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REFORM OF THE STATE SECRETS PRIVILEGE

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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REFORM OF THE STATE SECRETS PRIVILEGE

TUESDAY, JANUARY 29, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:11 a.m., in Room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Conyers, Nadler, Wasserman Schultz, Watt, Cohen, Franks, Issa, King, and Jordan.

Staff present: David Lachmann, Subcommittee Chief of Staff; Burt Wides, Majority Council; Heather Sawyer, Majority Counsel; Caroline Mays, Professional Staff Member; Paul Taylor, Minority Counsel; and Jacki Pick, Minority Counsel.

Mr. NADLER. Good morning. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order.

Today's hearing will examine the state secrets privilege.

The Chair recognizes himself for 5 minutes for an opening statement.

Government has always needed to keep certain sensitive information secret. The challenge for a free society has always been to balance the need to keep secrets with the openness necessary for democracy to function. It has never been easy to strike this balance.

What happens when claims that information must be kept confidential conflict with the rights of individuals to obtain justice in our courts or when coordinate branches of Government must make decisions concerning matters that the executive claims are too sensitive to be discussed even with them? Today, we examine just that problem.

In too many cases, claims of state secrets have succeeded in keeping important cases out of court entirely or preventing courts from considering evidence vital to the outcome of a case. Courts have sometimes proved overly deferential to these claims, refusing even to look behind decisions of the state secrets privilege to determine whether it has been made in good faith, and we know that in some cases it has been made in bad faith.

We will hear today from Judith Loether whose father was a civil engineer killed in a military plane crash. The report examining the crash has been withheld from the court on the grounds that it was a state secret, and the Supreme Court said that the courts have no

business examining that claim. If there is one thing we have learned over the years, it is that we cannot take such assertions at face value. When the report finally came to light 50 years later, it revealed Government negligence, but no state secrets.

We have the CIPA law that deals with how to deal with confidential information in the context of a criminal proceeding. We do not have a law codifying the state secrets privilege in the context of a civil proceeding, and we probably should.

Studies show that the Bush administration has raised the state secrets privilege in over 25 percent more cases per year than previous Administrations and has sought dismissal in over 90 percent more cases. Originally, the privilege was used just to shield certain information; but, in recent years, it has been used increasingly to dismiss cases from the start to say, "You cannot get your day in court."

As one scholar noted recently, this Administration has used the privilege "to seek blanket dismissal of every case challenging the constitutionality of specific ongoing Government programs" related to its war on terrorism and, as a result, the privilege is impairing the ability of Congress and the Judiciary to perform their constitutional duty to check executive power.

Another leading scholar recently found that "In practical terms, the state secrets privilege never fails." Like other commentators, he concludes that the state secrets privilege is the most powerful secrecy privilege available to the President, and the people of the United States have suffered needlessly because the law is now a servant to executive claims of national security.

I will shortly be introducing legislation to allow courts to examine these claims in a manner that would protect the information while giving the court a chance to determine whether the secrets need to be maintained or whether there is some other way to allow the case to go forward. This legislation would codify the state secrets privilege and would limit it. This is not a new task for the courts. They do it under CIPA in criminal cases, and they do it in Freedom of Information Act cases.

I look forward to the testimony of our witnesses on this difficult issue, and I welcome them.

I would now recognize our distinguished Ranking minority Member, the gentleman from Arizona, Mr. Franks, for his opening statement.

Mr. FRANKS. Well, thank you, Mr. Chairman.

And thank you all for being here.

Mr. Chairman, the state secrets privilege is a longstanding legal doctrine that is an irreplaceable tool in the war against Jihadist terrorism. The Supreme Court most recently described that doctrine in a case called *United States v. Reynolds.*

In that case, the Supreme Court made clear that where the central issues of a case involve sensitive and classified national security information, the courts have the responsibility to determine whether disclosure of the information would pose a reasonable danger to national security. If so, the court is obliged to either dismiss the case or limit the public disclosure of national security information as necessary.

Under this doctrine, people with legitimate claims are not denied access to court review. Rather, the doctrine allows judges to personally review any sensitive information, if necessary.

The roots of the state secrets privilege extend all the way back to the Supreme Court's decision in *Marbury v. Madison*, and the privilege is grounded in large part in the Constitution's separation of powers principles. In that case, the court held that an executive branch official is not "obliged" to disclose any information that was "communicated to him in confidence." Four years later, the same Chief Justice Marshall who wrote the opinion in *Marbury* held that the Government need not produce any information that would endanger the public safety.

In the modern era, Congress debated the issue of state secrets privilege under Federal law in the 1970's, but ultimately chose to maintain the status quo, including the elements of the privilege put in place by the Supreme Court in the *Reynolds* decision.

In *United States v. Nixon*, the court endorsed the executive privilege as "fundamental to the operation of Government and inextricably rooted in the separation powers under the Constitution" and strongly cautioned that sensitive information should not be disclosed if it involves "military, diplomatic, or sensitive national security secrets."

The First Circuit took exactly that same position in affirming dismissal of a case brought by Khaled el-Masri in which the court concluded that the state secrets privilege "has firm foundation in the Constitution in addition to its basis in the common law of evidence."

Not surprisingly, the state secrets privilege has played a significant role in the Justice Department's response to civil litigation arising out of counterterrorism policies after 9/11.

While political opponents of the President have argued that the Bush administration has employed the state secrets privilege with unprecedented frequency or in unprecedented contexts in recent years, a recent comprehensive survey of all state secrets cases has determined conclusively that neither claim is true.

And I want to repeat that. A recent survey of all state secrets cases has determined conclusively that neither of those claims is true.

As Professor Robert Chesney of Wake Forest University Law School has concluded, the data did not support the conclusion that "the Bush administration chooses to resort to the privilege with greater frequency than prior Administrations or in unprecedented substantive contexts."

Because the privilege is based in the Constitution's separation of powers principles, it is unclear whether Congress could constitutionally amend the state secrets privilege by statute. Professor Chesney pointed out that the "judges are nowhere nearly as well suited as executive branch officials to account for and balance the range of considerations that should inform assessments of dangers to national security."

I will strongly oppose, Mr. Chairman, any efforts that invite the courts to deviate from the sound procedures they currently follow and to divulge to our enemies sensitive national security information. Innocent Americans can only be protected if sensitive national

security information is protected, and I will do whatever I can to keep those Americans safe.

Thank you, Mr. Chairman.

Mr. NADLER. Thank you.

I will now recognize for an opening statement the distinguished Chairman of the full Committee, the gentleman from Michigan.

Mr. CONYERS. Thank you, Mr. Chairman.

I want to protect the American people as much as anybody in the Congress, but there is a different problem here. It is not just the fact that there are more cases in which the state secrets privilege is asserted, but it is how it is being asserted and how it is being used that really makes the difference here. It is not just the numbers.

And so I start off congratulating the American Bar Association and those other organizations that have been looking at this quite carefully.

And I ask unanimous consent to put in the record today's *Washington Post* article on the Greater Use of State Secrets Privilege Spurs Concerns and the washingtonpost.com's Bush Order Expands Network Monitoring.

Mr. NADLER. Without objection.

[The information referred to follows:]

The Washington Post · Tuesday, January 29, 2008 A17

STATE SECRETS

Greater Use of Privilege Spurs Concern

By Josh White
Washington Post Staff Writer

The U.S. government has been increasing its use of the state secrets privilege to avoid disclosure of classified information in civil lawsuits, prompting legislation in the Senate that would provide more congressional oversight of the practice.

Though there have been modest increases in the use of the state secrets privilege every decade since the 1960s, some legal scholars and members of Congress contend that the Bush administration has employed it excessively as it intervened in cases that could expose information about sensitive programs. These include the rendition of detainees to foreign countries for interrogation and cases related to the National Security Agency's use of warrantless wiretaps.

The privilege allows the government to argue that lawsuits — and the information potentially revealed by them — could damage national security. It gives judges the power to prevent information from reaching public view or to dismiss cases even if they appear to have merit.

Sen. Edward M. Kennedy (D-Mass.), in a speech on the Senate floor last week, said one reason for more congressional oversight is the risk that the privilege "will be overused and abused." He said the Bush administration's use of the privilege since the Sept. 11, 2001, terrorist attacks "has dramatically increased, and the harmful consequences of its irregular application by courts have become painfully clear."

Kennedy cited statistics that show the Bush administration has used the state secrets privilege substantially more, on a percentage basis, than previous administrations to block or dismiss lawsuits.

The cases include *El-Masri v. Tenet*, in which Khaled el-Masri, a German citizen, sued the U.S. government claiming that he was sent to Afghanistan for interrogation as part of a secret government program. The case was dismissed after government lawyers argued that Masri's civil claims could expose state secrets should CIA officials have to admit or deny the existence of the program or its details.

Amanda Frost, an assistant professor at American University's Washington College of Law, contends in a 2007 law review article that Congress should provide more oversight of government use of the privilege because the Bush administration "has raised the privilege with greater frequency than ever before, and has more often sought to remove cases entirely from judicial dockets."

However, the researcher who totaled the use of the privilege in published legal opinions said the increase is insignificant. Robert Chesney, an associate professor at Wake Forest University School of Law, showed that the Bush administration had invoked the state secrets privilege 20 times since 2001, while the same privilege was invoked 26 times from 1991 to 2000 and 23 times from 1981 to 1990.

Chesney, who published a paper last fall, said yesterday that while the numbers show an upward trend, administration critics do not take into account the fact that the nation has been at war since 2001. As a result, the government is undertaking a larger number of secret operations.

"There's this strong desire to show that this is something the Bush administration has seized upon to put things under the rug," Chesney said. "They have seized on it, but they also have been confronted with dozens and dozens of lawsuits seeking to explore classified programs."

Rep. Jerrold Nadler (D-N.Y.) has scheduled a hearing on the issue today before a House Judiciary subcommittee.

Kevin Bankston, a lawyer with the Electronic Frontier Foundation, a nonprofit legal organization that has fought the Bush administration's secrecy efforts on the NSA surveillance program, said the state secrets privilege is being abused regardless of the number of times it has been invoked.

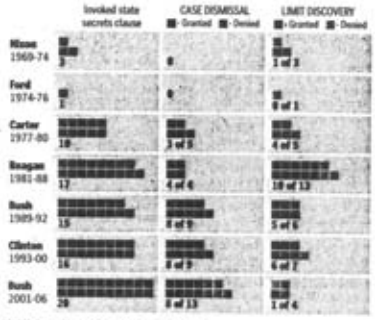
"The administration is attempting to use the privilege as a backdoor immunity to obtain dismissal of any case that attempts to put the NSA wiretapping issue in front of a judge," said Bankston, who is scheduled to testify at Nadler's hearing today. "It is no secret such a program existed."

Patrick Philbin, an associate deputy attorney general until November 2005, said yesterday that the statistics do not tell the story about the state secrets privilege.

"I don't think that this administration is applying or using the standard differently," said Philbin, who also is scheduled to testify today. "The privilege exists to protect national security information, and they're using it to do that."

Classified Information

Published cases of government use of the state secrets privilege have grown over the past 35 years.



SOURCE: Robert Chesney, George Washington Law Review

THE WASHINGTON POST

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Mr. CONYERS. So the other thing that I think should be taken into consideration, before this turns into who is more patriotic and who is fighting terror harder than anybody else or who is weakening our system and all that fear-mongering that goes on so much, is the question around the President issuances of executive orders which he can then ignore or claim they are modified.

He can with a stroke of his pen increase monitoring of the Internet. He can stop court cases in their tracks by claiming state secrets privilege and then try to bully the Congress into rendering the cases moot by providing telecommunications companies' retroactive immunity. We have a FISA issue going on in the Senate right now, and it will be going on very shortly in this body as to what the role should be.

But there is something that bothers me deep down about this whole discussion, and that is that judges are not qualified to determine what is in the national interest. They could work on all the complex cases in the world, but when it comes to the Government being examined, "Well, that is off limits. We will handle that, fellows," and although it is a common-law doctrine, we did not have a law on this until 1953.

So I come to this saying that since *Reynolds* in 1953 both Administrations, the Democrats or Republicans, have generated a lot of concern that, if not properly policed, the privilege might be misused to conceal not just embarrassing information, but downright illegal activity, maybe impeachable conduct, and that the public disclosure, in fact, may not pose any genuine threat to national security.

And, of course, these fears have been increased by the repeated use of the privilege, especially since 9/11, and it is being used now—get this—to dismiss cases challenging some of the most troubling aspects of the war on terror. It is being used to challenge rendition claims. It is being used to challenge torture claims. It is being used a lot to challenge warrantless wiretapping, which, by the way, went on apace across the years. It is not a brand-new issue.

And so when the executive branch—this one or any other—responds to serious claims of misconduct or illegality with blanket claims of secrecy, often telling the Federal judges that the material is too sensitive for even the judge to see, then I have a problem here that makes this hearing extra important, in my view.

There is understandable concern that the executive can use these claims frequently to shield unlawful conduct, and that is what we are here to examine today.

I will put the rest of my statement in the record, Chairman Nadler.

Thank you.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Today we examine the state secret privilege, a common law doctrine that allows the government to protect sensitive national security information from harmful disclosure in litigation.

Since it was first recognized by the U.S. Supreme Court in the 1953 case of *U.S. v. Reynolds,* this privilege has been used by Democratic and Republican Administra-

tions alike, often generating concern that—if not properly policed—the privilege might be misused to conceal embarrassing information whose public disclosure poses no genuine threat to national security.

These concerns have increased because of the Bush Administration's repeated use of the privilege, in the wake of the September 11th terrorist attacks, as a tool to dismiss cases challenging some of the most troubling aspects of its war on terror—including rendition, torture, and warrantless wiretapping.

When the Executive Branch responds to serious allegations of misconduct with blanket claims of secrecy—often telling federal judges that material is too sensitive for even the courts to see—there is understandable concern that the Executive may be using those claims as a subterfuge to shield embarrassing facts or unlawful conduct from judicial discovery.

This hearing will help us explore three important issues presented by the state secret privilege.First, we need to determine whether judges are using procedures and standards that allow for meaningful review of governmental claims. Some in the civil liberties community are concerned that the courts are being overly deferential to the Executive Branch, reluctant to review evidence and make their own independent assessment of whether the secrecy claim is valid.

Second, the hearing will help us examine whether there is any validity to continuing concerns about judicial expertise in handling secret information. In the fifty years since the *Reynolds* decision, numerous laws have been enacted that require the courts to review national security materials. These include the Classified Information Procedures Act, the Freedom of Information Act, and the Foreign Intelligence Surveillance Act.

Acting under this authority, courts routinely review classified evidence under procedures that are designed to protect against harmful disclosure of sensitive information, while still providing a fair opportunity for litigants who seek justice and accountability from our government.

And, third, today's hearing provides an opportunity for us to consider whether there is any need for congressional action. The American Bar Association, for example, recommends that there should be clear procedures and standards for state secret claims. Likewise, the bipartisan Constitution Project urges that courts be required to review the claims and ensure that cases are not dismissed prematurely.These organizations want to ensure that parties have a full and fair opportunity to discover non- privileged facts, and that appropriate orders are issued to protect material determined to be subject to the privilege.

This Administration's aggressive efforts to create an Imperial Presidency—an Executive Branch whose decisions remain secret and unchecked by Congress or the courts—raises important concerns about how claims of secrecy may impair our constitutional system of checks and balances.

Our firm commitment to respect for the rule of law requires that we take these concerns seriously.

Mr. NADLER. I thank the gentleman.

I would now like to introduce our panel of witnesses.

In the interest of proceeding to our witnesses and mindful of our busy schedules, I would ask that other Members submit their statements for the record. Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record.

Without objection, the Chair will be authorized to declare a recess of the hearing.

As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority on the Subcommittee, alternating between majority and minority, providing that the Member is present when his or her turn arrives. Members who are not present when their turn begins will be recognized after the other Members have had the opportunity to ask their questions. The Chair reserves the right to accommodate a Member who is unavoidably late or only able to be with us for a short time.

And I would now like to introduce our panel of witnesses, now that we have the boilerplate out of the way.

The first witness is H. Thomas Wells, Jr., the president-elect of the American Bar Association. He is a partner and founding member of the firm Maynard, Cooper & Gale in Birmingham, Alabama. He earned his BA and his JD from the University of Alabama.

Judith Loether is the daughter Albert Palya, one of the civilian engineers whose deaths were at issue in *United States v. Reynolds*, the 1953 Supreme Court case that established the modern understanding of the state secrets privilege.

The Honorable Patricia Wald has had a distinguished legal career. She served as a judge of the United States Court of Appeals for the D.C. Circuit from 1979 to 1999, serving as chief judge of the D.C. Circuit from 1986 to 1991. Judge Wald was also a judge with the International Criminal Tribunal for the Former Yugoslavia from 1999 to 2001 and a member of the President's Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction from 2004 to 2005.

Patrick Philbin is a partner in the firm of Kirkland & Ellis. From 2001 to 2005, Mr. Philbin served the Department of Justice as a deputy assistant attorney general in the Office of Legal Counsel, from 2001 to 2003 where he advised the Attorney General and Counsel to the President on issues related to the war on terrorism, and as an associate deputy attorney general from 2003. He is a graduate of Yale University and Harvard Law School.

Kevin Bankston is a senior attorney with the Electronic Frontier Foundation. He is lead counsel in *Hepting v. AT&T*, the first lawsuit brought against the telecommunications company for its role in the NSA's warrantless surveillance program, and is the coordinating counsel in the multidistrict litigation over the NSA program that has been consolidated before the Northern District of California Federal Court. He was recently named as a fellow at Stanford Law School Center for Internet and Society where he will conduct further academic research on the Fourth Amendment as applied to the Internet. That should be a relatively new field.

Mr. Bankston received his JD in 2001 from the University of Southern California Law Center and received his undergraduate degree from the University of Texas at Austin.

I am pleased to welcome all of you.

Each of your written statements will be made part of the record in its entirety. I would ask that you now summarize your testimony in 5 minutes or less.

To help you stay within that time limit, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow, and then red when the 5 minutes are up.

The first witness I will recognize for 5 minutes is Mr. Wells.

[Witnesses sworn.]

TESTIMONY OF H. THOMAS WELLS, JR., PRESIDENT-ELECT, AMERICAN BAR ASSOCIATION

Mr. WELLS. Thank you, Chairman Nadler, Ranking Member Franks, and distinguished Members of the Committee.

My name is Tommy Wells, and I am here today in my capacity as the president-elect of the American Bar Association and at the request of our current president, William Neukom. Mr. Neukom is sending his regrets that he is unable to attend this hearing.

The ABA thanks the Committee for inviting us to present the views of the association on the state secrets privilege.

The state secrets privilege is a common-law privilege, the roots of which reach back to the beginning of the republic. The privilege shields sensitive national security information from disclosure in civil litigation. However, today, most public discussion focuses on the U.S. Supreme Court's modern articulation of the privilege in *United States v. Reynolds.*

During the past several years, the Government has asserted the state secrets privilege in a growing number of cases, including those involving fundamental rights and serious allegations of Government misconduct, which raise critical legal issues. In the absence of congressional guidance, courts have adopted divergent approaches.

In recent years, there has been concern that courts are deferring to the Government without engaging in sufficient inquiry into the Government's assertion of the privilege. Thus, courts may be dismissing meritorious claims leading to potentially unjust results.

Federal legislation outlining procedures and standards for consideration of these privilege claims would facilitate the ability of the courts to act as a meaningful check on the executive branch's assertion of the state secrets privilege.

Concern about these circumstances led the ABA House of Delegates to adopt a policy that calls upon Congress to establish a standardized process designed to ensure that whenever possible cases are not dismissed based solely on the assertion of the state secrets privilege. The establishment of uniform standards and procedures will bring greater transparency and predictability to the process and benefit the system as a whole. My written statement outlines the specifics of the ABA recommendation in detail.

Fundamentally, the ABA believes that courts should evaluate privilege claims in a manner that protects legitimate national security interests, while permitting litigation to proceed with nonprivileged evidence. Judicial review informed by evidence would ensure that Government assertions of necessity are truly warranted and not simply a means to avoid embarrassment. Moreover, cases should not be dismissed based on the state secrets privilege, except as a last resort.

The legislation we envision would not require disclosure of information subject to the state secrets privilege to the plaintiff or to the plaintiff's counsel and would not require courts to balance the interests of the plaintiff in accessing particular privileged information against the Government's national security interests.

It would also not require the Government to choose between disclosing privileged information and forgoing a claim or a defense. The Government would face such a choice only with respect to the information the court had already determined was not privileged.

Many of the ABA recommendations are drawn from the procedures Congress established in the Classified Information Procedures Act. Under CIPA, Federal courts review and analyze classified information in criminal cases. The ABA's policy respects the roles of all three branches of Government in addressing state secrets issues.

The policy does not suggest that courts should substitute their judgments on national security matters for those of the executive branch. Instead, it provides that executive branch privilege claims should be subject to judicial review under a deferential standard that takes into account the executive branch's expertise in national security matters.

This is the proper role for the judiciary because courts routinely perform judicial review of decisions made by expert Government agencies and, as the *Reynolds* case explained, the secrets privilege is an evidentiary privilege, the type of issue courts rule upon with great regularity.

Ultimately, we believe there is a need to protect both the private litigants' access to critical evidence as well as our critically important national security interests.

The ABA believes that Congress should establish confidential procedures offering ample opportunity for the Government to assert the privilege, meaningful judicial access to the evidence at issue to evaluate whether the privilege should apply, and chance for litigation to proceed with nonprivileged evidence.

Thank you for considering the American Bar Association's views on an issue of such consequence to ensuring access to our justice system.

Thank you.

[The prepared statement of Mr. Wells follows:]

PREPARED STATEMENT OF H. THOMAS WELLS, JR.

STATEMENT OF

H. THOMAS WELLS, JR., PRESIDENT-ELECT

submitted on behalf of the

AMERICAN BAR ASSOCIATION

to the

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

COMMITTEE ON THE JUDICIARY

of the

U.S. HOUSE OF REPRESENTATIVES

for the

"Oversight Hearing on Reform of the State Secrets Privilege"

January 29, 2008

Chairman Nadler, Ranking Member Franks and distinguished Members of the Committee:

I am Tommy Wells. I am here today in my capacity as President-elect of the American Bar Association and at the request of our current President, William Neukom. He sends his regrets that he is unable to attend this hearing and deliver the views of the Association in person. I am a partner and founding member of the law firm Maynard, Cooper & Gale, P.C., in Birmingham, Alabama, and will assume the presidency of the ABA in August 2008. We thank the Committee for inviting us to present the views of the Association on matters that are pending before you.

The American Bar Association is the world's largest voluntary professional organization with a membership of more than 413,000 lawyers, judges, and law students worldwide, including a broad cross-section of civil litigators and national security lawyers, prosecutors and judges. As it has done during its 130-year existence, the ABA strives continually to improve the American system of justice and to advance the rule of law throughout the world.

I appear before you to voice the ABA's position with respect to legal claims that may be subject to the state secrets privilege. At the outset, we commend the leadership of the Subcommittee for demonstrating the importance of Congressional oversight on issues that are of such grave importance to the American people and our country.

