SUMMARY:

The state or military secrets privilege allows the United States to block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security. In *Crater Corp. v. Lucent Technologies, Inc.*, 423 F.3d 1260, 76 U.S.P.Q.2d 1338, 68 Fed. R. Evid. Serv. 177, 23 A.L.R.6th 905 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 2889, 165 L. Ed. 2d 938 (U.S. 2006), the court of appeals held, in a misappropriation of trade secrets action, that the Secretary of the Navy and Acting Secretary of the Navy were not required to personally review each of the 26,000 documents sought in discovery to properly invoke the military and state secrets privilege; it was sufficient that the Secretary, and later the Acting Secretary, were informed of the nature and scope of the documents, and that each determined, based on personal knowledge, that disclosure would jeopardize a state secret and would threaten national security. This annotation collects and summarizes those cases in which courts have addressed the invocation and effect of the state secrets privilege.

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ARTICLE: Scope

This annotation collects and summarizes those cases in which courts have addressed the invocation and effect of the state secrets privilege.

Some opinions discussed in this annotation may be restricted by court rule as to publication and citation in briefs; readers are cautioned to check each case for restrictions. A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject. These provisions are discussed herein only to the extent and in the form that they are reflected in the court opinions that fall within the scope of this annotation. The reader is consequently advised to consult the appropriate statutory or regulatory compilations to ascertain the current status of all statutes discussed herein.

Background and summary

The state or military secrets doctrine embodies an evidentiary privilege which protects military and state secrets from disclosure in judicial proceedings. The privilege against revealing military secrets belongs to the government and must be asserted by it, and it can neither be claimed nor waived by a private party. The privilege also cannot be asserted by a local government entity or official. Once a court is satisfied that any response at all to a question or request for production might have a deleterious effect on national security, the claim of the state secrets privilege will be accepted without requiring further disclosure. A plaintiff's showing of necessity for evidence allegedly subject to the state secrets privilege will determine how far a court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. National security concerns are paramount with respect to the state secrets privilege, for even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. If a court is satisfied that there is a reasonable danger of state secrets being exposed, it is not required to "play with fire" and chance further disclosure, whether it be inadvertent, mistaken, or even intentional, that would defeat the very purpose for which the state secrets privilege exists.
There must be a formal claim of the state secrets privilege, lodged by the head of the department having control over the matter, after actual personal consideration by that officer. Once a formal and proper claim of state secrets privilege has been made, district courts frequently can satisfy themselves of the sufficiency of that claim through the explanation of the department head who is lodging it; such explanations often come in the form of affidavits or declarations made personally by the department head. There may be cases where the necessity for evidence is sufficiently strong and the danger to national security sufficiently unclear that in camera review of all materials is required to evaluate a claim of state secrets privilege; however, when a judge is satisfied that the dangers asserted by the government are substantial and real, further inquiry is not to be undertaken.

In deciding the applicability of the privilege, courts must bear in mind the executive branch's preeminent authority over military and diplomatic matters and its greater expertise in predicting the effect of a particular disclosure on national security, and must accept the executive branch's assertion of the privilege whenever its independent inquiry discloses a reasonable danger that compulsion of the evidence will expose military matters which should not be divulged. The applicability of the state secrets privilege to prevent discovery in an action is wholly independent of the truth or falsity of the complaint's allegations or the strength or weakness of the plaintiff's case. Simply because a factual statement has been publicly made does not necessarily mean that the facts it relates are true and are not a secret for purposes of the state secrets privilege. In determining whether a factual statement is a secret for purposes of the state secrets privilege, the court should look only at publicly reported information that possesses substantial indicia of reliability and whose verification or substantiation possesses the potential to endanger national security; that entails assessing the value of the information to an individual or group bent on threatening the security of the country, as well as the secrecy of the information, and in determining whether information that the government contends is a secret is actually a secret for purposes of the state secrets privilege, the court may rely upon reliable public evidence that might otherwise be inadmissible at trial because it does not comply with the technical requirements of the rules of evidence.

If a court finds that the state secrets privilege has been validly asserted, it must then determine whether the case must be dismissed to prevent public disclosure of those secrets, or whether special procedural mechanisms may be adequate to prevent disclosure of the state secrets. Dismissal is appropriate only when no amount of effort and care on the part of the court and the parties will safeguard privileged material. Where the very question on which a case turns is itself a state secret, or the circumstances make clear that 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, dismissal is the appropriate remedy. In sum, the state secrets privilege may require dismissal of a case, the court said: (1) if the specific evidence must be removed from the case as privileged, and the plaintiff can no longer prove the prima facie elements of the claim without that evidence, (2) if the defendant is unable to assert a valid defense without the evidence covered by the privilege, or (3) even if the plaintiff is able to produce the nonprivileged evidence, the very subject matter of the action is a state secret.

Courts have determined, under the facts and circumstances presented, whether the applicability of the state secrets privilege to preclude disclosure of information was supportable, under the facts and circumstances presented in an immigration or denaturalization proceeding (§ 4); an action for defamation, libel, or slander (§ 5); a government whistleblower's action (§ 6); an action for breach of contract, finding such privilege supportable (§ 7) or not (§ 8); a corrections or parole proceeding (§ 9); an action for an environmental law violation (§ 10); an action alleging interception of electronic communications, finding such privilege supportable (§ 11) or not (§ 12); and action stemming from a government espionage investigation, finding such privilege to be supportable (§ 13) or not (§ 14); and action stemming from government detention of persons (§ 15); an action alleging wrongful employment practices (§ 16); an action alleging patent infringement, finding such privilege to be supportable (§ 17) or not (§ 18); and action for negligence or wrongful death (§ 19); a products liability action (§ 20); an action for misappropriation of trade secrets (§ 21); an action for interference with a business relationship (§ 22); an action for replevin or conversion (§ 23); and an action involving trade or customs, finding such privilege to be applicable (§ 24) or not (§ 25).

It has been determined whether sanctions were warranted against the government for assertion of the state secrets privilege (§ 26). Also, it has been decided whether a claim of fraud was supportable based on the assertion, by the government, of the state secrets privilege (§ 27). The issue whether the state secrets privilege, asserted by the government, was waived with respect to particular information based on public disclosure of that information has also been decided (§ 28). Courts have determined whether, in order for the government to assert the state secrets privilege, a formal claim of privilege must be made with respect to each separate item, finding such claim to be required (§ 29) or not (§ 30). Finally, it has been
determined whether the government waived the claim of the state secrets privilege based on an administrative rule or regulation (§ 31).

Practice pointers

Since the privilege for military and state secrets must be invoked by the head of the department or agency responsible for the records after personal consideration of the material sought; setting forth, with enough particularity to enable the court to make an informed decision, the nature of the material withheld, and of the threat to national security should it be revealed, a finding by a court that particular information is protected from disclosure under the state secrets may be challenged on the grounds that the supporting affidavit was defective. Such an affidavit by the Attorney General has been found defective as a formal claim of privilege because it contained no indication that the Attorney General personally considered the material and decided that disclosure would seriously endanger national interests. Moreover, without yet considering the in camera submissions, the affidavit was found to be insufficiently specific to be of any assistance in the court's proper function of deciding whether the documents in question fell within the privileged category.

In a suit in which discovery is sought and the government opposes discovery on the grounds of the state secrets privilege, representations by a government official in an affidavit or declaration regarding the protected nature, under the state secrets privilege and statutory privilege, of the information sought, may provide sufficient cause for the court to proceed in camera and review a classified declaration as to the exercise of the privilege in reference to the discovery requests and/or in anticipation of a motion to dismiss. Counsel may be excluded from participation in the in camera examination of the documents in question. It has been held, in such a case, that the nation's security was too important to entrust to the good faith and circumspection of the litigant's lawyer, whose sense of obligation to his client was likely to strain his fidelity to his pledge of secrecy, or to the coercive power of a protective order.

5 General principles

The following authority recognized general principles concerning the state secrets privilege.

CUMULATIVE CASES
Cases:

In considering the Government's invocation of the state secrets privilege, district court must address the validity of the privilege, satisfying itself that there is a reasonable danger that disclosure of the particular facts in litigation will jeopardize national security, while not compelling disclosure of the very thing the privilege is designed to protect; court must then address the effect of an invocation of the privilege, in light of the exclusion of the evidence, on the plaintiff's claim or the defendant's defense. Doe v. C.I.A., 576 F.3d 95 (2d Cir. 2009).

State secrets privilege is common-law evidentiary privilege that permits federal government to bar disclosure of information if there is reasonable danger that disclosure will expose military matters which, in interest of national security, should not be divulged. Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007).

The state secrets privilege may be asserted by the government when there is a reasonable danger that compulsion of the evidence will expose military matters which, in interest of national security, should not be divulged. Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (N.D. Cal. 2008).

6 Effect of government's successful invocation of state secrets privilege

The following authority considered the effect of the government's successful invocation of the state secrets privilege.

CUMULATIVE CASES
Cases:
Government did not unconstitutionally violate plaintiffs' right of access to the courts by invoking the state secrets privilege to deny their counsel access to secure media allegedly needed to draft their opposition to Government's assertion of the privilege, including the un-redacted classified version of the complaint and other purportedly privileged and classified information; plaintiffs had no right of access to material that Government contended contained state secrets prior to district court's adjudication of that contention. *U.S. Const. Amend. I. Doe v. C.I.A.*, 576 F.3d 95 (2d Cir. 2009).

Effect of government's successful invocation of state secrets privilege is simply that evidence is unavailable, as though witness has died, and case proceeds accordingly, with no consequences save those resulting from loss of evidence. *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007).

Invocation of states secret privilege is a categorical bar to a lawsuit (1) if the very subject matter of the action is a state secret, (2) if the invocation of the privilege deprives a plaintiff of evidence necessary to prove a prima facie case, or (3) if invocation of the privilege deprives a defendant of information necessary to raise a valid defense. *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008).

7 Procedural requirements for invocation of privilege, generally

The following authority addressed the procedural requirements for the invocation of the state secrets privilege.

**CUMULATIVE CASES**

Cases:

To assert the state secrets privilege, government must make 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. *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008).

8 Sufficiency of meeting procedural requirements for invocation of privilege

The following authority considered the sufficiency of the meeting of the procedural requirements for invocation of the state secrets privilege.

**CUMULATIVE CASES**

Cases:

Public declaration of the Director of the Central Intelligence Agency (CIA), in which he formally asserted the military and state secrets privilege, satisfied all of the procedural requirements for invocation of the privilege. *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008).

Immigration and denaturalization proceedings

The following authority determined whether the applicability of the state secrets privilege, to preclude disclosure of information in an immigration or denaturalization proceeding was supportable, under the facts and circumstances presented.

In *U.S. v. Koreh*, 144 F.R.D. 218 (D.N.J. 1992), the district court, recognizing that, when appropriately asserted, the state secrets privilege is absolute and may not be pierced by any demonstration of need, no matter how compelling, held that documents relating to the Soviet bloc's alleged disinformation campaign against an Eastern European migrant would pose a substantial risk to United States intelligence if disclosed and, therefore, were protected by the state secrets privilege in a denaturalization proceeding against an migrant for concealing propaganda efforts on behalf of the Nazis, even though the documents would not directly reveal intelligence source, where the declarations by the Attorney General and the assistant director of the FBI disclosed in detail how each withheld document contained information that could permit a hostile government to deduce the identity of intelligence sources. The court explained, a balancing approach applied to determine the consequences of upholding the United States' claim of the state secrets privilege, where the court was required to
weigh possibility of exculpation and the necessity for a defense, the government's interest in maintaining secrecy and bringing the action, good faith and cooperation, and alternatives to disclosure. The court concluded that upholding the government's claim of the state secrets privilege did not entitle the migrant to dismissal of the denaturalization proceeding, where the most significant material relating to a "disinformation" defense was voluntarily released by the government, disclosure of the withheld information would pose a substantial risk of compromising intelligence sources, and the government offered to stipulate to information in the withheld documents.

Defamation, libel, and slander

In the following cases, the courts determined whether the applicability of the state secrets privilege, to preclude disclosure of information in an action for defamation, libel, or slander was supportable, under the facts and circumstances presented.

The state secrets privilege barred an action by a former Department of Energy (DOE) intelligence official alleging that other DOE officials defamed him with statements charging that his part in an investigation of a DOE scientist for purportedly mishandling sensitive nuclear weapons documents was motivated by racial bias, even if an administrative inquiry (AI) into the matter used objective criteria in selecting the scientist for further investigation and a Department of Justice investigation concluded that the scientist was not the victim of racial profiling, where information provided by the investigators to the AI had allegedly been manipulated, and the investigators' conclusions were covered by an unchallenged protective order because they included information about the compromise of nuclear technology, analysis of a Chinese weapons program, and information regarding informants, the court of appeals, in *Trulock v. Lee*, 66 Fed. Appx. 472, 61 Fed. R. Evid. Serv. 581 (4th Cir. 2003), held.

