FORMAL WRITTEN TESTIMONY OF MARK S. ZAID, ESQUIRE[*]

DELIVERED BEFORE THE
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
U.S. HOUSE OF REPRESENTATIVES

***"Whistleblower Protection Enhancement Act of 2007"***

TUESDAY, FEBRUARY 13, 2007

Good morning Mr. Chairman, Members of the Committee, it is with pleasure that I testify once again before this distinguished Committee. Today's hearing is an extremely important topic, especially as it directly relates to creating due process protections for those who make great sacrifices in order to support the national security interests of the United States.

While I routinely represent federal whistleblowers and can comment if requested on the broader legislative purpose of today's hearing, I have been requested to specifically focus on the provisions of the "Whistleblower Protection Enhancement Act of 2007", HR ___, that pertain to the state secrets privilege (SSP). I applaud this Committee for taking on this challenge. You are, to my knowledge, the first Congressional Committee in decades – and perhaps ever – to directly focus on the manifestation and application of the

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[*] Managing Partner, Mark S. Zaid, P.C., 1920 N Street, N.W., Suite 300, Washington, D.C. 20006. Tel. No. 202-454-2809. E-mail: ZaidMS@aol.com. A short biography is attached at Exhibit "1". Most relevant is the fact that I am one of but a small handful of litigators across the country who routinely handles national security matters in administrative and litigative proceedings. I teach the D.C. Bar CLE courses on the Freedom of Information Act (which includes litigation Exemption One national security challenges) and security clearance challenges, and I have also testified numerous times before Congress to include such topics as national security whistleblowers, security clearances and federal government polygraph programs. *See e.g., "Can You Clear Me Now?:Weighing "Foreign Influence" Factors in Security Clearance Investigations"*, Committee on Government Reform, U.S. House of Representatives, July 13, 2006; *"National Security Whistleblowers in the post-9/11 Era: Lost in a Labyrinth and Facing Subtle Retaliation"*, Subcommittee on National Security, Emerging Threats, and International Relations, Committee on Government Reform, U.S. House of Representatives, February 14, 2006; *"Issues Surrounding the Use of Polygraphs"*, testimony before the Committee on Judiciary, U.S. Senate, Washington, D.C., April 25, 2001. The views expressed herein reflect the opinion of only myself and should not be attributed or ascribed to any organization with which I may be affiliated.

SSP.[1] The SSP is routinely exploited by the Executive Branch, and understandably so. The Judicial Branch, despite flowerily rhetoric, has abdicated its responsibility for oversight and the Legislative Branch has been historically silent. Fortunately the latter situation, as evidenced by this very hearing, is no longer.

Let me state at the outset that I support the passage of the current provision, although admittedly any favorable substantive impact it might have is likely too difficult to assess or measure. But the importance of the legislation is the broader result in that it very clearly opens the door for the first time in history for true congressional involvement and oversight, in particular to allow for the application of the most important type of test when it comes to Executive Branch claims of classification – one of smell.

I know all too well the implications of litigating cases involving national security disputes and classified information. Oftentimes my clients' very identity or relationship to the United States Government is a highly classified secret. I am frequently in the trenches fighting with federal agencies concerning access to classified information in order to pursue my clients' claims. I am not talking about circumstances where the contents of the documents are unknown and I am seeking to have them declassified for use in proceedings but rather using information learned from authorized access to presently classified information, as well as expanding that access.[2]

Over the years I have handled or have been consulted on a number of cases where the SSP was raised. Often I am generally aware of a substantial amount of the classified information at issue in any of the SSP or other national security lawsuits I handle. Sometimes I know exactly what is at issue. Other times, of course, I know little to nothing of what is involved.

I say this in order to point out that, contrary to perhaps what some of my legal adversaries in the Government all too casually try to argue in their court filings, I do appreciate the nature of properly classified information. There are many secrets that absolutely need to be protected. The disclosure of some of the information that I have been privy to over the years could easily cause serious damage to the national security interests of the United States and could lead to the loss of life including that of my clients. I take that prospect very seriously. The problem is that excessive overclassification is rampant and at times purposefully abused. This is no longer

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[1] The last time Congress apparently substantively considered matters relating to the SSP was in the early 1970s when it contemplated including a SSP provision in the newly proposed Federal Rules of Evidence. Hearings on Proposed Rules of Evidence Before the Special Subcomm. On Reform of Federal Criminal Laws of the House Comm. On the Judiciary, 93rd Cong., 1st Sess. 181-85 (1973). Ultimately no provision was included.

[2] *See e.g. Stillman v. Dep't of Defense et al.*, 209 F. Supp. 2d 185 (D.D.C. 2002), *rev'd on other grounds*, 319 F.3d 546 (D.C. Cir. 2003)(First Amendment prepublication dispute involving counsel's access to classified information).

conjecture as it has been admitted to by senior officials of our Government.[3] The SSP is a perfect example.

## CURRENT USE OF THE STATE SECRETS PRIVILEGE IS AN ANATHEMA TO OUR CONSITUTIONAL SYSTEM

Secrecy was designed to serve as a shield to protect the disclosure of certain harmful or sensitive information. In the context of civil litigation it is quite the opposite. In that venue it is the equivalent of a two-handed sword with the sharpest blade that in one fell swing at the outset of the battle decapitates its enemy. The sword is the SSP, one of the most powerful of tools available to the Executive Branch. And the enemy is fair judicial due process.

Since the formal creation of the SSP in 1953 by the Supreme Court in *United States v. Reynolds*,[4] courts routinely remind the Executive Branch that the assertion of the SSP is "not to be lightly invoked."[5] As routinely as that reminder occurs, the Executive Branch routinely ignores it. Indeed, as we engage in the first legislative discussion of the privilege in decades, it should not go unnoticed that we have no public understanding whatsoever as to the thought process that goes into play when an Executive agency decides to invoke the state secrets privilege. Likewise, we have absolutely no public understanding as to the thought process that comes into play with respect to analysis by the Department of Justice in deciding whether the invocation is legally sound.

