No. 09-1992

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DAVID AARON TENENBAUM AND MADELINE GAIL TENENBAUM,

Plaintiffs-Appellants,

v.

JOHN ASHCROFT, PAUL WOLFOWITZ, ULDRIC FIORE, JOHN SIMONINI, ALBERT D. SNYDER, MARK P. YOURCHOCK, and ROBERT M. RILEY,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan Southern Division

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION OF JEWISH LAWYERS AND JURISTS ("AAJLJ"), SIMON WIESENTHAL CENTER, AND AGUDATH ISRAEL OF AMERICA IN SUPPORT OF PLAINTIFFS-APPELLANTS

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Circuit Rule 26.1, *Amici Curiae,* The American Association of Jewish Lawyers and Jurists ("AAJLJ"), Simon Wiesenthal Center, and Agudath Israel of America make the following disclosure:

1) said amici are not subsidiaries or affiliates of publicly owned corporations; and, to their knowledge,

2) there is not a publicly owned corporation, nor a party to the appeal that has a financial interest in the outcome of this matter.

October 6, 2009 s/ Nathan Lewin

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INTRODUCTION AND INTEREST OF THE AMICI

This case has become notorious within the American Jewish community and is being closely followed by Americans who are concerned that ignorance and bigotry not be shielded by false allegations of "dual loyalty" or by baseless suspicions of unconventional religious practices. A young Orthodox Jew named David Tenenbaum, who has a bright future before him as an engineer in the United States Army, suddenly finds himself subjected to a bizarre polygraph and to a criminal investigation that threatens his and his family's future. There is no factual basis for this governmental scrutiny other than his religion. After he is cleared, he brings a lawsuit against those who initiated and conducted what, it turns out, was baseless harassment, alleging that their motive was invidious religious discrimination. That lawsuit is dismissed when the defendants claim that they can prove that their motives were legitimate only by disclosing "state secrets."

This Court affirms that judgment. But doubts remain regarding the basis for the conduct that has severely damaged Mr. Tenenbaum's life. A United States Senator requests an internal Defense Department investigation by the Department's Inspector General. The result of that investigation is a detailed factual recitation that substantiates Mr. Tenenbaum's hypothesis that he was singled out for the polygraph and the criminal investigation only because of his Orthodox Jewish faith.

When he returns to court armed with this finding, his tormentors continue to claim that only by disclosing state secrets can they present a "valid defense." The District Court then tells him that the Inspector General's finding is of no moment because the Court's decision – rendered before there was an objective internal review of the facts and a finding upholding his allegation – is *res judicata* and cannot be revised even in light of the subsequent internal investigation and findings.

The case recalls for Jewish sensitivities famous historic examples of prosecutions of Jews that were ultimately shown to be founded on sheer bigotry. The well-known prosecution in France of Alfred Dreyfus – a Jewish officer who was exonerated after many years and much public pressure by fair-minded Frenchmen – comes to mind. The case has, therefore, generated substantial comment in Jewish media sources.[1]

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[1] Doner Berne, *His Religion At Issue: Civilian Engineer And His Wife Sue Army For False Spy Charges,* DETROIT JEWISH NEWS, March 5, 2009; Vickie Elmer, *Pentagon Finds Religious Bias in Army Probe,* WASH. POST, Aug. 24, 2008; Judith Doner Berne, *US Admits Army victimized David Tenenbaum for being a Jew,* DETROIT JEWISH NEWS, Aug. 14, 2008; Binyamin Rose, *The Injustice of David Tenenbaum Falsely Accused of Spying for Israel,* MISHPACHA MAGAZINE, Aug. 6, 2008 at 1; David Ashenfelter, *They Called Him A Spy Because He Is Jewish; Feds Wrongly Targeted Military Engineer, Report Says,* DETROIT FREE PRESS, Aug. 4, 2008 at 1; Debbie Maimon, *Jewish Engineer Exonerated on Espionage Case; 'Religious Bias' Cited*, Yated Ne'eman, Aug. 1, 2008; *Religious Bias Found in Spy Case,* HAMODIA, July 23, 2008; *Religious Bias Found in Case of Orthodox Jew Accused of Spying for Israel,* YESHIVA WORLD NEWS, July 22, 2008; Rabbi Avi Shafran, *David Tenenbaum seeks redress for anti-Israel bias in the Pentagon,* ISRAEL INSIDER, July 3, 2008, *available at* http://web.israelinsider.

