based on valid concerns." *Jabara v. Kelley,* 75 F.R.D. 475, 484 (E.D. Mich. 1977); *see also In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989) ("[A] court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role."); *Ellsberg v. Mitchell,* 709 F.2d 51, 58 (D.C. Cir. 1983) ("[T]o ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine the instances of its invocation."); *Molerio*, 749 F.2d at 822 ("[T]he validity of the government's assertion must be judicially assessed.").

On the day this action was commenced, in response to a press inquiry about Mr. El-Masri's allegations, Secretary of State Condoleezza Rice stated:

> When and if mistakes are made, we work very hard and as quickly as possible to rectify them. Any policy will sometimes have mistakes and it is our promise to our partners that should that be the case, that we will do everything that we can to rectify those mistakes. I believe that this will be handled in the proper courts here in Germany *and if necessary in American courts as well.*

JA 193 (Watt Decl. ¶ 5) (emphasis added). As Secretary Rice acknowledged, it is precisely the role of the judiciary to ensure that allegations of grave Executive misconduct receive fair adjudication. That vital role does not evaporate simply because the Executive contends unilaterally that its actions are too sensitive for judicial review.

II. DISMISSAL OF THIS ACTION AT THE PLEADING STAGE ON THE BASIS OF THE STATE SECRETS PRIVILEGE WAS IMPROPER BECAUSE THE CENTRAL FACTS ARE NOT STATE SECRETS.

In its order dismissing Mr. El-Masri's suit at the pleading stage, the district court concluded that this litigation must be halted at its very outset – before the named defendants have even responded – because Mr. "El-Masri's private interests must give way to the national interest in preserving state secrets." *El-Masri v. Tenet*, 2006 WL 1391390, at *7, JA 224. As set forth below, dismissal at the pleading stage pursuant to an evidentiary privilege is almost always improper, particularly where, as here, the facts central to the litigation have been officially acknowledged or widely disseminated. To terminate Mr. El-Masri's right of redress in the name safeguarding information that is already known to the public would be to sacrifice his rights to a legal fiction.

A. The State Secrets Privilege Is a Narrow Evidentiary Privilege, Not a Broad Immunity Doctrine for the CIA.

The state secrets privilege is a common-law evidentiary rule that permits the government to "block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security." *Ellsberg,* 709 F.2d at 56. It is employed to protect against disclosure of information that will impair "the nation's defense capabilities, disclosure of intelligence-

gathering methods or capabilities, and disruption of diplomatic relations with foreign governments." *In re Under Seal*, 945 F.3d 1285, 1287 n.2 (4th Cir. 1991) (quoting *Ellsberg*, 709 F.2d at 57); *see also Sterling v. Tenet*, 416 F.3d at 346. The privilege must be narrowly construed and may not be used to "shield any material not strictly necessary to prevent injury to national security." *Ellsberg*, 709 F.2d at 58; *see also Reynolds*, 345 U.S. at 10 (there must be a "*reasonable* danger" that disclosure will harm national security) (emphasis added).

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

effort and care on the part of the court and the parties will safeguard privileged material." *Id.* at 1244.

The Supreme Court outlined the proper use of the state secrets privilege fifty years ago in *Reynolds,* 345 U.S. 1, and has not considered the doctrine in depth since then. In *Reynolds*, the family members of three civilians who died in the crash of a military plane in Georgia sued for damages. In response to a discovery request for the flight accident report, the government asserted the state secrets privilege, arguing that the report contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight. *Id.* at 3. The Court first held that the privilege could be invoked only by the government and then only upon "a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* at 7-8[21]

The *Reynolds* Court then upheld the claim of privilege over the accident report but did not dismiss the suit. Rather, it remanded the case for further proceedings, explaining: "There is nothing to suggest that the

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[21] Mr. El-Masri does not dispute that the public declaration of former CIA Director Goss satisfies the procedural requirements set forth in *Reynolds*. However, as discussed more fully below, Mr. El-Masri emphatically contests the propriety of the government's invocation of the privilege with respect to the entire case, before the named defendants even answered and before any nonsensitive discovery.

electronic equipment, in this case, had any causal connection with the accident. Therefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets." *Id.* at 11. Upon remand, plaintiffs' counsel deposed the surviving crewmembers, and the case was ultimately settled. *See* Barry Siegel, *The Secret of the B-29*, L.A. TIMES, Apr. 18, 2004, at A1, *available at* 2004 WLNR 19770961 (describing settlement as well as absence of military secrets in recently declassified accident report).

In the majority of cases since *Reynolds,* courts in this circuit and elsewhere have considered the state secrets privilege in response to particular discovery requests, not in support of a motion to dismiss an entire action prior to any discovery. *See, e.g.*, *DTM Research LLC v. AT&T Corp.*, 245 F.3d 327, 330 (4th Cir. 2001) (privilege invoked in response to subpoenas issued to federal agencies); *Bowles v. United States*, 950 F.2d 154, 156 (4th Cir. 1991) (privilege invoked in response to plaintiffs' discovery requests); *In re Under Seal*, 945 F.2d at 1287 (privilege invoked after many depositions and other discovery had already occurred); *Fitzgerald*, 776 F.2d at 1238 (privilege invoked after discovery and on eve of trial); *Heine v. Raus*, 399 F.2d 785, 787 (4th Cir. 1968) (privilege invoked during discovery); *Tilden v. Tenet*, 140 F. Supp. 2d 623, 625 (E.D. Va.

2000) (privilege invoked in response to plaintiffs' discovery requests).[22] Thus, the typical result, even when the privilege has been successfully invoked, is to remove the privileged evidence from the case but to permit the case to proceed. Moreover, even when the privilege is invoked to deny access to evidence during discovery rather than at the pleading stage, courts have construed the privilege narrowly. *See, e.g.*, *In re Grand Jury Subpoena Dated August 9, 2000*, 218 F. Supp. 2d 544, 560 (S.D.N.Y. 2002) ("[T]he contours of the privilege for state secrets are narrow, and have been so defined in accord with uniquely American concerns for democracy, openness, and separation of powers.").

