IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MAHER ARAR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 04-CV-249-DGT-VVP
	)	
JOHN ASHCROFT, *et al.*,	)	
	)	
Defendants.	)	
	)	

Memorandum in Support of the United States' Assertion of State Secrets Privilege

Plaintiff has filed a civil suit seeking money damages and declaratory relief from a number of federal officials in their individual and official capacities. The case arises from the detention and removal of plaintiff, a Syrian-born Canadian citizen. The complaint alleges that in September 2002, while en route to Canada from Tunisia via Switzerland, plaintiff was detained at JFK Airport and held in New York for 13 days before ultimately being removed to Syria. Complaint, ¶¶ 25, 47. Plaintiff alleges that he was advised he was "inadmissible in the United States because he belonged to an organization designated by the Secretary of State as a Foreign Terrorist Organization, namely al Qaeda." Id., ¶ 13 and Exhibit D. Federal officials allegedly removed plaintiff pursuant to an "extraordinary renditions program," because they believed that he was an al Qaeda member and that the Syrians would use "methods of interrogation to obtain information from Mr. Arar that would not be legally or morally acceptable in this country or in other

democracies." Id., ¶¶ 1, 57. Plaintiff claims he was tortured by Jordanian and Syrian officials while detained in Jordan and Syria. Id., ¶¶ 50-53, 58, 59, 68. Plaintiff alleges federal officials engaged in a conspiracy to procure this result and knew or should have known he would be tortured by the Syrian government. Id., ¶¶ 3, 69, 74, 77-80.

Plaintiff challenges his detention and removal to Syria as unlawful under the Fifth Amendment, the Torture Victim Protection Act (28 U.S.C. § 1350, note), and "treaty law." Id., ¶¶ 1, 3, 8, 72-95. Specifically, he challenges the conditions of his thirteen-day confinement in the United States (Count IV, ¶¶ 90-95); his subsequent detention in Syria (Count III, ¶¶ 83-89); and his alleged torture in Syria by Syrian officials (Counts I and II, ¶¶ 72-82). With respect to plaintiff's allegations regarding his detention at the border and his removal to Syria, there are three distinct legal decisions or actions at issue: (1) the United States' exclusion of plaintiff from this country based on the finding that he was a member of a foreign terrorist organization, namely al Qaeda; (2) the United States' rejection of plaintiff's designation of Canada as the country to which he wished to be removed; and (3) the United States' decision to remove plaintiff to Syria.

The information forming the basis of each of these decisions is properly classified. Its disclosure would interfere with

foreign relations, reveal intelligence-gathering sources or methods, and be detrimental to national security. In the accompanying Notice of Filing and public record declarations of Acting Attorney General James B. Comey and Secretary of the Department of Homeland Security Tom Ridge, the United States formally asserts the state secrets privilege. As explained in detail in this memorandum, the state secrets are at the core of plaintiff's challenges to these three decisions, and Counts I, II, and III of his complaint cannot be litigated without reference to the privileged material. Accordingly, under Fed. R. Civ. P. 56, those counts should be dismissed and judgment entered thereon in favor of all defendants, both in their individual and official capacities.[1]

Discussion

I. The State Secrets Privilege is an Absolute Bar to Civil Litigation That Would Require Disclosure of Protected Information.

The necessity of permitting the Executive Branch to protect military, intelligence, and diplomatic secrets from disclosure has been recognized since the earliest days of the Republic. See United States v. Burr, 25 F.Cas. 30 (C.C.D. Va. 1807). The state secrets privilege is based on the President's Article II power to

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[1] As discussed *infra* at n.6, Count IV, a constitutional conditions-of-confinement claim related solely to plaintiff's detention in the United States, does not on its face appear to be barred by the assertion of the state secrets privilege.

conduct foreign affairs and to provide for the national defense, and therefore has constitutional underpinnings. United States v. Nixon, 418 U.S. 683, 710 (1974). The privilege allows the government to withhold information if disclosing it would be "inimical to national security." Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991)(holding that state secrets privilege precluded product liability action against manufacturer of allegedly defective missile defense system). Because of the profound consequences of such disclosure, the state secrets privilege "must head the list" of evidentiary privileges. Halkin v. Helms, 598 F.2d 1, 7 (D.C. Cir. 1978) (Halkin I).

