Nos. 06-17132 and 0617137

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TASH HEPTING, *et al.*,
Plaintiffs-Appellees,
v.
AT&T CORP., *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF AMICI CURIAE WILLIAM G. WEAVER AND ROBERT M. PALLITTO IN SUPPORT OF AFFIRMANCE

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INTEREST OF AMICI CURIAE

William G. Weaver is an Associate Professor in the Institute for Policy and Economic Development at the University of Texas at El Paso. Robert M. Pallitto is an Assistant Professor of Political Science at the University of Texas at El Paso. Professors Weaver and Pallitto's recently published legal scholarship includes a detailed study of the history and use of the state secrets privilege, *State Secrets and Executive Power*, 120 Pol. Sci. Quart. 85 (Spring 2005), a historical legal analysis of "extraordinary rendition," *'Extraordinary Rendition' and Presidential Fiat*, 36 Pres. Studies Quart. 102 (March 2006), and the book *Presidential Secrecy and the Law* (Johns Hopkins U.P., 2007). Both Professors Weaver and Pallitto served on a recent panel for the Constitution Project to frame reform guidelines for use and assertion of the state secrets privilege. Additionally, Professor Weaver has testified before congressional committees twice during the last fourteen months concerning aspects of current use of the state secrets privilege. Amici file this brief with consent of all parties to the case.

SUMMARY OF THE ARGUMENT

The state secrets privilege is an indispensable common law evidentiary rule adapted to United States law from the British law doctrine of Crown Privilege. But with the Constitution to contend with it is certainly not an American expression of royal prerogative. The privilege, barely fifty years old in the United States, was created as a narrow and admittedly draconian exception to normal evidentiary procedure. The scheme for assertion and use of the principle, first announced by the U.S. Supreme Court in *U.S. v. Reynolds*, 345 U.S. 1 (hereinafter "*Reynolds"*), makes it clear that the privilege is a pragmatic tool to prevent predictable and consequential damage to the national security. *Reynolds* is also clear that the privilege is not to operate as an extra-constitutional principle, a sort of legal kudzu, spreading to and choking the life out of any case it touches.

The *Amicus Curiae* brief of Professor Robert Chesney in the instant action in support of reversal is emblematic of an unfounded, almost mythologized, expansive view of the privilege's reach. But the case law, which we comprehensively analyze here, does not support such a view. The assertion of the privilege under the facts of the present case is *sui generis*; it is without precedent. The decision of the district court below, holding that application of the privilege is premature and inapt in the present posture of this case, is not only consonant with

the *Reynolds* ruling it is required under any reasonable analysis of *Reynolds* and its progeny.

ARGUMENT

I. ANTECEDENTS TO THE STATE SECRETS PRIVILEGE

A. English Antecedents.

Before the 17th Century there is no discussion in extant records concerning a royal prerogative to withhold information from courts, Parliament, and the public. The *Prerogativa Regis*, 17 Edw. II, Stat. 1 (1324), in its development over the centuries did not address or spawn discussion of a Crown power to refuse disclosure of information or documents. The absence of contention over this matter before the 17th Century most likely results from the fact that such a power was so a part of Crown prerogative as not to generate any controversy. But Charles I put this issue into debate after he ordered the detention of subjects who refused to loan the crown money to prosecute war.

In *Darnel's Case*, 3 How. St. Tr. 59 (1628), detainees of the crown sought relief in *habeas corpus cum causa*. The Crown asserted that courts could not acquire jurisdiction over the detainees since no cause for their detention had been identified; they were held "*per speciale mandatum Domini Regis*" (by special order of the King). The Attorney General claimed that the Crown could hold the detainees without answering to the courts because the reasons for detention were

secrets of state and constituted "*Arcana Imperii*." Raising what has become a much-echoed concern about such a ranging power, Sir Benjamin Rudyard reportedly declaimed at the time that secrets of state "in the latitude [they] had been used . . . had eaten out, not only the laws, but all the religion of Christendom." 7 *A Collection of State Trials and Proceedings Upon High Treason* 91 (London: C. Bathurst, 1766).

