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Toyota's Deadly Secrets

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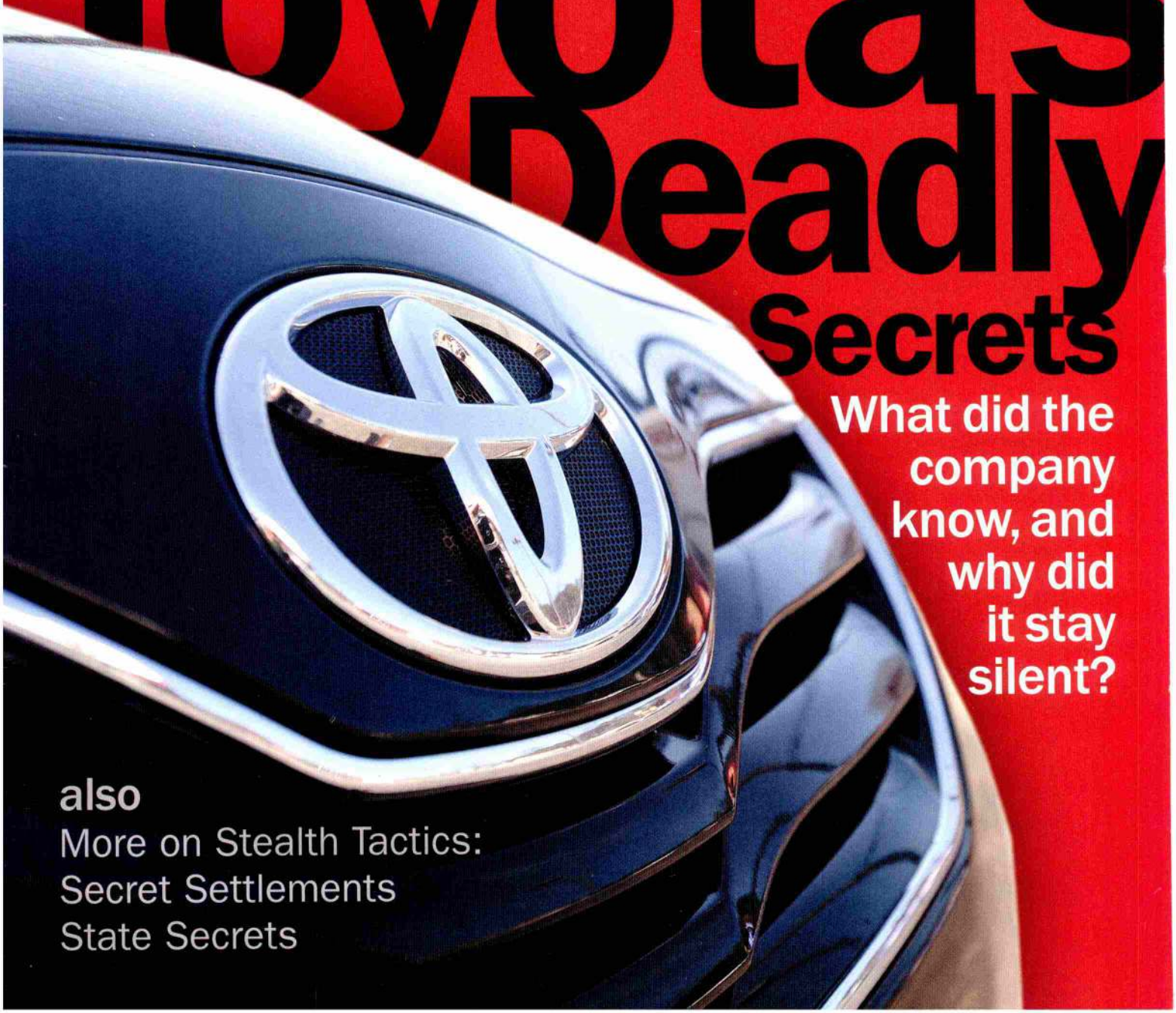

