VICTOR RESTIS and ENTERPRISES SHIPPING AND TRADING S.A.,

Plaintiffs,

v.

AMERICAN COALITION AGAINST NUCLEAR IRAN, INC. a/k/a UNITED AGAINST NUCLEAR IRAN, MARK D. WALLACE, DAVID IBSEN, NATHAN CARLETON, DANIEL ROTH, MARTIN HOUSE, MATAN SHAMIR, MOLLY LUKASH, LARA PHAM, and DOES 1-10,

Defendants.

UNITED STATES OF AMERICA,

Intervenor.

No. 1:13-cv-05032 (ER) (KNF)

BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL INTER VENOR TO PROVIDE ADDITIONAL INFORMATION RELATING TO THE ASSERTION OF THE STATES SECRETS PRIVILEGE AND OPPOSING DISMISSAL OF THE CASE

TABLE OF CONTENTS

This is an extraordinary case. Never before has the government sought dismissal of a suit between private parties on state secrets grounds without providing the parties and the public any information about the government's interest in the case. Amici curiae respectfully submit this brief to address the proper scope of the state secrets privilege, which is an evidentiary rule and can only be a basis for dismissal in the narrowest of circumstances. They also address the court's role in evaluating government invocations of the privilege.

construed so as not to "shield any material not strictly necessary to prevent injury to national security." Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983).

The Supreme Court set out the proper scope of the privilege in United States v. Reynolds, 345 U.S. 1 (1953). In that case, widows of victims killed in a military plane crash in Georgia sued for damages. In response to a discovery request for the accident report, the government asserted the state secrets privilege, arguing that the report contained information about secret military equipment aboard the aircraft during the fatal flight. Id. at 3. Where, the Court explained, "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged," the privilege operated to bar such disclosure. Id. at 10. The Court in Reynolds upheld the claim of privilege over the accident report but did not dismiss the suit. Rather, it remanded the case for further proceedings, so that the plaintiffs could pursue alternative sources of non-privileged evidence to prove their claim. Id. at 11–12.

The Supreme Court has never departed from its holding that the state secrets privilege is a rule of evidence, not justiciability. The privilege is not to be confused with the so-called Totten doctrine, which involves the non-justiciability of disputes over sensitive governmental contracts. See Totten v. United States, 92 U.S. 105 (1875) (barring judicial review of claims arising out of an alleged contract to perform espionage activities). In fact, the Court has taken pains in two recent cases to distinguish the "evidentiary state secrets privilege" of Reynolds from the narrow non-justiciability rule set forth in Totten. See Tenet v. Doe, 544 U.S. 1, 8 (2005); Gen. Dynamics Corp. v. United States, 131 S. Ct. 1900, 1905 (2011). In Tenet, the Court explained that secret government contract claims based on secret evidence were subject to a "unique and categorical . EDUŠD UXOH GHVLJQHG QRW PHUHO\ WR GLVFRXUDJH LQTXLU\ WKH DV

544 U.S. at 12. By contrast, the Court explained, Reynolds involved "the balancing of the state secrets evidentiary privilege" and did not mandate dismissal. Id. And just three years ago, the Court in General Dynamics reinforced the distinction between the state secrets privilege and the Totten contract doctrine. Like Totten and Tenet, General Dynamics involved a contract dispute with the government, this time over the development of stealth aircraft for the Navy. The Court held that the Totten rule barred adjudication of the dispute, but again distinguished that result from the more limited holding of Reynolds: "Reynolds was about the admission of evidence." 131 S. Ct. at 1906. By contrast, the basis for permitting threshold dismissals in government contracting cases involving secret evidence is the "common-law authority to fashion contractual remedies in Government-contracting disputes." Id. Thus, this Court should take care not to confuse the Totten doctrine for the state secrets privilege. The privilege applies only to exclude discrete and specific evidence—it is not a sweeping justification for dismissing a suit outright.[1]

II. DISMISSAL OF AN ACTION IS ONLY EVER APPROPRIATE AFTER SEARCHING REVIEW AND AS A LAST RESORT.

Dismissal of a suit on the basis of the state secrets privilege is a "drastic" result, 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. See Zuckerbraun, 935 F.2d at 547; see also Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1242 (4th Cir. 1985)

