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Proceeding Where State Secrets Privilege Was Invoked**

Before the

U.S. Senate Committee on the Judiciary

**“Examining the State Secrets Privilege: Protecting National Security
While Preserving Accountability”**

February 13, 2008

Chairman Leahy, Ranking Member Specter, and Members of the Committee,

I am offering the Committee my views on the State Secrets Protection Act. I applaud your Committee's decision to begin to address this issue after over 50 years. I view this as part of a much larger question of justice, checks, balances and accountability that is essential to the functioning of our democracy. I offer my particular insights from the standpoint of one of those very rare plaintiffs who, unfortunately, has practical experience in a fairly recent court proceeding where the State Secrets Privilege (SSP) was invoked over all the classified evidence, yet nevertheless went all the way to trial over a four year-long proceeding. *Barlow v. the U.S.* was a Congressional Reference by the Senate; your committee in particular initiated this. In a Reference, the Court of Federal Claims, by law, is supposed to serve as a fact finding advisory body for the Senate, the ultimate deciding and appellate body. So this was actually the Senate's inquiry. The case raises issues not dissimilar to those Senator Specter raised with Attorney General Gonzalez last year when he asked: *"Do you think that Constitutional government can survive if the President has unilateral authority to reject Congressional inquiries on the grounds of Executive Privilege and the President then acts to bar the Congress from getting a judicial determination as to whether that privilege was properly invoked?"*

The Reference case centered about my concerns that Congress, in the late 1980's, had been willfully misled by the Executive Branch about Pakistan's nuclear weapons program and related activities in violation of certain Congressional laws. In 1989, I was retaliated against by my employer, the Office of the Secretary of Defense, under Dick Cheney, because I objected to people lying to Congress. The chain of events began in 1987, with my truthful, fully approved classified testimony before Congress following my efforts as a CIA officer that resulted in the arrests of some of Dr. A.Q. Khan's agents here in the U.S., during what people are calling "Charlie Wilson's War" these days.

I am a former CIA intelligence officer. I have spent my entire adult life, some twenty seven years, working on sensitive WMD intelligence and counter proliferation matters, in both operational and analytical capacities, for CIA, FBI, the Office of the Secretary of Defense, the Department of Energy and others. I have a history with this Committee going back to 1998. My representatives, including my former attorney, Joseph Ostoyich, former Ambassador Robert Gallucci, and Danielle Brian, Director of the Project on Government Oversight and others expert in the relevant areas, recently met with Senator Leahy and Senator Specter after a few Senators on this committee placed anonymous holds on an amendment to the DOD Authorization bill intended to provide relief for me in the form of my pension, after 19 years of extensive Congressional involvement in my case. I spent considerable time reviewing some of the issues in the court case with the Minority Counsel. The SSP aspects of the court case were of particular interest to the Senators in these meetings.

As Senator Specter recently suggested, I believe you should avail yourselves of an excellent, if not unprecedented opportunity to examine an actual full SSP court proceeding in detail, including reviewing the full un-redacted court record and all the classified documents/evidence that I requested in discovery that were denied to me, the court and the Senate via the invocation of SSP. I think this is entirely appropriate since this was the Senate's case. Your Committee will then be able to draw from that practical knowledge in crafting truly effective and meaningful legislation to regulate the rules of procedure and evidence for the federal courts in cases where the government seeks to invoke SSP, while also protecting national security but assuring Executive Branch (EB) accountability.

Recognizing that the new bill (S.2533, the State Secrets Protection Act) is still in its infancy, such a review will, I respectfully submit, reveal that the bill, while well intended and containing some potentially useful provisions, exhibits an understandable lack of insight into the practical applications and effects of SSP in cases that might proceed through discovery and depositions to trial under circumstances similar to those proposed in the bill. If intended to provide plaintiffs with their fair "day in court," the bill must address the scope of assertions of SSP that indeed arise throughout an entire proceeding, and not only in the initial invocation of SSP. For example, in our proceeding, SSP was asserted not only over actual classified documents or information, but over virtually anything the Government unilaterally decided was "protected" in depositions, filings and trial testimony, to include unclassified documents and statements. As I will explain in some greater detail, the defendant, not the court, effectively controls the proceeding in truly extraordinary and inequitable ways.

