# Litigating in the Black World: Justiciability, Privilege, and Procedure in UAP and NHI Cases

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**Working premise.** This analysis assumes, as the site does, that non-human intelligence (NHI) and the craft associated with it are real, that the United States and other governments have concealed what they know, and that some form of official disclosure is likely. On that premise, the first question in almost any UAP case is whether a court will hear it at all. Most of the claims that disclosure would generate (records suits, whistleblower reprisal claims, contractor disputes over recovered material, injury claims, and claims arising from the alleged capture of NHI) will run into the body of law that governs litigation touching classified programs. This analysis describes that body of law, applies it to the UAP setting, and offers practice guidance.

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## Key points

- Official acknowledgment is the most important variable. The privilege protects what the government has not officially confirmed (*Zubaydah*), so every statute, sworn statement by an official and released record narrows what can be withheld.
- The *Totten* bar reaches suits about secret relationships with the government; plead rights that exist independently of any secret agreement.
- Exclusion of privileged evidence is the ordinary remedy. Dismissal follows only on one of three grounds, and the circuits apply the "valid defense" ground differently (D.C. Circuit: *In re Sealed Case*; Fourth Circuit: *Abilt*).
- Cases can be tried around the privilege with protective orders, cleared counsel, pseudonyms and substitutions (*Ibrahim*; the *Al Shimari* trial).
- Contractors are open to state tort claims for conduct the government did not require (*Hencely*), while the Alien Tort Statute is closed to new claims (*Cisco*).
- First steps: catalogue official acknowledgments, plead every element with unclassified evidence, and move for a protective order early (Form A1-1).

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## 1. Summary

The government has two doctrines for keeping national security matters out of court. The first is the *Totten* bar, a categorical rule that forecloses suits whose subject matter is itself a state secret,

most clearly suits to enforce secret espionage agreements. The second is the state secrets privilege of *United States v. Reynolds*, an evidentiary privilege that removes specific information from a case and, in a narrower set of circumstances, requires dismissal.

Since 2022 the case law has moved in two directions at once. The Supreme Court has strengthened the government's hand on what counts as a secret (*Zubaydah* treats unofficial public disclosure as insufficient to defeat the privilege). At the same time, recent appellate decisions show that litigation involving classified programs can be tried to verdict when the court manages the evidence carefully (the 2024 Abu Ghraib contractor trial in *Al Shimari v. CACI*, although the Fourth Circuit later ordered the case dismissed on Alien Tort Statute grounds), and the Supreme Court has opened contractors to state tort liability for conduct the military did not require or authorize (*Hencely v. Fluor*, 2026) while closing the Alien Tort Statute to new claims (*Cisco Systems, Inc. v. Doe I*, 2026).

For UAP litigation, the most consequential variable is official acknowledgment. Because the privilege protects what the government has not officially confirmed, every statute, hearing, report, and released record that officially acknowledges part of the UAP subject narrows what the government can withhold in litigation. A disclosure event would change the terrain more than any doctrinal development, and practitioners should plan pleadings around what has been officially acknowledged at the time of filing.

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## 2. The *Totten* bar

### 2.1 The rule

In *Totten v. United States*, 92 U.S. 105 (1876), the estate of a Civil War spy sued to recover compensation promised by President Lincoln. The Court held that public policy forbids suits "which would inevitably lead to the disclosure of matters which the law itself regards as confidential." The Court reaffirmed the rule in *Tenet v. Doe*, 544 U.S. 1 (2005), where former Soviet-bloc officials alleged that the CIA had broken promises of lifetime support made in exchange for espionage. The Court held that *Totten* is a categorical bar, separate from and broader than the *Reynolds* privilege, describing it as "a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry." 544 U.S. at 6 n.4. Justice Scalia's concurrence treated the bar as jurisdictional. *Id.* at 11-12 (Scalia, J., concurring).

See also *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981) (NEPA claim over possible nuclear weapons storage could not proceed where the government could neither confirm nor deny the facts).

### 2.2 *General Dynamics* and contract disputes over classified programs

*General Dynamics Corp. v. United States*, 563 U.S. 478 (2011), arose from the Navy's termination of the A-12 Avenger stealth aircraft contract, a black program. The contractors defended against default by arguing that the government had withheld its superior knowledge of stealth technology. The government invoked the state secrets privilege, which made that defense impossible to litigate. The Supreme Court, drawing on *Totten* and *Tenet*, held that where the privilege prevents litigation of a prima facie valid defense, neither side may obtain judicial relief: "Suit on the contract, or for performance rendered or funds paid under the contract, will not lie, and courts should leave the

parties to the agreement where they stood on the day they filed suit." 563 U.S. at 486-87. The rule "applies only when the superior-knowledge defense is supported by enough evidence to make out a prima facie case," and the Court reasoned that both parties to a black-program contract "must have understood" that state secrets would prevent courts from resolving many disputes under it. *Id.* at 489-90. The Court also observed that cutting-edge defense contractors are "repeat players" who have reason not to abuse the rule. *Id.* at 490.

