CONSTITUTION PROJECT AT NPC

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G. Sloan: I'm Ginny Sloan, I'm the president of the Constitution Project. I want to welcome you all here today and apologize for the lines. We're delighted there's so many people who turned out for this discussion, and it's obviously a very important issue to a lot of people, including many people in this room. There will be more food and I think there are now a sufficient number of chairs. So, anyway, I apologize for any inconvenience.

The Constitution Project, as many of you know, is an independent think-tank. We're based here in Washington, and we specialize in putting together what we call coalitions of unlikely allies who help us promote and defend constitutional safeguards on a wide diversity of issues, including the State Secrets Privilege, including habeas corpus in state criminal cases and also for the Guantanamo detainees. We address issues like the death penalty and the indigent defense, the constitutional power to declare war, and the list goes on, and there's information about our various publications and committees. And you can also sign up for our regular e-mail newsletter at the table in front.

Turning to today's program, the State Secrets Privilege, as you know, is a very controversial doctrine. The Constitution Project's Liberty and Security Committee and Coalition to Defend Checks and Balances issued a statement last May, which is also available to you, that condemns the current practice involving the State Secrets Privilege, which has allowed the Executive Branch to shield way too much evidence in court cases and has allowed a lot of injustice to occur by preventing the courts from hearing cases that they really should adjudicate and provide a remedy for the plaintiffs. There's no doubt that the State Secrets Privilege is needed to prevent the disclosure of national security secrets and classified information, but the use of it has become much too broad and one of our panelists today is going to talk about her personal experience with the kind of injustice that the Privilege can create and how it can basically shield the government from accountability and responsibility for its actions. The Constitution Project also filed an amicus brief before the Supreme Court asking the court to hear the El-Masri case, a case involving the rendition of, the mistaken rendition of, someone who was sent to another country

where he was tortured before the government's mistake was discovered, and his lawsuit was blocked because of the State Secrets Privilege. David Gossett from the law firm of Mayer Brown, who's here today, wrote an extraordinary brief, at least we believe it was extraordinary, but sadly the court was not convinced and did not take the case. So we're going to hear, I think, a really fascinating discussion from a variety of perspectives about this very important issue. I want to thank our panelists. I want to thank the Constitution Project staff for helping to create this what I think is going to be a terrific event, and I want to thank Suzanne S. Spaulding, our moderator, who is going to introduce our panelist. Suzanne, as many of you know, has been, she's a partner at Bingham McCutchen and at the Bingham Consulting Group and has been involved in national security issues for a long time so she is truly an expert and I think is going to help guide a very provocative discussion. So, let me turn it over to you, Suzanne. Thanks.

S. Spaulding: Thanks, Ginny. Excuse me. I want to encourage all of you to read the bios that you've received, but after the program because I'm going to keep the introductions very short and we're going to have a brief discussion and then I hope we're going to have lots of time for Q & A and discussion with all of you.

As you know, of course, the State's Secrets Privilege or Principle is one that allows the U.S. government, either as a party to civil litigation or even when the government is not a party, the government can intervene in any civil litigation. In order to ask the court to prevent evidence from being used in that litigation or disclosed through that litigation that would reveal a state secret. And part of what we're going to discuss today is exactly what is a state secret? What should that standard be and how should we define that?

But as a principle its origins really go back to British law and came up, you know, in this country in Aaron Burr's treason trial to keep evidence out of that trial, but was really recognized formally by the Supreme Court in the Reynolds case, *U.S. v. Reynolds*, which involved a suit brought by widows of three civilians who were onboard a B-29 superfortress aircraft that was on a secret mission for the government and crashed. And the widows sued the government and asked for copies of accident reports that they knew had been done in order to show liability on the part of the government. The government asserted that providing those

accident reports would reveal state secrets and that was what was litigated all the way up to the Supreme Court.

Since that time, there is some dispute about exactly what the numbers are in terms of the number of times the State Secrets has been asserted. And it is not clear that it's always been reported when it's been asserted so it's a little hard to tell. But, but there have been reports that, for example, there were four cases in which it was asserted between 1953 and 1976 and since 2001 it has been asserted in at least 23 cases. Other statistics that it was asserted 55 times in the nearly 50 years between 1954 and 2001 and in the years since, again, 23 times since 2001. But it seems unmistakable that the exercise or assertion of State Secrets Privilege has increased fairly dramatically since the attacks of 9/11 and there obviously could be lots of reasons for that including increased litigation. But we'll talk a bit about that.

There, it is an issue very much alive today in, in a number of cases pending and recently dismissed. It is of interest on the Hill that Senator Kennedy yesterday introduced legislation to, to try to regularize and govern and set forth statutory principles for the assertion and for how courts should judicate on the State Secrets assertions. The House Judiciary Committee is holding a hearing. Lou, is it January 29? Is that the right date?

L. Fisher: Wednesday. Yeah, Wednesday.

S. Spaulding: Yeah. On State Secrets. So it's very much a live issue and we're very lucky and pleased to have a great panel here today to help walk us through and educate us on this and generate, we hope, some interesting discussion about where we ought to go with this from here.

We're going to start with Lou L. Fisher who is the Senior Specialist in constitutional law at the Law Library of Congress. Lou, among many other books that he's written, wrote a book that was published in 2006 entitled "In the Name of National Security: Unchecked Presidential Power in the Reynolds Case," and so Lou is going to start by giving us some sort of a primer on the State Secrets Privilege and the Reynolds case, and exactly what went on in that case and what exactly did the courts say and on what basis.

Next we're going to hear from Judy Loether and as Ginny said, you know, we're particularly pleased to have Judy here today because Judy helps to remind us that this is not just an interesting

intellectual exercise we're engaged in here, but these have, these decisions have very real consequences for the, you know, individuals and Judy's going to tell her story. She is the daughter of one of the civilians who was killed in that crash and, and she has an interesting story to tell -- not just about the consequences of that case, but about its aftermath. And then we're going to hear from Ben Wisner, Wizner, thank you, who's gonna, who is staff attorney at the ACLU, who has litigated a number of civil liberty's cases since 9/11 including a number of cases in which the State Secrets Privilege has been asserted, including the El-Masri case that Ginny talked about. So Ben will bring us up to date in terms of how it's being used today and what the issues are that are being raised.

All of the speakers will talk a little about, obviously about where they think changes and reforms ought to be made, but Bobby Chesney who is an associate professor at Wake Forest University Law School is going to really kick off our discussion and debate about various proposals for reform, change, regularizing the States Secrets Privilege. Bobby, in addition to outstanding scholarship on a wide range of national security issues has published lots of articles including on State Secrets, has a national security law list serve, which all of you should get on which is absolutely outstanding. And, perhaps most important and nearest dearest to me has served as editor of the American Bar Association standing committee on law and national securities, National Security Law Report.

So we're going to start with Lou and he'll give us a few minutes primer on the Reynold's case.

L. Fisher: Okay, it's good to start with the Reynold's case because that was the first time the Supreme Court recognized it as a Constitutional Doctrine. At that point, the Reynold's case is important. We'll talk about it because it was a way for the government to conceal negligence.

I think the State Secrets Privilege today is a much more important issue because it's a way for the government through the State Secrets Privilege to conceal not just negligence, but to conceal illegalities of violations of statutes and treaties in the Constitution. So it's a big issue.

As Suzanne said, the case arose in October 1948 when this four engine B-29 always had a problem of fires in the engines, and engines caught fire and suddenly several engines are out and

people are trying to bail out but the plane is going into a spin and very few survivors. Out of the five civilian engineers who were helping with secret equipment on the plane, four died, and three widows sued the government, which they were entitled to do under the Federal Tort Claims Act which had been passed just two years before. And Congress made it very clear in that statute that if you're suing the government, the government is to be treated like any private party -- so you can ask questions, interrogatories, you can get documents like you would from any civil case. When the case started out, the government refused to give the widows what they asked for, namely the interviews of the three surviving crew members and the documents, particularly the accident report, the official accident report. Initially, the government did not talk about State Secrets. They talked about the confidentiality questions. Classified documents and so forth didn't really come up at the District Court level in Pennsylvania. The judge there was very, very experienced on these. He has handled them. He'd been a judge advocate in WWI so he was formidable. And he eventually told the government that either you give me the accident report for me to read in my chambers, or you lose the case. And he was interpreting I think correctly the purpose of the Federal Tort Claims Act because otherwise you would make a non-entity out of the Act. You would say you could sue the government, but any time you nose around and get close to negligence, we'll just traught out the State Secrets Privilege and you're dead in the water.