Clarification of the State Secrets Privilege is Needed

The state secrets privilege is a common law privilege that shields sensitive national security information from disclosure in civil litigation. The roots of the privilege reach back to the beginning of the Republic.[1] However, today most public discussion focuses on the U.S. Supreme Court's modern articulation of the privilege in the seminal decision, *United States v. Reynolds,* 345 U.S. 1 (1953).

During the past several years, the government has asserted the state secrets privilege in a growing number of cases, including those involving fundamental rights and serious allegations of government misconduct, and has sought dismissal at the pleadings stage of the case, arguing that the complaint cannot be answered without confirming or denying facts that would expose a

[1] *See United States v. Burr,* 25 F. Cas. 30, 37 (C.C.D. Va. 1807).

state secret. Courts have been required to evaluate these claims of privilege without the benefit of statutory guidance or clear precedent. This has resulted in the application of inconsistent standards and procedures in determinations regarding the applicability of the privilege.[2]

Several of the lawsuits allegedly involving state secrets raise critical legal issues. Should the government be able to terminate a court case simply by declaring that it would compromise national security without having the court scrutinize that claim? In a number of lawsuits, including those involving electronic surveillance by the government, that is exactly what is happening.

Concerned about these circumstances, the ABA concluded that a measured response was necessary to promote meaningful independent judicial review and protect two core principles at stake: 1) Americans who believe that their rights have been violated by the federal government should have a day in court; and 2) the government's responsibility to protect our national security should not be compromised. Accordingly, in August 2007, the ABA House of Delegates adopted a policy that calls upon Congress to establish procedures and standards designed to ensure that, whenever possible, cases are not dismissed based solely on the state secrets privilege.

The ABA believes that enactment of federal legislation, prescribing procedures and standards for the treatment of information alleged to be subject to the state secrets privilege, as outlined in this statement, would benefit our justice system. Such legislation would affirm the appropriate role of the courts in our system of government by assuring that they have a meaningful role in making decisions about the evidence that is subject to the privilege. More searching judicial review, informed by evidence, would ensure that government assertions of necessity are truly warranted and not simply a means to avoid embarrassment or accountability.

Without such procedural guidance, courts today are at times deferring to the government without first engaging in sufficient inquiry into the veracity of the government's assertion that information is subject to the privilege. As a result, courts may be dismissing meritorious civil litigation claims leading to potentially unjust results. By dismissing civil actions without further consideration, courts also may be abdicating their responsibility under the constitutional system

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[2] *See, e.g., Hepting v. AT&T,* 439 F. Supp. 2d 974 (N.D. Cal. 2006) (appeal pending) and *ACLU v. NSA* __ F.3d __, WL 1952370 (6th Cir. 2007) (warrantless wiretapping in the United States alleged to be both illegal and unconstitutional) and *El-Masri v. U.S.,* 479 F.3d 296 (4th Cir. 2007), *cert. denied,* 2007 U.S. LEXIS 11351 (Oct. 9, 2007) (extraordinary "rendition" of terrorism suspects from the United States to foreign countries alleged to have engaged in torture and other abusive conduct).

of checks and balances to review potential Executive Branch excesses. Federal legislation outlining procedures and substantive standards for consideration of privilege claims would facilitate the ability of the courts to act as a meaningful check on the government's assertion of the privilege.

The codification of such standards also would bring uniformity to the manner in which the courts apply the state secrets privilege, regardless of whether the government is an original party to the litigation or has intervened in the litigation. Uniform standards and procedures will bring greater transparency and predictability to the process and benefit the system as a whole.

Last year, the U.S. Supreme Court declined to address these issues by denying certiorari in the appeal of Khaled el-Masri, a German citizen, from the dismissal of his lawsuit alleging the U.S. government kidnapped and tortured him as a suspected terrorist in what has been described as a case of mistaken identity. In 2005, he sued the former director of the Central Intelligence Agency, three private airlines and 20 individuals. The government intervened to argue that the suit should be dismissed to avoid providing admissions or evidence that would compromise national security. The federal district court concurred, and dismissed the case at the pleadings stage.

By refusing to hear the *el-Masri* case, the United States Supreme Court has declined the opportunity to resolve lingering issues regarding the correct interpretation of *Reynolds* and to clarify the standard to be applied by the courts in cases involving assertion of the privilege. Given the current landscape, we believe that Congress should provide this much-needed clarification by adopting federal legislation, and we hope that our policy recommendations will be beneficial to you in that process.

ABA Recommendations for Legislation to Codify the State Secrets Doctrine

Fundamentally, the ABA believes that courts should vigorously evaluate privilege claims in a manner that protects legitimate national security interests while permitting litigation to proceed with non-privileged evidence, and that cases should not be dismissed based on the state secrets privilege except as a very last resort. To accomplish these objectives, we urge adoption of legislation that includes the following elements.

First, legislation should require a court to make every effort to permit a case to proceed past the pleadings stage while protecting the government's legitimate national security concerns

at the same time. Under our proposal, the government would be permitted to plead the state secrets privilege in response to particular allegations of a complaint, but would not admit or deny those allegations nor face adverse inferences for invoking the privilege.

Second, legislation should require the government to provide a full and complete explanation of the privilege claim and make available for *in camera* review the evidence the government claims is subject to the privilege. *In camera* judicial review is appropriate and necessary in order for the court to fulfill its recognized responsibility to determine whether the privilege applies.[3] The court simply cannot determine whether the government has met its burden in a vacuum: only an *in camera* review of the evidence in question will permit a thorough evaluation of the government's privilege claims.

This requirement challenges the Supreme Court's statement in *Reynolds* that there are some situations in which the privileged evidence is so sensitive that there should be no "examination of the evidence, even by the judge alone, in chambers."[4] Commentators have properly criticized that suggestion as an abdication of judicial responsibility.[5] Courts are charged with applying the law to facts in cases, not taking assertions as a matter of faith. It is as big a mistake for them to rule on the merits in a vacuum as it is for them to assess the need for secrecy without first examining the evidence. We believe that it is essential for courts to evaluate the government's claims *in camera*, away from the public eye, before deciding whether a lawsuit truly threatens the nation's safety.

Years after the court dismissed the *Reynolds* case without questioning the government's assertion of state secrets, the documents alleged to contain state secrets that were needed by the plaintiffs to plead their case were declassified and found NOT to contain any state secrets. Had the court been more diligent in executing its responsibility to ascertain for itself whether the documents contained state secrets, it is virtually certain that the plaintiffs in this case – widows of three of the civilian contractors who died aboard the military plane when it crashed – would

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[3] See *Reynolds*, 345 U.S. at 8; *Ellsberg v. Mitchell*, 709 F.2d 51, 57-59 (D.C. Cir. 1983); *Terkel*, 441 F. Supp. 2d at 908-09.

[4] *Reynolds*, 345 U.S. at 10.

[5] *See* Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the* Reynolds *Case*, 253-62 (University Press of Kansas) (2006); Scott Shane, *Invoking Secrets Privilege Becomes a More Popular Legal Tactic by U.S.*, N.Y. Times, June 4, 2006, at 32, *available at* 2006 WLNR 9560648. In addition, the federal courts' role in assessing classified information has evolved substantially since *Reynolds, and* numerous courts have followed the practice. *See, e.g.*, *Kasza v. Browner*, 133 F.3d 1159, 1169-70 (9th Cir. 1998); *Ellsberg*, 709 F.2d at 56, 59; *Halkin v. Helms*, 598 F.2d 1, 7-8, 9 (D.C. Cir. 1978).

not have been denied their day in court to adjudicate their claims for monetary damages for the federal government's alleged negligence in the death of their spouses. We can prevent such patently unjust outcomes by requiring a court to conduct its own *in camera* review and by establishing standards for it to apply in assessing the legitimacy of the government's privilege claims regarding potentially sensitive national security information. Such an enactment will improve government accountability and confidence in our system of checks and balances.

Third, legislation should require a court to assess the legitimacy of the government's privilege claims and deem evidence privileged only if the court finds, based on specific facts, that the government agency has reasonably determined that disclosure of the evidence would be significantly detrimental or injurious to the national defense or would cause substantial injury to the diplomatic relations of the United States.[6]

Under this proposed standard, the government agency must make a reasonable determination of "significant injury" to trigger the privilege when national defense secrets are at risk or a reasonable determination of the more exacting "substantial injury" to trigger the privilege when diplomatic relations are at stake. The term, "diplomatic relations" as opposed to "international relations" is intended to limit the circumstances in which the privilege can be claimed, and coupled with the more exacting "substantial injury" requirement, to ensure that the privilege cannot be claimed when disclosure of evidence would do little more than embarrass the government.

This requirement accordingly provides for judicial review of the specific basis upon which the relevant government agency rests its claim that particular information is privileged. The court would not make this determination *de novo*, but rather would decide whether the government had reasonably determined that the standard was met. The standard contemplated by this requirement is intended to give the courts sufficient flexibility to decide what information is subject to the privilege after reviewing the assertions of both the plaintiff and the Executive

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[6] The standard proposed in the policy is a modification of drafts by the Advisory Committee for Federal Rules of Evidence that would have codified the state secrets privilege in a Federal Rule of Evidence 509. Congress ultimately rejected Fed. R. Evid. 509 and other evidentiary privilege rules submitted contemporaneously in favor of Fed. R. Evid. 501, which recognizes common law evidentiary privileges but does not mention the state secrets privilege. The policy also recognizes that since the Supreme Court's decision in *Reynolds*, which established the privilege in cases in which disclosure of military secrets is at risk, subsequent decisions have extended the privilege to cases in which diplomatic secrets are at risk. See, e.g., *United States v. Nixon*, 418 U.S. 683, 706 (1974).

Branch, which has substantial expertise in assessing the potential injury to the national defense or diplomatic relations that could result from disclosure of the information.

Fourth, legislation should allow discovery to proceed under flexible procedures designed to protect the government's legitimate national security interests. To accomplish this, legislation should authorize the courts to permit discovery of non-privileged evidence, to the extent that it can effectively be segregated from privileged evidence, and issue protective orders, require *in camera* hearings and other procedures where necessary, to protect the government's legitimate national security interests. Disentanglement of privileged and non-privileged evidence is the most effective way to protect both the interests of the private party and the government's responsibility to protect national security secrets. The requirement that courts make efforts to separate privileged from non-privileged information is consistent with the Court's determination in *Reynolds* that the case be remanded to the lower court so the plaintiffs could adduce facts essential to their claims that would not touch on military secrets. Courts generally make efforts in state secrets cases to separate privileged from non-privileged information, or they ultimately make a determination that separation is impossible.

Fifth, legislation should require the government, where possible, and without revealing privileged evidence, to produce a non-privileged substitute for privileged evidence that is essential to prove a claim or defense in the litigation. In cases in which it is possible to generate such a substitute, and the government is a party asserting a claim or defense that implicates the privilege, the legislation would require the government to elect between producing the substitute and conceding the claim or defense to which the privileged evidence relates.

The requirement that the government produce where possible a non-privileged substitute for privileged information derives both from the *Reynolds* case and from the Classified Information Procedures Act (CIPA),[7] which governs the treatment of classified information in the criminal context. The *Reynolds* court based its decision upholding the government's privilege claim in part on the availability of alternative evidence in the form of testimony that might give the respondents the evidence they needed without the allegedly privileged documents. To preserve the defendant's constitutional right to confront the evidence in a criminal case, CIPA allows the government to provide a substitute for classified information to be used in a defendant's defense. The recommendation adopts the CIPA structure, but employs a slightly

[7] 18 U.S.C. App. 3.

lower standard for the substituted evidence to meet because the Confrontation Clause, which requires the high CIPA standard, is not applicable in civil cases.[8] To allow for further fairness, the policy also derives from CIPA the notion that the court can order the government to forego a claim or defense when it fails to provide a substitute for privileged information.[9]

Sixth, legislation should provide that a ruling on a motion that would dispose of the case should be deferred until the parties complete discovery of facts relevant to the motion.[10] Dismissal based on the state secrets privilege prior to the completion of discovery of relevant facts would be permissible only when the court finds there is no credible basis for disputing that the state secrets claim inevitably will require dismissal. This is a very high standard, and we anticipate that it would be met only in very limited circumstances.

Seventh, legislation should provide that, after taking the steps described above to permit the use of non-privileged evidence, the case should proceed to trial unless at least one of the parties cannot fairly litigate with non-privileged evidence. Specifically, a court should not dismiss an action based on the state secrets privilege if it finds that the plaintiff is able to prove a *prima facie* case, unless the court also finds, following *in camera* review, that the defendant is substantially impaired in defending against the plaintiff's case with non-privileged evidence (including the non-privileged evidentiary substitutes described above). To state this more plainly, if the plaintiff could prove the essential elements of his claim without privileged information, the case would be allowed proceed as long as the government could fairly defend against the claim without having to use privileged information. However, if the government would have its hands tied behind its back by not being able to invoke essential privileged information in defending against the plaintiff's case, the case would be dismissed. Likewise, if the court determines that a plaintiff cannot prove the essential elements of his claim without the privileged information, the case also would need to be dismissed.

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[8] In *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985), the court referred to CIPA as a possible model for use in the state secrets context.

[9] A similar provision also appeared in legislation proposed in 1973 by the Advisory Committee for Federal Rules of Evidence for a Federal Rule of Evidence 509 that would have codified the state secrets privilege. The proposed Rule of Evidence was never adopted by Congress.

[10] This provision of the policy relies on Rule 12(a)(4)(A) of the Federal Rules of Civil Procedure, which authorizes the court to "postpone[ ] its disposition" of a motion to dismiss "until the trial on the merits" and Rule 56(f) of the Federal Rules of Civil Procedure, which permits a "continuance" for "discovery to be had" in resolving a summary judgment motion.

Finally, our policy supports legislation providing the government with the opportunity for an expedited interlocutory appeal from a district court decision authorizing the disclosure of evidence subject to a claim under the state secrets privilege. Allowing for an expedited appeal before completion of the case recognizes the government's legitimate interests in protecting against disclosure of sensitive national security information that could be compromised if an appeal of such a decision had to await final judgment, given that the disclosure, once made, could not be undone.

What the ABA recommendations would *not* do is as important as what enactment of them would accomplish. The legislation we support would not require disclosure of information subject to the state secrets privilege to the plaintiff or the plaintiff's counsel. Even if counsel has a security clearance and agrees to a stringent protective order, under no circumstances would privileged information be disclosed to anyone except the presiding judge. The legislation we support would not require courts to balance the interests of the plaintiff in accessing particular privileged information against the government's national security interests. No matter how compelling the plaintiff's claim or the plaintiff's need for the privileged information to prove his claim, if disclosure of the information sought is reasonably likely to be significantly detrimental or injurious to the national defense or to cause substantial injury to the diplomatic relations of the United States, the information will be privileged and the legislation for which we call would not require its disclosure. It would also not require the government to choose between disclosing privileged information and foregoing a claim or defense. The government would face such a choice only with respect to the information the court had already determined was not privileged.

The ultimate goal of all of these recommendations and the objective that should underlie any legislative response is the protection of both the private litigant's access to critical evidence, including evidence necessary to obtain redress for constitutional violations and other wrongful conduct, and our critically important national security interests which, if not protected, could put the nation at grave risk.

Congressional Response

Congressional action in this area is entirely appropriate. In fact, many of the ABA recommendations are drawn from the tested and proven procedures established by Congress in CIPA. Under CIPA, federal courts review and analyze classified information in criminal cases.

Congress has also outlined a role for the courts in handling sensitive information with the adoption of the Foreign Intelligence Surveillance Act of 1978 and the 1974 amendments to the Freedom of Information Act. While some have argued that consideration of sensitive information should be left only to the Executive Branch, there is ample precedent demonstrating that courts can and do make measured, careful decisions about classified information in these other contexts. Further, cases in which the state secrets privilege is invoked increasingly involve allegations that the government has violated fundamental, constitutional rights, making federal court involvement especially important.

The ABA's policy respects the roles of all three branches of government in addressing state secrets issues. The policy does not suggest that courts should substitute their judgments on national security matters for those of the executive branch but instead provides that executive branch privilege claims should be subject to judicial review, under a deferential standard that takes into account the executive branch's expertise in national security matters. The ABA believes this is a proper role for the judiciary, because courts routinely perform judicial review of decisions made by expert governmental agencies. In addition, as the *Reynolds* case explained, the state secrets privilege is an evidentiary privilege; the judiciary properly makes the final decisions on privilege claims in cases involving executive branch agencies as litigants. Finally, it is constitutionally permissible and appropriate for Congress to act in this area, to provide greater clarity to the jurisdiction and procedures of the courts. For example, Congress routinely approves the proposed federal rules of civil and criminal procedure as well as considers legislation establishing the federal rules of evidence to ensure fair procedures for the courts. In fact, in 1973 the Congress considered, but ultimately did not adopt, proposed Rule of Evidence 509, which would have codified the state secrets privilege.[11]

The ABA supports S. 2533, the State Secrets Protection Act, recently introduced by Senators Edward Kennedy (D-MA) and Arlen Specter (R-PA). This legislation embodies a number of the principles advocated by the ABA to provide greater clarification to the application of the state secrets privilege. It establishes detailed procedures that ensure that claims of privilege are met with meaningful judicial review. For example, it requires that a court review asserted state secrets evidence in a secure proceeding in order to determine whether disclosure of the evidence would endanger national security or foreign relations. It requires that the

[11] *See* Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the* Reynolds *Case* (University Press of Kansas) (2006).

Government provide an unclassified or redacted alternative to evidence that the court concludes is protected by the state secrets privilege. It also allows expedited appeals of state secrets decisions. Finally, the legislation requires regular reports to Congressional committees on the use of the state secrets privilege. We hope a similar measure will be introduced soon in the House.

Going forward, robust congressional oversight will strengthen the ability of our government as a whole to ensure that our justice system is properly equipped to balance national security interests with the protection of individual rights and liberties. Additionally, with the adoption of new legislation establishing procedures for the application of the state secrets privilege, close congressional oversight could guard against any unintended consequences in the implementation of new uniform standards.

Conclusion

The ABA believes that now is the time for Congress to step in to ensure that the courts maintain a meaningful role in making decisions about the evidence that is subject to the privilege. It is within the constitutional mandate of Congress to oversee these issues with authority and to offer corrective legislation to allow for an inquiry into the government's assertion that information is subject to the privilege. We believe that our proposal provides ample opportunity for the government to assert the privilege, and to back up its assertion in confidential proceedings. And it entitles the government to a speedy appeal from any court decision that authorizes disclosure of evidence subject to a state secrets claim, or that imposes penalties for nondisclosure or refuses to grant a protective order to prevent disclosure. National security interests would be well protected.

As then-Supreme Court Associate Justice O'Connor observed, "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[12] The American Bar Association urges Congress to assert its proper role and to take action to ensure that the state secrets privilege is applied in a manner that protects the rights and civil liberties of private parties to the fullest extent possible without compromising legitimate national security interests.

On behalf of the American Bar Association, thank you for considering our views on an issue of such consequence to ensuring access to our justice system.

[12] *Hamdi* v. *Rumsfeld,* 542 U.S. 507, 536 (2004) (quoting *Mistretta* v. *United States*, 488 U.S. 361, 380 (1989)).

Mr. NADLER. Thank you very much.

Ms. Loether?

TESTIMONY OF JUDITH LOETHER, DAUGHTER OF VICTIM IN *U.S. v. REYNOLDS*

Ms. LOETHER. Mr. Chairman, Members of the Committee, I would like to start by saying that this morning I saw the statues outside that represented the majesty of law and the spirit of justice. I would like to think those principles do indeed always guide us in this great country.

I am Judy Loether. I am an ordinary housewife from the suburbs of Boston. You might call me chief cook and bottle-washer. I have come to tell you my story.

Six years ago, I did not know the first thing about the state secrets privilege.

Almost 60 years ago, when I was just 7 weeks old, my father, an engineer for RCA, was killed in the crash of a B-29. This put the death of my father and my mother's subsequent lawsuit against the United States government squarely in the center of the landmark case *United States v. Reynolds.*

My mother remarried and, while growing up, I knew very little about my own father and the lawsuit. My mother got some money. I thought she had won. I never knew her case went to the Supreme Court.

The death of my father was quite a mystery to me. The newspaper clippings in the attic had pictures of the wreckage and talked of secret missions and even cosmic rays. My uncle used to tell me that he thought the Russians blew up the plane.

After I had my own children, I became very interested in this man who was my father, the man whose pictures and documents of life and death had resided in the attic. When the Internet came to my house, I searched for information about anything related to his work and his life.

One day, I happened to type into the search engine "B-29 + accident." It was only chance that brought me to accident-report.com which provides accident reports for Air Force accidents from 1918 to 1953. My first thoughts were, "This might tell me about the secret project he was working on. This might tell me if the Russians blew up the plane!"

When I read this report, I felt a great deal of disappointment as there was no information about the project, the mission, or the equipment. Instead, it contained a truly sad and very dark comedy of errors that led to the terrible death of my father and eight other men.

Just some of these mistakes: With engine number 1 in flames, the pilot shut down the wrong engine, number 4; the engineer, charged with the task of cutting the fuel to the burning engine, cut the fuel to engine number 2. Now we have the largest bomber in the world flying on one of its four engines. What is more, the heat shield to be retrofitted into B-29s to prevent fires was never installed. There were many, many more mistakes.

The report did spur me on to look for and find another little girl who had lost her father on that plane. It was through her that I learned about the Supreme Court case.

That very day, I looked up the *Reynolds* decision on my computer. What I read there sent me on a journey that has brought me here today. I read a decision that hinged on this very same accident report, an accident report that the Government claimed told of the secret mission and the secret equipment. All I could think was, "No, it does not!"

Part of the *Reynolds* decision stated: "Certainly, there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission."

This accident report was not about secret equipment. This accident report was not about a secret mission. Even more telling, this accident report was not even classified as secret. And I now understood that my mother had lost her case.

As time passed, I came to understand the significance of the *Reynolds* case in establishing the state secrets privilege. I learned that it was discussed in law school courses on national security law. It seemed to me that the case that allows the executive to keep its secrets was, at its very foundation, a gross overstatement by the Government to forward its own purposes, to get themselves a privilege. At what cost? The cost was truth and justice and faith in this Government.

Five years ago, I stood in the woods in Waycross, Georgia, at the crash site. I thought about my father who spent his entire career working for the Government. His last thoughts must have been for the wellbeing of his family and who would take care of them.

Mistakes were made on that plane, and the Air Force should have done the right thing. The average American who backs out of his driveway and accidentally runs over his neighbor's mailbox will stop, walk up to his house, knock on the door, and own up to his mistake. However hard it is to look the fool, however hard it is to fork over the cash, it is simply the right thing to do, and it is how we all expect our Government to act when it makes a mistake.

For the other families, for my father, my mother, my two brothers and me, my America did not see fit to do the right thing, to step up, admit to their mistakes, and compensate three widows and five little children. It was more important to get a privilege.

I decided that day to try to let the people of this country know this is not the American way and is contrary to what I believe America stands for in the minds and hearts of its people.

The judiciary cannot give up any of the checks and balances that make this country great. Judicial review must be the watchdog that guards against actions by the executive that chip away at the moral character of this country.

Thank you.

[The prepared statement of Ms. Loether follows:]

PREPARED STATEMENT OF JUDITH LOETHER

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Almost sixty years ago, when I was just seven weeks old, my father, an engineer for Radio Corporation of America (RCA, an Air Force contractor), was killed in the crash of a B-29 Superfortress. This put the death of my father and my mother's subsequent lawsuit against the United States government squarely in the center of the landmark case United States v. Reynolds.