The *amici* who are submitting this brief are concerned that spurious allegations of national security may be invoked to mask their religious or racial bias by federal supervisors who practice invidious discrimination. The Supreme Court's decision in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1977), contemplated that federal officials would be personally responsible in damage lawsuits for the consequences of deliberate unconstitutional conduct. If a *Bivens* defendant in an agency that has access to classified data may have a discrimination lawsuit against him dismissed under the State Secrets Doctrine by merely declaring that he can prove a pure motive only by disclosing state secrets, minority employees of such agencies are left defenseless against bigotry. Their *Bivens* lawsuits will invariably result in dismissals because defendants will invoke the cloak of the State Secrets Doctrine. The Department of Justice has very recently determined to revise federal policy on the invocation of the State Secrets

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com/Articles/Diplomacy/12954.htm; Eli Lake, *Discrimination Seen in Michigan Spy Case,* N.Y. SUN, May 21, 2008; Beverly Lumpkin, *Pentagon's IG's Handling of Tenenbaum Raises Troubling Questions; Serious Conflict of Interest Deserve Review,* COMMONDREAMS.ORG NEWS CENTER, May 9, 2008, http://www.commondreams.org/news2008/0509-13.htm; Nathaniel Popper, *Espionage Charges Still Taint Army Engineer's Career*, FORWARD, Dec. 17, 2004, http://www.forward.com/ articles/3995/; Alan Abrams, *Congressional Intervention? Jewish Army Engineer Cleared Of Spying Presses His Religious Discrimination Claim*, DETROIT JEWISH NEWS, Dec. 3, 2004; Alan Abrams, *Reinstated: Falsely Accused Army Engineer Reacquires Security Clearance,* DETROIT JEWISH NEWS, July 11, 2003; Alan Abrams, *Targeted?,* DETROIT JEWISH NEWS, May 18, 2001, at A1.

Doctrine because too many legitimate claims were being aborted. The revised and narrowed policy states "that the privilege should be invoked only to the extent necessary to protect against the risk of significant harm to national security." *Memorandum from the Attorney General on the Policies and Procedures Governing Invocation of the State Secrets Privilege* at 1 (Sept. 23, 2009). This new policy should be applied in this case.

We do not challenge the decision made by the District Court in 2002 and affirmed by this Court in 2004 to dismiss Mr. Tenenbaum's complaint. At that juncture there was no basis other than Mr. Tenenbaum's own assertions for believing that the defendants acted out of unconstitutional illicit motives. But when the Inspector General's report substantiated Mr. Tenenbaum's assertions, the playing-field shifted. The District Court should now put the defendants to the test of proving their claimed lawful motives. The earlier decision, rendered when the defendants' claim that they could show a "valid defense" was not contradicted by any *prima facie* proof, is no longer binding.

The American Association of Jewish Lawyers and Jurists ("AAJLJ") represents the American Jewish legal community in defending Jewish interests and human rights in the United States and abroad. The AAJLJ also promotes the study of, and respect for, principles of Jewish Law as they have been applied throughout the history of the Jewish people. The AAJLJ has sponsored public lectures in

Jewish Law and promoted the publication of scholarly essays in the field of Jewish Law.

The Simon Wiesenthal Center is an international Jewish human rights organization. It is dedicated to generating change through education, and confronting anti-Semitism, hate, and terrorism. The Center promotes human rights and dignity and defends the safety of Jews worldwide. With 400,000 member families it is one of the largest Jewish organizations in the world. Through counsel, the Center has participated in filing *amicus* briefs in this country and in the negotiation of restitution for Holocaust survivors who were forced slave laborers during the Second World War. In Germany, the Center has participated as Counsel for Survivors (Co-Plaintiffs) in the prosecution of accused Nazi war criminals.

Agudath Israel of America, founded in 1922, is a national Orthodox Jewish organization with affiliated chapters and congregations throughout the country. Among its other activities, Agudath Israel serves as an advocate in various governmental arenas for the interests of and concerns of American Orthodox Jewry.

The *amici*, AAJLJ, Simon Wiesenthal Center, and Agudath Israel of America, file this brief with the consent of the parties.

STATEMENT

On October 14, 1998, David Tenenbaum and his wife filed a civil lawsuit under *Bivens* against four Army and Defense Investigative Service employees alleging that, for invidiously discriminatory religious motivations, the federal employees subjected him to an unlawful counterintelligence investigation. The District Court dismissed the complaint on September 30, 2002, on the ground that the defendants' defense would have required disclosure in violation of the state-secrets privilege. *Tenenbaum v. Simonini*, No. 98-CV74473-DT (E.D. Mich. Sept. 30, 2002). This Court affirmed that decision on the basis of findings that "a reasonable danger exists that disclosing the information in court proceedings would harm national security interests, or would impair national defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments" and "defendants cannot defend their conduct with respect to Tenenbaum without revealing the privileged information." *Tenenbaum v. Simonin*, 372 F.3d 776, 777 (6th Cir. 2004), *cert. denied*, 543 U.S. 1000 (2004). Having made these findings, this Court concluded that "the state secrets doctrine thus deprives Defendants of *a valid defense* to the Tenenbaums' claims . . . ." *Id.* at 777 (emphasis added).