[1] The government also casts the state secrets privilege as "a manifestation of the President's Article II powers to conduct foreign affairs and provide for the national defense." Dkt. No. 258 at 8. The Supreme Court has never adopted this controversial view of the privilege's origin. And as the Second Circuit has made clear, the state secrets privilege sounds in the common law, and is therefore a privilege the limits of which can, and should, be carefully set by the courts. See Zuckerbraun, 935 F.2d at 546. This is in accord with Article III, which explicitly places adjudication of legal controversies involving diplomacy and foreign affairs within the authority of the federal courts. See U.S. Const. Art. III, Sec. 2.

("[D]enial of the forum provided under the Constitution for the resolution of disputes, U.S. Const. art. III, § 2, is a drastic remedy that has rarely been invoked."). Courts subject governmental requests for dismissal based on claims of privilege to searching scrutiny because of the grave separation of powers concerns raised when the Executive acts to bar litigation.[2] In these circumstances, the reviewing court must carefully determine for itself whether litigation may go forward in light of the judiciary's constitutional "duty ... to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). "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.

The Court should therefore undertake the following steps to determine whether dismissal is required here: (A) require the government to provide, to security-cleared counsel at a minimum, some basis for its invocation of the state secrets privilege; (B) examine in camera the evidence the government seeks to withhold to determine if it is properly subject to the privilege; (C) evaluate, after non-privileged discovery, whether any privileged evidence is essential to plaintiff's prima facie case or a valid defense; and (D) if privileged evidence is essential, determine whether dismissal may nonetheless be avoided by use of specialized procedures.

[2] The "judicial Power" conferred by Article III belongs to the courts alone; it may not be ceded to or exercised by any other branch. See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58–59 (1982). It has long been held that neither the Legislature nor the Executive may "prescribe rules of decision to the Judicial Department of the government in cases pending before it." United States v. Klein, 80 U.S. 128, 146 (1871). To "defer to a blanket assertion of secrecy" would "abdicate" a court's "constitutional duty to adjudicate the disputes that come before it." Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 995 (N.D. Cal. 2006) remanded in light of intervening legislation, 539 F.3d 1157 (9th Cir. 2008)

A. The Court Should Require Disclosure By The Government To Cleared Counsel To Preserve Meaningful Adversarial Process.

Meaningful participation by counsel is essential to the determination whether the state

Agency Telecommunications Records Litig., 564 F. Supp. 2d 1109, 1119 (N.D. Cal. 2008), the plaintiffs were able to successfully demonstrate that a specific federal law had preempted the state secrets doctrine—but only with the benefit of a public declaration describing the general types of secrets the government sought to withhold. Here, by contrast, the government has deprived the parties of any opportunity to participate meaningfully in determining whether state secrets are essential to their claims. *See* Al Bakri v. Obama, 660 F. Supp. 2d 1, 2 (D.D.C. 2009) ("Counsel cannot realistically be expected to assist a court in conducting meaningful review if he does not have access to material facts.").

It is hard to see why, unlike in every other state secrets case in history, meaningful public disclosure to the parties is not possible in this case. Amici believe that.

to Sensitive Security Information ("cleared counsel"); Kindhearts for Charitable Humanitarian Dev., Inc. v. Geithner, 710 F. Supp. 2d 637, 660 (N.D. Ohio 2010) (ordering that counsel for charity contesting freezing of its assets "obtain an adequate security clearance to view the necessary documents, and will then view these documents in camera, under protective order, and without disclosing the contents to [plaintiff]"[6]).

Courts' long and successful experience with disclosure of classified information to security-cleared counsel confirms that it is a viable option. It is also a necessary one here, in light of the government's unprecedented refusal to make any public disclosure whatsoever of the basis for its assertion of the state secrets privilege. See also 26 WRIGHT & GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5671 (2d ed. 1992) at 734 ("many of [the countervailing arguments against in camera proceedings] would be resolved or weakened if courts did not automatically assume that every in camera hearing had to be ex parte as well").