My mother remarried and while growing up I knew very little about my own father and the lawsuit. My mother got some money; I thought she had won. I never knew her case had gone to the Supreme Court. The death of my father was quite a mystery to me; the newspaper clippings in the attic had pictures of the wreckage and talked of secret missions and cosmic rays. My uncle used to tell me that he thought the Russians blew up the plane. After I had my own children I became very interested in this man who was my father, the man whose pictures and documents of life and death had resided in the attic.

When the Internet came to my house I searched for information about anything related to his work and his life. One day I happened to type into the search engine B-29 + accident. It was only chance that brought me to *accident-report.com* which provides accident reports for Air Force accidents from 1918 to 1953. My first thoughts were that this might tell me about the secret project he was working on, this might tell me if the Russians blew up the plane! When I read this report I felt a great deal of disappointment as there was no information about the project, the mission, or the equipment. Instead, it contained a truly sad and very dark comedy of errors that lead to the terrible death of my father and eight other men. Just some of these terrible mistakes: with engine number 1 in flames, the pilot shut down engine number 4 by mistake; the co-pilot, a survivor, thought he corrected that by turning back on engine number 4, but he didn't; finally, the engineer, charged with the task of cutting the fuel to the burning engine, cut the fuel to engine number 2 by mistake. Now we have the largest bomber in the world, flying on only one of its four engines. What's more, a heat shield to be retrofitted into B-29s to prevent fires was never installed.

The report did spur me on to look for and find another little girl who had lost her father on that plane, now grown and living in my own state of Massachusetts. It was through her that I learned about the Supreme Court case and that very day I looked up the Reynolds decision on my computer. What I read there sent me on a journey that has brought me here today. I read a decision that hinged on this very same accident report, an accident report that the government claimed told of the secret mission and the secret equipment. All I could think was, no, it doesn't! Part of the Reynolds decision stated:

"Certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission."

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As time passed I came to understand the significance of the Reynolds case in establishing the State Secrets Privilege. I learned that it was discussed in law school courses on national security law. The more I understood what had happened to my mother and why, the more betrayed I felt. It seemed that the case that allows the Executive to keep its secrets was, at its very foundation, a gross overstatement by the government to forward its own purposes; to get themselves a privilege. At what cost? The cost was truth and justice and faith in this government.

Five years ago I stood in the woods in Waycross, Georgia, the crash site. I thought about my father who spent his entire career working for the government, developing technical equipment for the B-29. He sacrificed his life for it. His last thoughts must have been for the wellbeing of his family and who would take care of them. Mistakes were made on that plane and the Air Force should have done the right thing. The average American who backs out of his driveway and accidentally runs over his neighbor's mailbox, will stop, walk up to his neighbor's house, knock on the door, and own up to his mistake. However hard it is to look the fool, however hard it is to fork over the cash, it is simply the right thing to do, and it's how we all expect our government to act when it makes a mistake. For the other families, for my father, my mother, my two brothers and me, my America did not see fit to do the right thing, to step up, admit to their mistakes, and compensate three widows. It was more important for them to get a privilege. I decided that day to try to let the people of this country know that an injustice had been done. This is not the American way, and is contrary to what I believe America stands for in the minds and hearts of its people.

The judiciary cannot give up any of the checks and balances that make this country great. Judicial review must be the watchdog that guards against actions by the Executive that chip away at the moral character of this country.

Mr. NADLER. Thank you very much.

Our next witness will be Judge Wald.

TESTIMONY OF THE HONORABLE PATRICIA M. WALD, RETIRED CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT

Judge WALD. Chairman Nadler, Chairman Conyers, Committee Members, thank you for inviting me to testify today on the state secrets privilege. My testimony is going to deal with the capability of and the tools Federal judges need to administer the privilege in a manner that will not endanger national security at the same time it will permit litigants to the maximum degree feasible to pursue valid civil claims for injuries incurred at the hands of the Government or private parties.

So let me make a very few points in summarizing my testimony.

The first is I agree very much, especially with the letter which was submitted by William Webster, the former FBI and CIA director and former Federal judge, and with the prior ABA president-to-be, that there is a wide consensus in the legal community, as the Bar Association report showed, of the importance of the issue of state secrets, regardless of what the percentage is of the increase in its application to the cases that are increasingly coming into the courts today, and, more important, I think the varying results of leaving the implementation of the privilege totally within the discretion of individual judges. That, I believe, militates toward the exercise by Congress of what I believe is its acknowledged power under Article I Section 8 and Article III Section 2 to prescribe regulations concerning the taking of evidence in the Federal courts.

Again, as has already been pointed out, we have already had legislation in CIPA to take care of the criminal side with its classified information, in FISA in proceedings where information that was obtained under FISA, and especially I would like to point out, in the FOIA cases of which the D.C. Circuit had a great many—many of which I participated in—that it was Congress itself in 1974 that passed an amendment through FOIA Exemption 1 saying, when a request was made for information that might be classified, that the court not only had a duty to ensure that it had been classified according to the proper procedures, but that the court could itself look at the reasonableness of the classification.

Now I will tell you, in my experience, courts have been very cautious and courts have been very, very cognitive of national security needs in using that kind of power. FOIA did not require the court to look at the actual evidence, but it did allow them, if the court found it necessary, and, in some cases, where there had been what the court ultimately found to be bad faith exercises of the classification power, they have done it. So we already do have a precedent where courts look at those materials.

I also will tell you that courts look at national security materials and make a decision whether or not they have been validly classified in other contexts. I myself have participated in some of those cases, not only in the FOIA Exemption 1 cases, but on appeal of the CIPA cases. We have also had many cases—not many, but at least some cases—in which former CIA agents, et cetera, attempt to write books, articles, and according to their agreement to have them looked at by the agency before they are disclosed, there have

been disputes which have gone to court. So it is not that unusual for Federal judges to actually look at classified material or secret material.

I believe that even the *Reynolds* case—not even the *Reynolds* case—but the *Reynolds* case had as its bottom assumption that it was a judicial function. It was the court's function, not the executive's function to decide ultimately in a dispute whether or not the material did present a "reasonable danger" to national defense or foreign relations. Ultimately, the judge makes that decision, not the Government.

Now the problem that has arisen in many of these cases, the ones that I have read, is that the courts sometimes are so deferential that if the Government makes in its affidavits even a prime facie plausible claim of state security being involved, they will shy away and they will not go beyond that, and I think that legislation which required the courts to look at particular things, not to dictate whether or not something will be national security or will not be national security, but to actually, as it were, go through certain loops, will make judges themselves more aware of, more sensitive to the interests that are involved, and while ultimately if they decide something is a state secret, as Mr. Wells said, there is nothing in any legislation that I know about that would portend to tell them, "Well, we will release it anyway" or "We will balance it."

It is not like the executive privilege. Remember, these other privileges, the executive privilege, they can be balanced. If the litigants' need is bad enough or is compelling enough, they can actually be required to be disclosed. There is nothing in this legislation or anybody proposing that that be true in this case.

The other two points I would make is that the legislation, I think, should provide an array of alternatives that the court could look at, could substitute, as it does in CIPA. They might not need to be the same. I am aware, having read Mr. Philbin's testimony, CIPA cases are not exactly like the kind of civil cases because the Government—ultimately, it is their prosecution, and they can go away from it if they decide that it is more important than providing any substitute.

But we have had 20 years of experience, and courts, I think, have been pretty good. I have seen some of those appeals with the CIPA material in them, and they have been pretty good at creating alternatives that did not have classified information, summaries of information, stipulations by the Government and the parties which did away with the need to actually introduce the material in there. So I think we want to avail ourselves of that kind of experience.

The last quick point I will make is what I think is terribly important is that we do not dismiss these cases right at the pleading stage, if at all possible, unless it is clear under the Federal rules of civil procedure that there is no way this particular civil claimant can make a case without the material. Then I think you should let the civil claimant proceed along the road to discovery of non-secret material until the state secret privilege has been litigated and decided because a large number of cases get dismissed at the pleading stage.

There have been many studies on this which show that if somebody pleads something and then somebody introduces one piece of

information, they immediately convert it to summary judgment and you are gone. I think that special caution has to be taken in these kinds of cases, and especially in the standing realm, which, I believe, Mr. Bankston will get to, whereby a person cannot even make out the standing to bring the case.

Why can't they make it out? I think this is interesting. Because the court doctrines of standing over the last 30 years—and I have written about this extensively—has become very, very complex—causation, redressability. It is virtually impossible in many cases to get standing, but those are court-created doctrines. Those are not legislative, and they are not even constitutional. They are part of case in controversy, but they are court created.

So I think, in a situation where standing is dependent upon state secrets, at least the case should not be dismissed until the state secrets business has been litigated and the claimants have been given every opportunity to try to make out their case by further discovery.

So, in concluding, I would say I think that we have some of the tools already, some of the experience in the Federal courts, and with a legislation that would require judges go through certain procedures, just the way they do in habeus—the habeus statutes lay down what you have to do and who comes next and what then has to be shown, et cetera—I think that they would contribute mightily toward making it a fairer process.

Thank you.

[The prepared statement of Judge Wald follows:]

PREPARED STATEMENT OF THE HONORABLE PATRICIA M. WALD

Chairman Nadler, Committee Members:

Thank you for inviting me to testify briefly today on the state secrets privilege which is being increasingly raised as a determinative issue in federal court civil litigation involving alleged violations of civil and constitutional rights. My testimony will deal with the capability of federal judges to administer the privilege in a manner that will not endanger national security at the same time it permits litigants to the maximum degree feasible to pursue valid civil claims for injuries incurred at the hands of the government or private parties. In that regard let me make a few points.

1. The state secrets privilege is a common law privilege originating with the judiciary which enunciated its necessity and laid down some directions for its scope in cases going back to the nineteenth century but more recently highlighted in United States v Reynolds, 345 U.S. 1 (1953). Reynolds recognized the government's privilege in that case to refuse to reveal an airplane accident report in private injury litigation because of 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 10. (as you undoubtedly know it turned out that there were no such secrets in the report). Since Reynolds, courts have been deciding cases where the government raises the privilege on their own in terms of its scope and its consequences and producing often inconsistent results. There is a wide consensus in the legal community as the American Bar Association Recommendations and Report demonstrate that the importance of the issue and the varying results of leaving the implementation of the privilege totally within the discretion of individual judges militate toward the exercise by Congress of its acknowledged power under Article I, Section 8 and Article III, Section 2 of the U.S. Constitution to prescribe regulations concerning the taking of evidence in the federal courts. Again as you are aware Congress has legislated many times on the Rules of Evidence governing federal court procedures including those for proceedings like habeas corpus and FISA proceedings that may involve matters of national security. In the criminal area, the Classified Intelligence Procedures Act (CIPA) provides a relevant model for alternatives to full disclosure of classified information which allow a prosecution to continue while affording a defendant his or her due process rights. The time is now

ripe for such legislation in the civil arena; litigants and their counsel are confused and unsure as to how to proceed in cases where the government raises the privilege; the courts themselves are confronted with precedent going in many different directions as to the scope of their authority and the requirements for exercising it.

2. Although at this juncture we are not discussing specific draft bills, I believe there are several principles which need to be considered in such legislation. Many come from the cases themselves, others from the CIPA legislation , my own judicial experience with cases involving national security information such as the FOIA, and still others from the ABA Report and from a Judicial Conference Advisory Committee Report back in 1969. dealing with codification of the privilege (hereafter Advisory Committee).These principles I believe are capable of being observed by federal judges without making their jobs unduly onerous and are within their competence to administer, as proven by their current use in other kinds of litigation. They will, I also believe, contribute to the uniformity of the privilege's application throughout the federal judiciary and to both the reality and the perception of fairness for deserving litigants with valid civil claims.

(a) Reynolds made it clear and subsequent cases have verbally agreed that whether the evidence sought to be withheld by the government does present "a reasonable danger" to national defense or foreign relations (the precise formulation of national security risk varies in the cases but is an issue to be accorded serious thoughts by legislators; too broad a definition could encompass virtually anything in which the government has an interest in the modern day globally interdependent world) is ultimately a matter for the judge, not the government to decide. Thus it should not be enough—though some cases appear to come close to saying it is—that a prima facie plausible claim of state secret be raised by the government. In this sense it is different from some other contexts in which secrecy and national security are involved such as the FOIA. There in Exemption 1, the government may withhold from public disclosure material that has been duly classified under Executive Order criteria if that classification is reasonable. Under a specific amendment in 1974 however, the court has the authority to look at and decide de novo (though giving "substantial weight" to government affidavits) whether the classification is reasonable. The courts' use of that authority I will say has been cautious to the extreme, but it does exist and on occasion has been employed to reject unjustified claims. A case for more intense scrutiny of the state secret privilege by judges can be made on the basis that the need for such information is more compelling in the case of a civil plaintiff than any member of the public as in FOIA and in the fact that to qualify for Exemption 1, the material must have been reasonably classified under Executive Order criteria—a requirement that is not to my knowledge a component of the state secrets privilege per se. But the FOIA example makes a basic point that judges do deal with national security information on a regular basis and can be entrusted with its evaluation on the relatively modest decisional threshold of whether its disclosure is "reasonably likely" to pose a national security risk. To my knowledge there have been no court "leaks" of any such information There is no doubt that such a decision is a weighty one but if our courts are to continue their best tradition of constitutional guardianship it is an obligation that they cannot avoid, And the potentiality of a serious judicial review of the material in conjunction with the governments affidavits on the need for nondisclosure even in a courtroom setting will itself pose a deterrent to the dangers of the privilege being too "lightly invoked" (Reynolds)

(b) This brings me to the question of whether unlike FOIA which allows but does not require a judge to look at the allegedly risky material himself in camera rather than relying on the government's affidavits, state secret legislation should require the judge to himself or herself review the material before making a decision on whether the privilege applies. I am of the view that it should. The stakes in civil litigation—as I said—tend to be higher than in FOIA for the plaintiff and our traditions of fair hearing dictate that to the maximum degree feasible all relevant evidence be admitted in judicial proceedings. Reynolds itself left open the possibility that in some contexts where the plaintiffs' showing of need was not compelling, the judge need not do so, and as I have related ,in FOIA cases the judge may decide not to. On the other hand the judge in CIPA and in FISA cases does regularly inspect the material. in camera. I read the ABA Report to recommend a similar approach here. Only in that way can he fulfill the judicial obligation to insure a fair hearing but just as important only if he sees the evidence for himself can he make the CIPA like decision whether there are alternative ways than its presentation in original form to satisfy the plaintiff's need but not to impugn national security as well as whether the objected to material can be segregated from other material in the same document that does not qualify for protection. (I do not discount the possibility that an extraordinary case might arise where both the government and the

judge agree that his examination of the secret evidence would be unduly risky and alternatives c an be put in place that will insure fairness but this should not be the usual or ev en a frequent practice). My own experience with highly sensitive information is that our court security safekeeping facilities and procedures can insure its protection; law clerks or masters can be given clearances to handle it and if even that is not possible, the government's own cleared employees can be sent over to stand guard outside the chambers door while the judge reads it. (I have had this done on at least one occasion).

(c) The thrust of legislation on state secrets should be to emphasize judicial flexibility and creativity in finding alternatives to the original material that will permit the case to proceed whenever possible. Reynolds itself stressed this approach and it has been a hallmark of reform efforts on the privilege since the 1969 Advisory Report(if claim of state secrets is sustained and party is deprived of material evidence, judge shall make further orders in interest of justice including striking of witness testimony, finding against government on relevant issue, or dismissing action). Since 1969 however CIPA has listed and judges have additionally used less draconian measures such as requiring the government to produce an unclassified document with as much of the material as possible in the original, stipulating to facts that the original material was designed to prove or contravert, or a summary of the controversial document that allows the defendant "substantially the same ability to make his defense". 18 USC app 3 Sec. 6.

(d) Another aspect of judicial flexibility should require a judge to make a conscious decision after a state secrets claim is raised whether the plaintiff's case may proceed to the next stage without the secret material. Premature dismissals should be eschewed. Unless then without such material a party's affirmative case or defense surely falls short of the threshold required by the federal rules of civil procedure (Rules 12(b)(6) and 12(c), the party suffering disadvantage from nondisclosure should be allowed to supplement their case by additional discovery whenever it could reasonably bolster their case. This actually is a very important point because a high percentage of cases are dismissed at the pleading stage without additional discovery being allowed, and the interposition of the secrets claim makes it fair to mandate special caution in such cases to let the party play out its nonsecret [O1] case. Also worth noting is the difficulty of plaintiffs who cannot show standing to bring the suit unless they are allowed to see secret evidence. Here particular care should be taken to allow maximum access to nonsecret discovery or even postponement of the standing decision until the secrecy claim is decided. Standing is after all a judicial doctrine which has become increasingly onerous and complex in the past few decades; since state secrets is also a judicially implemented doctrine the two should be brought into some form of coexistence that does not fatally disadvantage valid civil claimants. As the ABA Report pointed out the Totten and Tenet cases involving espionage employment contracts do present an absolute bar to justiciability but other cases do not. I agree with the Report's suggestion as well that the government not be required to immediately plead" confirm or deny "at the pleading stage when the secrets claim is planning to be raised. FOIA practice provides an analog—the government has been allowed to raise a "neither confirm nor deny" answer as to whether a requested document exists in its pleadings in Exemption 1 cases.

(e) Once the government raises a secrets claim, the question arises as to how it will be litigated and by whom. The government is certainly required by affidavit or testimony to justify the claim but where and who can take part in the litigation at that stage may be an issue. The 1969 Advisory Committee Report permitted the judge to hear the matter in chambers "but all counsel are entitled to inspect the claim and showing and to be heard thereon", subject to protective orders. In general every effort should be made to provide the regular counsel with the necessary clearances to litigate the claim, and where that turns out to be impossible to substitute counsel who have such clearances. In some cases the validity of the secrets claim can be litigated at a level which does not require special clearances. The FOIA cases have produced a useful tool known as the Vaughn index which requires the government to create a line by line justification of withheld material with the reasons for nondisclosure. This device has permitted the adversary system to operate at some level to litigate secrecy claims without revealing the material itself. Another device used successfully by our district court was the appointment of a master with the necessary clearances to organize and separate out sample categories of documents in a voluminous submission for which total secrecy was originally claimed under FOIA Exemption 1 and to present them to the judge with the arguments pro and con for the judges decision. As a result 64% of the material was eventually released. See In re United States Department of Defense, 848 F2d 232 (1988). In short, judges are used to handling confidential material through sealing, protective orders against

disclosure by counsel, screened masters, and in camera or even ex parte submissions. But the need for guidance and a protocol for using such devices in a uniform manner is dominant. The mere exercise of going through the required procedural steps will concentrate the judge's attention and sharpen his or her awareness of the interests involved at each stage.

(f) Dismissal of a private party claim should be a last resort if it is based on the unavailability of state secret evidence. There will of course be cases where the judge ultimately and rightly decides that a state secret of significant consequence and risk cannot be revealed even under safeguards but I suggest legislators give some thought as to whether there are any compensatory remedies to the injured party in such cases. Or conversely whether when a secrets claim is upheld at the same time the court finds it is covering governmental misbehavior if some form of accountability is in order. Finally expedited appeal—interlocutory in many cases—should be allowed on a truncated record (sealed if necessary) with cutback briefing and absent any requirement for a detailed written opinion by either court, although I do think a few sentences of explanation are always necessary for any kind of meaningful review at any level. But the expedited appeal—especially if the government loses its claim—should insure against prolonged delays in the trial itself.

Thank you for this opportunity to present my views. I do believe thoughtful legislation is needed to insure that maximum and uniform efforts are made to strike the right balance between national security needs and fair judicial proceedings. I believe base d on my experience as a federal judge and my international war crimes experience that such a balance can be struck and that our federal judges are already acquainted with the use of many of the proper tools for doing so. I have confidence in the Committee's ability and I encourage it to tackle the task.

Mr. NADLER. Thank you.

Mr. Philbin is now recognized for 5 minutes.

TESTIMONY OF PATRICK F. PHILBIN, PARTNER, KIRKLAND & ELLIS

Mr. PHILBIN. Thank you, Chairman Nadler, Member Fanks, and Members of the Subcommittee, for the opportunity to appear to address the important subject of today's hearing, the state secrets privilege.

When I served as an associate deputy attorney general at the Department of Justice from 2003 to 2005, I gained some expertise relating to the privilege and the critical function it plays in preventing the disclosure of national security information in litigation.

I continue to watch developments in this area of the law with some interest, although at a distance.

I should emphasize that I am expressing purely my personal views here today, and I am not here in any representative capacity.

I would like to focus on three points in my testimony.

First, any discussion of possible legislation altering or regulating the state secrets privilege should begin with the recognition of the vital function the privilege serves. It is a mechanism by which the United States can ensure the secrecy of information related to foreign affairs and national security that would do harm to the United States if publicly disclosed.

The Supreme Court recognized the importance of the privilege in *United States v. Reynolds*. As explained, it is a privilege. When properly invoked, it is absolute. The court explained, "Even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."

The privilege plays a particularly vital role when, as now, the Nation is involved in an armed conflict. The United States remains locked in a struggle with al-Qaida, an enemy that operates by se-

crecy and stealth and whose primary objective is to unleash surprise attacks on the civilian population of the United States.

In combating al-Qaida, superior intelligence is essential for the Nation's success, yet currently pending litigation would, without interposition of the state secrets privilege, force the disclosure of innumerable details concerning the sources and methods of foreign intelligence operations, signals intelligence operations, and other activities the United States conducts in the ongoing conflict. The state secrets privilege plays a critical role in ensuring that such secrets, which would be welcome to our enemies, are not disclosed.

Second, any approach to legislating in this area must also begin with the recognition that the state secrets privilege is not merely a common-law evidentiary privilege subject to plenary regulation by Congress. To the contrary, the privilege is rooted in the constitutional authorities assigned to the President under Article II as Commander in Chief and representative of the Nation in foreign affairs. As the Supreme Court has explained in discussing the protection of national security information, "The authority to protect such information falls on the President as head of the executive branch and as Commander in Chief."

In the *United States v. Nixon*, the Supreme Court expressly recognized that the privilege has its underpinnings in the Constitution. The court explained generally that to extent a claim of privilege relates to the effective discharge of the President's powers, it is constitutionally based, and it expressly recognized that "a claim of privilege on the ground that information constitutes military or diplomatic secrets necessarily involves areas of Article II duties assigned to the President."

Given the unique constitutional role of the executive with respect to the protection of diplomatic intelligence and national security information, any legislation that would seek to reform the state secrets privilege as it is currently applied by the courts must be undertaken with the utmost caution. Legislation that would undermine the executive's authority to protect national security information would run a grave danger of impermissibly encroaching on authority assigned by the Constitution to the executive branch.

Third and finally, I would like to address and caution against a particular legislative change that may be considered. My comments here are necessarily tentative because there is not a specific legislative proposal before the Committee, but I think it bears noting that Congress should tread carefully in considering any legislation that would purport to alter substantially the deferential standard of review the courts apply in evaluating a claim of state secrets privilege.

In particular, I believe it would be a mistake to attempt to have Article III judges substitute their own judgment concerning what information should remain secret without deference to the judgment of the executive. Such a standard of review would be a marked departure from the law established by the Supreme Court.

