Introductory Note to El_Masri v. United States

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Introductory Note to El_Masri v. United States, 46 I.L.M. 626 (2007)
Introduction

In *El-Masri v. United States*, a three-judge panel of the United States Court of Appeals for the Fourth Circuit upheld the dismissal of Khaled El-Masri's civil action against former Director of Central Intelligence George Tenet, ten unnamed CIA employees, and three corporate defendants and ten of their employees. El-Masri, a German citizen of Lebanese descent, alleged that he was an innocent victim of an “extraordinary rendition” carried out by the United States. The district and appeals courts based their decisions on the state secrets doctrine, holding that state secrets were “so central to this matter that any attempt at further litigation would threaten their disclosure.” El-Masri filed a petition for certiorari in the Supreme Court following the panel’s decision, possibly setting the stage for the Court’s first major re-examination of the state secrets doctrine in more than fifty years.

El-Masri’s Allegations

El-Masri alleged that on December 31, 2003, while traveling in Macedonia, he was detained by Macedonian authorities and taken to a hotel room, where he was imprisoned for twenty-three days and interrogated about his involvement with terrorists. He said he was denied contact with the German Embassy, his family, or an attorney, and was told that if he confessed to Al Qaeda membership, he could return to Germany. El-Masri further alleged that on January 23, 2004, he was transferred to CIA custody, and was blindfolded and taken to an airport, where he was beaten, stripped, and sodomized. Seven or eight men dressed him in a diaper and sweatsuit, blindfolded him again, plugged his ears with cotton and covered them with headphones, and placed a bag over his head. He was chained to the floor of an airplane, injected with sedatives, and flown to Kabul.

In Afghanistan, according to El-Masri, he was taken to a prison he contends was a CIA-run facility. He alleged he was repeatedly interrogated about his ties to terrorists, and his repeated requests to meet with German officials were denied. In March, El-Masri says he met with two Americans. One of them conceded to Al-Masri that his detention was a mistake, but said that only Washington could authorize his release.

El-Masri remained in detention until May 28, 2004, when he was flown from Kabul to an unidentified location in Europe. He alleged that he was blindfolded and put on a truck and driven for several hours before he was let out of the truck and told to walk down a path and not turn back. Soon after, he was confronted by armed men, who told him he was in Albania and took him to the airport in Tirana, where he was escorted through customs and flown to Frankfurt.

The District Court Action

After arriving in Frankfurt, El-Masri contacted an attorney, who relayed El-Masri’s allegations to the German Government; German public prosecutors then initiated a formal investigation. El-Masri filed an action in federal district court in Virginia in December 2005 asserting three causes of action: (1) a Bivens action against the CIA defendants for violations of his Fifth Amendment right to due process; (2) an action against all defendants under the Alien Tort Statute (ATS) for violations of international prohibitions against arbitrary detention; and (3) an ATS action against all defendants for violations of international prohibitions against torture and cruel, inhuman, or degrading treatment.

Concurrently with filing a motion to intervene as a defendant in the district court proceedings, the United States moved to dismiss the complaint on the ground that the state secrets privilege precluded litigation of El-Masri’s case. The United States argued that litigation “would require the CIA to admit or deny the existence of clandestine CIA activity,” and “would create an unacceptable degree of risk” of disclosure of information whose revelation “would damage the national security and international relations of the United States.” Because the information was central to the case, protective measures other than dismissal would be inadequate: “‘[T]here are no safeguards that this Court could take that would adequately protect the state secrets in question.’”

El-Masri countered that dismissal was inappropriate at the pleading stage because the central facts of the case—regarding both CIA rendition operations generally, and his own rendition specifically—had been widely discussed...
in the media and publicly acknowledged by government officials. According to El-Masri, his experience was “the most widely known example of a publicly acknowledged program.” Thus, dismissal at this stage would serve only “to protect the nation against disclosure of information that the entire world already knows.” El-Masri urged the court to recall the Supreme Court’s interpretation of the state secrets privilege as a narrow evidentiary rule that “is not to be lightly invoked,” and whose proper use is “as a shield against disclosure of legitimately sensitive evidence,” rather than as a broad immunity doctrine used “as a sword to justify premature dismissal of legitimate claims.”