The state secrets privilege "belongs to the Government and must be asserted by it. . . ." United States v. Reynolds, 345 U.S. 1, 7 (1953). "The privilege must be claimed by the head of the department with control over the matter in question after personal consideration by that officer." Zuckerbraun, 935 F.2d at 546 (citing Reynolds, 345 U.S. at 7-8). This requirement of personal consideration by the agency head ensures "that the court can rely upon [the agency head's] judgment that the claim was prudently invoked." Kronisch v. United States, 1995 WL 303625, *11 (S.D.N.Y.)(citations omitted).

Federal courts of appeals, including the Second Circuit, uniformly hold that the standard of review in considering an

assertion of the state secrets privilege "is a narrow one." Halkin I, 598 F.2d at 9; see also Zuckerbraun, 935 F.2d at 547; Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir.), cert. denied, 525 U.S. 967 (1998)(dismissing suit against Air Force officials based on state secrets privilege). Courts "must accord the 'utmost deference' to the executive's determination of the impact of disclosure on military or diplomatic security." Zuckerbraun, 935 F.2d at 545 (citing Halkin I, 598 F.2d at 9, quoting Nixon, 418 U.S. at 710); cf. CIA v. Sims, 471 U.S. 159, 180 (1985) (explaining it is "the responsibility of the Director [of Central Intelligence] . . . not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process").

Where properly asserted, the state secrets privilege "is absolute." Halkin I, 598 F.2d at 7. There is no balancing of the litigant's interests against the harm from disclosure, and "even the most compelling necessity cannot overcome" a proper invocation of the privilege. Reynolds, 345 U.S. at 11; accord, e.g., Zuckerbraun, 935 F.2d at 546-47 (same); McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1024 (Fed. Cir. 2003) ("[W]ell-established precedent demonstrates that, when a properly invoked claim of State Secrets privilege undercuts a civil litigant's opportunity to prove its case, the interests favoring

the protection of the state secret always prevail."); Halkin v. Helms, 690 F.2d 977, 990 (D.C. Cir. 1982) (Halkin II) ("[T]he critical feature of the inquiry in evaluating the claim of privilege is not a balancing of ultimate interests at stake in the litigation. That balance has already been struck."). A litigant's need for the information is relevant, however, to the question of how closely the court will examine the validity of the privilege assertion. See Reynolds, 345 U.S. at 11 ("In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate.").

Where the effect of the invocation of the privilege is to prevent the plaintiff from establishing a prima facie case in support of his claims, or to "prevent the defendant from establishing a valid defense," the court should dismiss the claims at issue, most appropriately under Fed. R. Civ. P. 56. Zuckerbraun, 935 F.2d at 547. Generally speaking, there are three recognized and independent circumstances in which the Executive Branch invokes the state secrets privilege: (1) to protect against disclosure of information that would harm national security or defense; (2) to protect against disclosure of the United States' intelligence-gathering sources, methods, and capabilities; and (3) to protect against disruption of

diplomatic relations with foreign governments.[2] In the instant case, each of these three bases supports the assertion of the state secrets privilege.

II. The United States Has Properly Invoked the State Secrets Privilege in this Case.

The Department of Justice and the Department of Homeland Security, INS's successor agency, both have formally invoked the state secrets privilege in public record declarations. See Declaration of Acting Attorney General James B. Comey (Notice of Filing, Ex. 1); Declaration of Secretary, Department of Homeland Security, Tom Ridge (Notice of Filing, Ex. 2).[3] The assertions

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[2] See, e.g., Black v. United States, 62 F.3d 1115, 1117 (8th Cir. 1995), cert. denied, 517 U.S. 1154 (1996)(upholding state secrets privilege in Bivens case to protect "intelligence-gathering and diplomatic relations"); Halkin II, 690 F.2d at 990 n.53, 993 & nn.57 & 59 (same); Maxwell v. First Nat'l Bank of Maryland, 143 F.R.D. 590, 594 n.3 (D. Md. 1991)(upholding invocation of privilege in Bivens case and stating that "privilege extends to diplomatic and intelligence-gathering matters as well as military secrets"), aff'd, 998 F.2d 1009 (4th Cir. 1993); see also In re Agent Orange Prod. Liab. Litig., 97 F.R.D. 427, 430 (E.D.N.Y. 1983)("Material containing information concerning national defense, military secrets, or international relations is protected by the state secrets privilege.").

