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

MAHER ARAR,	§	
	§	
Plaintiff,	§	
	§	
v.	§	No. 04-CV-0249-DGT-VVP
	§	
JOHN ASHCROFT, Attorney General of the United States; LARRY D. THOMPSON, formerly Deputy Attorney General; TOM RIDGE, Secretary of the Department of Homeland Security; JAMES W. ZIGLAR, formerly Commissioner of the Immigration and Naturalization Service; J. SCOTT BLACKMAN, formerly Regional Director of the Eastern Regional Office of the Immigration and Naturalization Service; PAULA CORRIGAN, Regional Director of the Bureau of Immigration and Customs Enforcement; EDWARD J. McELROY, formerly District Director of the Immigration and Naturalization Service for the New York District, now District Director of the Bureau of Immigration and Customs Enforcement; ROBERT MUELLER, Director of the Federal Bureau of Investigation; and JOHN DOES 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents,	§	
	§	
Defendants.	§	

REPLY OF UNITED STATES OF AMERICA TO PLAINTIFF'S OPPOSITION TO UNITED STATES' INVOCATION OF THE STATE SECRETS PRIVILEGE

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The United States has formally asserted the state secrets privilege over information at the core of Counts I, II, and III of the complaint. The public-record declarations of James B. Comey, acting by operation of law as Attorney General, and Tom Ridge, former Secretary of the Department of Homeland Security, and the classified material upon which they rely, make clear that disclosure of the information at issue reasonably could be expected to cause exceptionally grave or serious damage to the Nation's security. None of Plaintiff's arguments changes the fact that preserving these state secrets makes it impossible for Plaintiff to litigate Counts I-III and deprives Defendants of defenses to those claims. Because those claims cannot proceed without disclosure of protected national security information, they should be dismissed as to all Defendants in their official and individual capacities.[1]

DISCUSSION

A. Where state secrets are at the core of a claim, or necessary to a defense, dismissal of that claim prior to discovery is not premature.

As we explained in our opening brief, the material that necessitated the assertion of the state secrets privilege goes to the core of Counts I-III of the complaint, and dismissal of those counts is necessary to protect against harm to the Nation's security, including revelation of intelligence-gathering sources, methods, and capabilities, and damage to diplomatic relations. U.S. SS Br. at 9-15. Plaintiff contends, relying on a single district court decision, that the state secrets privilege is an "evidentiary discovery rule" that is "not applicable at the pleading stage." Pl. SS Br. at 14, 16 (citing Hudson River

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[1] Plaintiff argues that the Court "should adjudicate the pending motions to dismiss for lack of jurisdiction and failure to state a claim" before considering whether the state secrets privilege requires dismissal of Counts I-III. See Pl. Opp. to U.S. Assertion of State Secrets Priv. ("Pl. SS Br.") at 16. The pending Rule 12 motions seek dismissal of Plaintiff's complaint in its entirety on grounds that are independent of the state secrets privilege. The United States would have no objection if the Court determined either to consider the Rule 12 motions and the state secrets privilege assertion together or to consider the Rule 12 motions first.

Sloop Clearwater, Inc. v. Department of the Navy, 1989 WL 50794 (E.D.N.Y.)). There is no such rule; rather, the law is clear that whether a properly asserted claim of state secrets privilege requires dismissal of a suit, or some part of it, or whether the suit or a claim can be litigated without reference to the privileged material, depends on the nature of the claims and the privileged information at issue. Where the "plaintiff cannot prove the prima facie elements of her claim with nonprivileged evidence," dismissal is required. Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998). Likewise, where the privilege deprives the defendant of the ability to present a valid defense, dismissal is required. See, e.g., Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 547 (2d Cir. 1991)(rejecting claim that plaintiff should be permitted discovery before dismissal based on state secrets privilege).

Nor does the Supreme Court's recent decision in Tenet v. Doe, 125 S. Ct. 1230 (2005), support Plaintiff's attempt to draw a categorical distinction between "Totten cases" (in which, Plaintiff concedes, pre-discovery dismissal is appropriate) and all other cases. To be sure, Tenet reaffirmed that suits arising out of contracts to perform espionage must be dismissed. See 125 S. Ct. at 1237 (describing "the categorical Totten bar")(citing Totten v. United States, 92 U.S. 105 (1875)). But the Court nowhere suggested that pre-discovery dismissal was appropriate only in espionage-contract suits and not in other types of suits similarly dependent on information that cannot be disclosed consistent with national security. Far from drawing any such categorical distinction, the Court made clear that, "[w]hen invoking the 'well established' state secrets privilege, we indeed looked to Totten," 125 S. Ct. at 1236, and reiterated that--under Totten and United States v. Reynolds, 345 U.S. 1 (1953)--where "'the very subject matter of the action'" is a state secret, "such a case" should be "'dismissed on the pleadings without ever reaching the question of evidence.'" Tenet, 125 S. Ct. at 1236-37 (quoting

Reynolds, 345 U.S. at 11 n.26).

