No. 19-5328

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BILAL ABDUL KAREEM,

Appellant,

v.

GINA CHERI HASPEL, *et al.*,

Appellees.

On Appeal from the
United States District Court
for the District of Columbia
1:17-cv-00581 (RMC)

APPELLANT'S BRIEF

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March 10, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Plaintiff-Appellant Bilal Abdul Kareem certifies as follows:

PARTIES

The Appellant (Plaintiff below) is Bilal Abdul Kareem.

The Appellees (Defendants below) are Donald J. Trump, President of the United States; William P. Barr, Attorney General of the United States; Mark T. Esper, Secretary of Defense; Chad F. Wolf, Acting Secretary of Homeland Security; Joseph Maguire, Acting Director of National Intelligence; Robert C. O'Brien, National Security Adviser; Gina Cheri Haspel, Director of the Central Intelligence Agency; the United States of America; the Department of Defense, the Department of Justice, the Department of Homeland Security, and the Central Intelligence Agency.

RULINGS UNDER REVIEW

The final ruling under review is the September 24, 2019 order of the district court (Collyer, J.), granting defendants' motion to dismiss. *See* Sept. 24, 2019, Order at JA_0216; see Sept. 24, 2019 Memorandum Opinion at JA_0202. The memorandum opinion is reported at *Kareem v. Haspel*, 412 F. Supp. 3d 52 (D.D.C. 2019).

RELATED CASES

This case has not previously been before this Court or any other court. Counsel is aware of no related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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MISCELLANEOUS

GLOSSARY OF ABBREVIATIONS

AIPAC:	American Israel Public Affairs Committee
AQAP:	al-Qaeda in the Arabian Peninsula
AUMF:	Authorization for Use of Military Force
CIPA:	Classified Information Procedures Act
SCI:	Sensitive Compartmented Information

JURISDICTIONAL STATEMENT

The district court had jurisdiction under the 5 U.S.C. § 706 (Administrative Procedure Act) and 28 U.S.C. § 1331 (federal question) and the First, Fourth and Fifth Amendments to the U.S. Constitution. This Court has jurisdiction under 28 U.S.C. § 1291 because this appeal is from a final judgment that disposed of all parties' claims. The notice of appeal was filed on November 21, 2019, within 60 days of the district court's decision. Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF ISSUES

1. Can the United States avoid its constitutional obligation to provide due process prior to killing one of its own citizens by invoking a common law evidentiary privilege over alleged state secrets?
2. Must the state secrets privilege "give way" per *Roviaro v. United States*, 353 U.S. 53 (1957), to a U.S. citizen's right to meaningful due process when he is facing *ex ante* extrajudicial execution by the U.S. government?
3. If the U.S. government effectively sentences a U.S. citizen to death without due process, and that citizen files suit to enjoin his killing, should the court apply the due process protections afforded in cases that raise life and liberty interests, such as criminal prosecutions, where state secrecy is not an absolute bar to relief?

4. Did the district court abuse its discretion in finding that the government had made an adequate showing that disclosure of the information sought would pose a "reasonable danger" to national security when much of that information was already public?

RELEVANT STATUTES & CONSTITUTIONAL PROVISIONS

The Administrative Procedure Act provides that:

> to the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
>
> **(2)** hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> **(B)** contrary to constitutional right, power, privilege, or immunity.

5 U.S.C. § 706.

The Fifth Amendment to the U.S. Constitution mandates that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

STATEMENT OF THE CASE

Plaintiff Bilal Abdul Kareem filed his complaint in March 2017, alleging that he was the victim of five near-miss missile attacks within a three-month period during 2016, including at least one strike from a Hellfire missile of the type used by the United States on armed drones. Mr. Kareem believes that because of his activities as a journalist in Syria, the government may have erroneously concluded—whether through use of metadata or otherwise—that he was a member of Al Qaeda or some other extremist group. The government moved to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6) on June 5, 2017, alleging that Mr. Kareem had not established standing because he failed to plead a plausible claim for relief and that the claim raised nonjusticiable political questions.

Mr. Kareem, and his co-plaintiff Ahmed Zaidan, opposed the motion, arguing that it was undisputed that they were journalists who interviewed and published news articles about rebels or members of extremist groups of potential interest to the United States. They also argued that the complaint adequately pleaded that the government did have lethal, metadata-based targeting programs and procedures for identifying individuals for assassination, and that this information had been made public in detail by government officials. And, because

it is a matter of public record that, after having identified targets for lethal action, the government conducts strikes using armed drones, and Mr. Kareem had pleaded that drone-fired missiles had nearly killed him, he plausibly pleaded that the defendants had designated him, a U.S. citizen with non-derogable due process rights, for death, and had tried to kill him at least five times.

The district court agreed with Mr. Kareem, and in its June 13, 2018 memorandum opinion, concluded that Mr. Kareem had credibly pleaded that he had been designated by the US government for assassination without due process. His claim did not present a political question, but a constitutional one, which, as the court below observed, is the "bread and butter of the federal judiciary." JA_0115. The district court decided that having brought his case to a U.S. court, Mr. Kareem's "constitutional rights as a citizen must be recognized." JA_0114.

The government filed an answer to the complaint on July 11, 2018, in which it repeatedly averred that it could "neither confirm nor deny whether [it] possess[es] information concerning whether or not the allegations are true or false without revealing or tending to reveal classified national security information that is subject to protection from disclosure by law." JA_0127.

The government's answer did not enable Mr. Kareem to determine whether the parties were in conflict over the merits of the claim. In order to have meaningful due process, Mr. Kareem asked the government to disclose 1) whether

the government had made a determination to kill him, 2) if yes, did it actually try to kill him, and if so, were the attempts described in the complaint; 3) what was the process by which defendants decided to target Mr. Kareem; 4) what was the factual basis for deciding to target Mr. Kareem; and 5) was Mr. Kareem still a target for lethal action. JA_0140–41. The government raised concerns over the state secrets privilege. JA_0143.

The district court directed the parties to engage in discussions to see if they could "work out some sort of non-judicial settlement of this dispute," which the court contemplated as Mr. Kareem being able to submit information to the defendants asking them not to kill him, which they would be ordered to consider. JA_0154. Mr. Kareem maintained that without any information about what factored into the decision to assassinate him, Mr. Kareem could not anticipate and address what the government might find relevant in determining whether or not to spare him his life. The government rejected any compromise over the disclosure of information. Given this, settlement talks failed. The court allowed the government until January 30, 2019, to decide whether it was going to invoke the state secrets privilege and to move accordingly.

