No. 06-1613

In the Supreme Court of the United States

KHALED EL-MASRI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The Constitution Project is an independent think tank that seeks to forge bipartisan solutions to pressing constitutional issues. To that end, the Project brings together policy experts, legal scholars, and former government officials and judges from across the political spectrum to issue and promote consensus recommendations for policy reform. Two such blue-ribbon coalitions are the Liberty and Security Committee, created to address the importance of protecting civil liberties as we confront the threat of terrorism, and the Coalition to Defend Checks and Balances, a group of prominent Americans brought together by a deep concern about the risk of permanent and unchecked presidential power and by a desire to see both Congress and the Judiciary exercise their responsibilities as separate and independent branches of government.

On May 31, 2007, members of the Liberty and Security Committee and the Coalition to Defend Checks and Balances issued a detailed statement entitled *Reforming the State Secrets Privilege*, *available at* http://www.constitutionproject.org/pdf/Reforming_the_State_Secrets_Privilege_Statement1.pdf (last visited August 30, 2007). (Signatories to the statement are listed in the appendix to this brief.) The report examines the "state secrets privilege" and expresses concern at the increasing frequency with which the privilege has been asserted and expanded in recent years. In particular, lower courts—including the Fourth Circuit in this case—have

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

broadened the privilege so that, rather than simply protecting particular pieces of sensitive evidence from public disclosure, it now operates to shield the Government from accountability for what may be grave violations of the Constitution, laws, and treaties of the United States. The bipartisan group of distinguished professionals who endorsed the Constitution Project's statement on reforming the state secrets privilege believe that this situation is intolerable and requires this Court's intervention.

SUMMARY OF ARGUMENT

The present case offers the Court a much-needed opportunity to clarify the proper scope and application of the state secrets privilege, an issue of overriding national importance that has been left entirely to the lower courts for over half a century. The allegations made by Khaled El-Masri are extremely disturbing: An innocent man, held by American agents for months, drugged, beaten, and tortured in violation of U.S. laws and treaties, was then unceremoniously dumped in a foreign country after the Government realized its mistake. The reception that El-Masri's claims for legal redress received in the courts below is equally disturbing. Invoking a privilege that this Court has recognized as a means of protecting particular pieces of evidence from disclosure, the court of appeals ruled that El-Masri's claims could not be adjudicated at all. And it did so at the pleading stage, before El-Masri had sought discovery of a single piece of evidence—thus giving him no opportunity to develop his claims without using material determined to be privileged.

This expansive understanding of executive immunity goes beyond anything this Court has endorsed. This Court's two main precedents in this arena are *Totten* v. *United States*, 92 U.S. 105 (1875), and *United States* v. *Reynolds*, 345 U.S. 1 (1953). In *Totten*, the Court held that a narrow category of claims—those brought to enforce clandestine employment contracts between the Government and its secret agents—are

non-justiciable. And in *Reynolds*, the Court allowed the Executive Branch, in certain circumstances, the benefit of an evidentiary privilege aimed at protecting particular pieces of classified information when disclosure would jeopardize national security.

This case falls within neither of these paradigms. Instead, in the name of protecting "state secrets," the Fourth Circuit's decision radically expands the *Totten* rule of non-justiciability, wrenching it from its roots in the law of contracts and turning it loose on whole new categories of cases. In recent years, the Government has with increasing frequency and success argued for this expansion, in part to avoid accountability for what may be egregious violations of law. The ruling below would do just that, shielding the Executive Branch from virtually any litigation challenging activities that it claims are secret—even when those activities have garnered front page attention, target U.S. citizens on American soil, or run contrary to the commands of the Constitution or of Congress. This ill-considered and hugely consequential extension of *Totten* and *Reynolds* threatens to undermine the rule of law, our system of checks and balances, and judicial independence. In a constitutional democracy, national security can and must be protected without taking the drastic step of declaring that any case challenging the Executive for what it does in the name of protecting the Nation from its enemies is beyond the judicial ken.

