Legal Backgrounder

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EL-MASRI v. USA: CONSTITUTIONAL FOUNDATION OF STATE SECRETS DOCTRINE UPHELD

by

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On March 2, 2007, the U.S. Court of Appeals for the Fourth Circuit affirmed the dismissal, on state secrets grounds, of the complaint of Khaled El-Masri, who had alleged that the CIA and three private corporations (as well as several unnamed employees of the CIA and the corporate defendants) had participated in a CIA operation under which El-Masri had been unlawfully detained, tortured, and interrogated in violation of the U.S. Constitution and international law. *El-Masri v. United* States, 479 F.3d 296 (4th Cir. 2007). The decision has drawn much attention in the press, mostly attacking the CIA's alleged program of rendition. A close review of the Fourth Circuit's opinion reveals that the Fourth Circuit reached the right result—dismissal of the action. Perhaps more importantly, the Fourth Circuit correctly emphasized that the state secrets doctrine is of "constitutional significance," a fact that has important implications for the doctrine's application.

The Background and Alleged Facts of El-Masri v. USA. El-Masri alleged that he had been detained by Macedonian law enforcement officials while traveling in Macedonia in December of 2003; held there for 23 days before being turned over to CIA custody; and flown to a CIA detention facility in Kabul, Afghanistan via an aircraft provided to the CIA and staffed by the corporate defendants and their employees. He claimed that he was then held there until May of 2004 when he was transported to Albania and released in a remote area before being picked up by Albanian officials who enabled him to travel to his home in Germany. El-Masri claimed that, at various times during his five-month period of detention, he had been beaten; drugged; bound and blindfolded; confined in unsanitary conditions; repeatedly interrogated; and prohibited from communicating with his family, the German government, or anyone else other than his captors.

In response to El-Masri's complaint, the United States intervened and sought to have the case dismissed under the state secrets doctrine. Throughout his proceedings in district court, El-Masri contended that his evidence did not rise to the level of a state secret because of the public attention focused on the

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CIA's alleged rendition operations and on his case in particular. Moreover, by the time El-Masri's case reached the Fourth Circuit, the Council of Europe had conducted an investigation on CIA renditions and released a draft report concluding that El-Masri's allegations were substantially accurate. Also by that time, President Bush had publicly disclosed the existence of a CIA program of rendition whereby suspected terrorists are detained and interrogated at locations outside of the United States. Despite the President's confirmation of the CIA program of rendition and the public attention on El-Masri's case, the Fourth Circuit agreed with the Government that the information at issue fell under the state secrets doctrine and affirmed the dismissal of El-Masri's complaint.

***The Fourth Circuit's Opinion in* El-Masri v. USA**. The Fourth Circuit began its analysis by examining the roots of the state secrets doctrine. The Fourth Circuit first highlighted the evidentiary roots of the doctrine as traced by the Supreme Court in *United States v. Reynolds*, 345 U.S. 1 (1953). In 1948, the widows of three civilians killed when a fire broke out during a B-29 bomber test flight sued the government under the Federal Tort Claims Act and sought documents relating to the crash. The Air Force refused to turn over the materials and sought to quash the motion on the grounds that the information "could not be furnished without seriously hampering national security, flying safety and the development of highly technical and secret military equipment." 345 U.S. at 5. The Fourth Circuit noted that the *Reynolds* Court sustained the government's refusal and reaffirmed the state secrets privilege as "well established in the law of evidence," tracing it back to the trial of Aaron Burr in 1807. *El-Masri*, 479 F.3d at 303 (quoting *United States v. Reynolds*, 345 U.S. at 6–7 (1953)).

The Fourth Circuit then emphasized the constitutional foundation underlying the state secrets doctrine. The court recognized that the doctrine extends well beyond the rules of evidence because it "performs a function of constitutional significance." 479 F.3d at 303. The court observed that the state secrets doctrine grows out of the Executive Branch's Article II authority and the separation of powers. Specifically, the doctrine springs from the Executive's constitutional authority over military and foreign affairs. The Fourth Circuit explained that the "Executive's constitutional mandate encompasses the authority to protect national security information," *id.* at 304, because the secrecy of such information is "necessary to [the Executive's] military and foreign affairs responsibilities." *Id.* at 303.