This Court has, on a number of occasions, upheld a claim of privilege in response to discovery requests or requests for a protective order but nonetheless allowed the case to proceed. Indeed, this Court explicitly rejected a "categorical rule mandating dismissal whenever the state secrets

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[22] *See also Linder v. Dep't of Defense*, 133 F.3d 17, 21 (D.C. Cir. 1998); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 397 (D.C. Cir. 1984); *Ellsberg,* 709 F.2d at 54-55; *Halkin v. Helms*, 690 F.2d 977, 985 (D.C. Cir. 1982) (*"Halkin II"*); *Att'y Gen. v. The Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1982); *Halkin v. Helms*, 598 F.2d 1, 4 (D.C. Cir. 1978) (*"Halkin I"*); *Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982); *ACLU v. Brown*, 619 F.2d 1170 (7th Cir. 1980) (en banc); *Crater Corp. v. Lucent Technologies, Inc.*, 255 F.3d 1361 (Fed. Cir. 2001); *United States v. Koreh*, 144 F.R.D. 218 (D. N.J. 1992); *Foster v. United States*, 12 Cl. Ct. 492 (Cl. Ct. 1987); *AT&T Co. v. United States*, 4 Cl. Ct. 157 (Cl. Ct. 1983); *Kinoy v. Mitchell*, 67 F.R.D. 1 (S.D.N.Y. 1975).

privilege is validly invoked." *DTM Research LLC*, 245 F.3d at 334; *see also Fitzgerald*, 776 F.2d at 1243 (rejecting district court's contention that *no* case in which individual alleges she was libeled as having engaged in espionage could proceed); *Heine*, 399 F.2d at 791 (upholding claim of privilege in defamation suit, but remanding for further discovery of non-privileged evidence); *see also Sigler v. LeVan*, 485 F. Supp. 185, 199 (D. Md. 1980) (dismissing replevin claim because it could not be litigated without revealing state secrets, but refusing to dismiss other claims because court was "not convinced that litigation [of those claims] would 'inevitably' lead to disclosure of the contents of the secret materials").

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

after parties had "fought the bulk of their dispute on the battlefield of discovery").[23]

Courts do not as a matter of course dismiss cases after upholding or accepting claims of privilege even where covert or clandestine CIA activity is part of or central to the case and even where plaintiffs might not ultimately prevail. For example, in *Heine v. Raus*, this Court considered the application of the privilege in a slander action brought by a person accused of being a KGB agent against a defendant who, it was later revealed, was a CIA employee acting under agency orders when he spoke against the plaintiff. 399 F.2d at 787. Notwithstanding the government's invocation of the privilege, the defendant was deposed and, "in the presence of the Judge," the CIA General Counsel invoked the privilege "on a question by question

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[23] *See also Ellsberg,* 709 F.2d at 65 (reversing partial dismissal on state secrets grounds because "dismissal of the relevant portion of the suit would be proper only if the plaintiffs were manifestly unable to make out a *prima facie* case without the [privileged] information"); *The Irish People, Inc.*, 684 F.2d at 955 (upholding invocation of privilege but declining to dismiss case); *Jabara*, 691 F.2d at 279 (upholding claim of state secrets with regard to Fourth Amendment claim but deciding case on the merits); *Halkin I,* 598 F.2d at 11 (upholding invocation of privilege but remanding case for further proceedings); *Foster*, 12 Cl. Ct. at 496 (upholding privilege but declining to dismiss); *Spock v. United States*, 464 F. Supp. 510, 519 (S.D.N.Y. 1978) (rejecting as premature pre-discovery motion to dismiss Federal Tort Claims Act suit on state secrets grounds).

basis." *Id.* Ultimately, this Court remanded the case for even more discovery. *Id.* at 791.[24]

The CIA has in fact been held liable for unlawful activity in the past, even when the harm was caused during a covert program. For example, the Second Circuit upheld a finding that the CIA was liable to three individuals who were harmed when, through a covert operation that spanned twenty years, the CIA secretly opened mail sent from and received by U.S. citizens to and from the former Soviet Union. *Birnbaum v. United States,* 588 F.2d 319, 333 (2d Cir. 1978). The court also upheld a damage award against the agency. *Id.*[25]

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

[25] *See also Avery v. United States*, 434 F. Supp. 937 (D. Conn. 1977) (rejecting motion to dismiss claims relating to CIA covert mail opening

In litigation that spanned decades and ultimately proceeded to trial, a plaintiff who alleged that CIA agents had dropped LSD into his drink while he sat in a Paris café sued the United States and two named CIA agents, asserting tort and constitutional claims. *Kronisch v. United States,* 150 F.3d 112, 116 (2d Cir. 1998). During discovery, approximately "thirty thousand pages of documents," many heavily redacted, were disclosed. *Id.* at 120 n.3. The magistrate judge upheld the CIA's privilege claims, but the case proceeded through discovery and summary judgment. *Kronisch v. United States*, No. 83 Civ. 2458, 1994 WL 524992, at *10-11 (S.D.N.Y. Sept. 27, 1994) (upholding privilege claim asserted during discovery). Thereafter, a three-week trial was conducted resulting in a judgment for the defendants. *Kronisch v. Gottlieb*, 213 F.3d 626 (2d Cir. 2000) (Table). Other similarly sensitive claims involving covert CIA or military activity have also proceeded to trial. *See, e.g., Air-Sea Forwarders, Inc. v. Air Asia Co. Ltd.*, 88 F.2d 176 (9th Cir. 1989) (jury trial held on claims brought by alleged CIA front company); *Barlow*, 53 Fed. Cl. 667 (trial held over whistleblower claims brought by former Department of Defense employee).