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[3] *See e.g.*, "*Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing,"* Hearings Before SubComm. On Nat'l Security, Emerging Threats and Int'l Relations, Comm. On Gov't Reform, U.S. House of Representatives, August 24, 2004, Testimony of Carol Haave, Under Secretary of Defense for Intelligence, U.S. Department of Defense (50% of information is overclassified) & Testimony of J. William Leonard, Director, Information Security Oversight Office, National Archives & Records Administration (more than 50% of information classified should not be), available at *http://www.fas.org/sgp/congress/2004/082404transcript.html*. *See also* Statement of Senator Ron Wyden (D-Or)(noting that Governor Thomas Kean, Chairman 9/11 Commission, had stated that "well over half of the documents that he saw that were marked 'classified' didn't warrant being classified." "*The Nomination of Mike McConnell to be Director of National Intelligence*," Hearing Before the Senate Select Committee on Intelligence, February 1, 2007, available at *http://www.fas.org/irp/congress/2007_hr /020107dni.pdf*; Erwin Griswold, "Secrets Not Worth Keeping: The Courts and Classified Information," *Washington Post*, February 15, 1989 (former Solicitor General who argued *Pentagon Papers* case for Government noted massive overclassification exists primarily to hide governmental embarrassment).

[4] 345 U.S. 1 (1953).

[5] *Id*. at 7.

I would wholeheartedly encourage the Committee to solicit views and perspectives from the different agencies that historically invoke the privilege as well as attorneys with the Department of Justice to attain an understanding of how the process works internally. Indeed, public testimony should be required from the Executive Branch in a follow-up hearing so that true transparency can occur as part of this important discussion. Though perhaps more sensitive, serious consideration should be accorded to having former, or even current, federal judges testify to better understand the limitations they feel are imposed upon them in SSP or similar cases and how best to overcome those problems.

Disappointingly, rarely does a federal judge do anything other than accept carte blanche whatever the head of the Executive Department states in a classified declaration submitted for review *in camera* and *ex parte*. There is no role, based on current law, for plaintiff's counsel in this review process. Essentially it is the defendant in the role of a batter calling for whatever preferred pitch he wants the pitcher to throw in order to guarantee hitting a home run.

In the majority of cases that I am familiar with that involve claims against Executive agencies for misconduct or wrongdoing the court never even gets to the point where specific classified documents that might comprise the evidence are in question. It is only the one-sided, self-serving, classified declaration that leads to a favorable decision for the government that is reviewed and serves as the basis for the court's decision. There is no case I am personally aware of where a district judge has verbally posed substantive questions or requested clarifying information in writing based on what was contained in the classified declarations. The contents of the declarations are adopted wholesale.

Yet we know from the *Reynolds* case that an Executive Agency will not hesitate to mislead, and arguably, lie to a court in order to protect itself from embarrassment or the revelations of potentially unlawful conduct.[6] The misuse of the classification system,

[6] The actual "classified" accident report that was at the heart of the *Reynolds* lawsuit was discovered on the Internet in 2000 among declassified files by one of the daughters of those killed in the 1948 plane crash that sparked the litigation. The claim by the Government at the time that release of the report would reveal sensitive, classified operations of the flight was completely erroneous. For information about the potential fraud that was perpetrated by the Government in this case and the dangers that emanate from this claim, *see e.g.*, LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE (Univ. Press of Kansas, 2006); "*Government's Ugly Secret*", Los Angles Times, Apr. 21, 2004, at B14; "*The Secret of the B-29*", Los Angeles Times, Apr. 18-19, 2004, at 1; "*A 1953 case echoes in high court: The administration asks that fraud-on-court allegations be dismissed***"**, National Law Journal, June 10, 2003, at 5; "*The secret's out: 17th century doctrine invoked to challenge 1953 ruling based on Air Force's national security claim in fatal crash*", Miami Daily Business Review , Mar. 11, 2003. *See also Hirabayashi v. United States*, 828 F.2d 591, 597 (9th Cir. 1987)(granting corum nobis relief as Dep't of War suppressed crucial report from initial court review).

especially in the context of judicial proceedings, is destructive to the fundamental tenets of our Constitution.[7]

Courts repeatedly hold that it is generally not within their purview to intervene on national security matters. I reject the notion that federal judges neither have the authority nor can exercise expertise regarding classification decisions. I would submit that Congress agrees with that premise due to its role in creating such statutes as the Freedom of Information Act and the Classified Information Procedures Act. The former is especially pertinent. This Legislative Branch, in 1974, specifically granted the courts explicit authority to overrule FOIA Exemption One national security assertions.[8] Despite the confidence that this Branch of Government determined existed, its sister branch refuses to accept the job. Nothing less than specific instructions from the Congress will apparently modify the courts' way of thinking.

And yet times have certainly changed over the years. Courts more frequently handle cases – whether those be criminal or civil – where classified information is at stake. And the Foreign Surveillance Act (FISA) court, in particular, obviously addresses some of the most sensitive, classified issues that exist today. Certainly those judges who sit on the FSIA court did not, at least initially, possess any greater skills or insight as to how to handle national security decisions than their colleagues assigned to other federal courts. To my knowledge there is no special qualification to serve on the FSIA court. But they do, and they render national security decisions. The real issue is transparency, or the lack thereof.

The problem with the SSP is that, in my personal opinion, federal judges are clearly concerned that a decision they issue will have dire consequences later on for which they shall be blamed. That is, should they order the disclosure of classified information during a civil proceeding and that information is somehow leaked, even inadvertently, the perceived fault will ultimately lie with the court. That concern does not exist with the FSIA court.

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[7] "[T]oo much classification … unnecessarily obstructs effective information sharing and impedes an informed citizenry, the hallmark of our democratic form of government. In the final analysis, inappropriate classification activity of any nature undermines the integrity of the entire process and diminishes the effectiveness of this critical national security tool. Consequently, inappropriate classification or declassification puts today's most sensitive secrets at needless increased risk," Hearings before U.S. House of Representatives, Comm. On Gov't Reform, Subcomm. On Nat'l Security, Emerging Threats and Int'l Relations, Mar 14, 2006 (statement by J. William Leonard, Director, Information Security Oversight Office, National Archives & Records Administration).