The court acknowledged that in these arenas, "the Executive's constitutional authority is at its broadest" and thus the judiciary's role as a check on presidential action is "limited." *Id.* at 303. Thus, the high degree of deference that courts show to an Executive assertion of the state secrets doctrine reflects the constitutional allocation of powers among the branches of government. The Fourth Circuit added that practical reasons support such deference as well; because courts are "ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of security classifications," the "Executive and its intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information." *Id.* at 305. This analysis allowed the court to conclude easily that "the state secrets privilege that the United States interposed in this civil proceeding thus has a *firm foundation in the Constitution*." *El-Masri*, 479 F.3d at 304 (emphasis added).

The Fourth Circuit then explained that when the state secrets doctrine applies, it is absolute—disclosure of the state secrets is not permitted. *El-Masri*, 479 F.3d at 305. ("[E]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."). The court then noted that this leads to one of two possible outcomes with regard to the underlying litigation. Where the case can be litigated without resort to the state secrets, the case may proceed. But where "state secrets form the very subject matter of a court proceeding, as in *Totten* [*Totten v. United States*, 92 U.S. 105 (1875)], dismissal at the pleading stage—'without ever reaching the question of evidence'—is appropriate." *El-Masri*, 479 F.3d at 306 (quoting *Reynolds*, 345 U.S. at 11 n.26).

Turning then to El-Masri's arguments, the Fourth Circuit concluded that the case could not be litigated without resort to state secrets. To litigate the case would require the proof of facts and circumstances regarding El-Masri's detention and interrogation, which would necessarily include the method and means by which the government acquires intelligence, the operational details about the CIA's program of rendition, and the defendants' identities and roles in the program. The court had no trouble concluding that these were state secrets as the government had disclosed only the existence of a rendition

program without elaborating on any of its details. And with regard to the corporate defendants, the court emphasized that adjudging their potential liability would require the disclosure of the existence and details of covert CIA agreements, "an endeavor practically indistinguishable from that categorically barred by *Totten*." *El-Masri*, 479 F.3d at 309. Thus, the Fourth Circuit found that dismissal was appropriate. Indeed, the court emphasized that examination of the state secrets by the trial judge alone and in chambers could not be permitted. 479 F.3d at 306.

The court also rejected El-Masri's policy attack—that dismissing his action would insulate "egregious executive misconduct" from judicial review. 479 F.3d at 312. El-Masri argued that in circumstances such as his, the courts "duty to review executive action" should trump the application of the state secrets doctrine. *Id*. The Fourth Circuit explained that El-Masri misunderstood the separation of powers. *Id*. ("Él-Masri's position in that regard fundamentally misunderstands the nature of our relationship to the executive branch."). Article III courts have the role of deciding cases and controversies; they do not have "a roving writ to ferret out and strike down executive excess." *Id*. Indeed, the court explained, "we would be guilty of excess in our own right if we were to disregard settled legal principles in order to reach the merits of an executive action that would not otherwise be before us—especially when the challenged action pertains to military or foreign policy." *Id*. The court did recognize that the application of the state secrets doctrine sometimes places a heavy burden on plaintiffs such as El-Masri, but also recognized that this burden is justified—indeed, constitutionally required—because the doctrine protects a "greater public value,"—namely, the citizenry's "collective interest in national security." *Id*. at 313.

***An Analysis of* El-Masri v. USA**. As an initial matter, the Fourth Circuit was correct to dismiss the case. El-Masri's claims rose or fell on his allegations about the CIA's rendition program and the participation of government contractors therein. To disclose the facts necessary to vindicate or defeat his claims would reveal the method and means of the rendition program along with the existence of covert agreements with the government and other secret operational details of this classified program. These are quintessential state secrets. Indeed, the entire subject matter of El-Masri's case consists of state secrets. Thus, *Totten* bars this case, and the Fourth Circuit correctly disposed of El-Masri's claims.

This might seem like an easy decision, but there has been some confusion over the scope of *Totten*. Some believed that *Totten* was but a rule of contract or estoppel that precluded only a party to a clandestine spy agreement from enforcing that agreement against the government. *See, e.g., Hepting v. AT&T Corp.*, No, C-06-672 (N.D. Cal. July 20, 2006) (explaining in litigation challenging the NSA's Terrorist Surveillance Program that "[t]he implicit notion in *Totten* was one of equitable estoppel: one who agrees to conduct covert operations impliedly agrees not to reveal the agreement even if the agreement is breached"), *appeal docketed*, No. 06-17132, -17137 (9th Cir.). But *Totten*'s reach is clearly not so limited. Indeed, recent Supreme Court decisions foreclose such a narrow reading of *Totten*. For example, in *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, the Court applied *Totten* to dismiss an action brought by public interest plaintiffs who sought to require the U.S Navy to file an environmental impact statement in connection with alleged plans to house nuclear weapons at a naval base in Hawaii. 454 U.S. 139, 141 (1981). No covert agreement was at issue, or even alleged to be present, in the case. But the Court found that, under *Totten*, dismissal was required because the subject matter of the action was a state secret. 454 U.S. at 146-47. In addition, the Supreme Court expressly reaffirmed *Totten* only two years ago in *Tenet v. Doe*, clarifying that *Totten* applies where "the very subject matter of the action . . . was a matter of state secret." 544 U.S. 1, 8-9 (2005).

