No. 06-1667

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KHALED EL-MASRI,

Plaintiff-Appellant

v.

GEORGE TENET, et al.,

Defendants-Appellees

UNITED STATES OF AMERICA

Intervenor-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia
The Honorable T.S. Ellis, III

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To be filed by: 07/24/06

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Richmond, VA

7 July 2006

No. 06-1667 El-Masri v. Tenet

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

COMPLETE ONLY ONE FORM PER PARTY EVEN IF THE PARTY IS REPRESENTED BY MULTIPLE ATTORNEYS. DISCLOSURES MUST BE FILED ON BEHALF OF INDIVIDUAL AND CORPORATE PARTIES. DISCLOSURES ARE REQUIRED FROM AMICUS CURIAE ONLY IF AMICUS IS A CORPORATION. COUNSEL HAS A CONTINUING DUTY TO UPDATE THIS INFORMATION. PLEASE FILE AN ORIGINAL AND THREE COPIES OF THIS FORM.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Khaled El-Masri (name of party/amicus) who is appellant (appellant/appellee/amicus),

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ( ) YES (X) NO

2. Does party/amicus have any parent corporations? ( ) YES (X) NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10 percent or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ( ) YES (X) NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ( ) YES (X) NO
   If yes, identify entity and nature of interest:

5. Is the party a trade association? ( ) YES (X) NO
   If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10 percent or more of a member's stock:

6. If case arises out of a bankruptcy proceeding, identify any trustee and the members of any creditor's committee:

_____ 7/7/06
(signature) (date)

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1332 (diversity), and 1350 (Alien Tort Statute). On May 12, 2006, the district court entered an order dismissing the action. Mr. El-Masri timely appealed. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Did the district court err in dismissing this action on the basis of the evidentiary state secrets privilege, prior to discovery, without first allowing Mr. El-Masri to prove his claims with nonprivileged evidence and without adequately considering alternatives to dismissal?

STATEMENT OF THE CASE

Plaintiff-Appellant Khaled El-Masri filed this action against former Director of Central Intelligence George Tenet, three private aviation companies, and several unnamed defendants, seeking compensatory and punitive damages for his unlawful abduction, arbitrary detention, and torture by agents of the United States. Mr. El-Masri alleged violations of the Fifth Amendment to the U.S. Constitution, as well as customary international law prohibiting prolonged arbitrary detention; cruel, inhuman, or degrading treatment; and torture, which are enforceable in U.S. courts pursuant to the

Alien Tort Statute (ATS), 28 U.S.C. § 1350. Although not named as a defendant, the United States government successfully intervened in this matter, and moved for dismissal pursuant to the evidentiary state secrets privilege. The district court held oral argument on the United States' motion on May 12, 2006. In an order dated that same day, the United States' motion to dismiss was granted. This appeal followed.

STATEMENT OF FACTS

In the final days of 2003, Khaled El-Masri, a German citizen of Lebanese descent, traveled by bus from his home near Neu Ulm, Germany, to Skopje, Macedonia. JA 43, 44 (El-Masri Decl. ¶¶ 1-2, 6). After passing through several international border crossings without incident, Mr. El-Masri was detained at the Serbian-Macedonian border because of alleged irregularities with his passport. JA 44-45 (*Id.* ¶¶ 7-9). He was interrogated by Macedonian border officials, then transported to a hotel in Skopje. JA 46-47 (*Id.* ¶¶ 11-14).[1]

Over the course of three weeks' detention, Mr. El-Masri was repeatedly interrogated about alleged contacts with Islamic extremists and

[1] Subsequent to his release in May, 2004, Mr. El-Masri was able to identify the hotel from website photographs as the Skopski Merak and to identify photos of the room where he was held and of a waiter who served him food. JA 47-48 (*Id.* ¶¶ 14, 17).

was denied contact with the German Embassy, an attorney, or his family. JA 48-50 (*Id.* ¶¶ 18-24). He was told that if he confessed to Al-Qaeda membership, he would be returned to Germany. JA 49 (*Id.* ¶ 21). On the thirteenth day of confinement, Mr. El-Masri commenced a hunger strike, which continued until his departure from Macedonia. JA 50 (*Id.* ¶ 24).