In short, where it is "'obvious that the action [shall] never prevail over the privilege,'" discovery is inappropriate and dismissal required. Id. at 1237 (quoting Reynolds, 345 U.S. at 11 n.26); see also U.S. SS Br. at 12-13 and cases cited therein.[2] Because state secrets that must be protected lie at the core of Counts I, II, and III of the complaint, Plaintiff cannot prove those claims and Defendants are deprived of valid defenses, and those claims should be dismissed.[3]

1. Contrary to Plaintiff's claim, the information protected by the state secrets privilege is at the core of Counts I, II, and III.

The United States' opening brief explained that information relating to the decisions to deny Plaintiff admission to the United States on the ground that he was a member of al Qaeda, to reject his designation of Canada as the country of removal, and to remove him to Syria is classified and must not be disclosed. U.S. SS Br. at 2-3, 13-14. Plaintiff devotes much of his opposition to trying to convince this Court that Counts I-III can be "resolved without resort to the privileged material" on the rationale that the reasons why these decisions were made are irrelevant. See Pl. SS Br. at 18-26. This assertion is particularly unconvincing because Plaintiff's opposition to Defendants' motions to dismiss framed "the fundamental question underlying this case" as "[w]hy would United States Officials intercept a Canadian

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[2] The Ninth Circuit's discussion of the state secrets privilege in Tenet did not survive the Supreme Court's reversal and cannot reasonably be characterized, as Plaintiff asserts, as having been reversed "on other grounds." See Pl. SS Br. at 13 & n.37.

[3] To the extent that Plaintiff's objection is that the "mere invocation" of the state secrets privilege should not result in immediate dismissal, see Pl. SS Br. at 15, the United States has never maintained that its "mere invocation" of the privilege is dispositive and has proffered all material supporting its invocation to this Court for its review if the Court believes that such review is necessary to evaluate whether Counts I, II, and III can be litigated without reference to the privileged information. See U.S. SS Br. at 7-8 n.3.

citizen on his way home to Canada, . . . order him removed, and then place him not on a connecting flight to his home in Canada, but on a federally chartered jet to Syria where he would be detained without charges, interrogated and tortured for nearly one year?" Pl. MTD Br. at 1 (emphasis added). Plaintiff's opposition made clear that his due-process claims were based on a "shocks the conscience" theory under which Defendants' intent is critical. See id. at 25; U.S. MTD Reply at 15-17. Plaintiff's claim that he was removed to Syria for the alleged purpose of torture also was central to his complaint, which is replete with references to Defendants' alleged motive or purpose.[4]

Plaintiff does not dispute that information relating to the reasons why he was found to be a member of al Qaeda and removed to Syria is classified, and he does not argue that he can proceed in the face of the privilege assertion with claims that turn on Defendants' motives. Instead, Plaintiff attempts to recharacterize his claims, abandoning the allegations of conspiracy and evil motive that formed the basis of his complaint and opposition to the Rule 12 motions, and relying instead on a putatively objective negligence-based theory that "Defendants knew or ought reasonably to have known that by removing Mr. Arar to Syria he would be subjected to arbitrary detention and there was a substantial likelihood that he would be subjected to torture." Pl. SS Br. at 21 (emphasis added). As an attempt to render state secrets irrelevant, Plaintiff's retreat from an intent-based theory to a

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[4] See, e.g., Compl. ¶ 77 ("Defendants agreed amongst themselves and with unnamed Syrian officials to deport plaintiff to Syria for the purpose [of] coercive interrogation and torture"); accord Compl. ¶¶ 3, 14-15, 17-18, 20-21, 55, 57, 69-71, 78-79, 84-86; see also, e.g., Pl. MTD Br. at 25 ("It is difficult to imagine any reason to send Mr. Arar . . . to Syria rather than to Canada, except that Syria, unlike Canada, engages in such practices as prolonged detention without charge, coercive interrogation and torture. Mr. Arar alleges that Defendants sent him to Syria not only knowing of these practices, but because of these practices pursuant to a policy of 'rendering' suspects in the war on terror to third countries where they will be tortured for information.").

negligence-based theory fails on its own terms, because classified material remains directly relevant to what Defendants knew or should have known. Moreover, what was clear before is now undeniable: Plaintiff's claims fail as a matter of law because none of his new theories comes close to stating a substantive due-process or Torture Victim Protection Act ("TVPA") claim.

To the extent Plaintiff's claims relate to what Defendants in fact "knew," state secrets remain squarely at issue. The protected material would include, among other things, classified information regarding Plaintiff, the nature and substance of any classified contacts with any foreign governments or intelligence sources, and the identity and reliability of any individuals providing such information or with whom such contacts were made. This is material that, if disclosed, would compromise the national security by enabling our adversaries to avoid detection, threatening our relationships with foreign governments, and undermining our intelligence-gathering capabilities. U.S. SS Br. at 8-10.