The bill also fails to effectively remedy one of the most basic issues in recent SSP cases: The issue in these cases, as in the initial invocation of SSP in Barlow, is not that the evidence in question was improperly classified, as was eventually discovered in the Reynolds case. These cases, such as those involving the Terrorist Surveillance Program, and others, actually appear to involve evidence which is indeed properly classified under Executive Order, such as NSA and CIA operations and intelligence, the unauthorized public disclosure of which, would indeed compromise sources and methods. As in Barlow, this type of classified information may nevertheless also provide clear evidence of illegal activity by the Executive agency invoking the SSP, which may be central to the claim of the plaintiff. Reynolds, in this sense and other respects, is not representative of cases cited in the floor statements and many other recent SSP cases. The bill must somehow address the fact that documents containing properly classified secrets in these proceedings may also provide relevant evidence of illegal activity by the Executive Branch. As far as I can see, it does not.

I offer the following more detailed views on the bill:

1. Addressing Properly Classified Evidence Revealing Criminal or Illegal Activity in SSP Proceedings: Of great concern to me is the idea expressed in Senator Kennedy's floor statement: *"At the same time, the State Secrets Protection Act will prevent the executive branch from using the privilege to deny parties their day in court or shield illegal activity*

that is not actually sensitive". I interpret this statement and the bill language to infer that illegal activity that is properly classified should be shielded by SSP. This would appear to constitute an abdication of Congressional power and a virtual Congressional approval of cover-ups of classified crimes by EB officials in court, effectively placing the President and his subordinates above the criminal laws of the land. I cannot imagine this is Constitutional. I do not see how today's Supreme Court, if asked to look at this, could agree with any law that puts anyone above the criminal laws, classified or not. Regardless of the SSP decisions of lower courts, there was, to my knowledge, no issue of EB criminality or illegality in the original Reynolds case and I do not believe the Supreme Court has ever addressed an issue of SSP being used to willfully conceal criminal activity from the courts by EB officials in that case, as is indeed evident in more recent cases.

To avoid any misimpressions: I am a big fan of Executive power, since I have had the privilege of assisting in wielding it in relevant classified areas, and it is a "good thing." But in my view, it must remain within the law. In a May 22, 2002 Justice Department memo to my attorney in Barlow, Justice stated: "*We of course agree with your general assertion that SSP is not designed to protect the government from embarrassment nor to cover up potential illegalities.*" While I recognize this a very complex issue, and certainly beyond my capability address in all its dimensions, it strikes me--having lived through exactly such a proceeding where potential or actual classified crimes against the Congress itself were the central issue--that the Congress needs to take the position in drafting this new law that at least in the class of civil cases that involve credible issues of illegal or criminal activity by any EB officer, the courts, after an in camera review, should NOT be procedurally allowed to accept invocations of SSP over classified evidence by those who may have violated the law. The same might apply to cases involving incompetence or mismanagement, as Justice implies.

In such cases, you might consider a provision that the Courts, having viewed such evidence in camera, be required to notify the appropriate committees of Congress in a secure manner that the classified evidence it has reviewed *in camera* reveals the potential for illegal activity. The court should not be bound to reach a final conclusion on criminality. It then falls appropriately on Congress to ask for the appointment of an independent or quasi-independent prosecutor of some sort. Assuming the classified evidence supports the plaintiff's claim the case should be decided in the plaintiff's favor, and Congress should provide direct relief, or both.

2. Unclassified Evidence Summaries or "Non-Privileged Substitutes": This is one of the most problematic ideas in the bill in a practical sense. While seemingly helpful, in practice, the approach of unclassified evidence summaries in classified cases does not serve justice in SSP cases since these will effectively be used to deny plaintiffs their day in court as things proceed. The same applies to unclassified depositions, trial testimony or even many filings in such cases. In reality, the "unclassified" approach effectively allows the defendant (as opposed to the court) to arbitrarily and capriciously control the entire proceeding, to manipulate the evidence, testimony and the scope or focus of the proceeding in its favor. Questions and answers by plaintiffs and witnesses are blocked at will. Documents are selectively redacted. This unclassified approach also