[8] In amending FOIA in 1974, Congress explicitly rejected the Supreme Court's decision in *EPA v. Mink,* 410 U.S. 73 (1973), which had limited the court's role in assessing security classifications under FOIA, and also overrode President Ford's veto. The 1974 Amendments explicitly empower courts to make a *de novo* determination of the propriety of a federal agency's classification decision. *Halkin v. Helms*, 598 F.2d 1, 16 (D.C.Cir. 1978).

Regrettably, this legislative hearing might not have been necessary if the Supreme Court had exercised its discretion in 2005-2006 when it was provided a prime opportunity to weigh in on this delicate issue for the first time since it issued *Reynolds* a half-century ago. In late 2005, it had two certiorari petitions simultaneously pending regarding SSP cases, as well as two others at the Circuit Court of Appeals level and at least one known case at the district court level.[9] All of the lower court cases were on their path towards the Supreme Court as well. Never before, to my knowledge, were so many SSP cases pending at one time, especially at such high levels. Yet, without even a comment, the Supreme Court turned away each of the cases that reached it. It chose to leave in place the ambiguity or hypocrisy that exists between its own admonition in *Reynolds* that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers" and the application of SSP in the practical reality of today.[10]

To put the consequences of the SSP in some sort of understandable perspective, I personally find it distressing that foreign criminal terrorist defendants receive more rights to ensure that they and their counsel have access to classified information than do U.S. nationals who place their lives on the line to fight against foreign criminal terrorists.[11] I am all for the application of full constitutional protection to any individual who finds themselves within the grasp of the U.S. criminal justice system but the absurdity and irony of this irreconcilable discrepancy must not go unnoticed any longer.[12]

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[9] Both *Edmonds v. Dep't of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004), *aff'd*, 161 Fed. Appx. 6 (D.C. Cir.), *cert. denied*, 126 S. Ct. 734 (2005) and *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005), *cert. denied, Sterling v. Goss*, 126 S. Ct. 1052 (2006),were pending certiorari consideration at the same time. The petition in *Herring v. United States*, 424 F.3d 384 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 1909 (May 1, 2006)(*Herring*, while not directly an SSP case, involved fraud claims arising from the original *Reynolds* litigation) was filed within weeks and was specifically acknowledged in the *Sterling* petition to be forthcoming. The petitions were denied certiorari on November 28, 2005, January 9, 2006, and May 1, 2006, respectively. The Court was also alerted to the fact that SSP cases were presenting being litigated in the D.C. Circuit Court of Appeals (*Horn v. Drug Enforcement Administration* – currently under seal) and the Eastern District of New York (*Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006)).

[10] *Reynolds*, 345 U.S. at 9-10.

[11] There is no legal or factual distinction with respect to how courts and litigants can adequately protect alleged classified information in civil or criminal proceedings. The alleged concerns regarding the unauthorized release of classified information are identical.

[12] *See United States v. Moussaoui*, 382 F.3d 453, 475-476 (4th Cir. 2004)("Executive's interest in protecting classified information does not overcome a defendant's right to present his case" in CIPA proceedings).

## BRIEF HISTORY AND LEGAL ANALYSIS OF THE STATE SECRETS PRIVILEGE[13]

The Founding Fathers of our country created a tri-partite system of government for very important reasons, primary among them the need to ensure checks and balances and prevent the abuse of power.[14]

The SSP is a Cold War judicially created privilege. Though its creation stems from a ruling of the United States Supreme Court, it has primarily been the Courts of Appeals and district courts that have shaped, interpreted and implemented the privilege since 1953. There are now numerous cases that demonstrate the avoidable inequities that follow abdication of responsibility by federal judges who fail to seriously challenge *ex parte, in camera* assertions by Executive Branch officials or shirk their authority to pursue available protective mechanisms to allow litigation that has the possibility of seemingly touching upon classified information.

As noted above, the Supreme Court created the SSP in its 1953 *Reynolds* decision.[15] There the United States Air Force successfully dismissed tort claims that sought to allegedly expose classified information concerning a B-29 bomber that had been testing secret electronic equipment and had crashed in 1948 killing nine people.[16] The rules surrounding the SSP appeared simple enough. Following the invocation of the SSP, courts must first ensure that the individual asserting the formal privilege is the head of the department with control over the information and that he has personally considered the matter.[17] This has become nothing more than a pro forma requirement.

The SSP was historically designed to be "a common law evidentiary rule that allows the government to withhold information from discovery when disclosure would be

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[13] For recent indepth discussions of the SSP, *see e.g.*, Robert M. Chesney, "State Secrets and the Limits of National Security Litigation," Geo. Wash. L. Rev. (forthcoming 2007), copy available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946676*; LOUIS FISHER, *supra* note 6; William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL.SCI. Q. 85 (2005).

[14] *See Mistretta v. United States*, 488 U.S. 361, 380 (1989)(it was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty").

[15] 345 U.S. 1.

[16] *Id*. at 7-8.

[17] *Id*.

inimical to national security."[18] Yet, over the years, the privilege has been judicially expanded by lower courts to permit the exploitation by the government to seek complete dismissal of a lawsuit even before filing an Answer. This has raised at least some expressed concerns within the judiciary.

> Dismissal of a suit, and the consequent denial of a forum without giving the plaintiff [his] day in court, however, is indeed draconian. "[D]enial of the forum provided under the Constitution for the resolution of disputes, U.S. Const. art. III, § 2, is a drastic remedy that has rarely been invoked."[19]

In SSP cases the Government will typically submit two declarations from the relevant agency department head. One declaration will be filed for public review and the other – due to its alleged classification – will be provided to the Court, should it choose to review it, *in camera, ex parte*. Typically the public declaration will offer little, if any, substantive statement that reasonably explains the basis for the invocation of the privilege.