Plaintiff's alternative, negligence-based theory is that, in light of State Department reports allegedly stating that Syria "regularly engage[s] in torture during interrogations," Pl. SS Br. at 22, Defendants "ought reasonably to have known" that he would be tortured. This theory fails either to render the privileged material irrelevant or to state a claim under the TVPA or the Fifth Amendment. As an initial matter, although the one State Department report cited by Plaintiff that existed at the time of his removal stated that security services in Syria had engaged in serious human rights violations, including torture, the report did not find that torture was probable in any given circumstance. Sohn Dec., Ex. 1 (Syria Country Report, released Mar. 4, 2002). But even if the report, taken in isolation, could have put Defendants on notice that Plaintiff more likely than not would be tortured, Defendants still would be entitled to defend by presenting any other evidence that may have caused them to form a

reasonable belief that torture would not in fact occur. Because evidence concerning why the United States removed Plaintiff to Syria, and bearing on Defendants' knowledge, belief, and intent concerning his treatment there, is protected by the state secrets privilege, Defendants would be deprived of the ability to present a valid defense to allegations that they "ought reasonably to have known" that Plaintiff would be tortured. The state secrets privilege thus requires dismissal of Plaintiff's claims even as recharacterized. See Zuckerbraun, 935 F.2d at 547 (where the effect of the privilege is to prevent plaintiff from establishing prima facie case or to "prevent the defendant from establishing a valid defense," the court should dismiss the claims at issue); U.S. SS Br. at 12-13, and cases cited therein.

More fundamentally, such a negligence theory is not actionable under the TVPA, as that statute's definition of torture includes an explicit intent requirement. 28 U.S.C. § 1350 note (defining torture in part as "any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering . . . whether physical or mental, is intentionally inflicted on that individual for such purposes").[5] Similarly, as a matter of substantive due process, the allegation that

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[5] This intent requirement inheres regardless of whether there is "aiding and abetting" liability under the TVPA. Pl. SS Br. at 22-23. Even if such secondary liability exists, Defendants still must have intended to aid and abet the alleged harm. See, e.g., Cabello v. Fernandez-Larios, __ F.3d __, 2005 WL 580533, **9 (11th Cir. Mar. 14, 2005)(per curiam)(noting for purposes of TVPA liability that evidence was "sufficient to show that [defendant] joined the conspiracy with knowledge of the conspiracy's plan and with the intent of helping to accomplish those goals"); Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 93 (D.C. Cir. 2002)(holding that "torture" under TVPA "requires acts both intentional and malicious"); see also Auguste v. Ridge, 395 F.3d 123, 128 (3d Cir. 2005)(holding for CAT purposes that "torture" "must be inflicted with the specific intent to cause severe physical or mental pain and suffering" and concluding that alien's claim "that he will be indefinitely detained upon his arrival in Haiti in prisons that are notorious for their brutal and deplorable conditions" was insufficient to satisfy that standard).

Defendants "ought reasonably to have known" of a particular risk is insufficient to state a claim,[6] and certainly it cannot state a prima facie case that Defendants' conduct "shocks the conscience." See U.S. MTD Reply at 15-17. Under Plaintiff's novel approach, the United States could never remove an alien to Syria who claimed, however unpersuasively, that he would be tortured, nor indeed to any country identified as condoning or participating in torture. Even if Plaintiff had a constitutional right that he could assert in this context (as opposed to any statutory rights he may have under the Foreign Affairs Reform and Restructuring Act), that is simply not the law.[7]

Plaintiff maintains further that the information regarding his al Qaeda membership need not be divulged in order to litigate this case because he does not challenge the removal order that resulted from the finding of al Qaeda membership. Pl. SS Br. at 21. There were three operative decisions, however, over which the United States asserted the state secrets privilege: (1) Plaintiff's inadmissibility finding and resulting removal; (2) the rejection of his designation of Canada as the country to which he wished

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[6] See, e.g., Daniels v. Williams, 474 U.S. 327, 328, 333 (1986)(holding that "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property" and that due process protections are not "triggered by lack of due care"); Davidson v. Cannon, 474 U.S. 344, 348 (1986)("the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials").

[7] See, e.g., Auguste, 395 F.3d at 129 (denying alien's CAT claim and request for withholding of removal despite "State Department reports on conditions in Haiti in 2001 and 2002 [that] discussed police mistreatment of prisoners and noted that there were isolated allegations of torture by electric shock, as well as instances in which inmates were burned with cigarettes, choked, or were severely boxed on the ears, causing ear damage"); Rashiah v. Ashcroft, 388 F.3d 1126, 1133 (7th Cir. 2004) (State Department "country report that describes instances of torture unrelated to the applicant does not provide a basis for withholding removal without evidence that the applicant himself will be targeted"); see also Hamid v. Ashcroft, 121 Fed.Appx. 158, 160, 2005 WL 272918, **2 (7th Cir. Jan. 31, 2005)(unpublished)(dismissing alien's challenge to removal to Syria and noting that, while the immigration judge found, "based on the 2002 Syria Country Report, that torture continued to be used in Syria," the judge also found "that the Report did not indicate that the use of torture was widespread").

to be removed; and (3) the selection of Syria as the removal country. U.S. SS Br. at 2, Ex. 1 ¶ 5, Ex. 2 ¶ 4. Plaintiff does not argue that his al Qaeda membership was irrelevant to the decision to reject his designation of country, nor could he credibly do so. Nor does he have any basis to claim that the evidence of al Qaeda membership is the sole material over which the United States asserted privilege.

