, the admission or denial by the government of its role in Mr. El-Masri's rendition would "reveal[] no important state secret . . . ." *Spock,* 464 F. Supp. at 519. The public declaration of Director Goss wholly fails to explain how confirming or denying a single rendition can cause any greater harm than publicly confirming the existence of the program, as he and other officials have repeatedly done.

II. Dismissal of this action without permitting nonsensitive discovery and considering nonprivileged evidence would be improper.

Where, as here, the very subject matter of the suit is a not state secret, a case may not be dismissed on state secrets grounds unless, after any possible nonsensitive discovery and presentation of nonprivileged evidence, a court determines that a plaintiff cannot present a prima facie case or a defendant cannot present a valid defense without resort to privileged evidence. *In re Under Seal,* 945 F.2d at 1289-90 (summary judgment granted only after plaintiff could not show genuine issue of material fact with nonprivileged evidence); *Ellsberg*, 709 F. 2d at 64 n.55 (remanding where district court had dismissed case on basis of privilege but "did not even consider whether the plaintiffs were capable of making out a prima facie case without the privileged information."); *Molerio*, 749 F. 2d at 822, 826 (terminating suit only after evaluating plaintiffs' nonprivileged evidence); *Clift*, 597 F.2d at 830 (remanding for further proceedings where plaintiff has "not conceded that without the requested documents he would be unable to proceed, however difficult it might be to do so."); *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992), *vacated in part on denial of reargument* (Oct. 14, 1992) (holding that plaintiff's case could go forward "without the privileged information and would be dismissed only if the remaining information were insufficient to make out a

prima facie case").[18] "If, after further proceedings, the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case." *Kasza v. Browner,* 133 F.3d 1159, 1166 (9th Cir. 1998).

The wisdom of this traditional practice is manifest. When the government urges dismissal pursuant to the state secrets privilege before an answer has been filed, it is difficult for a court to determine which allegations are relevant or even in dispute.[19] Because of the sheer amount of information about this matter that is public and officially acknowledged, it is possible that the named defendants would have no basis for denying certain key allegations in their answers.

Even in those instances in which government claims of privilege are upheld, courts routinely permit nonsensitive discovery to proceed. The Supreme Court set the stage for this approach when it held in *Reynolds* that "it should be possible . . . to adduce the essential facts as to causation without resort to material touching upon military secrets," and remanded the case for depositions. *Reynolds,* 345 U.S. at 11. Indeed, "an

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[18] *See also Monarch Assur. P.L.C.,* 244 F.3d at 1364 (reversing dismissal on state secrets grounds so that plaintiff could engage in further discovery to support claim with nonprivileged evidence); *Barlow,* 53 Cl. Ct. 667 (despite invocation of privilege with respect to some evidence, full-blown trial conducted on merits, with nonprivileged evidence); *McDonnell Douglas Corp. v. United States,* 37 Fed. Cl. 270, 280-281 (Fed. Cl. 1996) (terminating case because state secrets privilege deprived both plaintiff and defendant of ability to prove their cases, but only after giving "plaintiffs an opportunity to make a *prima facie* showing that they could make a case without the privileged information.").

[19] Federal Rule of Civil Procedure 8(b) states that in an answer, a party "shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." The purpose of this requirement is to "apprise the opponent of those allegations in the complaint that stand admitted and will not be in issue at trial and those that are contested and will require proof to be established to enable the plaintiff to prevail." Wright & Miller, Fed. Prac. & Proc. Civ. 3d §1261.

action as to which a certain avenue of discovery would compromise state secrets need not be dismissed if an alternative, non-sensitive avenue of discovery is available." *In re United States*, 872 F.2d at 481 (Ginsburg, J., concurring and dissenting); *In re Under Seal*, 945 F.2d at 1287 (noting that government provided some discovery despite invocation of the privilege).[20] Accordingly, before the court dismisses Mr. El-Masri's case on the basis of the privilege, it must consider and evaluate whether claims and defenses could be proved here through nonprivileged evidence.

Even at this preliminary stage of the proceedings, available evidence suggests that Mr. El-Masri could present a prima facie case that defendants violated his rights under the Constitution and the law of nations without privileged evidence. Mr. El-Masri's sworn declaration, submitted herewith, provides a remarkably detailed and consistent account of his ordeal which, if deemed credible by a trier of fact, would in itself satisfy much of his burden under the law. The declaration is supported by abundant evidence, including:

- Passport stamps confirming Mr. El-Masri's entry to and exit from Macedonia, as well as exit from Albania, on the dates in question (Masri Decl. ¶ 81 and Exh. E);
- Scientific testing of Mr. El-Masri's hair follicles, conducted pursuant to a German criminal investigation, that is consistent with Mr. El-Masri's account that he spent time in a South-Asian country and was deprived of food for an extended period of time (Gnjidic Decl. ¶ 13 and Exh. B);

[20] *See also Monarch Assur. P.L.C.*, 244 F.3d at 1364 (upholding privilege but remanding because discovery had been unduly limited); *Crater Corp.,* 255 F.3d at 1365 (government provided some discovery despite invocation of privilege); *Patterson v. FBI*, 893 F.2d 595, 598 (3d Cir. 1990) (same); *Zoltek*, 61 Fed. Cl. 14 (same); *Barlow*, 53 Fed. Cl. 667 (same); *Kinoy*, 67 F.R.D. at 4-5 (same).