So the government did not give over the accident report and they lost in District Court. And they went to the 3rd Circuit in Philadelphia, and the 3rd Circuit said, he's correct. You either give it up or you lose, and the government didn't give it up and the government lost. So now it goes to the Supreme Court, and of all of the times for a States Secrets case to come to the Supreme Court, 1953 might be the worst. This is the time of the Rosenbergs, of Hiss, Oppenheimer secrets going to Soviet Union, and the Supreme Court upheld the government six to three without ever looking at the accident report, never looked at it. And if you read, it's a very short opinion. If you read it, you'll see it's about as incoherent as a Supreme Court case can be because, on the one hand, it will say that the judiciary may not advocate to executive caprice, which is exactly what it did, precisely what it did. And we'll have other statements in there that there may be some conditions in which the information is such that even a judge in chambers couldn't look at the documents without ever explaining how you would ever know if you haven't seen any documents.

So that was a precedent set. There had been opportunities for the court to revisit it. The Supreme Court has not. It's interesting. The Executive Branch has a lot of power. If it exercises the power with some sort of restraint, it can usually win, and there's a certain history in the Executive Branch in pushing something that has a little bit of reasonable basis to the limit, and forcing Congress and the courts to stop it.

I came into Congress in 1970. Immediately, there was the impoundment dispute of a President saying I don't have to spend appropriated money. You could do it a little bit, but eventually Congress had to pass a statute. Today, we know that the Nixon Administration said it could do domestic surveillance under some sort of inherent presidential power, and eventually the court said you cannot and Congress had to pass a statute in 1978.

So we may be at a same kind of condition now where you have privilege that might be under certain circumstances exercised in a permissible way, but I think to me it has gone above board to put the Executive Branch in the position where it can violate statutes, treaties, the Constitution and pay no costs at all. So I'll stop with that, Suzanne.

S. Spaulding: Great. Thank you Lou. Judy?

J. Loether: Hi, I'm Judy.

I'm an ordinary housewife. You might call me chief cook and bottle washer. I've come from the suburbs of Boston just to tell you my story.

Six years ago, I didn't know the first thing about the State Secrets Privilege. Almost 60 years ago, when I was just seven weeks old, my father, an engineer for RCA, was killed in the crash of this B-29. This put the death of my father and my mother's subsequent lawsuit against the United States Government squarely in the center of the landmark decision *United States v. Reynolds*. My mother remarried and while growing up I knew very little about my own father and this lawsuit. My mother got some money. I always thought she'd won. I never knew her case went to the Supreme Court. The death of my father was quite a mystery to me. The newspaper clippings in the attic had pictures of the wreckage and talked of secret missions and even cosmic rays. My young uncle used to tell me he thought the Russians blew up the plane.

After I had my own children, I became very interested in this man who was my father, the man whose pictures and documents of life and death had resided in the attic. When the internet came to my house, I searched for information about anything related to his work and his life. One day, I happened to type into the search engine B-29 plus accident. It was only chance that brought me to the website "accidentreport.com," which provides accident reports for air force crashes between 1918 and 1953. My first thoughts were that this might tell me about the secret project he was working on; this might tell me if the Russians had really blown up the plane.

When I read this report, it was truly a sad, very dark comedy of errors that led to the terrible death of my father and eight other men. For instance, Engine No. 1 had caught on fire and it's reported by the co-pilot, who was a survivor, that the pilot actually turned off Engine No. 4 instead of Engine No. 1. The co-pilot saw this and thought he had corrected it, but they found later that he hadn't so both Engine No. 1 and Engine No. 4 had been turned off. They also discovered that Engine No. 2 had had a big loss of power and they think that the engineer, instead of cutting the fuel to the burning engine, had cut the fuel to Engine No. 2. So now you have the biggest bomber in the world with four propeller engines with now only one engine working. This was only part of all the things that went wrong that day.

The report did spur me on to look for and find another little girl who had lost her father on that plane. Now grown and living in my own state, it was through her that I learned about the Supreme Court case. That very day after seeing her, I went home and looked up the Reynolds case on my computer. What I read there sent me on a journey that has brought me here today. I read a decision that hinged on this very same accident report -- an accident report that the government claimed told of the secret mission and the secret equipment. All I could think is no it doesn't. Part of the Reynolds decision stated certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission. This accident report was not about the secret equipment. It was not about the secret mission. Even more telling, this accident report was not even stamped secret. I now understood that my mother had lost her case; that she had settled for less money than the Federal Court had awarded her. How could the government lie in the Supreme Court of the United States?

As time passed, I came to understand the significance of the Reynolds case in establishing the State Secrets Privilege. I learned that it was even discussed in law school courses on national security law. The more I understood what had happened to my mother and why, the more betrayed I felt. It seemed that the case that allows the Executive to keep its secrets was at its very foundation a gross overstatement by the government to forward its own purposes, to get themselves a privilege. At what cost? The cost was truth and justice and faith in this government. Five years ago, I sat in the woods in Waycross, Georgia, at the crash site. I thought about my father who spent his entire career working for the government, developing technical equipment for the B-29. He sacrificed his life for it. His last thoughts must have been for the well-being of his family and who would take care of them.

Mistakes were made on that plane. The Air Force should have done the right thing. The average American who backs out of his driveway and runs over his neighbor's mailbox will go up to the neighbor's house, knock on the door, and own up to his mistake; however hard it is to look the fool, however hard it is to shell out the cash. It's the right thing. It's how we all expect our government to act when it makes a mistake. For the other families, for my father, my mother, my two brothers and me, my America did not see fit to do the right thing, to step up and compensate three widows. It was more important for them to get a privilege. I decided that day to try and let the people of this country know. This is not the American way, and contrary to what I believe America stands for in the minds and hearts of its people. The judiciary cannot give up any of these checks and balances that make this country great. Judicial review must be the watchdog that guards against actions by the Executive that chip away at the moral character of this country.

S. Spaulding: Thank you Judy, that's great. Ben, I'm sorry to say you have to follow that.

B. Wizner: Well, maybe I should follow by thanking Judy at first because sooner or later the Reynolds case will be modified or overturned. It will be either by Congress or by the Supreme Court and I think that the work that you did in showing that this doctrine really is the fruit of a poisonous tree, that may never have been uncovered but for you, and that will be an important part of the solution when and if it comes, so thank you. And thank all of you for being here. It's so gratifying to see a room full of people here to listen to discussion of the State Secrets Privilege when some of us have felt very alone

in the wilderness in the last few years, shouting about this and having no one, least of all courts, listen to us. Before I say a few words about the cases that I've litigated involving State Secrets, I want to make two observations to frame my points. The first is that, and this raises eyebrows sometimes, every single case that's been brought in the last six years that has attempted to hold a government official accountable for torture; every single one of those cases has been dismissed at the outset of the pleading stage. Not all of them because of the State Secrets Privilege, but the State Secrets Privilege has played an important role in many of them. These cases were not dismissed because the courts found that the facts alleged weren't true. The cases weren't dismissed because the courts held that the conduct alleged was legal. These cases were all dismissed on what nonlawyers would call technicalities, the State Secrets Privilege being one of them.

The second point I want to make is that in the litigation that has challenged the President's authorization of the NSA to eavesdrop without warrants on American citizens, the government has made two related arguments. The first is that unless a citizen was himself or herself wiretapped by the NSA, that citizen does not have standing to go to court to challenge this policy. But, and this is the second point, because of the State Secrets Privilege, no one can find out ever whether she or he was ever a victim of warrantless wiretap. Therefore, no one has standing to challenge this policy and no court will ever be able to rule on its constitutionality.

The reason why I wanted to start with those two points which are not entirely or directly about the State Secrets Privilege is that what you often hear in these decisions and what the court certainly held in the El-Masri case is that there are times when the greater good, the public good, must take precedence over the private good, the individual remedy. But in many of the State Secrets cases in recent years, and I would argue at least the ones that I've been involved with, the plaintiffs are not only trying to vindicate their private interests, there are vital public interests at stake in these cases. There's a public interest in ensuring that actions taken by the Executive in the name of our country comply with our laws and treaties. There's a public interest in having a system of checks and balances where a court, the judiciary, gets to decide when the other branches have acted outside of the constitution in their authority, and so I want to lay that out there. I do think that's an important point. It was made very eloquently in the Constitution Projects brief in the Supreme Court in the El-Masri case and Ginny said

that David Gossett is here. We've never met so I don't know where he is, but thank you. Great. Hi, David.