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program); *Cruikshank v. United States*, 431 F. Supp. 1355 (D. Haw. 1977) (same).

Similarly sensitive litigation against the CIA is currently pending and has proceeded despite the CIA's successful invocation of the state secrets privilege to block certain sensitive discovery. Jennifer Harbury, the widow of a Guatemalan rebel leader who was allegedly captured, interrogated, tortured, and executed by CIA-trained Guatemalan forces at the behest of the CIA, sued the Agency and a number of named CIA officials and agents under the Federal Tort Claims Act and *Bivens*. Harbury sought discovery, most of which was successfully refused under the state secrets privilege. *Harbury v. Deutch*, No. 96-438 (D.D.C. Aug. 28, 2001). Although the case, like the instant one, involves an alleged covert operation and the cooperation of a foreign government, the district court refused to dismiss some of Harbury's common-law and international tort claims against the CIA, which remain pending before the district court. *See Harbury v. Deutch*, No. 96-438 (D.D.C. March 12, 2001); *Harbury v. Deutch*, No. 96-438 (D.D.C. March 9, 2000).[26]

[26] Other sensitive cases concerning covert CIA activity have been permitted to proceed through discovery. *See, e.g.*, *Linder v. Calero-Portocarrero*, 180 F.R.D. 168, 176-77 (D.D.C. 1998) (modifying, but requiring CIA to comply with, third-party subpoena in wrongful death action against alleged leaders of Nicaraguan Contra organizations); *Orlikow v. United States*, 682 F. Supp. 77, 79, 87 (D.D.C. 1988) (refusing to grant defendants summary judgment on claims arising out of harm caused by CIA front organizations that implemented part of notorious CIA MKULTRA program, noting that CIA had admitted facts about covert program).

As the Supreme Court has observed, lawsuits "attacking the hiring and promotion policies of the Agency are routinely entertained in federal court," despite the CIA's stated objection to litigants' "'rummaging around' in the Agency's affairs to the detriment of national security." *Webster v. Doe,* 486 U.S. 592, 604 (1988). In *Webster*, the Court held that it had jurisdiction to review a constitutional challenge brought by a former employee of the CIA who had been terminated and found ineligible for a security clearance on the ground that his sexual orientation was considered a security threat. In so holding, the Court rejected the government's argument that review of such claims was precluded and stressed the need to avoid the "serious constitutional question that would arise if . . . [Doe were denied] any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603. The Court emphasized the district court's "latitude to control any discovery process which may be instituted so as to balance [a plaintiff's] need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Id.* at 604.[27]

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[27] *See also, e.g.*, *Hutchinson v. CIA.*, 393 F.3d 226 (D.C. Cir. 2005) (allowing Privacy Act and due process claims brought by CIA imagery analyst against the CIA and Director Tenet to proceed through discovery, but ultimately granting summary judgment for defendants); *Dubbs v. CIA*,

In the face of this wide-ranging authority, the district court embraced a construction of the state secrets privilege that would create de facto immunity for CIA officials for even the most egregious and unlawful conduct. No prior court had ever dismissed worthy claims of torture and prolonged arbitrary detention on the basis of an evidentiary privilege. Yet, by the court's reasoning, the CIA's designation of a program as "clandestine" is alone sufficient to immunize its agents from liability for any injuries they inflict in the course of their duties and to remove a wide range of its activities from any judicial scrutiny. The Supreme Court has cautioned that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Reynolds,* 345 U.S. at 9-10. At the pleading stage, "before the relevancy of [privileged] information has . . . been determined," neither the court nor the parties can confidently predict whether privileged evidence will be necessary to the litigation. *In re United States,* 872 F.2d at 478.

Accordingly, as discussed more fully below, only in two situations is dismissal of suits on state secrets grounds appropriate: where the very subject matter of the suit is a state secret, *see infra* Section II.B., or where a

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866 F.2d 1114 (9th Cir. 1989) (reviewing contract employee's constitutional challenge to CIA's denial of higher security clearance and remanding questions about whether clearance policies were discriminatory).

court determines, *after evaluating all nonprivileged evidence*, that one of the parties is unable to prove or validly defend against a claim without relying on privileged evidence, *see infra* Section IV. Because the former situation is inapplicable and the latter cannot yet be determined, this case should not have been dismissed on the basis of the government's premature and overbroad claim of privilege.

B. The Central Facts of the Case Have Been Widely Disseminated and Are Not State Secrets.

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

because of the "centrality of the privileged material," or because "the very subject matter of the litigation is itself a state secret." *Fitzgerald*, 776 F.2d at 1243-44.

The central facts of this case are not state secrets and do not become so simply because the Agency insists otherwise. Far too many facts about this case, and about the CIA's rendition program in general, have been officially acknowledged or made public for the United States plausibly to contend that it "can neither confirm nor deny [Mr. El-Masri's] allegations" without "damage to the national security and our nation's conduct of foreign affairs . . . ." JA 38 (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.*, *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 the government would have no interest in censoring information already "in the public domain"); *Virginia Department of State Police v. Washington Post*, 386 F.3d 567, 579 (4th Cir. 2004) (holding that the government had no compelling interest in keeping information sealed where the "information ha[d] already become a matter of public knowledge").

At the heart of the district court's error in dismissing this action at the outset was its unexamined assumption that judicial confirmation of the government's role in Mr. El-Masri's abduction and detention would amount to a "disclosure of specific details about the rendition" program. *El-Masri*, 2006 WL 1391390, at *13, JA 223. 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 ludicrous, 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.").[28] Our enemies are on notice of the nature of the rendition program; of our government's intent to capture them; of our practice of detaining them; and of interrogation techniques that might be used against them. *See, e.g.*, Albert T. Church, III, *Review of Department of Defense Detention Operations and Detainee Interrogation Techniques*

[28] Although the court in *Hepting* purported to distinguish that case from *El-Masri,* it merely cited – and thereby repeated – the district court's erroneous reasoning that litigation of this matter would disclose "means and methods" of intelligence gathering. No. C-06-672, slip. op. at 34.