Indeed, in a series of decisions over the past three years, this Court has squarely rejected the argument that the Constitution gives the President free rein to respond to the threat of terrorism without fear of judicial scrutiny. These cases have made clear that the courts, acting within their proper constitutional sphere, can hold the Executive to account for actions taken to combat terrorism at home and abroad. The Fourth Circuit's decision in this case lost sight of this crucial aspect of our constitutional structure. Certiorari is warranted to undo

that damage by confirming the limited reach of the *Totten* bar and by reaffirming that the state secrets privilege acknowledged in *Reynolds* may properly be applied *only* to specific requests for concrete evidence.

Certiorari also should be granted to revisit *Reynolds*' dubious suggestion that state secrets privilege disputes can be resolved without necessarily conducting *in camera* inspection of the evidence at issue. As the disturbing post-decision history of that case confirms, applying the privilege without first subjecting the Government's claims to meaningful judicial scrutiny provides an all-too tempting invitation to Executive abuse. And developments in judicial procedure since 1953 have shown that courts are capable of protecting classified information, exposing the contrary fears expressed in *Reynolds* as anachronistic and dangerous. Only this Court can restore the appropriate balance between the Executive and the Judiciary that was undermined by this Court's decision in *Reynolds*, half a century ago.

ARGUMENT

I. Review Is Warranted Because This Court's Cases Do Not Support The Broad And Dangerous Non-Justicability Rule Endorsed By The Fourth Circuit.

The Fourth Circuit's decision to dismiss El Masri's case on the pleadings represents an expansion of executive immunity from civil litigation that this Court has never endorsed, either expressly or implicitly. Instead, this Court's cases establish two, limited, propositions. First, the narrow set of claims that seek enforcement of a secret employment contract between the Government and its clandestine agents are non-justiciable. See *Tenet* v. *Doe*, 544 U.S. 1 (2005); *Totten* v. *United States*, 92 U.S. 105 (1875). Second, provided it complies with various procedural requirements, the Government, in civil cases, may assert an evidentiary privilege to prevent the production of tangible information whose disclosure would threaten national security. See *United States* v. *Rey-*

nolds, 345 U.S. 1 (1953). The privilege recognized in *Reynolds* is at once broader and more limited than the *Totten* rule: *Totten* describes a "unique and categorical" nonjusticiability doctrine designed to "preclude judicial inquiry" into "secret espionage relationships" between the Government and its agents. *Tenet*, 544 U.S. at 6 n.4, 7. In contrast, *Reynolds* applies to a larger category of cases—those involving evidence that would expose "military and state secrets," 345 U.S. at 7—but it offers the Government far less, a privilege from having to disclose such evidence rather than a categorical exemption from any judicial scrutiny, *id*. at 11.

Properly understood, neither doctrine applies to this case. Because El-Masri's claims do not involve any clandestine employment contract that he made with the United States, his case simply does not fall into the category of cases "where success depends on the existence of [the plaintiff's] secret espionage relationship with the Government" that *Totten* and *Tenet* forbid. *Tenet*, 544 U.S. at 8. Nor has El-Masri, at least at the present stages of the litigation, sought to discover any classified information that might properly be shielded by the state secrets privilege recognized in *Reynolds*. That case involved a concrete dispute over a concrete document. The Court ruled that the plaintiffs had no right to obtain and use that document to prove their claims, but recognized that they should have an opportunity to "adduce the essential facts * * * without resort to material touching upon military secrets." *Reynolds*, 345 U.S. at 11. Without knowing what particular evidence El-Masri needs to adduce the essential facts supporting his claims, the court below could not even begin to determine, as required by *Reynolds*, whether "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Id*. at 10.