In *Fitzgerald v. Penthouse Intern., Ltd.*, 776 F.2d 1236, 12 Media L. Rep. (BNA) 1330, 19 Fed. R. Evid. Serv. 661, 3 Fed. R. Serv. 3d 837 (4th Cir. 1985), the court of appeals held that the state secrets privilege warranted dismissal of a defamation action brought by an individual who worked on a government marine mammal project against the publisher of an article which allegedly libelously charged the former with espionage, specifically, the unauthorized sale of a top secret marine mammal weapons system to other countries, where the Navy interposed the military secrets objection to the calling of certain witnesses as experts and there was no way the case could be tried without compromising sensitive military secrets. In so holding, the court recognized that the state secrets privilege will only come into play when the government is able to convince the court that, due to the nature of the proof to be presented, the action presents a substantial threat that state secrets will be compromised; however, the court may fashion appropriate procedures to protect against disclosure, and it is only when no amount of effort and care on the part of the court and the parties will safeguard privileged material that dismissal is warranted.

In *Heine v. Raus*, 305 F. Supp. 816 (D. Md. 1969), judgment summarily aff'd, 432 F.2d 1007 (4th Cir. 1970), a slander action, the district court, entering judgment for the defendant, a Central Intelligence Agency (CIA) employee, held that the record established that instructions given to the defendant to warn members of an Estonian migrant group that the plaintiff was a Soviet intelligence agent were given with approval of the CIA director or of a subordinate authorized by the director to issue such instructions, and that the giving of such instructions was ratified and approved by the deputy director, entitling the defendant to assert a defense relating to the disclosure of state secrets.

**** Observation:
The court of appeals, in *Heine v. Raus*, 399 F.2d 785, 33 A.L.R.3d 1318 (4th Cir. 1968), had held, as a governmental claim of privilege of secrecy was, in a slander suit brought against an employee of the Central Intelligence Agency (CIA), properly invoked generally by the Director of the CIA, and as the district court made sufficient inquiry to assure that the privilege had not been lightly invoked without pressing so far as to reveal the very state secrets the privilege is intended to protect, that the district court properly balanced the conflicting interests and properly allowed invocation of the privilege against taking the employee's deposition.

Whistleblower's action

The following authority determined whether the applicability of the state secrets privilege, to preclude disclosure of information in an action for recovery by a government "whistleblower" was supportable, under the facts and circumstances presented.
In a congressional reference case, where a private bill was referred to consider the amount, if any, of relief legally or equitably due from the United States to the plaintiff, a Department of Defense (DOD) probationary employee, as an alleged whistleblower, upon the plaintiff's motion for discovery, the district court held that discovery of documents pertaining to, inter alia, National Security Agency (NSA) and Central Intelligence Agency (CIA) documents related to Pakistan's nuclear arms program would be denied on the basis of the state secrets privilege, the court in Barlow v. U.S., 2000 WL 1141087 (Ct. Fed. Cl. 2000), held. The plaintiff asserted that the documents the government sought to protect would help him prove that he had a reasonable belief that Congress had been misled with regard to Pakistan's nuclear arms program. The court found that affidavits submitted by the director of the CIA indicated that improper disclosure of the classified intelligence information sought by the plaintiff would result in the compromise of current sources of intelligence and would necessarily cause the loss of the ability to collect additional intelligence on topics of continuing interest to the President and other senior United States policy makers, and there would likely be an adverse impact on U.S. foreign relations as foreign countries and entities would retaliate for perceived breaches of their sovereignty and diplomatic protocol.

Breach of contract - Privilege applicable

In the following cases, the courts determined that the applicability of the state secrets privilege was established or supportable, in an action for breach of contract, to preclude disclosure of information under the facts and circumstances presented.

In civil litigation between two defense contractors, the district court did not abuse its discretion in quashing one contractor's subpoena for certain Department of Defense documents relating to the sales of military equipment to foreign countries on the grounds of the "state secrets" privilege, the court of appeals, in Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 1985-1 Trade Cas. (CCH) P 66330, 17 Fed. R. Evid. Serv. 150, 40 Fed. R. Serv. 2d 1042 (D.C. Cir. 1984), held. The court found, initially, where the government's claim that the subpoenaed documents were subject to the "state secrets" privilege was not unreasonable, the trial court did not err in quashing the subpoena without conducting an in camera review of the documents. To establish the "state secrets" privilege in regard to subpoenaed government documents, the court said, all the government must show is a reasonable danger that harm will result from disclosure; it is not necessary to show that harm will inevitably result. Thus, the court found, the subpoena was properly quashed in light of the credibility of the Department's assertions that such intergovernmental communications about the defense systems were made with every expectation of confidentiality and that the government's ability to conduct relations with such countries in the future would be harmed by disclosure.

In McDonnell Douglas Corp. v. U.S., 323 F.3d 1006, 60 Fed. R. Evid. Serv. 1423 (Fed. Cir. 2003), the court of appeals ruled that the military and states secrets privilege applied with regard to the discovery of information about stealth aircraft, precluding litigation of the contractors' superior knowledge defense in an action challenging termination for the default of a contract to develop stealth aircraft, given that the privilege was properly invoked by an authorized federal official, that litigation of the superior knowledge claim would require giving the contractors' attorneys access to classified information and ultimately divulging that information at trial, and that a history of security breaches and discovery abuses in litigation created a risk that the military and state secret, once divulged, was unlikely to remain protected. The Court, recognizing that the presence of a properly invoked state secrets privilege requires dismissal of a claim that cannot prevail without the privileged information, ruled that due process (U.S. Const. Amend. V did not require that government contractors be able to present all defenses in the action, so as to apply to trump the military and state secrets privilege and require the government to choose between fully disclosing classified information pertaining to the contractors' superior knowledge defense and having the default termination vacated, notwithstanding the contention that applying the privilege would permit the government to abuse its authority as both the litigant and the sovereign and would lead the government to use the default termination as a ready alternative to terminations for convenience.

In an action for breach of contract and just compensation, the government properly invoked the state secrets privilege to bar discovery regarding a relationship, if any, between the Central Intelligence Agency (CIA) and an individual who borrowed money from the plaintiff, purportedly on behalf of the CIA, the court of appeals, in Monarch Assur. P.L.C. v. U.S., 244 F.3d 1356 (Fed. Cir. 2001), held.
In *Guong v. U.S.*, 860 F.2d 1063, 27 Fed. R. Evid. Serv. 254 (Fed. Cir. 1988), the court of appeals held, although a claimant could not prevail on a breach of employment contract against the United States without revealing or compromising government secrets in violation of the "state secrets" privilege, the government would not be required to stipulate that the claimant was employed in a covert Central Intelligence Agency (CIA) sabotage group, since this would be a stipulation of the elements of the contract that the claimant must prove in order to recover. Affirming the district court’s order dismissing the complaint, the Court determined that the alleged contract with the CIA for the performance of covert operations against North Vietnam as a saboteur was one that both the government and agent understood was a fact not to be disclosed and, thus, the contract could not be judicially enforced.

**Breach of contract—Privilege inapplicable**

The following authority determined that the applicability of the state secrets privilege was not established or supportable, in an action for breach of contract, to preclude disclosure of information under the facts and circumstances presented.

In an action for breach of contract and just compensation, although the government properly invoked the state secrets privilege to bar discovery regarding a relationship, if any, between the Central Intelligence Agency (CIA) and an individual who borrowed money from the plaintiff, purportedly on behalf of the CIA, in *Monarch Assur. P.L.C. v. U.S.*, 244 F.3d 1356 (Fed. Cir. 2001), held that summary judgment was improperly granted to the government where the trial court's ruling, on summary judgment, that the evidence was insufficient rested on an unduly limited scope of discovery with respect to the status of other individuals' relationship to the CIA. The court determined, if, because of the government's invocation of the state secrets privilege, the plaintiff cannot meet its burden to show that there are genuine factual issues for trial, a grant of summary judgment is appropriate. In the instant case, the court found, the evidence before the district court was insufficient to establish even a prima facie showing of the authority of a person who borrowed $8 million from the plaintiff, claiming to be an agent of the Central Intelligence Agency (CIA), where the evidence included statements from persons who believed that the person was with the CIA and a statement by an alleged "access agent" for the CIA as to the authority that would be held by a person with the title claimed by the person who borrowed money from the plaintiff. However, the court, while recognizing that there are strong policy reasons why courts should generally refrain from a merits review based on information disclosed in camera when the government has invoked the state secrets doctrine, and, if the case can be resolved properly on an evidentiary ground, without having to rely on nonrecord information, that is a preferable route to its resolution, found, in the instant case, that the plaintiff should have been allowed discovery of a person thought to be a member of British Intelligence, a detective who had interviewed a person who borrowed the money, that person's widow, and a British lawyer who had made inquiries as to whether such person was connected to the CIA, such that summary judgment was improperly granted.

**Corrections or parole proceeding**

In the following cases, the courts determined whether the applicability of the state secrets privilege, to preclude disclosure of information in a corrections or parole proceeding was supportable, under the facts and circumstances presented.

In *Pack v. Beyer*, 157 F.R.D. 226 (D.N.J. 1994), the district court held, in a civil rights action brought by state prison inmates alleging racial discrimination in placement in a maximum control unit (MCU), the state secrets privilege applied to preclude the general disclosure of prison documents, where following an in camera, ex parte hearing on the record, the district court determined that the interests of prison officials in maintaining confidentiality of documents far outweighed any possible need of the inmates for documents, where the officials claimed that if the inmates learned that disclosure of any contents within the internal affairs files were permitted, the security of the prison was threatened. The court held, furthermore, that the rule of evidence allowing an adverse party to inspect a writing used to refresh the memory of a witness did not apply to allow the inmates to examine the prison documents for which the state secrets privilege had been claimed, where the witness was not relying upon documents to refresh his recollection during testimony at the in camera, ex parte hearing on the record, but rather was referring to them to describe the nature of the documents and precisely why they should be considered privileged.

In *Taylor v. Nix*, 451 F. Supp. 2d 1351 (N.D. Ga. 2006) (applying Georgia law), an action by a prisoner against the state board of pardons and paroles alleging unlawful denial of parole, the district court, denying the prisoner's motion to compel production of documents, held that the state secrets privilege applied to the documents in question, barring disclosure. The
court stated that, in *Ga. Code Ann. § 42-9-53(b)*, the Georgia legislature chose to afford the broadest protection possible to the defendant parole board members by conferring privileged status upon "all" information, both oral and written, and "all" records, papers, and documents received or used by them in the performance of their duties, and the state of Georgia had a compelling and justifiable interest in creating and preserving this privilege.

Environmental law violation

The following authority determined whether the applicability of the state secrets privilege, to preclude disclosure of information in an action alleging an environmental law violation was supportable, under the facts and circumstances presented.

In *Kasza v. Whitman*, 325 F.3d 1178, 33 Envtl. L. Rep. 20172 (9th Cir. 2003), the court of appeals held that the district court's order approving the government's redaction of a previously sealed court transcript before unsealing it was warranted, in an action brought by former workers at a classified Air Force facility for alleged violations of the Resource Conservation and Recovery Act (RCRA), where the court compared the proposed redacted version of the transcript with the unredacted version and found that the redactions were consistent and classified under the state secrets privilege.

Interception of electronic communications - Privilege applicable

In the following cases, the courts determined that the applicability of the state secrets privilege was established or supportable, in an action alleging governmental interception of electronic communications, to preclude disclosure of information under the facts and circumstances presented.

In *American Civil Liberties Union v. National Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), the district court, recognizing that the "state secrets privilege" is an evidentiary rule developed to prevent the disclosure of information which may be detrimental to national security, and that the privilege belongs exclusively to the executive branch and thus, it is appropriately invoked by the head of the executive branch agency with control over the secrets involved, held that the government properly invoked the privilege in an action challenging the National Security Agency's (NSA) secret program for warrantless interception of international telephone and internet communications, where a publicly filed affidavit from the director of national intelligence set forth facts supporting the government's contention that the state secrets privilege and other legal doctrines required dismissal of the case. The court held, however, that discovery of information protected by the state secrets privilege was not required for the plaintiffs to establish a prima facie case. The court, recognizing that, in determining whether a factual statement is a secret protected by the state secrets privilege, the court considers only public admissions or denials by the government, held, where the claims regarding the program were based solely on what the government had publicly admitted, and classified information was not needed to mount a defense against those claims, the defendant's motion to dismiss the plaintiffs' claims would be denied. However, the court held that the state secrets privilege barred the plaintiffs' datamining claims where a prima facie case could not be established without the use of the privileged information, and further litigation would have forced disclosure of the information.