On July 13, 2008, the Inspector General of the Department of Defense issued a Report regarding Tenenbaum's case in which the Inspector General concluded that Mr. Tenenbaum's religion and ethnicity was "a factor or indicator

in the decision to continue an inappropriate Personnel Security Investigation" of Tenenbaum, and that "he was subjected to closer and more protracted scrutiny because of his religion and ethnicity." The Inspector General concluded that "[t]his unusual and unwelcome scrutiny because of his faith and ethnic background would undoubtedly fit a definition of discrimination, whether actionable or not." *Review of the Case of Mr. David Tenenbaum Department of the Army Employee* at 27 (July 13, 2008).

Following the issuance of the Inspector General's Report, the plaintiffs again filed an action against the previously named defendants and three additional federal officials. The plaintiffs alleged violations of their constitutional rights under *Bivens* in the investigation of Mr. Tenenbaum and in the invocation of the State Secrets Doctrine in the earlier litigation. The defendants moved to dismiss on the ground that the resolution of the earlier lawsuit brought by the plaintiffs barred the present claim under doctrines of *res judicata* and collateral estoppel. The District Court agreed and granted the defendants' motion to dismiss with prejudice.

SUMMARY OF ARGUMENT

1. This is not a case in which "the subject matter of the lawsuit is itself a state secret." The plaintiffs' claim is that in the course of his employment he was discriminated against on account of his religion and that in defending against plaintiffs' claim the defendants falsely invoked the State Secrets Doctrine. It is possible that this claim may be litigated without jeopardizing any state secrets.

Hence the complaint does not fall into the category of cases in which there is a "rule of non-justiciability."

Rather than dismissing the plaintiffs' complaint at this early juncture, the District Court should have examined any assertion by the defendants that they are precluded from presenting a "valid defense" by the state-secrets privilege. To permit dismissal of a complaint without careful scrutiny by the District Court of the basis for invoking the state-secrets privilege and the effect of recognizing the privileged status of the information on which the defendants rely would be tantamount to permitting dismissal of a valid complaint entirely on the defendant's say-so. Federal supervisors in agencies that have access to state secrets would then have *carte blanche* to treat their employees unlawfully, secure in the knowledge that they could shut the door to any lawsuit by asserting a state-secrets privilege.

When, as is true in this case, a plaintiff alleging unlawful discrimination can specify a factual *prima facie* basis for his allegation – as the plaintiffs are able to do in this case after the issuance of the Inspector General's report – the District Court should treat a claim of state-secrets privilege no differently than any other claim of evidentiary privilege. The District Court should examine the basis for the privilege claim and, if it has merit, treat it like any other evidentiary privilege. Only in the rarest of cases – when the District Court is satisfied from the proof submitted to it *in camera* that there is no factual support for the plaintiff's claim of discrimination because the secret evidence establishes the non-discriminatory

character of the defendant's conduct – may the complaint be dismissed on account of the State Secrets Doctrine.

2. The District Court's reliance on *res judicata* and collateral estoppel was clearly wrong. The plaintiffs did not have a full and fair opportunity to present a *prima facie* case before the Inspector General's report. They could not gain access to the proof on which the Inspector General relied. The plaintiffs should now be given a full and fair opportunity to present the Inspector General's proof and to establish the extent of his injury.

ARGUMENT

I.

THE INSPECTOR GENERAL'S FINDINGS AFFECT THE APPLICABILITY OF THE STATE SECRETS DOCTRINE

Amici acknowledge that the state-secrets privilege is well-established in the law and that where a defendant "will be deprived of a valid defense based on the privileged materials" it is appropriate for a District Court to dismiss a complaint. *In re Sealed Case*, 494 F.3d 139, 149 (D.C. Cir. 2007); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991). That is the relief that this Court approved in 2004 based on the record made before the District Court when Mr. Tenenbaum's complaint was first before the District Court.