also

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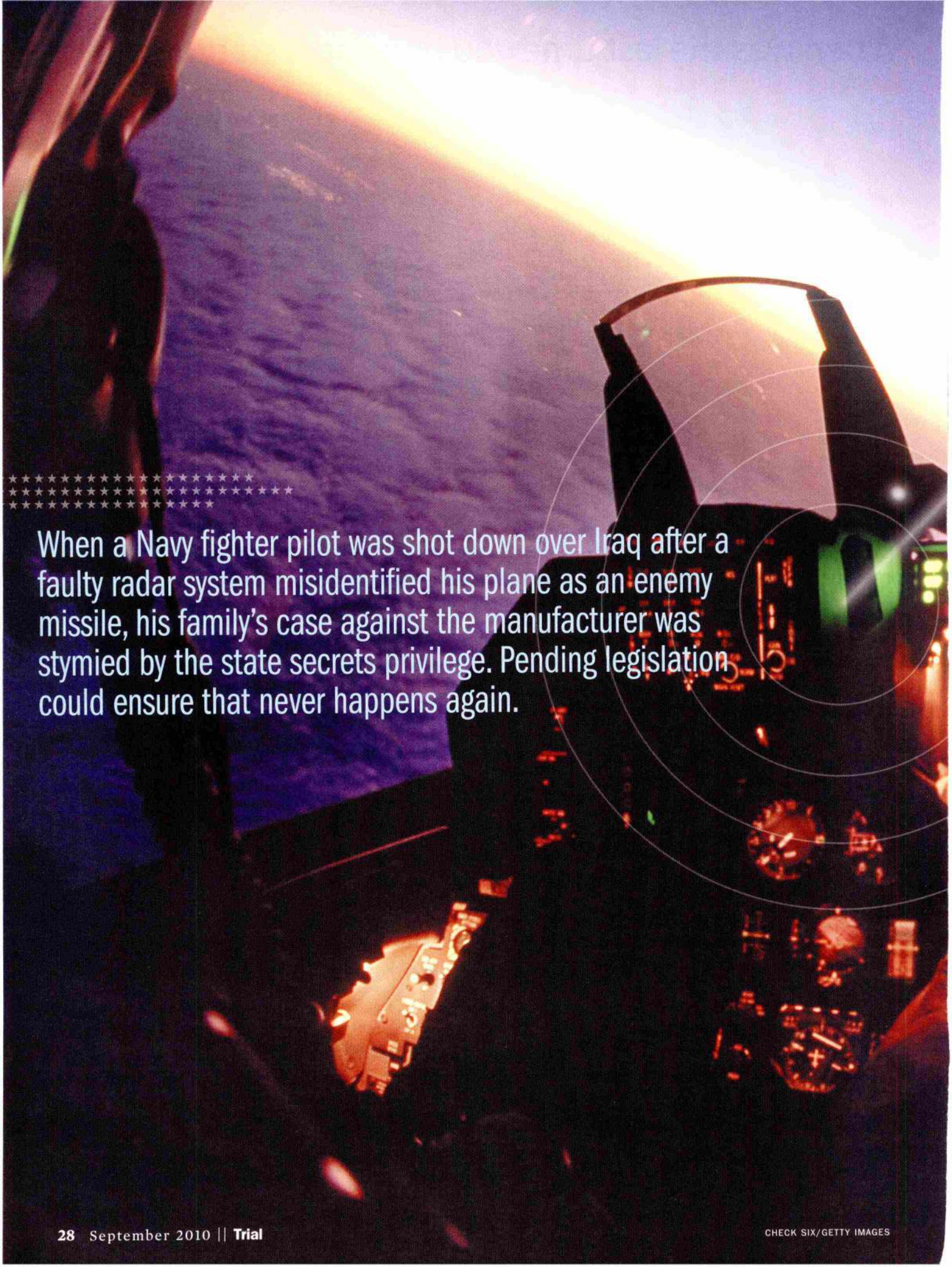
State Secrets



When a Navy fighter pilot was shot down over Iraq after a faulty radar system misidentified his plane as an enemy missile, his family's case against the manufacturer was stymied by the state secrets privilege. Pending legislation could ensure that never happens again.