Instead, what the Government has sought, and what the Fourth Circuit's decision represents, is a significant and dis-

turbing expansion of the *Totten* rule of non-justiciability in the guise of an application of the state secrets privilege.[2] The decision below stretches the *Totten* bar to cover not merely suits to enforce clandestine employment contracts, but virtually any case challenging activities that the Government claims are secret. Pet. App. 35a. Such a radical expansion, which would effectively immunize a wide swath of Executive misconduct from judicial review, is not supported by this Court's precedent.

First, the Court's rationale for barring the adjudication of espionage-contract cases does not apply here. In explaining its decision, *Totten* emphasized the mutual understanding between the Government and the spy attempting to bring suit:

> Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. *This condition of the engagement was implied from the nature of the employment,* and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties.

92 U.S. at 106 (emphasis added).

As this passage makes clear, the *Totten* rule is grounded in principles unique to the law of contracts. The decision rests on the premise that a categorical prohibition on litigation over the substance of a secret employment relationship is an implied condition of the contract. See 92 U.S. at 107 ("The secrecy which such contracts impose precludes any ac-

[2] The Fourth Circuit is not the only lower court to have improperly invoked the state secrets privilege as a sweeping jurisdictional bar rather than a limited evidentiary privilege. See also, *e.g.*, *ACLU* v. *Nat'l Sec. Agency*, 2007 WL 1952370 (6th Cir. July 6, 2007); *Black* v. *United States*, 62 F.3d 1115, 1119 (8th Cir. 1995); *Zuckerbraun* v. *Gen. Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991).

tion for their enforcement."). That makes sense. The plaintiff in such a case knew (or should have known) what he was bargaining for and, by agreeing to become a spy, voluntarily assumed the risk that he would not be able to resort to litigation if the Government failed to live up to its end of the bargain. Moreover, contract law supported the result in *Totten* in another way: The Court suggested that because the spy agreed, at least implicitly, not to reveal the nature of his employment, the act of bringing the suit *itself* amounts "to a breach of a contract of that kind, and thus defeats a recovery." *Ibid*.

The crucial element of consent is entirely absent in El-Masri's case. Far from entering a *voluntary* contractual relationship with the Government and its private contractors, El-Masri was subjected to a highly *involuntary* regime of detention, coercive interrogation, and abuse. It is impossible to assert that El-Masri consented in any way to a bar on his right to pursue his legal claims, or that the mere filing of those claims itself defeats his right to recover on the merits. The principles that supported the result in *Totten*, and that made it fair and equitable to turn that litigant out of court, do not apply here.

Second, this Court has twice confirmed the narrow scope of the *Totten* rule since it was first announced. In *Webster* v. *Doe*, 486 U.S. 592 (1988), this Court held that the National Security Act did not preclude judicial review of the constitutional claims made by an *acknowledged*, although anonymous, CIA electronics technician for alleged discrimination. *Id.* at 594; see also *Tenet*, 544 U.S. at 10. Because the CIA acknowledged that the plaintiff was an employee, his suit did not implicate the core concern of *Totten*, the disclosure of the plaintiff's covert agreement with the Government.[3] There-

[3] For that same reason, federal courts regularly entertain Title VII claims concerning the hiring and promotion of CIA employees. *Tenet*, 544 U.S. at 10.

fore, the case was justiciable. More recently, the Court in *Tenet* observed that the *Totten* bar is "unique and categorical," 544 U.S. at 6 n.4, and reaffirmed that it applies *only* in "the distinct class of cases that depend upon clandestine spy relationships." *Id*. at 10. That case, involving two former spies who brought suit against the Government to enforce a secret espionage agreement, fell squarely into that circumscribed category and was therefore barred.