Plaintiff's contention that the reasons for Defendants' actions are irrelevant because "the qualified immunity defense does not rely on the reasons Defendants acted as they did" so long as their acts are "objectively reasonable," Pl. SS Br. at 25, is similarly unpersuasive. While it is axiomatic that the qualified immunity standard is generally objective, it is equally clear that the inquiry is "fact-specific." Anderson v. Creighton, 483 U.S. 635, 640-41 (1987)(for immunity purposes, the alleged right must be clearly established in "a more particularized, and hence more relevant, sense"); Saucier v. Katz, 533 U.S. 194, 201 (2001)(the "clearly established" inquiry, "it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition"). In other words, among the "objective" facts a court must consider are those known to the defendant at the time of the challenged actions. Because evidence of the information available to Defendants is relevant to whether they acted in an objectively reasonable manner in "the circumstances with which [they were] confronted," Anderson, 483 U.S. at 640, as well as to whether their actions were lawful in the first place, the "objective" nature of qualified immunity does not reduce the relevance of the privileged material.

Plaintiff also tries to avoid the state secrets privilege by recasting his due-process claims as based on a "deliberate indifference" theory under Farmer v. Brennan, 511 U.S. 825 (1994). Pl. SS Br. at 24-25. Plaintiff did not cite Farmer in his opposition to the Rule 12 motions, and the United States in no way concedes that the existence of the State Department reports converted Defendants' objectively

reasonable immigration decisions into "deliberately indifferent" conduct within the meaning of Farmer, or that deliberate indifference would rise to the level of a substantive due-process violation in this context. In any event, however, Plaintiff's new theory does not help him, because a deliberate-indifference claim, no less than a "shocks the conscience" claim, requires proof of subjective knowledge and intent. In Farmer, the Court explicitly rejected the "invitation to adopt an objective test for deliberate indifference." 511 U.S. at 837 (no liability for deliberate indifference "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference"); see Phelps v. Kapnolas, 308 F.3d 180, 185 (2d Cir. 2002)(under Farmer, plaintiff "may prevail only where he proves both an objective element--that the prison officials' transgression was sufficiently serious--and a subjective element--that the officials acted, or omitted to act, with a sufficiently culpable state of mind")(citations and internal quotation marks omitted).

In short, under all of Plaintiff's shifting theories--the conspiracy and ill-motive theory of his complaint, the "shocks the conscience" theory of his opposition to the Rule 12 motions, or the "deliberate indifference" and negligence theories he now advances--the classified information known to Defendants and on which the challenged decisions were based is central to Counts I-III. The gist of the matter is that Plaintiff cannot pierce the objective authority for Defendants' conduct and simultaneously maintain that their knowledge and intent are irrelevant. If Defendants' conduct truly should be considered in a wholly objective manner such that what they knew and intended is irrelevant, then Plaintiff cannot state a claim for the objectively authorized immigration decisions that led to his removal to his native Syria, the country favored by statute once his designation of Canada was rejected. See

U.S. SS Br. at 14 n.7 (citing statutory authority for each immigration decision at issue). On the other hand, if--as pled in the complaint--Defendants' acts should be adjudicated based on their knowledge and intent regarding Plaintiff and his likely treatment in Syria, then Plaintiff cannot establish a prima facie case on Counts I-III, and Defendants cannot explain the reasons for their actions, without reference to the classified information over which the United States has asserted the state secrets privilege.

2. None of the exhibits proffered by Plaintiff overrides the United States' privilege assertion.

Plaintiff urges that, because there are many publicly available documents and much public discussion concerning his removal to Syria, the United States' privilege assertion should be rejected. Pl. SS. Br. at 5, 19-20. The mere fact that certain material may be "public" does not diminish the need to protect other information that is not. See Halkin v. Helms, 690 F.2d 977, 994 (D.C. Cir. 1982) (Halkin II)(upholding dismissal on state secrets grounds and rejecting "the theory that 'because some information about the project ostensibly is now in the public domain, nothing about the project . . . can properly remain classified' or otherwise privileged from disclosure")(citations omitted). This is especially true where "the information that is being withheld is not identical to the information in the public domain," or is "far more detailed and its release could provide a composite picture, or at least additional information, that would be harmful to national security." Edmonds v. U.S. Dep't of Justice, 323 F.Supp.2d 65, 76-77 (D.D.C. 2004)("the fact that information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods, and operations")(citations and internal quotation marks omitted), appeal docketed, No. 04-5286 (D.C. Cir. Aug. 8, 2004). In any event, the compendium of exhibits Plaintiff has amassed does not alter the clear application of the state secrets privilege.

