

Case No. 09-1992

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID AARON TENENBAUM AND
MADELINE GAIL TENENBAUM

Plaintiffs-Appellants,

v.

JOHN ASHCROFT, ET AL.

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan, Sothern Division
Case No. 09-10612
(The Honorable Robert H. Cleland)

**BRIEF OF *AMICUS CURIAE* ANTI-DEFAMATION LEAGUE
IN SUPPORT OF PLAINTIFFS-APPELLANTS SUPPORTING
REVERSAL OF THE DISTRICT COURT OPINION**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 6th Cir. R. 26.1, the Anti-Defamation League (“ADL”) states that it is a 501(c)(3) non-profit organization. ADL has no parent corporation. ADL is not an affiliate of any publicly owned corporations. No publicly owned corporation that is not a party to this appeal has a financial interest in the outcome of this case. No publicly owned corporation holds ten percent or more of the stock of ADL. ADL does not issue any stock.

Dated: October 8, 2009

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STATEMENT OF INTEREST

The Anti-Defamation League (“ADL”), founded in 1913, is one of the Nation’s premier human relations and civil rights agencies and is dedicated in purpose and program to combating anti-Semitism and all forms of bigotry, defending democratic ideals, and protecting civil rights for all. Its mission statement reads:

The immediate object of the League is to stop, by appeals to reason and conscience and, if necessary, by appeals to law, the defamation of the Jewish people. Its ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens

Anti-Defamation League Charter (1913). Consistent with that mission, ADL has a long and distinguished record of fighting against religious discrimination and advocating for the preservation of religious freedom. This mission is particularly apt in this case, where a litigant *twice* has been denied his day in court due to procedural bars even though an Official Department of Defense Report makes it clear that he was unlawfully discriminated against based on his religion.

Anti-Semitism is vile, shocks the conscience, and has no place in our system of justice. Sadly, it may be observed with surprising frequency in America, even

today.¹ This case involves not only the religious and ethnic animus typically associated with anti-Semitism, but also the long-standing and common “dual loyalty” stereotype. This case also presents the unfortunate situation where a U.S. Army engineer seeking redress for the government’s egregious discriminatory conduct has been denied access to the courts twice without any consideration of the merits of his claims.

ADL writes in support of Plaintiffs-Appellants David Aaron Tenenbaum (“Mr. Tenenbaum”) and Madeline Gail Tenenbaum to show how the “dual loyalty” stereotype has affected these individuals and how a number of American Jews are increasingly victimized by the same. As such, ADL urges this Court to reverse the trial court’s determination that their claim is barred by *res judicata* and collateral estoppel, allowing the Tenenbaums to have their day in court for the first time in eleven years.

Per Federal Rule of Appellate Procedure 29(a), ADL files this brief with the consent of the parties.

¹ See e.g., http://www.adl.org/PresRele/ASUS_12/5159_12.htm and http://www.adl.org/Anti_semitism/poll_2007/8.asp (reporting on ADL’s 2007 Survey of American Attitudes Towards Jews in America, which found that 15% of Americans – or nearly 35 million adults – hold views that are “unquestionably anti-Semitic,” compared to 14% in 2005); Kenneth L. Marcus, *Higher Education, Harassment, and First Amendment Opportunism*, 16 WM. & MARY BILL OF RIGHTS J. 1025 (2008) (describing recent incidents of anti-Semitism on college campuses).

ARGUMENT

As an engineer, David Tenenbaum admirably served the United States Army for the past twenty-five years. Among other noble pursuits, Mr. Tenenbaum designed the Light Armor Survivability Systems (“LASS”) program as a joint effort between the United States, Germany and Israel to increase the safety and survivability of deployed forces. He has been lauded by long-time supervisors, who have noted his “loyalty to the U.S. Government,” “impeccable integrity,” and “ability to secure classified data.” (R. 21, Plaintiffs’ Answer and Brief in Opposition to Defendants’ Motion to Dismiss First Amended Complaint or in the Alternative for Summary Judgment (“Response”) at Exh. 8, 9). In addition, Claude M. Kicklighter, then the Inspector General of the United States Department of Defense (“DoD”), wrote that Mr. Tenenbaum “is, and has always been, a dedicated, loyal and professional civil servant in the service of our Nation.” (R. 21, Response at Exh. 1, Second Page).

Based on his impeccable record and lifelong devotion to protecting the safety of U.S. troops, Mr. Tenenbaum should have been commended by the U.S. government. Instead, Mr. Tenenbaum, a devout member of the Jewish religion, was falsely accused of being an Israeli spy by certain members of the U.S. government who questioned his loyalties to the U.S. because of his religion. Based on these incorrect perceptions and the discriminatory actions of those in power,

Mr. Tenenbaum was subjected to an eight-year period of invasive investigations conducted by numerous government agencies, not one of which resulted in espionage charges or a criminal prosecution. In fact, following the FBI's "exceptionally thorough" investigation against Mr. Tenenbaum, the United States Attorney's Office concluded that there was insufficient evidence to even sustain an indictment. (R. 21, Response at Exh. 6).