In the Petition of Right of 1628, Charles grudgingly accepted the claim that arrests and detentions without showing legal cause were beyond the Crown's power. This put into notice the limit of the King's power to withhold information from courts, but once the problem of disclosure of matters of state was separated from warrantless detention, English courts generally adopted a position of strong deference to Crown claims to withhold information.

In the *Trial of the Seven Bishops*, the court refused to require a witness to testify as to the events of a Privy Council meeting. 12 How. St. Tr. 183, 309-11 (1688). Similarly, in *Layer's Case*, counsel for a defendant charged with high treason lost in his effort to have minutes of a Council meeting read into the record in open court. 16 How. St. Tr. 94, 223-224 (1722). And in *Rex v. Watson* a public official was forbidden to testify as to the accuracy of a publicly purchased plan of the Tower of London. 32 How. St. Tr. 1, 389 (1817).

The apogee of deference to Crown withholding came in two cases. In *Beatson v. Skene*, Chief Baron Pollock, for a unanimous panel of Law Lords, found: "We are of opinion that, if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice." 5 H. & N. 838, 853 (1860). *Beatson* also held that the determination of the public interest is solely in the hands of public ministers. Id. And in *Duncan v. Cammel Laird*, [1942] A.C. 624, 641 (1942), the Law Lords reiterated the holding of *Beatson* and approvingly quoted Lord Parker's observation in *The Zamora*, [1916] 2 A.C. 77, 107 (1916), that "Those who are responsible for the national security must be the sole judges of what the national security requires."[1] But In the United States, before *Reynolds*, there is virtually no history with the state secrets privilege. W. Weaver and R. Pallitto, *State Secrets and Executive Power*, 120 Pol. Sci. Quart. 85 (Spring, 2005), 92-7. While there was little doubt before *Reynolds* that U.S. law would recognize such a privilege, the form and reach that the privilege would take was speculative.

B. The Trial of Aaron Burr

Unlike England, the United States had no Crown Privilege or public interest exception privilege, so that when *Reynolds* arose there was virtually no American

[1] Abdication of judicial power in the face of ministerial withholding of information based on the public interest was abandoned by the Law Lords in 1968, and the holdings in *Beatson* and *Duncan* on this matter have been overruled. *Conway v. Rimmer*, [1968] A.C. 910 (1968).

law to draw on. Federal courts decisions, Justice Department briefs, scholarly articles, and amicus briefs often point to the Aaron Burr trial of 1807 and the Supreme Court case of *Totten v. United States*, 92 U.S. 105 (1876) (hereinafter "*Totten*") as valid precedents for the state secrets privilege. A district court in 1977, for example, claimed that the privilege "can be traced as far back as Aaron Burr's trial in 1807." *Jabara v. Kelley*, 75 F.R.D. 475, 483 (D. Mich. 1977). In 1989, the D.C. Circuit said that although "the exact origins" of the state secrets privilege "are not certain," the privilege in the United States "has it initial roots in Aaron Burr's trial for treason." *In re U.S.*, 872 F.2d 472, 474-75 (D.C. Cir. 1989).

In the *Reynolds* case, the Justice Department's brief to the Supreme Court cited Burr's trial as an apt precedent. Brief for the United States, *United States v. Reynolds*, No. 21, U.S. Supreme Court, October Term, 1952, at 10-11. See also *Edmonds v. U.S. Dept. of Justice*, 323 F. Supp. 2d 65, 70 (D.D.C. 2004); Brief of Amicus Curiae Professor Robert M. Chesney in Support of Reversal, *Hepting v. AT&T Corp.*, Nos. 06-17132 and 06-17137 (9th Cir. March 16, 2007), at 5-6 (hereinafter "Chesney Brief").