A common example of the most substantive statement contained in a public declaration would declare in conclusory fashion that the case needs to be dismissed because the "sensitivity of the information over which I claim this privilege is sufficiently critical to the ability of the CIA to perform its intelligence collection mission, and to the safety of its officers in vulnerable positions throughout the world… [and] by litigating this case, there is the possibility of disclosure of both 'Secret' and 'Top Secret' classified information."[20] Whether to the untrained or trained legal eye it is obvious that such a statement offers absolutely no information upon which to craft any rationale challenge.

If an agency formally invokes the privilege, according to Supreme Court jurisprudence, the district court then must undertake a serious and substantive review of the government's claims:

> [T]he more compelling a litigant's showing of need for the information in question, the deeper "the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." ... [T]he more plausible and substantial the government's allegations of danger to national security, in the context of all the circumstances surrounding the

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[18] *Zuckerbraun v. General Dynamics Corp*., 935 F.2d 544, 546 (2d Cir. 1991), *citing In re U.S.*, 872 F.2d 472, 474 (D.C.Cir.), *cert. denied*, 110 S. Ct. 398 (1989).

[19] *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985).

[20] *See* Declaration and Formal Claim of State Secrets Privilege and Statutory Privilege by George J. Tenet, Director of Central Intelligence at ¶7 (dated August 18, 2003), filed in *Sterling v. Tenet et al.*, Civil Action No. 01-8073 (S.D.N.Y.).

> case, the more deferential should be the judge's inquiry into the foundations and scope of the claim.[21]

In fact, the qualifying language is "[w]hen *properly* invoked, the state secrets privilege is absolute."[22] Therefore, I would submit that courts must undertake a balancing inquiry and probe the basis for the invocation before the privilege is deemed applicable and absolute. This is not the same as balancing the needs between the litigant to use the information and the government's desire to exclude it.[23] The court's inquiry is into the legitimacy of the government's invocation of the privilege, its application to the facts in the particular case and an investigation into whether disclosure would reasonably cause damage to national security interests.

However, it is not the extent to which a balancing of interests is undertaken that has become the focal point of a court's assessment of the invocation of the privilege but whether or not any substantive review or challenge occurs at all. The Supreme Court wanted to ensure that "[m]ere compliance with the formal requirement, however, is not enough."[24] "To some degree at least, the validity of the government's assertion must be judicially assessed."[25] "Once the privilege has been formally claimed, the court must balance the 'executive's expertise in assessing privilege on the grounds of military or diplomatic security' against the mandate that a court 'not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role.'"[26]

Thus, "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[27] "Without judicial control over the assertion of the privilege, the danger exists that the state secrets privilege will be asserted more frequently

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[21] *Reynolds*, 345 U.S. at 10.

[22] *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C.Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984)(emphasis added).

[23] *Cf. Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C.Cir. 1984)(a "party's need for the information is not a factor in considering whether the privilege will apply").

[24] *In re U.S.*, 872 F.2d at 475.

[25] *Molerio v. Federal Bureau of Investigation*, 749 F.2d 815, 822 (D.C.Cir. 1984).

[26] *Virtual Defense and Development International v. Republic of Moldova*, 133 F.Supp.2d 9, 23 (D.D.C. 2001), *quoting In re U.S.*, 872 F.2d at 475-476.

[27] *Reynolds*, 345 U.S. at 9-10.

and sweepingly than necessary leaving individual litigants without recourse."[28] Although "utmost deference" is to be accorded to the executive's expertise,[29] the government must show, and the court must separately confirm, that "the information poses a reasonable danger to secrets of state."[30]

One important area of inquiry for courts is whether the invocation is too broad.[31] In recent years there are a few, but unfortunately growing, number of cases where a plaintiffs' complaint is dismissed from the outset before an Answer is filed and without any opportunity for discovery. It is in these types of cases, in particular, where criticism can be levied against the courts for not applying a reasonable balancing test.[32]

Before the last decade most courts had found such an extreme remedy to be too distasteful and an anathema to our historical notions of liberty and due process. For example, in *In re U.S.* the government sought dismissal based on the state secrets privilege in a case that alleged illegal activities of the Federal Bureau of Investigation.[33] The district court denied the government's attempt to dismiss the case without answering the Complaint.[34]

In fact, it would appear that the Supreme Court intended the typical state secrets case to pertain to matters of discovery, not the entire case from the outset. Some courts try to follow that lead and undertake an effort to at least provide the plaintiff an opportunity to pursue his/her claim in good faith even if ultimately the case is dismissed.[35] This effort,

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[28] *NSN International Industry v. E.I. DuPont De Nemours*, 140 F.R.D. 275, 278 (S.D.N.Y. 1991), *citing Ellsberg*, 709 F.2d at 57.

[29] *United States v. Nixon*, 418 U.S. 683, 710 (1974).

[30] *Halkin v. Helms*, 690 F.2d 977, 990 (D.C.Cir. 1982).

[31] *Black v.* CIA, 62 F.3d 1115, 1119 (8th Cir. 1995).

[32] *See e.g. Edmonds v. Dep't of Justice*, 323 F.Supp.2d 65 (D.D.C. 2004); *Tilden v. Tenet*, 140 F.Supp.2d 623 (E.D.Va. 2000); *Doe et al. v. CIA et al.*, 2007 U.S. Dist. LEXIS 201 (S.D.N.Y. Jan. 4, 2007); *Sterling v. Tenet*, Civil Action No. 03-329, (E.D.Va. Mar. 3, 2004).

[33] *Id*. 872 F.2d at 473-74.

[34] *Id*. at 474.

[35] *See e.g.*, *Molerio*, 749 F.2d at 822-26 (affirming dismissal on ground of privilege after FBI answered complaint and complied with discovery requests); *Ellsberg*, 709 F.2d at 70 (reversing dismissal); *Halkin*, 690 F.2d at 984, 1009 (affirming dismissal after parties had fought "the bulk of their dispute on the battlefield of discovery"); *Halkin v. Helms*, 598 F.2d 1, 5 (D.C.Cir. 1978)(affirming partial dismissal and reversing decision rejecting privilege that was certified as interlocutory appeal). *See also Reynolds*, 345 U.S. at 11-12

unfortunately, rarely, if ever, occurs in cases where the Government itself is accused of misconduct or unlawful actions.