After conducting its own thorough examination of the government's inquiry into Mr. Tenenbaum, the DoD Office of the Inspector General ("OIG") concluded that Mr. Tenenbaum "was the subject of inappropriate treatment by Department of the Army and Defense Investigative Service officials. . . ." and that, "[b]ut for Mr. Tenenbaum's religion, the investigations would likely have taken a different course." (R. 21, Response at Exh. 1, p. ii). As highlighted in the 55-page report of the OIG ("DoD Report"), the discriminatory actions of those responsible for initiating and continuing the investigation caused Mr. Tenenbaum to suffer tangible injuries both professionally and personally. For instance, Mr. Tenenbaum was placed on paid administrative leave for over a year, lost his access to classified information, was stripped of his security clearance, had his computer seized, had 24-hour surveillance conducted of his home and family, had his house raided on the Sabbath, and was subjected to unwarranted harassment along with his family.

When seeking redress for the harm caused by the government's egregious discrimination, Mr. Tenenbaum was denied access to the courts – not once, but twice – in the very nation that he dutifully served for the past quarter-century. Both dismissals of Mr. Tenenbaum's claims were decided on purely technical procedural grounds without even addressing the merits of his serious allegations or considering the DoD Report. Now, Mr. Tenenbaum finds himself with no legal recourse even though the DoD itself has compellingly determined that he was victimized by the discriminatory actions of DoD personnel. This absurd result amounts to a manifest injustice that should not be tolerated by this, or any other, Court.

I. APPLICATION OF THE “DUAL LOYALTY” STEREOTYPE HAS RESULTED IN DISPARATE TREATMENT OF, AND ILLEGAL DISCRIMINATION AGAINST, A NUMBER OF AMERICAN JEWS.

At the outset, there can be no dispute that the Plaintiff-Appellant, Mr. Tenenbaum, was the victim of discrimination on account of his Jewish faith and ethnic background; the DoD Report so found. (R. 21, Response at Exh. 1, p. 27). As such, the actions of the Defendants-Appellants and others directed against Mr. Tenenbaum are inexcusable, if not also illegal and unconstitutional. Moreover, when these actions are placed in proper context, it becomes apparent that Mr. Tenenbaum is just one of a number of American Jews who have been victimized by a pattern of discrimination based on the so-called “dual loyalty” stereotype – a

stereotype which holds that Jews as a group are more loyal to their religious leaders, or to Israel, than they are to the country in which they live.

In this section of the brief, ADL will first explain what is meant by the dual loyalty stereotype and provide examples of how it has been applied to the Jewish people, both historically in other countries and more recently in the United States, continuing even into the 21st century. ADL next will show how adherence to the dual loyalty stereotype, particularly in government-dominated fields such as the military and the intelligence community, has resulted in a pattern of discrimination against American Jews, which, again, continues to this day.

A. The “Dual Loyalty” Stereotype: Definition and Historical Examples.

Generally speaking, the term “dual loyalty” is used to describe a situation where a person has loyalties to two separate, but potentially conflicting interests – classic examples being a person who is a dual citizen or an immigrant from one country living in a second country. Of particular relevance here, the term is also used to describe people who have religious, cultural or political ties to an interest other than the country of their primary residence. In any of these contexts, references to dual loyalty are used to target and discredit particular persons or groups and to call into question their loyalty to the country in which they reside.

Accusations of dual loyalty with respect to the Jewish people are rooted in their historic separateness and in the conditions following the expulsion of Jews

from ancient Palestine. Lacking a homeland of their own, Jews dispersed to various countries where they often were compelled to live together with other Jews, and separate from other, non-Jewish inhabitants. Often, this separateness resulted in Jews being denied even the most basic rights of citizenship and acceptance. Charges of dual loyalty were asserted at least as early as the first century by the Romans, resulting in a pogrom, or violent assault directed against Jews.²

The classic example of doubting the Jews' loyalty to the state is the Dreyfus case, an anti-Semitic incident occurring around the turn of the last century that engaged French society and its political forces for many years. Captain Alfred Dreyfus was accused by the French General Staff of spying for the Germans, based on a list of documents found in the wastepaper basket of the German attaché. Although there was no evidence tying Dreyfus to the document, the General Staff reasoned that no Christian officer could possibly be guilty of such an offense. Dreyfus was tried, convicted and sentenced to imprisonment on Devil's Island. Five years later, he was brought back and retried, convicted of "treason in extenuating circumstances," but pardoned. After a further investigation and retrial, Dreyfus ultimately was declared innocent twelve years after the case began.³

² Leonard P. Zakim, Janice Ditchek, *Confronting Anti-Semitism: A Practical Guide* 26 (2000).