So the Reynolds case that Judy and Lou discussed occurred more than half a century ago and in the time since then, the Supreme Court has not returned to directly confront the State Secrets Privilege although it will be forced to do so before long unless Congress intervenes. And in that case, the court recognized the common law State Secrets Privilege for the first time although it acknowledged that this Privilege was, in the court's words, well established in the law of evidence, and I put emphasis on the word evidence because the court clearly held that this was an evidentiary privilege. It belonged to the government and the government essentially alone has the right to assert the privilege to block the disclosure in litigation of particular evidence which might harm national security if it's released. Now there's some debate, Bobby has been part of this about whether the Privilege has been invoked with greater frequency in this administration than prior ones. I'm not so concerned about the quantitative debate. I'm much more concerned about the qualitative differences that I think there have been in the way that this administration has used the Privilege because the Privilege has been invoked in cases of greater national significance, and in a manner that I would argue has effectively transformed it from a rule of evidence into really an immunity doctrine for the government. It's been invoked in all of the cases challenging the so-called terrorist surveillance program, whether against the government or against the telecommunications companies. It was invoked in a very important whistleblower retaliation suit filed by an FBI translator who was reporting espionage in the FBI and one of her attorneys, Mark Zaid, is in the back of the room. It has been invoked in the rendition and torture cases that I discussed before; in Maher Arar's case, who was rendered from John F. Kennedy Airport to Syria and brutally tortured. In Khaled El-Masri's case, which I'll discuss in some more detail. And in another case, in which I'm counsel, against the division of the Boeing Corporation for its role in transporting five of our plaintiffs to torture, and on February 5th, I'll be in San Jose arguing against the CIA's attempt to dismiss that case on State Secrets grounds, so stay tuned.

And in each of these cases, in each one of these cases, the Privilege was invoked at the pleading stage of the litigation before there was any evidence at issue, before any request for evidence had even been made. And in these cases, dismissal was sought, and in many cases obtained, on the basis of an Executive Branch affidavit alone

without any judicial examination of their purportedly privileged evidence because there was no evidence in the case yet.

And so the result is that a broad range of executive misconduct has been shielded from Judicial Review because the perpetrators themselves invoked the Privilege to avoid any judicial accountability. Let me say a few more words about Khaled El-Masri's case because this one, I think, is very close to a lot of our hearts, those of us who worked on the case, and many of you will know some of this so bear with me. In fact, people throughout the world know the details of this case, and the only place in the world where we're not permitted to discuss these facts is in a federal court.

Khaled El-Masri is a German citizen who in December of 2003 traveled by bus to Macedonia for a holiday, and at the border between Serbia and Macedonia, he was apprehended by border officials who suspected that his passport was not valid, which turned out to be incorrect. But he was detained by Macedonians for a few weeks under armed guard; thereafter, turned over to the CIA in Macedonia, driven to an airport, had his clothes cut off of him, a suppository shoved into him, was shackled, blind-folded, subjected to sensory deprivation, chained to the floor of an airplane, injected with drugs and flown to Afghanistan, a country where he had never been and to which he had no ties. He was held for nearly five months in a CIA-run prison outside of Kabul, Afghanistan even though, we now know conclusively, the CIA knew, including George Tenet and even Condoleezza Rice knew, near the beginning of his detention that they had made a mistake and had detained the wrong person. Now, if Khaled El-Masri were from Yemen or Jordan, he probably just would have been sent to Guantanamo but because he was a German citizen, the CIA had a problem. There were debates in the government about how to proceed. It was decided that some parts of the German government had to be notified and his release had to be negotiated, but the release had all the hallmarks of a cover-up. Khaled El-Masri was blindfolded again, once again put on a plane, flown to Albania, driven around with a blindfold in the mountains and dropped on a hill at night without explanation, with the hope, of course, that his story would never be believed, but he did find a German lawyer who was crazy and paranoid enough to believe his story and before long, the details of his story came out. It has now been confirmed by physical evidence, by eye witness testimony, by government and intergovernmental reports, by parliamentary investigations, German prosecutors have sought indictments against 13 CIA

agents and contractors for their role in this. The Council of Europe, which represents 49 European countries, has written a report in which it concludes that the CIA was responsible for the kidnapping and abuse of Khaled El-Masri.

Well, we filed a lawsuit. In fact, I announced the filing of the lawsuit in this very room, and we filed the lawsuit against George Tenet and other named and unnamed CIA officials, aviation companies. The government intervened in that lawsuit, asserted the State Secrets Privilege and insisted that before again any evidence was at issue, the case had to be dismissed, pursuant to State Secrets. Khaled El-Masri is the public face of this program. The Rendition Program has been publicly defended by administration officials all the way up to the President. The President has publicly conceded that the CIA ran a detention program, has even named some of the prisoners in that program. The Secretary of State and head of the CIA have described many of the parameters of the program, have vigorously defended its legality, but, when they were asked to defend its legality in a court, insisted that any litigation of these claims and any discussion of them in a court would harm national security. Unfortunately, the CIA prevailed. The case was dismissed in the Eastern District of Virginia. The 4th Circuit unanimously upheld the dismissal of the case and the Supreme Court declined to accept *cert.* in that case. Again, with the amount of public information available about the Rendition Program and Khaled El-Masri's case, the notion that there are terrorists out there who were waiting, who had disregarded all of this information but were waiting for formal confirmation in a judicial proceeding before starting to take steps to avoid rendition, is so ludicrous that I don't even know how to finish that sentence.

The question is, where do we go? How should the, what I would call the abuses and misuses of the State Secrets Privilege be addressed and reformed? Remember that the Reynolds case was a tort case; the El-Masri case is a torture case. These are very different kinds of cases. In Reynolds, the Privilege was invoked to prevent the disclosure of a single document. In many of the cases in recent years, the Privilege has been invoked to block entire categories of executive misconduct from being litigated. Even if you think that the Reynolds rule with some minor modification is the right rule, the question is whether a rule that was devised for the former set of circumstances, a document in a tort case is adequate as a check on the latter set of circumstances, an attempt to evade judicial accountability for entire categories of executive misconduct. I

believe it's time to reevaluate the Reynolds case. At a minimum, as Lou has emphasized and I expect will testify about next week, at a minimum, the government must be required to produce the evidence that it claims is privileged to a court in camera ex parte. At a minimum, the government shouldn't be able to just submit an affidavit by the wrong doer saying don't look here. I think in cases like the torture cases that I've talked about, in cases that allege grave Executive misconduct, we may need to consider some additional reforms as well. We should consider whether burdens need to be shifted in some cases. Right now, if the privilege is invoked and that invocation is accepted, the evidence disappears from the case with no cost to the government. But it may be that in cases where the plaintiffs had really made a strong showing with credible non-privileged evidence that something like torture has occurred, the government should bear some of the burden of preventing the adjudication of those cases.

And we can talk about, we can talk about that in some more detail later. I know that Bobby has some concerns about it. But without these reforms, the government can and has engaged in torture, declared it a State Secret, and by virtue of that designation alone, avoided accountability for conduct that even administration officials concede is illegal in all circumstances. Thanks.

S. Spaulding: Thank you Ben. Bobby?

R. Chesney: Thanks. And thanks to all the other panelists and thanks to all of you for coming out today, especially the students from Gallaudet. It's wonderful that you are here.

I want to begin by noting that the public debate about the Privilege often involved people talking past one another or so it seems. And I think the reason why that occurs is because there are actually a number of different issues that lurk beneath the surface when we talk about whether or not we're happy with the state of the current Privilege. So I'm going to use my time to try to distinguish what some of these individual issues are in my view and at each point along the way I'll talk about at least some of the ideas for reform that have been bandied about with respect to each of the individual issues.

Let me start with what I think is the easiest case, and it's the one that has been most dramatically illustrated by the preceding comments. The question is, what happens if the government asserts the Privilege with respect to a particular document or

record of some kind, and in fact the document or record does not contain the information the government claims that it does? That's precisely as we've heard what happened in Reynolds itself, and I think that the answer in that question is rather clear and obvious. Of course the Privilege should not attach in that circumstance. Then the question is, well how do we ensure that the Privilege doesn't attach in that circumstance, and as the other panelists have indicated, judges, when there is a particular document or record that's an issue, judges absolutely should be looking to make sure at a minimum that the asserted information really is in there. That seems fairly obvious and straight forward so, and I don't think that's actually where a lot of resistance to change would come from. Where does resistance to change occur? Well actually before I move on to that let me flag one other thing. We should be clear that although, I think disgracefully no court ever looked at the B-29 accident report in Reynolds. It's not the case that courts in more recent years never looked at the documents in issue. I think we've heard reference to the fact that judges may not always do it, and to the extent that they don't when they could, that's a problem. But judges do look at the information from time to time. They will look at it in camera. The most recent example of this I can think of is the 9th Circuit's recent opinion in Al-Haramain, which was a State Secrets case in which a particular document was in issue and the 9th Circuit's panel makes expressly clear that the panel itself, each one of the judges did look at not just the declarations and affidavits the government submitted, but the contested document itself, they had personally reviewed it and based on the personal review they believed that the Privilege did attach to it.

