



U.S. Department of Justice

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January 18, 2005

Honorable David G. Trager
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Arar v. Ashcroft, et al., Civil Action No. 04-CV-249-DGT-VVP (E.D.N.Y.)

Dear Judge Trager:

As the United States advised in its June 21, 2004, pre-motion letter submitted pursuant to Your Honor's Individual Motion Practices, the United States was in the process of investigating whether or not it was necessary to assert the state secrets privilege in this case on the ground that litigating some or all of plaintiff's complaint would require the disclosure of classified information the disclosure of which would be "inimical to national security." Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991) (dismissing suit based on Navy's assertion of state secrets privilege); see also United States v. Reynolds, 345 U.S. 1, 7 (1953). By letter dated September 17, 2004, the United States advised the parties and the Court it would notify them as soon as that extensive inter-agency evaluation was complete.

This letter is to advise the Court that, after extensive review, the United States has determined it is necessary to assert the state secrets privilege over the information at the core of Counts I, II and III of plaintiff's complaint. The privilege is asserted by the declarations of James Comey, the Deputy Attorney General of the United States, acting by operation of law as Attorney General, and Tom Ridge, Secretary of the Department of Homeland Security. The assertion of the privilege is also supported by classified declarations further explaining the basis for asserting the privilege. Based on this assertion of the state secrets privilege, the United States respectfully submits that Counts I, II and III of plaintiff's complaint should be dismissed pursuant to Fed. R. Civ. P. 56 and judgment should be entered thereon in favor of all defendants, both in their individual and official capacities. See Zuckerbraun, 935 F.2d at 546. This ground for dismissal is independent of those asserted by the United States in its Motion to Dismiss pursuant to Fed. R. Civ. P. 12. The United States has enclosed herewith a copy of the public record materials supporting the privilege assertion sent to the Clerk for filing.

Counsel for the United States contacted the plaintiff, and attempted to contact counsel for each individual defendant, regarding a briefing schedule for this matter. We were unable to reach counsel for defendant Blackman. However, the plaintiff, and all other parties, are in agreement with the following schedule: the individual capacity defendants may file any response to the United States' assertion of the state secrets privilege within 21 days of the date the United States' Notice of Filing and supporting memorandum are filed. Plaintiff shall file his response to all defendants' submissions not later than 45 days after the individual defendants' responses are due. The United States shall submit any reply not later than 30 days thereafter. Enclosed herewith is a proposed order reflecting the schedule agreed upon by the noted parties, which the United States respectfully requests the Court to endorse.


Thank you for Your Honor's consideration.

Sincerely,

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

MAHER ARAR,

Plaintiff,

v.

JOHN ASHCROFT, Attorney General
of the United States, *et al.*,

Defendants

§
§
§
§
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§
§
§

No. 04-CV-0249-DGT-VVP

ORDER

The Court hereby approves the following schedule to govern the submission of briefs in response to the United States' assertion of the state secrets privilege:

1. Any Individual Federal Defendant who wishes to file a brief in response to the United States' submission will file his brief with the clerk of this Court (and serve all counsel) within 21 days of the date on which the United States' submission was filed;
2. Within 45 days thereafter, Plaintiff will file with the clerk (and serve all counsel) any response to the submissions of the United States and the Individual Federal Defendants;
3. Within 30 days thereafter, the United States will file with the clerk (and serve all counsel) its reply, if any, to the submissions of the Plaintiff and Individual Federal Defendants.

SO ORDERED.

BY THE COURT:

DAVID G. TRAGER
United States District Judge

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

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

NOTICE OF FILING

Notice is hereby given of the filing of the declarations of James B. Comey, the Deputy Attorney General of the United States, acting by operation of law as Attorney General in the above-captioned matter (Exhibit 1), and Tom Ridge, Secretary of the Department of Homeland Security (Exhibit 2). In their capacity as the heads of their respective agencies, each declarant formally asserts the state secrets privilege over information at the core of Counts I, II and III of plaintiff's complaint. The United States' privilege assertion is further supported by classified declarations, including the classified declaration of Secretary Ridge, the classified declaration of Acting Attorney General Comey, and the classified declaration of Bruce J. Gebhardt, former Deputy Director of the Federal Bureau of Investigation.¹ These materials support dismissal of Counts I, II and III of plaintiff's complaint, with respect to all

¹ At the time the declaration was signed, September 14, 2004, Mr. Gebhardt was Deputy Director of the FBI. He has since retired.

defendants, both in their individual and official capacities.²

In the event that the Court determines that review of these classified declarations is necessary to evaluate the assertion of the state secrets privilege in this case, the United States will make them available for the Court's ex parte, in camera review.

Respectfully submitted,

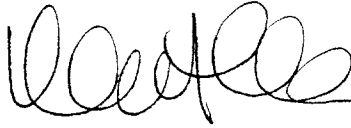
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Dated: January 18, 2005

² The classified information includes Foreign Intelligence Surveillance Act-derived material.