³ *Id.*

Jews also were commonly regarded as traitors and enemies of the state in the former Soviet Union. For example, Jews often were singled out for persecution and sent to labor camps in Siberia. In 1952, in what became known as the “Doctors’ Plot,” six Jewish and three non-Jewish doctors were accused of conspiring to poison the Soviet leadership under orders from Western intelligence and the American Jewish Joint Distribution Committee, a non-governmental organization providing humanitarian services to Jews and others around the world. And, in 1953, members of the Soviet-Jewish intelligentsia were executed under the pretext that a postwar proposal by the Jewish Anti-Fascist Committee to settle Jews in the Crimea was actually a plot to create a pro-Western base inside the Soviet Union.⁴

The formulation of the dual loyalty stereotype shifted with the birth of Israel as a Jewish state in 1948. Before that time, as explained above, Jews had been accused of having a greater loyalty to their religion, or to fellow Jews, than to the state. With the formation of Israel, the dual loyalty stereotype was recast as one in which Jews were suspected of putting their loyalties to Israel before their loyalties to the country of their residence. Indeed, the danger that this would occur was recognized at the beginning of the 20th century with the growth of the Zionist movement. Jacob Schiff, one of the wealthiest American Jews, warned that Zionist

⁴ *Id.* at 27.

activity in the U.S. would cause Jews to be regarded “as an entirely separate class, whose interests are different than those of the American people.”⁵

Consistent with Jacob Schiff’s prediction, the dual loyalty stereotype that American Jews hold a greater loyalty to Israel than to the United States continues to be publicly expressed even to the present day. Some notable examples include:

- In an article in the Nation, in March 1986, novelist Gore Vidal wrote, “Jews are Israel’s ‘fifth columnists’ who stay on among us in order to make propaganda and raise money for Israel.”
- In 1991, in opposing U.S. participation in the Gulf War, the columnist, talk-show host and future presidential candidate Pat Buchanan contended that “there are only two groups that are beating the drums for war in the Middle East -- the Israeli Defense Ministry and its amen corner in the United States.”
- In an October 1998 address, Nation of Islam leader Louis Farrakhan said, “Every Jewish person that is around the president is a dual citizen of Israel and the United States of America... And sometimes, we have to raise the question, ‘Are you more loyal to the state of Israel than you are to the best interest of the United States of America?’”⁶
- Between 1992 and 2007, surveys of American attitudes towards Jews in America conducted by ADL have consistently found that between 31% and 35% of those polled agreed with the statement, “Jews are more loyal to Israel than America.”⁷

⁵ Gabriel Schoenfeld, *Dual Loyalty and the “Israel Lobby,”* at http://www.myjewishlearning.com/israel/Contemporary_Life/Society_and_Religious_Issues/Israeli-Diaspora_Relations/Dual_Loyalty/The_Israel_Lobby.shtml#.

⁶ Zakim and Ditchek, *Confronting Anti-Semitism: A Practical Guide* at 27.

⁷ See http://www.adl.org/PresRele/ASUS_12/5159_12.htm and http://www.adl.org/Anti_semitism/poll_2007/8.asp.

This charge of dual loyalty continues today. Similar allegations of dual loyalty have been made, regarding Jewish “neoconservatives” who were proponents of the 2003 U.S. invasion of Iraq,⁸ and regarding the so-called “Israel Lobby.”⁹ Indeed, as recent as 2008, public allegations were made that American Jews are attempting to embroil the U.S. in a war with Iran in order to strengthen Israel’s regional power.¹⁰ In each of these examples, American Jews have been accused by non-Jews of promoting pro-Israeli policies and actions at the expense of U.S. interests.

Thus, the so-called dual loyalty stereotype has shaped the way in which Jews have been perceived by non-Jews for nearly two millennia. Moreover, this stereotype continues to influence how American Jews are perceived in the United States, and, indeed, throughout the world. As discussed in the following sections, this perception of Jews can, and often does, result in disparate treatment and even outright discrimination.

⁸ See, e.g., Patrick J. Buchanan, *Whose War?*, *The American Conservative* (March 24, 2003) at <http://www.amconmag.com/article/2003/mar/24/00007//>; Kathleen and Bill Christison, *Dual Loyalties, The Bush Neocons and Israel*, *Counterpunch* (Sept. 6, 2004) at <http://www.counterpunch.org/christison09062004.html>.

⁹ See, e.g., John J. Mearsheimer, Stephen M. Walt, *The Israel Lobby and U.S. Foreign Policy*, pp. 146-49 (2007).

¹⁰ “The Disloyalty Charge,” at http://www.adl.org/main_Anti_Semitism_Domestic/Year_in_Anti-Semitism_2008.htm?Multi_page_sections=sHeading_2.

B. Adherence to the Dual Loyalty Stereotype in the Government Sector Has Resulted in a Pattern of Discrimination Against American Jews.

The negative impacts of discrimination based on the dual loyalty stereotype are felt, perhaps most acutely, by Jews who are employed or seeking employment in the government sector, especially in the military and intelligence-related fields where security clearances are required. Here, the stereotype can lead to the perception among coworkers and superiors that Jewish workers are untrustworthy, disloyal and even prone to traitorous behavior on account of their allegedly divided loyalties between Israel and their home country, particularly, the United States. As a result, Jewish workers may be denied security clearances and excluded from employment, restricted in their job duties and opportunities for advancement, fired or even imprisoned.

