Memorandum November 25, 2005

TO: Senate Committee on Homeland Security and Governmental Affairs

FROM: Louis Fisher
Senior Specialist in Separation of Powers
Government and Finance Division

SUBJECT: Congressional Reference Case on Richard Barlow

This memorandum responds to questions regarding the Richard Barlow case, decided by the U.S. Court of Federal Claims in 2002. In the late 1980s, Barlow faced termination from the Defense Department and loss of security clearances following disputes about whether Pakistan was developing a nuclear capability. The basic issue in this memorandum is the extent to which the Court was able to examine and analyze the factual matters that the Senate referred to it under congressional reference procedures. For reasons set forth below, the decision by the Court to accept the government's invocation of the state secrets privilege prevented it from obtaining the facts.

A Factual, Adversarial Inquiry

The Barlow issue was transferred to the U.S. Court of Federal Claims under what is called a congressional reference case. Marion T. Bennett, who served three terms in Congress and as a commissioner of the U.S. Court of Claims where he handled congressional reference cases, wrote that a private petitioner in this type of case can expect to be accorded "an adversarial trial on the merits."[1] To uncover facts and assure an adversarial proceeding, the Court extends to each side — the private party and the government — opportunities for submitting evidence and obtaining documents. The Court does not favor either side. Its purpose is "to afford an impartial and independent forum for determination of the merits of a complex claim by judicial methods."[2]

[1] Col. Marion T. Bennett, "Private Claims Act and Congressional References," 9 U.S. Air Force JAG L. Rev. 9, 10 (1967).

[2] Id. at 16. Bennett's article was reprinted by the House Committee on the Judiciary in "Private Claims Acts and Congressional References," House Committee Print, 90th Cong., 2d Sess (Feb. 9, 1968),

A congressional reference case has been described as a "judicial-type adversary proceeding in order to determine whether the claim is meritorious."[3] The "ultimate function" of the Court in a congressional reference case "is to determine the facts so that Congress may assume them as the basis for its legislative judgement and discretion."[4] In congressional reference cases the Court functions as "an impartial and independent tribunal whose processes are careful and evenhanded."[5]

Statutory Directions

Section 1492 of 28 U.S.C. provides that any bill, except a bill for a pension, may be referred by either house to the chief judge of the U.S. Court of Federal Claims for a report "in conformity with section 2509 of this title." Section 2509 calls upon the chief judge to designate a judge as hearing officer for a referred case. The hearing officer is authorized "to do and perform any acts which may be necessary or proper for the efficient performance" of the court's duties, including the "power of subpoena and the power to administer oaths and affirmations."

As noted in subsection (c), the purpose of the hearing officer is "to determine the facts." Having performed that task, the hearing officer is to append "to his findings of fact conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity, and the amount, if any, legally or equitabl[y] due from the United States to the claimant." Although the U.S. Court of Federal Claims "does not enter a final judgment, the litigation of a congressional reference case is fully adversarial." United States Court of Federal Claims Bar Association, "The United States Court of Federal Claims: A Deskbook for Practitioners" (1998 ed.), at 57.

Subsection (f) of Section 2509 authorizes the Court to impose sanctions on any party that prevents the Court from accomplishing its assigned task: "Any act or failure to act or other conduct by a party, a witness, or an attorney which would call for the imposition of sanctions under the rules of practice of the Court of Federal Claims shall be noted by the panel or the hearing officer at the time of occurrence thereof and upon failure of the delinquent or offending party, witness, or attorney to make prompt compliance with the order of the panel or the hearing officer a full statement of the circumstances shall be

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[3] Marvin Jones and Fred Davis, "Recovery of Compensation From the Federal Government Where No Legal Action May Be Maintained: Profile of a Congressional Reference Case," 28 J. Mo. Bar 69, 71 (1972).

[4] Stanley J. Purzycki, "The Congressional Reference Case in the United States Court of Claims," 10 Cath. U. L. Rev. 35, 42 (1961).

[5] Jeffrey M. Glosser, "Congressional Reference Cases in the United States Court of Claims: A Historical and Current Perspective," 25 Am. U. L. Rev. 595, 605 (1976).

incorporated in the report of the panel." Congress not only directs the Court to obtain the facts but empowers it to do so when resisted by any party, including the government.