(2005), *available at*

http://www.aclu.org/safefree/torture/26068lgl20060703.html.

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. On numerous occasions and in varied settings, government officials have confirmed the existence of the rendition program and described its parameters. For example, on December 5, 2005 – in highly publicized comments delivered the day before this litigation 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, JA 192-193 (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.* However, she continued, the "United States has not transported anyone, and will not

transport anyone, to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured." *Id.* Accordingly, in a single statement, Secretary Rice both confirmed *and* denied allegations at the heart of Mr. El-Masri's complaint. *See Hepting,* No. C-06-672, slip op. at 40 ("[T]he government has opened the door for judicial inquiry by publicly confirming and denying material information" about NSA monitoring program).

Nor is it a secret that the CIA is the lead agency in conducting renditions for the United States government. In public testimony before the 9/11 Commission of Inquiry, Christopher Kojm, who from 1998 until February, 2003 served as Deputy Assistant Secretary for Intelligence Policy and Coordination in the State Department's Bureau of Intelligence and Research, described the CIA's role in liaising with foreign government intelligence agencies to effect renditions, stating that the agency "plays an active role, sometimes calling upon the support of other agencies for logistical or transportation assistance" but remaining the "main player" in the process. *Intelligence Policy and National Policy Coordination: Hearing of the National Commission on Terrorist Attacks Upon the United States*, Mar. 24, 2004, JA 195 (Watt Decl. ¶ 10). Similarly, Defendant Tenet, in his own written testimony to the 9/11 Commission, 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, including assisting "another foreign partner in the rendition of a senior Bin Laden associate" and assisting the Jordanian government in "render[ing] to justice" "terrorist cells that planned to attack religious sites and tourist hotels." *Written Statement for the Record of the Director of Central Intelligence Before the National Commission on Terrorist Attacks Upon the United States*, Oct. 17, 2002, JA 195 (Watt Decl. ¶ 10). Former CIA Director Porter Goss, whose declarations form the basis for the government's motion, has also spoken publicly about the CIA's role in renditions. In response to questions about rendition from the Senate Armed Services Committee, Mr. Goss asserted:

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

Threats to U.S. National Security: Hearing of the Senate Armed Services Committee, 109th Cong. 4 (Mar. 17, 2005), *transcript available at*

http://www.humanrightsfirst.org/us_law/etn/docs/fedwires125g.htm. Once again, in a single statement, a government official conceded that the Agency engages in "transfers" of "terrorists," and denied that it does so in violation of the U.S. and international law.[29]

Prominent media reports relating the circumstances of Mr. El-Masri's rendition are too numerous to assemble and include several hundred newspaper articles as well as segments on the nation's leading television news programs. In addition to widely disseminating Mr. El-Masri's allegations of kidnapping, detention, and abuse, these news reports have revealed a vast amount of information about the CIA's behind-the-scenes machinations during Mr. El-Masri's ordeal, and even about the actual aircraft employed to transport Mr. El-Masri to detention in Afghanistan. Most recently, the *New York Times* reported on its front page that one of Mr. El-Masri's fellow prisoners in Afghanistan has provided eyewitness confirmation of essential elements of Mr. El-Masri's account – including the central fact the Mr. El-Masri was detained by Americans in Afghanistan. *See* Smith & Mekhennet, *supra*; *see also* Dana Priest, *Wrongful*

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[29] Former CIA agents and operatives have described the rendition program in far greater detail. *See, e.g.*, *Interview: Michael Scheuer*, Frontline, Oct. 18, 2005, JA 197 (Watt Decl. ¶ 14); Michael Scheuer, *A Fine Rendition*, N.Y. TIMES, Mar. 11, 2005, at A23, JA 197 (Watt Decl. ¶ 14); *File on 4: Rendition* (BBC radio broadcast Feb. 8, 2005) JA 198 (Watt Decl. ¶ 15).

Imprisonment: Anatomy of a CIA Mistake, WASH. POST, Dec. 4, 2005, at A1, JA 208 (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); 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, JA 206 (Watt Decl. ¶ 26ii) (first comprehensive account of Mr. El-Masri's story in U.S., describing his rendition and alleged involvement of CIA); *CIA Flying Suspects to Torture?* (60 Minutes, CBS television broadcast Mar. 6, 2005), JA 207 (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.").[30] Other articles published subsequent to the district court's dismissal order have provided substantial additional corroboration of Mr. El-Masri's allegations. *See, e.g.,* Souad Mekhennet & Craig S. Smith, *German Spy Agency Admits Mishandling Abduction Case*, N.Y. TIMES, June 2, 2006, at A8, *available at* 2006 WLNR 9457614

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[30] *See also* Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, Feb. 14-21, 2005, JA 206 (Watt Decl. ¶ 26iii)(providing comprehensive accounting of rendition program from its initial inception to present); Michael Hirsh, Mark Hosenball and John Barry, *Aboard Air CIA*, NEWSWEEK, Feb. 28, 2005, JA 206 (Watt Decl. ¶ 26iv) (describing Mr. El-Masri's rendition and CIA's broader rendition program).

("Germany's external intelligence service, the BND, said yesterday that it knew about the American seizure and detention of a German citizen 16 months before the country was officially informed of his mistaken arrest.").