introduces ambiguities that may not exist at all in the actual classified evidence which can then be exploited by the defendant. For example, who determines what goes into an unclassified evidence summary, especially if these are done *ex parte*? What is the point of even an unclassified admission by the government where this cannot be explored further in any detail in depositions or trial? In *Barlow v. U.S.* not only did all of the aforementioned occur, but SSP was used to shield willfully false material testimony by a few government witnesses about their misleading of Congress that could not--as the defendant and the witnesses were well aware--be challenged by the plaintiff as a result of denial under SSP of all the relevant classified documents, or the ability to even subject these witnesses to cross examination on these "SSP" issues for the same reason. In proceeding at the unclassified level, SSP becomes both a sword and a shield for the defendant. Keep in mind that unlike most prospective plaintiffs, I knew the contents of the classified evidence denied under SSP. I recognize that the bill seeks to elevate the role of the court in reviewing the classified evidence, but—as noted below—there is reason to believe that courts will continue to be highly deferential to the government's position.

3. Risk of Unauthorized Disclosure or "Compromise" of Classified Information: This related issue goes to the heart of SSP, since it is ostensibly the underlying concern of the Executive Branch in invoking it. Judges are not interested in acting as arbiters of what is classified or not, as the bill essentially proposes. The Courts have stated repeatedly that they will not "second guess" the EB on such matters. Judges are understandably concerned about compromising intelligence sources or methods and are therefore utterly deferential to the EB in such matters and will remain so. After witnessing an untrained judge attempting to deal with even very basic intelligence matters in an overly deferential manner, I fully sympathize and agree with the Judicial Branch view on this issue. I feel that the inclusion of a court appointed special master is a necessary and excellent provision in this bill, which may mitigate some of these concerns, providing the courts with expert assistance and guidance on frequently complex intelligence matters, including whether evidence over which the government is attempting to invoke SSP is properly classified.

Unfortunately, as I mentioned, much of the evidence in many of these cases may be properly classified. In such circumstances, the only effective solution is a fully classified proceeding to relieve the Courts of this burden. I see no valid reason for precluding such an approach, if handled properly. Congress needs to ensure that justice is truly served in significant claims against the government--especially those involving illegal activity by the Executive Branch--while maintaining the security of the nation's legitimate secrets and assuring checks, balances and accountability. In most cases under consideration, these should not be conflicting goals in a nation of laws if handled with great care. The 1953 Reynolds decision was the child of a bygone McCarthy atmosphere and never really addressed the issue of SSP and illegal activity.

As in CIPA, private attorneys can be fully cleared to the Top Secret/SCI or above level if need be. Given proper facilities, controls, and procedures, the proceeding then should pose no greater risk of unauthorized disclosure, compromise or other security violations

than posed by those with such clearances and accessed within the EB itself. A clearance is a clearance. If someone is deemed trustworthy via the security clearance process, it makes no difference if they are an actual federal employee or not. Thousands of private contractors have the highest level clearances and accesses, some for relatively mundane work, and the government assumes that “risk” of compromise every day in matters far less important than justice being served in some of these cases. If a given attorney is not clearable (and clearly not all will be) the plaintiff would have to find one that is. Attorneys should face disbarment if they violate their security agreements in such cases, making such actions very unlikely.

The issue of clearing plaintiffs is cloudier. Obviously, not all plaintiffs would be clearable, but this does not mean that a proceeding would be impossible. This is where carefully cleared unclassified summaries might suffice for attorney client communications with unclearable plaintiffs.

In this matter of risk of unauthorized disclosure or “compromise” in a proceeding, *Barlow v. U.S.* provides a practical illustration of how irrational the invocation of SSP can become in this regard. As DCI George Tenet accurately states in his SSP declaration, I had prior official clearance and access to all the documents requested, described by me, and diligently located¹ by CIA in discovery. Due to my work as a consultant to intelligence agencies, I held Top Secret/SCI and other compartmented clearances before, during, and after the pendency of the proceeding, as did my lead attorney, the Honorable Paul Warnke (who died partway through the proceeding) the former Assistant Secretary of Defense and Director of the Arms Control and Disarmament Agency who was on advisory panels to the Cabinet level at the time of the proceeding.