Finally, the Fourth Circuit ignored the "serious constitutional question" raised by its expansion of *Totten*, a move that works "to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (citing *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). To prevent the courthouse doors from being closed to deserving plaintiffs, there is a strong presumption that jurisdictional statutes do not preclude judicial review of constitutional claims, a presumption that can be overcome only where Congress's intent to strip jurisdiction is extremely clear. See, *e.g.*, *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993); *Johnson* v. *Robinson*, 415 U.S. 361, 373–374 (1974). If a presumption in favor of adjudicating constitutional claims applies to statutes passed by Congress, then *a fortiori* that presumption must apply to jurisdictional rules created by judges. Although the *Totten* bar, within its defined sphere of operation, can preclude the adjudication of constitutional claims, see *Tenet*, 544 U.S. at 8, precisely for that reason the doctrine must be narrowly confined. The court of appeals ran roughshod over this important principle.

For these reasons, a decision significantly broadening *Totten* to bar virtually all suits challenging government activities done secretly in the name of national security—no matter how egregious the alleged conduct and no matter that it may already be public knowledge—is momentous. It goes beyond anything this Court has previously recognized and, as explained in the next section, is fraught with peril for our sys-

tem of constitutional constraints on government power. The consequences of such an expansion unquestionably warrant a grant of certiorari.

II. The Fourth Circuit's Broad Expansion Of *Totten* Is Inconsistent With The Judiciary's Historic Role And Would Have Profound Consequences For Our System Of Checks And Balances.

The ill-considered extension of the *Totten* bar not only harms individual plaintiffs like El-Masri by denying them any recourse to the courts, but has far broader and more systemic consequences. In order to prevent the accumulation of power and to ensure that the conduct of the three branches of government will be constrained by law, the Constitution authorizes each branch to act as a check on the others. As Madison explained, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, * * * may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47, at 301 (1788) (James Madison) (Clinton Rossiter ed. 1961). The Fourth Circuit's decision in this case, and other lower court decisions like it, upset this careful constitutional balance.

Integral to the system of checks and balances envisioned by the Framers is the ability of the Judiciary to decide, when presented with a genuine "Case" or "Controversy," U.S. CONST. art. III, whether the other branches have acted outside their constitutional or statutory authority. See, *e.g.*, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 545 (2001) ("Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy."). By refusing to evaluate the outrageous government conduct alleged by El-Masri against the requirements of the Constitution, statutes, and treaties of the United

States, the Fourth Circuit abdicated its duty to "say what the law is" and gave the Executive Branch *carte blanche* to decide the limits of its own power.

This analysis is no different because this case implicates the President's war powers. To the contrary, it is well settled that the limits on presidential authority, and the Judiciary's obligation to enforce those limits, do not waiver in times of war. See, *e.g.*, *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 536 (2004) ("[A] state of war is not a blank check for the President."); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 120–121 (1866) ("The Constitution of the United States is a law for rulers and people, equally in times of war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."). The President is "Commander in Chief of the Army and Navy," U.S. CONST. art. II, § 2, but the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536. Thus, although the Executive Branch has considerable power to defend the Nation against threats from abroad, that power does not divest the courts of their independent responsibility to determine whether that power is being exercised consistent with the law. As this Court has made clear, "the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Sterling* v. *Constantin*, 287 U.S. 378, 401 (1932).[4]

Illustrating its historic refusal to abdicate the judicial function in the face of expansive assertions of executive

[4] That is why, although the Court has given due deference to the Executive in matters of national security and foreign affairs, see, *e.g.*, *United States* v. *Pink*, 315 U.S. 203, 229-30 (1942), it has firmly rejected the Government's argument "that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances." *Hamdi*, 542 U.S. at 535; see also *Sterling*, 287 U.S. at 400–401. Deference must not be confused with abdication.

power, this Court has in three separate cases in the past three years rejected the President's argument that his power over military and foreign affairs precludes the courts from entertaining claims brought by individuals (both citizens and noncitizens) detained by the Government in its efforts to combat terrorism. See *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2798 (2006) (holding that the Court had jurisdiction to hear a pretrial challenge to the authority of a military commission and that the commission, as constituted, was unlawful); *Rasul* v. *Bush*, 542 U.S. 466 (2004) (holding that the habeas statute confers a right to judicial review of the legality of executive detention of aliens at Guantanamo Bay); *Hamdi*, 542 U.S. 507 (holding that a U.S. citizen is entitled to a meaningful opportunity to challenge, before an independent tribunal, his detention as an enemy combatant). Those cases all involved highly sensitive issues of national security, yet this Court was able to decide them without "sorely hamper[ing] the President's ability to confront and defeat a new and deadly enemy," or to "prevent future attacks of the grievous sort that we have already suffered." *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring) (internal quotation marks omitted).