Finally, additional information about the rendition program, and about Mr. El-Masri's case in particular, has come to light as a result of the Council of Europe's preliminary report, as well as from ongoing criminal investigations and public inquiries in eighteen countries, including France, Italy, Spain, Sweden, the United Kingdom, and Germany. The Council of Europe's preliminary report – released after the district court dismissed the case – includes an entire section entitled "CIA methodology – how a detainee is treated during a rendition," which provides a composite modus operandi of the CIA's rendition protocol derived from numerous cases and eyewitnesses. *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States*, *supra,* § 2.7.1, ¶¶ 79-87. And, in a section devoted entirely to Mr. El-Masri's case, the Council concluded, on the basis of numerous interviews and sources, that "the CIA carried out a 'rendition' of Khaled El-Masri." *Id.* at § 3.1, ¶ 125.

It defies logic to conclude that the very subject matter of a suit is a state secret when it involves an officially acknowledged program and widely corroborated allegations. Indeed, courts have properly rejected privilege

claims over evidence and information that has "already received widespread publicity." *Spock*, 464 F. Supp. at 519; *see also Hepting,* No. C-06-672, slip. op. at 36 (denying motion to dismiss, where "the very subject matter of [the] litigation has been so publicly aired"); *In re United States*, 872 F.2d at 478 (rejecting privilege claim, relying in part on prior release under FOIA of information relevant to litigation); *Ellsberg*, 709 F.2d at 61 (rejecting portion of privilege claim on ground that so much relevant information was already public); *see also Turkmen v. Ashcroft,* slip. op., 2006 WL 1517743, at * 4 (E.D.N.Y. May 30, 2006) (noting that "the government's electronic surveillance of individuals suspected of links to terrorism has received widespread publicity and has even been acknowledged by the President of the United States and other high-level government officials," thus "any claim that sensitive secrets would be revealed by the government's disclosure of whether conversations between plaintiffs and their counsel in [the] case were monitored [was] hard to fathom."). Because the rendition program is officially acknowledged, it cannot be that the very subject matter of this suit – a rendition and its consequences – is categorically a state secret. *Cf. Ellsberg*, 709 F.2d at 55 (noting that where government had made certain admissions, it appropriately refrained from asserting the privilege over that information); *Jabara*, 75 F.R.D. at 493 (observing that where information

over which government asserted privilege had been revealed in report to Congress, "it would be a farce to conclude" that information "remain[ed] a military or state secret").

In light of the vast amount of public and officially acknowledged information about the rendition program, the United States' insistence that it "can neither confirm nor deny" any of Mr. El-Masri's allegations is at best overstated. JA 38 (Goss Decl. ¶ 7). As the Supreme Court has recently held, there is a significant distinction between a matter that is covert and *unacknowledged,* and a matter that is covert but acknowledged: in the latter circumstance, even claims against the CIA may proceed. *See Tenet v. Doe*, 544 U.S. 1, 10 (2005) (distinguishing *Webster* and *Totten*). Thus, in *Sterling*, this Court found that the very subject matter of the case revolved around state secrets because the plaintiff's claim required comparative analysis of the portfolios of various CIA agents, potentially exposing *unacknowledged* activities, operations, and targets in open court. In contrast, this case requires only the linking of an acknowledged program to an individual once believed, albeit incorrectly, to have been a part of the intended class of targets: agents of Al-Qaeda.

Like other courts faced with overbroad assertions of the state secrets privilege prior to discovery, this Court should reject the unsupported

assertion that the very nature of this case compels immediate dismissal and instead require the government to assert the privilege on an item-by-item basis during discovery. Acknowledging the potential danger to our system of justice, one court properly rejected the government's demand that a case be dismissed pursuant to the privilege:

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

Spock, 464 F. Supp. at 519-520. Because the very subject matter of this litigation is not a state secret, the case should not be dismissed at this early stage.

C. This Court Must Carefully Assess the Validity of the Privilege Claim, Examine the Underlying Evidence, and Determine Whether Nonsensitive Evidence Can Be Disentangled from the Evidence that Creates a Reasonable Danger to National Security.

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

experiences is unnecessarily exacerbated when a district court acts with undue haste to dismiss a case." *Fitzgerald*, 776 F.2d at 1238 n.3. It is "the court" – not the executive – that is "the final arbiter of the propriety of [the] invocation" of the privilege. *In re Under Seal*, 945 F.2d at 1288; *see also Reynolds*, 345 U.S. at 9-10.

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

court would be unable to 'disentangle' the sensitive from the nonsensitive information as the case unfold[ed]").

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

This Court is plainly competent to make an independent assessment of the government's claims of privilege and must determine on its own whether further litigation would reasonably cause danger to national security, or simply cause embarrassment to the United States. Indeed, courts have not hesitated to reject state secrets claims where the invocation of the privilege was inappropriate or untimely. *See, e.g.*, *In re United States*, 872 F.2d at 478; *Ellsberg*, 709 F.2d at 60 (rejecting claim of privilege over name of Attorney General who authorized unlawful wiretapping, explaining that no "disruption of diplomatic relations or undesirable education of hostile

intelligence analysts would result from naming responsible officials"); *Spock*, 464 F. Supp. at 520.

Article III courts are routinely charged with making sensitive national security determinations – and the government routinely insists that courts have little or no role in evaluating executive assertions of secrecy. The recent litigation in this Court over accused 9/11 conspirator Zacarias Moussaoui's access to potentially exculpatory testimony from al Qaeda leaders in CIA custody provides an instructive example of both the government's extravagant security claims and the judiciary's ability to balance the government's legitimate needs against a private litigant's right to a fair proceeding. At issue was Moussaoui's attempt to gain access to "enemy combatant witnesses" in order to depose them under Federal Rule of Criminal Procedure 15. *See United States v. Moussaoui,* 382 F.3d 453, 456 (4th Cir. 2004). After the government refused to produce the witnesses, and the district court imposed sanctions by eliminating the possibility of a death sentence, the government appealed, insisting that the depositions "would irretrievably cripple painstaking efforts for securing the flow of information," and that "the courts [were] in no position to second guess such Executive Branch judgments." Brief of Petitioner-Appellant at *27, *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004) (No. 03-4792), *available*

at 2003 WL 22519704. The government argued there, as it has argued here, that "[e]ven the smallest piece of information . . . may prove to be the key that makes sense of a web of information collected from myriad other sources." *Id.* at *43.