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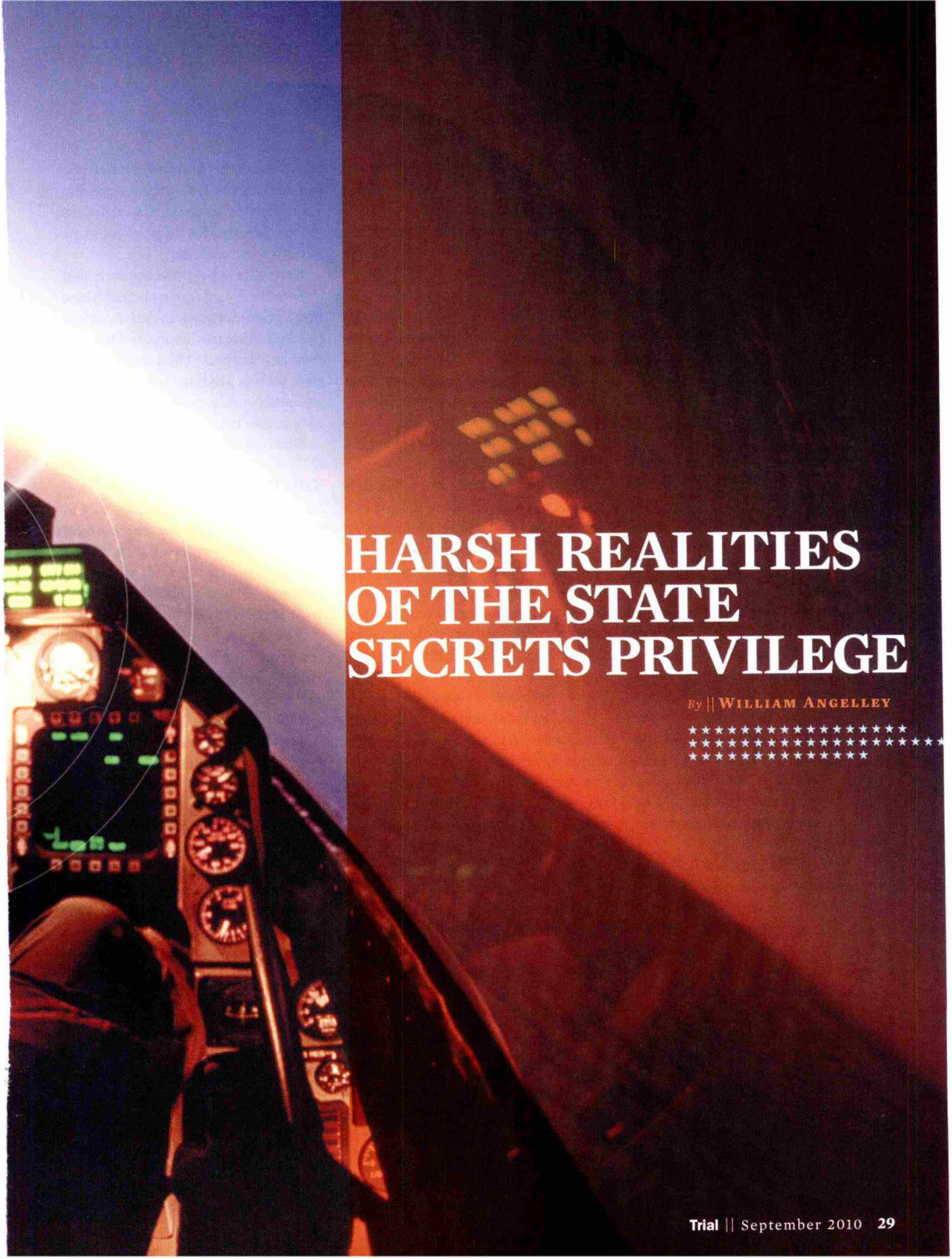


HARSH REALITIES OF THE STATE SECRETS PRIVILEGE

By || WILLIAM ANGELLEY

On April 2, 2003, a strange blip appeared on computer screens being watched by several men in a trailer in the Iraqi desert. The men—U.S. Army Patriot Missile System operators—were used to seeing errant "ghost hits" generated by the system's software, but this one had the characteristics of an actual radar contact.