During the proceeding, I actually engaged in classified business at CIA HQ, where I was fully cleared and trusted to roam unescorted. During the proceeding my primary work was helping to lead one of the FBI’s most sensitive and highly classified operational programs, a matter of considerable trust and responsibility. Yet, these intelligence documents critical to my case were all denied to me, the Court, and ultimately the deciding body, the Senate, by DCI Tenet due to the risk of “*unauthorized disclosure*”. As he stated in his SSP declaration: “*Providing Plaintiff 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.*” In my view, DCI Tenet’s, NSA Director Hayden’s and Deputy Secretary of Defense Hamre’s assertions in this regard were truly hollow in this situation. The risk of unauthorized disclosure by Mr. Warnke or me was no greater than anyone in the EB with access to this information. Indeed, in this case, the risk of disclosure was nil, assuming the provision of proper classified facilities and procedures in the proceeding. A similar situation might exist in other cases involving intelligence personnel with claims.

Had the court not taken what I think is the unsubstantiated position that the invocation of SSP over “virtually all the relevant evidence” was “absolute” and instead forced that

¹ The same cannot be said for the Office of the Secretary of Defense which announced it had shredded everything.

evidence to be admitted in a case centering on potential crimes against the Congress itself in the Senate's own Reference, the practical effect in this case would not have been any compromise, but only the introduction of material evidence of such illegalities, thereby revealing the motives for the actions taken against me that formed a basis for my claim. I would hardly call proceeding in the absence of the central evidence or testimony having "my day in court." Once it granted the SSP, the court should have sent the case back where it belonged and from where this case never should have left: the Senate. It did not follow the Senate's instructions, but instead failed to obtain the only facts the Senate did not have and speculated its way to erroneous conclusions.

4. In Camera Reviews: The problems with this provision are all the issues I have already identified regarding the next steps following such a review. If it becomes clear to the Court that the evidence over which the Government is attempting to invoke SSP is not properly classified under Executive Order, this bill effectively remedies that situation. Unfortunately, as I mentioned, in many of the current cases of concern to the committee, the evidence appears to be properly classified. With the court having viewed the evidence, this *in camera* provision might at least preclude what occurred in *Barlow v. U.S.* where the Court, having allowed itself to be denied every single classified document (literally thousands of pages) under SSP, then decided erroneously that it knew enough without them, proceeded for over four years, and then wrote a largely factually incorrect opinion based on erroneous speculation about evidence it never viewed and a dead witness it never met. If *in camera* reviews are desired, you might consider that the bill require that lawyers for the plaintiff should be present to explain somewhat complex evidence. Otherwise, the Court would have to rely on the government to incriminate itself, a rather unlikely prospect for any defendant, in my experience. The special master might mitigate this problem as well, however, assuming he has the substantive expertise.

5. Addressing the Actual Scope of SSP in Full Proceedings: This appears to be one of the greatest inadequacies of the current bill. The bill does not appear to address the basic applications of SSP by the government in practice in an actual court proceeding through discovery and depositions to trial. If you read the record in *Barlow*, SSP was invoked not only over the actual classified documents requested in discovery, per se, but over whatever the government deemed "protected information" as things proceeded on a daily basis. These "protected" things may be totally unclassified documents (magazine articles as I recall) and statements squarely in the public domain. To this day, neither my attorneys, nor I, or even the judge, quite understand exactly what criteria was being employed.

SSP is used at will to block even the most generalized questions or answers in depositions, trial testimony, as well as in selective redactions of documents, including deposition transcripts, affidavits and filings, to support the defense and weaken the plaintiff's case. The Executive Order classification authority being used is not even marked on the redacted or excluded documents, as is the normal practice. To cite but one of hundreds of examples in *Barlow*, the former Deputy Director of Central Intelligence, Richard Kerr and two of his highest level CIA subordinates all came voluntarily to Mr. Warnke's office and drafted what they considered to be very general unclassified sworn

affidavits supporting my allegations that Congress had been misled about what we knew about Pakistan's nuclear weapons activities. CIA and Justice then showed up at his office and seized these as Top Secret "SSP" documents calling for an emergency conference with the judge who viewed the documents and then upheld the assertion of SSP by the defendant and the selective redaction of the sworn affidavits by same defendant. I think that my former supervisors, DDCI Kerr and the other officials involved, having about ninety years of CIA experience between them, know at least as much as Mr. Tenet about what is classified, what is not and what compromises sources and methods.