- Other physical evidence, including Mr. El-Masri's passport, the two t-shirts he was given by his American captors on departing Afghanistan, his boarding pass from Tirana to Frankfurt, and a number of keys that Mr. El-Masri possessed during his ordeal, all of which have been turned over to German prosecutors (Gnjidic Decl. ¶ 12);
- Aviation logs confirming that a Boeing business jet owned and operated by defendants in this case, then registered by the FAA as N313P, took off from Palma, Majorca, Spain on January 23, 2004; landed at the Skopje airport at 8:51 p.m. that evening; and left Skopje more than three hours later, flying to Baghdad and then on to Kabul, the Afghan capital (Masri Decl. ¶ 34 and Exh. A);
- Witness accounts from other passengers on the bus from Germany to Macedonia, which confirm Mr. El-Masri's account of his detention at the border (Gnjidic Decl. ¶ 11);
- Photographs of the hotel in Skopje where Mr. El-Masri was detained for 23 days, from which Mr. El-Masri has identified both his actual room and a staff member who served him food (Masri Decl. ¶¶ 14, 17);
- Geological records that confirm Mr. El-Masri's recollection of minor earthquakes during his detention in Afghanistan (Masri Decl. ¶ 56 and Exh. C);
- Evidence of the identity of "Sam," whom Mr. El-Masri has positively identified from photographs and a police line-up, and who media reports confirm is a German intelligence officer with links to foreign intelligence services (Masri Decl. ¶ 61 and Exh. D);

- Sketches that Mr. El-Masri drew of the layout of the Afghan prison, which were immediately recognizable to another rendition victim who was detained by the U.S. in Afghanistan (Masri Decl. ¶ 84 and Exh. F; Watt Decl. ¶ 19 and Exh. Q);
- Photographs taken immediately upon Mr. El-Masri's return to Germany that are consistent with his account of weight loss and unkempt grooming (Gnjidic Decl. ¶ 3 and Exh. A).

During a reasonable discovery period, Mr. El-Masri might well be able to locate significant additional evidence, including prisoners with whom he was incarcerated in Afghanistan and other witnesses to his ordeal. Moreover, numerous government inquiries, including the German prosecutors' investigation, a German parliamentary investigation, and various intergovernmental human rights inquiries, are almost certain to produce additional corroborating evidence. *See* Gnjidic Decl. ¶¶ 6-16; Watt Decl.¶¶ 19, 20.

In short, at this early stage of the litigation, it would be premature for the Court to conclude that Mr. El-Masri cannot satisfy his burden of proof, or that defendants cannot validly defend against his allegations, without damage to the nation's security.

III. There are alternatives to dismissal that would permit this case to go forward without harming the nation's security.

The court may not dismiss this action on the basis of the privilege without carefully considering whether alternatives exist that would permit Mr. El-Masri's claims to be adjudicated without exposing secrets of state. As the Fourth Circuit has directed, courts must use "creativity and care" to devise "procedures which would protect the privilege and yet allow the merits of the controversy to be decided in some form." *Fitzgerald,* 776 F.2d at 1238 n.3; *see also In re United States*, 872 F.2d at 478 (discussing

measures to protect sensitive information as case proceeds); *cf. Colby v. Halperin,* 656 F.2d 70, 73 (4th Cir. 1981) (noting that "the principle of non-disclosure [of classified information] may give way in particular circumstances in the face of 'compelling necessity,' subject, of course, to appropriate protective devices and procedures"). "Only when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal [on state secrets grounds] warranted." *Fitzgerald,* 776 F.2d at 1244.