The *Reynolds* court properly emphasized that it remains the duty and the responsibility of the courts to determine whether the privilege had been validly invoked in any particular case. The mere assertion the privilege by the executive does not require a court to accept without question that the material involved is a state secret.

As the Supreme Court put it, "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."

Nevertheless, the court also made clear that a judge should not simply substitute his or her judgment for that of the executive branch. Rather, a court should proceed cautiously, showing deference to the judgment of the executive, concerning what constituted a secret that might do harm to the Nation if disclosed.

In the *United States v. Nixon*, the court further explained that where the executive makes a claim of privilege on the ground of military or diplomatic secrets, the courts have traditionally shown the utmost deference to presidential responsibilities. That deferential standard of review is itself infused with constitutional significance based upon the separation of powers and unique authorities of the executive under Article II.

The assertion of state secrets privilege is at its heart an exercise of a policy judgment concerning how the disclosure of certain information may affect the foreign affairs, the military and intelligence posture, or more broadly the national security of the United States. Time and again, the Supreme Court and lower courts have cautioned that such judgments are constitutionally assigned to the executive and that the judiciary is not institutionally suited to making them.

Thus, in the context of a court evaluating a claim by executive that certain information must remain classified and protected from disclosure, the Supreme Court has cautioned that "What may seem trivial to the uninformed may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." The quote went on to explain that the Director of Central Intelligence is "familiar with the whole picture as judges are not" and that his decisions upon what must be kept secret are, therefore, worthy of great deference.

Any legislative proposal, therefore, that would attempt to alter the standard of review established under *Reynolds* and *Nixon* by permitting an Article III judge to substitute his or her independent judgment for that of the executive concerning the need for secrecy on a particular piece of information would be a mistake. Attempting to assign the courts that role by legislation would at a minimum raise a serious question of impermissible encroachment on authority assigned to the executive under the Constitution.

Thank you, Mr. Chairman, for the opportunity to address the Committee. I would be happy to address any questions the Members may have.

[The prepared statement of Mr. Philbin follows:]

PREPARED STATEMENT OF PATRICK F. PHILBIN

Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Oversight Hearing on the Reform of State Secrets

January 29, 2008

Prepared Statement of Patrick F. Philbin, former Associate Deputy Attorney General, Department of Justice

Chairman Nadler, Ranking Member Franks, Members of the Subcommittee, thank you for the opportunity to appear before the subcommittee to address the important subject of today's hearing, the state secrets privilege. When I served as an Associate Deputy Attorney General at the Department of Justice from 2003 to 2005 I gained some expertise relating to the privilege and the critical function it plays in preventing the disclosure of national security information in litigation. Since my return to the private sector, I have continued to watch developments in this area of the law with interest. I should emphasize that I am expressing purely my personal views here today, and I am not here in any representative capacity.

I would like to focus on three points in my testimony.

First, the state secrets privilege serves a vital function in ensuring that private litigants cannot force the disclosure of information bearing on the foreign affairs or national security of the United States. Particularly at a time when the Nation is still engaged in a conflict with al Qaeda in which intelligence is critical for our success, the state secrets privilege is a necessary mechanism for the Executive Branch to protect the national security.

Second, the privilege is rooted in the constitutional authority of the President as Commander in Chief and representative of the Nation in foreign affairs to protect the national security of the United States. Any effort, therefore, to legislate concerning the privilege must be

undertaken with the utmost caution to ensure that Congress does not impermissibly entrench upon authority assigned by Article II of the Constitution exclusively to the Executive.

Third, I want to caution against two possible legislative changes that I believe would be misguided.

I. The State Secrets Privilege Serves a Critical Function in Preventing the Disclosure of National Security Information.

Any discussion of possible legislation altering or regulating the state secrets privilege should begin with a recognition of the vital function the privilege serves. It is a mechanism by which the United States can ensure the secrecy of information related to foreign affairs and national security that would do harm to the United States if publicly disclosed. The Supreme Court recognized the importance of the privilege in *United States v. Reynolds*, 345 U.S. 1, 11 (1953), as it explained that the privilege, when properly invoked, is absolute. "Even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Id.*

The privilege plays a particularly vital role when, as now, the Nation is involved in an armed conflict. The United States remains locked in a years-long struggle with al Qaeda -- an enemy that operates by secrecy and stealth and whose primary objective is to unleash surprise attacks on the civilian population of the United States. In combating this shadowy enemy, superior intelligence is essential for the Nation's success. Yet currently pending litigation would, without the interposition of the state secrets privilege, force the disclosure of innumerable details concerning the sources and methods of foreign intelligence operations, signals intelligence operations, and other activities the United States conducts in the ongoing conflict with al Qaeda. Allowing such information to be disclosed would aid our enemies and gravely damage the national interest. Indeed, it is no exaggeration to say that it would put American

lives at risk. The state secrets privilege thus plays a critical role in ensuring that the Executive Branch can fulfill its constitutional duty to protect the national security of the United States.

II. The Privilege Is Rooted in the Constitutional Authorities Assigned to the Executive Branch.

Any approach to legislating with respect to the state secrets privilege must also begin with a recognition that it is not merely a common law evidentiary privilege subject to plenary regulation by Congress. To the contrary, the privilege is rooted in the constitutional authorities assigned to the President under Article II as Commander in Chief and representative of the Nation in foreign affairs. As the Supreme Court has explained in discussing protection of national security information, "[t]he authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). Exercise of the states secrets privilege is thus a part of the Executive's constitutionally assigned responsibilities and necessarily implicates what the Supreme Court has described as "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court expressly recognized that the privilege has its underpinnings in the Constitution. The Court explained generally that, to the extent a claim of privilege "relates to the effective discharge of the President's powers, it is constitutionally based." *Id.* at 711. And it expressly recognized that a "claim of privilege on the ground that [information constitutes] military or diplomatic secrets," necessarily involves "areas of Art. II duties" assigned to the President. *Id.* at 710. *See also El-Masri v. United States*, 479 F.3d 296, 303-04 (4th Cir. 2007) (holding that state secrets privilege "has a firm foundation in the Constitution").

The state secrets privilege thus shares the same constitutional underpinnings as the authority that the Executive Branch has long maintained to withhold diplomatic or national security information even from Congress when the President deems it necessary in the interests of the foreign affairs or security of the Nation. Since the Founding of the Republic, beginning with the administration of President Washington, the Executive has claimed the authority, based upon the constitutional separation of powers, to refuse to provide Congress information related to the conduct of foreign affairs when the President deems that the information should remain secret. Most famously, when Congress sought information concerning the negotiation of the Jay Treaty with France, President Washington explained that "[t]he nature of foreign negotiations requires caution, and their success must often depend on secrecy," and refused to provide information that the Executive determined should remain secret. 1 *A Compilation of Messages and Papers of the President 1789-1897*, at 194 (James D. Richardson ed. 1897). As the Supreme Court has explained, the "wisdom" of his response "was recognized by the House itself and has never since been doubted." *Curtiss Wright*, 299 U.S. at 320.

Since the Washington Administration, the Executive Branch, under presidents of both parties, has consistently maintained the constitutional authority of the President to withhold certain information relating to foreign affairs and intelligence matters from Congress. As Walter Dellinger, the head of the Office of Legal Counsel under President Clinton explained, President Washington established the view that the "Constitution delegates to the President the authority to withhold documents relating to diplomatic negotiations from Congress when disclosure would be, in his judgment, contrary to the public interest." *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. Off. Legal Counsel 253, (1996). He went on to explain that "[t]he constitutional

position originally formulated by the Washington Administration has thus become the practice of the Executive Branch as an ongoing institution, and the Attorneys General and the heads of this Office have consistently maintained that it is the correct interpretation of the powers of [the] President and Congress." *Id.* He noted, also, that "Congress has usually accepted the Executive's position as a practical matter." *Id. See also The President's Compliance with the "Timely Notification" Requirement of Section 501(B) of the National Security Act*, 10 Op. Off. Legal Counsel 159, 171-73 (1986) (concluding that a statutory requirement of "timely notification" to Congress concerning covert operations must be construed, in light of constitutional concerns, to permit President to withhold information until he deems that revealing it will not jeopardize the success of an operation).

Given the unique constitutional role of the Executive with respect to the protection of diplomatic, intelligence, and national security information, any legislation that would seek to "reform" the state secrets privilege as it is currently applied by the courts must be undertaken with the utmost caution. Legislation that would undermine the Executive's authority to protect national security information would run a grave danger of impermissibly encroaching on authority assigned by the Constitution to the Executive Branch.

III. Congress Should Not Attempt to Substitute the Judgment of the Judiciary for the Executive Concerning What Information Merits Secrecy for Foreign Affairs or National Security Reasons and Should Beware of Analogies Concerning CIPA in the Context of Civil Litigation.

Finally, I would like to address and caution against two types of legislative changes that may be considered by Congress. My comments here are necessarily tentative, both because of the short time I have had to prepare for this hearing and because there is no specific legislative proposal before the subcommittee. Although a bill entitled the "State Secrets Protection Act" was introduced in the Senate just last week, the exact text of the bill, S. 2533, is not yet available.

The general description of the bill, however, suggests two considerations that warrant mention as Congress considers any legislation relating to the state secrets privilege.

First, Congress should tread carefully in considering any legislation that would purport to alter substantially the deferential standard of review that courts apply in evaluating a claim of state secrets privilege. In particular, I believe it would be a mistake to attempt to have Article III judges substitute their own independent judgment concerning what information should remain secret, without deference to the judgment of the Executive. Such a standard of review would be a marked departure from the law established by the Supreme Court. The *Reynolds* Court properly emphasized that it remained the duty and responsibility of the courts to determine whether the privilege had been validly invoked in any particular case. The mere assertion of the privilege by the Executive does not require a court to accept without question that the material involved is a state secret. As the Supreme Court put it "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." 345 U.S. at 9-10. Nevertheless, the Court also made clear that a judge should not simply substitute his judgment for that of the Executive Branch. Rather, a court should proceed cautiously, showing deference to the judgment of the Executive concerning what constituted a secret that might do harm to the Nation if disclosed. In *United States v. Nixon*, 418 U.S. 683 (1974), the Court further explained that, where the Executive makes a "claim of privilege on the ground [of] military or diplomatic secrets," the "courts have traditionally shown the utmost deference to Presidential responsibilities." *Id.* at 710. They have done so, moreover, because these are "areas of Art. II duties" under the Constitution. *Id. See also Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978) ("The standard of review here is a narrow one. Courts should accord the 'utmost deference' to

executive assertions of privilege upon grounds of military or diplomatic secrets.") (citation omitted).

The deferential standard of review is thus itself infused with constitutional significance based upon the separation of powers and the unique authorities of the Executive under Article II. The assertion of the state secrets privilege is, at its heart, an exercise of policy judgment concerning how the disclosure of certain information may affect the foreign affairs, the military and intelligence posture, or, more broadly, the national security of the United States. Time and again the Supreme Court and lower courts have cautioned that such judgments are constitutionally assigned to the Executive and that the judiciary is not institutionally suited to making them. Thus, in the context of a court evaluating a claim by the Executive that certain information must remain classified and protected from disclosure, the Supreme Court has cautioned that "what may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *CIA v. Sims*, 471 U.S. 159, 178 (1985). The Court went on to explain that the Director of Central Intelligence is "familiar with the whole picture, as judges are not" and that his decisions upon what must be kept secret are therefore "worthy of great deference." *Id.* Similarly, the United States Court of Appeals for the Fourth Circuit has explained that "[t]he courts, of course, are ill equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications." *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972). And again the Supreme Court has explained:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. . . . [T]he very nature of executive decisions as to foreign policy is political, not judicial. . . . They are

> decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility . . . .

Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

Any legislative proposal, therefore, that would attempt to alter the standard of review established under *Reynolds* and *Nixon* by permitting an Article III judge simply to substitute his or her independent judgment for that of the Executive concerning the need for secrecy on a particular piece of information would be a mistake. Attempting to assign the courts that role by legislation would, at a minimum, raise a serious question of an impermissible encroachment on authority assigned to the Executive under the Constitution.

Second, the descriptions of S. 2533 make analogies to the Classified Information Procedures Act, or CIPA, 18 U.S.C. App. 3 § 1 *et seq.*, which applies in criminal cases. The summary of the legislation suggests a mandatory procedure under which the court may order the United States to produce unclassified summaries of (or substitutes for) classified information, including substitutes or similar alternatives "crafted by the court." The proponents of the bill have analogized such provisions to CIPA. State Secrets Protection Act (S. 2533): Section-by-Section Summary.[1]

I am concerned that analogies to CIPA oversimplify matters. There are two critical differences between the proposals described in the Senate bill and the regime under CIPA. First, under CIPA, the Executive Branch always clearly retains absolute authority to determine what is classified and what is not. If a substitute is prepared under CIPA, it is the Executive that retains full discretion to determine whether or not the substitution has successfully removed any classified information. If the Executive determines that the substitution is still classified, the Attorney General may object to the disclosure of the classified information and the statute directs

[1] *Available at* /kennedy.senate.gov/newsroom/press_release.cfm?id=c56bd1d0-7ad3-46ca-9d30-a77317f28b70.

in mandatory terms that the "the court shall order that the defendant not disclose or cause the disclosure of such information." 18 U.S.C. App. 3 § 6(e)(1). The descriptions of the proposal in the Senate suggest the possibility that, under that legislation, which permits the court to order a substitution "crafted by the court," the Executive might not retain that ultimate control. State Secrets Protection Act (S. 2533): Section-by-Section Summary. At a minimum, this provision seems to authorize an Article III judge independently to determine what is properly classified and what is not, without regard to the judgment of the Executive -- a grant of authority that, as described above, at least raises a significant constitutional question.

Second, CIPA applies to criminal prosecutions, which are always initiated by the United States. If a court's rulings under CIPA in a particular prosecution were to create a situation in which the Executive Branch determined that proceeding with the case would still risk disclosure of sensitive national security information, the United States always has the option of dropping the prosecution to avoid compromising national security. In civil litigation brought by private plaintiffs, however, the Executive will not retain that ultimate control as a backstop for protecting national security. For that reason, I believe it would be inaccurate to think that there can be an easy analogy between CIPA and legislation that would mandate the creation of substitutes for classified information -- particularly judicially crafted substitutes -- in the context of civil litigation.

* * *

Thank you, Mr. Chairman, for the opportunity to address the subcommittee. I would be happy to address any questions that the Members may have.

Mr. NADLER. Thank you.

I will now recognize Mr. Bankston for 5 minutes.

TESTIMONY OF KEVIN S. BANKSTON, SENIOR ATTORNEY, ELECTRONIC FRONTIER FOUNDATION

Mr. BANKSTON. Good morning, Chairman Nadler, Ranking Member Franks, Chairman Conyers, and the Members of the Committee.

Thank you for inviting me to testify today on behalf of the Electronic Frontier Foundation, a nonprofit member-supported public interest organization dedicated to protecting privacy and free speech in the digital age.

I am here today because EFF represents AT&T customers in a lawsuit against that company for cooperating with the National Security Agency's warrantless electronic surveillance program by disclosing the contents of tens of millions of Americans' phone calls and e-mails, literally billions of domestic communications, to the NSA. Yet it is also co-coordinating counsel for 38 other NSA-related lawsuits consolidated in the Northern District of California.

EFF filed its complaint against AT&T 2 years ago this Thursday. Yet our case, like all the others, has barely moved out of the starting gate. We are still litigating over whether or not these cases can proceed at all, and the reason for that is the state secrets privilege.

The Administration has asserted an astonishingly broad claim that the courts cannot hear any case about the NSA's warrantless wiretapping and that such cases must be dismissed at the outset. Indeed, the Administration goes so far as to argue that even if the court were to find in our case that the constitutional and statutory privacy rights of tens of millions of Americans were violated, as we allege, the court cannot be permitted to so rule because doing so would confirm our allegations."

Frankly, Mr. Chairman, to call such logic Kafkaesque would be an understatement. The breadth of the Administration's state secrets claim is particularly astonishing considering that it is simply not a secret that AT&T and other telephone carriers helped the NSA.

Rather, there have been extensive public discussions, often at the behest of the Administration, ranging from the testimony of the previous Attorney General to the Director of National Intelligence's interview with the *El Paso Times* to the Administration's own deliberate leaks to newspapers, confirming this fact.

Indeed, as one court recently said, much of what is known about the terrorist surveillance program was spoon-fed to the public by the President and this Administration.

The Administration apparently believes the disclosures it makes about the program to politically defend its actions or to urge this Congress to pass immunity for the telephone companies will not harm the national security, but that allowing the judicial branch to examine the legality of its conduct and that of the carriers somehow will.

But the Administration should not be allowed to share or withhold information for its own political advantage or to avoid accountability. Rather, as Chief Judge Vaughn Walker ruled last summer when rejecting the Administration's motion to dismiss the

AT&T case, "If the government's public disclosures have been truthful, revealing whether AT&T assisted in monitoring communication content should not reveal any new information that would assist a terrorist and adversely affect national security. And if the government has not been truthful, the state secrets privilege should not serve as a shield for its false public statements."

EFF believes that Congress can and should reform the common-law state secrets privilege to ensure that it cannot be used to shield wrongdoing. Such reform legislation should provide fair and secure procedures by which the court is empowered to privately examine purportedly secret evidence and evaluate the Government's claims of state secrets.

And EFF agrees with the ABA that any reform legislation should allow the courts to make every effort to avoid dismissing a civil action based on the privilege. EFF also believes that for certain cases where fundamental rights are at issue, Congress should ensure that a decision on the merits may be reached even if critical evidence is privileged, based on the court's in camera and ex parte evaluation of that evidence.

Indeed, as described at length in my written statement, we believe Congress has already done so for cases concerning the legality of electronic surveillance as a part of FISA at 50 USA 1806(f), though the Government disagrees and the court has yet to address this issue.

Thus, Mr. Chairman, in addition to considering broader state secrets reform, EFF urges Congress to move immediately to clarify that FISA's existing security procedures, which have been used for 30 years without any harm to national security, apply in cases like EFF's suit against AT&T. We respectfully submit that such a clarification of FISA's procedures and not retroactive immunity is the appropriate response to claims by telephone carriers that they were acting in good faith but are prevented from defending themselves because of the Government's invocation of the privilege.

To conclude, Mr. Chairman, thank you for shining a spotlight today on the Administration's efforts to prevent the judiciary from enforcing Congress's laws using the shield of the state secrets privilege. EFF looks forward to working with this Committee to help achieve sensible state secrets reform and to rebuff an executive that insists that some branches of Government are more equal than others.

I look forward to your questions.

Thank you.

[The prepared statement of Mr. Bankston follows:]

PREPARED STATEMENT OF KEVIN S. BANKSTON

Statement of Kevin S. Bankston
Senior Staff Attorney
Electronic Frontier Foundation

before the
U.S. House of Representatives Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

for the
Oversight Hearing on Reform of the State Secrets Privilege

January 29, 2008

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Statement of Kevin S. Bankston

I. INTRODUCTION

Good morning Chairman Nadler, Ranking Member Franks, and Members of the Committee. Thank you for inviting me to testify today.

The Electronic Frontier Foundation[1] (EFF) is pleased to have this opportunity to discuss the critical issue of reform of the state secrets privilege, and to describe how the Administration has attempted to use the privilege to deprive my clients of their day in court and avoid any judicial scrutiny of the National Security Agency's warrantless wiretapping program.

EFF is a non-profit, member-supported public interest organization dedicated to protecting privacy and free speech in the digital age. As part of that mission, EFF is currently representing average AT&T customers in a civil action against that company for assisting the NSA's warrantless electronic surveillance of AT&T customers' telephone calls and Internet communications.[2] EFF is also co-coordinating counsel for all NSA-related lawsuits pending before Chief Judge Vaughn Walker in the Northern District of California, cases which were transferred to him from across the country by the Panel on Multi-District Litigation.[3] These include cases against AT&T, Verizon, Sprint, BellSouth and Cingular,[4] cases against several other carriers that have been dropped,[5] cases against the government,[6] and finally,

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[1] For more information on EFF, visit http://www.eff.org.

[2] *Hepting v. AT&T*, 439 F.Supp.2d 974 (N.D. Cal. 2006) (on appeal to the Ninth Circuit).

[3] *In Re National Security Agency Telecommunications Records Litigation*, Transfer Order, MDL Docket No. 1791 (Dec. 15, 2006).

[4] The 39 cases brought against various telecommunications carriers have been consolidated for pleading purposes into five combined complaints, organized by carrier: AT&T, Sprint, Verizon, Cingular and BellSouth. While BellSouth and Cingular have since been purchased by AT&T, those complaints remain separate since the facts underlying them occurred before the merger. The cases against all entities other than AT&T and Verizon have been voluntarily stayed by the plaintiffs pending the appeal of the *Hepting v. AT&T* case on the issue of the states secrets privilege.

[5] These carriers have been dropped from the litigation: Bright House Networks, Transworld Network Corp, Charter Communications, McLeod USA Telecommunications Services, Comcast, and T-Mobile.

[6] *Shubert, et al. v. Bush, et al.*, E.D. New York, C.A. No 1:06-cv-02282 (government states secrets privilege motion to dismiss pending); *Center for Constitutional Rights, et al. v. Bush, et al.*, S.D. New York, C.A. No. 1:06-cv-00313 (government states secrets

cases brought by the Administration itself to prevent state investigations into the carriers' cooperation in the NSA program.[7]

II. STATE SECRETS AND THE NSA LITIGATION

EFF filed its complaint in *Hepting v. AT&T* two years ago this Thursday. Yet, two years later, our case like all the others has barely moved out of the starting gate: no answer has been filed and no discovery has been conducted. The reason for this is the state secrets privilege.

Relying on this common law evidentiary privilege,[8] the Administration has asserted an astonishingly broad claim: that the courts simply cannot hear any case concerning the NSA's warrantless domestic surveillance, or the telecommunications industry's participation in such surveillance. They maintain that those cases must be dismissed at the outset, regardless of whether the law has been broken.

Indeed, the Administration has gone so far as to argue that even if a court were to find that the law was broken and the Constitutional rights of millions of Americans were violated, the court still could not proceed to create a remedy "because to do so would confirm Plaintiffs' allegations."[9]

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privilege motion expected after amended complaint); *Al-Haramain Islamic Foundation, Inc., et al. v. Bush, et al.*, D. Oregon, C.A. No. 3:06-cv-00274; 451 F.Supp.2d 1215 (D. Ore. 2006), reversed and remanded, 507 F.3d 1190 (9th Cir. 2007).

[7] *United States v. Rabner, et al,* 07-1324; *Unites States v. Gaw, et al,* 07-1242; *United States v. Adams, et al,* 07-1323; *United States v. Palermino, et al*, 07-1326; *United States v. Volz, et al*, 07-1396; and *Clayton et al. v. AT&T Communications of the Southwest, Inc. et al* 07-1187.

[8] *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1196 (9th Cir. 2007) ("common law evidentiary privilege"); *Kasza v. Browner*, 133 F.3d 1159, 1165 (9th Cir. 1998) ("[t]he state secrets privilege is a common law evidentiary privilege that allows the government to deny discovery of military secrets"); *Monarch Assur. P.L.C. v. U.S.*, 244 F.3d 1356, 1358 (Fed. Cir. 2001) (per curiam)("common-law state secrets privilege"); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991) ("The state secrets privilege is a common law evidentiary rule"); *In re United States*, 872 F.2d 472, 474 (D.C. Cir. 1989) (same).

