06-0000

IN THE

Supreme Court of the United States

KHALED EL-MASRI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the pleading-stage dismissal, on the basis of the evidentiary state secrets privilege, of a suit seeking compensation for petitioner's unlawful abduction, arbitrary detention, and torture by agents of the United States?

PARTIES TO THE PROCEEDINGS

The petitioner in this case is Khaled El-Masri. The respondent is the United States of America.

The following parties were named as defendants in the district court but were not parties to the proceedings in the court of appeals: Former Director of Central Intelligence George Tenet (sued in his individual capacity), Premier Executive Transport Services, Inc., Aero Contractors Limited, Keeler and Tate Management LLC, and Does 1-20.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 2

A. Abduction, Detention, and Release 2

B. Criminal, Parliamentary, and Inter-Governmental Investigations 5

C. U.S. Acknowledgments and Worldwide Media Coverage 6

D. Proceedings Below 9

REASONS FOR GRANTING THE PETITION 10

I. The Government's Increased Reliance on The Evidentiary State Secrets Privilege to Preclude Any Judicial Inquiry Into Serious Allegations of Grave Executive Misconduct Presents an Issue of Overriding National Significance 10

II. The Court Should Grant Review to Clarify the Proper Scope and Application of the State Secrets Privilege 15

A. There is conflict and confusion in the lower courts as to the application and scope of the privilege 15

1. There is confusion as to when the government may invoke the privilege and what the privilege may be invoked to protect 16

2. There is confusion as to when a lawsuit may be dismissed on the basis of the privilege 17

3. There is confusion as to how deeply and in what manner a court must scrutinize the government's privilege claim.....22

B. Mr. El-Masri's case is illustrative of the lower courts' departure from the privilege's evidentiary roots and from the principles of *Reynolds* 24

III. If The Court Believes that *Reynolds* Requires Dismissal of Mr. El-Masri's Claims, then This Case Presents an Appropriate Vehicle for Partial Reexamination of *Reynolds* 27

CONCLUSION.....30

APPENDIX.....1a

Order from the U.S. District Court for the Eastern District of Virginia, filed 5/12/06 .....1a

Order from the United States Court of Appeals for the Fourth Circuit, filed 3/2/07.....21a

Formal Declaration of State Secrets Privilege by Porter J. Goss, Director, Central Intelligence, filed 3/8/06.....52a

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, filed 4/11/06.....59a

Declaration of Manfred Gnjidic in Support of
Plaintiff's Opposition to the United States'
Motion to Dismiss or, in the Alternative, for
Summary Judgment, filed 4/11/06.....83a

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, filed 4/11/06.....88a

TABLE OF AUTHORITIES

Cases:

ACLU v. Brown, 619 F.2d 1170 (7th Cir. 1980)..... 23

ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006) 14, 20

Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006) ..... *passim*

Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) 14

Bareford v. General Dynamics Corp., 973 F.2d 1138 (5th Cir. 1992) 18, 20

Black v. United States, 62 F.3d 1115 (8th Cir. 1995)..... 17, 18, 20, 24

Capital Cities Media, Inc. v. Toole, 463 U.S. 1303 (1983)..... 26

Crater Corp. v. Lucent Technologies, Inc., 423 F.3d 1260 (Fed. Cir. 2005)..... 20, 25

DTM Research, L.L.C. v. AT&T Corp., 245 F.3d 327 (4th Cir. 2001) 19

Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65 (D.D.C. 2004), *cert. denied*, 74 USLW 3108 (U.S. Nov. 28, 2005) (No. 05-190)..... 14

Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983).. ..... 20, 23, 26

Farnsworth Cannon, Inc. v. Grimes,
635 F.2d 268 (4th Cir. 1980) 18, 20, 21

Fitzgerald v. Penthouse Internat'l Ltd.,
776 F.2d 1236 (4th Cir. 1985) 21

Halkin v. Helms ("Halkin II"), 690 F.2d 977
(D.C. Cir. 1982) 19

Halpern v. United States, 258 F.2d 36
(2d Cir. 1958) 22

Hepting v. AT&T, Corp., 439 F. Supp. 2d 974
(N.D. Cal. 2006), *appeal docketed*, No.
06-17137 (9th Cir. Nov. 9, 2006) ..... *passim*

In re United States, 872 F.2d 472
(D.C. Cir. 1989) 16, 19, 22

Kasza v. Browner, 133 F.3d 1159
(9th Cir. 1998) 18, 21, 22, 24

Monarch Assurance P.L.C. v. United States,
244 F.3d 1356 (Fed. Cir. 2001) 19, 20

Nat'l Lawyers Guild v. Att'y General,
96 F.R.D. 390 (S.D.N.Y. 1982) 17

Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978) 28

Snepp v. United States, 444 U.S. 507 (1980) 26

Spock v. United States, 464 F. Supp. 510
(S.D.N.Y. 1978) 19

Sterling v. Tenet, 416 F.3d 338 (4th Cir. 2005)..... 17, 18, 22, 23

Tenenbaum v. Simonini, 372 F.3d 776 (6th Cir. 2004)..... 21

Tenet v. Doe, 544 U.S. 1 (2005) 15, 16, 18

Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006)..... 14, 17, 18

Totten v. United States, 92 U.S. 105 (1875) 15, 16, 18

United States v. Pappas, 94 F.3d 795 (2d Cir. 1996)..... 29

United States v. Reynolds, 345 U.S. 1 (1953)..... *passim*

Zuckerbraun v. General Dynamics Corp., 935 F.2d 544 (2d Cir. 1991)..... 17, 18, 20, 22

Statutes:

5 U.S.C. § 552..... 28

18 U.S.C. App. 3..... 29

28 U.S.C. § 1350..... 9

50 U.S.C. § 1805..... 28

50 U.S.C. § 1806..... 28

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Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931 (2007) 12

CIA Flying Suspects to Torture? (60 Minutes, CBS television broadcast Mar. 6, 2005) 7

Craig S. Smith & Souad Mekhennet, *Algerian Tells of Dark Odyssey in U.S. Hands*, N.Y. TIMES, July 7, 2006, at A1, *available at* 2006 WLNR 11719762 ..... 4, 7