What is so frustrating when dealing with SSP cases is that the courts seem willing in other cases to challenge Executive Branch national security decisions. The degree of deference to be extended to the Executive Branch on matters of national security is frequently the topic of judicial discussion and the War on Terror brought the debate to the forefront. In *Hamdi et al. v. Rumsfeld et al.*, the Supreme Court was "called upon to consider the legality of the Government's detention of a United States citizen on United States soil as an 'enemy combatant' and to address the process that is constitutionally owed to one who seeks to challenge his classification as such." [36] The Fourth Circuit had held that the detention was legally authorized and that no further opportunity was available to challenge the status label assigned by the Executive Branch.[37] Though arising from a criminal context, the relevance of the *Hamdi* proceedings derives most notably from the discussion of the appropriate level of deference that is to be extended to the Government's security and intelligence interests.

On appeal the Fourth Circuit had ruled that the district court's actions had failed to extend the appropriate deference.[38] It also believed that separation of powers principles prohibited a federal court from "delv[ing] further into Hamdi's status and capture."[39] The Supreme Court rejected this rationale.

> While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to actual prosecution of war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.[40]

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(remanded for further proceedings without privileged material); *DTM Research, LLC v. AT & T Corp.*, 245 F.3d 327 (4th Cir. 2001)(quashing of subpoena that threatened state secrets did not foreclose possibility of fair trial and did not warrant dismissal); *Northrop Corp*., 751 F.2d at 400-02 (remanded for further proceedings without privileged material).

[36] 542 U.S. 507 (2004).

[37] *Id*. at 510.

[38] *Id*. at 512, *citing Hamdi et al. v. Rumsfeld et al.,* 296 F.3d 278, 279 (4th Cir. 2002).

[39] *Hamdi*, 542 U.S. at 515, *quoting Hamdi et al. v. Rumsfeld et al.,* 316 F.3d 450, 473 (4th Cir. 2003).

[40] *Hamdi*, 542 U.S. at 535.

Moreover, the Supreme Court noted, "*any process* in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short."[41] But this is exactly what typically occurs in most SSP cases. The district court proceedings in *Sterling v. Tenet*, which was a racial discrimination cases against the Central Intelligence Agency, illustrate the problem. The district court judge made it clear that the court was not "an intelligence agency."[42] He also opined that:

> it is not the place of the Court to oversee the classification of documents and information, to examine or question the rationale of why officials classified this information at the level it is, or to redetermine whether information is truly "Secret" or "Top Secret." *The only time in which a court should deny the privilege is if, after an examination of the agency head's declaration of his reasoning behind asserting the privilege, it is transparently obvious that the agency is engaging in an abuse of the privilege.*[43]

This mistaken perception of not only the Court's authority but its responsibility was echoed during oral arguments.

> MR. ZAID: And there's a distinction here as to what we're arguing on with respect to the government's motion and then secondarily this issue. Because I see them as very separate issues. One is whether or not this case, just after the complaint filed, is to be dismissed outright. The second is whether we can proceed forward and on a case-by-case basis meaning document by document or information by information and categories, whatever. You decide whether state secrets privilege could attach or statutory privilege could attach to certain information.
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> THE COURT: Wait a minute. You re saying that under your theory then I would have to contradict the director's declaration and decide for myself in a vacuum what would be admitted, what would not be admitted and what affects national security and what would not affect national security?
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> MR. ZAID: Well, I think you have the authority to do that.
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> THE COURT: Well, maybe I do. But I don't think that comports with my understanding of Reynolds and some of the other state secrets cases.[44]

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[41] *Id*. at 537 (emphasis added).

[42] *Sterling v. Tenet*, Civil Action No. 03-329, slip op. at 11 (E.D.Va. Mar. 3, 2004).

[43] *Id*. (emphasis added)

[44] *Sterling v. Tenet*, Civil Action No. 03-329, Tr. at 26 (E.D.Va. Mar. 3, 2004).

The Court later stated:

> I have -- and *I' m not hesitant to express some sense that the Court really does not have a way to do anything more than to look at the declaration and make a judgment whether it qualifies under the state secrets privilege.* I don't think I need to reach the other issues involved about the substance of Mr. Sterling complaint.[45]

This applied rationale is entirely erroneous and is rampant within the judicial system. It is a fundamental constitutional and statutory role of a federal district judge to assess the propriety of an agency's classification decision. Moreover, there is absolutely no legal basis upon which the district court could impose this new "obvious transparency" requirement in order to determine an agency's abuse of the privilege. Ultimately the district court became nothing other than a "rubber stamp". Given the fact that the court repeatedly noted it was not an intelligence agency, could not second-guess CIA determinations, would not examine or question agency rationale, and did not possess the proper expertise, then there is simply no way for any federal judge that shares these views to even understand, much less substantively review, an agency's classified declaration for examples of obvious abuse.[46]

"While judges should acknowledge, their limitation in areas where they lack expertise, the difficult task in assessing a claim of 'state secrets' privilege calls for a particularly judicial expertise balancing the government's need for secrecy against the rights of individuals."[47] However, the Supreme Court has made it clear in another national security context:

> We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases.[48]

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[45] *Id*. at 46.

[46] A similar sentiment was expressed by the Southern District of New York in dismissing my most recent SSP case. *Doe et al. v. CIA et al.*, 2007 U.S. Dist. LEXIS 201 (S.D.N.Y. Jan. 4, 2007). Even though significant First Amendment right to counsel issues were raised, to include the CIA impeding my ability to represent my clients, the Court made it clear in its decision (as well as in prior court appearances) that nothing I could argue, whether it was classified or not (and I had authorized access), would be sufficient to challenge the CIA's assertions in its classified declaration. The contents of the declaration, which the Court had made no effort to question, would prevail every time.