[9] United States' Reply in Support of the Assertion of the Military and State Secrets Privilege and Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States (*Hepting v. AT&T*, N.D. Cal. Case No. 06-672-VRW, Dkt. No. 245) at p.

The government argues, essentially, that the state secrets privilege provides complete immunity from suit for any surveillance purportedly related to national security, and provides a shield against any judicial inquiry into its wrongdoing or that of the carriers.

This is a startling claim, considering that Congress thirty years ago established as part of FISA a civil cause of action for those aggrieved by illegal foreign intelligence surveillance,[10] in addition to providing criminal penalties—which makes no sense if the entire subject matter of foreign intelligence surveillance is off limits to the courts.

Nor, as this Committee is doubtless aware, is it a secret that the telephone carriers participated in the NSA's warrantless surveillance program. There have been extensive discussions, often at the behest of the Administration, ranging from testimony from the previous Attorney General to the Director of National Intelligence's interview with the *El Paso Times* to Administration leaks to newspapers, confirming this fact.[11] As the Ninth Circuit noted, "much of what is known about the Terrorist Surveillance Program ("TSP") was spoon-fed to the public by the President and his Administration."[12]

Apparently, the Administration believes that the disclosures it makes about the program, to politically defend itself and urge this Congress to pass an immunity for the telephone companies that cooperated with the NSA, will not harm the national security, but allowing the judicial branch to actually examine the legality of its and the carriers' conduct somehow will. Indeed, last week gives us a final example of how this Administration has been playing the secrecy card to avoid Congressional and court scrutiny of the

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20:19-20 (emphasis added), *available at* http://www.eff.org/legal/cases/att/gov_MTD_reply.pdf.

[10] 50 U.S.C. § 1810.

[11] *See* Testimony of the Attorney General of the United States before the Senate Judiciary Committee at its July 24, 2007 hearing on the Oversight of the Department of Justice (stating that the Government requested and received the cooperation of telecommunications companies for the NSA surveillance program); Interview with Director of National Intelligence, *El Paso Times*, August 22, 2007, *available at* http://www.elpasotimes.com/news/ci_6685679.

[12] *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1192 (9th Cir. 2007).

NSA program. The timing of the Administration's belated disclosure to House members of materials related to the NSA program, after over a year of Congressional demands and at the height of the debate over whether to give AT&T and the other carriers immunity, was clearly dictated not by a need to protect state secrets but by political considerations.

The Administration should not be allowed to share or withhold information for its own political advantage, or to avoid accountability. Rather, as Judge Walker ruled last summer when denying the Administration's motion to dismiss *Hepting v. AT&T*:

> If the government's public disclosures have been truthful, revealing whether AT&T [assisted] in monitoring communication content should not reveal any new information that would assist a terrorist and adversely affect national security. And if the government has not been truthful, the state secrets privilege should not serve as a shield for its false public statements.[13]

This is particularly true when the integrity of Congress' surveillance laws, and the Constitutional rights of millions of average Americans, are at stake.

III. CONGRESS CAN AND SHOULD LEGISLATE TO REFORM THE STATE SECRETS PRIVILEGE

Congress can and should legislate to ensure accountability and prevent Executive from shutting down litigation without the court even considering the evidence. The state secrets privilege is an evidentiary privilege, and has never been an absolute immunity from suit. As the Supreme Court has explained, the "privilege" is "well established in the *law of evidence*,"[14] not

[13] *Hepting* at 996. This decision is currently before the Ninth Circuit. It was argued in August 2007, and we are awaiting the Court's decision. Transcript available at http://www.eff.org/files/filenode/att/hepting_9th_circuit_hearing_transcript_08152007.pdf.

[14] *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953)(emphasis added); *see also In re United States,* 872 F.2d 472, 474 (D.C. Cir. 1989) (rejecting the Government's effort to inflate a "*common law evidentiary rule* that protects information from discovery" into an immunity from suit) (emphasis added); *Halpern v. United States,* 258 F.2d 36, 43 (2d Cir. 1958) (Congress's creation of private rights of action in Invention Secrecy Act "must be

in Constitutional law. Therefore, it is well within Congress's prerogative to reform the common law of evidence by statute.[15]

EFF believes that any state secrets reform legislation should provide fair and secure procedures by which the federal court is empowered to privately examine purportedly secret evidence and evaluate the government's claim of privilege, so that miscarriages of justice may be avoided. EFF further agrees with the "essential premise" of the American Bar Association's recommendations on state secrets reform, which is that any reform legislation should allow the courts to "mak[e] every effort to avoid dismissing a civil action based on the state secrets privilege."[16]

EFF further believes that at least in certain types of cases, especially where constitutional rights are at issue, Congress should pass legislation ensuring that a legal ruling on the merits may be reached even if critical evidence is privileged, based on the court's evaluation of that evidence in chambers or in a secure facility. While we believe that this is already what FISA provides in the realm of electronic surveillance, Congress can use this opportunity to put the Administration's claims to the contrary to rest.

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viewed as waiving the [state secrets] privilege," because Congress could not have "created rights which are completely illusory, existing only at the mercy of government officials"). Even if the Executive asserts a constitutional power, "[w]hen the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

[15] Where Congress "speaks directly to the question otherwise answered by . . . common law"—including the question of how to handle state secrets in litigation—Congress's judgment binds both the Executive and the Courts. *Kasza*, 133 F.3d at 1167 (internal citation and brackets omitted).

[16] American Bar Association, *Report and Recommendation on Reform of the State Secrets Privilege*, August 2007, *available at* http://fas.org/sgp/jud/statesec/aba081307.pdf. See also The Constitution Project, *Reforming the State Secrets Privilege*, May 31, 2007, *available at* http://openthegovernment.org/otg/Reforming_the_State_Secrets_Privilege_Statement.pdf, and *Constitutional Scholars' Letter to Congress on State Secrets Reform*, October 4, 2007, available at http://www.constitutionproject.org/pdf/State_Secrets_ltr_to_Congress_10-4-07.pdf.

IV. FISA AND THE STATE SECRETS PRIVILEGE

As I mentioned before, Congress has already considered the issue of state secrets in the context of litigation over illegal surveillance, and when passing FISA in 1978 correctly chose not to allow the Executive to use the state secrets privilege as a shield against litigation. In fact, Congress created a specific procedure to be followed when the Executive asserts that the disclosure of information concerning electronic surveillance would harm national security.

Section 1806(f) of FISA provides that if during litigation the Attorney General files a sworn affidavit with the court that disclosure of materials related to electronic surveillance would harm the national security, then the court "*shall*, notwithstanding any other law," review those materials *in camera* and *ex parte* to determine the legality of the surveillance.[17] Furthermore, when reviewing those materials to determine whether the surveillance was lawfully authorized and conducted, the court may *only* disclose information about the surveillance to the aggrieved person seeking discovery where *necessary* to make an accurate determination.

Section 1806(f) reflects several key judgments made by Congress when crafting FISA. First, it reflects Congress's recognition that the legality of surveillance *must be litigable* in order for any of its laws on the subject to have teeth, a recognition bolstered by its creation of a civil remedy in FISA for those who have been illegally surveilled.[18] Second, it reflects Congress's intent to carefully balance the special need for accountability in the area of electronic surveillance with the Executive's interest in avoiding disclosure of information that may harm the national security, and to achieve a "fair and just balance between protection of national security and protection of personal liberties."[19] Finally, it reflects Congress's recognition that the final decision as to what information should be disclosed cannot be left to the Executive's unilateral discretion, but must instead be made by the courts[20]—

[17] *See* 50 U.S.C. § 1806(f) (emphasis added).
[18] *See* 50 U.S.C. § 1810.
[19] S. Rep. No. 94-1035, at 9 (1976) (discussing § 1806(f)).
[20] Congress explicitly stated that the appropriateness of disclosure is a "decision ... *for the Court to make*[.]" S. Rep. No. 95-701, at 64 (emphasis added); *accord* S. Rep. No. 95-604(I), at 58.

courts that both Congress and the Executive trusted could handle sensitive national security information in a reasonable and secure manner.[21]

Yet now, even though Section 1806(f) applies by its own plain language to any case in which a motion is made to discover materials related to electronic surveillance, even though the legislative history makes clear it was intended to apply in both criminal and civil cases,[22] and even though Congress in 2001, as part of the USA PATRIOT Act, made Section1806(f)'s procedures the exclusive means by which evidence in surveillance cases against the government shall be handled,[23] the Administration is arguing that it does not apply in the NSA litigation.

Therefore, in addition to considering the broader question of state secrets reform, Congress should move immediately to clarify that FISA's existing procedures, which have been used for thirty years without any harm to national security, apply in these cases. Such a clarification of FISA's procedures, and not immunity, is the only appropriate response to claims by telephone carriers that they were acting legally and in good faith when they assisted the NSA, but are prevented from defending themselves because of the government's invocation of the privilege.

V. ELECTRONIC SURVEILLANCE CASES DO NOT REQUIRE TRANSFER TO THE FISA COURT

We appreciate various Senators' attempts to reach a compromise on the issue of immunity, but two of the proposals on the table, the immunity

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[21] *See* Foreign Intelligence Surveillance Act of 1978: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary 95th Cong., at 26 (1977) (Attorney General Bell asserting that "[t]he most leakproof branch of the Government is the judiciary . . . I have seen intelligence matters in the courts. . . I have great confidence in the courts," to which Senator Hatch replied, "I do also").

[22] The final conference report on FISA clearly states that "[t]he conferees agree that an *in camera* and *ex parte* procedure is appropriate for determining the lawfulness of electronic surveillance in both criminal and civil cases. The conferees also agree that the standard for disclosure in the Senate bill adequately protects the right of the aggrieved person, and that the provision for security measures and protective orders ensures adequate protection of national security interests." H.R. Rep. No. 95-1720, 32 (1978) (Conf. Rep.), reprinted in 1978 U.S.C.C.A.N 4048, 4061.

[23] 18 U.S.C. § 2712(b)(4).

amendment offered by Senator Feinstein and the substitution proposal of Senators Specter and Whitehouse, contain troubling provisions that this House should view with great skepticism. Both of these purported compromise proposals would sweep all of the carrier lawsuits out of the regular court system and into the secretive FISA Court for key determinations. Essentially, they would legislatively enable the Administration to "forum shop" and shuttle all cases regarding its surveillance activities into a court whose only role for nearly thirty years has been to routinely approve the Executive's applications for surveillance authorization.

Proponents of these forum-shopping provisions argue that only the FISA Court can be trusted to handle sensitive national security information. Yet as already discussed, Congress and previous administrations have long trusted the regular court system to handle such information responsibly, and the Administration—despite its claims to the contrary—has been unable to point to a single instance in which the judiciary has failed to do so. Such baseless rhetoric about the need to maintain security cannot justify the diversion of properly maintained lawsuits into a court staffed by judges that are hand-picked by the Chief Justice of the Supreme Court and are accustomed to considering such matters in completely secret and non-adverserial proceedings. Rather, such cases should remain before the fairly and randomly selected state and federal judges that would otherwise adjudicate those disputes—subject, of course, to the carefully balanced FISA procedures already discussed.

VI. CONCLUSION

The Administration's expansive view of the state secret privilege has highlighted the need for sensible reform of that evidentiary privilege, as well as immediate clarification of Section 1806(f). The Electronic Frontier Foundation looks forward to working with this Committee to help achieve such reform, and I will be delighted to take any questions you may have.

Mr. NADLER. I thank the witnesses.

And I will begin the questions by recognizing myself for 5 minutes.

Mr. Philbin, as I gather, you are raising some constitutional concerns, but your bottom line simply seems to be that Congress should be careful in legislating this area. Is that correct?

Mr. PHILBIN. That is the bottom line of the testimony because I do not have familiarity with——

Mr. NADLER. You are not saying that the executive's power is absolute and Congress cannot legislate and limit or govern the way the privilege is applied, as we have, for instance, in CIPA for criminal cases?

Mr. PHILBIN. Well, let me respond this way, Mr. Chairman. In CIPA, yes, I believe Congress had the authority to enact the procedures in CIPA because they are purely procedures, and they end up leaving it ultimately at the discretion of the Attorney General to say——

Mr. NADLER. But under certain circumstances, if the evidence cannot be used, the Government is penalized by the case being dismissed.

Mr. PHILBIN. That is true. The Government——

Mr. NADLER. So, if we were to enact legislation along similar lines saying, under these circumstances, either the evidence must be revealed, at least to the court, and the court can insist that the evidence, in its judgment, can be revealed to the public, if it thinks it is not properly secret, or that a summary should be revealed to the public, or that if this cannot be done because it really is secret, then the inference, depending on the equities, must be for the Government or must be for the plaintiff, that would be within our rights to do as we have in CIPA.

Mr. PHILBIN. Well, Mr. Chairman, there was a lot built into that question. So let me try to answer it this way. Depending on the standard that was put in the legislation for the court determining that this substitution is okay or this one is not or this can be disclosed, if the court is being told, "You independently determine that without deference to the executive," I think there is a constitutional issue.

Mr. NADLER. Well, wait a minute. Deference. Then the court would independently determine it. The degree of deference is up to the courts ultimately, as in anything else.

Mr. PHILBIN. Well——

Mr. NADLER. You can write, "You should be deferential," but how that is interpreted is going to be in the court.

Mr. PHILBIN. That may be, but then, you see, again, Mr. Chairman, the reason I am being hesitant about giving absolute answers is I believe the devil is in the details of specific statutory language.

Mr. NADLER. Okay.

Now you would admit—or would you—in the case that Ms. Loether testified about—and this is a 50-year-old case, so we are not worried about casting any aspersions on individuals—clearly, what happened there was the Government at the time, whoever it was, lied. It said that this accident report involved secret information. It did not. The Government committed a fraud on the court. As a result of that, an unjust result happened, and you would

agree that we should strive to prevent such occurrences in the future, given the fact that Government officials being human beings, we cannot assure that no one will ever lie again.

Mr. PHILBIN. Yes, Mr. Chairman. I agree. Taking the facts to be as they have been described, yes, that was wrong, and it is not the sort of situation that we should want to be repeated. No.

Mr. NADLER. And we should have procedures to make sure it does not happen as far as we can.

Mr. PHILBIN. As far as possible, certainly, procedures that could help ensure that does not happen would be beneficial.

Mr. NADLER. Okay. Thank you.

Now you also quote an opinion in the Sims case saying that the director of central intelligence is "familiar with the whole picture as judges are not." Judge William Webster wrote a letter to the Subcommittee in which he states as follows—and I ask unanimous consent at this point to put the letter in the record.

Without objection.

[The information referred to follows:]

Statement of William H. Webster
Submitted to the
Subcommittee on the Constitution,
Civil Rights, and Civil Liberties
of the House Judiciary Committee

January 29, 2008

I am submitting this statement to urge you to enact much-needed reforms to the state secrets privilege. My background in the federal judiciary and in the intelligence services leads me to conclude that our courts can, and must, provide critical oversight and independent review of executive branch state secrets claims.

I served as a Judge for the U.S. District Court for the Eastern District of Missouri from 1970 to 1973, and as a Judge of the U.S. Court of Appeals for the Eighth Circuit from 1973 to 1978. Thereafter, I served for nine years as Director of the Federal Bureau of Investigation, and then, from 1987 to 1991, I served as Director of Central Intelligence.

Since the terrorist attacks of September 11, 2001, the executive branch has repeatedly asserted the state secrets privilege in court, in a variety of lawsuits alleging that its national security policies violate Americans' civil liberties. In these cases, the government has informed federal judges that litigation would necessitate disclosure of evidence that would risk damage to national security, and that consequently, the lawsuits must be dismissed. Courts have indeed dismissed lawsuits on this basis.

For example, *El-Masri v. United States* involved a challenge by Khaled El-Masri, a German citizen who, by all accounts, was an innocent victim of the United States' extraordinary rendition program. The district court dismissed the case at the pleadings stage, before any discovery had been conducted, on the basis of the executive branch's assertion of the state secrets privilege. The U.S. Court of Appeals for the Fourth Circuit affirmed the dismissal, and, last fall, the U.S. Supreme Court declined to accept review of the case. Thus, Mr. El-Masri has been denied his day in court even though no judge ever reviewed any evidence purportedly subject to the privilege. Nor did any judge make an independent assessment as to whether enough evidence might be available for Mr. El-Masri to proceed with his lawsuit based upon public accounts of the rendition and an investigation conducted by the German government.

As a former Director of the FBI and Director of the CIA, I fully understand and support our government's need to protect sensitive national security information. However, as a former federal judge, I can also confirm that judges can and should be trusted with sensitive information and that they are fully competent to perform an independent review of executive branch assertions of the state secrets privilege. Judges are well-qualified to review evidence purportedly subject to the privilege and make appropriate decisions as to whether disclosure of such information is likely to harm our national security. Indeed, judges increasingly are called upon to handle such sensitive information under such

statutes as the Foreign Intelligence Surveillance Act (FISA) and the Classified Information Procedures Act (CIPA).

In addition, judges are fully competent to assess whether it is possible to craft a non-privileged substitute version of certain evidence, such as by redacting sensitive information. It is judges, more so than executive branch officials, who are best qualified to balance the risks of disclosing evidence with the interests of justice. If there remains concern about judges having the necessary expertise and background in national security matters to make these determinations, a standing panel of judges specially designated could perform this function as under FISA, or judges could refer matters to special masters with appropriate security clearances for assistance.

Granting executive branch officials unchecked discretion to determine whether evidence should be subject to the state secrets privilege provides too great a temptation for abuse. It makes much more sense to require the executive branch to submit such evidence to the courts for an independent assessment of whether the privilege should apply. Courts, not executive branch officials, should be entrusted to make these determinations and thereby preserve our constitutional system of checks and balances.

Mr. NADLER. The quote is, "As a former director of the FBI and director of the CIA, I fully understand and support our Government's need to protect sensitive national security information. However, as a former Federal judge, I can also confirm that judges can and should be trusted with sensitive information, that they are fully competent to perform an independent review of executive branch assertions of the state secrets privilege."

My question is whether, despite these unequal credentials as both a judge and FBI and CIA director, you would think that Judge Webster's assessment as to the competence of judges to perform an independent review of executive branch assertions of the state secrets privilege is wrong.

Mr. PHILBIN. Well, not having seen Judge Webster's letter, Mr. Chairman, I am hesitant to comment on it specifically, but I believe the courts have recognized—time and again—the Supreme Court, the D.C. Circuit, the Fourth Circuit, other circuits—that Article III judges are not in the same position as members of the executive branch—the President, the Director of Central Intelligence, or now the Director of National Intelligence—to assess the whole picture and understand how a particular piece of information in one case might, if revealed, have significance to foreign intelligence services or other parties hostile to the United States. The judges do not have that institutional confidence.

Mr. NADLER. Thank you.

Judge Wald, could you comment on our dialogue of the last few minutes?

Judge WALD. Yes. I would not think that any legislation you have would rule out giving some deference, perhaps not the standard that you would like, utmost deference, but some due deference, something. Certainly, that is the way the FOIA legislation talks about substantial weight being given to the affidavits.

Certainly, no judge that I have ever been acquainted with in my 20 years on the Federal judiciary would ever go roaring in there and say, "Well, you know, never mind the President. Never mind those affidavits. You know, I do not happen to think this is." Certainly, the Government would be allowed, as it does in all of these cases, to make its case by affidavit, sometimes even by deposition, et cetera, and the court looks at it, carefully listens to the full presentation that the Government wishes to make.

The problem has been to what degree the other side is allowed to make a case given the secrecy of the information, and that is something the legislation has to take account of. So I do not see the fact that certainly the judiciary would give due deference to the Government's case in deciding whether or not something was a state secret.

As for the so-called mosaic theory, which we are all familiar with, which does have certainly a sliding scale kind of aspect to it, any one piece, when you look at all the other pieces, might be—this is something the courts have had to deal with already in the FOIA, and it is something that they should certainly look at, give thought to, but it cannot be an absolute bar that any one piece, if you put it together with a thousand other pieces, might give some clue to somebody.

So I do not see legislation that you are contemplating as presenting any more formidable obstacles than the other contexts in which the Government has to make its case on certain information, but the judge has ultimate power.

Mr. NADLER. Thank you.

My time has expired.

I now recognize for 5 minutes the distinguished Ranking Member of the Subcommittee, Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Chairman, it is a challenge when we are trying to balance these kinds of things today. I think everyone on the panel recognizes the need to protect national security secrets, and I think everyone on the panel, including those of us here on this side of the room, understand that there are times, like in Ms. Loether's case, where Government officials do things that are clearly wrong and are not in comportment with the law. They use the law in ways that distort its purpose, and the challenge, of course, is to make a policy that still does the best that it can, given the fact that sometimes the nature of man is to distort things.

With that said, Condoleeza Rice, Secretary of State, has publicly stated that "When and if mistakes are made, we work hard and as quickly as possible to rectify them. Any policy will sometimes have mistakes, and it is our promise to our partners that, should that be the case, we will do everything that we can to rectify those mistakes."

Now my question is—I will direct it to you, Mr. Philbin, if possible—what are the mechanisms if something happens like in Ms. Loether's case? What are the mechanisms out there, what other source of remedies or relief could be granted someone that has been cheated under this situation by someone using the state secrets privilege to really distort the circumstances? In the legislative or the executive branch, what things are available, because that seems to me to be a similar question?

Mr. PHILBIN. Well, I am certain that I cannot give an exhaustive list right now, but it occurs to me that the political branches do have the ability on their own to provide some compensation to a person where they believe a wrong has been done. There are examples. I believe that there were many bills in the 19th century.

The Congress would pass special bills to provide compensation to various people for various reasons. The example that comes most clearly to mind more recently is special legislation to provide compensation to American citizens of Japanese ancestry who were interned during World War II and that was a situation where there was access to the courts, yet it was felt the courts had not provided justice, and, subsequently, the political branches then provide some compensation.

So I think that there is an ability without using the court system, where a wrong has been done and the United States feels an obligation to make that right, for the political branches to do something.

Mr. FRANKS. Well, Mr. Chairman, I think one of the challenges we have, of course, is to try to foster an environment in our Government, in all branches, where there is greater emphasis put upon

people doing the right thing. It sounds very basic, but, ultimately, our system cannot survive apart from that fundamental ethic.

One of the other controversies that has come here—and it is a little bit of a conflict. I certainly do not question the motivation or the intent of any of the other questioners here on the panel. But there is this debate here as to whether or not the Bush administration has invoked this privilege more often or in ways that are very different.

And, Mr. Chairman, if I could, I would like to go ahead without objection and ask that the State Secrets and Limitations National Security Litigation Paper by Robert M. Chesney be placed in the record——

Mr. NADLER. Without objection.

[The information referred to is printed in the Appendix.]

Mr. FRANKS. I just directed my last question to Mr. Philbin here again.

Professor Chesney published this study that contains a chart of every published court decision involving the state secrets doctrine in the modern era, and he has concluded that the available data do not suggest that the privilege has been—you know, it says that the data has continued to play an important role in the Bush administration, but it does not support the conclusion that the Bush administration chooses to resort to the privilege with greater frequency than prior Administrations or in unprecedented substantive contexts. And he has also said the state secrets privilege has not been used in recent years to protect information not previously thought to be within its scope.