At first, the radar indicated the object was an unknown aircraft. But then the Patriot system identified it as an Iraqi missile headed for the Patriot's position. Adrenaline levels ran high as someone called out, "Scud on scope!" One of the men phoned the command post, which confirmed the target's classification and ordered the Patriot operators to engage. Almost immediately, the Patriot system locked onto the target and launched two missiles.

Thirty-three thousand feet above the desert, Lt. Nathan White and his commanding officer were flying their Navy fighter jets back to their ship after completing a bombing mission near Karbala. Suddenly, alarms began sounding in their cockpits, and the pilots realized they were being pursued by anti-aircraft missiles. They began desperately taking evasive maneuvers.

In spite of Nathan's best efforts to evade, both missiles struck his plane. The aircraft wreckage and Nathan's remains were eventually located in a remote desert lake. His commanding officer escaped unharmed.

Representing Nathan's widow and three young children, my firm[1] reviewed the unclassified portions of the Army's investigation report and concluded that a malfunction within the Patriot system caused the shoot-down. We sued Raytheon Co., the system's Massachusetts-based manufacturer, even though we knew from experience that a case against the company would be difficult.[2]

Using the state secrets privilege as a shield and the government contractor defense as a sword, Raytheon was able to dismiss the action solely on unproven allegations and, more important, in spite of evidence that showed that the Patriot system had serious problems.

The state secrets privilege occupies a unique position in American jurisprudence. It exists at the convergence of several fundamental, yet often conflicting, principles of government, including transparency, constitutional checks and balances, national security, and the rights of private litigants.

In its simplest form, the privilege is nothing more than "a common law evidentiary rule that protects information from discovery when disclosure would be inimical to the national security."[3] But through its development and application, the privilege has grown sharp claws that can eviscerate the best of cases, even when the government is not a party.

Its modern roots are found in *United States v. Reynolds*, a 1953 case in which the U.S. Supreme Court set forth the basic requirements for the government's assertion of the privilege.[4] The Court specified that only the government may invoke (or waive) the privilege. A trial court must then determine whether the privilege is appropriate, without disclosing the information it is designed to protect.[5]

These requirements remain substantially intact today. The determination of whether the privilege has been properly asserted is, however, only half of the analysis. The second half concerns whether and how a case can proceed after the privilege is found to exist.

Obviously, a case must be dismissed if the loss of the evidence prevents a plaintiff from meeting the burden of proof. Conversely, a case may be allowed to continue if a plaintiff can meet the burden without the privileged material.[6]

Most courts have ruled that the effect of a successful invocation of the privilege is simply that the evidence is unavailable, and the case moves forward accordingly, with the only consequence being the loss of the evidence.[7] Yet, the privilege's true effect is more complex.

Courts have held, for instance, that if the subject matter of a plaintiff's case involves state secrets, the privilege will preclude critical evidence, and the case must be dismissed.[8] This reveals that the state secrets privilege is more than an evidentiary privilege—it can also operate as "a rule of non-justiciability, akin to a political question."[9]

Valid Defense

An important distinguishing facet of the privilege is that several courts have held that a case may be dismissed if the privilege deprives a defendant of a valid defense.[10] This notion has no counterpart in other purely evidentiary privileges.

Most courts have offered no definition of the term "valid defense," seeming to treat it as if it means "alleged defense." Recognizing that this approach is fraught with the potential for abuse, the District of Columbia Circuit explained in 2007 that a valid defense is one that is "meritorious and not merely plausible and would require judgment for the defendant."[11] Deeming the phrase to mean any "potentially available" defense, the court said, would require dismissal of virtually every case in which the privilege is invoked, creating a "system of conjecture" rather than one based on evidence.[12]

The key question is how a court determines whether an alleged defense is valid if it has little or no access to the privileged information. Many courts have taken the position that judicial review of information that is alleged to contain state secrets should extend only far enough to make a determination as to the existence of the privilege.[13] A minority of courts have held, however, that courts have the responsibility to review the classified record to assess the validity

of alleged defenses.[14] This approach is more reasonable and equitable and, as discussed below, is reflected in two bills pending in Congress.