The separation of powers analysis that compelled the Court in *Hamdi*, *Rasul*, and *Hamdan* to reject the Executive's broad assertions that it must be given the power to fight against terrorism free from judicial interference applies with equal force in this case. Here, the Executive asserts not merely that the Judiciary cannot interfere with its fight against terrorism, but goes further to contend that the courts *cannot even know* what it is doing in the name of national defense—even where the issue arises in a concrete legal case involving serious claims that the President's agents have violated the Constitution he is sworn to "defend," U.S. CONST. art. II, § 1, and the laws he is charged to "faithfully execute," *id*. art. II, § 3. On that basis, the Executive argues, and the Fourth Circuit agreed, that a court must dismiss any case that the Government claims implicates secret national security

matters. And the courts are to do so without inquiring into any facts alleged—even those that are already public knowledge—or any of the legal arguments made.

This expansive vision of executive immunity from the ordinary judicial process profoundly disrupts our system of checks and balances and poses an acute danger to individual liberties. Such "[c]oncentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid." *Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring). Indeed, the Fourth Circuit's ruling aggrandizes the Executive Branch not merely at the expense of the Judiciary, but at that of the Legislative Branch as well. Expanding the *Totten* bar rends a significant hole in the jurisdiction of the federal courts to hear "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Importantly, that is a hole that Congress, which "decides what cases the federal courts have jurisdiction to consider" and "when, and under what conditions, federal courts can hear them," has not seen fit to recognize. *Bowles* v. *Russell*, 127 S. Ct. 2360, 2365 (2007). By declaring non-justiciable any case that the Government claims implicates secret national security matters, the Fourth Circuit effectively rubber-stamped the Executive's attempt to usurp Congress's constitutional power to determine what cases the federal courts may hear. See generally Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939 (2007).

Moreover, the Fourth Circuit's broad interpretation of the state secrets privilege is not limited to activities undertaken by the Executive Branch abroad and directed at foreign nationals. To the contrary, the court's reasoning would equally immunize operations targeting U.S. citizens at home.[5] Under the Fourth Circuit's decision, for example,

[5] This worry is not hypothetical, as any number of citizens whose claims have been dismissed based on lower courts' expansive view of the privi-

CIA operatives could kidnap innocent Americans from their homes and torture or even murder them, and, so long as the Executive maintained that the operation was classified, those citizens or their heirs would have no opportunity for judicial redress whatsoever. This ruling thus gives the Government license to trammel on the most fundamental constitutional and statutory rights of citizens and non-citizens, at home and abroad, without fear of being called to account in any judicial forum.

The court of appeals tried to defend this disturbing result by asserting that, in the end, El-Masri's "personal interest in pursuing his civil claim is subordinated to the collective interest in national security." Pet. App. 50a. Such reasoning overlooks not merely the fact that El-Masri's personal interests—in remaining free from torture and arbitrary detention—have *already* been subordinated to the collective interest in national security. It also neglects the vitally important "collective interest" that El-Masri's suit would vindicate: the interest in ensuring that actions taken in the name of the United States comply with the Constitution and with the laws duly enacted by the People's representatives in Congress. Making certain that the Executive Branch acts within the bound of the law is not some special interest in which only El-Masri has a stake.