And finally, the professor writes that "some commentators have suggested that the Bush administration is breaking with past practice by using the privilege to seek dismissal of complaints rather than just exemption from discovery. The data do not support this claim, however."

Do you know of any compilation or review of all the published records decisions involving the state secrets doctrine in the modern era that have come to a different conclusion than Professor Chesney?

Mr. PHILBIN. I am not aware of any. I have read Mr. Professor Chesney's article, and I believe he points to other law review articles that assert a different conclusion, but he points out that they had not tabulated all of the data.

Mr. FRANKS. Mr. Chairman, I see my time is gone, so I yield back. Thank you.

Mr. NADLER. Thank you.

I will now recognize the distinguished Chairman of the full Committee for 5 minutes.

Mr. CONYERS. Thank you very much.

I think we ought to recognize that in the course of a rather short period of time, we have come to some general parameters of how Congress might be able to work with it. We have a constitutional technician like Trent Franks and Steve King balanced by some of us on this side who, with all of you, you know, could shape——

Mr. Chairman and Mr. Franks, we could shape the outlines of a proposal. The president-elect has given us some guidance.

And, Patrick Philbin, your work has been enormously appreciated when you were at the Department of Justice, but I know what a stickler you are about the second article, and you revealed it here again today. It seems to have run in the DNA of all the people from the Department of Justice, and I accept that.

But with you and Bankston, with the judge, with the president-elect of the ABA, and all of us here, I do not see us that far from shaping something that would meet the demands of my constitutional technocrats on the other side, and it is pretty clear here just from what we have done in an hour and a half that there has to be some congressional direction for the judges. That is not asking too much. That is certainly going to be constitutional, and I think we can meet that.

Don't you feel, Judge Wald, that we are making slow progress? Of course, we have different views. That is why we are all here.

Judge WALD. Yes, I do, Chairman Conyers. It seems to me that the experience that Mr. Wells and I spoke about, the motivation that Ms. Loether spoke about, and—the only thing that I could find to disagree with in Mr. Philbin's testimony basically was we could fight—not fight about, we could have an exchange about—and I am sure you will inside your Committee—what the level of review would be for the judge when they looked at the evidence. I certainly do not suggest he goes in just does what he feels like doing without taking full account of the Government's case.

On the other hand, I would think utmost deference might deteriorate into an automatic kind of "Well, they have made out a good case, and I am not going to stick my neck out and do anything about it." But that I think is one of those important issues, but one that certainly would be worked out in the course of the legislation.

Other than that, I am sure that people would not object to judges doing in the civil area what they are doing in the criminal area in terms of finding alternatives that do not require the disclosure of the disputed information because you can find an adequate substitute that does not violate national security.

Mr. CONYERS. So we are coming out of this hearing with an agreement that no congressional statute under any circumstances could permanently block the President's exercise of executive authority in matters of national security. The Government may refuse to cooperate with the judge, but they cannot, you know, use inherent contempt or something to force the matter out of him.

So, for all the people afraid of weakening our opposition to terrorism, we are not putting the Government in some kind of a position where they would have to compromise whatever they believed in.

Mr. Bankston, what do you have to add to this part of our discussion?

Mr. BANKSTON. Well, I would just say that it is critical that judges be able to reach the legal questions that are at issue in the cases before them, of course, with a mind toward protecting legitimate state secrets, and just add that in our cases we are not seeking the revelation, as Mr. Philbin indicated, of any detailed means and methods regarding who the NSA listens to or how they target those people. We are simply trying to litigate the legality of the fact that has been reported on the front pages of the New York Times

and the USA Today and corroborated by record whistleblower evidence that AT&T has opened its network to the NSA.

Mr. CONYERS. Anna Diggs Taylor, the judge in the Eastern District of Michigan, made the same point, that everybody knows what they are complaining about is a state secret. It has been all over the newspapers and everyone knew about it.

So, if we got Patrick Philbin, Esquire, to join us in this direction that we are moving in——

Are there any caveats that you will not give up on?

Mr. PHILBIN. All right. I am sorry. I beg your pardon.

Mr. CONYERS. Are there any details here that you are holding out on us that we cannot feel that we have a tentative direction that we are all moving in?

Mr. PHILBIN. Well, I would say yes, Mr. Chairman, because I have focused on constitutional issues because I have not reviewed a specific legislative proposal.

Mr. CONYERS. Well, so did this Committee.

Mr. PHILBIN. Well, as I said to Chairman Nadler, the devil is often in the details. There is a constitutional issue about standard of review. Then, beyond constitutional issues, there are policy issues. If Congress has the constitutional power to enact procedures, then there are policy issues about what are wise and useful procedures.

It seems from the summary description of the bill that has been introduced in the Senate that it would require a judge in a case to review every piece of evidence that is claimed to have some classification to it, and there are cases, there are instances, probably the cases that Mr. Bankston involved in, that for a judge to review every piece of evidence that bore in some way on that case could mean mountains and mountains of documents. I do not know exactly what these procedures are going to involve.

Mr. CONYERS. Mr.——

Mr. PHILBIN. The policy issues involved——

Mr. CONYERS. Judge Wald, make us feel better. I ask for just a little time for her to make him feel more comfortable sitting next to you.

Judge WALD. But I will say that we have had some experience in that, and I particularly wrote one decision while I was in the D.C. Circuit that came up under Exemption 1, but that is a national security exemption, the language of which, if you look at it, is, you know, very, very close to what we are talking about in terms of the ultimate substantive level that a judge would have to find.

In this case, there were either tens or hundreds of thousands, but huge, huge numbers of documents, that the Government was raising a privilege on dealing with the aborted hostage attempt in 1980, to rescue the Iranian hostages.

Now what Judge Oberdorfer did in that case which came up to the appeals court, because the Government objected, was he appointed a master with security clearance, actually a person who had performed that function in the Justice Department previously, who would sit down with those tens or hundreds of thousands of documents, which would have taken him off the bench for the next year probably, segregated them into certain categories of objections

and then summarized, did not attempt to tell the judge how he should rule, but summarized what the pros and cons of those arguments were. The judge was then able to make his decision about whether or not they needed to be classified.

But here is the interesting thing. In that process, just because of that process, going forth—the Government was able, obviously, as they proceeded to talk with the other side—in the end, 64 percent of those documents, those tens or hundreds of thousands of documents, were released, and I think that, you know, this big, voluminous, big case thing is a real problem, but it is one that if you give the Federal judges tools——

But I have to tell you the one footnote that is always talked about. One of the classified pieces of information in the hundred thousand which was ultimately released was the fact that if you have milk in certain kinds of containers in helicopters, then it is going to curdle. [Laughter.]

Judge WALD. So, I mean, you know, everybody knows about overclassification. Secretary Rumsfeld talked about it. Porter Goss talked about it.

Mr. NADLER. Would the witness please conclude?

Thank you.

We are way over time at this point.

The gentleman from Iowa is recognized for 5 minutes.

Mr. KING. Thank you, Mr. Chairman.

You know, I listened to the testimony here and the exchange that we have had and listened to Chairman Conyers make the point that no statute can force the Administration to risk our national security, and that is a subject matter that we are all wrestling with here.

And I think I have to go back to a question I directed to Mr. Bankston first, and that is: Can this Congress tell a court what they can and cannot look at and what they can and cannot review? Do we have the statutory authority to do that if we pass the law?

Mr. BANKSTON. Well, the Senate bill under consideration does not require the court, as Mr. Philbin said, to examine anything. Rather, it requires the Government to disclose to the court so that it is empowered to make its own evaluation as to the state secrets claim.

And so in terms of your ability to legislate the state secrets privilege, it is a common-law evidentiary privilege. There is consensus on this panel, I think, that you can legislate in this area, even if there is a constitutional root to the privilege, which I humbly disagree with.

So, yes, you do have the power to do that.

Mr. KING. The answer is yes then. So the Congress can limit what evidence may be heard by the court, and that would constitutionally consistent——

Mr. BANKSTON. No, I would say——

Mr. KING [continuing]. Even though there are common-law precedents that you have referenced.

Mr. BANKSTON. Well, Congress has the ability to legislate rules of procedure for the court, and the Senate bill under consideration requires the Government to disclose to the court.

Mr. KING. I thank you, Mr. Bankston.

And I direct to Mr. Wells: Do you agree generally with the response from Mr. Bankston?

Mr. WELLS. I think generally yes, Congressman. Clearly, Congress has the right and has enacted and acted on proposed Federal rules of evidence. The rules of evidence by their very nature dictate what can and cannot be seen by a trier of fact, whether it be a judge or a jury.

In fact, the proposal that the ABA put forth on the state secrets privilege in terms of the standard of review draws upon the draft that was submitted to Congress as Federal Rule of Evidence 509 when Congress was considering enacting as a Federal Rule of Evidence all of the privileges, all the common-law privileges.

Congress decided not to do that and instead enacted 501 which simply acknowledged all common-law privileges.

Mr. KING. Okay. Mr. Wells, can you reference the constitutional authority that Congress has, the Constitution itself?

Mr. WELLS. Sir, I was merely talking about the rules of evidence, not the——

Mr. KING. I understand that. They are based upon some authority, and I would presume that it is built upon constitutional authority, and I would ask if that is something that you are familiar with that you could address.

Mr. WELLS. Sir, I have not researched that particular issue in terms of the broad question you asked. I would be glad to do so and get back to you on that if I could.

Mr. KING. Well, I thank you for your response. It occurs to me that this is the Constitutional Subcommittee, so I always like to look at the Constitution.

Mr. BANKSTON. Mr. King, I could answer that question if you would like.

Mr. KING. And I think you are going to tell me Article III Section 2.

Mr. BANKSTON. Yes, yes.

Mr. KING. And I appreciate your volunteering to do that. I then again ask the question back of Mr. Wells: Do you agree that this Congress has the authority to limit the jurisdictions of the court?

Mr. WELLS. Clearly, in terms of Federal courts, you have limited the jurisdiction of Federal courts. You have set jurisdictional minimums in terms of the jurisdiction of Federal courts. So, yes, the Congress has the authority to a certain extent to limit the jurisdiction of Federal courts.

Mr. KING. Okay. And I thank you because this brings me back to the question that was inspired by Chairman Conyers—and I agree with him—that no statute should be able to force the Administration to risk our national security, and the question that comes to me is: How does Congress enforce a jurisdictional limitation upon the court if the court refuses to acknowledge the authority of Congress?

And I would ask that question of Justice Wald, please. How do we enforce if the court refuses to be guided by our statute?

Judge WALD. I am thinking.

Well, that situation, certainly, would be a unique one. In my experience, I will tell you, first of all, it is not like one district court

judge could say, "The heck with that. I am not going to abide by what Congress has said."

You know the hierarchy. It then goes up to an appeals court, and, eventually, it goes, if it is important enough by certiorari or otherwise, to the Supreme Court. The likelihood that you would get through that entire hierarchy of the Federal judiciary with everyone of them saying—unless they declared it unconstitutional.

Now it is, of course, always possible that a court as it went up to the hierarchy—I am not saying I think this was unconstitutional, but the abstract question of what would happen if the court——

Mr. KING. Well, Justice, didn't that happen in the Hamden case in the D.C. Circuit? Wasn't there judicial jurisdictional limitation there and the Supreme Court heard it even though it was exclusively directed to the D.C. Court of Appeals in Hamden? And then what do we do when the Supreme Court refuses to follow the direction of Congress?

Judge WALD. I——

Mr. NADLER. The time has expired. The witness may answer the question briefly.

Judge WALD. Well, first of all, my understanding—if you are talking about the same part of Hamden—is the Supreme Court took the Hamden case because it disagreed with the interpretation with——

Mr. KING. Yeah.

Judge WALD. It interpreted what Congress did to say that it did not take away the jurisdiction in the pending cases. It did not sort of say, "Well, the heck with what you did."

Now, if you get all the way up to the Supreme Court, I mean, we can always go back to President Jackson's, "You know, the court has made its ruling. Now let them enforce it." However, that kind of thing has not happened, fortunately, very often in our history.

I would doubt very much it would happen here. The only way, I would suspect, would be if the Supreme Court has two things it can do. It can interpret what you have done in a way you may not agree with. That happens frequently, I think—well, that would be the most likely thing—or it can declare what you have done unconstitutional as an infringement upon the Article III powers, and you are into a big separation of powers conflict.

Given the FOIA experience and other experiences—even the Detainee Treatment Act where this Congress though it is not one of my favorite pieces of legislation, more or less said to the D.C. Circuit what you can review on—that is subject to a lot of interpretations, but they did lay down what you can look at when you are reviewing the CSRTs.

Mr. NADLER. Thank you.

The time of the gentleman has expired.

The gentlelady from Florida is recognized for 5 minutes.

Ms. WASSERMAN SCHULTZ. Thank you, Mr. Chairman.

My question is to Mr. Philbin.

Mr. Philbin, in your——

Well, actually, before I ask my question, Mr. Chairman, I would like to ask unanimous consent to admit the statement of William H. Webster submitted to this Subcommittee dated——

Mr. NADLER. We have already done that.

Ms. WASSERMAN SCHULTZ. Let us do it again.

Mr. NADLER. Without objection.

Ms. WASSERMAN SCHULTZ. Thank you.

I was asleep at the switch or not here yet. Thank you very much.

Mr. Philbin, you, in your statement, made reference to the state secrets privilege as when properly invoked, and you quoted an opinion in the Sims case saying that the director of central intelligence is "familiar with the whole picture as judges are not," and you object to courts making an independent assessment of the submitted evidence. Is that right?

Mr. PHILBIN. I think that a standard of review has to incorporate deference to the judgment of the executive, yes.

Ms. WASSERMAN SCHULTZ. But do you support any involvement whatsoever in terms of an independent review by a judge?

Mr. PHILBIN. Well, let me answer the question this way because I think we may be getting hung up on the word "independent." There should be independent review in the sense that the judge, the court, is the ultimate decision-maker on whether or not the privilege was properly invoked. That is what the Supreme Court said in *Reynolds*. In my statement, I went through that, that it is not simply a rubber stamp once the executive invokes the privilege, that the court accedes to that. So there is some independent review in the sense that the decision belongs to the court, but——

Ms. WASSERMAN SCHULTZ. But there is not independent review in terms of review of the material.

Mr. PHILBIN. In terms of whether or not this piece of information is classified, that this is a secret that will do harm if released, the judge in considering that, if the judge determines he should examine ex parte in camera something, should show deference to the judgment of the executive because judges, as the Supreme Court said in Sims and as many other courts have said, the D.C. Circuit has said, do not have the same expertise and do not have the full picture that those in the executive branch or any intelligence community have.

Ms. WASSERMAN SCHULTZ. Well, let me further read from Judge Webster's letter to the Subcommittee.

He says, "As a former director of the FBI and director of the CIA, I fully understand and support our Government's need to protect sensitive national security information. However, as a former Federal judge, I can also confirm that judges can and should be trusted with sensitive information and that they are fully competent to perform an independent review of executive branch assertions of the state secrets privilege."

So my question is really twofold. Why, despite his unequal credentials as a judge and former FBI and CIA director, do you think Judge Webster's assertion is incorrect or wrong, and why do you think that there should be deference shown to the executive?

There is a system of checks and balances in which the judiciary is a co-equal branch of Government, and despite the *Reynolds* decision, that is why we are here today, because the legislative branch is concerned about how far this Administration has taken the state secrets privilege and how many times it has excessively potentially invoked it.

So, in light of that concern and our co-equal role in the system of checks of balances, can you answer my question?

Mr. PHILBIN. Well, again, Madam Representative, there is a lot built in there, but let me try to go through it, and I am trying not to take issue with Mr. Webster's letter because I have not read it, and I do not fully exactly what it says or if the quotation that you have read in this context would give me a better idea of exactly what it means.

To the extent his statement is that Federal judges have and can be trusted with reviewing classified material, I have no dispute with that. Federal judges review classified material in multiple contexts, as Judge Wald has explained. The FISA court does it. Other courts do it in the FOIA context. So simply handling and looking at the material is not necessarily an issue.

Then there is the question of determining whether or not the material, if released, would do harm to the United States, and as I was trying to explain before, I think we are getting hung up maybe on what the word "independent" builds into it. I believe that the judges can conduct and do under current law conduct a review to ensure that if the executive asserts that something is secret and would do damage to the United States if released, they look at that to determine whether that is appropriately invoked under a deferential standard of whether or not it was reasonable——

Ms. WASSERMAN SCHULTZ. But let me give you an idea of what he is talking about. In his letter, he refers to *el-Masri v. the United States*, and in the letter, he talked about how Mr. el-Masri had been denied his day in court, "even though no judge ever reviewed any evidence purportedly subject to the privilege, nor did any judge make an independent assessment as to whether or not the evidence might be available for Mr. el-Masri to proceed with his lawsuit based on public accounts of the rendition and an investigation conducted by the German government."

I mean, we are talking about a person who was by all accounts an innocent victim, as Judge Webster refers to in his letter, and, I mean, let us not split hairs. You know what an independent review means. An independent review means that without the executive looking over their shoulder, without the executive deciding what it is that the judge can see in order to make their decision, they independently review the evidence and decide whether the state secrets privilege has been properly invoked, as you referred to it being necessary in the beginning of your statement.

Mr. PHILBIN. With all respect, Madam Representative, I am not attempting to split hairs. I am attempting to be precise about what I think is an issue that has some constitutional significance.

I believe that judges should conduct, can conduct an independent review in the sense that they are the decision-maker and do not simply rubber stamp what the executive says. At the same time, the standard of review announced by the Supreme Court in *Reynolds* and in *U.S. v. Nixon* has constitutional significance and constitutional overtones, and Article III judges should show deference to the judgment of the executive in terms of what is material that will do harm to the national security of the United States if released.

To the extent that Mr. Webster's letter—and I have the greatest respect for him, and he has great expertise—suggests or that you understand this letter is suggesting that judges are equally qualified and should with complete independence from the judgment of the executive decide what is a secret or not or what would do harm to the United States, I respectfully disagree with that and believe——

Ms. WASSERMAN SCHULTZ. So——

Mr. PHILBIN [continuing]. It is against a long line of precedent.

Mr. NADLER. The gentlelady's time has expired.

The gentleman from——

Ms. WASSERMAN SCHULTZ. The question, Mr. Chairman, is: How do we know? I mean, that is really the question, and I do not think the gentleman has answered that question.

Mr. PHILBIN. I am sorry. I am not sure. How do we know?

Ms. WASSERMAN SCHULTZ. How do we know that the Government's privilege has been properly invoked, if the judge does not have an independent opportunity to review the evidence? I mean, we just do not know.

Mr. PHILBIN. No, the judge can and should have an independent opportunity to review the evidence. I am merely trying to be precise about the standard under which the——

Mr. NADLER. Thank you.

The gentleman from Tennessee is recognized for 5 minutes.

Mr. COHEN. Thank you, Mr. Chairman.

I came in a little late, and I apologize.

Mr. Philbin, you are taking the most pro executive Administration position—is that accurate—among the panelists here?

Mr. PHILBIN. Yes. Among the panelists here, I am taking the most pro Administration position.

Mr. COHEN. And do you feel Article III Section 2 gives them some type of unique—or not Article III, but Article II—gives the Administration some unique ability to have information and not to have it be checked, or do you just think there should be limited checks?

Mr. PHILBIN. Well, I believe that Article II, in assigning the President authority as commander in chief and as representing the Nation in foreign affairs, does give the executive special and uniquely assigned constitutional responsibilities with respect to diplomatic, military, and national security information and that the other branches have to show respect for that unique constitutional role.

Mr. COHEN. And does respect preclude review?

Mr. PHILBIN. I do not think it absolutely precludes any review, and that is not the way the Supreme Court has treated it. But it does affect the standard and the scope of review.

Mr. COHEN. And, Judge Wald, you have had some cases like this. Do you have a problem with the scope of review as has been proposed in the bill in the Senate or maybe if you have seen the one that Mr. Conyers intends to introduce in the House?

Judge WALD. I have seen them, but I am going to have to go back and look. Or maybe you can remind me what the——

Mr. COHEN. Does anybody have an opinion on those bills?

Judge WALD. I know when I looked at them, I had no problem with them——

Mr. COHEN. Objection?

Judge WALD [continuing]. And I think I can find it.

Mr. COHEN. I cannot. My eyes are not good enough, but——

Mr. Wells?

Mr. WELLS. Yes, Congressman. The Senate bill is consistent with the ABA policy in large respect, and I believe the ABA would support the Senate bill that is currently drafted.

Mr. COHEN. Thank you.

I know we want to close. I just think that we need to provide as many checks and balances as possible. That is the foundation of our Government.

I understand national security, but when an Administration will lie to send people into war, lie about weapons of mass destruction, lie about countries having uranium that they are going to give to a Nation to threaten our security, lie about relations with al-Qaida and 9/11, when they will lie about that, they will lie about anything.

I felt so bad last night listening to President Bush and having to think that when he talked about Iran, I could not accept anything he said because I knew he lied to a previous Congress. So he has lost the ability for the American people to listen to anything he says, and it is like the sky is falling.

And, unfortunately, he has done great damage to the Administration and to the presidency and to the judgment of the executive to assert privilege because when you will go to war under false pretenses and lies——

Mr. FRANKS. Mr. Chairman, I want to make a point of order that the gentleman's words are unparliamentary because they are personally offensive toward the President of the United States.

Mr. COHEN. If they are, you know, if we need to withdraw them, I will withdraw them, but I think that there was a report recently that suggested—maybe I could quote that—that 400 times they have been cited, the Administration, for giving mistruths, untruths, prevarications, and other type of statements to the American people.

Mr. NADLER. Okay. Does the gentleman withdraw the words?

Mr. COHEN. Withdraw them all.

Mr. NADLER. Thank you. let us——

Mr. COHEN. Adios.

Judge WALD. Mr. Chairman, I just want to answer yes or no because I did not finish it.

Mr. NADLER. Yes, please.

Judge WALD. I managed now to look at the underlying bill. I do not have a problem. I think the word "deference" is something that applies—there are 50,000 degrees of deference that you can give, and whenever any expert comes in, I mean, who has some kind of qualified experience, you say, "You are the expert in architecture, so we are going to look at your opinion with deference." So, in that respect, I have no problem with the bill.

Mr. NADLER. Thank you very much.

The gentleman's time has expired.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward and ask the witnesses to respond to as promptly as you can so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

Without objection, we unanimously thank all the witnesses.

And with that, this hearing is adjourned.

[Whereupon, at 11:45 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

WASHINGTON
LEGISLATIVE OFFICE

American Civil Liberties Union
Statement for the Record to the U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Submitted by
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TREASURER

January 29, 2008

Chairman Nadler, Ranking Member Franks, and Members of the Subcommittee:

We are pleased to submit this statement for the record on behalf of the American Civil Liberties Union, its 53 affiliates and more than 500,000 members nationwide, to explain the ACLU's concern about an issue of critical importance to us, to this Subcommittee of the Committee on the Judiciary, and to all Americans concerned about the unchecked abuse of executive power: reform of the state secrets privilege.