**** Caution:

In *Terkel v. AT & T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006), the district court, recognizing that the "state secrets privilege" is a common law evidentiary privilege that allows the government to block discovery of any information that, if disclosed, would adversely affect national security, held that the state secrets privilege barred a grant of a telephone company subscribers' request to compel the telephone company to confirm or deny whether it had disclosed large quantities of subscribers' telephone records, including the time and date, originating numbers and receiving numbers, to the National Security Agency (NSA), since the disclosures could give the adversaries of the country valuable insights into the government's intelligence activities, and any disclosure would adversely affect national security. Thus, the court found,
without the requested information, the subscribers lacked standing to proceed with their claim, where, in the absence of that information, media accounts of the disclosure provided an insufficient basis to sue.

In *Al-Haramain Islamic Foundation, Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006), where an Islamic foundation, a director and its attorneys sued the government, claiming that their telephone conversations were monitored in violation of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C.A. §§ 1801 to 1811, the district court ruled that the state secrets privilege warranted denial of the request to unseal and declassify a sealed classified document, but determined that there was no reasonable danger that the national security would be harmed if it was confirmed or denied that the plaintiffs were subject to surveillance with respect to the events described in the document, without publicly disclosing any other information in the sealed document; however, disclosing whether the plaintiffs were subject to any other surveillance efforts could harm the national security. The court found that the plaintiffs made a strong showing of the necessity for production of the document, where the document would allegedly show that communications between the foundation and its attorneys were intercepted without a warrant, supporting their standing to sue and providing evidence that the government had the requisite intent for a FISA violation. The court found, also, that the fact that the government maintained a surveillance program involving warrantless wiretapping of telephone conversations where one party was located outside of United States, was not privileged information, and there would be no harm to national security in disclosure insofar as it confirmed a publicly known fact that the claimants were subjected to surveillance. Furthermore, the court found, the state secrets privilege could not be applied on the grounds that the entire suit turned on the document that would allegedly reveal that the government conducted warrantless wiretapping of the claimants' telephone conversations, where the government had acknowledged warrantless wiretapping, which was the subject matter of the case. However, the court determined, concern over national security precluded grant of access to the entire document, and, in light of its determination that inadvertent disclosure of the document, at one time, would not declassify it or waive application of the state secrets privilege, the court would not unseal the document in question.

In *Ellsberg v. Mitchell*, 709 F.2d 51, 12 Fed. R. Evid. Serv. 1836, 36 Fed. R. Serv. 2d 367 (D.C. Cir. 1983), where a constitutional tort action was brought in which plaintiffs sought compensation for injuries sustained through their exposure to warrantless electronic surveillance, the court of appeals held, with regard to almost all the materials submitted for in camera inspection, the district court was correct in concluding that invocation of the state secrets privilege was proper since there was a reasonable danger that revelation of the information in question would either enable a sophisticated analyst to gain insights into the nation's intelligence-gathering methods and capabilities or would disrupt diplomatic relations with foreign governments.

**** Observation:

Affirming the district court's order dismissing the plaintiff's action seeking compensation for injuries sustained through their exposure to warrantless electronic surveillance, the court of appeals, in *Ellsberg v. Mitchell*, 807 F.2d 204 (D.C. Cir. 1986), held that the plaintiffs' assertion that the government's "prolonged history of fraudulent misrepresentation" regarding its wiretapping activities and other prosecutorial misconduct could convince the jury that federal officials were in the "habit" of concealing such wiretaps from the court and were behaving pursuant to that "habit" was insufficient to create a genuine issue as to the truth of the government's denial that the plaintiffs were subject to other wiretaps not subject to the state secrets privilege that the government had concealed.

In *Halkin v. Helms*, 598 F.2d 1, 4 Fed. R. Evid. Serv. 593, 11 Fed. R. Evid. Serv. 1381, 25 Fed. R. Serv. 2d 906, 26 Fed. R. Serv. 2d 1019 (D.C. Cir. 1978), the court of appeals ruled that the claim of state secrets privilege was properly sustained with respect to "mere fact of interception" of the plaintiffs' foreign communications by the National Security Agency through particular operation, and should have been sustained with respect to information obtained from a second source as well, despite revelations about such source by congressional investigating committees; the government was not estopped from concluding in one case that disclosure was permissible while in another case that it was not, and it would not be appropriate to assume from the mere fact that the plaintiffs' names might have been included on watch lists submitted to the NSA by federal intelligence agencies that the warrantless acquisitions of communications sent by or to those individuals occurred.

**** Comment:
On remand, in *Halkin v. Helms*, 690 F.2d 977, 34 Fed. R. Serv. 2d 1611 (D.C. Cir. 1982), the court of appeals held that the persons whose names had been submitted by the CIA to the National Security Administration for monitoring of international communications but who could not, because of the state secrets privilege, show that any of their communications had actually been intercepted, did not have standing to sue for injunctive or declaratory relief. The court held, in any event, that where the essence of the plaintiffs’ claims was that information gathering by the CIA infringed upon a justified expectation of privacy in an unreasonable manner, but where they could not, because of the state secrets privilege, establish either the threshold invasion of privacy or the ultimate unreasonableness of that activity, they were incapable of proving any First or Fourth Amendment (U.S. Const. Amends. I, IV) violation and consequently could not show themselves entitled to injunctive or declaratory relief. Finally, the court found, even if the plaintiffs could make out a showing of liability of the CIA, it would have been an abuse of discretion to enter an injunction restraining future foreign intelligence-gathering operations conducted at the behest of the president.

**CUMULATIVE CASES**

**Cases:**

State secrets privilege protected sealed document regarding federal government’s terrorist surveillance program (TSP), in Islamic foundation’s challenge to TSP alleging warrantless wiretapping in violation of Fourth Amendment and Foreign Intelligence Surveillance Act (FISA), even though government had inadvertently furnished document to foundation; in camera review revealed that disclosure of information in document, including means, sources and methods of intelligence gathering in context of TSP, would undermine government’s intelligence capabilities and compromise national security. U.S. Const. Amend. IV; 50 U.S.C.A. §§ 1801 et seq. *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007).

**** Caution:

The court in *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007), reversed *Al-Haramain Islamic Foundation, Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006), rev’d and remanded, 507 F.3d 1190 (9th Cir. 2007), holding that the state secrets privilege protected the sealed document regarding the federal government’s terrorist surveillance program (TSP), in the Islamic foundation’s challenge to the TSP alleging warrantless wiretapping in violation of the Fourth Amendment and the Foreign Intelligence Surveillance Act (FISA), even though the government had inadvertently furnished the document to the foundation.

**Interception of electronic communications**

In the following cases, the courts determined that the applicability of the state secrets privilege was not established or supportable, in an action alleging governmental interception of electronic communications, to preclude disclosure of information under the facts and circumstances presented.

The district court, in *Spock v. U.S.*, 464 F. Supp. 510 (S.D. N.Y. 1978), recognizing that the state secrets privilege is "only" an evidentiary privilege and it should be construed narrowly to permit as broad as possible discovery consistent with the purpose of the privilege, held that the existence of the privilege, which was sufficiently established with respect to particular government information by the public affidavit of the Secretary of Defense and a sealed affidavit submitted for in camera review, did not, however, abrogate the plaintiff's right of access to the courts for alleged unlawful interception of his oral, wire, telephone, and telegraph communications by the National Security Agency agents, where the only disclosure in issue was the admission or denial of the allegation that interception of the communications had occurred, an allegation that had already received widespread publicity.

In *Hepting v. AT & T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006), the state secrets privilege did not categorically bar an action against the government and a telecommunications provider based on alleged warrantless surveillance programs that tracked domestic and foreign communications and communications records, where the government had disclosed the general contours of a “terrorist surveillance program,” which required the assistance of a telecommunications provider, and the provider claimed that it lawfully and dutifully assisted the government in classified matters when asked. The court found, the subject matter of the action was not a state secret, as required for the state secrets privilege to bar the action,
where significant amounts of information about the government's monitoring of the communication content and the provider's intelligence relationship with the government were already nonclassified or in the public record. The court held, also, that the government's warrantless monitoring of the contents of communications with parties outside the United States linked to terrorist organizations was not a state secret, and thus the state secrets privilege would not prevent the telecommunications provider from disclosing whether it received a certification authorizing its assistance to the government as a defense in the action based on its participation in the alleged warrantless surveillance program, where the government had "opened the door" for judicial inquiry by publicly confirming and denying material information about its monitoring of the content of the communication.

In Ellsberg v. Mitchell, 709 F.2d 51, 12 Fed. R. Evid. Serv. 1836, 36 Fed. R. Serv. 2d 367 (D.C. Cir. 1983), where a constitutional tort action was brought in which the plaintiffs sought compensation for injuries sustained through their exposure to warrantless electronic surveillance, the court of appeals held, the district court erred in concluding that invocation of the state secrets privilege was proper to prevent disclosure of the names of attorneys general who authorized electronic surveillance, where the defendants had admitted that each tap was authorized by an attorney general, although not specifying which one, and there was no reason provided by the government how any further disruption of diplomatic relations or undesirable education of hostile intelligence analysts would result from naming the responsible officials.

**** Observation:
Affirming the district court's order dismissing the plaintiff's action seeking compensation for injuries sustained through their exposure to warrantless electronic surveillance, the court of appeals held, where the plaintiffs' assertion that government’s "prolonged history of fraudulent misrepresentation" regarding its wiretapping activities and other prosecutorial misconduct could convince the jury that federal officials were in the "habit" of concealing such wiretaps from the court and were behaving pursuant to that "habit" was insufficient to create a genuine issue as to the truth of the government's denial that the plaintiffs were subject to other wiretaps not subject to the state secrets privilege that the government had concealed.

CUMULATIVE CASES
Cases:

State secrets privilege did not protect very subject matter of Islamic foundation's Fourth Amendment and Foreign Intelligence Surveillance Act (FISA) challenge to federal government's terrorist surveillance program (TSP), so as to require dismissal; President and other administration officials had publicly acknowledged authorization of TSP, which permitted warrantless wiretapping of telephone conversations with one out-of-country participant and involving persons or entities suspected of having connections to terrorists, and government had designated foundation as terrorist organization. U.S. Const.Amend. IV; 50 U.S.C.A. §§ 1801 et seq. Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007).

Government espionage investigation - Privilege applicable

In the following cases, the courts determined that the applicability of the state secrets privilege was established or supportive, in an action stemming from a governmental espionage investigation, to preclude disclosure of information under the facts and circumstances presented.

In Patterson by Patterson v. F.B.I., 893 F.2d 595 (3d Cir. 1990), the court of appeals held that a cause of action against the Federal Bureau of Investigation (FBI) and John Doe defendants arising from the maintenance of records on a minor who received a flood of international correspondence in connection with a school project was properly dismissed by the district court, which treated the motion to dismiss for lack of personal jurisdiction as one for summary judgment, where the FBI's evidence, in public and in camera materials, established that the FBI was not one of the John Doe defendants named by the minor and that the FBI was shielded from further disclosure by the state secrets privilege.

In Tenenbaum v. Simonini, 372 F.3d 776, 64 Fed. R. Evid. Serv. 831 (6th Cir. 2004), cert. denied, 543 U.S. 1000, 125 S. Ct. 605, 160 L. Ed. 2d 457 (2004), an action by the plaintiffs, husband and wife, against various federal agency employees and
the United States, alleging that the defendants conducted a criminal espionage investigation of the husband solely because he is Jewish, the court of appeals held that the district court properly granted the defendants' summary judgment motion, accepting their argument that they could not defend themselves against the plaintiff's claims without disclosing information protected by the state secrets doctrine. The court found that the state secrets doctrine applied because a reasonable danger existed that disclosing the information in court proceedings would harm national security interests, or would impair national defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments, and, furthermore, the defendants could not defend their conduct with respect to the plaintiff without revealing the privileged information. Because the state secrets doctrine thus deprives the defendants of a valid defense to the plaintiff's claims, the district court properly dismissed the claims, the court concluded.

In Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982), where an attorney active in various Arab organizations brought suit challenging various practices employed by the National Security Agency, the Federal Bureau of Investigation, and several of their agents in conducting an investigation of him, the court of appeals held that the district court properly ruled that the classified appendix filed by the government defendants, being protected by the state secret privilege, should be submitted in camera; furthermore, the court of appeals likewise could properly receive in camera and so consider such materials.