White v. Raytheon Co., the case we brought on behalf of Nathan's family, provides a poignant example of the valid-defense question and demonstrates its importance. Much of the Army's report about its investigation into Nathan's death was classified and heavily redacted. The unclassified portions, however, contained significant information about the cause of the shoot-down, and we were confident that we could meet our burden under the law of Massachusetts—where the case was filed—using only the unclassified record.

In the report, the Army took a broad approach in assigning blame for the shoot-down—contributing factors included failures in training, communication, and doctrine. But the report also showed that if the system had simply depicted Nathan's aircraft as friendly, as it was designed to do, the shoot-down would not have happened.

For example, the report contained a summary section that, in our opinion, plainly acknowledged the Patriot system's misidentification of Nathan's aircraft as an enemy missile.[15] It also contained several handwritten statements from the Patriot operators that recounted how the system malfunctioned. A written briefing from the Army to the White family in December 2004 confirmed that the Patriot system misclassified Nathan's jet as a ballistic missile "due to some type of electromagnetic anomaly."[16]

Other evidence confirmed our claims. Raytheon filed with the court a declaration from a retired Army officer employed by the company. The declaration alleged that the Army was aware that there had been documented instances in which the Patriot system misidentified friendly vehicles as enemy targets.[17] And an investigation revealed that about two weeks before Nathan's plane was shot down, another Patriot system misidentified a British aircraft as an anti-radiation missile and shot it down, killing both crewmen.[18]

After Raytheon sent a voluminous document request to the Army, the U.S. Department of Justice (DOJ) filed a motion for a protective order in the case, although it did not seek to intervene. Following the requirements of *Reynolds*, the motion asserted that the state secrets privilege applied to all "design, performance, functional characteristics, and vulnerabilities of the Patriot Missile System," along with "information concerning rules of engagement authorized for [the system], and military operational orders applicable to [it]."[19]

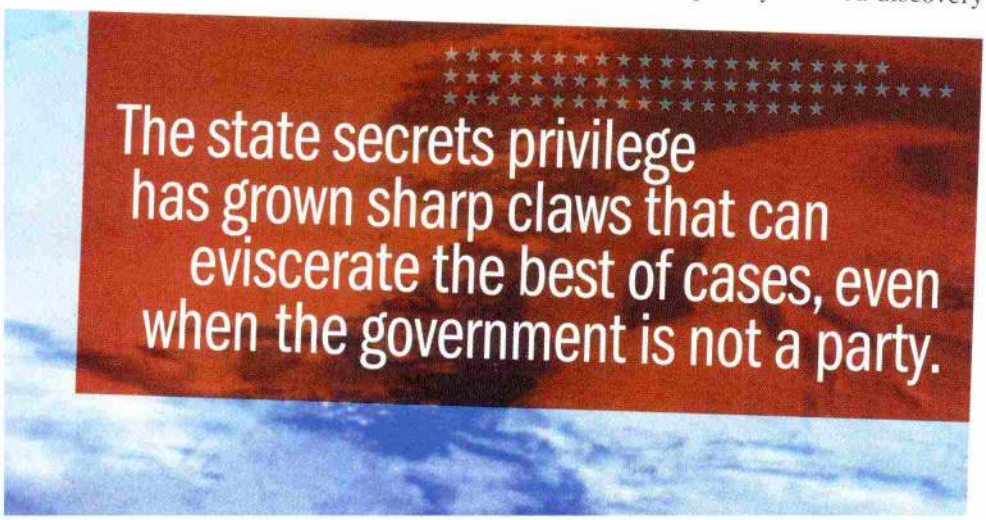
Because the information was classified and we did not feel we needed it for our case, we did not object. Interestingly, neither did Raytheon, which had asked for it. The court entered the protective order but expressly allowed discovery regarding the unclassified record.[20]