[47] *Halkin*, 598 F.2d at 15.

[48] *United States v. United States District Court (Keith)*, 407 U.S. 297, 320 (1972).

"Although the judicial competence factor arguably has more force when made in the foreign rather than domestic security context, the response of *Keith* to the analogous argument is nevertheless pertinent to any claim that foreign security involves decisions and information beyond the scope of judicial expertise and experience."[49]

In the system of law that I operate under I believe it is the duty and obligation of district courts to make every conceivable attempt to fashion procedures that would allow SSP cases to proceed. In fact, there are numerous safeguards that could be successfully implemented. District courts have the authority to "fashion appropriate procedures to protect against disclosure."[50] "Only when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal warranted."[51]

In *Sterling* the district court was frustrated by the "unique bind" it was placed in by the CIA's invocation of the state secrets privilege. Part of the problem was the district court's misunderstanding of the classification nature of much of the information at issue or the simple ability to devise protective procedures. For example, it noted:

> Virtually all of Plaintiff's duties as an Operations Officer are classified. The location of Plaintiff's workplace is classified. All of Plaintiff's supervisors and most of his co-workers names are classified (hence Defendants John Does #1-10). The basic duties that a Court would ask a jury to perform as fact finder, such as to examine what Plaintiff's duties were, and to compare these duties to similarly situated Operations Officers, are impossible to achieve because all of this information is classified.[52]

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[49] *Zweibon v. Mitchell*, 516 F.2d 594, 641 (D.C.Cir. 1975)(en banc).

[50] *Fitzgerald*, 776 F.2d at 1243. *See generally* Comment, *Keeping Secrets from the Jury: New Options for Safeguarding State Secrets*, 47 Fordham L.Rev. 94, 109-113 (1978) (discussing options short of dismissal for the protection of state secrets); J. Zagel, *The State Secrets Privilege*, 50 Minn. L.Rev. 875, 885-88 (1966) (discussing procedures to protect secrets yet allow cases to go forward); *Cf.* Classified Information Procedures Act, 18 U.S.C. App. (1980)(procedures for the use of classified information in criminal trials).

[51] *Fitzgerald*, 776 F.2 at 1244.

[52] The district court further noted that the only way a jury could hear Sterling's case would be to "choose jurors who have the applicable security clearances. Because the whole point of a jury in the American judicial system is to randomly choose citizens regardless of race, sex, economic status – or other intangibles, such as one's eligibility for a security clearance – this is an impossible goal to reach." *Sterling*, Civil Action No. 03-329, slip op. at 9. It would be a small, though valuable, price to pay for individuals who face SSP cases to waive their jury rights, if it even exists in their case, in exchange for the ability to have their day in court. Sterling's case was dismissed despite his willingness to waive his right to a jury of his peers.

However, these observations were simply either untrue or exaggerated. It was our position that Sterling's duties as an Operations Officer could easily be discussed in an unclassified manner and that his workplace location was not classified. In any event, the specific location was irrelevant. In CIA cases it is routine to simply refer to a work location as either Domestic Location "A" or Overseas Location "B". The parties know the true location, as does the Court, and it may not even be relevant to the claims. The same applies to names of CIA officials, who can be identified by initials or pseudonyms.[53]

The Supreme Court has directly addressed the issue of dealing with the CIA's concerns that civil litigation may reveal classified information. In fact, *Webster v. Doe*,[54] arguably suggests that lower courts should not dismiss a complaint without at first allowing the plaintiff an opportunity to pursue discovery. Although *Webster* did not involve the state secrets privilege, the issue was whether or not a federal court can adjudicate a claim against the CIA in light of the fact the CIA and its missions are enveloped nearly completely in secrecy. The Court outright rejected the CIA's attempt to shield itself from the civil litigation process when it ruled:

> the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof that would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission.[55]

Even the Fourth Circuit, historically the most conservative court in the United States, explicitly recognized that "there may be a case where an *in camera* hearing or other special procedure is necessary to properly determine whether the invocation of the state secrets privilege makes it impossible to go forward."[56] That being said, I am unaware of

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[53] Additionally, any depositions could be taken at secure facilities before a cleared court reporter. Copies of transcripts and other discovery responses that may contain classified information would be maintained by the relevant agency, but would be available to the district court for full examination at the appropriate time.

[54] 486 U.S. 592 (1988).

[55] *Id*. at 604.

[56] *Wen Ho Lee*, 2003 WL 21267827, at *13 (4th Cir. June 3, 2003). As part of my representation of Sterling I was in possession of a significant amount of allegedly "classified" facts. The district court could have taken the opportunity to hear *in camera* evidence to further assist it in deciding whether the state secrets privilege was appropriate. Indeed, I even suggested that we could submit in advance interrogatories, document production requests and deposition notices, along with a description of what information would be expected, to enable the district court to truly assess the applicability of the privilege. This suggestion was rejected.

any case in almost fifty years where such a method was actually employed by a court handling a SSP case.[57]

Far more common is the language in *Tilden* where the court ruled "there are no safeguards that this Court could take that would adequately protect the state secrets in question."[58] Yet the Supreme Court contradictorily noted,

> We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual's case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.[59]

Several district courts, in resolving challenges pertaining to the Guantanamo Bay detentions in the aftermath of the Supreme Court's opinion in *Hamdi*, have already implemented similar if not identical safeguard protections that could function in any number of SSP cases. Judge Kollar-Kotelly of the U.S. District Court for the District of Columbia noted that:

> Counsel would be required to have a security clearance at the level appropriate for the level of knowledge the Government believes is possessed by the detainee, and would be prohibited from sharing with the detainee any classified material learned from other sources. The Court pointed out that the Government's decision to grant an individual attorney a security clearance amounts to a determination that the attorney can be trusted with information at that level of clearance. Furthermore, any attorney granted the clearance would receive appropriate training with respect to the handling of classified information, commensurate with the

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[57] The last time a court apparently permitted such an occurrence – even going beyond what the Fourth Circuit was considering – was *Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958) where an *in camera* trial was held sufficient to address the government's concerns so long as a jury was waived.