The Fourth Circuit's reasoning also ignores the collective interest in government transparency. Secrecy, after all,

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lege can attest. See, *e.g.*, *ACLU* v. *Nat'l Sec. Agency*, 2007 WL 1952370 (dismissing challenge to the National Security Agency's domestic wiretapping program); *Kasza* v. *Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (dismissing citizen suit seeking to compel the Air Force's compliance with hazardous waste reporting and inventory requirements); *Black*, 62 F.3d at 1118–1120 (dismissing plaintiff's claims against CIA and FBI for assault, battery, and intentional infliction of emotional distress); *Halkin* v. *Helms*, 598 F.2d 1 (D.C. Cir. 1978) (dismissing case brought by Vietnam War protesters challenging surveillance by NSA).

can be as dangerous to a democratic society as disclosure. The newly released CIA "Family Jewels" report illustrates that the worst abuses of government occur in the dark. The report, made public in response to a Freedom of Information Act request, catalogs a long list of CIA misdeeds from the 1950s through the 1970s: domestic wiretapping, failed assassination plots, mind-control experiments, and surveillance of journalists and anti-Vietnam War protestors.[6] As this long list of misdeeds committed in the name of national security reveals, there is a powerful "collective interest" on El-Masri's side of this case, for just as secrecy can be fatal to democracy, openness is often the antidote. Because societal interests are implicated no matter how a case such as this one is resolved, the Fourth Circuit's hasty dismissal—and its unwillingness to consider any alternatives to an outright bar on El Masri's suit—cannot be justified merely by purporting to elevate the Nation over the individual.

III. This Court Should Reexamine *Reynolds* In Light Of What Is Now Known About The Government's Brazen Abuse Of The State Secrets Privilege In That Case.

As discussed above, this Court should, at a minimum, grant certiorari to confirm that the *Totten* rule is limited to cases involving the enforcement of covert espionage agreements and to reject its expansion to the much larger category of cases in which the Government claims that sensitive evidence will be necessary to adjudicate the plaintiff's claims. But the Constitution Project urges the Court to go one step further and use this opportunity to revisit *Reynolds* itself, and

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[6] See Memorandum from Howard J. Osborn, Director of Security, to the James R. Schlesinger, CIA Director (May 16, 1973), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB222/family_jewels_full_ocr.pdf (last visited August 30, 2007); *see also* Karen DeYoung & Walter Pincus, *CIA Releases Files on Past Misdeeds*, WASH. POST, June 27, 2007, at A1.

in particular that case's suggestion that, in certain circumstances, judges should not even conduct an *in camera* inspection of evidence claimed to be state secrets. Reexamination of that issue is warranted because this Court's willingness to uphold a state secrets privilege claim without any judicial examination of the allegedly privileged material provides a dangerous incentive for the Government to use the state secrets privilege in bad faith to avoid embarrassment and conceal illegality, rather than to protect national security. The remarkable circumstances surrounding *Reynolds* itself prove that this risk is in no way hypothetical.

Throughout the *Reynolds* litigation, the Government fought tooth and nail to shield an official report by the Air Force concerning the crash of a B-29 aircraft. 345 U.S. at 3. When the widows of three civilian engineers killed in the crash brought suit against the United States and requested the accident report, the Secretary of the Air Force filed a formal "Claim of Privilege" objecting to disclosure. The Secretary asserted that the aircraft had gone aloft on a highly secret mission to test classified electronic equipment. *Id.* at 4. After the district court and the Third Circuit rejected this privilege claim and ordered the report disclosed to the trial judge *in camera*, the Government pressed on, arguing to this Court that the matter implicated the gravest national security concerns. Ultimately, this Court was persuaded and thus granted the Government's request to refuse disclosure of the report even to the Justices themselves. *Id.* at 11. It did so without ever looking at the document in question, suggesting that the court "should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." *Id.* at 10.