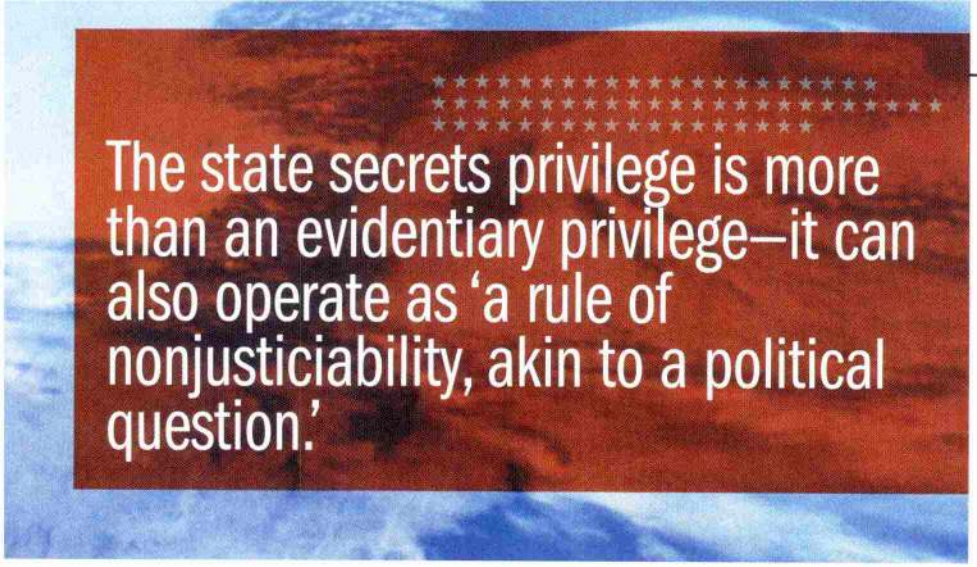
Raytheon then moved to have the case dismissed under Federal Rule of Civil Procedure 12(b)(6), asserting, in part, that it could not prove its government contractor defense because the required evidence was protected by the state secrets privilege. The applicability of the government contractor defense turns on whether the United States approved reasonably precise specifications for equipment, the equipment conformed to those specifications, and the manufacturer warned the government about dangers in the use of the equipment that were known to the supplier but not the government.[21]

We countered that it was clear from the unclassified record that the Patriot system could not have met the government's specifications given the nature of the failure involved and Raytheon's admission that the Patriot system frequently could not discern friend from foe. We asked the court to review the classified record *in camera* to determine whether Raytheon could meet its burden of proving the necessary elements of the government contractor defense. The court indicated its willingness to do this, but the DOJ refused to provide any portion of the classified record.

Given the government's position, the court ultimately found that it had no choice but to dismiss the matter. The court made it clear that the unclassified record was sufficient to support our prima facie case but stressed that dismissal was warranted because neither Raytheon nor the court had access to the evidence needed to evaluate the validity of the alleged government contractor defense.[22]

Raytheon was able to obtain dismissal of the action without proving a single element of the defense or providing evidence that the defense was valid. This is particularly troubling because if the court had been able to conduct a full *in camera* review of the classified record,





The state secrets privilege is more than an evidentiary privilege—it can also operate as 'a rule of nonjusticiability, akin to a political question.'

we believe that Raytheon's defense would likely have failed.

The State Secrets Protection Act

The *White* case demonstrates the need for reform in this narrow but vitally important area of the law. Two bills pending in Congress address the court's obligation to review the sealed record, to determine both whether the privilege is appropriate and whether it supports the alleged defenses. House Resolution 984 and Senate Bill 417, both entitled the State Secrets Protection Act, were introduced on February 11, 2009. The House judiciary committee has recommended that the bill go to the full House for a vote, while the Senate bill is still in committee.

Both bills essentially codify the *Reynolds* standard for determining the appropriateness of the government's assertion of the privilege. They also address significant issues that frequently arise in state secrets cases, such as the ability of a federal court to make an *in camera* review of the protected information, the availability of security clearances for attorneys handling cases involving classified information, and the potential for using nonprivileged substitutes in place of privileged information.