### 2.3 Application to UAP matters

The *Totten* line bears on three foreseeable categories of UAP litigation.

**Insiders suing for promised compensation or benefits.** A former program participant who sues to enforce promises made in exchange for secret service (pay, pensions, medical care, legal protection) stands where the plaintiffs in *Totten* and *Tenet* stood. Counsel should frame claims around statutory rights that exist independent of any secret agreement (veterans' benefits, FECA, whistleblower reprisal statutes, the anti-reprisal provisions of 50 U.S.C. §3373b) rather than around the secret relationship itself.

**Contractor and government disputes over recovered material.** If a contractor holds craft or material under a classified arrangement and the government seeks to take it (by contract, regulation, or eminent domain; see Issue E1), *General Dynamics* suggests that a court may refuse to adjudicate rights under the secret arrangement and leave the material where it sits on the filing date. That outcome would favor whichever party holds the material when suit is filed, and it gives both sides an incentive to secure physical custody before litigating.

**Effect of disclosure.** The *Totten* bar depends on the secrecy of the relationship itself. Once the government officially acknowledges a program, the relationship, or the material, the categorical bar should fall away and the dispute should proceed under the narrower *Reynolds* framework. A plaintiff should plead the specific official acknowledgments (statutes, public reports, hearing testimony by officials, declassified records) that take the subject matter out of *Totten*.

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## 3. The *Reynolds* privilege

### 3.1 Elements

*United States v. Reynolds*, 345 U.S. 1 (1953), was an FTCA suit by widows of civilians killed in the crash of a B-29 testing secret electronic equipment. The Court set out the requirements that still govern:

- The privilege belongs to the government and "can neither be claimed nor waived by a private party." *Id.* at 7. A contractor sued over its own conduct (for example, a state habeas petition alleging that it holds a non-human being on its own account, Form F1-2) cannot refuse to answer on privilege grounds; only the United States, by intervening and making the formal claim, can assert it.
- "There must be formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* at 7-8.

- "The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect." *Id.* at 8.
- "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers," but the court need not always examine the material itself; the claim is upheld if "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Id.* at 9-10.
- The litigant's showing of need determines how far the court probes, but "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Id.* at 11.

The later history of *Reynolds* matters for the UAP field. The accident report the government withheld was declassified in the 1990s, and it said little about the secret equipment while describing safety failures. The families' heirs sued to reopen the 1953 settlement for fraud on the court. The Third Circuit rejected the claim: fraud on the court requires an intentional fraud by an officer of the court that in fact deceives it, and the Air Force's claim of privilege "can reasonably be interpreted to include within its scope information about the workings of the B-29." *Herring v. United States*, 424 F.3d 384, 386-87 (3d Cir. 2005). The history still supports a request that the court examine the material itself, since a declaration can be literally accurate and still overstate what the withheld document would reveal; it does not support an argument that the government lied.

### 3.2 *Zubaydah* (2022): unofficial disclosure does not defeat the privilege

In *United States v. Zubaydah*, 595 U.S. 195 (2022), a detainee sought discovery from two CIA contractors about his treatment at a detention site that had been widely reported to be in Poland. The Ninth Circuit had held that facts already in the public domain could not be privileged. The Supreme Court reversed. Drawing on the FOIA official-acknowledgment doctrine, the Court reasoned that "official confirmation of sensitive information may pose risks that unofficial disclosure does not," quoting the Fourth Circuit's observation that "[i]t is one thing for a reporter or author to speculate or guess that a thing may be so … it is quite another thing for one in a position to know of it officially to say that it is so." 595 U.S. at 210-11 (quoting *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975)). The Court also held that the detainee's failure to pursue an available alternative (a declaration of his own, cleared through the government's preclearance process) showed "a dubious showing of necessity." The Court remanded with instructions to dismiss the discovery application. *Id.* at 214.

**Consequence for UAP cases.** Insider testimony, journalism, books, and leaked documents do not by themselves defeat a privilege claim, however widely they circulate. What matters is official confirmation. Statements by officials in sworn congressional testimony, statutory findings, AARO and ODNI reports, PURSUE releases, and agency FOIA productions are official acts and should be catalogued and pleaded with precision. The *Zubaydah* reasoning also cuts in the other direction: once the government officially confirms a fact, its argument that confirming the fact in litigation would cause harm becomes much weaker.