But the Burr trial is simply not a state secrets case, either directly or as a matter of incipience. Although the trial *threatened* to involve a question concerning state secrets, the Jefferson administration ultimately not only did not withhold documents but Jefferson himself took a personal and active interest in

making sure that all pertinent documents would be made available to the court. 11 *The Writings of Thomas Jefferson* 241 (Thomas Jefferson Memorial Association of the United States, 1904). Justice John Marshall, writing in his capacity of eyre judge for the Circuit of Maryland, noted that on the matter of withholding for state secrets "it need only be said that the question does not occur at this time." *United States v. Burr*, 25 Fed. Cas. 30, 37 (D.C.D. Va. 1807). *See also* Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case* 212-20 (2006).

C. Totten v. United States

As for *Totten*, in *Reynolds* the Supreme Court cited several precedents for "the privilege against revealing military secrets, a privilege which is well established in the law of evidence." *Reynolds* at 6-7. The first cite is to *Totten*. Id. at n.11. Other federal court decisions, Justice Department briefs, scholarly articles, and amicus briefs also cite *Totten* as a legitimate precedent for the state secrets privilege. *See e.g. Edmonds v. U.S. Dept. of Justice*, 323 F. Supp. 2d 65, 71; Petition for a Writ of Certiorari, *Tenet v. Doe*, No. 03-1395, U.S. Supreme Court, April 6, 2004, at 17-18; Chesney Brief, at 6-7.

But *Totten* is not a basis for the state secrets privilege. The case involved a discrete category of unenforceable contracts. Nothing should be extracted from the law of this narrowly defined case to justify the application of its principles to the

entire field of military secrets, national security, and foreign affairs. If *Totten* had such a broad reach then it would have all but replaced the state secrets privilege, since it is a jurisdictional bar; when it applies it demands dismissal of the case on the pleadings.

In *Tenet v. Doe*, 544 U.S. 1 (2005), the United States Supreme Court, in overruling a holding of the 9th Circuit, found that *Totten* was a separate doctrine from the state secrets privilege, noting "*Reynolds* . . . cannot plausibly be read to have replaced the categorical *Totten* bar with the balancing of the state secrets evidentiary privilege in the distinct class of cases that depend upon clandestine spy relationships." Id. at 10. As the Court further found, the *Totten* bar has no application to the kind of tort claims action brought by the three widows in *Reynolds*, nor, as we explain below, does it have any application in the present case. Id. at 8-9.

The government claims that the Totten Bar requires dismissal of the present action. Brief for the United States, 17-19. The district court considered, and rejected, this claim. *Hepting v. At&T*, 439 F. Supp. 2d 974, 993 (N.D. Cal. 2006) (hereinafter "*Hepting*"). This rejection was not surprising considering that the Appellee is not in privity with the government, the whole world believes there is an intelligence relationship between AT&T and government, all available evidence points to such a relationship, the government itself admits to such relationships,

and AT&T freely acknowledges that when asked by the government to cooperate in intelligence operations it does so. To bar the present case under *Totten* based on a "secret" contractual relationship between the government and AT&T, is to pluck the Fourth Amendment from the Constitution on the basis of a trite formalism one would suspect had long been dead in the law.

In any event, the Totten Bar has no application to the present case. In analyzing state secrets cases for instances of *Totten*-based dismissals of cases where plaintiff parties are not in privity with the government, we find that there is only one case that meets this criterion. *Hudson River Sloop Clearwater, Inc. v. Navy*, 1989 U.S. Dist. LEXIS 19034 (E.D.N.Y. 1989). The trial court found that the Totten Bar "requires dismissal of the supplemental . . . claim." Id. at *4. The Second Circuit Court of Appeals upheld dismissal of the case, but reversed on the grounds for dismissal. *Totten, Hudson River Sloop Clearwater, Inc. v. Navy*, 891 F.2d 414, 423 (2nd Cir. 1989). The court held that although it "agree[d] with this result" (dismissal of the claim) it held that the case "need not be resolved on whether judicial proceedings would necessarily divulge classified information to the public." Id. Other than this orphaned district court case there is no case law to indicate that the Totten Bar is applicable against a plaintiff not in privity with the government.