Over the years we have seen the state secrets privilege mutate from a common-law evidentiary rule that permits the government "to block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security,"[1] into an alternative form of immunity that is increasingly being used to shield the government and its agents from accountability for systemic violations of the Constitution. Since September 11, 2001, the Bush administration has fundamentally altered the manner in which the state secrets privileged is used, to the detriment of the rights of private litigants harmed by egregious government misconduct, and at the sacrifice of the American people's trust and confidence in our judicial system.

ACLU litigators challenging the Bush administration's illegal policies of warrantless surveillance, extraordinary rendition, and torture have increasingly faced government assertions of the state secrets privilege at the initial phase of litigation, even before any evidence is produced or requested. Too often in these cases, courts accept government claims of risk to national security as absolute, without independently scrutinizing the evidence or seeking alternative methods to give our plaintiffs an opportunity to discover non-privileged information with which to prove their cases.

The untimely dismissal of these important lawsuits has undermined our constitutional system of checks and balances and weakened our national interest in having a government that is accountable to the people. The misuse of the privilege by the executive branch, coupled with the failure of the courts to exercise independent scrutiny over privilege claims, has allowed serious, ongoing

abuses of executive power to go unchecked. Congress has the power and the duty to restore these checks and balances and we urge you to pass legislation to clarify judicial authority over civil litigation involving alleged state secrets.

HISTORY OF THE PRIVILEGE

It has been more than half a century since the Supreme Court formally recognized the common-law state secrets privilege in *United States v. Reynolds*, a case that both establishes the legal framework for accepting a state secrets claim and serves as cautionary tale for those judges inclined to accept the government's assertions as valid on their face.[2] In *Reynolds*, the family members of three civilians who died in the crash of a military plane in Georgia sued for damages. In response to a discovery request for the accident report, the government asserted the state secrets privilege, arguing that the report contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight.

Although the Supreme Court had not previously articulated rules governing the invocation of the privilege, it emphasized the privilege was "well established in the law of evidence,"[3] and cited treatises, including John Henry Wigmore's *Evidence in Trials at Common Law*, as authority. Wigmore acknowledged that there "must be a privilege for *secrets of state, i.e.* matters whose disclosure would endanger the Nation's governmental requirements or its relations of friendship and profit with other nations."[4] Yet he cautioned that the privilege "has been so often improperly invoked and so loosely misapplied that a strict definition of its legitimate limits must be made."[5] Such limits included, at a minimum, requiring the trial judge to scrutinize closely the evidence over which the government claimed the privilege:

> Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coordinate body of government share the confidence? The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege.[6]

Noting that the government's privilege to resist discovery of "military and state secrets" was "not to be lightly invoked," the *Reynolds* Court required "a formal claim of privilege, lodged by the head of the department which had control over the matter, after actual personal consideration by that officer."[7] Further, the Court suggested a balancing of interests, in which the greater the necessity for the allegedly privileged information in presenting the case, the more "a court should probe in satisfying itself that the occasion for invoking the privilege is appropriate."[8] Like Wigmore, the *Reynolds* Court cautioned against ceding too much authority in the face of a claim of privilege: "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[9]

Yet despite these cautions the *Reynolds* Court produced an ambiguous standard for making a judicial determination of whether the disclosure of the evidence in question poses a reasonable danger to national security,[10] and it sustained the government's claim of privilege over the accident report without

ever looking at it. While the Court allowed the suit to proceed using alternative non-classified information (testimony from the crash survivors) as a substitute for the accident report, the declassification of the report many decades later proved the folly in the Court's unverified trust in the government's claim. The accident report contained no national security or military secrets, but rather compelling evidence of the government's negligence.[11]

The Supreme Court has not directly addressed the scope or application of the privilege since *Reynolds*. In the intervening years, the privilege has become unmoored from its evidentiary origins. No longer is the privilege invoked solely with respect to discrete and allegedly secret evidence; rather, the government now routinely invokes the privilege at the pleading stage, before any evidentiary disputes have arisen. Indeed, Reynolds' instruction that courts are to weigh a plaintiff's showing of need for particular evidence in determining how deeply to probe the government's claim of privilege is rendered wholly meaningless when the privilege is invoked before any request for evidence has been made. Moreover, the government has invoked the privilege with greater frequency;[12] in cases of greater national significance;[13] and in a manner that seeks effectively to transform it from an evidentiary privilege into an immunity doctrine, thereby "neutraliz[ing] constitutional constraints on executive powers."[14]

In particular, since September 11, 2001, the government has invoked the privilege frequently in cases that present serious and plausible allegations of grave executive misconduct. It has sought to foreclose judicial review of the National Security Agency's warrantless surveillance of United States citizens in contravention of the Foreign Intelligence Surveillance Act, to foreclose review of the NSA's warrantless data mining of calls and e-mails, and to foreclose review of various telecommunication companies' participation in the NSA's surveillance activities.[15] It has invoked the privilege to terminate a whistleblower suit brought by a former FBI translator who was fired after reporting serious security breaches and possible espionage within the Bureau.[16] And, of course, it has invoked the privilege to seek dismissal of suits challenging the government's seizure, transfer, and torture of innocent foreign citizens.[17]

The proliferation of cases in which the government has invoked the state secrets privilege, and the lack of guidance from the Court since its 1953 decision in *Reynolds*, have produced conflict and confusion among the lower courts regarding the proper scope and application of the privilege.

In *Tenet v. Doe*, the Supreme Court clarified the distinction between the evidentiary state secrets privilege, which may be invoked to prevent disclosure of specific evidence during discovery, and the so-called *Totten* rule, which requires outright dismissal at the pleading stage of cases involving unacknowledged espionage agreements.[18] As the Court explained, *Totten* is a "unique and categorical . . . bar – a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry."[19] By contrast, the Court noted, the state secrets privilege deals with evidence, not justiciability.[20] Nevertheless, some courts have permitted the government to invoke the evidentiary state secrets privilege to terminate litigation even before there is any evidence at issue.

There is substantial confusion in the lower courts regarding both *when* the privilege properly may be invoked, and *what* precisely the privilege may be

invoked to protect. The *Reynolds* Court considered whether the privilege had been properly invoked during discovery, at a stage of the litigation when *actual evidence* was at issue.[21] Consistent with *Reynolds,* some lower courts have properly rejected pre-discovery, categorical assertions of the privilege, holding that the privilege must be asserted on an item-by-item basis with respect to particular disputed evidence.[22] Other courts, however, have permitted the government to invoke the privilege at the pleading stage, with respect to entire *categories* of information – or even the entire subject matter of the action – before evidentiary disputes arose.[23]

There is also a wide divergence among the lower courts regarding how deeply a court must probe the government's claim of privilege, and what, exactly, the court must examine in assessing a privilege claim and its consequences. Notwithstanding *Reynolds'* clear instruction that the judge has a critical and authoritative role to play in the privilege determination, many courts have held that the government's state secrets claim must be afforded the most extreme form of deference.[24] Other courts properly have scrutinized the government's privilege claim with more rigor – adopting a common-sense approach to assessing the reasonable risk of harm to national security should purported state secrets be disclosed.[25]

This confusion as to the proper judicial role plays out with particularly dire consequences when a successful claim of privilege results in dismissal of the entire lawsuit. Some courts correctly have held that where dismissal might result from a successful invocation of the privilege, the court must examine the *actual* evidence as to which the government has invoked the privilege before making any determination about the applicability of the privilege or dismissal.[26] Other courts have refused or declined to examine the allegedly privileged evidence, relying solely on secret affidavits submitted by the government.[27]

Legislative action to narrow the scope of the state secrets privilege and standardize the judicial process for evaluating privilege claims is needed to clear up the confusion in the courts and to bring uniformity to a too often flawed process that is increasingly denying justice to private litigants in cases of significant national interest.

THE ACLU CASES

The ACLU has brought several cases designed to challenge controversial government intelligence programs that have come to light through press leaks, through inadvertent disclosure, and through intentional admissions of high government officials. These cases serve more than just the narrow personal interests of the litigants; they serve the national interest in that they often seek declaratory relief and/or a judicial determination that the challenged government conduct is illegal and unconstitutional, and therefore must end. The misuse of the privilege to dismiss these cases at the pleading stage does damage to the body politic as a whole, and not just to the rights of the litigants.

EXTRAORDINARY RENDITION, TORTURE

Khaled El-Masri, a German citizen of Lebanese descent, was forcibly abducted while on holiday in Macedonia in late 2003. After being detained

incommunicado by Macedonian authorities for 23 days, he was handed over to United States agents, then beaten, drugged, and transported to a secret CIA-run prison in Afghanistan. While in Afghanistan he was subjected to inhumane conditions and coercive interrogation and was detained without charge or public disclosure for several months. Five months after his abduction, Mr. El-Masri was deposited at night, without explanation, on a hill in Albania. El-Masri suffered this abuse and imprisonment at the hands of U.S. government agents due to a simple case of mistaken identity.

Mr. El-Masri's ordeal received prominent coverage throughout the world and was reported on the front pages of the United States' leading newspapers and on its leading news programs. In addition to widely disseminating Mr. El-Masri's allegations of kidnapping, detention, and abuse, these news reports revealed a vast amount of information about the CIA's behind-the-scenes machinations during Mr. El-Masri's ordeal, and even about the actual aircraft employed to transport Mr. El-Masri to detention in Afghanistan. German and European authorities began official investigations of El-Masri's allegations. Moreover, on numerous occasions and in varied settings, U.S. government officials have publicly confirmed the existence of the rendition program and described its parameters.

The government has acknowledged that the CIA is the lead agency in conducting renditions for the United States in public testimony before the 9/11 Commission of Inquiry. Christopher Kojm, who from 1998 until February, 2003 served as Deputy Assistant Secretary for Intelligence Policy and Coordination in the State Department's Bureau of Intelligence and Research, described the CIA's role in coordinating with foreign government intelligence agencies to effect renditions, stating that the agency "plays an active role, sometimes calling upon the support of other agencies for logistical or transportation assistance" but remaining the "main player" in the process.[28] Similarly, former CIA Director George Tenet, in his own written testimony to the 9/11 Joint Inquiry Committee, described the CIA's role in some seventy pre-9/11 renditions and elaborated on a number of specific examples of CIA involvement in renditions.[29] Even President Bush has publicly confirmed the widely known fact that the CIA has operated detention and interrogation facilities in other nations, as well as the identities of fourteen specific individuals who have been held in CIA custody.[30]

On December 6, 2005, Mr. El-Masri filed suit against former Director of Central Intelligence George Tenet, three private aviation companies, and several unnamed defendants, seeking compensatory and punitive damages for his unlawful abduction, arbitrary detention, and torture by agents of the United States.[31] Mr. El-Masri alleged violations of the Fifth Amendment to the U.S. Constitution as well as customary international law prohibiting prolonged arbitrary detention; cruel, inhuman, or degrading treatment; and torture, which are enforceable in U.S. courts pursuant to the Alien Tort Statute.[32] Although not named as a defendant, the United States government intervened before the named defendants had answered the complaint, and before discovery had commenced, for the purpose of seeking dismissal of the suit pursuant to the evidentiary state secrets privilege. In a public affidavit submitted with the motion, then-CIA director Porter Goss maintained that "[w]hen there are allegations that the CIA is involved in clandestine activities, the United States can neither confirm nor deny those allegations," and accordingly Mr. El-Masri's suit must be dismissed.[33]

The district court held oral argument on the United States' motion on May 12, 2006, and despite the wealth of evidence already in the public record, the United States' motion to dismiss was granted that same day.[34] Mr. El-Masri thereafter appealed to the Court of the Appeals for the Fourth Circuit. On March 2, 2007, the court of appeals upheld the dismissal of Mr. El-Masri's suit, holding that state secrets were "central" both to Mr. El-Masri's claims and to the defendants' likely defenses, and thus that the case could not be litigated without disclosure of state secrets.[35]

The district court held that "El-Masri's private interests must give way to the national interest in preserving state secrets." But no meaningful national interest was served by this decision. There is no national security interest served in having U.S. government agents kidnap, render, torture, abuse, and illegally detain the wrong person. To the contrary, the allegations questioned our government's commitment to core values of American criminal law and international humanitarian law. In an amicus brief filed in support of El-Masri's appeal to the Forth Circuit, ten former U.S. diplomats warned that denial of a forum for El-Masri would undermine U.S. standing in the world community and the ability to obtain foreign government cooperation essential to combating terrorism, and thereby undermine our national security.[36] Perhaps it should have been no surprise that on January 31, 2007 a German court issued arrest warrants for 13 unnamed CIA agents believed to have participated in the El-Masri abduction and rendition.[37] In cases that touch fundamental values and constitutional principles, courts must be empowered to look to the long-term national interests in devising a solution that protects both our national interests and the interests of justice for all.

The ACLU recently filed another federal lawsuit on behalf of five victims of the U.S. government's unlawful extraordinary rendition program. The lawsuit charges that Jeppesen Dataplan, Inc., a subsidiary of the Boeing Company, knowingly provided direct flight services to the CIA that enabled the clandestine transportation of Binyam Mohamed, Abou Elkassim Britel, Ahmed Agiza, Mohamed Farag Ahmad Bashmilah, and Bisher al-Rawi to secret overseas locations where they were subjected to torture and other forms of cruel, inhuman and degrading treatment.[38] On October 19, 2007 the government moved to intervene and filed a motion to dismiss based on CIA Director Michael Hayden's formal invocation of the state secrets privilege as grounds for dismissal. The matter is currently pending in the district court.

NATIONAL SECURITY AGENCY WARRANTLESS SURVEILLANCE

In December of 2005 the *New York Times* revealed that shortly after the 9/11 attacks the NSA began conducting warrantless domestic eavesdropping in violation of the Foreign Intelligence Surveillance Act (FISA).[39] The Bush administration acknowledged approving this surveillance as part of a program it called the Terrorist Surveillance Program (TSP). Subsequent articles in the *Times* and *USAToday* alleged that major telecommunications companies "working under contract to the NSA" were also providing the domestic call data of millions of Americans to the government for "social network analysis."[40]

The ACLU sued the NSA on behalf of a group of journalists, academics, attorneys and nonprofit organizations, alleging that their routine communication with individuals in the Middle East made them likely victims of the NSA's warrantless wiretapping program.[41] The plaintiffs alleged the NSA program violated the Fourth Amendment, FISA, and other federal laws. They also alleged that they suffered real injury as a result of the NSA's warrantless surveillance program because the program forced them to make other, more costly arrangements to communicate with clients, sources, and colleagues in order to maintain confidentiality. The government filed a motion to dismiss prior to discovery, arguing the matter could not be explored in litigation because evidence supporting the NSA program qualifies for the state secrets privilege. U.S. District Judge Anna Diggs Taylor correctly found that the ACLU's challenge to the program could be made based solely on the government's public acknowledgement of the warrantless wiretapping program and ruled the NSA program unconstitutional.

In July 2007, the Sixth Circuit Court of Appeals dismissed the case, ruling the plaintiffs in the case had no standing to sue because they did not, and because of the state secrets doctrine could not state with certainty that they had been wiretapped by the NSA.[42] Once again the interests of justice were not properly served by dismissal of this case because Americans were denied the chance to contest the warrantless surveillance of their telephone calls and e-mails when the appeals court refused to rule on the legality of the program. Indeed, if this decision stands no person could ever challenge a secret domestic surveillance program because evidence necessary to demonstrate standing falls under the protection of the privilege. This unfettered executive authority is untenable to our constitutional system of competing powers among the separate branches of government. In October 2007, the ACLU asked the Supreme Court of the United States to review the Sixth Circuit decision and we are awaiting a decision regarding whether they will accept the case.

NATIONAL SECURITY WHISTLEBLOWER

Sibel Edmonds, a 32-year-old Turkish-American, was hired as a translator by the FBI shortly after the terrorist attacks of September 11, 2001 because of her knowledge of Middle Eastern languages. She was fired less than a year later in March 2002 in retaliation for reporting shoddy work and security breaches that could have had serious implications on our national security to her supervisors. Edmonds sued to contest her firing in July 2002. Rather than deny the truth of Edmonds' assertions, the government invoked the state secrets privilege in arguing that her case raised such sensitive issues that the court was required to dismiss it without even considering whether the claims had merit. On July 6, 2004, Judge Reggie Walton in the U.S. District Court for the District of Columbia dismissed Edmonds' case, citing the government's state secrets privilege. The ACLU represented Edmonds in her appeal of that ruling.[43]

A few days before the appeals court heard Edmonds' case, the Inspector General published an unclassified summary of its investigation of her claims.[44] The summary vindicated Edmonds. It stated that "many of [Edmonds'] allegations were supported, that the FBI did not take them seriously enough, and that her allegations were, in fact, the most significant factor in the FBI's decision to terminate her services."[45] The Inspector General urged the FBI to conduct a

thorough investigation of Edmonds' allegations. It stated that "the FBI did not, and still has not, conducted such an investigation."[46] It is truly difficult to see how ignoring and suppressing a whistleblower's complaint about security breaches within the FBI protects the national security.

In the appeals court, the government continued to argue that the state secrets privilege deprived the judiciary of the right to hear Edmonds' claims. In fact, the appeals court closed the arguments for the case to the press and general public.[47] Even Edmonds and her attorneys were forbidden from hearing the government present part of its argument. In a one-line opinion containing no explanation for its decision, the appeals court agreed with the government and dismissed Edmonds' case. Edmonds asked the Supreme Court to review her case, but it declined.[48]

CONCLUSION

In each of these instances, the government has sought dismissal at the pleading stage, and the privilege as asserted by the government and as construed by the courts has often permitted dismissal of these suits on the basis of a government affidavit alone – without any judicial examination of the purportedly privileged evidence and sometimes only after ex parte hearings. Accordingly, a broad range of executive misconduct has been shielded from judicial review after the *perpetrators themselves* have invoked the privilege to avoid adjudication. Employed as it has been in these cases, the privilege permits the executive to declare a case nonjusticiable – without producing specific privileged evidence, without having to justify its claims by reference to those specific facts that will be necessary and relevant to adjudicate the case, and without having to submit its claims to even modified adversarial testing. These qualitative and quantitative shifts in the government's use – and the courts' acceptance – of the state secrets privilege warrant legislative action to correct this imbalance of power and rein in unconstitutional executive practices that are injurious to the health of a democratic society.

RECOMMENDATIONS

The ACLU recommends that Congress exercise its constitutional authority and pass legislation that narrows the state secrets privilege to its common-law roots as a privilege over evidence rather than justiciability. We recommend that Congress require courts to exercise independent judicial review over all government state secrets claims. At a bare minimum the legislation must require the government to present all evidence over which it is claiming a privilege to the court, *in camera*, for an independent assessment of whether disclosure of the evidence would reasonably pose a significant risk to national security.

Courts have long experience responsibly handling national security information in criminal cases involving terrorism and espionage, and there is no reason to suggest courts will not be just as reasonable in fulfilling their obligations in civil cases. Congress should look to the Classified Information Procedures Act as a successful model that has both protected the national security and the rights of individuals in adversarial proceedings against the government for more than twenty years.[49] CIPA not only establishes procedures, now tested, for handling classified information in an adversarial process, it also correctly shifts

the burden that results from the government's withholding of evidence to the government where it belongs. The balancing test under CIPA holds that our collective national interest in protecting the rights of an individual the government seeks to deprive of his liberty outweighs the government's interest in pursuing its criminal justice mission or protecting its secrets. This is the appropriate balance because the government is in the best position to weigh the competing risks and come to a determination whether protecting its secret is more or less important than prosecuting the individual, and placing the burden on the government is the only way to compel it to make that choice. While not every tort case will implicate issues of collective national interest, Congress should direct the courts to consider broader interests of justice in those cases that involve torture in addition to torts.

Where particular judges feel they are not competent to make decisions on issues concerning national security claims, they should be authorized to appoint special masters to assist them in their analyses. Congress should recognize, however, that centuries of American jurisprudence have demonstrated the strength of the adversarial process in reaching decisions on matters of law and fact, and to the extent possible the adversarial process should be maintained. Congress should consider whether appointing a cleared Guardian ad Litem, who would represent the interests of the adverse party, or better yet, providing appropriate security clearances to counsel to participate in the review of the privileged material, would serve as a more effective means of ensuring that litigant's rights are best protected and the most just result is achieved.

Where the courts do find that disclosure of privileged evidence would reasonably pose a significant risk to national security, they should be directed to follow CIPA procedures in redacting, summarizing, substituting, and/or stipulating to the facts dispute. These procedures will ensure the litigation can proceed to a just result unless the court determines the government is unable to present specific privileged evidence that establishes a valid defense.

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[1] Ellsberg v. Mitchell, 709 F.2d 51, 56 (D.C. Cir. 1983); *See also*, United States v. Reynolds, 345 U.S. 1, 10 (1953); Tenenbaum v. Simonini, 372 F.3d 776, 777 (6th Cir. 2004).
[2] Reynolds, 345 U.S. 1 (1953).
[3] *Id*, at 6-7.
[4] 8 John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW §2212a (3d c. 1940)(emphasis in original).
[5] *Id*.
[6] Id, at § 2379.
[7] Reynolds, 345 U.S. 1, 7-8.
[8] *Id*, at 11.
[9] *Id*, at 9-10.
[10] Id. at 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.").
[11] *See*, Herring v. United States, Civil Action No. 03-5500 (LDD) (E.D. Pa. Sept. 10, 2004).
[12] Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939 (2007) ("The Bush Administration has raised the privilege in twenty-eight percent more cases per year than in the previous decade, and has sought dismissal in ninety-two percent more cases per year than in the previous decade.")

[13] Editorial, Too Many Secrets, N.Y. Times, Mar. 10, 2007, at A12, available at: http://www.nytimes.com/2007/03/10/opinion/10sat2.html?ex=1331182800&en=023b94ae28666f34&ei=5090&partner=rssuserland&emc=rss ("It is a challenge to keep track of all the ways the Bush administration is eroding constitutional protections, but one that should get more attention is its abuse of the state secrets doctrine.").

[14] Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 581 (1982).

[15] *See*, Hepting v. AT&T Corp., 439 F.Supp. 2d 974 (N.D. Cal. 2006), *appeal docketed*, No. 06-17137 (9th Cir. Nov. 9, 2006); Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006); ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006).

[16] Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65 (D.D.C. 2004), *cert. denied*, 74 USLW 3108 (U.S. Nov. 28, 2005) (No. 05-190).

[17] *See*, El-Masri, *supra*; Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissed on other grounds).

[18] Tenet v. Doe, 544 U.S. 1 (2005).

[19] *Id*, at 6.

[20] *Id.* at 9, 10.

[21] Reynolds, 345 U.S. at 3.

[22] *See, e.g.*, In re United States, 872 F.2d 472, 478 (D.C. Cir. 1989) (rejecting categorical, prediscovery privilege claim because "an item-by-item determination of privilege [would] amply accommodate the Government's concerns"); Hepting, 439 F. Supp. 2d at 994 (N.D. Cal. 2006) (refusing to assess effect of pleading stage, categorical assertion of the privilege in suit challenging phone company's involvement in warrantless surveillance, preferring to assess the privilege "in light of the facts."); Nat'l Lawyers Guild v. Att'y General, 96 F.R.D. 390, 403 (S.D.N.Y. 1982) (holding privilege must be asserted on document-by-document basis).