1. The DoD officially invoked and then purportedly rejected this pernicious dual loyalty stereotype.

In what is undoubtedly one of the most blatant, overt articulations of the dual loyalty stereotype appearing in the government context, a 1995 confidential DoD memo issued to government contractors warned that Israel would try to spy on those contractors and use the religious affinities of their Jewish employees to obtain secret information.¹¹ The confidential memo included a profile that

¹¹ Tim Weiner, *U.S. Memo on Israel Cited its Spy Aims*, The New York Times (Feb. 3, 1996) at <http://www.jonathanpollard.org/1996/020396.htm>.

described Israel as a non-traditional adversary in the world of espionage, and further stated that “[t]he strong ethnic ties to Israel present in the United States coupled with aggressive and extremely competent intelligence personnel has resulted in a very productive collection effort.” (R. 21, Response at Exh. 1, p. 26). The memo also stated that Israel’s recruitment techniques include “ethnic targeting, financial aggrandizement, and identification and exploitation of individual frailties” of U.S. citizens. *Id.* The warning about Israel was later withdrawn by the Pentagon in December 1995, after senior officials decided that its author had improperly singled out Jewish “ethnicity” as a specific counterintelligence concern.¹² *Id.*

The document later became public, and in late January 1996 was the subject of a vigorous protest by ADL. ADL Director Abraham Foxman sent a letter to Defense Secretary William Perry, stating that, “[t]his is a distressing charge which impugns American Jews and borders on anti-Semitism.” ADL’s letter elicited an immediate reply from Assistant Secretary of Defense Emmett Paige Jr., in which he stated that “the content of this document does not reflect the official position” of the DoD. Paige further elaborated that “singling out ethnicity as a matter of counterintelligence vulnerability is particularly repugnant to the Department. We

¹² R. Jeffrey Smith, *Defense Memo Warned of Israeli Spying, ‘Ethnic Ties’ Charge Draws ADL Rebuke*, The Washington Post (Jan. 30, 1996) at <http://www.jonathanpollard.org/1996/013096.htm>.

have instructed appropriate personnel that similar documents will not be produced in the future.”¹³ As explained below, however, this strong disavowal by the DoD did not prevent Mr. Tenenbaum’s Jewish ethnicity from becoming a factor in the decision, just nine months later, to conduct a discriminatory counterintelligence investigation of him under false pretenses.

2. The CIA also engaged in discrimination based on the dual loyalty stereotype.

In addition to the DoD, published reports establish that, during the 1990s, the CIA was also pursuing counterintelligence investigations against American Jews based on their alleged ties to Israel. One of the most well-publicized incidents involved Adam Ciralsky, a Jew from Milwaukee who was hired as an attorney for the CIA. The CIA accused Ciralsky of not fully disclosing his ties with Israel while undergoing a polygraph test, but Ciralsky's lawyer claims that Ciralsky was singled out for especially harsh treatment from the beginning because of his Jewish background. According to a report on National Public Radio, Ciralsky's file was flagged initially for "strong ethnic ties," and reflects an anti-Jewish paranoia. For example, the file lists Ciralsky's proficiency in Hebrew but

¹³ *Id.*

not Spanish, his trips to Israel but not China, and his Judaic Studies minor in college but not his International Affairs major.¹⁴

The anti-Jewish motivation for investigating Ciralsky is further demonstrated by several internal CIA memos. In one such memo, written as the CIA was investigating Ciralsky, a senior CIA official stated, “[f]rom my experience with rich Jewish friends from college, I would fully expect Adam's wealthy daddy to support Israeli political/social causes.” Another memo laid out the strategy for questioning Ciralsky, as follows: “I think that it is important that he state openly he and his family's support for the Likud Party. We are sophisticated enough and broad-minded enough to understand the unique ties that bind American Jews to their brethren in Israel.” Yet another memo suggested that then-CIA director George Tenet had decided to fire Ciralsky even before the investigation was completed. The memo, dated September 17, 1997 and stamped “restricted handling, hand carry only, eyes only,” stated that “Tenet says this guy is outta here because of a lack of candor.”¹⁵

Articles reporting on the Ciralsky situation identify other instances of discrimination by the CIA against Jews or persons with alleged ties to Israel. One

¹⁴ D.D. Levitin, *CIA Accused of Systematic Anti-Semitism*, Yated Ne'eman (April 16, 1999) at <http://www.jonathanpollard.org/1999/041699a.htm>.

¹⁵ Matthew Dorf, *Jewish Attorney to Sue CIA; Claims Rampant Anti-Semitism*, Jewish Telegraphic Agency (April 13, 1999) at <http://www.jonathanpollard.org/1999/041399.htm>.

such article, from April 1999, stated that at least two other Jewish employees of the CIA who required security clearances had encountered trouble with the agency, and that other government employees reportedly had been blocked from positions because the CIA, which handles many background checks for such employees, would not grant the necessary clearances.¹⁶ For example, it has been reported that an employee at the State Department failed to receive a promotion to serve on the National Security Council because he allegedly failed a lie detector test about his contacts with Israelis. In addition, a non-Jewish CIA employee won a six-figure settlement against the CIA because she was suspended after a trip to Israel. The employee, a station chief, received approval to visit Israel on a trip she found in a tour book. While in Israel, she was asked if she would like to meet with a Mossad official. She refused and reported the conversation to the CIA, but was suspended nonetheless.¹⁷

3. The dual loyalty stereotype continues to create difficulties for persons seeking security clearance who have ties to Israel.