The government most likely will reply to this proposal by quoting Reynolds's admonition that courts should evaluate a privilege claim "without forcing a disclosure of the very thing the privilege is designed to protect." Reynolds, 345 U.S. at 8. But disclosure to security-cleared counsel under secure conditions is not the equivalent of a general public disclosure. See Al Haramain Islamic Found. v. U.S. Dep't of Treasury, 686 F.3d 965, 983 (9th Cir. 2011) (disclosing information to a "lawyer for the designated entity who has the appropriate security clearance also does not implicate national security when viewing the classified material because,

[6] In recent years, the federal courts have applied their expertise and experience handling classified information in habeas cases brought by Guantanamo detainees. Those courts have developed workable procedures designed to allow reasonable access to classified evidence, while protecting the government's secrecy interests. See The Constitution Project & Human Rights First, Habeas Works: Federal Courts' Proven Capacity to Handle Guantanamo Cases: A Report from Former Federal Judges, at 17 (June 2010) (describing procedures that seek "to strike a careful balance between protecting classified information and ensuring that petitioners have enough information to challenge their detention").

by definition, he or she has the appropriate security clearance"). And the degree of disclosure to security-cleared counsel can be tailored to the necessities of the case. Typically, for example, the government's state secrets privilege declarations do not disclose in detail the assertedly privileged evidence itself but instead describe the general categories of evidence over which the government claims the privilege and the harms it asserts would result from public disclosure. See, e.g., Zuckerbraun, 935 F.2d at 548–53. At a minimum, similar disclosures to security-cleared counsel are required here.

B. The Court Must Undertake A Particularly Searching Inquiry Of The Government's Assertion Of Privilege, Including In Camera Review.

The Supreme Court has emphasized that the courts, not the government, determine the validity of assertions of the state secrets privilege. See Reynolds, 345 U.S. at 8 ("The court itself must determine whether the circumstances are appropriate for the claim of privilege."). Under Reynolds, a state secrets privilege assertion is sustainable only if it is supported by a credible showing that there is a "'reasonable danger'" that disclosure of any of the evidence within the scope of the privilege assertion will harm national security. Reynolds, 345 U.S. at 10; see also Zuckerbraun, 935 F.2d at 546-47 ("A court before which the privilege is asserted must assess the validity of the claim of privilege, satisfying itself that there is a reasonable danger that disclosure of the particular facts in litigation will jeopardize national security."). As courts have repeatedly emphasized, the proper standard of deference cannot render the judicial role irrelevant or allow for unilateral termination of unwanted litigation by the Executive Branch. 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. Were the rule otherwise, the Executive Branch could immediately ensure that the state secrets privilege was successfully invoked simply by classifying information, and the Executive's actions would be

beyond the purview of the judicial branch."[7] Horn v. Huddle, 647 F. Supp. 2d 55, 62-63 (D.D.C. 2009), vacated due to settlement

Am. Civil Liberties Union v. Brown, 619 F.2d 1170, 1173 (7th Cir. 1980); accord Al Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1203 (9th Cir. 2007) ("[W]e read Reynolds as requiring an in camera review of the Sealed Document in these circumstances because of [the

courts with deciding whether disclosures to the parties are necessary to assist in making this determination. See 50 U.S.C. § 1806(f).

Congress's guidance has also made clear that the judiciary has a vital role in policing claims of secrecy in the context of FOIA, and that the Executive's choice to classify information is the beginning—not the end—of the Court's inquiry. Overriding a presidential veto, Congress granted judges explicit authority to conduct in camera review of records despite the government's assertion of national security. The purpose of this provision was to safeguard against arbitrary, capricious, and myopic use of the awesome power of the classification stamp by the government bureaucracy. See S. Rep. No. 93-854 (1974), as reprinted in FOIA SourceBook, at 183. When it amended FOIA in 1974, Congress "stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security." Ray v. Turner, 587 F.2d 1187, 1194 (D.C. Cir. 1978).