Writing for this Court, Chief Judge Wilkins observed that the dispute presented "questions that test the commitment of this nation to an independent judiciary, to the constitutional guarantee of a fair trial . . . , and to the protection of our citizens against additional terrorist attacks." *Moussaoui*, 382 F.3d at 456. Notwithstanding the government's dire warnings about the "irreparable harm" that would flow from "any form of access" to the enemy combatant witnesses, Brief of Petitioner-Appellant at *42-43, *Moussaoui* (No. 03-4792), this Court rejected the government's proposal to provide the defense with "a series of statements" derived, presumably, from interrogation summaries. *Moussaoui*, 382 F.3d at 477. Instead, this Court instructed the lower court to devise a procedure for Moussaoui to submit written questions to the combatant witnesses. *Id.* at 479-81. At trial, the transcribed responses of several named al Qaeda detainees were read aloud in open court. *See, e.g.*, *Al Qaeda Witnesses Saw*

Moussaoui as a Bumbler, CNN.com, Mar. 28, 2006, *available at* http://www.cnn.com/2006/LAW/03/28/moussaoui/index.html.[31]

In considering the government's claim of privilege in this matter, this Court should rigorously evaluate how confirming or denying that Mr. El-Masri was a victim of an officially acknowledged program would do lasting harm to national security. As in *Spock*, where the government policy of wiretapping American citizens had been officially acknowledged, and the plaintiff's involvement had been reported in *The Washington Post*, the admission or denial by the government of its role in Mr. El-Masri's rendition would "reveal[] no important state secret . . . ." *Spock*, 464 F. Supp. at 519. The public declaration of former CIA Director Goss wholly fails to explain how confirming or denying a single rendition can cause any greater harm than publicly confirming the existence of the program, as he and other officials have repeatedly done. Furthermore, as elaborated below, it is premature to conclude that those means and methods are necessary or even relevant to the adjudication of Mr. El-Masri's claims.

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

III. DISMISSAL OF THIS ACTION WITHOUT PERMITTING NONSENSITIVE DISCOVERY AND CONSIDERING NONPRIVILEGED EVIDENCE WOULD BE IMPROPER.

Where, as here, the very subject matter of the suit is a not state secret, a case may not be dismissed on state secrets grounds unless, after all possible nonsensitive discovery and presentation of nonprivileged evidence, a court determines that a plaintiff cannot present a prima facie case or a defendant cannot present a valid defense without resort to privileged evidence. *In re Under Seal*, 945 F.2d at 1289-90 (summary judgment granted only after plaintiff could not show genuine issue of material fact with nonprivileged evidence); *Ellsberg*, 709 F. 2d at 64 n.55 (remanding where district court had dismissed case on basis of privilege but "did not even consider whether the plaintiffs were capable of making out a prima facie case without the privileged information."); *Molerio*, 749 F. 2d at 822, 826 (terminating suit only after evaluating plaintiffs' nonprivileged evidence); *Clift v. United States*, 597 F.2d 827, 830 (2d Cir. 1979) (remanding for further proceedings where plaintiff has "not conceded that without the requested documents he would be unable to proceed, however difficult it might be to do so.").[32] "If, after further proceedings, the plaintiff

[32] *See also Monarch Assurance P.L.C.*, 244 F.3d at 1364 (reversing dismissal on state secrets grounds so that plaintiff could engage in further discovery to support claim with nonprivileged evidence); *Barlow*, 53 Cl. Ct.

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

The wisdom of this traditional practice is manifest. When the government urges dismissal pursuant to the state secrets privilege before an answer has been filed, it is difficult for a court to determine which allegations are relevant or even in dispute. 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 Technologies, Inc.*, 423 F.3d 1260, 1268 (Fed. Cir. 2005). Because of the sheer amount of information about this matter that is public and officially acknowledged, it is possible that the named defendants would have no basis for denying certain key allegations in their answers.

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667 (despite invocation of privilege with respect to some evidence, full-blown trial conducted on merits, with nonprivileged evidence); *McDonnell Douglas Corp. v. United States*, 37 Fed. Cl. 270, 280-281 (1996) (terminating case because state secrets privilege deprived both plaintiff and defendant of ability to prove their cases, but only after giving "plaintiffs an opportunity to make a *prima facie* showing that they could make a case without the privileged information.").

Even in those instances in which government claims of privilege are upheld, courts routinely permit nonsensitive discovery to proceed. The Supreme Court set the stage for this approach when it held in *Reynolds* that "it should be possible . . . to adduce the essential facts as to causation without resort to material touching upon military secrets," and remanded the case for depositions. *Reynolds*, 345 U.S. at 11. Indeed, "an action as to which a certain avenue of discovery would compromise state secrets need not be dismissed if an alternative, non-sensitive avenue of discovery is available." *In re United States*, 872 F.2d at 481 (Ginsburg, J., concurring and dissenting); *In re Under Seal*, 945 F.2d at 1287 (noting that government provided some discovery despite invocation of the privilege).[33] Accordingly, before this Court affirms the dismissal of Mr. El-Masri's case on the basis of the privilege, it must consider and evaluate whether claims and defenses could be proved here through nonprivileged evidence.