Statutory Purpose

In 1855, Congress established a Court of Claims to investigate claims against the United States. 10 Stat. 612 (1855). The Court performed an advisory role in assisting Congress in discharging its legislative duties over private claims. Legislation in 1863 authorized the Court to render final judgments. 12 Stat. 766 (1863). The model for congressional reference cases did not appear until 1883 when Congress placed upon the Court of Claims a specific fact-finding duty. The statute provided that whenever "a claim or matter is pending before any committee of the Senate or House of Representatives, or before either House of Congress, which involves the investigation and determination of facts, the committee or house may cause the same, with the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the court of Claims of the United States, and the same shall there be proceeded in under such rules as the court may adopt. When the facts shall have been found, the court shall not enter judgment thereon, but shall report the same to the committee or to the house by which the case was transmitted for its consideration." 22 Stat. 485, § 1 (1883).

In passing the 1883 law, Congress concluded that the adversary nature of court proceedings would better establish the facts than the purely ex parte process followed by the Committee of Claims in each house, where there was "no cross-examination or opportunity for it, no depositions, no way of testing the truth or falsity of statements of the case." H. Rept. No. 69, 47th Cong., 1st Sess. 2 (1882). The "great difficulty" of the existing congressional system "has been to ascertain the true facts." Id. at 4.

It has been said that the congressional reference procedure makes the Claims Court "an arm of the Congress for the handling of those cases and there is no appeal from them except to Congress itself." Bennett, supra note 1, at 15. The Court is an arm of Congress only in the sense that it provides assistance when requested by a house. In acting on the request, the Court does not favor the private plaintiff. However, there is risk that the Court, in permitting the government to invoke the state secrets privilege and deny a plaintiff access to documents it seeks, may appear to be an arm of the Executive.

The Barlow Bill

On October 5, 1998, the Senate passed S. Res. 256, which referenced S. 2274, a bill for the relief of Richard Barlow. The purpose of S. Res 256 was to refer the matter to the Court of Federal Claims, directing the chief judge to proceed in accordance with "the provisions of sections 1492 and 2509 of title 28, United States Code," and to report back to the Senate, at the earliest practicable date, "such findings of fact and conclusions that are sufficient to inform the Congress of the nature, extent, and character of the claim for compensation referred to in such bill as a legal or equitable claim against the United States or a gratuity." 144 Cong. Rec. 23357 (1998).

The language of S. 2274 asked for compensation for losses incurred by Barlow "relating to and a direct consequence of (1) personnel actions taken by the Department of Defense affecting Mr. Barlow's employment at the Department (including Mr. Barlow's top secret security clearance) during the period of August 4, 1989, through February 27, 1992; and (2) Mr. Barlow's separation from service with the Department of Defense on February 27, 1992." The Senate directed the court to determine the facts surrounding those two issues for the purpose of permitting Congress to act in an informed manner on S. 2274.

State Secrets Privilege

State secrets are generally defined as "matters the revelation of which reasonably could be seen as a threat to the military or diplomatic interests of the nation." Halkin v. Helms, 690 F.2d 977, 990 (D.C. Cir. 1982). On February 10, 2000, regarding the Barlow case, CIA Director George Tenet signed a declaration and formal claim of state secrets privilege and statutory privilege. The Declaration did not apply the privilege to a particular document, considered too sensitive to be disclosed. Instead, it broadly precluded "the disclosure of classified intelligence information to Plaintiff and his counsel for use in this litigation" (Declaration at 7). Tenet's determination was based on his conclusion that providing Barlow and his counsel access to the requested information "would expose fragile intelligence sources and methods to serious risk of compromise without furthering the intelligence mission for which the sources and methods were utilized" (id. at 7-8).

In a separate Declaration issued in February 2000, Lt. Gen. Michael V. Hayden, Director of the National Security Agency, formally invoked the state secrets privilege to assert NSA's "statutory privilege over NSA Intelligence reports and information derived from intelligence reports contained in minutes of the Nuclear Export Violations Working Group ('NEVWG') meetings." Barlow had sought those documents through discovery requests.

The Tenet Declaration did not, by itself, block access to the requested materials. As he noted, the branch that decides how to conduct a trial and what evidence to admit is the judiciary, not the executive branch: "I recognize it is the Court's decision rather than mine to determine whether requested material is relevant to matters being addressed in litigation" (Declaration at 7). No such statement appears in the Hayden Declaration, but courts have discretion in determining whether to treat an executive claim of state secrets privilege as absolute or as qualified. If the latter, a court may limit the scope of the privilege or deny it in full.