**AARO's statements on the site's working premise.** The site assumes that AARO is a deliberate source of disinformation and part of the concealment. On that premise its statements cut in one

direction only. A confirmation by AARO is still an official act of the Department of War and counts as official acknowledgment (Issue B1). A denial or a negative finding by AARO, including the conclusions of its Historical Record Report, should be treated as a contested assertion by an interested party: answer it with other official evidence (sworn testimony, statutory findings, records released by other components), and do not concede that AARO's account is complete.

### 3.3 *Fazaga* (2022) and its aftermath

*FBI v. Fazaga*, 595 U.S. 344 (2022), held that FISA's procedures for in camera review of surveillance materials, 50 U.S.C. §1806(f), do not displace the state secrets privilege. The Court expressly left open the circumstances in which the privilege requires dismissal. On remand the Ninth Circuit held that the "valid defense" ground for dismissal applies only where the privileged information establishes a legally meritorious defense that would require judgment for the government, that both sides must be heard on that question, and that a court must consider all protective measures before dismissing on the ground that privileged and nonprivileged evidence are inseparable. *Fazaga v. FBI*, 124 F.4th 637 (9th Cir. 2024). The Supreme Court granted certiorari, vacated that judgment, and remanded "for reconsideration in light of recent factual" developments. *FBI v. Fazaga*, No. 25-430, 146 S. Ct. 2160 (mem.), 2026 WL 922539 (U.S. Apr. 6, 2026). Because the judgment was vacated on factual grounds, the 2024 opinion's analysis is no longer binding circuit law, though its reasoning remains available as persuasive authority.

### 3.4 When the privilege requires dismissal

Once the court upholds the privilege, the ordinary remedy is exclusion of the privileged evidence and continuation of the case without it. Courts have identified three situations in which the case must instead be dismissed:

1. the plaintiff cannot make out a prima facie case without the privileged information;
2. the privilege deprives the defendant of information that would otherwise give it a valid defense; or
3. privileged and nonprivileged information are so intertwined that litigating the case would present an unacceptable risk of disclosing secrets.

*Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc) (6-5 decision affirming dismissal of extraordinary-rendition claims against a contractor); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (dismissal where any of the main avenues of defense would require disclosure of CIA means and methods).

Decisions applying these grounds show the range of outcomes a practitioner should anticipate:

- **Case survives.** *In re Sealed Case*, 494 F.3d 139 (D.C. Cir. 2007): in a *Bivens* suit by a DEA agent against State Department and CIA-affiliated officials, the court held that the privilege applied and upheld exclusion of portions of inspector general reports, but reversed dismissal because the plaintiff could still make out a prima facie case and the exclusions did not deprive the defendant of a valid defense.
- **Case tried to verdict despite the privilege.** *Al Shimari v. CACI Premier Technology, Inc.*, 170 F.4th 162 (4th Cir. 2026), vacated on reh'g on other grounds, 2026 WL 2547096 (4th Cir.

Aug. 28, 2026) (per curiam) (unpublished): Abu Ghraib detainees sued an interrogation contractor. The government asserted the privilege over interrogator identities, training records, interrogation plans, and contemporaneous reports; witnesses testified pseudonymously and by telephone. The Fourth Circuit applied *El-Masri*'s "main avenues of defense" test and held that the privilege did not prevent the contractor from contesting whether the abuse occurred or whether it was involved, so dismissal was not required and the verdict largely stood. The court observed that the format of testimony affected the defense "qualitatively" but that the relevant question is whether the defendant could not present a defense without privileged information. 170 F.4th at 197-98. On panel rehearing the court vacated that opinion and ordered the case dismissed because *Cisco Systems, Inc. v. Doe I*, 609 U.S. 141 (2026), foreclosed the Alien Tort Statute claims. The privilege analysis was not disturbed on its merits but no longer binds; it remains a persuasive account of how a court can try such a case.