After twenty-three days of detention, Mr. El-Masri was videotaped, blindfolded, and transported to an airport. JA 50 (*Id.* ¶¶ 25-27). There he was beaten, stripped naked, and thrown to the ground. JA 51 (*Id.* ¶ 28). A hard object was forced into his anus. *Id.* When his blindfold was removed, he saw seven or eight men, dressed in black, with hoods and black gloves. JA 51 (*Id.* ¶ 29). He was placed in a diaper and sweatsuit, subjected to full sensory deprivation,[2] shackled, and hurried to a plane, where he was chained spread-eagled to the floor. JA 51-52 (*Id.* ¶¶ 30-31). He was injected with drugs and flown to Baghdad, then on to Kabul, Afghanistan.[3] JA 52-53 (*Id.* ¶¶ 32-34).

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[2] This included being blindfolded, having his ears plugged with cotton and then covered with headphones, and finally having a bag placed over his head. JA 51-52 (*Id.* ¶ 30).

[3] This itinerary is confirmed by public flight records. JA 52-53 (*Id.* ¶ 34). At some point prior to his departure, an exit stamp was placed in his passport, confirming that he left Macedonia on January 23, 2004. JA 106-109 (*Id.* ¶ 81 & Exh. E).

Upon arrival in Kabul, Mr. El-Masri was kicked and beaten and left in a filthy cell. JA 53 (*Id.* ¶¶ 35-36). There he would be detained for more than four months. He was interrogated several times in Arabic about his alleged ties to 9/11 conspirators Muhammed Atta and Ramzi Bin Al-Shibh and to other suspected extremists based in Germany. JA 55-56 (*Id.* ¶¶ 43-46). American officials participated in his interrogations. JA 56-57 (*Id.* ¶ 49). All of his requests to meet with a representative of the German government were refused. JA 56 (*Id.* ¶ 46).

In March, Mr. El-Masri and several other inmates commenced a hunger strike. JA 56 (*Id.* ¶ 47). After nearly four weeks without food, Mr. El-Masri was brought to meet with two American officials. JA 57 (*Id.* ¶ 50). One of the Americans confirmed Mr. El-Masri's innocence but insisted that only officials in Washington could authorize his release. JA 57-58 (*Id.* ¶ 52).[4] Mr. El-Masri continued his hunger strike. On the evening of April 10, Mr. El-Masri was dragged from his room by hooded men and force-fed through a nasal tube. JA 58 (*Id.* ¶ 55).[5]

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[4] Subsequent media reports confirm that senior officials in Washington, including Defendant Tenet, were informed long before Mr. El-Masri's release that the United States had detained an innocent man. JA 58 (*Id.* ¶ 53).

[5] At around this time, Mr. El-Masri felt what he believed to be a minor earthquake. JA 58-59 (*Id.* ¶ 56). Geological records confirm that in

On May 16, Mr. El-Masri was visited by a uniformed German speaker who identified himself as "Sam." JA 59-60 (*Id.* ¶ 59). "Sam" refused to say whether he had been sent by the German government or whether the government knew about Mr. El-Masri's whereabouts. *Id.*[6]

On May 28, Mr. El-Masri, accompanied by "Sam," was flown from Kabul to a country in Europe that was not Germany. JA 62-63 (*Id.* ¶¶ 66-71). There he was placed, blindfolded, into a truck and driven for several hours through mountainous terrain. JA 63 (*Id.* ¶¶ 72-74). He was given his belongings and told to walk down a path without turning back. JA 63 (*Id.* ¶ 74). Soon thereafter, he was confronted by armed men who told him he was in Albania and transported him to Mother Theresa Airport in Tirana. JA 64-65 (*Id.* ¶¶ 76-80). He was then escorted through customs and immigration and placed on a flight to Frankfurt. JA 65 (*Id.* ¶ 80).