Craig Whitlock, *Germans Charge 13 CIA Operatives*, WASH. POST, Feb. 1, 2007, at A1 ..... 5, 6

Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, Dec. 4, 2005, at A1 7

Dick Marty, Committee on Legal Affairs and Human Rights, Council of Europe, *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States* § 3.1 (draft report 2006) 6

Don Van Natta, Jr. & Souad Mekhennet, *German's Claim of Kidnapping Brings Investigation of U.S. Link*, N.Y. TIMES, Jan. 9, 2005, at A1 7

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hearing8/9-11Commission_Hearing_
2004-03-24.htm..... 8

John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW (3d ed. 1940) 11, 12

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The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?, 91 YALE L.J. 570 (1982)..... 13

William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85 (2005)..... 12

Written Statement for the Record of the Director of Central Intelligence Before the Joint Inquiry Committee, Oct. 17, 2002, *available at* http://www.intelcenter.com/resource/2002/tenet-17-Oct-02.pdf..... 9

Khaled El-Masri respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 479 F.3d 296 (4th Cir. 2007) and reprinted in the Appendix at 21a. The opinion of the district court is reported at 437 F. Supp. 2d 530 (E.D. Va. 2006) and reprinted in the Appendix at 1a.

JURISDICTION

The court of appeals entered its judgment on March 2, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves application of the state secrets privilege, which has not been codified by any Act of Congress. Petitioner's underlying complaint raises claims under the Fifth Amendment to the United States Constitution and the Alien Torts Statute, 28 U.S.C. 1350, which provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

STATEMENT OF THE CASE

A. Abduction, Detention, and Release

Petitioner Khaled El-Masri, a German citizen of Lebanese descent, was forcibly abducted while on holiday in Macedonia, detained incommunicado, handed over to United States agents, then beaten, drugged, and transported to a secret prison in Afghanistan, where he was subjected to inhumane conditions and coercive interrogation and was detained without charge or public disclosure for several months. Five months after his abduction, Mr. El-Masri was deposited at night, without explanation, on a hill in Albania.

Mr. El-Masri's ordeal began in the final days of 2003, when he traveled by bus from his home near Neu Ulm, Germany, to Skopje, Macedonia. App. 59a, 60a (El-Masri Decl. ¶¶ 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. App. 60a, 61a (*Id.* ¶¶ 7-9). He was interrogated by Macedonian border officials, then transported to a hotel in Skopje. App. 62a, 63a (*Id.* ¶¶ 11-14).[1]

Over the course of three weeks' detention, Mr. El-Masri was repeatedly interrogated about alleged contacts with Islamic extremists and was denied contact with the German Embassy, an attorney, or his family. App. 64a, 65a, 66a (*Id.* ¶¶ 18-24). He was told that if he confessed to Al-Qaeda membership, he

[1] 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. App. 63a, 64a (*Id.* ¶¶ 14, 17).

would be returned to Germany. App. 65a (*Id.* ¶ 21). On the thirteenth day of confinement, Mr. El-Masri commenced a hunger strike, which continued until his departure from Macedonia. App. 66a (*Id.* ¶ 24).

After twenty-three days of detention, Mr. El-Masri was videotaped, blindfolded, and transported to an airport, where he was turned over to U.S. agents. App. 66a (*Id.* ¶¶ 25-27). There he was beaten, stripped naked, and thrown to the ground. App. 66a, 67a (*Id.* ¶ 28). A hard object was forced into his anus. *Id.* When his blindfold was removed, he saw seven or eight men, dressed in black, with hoods and black gloves. App. 67a, 68a (*Id.* ¶ 29). He was placed in a diaper and sweatsuit, subjected to full sensory deprivation,[2] shackled, and hurried to a plane, where he was chained spread-eagled to the floor. App. 67a, 68a (*Id.* ¶¶ 30-31). He was injected with drugs and flown to Baghdad, then on to Kabul, Afghanistan.[3] App. 68a (*Id.* ¶¶ 32-34).

Upon arrival in Kabul, Mr. El-Masri was kicked and beaten and left in a filthy cell. App. 68a, 69a (*Id.* ¶¶ 35-36). There he would be detained in a CIA-run prison for more than four months. He was interrogated several times in Arabic about his alleged terrorist ties. App. 70a, 71a (*Id.* ¶¶ 43-46). American officials participated in his interrogations. App. 72a (*Id.* ¶ 49). All of his requests to meet with a representative of the German government were refused. App. 71a (*Id.* ¶ 46).

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[2] This included being blindfolded, having his ears plugged with cotton and then covered with headphones, and finally having a bag placed over his head. App. 67a (*Id.* ¶ 30).

[3] This itinerary is confirmed by public flight records. App. 68a (*Id.* ¶ 34). At some point prior to his departure, an exit stamp was placed in Mr. El-Masri's passport, confirming that he left Macedonia on January 23, 2004. App. 80a (*Id.* ¶ 81).

In March, Mr. El-Masri and several other inmates commenced a hunger strike. App. 71a, 72a (*Id.* ¶ 47).[4] After nearly four weeks without food, Mr. El-Masri was brought to meet with two American officials. App. 72a (*Id.* ¶ 50). One of the Americans confirmed Mr. El-Masri's innocence but insisted that only officials in Washington could authorize his release. App. 73a (*Id.* ¶ 52).[5] 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. App. 73a, 74a (*Id.* ¶ 55).[6]

On May 16, Mr. El-Masri was visited by a uniformed German speaker who identified himself as "Sam." App. 74a, 75a (*Id.* ¶ 59). "Sam" refused to say whether he had been sent by the German

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[4] More than two years after Mr. El-Masri's release, he was contacted by one of his fellow inmates. Laid Saidi, an Algerian citizen who was detained in the same Afghan prison as Mr. El-Masri, memorized Mr. El-Masri's telephone number and sent him a text message upon his own release. *See* Craig S. Smith & Souad Mekhennet, *Algerian Tells of Dark Odyssey in U.S. Hands*, N.Y. TIMES, July 7, 2006, at A1, *available at* 2006 WLNR 11719762. The two have since spoken by telephone, and Mr. El-Masri has recognized Mr. Saidi's voice as that of his fellow detainee. *Id*.