Much of the material Plaintiff identifies does not come from, and has not been confirmed by, the United States. This includes press and law review articles, and letters and reports of advocacy organizations that, to the extent they offer any "facts," are not specific to Plaintiff, are unsourced, or reveal only the most general information. See Sohn Dec., Exs. 12, 23, 24-36, 38, 39, 40, 43. Information such as this is not official and may not be accurate, and Plaintiff acknowledges as much, maintaining that the publicly available information contained in his exhibits is not "submitted for its veracity, but rather to show that the issues involved are being discussed and investigated publicly, albeit not by the U.S. Government in front of this Court." Pl. SS Br. at 5 n.3. Such material does not defeat the state secrets privilege, either generally[8] or in this case.

Plaintiff makes much of the Commission of Inquiry convened by the government of Canada to examine the actions of Canadian officials with respect to him. See Pl. SS Br. at 3 n.2, 20; Lahood Dec., Sohn Dec., Exs. 18-22. The government of Canada has maintained that certain material

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[8] See, e.g., Edmonds, 323 F.Supp.2d at 77 ("since the statements in the press were made by anonymous sources, even documents containing identical information may properly be withheld because release would amount to official confirmation or acknowledgment of their accuracy")(citations and internal quotation marks omitted); Maxwell v. First Nat'l Bank of Md., 143 F.R.D. 590, 597 (D. Md. 1992)(rejecting claim that "published articles speculating on a relationship between the CIA and ATC constitute public disclosure so as to bar the assertion of the state secrets privilege"), aff'd, 998 F.2d 1009 (4th Cir. 1993)(Table); cf. Hudson River Sloop Clearwater, Inc. v. Department of the Navy, 891 F.2d 414, 421 (2d Cir. 1989)(rejecting claim that public statements of a retired Rear Admiral were "an official disclosure of information since he is no longer an active naval officer"); Afshar v. Department of State, 702 F.2d 1125, 1130-31 (D.C. Cir. 1983)(holding, in the FOIA context, that, "even if a fact--such as the existence of such a liaison--is the subject of widespread media and public speculation, its official acknowledgment by an authoritative source might well be new information that could cause damage to the national security. Unofficial leaks and public surmise can often be ignored by foreign governments that might perceive themselves to be harmed by disclosure of their cooperation with the CIA, but official acknowledgment may force a government to retaliate.").

submitted to the Commission is classified and may not be disclosed, and the documents Plaintiff offers are heavily redacted. See, e.g., Exs. 20-22. Plaintiff claims that his Canadian counsel has certain non-public documents, LaHood Dec., ¶¶ 7-8, and that it is "highly likely" that "non-privileged evidence" will be revealed by the Commission in the future. Pl. SS Br. at 5.[9] The speculative nature of this representation aside, the hypothesis that such future release may occur in no way diminishes the United States' assertion of privilege over the United States' classified information. Not only is such information not in the public domain, the United States has declined the Commission's request to provide documents, to provide statements by individuals involved in Plaintiff's removal, or to facilitate witnesses appearing before it. See Ex. A (Letter from William H. Taft, IV, Legal Adviser, State Department to the Lead Commission Counsel, Canadian Commission of Inquiry)(attached).

Finally, what little U.S. government material Plaintiff does submit is peripheral, both to the issues in this case and to the information over which the United States has asserted privilege. He claims, for instance, that the existence of State Department reports regarding Syria is relevant to

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[9] Plaintiff claims his Canadian counsel has documents that were provided to the Commission by Canada's Department of Foreign Affairs and International Trade and that contain communications between that agency and unidentified U.S. officials that may be made public. LaHood Dec., ¶ 7. There is no claim, however, that this information is relevant to Counts I-III of the complaint, or that Plaintiff has, or even expects to secure, access to the classified, non-public information of other Canadian agencies such as the Royal Canadian Mounted Police or the Canadian Security Intelligence Service. Even assuming the Commission sought to make that information public, the Canada Evidence Act, R.C.S. 1985, c. C-5, permits Canada's Attorney General to object to its disclosure on the ground that it "could injure international relations or national defense or national security," and to seek a court order preventing disclosure. Ultimately, even if the court orders disclosure, the Attorney General may prohibit such disclosure to protect national defense and security or relations with foreign entities including the United States. Id. §§ 38, et seq.; see LaHood Dec., Ex. A (Terms of Reference, Arar Commission of Inquiry, § m (provisions of Canada Evidence Act apply)).