So I think that we should realize that as terrible as what happened to the Reynolds plaintiffs was, that's not necessarily the most pressing issue today. Now, I don't think there's any harm in codifying the need for judges to review these documents just to make sure that this doesn't happen again, and to make sure that judges realize that they are in fact at liberty to do this. I think that's probably a good idea.

What do I think the bigger issues are under the Privilege? Well, let's assume we have a document where the Government has claimed there's privileged information. And in fact, there is information of that description in there; the question is should the Privilege really attach to it. But it's really, with the B-29 report, it really does have information about the radar equipment. Let's assume that set of circumstance, several questions arise. First of all, who is it that should decide whether the Privilege attaches to

that document? That is, should it be the judge or should be the Executive Branch official who is asserting the Privilege? Second, whoever is going to decide it, what standard should that decision maker use? In other words, what's the test for what counts as sufficiently important that we'll attach the privilege to it? And third, what process should that decision maker use in figuring out whether the standard's been met?

So taking these in that order, first of all, who should decide, this is also an easy question and it's one that the Supreme Court actually has already decided. I think the law's clear on this; it's the judge who decides ultimately, not the Executive Branch Official. In the Reynolds litigation, the Executive Branch, its brief in the Supreme Court expressly and at length advanced the view that it should be the department head invoking the Privilege. Let's say the Secretary of the Navy or the Secretary of Defense, or to update that a little bit the Director of National Intelligence. That person's view should be conclusive. That was the position when they filed the brief in 1952. The Supreme Court expressly rejected that rule. They couldn't have been clear about it that ultimately it's the judge's responsibility.

Now as Lou notes, the opinion does have some internal contradictions. There's some reason to look at other things the court said that made you wonder, well how serious were they about this? But, the baseline rule is there in Reynolds itself; the judge decides and that is in fact the position of subsequent judges and it's how it's resolved today. So, I'm not sure that's either one of our significant issues.

A much tougher question is what is the standard that a judge should use when deciding that the information should in fact be treated as Privilege? Here's what Reynolds said. Reynolds said the test is whether there is a "reasonable risk" of harm to national security should there be disclosure. That's the standard. Now that is a pretty forgiving standard, isn't it? Reasonable risk, that's not actually asking that much. So, not surprisingly then, some people who've been thinking about ways to reform the Privilege have suggested perhaps there's a place we could work on it. Elevate the threshold. Raise it from reasonable risk to substantial or compelling risk, something like that.

I'm not personally drawn to that solution in part because of the fuzziness of all these terms, in part because of the risk that in elevating the threshold will err too far in the other direction, but

mainly because I think that the substantive standard isn't so much the problem. The problem, I think, to the extent that there is a problem, is the concern that, the very serious concern that many judges themselves have that they're not really in an appropriate position by dent of lack of experience, lack of education on the issues, what have you; that they're not in a good enough position to second guess the Director of National Intelligence or the Secretary of Defense when they say that in their expert and experienced and informed judgment that there would be certain arms that would follow from this disclosure. Judges understandably are reluctant to second guess that. The 4th Circuit in Amazura I think actually writes something to that effect. I think they actually said, we are really reluctant to second guess the executive in this scenario.

And so, this is really a question of process perhaps. Maybe there is something you can do on the process of the decision making process, or the decision making system that could address this lack of experience perhaps. And a number of interesting suggestions have admitted in this area. Some have suggested for example that judges could appoint special masters or other experts using existing civil procedure rules of authority; people with that experience, with the requisite clearances, with the requisite knowledge to come in and provide a report and recommendation to the judge on whether the standard's been met. That's very interesting and worth exploring. Some have suggested the possibility, and I've suggested this, the possibility of bringing in an element of adversariality.

As you've heard, the judge's current review of a document that allegedly is privileged is conducted ex parte, meaning no one else is in the room except the government and its positions without opening the door to full-on adversarial proceedings where the opposing party is let in and therefore their questions and disclosure is sort of mooted at the outset. You could have prescreened guardian ad litem attorneys. They could be federal government attorneys who are brought in for this specific purpose. Canadians and other systems, the Canadian system using something like this with special, what's the word, special representatives or special guardians. You could do something like that and bring in at least someone to stand in for the opponent to challenge the government's claims. I think that's worth exploring.

And finally there could be a concentration of litigation of these issues before something akin to the Foreign Intelligence Surveillance Court. You could select a court, even using the FISC if you wanted to so that you have the same judges routinely exposed

to these arguments and debates and building up confidence and expertise in their ability to judge them. Now, all those are worth exploring.

Let's assume we have a document that at the end of the day a judge decides, whether with the help of a special master, with adversariality or not, in fact it is privileged. There is a reasonable risk National Security would be harmed. What then? Under current Doctrine, the answer's fairly straight forward. The document is privileged. It cannot be disclosed. It's as if it does not exist. The Privilege is absolute rather than qualified. So it's not like work product doctrine where if the litigant has sufficient need you're going to allow them to have the document even though the Privilege attaches. It doesn't work that way.

Some have suggested, and we can talk about this later, some have suggested perhaps we should make it qualified. Maybe it should be possible to overcome it when there's requisite need. That makes me quite nervous in part because I think there will be significant need in almost all these cases, and so I think it could essentially eviscerate the privilege to adopt that standard. What I'd rather see us doing is looking at making sure the judges do the absolute maximum possible to redact or create substitutions for the document as we do in the criminal context under the Classified Information Procedures Act. So I'd like to see more attention paid to that possible solution.

I've been going on too long so I'll just conclude with this final point: I've been talking all along as if this issue arises only in the context of particular documents or records. As has been pointed out, it's an issue at the pleading stage as well and so if you'll permit me to put on my civ pro teacher hat for a moment because we've just been doing this this week in civil procedure. What is it exactly that's going on when the privilege arises at the pleading stage? The plaintiff has alleged in the complaint certain facts. Those facts require an answer, a specific and individualized answer from the defendant, an answer that's either admit, deny, or state the lack of information to enable you to do that. If you admit the fact, and you should admit if it's a true fact and you're going to have to respond to it, if you admit the fact, it's conclusively established, it's largely approximating the introduction of evidence on the issue.

So there's a rationale, I think, for introducing privilege issues at the pleading stage. It does make sense to consider when a plaintiff alleges George Tenet's operational role was X, in order for Tenet to

respond to that, it may require admitting essentially the fact that, if proven through evidence, would clearly be an occasion for invoking the Privilege. It makes sense to think about the Privilege in that context. What may not make so much sense is the notion of using the Privilege as a broad justiciability bar to litigation of this suit just because the general nature of what this suit would be about. I think you can distinguish those two and you could still allow individual factual allegations to be met with State Secrets objections without necessarily requiring dismissal of the suit. So I'll stop there; I look forward to your questions.

S. Spaulding: Thank you, Bobby. Well, I think you've all given us a lot to think about, and opened the door I hope to a good discussion. We're going to start with giving the other panelists an opportunity to kind of weigh in as well on ideas for reform and the proposals that Bobby has put forward, and some of which he's rejected, and we'll talk about that a little bit and as they say we'll open it up for Q&A.

As I said, a threshold question, and, Bobby, I think you provided us with a very nice kind of logical framework for thinking about this, but the threshold question I think still is how you define a state secret. Even before you get to what the standard should be, whether it's a reasonable risk or what have you. Because certainly to the extent that you include not just national defense but foreign relations, and depending on how broadly you interpret national security, you're going to sweep in a great deal. In fact, I've even heard folks speculate that one of the reasons the government was sensitive about the accident report was not just that it was afraid of losing the lawsuit or embarrassed, but that in fact it did not want the adversaries to know what a pathetic platform or fragile platform the B-29 actually was, and that they would have made that national security claim. It isn't actually, as Lou would tell us, what they articulated in their affidavit, but a potential claim there, and certainly with respect to the El-Masri case, I'm sure that, you know, you've heard this, that there could be concerns about foreign relations in terms of who helped who provided information that the CIA may have relied upon, etc. So, how you define and how broadly you define state secret is one of the issues and I'd like to hear folks talk about that. The Mosaic Theory, for example, I think gets, makes it extremely hard to argue against the government's assertions. And then, you know, let's talk about what the burden of proof then ought to be, how much deference ought to be afforded to the executive branch assertion. In terms of the judge's reviewing the evidence, I've spoken to government attorneys who've been directly involved in asserting state secrets privileges on behalf of

the government in cases who've said that in a number of cases, the evidence that the government is seeking to protect, that contains information the disclosure of which would damage national security, can run into the double digit millions of pages. So we think in terms of the Reynolds accident report and of course the judge should read the report before deciding whether this is classified. But, I, you know, as you think about and as Congress thinks about requiring judges to review all of the evidence about which this is asserted, that's also something to think about.