[5] Subsequent media reports confirm that senior officials in Washington, including Defendant George Tenet, were informed long before Mr. El-Masri's release that the United States had detained an innocent man. App. 73a (*Id.* ¶ 53).

[6] At around this time, Mr. El-Masri felt what he believed to be a minor earthquake. App. 74a (*Id.* ¶ 56). Geological records confirm that in February and April, there were two minor earthquakes in the vicinity of Kabul. *Id.*

government or whether the government knew about Mr. El-Masri's whereabouts. *Id.*[7]

On May 28, Mr. El-Masri, accompanied by "Sam," was flown from Kabul to a country in Europe that was not Germany. App. 77a, 78a (*Id.* ¶¶ 66-71). There he was placed, blindfolded, into a truck and driven for several hours through mountainous terrain. App. 78a (*Id.* ¶¶ 72-74). He was given his belongings and told to walk down a path without turning back. App. 78a (*Id.* ¶ 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. App. 79a, 80a (*Id.* ¶¶ 76-80). He was then escorted through customs and immigration and placed on a flight to Frankfurt. App. 79a, 80a (*Id.* ¶ 80).

B. Criminal, Parliamentary, and Inter-Governmental Investigations

Upon his return to Germany, Mr. El-Masri contacted an attorney and related his story. App. 80a, 81a (*Id.* ¶ 84). The attorney promptly reported Mr. El-Masri's allegations to the German government, thereby initiating a formal investigation by public prosecutors. App. 84a, 85a (Gnjidic Decl. ¶¶ 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. App. 86a (*Id.* ¶ 13). In January of 2007, German prosecutors issued arrest warrants for thirteen suspected CIA agents for their roles in the abduction and abuse of Mr. El-Masri. *See* Craig

[7] Subsequent to his release, Mr. El-Masri identified "Sam" in a photograph and a police lineup as Gerhard Lehmann, a German intelligence officer. App. 75a, 76a (*Id.* ¶ 61).

Whitlock, *Germans Charge 13 CIA Operatives*, WASH. POST, Feb. 1, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/01/31/AR2007013100356.html.

A German parliamentary investigation of Mr. El-Masri's allegations is ongoing. App. 86a, 87a (*Id.* ¶¶ 15-16). Moreover, a separate European inquiry has now concluded, on the basis of Mr. El-Masri's testimony and substantial corroborating evidence, that Mr. El-Masri was abducted, detained, interrogated, and abused by the United States Central Intelligence Agency and its agents. *See* Dick Marty, Committee on Legal Affairs and Human Rights, Council of Europe, *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States* § 3.1 (draft report 2006), *available at* http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/07_06_06_renditions_draft.pdf.

C. U.S. Acknowledgments and Worldwide Media Coverage

The vast and growing body of public knowledge concerning the issues at the heart of this case comprises both official acknowledgements and descriptions of the rendition program in general, as well as detailed information and substantial corroborating evidence regarding Mr. El-Masri's case in particular. Mr. El-Masri's ordeal has received prominent coverage throughout the world and has been reported on the front pages of the United States' leading newspapers and on its leading 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.*, Don Van Natta, Jr. & Souad Mekhennet, *German's Claim of Kidnapping Brings Investigation of U.S. Link*, N.Y. TIMES, Jan. 9, 2005, at A1, App. 105a (Watt Decl. ¶ 26ii) (first comprehensive account of Mr. El-Masri's story in U.S., describing his rendition and involvement of CIA); *CIA Flying Suspects to Torture?* (60 Minutes, CBS television broadcast Mar. 6, 2005), App. 106a (Watt Decl. ¶ 26vi) (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"); Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, Dec. 4, 2005, at A1, App. 107a (Watt Decl. ¶ 26viii) (describing in detail decision-making process during Mr. El-Masri's rendition, including internal CIA discussions and role of German and Macedonian governments); Craig S. Smith & Souad Mekhennet, *Algerian Tells of Dark Odyssey in U.S. Hands*, N.Y. TIMES, July 7, 2006, at A1, *available at* 2006 WLNR 11719762 (describing ordeal of Mr. El-Masri's fellow detainee in Afghan prison and their reconnection following release); Michael Hirsh, Mark Hosenball and John Barry, *Aboard Air CIA*, NEWSWEEK, Feb. 28, 2005, App. 105a, 106a (Watt Decl. ¶ 26iv) (describing Mr. El-Masri's rendition and CIA's broader rendition program).

Moreover, on numerous occasions and in varied settings, U.S. government officials have publicly confirmed the existence of the rendition program and described its parameters. For example, on December 5, 2005 – in highly publicized comments delivered the day before this litigation 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." Condoleezza Rice, *Remarks Upon Her Departure for Europe*, Dec. 5, 2005, App. 89a, 90a (Watt Decl. ¶ 4). 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." *Id*.

The government has also acknowledged that the CIA is the lead agency in conducting renditions for the United States. In public testimony before the 9/11 Commission of Inquiry, Christopher Kojm, who 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. *Intelligence Policy and National Policy Coordination: Hearing of the National Commission on Terrorist Attacks Upon the United States*, Mar. 24, 2004, *available at* http://govinfo.library.unt.edu/911/archive/hearing8/9-11Commission_Hearing_2004-03-24.htm. App. 92a (Watt Decl. ¶ 9). Similarly, former CIA Director George Tenet, in his own written testimony to the 9/11 Joint Inquiry Committee, described the CIA's role in some seventy pre-9/11 renditions and elaborated on a number of specific examples of CIA

involvement in renditions. *Written Statement for the Record of the Director of Central Intelligence Before the Joint Inquiry Committee*, Oct. 17, 2002, *available at* http://www.intelcenter.com/resource/2002/tenet-17-Oct-02.pdf. App. 92a, 93a (Watt Decl. ¶ 10). More recently, President Bush has publicly confirmed the widely known fact that the CIA has operated detention and interrogation facilities in other nations, as well as the identities of fourteen specific individuals who have been held in CIA custody.