whether Defendants knew or reasonably ought to have known that he was likely to be tortured. Some of the reports Plaintiff includes, however, were issued well after the alleged actions of Defendants herein, and indeed after the date he alleges he was released by Syrian officials. Sohn Dec., Exs. 2-4. Similarly, the DOJ, Office of Inspector General's report on conditions of detainees at the Metropolitan Detention Center, id. Ex. 13, did not address the time period of Plaintiff's detention, and in any event could only conceivably have any bearing on Count IV, as to which the United States has not asserted privilege. Other information is not specific to Plaintiff and is not remotely related to the information over which the United States has asserted privilege.[10] Even the governmentally sourced documents that mention Plaintiff discuss only the most general of facts, and to the extent they are even relevant to this case, contain statements such as "[w]e have no information that Mr. Arar has been tortured or mistreated." Id. Ex. 5 (unsigned, undated draft of letter from the Deputy Assistant Secretary of State, Bureau of Near Eastern Affairs); see also id. Exs. 6-11, 15-16, 37, 41, 42. It is patently clear from the classified declarations submitted in support of the United States' assertion of state secrets privilege that none of the public-record material that Plaintiff offers divulges the protected information.

3. The United States has narrowly tailored its privilege assertion to only those claims that cannot be litigated without disclosure of classified information, and neither a protective order nor security clearances for counsel nor in camera proceedings in which Plaintiff participates would resolve the national security concerns that prompted that assertion.

Underlying Plaintiff's opposition is the suggestion that the United States failed to carefully

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[10] See, e.g., Sohn Dec., Ex. 14 (White House press release with President Bush's remarks on a variety of subjects including the "open[ness]" of the United States); Ex. 17 (transcript of confirmation hearing of Attorney General Gonzales); Ex. 44 (remarks by President Bush noting generally that Syrian dictators have left "a legacy of torture, oppression, misery, and ruin")

consider the material necessary to litigate each count in the complaint in this case or tailor its assertion accordingly. In fact, concern over the breadth of any privilege assertion is precisely why the United States did not assert a blanket claim of privilege as to all Plaintiff's claims. Privilege was not asserted as to Plaintiff's domestic conditions of confinement claim in Count IV, although the United States agrees with the individual Defendants that there may be information protected by the privilege that could surface with broad-ranging discovery on that claim. However, it appears possible at this juncture that, with respect to Count IV, discovery could be tailored in a way to protect privileged information from disclosure without defeating Plaintiff's ability to prove that claim or Defendants' ability to defend against it. The same is simply not true with respect to Counts I, II, and III, where the classified information is not severable from--and indeed is--the very matter over which Plaintiff seeks to litigate.

Plaintiff dismisses the national security implications of those claims, asserting that "various means are available to protect state secrets throughout the litigation process, including protective orders, security clearances for Mr. Arar's counsel, and in camera proceedings for the consideration of assertedly privileged documents." Pl. SS Br. at 17. Executive Order ("E.O.") 13292 "prescribes a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism." E.O. 13292, 68 Fed. Reg. 15315, 15315 (2003). Under its terms, a "person may have access to classified information" if "(1) a favorable determination of eligibility for access has been made by an agency head or . . . designee; (2) the person has signed an approved nondisclosure agreement; and (3) the person has a need-to-know the information." Id. at § 4.1(a), 68 Fed. Reg at 15324. "Need-to-know," in turn, means that the holder of the classified information has determined "that a prospective recipient requires access to

specific classified information in order to perform or assist in a lawful and authorized governmental function." Id. at § 6.1(z), 68 Fed. Reg. at 15332. With or without a clearance, neither Plaintiff nor his counsel would have the required need-to-know any classified information based simply on their desire to pursue a tort action. If the law were otherwise, anyone could obtain access to classified information simply by filing a civil action and claiming that the information is necessary to litigate the case.[11]

In a tort suit like this one, courts do not consider in camera proceedings or the provision of security clearances to counsel to be satisfactory to address national security concerns where the state secrets privilege is asserted. In fact, "[i]t is well settled that a trial judge called upon to assess the legitimacy of a state secrets claim should not permit the requester's counsel to participate in an in camera examination of putatively privileged material." Ellsberg v. Mitchell, 709 F.2d 51, 61 (D.C. Cir. 1983)(emphasis added). As the Ellsberg court explained,

> [t]he rationale for this rule is that our nation's security is too important to be entrusted to the good faith and circumspection of a litigant's lawyer (whose sense of obligation to his client is likely to strain his fidelity to his pledge of secrecy) or to the coercive power of a protective order.

Id.[12] "It is not to slight judges, lawyers or anyone else to suggest that any such disclosure carries with it

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[11] It would be especially inappropriate to provide such access here, given the unchallenged finding that Plaintiff, a foreign national, is a member of al Qaeda. See 28 C.F.R. § 17.41(b)("Eligibility shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States and any doubt shall be resolved in favor of the national security.").

[12] Plaintiff argues that, because the United States may make certain information available to habeas counsel for Guantanamo detainees, it should make certain other information available here. Pl. SS Br. at 18. The assessment of the national security implications of the disclosure of classified information, however, is necessarily made on a case-by-case basis, and that assessment "belongs to the Government." Reynolds, 345 U.S. at 7. That the United States may provide certain information in criminal cases or in certain unique habeas cases where it has not asserted the state secrets privilege

serious risk that highly sensitive information may be compromised." Id. at 57 n.31.[13] Only by recognizing the United States' privilege assertion and dismissing Counts I-III will the threat to national security, intelligence-gathering capabilities, and diplomatic relations posed by disclosure of classified information in this matter be avoided.