In American Civil Liberties Union v. Brown, 619 F.2d 1170, 6 Fed. R. Evid. Serv. 87, 29 Fed. R. Serv. 2d 661 (7th Cir. 1980), in a lawsuit seeking redress for alleged violations of the plaintiffs' constitutional rights stemming from the Army's investigations and intelligence-gathering activities aimed at the plaintiffs and the classes they represented, the court of appeals, reversing and remanding the district court's judgment ordering production of some of the documents, held that the trial judge should satisfy himself that the plaintiffs had sufficiently shown a need for the documents and, in resolving that question, should consider all options available to the plaintiffs, including any alternative methods of discovery. The court held, additionally, that where it appeared in preliminary in camera examination that the existence of state or military secrets in the government documents sought was sufficiently dubious that a formal claim of privilege might not prevail if the district judge determined that the material was needed by the plaintiffs, but substantial portions of the material seemed so remotely related to the plaintiff's claim as to raise questions whether the government's interest in protecting material should be swept away, the district judge, without disclosing the text of the documents, should determine in colloquy with counsel whether any individual portion of the documents, or the documents as a whole, were not reasonably calculated to lead to discovery of admissible evidence and therefore not producible.

In Black v. U.S., 62 F.3d 1115 (8th Cir. 1995), the court of appeals held that the Director of the Central Intelligence Agency (CIA) properly asserted the state secrets privilege, exempting from disclosure information that would confirm or deny the plaintiff's alleged contacts with government officers, including the identities, nature, and purpose of possible contacts, and the locations, for purposes of the plaintiff's action alleging that his Fourth Amendment (U.S. Const. Amend. IV) rights were violated when a CIA employee questioned the plaintiff about his contact with a Soviet national, and when the plaintiff became the focus of a campaign of harassment and psychological attacks by various government employees, since information covered by the privilege was at the core of the plaintiff's claims, and the litigation could not be tailored to accommodate the loss of privileged information. Furthermore, even if the government conducted domestic surveillance on the plaintiff, the court found, such surveillance was not ultra vires, and thus, the United States was not thereby prevented from asserting the state secrets privilege.

The district court, in Matter of Extradition of Smyth, 826 F. Supp. 316 (N.D. Cal. 1993), rev'd on other grounds, 61 F.3d 711 (9th Cir. 1995), opinion amended on other grounds, 73 F.3d 887 (9th Cir. 1995), recognizing that, as a claim of a state secret is to be decided without review of the subject documents, it is incumbent upon the party asserting the privilege to make some showing regarding potential injury to national security should the information in question be disclosed, held that the English government's assertion that disclosure of information requested by an Irish Catholic nationalist seeking to resist extradition would expose the internal affairs investigations of English security forces, as well as the organization and operation of highly sensitive security force procedures, was adequate to establish that the state secret privilege attached to investigative reports relating to police officers' involvement in the shooting of suspected members of the Irish Republican Army and to alleged collusion between members of the English security forces and loyalist paramilitaries, although not as to certain other documents which were relevant to the nationalist's claim that he faced mistreatment based on his status if returned.

In Attorney General of U.S. v. Irish People, Inc., 684 F.2d 928, 67 A.L.R. Fed. 733 (D.C. Cir. 1982), the court of appeals held, even if there was colorable showing of selective prosecution in a suit to compel registration under the Foreign
Agents Registration Act, dismissal might be an inappropriate remedy for the government's inability to produce documents which constituted state secrets, the court stating that the court should weigh other factors such as the likelihood that the documents would serve to exculpate the defendant, their necessity for the defense, what the defendant stood to lose in the case, the government's interest in maintaining secrecy and bringing the action, the availability of alternatives, the parties' respective behavior, and the distinction between civil and criminal cases. The district court had ruled that certain documents requested by the defense from the plaintiff were state secrets, as the Attorney General claimed, but that the defendant had established a need for discovery of the documents in order to pursue the selective prosecution defense it had raised. The court therefore concluded that because the Attorney General chose not to surrender the material to the defendant, the action had to be dismissed. On the existing record, the court found, aside from the fact that the defendant had failed to make a colorable showing of either element of the selective prosecution defense, the weighing of the relevant factors did not indicate that dismissal would be a proper remedy for inability of the government to produce certain documents which constituted state secrets, where no constitutional rights were threatened, only registration was imminent, no jail sentence loomed, and it was not demonstrated that the material was relevant, let alone necessary, to the defense. Furthermore, the court held, due process would not require that the defendant gain actual physical possession of the documents claimed to be relevant to the selective prosecution defense, so long as the defendant was not deprived of the benefit of any evidence which the documents might contain.

CUMULATIVE CASES

Cases:

Foreign nationals' action, under the Alien Tort Statute (ATS), against company alleged to have participated in Central Intelligence Agency's (CIA) "extraordinary rendition" program, involved allegations about conduct by the CIA and was thus properly the subject of government's state secrets privilege; allegations implicated national security interests of the United States. 28 U.S.C.A. § 1350. Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (N.D. Cal. 2008).

District court did not abuse its discretion, in federal employee's Bivens action alleging Fourth Amendment violations by State Department official and Central Intelligence Agency employee, by excluding under state secrets privilege portions of internal investigations conducted by agency inspectors general, conducted in response to employee's allegations; court concluded, after reviewing declarations of high-ranking officials of Central Intelligence and Department of Defense, that national security would be compromised by revealing, inter alia, covert operatives. U.S.C.A. Const.Amend. 4. In re Sealed Case, 494 F.3d 139 (D.C. Cir. 2007).

Government espionage investigation

The following authority determined that the applicability of the state secrets privilege was not established or supportable, in an action stemming from a governmental espionage investigation, to preclude disclosure of information under the facts and circumstances presented.

In In re U.S., 872 F.2d 472, 27 Fed. R. Evid. Serv. 1003 (D.C. Cir. 1989), where the wife of a former member of the Communist Party brought an action under Federal Tort Claims Act for injuries to her and her deceased husband due to alleged prolonged investigation by the Federal Bureau of Investigation (FBI) into the husband's personal and political affairs, and the Bureau's use of the "snitch jacket" technique to have him expelled from the party, and the district court denied the government's motion to dismiss, the court of appeals held that the affidavit of the assistant director of the Intelligence Division of the Federal Bureau of Investigation (FBI), which purported to explain why an item-by-item determination of applicability of the state secrets privilege to information sought to be discovered in the wife's action, did not show that evidence of the government's activities of 20 to 30 years ago would result in disclosure of state secrets today. The court stated that the effect of a valid claim of state secrets privilege on the outcome of a particular case depends on the purpose that the privileged information would have served; if the information is essential to establishing the plaintiff's prima facie case, dismissal is appropriate, but if the information related not to the plaintiff's claim, but rather to the defense, summary judgment against the plaintiff is proper if the district court decides that the privileged information, if available to the defendant, would establish a valid defense to the claim.
CUMULATIVE CASES

Cases:

Plaintiff's need for certain classified information, in his action alleging illegal eavesdropping on certain private conversations, was compelling, weighing against granting Government's reassertion of the state secrets privilege; forbidding plaintiff from inquiring into or presenting information regarding his central allegation would likely be fatal to his lawsuit. *Horn v. Huddle*, 636 F. Supp. 2d 10 (D.D.C. 2009).

Government detention of persons

The following authority determined whether the applicability of the state secrets privilege to preclude disclosure of information in an action stemming from government detention of persons was supportable, under the facts and circumstances presented.

The court in *El-Masri v. U.S.*, 479 F.3d 296 (4th Cir. 2007), cert. denied, 128 S. Ct. 373, 169 L. Ed. 2d 258 (2007), affirming *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006), order aff'd, 479 F.3d 296 (4th Cir. 2007), cert. denied, 128 S. Ct. 373, 169 L. Ed. 2d 258 (2007), in which the plaintiff appealed from the dismissal of his civil action against former Director of Central Intelligence George Tenet, three corporate defendants, 10 unnamed employees of the Central Intelligence Agency, and 10 unnamed employees of the defendant corporations, and in his complaint in the Eastern District of Virginia, the plaintiff alleged that the defendants were involved in a CIA operation in which he was detained and interrogated in violation of his rights under the Constitution and international law, and the United States intervened as a defendant in the district court, asserting that the plaintiff's civil action could not proceed because it posed an unreasonable risk that privileged state secrets would be disclosed, and the district court agreed with the position of the United States and dismissed the plaintiff's complaint, and on appeal, the plaintiff contended that the district court misapplied the state secrets doctrine and erred in dismissing his complaint, affirmed the order of the district court. The plaintiff alleged that while travelling in Macedonia, he was detained by Macedonian law enforcement officials; after 23 days in Macedonian custody, he was handed over to CIA operatives, who flew him to a CIA-operated detention facility near Kabul, Afghanistan; he was held in this CIA facility until May 28, 2004, when he was transported to Albania and released in a remote area; and Albanian officials then picked him up and took him to an airport in Tirana, Albania, from which he travelled to his home in Germany. The complaint asserted that the plaintiff had not only been held against his will, but had also been mistreated in a number of other ways during his detention, including being beaten, drugged, bound, and blindfolded during transport; confined in a small, unsanitary cell; interrogated several times; and consistently prevented from communicating with anyone outside the detention facility, including his family or the German government. The plaintiff alleged that his detention and interrogation were carried out pursuant to an unlawful policy and practice devised and implemented by defendant Tenet known as "extraordinary rendition": the clandestine abduction and detention outside the United States of persons suspected of involvement in terrorist activities, and their subsequent interrogation using methods impermissible under U.S. and international laws. The United States filed a statement of interest in the underlying proceedings, pursuant to 28 U.S.C.A. § 517, and interposed a claim of the state secrets privilege, and the United States moved to dismiss the complaint, contending that its interposition of the state secrets privilege precluded the litigation of the plaintiff's causes of action. The plaintiff responded that the state secrets doctrine did not necessitate dismissal of his complaint, primarily because CIA rendition operations, including his alleged rendition, had been widely discussed in public forums. The district court concluded that the claim of the state secrets privilege was valid, and that, given the application of the privilege to this case, the United States' motion to dismiss must be granted. The appellate court noted that pursuant to *U.S. v. Reynolds*, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727, 1953 A.M.C. 976, 32 A.L.R.2d 382 (1953), under the state secrets doctrine, the United States may prevent the disclosure of information in a judicial proceeding if "there is a reasonable danger" that such disclosure "will expose military matters which, in the interest of national security, should not be divulged." The heart of the plaintiff's appeal was his assertion that the facts essential to his complaint have largely been made public, either in statements by United States officials or in reports by media outlets and foreign governmental entities. He maintained that the subject of this action was simply "a rendition and its consequences," and that its critical facts -- the CIA's operation of a rendition program targeted at terrorism suspects, plus the tactics employed therein -- have been so widely discussed that litigation concerning them could do no harm to national security. As a result, the plaintiff contended that the district court should have allowed his case to move forward with discovery, perhaps with special procedures imposed to protect sensitive information. The appellate court noted that the plaintiff's contention in that regard misapprehended the nature of the court's assessment of a dismissal on state secrets grounds. The controlling inquiry is not whether the general subject matter of an action can be described without resort to state secrets. Rather, the court must
ascertain whether an action can be litigated without threatening the disclosure of such state secrets. Thus, for purposes of the state secrets analysis, the "central facts" and "very subject matter" of an action are those facts that are essential to prosecuting the action or defending against it. The appellate court found that the plaintiff was therefore incorrect in contending that the central facts of this proceeding are his allegations that he was detained and interrogated under abusive conditions, or that the CIA conducted the rendition program that has been acknowledged by United States officials. Facts such as those furnish the general terms in which the plaintiff related his story to the press, but advancing a case in the court of public opinion, against the United States at large, is an undertaking quite different from prevailing against specific defendants in a court of law. The appellate court noted that if the plaintiff's civil action were to proceed, the facts central to its resolution would be the roles, if any, that the defendants played in the events he alleged, and to establish a prima facie case, he would be obliged to produce admissible evidence not only that he was detained and interrogated, but that the defendants were involved in his detention and interrogation in a manner that renders them personally liable to him, and such a showing could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations. The court also noted that if the plaintiff was somehow able to make out a prima facie case despite the unavailability of state secrets, the defendants could not properly defend themselves without using privileged evidence. The court thus rejected the plaintiff's view that the existence of public reports concerning his alleged rendition (and the CIA's rendition program in general) should have saved his complaint from dismissal. The court noted that even if it was assumed, arguendo, that the state secrets privilege does not apply to the information that media outlets have published concerning those topics, dismissal of his complaint would nonetheless be proper because the public information does not include the facts that are central to litigating his action; rather, those central facts -- the CIA means and methods that form the subject matter of the claim -- remain state secrets. Consequently, the court held that the district court did not err in dismissing the complaint at the pleading stage.