There have been no credible claims that judicial review in such cases has compromised national security or resulted in the mishandling of classified information. To the contrary, federal courts have consistently shown their competence in adjudicating cases that implicate national security. As former Judge Patricia Wald explained in testimony before Congress, courts "deal with national security information on a regular basis and can be entrusted with its evaluation on the relatively modest decisional threshold of whether its disclosure is 'reasonably likely' to pose a national security risk." Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability, Hearing before the S. Comm. on the Judiciary, 110th Cong. (Jan. 29, 2008) (prepared statement of Patricia Wald). Former federal judge, FBI Director and CIA Director William Webster made a similar observation in his statement to Congress: "I can

Cir. 1979) (remanding for further proceedings where plaintiff has "not conceded that without the requested documents he would be unable to proceed").[11]

The wisdom of this traditional practice is manifest. 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. v. Lucent Tech., 423 F.3d 1260, 1268 (Fed. Cir. 2005). As *Reynolds* makes clear, plaintiffs should be free to attempt to establish their claims "without resort to material touching upon military secrets." 345 Ur w1J EMC Tae0.002 Tc -0.002 Tw [(ma)62 o, (r)-cem2

Premature dismissal not only interferes with evaluation of whether a plaintiff can establish her claims without privileged information, but also threatens the Court's ability to determine whether any asserted state secrets will interfere with an actual, valid, rather than hypothetical, defense. As the Second Circuit has explained, dismissal on state secrets grounds is not permissible when the privilege may interfere with possible defenses, but only when it precludes the assertion of a valid defense. *See* Zuckerbraun, 935 F.2d at 547 (dismissal may be warranted only "if the court determines that the privilege so hampers the defendant in establishing a valid defense that the trier is likely to reach an erroneous conclusion" (that is, that

successfully invokes the state secrets privilege would need to be dismissed. 1 F.3d at 1150-51. As

Before dismissal may be ordered, the Court must determine whether secret evidence is absolutely essential either for the plaintiff to prove his claims or for defendants validly to defend against them. As the Government acknowledges, "it does not appear that there has been any meaningful party discovery." Dkt. #258 at 6. Therefore, such a determination is virtually certain to be premature at this stage. The proper manner in which to assess the effect of the privilege on the evidence available to plaintiff and defendants is to permit the case to proceed to controlled discovery. There will be no shortage of opportunities for the government to protect its legitimate interests with respect to specific privileged evidence.

D. Even If Privileged Evidence Is Essential, The Court Must Consider Whether Any Alternative To Dismissal Would Avoid The Draconian Result Of Denying Plaintiff Access To The Courts.

Courts must make every effort to allow claims to proceed even where privileged material is essential, dismissal is available only as a last resort. Because evidentiary privileges by their very nature hinder the ascertainment of the truth, and may even exclude it entirely, their exercise 'should in every instance be limited to their narrowest purpose.' Jones v. U.S., 872 F(i)-6(11(A)-2t]TJ /TT0 1-8

explained in Loral, judges "are faced with the problem of resolving private civil disputes and at the same time preserving the confidentiality of developments by or for governmental defense agencies." 558 F.2d at 1133. Rather than "long

courts to continue innovative experimentations in the use of this judicial officer.'" (quoting 4 S.Rep. No. 94-625, 94th Cong., 2d Sess. (1976), at 10)). In Halpern, the Court was able to instead make use of an in camera trial. See 258 F.2d at 44; see also Clift v. United States, 597 F.2d 826, 829 (2d Cir. 1979) (noting that the district court could craft creative procedures, such as recruiting security-cleared court personnel, to conduct in camera trial). And in long-running litigation brought by a plaintiff who alleged that CIA agents had dropped LSD into his drink while he sat in a Paris café, the Government was allowed to preserve the privilege by producing redacted documents so that the case could proceed through discovery, summary judgment, and trial. See Kronisch v. United States, 150 F.3d 112 (2d Cir. 1998).