B. Wizner: Does that mean we have to talk about over-classification as well?

S. Spaulding: Well, yeah. There you have it. You know, the competency of judges to make these decisions, which Bobby talked about, clearly something that we need to talk about and I think it's interesting in Senator Kennedy's legislation, that he has in fact included authorization for the judge to appoint a special master, to appoint a guardian ad litem. I don't see an opportunity otherwise for there isn't anything about removal to the FISA court in this legislation, but in the FISA legislative battle that is taking place in the Senate today, there is going to be an amendment, I think, on the immunity issue, which will call for moving the suits around the TSP into the FISA court, so all of those ideas are out there. And then finally the issue of absolute, whether this Privilege should be absolute. I think Senator Kennedy's legislation frankly is also a little schizophrenic on that issue, because on the one hand it says early on that the judge should make decisions taking into consideration the interests of justice and national security, which seems to imply that the judge ought to do some balancing here, later in the legislation though it seems pretty clear that they say if they find that there's a state secret that the State Secret is appropriately asserted, that's the end and it shall not come in to, the item shall not be disclosed or admissible as evidence.

And it's interesting to me that in CIPA we have an absolute, but it runs in the opposite direction. CIPA, of course, is the Classified Information Procedures Act which applies in criminal, in the criminal context. And it's a, so it's where the government has brought a criminal action against an individual, and that individual seeks, as exculpatory, as part of their defense to gain access to classified information that the government holds. And there's a whole process that is set forth by which a judge makes a determination and it has provisions for providing sanitized versions, etc., but at the end of the day, if in fact, the government insists on not disclosing that information, there is no balancing that

the judge does; if a judge finds that this information is necessary for the defense, for the defendant to have a full and fair, make a full and fair defense, but it's exculpatory information, the government is required to turn it over, or drop that part of the prosecution. So it's an absolute but it runs in the favor of the defendant. We've decided that the interests of a criminal defendant are so great that, you know, this is the way we're going to have this operate. In the state secrets in the civil litigation context, the absolute privilege operates in exactly the reverse. If the government insists on keeping this a secret, it is the plaintiff in that case that loses that case. So, those are some of the issues I hope we'll get into. Lou, I'm going to give you first stab at that.

L. Fisher: Just two points, basic ones. When you assert or you claim a state secret as Suzanne says, has to be the head of a department. In the Reynolds case, I don't think there's any reason to believe that the head of the department, Secretary of the Air Force Finletter, read the accident report. It's preposterous to think that a head of a department is going to read something like that, it's very detailed, it takes a long time to go through. So no head of a department is going to actually look at the document when he makes a claim on assertion. That troubles me. The second point, on the balance, there's been those from the El-Masri case, the judges would say that its individual right, El-Masri, against the national interest, or an individual right against the collective interest. I have no idea what the collective interest is but no one, Suzanne, me or anyone is going to win with a setup like that. One person against the whole national interest and, in fact, on the El-Masri case he's not alone, I'm on his side, I don't want to be picked out by mistake and be taken to Kabul. So I think that kind of a formula that was used in the El-Masri case totally goes in the direction of holding for any type of executive action. This is just not a formula to be used. So those are the two, I mean, the claim, the assertion, is it reasonable to think that a head of a department is going to look at all the underlying documents to make a reasonable assertion? I don't think so. And what kind of a balancing test do we use? Because, I think, in the El-Mosri case, there is no national interest picking up the wrong person, putting them in prison somewhere, there is no national interest at all; it is against the national interest.

It's a humiliation for the United States to behave in that fashion, so I don't know how you can ever get judges to look at a number of factors, not just national interest, but the checks and balance system that we use. We use structure in this government to protect individual rights, we use the adversary process, to make sure that

we have enough facts to make a reasonable judgment. So I would like to see judges aware that the whole list of values, not just the national interest and not just foreign affairs, such matters like that. But there are just rock-bed constitutional principles at stake when making such a judgment.

S. Spaulding: Then if that concept that Lou talks about, that you mentioned as well get into the consideration of the court or the judge, this notion that it is not just an individual right at stake but there is a national interest, that is preserved, or protected by these lawsuits, presumably. Is that something that you see, perhaps appropriate to put in a statute in requiring the judge to consider, or is it really more of an awareness in educating judges and having within the public discussion and debate a greater sense of that understanding?

L. Fisher: That's a fair question. I'm not sure I'm prepared to answer it. I do think that it shows that, you know, these supposed conflicts and tensions are more complicated than they seem. And, you know, let's take the issue that you raised. Should the State Secrets Privilege apply to diplomatic relations, and not just, you know, harmed through disclosure of secrets? I don't quarrel with that category. I think it's valid and there are certainly cases where a communication or cooperation between our country and another would absolutely be a state secret. But again, when you look at a case like El-Masri and we had a dozen retired American diplomats from Republican and Democratic administrations file a brief in the courts circuit saying, you want to talk about harms and diplomatic relations. Harms and diplomatic relations is closing our courtrooms doors to an innocent European citizen who was a victim of our anti-terror policies and our mistakes. You want to talk about harms to our relations, it is disregarding international treaties that were signatories to, that prevent this kind of kidnapping and torture. And we had the special repertoire for the Council of Europe file a brief in the Supreme Court saying America's position in this case has done harm to cooperation with other countries. So, again, it's not all on one side of the ledger. And I also think this goes to the question, the next question you raised and that Bobby raised about judicial confidence. We talk a lot about judicial confidence and whether judges are in a proper position to balance and weigh these issues. I don't think we talk enough about executive conflict of interest which, to me, plays a much bigger role in these cases when you have the perpetrator agencies themselves going into court to **["state the states" – can't quite make out what he is saying**]. I don't think there is any balancing going on from the head of the CIA in taking into account the plaintiff's rights. The head of the

CIA want cases against CIA agents dismissed. And so coming up with some kind of structure where someone else plays a role. If the judge doesn't find himself confident then appointing a special master of some kind, I think all of that makes sense in any of the alternatives, Bobby, that you suggested that would be preferable to the state of affairs right now where everyone shrugs and the case gets dismissed.

S. Spaulding: Bobby, do you think, that we are moving toward State Secrets being more of an immunity or judiciability issue like the Tottin Principal? You know, where, where basically the government is asserting this whole category of cases can't go forward? That's one question and then picking up on what we've just been talking about in terms of arguing competing national interests. When you talk about the role of a special master or a guardian ad litem as in Kennedy's legislation, would you envision that person simply countering the government's argument that this evidence, the disclosure of this evidence, would harm national security or would you envision it having a broader role of arguing competing national security interests or even more broadly competing national interests?

R. Chesney: Great questions. Let me take those in reverse order. I see a special master solution serving a different function than guardian ad litem solution, the master would essentially stand in for the judge the same way the magistrate judge often does on minor matters. Resolving the question is there reasonable risk of harm here, in the first instance, and then the judge adopts or does not adopt that recommendation. The guardian ad litem is…

S. Spaulding: …think, excuse me. The special master would be someone who brings a technical or a somehow an ex…

R. Chesney: …with expertise. The guardian ad litem is the person who comes in and is representing with the duty of zealous advocacy the interests of the litigants. It's not perfect advocareality. The way I envision it - this is not actually someone who becomes counsel to the litigant who then says all right, here is what they are saying in this information, tell me how I should respond to that. It would be a limited form if advocareality but it's, that would be some advocareality where currently there is none. That is a definite improvement and I'll just throw this out there, I think that's something we should be thinking about down in Guantanamo with the sea search, as well. But that is a different meeting on some other occasion.

S. Spaulding: And, of course, there have been those who have advocated that, the FICA judges with regard to FICA applications ought to also have the authority to bring in someone.

R. Chesney: Yeah, I've actually suggested the same thing I think it is sort of an all purpose solution through the multiple context in which we have problems of ex parte proceedings that are driven by the tension between security and secrecy. I think that a lot of times we can address, we can go forward in addressing some of those tensions with guardian ad litem procedures. Again, a number of allied countries with similar systems and similar legal systems have done just that. So those are the roles I see them playing on the justiciability and Totten question, it is such as dilemma. There is this somewhat robust academic debate going on about precisely what it is that's happening in the State Secrets Privilege and all of this has been part of that, in various ways. One of the themes in the debate right now is the argument that what's happening is that what was once simply an evidentiary privilege did, knocks out some item as evidence but does nothing else to the case. The case goes on as if the witness died, as one court puts it. Whether it's evolving into this justiciability sort of political question doctrine type of constitutional objection, and that debate is tied up in another question which is does the 1875 decision in Tottin, I think it's 1875, the 1875 decision in Tottin in which the Supreme Court held you cannot litigate, if you are a spy with the government you can't litigate a breach of your espionage contract, in effect, it's not judiciable because the whole point of the contract is supposed to be secret. Is that something that the government is now trying to tie in as a way to elevate the impact of the Privilege and give it constitutional status? The reality is that Tottin's been tied up with the Privilege from the beginning in U.S. law.