II. THE PRAGMATISM OF THE *REYNOLDS* DECISION

Crown Privilege proved maladroit when introduced into United States law. First, claims in Crown Privilege were not differentiated as to their compelling natures or underlying facts. Judges approached claims concerning secrets of state the same as matters concerning confidentiality of informer identities, *Rex v Watson*, 32 How. St. Tr. 1, 389 (1817), allegedly defamatory reports generated by government officials, *Home v. Bentinck, 2 Brod. & B. 130* (1820), or any other basis for a claim of Crown Privilege. The standard that developed in English law, which was really not much of a standard at all, was whether or not the disclosure of the requested documents would be "prejudicial to the public interest." *See e.g. Duncan v. Cammel Laird* at 637-41.

But in *Reynolds*, in accordance with our system of divided government, the Court declared a *state secrets* privilege, and specifically refused the Justice Department's demand for a *public interest exception* privilege to withhold information from courts. *Reynolds*, at 6. Judges in the United States have a responsibility in determining the nature of the privileged material that English judges did not bear.

Second, in English law the privilege was a *principle* of government. As Viscount Simon wrote in *Duncan*, the case represented a "question . . . of high constitutional importance," at 629, and noted that "When the Crown . . . is a party

to a suit, it cannot be required to give discovery of documents at all. No special ground of objection is needed," at 632. Understanding of the state secrets privilege developed in *Reynolds*, by contrast, does not embrace a constitutional principle but is a pragmatic device that is only to operate when requested information if disclosed may reasonably be expected to cause damage to the national security. *Reynolds* at 10. These distinctions limit the operation of the privilege, emplace the courts as the final authority as to when the privilege is correctly asserted, and transform the constitutional, principle-based privilege of English law into the pragmatic, fact-driven privilege of American law.

The state secrets privilege shares only superficial similarities and spotty history with the doctrine of Crown Privilege. But the government attempts to elide these crucial distinctions by claiming a constitutional basis for the privilege, often alluding to, and sometimes simply declaring, that it protects the sphere of Article II powers held by the President.[2] *Reynolds* explicitly holds otherwise. As the Court noted, "We have had broad propositions pressed upon us for decision . . . [these] positions have constitutional overtones which we find it unnecessary to pass upon, there being a narrower ground for decision." Id. at 6. By denying the government's demand for a public interest exception and refusing to treat the matter as even implicating constitutional doctrine, the Court recognized the

[2] See, for example, *Hepting v. AT&T*, Nos. 06-17132 and 0617137, Brief for the United States (March 9, 2007), at 15 ("The state secrets privilege derives from the President's Article II powers to conduct foreign affairs and provide for the national defense").

substantial differences between Crown Privilege and what shape an American privilege for withholding state secrets must take.

The entire decision is a discussion of compromise, not principle. It is about the nuts and bolts of judicial action, not the reach of Article II powers. The Court refers repeatedly to "judicial experience," the practice and habits of judges in factually idiosyncratic settings of discovery. It speaks of "sound formula of compromise," Id. at 9, weighing plaintiff's need for the requested material when deciding on *in camera* review, and the pursuit of alternatives to allow the case to go forward in the face of a state secrets privilege claim. It is clear that the Court believed that when the privilege applied, the information affected has absolute protection, but all efforts must be made to allow the suit to go forward without such information.

The privilege is also consistently referred to in case law as a "common law doctrine," and *Reynolds* explicitly recognized the common law origins of the privilege. Id. at 7 and note 11. The fact that the privilege is a common law practice is important for two reasons. First, the genealogical link to Crown Privilege is thereby tacitly assumed, and second, the lack of constitutional foundation for the doctrine is acknowledged. Both of these points are frequently passed over too quickly in discussions of state secrets.