**** Observation:
The court in *El-Masri v. U.S.*, 2007 WL 625130 (4th Cir. 2007), noted that the plaintiff presented a sharp attack on what he viewed as the dire constitutional and policy consequences of dismissing his complaint. He maintained that the district court's ruling, if affirmed, would enable the executive to unilaterally avoid judicial scrutiny merely by asserting that state secrets are at stake in a given matter. More broadly, he questioned the very application of the state secrets doctrine in matters where "egregious executive misconduct" is alleged, contending that, in such circumstances, the courts' "constitutional duty to review executive action" should trump the procedural protections traditionally accorded state secrets. The court opined that contrary to the plaintiff's assertion, the state secrets doctrine does not represent a surrender of judicial control over access to the courts, as it is the court, not the executive, that determines whether the state secrets privilege has been properly invoked. In order to successfully claim the state secrets privilege, the executive must satisfy the court that disclosure of the information sought to be protected would expose matters that, in the interest of national security, ought to remain secret. Similarly, in order to win dismissal of an action on state secrets grounds, the executive must persuade the court that state secrets are so central to the action that it cannot be fairly litigated without threatening their disclosure. The court noted that the state secrets privilege cannot be successfully interposed, nor can it lead to dismissal of an action, based merely on the executive's assertion that the pertinent standard has been met. The court also rejected the plaintiff's view that the court is obliged to jettison procedural restrictions -- including the law of privilege -- that might impede the ability to act as a check on the executive. While the plaintiff envisioned a judiciary that possesses a roving writ to ferret out and strike down executive excess, the court noted that Article III assigns the courts a more modest role to simply decide cases and controversies. Thus, when an executive officer's liability for official action can be established in a properly conducted judicial proceeding, a court will not hesitate to enter judgment accordingly. However, the court noted, it would be guilty of excess if it were to disregard settled legal principles in order to reach the merits of an executive action that would not otherwise be before the court, especially when the challenged action pertains to military or foreign policy. The court declined to follow such a course and thus rejected the plaintiff's invitation to rule that the state secrets doctrine can be brushed aside on the ground that the President's foreign policy has gotten out of line.

CUMULATIVE CASES
Cases:

Denying certiorari, the United States Supreme Court in *El-Masri v. U.S.*, 128 S. Ct. 373, 169 L. Ed. 2d 258 (2007), let stand the Fourth Circuit decision in *El-Masri v. U.S.*, 479 F.3d 296 (4th Cir. 2007), cert. denied, 128 S. Ct. 373, 169 L. Ed. 2d 258 (2007), this section, that the state secrets privilege applied to discovery sought by a plaintiff with respect to his
allegation that he was illegally detained by the Central Intelligence Agency (CIA) as part of its "extraordinary rendition" program. The plaintiff, a German citizen of Lebanese descent, alleged that he was detained by Macedonian law enforcement officials while he was traveling in Macedonia, that after 23 days he was handed over to CIA operatives, that the CIA operatives flew him to a CIA-operated detention facility in Afghanistan, and that eventually he was transported to Albania and released in a remote area. He also alleged that during his detention he was beaten, drugged, bound, and blindfolded during transport, confined in a small, unsanitary cell, interrogated several times, and prevented from communicating with anyone outside the detention facility. He further alleged that his detention and interrogation were carried out pursuant to an unlawful policy and practice devised and implemented by the CIA's Director George Tenet known as "extraordinary rendition," which consisted of the clandestine abduction and detention outside the United States of persons suspected of involvement in terrorist activities, and their subsequent interrogation using methods impermissible under United States and international laws. The Court of Appeals cited U.S. v. Reynolds, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727, 1953 A.M.C. 976, 32 A.L.R.2d 382 (1953), as the Supreme Court's leading decision on the state secrets privilege. Reynolds was a Federal Tort Claims Act action arising from the crash of an Air Force B-29 bomber during testing of secret electronic equipment. Under Reynolds, the United States may prevent the disclosure of information in a judicial proceeding if there is a reasonable danger that such disclosure will expose military matters which, in the interest of national security, should not be divulged, the Court of Appeals said. With respect to the case at bar, the Court of Appeals concluded that privileged state secrets would be implicated even by marshalling the evidence necessary to establish a prima facie case of the plaintiff's claims under the Alien Tort Statute and under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). The plaintiff would need to rely on witnesses whose identities had to remain confidential in the interest of national security. Further, the Government's defenses that the plaintiff was not subject to the alleged treatment, that the defendants were not involved in the treatment, and that the nature of any involvement did not give rise to liability also would require the disclosure of information regarding the means and methods by which the CIA gathered intelligence. As a result, dismissal of the plaintiff's claims was appropriate.

United States government's assertion of the state-secrets privilege constituted a "special factor" counseling Court of Appeals' to hesitate before creating a new Bivens claim arising out of alien's allegation that U.S. government officials removed him to Syria to be detained and tortured. Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008), reh'g in banc granted, (Aug. 12, 2008).

Foreign nationals' action under Alien Tort Statute against company that allegedly assisted in Central Intelligence Agency's (CIA) extraordinary rendition program would be dismissed pursuant to state secrets privilege under Reynolds; information concerning whether company assisted CIA with clandestine intelligence activities involved valid state secrets, and there was no feasible way to litigate company's alleged liability without creating unjustifiable risk of divulging such secrets, since facts underlying foreign nationals' claims were so infused with state secrets that risk of disclosing them was both apparent and inevitable. 28 U.S.C.A. § 1350. Mohamed v. Jeppesen Dataplan, Inc., 2010 WL 3489913 (9th Cir. 2010).

Foreign nationals' action under Alien Tort Statute against company that allegedly assisted in Central Intelligence Agency's (CIA) extraordinary rendition program would be dismissed pursuant to state secrets privilege under Reynolds; information concerning whether company assisted CIA with clandestine intelligence activities involved valid state secrets, and there was no feasible way to litigate company's alleged liability without creating unjustifiable risk of divulging such secrets, since facts underlying foreign nationals' claims were so infused with state secrets that risk of disclosing them was both apparent and inevitable. 28 U.S.C.A. § 1350. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010).

Fact that certain documents pertaining to "extraordinary rendition" program allegedly operated by Central Intelligence Agency (CIA) had been classified by government did not compel finding that documents were secret and thus subject to state secrets privilege, in action by foreign nationals under Alien Tort Statute (ATS). 28 U.S.C.A. § 1350. Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943 (9th Cir. 2009).

Foreign nationals' action, under the Alien Tort Statute (ATS), against company alleged to have participated in Central Intelligence Agency's (CIA) "extraordinary rendition" program, involved allegations about conduct by the CIA and was thus properly the subject of government's state secrets privilege; allegations implicated national security interests of the United States. 28 U.S.C.A. § 1350. Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (N.D. Cal. 2008).
Wrongful employment practices

In the following cases, the courts determined whether the applicability of the state secrets privilege was established or supportable, in an action alleging wrongful employment practices, to preclude disclosure of information under the facts and circumstances presented.

See Tenet v. Doe, 544 U.S. 1, 125 S. Ct. 1230, 161 L. Ed. 2d 82 (2005), in which the United States Supreme Court reversed the holding of the court of appeals that the district court had subject matter jurisdiction over a claim that the Central Intelligence Agency (CIA) violated the due process rights of former spies by failing to provide financial support, despite the claim that all matters related to their espionage activities were classified, holding that the longstanding rule announced by the Supreme Court in Totten v. U.S., 92 U.S. 105, 23 L. Ed. 605, 1875 WL 17758 (1875), prohibiting suits against the government based on covert espionage agreements, barred the suit, rather than the state secrets doctrine. The Court stated that the state secrets privilege and the use of in camera judicial proceedings simply cannot provide the absolute protection the Court found necessary in enunciating the Totten rule. The possibility that a suit may proceed and an espionage relationship may be revealed is unacceptable, the Court concluded.

In Robinson v. City of Philadelphia, 233 F.R.D. 169 (E.D. Pa. 2005), the court held, in a city employee’s 42 U.S.C.A. § 1983 action alleging that the city took certain illegal actions against her in retaliation for her cooperation with a federal criminal investigation of corruption within city government, the court would not compel deposition of an employee where the state secrets, deliberative process, attorney-client, law enforcement, and confidential informant privileges, as well as attorney work-product doctrine, were raised by the federal government.

In Sterling v. Tenet, 416 F.3d 338, 96 Fair Empl. Prac. Cas. (BNA) 225, 86 Empl. Prac. Dec. (CCH) P 42040 (4th Cir. 2005), cert. denied, 126 S. Ct. 1052, 163 L. Ed. 2d 860, 97 Fair Empl. Prac. Cas. (BNA) 192 (U.S. 2006), the court of appeals held that the materials necessary for pressing a covert agent’s Title VII, 42 U.S.C.A. §§ 2000e et seq., claim against the Central Intelligence Agency (CIA) were covered by the state secrets privilege, where the agent’s duties may well have involved recruiting foreign sources of intelligence, the agent would have to expose classified activities of himself and similarly situated agents to establish a prima facie case of discrimination, he could not prove his retaliation claim that the CIA used security processing as a tool for intimidation without evidence regarding the CIA’s internal security procedures, and many witnesses would be covert CIA operatives who would risk their cover by testifying. The court determined, initially, that the CIA properly invoked the claim of the state secrets privilege, such that the district court could consider the claim, where the CIA’s Director, who was the head of the department with control over the matter, lodged a formal claim of privilege, stating that his claim came after his personal consideration of the matter, and explaining in both classified and unclassified declarations why application of the privilege was required. The court held, next, that dismissal of the claim, rather than devising special procedures to avoid disclosing state secrets, was appropriate, given that the sum and substance of the case involved state secrets, and that special accommodations at best would give rise to the added opportunity for leaked information. Information that would result in disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments, falls squarely within the definition of “state secrets” covered by the state secrets privilege, the court said. The court explained, further, dismissal based on the state secrets privilege is appropriate only when no amount of effort and care on the part of the court and the parties will safeguard privileged material. Where the very question on which a case turns is itself a state secret, or the circumstances make clear that 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, dismissal is the proper remedy. Litigation centering around a covert agent’s assignments, evaluations, and colleagues meets the test for dismissal under the state secrets privilege, the court concluded.

In Maxwell v. First Nat. Bank of Maryland, 998 F.2d 1009 (4th Cir. 1993), an action by a former employee against his former employer, a bank, and against an alleged proprietary company of the Central Intelligence Agency (CIA) for conspiracy to interfere with his civil rights, violations of his First Amendment (U.S. Const. Amend. I) right of free speech, and violations of his Fifth Amendment (U.S. Const. Amend. V) right to seek redress of grievances in the courts of the United States, as well as abusive discharge, intentional infliction of emotional distress, and misappropriation of name, the court of appeals affirmed the order of the district court limiting the scope of discovery based on the state secrets privilege. The Court held that the district court properly limited discovery based on the state secrets privilege to preclude the plaintiff from offering in support of the amended complaint any evidence that would tend to confirm or deny the alleged connection between the CIA and the defendant bank and the alleged proprietary company of the CIA. Such a finding was
based on a declaration and formal claim of state secrets privilege by the Director of the CIA, as well as an ex parte, in camera declaration that justified invocation of the privilege.

In Tilden v. Tenet, 140 F. Supp. 2d 623, 85 Fair Empl. Prac. Cas. (BNA) 404 (E.D. Va. 2000), the district court, recognizing that dismissal in the wake of a claim of state secrets privilege is an extraordinary but not unprecedented remedy, held that the state secrets privilege warranted dismissal of an employee's sex discrimination claim against the Director of the Central Intelligence (DCI), as there was no way that the lawsuit could have proceeded without disclosing state secrets and there were no safeguards the court could have taken that would have adequately protected the privileged information, since an in camera trial, utilizing court staff with security clearances, and swearing all participants to secrecy would not have sufficiently safeguarded the secrets outlined by the Director in a classified declaration, and the mere existence of such a trial would have put state secrets in jeopardy.