[58] 140 F.Supp.2d at 627. In support of this mistaken premise, the district court relied on several prior circuit court pronouncements. *See Bowles v. United States*, 950 F. 2d 154 (4th Cir. 1991)(dismissal warranted because "no amount of effort or care will safeguard the privileged information"); *Fitzgerald*, 776 F. 2d at 1243 (dismissal of defamation action warranted "because there was simply no way [the] case could be tried without comprising sensitive military secrets"); *Molerio*, 749 F.2d at 815 (dismissal of Title VII lawsuit warranted because without disclosure of state secrets, insufficient evidence of discrimination existed). It is also worth noting that this is the same district court that offered the conclusory statement that "the security of our nation's secrets is too important to be left to the good will and trust of even a member of the Bar of this Court." *Tilden*, 140 F.Supp. at 627.

[59] *Hamdi*, 124 S.Ct. at 2652.

> level of clearance granted and the type of classified material to which the attorney would be expected to have access. The Court also indicated that there are significant statutory sanctions relating to the misuse or disclosure of classified information. *see, e.g.*, 18 U.S.C. § 793 (addressing sanctions for gathering, transmitting or losing defense information); 18 U.S.C. § 798 (addressing sanctions for disclosure of classified information). Finally, the Court's framework presupposes full compliance by Petitioners' counsel.[60]

District Judge Green, who is coordinating all the Guantanamo Bay cases within the U.S. District Court for the District of Columbia, issued a lengthy decision detailing with precision all the steps that will be taken by the court and counsel "to prevent the unauthorized disclosure or dissemination of classified national security information and other protected information…."[61] Again, there is absolutely no difference between protecting and safeguarding classified information in a criminal versus civil matter.

The procedures that Judge Green set in place are routine in nature, and generally apply to the majority of the Intelligence Community cases I handle. There is no reason why these procedures cannot be implemented and adapted in SSP cases. They include, but are not limited to:

- Counsel submitting all writings requesting access to classified information to a security officer for review.[62]

- The Government arranging for an appropriately approved secure area for the use of counsel to work with classified information. All information shall be stored and maintained in the secure area.[63]

- Allowing counsel to challenge the Government's assertions that there does not exist a "need to know" the sought-after classified information.[64]

- Ensuring counsel understands the serious ramifications, to include civil and criminal penalties, which could occur were violations to occur.[65]

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[60] *Odah et al. v. United States of America*, 346 F. Supp. 2d 1 (D.D.C. 2004).

[61] *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004).

[62] *Id*. at 179.

[63] *Id*. at 178.

[64] *Id*. at 180.

[65] *Id*. at 176, 183.

It has been my experience that many judges will initially inquire about the application or relevance of the Classified Information Procedures Act (CIPA),[66] which is a statute applicable to criminal proceedings only. In my opinion CIPA does offer guidance to judges in civil proceedings to the extent it demonstrates that courts are the proper authority to render relevancy determinations or "need-to-know" decisions in clearance parlance.[67] But the statute itself offers little guidance on how to deal with a civil privilege given the significant differences that exist between the types of cases. Even where in CIPA cases the court orders the release of the classified information the Executive Branch still has the prerogative to say "no". The consequence in doing so is to dismiss the criminal indictment, thus falling victim to "greymail", but the significance is that the decision for disclosure rests with the Executive Branch and not ultimately the court. Thus if the Executive Branch decides to move forward with disclosure it was the one that rendered an affirmative decision in doing so thereby, on some levels, relieving the court of a greater burden of perceived responsibility.

Perhaps the corollary to reach from CIPA is that if in a civil proceeding the court determines that sufficient security precautions can be taken or at least should be attempted, the Executive Branch retains the right to decline participation but suffers the consequences of having to concede whatever factual element that particular evidence applies to in the case.

At a minimum it would seem a matter of course that Executive Branch agencies should be required to demonstrate that every element of each cause of action asserted against it in a lawsuit is properly subject to the SSP. Too often are entire cases subsumed in the application of the privilege when it is absolutely clear that this is a perverse and inappropriate broad ruling. The case of Sibel Edmonds is a perfect example.[68] Ms. Edmonds' lawsuit against the FBI included claims of violations of the First Amendment and the Privacy Act. Though it was clearly spelled out to the court that these claims,

[66] 18 U.S.C. app. 3 (2006).

[67] The CIA explicitly acknowledged that "it is the Court's decision … to determine whether requested material is relevant to matters being addressed in litigation." Declaration and Formal Claim of State Secrets Privilege and Statutory Privilege by George J. Tenet, Director of Central Intelligence, February 10, 2000, submitted in *Barlow v. United States,* Congressional Reference No. 98-887X, at 9, as quoted in FISHER, *supra* note 6, at 247. The CIA now routinely argues to the contrary in cases I have litigated.

[68] I served as Ms. Edmonds' legal counsel from March 2004 – November 2005 and was intimately involved in the proceedings from the district court to Supreme Court.

especially the Privacy Act, could easily be carved out of the case, those arguments were completely rejected.[69]

Finally, in recent years much ado has been made about the perceived proliferation of the current Bush Administration's proclivity to invoke the state secrets privilege.[70] While the numbers on paper certainly reflect an increase in use, this issue, while certainly interesting, is of little practical value with respect to the SSP itself. For one thing, the number of cases and new invocations are not truly significant. But more importantly there are numerous external factors that have contributed to this increase that simply cannot be ignored. That includes an increase in federal employees working in the national security arena, the occurrence of 9/11, a greater willingness of federal employees to publicly challenge actions purportedly taken against them by their agency and, ironically, attorneys like myself who will not hesitate to litigate alleged wrongful conduct even if it requires *pro bono* efforts.

Yes, this Administration is far more aggressively secretive than its immediate predecessor. I think few people would disagree with that sentiment. So, yes, the situation is worse today than it was in prior years. But that doesn't mean that the situation was all rosy during the Clinton administration. It was not. There are positive aspects that emanated from the Clinton period and there are positive aspects from the Bush presidency.