Because of the injustice and finality of dismissal, courts have sought creative alternatives that permit the injured party to vindicate her rights while protecting state secrets from disclosure. For example, in *Heine v. Raus,* a case involving sensitive CIA information, the Fourth Circuit directed the district court to review *in camera* any discovery material that might arguably fall within the privilege. 399 F.2d at 791. In *In re United States*, the D.C. Circuit discussed several alternatives to dismissal, noting that "the information remains in the Government's custody, and the parties' discovery stipulation has preserved the Government's right to assert the privilege and to support its assertions by submissions of representative samples of documents for *in camera* review." 872 F. 2d. at 478. Moreover, "the parties have provided for the protection of third party privacy by agreeing to mechanisms limiting the disclosure of certain documents, including redaction of names." *Id.* Finally, the court noted that a bench trial "w[ould] reduce the threat of unauthorized disclosure of confidential material." *Id.*

Similarly, in *The Irish People, Inc*, the D.C. Circuit upheld the invocation of the privilege but refused to dismiss the case, suggesting that the district court could make representative findings of fact and provide summaries of withheld information. The court

noted that "the district court may properly itself delve more deeply than it might ordinarily into marshalling the evidence on both sides for the selective prosecution claim." *The Irish People*, 684 F.2d at 955. Other courts have utilized a number of additional tools to safeguard sensitive information in cases involving state secrets, including (1) protective orders, *Lockheed Martin Corp.,* 1998 WL 306755; (2) seals, *In re Under Seal,* 945 F.2d at 1287; (3) bench trials, *In re United States,* 872 F. 2d. at 478; (4) the use of special masters, *Loral Corp. v. McDonnell Douglas Corp,* 558 F.2d 1130, 1132 (2d Cir. 1977); and (5) *in camera* trials, *Halpern*, 258 F.2d at 41.

Any or all of those alternatives, or others devised by this Court, could be employed to permit this case to proceed without jeopardizing national security. For example, the Court could seal any sensitive evidence and provide Mr. El-Masri's counsel with access to that evidence under a protective order. *See, e.g., In re Under Seal,* 945 F.2d at 1287 (noting protective orders issued and allowing depositions to be conducted in secure facilities); *Air-Sea Forwarders, Inc. v. United States,* 39 Fed. Cl. 434, 436-37 (Fed. Cl. 1997) (noting that CIA provided discovery under protective order).[21] If

[21] *See also In re Guantanamo Detainee Cases,* 344 F. Supp. 2d 174 (D.D.C. 2004); *United States v. Rezaq*, 899 F. Supp. 697, 708 (D.D.C. 1995) (issuing protective order tracking provisions of Classified Information on Procedures Act provided "more than adequate procedural protections against public disclosure of classified information"); *United States v. Musa*, 833 F.Supp. 752, 758-61 (E.D.Mo.1993) (imposing protective order to control viewing of classified documents and requiring counsel to sign confidentiality agreement). In addition, courts routinely protect classified information used in criminal proceedings through protective orders. Under CIPA, when necessary, protective orders are utilized to prevent the release of classified information beyond the parties to the litigation. *See, e.g.,* 18 U.S.C. app. III § 3; *United States v. Pappas,* 94 F.3d 795, 797 (2d Cir. 1996); *United States v. Musa*, 833 F. Supp. 752, 758-61 (E.D. Mo. 1993).

evidence is classified, one or more of plaintiffs' counsel may be granted a security clearance and compelled to sign a non-disclosure agreement.[22]

Furthermore, the court could receive evidence *in camera* to alleviate any risk of public disclosure, *see Heine,* 399 F.2d at 791, or even conduct an entire trial *in camera. See Halpern*, 258 F.2d at 41; *see also Tenet,* 125 S. Ct. at 1237 (noting "the more frequent use of *in camera* judicial proceedings"). If, notwithstanding such protections, there were evidence that the CIA insisted upon shielding from plaintiffs' counsel, the Court could assume a more active role in examining the evidence itself. *See Webster v. Doe*, 486 U.S. at 603 (noting that "the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission"); *The Irish People*, 684 F.2d at 955.

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[22] The government has granted clearance to attorneys in civil litigation on numerous occasions. *See, e.g., In re Guantanamo Detainee Cases,* 344 F. Supp. 2d at 179-80 (noting in protective order that "counsel for petitioners in these cases are presumed to have a 'need to know' information both in their own cases and in related cases pending before this Court."); *Al Odah v. U.S.,* 346 F. Supp. 2d 1, 14 (D.D.C. 2004 (noting counsel in three Guantanamo *habeas* cases would be "required to have a security clearance at the level appropriate for the level of knowledge the Government believes is possessed by the detainee, and would be prohibited from sharing with the detainee any classified material learned from other sources"); *U.S. v. Lockheed Martin Corp.,* 1998 WL 306755, at *5 (D.D.C. May 29, 1998) (issuing protective order stating that "defendant's identification of an individual as someone required for the defense of this litigation will establish a 'need to know' for access to the specific classified information"); *see also Doe v. Tenet*, 329 F.3d 1135, 1148 (9th Cir. 2003), *rev'd on other grounds*, 125 S.Ct. 1230 (2005) (noting that plaintiffs' counsel had received security clearance from CIA to aid in representing alleged covert CIA agents); *In re United States,* 1993 WL 262656, at *2-3 (Fed. Cir. Apr. 19, 1993) (acknowledging that government had granted clearance to numerous counsel in civil litigation).