The government did invoke the state secrets privilege and filed a second motion to dismiss. It contended that none of the issues in this lawsuit could be litigated without requiring disclosures that would harm national security and

submitted two declarations in support of its motion—one by the then Acting Secretary of Defense Patrick Shanahan and the other by the then Director of National Intelligence Daniel Coats. JA_0182–201. The government submitted classified versions of the declarations *ex parte*. Only public versions of the declarations were provided to Mr. Kareem and its counsel.

The district court reviewed the declarations and found that there was a "reasonable danger" that disclosure of information at issue in the case could harm national security, including specifically disclosure whether Mr. Kareem is or was designated for lethal action and why. JA 0213. The district court determined that Mr. Kareem would not be able to prove his *prima facie* case without this information and, even if he could, the risk of disclosure of state secrets in this litigation warranted dismissal of the lawsuit. *Id*. The court entered an order dismissing the case on September 24, 2019 (JA_0216), and Mr. Kareem filed his notice of appeal on November 21, 2019.

Essentially, the court below, having found that Mr. Kareem did have a constitutional right not to be killed by the United States without due process, nevertheless dismissed his complaint seeking that due process, leaving the government the power, unchecked and unconditional, to go ahead and kill Mr. Kareem, a U.S. citizen and working journalist, without due process. This result cannot stand.

STATEMENT OF FACTS

Mr. Kareem was born and raised in the United States. He is a U.S. citizen and a journalist reporting in Syria. JA_0021. He has reported for top media outlets such as CNN, BBC, and Al Jazeera, and has been reporting for On the Ground Network ("OGN") in Syria for several years. *Id.* OGN's objective is to provide independent, objective investigative journalistic coverage of the numerous groups of anti-Assad rebels so that audiences can understand the perspectives of the various groups involved in the conflict. *Id.* In the course of this reporting, Mr. Kareem has interviewed local "militants," including extant and erstwhile U.S. allies, using a variety of devices that can pick up or emit signals, including cell phones, satellite phones, and handheld receivers. *Id.*

The government has publicly admitted that it conducts lethal strikes at targets outside the United States using remotely piloted aircraft of the type that launched the strikes on Mr. Kareem. JA_0023–25. It has also publicly admitted that targets are selected as a result of an identification and selection process; one such iteration of this process—the Presidential Policy Guidance—was declassified and published on August 6, 2016. *Id.* That guidance revealed that the actual identity of the target need not be confirmed before action against him is taken. JA_0024-25. One of the programs used to identify potential terrorists is SKYNET, which employs metadata analysis and cellphone tracking to "identify patterns of

suspect activity." JA_0019–20. Former CIA director Michael Hayden confirmed that "[w]e kill people based on metadata." JA_0025.

In the summer of 2016, Mr. Kareem was nearly killed by missile strikes five times while reporting. JA_0022–23. Mr. Kareem has alleged that these strikes were carried out as a result of his having been placed on a list of persons designated for lethal action, a.k.a., the U.S. "Kill List." JA_0023. Mr. Kareem is not a terrorist, does not support terrorists, and does not pose a threat to national security. *Id.* His inclusion on the Kill List was plainly a mistake. He is an American citizen performing a vital, constitutionally protected news-gathering function. Nevertheless, U.S. officials appear to have concluded otherwise. Mr. Kareem does not know the basis for this conclusion, making it impossible for him to rebut it. It is possible that signal intelligence showing Mr. Kareem in rebel-occupied areas in Syria misleadingly suggested to the algorithms used by the government that Mr. Kareem himself was a rebel, or there could be some entirely different reason unknown to Mr. Kareem. What is clear is that the strikes appeared to be targeting him mistakenly with a frequency and precision that belie coincidence.

Of the five strikes, two strikes were on OGN's office in June 2016, both at times that Mr. Kareem was present. JA_0022–23. The three other strikes occurred at locations where Mr. Kareem and his crew had been reporting. The first strike

was in early June 2016, when Mr. Kareem returned to the OGN office after field reporting. He heard aircraft approaching and ran into the office, which was underground. The strike hit the OGN building. The second strike also occurred in early June. Mr. Kareem heard drones buzzing above while he interviewed a local grocer; Mr. Kareem and the man started walking up a hill when they heard an explosion. They returned to the site where they had been filming and saw that it had been hit. A third strike flipped the vehicle in which Mr. Kareem was sitting, and nearly killed him. The strike came in the form of what appeared to be a Hellfire missile—the missile attached to most armed U.S. drones—launched from a drone that had been circling Mr. Kareem and his crew while they were filming. That missile was fired on Mr. Kareem while he and the crew were on a break in their parked vehicles under a tree. A fourth strike hit the OGN office two days later. Shrapnel from the final strike—two months later in August 2016—hit Mr. Kareem and his crew as they were arriving at a rebel-controlled site. The blast was yards from their still-moving vehicle.

Whatever process may have been used to identify Mr. Kareem, it led to the erroneous and unconstitutional inclusion of an innocent U.S. citizen on the Kill List when he was merely fulfilling the difficult role of a war correspondent. Mr. Kareem filed this lawsuit in March 2017 in order to challenge the basis for his

designation for lethal action and to demand due process before his government could kill him.

SUMMARY OF THE ARGUMENT

U.S. citizens are entitled to due process of law before their government can kill them, and no common law evidentiary privilege suspends the obligation of the United States government to provide it. The district court was incorrect to determine that the state secrets doctrine should be applied to eclipse Mr. Kareem's right not to be killed without due process. While the executive has the obligation to protect national security, it must do so within the confines prescribed by the Constitution, and its powers end where Mr. Kareem's rights begin. The government's decision to kill one of its citizens without lawful basis or due process cannot be a state secret because the Constitution does not grant the executive the power to kill a U.S. citizen in secret, without due process. The government is not entitled to invoke the state secrets privilege, a common law evidentiary privilege, over a decision that it does not have the authority to make. Nor can the government invoke state secrets with respect to facts and policies that have already been made public and which served to defeat the government's motion to dismiss. JA_0099.

Although what process is due may depend on circumstances, notice and a meaningful opportunity to be heard are the baseline requirements of due process

and Mr. Kareem is entitled to know whether his government plans to kill him and, if so, the basis for that decision. Moreover, the right to due process is at its apex when a citizen's life is at stake. The Supreme Court has repeatedly declared that "death is different," and has mandated extensive procedural protections whenever the government seeks to put one of its citizens to death. In those cases, the government's interests in protecting its secrets is secondary to the defendant's right to defend his life. As the Supreme Court articulated in *Roviaro v. United States*, 353 U.S. 53 (1957)—in which the court ruled that it was prejudicial error not to disclose the identity of an informant in a narcotics prosecution—the privilege must give way to the citizen's inviolate right to meaningful due process. So too here.