The task before the U.S. Court of Federal Claims was to fulfill the Senate's need for facts regarding the two issues in S. 2274. In line with judicial precedents, the Court had several options. It could have insisted that the government provide a fuller public account of why disclosure of the information would harm national security. Ellsberg v. Mitchell, 709 F.2d 51, 60-64 (D.C. Cir. 1983). It could have conducted "an *in camera* examination of the requested materials." Id. at 64. It could have redacted some sensitive documents to permit access by the plaintiff. In view of the Senate resolution, the role of the Court was to pursue the facts and devise whatever procedures were necessary to that end. The Tenet Declaration expressly invited that course.

Deciding the State Secrets Issue

In a decision filed July 18, 2000 and reissued August 3, 2000, the U.S. Court of Federal Claims ruled on the state secrets privilege invoked by the government. The Court examined both the unclassified and classified declarations presented by Tenet and Hayden. Barlow v. United States, No. 98-887X, 2000 WL 1141087, at 3, n8. Initially the Court decided that the state secrets privilege was not absolute but qualified. Later, however, the Court ruled that it was absolute.

The Court cited a D.C. Circuit case in 1982 for the proposition that state secrets "are *absolutely privileged* from disclosure in the courts." Barlow v. United States, No. 98-887X, 2000 WL 1141087, at 5 (quoting Halkin v. Helms, 690 F.2d at 990 (emphasis in original)). Yet the Court's discussion initially treated the privilege as qualified. While affording the "utmost deference" to the invocation of the state secrets privilege, "the mere formal declaration of the privilege does not end the court's inquiry." 2000 WL 1141087, at 4. "[A] court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important role." Id. (quoting In re United States, 872 F.2d 472, 475 (D.C. Cir. 1989)). The Court relied on this language from the Supreme Court's decision in *United States* v. *Reynolds*: "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." Id. (quoting from 345 U.S. at 9-10).

Moreover, the U.S. Court of Claims said that a court "must be satisfied from all of the evidence before it, particularly the declarations of the department heads, that 'there is a reasonable danger that disclosure of the information in question would pose a threat to national security.'" Id. (quoting Clift v. United States, 808 F.Supp. 101, 106-07 (D. Conn. 1991)). "If the court is so satisfied, then the inquiry ends." Id. "At that point, *in camera* review of the actual materials the government seeks to have protected by the privilege is normally inappropriate." Id.

"Normally inappropriate" implies that under some circumstances a court could review the materials in camera, thus rejecting the state secrets privilege as "absolutely privileged." The Court pointed out that Barlow asserted that the documents the government wanted to withhold "will help him prove that he had a reasonable belief, as required by the WPA [Whistleblower Protection Act], that Congress had been misled with regard to Pakistan's nuclear arms program. The court will assume that the documents are relevant, and that, if not privileged, the government would be required to turn them over to plaintiff." Id.

At that stage of the decision the Court returns to *Reynolds* for language that "even the most compelling need [by a plaintiff] cannot overcome the claim of privilege." Id. (quoting from 345 U.S. at 11)). The Court now ruled that the government's claim was absolutely privileged. "The privilege is absolute, the law having evolved to reflect a choice of secrecy over any balancing of risks and harms." Id. at 8-9. The Court concluded that the documents sought by Barlow, "to the extent not already produced or located, are privileged *in toto*." Id. at 9.

Having decided that the disputed documents could not even be reviewed in camera and that the privilege was absolute, the Court had some choices. It could have suspended the trial and informed the Senate that the Court was unable to accomplish its assigned task — to find the facts — because it decided to defer to the executive branch. So informed, the Senate (and the Congress) would have been in a position to review Sections 1492 and 2509 of Title

28 to determine whether the language needed to be changed to take into account claims of the state secrets privilege. Congress could have considered, for example, this type of amendment: "In the event the executive branch invokes a privilege to withhold certain documents, the court is authorized to examine those documents in camera to permit it to reach an independent decision on the disclosure of the documents. The court may redact a document to facilitate the plaintiff's access to disputed materials."

Instead, what the Court did was to continue the trial and allow the government to introduce the documents and testimony it found beneficial to strengthen its case, while at the same time denying Barlow access to documents and testimony he requested to support his position. That procedure limited the facts available to the Court.

Plaintiff's Reaction to Privilege

Several passages in the Court's opinion, upholding the government's invocation of the state secrets privilege, suggests that Barlow and his attorney accepted the privilege: "plaintiff's counsel candidly conceded at oral argument that plaintiff had no real basis for questioning the validity of the affidavits' assertions." 2000 WL 1141087, at 7-8. Note 11 explains: "In any event, plaintiff has conceded that the method of invocation of the privilege was proper. See Plaintiff's Opposition to Defendant's Motion for a Protective Order at 9 n. 9 ('Plaintiff does not challenge whether the government's invocation of the [state secrets] privilege was proper.')." Id. at 6. Yet the Court also notes: "Plaintiff opposes the government's invocation of the state secrets privilege, claiming that the documents can be disclosed, in one manner or another, without posing a 'reasonable danger' to national security." Id. at 6-7.