Turning to the present decade, a study published in April 2006 was reported to have found that U.S. citizens who have ties to Israel or an Israeli-American dual citizenship encountered difficulties in obtaining security clearance from the

¹⁶ See *id.*; see also Levitin, *CIA Accused of Systematic Anti-Semitism*, at <http://www.jonathanpollard.org/1999/041699a.htm>.

¹⁷ See *id.*

Pentagon and were dealt with in a manner similar to that of Americans who have ties with hostile nations.¹⁸ The study was conducted by Sheldon I. Cohen, an attorney who handles government and private employment cases with emphasis on national security law. It examines the decisions by the Defense Office of Hearings and Appeals (DOHA) concerning clearance requests by Americans with ties to Israel and finds that in many cases the applicants are questioned on the issue of dual loyalty. The protocols of DOHA reveal that Americans with dual Israeli citizenship are frequently asked questions regarding their loyalties to the U.S. and Israel.¹⁹ According to the report, “The appeal board used the hypothetical situation of an applicant being asked to disclose classified information, not for the purpose of harming the United States, but to either increase the security of Israel so his family in Israel could live in peace and safety, or to reduce threats to the lives of Israeli military personnel, which might include the applicant's sister and brother.”²⁰

The report describes one case in which an applicant who was born in Israel and later became a U.S. citizen was asked hypothetically if he would take up arms against Israel if the U.S. would require him to do so. He said he could not conceive

¹⁸ Nathan Guttman, *Israeli ties impair US security clearance*, The Jerusalem Post (May 18, 2006) at <http://www.jonathanpollard.org/2006/051806a.htm>.

¹⁹ *Id.*

²⁰ Sheldon I. Cohen, *Israel: Foreign Preference - Foreign Influence Cases, A Review of DOHA Decisions*, at p. 5 (April 2006) at <http://www.sheldoncohen.com/publications/Israel%20Connection%20-%20DOHA%20Cases.pdf>.

of such a situation and could not see himself taking up arms against Israel. The appeals board denied his request for clearance based on “foreign preference.”²¹ The author of the report, Mr. Cohen, said that from his experience, Israel is the only country about which these hypothetical questions are asked. Further, Pentagon sources confirmed that ties with Israel are seen as a problem when requesting security clearance and that even elderly family members living in Israel may provide a reason to revoke or deny clearance.²²

Thus, over the last two decades (if not longer), not just one, but several U.S. governmental agencies have applied the dual loyalty stereotype in a manner that results in disparate impacts and discrimination against American Jews and those with ties to Israel. It should come as no surprise, then, that personnel within the DoD followed precisely the same approach in Mr. Tenenbaum’s case, as explained below.

II. THE FACTUAL RECORD AND DoD REPORT DEMONSTRATE THAT MR. TENENBAUM WAS A VICTIM OF INVIDIOUS DISCRIMINATION BASED ON THE DUAL LOYALTY STEREOTYPE.

Turning now to the case at hand, the factual record developed to date demonstrates beyond question that Mr. Tenenbaum was singled out for disparate

²¹ *Id.* at pp. 9-10.

²² Guttman, *Israeli ties impair US security clearance*, at <http://www.jonathanpollard.org/2006/051806a.htm>.

and discriminatory treatment because of his Jewish faith. Indeed, the record is replete with evidence that the dual loyalty stereotype described above was applied to Mr. Tenenbaum. As explained more fully in the following paragraphs, the facts of Mr. Tenenbaum's case mimic past instances of discrimination based on this stereotype.

First, the evidence shows that Mr. Tenenbaum came under suspicion as a security risk primarily because of his Jewish faith. Defendant-Appellee John Simonini, the Director of Intelligence and Counterintelligence of the Army's Tank Automotive Armaments Command ("TACOM") during the relevant time period admitted as much. (R. 21, Response at Exh. 12, pp. 222-224, 229). Simonini further testified on this issue as follows:

[I]t's very hard from the Jewish cultural perspective to separate religion from their heritage. It's a big element of their heritage. (R. 21, Response at Exh. 12, p. 127).

It's hard to separate Jewish history without their religion. Other societies and cultures are a little bit different. (R. 21, Response at Exh. 12, p. 128).

In addition, at a meeting on October 21, 1996, Simonini gave a presentation in which he stated that Mr. Tenenbaum's "behavior, actions, and statements fit classic profile that warrants increased security concerns." (R. 21, Response at Exh. 1, p. 7). Simonini's presentation pointed out that Mr. Tenenbaum traveled to Israel for both official and personal reasons, and noted that "[h]ost nation [Israel] is

known to try to exploit nationalistic and religious tendencies.” (*Id.*). The DoD Report recognizes that this last statement is “consistent with” the 1995 profile that was withdrawn and publicly disavowed shortly after its issue. (*Id.* at 26). Yet, notwithstanding the official withdrawal of this profile, the very same rationale was used, just nine months later, to justify a secret counterintelligence investigation of Mr. Tenenbaum based on his religious beliefs.