Given the unique position of death sentences in the firmament of due process cases, the court below erred in ruling that state secrets privilege is absolute in this case because the cause of action is styled as civil, not criminal, and so must be dismissed. Instead of honoring Mr. Kareem's non-derogable right to due process, the district court proceeded directly to an analysis of whether the government met the procedural requirements for successfully invoking the state secrets privilege. In so doing, it neglected to engage in the necessary analysis of whether the privilege should, as a matter of constitutional law, apply to foreclose relief in this case. The perhaps inadvertent result is that the court accepted the ghastly premise that the U.S. government may decide to murder its own citizens,

and that it may undertake do so in secret, without any due process whatsoever. This is wrong. No rule of evidence mandates a suspension of due process rights for the sake of a common law evidentiary privilege. The state secrets privilege does not give way in criminal cases simply because they are criminal and the government is the initiating party; it gives way because the Constitution mandates that the government affords citizens due process rights in cases in which the government seeks to kill or confine its citizens, even in matters directly relating to national security. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004); *Doe v. Mattis,* 889 F.3d 745, 759 (D.C. Cir. 2018).

This case is civil only because the government decided to bypass due process. The fact that this circumstance required Mr. Kareem to initiate the legal proceeding to save his life should not benefit the government's position or insulate the government's conduct from judicial scrutiny. Moreover, the rigid distinction between criminal and civil actions is an artificial one where the case is a demand for due process in advance of an extrajudicial killing of a U.S. citizen. That the designated victim initiated the case does not dispense with the protections to which he would be entitled if given a trial.

There are multiple cases which adapt methodologies originally developed for the handling of classified information in criminal cases to civil cases where serious constitutional rights are at issue—rights well short of the right to life—and

Mr. Kareem's due process rights demand that they be applied to discovery in this case. This case should be remanded with orders to fashion procedures for disclosure, such as those which are routinely used in criminal cases (and civil habeas proceedings) involving sensitive classified national security information. These methods—including the provision of summaries, redacted documents, and restricted disclosure to cleared counsel—enable the court to both protect government secrets and uphold due process rights.

Finally, the district court erred in finding that the government had adequately shown that disclosure of whether Mr. Kareem has been targeted and why actually poses a reasonable danger to national security. Mr. Kareem seeks to know whether or not he was he targeted for killing by the U.S. government and, if so, what evidence did the government rely upon in making decision to target him for killing. JA_0140–41. The government's categorical claim that information of this type can never be disclosed is disingenuous. In the past, it has not only disclosed the fact of its targeted killing programs to the public, along with the standards by which individuals are selected for assassination, but it has identified a specific U.S. person who had been designated for lethal action, explained why, published a memo on its analysis, and killed that individual via drone strike. The government's blanket assertion here that such information cannot be disclosed suggests that the government is using the state secrets privilege as a sword and a

shield, making disclosures only when it the government sees an advantage in doing so. Faced with such a contradiction, the court below should have examined the government's declarations as to the secret nature of the information being sought by Mr. Kareem with a skepticism that appears to be wholly lacking from its opinion. While Mr. Kareem cannot know what was disclosed to the court in classified versions of the declarations, the information contained within the public versions makes no showing whatsoever as to why disclosures cannot be made in *this* case, and there is no basis to conclude that the court had an adequate basis for its finding that the discrete facts sought here could not be revealed without endangering national security.

Mr. Kareem is a U.S. citizen and journalist and appears to have been mistakenly targeted for killing. The government's *ipse dixit* contention that national security prevents it from disclosing to a U.S. citizen (or his lawyers, who would be bound by stringent security requirements) whether he is designated for death defies reason, and the state secrets privilege should not apply to protect that information from disclosure.

STANDARD OF REVIEW

The standard of review of a district court's legal determinations involving the state secrets privilege, including the decision to dismiss a complaint, is *de novo*. *Molerio v. F.B.I.*, 749 F.2d 815, 820 (D.C. Cir. 1984) (proper standard of

review an "independent assessment"). The district court's underlying findings that the government has made the requisite showing that the state secrets privilege applies to the facts at issue are reviewed for abuse of discretion. *In re Sealed Case*, 494 F.3d 139, 144 (D.C. Cir. 2007).

ARGUMENT

A. Due Process Requires That the Government Must Disclose Whether Mr. Kareem Has Been Targeted for Lethal Action and the Basis for That Decision.

Mr. Kareem has credibly pleaded that he has been sentenced to death by his own government without charges or a trial. He has a due process right not to be summarily executed by the government, and filing this lawsuit was the only way to avail himself of it. The district court agreed. In its memorandum opinion denying in part the first motion to dismiss, the district court recognized that what Mr. Kareem seeks to do here is his birthright: "a timely assertion of his due process rights under the Constitution to be heard before he might be included on the Kill List and his First Amendment rights to free speech before he might be targeted for lethal action due to his profession." JA_0114.

Mr. Kareem has every reason to be afraid that the government believes that it is entitled to kill him without notifying him and without justifying its actions in any way. All citizens should be concerned about such a proposition. Mr. Kareem, and the court below in its June 13, 2018 memorandum opinion, strongly disagree

with the government, and for good reason. But the district court, after acknowledging Mr. Kareem's clear due process right to life, allowed the government entirely to override that right through the unilateral invocation of the state secrets privilege. There is *no case* in which the government has been able to invoke the state secrets doctrine to avoid judicial scrutiny of its decision to kill a U.S. citizen who has appeared in court to challenge that decision. This Court should ensure that this case is not the first.

In every other circumstance in which a citizen faces death at the hands of his government, due process applies. The Supreme Court has recognized a body of constitutionally required procedural protections that apply in capital punishment cases premised on the fact that "death is different." *E.g.*, *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). "[T]he action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action." *Gardner v. Florida*, 430 U.S. 349, 357–58 (1977). The consequences of this action are too severe, and the right too foundational to a constitutional democracy, to allow the government to secretly condemn an American citizen to death, and then, when that citizen discovers the impending and unwarranted sentence, refuse to identify the basis for this sanction that might allow him to challenge it. In essence, Mr. Kareem has asserted that this is a terrible mistake and the government has asserted

that national security allows it to bury that mistake and the fatal consequences that may flow from it.