- **Case dismissed on the eve of trial.** *Geospatial Technology Associates, LLC v. United States*, No. 16-346C, 2026 WL 2253842 (Fed. Cl. July 7, 2026, reissued Aug. 3, 2026), appeal filed (Fed. Cir. Sept. 14, 2026): a patent and copyright infringement suit under 28 U.S.C. §1498 against the National Geospatial-Intelligence Agency was dismissed ten years after filing. The court had accepted the privilege in 2021 and excluded evidence through several rounds of motions in limine; it ultimately held that the government could not present its obviousness and secondary-considerations defenses and that "[m]ultiple witnesses in this case simply know too much" for a public trial to proceed safely.
- **Employment suit dismissed on the defense ground.** *Abilt v. CIA*, 848 F.3d 305 (4th Cir. 2017): a covert CIA employee sued under the Rehabilitation Act and Title VII after the agency cancelled his war-zone assignment. The Fourth Circuit listed three situations requiring dismissal (no prima facie case without privileged evidence; defendants unable to defend themselves without it; further litigation presenting an unjustifiable risk of disclosure), *id.* at 313-14, and affirmed on the second. Even assuming the plaintiff could make his prima facie case, any legitimate nondiscriminatory reason the agency could offer for its assignment decisions "would undoubtedly rely on privileged information." *Id.* at 316 (following *Sterling v. Tenet*, 416 F.3d 338, 347 (4th Cir. 2005)). The court did not require the government to show that the defense was meritorious, the showing *In re Sealed Case* demands in the D.C. Circuit. A claim whose burden-shifting framework invites the government to explain its reasons, such as an employment or reprisal claim by a program insider, is at the greatest risk in the Fourth Circuit.
- **Surveillance challenges dismissed after years of litigation.** *Wikimedia Foundation v. National Security Agency*, 14 F.4th 276 (4th Cir. 2021), held that the state secrets doctrine required dismissal of a challenge to NSA's Upstream surveillance, and *Jewel v. National Security Agency*, 856 F. App'x 640 (9th Cir. 2021), cert. denied, 142 S. Ct. 2812 (2022), ended a challenge first filed in 2008. A UAP case that depends on how an intelligence agency collects or processes sensor data faces the same risk.
- **Case tried despite the privilege, and won.** *Ibrahim v. Department of Homeland Security*, 62 F. Supp. 3d 909 (N.D. Cal. 2014): the court upheld the privilege over nearly all of the documents the government withheld, denied the government's renewed request to dismiss

on that ground, and tried the plaintiff's no-fly-list claims on the evidence that remained; it ordered her name removed. *Id.* at 912-14. The case is the clearest recent example of a court managing excluded evidence and still reaching the merits.

- **Private suit dismissed sua sponte.** *Sakab Saudi Holding Co. v. Aljabri*, 58 F.4th 585 (1st Cir. 2023): a suit between private parties over an alleged $3.5 billion expropriation was dismissed because the parties' counterterrorism work with the U.S. government lay at the center of the dispute. The privilege can therefore end litigation between private parties (for example, between a contractor and a former employee, or between two contractors) even when the government is not a party.
- **Qui tam dismissed.** *Schwartz v. Raytheon Co.*, 150 F. App'x 627 (9th Cir. 2005): a False Claims Act qui tam suit alleging that a defense contractor falsely certified compliance with contract requirements was dismissed because the United States determined that the case threatened military and state secrets and the relator could not show the case could be litigated without privileged material.

### 3.5 Executive branch policy

Attorney General Holder's memorandum of September 23, 2009, *Policies and Procedures Governing Invocation of the State Secrets Privilege* (effective October 1, 2009), provides that the Department of Justice will defend an assertion of the privilege only on "a sufficient showing that assertion of the privilege is necessary to protect information the unauthorized disclosure of which reasonably could be expected to cause significant harm to the national defense or foreign relations" (§1.A). The privilege is to be invoked "only to the extent necessary," and the Department will seek dismissal of a claim or case "only when doing so is necessary to protect against the risk of significant harm to national security" (§1.B). The Department "will not defend an invocation of the privilege in order to: (i) conceal violations of the law, inefficiency, or administrative error; (ii) prevent embarrassment to a person, organization, or agency of the United States government; (iii) restrain competition; or (iv) prevent or delay the release of information the release of which would not reasonably be expected to cause significant harm to national security" (§1.C). The requesting agency must submit a detailed declaration based on personal knowledge (§2.A); the responsible Assistant Attorney General must recommend in writing (§2.B); a State Secrets Review Committee evaluates the request; and the Attorney General must personally approve. The memorandum also provides for referral of credible allegations of wrongdoing to the agency inspector general (§4.C) and for periodic reports to the oversight committees of Congress on every case in which the privilege is invoked (§5).

The memorandum is internal policy and creates no enforceable rights, but counsel can ask the government to confirm that it has been followed, can test the agency declaration against §2.A, and can cite §1.C when the information sought concerns alleged unlawful conduct, which UAP claims frequently do. Attorney General Garland reaffirmed the 2009 policies on September 30, 2022, and added requirements: the agency head must submit a declaration "based on personal consideration of the matter" (with an expert declaration if the head's is not detailed enough), intelligence agencies must consult the DNI, requests must reach DOJ at least 40 days before the privilege is to be invoked, and DOJ will not defend an invocation or a privilege-based dismissal on appeal without fresh confirmation that the 2009 standards are still met (Supplement §§A-B). A search on October 14, 2026 found no public rescission of either memorandum, though in April 2025 the Attorney

General did rescind the separate Garland-era policy on subpoenas to journalists. Counsel should ask the government to state whether the 2009 and 2022 procedures were followed.