The way that the Privilege comes in to U.S. law, is largely through the writings of evidence law treatise writers in the 1800s. It begins in about the 1820s and it picks up steam until Wigmore, who if you are a law student or recall your Evidence Law class, Wigmore is the Dean of evidence law treatises from the 1900s. These authors almost treatise to themselves as a sort of classic common law way. The had the Burr Opinion here which is, isn't really on point but it's got some dicta and there is something John Marshall said briefly in *Marbury versus Madison* and there is some English precedent, they weave it all together and over time they come up with the State Secrets Privilege and describe it as being part of our common law of evidence. In the 20Pth century, in the early 20th century, you start getting cases that cite to Wigmore and his statement describing

State Secrets Privilege and they cite to Tottin and that's how it is in 1917 or so in the first Sterling case which is, I think, the first true modern State Secrets Privilege case where a judge refused to allow discovery into evidence, it was an armor piercing projectile, the schematics, or it might have been a gun sight, but it was some sort of straight-forward military specifications for military equipment, sort of a paradigm case when you would want a privilege. They cited Wigmore and they cited Tottin. Tottin was cited by the Supreme Court in Reynolds as being of a piece with what they were they were talking about in that case. So I don't think we can always distinguish the two but it brings me back to what Ben and I were talking about earlier. You know, what the role of pleadings stage invocation and the privilege is. I do think it makes more sense to think of it, to atomize it and you should address the Privilege on a paragraph by paragraph, allegation by allegation basis in dealing with the complaints and once the Privilege attaches it may knock out certain allegations and then you have to look at the complaint to see if it still withstands the 12(b)(6) motion to dismiss. The notion that it should be knocked down on 12(b)(1) grounds for want of jurisdiction, I think that's a more problematic notion. I think that's really what the fear is that this is becoming a jurisdictional ground.

B. Wizner: I just want to respond because Bobby's history of Tottin state secrets stopped before the point on which my question was definitively resolved. The 9th Circuit in a case called Tenant against Doe had essentially said these two doctrines have merged into one and the Supreme Court in a nine to zero opinion reversed that and distinguished expressly the justiciability rule of Tottin from what it referred to over and over again as the evidentiary State Secrets Privilege. That was in 2004. So I, you know, I just, I think you left a little confusion there.

R. Chesney: That, that's absolutely right, the Supreme Court recently did say very clear like they're two different things and yet, nonetheless, the reality is do you look for what the authorities in Reynolds where the Supreme Court says they are getting this, Tottin is the main thing they saw.

B. Wizner: Yeah, it's another oddity of Reynolds, that's true. And, I think the pleading stage point is an important one and the whole procedure professor manner in which Bobby has addressed this is quite different from the way in which the government invokes it and the courts apply it. Because in none of these cases is the government asserting it over the defendant's answer to a complaint or over its

own. It's asserting it in a motion to dismiss or for a summary judgment, not on a question by question basis but over the entire lawsuit. And so, I think everyone acknowledges that the privilege could be asserted at the pleading stage in response to a particular allegation of a complaint but that's not the way in which it's being invoked. It's being invoked in broad sweeping motions to dismiss the entire lawsuit without reference to the individuality.

R. Chesney: That's right, I think the technically correct way to do it is more the way I described. The problem is you may very likely, especially in something like El-Masri, you may end up in very much the same place, right? Maybe El-Masri is not a good example, maybe that's one where when you knock out certain allegations the complaint still stands and can go forward to discovery but there will be complaints relating to NSA surveillance and so forth where all the money allegations will be given out at that end of that process.

B. Wizner: That is all we want, you know?

R. Chesney: But then there will be a 12(b)(6) motion to dismiss, you know, and it would be granted.

B. Wizner: That's fine. But the plaintiff's deserve the dignity of that process.

R. Chesney: I couldn't agree with that more, they deserved the process.

B. Wizner: They deserve the opportunity to come forward with their non-privileged evidence, to conduct discovery of non-privileged information that is in the possession of the government and the defendants before a court speculates about the evidentiary impact of the privilege. And, you know, I want to raise again something that is unrelated. Because when the CIA was trying to get out ahead of the story about its alleged destruction of alleged tapes, of alleged torture, General Hayden wrote a letter to the CIA, and this came out the day before, in which he said that he had determined, or the CIA had determined, that these tapes were not relevant to any ongoing judicial or congressional investigation. He had determined that. And we need to remember that, again, I mean, this is what I think is happening in the State Secrets cases where the director of an agency is telling a court at the pleading stage I've determined that the plaintiffs can't litigate their case without this privileged evidence. The Director of the CIA is entitled to some deference. He is not a federal judge. He doesn't get to decide what evidence is relevant to the litigation. He may get to have some deference to his determination about what evidence is secret but it's

up to the court to decide what the affect of that is on the litigation. That's very hard to do at a pleading stage before the plaintiff has had an opportunity to come forward with evidence that is not privileged.

R. Chesney: Part of the problem, too, is the Supreme Court's decision last term in Bell Atlantic and Twombly where, if you guys have been following this, this is pretty obscure stuff but it actually matters a lot. The Supreme Court according to most civ pro scholars has ramped up the level of detail you need to plead in order to survive a rule 12(b)(6) motion to dismiss at the pleading stage and then get on to the discovery. It's upset a lot of people who feel like it makes it a lot harder for plaintiffs who need discovery to prove their cases, to get there. I think it has a real potential impact on the consequences of what we're talking about.

B. Wizner: Okay.

S. Spaulding: Well, again I would encourage you again to look at Senator Kennedy's legislation; he tries to tackle this issue head on. What to do at the pleading stage and how the court should handle that and make the push for the court not dismissing a case until conducting discovery. At which has its own, right, which raises its own problems and issues clearly. I want to open it up, to questions and discussion but, and Judy, I don't want to put you on the spot, but before I do I want to, you know, we've talked a good bit up here about, you know, who should decide and the competency of judges and clearly, it will depend, significantly on the nature of the case and nature of the evidence that the government is trying to protect, but you're one of the only people, certainly in this room and I think one of the only people in the world, that has actually read this accident report that the government asserted the privilege for, and so I'd be curious as to, you know, your thoughts at least in that instance whether you think a judge, if the judge had read that, would have been competent to determine whether in fact the State Secrets Privilege was being appropriately asserted there.

J. Loether: Of course I feel that way. I would like everybody to read the accident report, I mean everybody who has this issue in mind because truly it's all about, you know, the witness statements who looked up and saw the plane break apart, the weather that day, what time it was, what radio communications went back and forth; the only references to secret equipment were a couple times. For instance, the co-pilot said he made a call as soon as he could get to a phone to tell them to come and remove the secret equipment. That

was the big reference to the secret equipment. I think in another place it might have said the secret equipment had not been used yet, because this happened early on in the flight. What secret equipment? I mean, I read that wanting to know. I wanted to know what was the secret project that my father died for? I never found out. You know, in that case, you know, I think the judge would have been appalled as anybody would if they saw how many mistakes happened on the plane that day. All this legal stuff certainly gets very complex, you know, but really I truly say, here, maybe I represent the average American. I want to know why the Air Force simply didn't just pay the wives. It wasn't much money for the federal government; they did make terrible mistakes. All I could envision is people in my government sitting around a conference table deciding that they were going to appeal this to the Appellate Court. They were going to appeal it to the Supreme Court. And here are these widows with these little children, these horrible mistakes that went on on this plane. Why not just pay them? Keep your accident report. Frankly, I don't understand in this El-Masri case why this country doesn't just pay the man what we ought to pay him. I mean, isn't that what maybe we want in leadership from a president? I mean, we made a mistake. Keep all the darn secrets. Pay the guy. Fix it. I mean…

B. Wizner: He doesn't even want money. He just wants an apology.

S. Spaulding: This is the problem with having non-lawyers on the panel…

B. Wizner: That's right; they make too much sense.

S. Spaulding: They inject common sense into all of this…

B. Wizner: Yes.

S. Spaulding: …otherwise fascinating intellectual discussion.

J. Loether: Honestly, when you talk about the apology, you know, it took me a while to figure out this whole thing that happened to my mother, and when we first sent our case to the Supreme Court, I honestly thought, you can all laugh, I honestly thought that the lawyers for our government would look at our petition, they would look at that accident report with all this horrible stuff that went on, and they would say, my god, what were they thinking? These poor widows. They didn't get their settlement? I thought maybe President Bush would call me and apologize. That's all I needed, you know, I was certainly upset with the people that made mistakes, but the fact that my country lied in the Supreme Court, that all this terrible

stuff went on to avoid paying these widows, to get this, I mean, I didn't understand the Privilege part at first. You know, I thought that's all I needed was an apology, to say, well, this country really messed up. You know, I mean, how much would it mean to, when you talk about how this hurts us diplomatically, right off the bat, for this country to have stepped up and apologized to this man. That's all that you need to do.