The government is wrong, and Mr. Kareem is entitled to the ordinary due process protections afforded to citizens facing death at the hands of the government. Because of its qualitative difference from "all other punishments," the Court has insisted upon a "correspondingly greater degree of scrutiny" and has focused on implementing procedures to ensure that punishment is "not meted out arbitrarily or capriciously." *California v. Ramos*, 463 U.S. 992, 998-99 (1983). Such procedures include requiring disclosure to the accused of any confidential information that the government has used or intends to use as a basis to impose the death penalty (*Gardner*, 430 U.S. at 362) and requiring consideration of the record of the individual offender (*Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). Given that the government concedes the possibility that it may have targeted Mr. Kareem for lethal force—it will neither confirm nor deny whether it has (JA_0185; JA_0198)—it cannot avoid the corollary duty to give Mr. Kareem an informed chance to avoid that fate, just as it must in any other scenario in which the government seeks to kill one of its citizens.

At a minimum, due process requires that a U.S. citizen designated for death be given notice of the basis for the adverse determination and an opportunity to challenge it. "For more than a century the central meaning of procedural

due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)); *Mathews v. Eldridge*, 424 U.S. 319, 333-34 (1976) (the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner" and that includes "notice of the action sought").

If the government has decided to target one of its own citizens for lethal action, that fact cannot be protected by the state secrets privilege, not even in the war on terror. The Supreme Court has insisted on enforcing due process for U.S. citizens in circumstances implicating national security, even in the exigencies of war and even where the penalty at issue (detention) is significantly less severe than the death sentence at issue here. In *Hamdi v. Rumsfeld*, a plurality of the Court held that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." 542 U.S. at 533.

These constitutional protections extend to government action outside U.S. territory. In *Doe v. Mattis*, 889 F.3d 745 (D.C. Cir. 2018), a U.S. citizen was captured in Syria. The Department of Defense determined that he was a member

of ISIL and detained him in Iraq. The D.C. Circuit ruled that he was constitutionally entitled to notice of the basis for his designation as an enemy combatant within the military's detention authority before it could transfer him to a third country. *Id.* at 748. If the government is able to provide due process in those battlefield contexts, it can do so here now that its target has filed suit demanding it. These two pillars of due process—meaningful notice and a factfinding hearing—have withstood more than 18 years of the war on terror and numerous related criminal trials without compromising national security.[1] *E.g., United States v. Lindh*, 198 F. Supp. 2d 739, 740 (E.D. Va. 2002) (granting protective order over interviews of detainees disclosed to defense counsel in the prosecution of a U.S. citizen for supporting Al Qaeda). There is no reason to question the propriety of continuing to honor them here.

Nor should the disclosure that the government has *not* designated Mr. Kareem be a state secret. The government is not permitted to kill its citizens without due process. Confirmation that the government has not taken the decision to kill Mr. Kareem—or any other U.S. citizen for that matter—does not affect national security; it merely affirms compliance with the rule of law. And it resolves the case rather than leaving Mr. Kareem in existential limbo.

[1] Counsel for Appellant informed the district court that she had a security clearance. JA0142. Undersigned counsel has had a Top Secret SCI clearance which he can seek to renew.

B. The State Secrets Privilege Does Not Defeat Mr. Kareem's Due Process Rights.

The district court improperly concluded that the state secrets privilege supplants a citizen's right not to be killed by his government without due process. It reached this erroneous conclusion by analyzing only the procedural aspects of the government's claimed national security interest without examining what due process demands when a citizen's life is at stake. The state secrets privilege is an evidentiary rule rooted in common law; it does not override the Constitution. *Fazaga v. Fed. Bureau of Investigation*, 916 F.3d 1202, 1231 (9th Cir. 2019); *In re Sealed Case*, 494 F.3d 139, 143 (D.C. Cir. 2007). This principle is codified in the rules of evidence. Federal Rule of Evidence 501 indicates common law governs a claim of privilege unless the Constitution provides otherwise. Similarly, the Supreme Court has a statutory right to promulgate evidentiary rules, but those rules may not operate to "abridge . . . any substantive right." 28 U.S.C. § 2072(b). "[T]he rules of evidence must yield when they offend the constitutional trial rights of litigants." *In re Sealed Case*, 494 F.3d at 143. Mr. Kareem has a non-derogable right to due process before the government may kill him, and that includes notice of the basis for the determination made against him. As invoked here, the state secrets privilege completely eliminates Mr. Kareem's substantive and procedural rights to due process, and so it must yield.

By limiting its inquiry to whether procedural requirements for invoking the state secrets privilege had been met (JA_0204 *et seq*.), the district court's opinion failed to account for a core principle of a constitutional democracy: there are limits on what this government may do to its citizens in the name of national security, and they are judicially enforceable. Otherwise, the label "national security" simply becomes a talisman to cover "a multitude of sins." *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985). While the state secrets privilege has been given a broad reading over the years, it has *never* been applied to authorize the U.S. government to summarily execute its own citizens and the district court should not have ratified the government's radical expansion of the privilege here.

C. Because Mr. Kareem Alleges That the Government Intends to Deprive Him of His Life, the Court Should Treat His Case as a Criminal Case for the Purpose of Reviewing the State Secrets Privilege.

Mr. Kareem is in the same posture as a criminal defendant facing capital punishment, and the only reason the case is docketed as civil is because the government chose summary execution without any opportunity for Mr. Kareem to defend his right to life as a U.S. citizen. The government's argument bootstraps its current procedural denial of Mr. Kareem's due process claims to its initial substantive denial of Mr. Kareem's due process rights. The government first denied Mr. Kareem due process of law when it decided to kill him without notice or an opportunity to be heard. Because the government undertook to kill Mr.

Kareem via extrajudicial mechanisms, Mr. Kareem had to take affirmative steps to save his life, forcing him into the initiating posture of a civil litigant. Although filed necessarily as a civil case under the docketing rules of the district, Mr. Kareem is essentially seeking the right to intervene with respect to a governmental action taken against him in secret before he is killed. The mere fortuity that the government and Mr. Kareem are not on the usual sides of the "v." in the case caption does not alter the fundamental reality that this is a capital case. Nevertheless the government invoked the state secrets privilege, arguing that because this was a civil proceeding, rather than criminal, the privilege served as a complete bar to Mr. Kareem's case.