In Weston v. Lockheed Missiles & Space Co., 881 F.2d 814, 50 Fair Empl. Prac. Cas. (BNA) 873, 51 Empl. Prac. Dec. (CCH) P 39247 (9th Cir. 1989), the court of appeals held that the state secrets privilege could provide an adequate, independent ground for upholding the district court's dismissing the claim of a homosexual employee of a government contractor that the contractor's decision not to submit his application for security clearance deprived him of his constitutional rights, where the government asserted the privilege in its motion to dismiss as one of two alternative grounds for dismissal and the trial court order plainly reflected that the state secret privilege ruling was a separate ground for the dismissal order, independent of the due process and mootness issues argued on appeal by the employee. Moreover, the court found, the issue of whether the state secrets privilege barred the claim that the contractor's decision not to submit his application for security clearance deprived him of his constitutional rights was abandoned where the employee refused to address the issue on appeal from dismissal of the action.

In Molerio v. F.B.I., 749 F.2d 815, 36 Fair Empl. Prac. Cas. (BNA) 586, 35 Empl. Prac. Dec. (CCH) P 34825, 16 Fed. R. Evid. Serv. 1295, 40 Fed. R. Serv. 2d 769 (D.C. Cir. 1984), the court of appeals, affirming the district court's dismissal of a complaint alleging that the Federal Bureau of Investigation (FBI) refused to hire the plaintiff as a special agent for illegal and unconstitutional reasons, held that, where the district court did not rest upon conclusory statements contained in the public affidavit of the acting Attorney General of the United States but also examined the sworn in camera affidavit of the assistant director in charge of the Intelligence Division of the FBI, which specifically set forth the reason for the failure of the Bureau to hire the plaintiff as a special agent, the district court satisfied itself that disclosure of the reason for the failure to hire would impair national security, so as to prohibit disclosure under the state secrets privilege.

Invocation of the state secrets privilege by the Attorney General, in an action against the United States brought by a terminated contract translator hired by the Federal Bureau of Investigation (FBI) was proper, the district court, in Edmonds v. U.S. Dept. of Justice, 323 F. Supp. 2d 65, 21 I.E.R. Cas. (BNA) 1037 (D.D.C. 2004), order summarily aff'd, 161 Fed. Appx. 6 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 734, 163 L. Ed. 2d 569 (U.S. 2005), held, warranting dismissal of the action. To formally invoke the state secrets privilege, the court explained, there must be: (1) a formal claim of privilege; (2) lodged by the head of the department which has control over the matter; (3) after actual personal consideration by that officer. In the instant case, the court found, invocation of the state secrets privilege comporting with the personal consideration requirement, where the Attorney General's declaration stated that he had personally considered the material sought in connection with the lawsuit before he determined that privilege was warranted by national security concerns. The court also found that invocation of the state secrets privilege by the Attorney General comporting with the specificity requirement, although his unclassified declaration did not specify the harm that might occur to national security should the information be disclosed, where his classified declaration, reviewed in camera, specifically detailed the reasonable danger that revelation of classified information would have on both “intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments.” The court, recognizing that, if proper assertion of the state secrets privilege precludes access to evidence necessary for the plaintiff to state a prima facie claim, dismissal is appropriate, held that the state secrets privilege, properly invoked, warranted dismissal, where the translator was unable to prove the prima facie elements of her claim without disclosure of privileged information, and the government was unable to assert valid defenses to the claim without such disclosures, since the nature of the translator's employment and the events surrounding her termination were the subjects of the privilege. The court held, furthermore, that dismissal was warranted where it was impossible for the parties to participate in a trial in order to give the translator opportunity to refute allegations made about her, because the nature of the charges allegedly made by the anonymous government official was comprised of privileged information, and the government would be unable to adequately rebut her assertions without revealing privileged information. The court stated that the state secrets privilege may not be used to shield any material not strictly necessary to
prevent injury to national security, and, whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.

CUMULATIVE CASES

Cases:

Government did not unconstitutionally violate plaintiffs' right of access to the courts by invoking the state secrets privilege to deny their counsel access to secure media allegedly needed to draft their opposition to Government's assertion of the privilege, including the un-redacted classified version of the complaint and other purportedly privileged and classified information; plaintiffs had no right of access to material that Government contended contained state secrets prior to district court's adjudication of that contention. Doe v. C.I.A., 576 F.3d 95 (2d Cir. 2009).

The court in Doe v. C.I.A., 2007 WL 30099 (S.D. N.Y. 2007), in which the plaintiffs brought an action against the Central Intelligence Agency ("CIA") and the United States of America (collectively, "the Government" or "Defendants"), alleging that the defendants violated the Administrative Procedure Act, 5 U.S.C.A. §§ 701 et seq., the Privacy Act, 5 U.S.C.A §§ 552a et seq., the Federal Tort Claims Act, 28 U.S.C.A. §§ 1346(b), 2671-2680, as well as the plaintiffs' rights under the First, Fifth, and Eight Amendments to the United States Constitution, and the Government, invoking the state secrets privilege, moved to dismiss the Complaint in its entirety, granted the Government's motion to dismiss the Complaint. The Complaint alleged that the plaintiff's husband "was summarily separated from his CIA employment," for a reason that was redacted as classified, and "terminated immediately for unspecified reasons." The plaintiffs departed to Foreign Country A, where they currently reside because the CIA "refused to provide any assistance, medical or otherwise." The Complaint alleged that the plaintiffs are unable to leave Foreign Country A and that plaintiff wife is a virtual prisoner in her home. She is "constantly fearful of eventual detection," for a reason that is redacted as classified. Although the plaintiff wife allegedly receives medical treatment and psychological counseling, she claimed that the CIA has "demanded that she not disclose the basis for her apprehension to her medical professionals, while simultaneously refusing to provide her alternative treatment." The plaintiff wife alleged that she "suffers severe emotional distress producing physical symptoms from fear," and "lives in constant fear;" the reason for her alleged fear is redacted as classified. The plaintiffs sought injunctive and declaratory relief, and monetary damages. The defendants asserted the state secrets privilege and contended that application of this privilege necessitates the dismissal of the action. The court noted that the state secrets privilege is a common law evidentiary rule that allows the government to withhold information from discovery when disclosure would be inimical to national security, and in order properly to invoke the privilege, the head of the department which has control over the matter must assert the privilege after the officer has personally considered the matter, and once the privilege is properly invoked, a district's court review is quite narrow. The plaintiffs asserted that they have a right to submit classified material to the court in connection with the Government's claim of the state secrets privilege and that the privilege claim cannot be ripe for adjudication in the absence of such a submission. The court held that the assertion was not an accurate statement of the law, as the court is not required to review, even in camera, the underlying privileged material if it can otherwise satisfy itself that the privilege has properly been invoked and that there is a reasonable danger that disclosure of particular facts in litigation will jeopardize national security. The court noted that the disclosure and submission right asserted by the plaintiffs would stand on its head the principle that courts are to be protective of material as to which privilege is claimed. The court found that the Government properly invoked the state secrets privilege. The Government submitted a declaration by the Director of the CIA, which is the agency that controls the information related to this matter. The Director asserted a formal claim of the state secrets privilege based upon his personal consideration of the matter. The court found that the Director's affidavits, and the unredacted Complaint, made it plain that all of the plaintiff's claims in this action involve relationships and procedures that implicate national security issues. Thus, the court was satisfied that there is a reasonable danger that disclosure of the facts underlying the plaintiffs' claims would jeopardize national security. Having reviewed the classified version of the Director's declaration and the unredacted Complaint, the court found that the plaintiffs could not make out a prima facie case, nor could the Government defend itself against their claims, without relying on privileged information and that any further ligation would threaten disclosure of these privileged matters. Accordingly, the defendants' motion to dismiss the action was granted.

Patent infringement - Privilege applicable
The following authority determined that the applicability of the state secrets privilege was established or supportable, under the facts and circumstances presented, in a patent infringement action.

In *American Tel. & Tel. Co. v. U.S.*, 4 Cl. Ct. 157 (1983), where in a patent infringement action brought against the government, the government moved for a protective order arising out of the plaintiffs’ request for production of documents, the court of claims held that, based on the public affidavit of the Secretary of Defense which generally outlined the interest the United States hoped to protect and the need for maintaining secrecy concerning cryptographic devices, and in camera inspection of the affidavit of the deputy director for communications security of the National Security Agency and a classified document film which the deputy director's affidavit incorporated by reference, the United States validly invoked the state secrets privilege in its motion to bar all discovery concerning cryptographic devices in patent infringement.

The following authority determined that the applicability of state secrets privilege was not established or supportable, under the facts and circumstances presented, in a patent infringement action.

In *Foster v. U.S.*, 12 Cl. Ct. 492, 23 Fed. R. Evid. Serv. 132, 8 Fed. R. Serv. 3d 133 (1987), the court of claims, recognizing that the broad authority of the Director of the Central Intelligence Agency (CIA) to protect sources of intelligence information from disclosure implies the power to prevent the disclosure of classified material from all departments and agencies of the government under the state secrets privilege, held that the United States properly invoked the state secrets privilege in an action for compensation based on the governments’ use of a patentable invention disclosed in an application under a secrecy order where the circumstances of the case did not permit a more detailed public affidavit by the Director of the Central Intelligence Agency than that which he gave. The court explained that the state secrets privilege is not to be invoked lightly but, once properly asserted, it is absolute. The court said that significant deference should be given to an agency affidavit asserting the state secrets privilege, but the validity of the assertion must nonetheless be judicially assessed. In the instant case, the court found, although necessarily vague, the affidavit of the CIA Director, that disclosure of the requested information would risk disclosure of extremely sensitive and highly classified information, showed a reasonable danger that disclosure of the requested information would damage national security; the court finding that it was reasonable to believe that exposure of methods or apparatus similar to the plaintiff's “Light Operated Information Techniques” disclosed in his patent application, which was under a secrecy order, could in some way disclose classified information, thus supporting assertion of the state secrets privilege.

Negligence or wrongful death

In the following cases, the court determined whether the applicability of the state secrets privilege was established or supportable, under the facts and circumstances presented, in an action for negligence or wrongful death.

In *U.S. v. Reynolds*, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727, 1953 A.M.C. 976, 32 A.L.R.2d 382 (1953), the United States Supreme Court held, in view of the fact that the Federal Rules of Civil Procedure are applicable to suits against the United States under the Tort Claims Act, and the fact that under the Federal Rules of Civil Procedure, production of only unprivileged documents is required, when a formal claim of privilege was filed by the Secretary of the Air Force in actions by the widows of civilians killed in the crash of an Air Force plane which had gone aloft to test secret electronic equipment, there was a sufficient showing of privilege to cut off further demand for production of the documents. The Court found, in determining the propriety of the trial court's denial of the government's plea of privilege, the Court would take judicial notice that the time was one of vigorous preparation for the national defense, that air power was a potent weapon in the scheme of the defense, and that newly developed electronic devices, such as those being tested at the time of the accident, had greatly enhanced the effective use of air power, and that such devices must be kept secret if their military advantages were to be properly exploited. Where a plea of privilege against revealing military secrets is entered by the government in suit under the Federal Tort Claims Act, the Court noted, a showing of necessity for production of a document will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate, but even the most compelling necessity cannot overcome a claim of privilege if the court is ultimately satisfied that military secrets are at stake, and where the necessity is dubious, a formal claim of privilege, made under circumstances indicating a reasonable possibility that military secrets are involved, is entitled to prevail.
In Kronisch v. U.S., 150 F.3d 112 (2d Cir. 1998), an action alleging that her deceased brother was one of the victims of a decade-long program to test human responsiveness to certain mind-altering drugs, in particular lysergic acid diethylamide (LSD), which was sponsored by the Central Intelligence Agency (CIA) beginning in approximately 1950, the court of appeals held that the district court did not abuse its “wide discretion by concluding that certain government documents were subject to the state secrets privilege, and, having viewed the unredacted versions of the documents itself, affirmed the district court’s discovery order. The district court had found that the redacted information would pose, if disclosed, a reasonable danger to the diplomatic relations of the nation and, moreover, found the unredacted documents to be irrelevant to the plaintiff's claim, and denied the plaintiff leave to move to compel the production of the unredacted material in the remaining documents.

In Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 1993 A.M.C. 1811, 33 Fed. R. Evid. Serv. 211 (2d Cir. 1991), the court of appeals held that the state secrets privilege was properly invoked by the Secretary of the Navy in an action against missile defense systems designers, manufacturers, and testers for the wrongful death of a sailor who was killed when his ship was fired on by foreign aircraft, where the Secretary’s affidavit established that disclosure of secret data and tactics concerning the weapons system of the most technically advanced and heavily relied upon of our nation’s war ships could reasonably be viewed as inimical to national security. The court explained that the "state secrets privilege" is a common-law evidentiary rule that allows the government to withhold information from discovery when disclosure would be inimical to national security. The court continued stating that the state secrets privilege may be invoked only by the government and may be asserted even when the government is not a party to the case. Once properly invoked, the effect of the privilege is to exclude evidence from the case. In determining the applicability of the privilege, the court before which the privilege is asserted must assess the validity of the claim of privilege, satisfying itself that there is a reasonable danger that disclosure of the particular facts in the litigation will jeopardize national security. If proper assertion of the privilege precludes access to evidence necessary for the plaintiff to state a prima facie claim, dismissal is appropriate. In the instant case, the court found, removal of information subject to the state secrets privilege from the action required dismissal, where the very subject matter of the action was a state secret and removal of privileged information left no evidence available to establish a prima facie case.