We heard about the SSP "mosaic theory" in which the Government explained that all these unclassified little bits could allegedly be put together to make something classified. You can imagine that this approach provides carte blanche control to assert SSP over just about anything the Government chooses. And they do. Keep in mind, that during depositions, the judge is not even present, so the defendant always unilaterally prevails, deciding what answers can be provided or what questions can be asked. In effect, the court does not control the proceeding; the defendant does. As anyone familiar with litigation knows, much of the case is decided before it ever gets to actual trial.

In my particular case, it should be evident that my daily Top Secret professional life and the central issues being explored in court were, by definition, dealing with some of the more highly classified matters in our nation, as Mr. Tenet properly states in his SSP declaration. Yet, I and other similar witnesses were forced to try to answer specific questions about central issues at an unclassified level in depositions and at trial. I could not do so effectively and I made this clear as I was deposed for days. It was highly frustrating. The resultant ambiguities in my testimony that only existed due to the assertion of SSP to preclude my complete answers were later exploited by both the defendant and the Court in its opinion to reach erroneous "factual" and other conclusions that would have otherwise been both impossible and ridiculous had the evidence denied under SSP been before the court and part of the proceeding.

The trial itself was conducted in a CIA-swept courtroom under an arrangement where I was to speak slowly in my testimony providing an opportunity for the lead Justice attorney to jump up if the CIA and NSA people whispered in his ear that my answers were sounding "SSPish" and I was to stop speaking instantly when this occurred. He must have stood at least 60 times in one day as my attorney was attempting his direct. He had to rephrase his questions. I had to try to constantly rephrase my already generalized answers to please the Government. Some witnesses simply unilaterally refused to answer generalized key questions on SSP grounds in both depositions and at trial, or were directed not to by the Government.

I hope you can now have at least some sense that all of this becomes hopeless for the plaintiff in any such court proceeding and cannot by any stretch of the imagination fall into the category of fair litigation. If you want plaintiffs to have "their day in court" you need to ensure that you address the practical issues I have raised in your SSP bill to create a level playing field. Unclassified proceedings about classified matters and evidence will not generally accomplish this goal. An examination of the actual un-redacted record and

documents denied under SSP in Barlow will illustrate this is far more vividly than I can in this statement.

6. Congressional Relief for Some Plaintiffs: Senator Kennedy in his floor statement has also quite justifiably raised the issue of providing "relief" for plaintiffs who have been denied their day in court since the evidence they need has been denied them by invocations of SSP. I am most gratified to hear this and I think this should be a central issue in your consideration of this SSP legislation, if not embodied in the legislation, since if you cannot address many of the practical issues I have broached, either the status quo will continue, or additional plaintiffs will be sent on incredibly expensive, unfair proceedings and will likely lose. The only remedy left then is Congressional relief.

Relief involves Congressional action. Congressional action can either be bi-partisan, equitable and timely, or it can disintegrate into politics, even to the point of Senators blocking relief seeking to protect EB officials. This will result in inaction at the cost of a plaintiff who may have already experienced profound damage. In this sense, after nineteen years of Congressional deliberations, I think I can safely say that Barlow v. US can also serve as a prime example of how not to handle matters of relief.

Senators, having said all that I have about SSP proceedings, I must note for the record that in my particular situation, I did not request that this Committee give me my "day in court." Under the circumstances, that was entirely unnecessary and this was obvious from the beginning of such considerations as Mr. Warnke told your committee at the time. I think the only reason I was sent to court was the desire by one Senator to block relief for me for highly dubious political reasons. The Senate had all the facts it needed, many more facts than the court ever uncovered.

The committees with primary jurisdiction over the offending agency had concluded after seven years of truly extensive investigation and consideration that I was due relief. They still believe this. Sending this case to the court of federal claims as a Congressional Reference served no practical purpose other than to deny me relief and to launch me on a unfair, four year-long million dollar wild goose chase, the outcome of which, especially when SSP was invoked, was predictable.