Simonini later confirmed that his concerns were based on Mr. Tenenbaum’s status as a Jew and the possibility that his religious beliefs might be exploited by Israel. On January 22, 1997, Simonini provided an 8-page sworn statement to investigators in which he outlined the basis for his concerns. Among the factors cited were the following:

- Subject’s behavior, actions, and statements fit a classic profile that warrants increased security concerns.
- At best -- an unwitting accomplice. At worst -- he may be knowingly assisting a foreign government which is known to exploit nationalistic and religious tendencies.
- I also felt he had natural religious and ethnic sympathies which the Israelis could try to exploit.

(R. 21, Response at Exh. 1, pp. 10-11). Clearly, Simonini’s suspicions regarding Mr. Tenenbaum were based on his status as a Jew.

Paul Barnard, TACOM’s Director of Counterintelligence, also admitted that Mr. Tenenbaum was singled out for special scrutiny because of his religious beliefs. Barnard was the person responsible for the plan to pretextually investigate

Mr. Tenenbaum under the guise of a security clearance upgrade when the true purpose of the investigation was for counterintelligence only, an approach that was heavily criticized in the DoD Report. (*See* R. 21, Response at Exh. 1, pp. 19-24). When questioned at his deposition, Barnard admitted that many of the reasons for revoking Mr. Tenenbaum's security clearance were based on his religious and ethnic connections to Israel, and he further admitted that Mr. Tenenbaum was unique among TACOM employees in having his clearance revoked based on ethnic or religious considerations of any kind. (R. 16, First Amended Complaint, pp. 20-21) (quoting deposition testimony).

Steve Twynham, a Special Agent in the 902nd Military Intelligence Battalion, also participated in the investigation of Mr. Tenenbaum. Similar to Simonini and Barnard, Twynham cited Mr. Tenenbaum's religious beliefs as the primary reason for suspecting him of engaging in espionage. In particular, Twynham initially testified at his deposition that Mr. Tenenbaum's being Jewish was a factor in accusing him of being a spy, and he later admitted that, in fact, this was the number one factor in suspecting Mr. Tenenbaum. (R. 16, First Amended Complaint, p. 19) (quoting deposition testimony).

The record also shows that Mr. Tenenbaum was subjected to disparate and discriminatory treatment during his polygraph test on account of his Jewish beliefs. Defendant-Appellee Albert Snyder, who administered the test, admitted that during

the test he discussed and made comments about Mr. Tenenbaum's Jewish background, and that this was the first and only polygraph examination where he had taken such an approach. (R. 16, First Amended Complaint, p. 19) (quoting deposition testimony). As Mr. Tenenbaum explained regarding the polygraph test:

He also asked me about being Jewish, the religious aspect. I don't remember the exact questions, maybe how you feel about Israel, as a Jew how do you feel about Israel.

(R. 21, Response at Exh. 1, p. 16). Yet, the DoD Report found no evidence that Mr. Tenenbaum's religion was pertinent or necessary to the polygraph test, nor was Mr. Tenenbaum's religion of special relevance to his suitability for a personnel security clearance upgrade. (*Id.* at p. 31).

In sum, there was no reason even to address Mr. Tenenbaum's religious beliefs during the test. Because there is thus no *rational* explanation for Snyder's conduct towards Mr. Tenenbaum during the polygraph test, one must look to the *irrational* ones – specifically, a discriminatory application of the dual loyalty stereotype that is entirely consistent with the irrational basis for singling out Mr. Tenenbaum for investigation in the first place.

III. A STRICT APPLICATION OF *RES JUDICATA* AND COLLATERAL ESTOPPEL IS NOT WARRANTED UNDER THE FACTS OF THIS CASE.

In view of the wide-spread discrimination facing American Jews based on the dual loyalty stereotype and the specific findings of discrimination against Mr.

Tenenbaum, a strict application of *res judicata* and collateral estoppel was not warranted here. *See, e.g., Dore v. Kleppe*, 522 F.2d 1369, 1374 (5th Cir. 1975) (“*res judicata* is a principle of public policy and should be applied so as to give rather than deny justice”). Mr. Tenenbaum’s case is even more compelling than a typical *res judicata* situation because now he *twice* has been denied his day in court to prove he was discriminated against, not on the merits, but on strict procedural grounds.

Mr. Tenenbaum’s first lawsuit was dismissed when the Government argued, and the court accepted, that it could not defend the lawsuit without revealing information protected by the state secrets doctrine. *Tenenbaum v. Simonini*, 372 F.3d 776 (6th Cir. 2004). After the first lawsuit was dismissed, the DoD Report was issued, prompting Mr. Tenenbaum to file a subsequent lawsuit. The district court then dismissed Mr. Tenenbaum’s subsequent lawsuit on *res judicata* grounds, holding that plaintiffs are “collaterally estopped from relitigating the propriety of the assertion of the state secrets doctrine.” (R. 27, Opinion at 8). Thus, even though the DoD Report detailed new and specific findings of discrimination, Mr. Tenenbaum has never been afforded the opportunity to participate in a trial on the merits. Justice demands a different result.