EXHIBIT 1

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

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

DECLARATION OF JAMES B. COMEY

I, James B. Comey, declare as follows:

1. I am the Deputy Attorney General of the United States. The Department of Justice is an Executive Department of the United States. See 28 U.S.C. §§ 501, 503, 504, 509. Attorney General John Ashcroft has been sued in his individual capacity in the above-captioned case, and has recused himself from the decision of whether to assert the state secrets privilege in his official capacity. Under such circumstances and by operation of law, I am authorized to exercise "all duties of that office" with respect to that decision. 28 U.S.C. § 508(a).

2. My statements in this declaration are based on my personal knowledge, on classified and other information provided to me in my official capacity, and on my evaluation of that information. In personally considering this matter, I have executed a classified declaration dated January 18, 2005.

In addition, I have reviewed and considered the public record and classified declarations of Tom Ridge, Secretary of the Department of Homeland Security, dated January 17, 2005, and the classified declaration of Bruce J. Gebhardt, former Deputy Director of the Federal Bureau of Investigation, dated September 14, 2004. My purpose in submitting this Declaration is to assert, in my capacity as Acting Attorney General, a formal claim of the state secrets privilege in order to protect the intelligence, foreign policy and national security interests of the United States.

3. As Acting Attorney General, I have original classification authority pursuant to § 1.3 of Executive Order 12958, as amended by Executive Order 13292, entitled "Classified National Security Information," which sets out the procedures and bases for classification. 60 Fed. Reg. 19825; 68 Fed. Reg. 15315. The classified declarations on which I rely in this case are properly classified under § 1.2 and § 1.4 of Executive Order 13292 because the public disclosure of the information contained in those declarations reasonably could be expected to cause exceptionally grave or serious damage to the intelligence, foreign policy and national security interests of the United States, including defense against transnational terrorism. In addition, portions of the

classified declarations on which I rely are properly classified under § 2.1 of Executive Order 13292 related to derivative classification of material classified by other federal agencies.

4. I have reviewed the complaint of plaintiff, Maher Arar, in the above-captioned matter filed January 22, 2004, in the Eastern District of New York. I have also reviewed the October 7, 2002, Decision of the Regional Director of the Immigration and Naturalization Service, in removal proceedings under Section 235(c) of the Immigration and Nationality Act with respect to Mr. Arar, and the classified addendum referenced in it. In addition, I have reviewed other classified material as indicated in my classified declaration.

5. Litigating Counts I, II and III of plaintiff's complaint would necessitate disclosure of classified information, including: (1) the basis for the decision to exclude plaintiff from this country based on the finding that plaintiff was a member of a foreign terrorist organization, namely al Qaeda, 8 U.S.C. § 1225(c)(2)(B) and 8 U.S.C. § 1182(a)(3)(B)(i)(V); (2) the basis for the rejection of plaintiff's designation of Canada as the country to which plaintiff wished to be removed, 8 U.S.C. § 1231(b)(2)(C)(iv); and (3) the considerations involved in the decision to remove

him to Syria, 8 U.S.C. §§ 1231(b)(2)(C) and (D). Based on my personal consideration of the matter, I have concluded that disclosure of the classified information used by government officials to reach each of the three noted decisions reasonably could be expected to cause exceptionally grave or serious damage to the national security interests of the United States.

6. The classified information in this case relates to the United States' intelligence activities and intelligence information regarding the plaintiff. It contains numerous references to intelligence sources and methods, the disclosure of which reasonably could be expected to cause exceptionally grave or serious damage to the national security of the United States and its foreign relations or activities. Disclosure of this information would enable adversaries of the United States to avoid detection from the Nation's intelligence activities, sources, and methods, and/or take measures to defeat or neutralize those activities, which could seriously damage the United States' national security interests. In addition, disclosure of the information relied upon to reach each of the three noted decisions would pose an exceptionally grave or serious risk to diplomatic relations and national security.

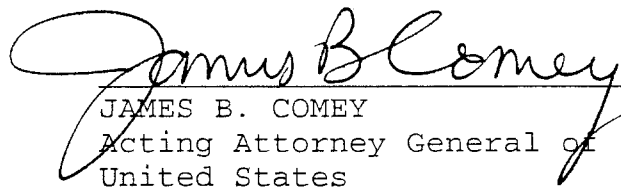
7. Any further elaboration on the public record

concerning this matter would reveal information that could cause the very harms my assertion of the state secrets privilege is intended to prevent. The classified declarations that I considered in making this privilege assertion provide a more detailed explanation of the information at issue and the harms to national security that would result from its disclosure.

8. Accordingly, I formally assert the state secrets privilege to prevent the disclosure of the information detailed in the classified declarations available for the Court's ex parte, in camera review.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of January, 2005, in Washington, D.C.



JAMES B. COMEY
Acting Attorney General of the
United States

EXHIBIT 2

exceptionally grave or serious damage to the foreign policy and national security of the United States, including defense against transnational terrorism. 60 Fed. Reg. 19825; 68 Fed. Reg. 15315. In addition, portions of the classified declarations on which I rely are properly classified under § 2.1 of Executive Order 12958, as amended, related to derivative classification of material classified by other federal agencies.