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### 3.6 The sequence in one table

| Step | Question | If yes | If no | Authority |
|---|---|---|---|---|
| 1 | Is the very subject of the suit a secret agreement with the government (espionage or a similar relationship)? | Dismissal at the outset under the *Totten* bar | Go to step 2 | *Totten*; *Tenet v. Doe* (§2) |
| 2 | Has the head of the department lodged a formal claim after personal consideration? | Go to step 3 | No privilege | *Reynolds*, 345 U.S. at 7-8 (§3.1) |
| 3 | Is there a reasonable danger that disclosure would expose matters that should not be divulged in the interest of national security? | Privilege upheld for that evidence; go to step 4 | Evidence comes in, under protective order if needed | *Reynolds*; *Zubaydah* (§§3.1-3.2) |
| 4 | Can the plaintiff make a prima facie case without the privileged evidence? | Go to step 5 | Dismissal | §3.4, ground 1 |
| 5 | Would the privilege deprive the defendant of a valid defense? | Dismissal (the Fourth Circuit does not test the defense's merits, *Abilt*) | Go to step 6 | §3.4, ground 2 |

| Step | Question | If yes | If no | Authority |
|---|---|---|---|---|
| 6 | Are privileged and unprivileged facts so intertwined that litigation risks disclosure? | Dismissal | The case proceeds without the privileged evidence | §3.4, ground 3; *Jeppesen* |

## 4. The Groom Lake precedents

The litigation most similar to what UAP disclosure would generate arose from the Air Force's operating location near Groom Lake, Nevada ("Area 51").

**Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998).** Former workers and the widows of workers who died of cancer alleged that hazardous waste was burned in open trenches at the facility in violation of the Resource Conservation and Recovery Act. The Air Force asserted the state secrets privilege, and the President issued an exemption for the facility under RCRA §6001. The Ninth Circuit held that the RCRA exemption did not displace the privilege, that the privilege, once properly invoked, is absolute, and that summary judgment for the Air Force was proper because the privileged information was central to every element of the claims. Judge Tashima concurred on the narrower ground that the presidential exemption resolved the case. The companion case, *Frost v. Perry*, produced the two reported district court opinions on the privilege: 161 F.R.D. 434 (D. Nev. 1995), and 919 F. Supp. 1459 (D. Nev. 1996) (summary judgment for the Air Force because the privilege made discovery and trial impossible). The district court dismissed *Kasza* as moot, *Kasza v. Browner*, 902 F. Supp. 1240 (D. Nev. 1995), and the Ninth Circuit reviewed both. *Kasza*, 133 F.3d at 1162-63.

**United States v. 400 Acres of Land, Lincoln County, Nevada**, No. 2:15-cv-01743-MMD-NJK, 2017 WL 4797517 (D. Nev. Oct. 24, 2017). The United States condemned a privately held inholding with a view of the Groom Lake facility to expand the Nevada Test and Training Range. Public use was established; the remaining dispute concerned just compensation. The owners offered expert valuations built on surveys asking respondents about their interest in "extraterrestrials and/or government conspiracies" and their willingness to pay for an unobstructed view of Area 51, and the government moved to exclude them. The case shows how a court handles valuation when an asset's worth depends on secrecy and public fascination, a problem that would recur in any taking of UAP-related material (Issue E1).

**Lesson for practitioners.** In *Kasza*, the facility's existence was officially unacknowledged, which allowed the government to deny every element of the claims. Today the government has publicly acknowledged far more about UAP programs than it acknowledged about Groom Lake in the 1990s. A claim built on officially acknowledged facts is more likely to survive than one that depends on the internal operations of an unacknowledged program.

## 5. UAP case law to date

The reported UAP decisions are few, mostly FOIA cases, and largely favorable to the government.

| Case | Holding and practice significance |
|---|---|
| *Citizens Against UFO Secrecy v. NSA*, No. 80-1562 (D.D.C. 1980), aff'd, 672 F.2d 893 (D.C. Cir. 1981) (table), cert. denied, 455 U.S. 1002 (1982) | NSA withheld UFO-related signals intelligence under FOIA Exemptions 1 and 3; the district court relied on a classified in camera affidavit (Eugene Yeates, Oct. 9, 1980), later released in redacted form. The case shows how classified declarations decide UAP records suits. |
| *Lindsey v. NSA/CSS*, 915 F.2d 1565 (4th Cir. 1990) (table), 1990 WL 148422 | FOIA request included records on "a UFO codenamed Blue Sky"; the search for that item stopped when the requester did not pay fees. The court vacated summary judgment on a different item because the agency affidavit did not describe its search. |
| *Bryant v. Cheney*, 924 F.2d 525 (4th Cir. 1991) | An Army civilian writer alleged retaliation for off-duty speech about an alleged UFO coverup. The Civil Service Reform Act did not bar equitable constitutional claims, but the plaintiff lacked standing for prospective relief after his rating was expunged, and the claims failed on the merits after a bench trial. The opinion records Bryant's 1983 D.D.C. filing styled "Writ of Habeas Corpus Extraterrestrial," which sought production of bodies recovered from crashed craft; no docket for that filing has been located. |
| *Bryant v. CIA*, 742 F. Supp. 2d 90 (D.D.C. 2010), reconsideration denied, 818 F. Supp. 2d 153 (D.D.C. 2011) | FOIA suit for records of airborne encounters with UFOs; litigation produced two excised documents totaling five pages; fees denied for lack of public benefit. |
| *Slaughter v. Department of the Air Force*, No. 1:24-cv-862-RCL, 2026 WL 571249 (D.D.C. Mar. 2, 2026) | FOIA for UAP videos submitted to NASIC. Judge Lamberth held the Air Force's search declarations inadequate because they did not identify the record systems each unit searched, listed only "common" search terms, omitted "obvious synonyms" such as UAP and UFO, and did not follow up on a lead. He upheld the Exemption 1 withholding of an F-22 video |