Let me briefly review the nineteen year history of this matter with the Congress. Beginning in 1989, my life had been irreparably harmed, professionally and personally by the Office of the Secretary of Defense, via some of the most vicious retaliations anyone in the Congress had ever seen, over something I had never actually done: "intending" or threatening to tell Congress directly that the EB was willfully misleading lawmakers about Pakistan's classified nuclear activities, something that later spawned serious threats to our national security; threats that could have been prevented. Beginning in 1990, I then cooperated in seven years of investigation by the committees with primary jurisdiction over the agencies involved. I endured seemingly endless streams of IG investigators from three IG's, followed by an eighteen month-long GAO investigation into the IG's.

The driving force during this seven year period was the Senate Armed Services, Intelligence, and Governmental Affairs Committees along with the participation of six or seven other Senate and House Committees including the HPSCI. These inquiries and efforts were led by a fairly impressive bipartisan group, notably Senators Thurmond, Nunn, Levin, Boren, Murkowski, Glenn, Grassley and Bingaman, most of whom were Committee Chairmen or Ranking Members. By 1997, these committees had concluded, on a bi-partisan basis, that I had been unjustifiably harmed, was due Congressional relief, and that the case raised a series of critical issues about the interests of the Congress itself to know the classified truth in the execution of its Constitutional duties, as well as issues relating to WMD intelligence, the lack of protections for intelligence officers from political retaliation, and the effectiveness of our counter proliferation operations and policies as well as separation of powers issues that arose over something I had never done. This is memorialized in legislative history. In reaching their decisions, these committees and Senators were well aware not only of the detailed facts of the case, but based on truly extensive correspondence, of DOD's legal and other views and the players involved in OSD and CIA. They were also well aware of the highly classified nature of the central issues involved, and with substantially more access to the relevant classified information and evidence than this committee (and certainly the Court). I had extensive face to face personal contacts for a period of years with senior staff on both sides of the aisle on all these committees, who were thus in a position to assess my credibility and character.

One of the major considerations by the involved committees and Senators in deciding I was due relief, was a clear recognition, by all involved, that due to rather extraordinary circumstances, I had exhausted all legal and administrative options. I did not ask for a relief bill. This was offered and then promised to me by Chairman Thurmond, Ranking Member Nunn, and Senator Levin on behalf of the committee. The SSCI was also deeply involved and supported this matter of relief including Chairman Boren, and later Chairman Shelby, Vice Chairman Murkowski and Senator Glenn. Even President Clinton was briefed on the case in late 1997, and he also supported relief and expressed this to the Chairman Thurmond, expecting a relief bill to arrive at his desk shortly.

In early 1998, a private relief bill was offered with the full bipartisan backing of the aforementioned committees. The intent was to act swiftly, pass the bill through both houses and send it up to the President who was ready to sign it, providing me with at least some compensation for the irreparable damages I had suffered, and allowing me to resume some semblance of a normal life, a concern of all the involved Senators. The bill was referred to Judiciary since your committee has jurisdiction over private relief. It is my understanding that it initially had the full backing of this committee as well.

Thus, the bill was ready to pass, but suddenly, in a fateful turn of events, a single Senator reportedly placed a hold on the bill for no valid reason. Rather than abiding by democratic procedures and overcoming the questionable unilateral actions of a single Senator, as an apparent "compromise," this committee instead decided to refer this bill to the Court of Federal claims causing further unnecessary harm to my life. To this day, the

constructive intent of this committee in making this Reference evades me, as it does my attorneys and perhaps even the Article I judge who was stuck with it. You are capable of reaching your own conclusions and making decisions in the Congress as part of your oversight responsibilities. You do not need a court to find the facts for you, especially after seven years of Congressional inquiries involving Top Secret/SCI matters.