Even at this preliminary stage of the proceedings, available evidence suggests that Mr. El-Masri could present a prima facie case that defendants violated his rights under the Constitution and the law of nations without

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[33] *See also Monarch Assurance P.L.C.*, 244 F.3d at 1364 (upholding privilege but remanding because discovery had been unduly limited); *Crater Corp.*, 255 F.3d at 1365 (government provided some discovery despite invocation of privilege); *Patterson v. FBI*, 893 F.2d 595, 598 (3d Cir. 1990) (same).

privileged evidence. Mr. El-Masri's sworn declaration, submitted below, provides a remarkably detailed and consistent account of his ordeal which, if deemed credible by a trier of fact, would in itself satisfy much of his burden under the law. The declaration is supported by abundant evidence, including:

- The Council of Europe's public report which concludes, on the basis of numerous sources and interviews, that Mr. El-Masri was abducted in Macedonia, turned over to the CIA, and transported to Afghanistan, *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States*, *supra,* § 3.1;
- Passport stamps confirming Mr. El-Masri's entry to and exit from Macedonia, as well as exit from Albania, on the dates in question, JA 106-109 (Masri Decl. ¶ 81 & Exh. E);
- Scientific testing of Mr. El-Masri's hair follicles, conducted pursuant to a German criminal investigation, that is consistent with Mr. El-Masri's account that he spent time in a South-Asian country and was deprived of food for an extended period of time, JA 163-181 (Gnjidic Decl. ¶ 13 & Exh. B);
- Other physical evidence, including Mr. El-Masri's passport, the two t-shirts he was given by his American captors on departing

Afghanistan, his boarding pass from Tirana to Frankfurt, and a number of keys that Mr. El-Masri possessed during his ordeal, all of which have been turned over to German prosecutors, JA 155-156 (Gnjidic Decl. ¶ 12);

- Eyewitness confirmation from a fellow prisoner that Mr. El-Masri was detained in an Afghan prison by Americans, Smith & Mekhennet, *supra*;
- Aviation logs confirming that a Boeing business jet owned and operated by defendants in this case, then registered by the FAA as N313P, took off from Palma, Majorca, Spain on January 23, 2004; landed at the Skopje airport at 8:51 P.M. that evening; and left Skopje more than three hours later, flying to Baghdad and then on to Kabul, the Afghan capital, JA 70-72 (Masri Decl. ¶ 34 & Exh. A);
- Witness accounts from other passengers on the bus from Germany to Macedonia, which confirm Mr. El-Masri's account of his detention at the border, JA 155 (Gnjidic Decl. ¶ 11);
- Photographs of the hotel in Skopje where Mr. El-Masri was detained for twenty-three days, from which Mr. El-Masri has identified both his actual room and a staff member who served him food, JA 47-48 (Masri Decl. ¶¶ 14 & 17);

- Geological records that confirm Mr. El-Masri's recollection of minor earthquakes during his detention in Afghanistan, JA 77-100 (Masri Decl. ¶ 56 & Exh. C);
- Evidence of the identity of "Sam," whom Mr. El-Masri has positively identified from photographs and a police line-up, and who media reports confirm is a German intelligence officer with links to foreign intelligence services, JA 101-105 (Masri Decl. ¶ 61 & Exh. D);
- Sketches that Mr. El-Masri drew of the layout of the Afghan prison, which were immediately recognizable to another rendition victim who was detained by the United States in Afghanistan, JA 110-139 (Masri Decl. ¶ 84 & Exh. F); Smith & Mekhennet, *supra*;
- Photographs taken immediately upon Mr. El-Masri's return to Germany that are consistent with his account of weight loss and unkempt grooming, JA 159-162 (Gnjidic Decl. ¶ 3 & Exh. A).

During a reasonable discovery period, Mr. El-Masri might well be able to locate significant additional evidence, including additional prisoners with whom he was incarcerated in Afghanistan and other witnesses to his ordeal. *See* Smith & Souad, *supra* (noting that two other individuals detained with Mr. El-Masri are now listed by the U.S. Department of Defense as held at Guantánamo Bay). Moreover, numerous government inquiries, including

the German prosecutors' investigation, a German parliamentary investigation, and various intergovernmental human rights inquiries, have and will continue to produce additional corroborating evidence. *See Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States*, *supra*, § 3.1.2 ("Elements of Corroboration for Mr. El-Masri's Account"); *see also* JA 154-157 (Gnjidic Decl. ¶¶ 6-16); JA 199-203 (Watt Decl.¶¶ 19, 20) (detailing pending investigation).

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

IV. THERE ARE ALTERNATIVES TO DISMISSAL THAT WOULD PERMIT THIS CASE TO GO FORWARD WITHOUT HARMING THE NATION'S SECURITY.

Even if this Court determines that litigation of this matter is likely to touch upon privileged evidence, it may not affirm the outright dismissal of this action without carefully considering whether alternatives exist that would permit Mr. El-Masri's claims to be adjudicated without exposing secrets of state. As this Court has made clear, courts must use "creativity and care" to devise "procedures which would protect the privilege and yet allow the merits of the controversy to be decided in some form." *Fitzgerald*,

776 F.2d at 1238 n.3; *see also In re United States*, 872 F.2d at 478 (discussing measures to protect sensitive information as case proceeds); *cf. Colby v. Halperin*, 656 F.2d 70, 73 (4th Cir. 1981) (noting that "the principle of non-disclosure [of classified information] may give way in particular circumstances in the face of 'compelling necessity,' subject, of course, to appropriate protective devices and procedures"). "Only when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal [on state secrets grounds] warranted." *Fitzgerald*, 776 F.2d at 1244.