The unique circumstances of this case require the adaptation and application of precedent from criminal cases, where the state secrets privilege is not absolute. In criminal cases, where the defendant faces and impending loss of liberty or life, the state secrets privilege must "give way" and the defendant must have access to information material to his defense. *Roviaro v. United States*, 353 U.S. 53, 61 (1957) (reversing conviction where government withheld informant's identity); *United States v. Abu-Jihaad*, 630 F.3d 102, 141 (2d Cir. 2010) (discussing when a defendant's right to present a defense "displaces" the state secrets privilege). When the government stands poised to take action against an accused, "it is unconscionable to allow it to undertake prosecution and then invoke its

governmental privileges to deprive the accused of anything which might be material to his defense." *United States v. Reynolds*, 345 U.S. 1, 12 (1953). Proceeding against a person in jeopardy for his liberty or life on the basis of undisclosed state secrets is a "denial of [an individual's] constitutional right"; there is "no significant distinction between introducing evidence against an accused which he is not allowed to see, and denying him the right to put in evidence on his own behalf." *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950). An action seeking to deprive a person of liberty or life therefore cannot go forward "when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony." *Jencks v. United States*, 353 U.S. 657, 672 (1957).

In other words, it is not that the privilege yields because the case is criminal; rather it gives way because the defendant has due process rights that must be honored before the government may deprive him of his right to life or liberty. This right must be honored whether a case is docketed as civil or criminal; the right to civil redress in damages for backward-looking constitutional violations is an entirely different question. Because this case is ultimately a demand for due process for an *impending* harm by the state, the state secret privilege should give

way here, and, as in a criminal prosecution, the government should be required to produce the information necessary to Mr. Kareem's defense, or in the alternative, confirm that it is going to abandon any efforts to take lethal action against him. Precluding review on account of the state secrets privilege in this case effectively frees the government to designate individuals for lethal action in secret, instead of prosecuting them. As Justice Jackson cautioned in his prophetic dissent in *Korematsu v. United States*, 323 U.S. 214, 245-46 (1944): "Once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle . . . [which] then lies about like a loaded weapon, ready for the hand of any authority . . . ." Just so here, where the absolute application of the state secrets privilege would insulate extrajudicial killing from meaningful challenge.

The district court's analysis extended no further than the finding that "Mr. Kareem is not a criminal defendant, he is a plaintiff in a civil suit." JA_0212. The district court accepted the government's attempt to make the distinction that here it is not the government who has taken the initiative; it is Mr. Kareem who is "in the driving seat." *Id.* But trying to prevent your own execution does not put you in the driver's seat; it is an effort to avoid being ground under the wheels of arbitrary government power. Far from being in control, Mr. Kareem comes before this

Court as the target of a secret government death sentence, and should be afforded the procedural due process available in criminal cases.

The district court erred in its due process analysis, relying on inapposite civil cases in which the plaintiff sought redress for past wrongs and damages as compensation. These bear no resemblance to this case. In arguing that a remedy ought to be provided by Congress, the court cited to a case that was specifically concerned with obtaining civil, compensatory damages against the government for harm arising from its illegal interception of communications. JA_0212; *Halkin v. Helms*, 690 F.2d 977, 1001 (D.C. Cir. 1982). That interest is dramatically different from Mr. Kareem's request for prospective injunctive relief—that the court stop the government from trying to kill him, at least until he can be given his due process rights.

No case relied upon by the district court comes remotely close to the interest at stake here. In *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010), foreign nationals brought suit against a U.S. corporation not under the Constitution, but the Alien Tort Statute, seeking civil damages for torture that had been inflicted by a government contractor at CIA black sites. Because the government's invocation of the state secrets doctrine deprived the defendant government contractor of the possibility of defending itself, the case was dismissed. In *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 537 (E.D. Va. 2006), *aff'd*

sub nom. El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007), the state secrets doctrine similarly precluded a damages claim for torture in connection with a clandestine extraordinary rendition program. And in *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1195 (9th Cir. 2007), a non-profit organization sought damages for warrantless surveillance. In none of these cases did the litigant come to the court and seek due process and injunctive relief against a prospective deprivation of a fundamental constitutional right, the right to life.

D. The Court Has the Duty to Fashion Procedures That Would Allow the Case to Proceed.

Not only does the court have the authority to adjudicate this claim, it has an obligation to do so, claimed national security interests notwithstanding. "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536. The state secrets privilege does not give the executive a pass to disregard those constraints, nor does it absolve the federal judiciary of its obligation to ensure that the executive acts within those constraints.

The fact that the government may have to disclose national security information should not serve as a bar to the protection of Mr. Kareem's due process rights. "Due process is flexible and calls for such procedural protections as the particular situation demands." JA_0112, *citing Morrisey v. Brewer*, 408

U.S. 471, 481 (1972)). When faced with a conflict between secrecy and an individual's rights, the Supreme Court has instructed that there is "no fixed rule," but rather courts should "balanc[e] the public interest in protecting the flow of information against the individual's right to prepare his defense." *Roviaro*, 353 U.S. at 62 (prejudicial error where government refused to disclose identity of informant in heroin transaction). The fundamental error of the district court was to view the civil styling of the case as dispositive of the issue and thereby ignore the Supreme Court's injunction to adapt flexibly to the nature of the rights at issue. Courts have regularly ordered limited disclosure of state secrets and classified information in circumstances such as these, where a citizen is at risk of being erroneously deprived of his life by the government on the basis of evidence that the government refuses to disclose.

In keeping with the flexibility required by due process and in recognition of the equities in this case, the Court should order remand for disclosure of whether Mr. Kareem was designated for extrajudicial killing, and, if so, the factual basis for that determination. The district court may then proceed in accordance with procedures modeled after those in the Classified Information Procedures Act ("CIPA"), 18 U.S.C. § App. 3 § 1 or those employed in Guantanamo habeas cases. CIPA governs the use of classified information in certain criminal cases but has also been applied when courts need to fashion remedies to ensure that a litigant has

due process. Through CIPA, Congress provided a structure designed to balance the government's interests in secrecy against the due process interests of a person who is the target of government action. Due process rights afford defendants or their counsel access to classified information, handled in accordance with CIPA's safeguards, that is material or "helpful to the defense of [the] accused." *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (quoting *Roviaro*, 353 U.S. at 60-61).

Throughout the war on terror, with the growth of complex questions at the interplay between liberty and security, federal courts have fashioned workable remedies, most often in the context of Guantanamo detainees wishing to challenge their designations as enemy combatants in the civil habeas context. Mr. Kareem functionally seeks to do the same thing here and challenge a determination that has been made to deprive him of his life. The detainees' cases contest the determinations that deprive them of their liberty. While habeas cases are civil, due process demands disclosure of classified information. The government cannot rely on undisclosed classified statements as the basis for detention; it must either disclose these statements or rely on other evidence that it can disclose. *Mohamed v. Ga*tes, 624 F. Supp. 2d 40, 44 (D.D.C. 2009).