On the other hand, I can point to negative aspects in both as well. I have been handling these types of cases since virtually the establishment of my law practice here in Washington, D.C. in 1993. There have always been significant roadblocks preventing those within the Intelligence Community from pursuing claims against their agencies. That there are now, say, 20 instead of 15 roadblocks makes little practical difference. The invocation of the SSP is not a partisan political issue. However, the biggest difference I would say between the Administrations really stems from the judges that have been appointed. That is where the Bush Administration has ensured that cases that involve SSP will likely never proceed beyond the filing of a Complaint because the deference, or more appropriately the abdication of responsibility, accorded to Executive Branch agencies is far more likely.

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[69] *Edmonds*, 323 F.Supp.2d at 80-81. For example, Ms. Edmonds claimed that the FBI violated the Privacy Act by revealing privileged personal information from her systems of records to the media without consent. In proving such a claim all that was needed to be done was to confirm the disclosure to the media and the lack of written consent. None of the substantive work Ms. Edmonds performed for the FBI would have been at issue. The veracity of her allegations against the FBI was irrelevant to the facts surrounding the alleged violation of the Privacy Act. Yet the courts at all levels declined to separate the allegations and robbed Ms. Edmonds of any chance to even try to pursue her claims.

[70] *Cf.* Weaver, *supra* note 12, to Chesney, *supra* note 12 (reflecting discussion of significance of rise in SSP cases over the years).

## LEGISLATIVE RECOMMENDATIONS

Having dealt with the privilege for years and tried, without success, every conceivable litigation tactic I can devise to attain judicial modification to or clarification of the SSP, it is crystal clear to me that any real viable reform of the SSP will only emanate from Congress.

Therefore, I strongly recommend that Congress consider the implementation of one or more of the following steps in order to ensure the constitutional balance that typically exists in our judicial system also applies to SSP cases. These recommendations include considering (one or more of which are not necessarily to be considered exclusive from one another):

- Creating a special Article III court or Article I administrative entity (or modification of existing courts or entities) to hear certain designated classified cases utilizing safeguarding procedures such as *in camera* hearings, special facility locations, cleared counsel and court staff, etc.;

- Adoption of statutory language that would impose clear requirements on federal judges to, prior to dismissing an SSP case, attempt discovery and implement safeguard procedures to prevent the disclosure of classified information, utilize independent classification experts either as advocates for the plaintiffs (such as where the individual counsel is not permitted or authorized to review the classified information) or as an educator to the court, require federal agencies to justify application of the SSP to each element of a plaintiff's claim or, under certain circumstances, consider granting judgment to a plaintiff where an agency precludes use of classified information judicially designated as relevant by the court;

- Ensuring proper education and training of federal judges with respect to understanding proper classification/declassification and the protection of classified information;

- Tasking the Congressional Research Service to draft proposed statutory language to address concerns expressed regarding the SSP which would include, but not be limited to, reviewing the history of the Foreign Surveillance Intelligence Act court and the Merit System Protection Board to explore expanding their jurisdiction; or

- Tasking the GAO to conduct a thorough examination of the historical invocation of the state secrets privilege and objectively analyze the appropriateness of at least a select – even random – sample of classified declarations that agencies have provided to federal courts to justify application of the privilege. If such a tasking were issues, no federal agency should be considered exempt from review.

## CONCLUSIONS

To be sure, the changes I propose require additional work and thought. In fact, some of the proposals I have discussed will necessarily need to be considered by other Committees of competent, and for some issues primary, jurisdiction. But I am more than willing to work with this Committee to explore all possible options.

In the interim, the legislation before you is a step forward. It is not far enough, but it is in the right direction.

I would be happy to answer any questions you might have.

EXHIBIT "1"

Mark S. Zaid specializes in litigation and lobbying on matters relating to national security, foreign sovereign and diplomatic immunity, international transactions, international torts and crimes, defamation, the Constitution (First and Fifth Amendments), and the Freedom of Information/Privacy Acts (FOI/PA).

Through his practice Mr. Zaid often represents former/current federal employees, intelligence officers, Whistleblowers and others who have grievances against agencies of the United States government or foreign governments. Additionally, he frequently represents members of the media and the public in First Amendment and FOI/PA disputes. He has handled dozens of security clearance cases throughout the national security and military communities. He currently teaches the DC Bar CLE courses on FOIA and security clearances.

Mr. Zaid is also the Executive Director of the James Madison Project, a Washington, D.C.-based organization with the primary purpose of educating the public on issues relating to intelligence gathering and operations, secrecy policies, national security and government wrongdoing. He is the co-editor of *LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS*. More information can be found at *www.jamesmadisonproject.org*.

In connection with his legal practice on international and national security matters, Mr. Zaid has testified before, or provided testimony to, a variety of governmental bodies including the Senate Judiciary Committee, the Senate Governmental Affairs Committee, the House Judiciary Committee, the House Government Reform Committee, the Department of Energy, the Public Interest Declassification Board and the Assassination Records Review Board, an independent federal entity. Of particular note he testified as an expert witness on security clearances before subcommittees of the U.S. House of Representatives in February and July 2006, and before the Senate Committee on the Judiciary in April 2001, on the use of pre-employment polygraphs by the U.S. Government.

Mr. Zaid is a frequent contributor of opinion pieces and legal articles and has been published by, among others, the *Washington Post, Washington Times*, the *National Law Journal* and *Findlaw.com*. Additionally, he often appears as a commentator in media interviews for such entities as CNN, FoxNews, MSNBC, BBC, *New York Times*, *Washington Post, Los Angeles Times, Reuters, Associated Press* and others.

A 1992 graduate of Albany Law School of Union University, New York, where he served as an Associate Editor of the Albany Law Review, he completed his undergraduate education (*cum laude*) in 1989 at the University of Rochester, New York with honors in Political Science and high honors in History. Mr. Zaid is a member of the Bars of New York State, Connecticut, District of Columbia, and numerous federal courts.

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