[3] As is standard practice where the state secrets privilege is asserted, the public record declarations rely on a number of classified declarations. This is necessary to avoid "forcing a disclosure of the very thing the privilege is designed to protect." Reynolds, 345 U.S. at 8. In camera review of such classified declarations is "not required as a matter of course," Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 401 (D.C. Cir. 1984), and the United States does not believe it is warranted here. See, e.g., Reynolds, 345 U.S. at 10 ("court should not jeopardize the security which the privilege is meant to protect by insisting on an examination of the evidence, even by the judge alone in chambers"); Zuckerbraun, 935 F.2d at 548

of privilege meet all three prerequisites described in Reynolds, 345 U.S. at 7-8. First, the privilege is formally asserted in each declaration. Ex. 1, ¶¶ 2, 8; Ex. 2, ¶¶ 2, 11. Second, the individuals asserting the privilege are the highest-ranking officials in their respective agencies.[4] Ex. 1, ¶ 3; Ex. 2, ¶ 1. Finally, each declarant has personally considered the matter. Ex. 1, ¶¶ 4-5; Ex. 2, ¶¶ 3-4.

As explained in both declarations, disclosure of the information necessary to litigate plaintiff's claims "reasonably could be expected to cause exceptionally grave or serious damage to the national security interests of the United States." Ex. 1, ¶ 5; Ex. 2, ¶ 5. As the complaint reveals, plaintiff was found inadmissible to the United States as a member of al Qaeda. Compl., ¶ 38; see also 8 U.S.C. § 1182(a)(3)(B)(i)(V). That determination was made based on evidence contained in a classified addendum to the Regional Director's decision. Complaint, Attachment D, Decision of the Regional Director at 1

(in camera review not necessary if it would not alter the disposition of the case); In re Agent Orange, 97 F.R.D. at 430-31. Nonetheless, if this Court concludes that review of the classified declarations is necessary to assess the assertion of privilege, the United States will provide them for the Court's ex parte, in camera review.

[4] Attorney General Ashcroft has recused himself from the decision of whether to assert the state secrets privilege in this case because he is a defendant in his individual capacity. By operation of law, the Deputy Attorney General may exercise "all duties of [the Attorney General's] office" with respect to that decision. 28 U.S.C. § 508(a).

(considering "classified and unclassified information concerning Arar"). The Regional Director concluded both that "there are reasonable grounds to believe that Arar is a danger to the security of the United States," and that "disclosure of the classified information upon which this decision is based would be prejudicial to the public interest, safety, or security." Id. at 2, 6. Classified declarations describe in detail the particular information subject to the claim of privilege and explain further how its disclosure would harm national security.[5]

The public declarations further establish that the "classified information in this case relates to intelligence activities conducted by various federal agencies and intelligence information regarding the plaintiff." See Ex. 1, ¶ 6; Ex. 2, ¶ 7. The classified information at issue "contains numerous references to intelligence sources and methods, the disclosure of which reasonably could be expected to cause exceptionally grave or serious damage to the national security of the United States

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[5] Not every piece of information contained in the classified declarations must itself be classified. See Kasza, 133 F.3d at 1166 ("if seeming innocuous information is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure and the court cannot order the government to disentangle this information from other classified information"). Disclosure of unclassified information may be restricted if "pieces of evidence or areas of questioning . . . press so closely upon highly sensitive material that they create a high risk of inadvertent or indirect disclosures." Bareford v. General Dynamics Corp., 973 F.2d 1138, 1144 (5th Cir. 1992), cert. denied, 507 U.S. 1029 (1993); see also Maxwell, 143 F.R.D. at 596.

and its foreign relations or activities." Ex. 1, ¶ 6; Ex. 2, ¶¶ 6-8; Halkin II, 690 F.2d at 993 ("exposure of one who acted - and indeed may still be acting - as a CIA operative here and abroad" a proper basis to invoke state secrets privilege). Of particular concern, disclosure of this information "would enable adversaries of the United States to avoid detection from the nation's intelligence activities, sources, and methods, and/or take measures to defeat or neutralize those activities, thus, seriously damaging the United States' national security interests." Ex. 1, ¶ 6; Ex 2, ¶ 5; Ellsberg v. Mitchell, 709 F.2d 51, 59 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984) (state secrets privilege properly asserted where disclosure would "enable a sophisticated analyst to gain insights into the nation's intelligence-gathering methods and capabilities").

"It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair." Halkin I, 598 F.2d at 9. "Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate." Id. Where, as here, "confirming or denying" plaintiff's allegations "would provide foreign intelligence analysts with information concerning this nation's intelligence

priorities and procedures," the state secrets privilege should be recognized and the litigation may not proceed. Black, 62 F.3d at 1117 (citing Halkin II, 690 F.2d at 993).