In *Al Odah v. United States*, in a habeas proceeding, the court affirmed that a district court "may compel the disclosure of classified information." 559 F.3d 539,

544 (D.C. Cir. 2009). The D.C. Circuit pointed the way forward, and noted that CIPA "or other alternatives should also be available in habeas if the district court determines that a proposed admission or summary would suffice to provide the detainee with 'a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law.'" *Id*. at 547; *see also Parhat v. Gates*, 532 F.3d 834, 849-50 (D.C. Cir. 2008) (citing CIPA as a way to deal with sensitive classified information in a habeas case).

District courts have proceeded accordingly to use their discretion to apply CIPA analogously to fashion remedies that permit disclosure of necessary information to protect due process rights. For example, in *Al Bakri v. Obama*, 660 F. Supp. 2d 1, 2 (D.D.C. 2009), the district court ordered the production of relevant and material classified information to security-cleared counsel for the detainee habeas petitioner. Similarly, Judge Lamberth found in *Huddle v. Horn*, 636 F. Supp. 2d 10, 19 (D.D.C. 2009), *vacated per settlement*, 699 F. Supp. 2d 236 (D.D.C. 2010), a *Bivens* action relating to eavesdropping, that CIPA-type procedures can and should be applied in civil cases to manage classified information and try to avoid the state secrets privilege being employed to bar effective relief:

> The Court understands that the implementation of CIPA-like procedures in a civil case is unusual. However, the Court of Appeals foresaw the problems that could arise in this case, and therefore conspicuously stated in 2007 that

> "nothing in this opinion forecloses a determination by the district court that some of the protective measures in CIPA, 18 U.S.C. app. III, which applies in criminal cases, would be appropriate, as Horn urges, so that this case could proceed." *In re Sealed Case*, 494 F.3d at 154.

Disclosure of information does not mean the indiscriminate publication of state secrets. Courts have ordered careful and appropriate disclosures in ways that could be emulated here, including reviewing information in camera, ordering the disclosure of summaries, allowing redactions, and protecting from disclosure the methods of information-gathering.

In *United States v. Rosen*, for example, several individuals affiliated with AIPAC were charged with obtaining national defense information from sources in the U.S. government and unlawfully passing that information to AIPAC staffers and foreign officials. The Fourth Circuit upheld the district court's order to admit classified information over the government's objections. The district court had allowed limited redactions, and the summaries omitted sources and methods of the government's intelligence-gathering. 557 F.3d 192, 199 (4th Cir. 2009). Similarly, in the prosecution of an individual for lying to federal agents about traveling to Pakistan to join a violent insurgent group, the district court held an *ex parte* conference with the defense team to ascertain whether the alleged state secrets would be useful to its defense strategy and then approved for disclosure summaries of certain classified documents that the government sought to withhold.

United States v. Shehadeh, 857 F. Supp. 2d 290, 294 (E.D.N.Y. 2012). In other cases, such as the prosecution for the U.S. embassy bombings in Somalia, the government avoided disclosure of state secrets by stipulating to the facts sought to be established. *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 125 (2d Cir. 2008). These cases demonstrate the extent to which federal courts have devised flexible solutions that accommodate the government's need to protect state secrets and individuals' due process rights.

Just as in a criminal case in which the government declines to disclose the state secrets and is required to drop the charges, if the government truly cannot or will not allow Mr. Kareem due process to know the basis for and challenge his designation, then the government could simply acknowledge that, whatever may have happened in the past, it is *not* planning on an extrajudicial killing of Mr. Kareem, and it will inform the court if that position changes. As noted above, there is no reason the government should be resistant to a statement that it does not intend to kill one of its citizens.

The government defends its non-disclosure by making a bizarre fairness argument—that if it tells Mr. Kareem that he will be or not be killed, then it will have to tell others who may be marked for assassination, or else they will conclude the worst. First, one would hope and expect that deliberate extrajudicial killing of U.S. citizens is a rare event and this situation is unlikely to recur with frequency, or

at all. But if there is a different case in a different place with different facts, that is a case that can be brought and evaluated on its own merits. But a parade of future hypotheticals does not constitute a state secret here. If Mr. Kareem was never designated, or (more likely, given the facts) designated by mistake on account of misleading metadata, or is not now designated for any reason, it would be easy for the United States to say that he is no longer designated and will not be. It then becomes irrelevant whether he was designated previously; the government can shroud its previous actions from scrutiny and provide relief.

It surely cannot be a matter of urgent national security to tell him that he is *not* a target of extrajudicial killing, and such disclosure would obviate any purported concerns about compromising sources and methods of intelligence-gathering, and would not require further admissions by the government relating to the Kill List or the process by which individuals are selected for lethal action. Compelling such limited relief would resolve the case and alleviate the moral hazard of the use of the state secrets privilege to prevent a citizen from asserting his right to life.

E. The Court Abused Its Discretion In Determining That Disclosure of Any Kind Poses a Reasonable Danger to National Security

Aside from reaching the wrong conclusion with regard to Mr. Kareem's right to know that he has been targeted for lethal action and why, the court erred in finding that the government had adequately made the case that there is a reasonable

danger to national security if this information is disclosed. As an initial matter, the government admits *in this case* that it does have a lethal targeting program, it has taken airstrikes in Syria, and it has publicly disclosed many of those strikes. JA_0186–87. On other occasions—in the media, in public speeches, and via declassification—government officials have disclosed the fact of an extrajudicial assassination program, have identified individuals who have been on the list, and disclosed the process by which at least some individuals have been selected. The district court did not disagree that these facts have been disclosed. The district court's decision here appears to encompass only whether the government may invoke the state secrets privilege to refrain from disclosing whether Mr. Kareem himself is or is not on the Kill List and why. Its decision was in error.

In order to successfully invoke the state secrets privilege, the government must show that there is a reasonable danger to national security if the information sought is disclosed. *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983). Where the litigant's showing of need is compelling "the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." *Id*. "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *United States v. Reynolds*, 345 U.S. 1, 9–10 (1953). Courts must examine the plausibility of the government's claims in the context of all the circumstances surrounding the case. *Ellsberg*, 709 F.3d at 59; *Molerio v. F.B.I.*,

749 F.2d 815, 822 (D.C. Cir. 1984) ("the validity of the government's assertion must be judicially assessed"). The applicability of the state secrets privilege "turns on the facts of the case" and the district court may "police the litigation so as not to compromise national security." *In re U.S.*, 872 F.2d 472, 479 (D.C. Cir. 1989).