3. The statements in this declaration are based on my personal review of the following materials. I have reviewed the complaint of plaintiff, Maher Arar (Arar), in the above-captioned matter filed January 22, 2004, in the Eastern District of New York. I have also reviewed the October 7, 2002, decision of the Eastern Regional Director of the INS, in removal proceedings under Section 235(c) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1225(c), with respect to Arar, and the classified addendum referenced in it. I have also reviewed pertinent unclassified material relating to this matter. In addition, I have reviewed other classified material as indicated in my classified declaration.

4. Based on my personal consideration of the matter, I have concluded that the litigation of Counts I through III of Arar's Complaint would necessitate disclosure of the classified information, including:

- a. The basis for the decision to exclude and remove plaintiff from the United States on the finding that plaintiff was a member of a foreign terrorist organization, namely, Al-Qaeda, INA § 235(c)(2)(B), 8 U.S.C. § 1225(c)(2)(B), and INA § 212(a)(3)(B)(i)(V), 8 U.S.C. § 1182(a)(3)(B)(i)(V);

- b. The basis for the rejection of Canada as the country to which plaintiff wished to be removed, INA § 241(b)(2)(C)(iv), U.S.C. § 1231(b)(2)(C)(iv); and
- c. The considerations involved in the decision to remove him to Syria, INA §§ 241(b)(2)(C) and (D), 8 U.S.C. §§ 1231(b)(2)(C) and (D).

5. The INS relied on unclassified and classified materials in making the three decisions referenced above. The classified information in this case relates to the United States' intelligence activities and intelligence information regarding the plaintiff. It contains numerous references to intelligence sources and methods, the disclosure of which reasonably could be expected to cause exceptionally grave or serious damage to the national security of the United States and its foreign relations or activities. Disclosure of this information would enable adversaries of the United States to avoid detection by the nation's intelligence activities, sources, and methods, and/or take measures to defeat or neutralize those activities, thus, causing extremely grave or serious damage to the United States' national security interests. In addition, disclosure of the information relied upon to reach each of the three noted decisions would pose an exceptionally grave or serious risk to diplomatic relations and national security.

6. Any further elaboration on the public record concerning this matter could reveal information that could cause the very harms my assertion of the state secrets privilege is intended to prevent. The classified declaration that I am also submitting in making this privilege assertion provides a more detailed explanation of the information at issue and the harms to national security that could result from its disclosure.

7. Although the INS was not the originator of the classified information in this case, it relied upon and reproduced this information in its derivatively classified materials.

8. My statements and conclusions in this declaration are based upon information made available to me in the course of my official duties and my full understanding of this material. Accordingly, I formally invoke the state secrets privilege to prevent the disclosure of the information detailed in the classified declarations available for the Court's ex parte, in camera review.

9. I submit this declaration in support of my assertion of the state secrets privilege on behalf of the U.S. Department of Homeland Security in this case, Arar v. Ashcroft, et al.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day January, 2005.

A handwritten signature in black ink, reading "Tom Ridge", followed by a horizontal line.

Tom Ridge,
Secretary of the U.S. Department of Homeland Security

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2005, true copies of the foregoing Notice of Filing were served by first class mail, postage pre-paid, or by Federal Express, upon the following:

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MARY H. MASON

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

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

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

Plaintiff has filed a civil suit seeking money damages and declaratory relief from a number of federal officials in their individual and official capacities. The case arises from the detention and removal of plaintiff, a Syrian-born Canadian citizen. The complaint alleges that in September 2002, while en route to Canada from Tunisia via Switzerland, plaintiff was detained at JFK Airport and held in New York for 13 days before ultimately being removed to Syria. Complaint, ¶¶ 25, 47.

Plaintiff alleges that he was advised he was "inadmissible in the United States because he belonged to an organization designated by the Secretary of State as a Foreign Terrorist Organization, namely al Qaeda." Id., ¶ 13 and Exhibit D. Federal officials allegedly removed plaintiff pursuant to an "extraordinary renditions program," because they believed that he was an al Qaeda member and that the Syrians would use "methods of interrogation to obtain information from Mr. Arar that would not be legally or morally acceptable in this country or in other

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

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

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

privilege and protecting the . . . secrets at issue here." ;
McDonnell Douglas Corp., 323 F.3d at 1022. Because information
at the core of Counts I, II, and III is classified and cannot be
disclosed, plaintiff cannot prove his claims and defendants are
deprived of information critical to their defense. Therefore,
Counts I, II, and III should be dismissed pursuant to Rule 56 and
judgment entered for defendants on those counts. See
Zuckerbraun, 935 F.2d at 548.⁸

CONCLUSION

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

Respectfully submitted,

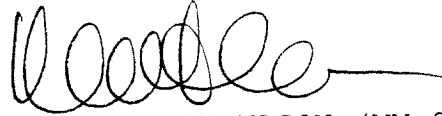
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⁸ Accord Black, 62 F.3d at 1119 (affirming dismissal of
Bivens claim where "information covered by privilege is at the
core of [plaintiff's] claims, and . . . the litigation cannot be
tailored to accommodate the loss of privileged information");
Bowles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

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CERTIFICATE OF SERVICE

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