A few of the more critical provisions of the bills should be strengthened or clarified. Both, for example, contain sections that address the government's refusal to provide nonprivileged information to the court for *in camera* review but remain silent with respect to privileged information. While one could infer from the legislation that the court may compel the government to produce privileged information, the law should explicitly grant the court that authority.

Moreover, neither bill states strongly enough that a case should not be dismissed until a full *in camera* review has been made to analyze the validity of an asserted claim or defense. On this point, the Senate version references, but does not define, the term "valid defense." The law should define a valid defense as one that is supported by the facts and evidence and should preclude dismissal until a court determines that a defense is valid after *in camera* review.

Nathan's wife and children should have been allowed to pursue their claims that his death was the result of the negligence of one of America's largest defense contractors. They were denied that right, and Raytheon has been allowed to escape accountability because of fundamental flaws in the common law interpretation of the state secrets privilege.

Justice Louis Brandeis once said, "If we desire respect for the law, we must first make the law respectable." The pending legislation could, with minor adjustments, correct the common law deficiencies regarding the state secrets privilege. Congress should act swiftly to ensure that the men and women in our nation's armed services are afforded full protection under the law.

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Notes

1. At the time of this review, I was a partner in the Los Angeles office of Kreindler & Kreindler LLP. I have since opened my own firm in Dallas.
2. The facts described in the introduction are based on the Army's investigation report and related materials in the case, *White v. Raytheon Co.*, 2008 WL 5273290 (D. Mass. Dec. 17, 2008).
3. *See In re U.S.*, 872 F.2d 472, 474–75 (D.C. Cir. 1989).
4. 345 U.S. 1 (1953).
5. *Id.* at 7–8.
6. *See id.* at 11.
7. *See e.g. Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 270 (4th Cir. 1980); *In re Sealed Case*, 494 F.3d 139, 144–45 (D.C. Cir. 2007); *In re U.S.*, 872 F.2d at 476; *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983).
8. *See e.g. Sterling v. Tenet*, 416 F.3d 338, 345–46 (4th Cir. 2005); *Kasza v. Browner*, 133 F.3d 1159, 1166–67 (9th Cir. 1998).
9. *See Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1197 (9th Cir. 2007).
10. *See e.g. Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992); *Tenenbaum v. Simonini*, 372 F.3d 776, 777–78 (6th Cir. 2004); *Kasza*, 133 F.3d at 1166; *In re U.S.*, 872 F.2d at 476–77.
11. *In re Sealed Case*, 494 F.3d at 149.
12. *Id.* at 149–50.
13. *See e.g. Reynolds*, 345 U.S. at 10; *El-Masri v. U.S.*, 479 F.3d 296, 306 (4th Cir. 2007).
14. *See e.g. In re Sealed Case*, 494 F.3d at 151; *Ellsberg*, 709 F.2d at 64.
15. Commander, U.S. Naval Forces C. Command, *Review of Report of Investigation into Patriot Shootdown of U.S. Navy F/A-18 Hornet on 2 April 03 over Iraq* ¶3 (Aug. 22, 2003) (on file with author).
16. Power Point presentation, *F/A-18 Fratricide Incident in Operation Iraqi Freedom* (Dec. 2004) (on file with author).
17. Memo. in Support of Def.'s Mot. Dismiss, Decl. of Daniel Roy Kirby, Ex. 3, *White v. Raytheon*, No. 1:07-cv-10222-RGS (June 26, 2007).
18. Exec. Summary, *Review of Finding in the Friendly Fire Report of Investigation, Patriot Shoot Down of U.S. Navy F/A-18, Near Karbala Gap, An Najaf, 2 Apr. 03, 2003* ¶4 (undated) (on file with author).
19. Protective Or. at ¶2, *White v. Raytheon*, No. 1:07-cv-10222-RGS (Sept. 10, 2008).
20. *Id.* at ¶4.
21. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988).
22. *White*, 2008 WL 5273290, at *5.