B. Plaintiff's claim that the United States has not properly invoked the state secrets privilege is without merit.

Proper invocation of the state secrets privilege requires that three criteria be met. The privilege must be: (1) formally invoked; (2) by the head of the agency with control over the matter; (3) after personal consideration. U.S. SS Br. at 4, 7-9. As the declarants asserting the privilege attest, those requirements have been met here. See Notice of Filing asserting the state secrets privilege, Ex. 1 at ¶¶ 2, 8, and Ex. 2 at ¶ 8 (formal invocation); Ex. 1 at ¶ 1, and Ex. 2 at ¶ 1 (agency head); Ex. 1 at ¶¶ 2, 5, and Ex. 2 at ¶ 4 (personal consideration).

Plaintiff contends that the privilege assertion in this case was "insufficiently detailed." Pl. SS Br. at 28. Plaintiff, of course, has seen only part of the picture--that found in the public-record

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does not mean that the United States must do so in this private tort suit where it has asserted the state secrets privilege.

[13] Accord In re Under Seal, 945 F.2d 1285, 1288 (4th Cir. 1991)(rejecting contention that protective order "would permit [plaintiffs] to develop the factual basis for their action without violating the government's privilege not to reveal sensitive, classified information and protect the national security interests"); Kasza, 133 F.3d at 1170 ("No protective procedure can salvage [plaintiff's] suit."); Halkin v. Helms, 598 F.2d 1, 7 (D.C. Cir. 1979)("Protective orders cannot prevent inadvertent disclosure nor reduce the damage to the security of the nation which may result. Therefore we reject the plaintiffs' argument that counsel should have been permitted to participate in the in camera proceedings below."); Siglar v. LeVan, 485 F. Supp. 185, 194 (D. Md. 1980)("potential risks of inadvertent disclosure and ensuing damage to our national security outweigh the benefits to be gained if plaintiffs' counsel are permitted to examine the secret materials and contest the applicability of the state secrets privilege").

declarations. Those declarations relied on ex parte, classified declarations, which, as the declarants explained, Ex. 1 at ¶ 7, Ex. 2 at ¶ 6, were necessary so as not to "forc[e] a disclosure of the very thing the privilege is designed to protect." Reynolds, 345 U.S. at 8. "Elaborating the basis for the claim of privilege through in camera submissions is unexceptionable." Kasza, 133 F.3d at 1169 (citing cases). In fact, the Court is not obligated to review the underlying classified material at all. U.S. SS Br. at 7-8 n.3 and cases cited therein; see also Trulock v. Lee, 66 Fed.Appx. 472, 477-78, 2003 WL 21267827, **5 (4th Cir. June 3, 2003)(affirming district court's decision not to conduct extensive in camera proceedings to probe assertion of state secrets privilege, and observing that "knowing the particular contents of specific documents would not have assisted the court's decision"). Plaintiff's specificity objections are groundless.[14]

The declarant asserting the state secrets privilege need not, as Plaintiff suggests, conduct an "item-by-item review of documents subject to the state secrets privilege." Pl. SS. Br. at 30. Rather, it is sufficient that he "personally considered the type of evidence necessary to [the] claim." Bareford v. General Dynamics Corp., 973 F.2d 1138, 1142 (5th Cir. 1992); see Molerio v. F.B.I., 749 F.2d 815, 821 (D.C. Cir. 1984)(where "the whole object of the suit and of the discovery is to establish a fact that is a state secret," Acting Attorney General did not need to examine individual documents to satisfy the "personal consideration" criterion); Maxwell, 143 F.R.D. at 598 ("Although Director Webster may not have personally read every document, his affidavit is sufficient to convince this Court that he has

[14] Plaintiff complains that the United States did not file a statement of material facts under Fed. R. Civ. P. 56. Pl. SS Br. at 30-31. He points to no state secrets case supporting such a requirement, and such a statement could not have been filed here without revealing protected information.

assessed the necessity of asserting the [state secrets] privilege in consultation with other agency officials who are closely involved with . . . this case."). Consonant with the "personal consideration" requirement, the cabinet official asserting the privilege may rely on other officials' classified declarations. See Edmonds, 323 F.Supp.2d at 74-75 (Attorney General's reliance on classified declaration of FBI Deputy Director "satisfied the 'personal consideration' requirement of Reynolds"); Jabara v. Kelley, 75 F.R.D. 475, 487 (E.D. Mich. 1977)("The fact that these 'matters' [over which privilege was asserted] have been submitted to the Court in the in camera affidavit of another governmental official does not mean that [Attorney General] Saxbe had not personally considered the allegedly privileged material."). In light of the public-record and classified declarations, the United States has more than met the prerequisites necessary to properly invoke the privilege.