The district court granted the motion to dismiss. Reasoning that litigation would reveal the methods used to implement the CIA’s clandestine intelligence program, which according to the United States would present a “grave risk of injury to national security,” the court first concluded that the state secrets privilege undoubtedly was validly asserted. The district court then addressed whether the litigation could proceed without disclosure of the state secrets. Guided by the Fourth Circuit’s holding that “when the very subject of the litigation is itself a state secret,” “a district court may properly dismiss the plaintiff’s case,” the court concluded that special procedures would be inadequate in this case, as the “entire aim of the suit is to prove the existence of state secrets.”

The Appeal

Affirming the district court, the Fourth Circuit conducted a three-part test. First, the court ascertained that the government had satisfied the procedural requirements for invoking the privilege, as set out in United States v. Reynolds, the decision which “established the [state secrets] doctrine in its modern form.” Second, it concluded that the information the United States sought to protect constituted state secrets, based on the Reynolds requirement of “a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security should not be divulged.” Third, the court determined that dismissal was appropriate because the privileged information was “so central to the litigation that any attempt to proceed will threaten that information’s disclosure.”

Significance

The Fourth Circuit’s decision has been noted for its exposure of details regarding alleged renditions, for its statement on the decision to subordinate—and indeed sacrifice—an individual’s “personal interest” to “the collective interest in national security,” and for the possible impact on U.S. foreign relations caused by the denial of a U.S. forum in which victims of alleged renditions can seek redress for injuries. Its most lasting significance, however, will be the precedent it sets (or the Supreme Court review it triggers) regarding the exercise of the state secrets privilege itself, and how exercise of the privilege relates to judicial review of executive action. The decision has been presented as an evaluation not only of the scope of the state secrets privilege, but also of the broader issue of separation of powers. Quoting the Supreme Court’s statement in Hamdi v. Rumsfeld that the Constitution “envisions a role for all three branches when individual liberties are at stake,” El-Masri argued on appeal that “[w]hen the Executive unilaterally asserts a need for secrecy in a manner that disables judicial power and threatens individual liberties, courts have a special duty to probe deeply before acceding to Judicial demands.” The court rejected this argument, commenting that El-Masri incorrectly “envisions a judiciary that possesses a roving writ to ferret out and strike down executive excess.” Contrary to El-Masri’s assertion, the panel explained, “Article III assigns the courts a more modest role.” “We would be guilty of excess in our own right,” opined the court, “if we were to disregard settled legal principles in order to reach the merits of an executive action that would not otherwise be before us—especially when the challenged action pertains to military or foreign policy.”

The court’s view of its role is certainly reasonable—it is well settled that the judiciary’s role in reviewing executive action is in many ways limited. Nonetheless, the court’s response to El-Masri’s argument presupposes that its decision on the applicability of the privilege adheres to the principles set forth in Reynolds and its progeny. The Fourth Circuit reminded us that Reynolds “itself suggested that the state secrets doctrine allowed the court to avoid the constitutional conflict that might have arisen had the judiciary demanded that the executive disclose highly sensitive military secrets.” But in every case, the threshold question—under what circumstances the state secrets doctrine is properly asserted, thus rendering avoidance of that constitutional conflict permissible—still must be answered.
In *Reynolds*, the Supreme Court recognized the difficulty of allowing invocation of the state secrets privilege. The Court was keenly aware that while the president's ability to protect state secrets cannot be subject entirely to the approval of the courts, "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." The Fourth Circuit's decision acknowledged that *Reynolds* put the judiciary "firmly in control of deciding whether an executive assertion of the state secrets privilege is valid." But courts throughout the country have differed on what it means to exercise this control. With an increasing focus since September 11 on cases in which the state secrets privilege is asserted, the extent to which the judiciary in fact is exercising this control, as under *Reynolds* it is bound to do, and the principles upon which it should base its exercise of control, are perhaps open questions.

ENDNOTES

1 Sara Mohamed is an Attorney-Adviser in the U.S. Department of State's Office of the Legal Adviser. The views expressed in this Note are her own and do not necessarily reflect those of the United States Government.