D. Proceedings Below

On December 6, 2005, Mr. El-Masri filed this action against former Director of Central Intelligence George Tenet, three private aviation companies, and several unnamed defendants, seeking compensatory and punitive damages for his unlawful abduction, arbitrary detention, and torture by agents of the United States. Mr. El-Masri alleged violations of the Fifth Amendment to the U.S. Constitution as well as customary international law prohibiting prolonged arbitrary detention; cruel, inhuman, or degrading treatment; and torture, which are enforceable in U.S. courts pursuant to the Alien Tort Statute, 28 U.S.C. § 1350. Although not named as a defendant, the United States government intervened before the named defendants had answered the complaint, and before discovery had commenced, for the purpose of seeking dismissal of the suit pursuant to the evidentiary state secrets privilege. In a public affidavit submitted with the motion, then-CIA director Porter Goss maintained that "[w]hen there are allegations that the CIA is involved in clandestine activities, the United States can neither confirm nor deny those allegations," and accordingly Mr. El-Masri's suit must be dismissed. App. 54a, 55a (Goss Decl. ¶ 7).

The district court held oral argument on the United States' motion on May 12, 2006. In an order dated that same day, the United States' motion to dismiss was granted. Mr. El-Masri thereafter appealed to the Court of the Appeals for the Fourth Circuit. The court of appeals held oral argument on November 28, 2006, with Mr. El-Masri, who had been granted a visa, in attendance. On March 2, 2007, the court of appeals upheld the dismissal of Mr. El-Masri's suit, holding that state secrets were "central" both to Mr. El-Masri's claims and to the defendants' likely defenses, and thus that the case could not be litigated without disclosure of state secrets.

Two months later, Defendant George Tenet, appearing on CNN to promote his memoir, disputed the truth of Mr. El-Masri's allegations despite the CIA's insistence in court papers that Mr. El-Masri's complaint must be dismissed because his allegations could neither be confirmed nor denied.[8]

REASONS FOR GRANTING THE PETITION

I. The Government's Increased Reliance on the Evidentiary State Secrets Privilege to Preclude Any Judicial Inquiry Into Serious Allegations of Grave Executive Misconduct Presents an Issue of Overriding National Significance.

It has been more than half a century since this Court's formal recognition of the common-law state secrets privilege in *United States v. Reynolds*, 345 U.S. 1 (1953). In *Reynolds*, the family members of three civilians who died in the crash of a military

[8] *The Situation Room* (CNN television broadcast May 2, 2007), transcript *available at* http://edition.cnn.com/TRANSCRIPTS/0705/02/sitroom.02.htm.

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. 345 U.S. at 3-4. Noting that the government's privilege to resist discovery of "military and state secrets" was "not to be lightly invoked," the Court required "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. The greater the necessity for the allegedly privileged information in presenting the case, the more a "court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." *Id.* at 11. The *Reynolds* Court cautioned that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.* at 9-10.

Although the Court had not previously articulated the rules governing invocation of the privilege, it emphasized that the privilege was "well established in the law of evidence," 345 U.S. at 6-7, and cited treatises, including John Henry Wigmore's EVIDENCE IN TRIALS AT COMMON LAW, as authority. Wigmore acknowledged that there "must be a privilege for *secrets of State, i.e.* matters whose disclosure would endanger the Nation's governmental requirements or its relations of friendship and profit with other nations." 8 John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 2212a (3d ed. 1940) (emphasis in original). Yet he cautioned that the privilege "has been so often improperly invoked and so loosely misapplied that a strict definition of its legitimate limits must be made." *Id.* Such limits included, at a minimum, requiring the trial judge to

scrutinize closely the evidence over which the government claimed the privilege:

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

Id. at § 2379.

This Court has not directly addressed the scope and application of the privilege since *Reynolds.* In the intervening years, the privilege has become unmoored from its evidentiary origins. No longer is the privilege invoked solely with respect to discrete and allegedly secret evidence; rather, the government now routinely invokes the privilege at the pleading stage, before any evidentiary disputes have arisen. Indeed, *Reynolds*' instruction that courts are to weigh a plaintiff's showing of need for particular evidence in determining how deeply to probe the government's claim of privilege is rendered wholly meaningless when the privilege is invoked before any request for evidence has been made. Moreover, the government has invoked the privilege with greater frequency;[9] in

[9] Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939 (2007) ("The Bush Administration has raised the privilege in twenty-eight percent more cases per year than in the previous decade, and has sought dismissal in ninety-two percent more cases per year than in the previous decade."); William G. Weaver & Robert M. Pallitto, *State-secrets and Executive Power*, 120 POL. SCI. Q. 85, 100 (2005) (concluding that the executive is asserting the privilege

cases of greater national significance;[10] and in a manner that seeks effectively to transform it from an evidentiary privilege into an immunity doctrine, thereby "neutraliz[ing] constitutional constraints on executive powers." Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive*?, 91 YALE L.J. 570, 581 (1982).

In particular, since September 11, 2001, the government has invoked the privilege frequently in cases that present serious and plausible allegations of grave executive misconduct. It has sought to foreclose judicial review of the National Security Agency's warrantless surveillance of United States citizens in contravention of the Foreign Intelligence Surveillance Act, to foreclose review of the NSA's warrantless datamining of calls and emails, and to foreclose review of various telecommunication companies' participation in the NSA's surveillance activities. *See Hepting v. AT&T, Corp*., 439 F. Supp. 2d 974 (N.D. Cal. 2006), *appeal docketed*, No. 06-17137 (9th Cir. Nov. 9, 2006); *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or.

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with increasing frequency, and declaring that the "Bush administration lawyers are using the privilege with offhanded abandon"); *see also* Scott Shane, *Invoking Secrets Privilege Becomes a More Popular Legal Tactic by U.S.*, N.Y. TIMES, Jun. 4, 2006 ("Facing a wave of litigation challenging its eavesdropping at home and its handling of terror suspects abroad, the Bush administration is increasingly turning to a legal tactic that swiftly torpedoes most lawsuits: the state secrets privilege.").