On the one hand, this results in a misreading of the *Reynolds* ruling that sees it as bootstrapping a powerful doctrine into American law so that it seems as if it has always been there. But it has not always been there: it is a modern doctrine in American law, driven by modern concerns arising mainly from the use of modern technology. In the United States the *idea* of a state secrets privilege has long been well established in legal scholarship, but before *Reynolds*, that idea was naked of legal scaffolding.

On the other hand, the link to Crown Privilege and the Justice Department's tendency to look past the pragmatic spirit of *Reynolds* has allowed the government to propagate the erroneous position that the privilege is central to Article II powers held by the President. But it takes no studied analysis to conclude that the *Reynolds* court did not accidentally, tacitly, or directly mean to eliminate operation of Constitutional rights of private citizens and corporations in national security cases. If that were the case, the executive branch could digest the Bill of Rights and avoid judicial accountability for its actions through calculated expansion of the term "national security" through over-classification of information, improper claims of privilege, and declaring all manner of matters as implicating security issues. Sidney Souers, the first director of the CIA, once defined "national security" as a "point of view rather than a distinct area of governmental responsibility," *Policy Formulation for National Security*, 43 Am. Pol. Sci. Rev.

534, 535 (June, 1949), but it has become only the executive branch's "point of view" and it is one that must be held to strict limitations imposed by law and the Constitution.

III. THE AMICUS CURIAE BRIEF OF PROFESSOR ROBERT M. CHESNEY: POST-*REYNOLDS* MYTHOLOGY

The tendency on the part of some to cut the privilege from its moorings is evident in the Chesney Brief urging reversal of the district court's ruling on the privilege in the instant case. This brief, similar to positions often taken by the government, mythologizes and expands the power of *Reynolds* beyond its pragmatic banks.

A. The Trial Court Correctly Applied Existing State Secrets Precedent. The Classificatory Scheme And Analysis For State Secrets Evidence Proposed By The Chesney Brief Is Unsupported By Law And Should Be Rejected.

The trial court carefully and correctly applied state secrets precedent, including the varieties of application of the privilege contained in the case law. However, the Chesney Brief would replace the court's analysis with a novel and arbitrary division of state secrets cases into "several categories based on the nature of the information to be protected." Chesney Brief at 8-9. This proposed division conflicts with precedent and introduces confusion, and it should therefore be rejected.

Professor Chesney suggests the following three classifications of state secrets-related evidence: "technical information of military significance," "the internal operation of intelligence agencies," and "information reflecting sources and methods of intelligence collection, including in particular the existence of relationships between private entities and the government." Id. At 9. The first and third of these categories, according to Professor Chesney, "are directly implicated by the *Hepting* plaintiffs' claims." Id. At 10. Applying the categories to this case, Professor Chesney drops the adjective "military," thus leaving only "protection of technical information." Id. Since there does not appear to be any "military" evidence involved in this case, it is understandable that one would want to drop the term here, but what is left is a category so broad as to be of little analytical use. It is difficult to see what would not fit under the category of "technical information," and of course no court has ever held that all technical information must be protected from disclosure, wholesale, on state secrets grounds.

There is much overlap between "technical information" and the other proffered category ("protection of sources and methods (including espionage relationships)") as well, and including "espionage relationships" in the "sources and methods" category of purportedly protected information risks confusing matters further.

Totten, which Professor Chesney cites as an example of "espionage relationships," is a distinct precedent, a bar to suit that applies separately and independently from the more detailed analysis required in state secrets cases generally. *Tenet v. Doe*, 544 U.S. 1, 9 (2005). Indeed, the trial court in this case treated it as such, carefully distinguishing *Totten*-type cases from this case by noting that unlike *Totten*, the plaintiffs in *Hepting v. AT&T* do not have a secret contractual relationship with the government. *Hepting* at 991.