Immediately following the invocation of SSP over all the relevant classified evidence, in 2000, I asked the Senate for permission to withdraw from the case, predicting that I would almost certainly lose in the absence of all the material evidence. Mr. Warnke and I were told by the Senate that it was recognized that once SSP had been asserted, we would probably lose, but to proceed anyway. We were told that losing in the court under these circumstances would not preclude Congressional relief

Over two years later, in 2002--during which time I was forced to spend thousands of hours essentially fighting for Congress' right to not be misled by the EB about WMD intelligence--we lost. We formally appealed the case, via the court, back to this Committee and the Senate, the deciding and appellate body under the law, but neither my attorney nor I received any response from this committee, despite lengthy letters warning of further major abuses of Executive power if the Senate did not act to address the issues and precedents raised in the court case, especially the use of SSP in this situation and the destruction of WMD intelligence officers just doing their jobs.

The court failed to follow the Senate's instructions in a variety of ways including not finding the facts for the Senate as a result of allowing SSP to be invoked, despite clear testimony indicating potential crimes had been committed against the Congress. To quote Louis Fisher, your expert on separation of powers and SSP at the Library of Congress: *"The executive branch, by asserting the state secrets privilege, essentially told the court that it was not entitled to know the facts, and the court, in accepting that position, essentially told the Senate--and Congress--that it was not entitled to know the facts."* It also blocked any proceeding whatsoever on one of the Senate's primary concerns and instructions in its Reference: to examine the primary form of retaliation by OSD--the "security actions" taken against me as a suspected Congressional spy.

Just to impart some slight sense of the extent of abuse of the SSP in Barlow v. U.S and how unfair this proceeding was, let me quote from DCI Tenet's SSP February 10, 2000 sworn declaration (attached) paragraph 18, where, before what was supposed to be a proceeding on the merits even began, he stated the following: *"In his motion to compel Plaintiff specifically asserts that intelligence community employees provided incomplete and misleading testimony to Congress...because this testimony ignored evidence that the F-16's proposed for sale to Pakistan could deliver nuclear weapons, that Pakistan possessed nuclear weapons, and that Pakistan was engaged in a systematic effort to obtain U.S. technology illegally in support of its nuclear weapons program...As a former staff Director of the Senate Select Committee on Intelligence I was particularly disturbed at Plaintiff's allegation. However, my review of...classified information available to me as DCI has convinced me that plaintiff's allegations are groundless. By July 1989, the Congress had received the Intelligence Community's candid assessment of the status of*

Pakistan's nuclear weapons program...(the) classified information Plaintiff seeks in discovery, refutes rather than supports his assertions..."

In essence, Mr. Tenet told the court, "you can't see the evidence, your Honor, and Mr. Barlow can't have access to it again to show it to you (since he might spill the beans) but it's a slam dunk your Honor, we never misled Congress on Pakistan WMD. Trust me, I'm the head of the CIA and Mr. Barlow doesn't know what he is talking about." I ask you Senators, what is the point of having a court proceeding when the government simultaneously denies the evidence and in the same breath effectively decides the merits? How can a plaintiff effectively challenge this? In this case, the Court relied heavily on these and other unsubstantiated assertions in Tenet's SSP declaration that went to the merits as a central basis for its opinion.

As I recall, not too long after this SSP declaration about Pakistan nuclear intelligence, the Congress also had from DCI Tenet the Intelligence Community's "candid assessment" of the status of WMD's in Iraq, as did the President. Trust me, Senators, as one of the CIA's top experts, on a single good day, we had more hard, reliable, superb intelligence on Pakistan's very real nuclear weapons activities (including Dr. A.Q Khan's nuclear network) than the sum total of everything we had on Iraq's alleged nuclear intentions in 2003, other than suspicions. Yet we have the very odd situation where two presidents in the late 1980's certified to Congress that Pakistan did not possess nuclear weapons, while another told you more recently that Iraq was awfully close to possessing them.

Of even greater concern to me is why we waited thirteen years from the time I was removed from my job--thereby shutting down the operations I was leading against the A.Q. Khan network and sending a chilling message to my colleagues--to bust Dr. Khan, only after Pakistan spread critical nuclear weapons technology Iran, North Korea, Libya and perhaps elsewhere in the interim. We knew enough to shut down that network twenty years ago, Senators. The central issues in Barlow v. U.S. over which SSP was invoked thus have implications far beyond the impact of OSD's actions against me. Had Congress known the truth about these matters and acted ten years ago at the time of this Reference, much less twenty year ago, history may have been very different. Without critical assistance from Pakistan, there would be no meaningful Iranian nuclear weapons program today, in my professional opinion. The same applies to North Korea's uranium enrichment activities recently referred to by DNI McConnell.