As a broader doctrinal matter, the Fourth Circuit was correct to emphasize the "constitutional significance" of the state secrets doctrine. The doctrine is not merely an evidentiary privilege. Rather, the doctrine is a manifestation of the separation of powers, the Constitution's defining structural principle, which was carefully crafted to preserve liberty. See *Myers v. United States*, 272 U.S. 52, 116 (1926) ("[I]f there is a principle in our Constitution, indeed in any free Constitution more sacred than another, it is that which separates the legislative, executive, and judicial powers."); *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J. concurring) ("It remains one of the most vital functions of this Court to police with care the separation of the governing powers. That is so even when . . . no immediate threat to liberty is apparent. When structure fails, liberty is always in peril."). On this score, the

Fourth Circuit emphasized that the state secrets doctrine is a logical outgrowth of the Framers' allocation of military and foreign affairs powers to the Executive, noting that "the Executive's constitutional mandate encompasses the authority to protect national security information." *El-Masri v. United States*, at *9. *See also El-Masri v. Tenet*, 2006 U.S. Dist. LEXIS 34577, at *14 (E.D. Va.) (Ellis, J.) (explaining that the doctrine reflects "the executive branch's preeminent authority over military and diplomatic matters and its greater expertise relative to the judicial branch in predicting the effect of a particular disclosure on national security").

This constitutional point is an important one that is lost on many, not just plaintiffs like El-Masri, *see, e.g.*, Petition for Certiorari, *El-Masri v. United States*, No. 06-1613 (filed May 30, 2007) (characterizing the doctrine solely as an evidentiary privilege without any reference to its constitutional basis), but critics of the Bush Administration's policies relating to the War on Terror. Henry Lanman, *Secret Guarding*, Slate, May 22, 2006. In addition to those who see the doctrine as merely an evidentiary privilege, others recognize the doctrine's constitutional foundation but appear to consider it only within the context of *Totten*. *See* Carrie Newton Lyons, *The State Secrets Privilege: Expanding its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 120-23 (2007). But the doctrine, no matter its application, is rooted in the Constitution; its application—either as a complete bar to suit or as a limitation on the discovery and disclosure of certain evidence—depends solely on the centrality of the state secrets to the claims asserted. *El-Masri*, 479 F.3d at 301 ("The effect of a successful interposition of the state secrets privilege by the United States will vary from case to case. If a proceeding involving state secrets can be fairly litigated without resort to the privileged information, it may continue. But if the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters, dismissal is the proper remedy.").

This constitutional foundation is important because it elevates the state secrets doctrine over and above a simple evidentiary privilege. Thus, state secrets are not subject to a balancing test like the work-product privilege, to which a necessity exception applies, *see* FED. R. CIV. P. 26(b)(3). Rather, the state secrets doctrine operates as an absolute rule: "a court's determination that a piece of evidence is a state secret removes it from the proceedings entirely." *El-Masri*, 479 F.3d at 306. Asserted need for and probative value of the state secret as evidence are simply not relevant. *See id.* at 305 ("[E]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." (quoting *Reynolds*, 345 U.S. at 11)). Indeed, the rule operates with such force that a "court should not jeopardize the security which the privilege is meant to protect by insisting upon the examination of the evidence, *even by the judge alone, in chambers*." *Id.* at 306 (quoting *Reynolds*, 345 U.S. at 10) (emphasis added). And because the Constitution places the obligation and authority to manage the flow of national security information with the Executive, public discussion and media reports regarding matters of state secret have no bearing on the analysis.

Conclusion. The Fourth Circuit's opinion in *El-Masri v. United States* is an important one—important because it relates to national security and the government's prosecution of the War on Terror, and more specifically, because it addresses the sometimes difficult and complicated issue of state secrets. In highlighting the doctrine's constitutional foundation, the Fourth Circuit correctly dismissed El-Masri's action and provided clarity to the scope and breadth of the state secrets doctrine.

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