The state secrets privilege also applies to prevent disclosure of information that may have been received from foreign governments pursuant to an understanding of confidentiality. As the D.C. Circuit explained in a case alleging misconduct by the CIA,

> [r]evelation of particular instances in which foreign governments assisted the CIA could strain diplomatic relations in a number of ways - by generally embarrassing foreign governments who may wish to avoid or may even explicitly disavow allegations of CIA or United States involvements, or by rendering foreign governments or their officials subject to political or legal action by . . . their own citizens . . . .

Halkin II, 690 F.2d at 993 (footnote omitted). Disclosure of "the government's intelligence relationships with other countries could be put at risk, either by requiring the United States to confirm or deny that it (a) conducts intelligence operations in those countries, and (b) has targeted locations in those countries as sources of intelligence." Black, 62 F.3d at 1117. Those risks inhere here. See Ex. 1, ¶ 6; Ex. 2, ¶¶ 5-8.

In asserting the state secrets privilege, the United States need not show that disclosure of the protected information definitely would harm the Nation's security. It is enough that "there is a reasonable danger that compulsion of the evidence will expose [protected] matters which, in the interest of

national security, should not be divulged." Reynolds, 345 U.S. at 10 (emphasis added); see also, e.g., Northrop, 751 F.2d at 402. This standard is clearly satisfied in this case.

The material gathered by the United States supporting the determination that plaintiff is an al Qaeda member is properly classified. Its disclosure would present an obvious danger to national security by threatening to compromise ongoing efforts to identify and arrest al Qaeda operatives and to protect the Nation and our allies against future terrorist attacks. Similarly, the disclosure of certain information in this matter would interfere with the management of foreign relations by the Executive Branch and threaten to undermine the international cooperation necessary to counter the terrorist threat. See Halkin II, 690 F.2d at 993 & n.58. Under these circumstances, this Court should uphold the Executive Branch's assertion of the state secrets privilege.

III. Because State Secrets Are at the Core of Counts I, II, and III, Dismissal of those Counts Is Required.

"In some cases, the effect of an invocation of the privilege may be so drastic as to require dismissal" under Fed. R. Civ. P. 56. Zuckerbraun, 935 F.2d at 547. In particular, "if proper assertion of the privilege precludes access to evidence necessary for the plaintiff to state a prima facie claim, dismissal is appropriate." Id.; see also, e.g., Kasza, 133 F.3d at 1166 (dismissal required if "plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence"); Bareford,

973 F.2d at 1141. Likewise, if the unavailability of the privileged information "so hampers the defendant in establishing a valid defense that the trier is likely to reach an erroneous conclusion," dismissal is proper. Zuckerbraun, 935 F.2d at 547; see also Tenenbaum v. Simonini, 372 F.3d 776, 777 (6th Cir.), cert. denied, 125 S. Ct. 605 (2004)(affirming summary judgment for Bivens defendants because state secrets privilege "deprives Defendants of a valid defense to the Tenenbaums' claims"); Bareford, 973 F.2d at 1141.

The classified information that must be protected goes to the core of Counts I, II, and III of plaintiff's complaint.[6] Each of those counts necessarily challenges one or more of the operative legal steps in plaintiff's removal - his exclusion from the United States based on the finding that he was a member of al Qaeda; the rejection of his designation of Canada as the country to which he wished to be removed; and the decision to remove him to Syria. Classified information is central to these claims, and there is no theory under which plaintiff might succeed on these

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[6] Count IV challenges the constitutionality of plaintiff's detention in the United States. Which defendant or defendants this count is directed to and in what capacity, as well as the nature of the relief sought, are unclear. To the extent that this claim is limited to the conditions of plaintiff's domestic confinement, including his alleged interrogations and "communications blackout," Compl. ¶ 93, it appears this claim could be litigated without reference to state secrets-protected material. Count IV, however, is subject to dismissal for the independent reasons stated in the motions to dismiss of the United States and the individual-capacity defendants.

claims without consideration of the classified material. On its face, each of the three challenged decisions was within the lawful discretion of the United States.[7] Thus, in order to carry his burden of proof, plaintiff must prove that defendants took those facially permissible actions for unconstitutional or otherwise unlawful reasons. Such a determination would focus on the information known to defendants at the time, including the factual basis for the finding that plaintiff was a member of al Qaeda and the communications, if any, between the United States and foreign governments relating to his removal. Similarly, in order to defend their actions, defendants in this case would also need to rely on that information.