Because of the injustice and finality of dismissal, courts have sought creative alternatives that permit the injured party to vindicate her rights while protecting state secrets from disclosure. For example, in *Heine v. Raus*, a case involving sensitive CIA information, the Fourth Circuit directed the district court to review *in camera* any discovery material that might arguably fall within the privilege. 399 F.2d at 791. In *In re United States*, the D.C. Circuit discussed several alternatives to dismissal, noting that "the information remains in the Government's custody, and the parties' discovery stipulation has preserved the Government's right to assert the privilege and to support its assertions by submissions of representative samples of documents for *in camera* review." 872 F.2d at 478. Moreover, "the parties

have provided for the protection of third party privacy by agreeing to mechanisms limiting the disclosure of certain documents, including redaction of names." *Id.* Finally, the court noted that a bench trial "w[ould] reduce the threat of unauthorized disclosure of confidential material." *Id.*

Similarly, in *The Irish People, Inc*, the D.C. Circuit upheld the invocation of the privilege but refused to dismiss the case, suggesting that the district court could make representative findings of fact and provide summaries of withheld information. The court noted that "the district court may properly itself delve more deeply than it might ordinarily into marshalling the evidence on both sides for the selective prosecution claim." 684 F.2d at 955. Other courts have utilized a number of additional tools to safeguard sensitive information in cases involving state secrets, including (1) protective orders, *United States v. Lockheed Martin Corp.*, No. 98-CV-731, 1998 WL 306755 (D.D.C. May 29, 1998); (2) seals, *In re Under Seal*, 945 F.2d at 1287; (3) bench trials, *In re United States*, 872 F. 2d. at 478; (4) special masters, *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130, 1132 (2d Cir. 1977); and (5) *in camera* trials, *Halpern*, 258 F.2d at 41. Most recently, the court in *Hepting* proposed "appointing an expert pursuant to FRE 706 to assist the court in determining whether disclosing particular

evidence would create a 'reasonable danger' of harming national security." No. C-06-672, slip. op. at 69.

Any or all of those alternatives, or others devised by this Court, could be employed to permit this case to proceed without harm to national security. For example, the Court could seal any sensitive evidence and provide Mr. El-Masri's counsel with access to that evidence under a protective order. *See, e.g.*, *In re Under Seal*, 945 F.2d at 1287 (noting protective orders issued and allowing depositions to be conducted in secure facilities); *Air-Sea Forwarders, Inc. v. United States*, 39 Fed. Cl. 434, 436-37 (Fed. Cl. 1997) (noting that CIA provided discovery under protective order).[34] If evidence is classified, one or more of plaintiffs' counsel may be

[34] *See also In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004) (allowing entry of "classified national security information" into the record under a protective order); *United States v. Rezaq*, 899 F. Supp. 697, 708 (D.D.C. 1995) (issuing protective order tracking provisions of Classified Information on Procedures Act provided "more than adequate procedural protections against public disclosure of classified information"). In addition, courts routinely protect classified information used in criminal proceedings through protective orders. *See, e.g.*, *Moussaoui*, 365 F.3d at 312; *United States v. Pappas*, 94 F.3d 795, 797 (2d Cir. 1996); *United States v. Musa*, 833 F. Supp. 752, 758-61 (E.D. Mo. 1993) (imposing protective order to control viewing of classified documents and requiring counsel to sign confidentiality agreement).

granted a security clearance and compelled to sign a non-disclosure agreement.[35]

Furthermore, the Court could receive evidence *in camera* to alleviate any risk of public disclosure, *see Heine*, 399 F.2d at 791; *Ellsberg,* 709 F.2d at 69, or even conduct an entire trial *in camera. See Halpern*, 258 F.2d at 41; *see also Tenet*, 544 U.S. at 11 (noting "the more frequent use of *in camera* judicial proceedings"). If, notwithstanding such protections, there were evidence that the CIA insisted upon shielding from plaintiffs' counsel, the Court could assume a more active role in examining the evidence itself. *See Webster v. Doe*, 486 U.S. at 603 (noting that "the District Court has the

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[35] The government has granted clearance to attorneys in civil litigation on numerous occasions. *See, e.g.*, *In re Guantanamo Detainee Cases,* 344 F. Supp. 2d at 179-80 (noting in protective order that "counsel for petitioners in these cases are presumed to have a 'need to know' information both in their own cases and in related cases pending before this Court."); *Al Odah v. United States*, 346 F. Supp. 2d 1, 14 (D.D.C. 2004) (noting counsel in three Guantanamo habeas cases would be "required to have a security clearance at the level appropriate for the level of knowledge the Government believes is possessed by the detainee, and would be prohibited from sharing with the detainee any classified material learned from other sources"); *United States v. Lockheed Martin Corp.*, 1998 WL 306755, at *5 (issuing protective order stating that "defendant's identification of an individual as someone required for the defense of this litigation will establish a 'need to know' for access to the specific classified information"); *see also Doe v. Tenet*, 329 F.3d 1135, 1148 (9th Cir. 2003), *rev'd on other grounds*, 125 S.Ct. 1230 (2005) (noting that plaintiffs' counsel had received security clearance from CIA to aid in representing alleged covert CIA agents). *See generally In re United States*, No. 370, 1993 WL 262656, at *2-3 (Fed. Cir. Apr. 19, 1993) (acknowledging that government had granted clearance to numerous counsel in civil litigation).

latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission"); *The Irish People*, 684 F.2d at 955.

While some of these alternatives are extreme, *any* alternative would be preferable to the elimination of Mr. El-Masri's rights at the pleading stage. The district court's failure to give serious consideration to these options before depriving Mr. El-Masri of any opportunity for legal redress was unfair and improper.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and remand for further proceedings.

ORAL ARGUMENT REQUEST

Plaintiff-Appellant respectfully requests oral argument.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1667 **Caption:** Khaled El-Masri v. George Tenet, et al.

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Attorney for Khaled El-Masri

Dated: 7/24/06

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2006, I filed and served the following documents: (1) Plaintiff-Appellant's Opening Brief; and (2) Joint Appendix by causing two copies of the former document and one copy of the latter document to be delivered via overnight courier to:

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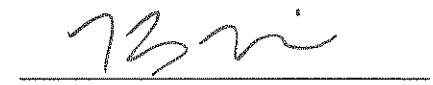

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