[10] Editorial, *Too Many Secrets*, N.Y. TIMES, Mar. 10, 2007, at A12, *available at* 2007 WLNR 4552726 ("It is a challenge to keep track of all the ways the Bush administration is eroding constitutional protections, but one that should get more attention is its abuse of the state secrets doctrine.").

2006); *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006). It has invoked the privilege to terminate a whistleblower suit brought by a former FBI translator who was fired after reporting serious security breaches and possible espionage within the Bureau. *Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004), *cert. denied*, 74 USLW 3108 (U.S. Nov. 28, 2005) (No. 05-190). And, of course, it has invoked the privilege to seek dismissal of suits challenging the government's seizure, transfer, and torture of innocent foreign citizens. *See El-Masri, supra; Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissed on other grounds).

In each of these instances, the government has sought dismissal at the pleading stage. Moreover, the privilege as asserted by the government and as construed by the court of appeals below has permitted dismissal of these suits on the basis of a government affidavit alone – without any judicial examination of the purportedly privileged evidence. Accordingly, a broad range of executive misconduct has been shielded from judicial review after the *perpetrators themselves* have invoked the privilege to avoid adjudication. If employed as it was here, the privilege permits the Executive to declare a case nonjusticiable – without producing specific privileged evidence, without having to justify its claims by reference to those specific facts that will be necessary and relevant to adjudicate the case, and without having to submit its claims to even modified adversarial testing.

These qualitative and quantitative shifts in the government's use – and the courts' acceptance – of the state secrets privilege warrant Supreme Court review.

II. The Court Should Grant Review to Clarify the Proper Scope and Application of the State Secrets Privilege.

A. There is conflict and confusion in the lower courts as to the application and scope of the privilege.

The proliferation of cases in which the government has invoked the state secrets privilege, and the lack of guidance from this Court since its 1953 decision in *Reynolds*, have produced conflict and confusion among the lower courts regarding the proper scope and application of the privilege.

Two terms ago, in *Tenet v. Doe*, 544 U.S. 1 (2005), the Court clarified the distinction between the evidentiary state secrets privilege, which may be invoked to prevent disclosure of specific evidence during discovery, and the so-called *Totten* rule, which requires outright dismissal at the pleading stage of cases involving unacknowledged espionage agreements.[11] As the Court explained, *Totten* is a "unique and categorical . . . bar – a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry." *Tenet*, 544 U.S. at 6. By contrast, the Court noted, the state secrets privilege deals with evidence, not justiciability. *Id.* at 9, 10. Nevertheless, some courts – including the court of appeals below – have permitted the government to invoke the evidentiary state secrets privilege to terminate litigation even before there is any evidence at issue.

[11] In *Totten v. United States*, 92 U.S. 105 (1875), the Court dismissed at the pleading stage an action to enforce an alleged secret espionage contract, because the government could neither confirm nor deny the contract's existence.

Because the state secrets privilege was discussed in *Tenet* only to contrast it with the *Totten* rule, the *Tenet* Court had no occasion to clarify the proper scope and use of the state secrets privilege. This Court should accept review in the present case to resolve conflicting decisions and widespread confusion in the lower courts about several aspects of the privilege: how and when the government properly may invoke the evidentiary state secrets privilege; when a case may be dismissed on the basis of the privilege; and how deeply and in what manner a court must scrutinize the government's claim of privilege.

1. <u>There is confusion as to when the government may invoke the privilege and what the privilege may be invoked to protect.</u>

There is substantial confusion in the lower courts regarding two closely-related matters: *when* the privilege properly may be invoked, and *what* precisely the privilege may be invoked to protect. The *Reynolds* Court considered whether the privilege had been properly invoked during discovery, at a stage of the litigation when *actual evidence* was at issue. *Reynolds*, 345 U.S. at 3. Consistent with *Reynolds*, some lower courts have properly rejected pre-discovery, categorical assertions of the privilege, holding that the privilege must be asserted on an item-by-item basis with respect to particular disputed evidence. *See, e.g., In re United States*, 872 F.2d 472, 478 (D.C. Cir. 1989) (rejecting categorical, pre-discovery privilege claim because "an item-by-item determination of privilege [would] amply accommodate the Government's concerns"); *Hepting*, 439 F. Supp. 2d at 994 (N.D. Cal. 2006) (refusing to assess effect of pleading stage, categorical assertion

of the privilege in suit challenging phone company's involvement in warrantless surveillance, preferring to assess the privilege "in light of the facts."); *Nat'l Lawyers Guild v. Att'y General*, 96 F.R.D. 390, 403 (S.D.N.Y. 1982) (holding privilege must be asserted on document-by-document basis).

Other courts, however, have permitted the government to invoke the privilege at the pleading stage, with respect to entire *categories* of information – or even the entire subject matter of the action – before evidentiary disputes arose. *See, e.g.*, *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991) (finding privilege properly asserted at pleading stage over all information pertaining to ship's defense system and rules of engagement); *Sterling v. Tenet*, 416 F.3d 338, 345-46 (4th Cir. 2005) (upholding pre-answer invocation of privilege over categories of information related to plaintiff's employment as well as alleged discrimination by CIA); *Black v. United States*, 62 F.3d 1115, 1117, 1119 (8th Cir. 1995); *Terkel*, 441 F. Supp. 2d at 918. In recent years, the government has increasingly invoked the privilege in such a manner, seeking and at times obtaining dismissal of suits pursuant to the privilege prior to any discovery. *See* Point I, *supra*.

2. <u>There is confusion as to when a lawsuit may be dismissed on the basis of the privilege.</u>

Perhaps the greatest source of confusion in the lower courts with respect to the privilege is whether a case may ever properly be dismissed at the pleading stage on the basis of the state secrets privilege – a stage in which the invocation must be asserted over abstract or predictive categories of information, and must be assessed in a vacuum without actual contested evidence. Decisions permitting pleading-

stage dismissal of entire actions or claims on state secrets grounds often stem from an erroneous conflation of the *Totten/Tenet* doctrine and the evidentiary state secrets privilege. *See supra* at n.11 and accompanying text.