Upon his return to Germany, Mr. El-Masri contacted an attorney and related his story. JA 66 (*Id.* ¶ 84). The attorney promptly reported Mr. El-Masri's allegations to the German government, thereby initiating a formal investigation by public prosecutors. JA 154 (Gnjidic Decl. ¶¶ 5-7).

February and April, there were two minor earthquakes in the vicinity of Kabul. *Id.*

[6] Subsequent to his release, Mr. El-Masri identified "Sam" in a photograph and a police lineup as Gerhard Lehmann, a German intelligence officer. JA 60-61 (*Id.* ¶ 61).

Pursuant to their investigation, German prosecutors obtained and tested a sample of Mr. El-Masri's hair, which proved consistent with his account of detention in a South-Asian country and deprivation of food for an extended period. JA 155-156 (*Id.* ¶ 13). That investigation, as well as a German parliamentary investigation of Mr. El-Masri's allegations, is ongoing. JA 156-157 (*Id.* ¶¶ 15-16). Moreover, a separate European inquiry has now concluded, based on Mr. El-Masri's testimony and substantial corroborating evidence, that Mr. El-Masri was abducted, detained, interrogated, and abused by the United States Central Intelligence Agency and its agents. *See* Dick Marty, Committee on Legal Affairs and Human Rights, Council of Europe, *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States* § 3.1 (draft report 2006), *available at* http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/07_06_06_renditions_draft.pdf.

Finally, after Mr. El-Masri's suit was dismissed by the district court, an eyewitness to his detention in Afghanistan came forward. Laid Saidi, an Algerian citizen who was detained in the same Afghan prison as Mr. El-Masri, memorized Mr. El-Masri's telephone number and sent him a text message upon his own release. *See* Craig S. Smith & Souad Mekhennet, *Algerian Tells of Dark Odyssey in U.S. Hands*, N.Y. Times, July 7, 2006, at

A1, *available at* 2006 WLNR 11719762. The two have since spoken by telephone, and Mr. El-Masri has recognized Mr. Saidi's voice as that of his fellow detainee. *Id.*

SUMMARY OF ARGUMENT

The rendition of plaintiff Khaled El-Masri to detention and interrogation in Afghanistan by agents of the United States represents the most widely known example of a publicly acknowledged program. In dismissing Mr. El-Masri's profoundly substantial claims of unlawful abduction, arbitrary detention, and torture, the district court invoked state secrets to protect the nation against disclosure of information that the entire world already knows. Government officials at the highest level have spoken publicly, repeatedly, and in detail about the rendition program. And Mr. El-Masri's allegations – which are supported by abundant corroborating evidence, including eyewitness testimony and official intergovernmental reports – have been the subject of widespread media reports in the world's leading newspapers and news programs, many of them based on the accounts of U.S. officials.

The common-law state secrets privilege, which the United States invoked below to extinguish altogether Mr. El-Masri's right of redress, is an evidentiary privilege, not an immunity doctrine. Its purpose is to block

disclosure in litigation of information that will damage national security, and it is rare and "drastic" for invocation of the privilege to result in dismissal of an action. *Fitzgerald v. Penthouse Internat'l, Ltd.*, 776 F.2d, 1236, 1242 (4th Cir. 1985). Mr. El-Masri does not dispute that, during the course of litigation, there may well be relevant evidence that may be properly withheld pursuant to the privilege. However, dismissal at this stage – before the named defendants have so much as answered Mr. El-Masri's complaint – was unjust, unnecessary, and improper. Only where the "very subject matter" of a suit is a state secret – a circumstance not remotely applicable here – is dismissal at the pleading stage permissible.