A. Weighing the Competing Policy Considerations Supports Allowing Mr. Tenenbaum’s Lawsuit to Proceed.

It is well settled in the Sixth Circuit that:

(n)either collateral estoppel nor *res judicata* is rigidly applied. Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice.

Bronson v. Board of Ed. of City School Dist. of Cincinnati, 525 F.2d 344, 349 (6th Cir. 1975) (quoting *Tipler v. E. I. duPont deNemours and Co.*, 443 F.2d 125, 128 (6th Cir. 1971)).

While the Government's interest in protecting national security concerns and the court's interest in judicial economy are legitimate concerns, the court must be mindful that the state secrets privilege and doctrine of *res judicata* borne out of those concerns are procedural bars that serve to deny a worthy litigant his day in court. *In re United States*, 872 F.2d 472 (D.C. Cir. 1989) (“[d]ismissal of a suit [based on the state secrets privilege], and the consequent denial of a forum without giving the plaintiff her day in court, however, is indeed draconian”); *Moch v. East Baton Rouge Parish School Bd.*, 548 F.2d 594, 598 (5th Cir. 1977) *cert. denied*, 434 U.S. 859 (1977) (“plaintiffs never really had their day in court since [prior] complaint was dismissed merely on a 12(b)(6) motion.”). In this case, it would be unjust to subvert Mr. Tenenbaum's right to seek redress for the Government's violations of his Constitutionally-protected civil rights to the competing interests of the Government and the court.

Unfortunately, however, the Government has used *both* of those procedural road-blocks in turn to prevent Mr. Tenenbaum from ever reaching the merits of his

religious discrimination claim. This, coupled with the specific findings of discrimination and the back-drop of the dual-loyalty problem that has faced Jewish Americans for some time, favors letting Mr. Tenenbaum have his day in court. *See International Harvester Co. v. Occupational Safety and Health Review Com'n*, 628 F.2d 982, 986 (7th Cir. 1980) (“we note that even where the technical requirements of *res judicata* have been established, a court may nonetheless refuse to apply the doctrine.”) Based on the foregoing, the district court’s strict application of *res judicata* and collateral estoppel have resulted in a manifest injustice here.

B. Collateral Estoppel Should Not Have Barred Plaintiffs Claim in Light of New Credible Evidence.

While the district court concluded that plaintiffs are collaterally estopped from relitigating the propriety of the assertion of the state secrets doctrine, the fact remains that the first lawsuit was dismissed without the trial judge having the benefit of the DoD Report. Under this unique set of facts, it was improper to bar Mr. Tenenbaum’s claim under the doctrine of collateral estoppel. Indeed, “collateral estoppel may not be invoked where controlling facts or legal principles have changed significantly, or where the circumstances of the case justify an exception to general estoppel principles.” *Detroit Police Officers Ass'n v. Young*, 824 F. 2d 512, 515 (6th Cir. 1987).

Here, the DoD Report, which was issued after the first lawsuit was terminated, concluded that “Mr. Tenenbaum was the subject of inappropriate

treatment by Department of the Army and Defense Investigative Service Officials.” (R. 21, Response at Exh. 1, p. ii). More specifically, “Mr. Tenenbaum’s religion was a factor” and “Mr. Tenenbaum was subjected to unusual and unwelcome scrutiny because of his faith and ethnic background, a practice that would undoubtedly fit a determination of discrimination.” (*Id.*)

Of course, these specific DoD findings were not considered by the trial judge in the first lawsuit (because they were not yet available) and could very well alter the court’s analysis of the application of the state secrets privilege. Indeed, the DoD’s publicly-available report was issued without any state secrets problems. Accordingly, the concerns identified by the lower court in upholding the Government’s invocation of the state secrets privilege have now been assuaged by the public issuance of the DoD Report.

Furthermore, dismissal of an entire action is not proper in most instances where the state secrets privilege even is properly invoked. For example, in *In re Sealed Case*, 494 F.3d 139 (D.C. Cir. 2007), a DEA employee brought a *Bivens* action, claiming Fourth Amendment violations, against a State Department official and another agent who allegedly were working for the CIA. Despite the availability of the state secrets privilege, the court held that the plaintiff established a *prima facie* Fourth Amendment claim based on unprivileged information and

reversed the district court's dismissal. In other words, the case would continue and the plaintiff could proceed with whatever unprivileged evidence he had.

Similarly, in a Federal Tort Claims Act action against the FBI for injuries from a prolonged investigation, the D.C. Circuit refused to order dismissal of plaintiff's claim, recognizing that "denial of the forum provided under the Constitution for the resolution of disputes, U.S. Const. art. III, § 2, is a drastic remedy that has rarely been invoked." *In re United States*, 872 F.2d at 477 (citing *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985)). Instructively, the Court noted that "[b]ecause of the serious potential for defeating worthy claims for violations of rights that would otherwise be proved, the privilege is not to be lightly invoked." *Id.* at 476 (citations omitted).