The obvious consequence of authorizing District Courts to dismiss complaints when the state-secrets privilege is invoked on behalf of a defendant is

that there will be occasions when legal claims that are facially valid will be barred because the subject of the lawsuit touches upon information that has to be protected in the national interest. This is the necessary result when the lawsuit concerns the United States' employment of a spy, which by its very nature involves state secrets. *See, e.g.*, *Tenet v. Doe*, 544 U.S. 1 (2005); *Totten v. United States*, 92 U.S. 105 (1875). This Court has recognized that there is, in such instances, a governing "rule of non-justiciability" that requires dismissal if "the subject matter of the lawsuit is itself a state secret." *American Civil Liberties Union v. National Security Agency*, 493 F.3d 644, 651 n.2 (6th Cir. 2007); *see also Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008).

But dismissal of the complaint is not required if proof of the plaintiff's claim will not disclose espionage by the United States and if the harm allegedly suffered by the plaintiff will not, if disclosed, necessarily compromise the national interest. Proof that non-confidential conduct by federal employees was tortious because the defendants invidiously discriminated against the plaintiff does not, *ipso facto*, compromise state secrets. Nor should a complaint alleging illegal motive be dismissed simply because the employment is by an agency that has access to classified data and possible state secrets, and the defendants invoke the State Secrets Doctrine. The Government's position prior to the recent change of policy apparently permitted federal employees to invoke the state-secrets privilege liberally to secure dismissal of a complaint against them.

In order to preclude excessive reliance on the State Secrets Doctrine as a basis for dismissing potentially legitimate claims that will not, if tried, endanger national security, the State Secrets Doctrine should be limited. If a plaintiff presents a *prima facie* case of unlawful discrimination, defendants may be required to prove that their motives were not illicit with evidence that does not disclose information that qualifies as a state secret. The usual evidentiary rules governing permissible and impermissible inferences from the invocation of a privilege would govern what this Court has called "the rule of state secrets evidentiary privilege." *American Civil Liberties Union*, 493 F.3d at 651 n.2; *see also Kasza v. Browner*, 133 F.3d 1159, 1165-67 (9th Cir. 1998).

These *amici* support the Plaintiffs-Appellants' position in this appeal because we believe that supervisors in government agencies that deal with classified information and state secrets should not be granted *carte blanche* to engage in prohibited employment discrimination or to violate the constitutional rights of their subordinates. The ruling of the District Court effectively grants immunity from civil liability to even the most extreme and pernicious bigoted behavior by a supervisor if he asserts that he cannot disclose his real motive without compromising some classified data.

To be sure, if a federal employee claims that he or she has been the victim of illegal discrimination in an agency that has access to state secrets, the national interest may justify dismissing his or her case if the plaintiff has no specific factual

basis to constitute a *prima facie* case of discrimination and the defendant says that he cannot prove that he was not engaged in illegal discrimination without compromising state secrets. Rather than jeopardizing state secrets by compelling the plaintiff's supervisors to explain their conduct with evidence in a publicly accessible proceeding, the national interest in protecting state secrets may foreclose a possibly valid claim. But if a plaintiff can present a *prima facie* case of discrimination based upon religion, race, gender, or national origin even prior to discovery, the District Court should not dismiss the plaintiff's complaint without seeking, by every possible procedural means, to permit the discrimination claim to proceed while preserving the confidentiality of any state secrets.

The existence of such a *prima facie* case of discrimination marks the difference between the record before the District Court in 2002 and the record now before that Court, which is here on appeal. In 2002, the District Court said with confidence, from the evidence presented to it *in camera*, that if the case had proceeded, the "Defendants would have to reveal their actual reasons and motivations for taking the actions that they did" and "the state secrets doctrine prevents Defendants from presenting *a valid defense*." *Tenenbaum v. Simonini*, No. 98-CV74473-DT, slip op. at 9 (E.D. Mich. Sept. 30, 2002) (emphasis added). There was, at that juncture, little basis on which to credit Mr. Tenenbaum's allegations of illegal motive. He was not, therefore, allowed to explore the motives of the defendants in discovery because public disclosure could harm the national

interest. The posture of the case was comparable to *Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984), where the Court of Appeals said that its *in camera* review of state-secret evidence established, to the Court's satisfaction, "that the reason Daniel Molerio was not hired had nothing to do with [his father's] assertion of First Amendment rights." The secret evidence supported the defendant's "valid defense" in *Molerio* as it apparently did in this case in 2002 and 2004.

The record now before the District Court – after the finding by the Inspector General that Mr. Tenenbaum's "religion and ethnicity" contributed to the defendants' conduct in a manner that "undoubtedly fit[s] a definition of discrimination" – is significantly different. The factual basis for the earlier ruling – that the state-secrets privilege forecloses presentation by the defendants of a "valid defense" – has been substantially diminished by the more recent Inspector General determination. There is now much less likelihood that a "valid defense" could be presented in this case if all the evidence – including state secrets – were laid on the table. Hence this lawsuit is very different from the Tenenbaums' first action which was dismissed because of the state-secrets doctrine.