The United States insisted below that it could neither confirm nor deny any allegations concerning its clandestine rendition program. In fact, as discussed below, the United States has done both, repeatedly – confirming and even defending the existence of the rendition program and describing its parameters, and denying that the program is an instrument of coercive interrogation. Only in seeking to dismiss this action did the United States insist that it could neither admit the former nor deny the latter. *Cf. Padilla v. Hanft,* 432 F.3d 582 (4th Cir. 2005). Although the district court below wholly acceded to the government's demands, another district court recently rejected that argument in nearly identical circumstances, holding that "to

defer to a blanket assertion of secrecy" would be "to abdicate" judicial duty, where "the very subject matter of [the] litigation ha[d] been so publicly aired." *Hepting v. AT&T*, No. C-06-672, slip op. at 29, 36 (N.D. Cal. July 20, 2006) (denying government motion to dismiss suit challenging telecommunications carrier's participation in warrantless eavesdropping, where "the government has publicly admitted the existence of a 'terrorist surveillance program,' which the government insists is completely legal.").

This Court has instructed that courts must use "creativity and care" in devising procedures that protect against disclosure of legitimate state secrets while safeguarding injured parties' right of access to Article III courts. *Fitzgerald,* 776 F.2d at 1238 n.3. Federal courts are plainly competent to make such determinations and to formulate protective measures that would permit this case to proceed. Should this Court decide otherwise, the United States will have succeeded, now and in the future, in shielding its most egregious conduct from legal redress.[7]

STANDARD OF REVIEW

This Court reviews the district court's "legal determinations involving state secrets de novo." *Sterling v. Tenet*, 416 F.3d 338, 342 (4th Cir. 2005)

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[7] *Cf. United States v. Nixon*, 418 U.S. 683, 708 (1974) ("[A] presumptive privilege must be considered in light of our historic commitment to the rule of law.")

(citing *Molerio v. FBI*, 749 F.2d 815, 820 (D.C. Cir. 1984)). Moreover, this Court "accept[s] as true the factual allegations of the challenged complaint and . . view[s] those allegations in the light most favorable to the plaintiff." *Lambeth v. Board of Commissioners*, 407 F.3d 266, 268 (4th Cir. 2005) (internal citations omitted).

ARGUMENT

I. THE GOVERNMENT'S RADICAL VIEW OF THE STATE SECRETS PRIVILEGE CANNOT PRECLUDE THIS COURT FROM FULFILLING ITS CONSTITUTIONAL DUTY TO REVIEW EXECUTIVE ACTION.

In ratifying the government's contention that Mr. El-Masri's suit must be dismissed on the basis of an evidentiary privilege before there was any evidence at issue, the district court embraced an expansive and overbroad construction of the state secrets privilege that would virtually immunize the most egregious executive misconduct from judicial review. The government's theory, wholly accepted by the district court, constitutes an assault not only on Mr. El-Masri's right of access to an Article III forum, but to core separation of powers principles. If endorsed by this Court, it would upset the system of checks and balances that sustains a free society by

preventing courts from reviewing executive actions that violate the law and the Constitution.[8]

Because the Constitution's Framers feared the prospect of unchecked executive power,[9] the Constitution provides for an independent judiciary as the ultimate arbiter of when the Executive has acted beyond its authority, contrary to its legal obligations, or in violation of individual rights. The Supreme Court has stated that "when the President takes official action, the Court has the authority to determine whether he has acted within the law." *Clinton v. Jones*, 520 U.S. 681, 703 (1997).[10]

To permit the Executive to have the first and final say on the extent of its own power flies in the face of the most basic separation of powers principles. *Id.* at 699 ("The Framers built into the tripartite Federal

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[8] The government additionally argued below, almost by way of afterthought, that this case should be dismissed on the alternative ground that judicial consideration was prohibited by the nonjusticiability rule of *Totten v. United States*, 92 U.S. 105 (1875). The district court declined to decide that issue, although it correctly noted that "[t]his argument is problematic . . . ." *El-Masri v. Tenet*, --- F.Supp.2d ----, 2006 WL 1391390, at *7 (E.D.Va. May 12, 2006), JA 224.