In Hyundai Merchant Marine v. U.S., 1992 WL 168281 (S.D. N.Y. 1992), order aff'd on other grounds, 1992 WL 235162 (S.D. N.Y. 1992), an action against the United States for negligence arising out of the grounding of the plaintiffs' vessel off the coast of Brazil, which the plaintiffs contended was caused by the negligent publication of an inaccurate nautical chart by the United States Government, the district court held that certain documents were not subject to discovery due to the state secrets privilege. The court found that the declaration supporting the claim of the privilege, filed by the Secretary of Defense, showed a reasonable danger that disclosure of the information in question would expose military and intelligence matters which, in the interest of national security, may not be divulged.

In Bowles v. U.S., 950 F.2d 154 (4th Cir. 1991), the court of appeals held that assertion of the state secrets privilege warranted dismissal of the United States as defendant from an action under the Federal Tort Claims Act, 28 U.S.C.A. §§ 1346(b), 2671 et seq. arising out of a one-car accident in the Sultanate of Oman involving a vehicle owned by the United States Government and driven by a government employee, where the case against the United States could not be tried without compromising privileged information. The court found that the Secretary of State properly invoked the state secrets privilege by stating that he was asserting a formal claim of the privilege based upon information conveyed to him by United States Government advisors in the course of their official duties and upon his own personal determination that the nature of the information in question required assertion of the privilege.

In Mounsey v. Allied-Signal, Inc., 2000 WL 34017116 (C.D. Cal. 2000), an action arising out of the accidental "friendly fire" shoot down of two U.S. Army helicopters by two U.S. Air Force jets over Northern Iraq, the court held that the magistrate properly found that specific documents, if revealed, could threaten the national security of the United States and so were not subject to discovery under the state secrets privilege. Revealing the rules of engagement and changes in those rules after the shoot down could provide information that would benefit enemies and endanger American service men and women, the court found, and, additionally, disclosing technical manuals and critiques of the "Identification Friend or Foe" (IFF) system prepared after the shoot down could threaten national security by compromising the secrecy of the IFF system's capabilities and vulnerabilities. Thus, the court found that the magistrate properly dismissed the plaintiff's case where assertion of the state secrets privilege by the government would make it impossible for the plaintiffs to establish a prima facie case. The court found, without access to the privileged information, the plaintiffs could not
establish the existence of a manufacturing defect in one of the IFF components, nor could they prove that a defect caused the IFF system to fail.

In *Nejad v. U.S.*, 724 F. Supp. 753, 1990 A.M.C. 3000 (C.D. Cal. 1989), the district court held that the state secrets privilege barred claims by the families and dependents of passengers who perished aboard an Iranian airliner that was shot down by a missile fired from the U.S.S. Vincennes, where the Secretary of Navy invoked the privilege after personal consideration, and disclosure of technology for the AEGIS weapon system, rules for engagement, and military operational orders could be harmful to national security.

In *Linder v. Calero-Portocarrero*, 183 F.R.D. 314 (D.D.C. 1998), where the movants, plaintiffs in a civil suit seeking damages for the death of a United States citizen working in Nicaragua who was allegedly killed by Nicaraguan counterrevolutionary organizations (contras), sought documents from federal agencies which allegedly played prominent roles in the formation and operation of the Nicaraguan contras, the district court, recognizing that the United States, by invoking its state secrets privilege, may block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security, held that portions of a confidential cable from the U.S. Embassy in Nicaragua to the State Department which revealed the source's name and journalistic affiliation were protected from discovery by the state secrets privilege in order to protect the nation's intelligence-gathering capabilities. The court explained, when properly invoked, the state secrets privilege is absolute; no competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege. In order to invoke the privilege, the court said, there must be 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. In situations in which close examination of the government's assertion of the state secrets privilege is warranted, the court added, the trial judge should insist (1) that the formal claim of privilege be made on the public record, and (2) that the government either (a) publicly explain in detail the kinds of injury to national security it seeks to avoid and the reason those harms would result from revelation of the requested information, or (b) indicate why such an explanation would itself endanger national security.

**Products liability**

The following authority determined whether the applicability of the state secrets privilege was established or supportable, under the facts and circumstances presented, in a products liability action.

In *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993), the district court held that the government's assertion of state secrets privilege precluded adjudication of a manufacturing defect claim against the manufacturer of a missile that allegedly malfunctioned during the Persian Gulf War, resulting in the deaths of six Marines. The court recognized that, if proper assertion of the state secrets privilege precludes access to the evidence necessary for the plaintiff to state a prima facie claim, dismissal is appropriate; similarly, if the court determines that the privilege so impairs the defendant in establishing a valid defense that the trier is likely to reach an erroneous conclusion, dismissal is also proper. In the instant case, the court found that the privilege barred disclosure of the information necessary to establish both the plaintiffs' prima facie case and the manufacturer's defense.

**Misappropriation of trade secrets**

In the following cases, the courts determined whether the applicability of the state secrets privilege was established or supportable, under the facts and circumstances presented, in an action for misappropriation of trade secrets.

In *N.S.N. Intern. Industry v. E.I. Dupont de Nemours & Co., Inc.*, 140 F.R.D. 275 (S.D. N.Y. 1991), the district court held that the state secrets privilege prevented a foreign corporation which alleged that a defense contractor wrongfully used the foreign corporation's armor systems technology, from discovering classified documents relating to the contract between the contractor and the Defense Advance Research Projects Agency of the Department of Defense. The district court found that the declarations of the Secretary of Defense indicated that the classified documents contained technical information pertaining to the development, design, and performance of advanced armor systems. The existence of such systems, the declaration stated, had the potential to provide a significant combat advantage to United States tactical forces, and release of these data could enable other nations to produce similar armor systems and/or design anti-armor systems to defeat the United States' armor systems if and when they are actually used in combat, as well as to compromise intelligence operations because information revealing the United States' knowledge of the nature and detail of current and projected future
threats could be used to deduce the sources and methods of United States intelligence gathering and analysis. The court also found that the representations by the Secretary of Defense that personal consideration was given to each of the documents at issue and that the unclassified portion of the documents had been released, was sufficient personal consideration by the Secretary to justify assertion of the state secrets privilege.

In *DTM Research, L.L.C. v. AT & T Corp.*, 245 F.3d 327, 58 U.S.P.Q.2d 1236 (4th Cir. 2001), the court of appeals held that although the trial court properly granted a motion to quash a subpoenas duces tecum which had been served on the United States by the defendant in a suit for misappropriation of trade secrets relating to data mining techniques, on the basis that the "state secrets" privilege barred disclosure of the information sought, the invocation of such privilege did not foreclose the possibility of a fair trial, and thus did not warrant dismissal of the misappropriation claims, where the evidence protected from discovery, while potentially relevant to some aspects of the defense, was not central to the question of whether the defendant was liable for misappropriation. The court stated, when a plaintiff's attempt to establish a prima facie case would threaten disclosure of state secrets, preservation of the secrets may require dismissal of the plaintiff's case; however, unless the very question upon which the case turns is itself a state secret, or the circumstances make clear that 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 case should be allowed to proceed, even if some otherwise relevant evidence might not be presented.

In *Crater Corp. v. Lucent Technologies, Inc.*, 423 F.3d 1260, 76 U.S.P.Q.2d 1338, 68 Fed. R. Evid. Serv. 177, 23 A.L.R.6th 905 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 2889, 165 L. Ed. 2d 938 (U.S. 2006), discussed more fully in § 30, the court of appeals held, in a patentee's misappropriation of trade secrets claim against a government contractor, the Secretary of the Navy and Acting Secretary of the Navy properly invoked the state secrets privilege with respect to documents sought in discovery where each made an ultimate policy determination, based on personal knowledge, that disclosure would jeopardize a legitimate state secret and would pose a threat to national security. The court concluded that whether dismissal was appropriate on the ground the claims could not be adjudicated without information protected by the military and state secrets privilege could not be determined until the scope of the alleged trade secrets and the existence and terms of the alleged contract were first determined on remand.

**Interference with business relationship**

In the following cases, the courts determined whether the applicability of the state secrets privilege was established or supportable, under the facts and circumstances presented, in an action for interference with a business relationship.

The state secrets privilege was properly invoked by the United States in an action by a former government contractor against a second contractor alleging tortious interference with business or occupation under Maryland law due to the second contractor's alleged conspiracy with government employees to prevent the plaintiff's contract from being renewed, the district court, in *In re Under Seal*, 945 F.2d 1285, 33 Fed. R. Evid. Serv. 1405 (4th Cir. 1991), held. In order to invoke the state secrets privilege, the court explained, there must be 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, then the court itself must determine whether the circumstances are appropriate for a claim of the privilege, and yet do so without forcing disclosure of the very thing the privilege is designed to protect. Thus, the court found, summary judgment was properly granted to the defendant contractor where a protective discovery order could not be modified so as to permit the plaintiff to develop a factual basis for a claim of tortious interference with business or occupation under Maryland law without violating the government's state secrets privilege, since the contractor was not seeking discoverable information known to exist, but was attempting to fortify vague allegations made by potential witnesses concerning an undefined conspiracy to help the defendant contractor obtain a contract.

The court of appeals, in *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 6 Fed. R. Evid. Serv. 343, 7 Fed. R. Evid. Serv. 380 (4th Cir. 1980), held, where any attempt on the part of the plaintiff to establish a prima facie case of tortious interference with prospective contractual relations between the plaintiff and the United States Navy would threaten the overriding interest of the United States and preservation of its state secrets, any further attempt to pursue the litigation would be precluded.

**Replevin or conversion**
The following authority determined whether the applicability of the state secrets privilege was established or supportable, under the facts and circumstances presented, in an action for replevin or conversion.

The district court, in Sigler v. LeVan, 485 F. Supp. 185 (D. Md. 1980), held that the government, which presented the affidavit of the Secretary of Army for in camera review, met its burden of proving that material sought by the widow of an army counterintelligence agent, which consisted of memoirs material which was seized from the agent's home, was protected from disclosure by the state secrets privilege; thus, the widow was not entitled to the return of such papers and effects. The court held, furthermore, that although the court ruled that the materials in question, which had been seized as a result of an allegedly unlawful search and seizure, would be protected from disclosure under the state secrets privilege, the agent's widow and daughter could proceed with their claims for conversion, replevin, and constitutional injuries against military and nonmilitary intelligence officers until such time as the court determined that the litigation would inevitably lead to disclosure of the contents of secret materials or until such time as the government asserted a formal claim of privilege over the deceased agent's relationship and contacts with the defendant intelligence officers and established such claim to the court's satisfaction.

Trade and customs actions - Privilege applicable

In the following cases, the courts determined that the applicability of the state secrets privilege was established or supportable, in actions involving trade or customs, to preclude disclosure of information under the facts and circumstances presented.

In Xerox Corp. v. U.S., 12 Cl. Ct. 93 (1987), the Court of Claims held that the government's claim that production of a letter written by the policy division of the United Kingdom's Inland Revenue to the associate commissioner of the Internal Revenue Service would impair the government's ability to deal with the tax authorities of foreign governments by breaching the historic confidentiality of negotiations between the United States and foreign governments was adequate to support a claim of the state secret privilege. The court held, therefore, that it would not conduct in camera inspection of the letter where there was no showing of bad faith on the part of the Internal Revenue Service and no indication that the privilege was not properly invoked, and where it was reasonable to conclude that the letter contained a frank and honest expression of views made in the belief that historic confidentiality would govern the document.

In Star-Kist Foods, Inc. v. U.S., 8 Ct. Int'l Trade 305, 600 F. Supp. 212, 6 Int'l Trade Rep. (BNA) 1584 (1984), in an action to contest a final affirmative countervailing duty determination covering canned tuna from the Philippines, the court, recognizing, under the plain language of 28 U.S.C.A. § 2641(b), the state secrets privilege may not be regarded as absolute in the Court of International Trade, and the proper assertion of the privilege is but one factor, albeit a strong one, for the court to consider in balancing conflicting interests involved in the disclosure of documents, held that, as disclosure of material against which the claim of state secrets was asserted might have significance wholly independent of the contents of the documents, and as the classified portions of the documents would be of only marginal relevance to the issues presented in the action, release of the documents in question would pose a "reasonable danger" to national security, and disclosure would therefore be denied.