Other courts have also developed a variety of innovative "procedures which will 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. These courts have utilized a number of additional tools to safeguard sensitive information in cases involving state secrets, including protective orders, seals, bench trials, and specialized discovery procedures. See In re U. S., 872 F. 2d. at 478 (bench trial); In re Under Seal, 945 F.2d 1285, 1287 (4th Cir. 1991) (protective orders as well as depositions in secure facilities); Horn, 647 F. Supp. 2d at 58, 58 n.3 (making use of procedures analogous to CIPA to protect state secrets); Burnett v. Al Baraka Inv. & Dev. Corp., 323 F. Supp. 2d 82 (D.D.C. 2004) (prohibiting certain deposition questions and permitting the government "to have a representative present at any deposition" of deponent "to monitor compliance with this Order and to otherwise ensure that state secrets are not revealed"); United States v. Lockheed Martin Corp., 1998 WL 306755 (D.D.C. 1998) (protective order); Air-Sea Forwarders, Inc. v. United States, 39 Fed. Cl. 434, 437 (Fed. Cl. 1997) (protective order).

"Dismissal of a suit [on the basis of state secrets], and the consequent denial of a forum without giving the plaintiff her day in court . . . is indeed draconian." *In re U.S.*, 872 F.2d at 477. As decades of precedent make clear, courts have an abundance of tools at their disposal to accommodate the government's legitimate security needs without undertaking the radical step of barring a plaintiff from the courts' protection.

III. THE UNPRECEDENTED OPACITY OF THE PUBLIC DISCLOSURES IN THIS CASE HARMS THE PUBLIC INTEREST.

Beyond damaging the adversarial process, the government's unprecedented secrecy here also harms the public interest. Excessive and unchecked secrecy erodes public confidence in the legitimacy of government.[16] This concern is confirmed by the history of Executive misuse of classification and the state secrets privilege. *See* notes 7–8, *supra*. Concerns over excessive secrecy are exacerbated by the uniquely opaque public disclosures in this case, which deprive the public of any understanding of why the Executive has sought the extreme result of denying an individual his day in court. Moreover, unlike previous cases involving private litigants in which the government has intervened to assert the state secrets privilege, there is no known contractual relationship between the government and one of the parties, or any other apparent reason why state secrets would be implicated in the litigation. When combined with the unprecedented lack of public explanation, the predictable result is rampant public speculation about unlawful government activity or secret foreign intelligence involvement in shaping U.S. public opinion, eroding public trust in government. *See, e.g.*, Matt Apuzzo, Holder Says Private Suit Risks State

[16] *See, e.g.*, *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 520 n.242 (S.D.N.Y. 2004)

Secrets, N.Y. TIMES, Sept. 14, 2014 at A13, available at http://nyti.ms/1wEAXSQ ("United Against Nuclear Iran possesses American classified information, it is not clear how the group obtained it. Government intelligence agencies are prohibited from secretly trying to influence [U.S.] public opinion."); Emily Flitter, U.S. Judge to Decide State Secrets Procedure in Iran Case, REUTERS, Oct. 8, 2014, available at http://reut.rs/1tDMOjX ("There has been virtually no indication of what the information in question may be. UANI, which is funded in part by the American mining tycoon Thomas Kaplan, whose family has ties to Israel, includes several former intelligence chiefs on its advisory board, including the former head of Israel's Mossad, Meir Dagan.").

Once again, the example of other courts demonstrates the tools available to the judiciary to protect the public's right of access to judicial proceedings and guard against excessive secrecy. This Court can and should adopt the procedure used recently by the Northern District of California, requiring the government to submit to the public docket unclassified or redacted versions of its classified state secrets privilege declarations. See Jewel v. NSA, No. 08-CV-4373, ECF No. 164 at 8-9, 17, 22-25; ECF Nos. 172, 209, 212-228. The experience in that district has been that when the government is put to the task of reviewing its classified declarations line by line, it turns out that not every sentence is in fact secret and much of the declarations can be publicly disclosed. See, e.g., id. ECF No. 220, available at http://bit.ly/1FWvI6l, (Redacted Declaration of James R. Clapper).

This Court should carefully weigh whether this case is so extraordinary in the history of the state secrets privilege as to justify keeping the public entirely in the dark as to the government's interest in dismissal.

CONCLUSION

For theforegoing reasons, the Court should deny the government's motion to dismiss and order further disclosure and discovery before considering any renewed assertion of the state secrets privilege.

Respectfully submitted,

/s/ Dror Ladin

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