These conflicting statements by the Court can be read most naturally to conclude that Barlow and his attorney opposed the *scope* of the privilege while recognizing that the government followed the appropriate *procedures*. That is, Barlow "conceded that the *method* of invocation of the privilege was proper." More troublesome is the statement that Barlow's counsel "candidly conceded at oral argument that plaintiff had no real basis for questioning the validity of the affidavits' assertions." For Barlow and his attorney to accept the Tenet and Graham declarations as valid would deprive them of the documents they had requested to prove their case.

Court documents show that Barlow and his attorneys opposed the scope of the state secrets privilege advocated by the government. On May 4, 2000, Barlow's attorneys, Paul C. Warnke and Diane S. Pickersgill, filed an opposition to the government's motion for a protective order. They said that the "sole question here is whether the state secrets privilege and/or statutory 'national security' privileges should apply in this Congressional Reference proceeding to prevent access by the plaintiff and the Court to key evidence. The answer to that question is a resounding 'no.'" Plaintiff's Opposition to Defendant's Motion for a Protective Order, Barlow v. United States, Congressional Reference No. 98-887 X, at 1. The documents the government sought to withhold from discovery "are not protected under the state secrets privilege in the context of this Court proceeding, because the production of the documents requested would not harm national security. Moreover, because of Mr. Barlow's need for these documents, before this Court rules, it must review them *in camera*." Id. at 9.

The opposition by Warnke and Pickersgill also pointed out that the Senate ordered the U.S. Court of Federal Claims "to make a determination **of the merits** of Mr. Barlow's claim, for the **legislative purpose** of informing Congress as to the nature, extent, and character of Mr. Barlow's claim for compensation as a legal or equitable claim or a gratuity, so that Congress can decide upon an appropriate monetary figure to compensate Mr. Barlow for his injuries. The information Mr. Barlow seeks in discovery is necessary for this Court to make a fully-informed decision and thus a fully-informed recommendation to Congress." Id. at 14 (emphasis in original) (footnote omitted).

In an opposition filed on May 9, 2002, Barlow's attorney, Joseph A. Ostoyich, pointed out that during the discovery phase the government "blocked Mr. Barlow's access to thousands of pages of documents containing the facts he alleges were concealed from Congress by invoking the state secrets privilege over every word in those documents." Plaintiff's Opposition to the Government's Motion *in Limine*, Barlow v. United States, Congressional Reference No. 98-887 X, at 1-2. The government had moved "to exclude the testimony of eight of Mr. Barlow's witnesses and to prevent this Court from hearing another ten of the witnesses live. . . . Such an artificially truncated trial would prevent Mr. Barlow from having his day in court. It would also frustrate the purpose of Mr. Barlow's Congressional Reference and impede the Court's ability to provide full fact findings, including credibility determination, sufficient for the Congress to determine the nature of Mr. Barlow's claim." Id. at 3.

On May 31, 2002, two days before the trial, Ostoyich objected that "the Government seeks to prevent the Court carrying out its mission, to prevent the Congress from finding out whether it was misled, and to thwart Mr. Barlow's case by asserting the state secrets privilege over virtually all classified information relevant to the Pakistani nuclear program –– even the most generalized conclusions about the facts known to the Executive Branch — regardless of the fact that much of it is already public and none of it threatens to jeopardize a source or method of U.S. intelligence gathering." Plaintiff's Opposition to the Government's Motion for Clarification Regarding the State Secrets Protective Order, Barlow v. United States, Congressional Reference No. 98-887 X, at 1. "No case has ever granted the Executive Branch such a broad — and irrational — invocation of the state secrets privilege and this Court should decline to do so." Id. at 2. Again: "Plaintiff believes that the sweeping privilege the Government claims to invoke goes far beyond what the caselaw permits and, if accepted by the Court, would make the trial an impossible exercise in wordsmithing that ultimately prevents even broad truths from coming to light." Id.