The government did not meet these standards, and the court abused its discretion in finding that disclosure here would present a reasonable danger to national security. JA_0213. As an initial matter, since the government submitted *ex parte* declarations, Mr. Kareem has no way of knowing, and the district court did not provide any explanation to suggest, that the government met its obligations to make a particularized showing justifying non-disclosure. Former Acting Secretary Shanahan and Former Director of National Intelligence Coats spoke to the potential harm involved in whether "an individual" or "particular person" knows that he is designated for lethal action, because he could "alter his behavior in a manner that would be harmful to the national security." JA_0198–99; JA_0188–89. In other words, if the government admits that it is seeking to kill a U.S. citizen without due process, that person could "alter his behavior" by trying to get out of the way and somehow that would harm national security. Similarly, if some abstract person had confirmation that the U.S. was not trying to kill them, presumably because he had not been identified as an imminent threat to the United States, then he could "operate more freely." JA_0189.

These speculative concerns are circular and nonsensical. Mr. Kareem is *already aware* of at least five times that the government has tried to kill him. It is why he filed this lawsuit. How can that be a secret? Whatever evasive measures he could take "to alter his behavior" against predator drones or other lethal force, the incentive to take them rose with the successive strike attempts. If he is in error and it was all just a strange coincidence, then the government can tell him that he is not designated for death without any consequences. By definition, he will not "operate more freely" in any way that concerns the U.S. government, because the government does not have any concerns that have resulted in his designation for death.

If, on the other hand, the government confirms what appears to be obvious to Mr. Kareem—that he was and remains designated for death—then he should have the opportunity to prove that he is an innocent actor. But when the government asserts that the necessary factual predicates—whether he was and still is designated and, if so, why—are state secrets, then he has no opportunity to adduce with hard evidence what is overwhelmingly likely here: Mr. Kareem was meeting with Syrian rebels to report the news; his metadata put him in places where bad people were; and so the government wrongly concluded that he was a bad person and made a mistake, which it seeks to obscure here with an implausible and improper invocation of the state secrets doctrine.

The government's history of disclosing exactly what Mr. Kareem is asking for here further undermine its assertion that national security will be harmed by disclosure. At the very least, the government's past disclosure required the district court to view the government's blanket invocation of state secrets here with considerable skepticism. For decades, the government has routinely publicly identified terrorist targets. The Department of State issues press releases when it designates an individual or an organization as a terrorist.[2] The Department of Treasury maintains a registry of people affiliated with terrorism globally in connection with its global terrorism and Syrian sanctions programs. These "specially designated nationals" are put on notice that the U.S. government maintains intelligence on them, and this process enhances national security by preventing U.S. persons from interacting with them. Terrorists are also listed on the FBI's most wanted list.[3] During the Iraq War, it was well-publicized that the government issued a deck of playing cards with the faces and names of the 52 most-wanted Iraqis and distributed them to service personnel.[4] As the

[2] U.S. Dep't of State, *Terrorism Designation Press Releases*, https://www.state.gov/j/ct/rls/other/des/index.htm, cited in Plaintiff's Opposition to Motion to Dismiss, April 1, 2019, Dkt. No. 27 at 20 (hereinafter "Opp. MTD").

[3] FBI, *Most Wanted Terrorists*, https://www.fbi.gov/wanted/wanted_terrorists (last visited March 31, 2019), Opp. MTD at 20.

[4] Joel Christie, *Dead hand: Deck of 52 Most-Wanted Iraqi playing cards given to soldiers at the start of the war shows the fall of Saddam 'The Ace of Spades' Hussein's army*, Daily Mail UK, Oct. 18, 2014, https://www.dailymail.co.uk

government's conduct makes clear, it is possible both for a person to be alerted of the fact that the U.S. government has suspicions about his or her conduct and for the U.S. government to be effective in protecting its national security interests. They are not mutually exclusive, as illogically suggested in the declarations provided. The court abused its discretion in finding that the government had made its case that basic information regarding Mr. Kareem is a state secret.

It is also untrue that the government categorically considers designation for lethal action a state secret and so it cannot alert one designee without alerting all. In the case of Anwar al-Aulaqi, who was a known and wanted terrorist, the government disclosed its designation of a U.S. citizen for lethal action. On April 6, 2010, in an apparently coordinated media strategy, senior U.S. officials informed the major news outlets that al-Aulaqi had been targeted for assassination.[5] In announcing this designation, the officials also explained what al-Aulaqi was suspected to have done—plotted attacks and recruited for Al Qaeda—providing at least some bare notice of the factual basis for its action. The operation

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/news/article-2798050/dead-hand-deck-52-wanted-iraqi-playing-cards- given-soldiers-start-war-shows-fall-saddam-ace-spades-hussein-s-army.html, Opp. MTD at 20.

[5] *See, e.g.,* Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. Times, Apr. 6, 2010, https://www.nytimes.com/2010/04/07/world/middleeast /07yemen.html; Greg Miller, *Muslim Cleric Aulaqi is 1st U.S. citizen on List of those CIA Allowed to Kill*, Wash. Post, Apr. 7, 2010, http://www.washingtonpost .com/wpdyn/ content/article/2010/04/06/AR2010040604121 _pf.html, Opp. MTD at 21.

that ultimately resulted in al-Aulaqi's death does not appear to have been impeded by the provision of notice of the designation or the reasons behind it to al-Aulaqi (who had even responded publicly).

Nor is it reasonable to protect from disclosure any information as to how the government makes its targeting decisions. In 2013, the Department of Justice released an official copy of its White Paper on the "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force" in connection with a FOIA request.[6] This paper indicates that as a baseline criterion, the person targeted would pose "an imminent threat of violent attack against the United States."[7] It also recites that the "Department assumes that the rights afforded by the Fifth Amendment's Due Process Clause, as well as the Fourth Amendment, attach to a U.S. citizen even while he is abroad," and that "[n]o private interest is more substantial" than ensuring that a person is not erroneously deprived of his life.[8] Given the government's acknowledgement of this constitutionally protected interest, its refusal to disclose the circumstances pertaining to Mr. Kareem is inexplicable.

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[6] Steven Aftergood, *DoJ White Paper Released as a Matter of "Discretion"*, Secrecy News Blog (Feb. 11, 2013), https://fas.org/blogs/secrecy/2013/02/doj_discretion/, Opp. MTD at 18.