A number of courts have held that a case may be dismissed at the pleading stage pursuant to the state secrets privilege if the "very subject matter" of the suit is a state secret. *See, e.g., Zuckerbraun*, 935 F.2d at 547 (dismissing wrongful death claim implicating ship's weapons system at pleading stage because very subject matter was state secret); *Sterling*, 416 F.3d at 348; *see also Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998). Still other courts have dismissed suits at the pleading stage not because the "very subject matter" was a state secret, but because the court accepted the government's wholly predictive judgment that state secrets would be so central to proving the parties' claims or defenses that the litigation could not conceivably reach resolution. *See, e.g., Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (dismissing contract suit between defense contractors at pleading stage because any trial would "inevitably" reveal state secrets); *Bareford v. General Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992) (dismissing case because trial "would inevitably lead to a significant risk" that state secrets would be disclosed); *Black*, 62 F.3d at 1119; *Terkel*, 441 F. Supp. 2d at 918.

Other courts, however, have properly refused to dismiss suits at the pleading stage, rejecting the government's invitation to assess the effect of a privilege claim in the absence of actual evidence, and recognizing the impossibility of determining at the pleading stage what evidence would be relevant and

necessary to the parties' claims and defenses. *See, e.g.*, *In re United States*, 872 F.2d at 477 (refusing to dismiss Federal Tort Claims action merely on basis of the government's "unilateral assertion that privileged information lies at the core of th[e] case"); *DTM Research, L.L.C. v. AT&T Corp*., 245 F.3d 327, 334-35 (4th Cir. 2001) (upholding claim of privilege but rejecting premature dismissal of trade secret misappropriation suit and remanding for further discovery); *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1364 (Fed. Cir. 2001) (reversing premature dismissal of contract suit on basis of the privilege so that plaintiff could engage in further discovery to support claim with non-privileged evidence); *Spock v. United States*, 464 F. Supp. 510, 519 (S.D.N.Y. 1978) (rejecting pre-discovery motion to dismiss Federal Tort Claims Act suit on state secrets grounds as premature); *Hepting*, 439 F. Supp. 2d at 994 (refusing to evaluate whether parties could prove claims and defenses without state secrets – and to dismiss on that basis – at pleading stage)*; Al-Haramain*, 451 F. Supp. 2d at 1226-27, 1229, 1231-32 (refusing to dismiss challenge to NSA's warrantless surveillance of plaintiffs on basis of privilege and permitting case to proceed to discovery).

There is considerable confusion in the lower courts about other conditions that must be satisfied before a case may be dismissed on the basis of the state secrets privilege, regardless of whether dismissal is being considered at the outset of the case or at later stages. For instance, some courts permit all possible non-sensitive discovery to proceed before considering dismissal pursuant to the privilege. *Halkin v. Helms ("Halkin II")*, 690 F.2d 977, 984 (D.C. Cir. 1982) (noting parties fought "the bulk of their dispute on the battlefield of discovery," before dismissing case);

Monarch Assurance P.L.C., 244 F.3d at 1364 (upholding privilege but remanding because discovery had been unduly limited); *Hepting*, 439 F. Supp. 2d at 994 (refusing to dismiss challenge to phone company's involvement in NSA warrantless wiretapping because plaintiffs were "entitled to at least some discovery," after which privilege could be assessed "in light of the facts"); *Al-Harmain*, 451 F. Supp. 2d at 1229, 1231-32 (permitting discovery to proceed). Other courts, like the court of appeals below, permit dismissal without requiring even non-sensitive discovery. *See, e.g.*, *Zuckerbraun*, 935 F.2d at 548*; Farnsworth*, 635 F.2d at 281; *Black*, 62 F.3d at 1119.

Similarly, some courts permit or require a full presentation of all non-privileged evidence to support the parties' claims and defenses before determining whether a case must be dismissed on the basis of the privilege. *See, e.g.*, *Bareford*, 973 F.2d at 1140 (dismissing suit on basis of privilege but first permitting plaintiff to submit all non-privileged evidence); *Ellsberg v. Mitchell*, 709 F.2d 51, 64 n.55 (D.C. Cir. 1983) (reversing dismissal of constitutional tort action and remanding where district court "did not even consider whether the plaintiffs were capable of making out a *prima facie* case without the privileged information"); *Crater Corp. v. Lucent Technologies, Inc.*, 423 F.3d 1260, 1268 (Fed. Cir. 2005); *ACLU v. NSA*, 438 F. Supp. 2d at 765 (refusing to dismiss challenge to NSA warrantless surveillance because parties' claims and defenses could be evaluated based on non-privileged evidence); *Al-Haramain*, 451 F. Supp. 2d at 1226 (refusing to dismiss at pleading stage challenge to NSA's warrantless surveillance of plaintiffs where court was simply "not yet convinced that [allegedly privileged] information [was] relevant to the case and

[would] need to be revealed"); *Hepting*, 439 F. Supp. 2d at 994 (refusing to dismiss challenge to phone company's involvement in NSA warrantless surveillance where it was "premature" to decide which facts were relevant and necessary to claims and defenses "at the present time"). Other courts, however, dismiss cases without regard to the non-privileged evidence at the parties' disposal. *See, e.g.*, *Fitzgerald v. Penthouse Internat'l Ltd.*, 776 F.2d 1236, 1243 (4th Cir. 1985) (dismissing suit despite plaintiff's ability to rely on non-privileged evidence); *Black*, 62 F.3d at 1119 (dismissing suit because "the litigation [could] not be tailored to accommodate the loss of the privileged information" without assessing any non-privileged evidence); *Kasza*, 133 F.3d at 1170 (dismissing suit concerning hazardous materials at Air Force facility without analyzing non-privileged evidence).