Reliance on "sources and methods" as a category needing protection is also misplaced. That phrase is found in 50 U.S.C. § 403-1(i)(1), which states, "The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." This is a statutory category of course, and one which the trial court considered and specifically rejected as a basis for dismissing this case. *Hepting* at 998. Further, in this case, plaintiffs have repeatedly stated that they do not need to delve into "sources and methods" in order to prove their claims; they are concerned instead with the *fact* of unlawful interception and disclosure of their communications. *See, e.g.*, Plaintiffs' Complaint, Paragraphs 78-90. One case where inquiries into "means and methods" did, in fact, lead to dismissal, was *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006). That case was dismissed on state secrets grounds because, according to the court, "any admission or denial by defendants in this case would reveal the means and methods

employed pursuant to this clandestine program and such a revelation would present a grave risk to national security." Id. at 537. But the trial court here distinguished the "means and methods" inquiry in *El-Masri* from the *Hepting* plaintiffs' claims by stating:

> In El-Masri, only limited sketches of the alleged program had been disclosed and the whole object of the suit was to reveal classified details regarding 'the means and methods the foreign intelligence services of this and other countries used to carry out the program'." *El-Masri v. Tenet*, 2006 U.S. Dist. LEXIS 34577 (2006). By contrast, this case focuses only on whether AT&T intercepted and disclosed communications or communication records to the government. And as described above, significant amounts of information about the government's monitoring of communication content and AT&T's intelligence relationship with the government are already non-classified or in the public record. *Hepting* at 994.

Thus, the trial court in the instant case properly distinguished *El-Masri* by showing that proving the "means and methods" of extraordinary rendition was the "whole object of the suit" in that case. *Hepting* at 994.

An additional problem with the state secrets classificatory scheme proposed by Professor Chesney is that it assumes, prematurely, what the evidence in this case will be, based on the declarations of intelligence officials and the statements made by counsel for the government. To accept declarations by interested parties in the place of substantive evidence would run counter to the requirement in *Reynolds* that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." At 9-10. Consistent with *Reynolds*, the trial

court states in its opinion that "it would be premature to conclude that the privilege will bar evidence necessary for plaintiffs' prima facie case or AT&T's defense." *Hepting* at 994.

It is important to note that the court's decision to permit this litigation to continue, rather than dismissing it on the pleadings, falls squarely in line with the post-*Reynolds* precedent as well as with *Reynolds* itself. The court notes that it "is following the approach of the courts in *Halkin v Helms* and *Ellsberg v Mitchell*; these courts did not dismiss those cases at the outset but allowed them to proceed to discovery sufficiently to assess the state secrets privilege in light of the facts. The government has not shown why that should not be the course of this litigation." Id.

In sum, the analysis proposed by the Chesney Brief misstates existing precedent and conflates distinct legal doctrines. There is no reason to replace or supplement the trial court's analysis of state secrets precedent with professor Chesney's analyses.

B. The Table of Cases Supplied In the Addendum to the Chesney Brief is Flawed by Selection Bias.

The Addendum to the Chesney Brief includes a problematic table of cases purporting to be "Published Opinions Adjudicating Assertions of the State Secrets Privilege after Reynolds, 1954-2006." Addendum Appendix 1.

Four of the ten cases included in the table before 1975 are not state secrets cases at all. *United States v. Ahmad*, 499 F. 2d 851 (3rd Cir. 1974); *Black v. Sheraton*, 371 F. Supp. 97 (D.D.C. 1974); *Elson v. Bowen*, 83 Nev. 515 (1967); *Petrowicz v. Holland*, 142 F. Supp. 369 (E.D. Pa. 1956). In none of those four cases did the government assert the privilege or apparently even bring up the privilege, and it can hardly be said that the courts involved "adjudicated" any matter concerning the privilege. This apparent substantial selection bias would on its own seriously compromise the value of the table, but this bias is also double-edged: later cases that discuss *Reynolds* or the state secrets privilege in a similar manner as in the erroneously included cases are omitted from the table.[3] In other words, without explanation, Professor Chesney excludes post-1975 cases similar to those that he included pre-1975.