[9] *Cf.* James Madison, *The Federalist No. 47*, at 324 (J. Cooke ed., 1961) ("The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.").

[10] *See also Sterling v. Constantin*, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions," not matters for unilateral Executive decision.).

Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.") (internal quotation marks omitted). The question whether the government violated Mr. El-Masri's constitutional and human rights when it abducted, detained, and tortured him – outside of any legal process – remains an inherently judicial determination. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) ("Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy.").

To allow the Executive to violate the law and thereafter to avoid judicial scrutiny altogether by invoking the state secrets privilege as a bar to justiciability would dangerously concentrate executive, legislative, and judicial power in a single branch of government.[11] When the Executive unilaterally asserts a need for secrecy in a manner that disables judicial

[11] *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 536-37 (2004) ("[I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge."); *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946) ("[The framers] were opposed to government that placed in the hands of one man the power to make, interpret, and enforce the laws.").

power and threatens individual liberties, courts have a special duty to probe deeply before acceding to Executive demands. This is no less true in time of war or claimed emergency.[12] As the Supreme Court recently emphasized, the Constitution "envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536.[13] And as this Court has made clear, "a blind acceptance by the courts of the government's insistence on the need for secrecy . . . would impermissibly compromise the independence of the judiciary and open the door to possible abuse." *In re Washington Post Co. v. Soussoudis*, 807 F.2d 383, 392 (4th Cir. 1986).

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[12] *See, e.g., Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.").

[13] *See also id.* at 545 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) ("In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security . . . . A reasonable balance is more likely to be reached on the judgment of a different branch, just as Madison said in remarking that 'the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other-that the private interest of every individual may be a sentinel over the public rights.'") (citation omitted).

Courts are plainly competent to review cases implicating even the most sensitive national security issues. Consistent with the Supreme Court's admonition that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," *Hamdi,* 542 U.S. at 536, courts have played an active and vital role in evaluating the legality of executive action taken in the name of national security. In the past five years alone, the Supreme Court has decided whether the President can detain enemy combatants captured on the battlefield in Afghanistan and whether those captured are entitled to due process,[14] whether individuals detained at Guantánamo Bay may challenge their detention,[15] and whether the trial of detainees by military commissions passes constitutional muster.[16] Courts have required access to the testimony of enemy combatant witnesses;[17] decided whether, consistent with the Constitution, the FBI may unilaterally demand that Internet Service Providers turn over customer records related to national security investigations and gag them forever without judicial

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[14] *Hamdi,* 542 U.S. 507.

[15] *Rasul v. Bush*, 542 U.S. 466 (2004).

[16] *Hamdan v. Rumsfeld,* 126 S.Ct. 2749 (June 29, 2006).

[17] *United States v. Moussaoui*, 365 F.3d 292 (4th Cir. 2004).

review;[18] whether the government may require closure of all post-9/11 deportation hearings for national security reasons;[19] and whether the government must disclose information about the treatment of detainees in Iraq, Afghanistan, and Guantánamo Bay.[20] Had the government urged its radical state secrets theory in these cases – all of which involve national security issues at least as sensitive as those presented in this case – important constitutional issues might never have been decided.

The Court should assess the government's state secrets claim with these precedents and principles in mind. Ultimately, only the Court can ensure that Mr. El-Masri is not unnecessarily denied his "constitutional right to have access to the courts to redress violations of his constitutional and statutory rights." *Spock v. United States*, 464 F. Supp. 510, 519 (S.D.N.Y. 1978). The Supreme Court has cautioned that judicial control in a case "cannot be abdicated to the caprice of executive officers." *United States v. Reynolds,* 345 U.S. 1, 9-10 (1953). It is "the courts, and not the executive officer claiming the privilege, who must determine whether the claim is

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[18] *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004), *vacated, Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006); *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005), *appeal dismissed as moot*, 449 F.3d 415 (2d Cir. 2006).

[19] *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

[20] *ACLU v. Dep't of Defense*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005).