| Case | Holding and practice significance |
|---|---|
| | showing AIM-9X launch-envelope cues. The opinion records that NASIC's UAP team operated from June 2021 to April 2023 and was then disbanded, and that a SOCOM video of a "metallic-looking spherical object" was declassified and released in June 2025. |
| *Citizens Against UFO Secrecy, Inc. v. Department of Defense*, 21 F. App'x 774 (9th Cir. 2001) | The Ninth Circuit held that DoD had shown an adequate search for the requested UFO records although it found none. The case shows that "no records" responses survive where the agency's declarations describe the search; compare *Slaughter* below. |
| *Cash v. United States* (Cash-Landrum) (S.D. Tex., filed 1984, dismissed 1986) | The only known FTCA personal-injury suit arising from a UAP encounter; reportedly dismissed after the government denied owning the craft or helicopters involved. No reported opinion exists, and accounts of the dismissal come from secondary sources. |

The FOIA cases are discussed further under Issue B1.

## 6. Procedure for classified information in civil litigation

The Classified Information Procedures Act, 18 U.S.C. App. 3, governs criminal cases only. Civil courts handling classified information rely on their inherent authority, Rule 26(c) protective orders, and procedures borrowed from CIPA practice. The tools available to a civil litigant include:

- **Protective orders** limiting access to cleared counsel, requiring storage and review in a secure facility, and governing filing under seal.
- **Security clearances for counsel**, sponsored by the agency or the court. Access still depends on the agency's need-to-know determination. The Court of Federal Claims' *Guidelines for Classified Information* (2021) state the general rule: access to classified material depends on a clearance and a need-to-know determination by the classifying agency, and a protective order does not by itself confer access.
- **Classified Information Security Officers** assigned by the Department of Justice's Litigation Security Group to handle storage, transmission, and review.
- **In camera and ex parte review** of privilege declarations and of the underlying material. Many courts accept classified ex parte declarations; counsel should press for review of the

material itself, citing *Reynolds*' warning against abdicating "judicial control over the evidence."

- **Substitutions and summaries** modeled on CIPA §§4 and 6, including stipulations to unclassified facts and pseudonymous testimony (as in the *Al Shimari* trial).
- **Classified opinions** with public redacted versions.

Reference works: Federal Judicial Center, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* (2d ed. 2013); Federal Judicial Center, *National Security Case Studies: Special Case-Management Challenges* (7th ed. 2022); CRS Report R47081, *The State Secrets Privilege: National Security Information in Civil Litigation* (2022).

**Removal and the government's interest in private suits.** A state-court suit against a contractor for conduct under a federal program will usually be removed under 28 U.S.C. §1442(a)(1), which lets a "person acting under" a federal officer remove and assert a federal defense. Even where the United States is not a party, the Attorney General may send any officer of the Department of Justice to "attend to the interests of the United States" in a pending suit (28 U.S.C. §517), which is how the government files statements of interest and asserts the privilege in private litigation (see *Sakab*, below). Counsel in a contractor-only case should plan for both.

Reported civil decisions addressing cleared counsel include *Tilden v. Tenet*, 140 F. Supp. 2d 623 (E.D. Va. 2000) (Title VII suit by CIA employee), and *De Sousa v. Department of State*, 840 F. Supp. 2d 92 (D.D.C. 2012). The Guantánamo habeas protective order, *In re Guantanamo Bay Detainee Litigation*, 577 F. Supp. 2d 143 (D.D.C. 2008), amended July 10, 2009, is the most developed civil model for cleared-counsel access. Judge Hogan entered it on the government's motion; it presumes that cleared counsel have a "need to know" classified information in their own and related cases, and bars counsel from disclosing to their clients classified information the client did not provide. Both features would carry over to UAP litigation, where a client may already hold information the government considers classified.