Finally, the lower courts have no uniform practice concerning whether and when a court must consider alternatives to dismissing a case on the basis of the privilege and what those alternatives might be. Some courts have improperly dismissed cases on the basis of the privilege without explicitly considering *any* alternatives. *See, e.g., Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004) (dismissing religious discrimination suit without consideration of alternatives); *Farnsworth Cannon*, 635 F.2d at 281. Other courts have explicitly considered and rejected alternatives before dismissing a suit on the basis of the privilege. *See, e.g.*, *Fitzgerald*, 776 F.2d at 1244 (dismissing suit but holding that "[o]nly 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"). Still other courts have expressly refused to dismiss where certain procedural safeguards might enable the case to

proceed. *See, e.g., Halpern v. United States*, 258 F.2d 36, 41 (2d Cir. 1958) (refusing to dismiss Invention Secrecy Act suit because case could be tried in camera); *In re United States*, 872 F.2d at 478 (discussing measures to protect sensitive information as case proceeds); *Hepting*, 439 F. Supp. 2d at 1010-1011 (proposing appointment of special master to handle privilege questions during discovery).

3. <u>There is confusion as to how deeply and in what manner a court must scrutinize the government's privilege claim.</u>

There is a wide divergence among the lower courts regarding how deeply a court must probe the government's claim of privilege, and what, exactly, the court must examine in assessing a privilege claim and its consequences. Notwithstanding *Reynolds'* clear instruction that the judge has a critical and authoritative role to play in the privilege determination, many courts have held that the government's state secrets claim must be afforded the most extreme form of deference. *See, e.g., Zuckerbraun*, 935 F.2d at 547; *Sterling*, 416 F.3d at 349 (accepting government's pleading-stage claim that state secrets would be revealed if plaintiff's suit were allowed to proceed, holding that court was "neither authorized nor qualified to inquire further"); *Kasza*, 133 F.3d at 1166 (holding that government's privilege claim is owed "utmost deference"). Other courts properly have scrutinized the government's privilege claim with more rigor – adopting a common-sense approach to assessing the reasonable risk of harm to national security should purported state secrets be disclosed. *See, e.g., In re United States*, 872 F.2d at 475 ("[A] court must not merely unthinkingly ratify the Executive's assertion of absolute privilege, lest it inappropriately abandon its

important judicial role."); *Ellsberg*, 709 F.2d at 60 (rejecting claim of privilege over name of Attorney General who authorized unlawful wiretapping, explaining that no "disruption of diplomatic relations or undesirable education of hostile intelligence analysts would result from naming the responsible officials"); *Hepting*, 439 F. Supp. 2d at 995 (holding that "to defer to a blanket assertion of secrecy" would be "to abdicate" judicial duty, where "the very subject matter of [the] litigation ha[d] been so publicly aired"); *Al-Haramain*, 451 F. Supp. 2d at 1224 (rejecting government's overbroad secrecy argument, stating that "no harm to the national security would occur if plaintiffs are able to prove the general point that they were subject to surveillance . . . without publicly disclosing any other information").

This confusion as to the proper judicial role plays out with particularly dire consequences when a successful claim of privilege results in dismissal of the entire lawsuit. Some courts correctly have held that where dismissal might result from a successful invocation of the privilege, the court must examine the *actual* evidence as to which the government has invoked the privilege before making any determination about the applicability of the privilege or dismissal. *See, e.g.*, *Ellsberg*, 709 F.2d at 59 n.37 (when litigant must lose if privilege claim is upheld, "careful *in camera* examination of the material is not only appropriate . . . but obligatory"); *ACLU v. Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980). Other courts have refused or declined to examine the allegedly privileged evidence, relying solely on secret affidavits submitted by the government. *See, e.g.*, *Sterling*, 416 F.3d at 344 (finding "affidavits or declarations" from government were sufficient to assess privilege claim even where asserted to sustain dismissal, and holding that in camera review of

allegedly privileged evidence not required); *Black*, 62 F.3d at 1119 (examining only government declarations); *Kasza*, 133 F.3d at 1170 (same).

To be sure, when, as here, the government invokes the privilege before any evidence has even been requested, a court cannot possibly conduct the analysis required by *Reynolds*. Accordingly, this Court should reaffirm that the privilege must be invoked with respect to specific evidence on an item-by-item basis, rather than overly broad categories of information whose relevance has not been determined. It should clarify that dismissal of a suit on the basis of the state secrets privilege is appropriate *solely* when the removal of privileged evidence renders it impossible for the plaintiff to put forth a prima facie case, or for the defendant to assert a valid defense – a determination that cannot be made at the pleading stage. And it should permit the plaintiff to submit all non-privileged evidence before the court evaluates the consequences of the government's invocation of the privilege.

B. Mr. El-Masri's case is illustrative of the lower courts' departure from the privilege's evidentiary roots and from the principles of *Reynolds*.

Mr. El-Masri's case provides a compelling example of the lower courts' acquiescence in the government's expansion of the privilege beyond its evidentiary foundation. In this case, the government sought outright dismissal of Mr. El-Masri's claims by invoking an evidentiary privilege before any evidence had even been requested. Indeed, the government's arguments were not evidentiary: the government did not, because it could not, invoke the privilege with respect to specific evidence. Relying entirely on the CIA Director's speculative assessment of what

evidence *might* be required to adjudicate Mr. El-Masri's claims, and the sweeping contention that any confirmation or denial of any allegation related to Mr. El-Masri's case would cause harm to the nation, the lower courts acceded to the government's demand that Mr. El-Masri be denied any judicial remedy for his unconscionable and unlawful treatment by U.S. officials.

As some courts have recognized, attempting to discern the "impact of the government's assertion of the state secrets privilege" before the plaintiff's claims have developed and the relevancy of privileged material has been determined is "akin to putting the cart before the horse." *Crater Corp.,* 423 F.3d at 1268. Nothing in *Reynolds* remotely sanctions such a practice. And the lower courts' threshold error in this case – permitting invocation of an evidentiary privilege without any evidence to consider – set the stage for their more consequential error of depriving Mr. El-Masri of a forum without adequately exploring whether his case could be litigated without privileged evidence. The courts granted and upheld dismissal of Mr. El-Masri's suit without permitting non-sensitive discovery, without considering abundantly available non-privileged evidence corroborating Mr. El-Masri's allegations, and without considering alternative procedures that might permit litigation of the case without public disclosure of privileged evidence.