While some of these alternatives are extreme, *any* alternative would be preferable to the elimination of Mr. El-Masri's rights at the pleading stage. Failure to consider these options before depriving Mr. El-Masri of any opportunity for legal redress would be unfair and improper.

IV. Dismissal of this action under *Totten* would be wholly inappropriate and would radically expand the doctrine.

Almost by way of afterthought, the government argues in the alternative that this case should be dismissed pursuant to the categorical bar of the *Totten* doctrine. *Totten* involved a suit brought by a covert and unacknowledged spy to enforce a secret contract for espionage allegedly negotiated with President Lincoln. *Totten v. United States*, 92 U.S. 105 (1875). The *Totten* case stands for the proposition that courts cannot entertain "suits against the Government based on covert espionage agreements." *Tenet,* 125 S. Ct. at 1233. The Supreme Court recently reaffirmed the doctrine's validity in *Tenet v. Doe,* holding that an action against the CIA for breaching its alleged obligation to "ensure financial and personal security for life," brought by alleged former CIA spies who were unacknowledged by the U.S. government, was squarely barred under *Totten.* *Id.*

The state secrets privilege is a rule of evidence. The *Totten* doctrine is a rule of justiciability. It is appropriately invoked to bar only those cases "where success depends upon the existence of [a] secret espionage relationship with the government," *Tenet,* 125 S. Ct. at 1236, or where the government cannot openly "admit or deny [a] fact that [is] central to the suit." *Id.* at 1237. The "categorical bar" to suits imposed under *Totten* prohibits any court from entertaining an extremely narrow category of cases, *id.* at 1236; as discussed above, it does not apply to all claims against the CIA, even all those involving clandestine operations. *See supra* Section I.A. As the Supreme Court has

emphasized, the *Totten* doctrine is a "unique and categorical bar – a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry." *Tenet,* 125 S. Ct. at 1237.

Indeed, in the years between its 1875 decision in *Totten* and its 2005 decision in *Tenet*, the Court only once held a claim barred under the doctrine. In *Weinberger v. Catholic Action of Haw./Peace Ed. Project*, 454 U.S. 139 (1981), the Court invoked the *Totten* bar to dismiss a suit to enforce certain provisions of the Environmental Policy Act that would have compelled the Navy to disclose the impact of storing nuclear weapons in a particular location. Because, as the *Tenet* court explained, the Navy could "neither admit or deny the fact that was central to the suit, *i.e.,* that it proposed to store nuclear weapons at a [particular] facility," the suit could not proceed. *Tenet,* 125 S. Ct. 1237 (characterizing *Weinberger* holding). Thus, the *Totten* bar has been largely limited to cases concerning secret espionage agreements – where absolute secrecy is a term agreed upon by all parties to the contract – and a suit that would have revealed the location of nuclear weapons. The lower courts that have applied the doctrine have generally confined its reach to secret espionage contracts. *See, e.g., Korczak v. United States,* 124 F.3d 227 (Fed. Cir. 1997) (Table); *Guong v. United States,* 860 F.2d 1063 (Fed. Cir. 1988); *Kielczynski v. C.I.A.,* 128 F. Supp. 2d 151 (E.D.N.Y. 2001); *Mackowski v. United States*, 1981 WL 21464 (Cl. Ct. June 12, 1981).

This case, which involves harms allegedly perpetrated pursuant to an *acknowledged* CIA program, is of a different order. Nonetheless, the government posits here that the *Totten* doctrine should be applied to bar not only claims relating to covert espionage agreements, but any claim involving "allegations of a clandestine CIA foreign

intelligence activity." Gov't Br. at 16. Even accepting the government's characterization of Mr. El-Masri's allegations, its proposed rule would mark a departure from – and expansion of – the *Totten* doctrine. *See supra* nn. 4-9 and accompanying text. That no court in the Fourth Circuit has *ever* held a case categorically barred under the *Totten* doctrine, although most claims against the CIA are litigated in those courts, underscores the limits of the doctrine and undermines the government's overbroad interpretation.

CONCLUSION

For the forgoing reasons, this Court should deny the United States motion to dismiss or for summary judgment, and permit this case to proceed.

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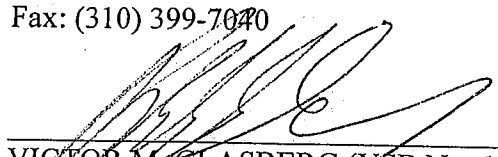

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