Trade and customs actions - Privilege inapplicable

In the following cases, the courts determined that the applicability of the state secrets privilege was not established or supportable, in actions involving trade or customs, to preclude disclosure of information under the facts and circumstances presented.

The district court, in In re Grand Jury Subpoena dated August 9, 2000, 218 F. Supp. 2d 544 (S.D. N.Y. 2002), held that the state secrets privilege did not protect from disclosure to a grand jury investigating an American corporation for bribing foreign officials' documents that the foreign nation asserted were within its executive privilege, and were located, in part, abroad, where production was prohibited by foreign law and specific opinions rendered by high legal officials of the foreign nation, since the documents reflected communications between corporation employees and foreign officials relating to trade and economic relations and did not implicate serious military or intelligence matters. The court stated that the state secrets privilege is absolute, and it applies where there is a reasonable danger that compulsion of the evidence
will expose military matters which, in the interest of national security, should not be divulged. However, the court emphasized, the privilege may not be used to shield any material not strictly necessary to prevent injury to national security, and, whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.

The court in *U.S. Steel Corp. v. U.S.*, 6 Ct. Int’l Trade 182, 578 F. Supp. 409, 5 Int’l Trade Rep. (BNA) 1249 (1983), decision supplemented on other grounds, 7 Ct. Int’l Trade 117, 5 Int’l Trade Rep. (BNA) 2072, 1984 WL 14334 (1984), recognizing that it is for the Court of International Trade to determine whether the state secrets privilege applies, since classification of the documents by the government does not immunize them from the court’s exercise of judgment on the point, held that documents regarding the financial condition of two Brazilian steel companies and the question whether they received subsidies, submitted by the government of Brazil and the World Bank to the United States Department of Commerce, International Trade Administration during the Administration’s countervailing duty investigation of a carbon steel plate from Brazil, were not entitled to the privilege against exposure of state secrets, and the material did not achieve the status of a state secret by virtue of a request by a foreign government and an international agency that it be kept confidential, or by this government’s classification of it under an executive order, or by the opinion of the Secretary of Commerce that disclosure of the information would damage international relations and would reasonably be expected to damage national security. The court stated that the potency of the state secrets privilege is such that it ought not to be granted except in cases of a palpable threat to national security, just as the more exceptional powers of the executive ought not to be used except in cases of grave peril.

*See* *Ceramica Regiomontana, S.A. v. U.S.*, 4 Ct. Int’l Trade 267, 557 F. Supp. 593, 4 Int’l Trade Rep. (BNA) 1481 (1982), in which the district court held, where discovery sought by the intervenor in a countervailing duty investigation was specifically in response to the International Trade Administration’s claim of the state secrets privilege, the matter was for de novo consideration pursuant to the discretion lodged in the Court of International Trade to order disclosure of confidential documents provided to the United States by a foreign government; therefore, limited discovery to refute the basis for the claim of the state secrets privilege was permissible.

Sanctions for government assertion of privilege

The following authority determined whether sanctions were warranted against the government for assertion of the state secrets privilege.

In *Salisbury v. U.S.*, 690 F.2d 966, 11 Fed. R. Evid. Serv. 1409 (D.C. Cir. 1982), the court of appeals, recognizing that assertion by the government of the state secrets privilege does not compel issuance by the court of any sanction whatsoever in a suit brought against the government by an individual who seeks the privileged information to prove some facet of his case, held, where the district court determined that information as to whether or not the plaintiff’s electromagnetic communications had been intercepted was properly classified and was exempt from disclosure under the Freedom of Information Act 5 U.S.C.A. § 552(b)(1), sanctions were not warranted against the government for assertion of the state secrets privilege.

Claim of fraud based on assertion of privilege

The following authority determined whether a claim of fraud was supportable based on the assertion, by the government, of the state secrets privilege.

In *Herring v. U.S.*, 424 F.3d 384, 33 Media L. Rep. (BNA) 2313, 68 Fed. R. Evid. Serv. 386 (3d Cir. 2005), cert. denied, 126 S. Ct. 1909, 164 L. Ed. 2d 685 (U.S. 2006), the court of appeals held that the Air Force’s assertion of the military secrets privilege for an accident report discussing a military airplane crash which killed civilian employees, in an action brought against the United States by the widows of the deceased civilians, did not misrepresent the nature of the information contained in the accident report, since the report contained information about the workings of the particular aircraft involved in the accident, and thus did not support the widows’ subsequent action against the United States of fraud upon the court, even though the report was declassified 52 years after the accident, since the formal claim of privilege stated that the aircraft in question, together with the personnel on board, were engaged in a confidential mission of the Air Force and that the aircraft carried confidential equipment.
Waiver of privilege based on disclosure of information

The courts in the following cases determined whether the state secrets privilege, asserted by the government, was waived with respect to particular information based on public disclosure of that information.

In *N.S.N. Intern. Industry v. E.I. Dupont de Nemours & Co., Inc.*, 140 F.R.D. 275 (S.D. N.Y. 1991), the district court held that the state secrets privilege was not waived by the government's granting access to disputed documents to attorneys for a defense contractor, where access to the classified information was granted in accordance with established procedures, did not result in examination of the documents at issue by the attorneys, and did not give the defense contractor any greater advantage in a suit which alleged that the contractor wrongfully used armor systems technology for its own benefit, than the contractor possessed before the lawsuit began.

See *National Lawyers Guild v. Attorney General*, 96 F.R.D. 390, 12 Fed. R. Evid. Serv. 697, 35 Fed. R. Serv. 2d 1020 (S.D. N.Y. 1982), in which the district court recognized, under the general principles of evidentiary privilege, prior disclosure of specific information sought to be disclosed waives the state secrets privilege, but disclosure of the type of information similar to that presently sought will not vitiate the privilege. Thus, the court said, disclosure of an intelligence method or goal in a generalized way does not preclude the state secrets privilege protection of an intelligence method or goal which relates to a particular time and place and particular target.

In *Al-Haramain Islamic Foundation, Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006), discussed more fully § 11, where an Islamic foundation, a director, and its attorneys sued the government, claiming that their telephone conversations were monitored in violation of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C.A. §§ 1801 to 1811, the district court, denying the plaintiffs' request to unseal and declassify a sealed classified document, found that inadvertent disclosure of the document, at one time, would not declassify it or waive application of the state secrets privilege.

**** Caution: ****
The court in *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007), reversed *Al-Haramain Islamic Foundation, Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006), rev'd and remanded, 507 F.3d 1190 (9th Cir. 2007), holding that the state secrets privilege protected the sealed document regarding the federal government's terrorist surveillance program (TSP), in the Islamic foundation's challenge to the TSP alleging warrantless wiretapping in violation of the Fourth Amendment and the Foreign Intelligence Surveillance Act (FISA), even though the government had inadvertently furnished the document to the foundation.

The state secrets privilege, the court of appeals, in *Monarch Assur. P.L.C. v. U.S.*, 244 F.3d 1356 (Fed. Cir. 2001), found, which was applicable to preclude disclosure of whether an individual was an agent of the Central Intelligence Agency (CIA), was not waived by any alleged conversations with officials in the office of the Director of the CIA, purportedly telling the caller that the individual was not an agent.

In *Taylor v. Nix*, 451 F. Supp. 2d 1351 (N.D. Ga. 2006) (applying Georgia law), an action by a prisoner against the state board of pardons and paroles alleging unlawful denial of parole, the district court, denying the prisoner's motion to compel production of documents, held that the board did not waive the state secrets privilege by briefly describing, in its brief supporting summary judgment, privileged documents relating to the prisoner's prior litigation against the board which were inadvertently placed in the prisoner's clemency file, since the board did not rely upon these documents in support of its motion for summary judgment, but rather described them in order to specifically identify the documents that had been inadvertently placed in the clemency file. The court, acknowledging that the state of Georgia had a compelling and justifiable interest in creating and preserving this privilege, concluded that the privilege was not waived merely by the board's reference to, and brief description of, a few privileged documents.

CUMULATIVE CASES

Cases:

Following federal government's successful invocation of state secrets privilege with regard to sealed document concerning terrorist surveillance program (TSP), in Islamic foundation's challenge to program, district court should not have
permitted in camera review of affidavits attesting to foundation attorneys' memories of document, which government had inadvertently furnished to them; review sanctioned "material touching" upon privileged information, and also circumvented document's absolute privilege. Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007).

Requirement of formal claim of privilege as to each item - Held required

The following authority determined that, in order for the government to assert the state secrets privilege, a formal claim of privilege must be made with respect to each separate item.

The district court, in National Lawyers Guild v. Attorney General, 96 F.R.D. 390, 12 Fed. R. Evid. Serv. 697, 35 Fed. R. Serv. 2d 1020 (S.D. N.Y. 1982), held that the Federal Bureau of Investigation was required to make a formal claim of the state secrets privilege for every asserted privileged item, and could not use a sampling technique in making its executive privilege claims, and such requirement included the requirement that the Attorney General personally review each item for which he asserted the privilege. The court explained that the state secrets privilege permits the executive branch of government to withhold information, although relevant to litigation, which contains military secrets and secrets of state because disclosure would jeopardize national security. Information protected by the state secrets privilege is not strictly limited to military affairs but also includes matters related to national defense, foreign policy, and foreign intelligence activities. The court continued, an affidavit in support of a state secrets claim should describe the disputed material in sufficient detail and the reasons for withholding the material should be set forth with reasonable specificity. Even where the allegedly privileged documents submitted for the court's in camera review may be fully self-explanatory, the court said, the affidavit lodging a formal claim of the state secrets privilege must nonetheless specify the agency's reasons for invoking the privilege. In ruling on a claim of state secrets privilege, the court added, a court need only be satisfied that there is a reasonable danger that compulsion of evidence will expose military matters which, in the interest of national security, should not be divulged; such standard, as applied, essentially asks whether there is reasonable danger that disclosure of material will adversely affect national security.

CUMULATIVE CASES

Cases:

United States may claim state secrets privilege against discovery of military and state secrets, through formal request lodged by head of department which has control over matter, after actual personal consideration by that officer. In re Sealed Case, 494 F.3d 139 (D.C. Cir. 2007).

Requirement of formal claim of privilege as to each item - Held not required

The courts in the following cases determined that, in order for the government to assert the state secrets privilege, a formal claim of privilege was not required with respect to each separate item.

In Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 1985-1 Trade Cas. (CCH) P 66330, 17 Fed. R. Evid. Serv. 150, 40 Fed. R. Serv. 2d 1042 (D.C. Cir. 1984), the court of appeals found, in civil litigation between two defense contractors, that the Department of Defense properly made its claim to the state secrets privilege, where, in an affidavit, the Secretary of Defense stated that he had reviewed a representative sample of the documents as well as affidavits of staff members who had received all of the documents, and based on this knowledge he asserted a formal claim of privilege in order to protect certain military and state secrets relating to the national defense and the national security of the United States.

In Crater Corp. v. Lucent Technologies, Inc., 423 F.3d 1260, 76 U.S.P.Q.2d 1338, 68 Fed. R. Evid. Serv. 177, 23 A.L.R.6th 905 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 2889, 165 L. Ed. 2d 938 (U.S. 2006), the court of appeals held, in a patentee's misappropriation of a trade secrets claim against a government contractor, the Secretary of the Navy and Acting Secretary of the Navy were not required to personally review each of the 26,000 documents sought in discovery to properly invoke the military and state secrets privilege with regard to those documents; it was sufficient that the Secretary, and later the Acting Secretary, were informed of the nature and scope of the documents, and that each then made an
ultimate policy determination, based on his personal knowledge, that disclosure would jeopardize a legitimate state secret and would pose a threat to national security.

Waiver of privilege based on administrative rule or regulation

The following authority determined whether the government waived the claim of the state secrets privilege based on the applicability of an administrative rule or regulation.

In *Tilden v. Tenet*, 140 F. Supp. 2d 623, 85 Fair Empl. Prac. Cas. (BNA) 404 (E.D. Va. 2000), an employee's sex discrimination action against the Director of the Central Intelligence (DCI), the court held that the DCI did not waive the claim of the privilege through an internal Central Intelligence Agency (CIA) regulation concerning the agency's equal employment opportunity (EEO) program, which stated that at any stage of the informal and formal EEO complaint process, the complainants had the right to be accompanied, represented, and advised by a representative of their choice, since the regulation only applied to the informal EEO proceeding and specifically stated that compliance with employment-related civil rights laws was to be in a manner consistent with the requirements of national security.

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