The inclusion of four non-state secrets cases prior to 1975, a time when such cases were extremely rare, misleadingly gives the impression of continuity in use of the privilege. Further, because of the general categories embraced by the table presented by Professor Chesney, it is difficult to tell what value the table is to illuminate anything about the particular facts of the present case.

[3] See, e.g. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 389 (2004); *United States v. Zolin* 491 U.S. 554, 570-71 (1989); *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995); *Exxon Shipping Co. v. United States Dep't of Interior*, 34 F.3d 774, 778 (9th Cir. 1994).

IV. *REYNOLDS* AND ITS PROGENYNOT ONLY PERMIT, BUT REQUIRE THE HOLDING OF THE DISTRICT COURT BELOW

Table Demonstrating the Unique, Unprecedented Request of the Government Compared to the Universe of Reported State Secrets Cases

All Cases[4]

Cases Heard on Appeal	District Court Cases
Halpern v. U.S.	*China v. Nat. Union*
Hobson v. Wilson	*Heine v. Raus*
Halkin v. Helms	*Pan Am v. Aetna*
ACLU v. Brown	*Kinoy v. Mitchell*
Clift v. U.S.	*Spock v. U.S.*
Farn. Can. v. Grimes	*Jabara v. Kelley*
U.S. v. The Irish	*U.S. v. Felt*
Salisbury v. U.S.	*Alliance v. DiLeonardi*
Gandera, S.A. v. Block	*U.S. v. Felt*
Ellsberg v. Mitchell	*Sigler v. LeVan*
Northrop v. McD. Doug.	*Zenith v. U.S*
Molerio v. FBI	*Nat'l Law. Gld. v. Att. G.*
Fitzgerald v. Penthouse	*Ceramica, S.A. v. U.S.*
Guong v. U.S.	*Republic Steel v. U.S.*
Weston v. Lockheed	*AT&T v. U.S.*
In re U.S.	*U.S. Steel v. U.S.*
Zucker. v. Gen. Dyn	*Star-Kist, Inc. v. U.S.*
Hudson River v. Navy	*In re Agent Orange*
Wilkinson v. FBI	*Foster v. U.S.*
In re Under Seal	*Xerox v. U.S.*
Bowles v. U.S.	*Patterson v. U.S.*
Maxwell v. FNB	*Nejad v. U.S.*
Bareford v. Gen. Dyn.	*N.S.N. v. DuPont*
In re U.S.	*Clift v. U.S.*
Black v. U.S.	*Hyundai v. U.S.*
Monarch, P.L.C. v. U.S.	*U.S. v. Koreh*
Kasza v. Browner	*Bentzlin v. Hughes Co.*
U.S. v. Klimavicius-Vil.	*In re Smyth*
Crater v. Lucent	*McD. Douglas v. U.S.*
DTM Research v. U.S.	*Kronisch v. U.S.*
Doe v. Tenet	*Yang v. Reno*
Trulock v. Wen Ho Lee	*Frost v. Perry*
Darby v. U.S	*Linder v. Calero*
Tenenbaum v. Simonini	*Tilden v. Tenet*
Schwartz v. Raytheon	*Barlow v. U.S.*
El-Masri v. Tenet	*Virtual, Inc. v Moldova*
Sterling v. Tenet	*U.S. v. TRW*
	Horn v. Huddle
	Burnett v. Al Baraka
	Edmonds v. DOJ
	Arar v. Ashcroft
	Doe v. CIA