C. When properly invoked, the state secrets privilege is absolute, including in cases alleging constitutional violations.

According to Plaintiff, sustaining the assertion of the state secrets privilege here would raise "serious constitutional questions" because it would deny him a forum in which to pursue constitutional claims. Pl. SS Br. at 31. It is important, first, to put Plaintiff's contention in perspective. To leap from the proposition that non-resident aliens may have some constitutional protection against gross physical abuse while on United States soil, see U.S. MTD Br. at 23, to the conclusion that the constitutional rights of such aliens, including those belonging to terrorist organizations, extend to obtaining access to national security information in support of private tort actions, stretches reason to the breaking point.

Even U.S. citizens enjoy no such constitutional right. The practical effect of many common-law privileges and immunities is to deny individual plaintiffs a forum in which to raise constitutional claims.

See Nixon v. Fitzgerald, 457 U.S. 731, 754 n.37 (1982)(concluding that absolute immunity barred suit, recognizing "there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions," and stating "it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong"); cf. Cheney v. United States Dist. Court for Dist. of Columbia, 124 S. Ct. 2576, 2590 (2004)("The observation in Nixon that production of confidential information would not disrupt the functioning of the Executive Branch [in criminal cases] cannot be applied in a mechanistic fashion to civil litigation."). Indeed, there is nothing remarkable about the absence of a remedy under certain circumstances for alleged constitutional violations. See, e.g., Schweiker v. Chilicky, 487 U.S. 412, 420, 428-29 (1988)(declining to create Bivens remedy for unconstitutional denial of Social Security benefits where special factors counseled hesitation against recognizing implied right of action). And in the state secrets context in particular, Plaintiff's argument that the Court must balance his purported constitutional rights on the one hand against the interests of national security on the other is directly contrary to applicable precedent:

> [T]he critical feature of the inquiry in evaluating the claim of [state secrets] privilege is not a balancing of ultimate interests at stake in the litigation. That balance has already been struck. Rather, the determination is whether the showing of the harm that might reasonably seem to flow from disclosure is adequate in a given case to trigger the absolute right to withhold the information sought in that case.

Halkin II, 690 F.2d at 990; see also U.S. SS Br. at 5-6. Plaintiff's contention that, in some circumstances, the state secrets privilege is less than "absolute," Pl. SS. Br. at 32, has not one iota of support. Rather, the absolute nature of the state secrets privilege applies with full force to claims

alleging constitutional violations.[15]

CONCLUSION

Given the very nature of Plaintiff's claims, the litigation of Counts I, II, and III of this suit would necessitate the disclosure of classified information inimical to national security. For the foregoing reasons, and those stated in the United States' Memorandum in Support of its Assertion of the State Secrets Privilege, this Court should enter judgment dismissing those counts against all Defendants, in both their individual and official capacities.

Respectfully submitted,

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[15] See Black v. United States, 62 F.3d 1115 (8th Cir. 1995)(dismissing case, including Fourth Amendment claims, based on state secrets privilege); Molerio, 749 F.2d at 822 (affirming dismissal of First Amendment claims based on state secrets privilege); Kronisch v. United States, 1995 WL 303625, *8 (S.D.N.Y. May 18, 1995)(denying plaintiff's motion to compel, based on state secrets privilege, despite constitutional tort allegations "of a 'serious and malevolent nature'")(citations omitted).

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ATTORNEYS FOR THE UNITED STATES OF AMERICA
AND ALL OFFICIAL-CAPACITY DEFENDANTS

DATED: APRIL 4, 2005

EXHIBIT A

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

September 10, 2004

Mr. Paul Cavalluzzo
Lead Commission Counsel
Commission of Inquiry

Dear Mr. Cavalluzzo:

This letter is in response to your request of May 26, transmitted to the Department of State on June 15, 2004.

Mr. Arar's name was placed on a United States terrorist lookout list based on information received as part of an ongoing general sharing of information between the Governments of the United States and Canada. The RCMP was advised of Mr. Arar's detention through law enforcement channels and a Canadian consular official was granted access to Mr. Arar.

The United States did not seek the Government of Canada's approval or consent prior to removing Mr. Arar from the United States. This decision was made by U.S. government officials based on our own assessment of the security threat to the United States posed by Mr. Arar. We believe that Mr. Arar's removal was in the best interests of the United States. Questions regarding the role of Canadian officials in the imprisonment and treatment of Mr. Arar in Syria and his return to Canada should be directed to the appropriate Canadian authorities.

The United States Government declines to provide documents in response to your request, or to provide statements by individuals involved in this case, or to facilitate witnesses appearing before the commission. We would note that as your inquiries focus on the actions of Canadian authorities, many of these questions should best be directed to the Government of Canada, rather than to the United States Government.

Sincerely,

William H. Taft

William H. Taft, IV

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2005, true copies of the foregoing were served by first class mail, postage pre-paid, or by Federal Express, upon the following:

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