[7] Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force* at 3, https://fas.org/irp/eprint/doj-lethal.pdf.

[8] *Id.* at 5–6.

The government has also disclosed how its policies operate in practice. In 2014, the government released a 41-page memorandum outlining the legal justification for killing Anwar al-Aulaqi. This memorandum discusses the authority held by both the DoD and CIA to conduct lethal action operations against "AQAP forces of which al-Aulaqi is a leader 'associated with' al Qaida forces for purposes of the AUMF."[9] In its memorandum concerning its analysis of whether it could legally kill al-Aulaqi, the government resolved its due process obligations to that U.S. citizen as follows:

> we conclude that at least where, as here, the target's activities pose a "continued and imminent threat of violence or death" to U.S. persons, "the highest officers in the Intelligence Community have reviewed the factual basis" for the lethal operation, and a capture operation would be infeasible and where the CIA and DoD "continue to monitor whether changed circumstances would permit such an alternative," . . . the "realities of combat" and the weight of the government's interest in using an authorized means of lethal force against this enemy are such that the Constitution would not require the government to provide further process to the U.S. person before using such force.[10]

[9] Memorandum for the Attorney General, July 16, 2010, *Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi* at 21, https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/06/23/National-Security/Graphics/memodrones.pdf?tid=a_inl_manual, Opp. MTD at 19.

[10] *Id.* at 40.

The government has made no effort here to distinguish why it disclosed in one case with real national security implications what it will not disclose here, making it impossible to accept that it has shown that there is a reasonable danger to national security every time it makes the kind of disclosures sought in this case.[11]

Indeed, as noted above, in every civil habeas action filed by an enemy combatant, the detainee is able to obtain the basis for his designation. Cleared counsel are able to obtain classified information. in *Al Bakri v. Obama*, 660 F. Supp. 2d 1, 2 (D.D.C. 2009). If the government asserts the right to continue to detain that person, it ordinarily follows CIPA-type procedures and discloses information. In *Doe v. Mattis*, 928 F.3d 1, 4 (D.C. Cir. 2019), a U.S. citizen captured in Syria filed a habeas petition to challenge his detention. The court held

[11] To the extent the district court was persuaded by Director Coats' broader claims of the need for secrecy over lethal targeting programs, those claims are demonstrably implausible and should not be countenanced. The intelligence community has tried to invoke a blanket privilege over public information concerning drone strikes in this Circuit before, without success. This Court observed in *American Civil Liberties Union v. C.I.A*, 710 F.3d 422, 430 (D.C. Cir. 2013) that the CIA's claim that "no authorized CIA or Executive branch official has disclosed whether or not. . . the CIA is involved in drone strikes or has an interest in drone strikes," was neither "logical nor plausible" on account of public acknowledgments made by the president and counterterrorism officials, including the Director of the CIA. Similarly, the Second Circuit expressly found that the CIA had waived the right to assert secrecy over its targeting program because its director had discussed the program in public. *New York Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 122 (2d Cir. 2014), *opinion amended on denial of reh'g*, 758 F.3d 436 (2d Cir. 2014), *supplemented*, 762 F.3d 233 (2d Cir. 2014) (ordering CIA to submit Vaughn index in response to FOIA request about secret drone program).

that, just as in *Hamdi*, he was entitled to notice of the basis for his detention, and an opportunity to challenge it. In the course of these proceedings, not only did the government provide a factual return containing sources and methods of intelligence leading it to conclude that Doe was a member of the Islamic State, but it made it public. It is available for review online.[12] Just as the government must disclose information it would prefer not to in order to detain a U.S. citizen abroad, it must disclose such information to allow meaningful relief when it seeks to kill a U.S. citizen abroad.

The trial court's decision therefore swept too broadly when it said that the government "is not estopped" from concluding that disclosure is permissible in one case but not another (JA_0212), because the government has, in fact already disclosed a significant amount of information about the "who, why, and how" of how it makes targeting decisions, invalidating its claim that it cannot make any disclosures on this subject, much less with respect to Mr. Kareem, a U.S. citizen. While the government may not have waived its right to keep certain facts secret, the fact that it has previously disclosed significant details about its lethal action program, including in at least one instance, who was on it and why, undermines its

[12] Respondent's Factual Return, *Doe v. Mattis*, Civil Action No. 1:17-cv-2069 (TSC), ECF. No. 66-1, available at https://www.aclu.org/sites/default/files/field_document/66-1._ecf_46_redacted_version_for_public_filing_2.14.18.pdf

claim that ever revealing this information poses a threat to national security while the government may not be estopped, it must have a meaningful and not arbitrary basis for such distinctions. The district court's opposite conclusion cannot be squared with the fact that a great deal of the information sought here is already public and indicates a failure to skeptically examine the government's purported need for secrecy in a case that demands strict scrutiny. Its decision allows the government to use the privilege as both a sword and a shield, invoking national security and making disclosures when it seeks to justify the targeted killing program, and refusing to make the same disclosures when a U.S. citizen challenges that action. This is asking the Court to protect the information sought as a matter of institutional self-protection, not national security. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1193 (9th Cir. 2007) (government's publicly acknowledged warrantless surveillance program was not a state secret); *Doe 2 v. Esper*, No. CV 17-1597 (CKK), 2019 WL 4394842, at *6 (D.D.C. Sept. 13, 2019) (Secretary of Defense may not invoke deliberative process privilege to prevent discovery into evidence concerning military judgments which would show whether or not such deference is appropriate).

The public nature of so much information key to Mr. Kareem's claim demonstrates that it is entirely possible to litigate this case without impinging on discrete matters that are the proper subject of the state secrets privilege. Without a

particularized factual showing as to why the government could not disclose here what it has disclosed on many other occasions, the decision is devoid of any evidence that the requisite showing was made. The government can cooperate to solve any evidentiary issues here in multiple ways; it chooses not to. The state secrets privilege has not been properly invoked with respect to Mr. Kareem. The government should not be permitted to hold unquestioned a missile-armed sword of Damocles over Mr. Kareem's head while he reports the news; this Court must reverse.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's order and remand with an order to commence discovery.

Respectfully submitted,

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Dated: March 10, 2020

/s/ Tara J. Plochocki
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2020, I electronically filed Appellant's Brief and Joint Appendix with the Clerk of the Court using the CM/ECF system.

And I hereby certify that I mailed a copy of the Appellant's Brief and Joint Appendix by Federal Express to the following:

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