Thus it was that for more than 50 years the Government's account of the sensitivity of the accident report went unquestioned. In 1996, however, the Air Force at last declassified that report and, in 2000, Judith Loether, the daughter of

one of the civilians killed in the crash, discovered the document on the Internet. See Louis Fisher, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 166 (2006). It was immediately obvious that the report, which the Government had so steadfastly insisted contained classified information, did nothing of the sort. There was no mention of the B-29's secret mission or of any secret equipment on board. *Id.* at 167–169. Instead, what the report did reveal is that the crash was the result of the Air Force's negligence, plain and simple. Thus, it seems that the reason the Government fought all the way to this Court to avoid disclosing the report—and deceived several courts about its contents—was *not* to protect national security. The real reason was that disclosure would have embarrassed the Air Force and allowed the widows to win their case. Had this Court merely inspected the challenged evidence *in camera*, the Government's mischief would have been exposed and could readily have been corrected.[7]

As egregious as the circumstances of *Reynolds* are, they unfortunately do not represent an isolated incident. Indeed, all evidence suggests that improper classification is rampant. Executive officials have estimated that somewhere between fifty percent (Carol A. Haave, Deputy Undersecretary of Defense for Counterintelligence and Security) and ninety percent (Rodney B. McDaniel, executive secretary of the National Security Council under President Reagan) of documents ostensibly classified for national security purposes should never have been so classified. See *Emerging Threats:*

[7] In 2002, Judy Loether and other descendants of the civilians killed in the crash petitioned this Court for a writ of *coram nobis*, asserting that the Court should review and correct its judgment because it was based on an error of fact. This Court denied the petition. Fisher, *supra*, at 188. In 2003, the plaintiffs went back to the district court for relief from judgment in order to remedy fraud on the court. The district court refused and the Third Circuit affirmed, citing the interest in judicial finality. See *Herring* v. *United States*, 424 F.3d 384 (3d Cir. 2005).

Overclassification and Psuedo-classification: Hearing Before the Subcommittee on National Security, Emergency Threats and International Relations of the H. Committee on Government Reform, 109th Cong. 115 (Mar. 2, 2005) (prepared statement of Thomas Blanton, Executive Director, National Security Archive) [hereinafter *Testimony of Thomas Blanton*], *available at* http://www.access.gpo.gov/congress/house/pdf/109hrg/20922.pdf (last visited August 30, 2007).[8]

The Executive's tendency to overclassify has only increased during the current administration,[9] which has promulgated secret laws[10] and even secret legal theories.[11] Indeed,

[8] See also *id*. at 121 ("It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but with governmental embarrassment of one sort or another. There may be some basis for short-term classification while plans are being made, or negotiations are going on, but apart from details of weapons systems, there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past.") (emphasis omitted) (quoting Erwin N. Griswold, Editorial, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25); see also William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 101-02, 109 (2005).

[9] For example, former Attorney General Janet Reno authorized withholding of information under a request based on the Freedom of Information Act only if an agency "'reasonably foresees that disclosure would be harmful [to national security].'" Weaver & Pallitto, *supra* note 8, at 108 (alteration in original) (quoting Janet Reno, Attorney General, *Memorandum for Heads of Departments and Agencies: The Freedom of Information Act* (Oct. 4, 1993)). In contrast, her successor, John Ashcroft directed agencies "to withhold information where there is a 'sound legal basis' to do so." *Ibid.* (quoting John Ashcroft, Attorney General, *Memorandum for Heads of All Federal Departments and Agencies: The Freedom of Information Act* (Oct. 12, 2001), *available at* http.//www.usdoj.gov/oip/foiapost/2001foiapost19.htm.