L. Fisher: Suzanne, anyone who had read the accident report would see that the government had failed to install heat shields as a protective measure to minimize the possibility of fires in the engines; also, there was no training or instruction given to the civilian engineers on how to get a parachute on and how to get out of a plane. So there was negligence there that was hidden. This case, I think most of you know, was re-litigated fifty years later, got back into court thinking that the court would recognize that there'd been fraud in the court, that the federal government had deceived the Supreme Court in particular, and that was lost in district court, lost in the, the 3rd Circuit with Samuel Alito part of the panel, said that not exactly there's secrets but there's sensitive materials, sensitive material, and they pinpointed out that the B-29 was at 20,000 feet. Well, people the next day reading newspapers knew that the plane was at 20,000 feet. Also, the sensitive information that the B-29 had bomb bay doors. You mean bombers have bomb bay doors? And the other sensitive information was that it was the 3,150th Electronic Squadron, whatever …well, if that's sensitive for some reason, just blacken it out. You can read the rest of the report.

S. Spaulding: Alright. We do have microphones and they are recording this, so wait till you get a microphone and we'll start here.

D. Breichenruchardt: Hi, I'm Dane von Breichenruchardt with the U.S. Bill of Rights Foundation. One of the things I was wondering if you all could comment on, for instance, and I'm glad Sibel Edmonds' attorney is here, he might have something to say about this. Sibel Edmonds did not start off, for instance, she, like many others, did not start off with any kind of a suit against the government. It was a whistleblower, internal whistleblower case, and all she was trying to do was to get the FBI to behave itself and to run the translation shop in the manner that it should have been run, and she also knew that there were people operating within that shop that were spies for the other side, for the Turkish embassy. So, I was just wondering if we could talk about, I mean, you know, here you're talking about settling a problem that's within the confounds of the secret community so you're not stepping outside the secret

community and going to court. The only reason Sibel Edmonds ever got into court is because they kept ignoring her and firing her and retaliating against her for the things that she was supposed to be doing. And the other thing kind of goes a little bit to what Judy just said. What kind of damage is this doing to our work pool, the people, good people, coming out of college, the kind of people we want to see working for the government, the kind of people we want to see in the CIA, knowing that if you take a job and you disagree with somebody, you're going to get screwed, and if you try to go to the courts and get any remedy there, some bully, like the president, is going to pull some kind of a State Secrets Privilege to prevent it from happening. So what about, I was wondering if you could speak to the issues about what is this doing to our workforce, to the good people that turn away and don't take these jobs because they hear of all of these horror stories in the meantime. Thank you.

B. Wizner: Well, maybe someone else will address the workforce issues, I can briefly comment on Sibel Edmonds' case because I was co-counsel with Mark Zade on that case and part of the legal team, but as you rightly point out, Sibel Edmonds didn't end up in federal court until she was fired, and she was fired for reporting serious security breaches, misconduct, and espionage within the FBI. What's really galling about the outcome in that case is that you had a publicly released, unclassified Department of Justice Inspector General report that essentially vindicated Sibel Edmonds' version of events, and in a very public way concluded that she faced unjust retaliation for her free speech, and not for any other conduct. So here we had a public report that essentially made out her case under Title VII and a federal court saying that she wasn't even entitled to one scrap of discovery, the case had to be dismissed at the pleading stage. The Court of Appeals for the D.C. circuit upheld the dismissal without an opinion, so we'll never know the reason until fifty years later when those records are declassified.

S. Spaulding: Bob, you talked to a lot of young students interested in national security, do they ever, do they talk about this? Do you have any sense of this kind of…

R. Chesney: This'll never happen to me, right? These are other people's problems. So I think you raise a really valid concern for people who work in the intelligence community, of course, these are not the first instances of concerns and I know Mark's litigated lots of this stuff. How stable is your employment? How stable are your contractual relations and all that and what are you remedies as Tottin itself illustrates, you know these are dicey propositions. So

it's an issue. People still signed up though, and I'm really not competent to talk about it beyond that.

S. Spaulding: Well and clearly, I mean, I would have to say that there is a counterpart to that which I think we see pretty clearly impact on the work force and that is the risk of being sued. So, on the one hand you're raising a concern about how do people feel about their inability, for example, to bring whistle blower suits and I think to some extent as Bobby says you have to imagine that has some impact. The flip side of that is if you allow all these suits against the CIA to go forward, continuing concerns among the workforce in doing things that they think their government wants them to do, they're going to wind up having to hire lawyers later to defend their actions. So there are actually, I think sort of two sides to that issue.

B. Wizner: Although in fairness that's a question for immunity doctrine, not secrecy doctrine.

S. Spaulding: No, no, no. I think it's not right.

B. Wizner: Yeah.

Male: Or in those cases too that where no one has any intention of suing anybody, they're just trying to correct a problem within their agency. How many of those exist in comparisons being filed of cases in court? Very few. The majority of whistleblowers…

S. Spaulding: Yeah, do we have a question over here? Yeah.

D. Kasanow: Hi, my name is David Kasanow with McKenna Long & Aldridge here in Washington, and I've actually been involved in a lot of litigation of the more mundane type of State Secrets cases, tort cases, government contractor cases. The comment that someone made about the difference between the tort verses torture. Seems to me to be the issue that I think is most on everybody's mind here. I believe that whether its Kennedy's recommendation or the AVA Panel's recommendation for some fixes to the legislative fixes to the doctrinal part of the State Secrets, most people will be able to accept some sort of change. But what happens when those changes run up against the kind of competing interest that the compromise in SEPA represents?

In SEPA, the notion of Constitutional due process for a criminal defendant was deemed to trump the government's ability to win a case. In the torture cases or the extraordinary rendition cases, does

anyone here suggest that assuming we could get good fixes to the State Secrets Doctrine or generally that there ought to be included in that some moving target that says the more egregious the conduct of the United States, the less right they have to assert the privilege or that the standard for whether the privilege should be absolute should be modified. Does anybody take that position?

B. Wizner: I think there's two ways, there's two ways that that concern might be addressed. One way, is something that I hinted at but didn't really elaborate on, and that is that maybe for certain categories of cases, that involve grave executive misconduct and where the plaintiffs can make what amounts to a prima facia showing so that they've met some evidentiary burden. Maybe in those cases the government should bear the burden of its invocation so that in a case like Khaled El-Masri's case, where he really did have a vast amount of evidence, direct and circumstantial that proved his allegations. If the CIA didn't want that case litigated, maybe they should have had to pay them for that, and, you know, we could talk at length about the details, but it seems to me that you could come up with a Title VII-like structure where the burden doesn't shift until the plaintiff meets a certain set of standards and maybe it would only be for certain categories of cases. Now the other possibility, and this is doctrinally distinct, would be to say that the privilege is not absolute, and so that there might be a situation where the court acknowledges that information is secret and yet allows in some cases for it to come out. I had this discussion, a very interesting discussion, with the former Chief Justice of the Israeli Supreme Court, Aharon Barak, and I asked him about the El-Masri case. I said, what would you have done with this case? And he said what you don't have and what we have is a notion of proportionality. You know, I would say to George Tenet, you are an expert on secrecy, but I'm an expert on how to balance secrecy with justice. I'm a judge, you're not.

And he gave the example of a case in which he ordered that a security fence in the West Bank be moved so that it would spare orchards and, you know, he said the military came forward and said it has to be here. He looked at it. He believed that that was probably the most secure place, but that by moving it to someplace in between where the plaintiffs wanted it and where the government wanted it, he could accommodate both interests. That's what judges do. We don't have any room for that in our State Secrets Privilege. Once someone, once it's determined that information is secret, that's it. Zap, it's gone. But maybe we should have a little more faith in Article III judges, who after all have

security clearance, have gone through grueling political processes to get to where they are and have pretty good judgment, maybe better judgment than the executive in these cases.