What Barlow recognized was a narrow, not an unlimited, state secrets privilege. As explained in the Plaintiff's Opposition (cited in the paragraph above), he "understood the Court's state secrets ruling to relate to specific documents which (presumably) detailed the date when the U.S. government acquired knowledge of specific facts regarding Pakistan's nuclear program and the sources and methods employed to obtain those facts." He understood that those documents "were privileged because, according to CIA Director Tenet's affidavit, the information implicating sources and methods could not be extricated from the benign parts of those documents." Barlow understood that testimony "on specific facts or sources of methods contained in these documents was similarly off-limits." He did not believe, however, "that the state secrets privilege is unlimited and can, as the Government argues here, be applied to block certain CIA officials from testifying to generic conclusions . . . ." Id. at 12-13 (footnote omitted).

Which Branch Decides the Privilege?

On January 14, 2002, the U.S. Court of Federal Claims noted that it had "previously ruled that the defendant successfully invoked the state secrets privilege. We found no compelling rationale for exempting Congressional Reference proceedings." Barlow v. U.S., 51 Fed.Cl. 380, 384 n. 6 (2002). Note 6 implies that the state secrets privilege has been considered absolute by other courts and there is no "compelling rationale" for exempting congressional reference proceedings.

A number of federal courts have treated the state secrets privilege as qualified, not absolute. To the extent that the executive branch is determined to make it absolute and refuses to share documents even with a judge, in chambers, the cost to the government can be losing the case. In this view, to accept the state secrets privilege as absolute would risk turning a trial over to the executive branch and eliminating the possibility of fair and informed proceedings. The question of deciding access to evidence in a trial is traditionally for the judiciary, not the executive branch.

"Responsibility for deciding the question of privilege properly lies in an impartial independent judiciary — not in the party claiming the privilege and not in a party litigant." NLRB v. Capitol Fish Co., 294 F.2 868, 875 (5th Cir. 1961). A trial court may conduct in camera review to independently assess the government's claim of privilege, including state secrets. "Any other rule would permit the Government to classify documents just to avoid their production even though there is need for their production and no true need for secrecy." American Civil Liberties U. v. Brown, 619 F.2d 1170, 1173 (7th Cir. 1980).

Two cases decided by the U.S. Court of International Trade, in 1982 and 1983, illustrate how a court can examine a state secrets claim by the government and find it empty of privileged content. In the first case, the government insisted that two documents needed to be kept confidential. After examining the materials in camera, the court said they "showed nothing in the nature of a state secret, nothing suggestive of delicate matters of foreign policy and nothing else of a dimension entitled to a privilege against disclosure under the existing case law." Republic Steel Corp. v. United States, 538 F.Supp. 422, 423 (1982). The following year the court again rejected the government's contention that documents could be withheld because they contained state secrets. In dismissing the government's claim that the state secrets privilege is absolute, the court ruled: "It is for this Court to determine whether the state secrets privilege applies." United States Steel Corp. v. United States, 578 F.Supp. 409, 411 (1983). For the government's claim to prevail "would be a distortion of the state secrets privilege and an unjustified interference with the right of judicial review." Id. at 413.

It is broadly recognized that the government is entitled to protect such state secrets as sources and methods, but acceptance of an absolute state secrets privilege would undercut the judiciary's duty to assure fairness in the courtroom and decide what evidence may be introduced. The person conducting the trial is the judge, not the executive official. In the Barlow case, the court's deference to the state secrets privilege denied Barlow the documents he requested to prove his case. It may also have denied the Senate the facts it asked for. The D.C. Circuit in 1971 said that an "essential ingredient of our rule of law is the authority of the courts to determine whether an executive official or agency has complied with the Constitution and with the mandates of Congress which define and limit the authority of the

executive. Any claim to executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative will." Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 793 (D.C. Cir. 1971). To give an executive official or agency absolute authority to determine what documents may be given to private parties and the courts would empower executive departments "to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law." Id. at 794.

Conclusions

By deferring absolutely to the state secrets privilege, the U.S. Court of Federal Claims denied Barlow the facts he requested. As the Court acknowledged, it "early on permitted the assertion by the Directors of the Central Intelligence Agency and the National Security Agency of the 'state secrets privilege.' See Order of July 18, 2000. A limited amount of information and testimony was thus removed beyond even the court's access." Barlow v. U.S., 53 Fed.Cl. 667, 669 (2002). The Court had an opportunity to gain access to that material but chose not to. How much of that "limited amount" of information and testimony was crucial to Barlow's case cannot be known. Considering the conduct of the trial and the Court's decision to "permit" the assertion of the state secrets privilege and to treat it as absolute, the Court was unable to obtain available facts.

I trust this information will be helpful to you. If I can provide any further assistance, please contact me at 7-8676.