Had the lower courts required the government to invoke the privilege solely with respect to specific evidence, it would have been evident that Mr. El-Masri's case does not depend on disclosure of state secrets. The central facts of this case are not state secrets and do not become so simply because the government 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 government 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 . . . ." App. 55a (Goss Decl. ¶ 7). As a matter of law and common sense, the government cannot legitimately keep secret what is already widely known. *See, e.g.*, *Ellsberg*, 709 F.2d at 61 (rejecting portion of privilege claim on ground that so much relevant information was already public); *see also 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").

The CIA's extraordinary rendition program is not a state secret. President Bush's public confirmation that the CIA has operated detention and interrogation centers overseas plainly demonstrates that the "very subject matter" of this litigation – the abduction, detention, and coercive interrogation of Khaled El-Masri by the CIA – is not a state secret. Indeed, the government has repeatedly defended the existence of the rendition program and described its parameters, while denying that the program is an instrument of coercive interrogation. Only in seeking to dismiss this action has the government insisted that it can neither admit the former nor deny the latter.

Similarly, Mr. El-Masri's allegations, reported in hundreds of press accounts and supported by abundant corroborating evidence – including

eyewitnesses and scientific testing – are not state secrets. The government wholly failed to demonstrate how formal confirmation of what the entire world already knows would reasonably cause harm to American security. The idea that foreign intelligence services and terrorist enemies are awaiting confirmation in a judicial proceeding – and have entirely disregarded the government-sourced news media accounts and public reports that describe in detail the means and methods of the rendition program – is inherently implausibe, and cannot provide a basis for denying Mr. El-Masri a remedy. *See Hepting,* No. C-06-672, slip. op. at 31 (noting that specific involvement of AT&T in program acknowledged by government "is hardly the kind of 'secret' that . . . a potential terrorist would fail to anticipate").

III. If The Court Believes that *Reynolds* Requires Dismissal of Mr. El-Masri's Claims, then This Case Presents an Appropriate Vehicle for Partial Reexamination of *Reynolds.*

This Court has not revisited its holding in *Reynolds* in more than half a century. *Reynolds* was a wrongful death suit in which the privilege was invoked during discovery to block disclosure of a single document. The Executive Branch's assertion of the state secrets privilege in such a case is quite unlike a sweeping assertion of the privilege to foreclose judicial review of entire categories of executive misconduct. Experience has shown that a set of rules devised to govern the former situation may be inadequate as a check on the latter. In *Reynolds*, the Executive was not suspected of employing the privilege to avoid liability or accountability, and the privilege was upheld after the

government had provided an alternative means for the plaintiffs to prove their case. This Court concluded that a plaintiff's ability to obtain evidence in a personal injury suit must be subordinated to the government's legitimate security concerns. It is far from clear that the Court would have balanced the equities in the same manner had the Executive been attempting to foreclose any judicial review in a case alleging grave misconduct by the Executive branch.

Since this Court's decision in *Reynolds*, two developments have called into question aspects of its holding. First, the privilege is now routinely invoked to block adjudication of disputes that raise profound constitutional questions about the enumerated powers of the three branches and, more specifically, the role of courts in safeguarding individual rights against serious abuses of government power. (*See* Point I, *supra*.) Second, courts have become more accustomed to assessing claims regarding access to sensitive information than they were in 1953. Under the Freedom of Information Act, for instance, Congress authorized courts to determine whether the government has properly classified information. *See* 5 U.S.C. § 552(a)(4)(B) & (b)(1) (2002); *Ray v. Turner*, 587 F.2d 1187, 1191-95 (D.C. Cir. 1978) (describing *de novo* review procedures required by FOIA). Similarly, under the Foreign Intelligence Surveillance Act, Article III judges must independently review the government's assertion that electronic surveillance is needed for foreign intelligence purposes. *See* 50 U.S.C. § 1805 (2006). FISA empowers all federal district courts, not just the special FISA court, to review highly sensitive information in camera and ex parte to determine whether the surveillance was authorized and conducted in accordance with FISA. *See* 50 U.S.C. § 1806(f) (2006).

Finally, the Classified Information Procedures Act, 18 U.S.C. App. 3, empowers federal judges to craft special procedures to determine whether and to what extent classified information may be used at trial. *See generally United States v. Pappas*, 94 F.3d 795, 799 (2d Cir. 1996). Section 4 of CIPA, which allows for defense discovery of classified information, explicitly provides courts with discretion to deny government requests to delete specific data from classified materials or substitute summaries or stipulations of facts. 18 U.S.C. App. 3 § 4. When section 4 of CIPA is invoked, a judge must determine the relevance of the information in light of the asserted need for information and any claimed government privilege.

These developments call for the reexamination of *Reynolds*. At a minimum, the Court should require in all instances that the government produce the evidence as to which it has invoked the privilege for in camera inspection by the district court. Courts are plainly equipped to evaluate such evidence, and requiring in camera inspection would avoid the doctrinal confusion attendant to adjudicating the effects of an evidentiary privilege in the absence of actual evidence. And, in cases in which the government is a party and plaintiffs raise serious allegations of grave executive misconduct – such as the kidnapping and torture claims at the heart of this suit – the evidentiary consequences of the government's invocation of the state secrets privilege should not be borne by the plaintiff alone. In such cases, even if the privilege is validly invoked to prevent disclosure of sensitive evidence, compensatory action – such as construing facts in favor of deprived litigants or shifting burdens against the government – may be the only means for the courts to enforce constraints on executive power.

This Court allocated the evidentiary burdens in *Reynolds*, and it has both the authority and the obligation to amend those burdens if they interfere with the judiciary's constitutional role in reviewing the legality of executive actions. Otherwise, the government may engage in torture, declare it a state secret, and by virtue of that designation avoid any judicial accountability for conduct that even the government purports to condemn as unlawful under all circumstances. Under a system predicated on respect for the rule of law, the government has no privilege to violate our most fundamental legal norms, and it should not be able to do so with impunity based on a state secrets privilege that was developed to achieve very different ends.

CONCLUSION

For the reasons stated above, petitioner urges this Court to grant review in this case.

Respectfully submitted,

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