In light of the findings of the Inspector General – which are sufficient to establish a *prima facie* basis for accepting the plaintiffs' assertion that Mr. Tenenbaum was the victim of invidious racial discrimination – the District Court should require the defendants to assert the state-secrets privilege at appropriate points during the litigation. In *Mohamed v. Jeppesen Dataplan, Inc.*, No. 08-

15693, 2009 WL 2710198 (9th Cir. Aug. 31, 2009), the Court of Appeals for the Ninth Circuit set out the correct procedure, requiring the Government to "assert the privilege with respect to secret evidence (not classified information)" and then directing the District Court to "determine what evidence is privileged and whether any such evidence is indispensable either to plaintiff's prima facie case or to a valid defense." In this case, the Government's assertion of any such privilege should follow the newly announced Department of Justice policy.

II.

RES JUDICATA AND COLLATERAL ESTOPPEL DO NOT JUSTIFY DISMISSAL OF THE COMPLAINT

The District Court recognized that its 2002 decision would not justify dismissal of Mr. Tenenbaum's second complaint on grounds of *res judicata* or collateral estoppel if he was not given "a full and fair opportunity to litigate the claim or issue" in the earlier proceeding. *Haring v. Prosise*, 462 U.S. 306, 313 (1983); *see Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481 (1982); *Montana v. United States*, 440 U.S. 147, 159, 164 n.11 (1979); *Fellowship of Christ Church v. Thorburn*, 758 F.2d 1140, 1143 (6th Cir. 1985). Nonetheless, the District Court dismissed the complaint on grounds of *res judicata* and collateral estoppel because it concluded that the issue resolved in 2002 was not the merits of the prior lawsuit but "the applicability of the state secrets doctrine." *Opinion and Order Granting Motion to Dismiss*, No. 09-10612 at 11 (E.D. Mich. July, 23 2009). The District

Judge held that the plaintiffs had received a full and fair opportunity to litigate the applicability of the State Secrets Doctrine in 2002, and that its decision that the State Secrets Doctrine requires dismissal of the complaint was determined by "two courts reviewing and determining the issue." *Id.* at 19.

In fact, the 2002 determination that the complaint should be dismissed because of the State Secrets Doctrine was *not* the result of full and fair litigation because neither Mr. Tenenbaum nor either of the two courts "reviewing and determining the issue" had the benefit of the Defense Department's Inspector General Report. For reasons previously elaborated in this Brief, that Report affects the question whether dismissal of the complaint is the proper judicial response to the defendants' assertion of the state-secrets privilege. Had the Inspector General's findings been available in 2002, the District Court and this Court would not so readily have arrived at the conclusion that the defendants have a "valid defense" that they cannot prove without disclosing state secrets.

The District Court should have considered anew, in light of the findings of the Inspector General, whether the State Secrets Doctrine justifies the drastic remedy of dismissal of the complaint rather than mere recognition of the evidentiary privilege. The District Court mistakenly believed that the Inspector General's findings could be relevant to the present case only if the Court were to accept the conclusion that the defendants' conduct was "necessarily" discriminatory. *See id.* at 13-14. In fact, the Inspector General's conclusions did

not have to be adopted by the District Judge, nor did he have to accept the proposition that the defendants were "necessarily" guilty of illegal discrimination to decide that rather than dismissing the complaint, he would review individually each instance when the state-secrets privilege is invoked to determine its impact on the litigation. This is the course directed by the Ninth Circuit in its recent ruling in *Mohamed*.

CONCLUSION

The District Court failed to evaluate the impact of the State Secrets Doctrine on the remedy that the Court should issue when and if the state-secrets privilege is invoked by any of the defendants. This Court should vacate the Order dismissing the complaint and remand the case to the District Court for an individualized determination regarding each occasion when a defendant invokes the state-secrets privilege.

Dated: October 6, 2009

Respectfully submitted,

s/ Nathan Lewin

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, I hereby certify that, by the word count of the word-processing system used to prepare this Brief, it contains 3,496 words exclusive of those portions that are excluded under Rule 32(a)(7)(B)(iii).

s/ Nathan Lewin
Nathan Lewin

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2009, I electronically filed the *Amicus Curiae Brief of the American Association of Jewish Lawyers and Jurists ("AAJLJ"), Simon Wiesenthal Center, and Agudath Israel of America in Support of Plaintiffs-Appellants* with the Clerk of the Court using the ECF system that will send notification of such filing to the following:

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