Although here the assertion of the privilege does not require dismissal of the complaint in its entirety, plaintiffs often urge that dismissing civil suits based on the assertion of the state secrets privilege is harsh. Nonetheless, "[t]he public good must prevail over individual needs by enforcing the

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[7] First, the INA authorized the Attorney General to "order [plaintiff] removed without further inquiry or hearing by an immigration judge" if the Attorney General was "satisfied on the basis of confidential information that [plaintiff was] inadmissible," 8 U.S.C. § 1225(c)(2)(B), based on reasonable grounds to believe he was a member of a foreign terrorist organization such as al Qaeda, 8 U.S.C. § 1182(a)(3)(B)(i)(V). The INA also authorized the Attorney General to "disregard" plaintiff's designation of the country to which he wished to be removed. 8 U.S.C. § 1231(b)(2)(C)(iv). Third, once plaintiff's designation of Canada had been disregarded, the INA favored removal to Syria as a country of which plaintiff was a "subject, national, or citizen." 8 U.S.C. § 1231(b)(2)(D).

privilege and protecting the . . . secrets at issue here." McDonnell Douglas Corp., 323 F.3d at 1022. Because information at the core of Counts I, II, and III is classified and cannot be disclosed, plaintiff cannot prove his claims and defendants are deprived of information critical to their defense. Therefore, Counts I, II, and III should be dismissed pursuant to Rule 56 and judgment entered for defendants on those counts. See Zuckerbraun, 935 F.2d at 548.[8]

CONCLUSION

For the foregoing reasons, the United States' assertion of the state secrets privilege should be upheld, and Counts I, II, and III of plaintiff's complaint should be dismissed with prejudice and judgment should be entered thereon in favor of all defendants, both in their individual and official capacities.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General
Civil Division

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[8] Accord Black, 62 F.3d at 1119 (affirming dismissal of Bivens claim where "information covered by privilege is at the core of [plaintiff's] claims, and . . . the litigation cannot be tailored to accommodate the loss of privileged information"); Bowles v. United States, 950 F.2d 154, 156 (4th Cir. 1991)(if "the case against the United States cannot be tried without compromising the information sought to be protected," it must be dismissed); Fitzgerald, 776 F.2d at 1244 (where state secret is central to the litigation, "no amount of effort and care on the part of the court and the parties will safeguard privileged material [and] dismissal is warranted").

JEFFREY S. BUCHOLTZ
Deputy Assistant Attorney
General

ROSLYNN R. MAUSKOPF
United States Attorney
Eastern District of New York

TIMOTHY P. GARREN
Director
Torts Branch, Civil Division

SCOTT DUNN
Assistant United States Attorney
Eastern District of New York
One Pierrepont Plaza, 14th Floor
Brooklyn, NY 11201-2776
Tel. (718) 254-6029

MARY HAMPTON MASON (MM 9148)
Senior Trial Attorney
JEREMY S. BRUMBELOW
Trial Attorney
U.S. Department of Justice
Torts Branch, Civil Division
P.O. Box 7146
Ben Franklin Station
Washington, D.C. 20044-7146
Tel: (202) 616-4123
Fax: (202) 616-4314

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2005, true copies of the foregoing Memorandum in Support of the United States' Assertion of State Secrets Privilege were served by first class mail, postage pre-paid, or by Federal Express, upon the following:

Counsel for the plaintiff:
Barbara J. Olshansky, Esq.
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012

Counsel for defendant John Ashcroft:
Larry Gregg, Esq.
Assistant U.S. Attorney
Eastern District of Virginia
2100 Jamieson Ave.
Alexandria, VA 22314

Counsel for defendant Larry D. Thompson:
John J. Cassidy, Esq.
Stephen L. Braga, Esq.
Baker Botts, L.L.P
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004-2400

Counsel for defendant J. Scott Blackman:
Thomas G. Roth, Esq.
Law Offices
395 Pleasant Valley Way, Suite 201
West Orange, NJ 07052

Counsel for defendant Robert Mueller:
Ira H. Raphaelson, Esq.
O'Melveny & Myers, L.L.P.
1625 Eye Street NW
10th Floor
Washington DC 20006-4001

Jim Walden, Esq.
O'Melveny & Myers, L.L.P.
Times Square Tower
7 Times Square
New York, NY 10036

Counsel for defendant James Ziglar:
William Alden McDaniel, Jr., Esq.
Law Offices of William Alden McDaniel, Jr.
118 West Mulberry Street
Baltimore, MD 21201-3606

Counsel for defendant Edward J. McElroy:
Debra L. Roth, Esq.
Thomas M. Sullivan, Esq.
Shaw, Bransford, Veilleux & Roth, PC
1100 Connecticut Avenue, N.W., Ste. 900
Washington, DC 20036-4101

MARY H. MASON