L. Fisher: On proportionality, I think there's something wrong with the surveillance cases where once the New York Times broke the story, the Bush Administration had the option of saying nothing, as keeping it a secret, but once the office of legal counsel in the Justice Department puts out a 42 page white paper defending the legality of it, then you can't say one side can offer everything it wants to defend the legality of something but the other side has no opportunity to contest it. So I think there's a lack of proportionality there, and something very similar on over-classification: there's nothing to prevent the administration, whenever it decides that a secret has some appeal, if released, of declassifying it. This happens on a very regular basis, so I think people should be quite skeptical of all these claims and not just take at face value some head of a department saying this is thus and so, and will always be thus and so. No, it's just the starting point.

S. Spaulding: I think no one is suggesting that simply the government's determination that it's classified should be controlling, but the concern that you might have with going toward a proportionality or a balancing is that you might wind up in some instances broadening the application of the State Secrets Privilege because if you start with the notion, this is why I thought it was important to start with what is a state secret, so if you start with the notion that it's not going to qualify as a state secret unless disclosure would produce significant harm to the national security, so if that's your starting point, you know, now you're asking the judge to decide that significant harm to the national security is okay because I think this is a really important case.

L. Fisher: What if they were competing harms...

S. Spaulding: If you're not well, and that's a different issue…

L. Fisher: Right.

S. Spaulding: That's not balancing necessarily just justice. It's balancing a national security argument…

L. Fisher: Maybe.

S. Spaulding: …against a national security argument, and that's the point I was raising, that perhaps that is something you could empower the

court to consider in an ad litem case, although again you sort of, but my worry about letting the court sort of do this balancing is that if the court decides this is not a particularly significant plaintiff's, you know, interest, it's not a particularly big secret, but, you know, it's kind of a secret and it sort of protects but and this is, you know, this guy's suit isn't very important and so I'm going to let the government assert, do you know what I'm saying?

L. Fisher: I do…

S. Spaulding: You either have to decide that you're standard is going to be a pretty strict standard, which is significant harm to national security, in which case, you really have to think about whether you want a judge to be able to force that disclosure. I mean ultimately that is not what's going to happen. I guess ultimately…

L. Fisher: No.

S. Spaulding: …what happens is that…

L. Fisher: …that's going to force the government.

S. Spaulding: Yeah, the government will have to pay or concede…

L. Fisher: Right.

S. Spaulding: …that litigation or whatever.

L. Fisher: That was going to be my answer to it, and I guess I would say that among the concerns that I have right now is not that the State Secrets Privilege will be broadened.

S. Spaulding: It's pretty broad already.

L. Fisher: Yeah.

S. Spaulding: Did we have a question over here? Yeah? Wait for the microphone.

R. Moy: Hi, my name is Russ Moy. I have two quick comments and then a question, one regarding the, as Lou mentioned, the re-litigation of the case recently, just a reminder that the district court and the appeals court went through the specific wording of the Air Force secretary's declaration of secrecy and reasoned that it was reasonable to believe that the airplane's defects and propensity for fire was a secret because the Russians had copied the plane, etc. If that's what he actually meant at the time, we'll never know, but that's what was relitigated. And with regard to Ben's earlier

comment about some of these warrantless wiretaps going on and you never know what's going on, there's the bizarre case in the 9th Circuit now where the FBI accidentally nailed the results of the warrantless wiretap and these guys are suing under five in the 9th Circuit now. But the question that I have has to do with the original 1953 Supreme Court Reynolds case and the court was clear that the decision as to whether or not it's a State Secret is that of the judge, and if the judge is convinced that the government's assertion is correct and then the Privilege gets invoked. The question I have is, has there ever been an instance, and I don't know if you would, if there's even a record of this, has there, do we know of a situation where the Privilege was invoked and the judge just didn't agree with it? And if so, was there ever an appeal against the judge's ruling and how did that shake out?

R. Chesney: I'll start off on this. I don't know if any judge has ever said this information is still secret or viewed in camera and I don't think this poses a reasonable risk of harming national security but what does happen from time to time, did that happen in Ellsberg?

B. Wizner: Yeah, I mean, the court said that the government's assertion that the identities of the attorneys general who had authorized the wiretap decades earlier was not a state secret.

R. Chesney: And that's a great example of how it ought to work. The judge should be looking, whether it's allegation, relegation or item-by-item, the judge should be making those kinds of calls. There are examples of relatively frivolous, yeah, but what does happen a lot is that the judge will say contrary to what the government's been claiming this really isn't secret anymore; there's been enough public disclosure and of course this goes to one of the most important checks on the State Secrets Privilege. Once it's out there, it's not secret anymore, and if it's not secret, judges have and will say so and will say that, you know, the privilege might have attached last week but not after Dana Priest got through with it, so, you're done. That is…

B. Wizner: Not that one.

R. Chesney: That's just a joke…

B. Wizner: Yeah, I wish.

R. Chesney: …but there are…

B. Wizner: My cases would survive _______...

R. Chesney: Yeah sorry, that was sort of a bad example for Ben's sake…

B. Wizner: That hurts.

R. Chesney: …but there have been cases where, for example, in the 70s you know, a lot the TSP that warrantless surveillance litigation we're now going through, in the 70s we had the same litigation and the exact same State Secrets Privileges were raised to get rid of that litigation with about the same results, except in cases I think Dr. Spock, his identity had been disclosed that he'd been surveilled so when the government said he didn't have standing the court said no, it's known, it's publicly known that he was surveilled so he has standing.

B. Wizner: And in the Hepting litigation in the 9th Circuit, which is the case against AT&T for its participation in the NSA wiretapping, when the government took the position in the District Court that even though this was, you know, public in a lot of ways, that it was still a State Secret because it had not been officially confirmed by the United States that AT&T had participated. And Judge Walker said in that case look, you know, this is not the kind of secret that a terrorist is out there waiting to find out. Of course anyone who makes phone calls assumes that a telecommunications company like AT&T has to be involved, that's not a state secret. So there have been cases, and more recently, you know, I think that there are some cracks in the wall on some of these cases.

R. Chesney: The decision that Walker examples is a very interesting one because there were, if I'm remember, I think this is in front of Walker, two different claims, two different programs. There's surveillance and then there's data mining right, and both have been the subject of news stories, USA Today, I forget who but somebody in USA Today had a piece on the data mining allegation. Unlike the TSP, the government has never confirmed or denied anything about data mining on that separated alleged program and the court acknowledged that that was a difference and that the government hadn't owned up to it in the same way.

L. Fisher: There were a couple of cases of the court of international trade where the government said that these cables would do great harm to another country and the judge says come on, you have to be kidding and so they threw that out. On the accident report, if there were items in there such as the problems with the engines and so forth with the Russians, then I think you could both do national security and the rights of the widows just to say that we cannot

release this but we will pay the full amount which would have been $80,000 to two women, $65,000 to the other woman. So you can do both.

S. Spaulding: Yeah.

Shane: Hi, Shane here with National Journal. I'm following up on the FICA issue and the TSP, the Center right now of course is debating an amendment to FICA and the big sticking point is whether to allow the lawsuits against the telecom companies to proceed. Senator Specter has proposed an amendment that would substitute the government as the defendant in place of the companies. If that were to happen, does it become easier, if that's the right word, for the government to assert the State Secrets Privilege in those cases if it's the defendant as opposed to an interested party or something like that.

B. Wizner: No, it's identical.

R. Chesney: Same result either way. Same result no matter what, either way.

B. Wizner: Identical.

S. Spaulding: 'Cause the government can intervene in the case even if it's not a party.

B. Wizner: And it has.

S. Spaulding: We'll have one; Ginny, do we have time for one more question or should we break there?

B. Wizner: Al?

S. Spaulding: You can ask the last question.

A. Bronstein: Thank you. I'm Al Bronstein, longtime senior lawyer at the ACLU, now a consultant for the ACLU. But putting on my other hat, I'm the President of Penal Reform International, an organization working to get democratic and decent prisons throughout the world working mainly in the former Soviet Union, new democracies in Africa, and Latin America. You know, I lecture on international human rights standards and training people in the Ukraine, there's a lot of interest in that because they want to get into the Council of Europe but they're serious about doing it. And now when I travel, this was all in the 80s and 90s, I'd go to these countries and they'd say what are you preaching to us, what is the United States doing.

They talk about El Masri and how people think torture is okay, why are you lecturing us. The great damage that decisions like El Masri and the behavior of our government around the world is just terrifying and I just wanted people to know that we're doing some terrible things throughout the world.

S. Spaulding: I'm not sure that any response is needed to that, but thank you, no, no. And on that cheery note, I wanted to thank you again on behalf of the Constitution Project and also the D.C. Bar's Administrative Law and Agency Practice section which supported this event. And I also want to just especially thank Nikisa Akavan, who's one of our interns who worked so very hard on this event. Thank you all for coming; watch your e-mail for future events.

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