In re Sealed Case and *In re United States* establish that dismissal of an entire lawsuit is not favored. Even if the privilege is properly asserted, other alternatives to dismissal should be considered first, such as merely excluding or redacting the privileged information. *See also Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983) ("[T]he privilege may not be used to shield any material not strictly necessary to prevent injury to national security; and, whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter."). Here, the same result is required.

Indeed, such a limited approach to applying the state secrets privilege would appear to be required by the Constitution in this case. In light of the specific findings that Mr. Tenenbaum was discriminated against based on his faith and ethnic background and, more generally, the long-standing problems with the dual loyalty stereotype facing American Jews, the Government's assertion of the state secrets privilege, which constitutes state action, should be reviewed under strict scrutiny standards. *See Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."). Although the government has a compelling interest in concealing national security secrets, the district court's application of the state secrets privilege was not the least restrictive means for achieving that interest. As discussed above, there are other options besides a blanket dismissal of all of Mr. Tenenbaum's claims that may be more appropriate in light of the DoD Report that was publicly issued after the first lawsuit was dismissed.

In this case, fairness dictates that, at the very least, Mr. Tenenbaum be allowed to litigate his claim with the unclassified information in the DoD Report. Moreover, the government's assertion of the state secrets privilege should be re-evaluated by having the district court consider the DoD Report in connection with the affidavits and any other evidence previously relied upon by the parties to

support or refute the privilege. Only then would the propriety of the assertion of the state secrets privilege be fully and fairly litigated.

C. Ruling in Mr. Tenenbaum’s Favor Would Not Unreasonably Encroach Upon *Res Judicata* Jurisprudence.

As previously stated, ADL is mindful of the value that *res judicata* and collateral estoppel serve in the court system. Indeed, *res judicata* ensures the finality of decisions. *Brown v. Felsen*, 442 U.S. 127, 131 (U.S. 1979). *Res judicata* thus encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes. *Id.* However, these important principles would not be undermined by ruling in Tenenbaum’s favor in this case. *See Moch*, 548 F.2d at 598 (“we believe that the occasional adoption of an exception to the finality rule when public policy so demands does not undermine its general effectiveness”). Rather, the holding in this case would be limited to the rare and unique fact pattern presented here. *See e.g. Bronson*, 525 F.2d at 349 (“This appeal requires that we determine the extent to which the doctrine of *res judicata* should be applied in order to accommodate two competing public policies and avoid manifest injustice. We believe that the district court properly limited the application of the doctrine to this case...”).

Indeed, the facts of this case are extraordinary. Several years after the district court's dismissal on state secrets grounds, the DoD OIG, an arm of the very governmental entity that is asserting the state secrets privilege here, was asked by

Senator Carl Levin, a ranking member of the Committee on Armed Services, to examine the dubious investigation of Mr. Tenenbaum. After an extensive investigation spanning two years and including the review of classified and unclassified documents, the OIG issued the comprehensive DoD Report, which confirmed that Mr. Tenenbaum was subjected to disparate treatment by Army and Defense Investigative Service employees because of his religious affiliation.

The DoD Report casts doubt on the government's case for invoking the state secrets privilege and the fairness of the hearing in which that privilege was granted. Based on this new and compelling evidence, Mr. Tenenbaum's lawsuit should proceed, at the very least, with the evidence in the publicly available DoD Report that is clearly not protected by the state secrets privilege. Alternatively, Mr. Tenenbaum should be allowed to submit the DoD Report to the district court for a further review of the state secrets privilege. There can be little concern that the facts of this case will be often repeated, and, in those limited situations, it would be just to allow such evidence to be considered.

Moreover, if the lower court's decision is allowed to stand in light of the circumstances of this case, it is difficult to imagine a situation in which the invocation of the state secrets privilege could ever be challenged successfully when new, credible evidence casts doubt on its applicability. Here, the government presented false and misleading "support" for the invocation of the state secrets

privilege, which it filed under seal. As a result, Mr. Tenenbaum had no meaningful opportunity to challenge this "evidence," and the lower court granted the state secrets privilege after a careful review of the evidence of record. Years after that decision, the DoD issued its compelling report of government wrongdoing, which the lower court then effectively barred from consideration on *res judicata* grounds.

If this decision is allowed to stand, this Court will have implicitly ratified the government's conduct and essentially given the government license to create the necessary record to justify its state secrets privilege, whether rooted in fact or self-serving fabrications. In so doing, this Court will have established a playbook whereby the government is able to avoid liability for its illegal discrimination of its own civil servants, even in the face of an extensive government report chronicling that very discrimination. Indeed, it is difficult to imagine a more draconian result or a more severe miscarriage of justice than a decision which provides the government *carte blanche* to discriminate against its own civil servants based on their religious affiliation with no fear of repercussion. Accordingly, the lower court's ruling must be overturned.

CONCLUSION

For all of the foregoing reasons, ADL respectfully requests that this Court reverse the district court's ruling.

Dated: October 8, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,944 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief was electronically filed this 8th day of October, 2009 with the Clerk of the Court using the ECF system. Notice of this filing will be sent to all registered parties by operation of the Courts electronic filing system.

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