3 El-Masri v. United States, 479 F.3d 296, 302 (4th Cir. 2007).

4 A copy of the petition is available at <http://www.aclu.org/safefree/torture/299171g120070530.html>.


6 Opening Brief for Plaintiff-Appellant, supra note 3, at 3; see also El-Masri, 437 F. Supp. 2d at 533.

7 See El-Masri, 437 F. Supp. 2d at 533; Opening Brief for Plaintiff-Appellant, supra note 4, at 4. El-Masri alleged that the CIA determined soon after his arrival in Afghanistan that he was innocent, and that Tenet knew this fact by April 2004. He also alleged that his detention was known to the German government, including an individual who visited him in the detention facility in Kabul, whom El-Masri later identified in a police lineup as a German intelligence officer. El-Masri, 479 F.3d at 300.

8 El-Masri, 437 F. Supp. 2d at 534; Opening Brief for Plaintiff-Appellant, supra note 5.

9 Opening Brief for Plaintiff-Appellant, supra note 6.

10 El-Masri, 437 F. Supp. 2d at 535; see also El-Masri, 479 F. 3d at 301.

11 El-Masri, 437 F. Supp. 2d at 536.


13 Id. at 12 (quoting *Tilden v. Tenet*, 140 F. Supp. 2d 623, 626 (E.D. Va.)).


15 Memorandum of Points and Authorities in Opposition to Motion to Dismiss, supra note 14 at 1.

16 Id.

17 See supra note 14 at 6-7 (quoting United States v. *Reynolds*, 345 U.S. 1, 7 (1953)).

18 See supra note 14 at 11.

19 El-Masri, 437 F. Supp. 2d at 537. The court dismissed El-Masri's contention that the government's public affirmation of the program's existence rendered the state secrets privilege inapplicable, explaining that litigation would inevitably involve "operational details" that are validly claimed as state secrets. The court further asserted that general acknowledgement by public officials that the program exists "provides no details as to the means and methods employed in these renditions, or the persons, companies or governments involved," and the existence of media and other reports discussing renditions had no relation to government discussion of the program's existence or its details, which would be required to litigate the action.


21 El-Masri, 437 F. Supp. 2d at 539.

22 345 U.S. 1 (1953).

23 El-Masri, 479 F.3d at 302.

24 Id. at 304 (quoting *Reynolds*, 345 US at 10).

25 See supra note 23 at 307.

26 The facts that El-Masri alleged have been credited by many sources. German prosecutors concluded that chemical analysis of a sample of El-Masri's hair was consistent with a period of detention in a South Asian country and an extended period of fasting (El-Masri was on a hunger strike for several weeks). See Opening Brief for Plaintiff-Appellant, supra note 4, at 5–6. The Council on Europe released a report in June 2006 on alleged secret detentions that concluded that "[e]verything points in the direction that [El-Masri] was the victim of abduction and ill-treatment amounting to torture." Council of Europe, Parl. Ass., *Alleged Secret Detentions and Unlawful Inter-state Transfers of Detenuees Involving Council of Europe Member States* at 31, Doc. No. 10957 (2006) (available at <http://assembly.coe.int//Main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.htm?link=Documents/WorkingDocs/Doc06/EDOC10957.htm>). The

27 El-Masri, 479 F.3d at 313.


29 As the Fourth Circuit's decision noted, the Supreme Court in United States v. Nixon asserted that "to the extent an executive claim of privilege 'relates to the effective discharge of a President's powers, it is constitutionally based.'" El-Masri, 479 F.3d 296, 303 (quoting 418 U.S. 683, 711 (1974)).

30 Opening Brief for Plaintiff-Appellant, supra note , at 12–13 (quoting 542 U.S. 507, 536 (2004)).

31 El-Masri, 479 F. 3d at 312.

32 Id.

33 See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594–95 (1952) (Frankfurter, J., concurring).

34 345 U.S. at 6, quoted in El-Masri, 479 F.3d at 303.

35 345 U.S. at 9–10.

36 El-Masri, 479 F.3d at 304–05.

37 Compare El-Masri, 479 F.3d 296, with Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006), appeal docketed, No. 06-17137 (9th Cir. Nov. 9, 2006) ("[E]ven the state secrets privilege has its limits. While the court recognizes and respects the executive's constitutional duty to protect the nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it. To defer to a blanket assertion of secrecy here would be to abdicate that duty, particularly because the very subject matter of this litigation has been so publicly aired." (citation omitted)).

38 In the petition for certiorari, El-Masri contends that the current government has asserted the privilege with greater frequency and in cases of greater significance than previous administrations. See Petition for Writ of Certiorari at 12–13 & nn.9–10, El-Masri (not yet docketed).