[10] Steven Aftergood, *The Secrets of Flight: Why Transportation Security Administration Guards Don't Have To Tell You What They Won't Tell You*, Slate.com, Nov. 18, 2004, http://www.slate.com/id/2109922 (last visited Aug. 30, 2007) (describing fact that certain federal regulations governing airport security have been classified as "sensitive security in-

new classification decisions are only increasing. According to the Information Security Oversight Office, the Government made 9 million new classification decisions in 2001, 11 million in 2002, 14 million in 2003, 15 million in 2004, 14 million in 2005, and a breathtaking 20 million new classification decisions in 2006. Declassification, on the other hand, has remained stagnant.[12]

This is not surprising. Secrecy, after all, is a tried and true strategy to evade accountability and, alas, sometimes to evade the law—a strategy reflected in the sheer number of state secrets privilege claims raised in recent years.[13] *Reynolds*' suggestion that courts should in some instances accept the Executive's privilege assertions without verifying for

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formation" and therefore may not be disclosed); *see also* Harold C. Relyea, *The Coming of Secret Law*, 5 GOV'T INFO. Q. 97 (1988). As an example of how the "sensitive secure information" concept has been abused, in response to a Freedom of Information request for five Federal Aviation Administration warnings to airlines on terrorism in the months just prior to 9/11, the Transportation Security Association responded by claiming that they were "Sensitive Security Information" and refused to disclose them—even though the warnings were quoted in the 9/11 Commission report, the bestselling book in America at that time, and discussed at length in public testimony by high-ranking government officials. *See Testimony of Thomas Blanton*, *supra*, at 123.

[11] Editorial, *Injustice, in Secret*, WASH. POST, Feb. 21, 2005, at A26 (describing how one Justice Department lawyer urged dismissal of *United States* v. *Abu Ali*, 395 F. Supp. 2d 338 (E.D. Va. 2005), on the basis of a secret argument, claiming that the "legal argument itself cannot be made public without disclosing the classified information that underlies it").

[12] *See* INFORMATION SECURITY OVERSIGHT OFFICE, REPORT TO THE PRESIDENT 2006, at 22 (2007), *available at* http://www.archives.gov/isoo/reports/2006-annual-report.pdf; INFORMATION SECURITY OVERSIGHT OFFICE, REPORT TO THE PRESIDENT 2005, at 15 (2006), *available at* http://www.fas.org/sgp/isoo/2005rpt.pdf (last visited Aug. 30, 2007).

[13] See Frost, *supra*, 75 FORDHAM L. REV. at 1939 ("The Bush Administration has raised the [state secrets] privilege in twenty-eight percent more cases per year than in the previous decade, and has sought dismissal [based on it] in ninety-two percent more cases per year than in the previous decade.").

themselves that the materials in dispute are in fact privileged has only facilitated that corrosive strategy. Worse, that decision was based on a false premise. The Court acceded to the Government's unchecked assertions because it was concerned that disclosure even to a judge alone could jeopardize national security. *Reynolds*, 345 U.S. at 10. This worry has proven to be unfounded. Since *Reynolds*, courts have frequently been called upon to assess claims regarding access to sensitive information under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B) & (b)(1), the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1805, and the Classified Information Procedures Act, 18 U.S.C. App. 3. In each of these contexts, *in camera* inspection of classified material is routine. In light of what we now know about the tendency of the Executive Branch to over-classify information and the competency of the courts to review sensitive national security information, this aspect of *Reynolds* has become dangerous and anachronistic.

Finally, the disturbing post-decision history of the *Reynolds* case confirms the dangers of judicial self-abnegation and provides further reason to be wary of invoking the evidentiary privilege recognized in *Reynolds* to expand *Totten*'s unique and categorical bar on adjudication to new categories of claims. Dismissing a plaintiff's claim on the pleadings, before any discovery has been sought or produced, requires the court to speculate about what the plaintiff will need to prove his or her case and to rely on the Government's bare assertions that the claims will intrude on privileged material. As *Reynolds* demonstrates, when judicial review of such privilege claims is conducted in the abstract, without looking at the particular set of materials at issue, the opportunity for abuse of the privilege, distortion of the adversary process, and subversion of checks and balances is all too plain.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

MEMBERS OF THE CONSTITUTION PROJECT'S LIBERTY AND SECURITY COMMITTEE & COALITION TO DEFEND CHECKS AND BALANCES ENDORSING THE STATEMENT ON REFORMING THE STATE SECRETS PRIVILEGE[*]

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