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## 7. Security clearance decisions

Program participants who report UAP information commonly fear clearance revocation more than discharge. The law gives them limited protection in court.

- *Department of the Navy v. Egan*, 484 U.S. 518 (1988): the Merit Systems Protection Board may not review the substance of a clearance decision.
- *Webster v. Doe*, 486 U.S. 592 (1988): the National Security Act did not preclude review of colorable constitutional claims arising from a CIA employee's termination.
- *Lee v. Garland*, 120 F.4th 880 (D.C. Cir. 2024): Title VII does not permit challenges to the substantive basis for a clearance revocation, and, on an issue the court treated as one of first impression, "federal courts may not consider constitutional claims challenging such denials or revocations"; Fifth Amendment and First Amendment retaliation claims presented nonjusticiable political questions.

In the D.C. Circuit, where most national security employment cases are filed, *Lee* leaves the statutory reprisal procedures (PPD-19, 50 U.S.C. §3341(j), the inspector general channels, and 50 U.S.C. §3373b) as the practical avenues. Issue C1 develops those procedures.

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## 8. Contractors after *Hencely* and *Cisco*

Two 2026 Supreme Court decisions change the exposure of contractors that carry out classified work.

*Hencely v. Fluor Corp.*, 608 U.S. 31 (2026), involved a soldier injured by a suicide bomber employed by a military contractor in Afghanistan. The Court held that no statute or constitutional provision expressly preempted the soldier's state tort claims, and that state-law claims premised on a contractor's combatant activities in a war zone are not preempted when the contractor was not required or authorized by the military to take the action at issue. Assuming that a federal interest in "foreclosing state regulation of the military's battlefield conduct and decisions" can preempt state law, "[n]o significant conflict exists between that interest and state law unless the challenged action can reasonably be considered the military's own conduct or decision and the operation of state law would conflict with that decision." 146 S. Ct. at 1096-97 (quoting *Badilla v. Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105, 128 (2d Cir. 2021)) (pin cites are to the Supreme Court Reporter because the U.S. Reports page breaks are not yet available). The Court abrogated *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326 (4th Cir. 2014), and *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), and found no significant conflict with a uniquely federal interest where the claim rested on the contractor's unauthorized departure from military instructions. Justice Alito dissented, joined by the Chief Justice and Justice Kavanaugh.

The second decision closes a federal route. In *Cisco Systems, Inc. v. Doe I*, 609 U.S. 141 (2026), the Court said it would "close the door that *Sosa* cracked to judicially created ATS liability," leaving the statute jurisdictional and assuming causes of action only for the three historical torts *Sosa* identified, because the class of cases in which courts could create new ATS actions "is a null set." *Id.* at 1892 (as quoted in *Al Shimari*, 2026 WL 2547096, at *1). The Fourth Circuit then vacated its* Al Shimari* panel opinion, which had recognized corporate and conspiracy liability under the ATS for torture and cruel, inhuman, or degrading treatment and affirmed $3 million compensatory awards, and ordered the case dismissed. *Al Shimari*, 170 F.4th 162, vacated on reh'g on other grounds, 2026 WL 2547096 (4th Cir. Aug. 28, 2026) (per curiam) (unpublished).

**Application.** Insider accounts describe contractors holding and studying recovered craft, and some describe contractor personnel participating in retrievals and in the detention of NHI. If those accounts are accurate, contractor conduct that exceeded or departed from government authorization is exposed to state tort claims under *Hencely*, and to federal claims only where a statute supplies one; the ATS no longer does, and the Torture Victim Protection Act reaches only natural persons (*Mohamad v. Palestinian Auth.*, 566 U.S. 449 (2012)). The contractor's best defenses will be authorization (that the government required the conduct, which returns the case to *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988)) and the state secrets privilege. The *Al Shimari* trial shows that the privilege does not automatically end such a case. Issues D5 and F2 develop these claims.

## 9. Anticipated litigation and the likely defenses

| Claim | Likely government or contractor position | Plaintiff strategy |
|---|---|---|
| FOIA or Records Collection suit for UAP records | Exemption 1 and 3; Glomar; adequacy of search | Plead official acknowledgments; insist on specific search terms (UAP, UFO, UAS, program names), custodians, and record systems (*Slaughter*); seek in camera review; use MDR in parallel (Issue B1) |
| Whistleblower reprisal and clearance revocation | *Egan*; *Lee v. Garland*; statutory exclusivity | Use statutory channels (PPD-19; §3341(j); §3373b; IG); preserve constitutional claims only outside the D.C. Circuit or for issues *Lee* left open (Issue C1) |
| Suit to enforce promises made for secret service | *Totten* and *Tenet* bar | Plead rights independent of the secret relationship; rely on official acknowledgment of the program |
| Contractor-government dispute over recovered material or program funding | *General Dynamics*; privilege; sovereign immunity | Secure custody and records before filing; frame as a takings claim in the Court of Federal Claims with a CIPA-style protective order (Issue E1) |
| Injury claims (workers, service members, experiencers) | FTCA discretionary-function and *Feres*; privilege; *Kasza* | Build the claim on officially acknowledged events; sue contractors in state court under *Hencely*; plead alternatives that can be proved with nonprivileged evidence (Issue D5) |
| Claims arising from alleged NHI capture or killing | Privilege; political question; standing; *Totten* | Sue contractors under state tort law (*Hencely*); the ATS is closed after *Cisco*; propose the |