After four years of effort, while failing to find the relevant facts, the judge told the Senate what it already knew: that the Whistleblower Protection Act of 1989 did not apply to classified whistleblowing (although I note that this was not the view of the Congress in 1989) adding also that employees could be fired for even threatening to blow the whistle on classified wrongdoing or malfeasance of any sort, including crimes of the most serious nature, or people in the EB ignoring intelligence relating to the attacks on 9/11, for example. That would include me, in the view of the court. Nowhere in this bizarre opinion does it address or even mention the central fact that OSD itself, nine years earlier, had officially concluded that both the "*performance*" and the "*security*" actions taken against me were based on fabrications, or, that in 1990, following extensive

investigation, OSD itself officially overturned all its actions against me, restored my security clearance and made me a permanent member of the civil service. OSD's actions in this regard were upheld by DOD, CIA and State Department IG's as well as the GAO, long before the Reference. Mr. Cheney himself assisted in one aspect of this, although the political appointees beneath him refused to place me back in any job in OSD. The damage was done, as intended. My career as a government employee was over.

I hardly think that in referring this matter to the court, the Senate intended for the judge to fail to obtain the facts on the central issues and instead rewrite the history of my personnel and security files and OSD's official decisions. As I stated, when SSP was granted, he should have sent the case back to the Senate immediately.

This was not the end of my history with this committee, however. In 2005, after the bust of the A.Q. Khan network, the injustice of what both OSD and the Senate had done to the life of the person who had organized government efforts to shut that network down and tried to get the truth about Pakistan's nuclear activities to Congress became the subject of international concern. The handling of Iraq WMD intelligence by some of my former OSD bosses, followed by their retaliations against Joe Wilson and another CIA officer, Valerie Plame, tended to further confirm their *modus operandi* in dealing with WMD intelligence and intelligence officers that get in the way. Ambassador Robert Gallucci, other former senior government WMD officials and POGO approached the Senate, asking for at least the pension I would have earned if not for OSD's actions, especially because I had continued to serve my country as a self-employed consultant to the intelligence community for years.

In July of last year, once again, a bi-partisan coalition headed by the Senate Armed Service Committee introduced an amendment to the DOD Authorization bill for pension relief for me. Once again, when it reached this committee, a few Senators--this time members of the committee--placed anonymous holds on the amendment, effectively killing the amendment. The reason they offered: The court case. Let me mention that this recent relief amendment was for a pension, not a subject of the 1998 Reference and something the court did not consider, nor could it under the law. Of even greater concern to me is that I am now apparently faced with a few senators, whether they realize it or not, siding with the EB, this time effectively supporting an SSP cover-up of potential crimes against the Congress in an apparent attempt to protect certain EB officials who might appear to have made some mistakes in my situation in this matter. Besides being unfair to me, I do not think this is appropriate Congressional behavior, nor does misplaced partisan politics serve as a substitute for justice. No member of Congress, understanding the facts, should view me as an adversary or deny me relief. This case should be as it was before it arrived at this Committee, a matter of bipartisan concern and action.

The broad lesson here is that in SSP cases where potential plaintiffs have no options for meaningful litigation, timely consideration of Congressional relief is warranted and appropriate. In such situations, the Senate and the House are essentially acting as a court. To allow one (or even two or three) Senators to unilaterally block relief for an individual

via the practice of holds or other procedural maneuvers is entirely inappropriate since it violates the principles of our democracy and of justice. There will always be some Member of Congress willing to further EB interests. In passing this new law you should prohibit such practices within your institution in such cases. You may want to establish a Select Committee consisting of Senators drawn from the Intelligence, Judiciary and the committee overseeing the offending agency to address these matters of relief in a timely, efficient and bi-partisan democratic manner. Simple democratic majorities should rule in such cases, both in committee and in the full House and Senate, by law.