Cases remaining after eliminating those that allowed discovery.[5]	Cases remaining after eliminating those that would necessarily reveal identities of secret government agents or expose secret inner workings of intelligence agencies.	Cases remaining after eliminating those that would reveal the details of weapons or warfare systems.	Cases dismissed where there is a congressional command (such as 50 U.S.C. 1806(f)) to modify state secrets procedures.
Farn. Can. v. Grimes-a *Salisbury v. U.S.-a* *Foster v. U.S.* *Guong v. U.S.-a* *Weston v. Lockheed-a* *Nejad v. U.S.* *Zucker. v. Gen. Dyn.-a* *Bowles v. U.S.-a* *Maxwell v. FNB-a* *Clift v. U.S.-a* *Bareford v. Gen. Dyn.-a* *Bentzlin v. Hughes* *Black v. U.S.-a* *Tilden v. Tenet* *Trulock v. Lee-a* *Edmonds v. DOJ* *Sterling v. Tenet-a* *El-Masri v. Tenet-a* *Doe v. CIA*	*Farn. Can. v. Grimes-a* *Foster v. U.S.* *Weston v. Lockheed-a* *Nejad v. U.S.* *Zucker. v. Gen. Dyn.-a* *Clift v. U.S.-a* *Bareford v. Gen. Dyn-a.* *Bentzlin v. Hughes*	**NONE**	**NONE**

[4] Cases consolidated under *In re NSA Telecoms. Records Litig.*, 444 F.Supp 2d 1332 (J.P.M.L. 2006) are not included in the table.

[5] "-a" following a case means it was heard on appeal.

The preceding chart shows the uniqueness of the appellants' position in this case. The trial court's ruling falls squarely within existing precedent, and the appellants' request for reversal of that ruling urges a result that would be without precedent in state secrets jurisprudence. The chart lists in Cell 1 all state secrets cases that resulted in published opinions. From that universe of cases, Cell 2 eliminates all cases that allowed some amount of discovery. Those remaining in Cell 2 – a much smaller group than the original universe of all state secrets cases – were dismissed at the pleadings stage, as appellants ask the court to do here. But that group is further reduced in Cell 3 by removing the cases that would reveal secret agents' identities or intelligence agencies' inner workings. The trial court in this case correctly concluded that identities and inner workings of the NSA would not necessarily be revealed through litigation of plaintiffs' claims. Thus, the eliminated cases are distinguishable from this case and cannot serve as precedent for dismissal here.

Cells 4 and 5 are empty. There are no state secrets cases left once weapons systems cases are eliminated. Of the narrowed group of cases remaining in Cell 3, courts found that the cases could not be litigated without revealing secret details of weapons or warfare systems. This concern is not present in the instant appeal, and

therefore the weapons systems cases are distinguishable and unavailable to appellants as precedent.

Cell 5 shows, further, that there has never been a case dismissed at the pleadings stage where Congress commanded a modified use of the state secrets privilege, such as that required by 50 U.S.C. 1806(f) of the Foreign Intelligence Surveillance Act.

CONCLUSION

In sum, the government is asking this court to decide this case counter to state secrets precedent, the teaching of *Reynolds*, and in contravention of an explicit congressional preemption of the normal state secrets process. In short, dismissal of this case at the pleading stage would be an extraordinary departure from accepted practices of judicial decision making, since it would be: (1) contrary to clear precedent; (2) based solely on the unverified self-serving claims of the government; (3) in the face of strong evidence of massive constitutional violations by the government; (4) in violation of a statute pre-empting normal operation of the state secrets privilege. This court ought not entertain such a result.

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NOS. 06-17132 AND 06-17147

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 5,256 words.

Dated:

_____

Jean-Paul Jassy

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original and fifteen (15) copies of the foregoing Brief of Amici Curiae of Professors William G. Weaver and Robert M. Pallitto in Support of Affirmance were this day filed with the Clerk of the United States Court of Appeals for the Ninth Circuit by Federal Express next-day delivery service. I also certify that two (2) copies of the foregoing Brief of Amici Curiae of Professors William G. Weaver and Robert M. Pallitto in Support of Affirmance were this day served by first-class United States mail upon the following:

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