| Claim | Likely government or contractor position | Plaintiff strategy |
|---|---|---|
| | | protective measures used in the *Al Shimari* trial; identify a plaintiff with standing (Issue F2) |
| Patent claims under §1498 for government use of privately developed technology | Privilege (*Geospatial*); secrecy orders | Expect early privilege assertion; preserve §183 compensation route (Issue E2) |
| Qui tam over misuse of program funds | Privilege (*Schwartz*); government motion to dismiss under §3730(c)(2)(A) | Build the case on unclassified financial evidence; coordinate with congressional oversight (Issue D2) |

## 10. How disclosure changes the analysis

1. **Official acknowledgment narrows the privilege.** Under *Zubaydah*, official confirmation is what strips information of protection. A presidential announcement, a statutory finding, or a released record that confirms recovered craft or NHI would remove those facts from the privilege and from the *Totten* bar, though operational details (sources, methods, locations, technical data) would remain protectable.
2. **Declassification is an executive act that courts will respect.** Courts do not declassify. A litigant who needs material should pursue declassification in parallel through mandatory declassification review and congressional channels, and should ask the court to stay rather than dismiss while that process runs.
3. **Congress can legislate procedure.** Congress has authority to regulate the use of the privilege in civil cases. Proposed State Secrets Protection Acts (introduced in several Congresses) would require judicial review of the underlying material, segregation, and non-privileged substitutes. A UAP disclosure statute could include CIPA-style civil procedures for UAP claims, a provision that official acknowledgment by the Review Board or the President waives the privilege for the acknowledged facts, and a cause of action for persons injured by UAP programs. The State Secrets Protection Act was last introduced as H.R. 4767 in the 114th Congress (2016); no version has been introduced in the 119th Congress (Issue A3).
4. **Executive policy can change faster than doctrine.** The Attorney General can decline to assert the privilege, and the 2009 Holder policy already disclaims its use to conceal wrongdoing or avoid embarrassment. Counsel should ask for the government's position on invocation early and in writing.

## 11. Comparative note

- **United Kingdom.** The Justice and Security Act 2013, Part 2 (ss. 6-11), authorizes closed material procedures in civil proceedings, with special advocates representing excluded parties. An independent review by Sir Duncan Ouseley (2021) and the Government Response (CP 1103, May 2024) assess its operation. Public interest immunity continues to apply in other proceedings. The 2013 Act responded to *Al Rawi v. Security Service* [2011] UKSC 34, [2012] 1 AC 531, in which the Supreme Court held that the courts have no common law power to replace public interest immunity with a closed material procedure in an ordinary civil damages claim, and that any such change was for Parliament.
- **Canada.** Canada Evidence Act s. 38 assigns disclosure decisions on sensitive or potentially injurious information to the Federal Court.
- **Australia.** National Security Information (Criminal and Civil Proceedings) Act 2004.

A UAP disclosure event that is international in scope will produce parallel litigation, and the availability of closed procedures abroad may make some foreign forums more hospitable to claims involving classified material than U.S. courts are.

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## 12. Practice checklist

1. Before filing, catalogue every official acknowledgment relevant to the claim (statutes, sworn testimony by officials, agency reports, PURSUE and NARA releases, FOIA productions), with dates and citations.
2. Draft the complaint so each element can be proved with unclassified evidence; plead alternatives.
3. Avoid basing claims on secret agreements; use statutory rights.
4. Seek a protective order and clearances for counsel at the outset; propose CIPA-style procedures.
5. When the privilege is asserted, demand the formal claim by the agency head, ask the court to review the material itself, propose substitutions and segregation, and oppose dismissal under each of the three *Jeppesen* grounds separately.
6. Ask the government to confirm compliance with the Attorney General's state secrets policy.
7. Run declassification requests (MDR) and congressional inquiries in parallel, and ask for a stay rather than dismissal while they proceed.
8. In contractor cases, consider state court and state tort theories after *Hencely*; anticipate removal under 28 U.S.C. §1442.
9. In FOIA cases, insist on specific search terms, custodians, and record systems (*Slaughter*).
10. Preserve the record for appeal and for later legislative or executive relief; a dismissal on privilege grounds may not be the last word if disclosure occurs while the case is pending.