[23] *See, e.g.*,Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991) (finding privilege properly asserted at pleading stage over all information pertaining to ship's defense system and rules of engagement); Sterling v. Tenet, 416 F.3d 338, 345-46 (4th Cir. 2005) (upholding pre-answer invocation of privilege over categories of information related to plaintiff's employment as well as alleged discrimination by CIA); Black v. United States, 62 F.3d 1115, 1117, 1119 (8th Cir. 1995); Terkel, 441 F. Supp. 2d at 918.

[24] *See, e.g.*, Zuckerbraun, 935 F.2d at 547; Sterling, 416 F.3d at 349 (accepting government's pleading-stage claim that state secrets would be revealed if plaintiff's suit were allowed to proceed, holding that court was "neither authorized nor qualified to inquire further"); Kasza, 133 F.3d at 1166 (holding that government's privilege claim is owed "utmost deference").

[25] *See, e.g.*, In re United States, 872 F.2d at 475 ("[A] court must not merely unthinkingly ratify the Executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role."); Ellsberg, 709 F.2d at 60 (rejecting claim of privilege over name of Attorney General who authorized unlawful wiretapping, explaining that no "disruption of diplomatic relations or undesirable education of hostile intelligence analysts would result from naming the responsible officials"); Hepting, 439 F. Supp. 2d at 995 (holding that "to defer to a blanket assertion of secrecy" would be "to abdicate" judicial duty, where "the very subject matter of [the] litigation ha[d] been so publicly aired"); Al-Haramain, 451 F. Supp. 2d at 1224 (rejecting government's overbroad secrecy argument, stating that "no harm to the national security would occur if plaintiffs are able to prove the general point that they were subject to surveillance . . . without publicly disclosing any other information").

[26] *See, e.g.*, Ellsberg, 709 F.2d at 59 n.37 (when litigant must lose if privilege claim is upheld, "careful *in camera* examination of the material is not only appropriate . . . but obligatory"); ACLU v. Brown, 619 F.2d 1170, 1173 (7th Cir. 1980).

[27] *See, e.g.*, Sterling, 416 F.3d at 344 (finding "affidavits or declarations" from government were sufficient to assess privilege claim even where asserted to sustain dismissal, and holding that in camera review of allegedly privileged evidence not required); Black, 62 F.3d at 1119 (examining only government declarations); Kasza, 133 F.3d at 1170 (same).

[28] *Intelligence Policy and National Policy Coordination: Hearing of the National Commission on Terrorist Attacks Upon the United States*, Mar. 24, 2004, *available at* http://govinfo.library.unt.edu/911/archive/hearing8/9-11Commission_Hearing_2004-03-24.htm

[29] *Written Statement for the Record of the Director of Central Intelligence Before the Joint Inquiry Committee*, Oct. 17, 2002, *available at http://www.intelcenter.com/resource/2002/tenet-17-Oct-02.pdf*

[30] Statement of President George W. Bush, President Discusses Creation of Military Commissions to Try Suspected Terrorists, Office of the White House Press Secretary, (Sept. 6, 2006) at: http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html
[31] El-Masri v. Tenet, 437 F.Supp.2d 530 (E.D.Va. May 12, 2006).
[32] 28 U.S.C. § 1350.
[33] See Petition for a Writ of Certiorari at 9, 2007 WL 1624819, (Appellate Petition, Motion and Filing), El-Masri v. U.S., 128 S. Ct. 373 (U.S. 2007) (No. 06-1613), *available at* http://www.fas.org/sgp/jud/statesec/elmasri-cert.pdf
[34] El-Masri v. Tenet, 437 F.Supp.2d 530, 532-34 (E.D.Va. May 12, 2006).
[35] El-Masri v. U.S., 479 F.3d 296, 313 (4th Cir. 2007) *cert. denied*, 128 S. Ct. 373 (U.S. 2007).
[36] Brief Amicus Curiae of Former United States Diplomats Supporting Plaintiff-Appellant and Reversal, El-Masri v. Tenet, 437 F.Supp.2d 530, 532-34 (E.D.Va. May 12, 2006), (No. 06-1667) *available at*: http://www.aclu.org/safefree/rendition/asset_upload_file638_26287.pdf
[37] Mark Landler, *German Court Seeks Arrests of 13 CIA Agents*, N.Y. TIMES, Jan. 31, 2007, *available at*: http://www.nytimes.com/2007/01/31/world/europe/31cnd-germany.html?ref=europe
[38] Mohamed et al, v. Jeppesen Dataplan, Inc., Civil Action No. 5:07-cv-02798-JW, (United States District Court for the Northern District of California), (May 30, 2007).
[39] James Risen and Eric Lichtblau, *Bush lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, *available at* http://www.nytimes.com/2005/12/16/politics/16program.html?ei=5090&en=e32072d786623ac1&ex=1292389200.
[40] Leslie Cauley, *NSA has Massive Database of Americans' Phone Calls*, USATODAY, May 11, 2006, at 1A, *available at* http://www.usatoday.com/news/washington/2006-05-10-nsa_x.htm. See also, James Risen and Eric Lichtblau, *Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. Times, Dec. 24, 2005.
[41] ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006).
[42] ACLU v. NSA, 467 F.3d 590, 591 (6th Cir. 2006).
[43] *See* Edmonds v. U.S. Dept. of Justice, 323 F.Supp.2d 65, (D.D.C. Jul 06, 2004), *aff'd* 161 Fed.Appx. 6, (D.C.Cir. May 06, 2005) (NO. 04-5286); Reply Brief for the Plaintiff-Appellant, 2005 WL 622960, (Appellate Brief), (C.A.D.C. Mar. 10, 2005) (NO. 04-5286).
[44] U.S. DEPARTMENT OF JUSTICE OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FBI'S ACTIONS IN CONNECTION WITH THE ALLEGATIONS RAISED BY CONTRACT LINGUIST SIBEL EDMONDS, (Unclassified Summary, January 2005).
[45] *Id*, at 31.
[46] *Id*, at 34.
[47] Petition for a Writ of Certiorari, 2005 WL 1902125, (Appellate Petition, Motion and Filing), Edmonds v. U.S. Dept. of Justice, 546 U.S. 1031, 126 S.Ct. 734, (U.S. Nov 28, 2005) (NO. 05-190), *available at* http://www.justacitizen.com/articles_documents/edmonds%20cert[1].%20petition.pdf
[48] Edmonds v. U.S. Dept. of Justice, 546 U.S. 1031, 126 S.Ct. 734, (U.S. Nov 28, 2005) (NO. 05-190) .
[49] Pub. Law 96-456 (1980).

The Honorable Jerrold Nadler
Committee on the Judiciary
Chairman, Subcommittee on the Constitution
U.S. House of Representatives
Washington, D.C.

February 8, 2008

Dear Chairman Nadler:

Thank you for allowing us to comment for the record concerning use of the state secrets privilege by the President and executive departments of the United States government.

There is much about the state secrets privilege and its use over the last 50 years that warrants extended discussion, but we will constrain our comments here to two issues raised by Professor Robert Chesney in his remarks to the media and in scholarship that has incorrectly colored views concerning executive branch use of the state secrets privilege.

First, Professor Chesney claims that increased use of the privilege over time is of little significance in its impact on our institutions and oversight processes. Recently a *Washington Post* article quoted and paraphrased Chesney's views in the following way:

> . . . [T]he researcher who totaled the use of the privilege in published legal opinions said the increase is insignificant. Robert Chesney, an associate professor at Wake Forest University School of Law, showed that the Bush administration had invoked the state secrets privilege 20 times since 2001, while the same privilege was invoked 26 times from 1991 to 2000 and 23 times from 1981 to 1990.
>
> Chesney . . . said . . . that while the numbers show an upward trend, administration critics do not take into account the fact that the nation has been at war since 2001. As a result, the government is undertaking a larger number of secret operations. "There's this strong desire to show that this is something the Bush administration has seized upon to put things under the rug," Chesney said. "They have seized on it, but they also have been confronted with dozens and dozens of lawsuits seeking to explore classified programs."[1]

It is unclear how Chesney is counting invocations of the privilege, but since 2002 courts have issued 34 opinions where the privilege has been pressed by the Bush administration. This far outstrips the number of opinions issued for any similar period of time.[2] Yet Chesney claims that increased use of the privilege is "insignificant." Appendix A shows that use of the privilege has increased dramatically over the last three decades. Discounting the pre-1975 cases Chesney erroneously includes in his table of cases discussed below, the privilege was invoked on only five occasions between 1953 and 1975 (including the invocation in United States v. Reynolds, the

[1] http://www.washingtonpost.com/wp- dyn/content/story/2008/01/29/ST2008012900463.html?sid=ST2008012900463

[2] See Appendix A. In analyzing five-year rolling numbers, 2003-2007, with 34 reported opinions, is by far the most active period for opinions concerning state secrets claims. The next most active five-year periods not involving the administration of George W. Bush are 1979-1983 and 1980-1984, each with 22 reported opinions concerning United States assertion of the privilege.

case that established the privilege in U.S. jurisprudence). While Chesney claims increased use of the privilege may be substantially explained by the fact that we are "at war," it should be noted that between 1953 and 1975 we were also at war; for a full decade or more of that time frame.

The fact is that prior to 1975 use of the privilege was an extraordinary event. Since that time use of the privilege has become routinized and primary decisions about whether or not it should be deployed have migrated from department heads to the Attorney General's office. In the words of one government attorney: "For those of us defending the government from the range of legal assaults, openness is like AIDS – one brief exposure can lead to the collapse of the entire immune system . . . but we can always play the trump card – state secrets – and close down the game."[3] And a high ranking CIA official noted that in an assertion of the privilege taken up in the administration of President Bill Clinton, "We were forced to accept Justice's assurances that the sky would fall if [then-CIA Director John] Deutch didn't act at that very moment . . . We had no alternative but to accept Justice's litigation strategy, which was frankly, brinkmanship."[4] Even when agencies have no objection to release of information or to review of information toward possible release, Justice officials step in to block what they believe to be actions that may undercut executive power. This is not a goal of the state secrets privilege as intended in the *Reynolds* case. The privilege exists not to serve one branch, and is not intended to protect executive branch policy and shield agencies from oversight. It has been converted by the Department of Justice from a functional, practical litigation rule into part of a comprehensive strategy to reduce public exposure of executive branch activities.

The Department of Justice appears to employ the privilege in support of executive branch policy, rather than out of a main concern to protect against the disclosure of information that would harm the national security if made public. A telling feature that the privilege is now a captive of executive branch policy and is detached from the pragmatic moorings announced in *Reynolds* is the Department of Justice's movement toward a super privilege, one that would require dismissal upon the pleadings whenever the government asserts that "national security" would be imperiled by allowing a case to go to discovery.[5]

Under these circumstances it is incorrect to say that increased use of the privilege does not represent a significant alteration of the privilege's affect on democratic government compared to use in previous times. The privilege is obviously an inconvenient necessity in a democratic government, but exploitation of the privilege over the last several decades, apparently to the unwarranted aggrandizement of executive power, represents a serious threat to congressional oversight and the ends of justice.

Second, Professor Chesney submitted an article, "State Secrets and the Limits of National Security Litigation," for the record before this committee that is substantially biased in favor of deference to executive power. The Addendum to his article includes a problematic table of cases purporting to be "Published Opinions Adjudicating Assertions of the State Secrets Privilege after Reynolds, 1954-2006."

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[3] Scott Armstrong, "Do You Wanna Know a Secret," Washington Post, 16 February 1997.

[4] Ibid.

[5] See In re NSA Tel. Rec., 444 F. Supp. 2d 1332 (J.P.M.L. 2006) for a list of dozens of actions against the United States alleging unconstitutional and illegal electronic surveillance of U.S. citizens. This case considered and approved consolidation of these cases in the Northern District of California. In many of these cases, the United States asserted that Totten v. United States (92 U.S. 105 (1875)) barred suit (espionage contracts may not be sued upon for breach, since the very nature of the suit concerns secret matters). The government seems to want the *Totten* doctrine to do a good deal more than preclude suits for breach of contract, arguing that whenever a matter is claimed to be clothed in national security the case should be dismissed on the pleadings.

Four of the ten cases included in the table before 1975 are not state secrets cases at all.[6] In none of those four cases did the government assert the privilege or apparently even bring up the privilege, and it can hardly be said that the courts involved "adjudicated" any matter concerning the privilege. This apparent substantial selection bias would by itself seriously compromise the value of the table, but this bias is also double-edged: Chesney fails to include cases after 1975 that are similar to those he includes prior to 1975.[7] This bias has the effect of making it appear as if pre-1975 use of the privilege is more extensive and has greater continuity than actually existed. The inclusion of the four non-state secrets cases helps to obscure a distinct shift in use of the privilege during the administration of Jimmy Carter. In the late 1970s, use of the privilege began to expand rapidly.

Additionally, a fifth case Chesney includes, the 1956 case Republic of China v. National Fire Union, helps to skew the pre-1975 results that Chesney seems intent on filling out to greater numbers. While the privilege was asserted in *National Fire Union*, it was an assertion made by China, and assertions by foreign entities are not treated with the same deference and respect as assertions by the U.S. Government. Cases of foreign assertion are rarely cited to as part of the state secrets jurisprudence and it is clear that different standards apply to such assertions.

In the end, half of the cases in Chesney's table prior to 1975 should not have been included. Their inclusion creates an erroneous impression that the privilege had a more frequent use and a much broader and deeper jurisprudence during its first 22 years than what is the case.

As a result of selection bias concerning front end, pre-1975 cases, Chesney must make sure that his wide open acceptance of cases of that era does not translate into huge numbers of post-1975 non-state secrets cases entering the table on the back end. Chesney's refusal to include similar post-1975 cases to those he included pre-1975 is made necessary because if he had used the same criteria for inclusion his table could be diluted with dozens of cases that cited to and discussed *Reynolds* but had no connection with state secrets. The dividing point represented by the year 1975 is important, since, as noted above, increased use of the privilege clearly began during the administration of President Jimmy Carter.[8] This increased use appears to be a response to establishment of the select committees on intelligence in Congress, more aggressive oversight activity by this committee, passage of the Foreign Intelligence Surveillance Act, which injected judicial review into the arena of national security surveillance, and a defensive reaction by the executive branch to mistrust of the presidency after the events of the administration of Richard M. Nixon.

Turning to the cases erroneously included by Chesney prior to 1975, three of the cases concerned unconstitutional wiretaps, while the fourth involved the question of whether or not to compel production of statements in deportation litigation. In none of these cases did the government raise the state secrets privilege, and in only one case, United States v. Ahmad, can it be said that national security was involved. And even in that case the "national security" issue was merely that the president had ordered warrantless surveillance of U.S. citizens: there is no evidence that any classified information was involved. It is true that these cases cite to United States v. Reynolds, but Reynolds is frequently used for support of legal positions that have nothing to do with state secrets.

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[6] United States v. Ahmad, 499 F. 2d 851 (3rd Cir. 1974); Black v. Sheraton, 371 F. Supp. 97 (D.D.C. 1974); Elson v. Bowen, 83 Nev. 515 (1967); Petrowicz v. Holland, 142 F. Supp. 369 (E.D. Pa. 1956).

[7] For example, in the random review of cases discussed in note 4 below, two cases contained language similar in scope and depth to remarks in the four disputed cases that Chesney includes. But Chesney does not include those cases in his table (U.S. v. Winner, 641 F.2d 825, 831-32 (10th Cir. 1981); Denver Policemen's Protective Asso. v. Lichtenstein, 660 F.2d 432, 660 F.2d 432, 437 (10th Cir. 1981)).

[8] See Appendix A.

For example, over 500 federal court opinions have relied on *Reynolds* in some way, yet only 115 of these opinions were in cases where the privilege was asserted. Likewise, 77 state court decisions cite to *Reynolds*.[9] The great majority of these cases have nothing to do with state secrets questions. The four cases cited above and included in Chesney's table simply are not state secrets cases and are clearly outside the state secrets jurisprudence initiated in *Reynolds*. Perhaps the best evidence for this point is found in how the four cases are referred to by other court decisions that do involve state secrets claims. Two of the cases, Elson v. Bowen and Petrowicz v. Holland, are not cited at all in subsequent state secrets litigation. Black v. Sheraton is cited in three state secrets cases, but not in the context of use of the privilege. United States v. Ahmad is cited in five state secrets cases, but only one of those cites could be considered within the scope of use of the privilege. Even this lone instance is rather lukewarm. In Alliance v. Di Leonardi, 1979 U.S. Dist. LEXIS 8167, the court only noted that "Courts called upon to evaluate the claim of state secrets have consistently used this approach. cf. United States v. Ahmad, 499 F.2d 851 (3d Cir. 1974) . . ."[10]

From 1975 to present there have been 110 reported decisions in cases where the state secrets privilege was asserted by the government.[11] In all of those cases only once were any of the four cases included in the Chesney table cited to in support of the privilege. Contrary to Chesney's views, federal courts have not considered the four cases he included in his table prior to 1975 to be informative concerning state secrets jurisprudence.

Sincerely,

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[9] Lexis search. A random selection and review of 25 non-state secrets cases dating back to 1961 in which United States v. Reynolds is cited reveals the variety of uses for which it is used as precedent. For example: Seven of the cases cited *Reynolds* in support of discussions concerning sanctions for failure to produce requested documents; six cases concerned questions about *in camera* inspection of unclassified documents; five cases used the *Reynolds* precedent for matters about the general form a claim of privilege must take; three cases used *Reynolds* as an example of when information may be withheld.

[10] "This approach" mentioned by the court was, "A fortiori, where necessity [of requested documents] is dubious, a formal claim of privilege… will have to prevail."

[11] See Appendix A.

Appendix A

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All known reported state secrets cases or cases discussing significant matters concerning the state secrets doctrine.

Cases In Chronological Order.

	Citations	**Privilege Formally Asserted?** X=Yes —— = No F = Foreign S = States	**Related Entries**	**Cat. 1:** Secret relationships with govt. put at issue under the SSP or implied in facts?	**Cat. 2:** Dismissed because "very nature" of case a state secret?	**Cat. 3:** Question of whether Govt. acknow—ledges secret activity put at issue or facts in public domain detail the secret program?	**Cat. 4:** Case dismissed under SSP before discovery?	**Cat. 5:** Mosaic theory or similar approach discussed or applied?[1]
1. U.S. v. Burr **(1807)**[7]	25 F. Cas. 30; 25 F. Cas 187 (1807)	—	—	Yes	No	No	No	No
2. Totten v. U.S. (1875)	92 U.S. 105 (1875)	—	—	Yes	Yes	Yes	No	Yes
3. D. of Colum. v. Bakersmith (D.C. Cir. 1901)	18 App. D.C. 574 (D.C. Cir. 1901)	X[2]	—	No	No	No	No	No
4. King v. U.S. **(5th Cir. 1902)**[7]	112 F. 988 (5th Cir. 1902)	X	—	No	No	No	No	No
5. In re Grove (3rd Cir. 1910)	180 F. 62 (3rd Cir. 1910)	—	—	No	No	No	No	No
6. Firth v. Bethlehem Steel (E.D. Penn. 1912)	199 F. 353 (E.D. Penn 1912)	X	—	No	No	No	No	No
7. Pollen v. Ford (E.D.N.Y. 1939)	26 F. Supp. 583 (1939)	X	—	No	No	No	No	No
8. *Cresmer v. U.S.* (F.D.N.Y. 1949)	9 F.R.D. 203 (1949)	X	—	No	No	No	No	No
9. Reynolds v. U.S. (3rd Cir. 1951)	192 F.2d 987 (3rd Cir.)	X	10	No	No	No	No	No
10. U.S. v. Reynolds (S.C. 1953)	345 U.S. 1 (1953)	X	9	No	No	No	No	No
11. Tucker v. United States(Ct. Cl. 1954)	127 Ct. Cl. 477 (1954)	—	—	Yes	Yes	No	No	No
12. China v. Nat. Union (D. Md. 1956)	142 F. Supp 551 (D. Md.)	F-Unk[3]	—	No	No	No	No	No
13. Halpern v. U.S. (S.D.N.Y. 1957)	151 F. Supp. 183 (S.D.N.Y.)	X	14	No	No	No	No	No
14. Halpern v. U.S. (2nd Cir. 1958)	258 F.2d 36 (2nd Cir.)	X	13	No	No	No	No	No
15. Heine v. Raus (4th Cir. 1968)	399 F.2d 785 (4th Cir.)	X	—	Yes[4]	No	No	No	No
16. Pan Am v. Aetna (S.D.N.Y. 1973)	368 F. Supp. 1098 (S.D.N.Y. 1973)	X	—	Yes	No	No	No	No
17. Kinoy v. Mitchell (S.D.N.Y. 1975)	67 F.R.D. 1 (S.D.N.Y. 1975)	X	—	No	No	No	No	No
18. Kerr v. U.S.(9th Cir. 1975)[5]	511 F.2d 192 (9th Cir. 1975)	S	19	No	No	No	No	No
19. Kerr v. U.S. **(1976)**[5]	426 U.S. 394 (1976)	S	18	No	No	No	No	No
20. Halkin v. Helms (D.C. Cir. 1978)	598 F.2d 1 (D.C. Cir. 1978)	X	40	No	No	Yes	No	Yes
21. Spock v. U.S. (S.D.N.Y. 1978)	464 F. Supp. 510 (S.D.N.Y. 1978)	X	—	No	No	Yes	No	No
22. ACLU v. Brown (7th Cir. 1979)	609 F.2d 277 (7th Cir.)	X	23, 28	No	No	No	No	No
23. Jabara v. Kelley (E.D. Mich. 1979)	75 F.R.D. 475 (D. Mich. 1977)	X	—	No	No	No	No	No
24. Clift v. U.S. **(2nd Cir. 1979)**[6]	597 F.2d 826 (2nd Cir. 1979)	—	69	No	No	No	No	No
25. U.S. v. Felt **(D.D.C. 1979)**[7]	491 F. Supp. 179 (D.D.C. 1979)	X	29	No	No	No	No	No
26. Alliance v. DiLeonardi (N.D. Il. 1979)	1979 U.S. Dist. LEXIS 8167 (N.D. Ill. 1979)	X	—	No	No	No	No	No
27. ACLU v. Brown (7th Cir 1980)	619 F.2d 1170 (7th Cir.)	X	22, 28	No	No	No	No	No

28. ACLU v. Brown (7th Cir. *En banc* 1980)	619 F.2d 1170 (7th Cir. 1980)	**X**	22, 23	No	No	No	No	No
29. U.S. v. Felt **(D.D.C. 1980)**[7]	502 F. Supp. 74 (D.D.C. 1980)	**X**	26	No	No	No	No	No
30. Sigler v. LeVan (D. Md. 1980)	485 F. Supp. 185 (D. Md.)	**X**	—	No	No	No	No	**Yes**
31. Farnsworth Can. v. Grimes (4th Cir. 1980)	1980 U.S. App. LEXIS 11406 (4th Cir. 1980)	**X**	—	No	**Yes**	No	**Yes**	No
32. Zenith v. U.S (C.I.T. 1981).	1 C.I.T. 325 (C.I.T. 1981)	**X**	—	No	No	No	No	No
33. Nat'l Law. Guild v. Att. G. (S.D.N.Y. 1982)	96 F.R.D. 390 (S.D.N.Y. 1982)	**X**	—	No	No	**Yes**	No	No
34. U.S. v. The Irish (D.C. Cir. 1982)	684 F.2d 928 (D.C. Cir. 1982)	**X**	—	No	No	No	**Yes**[8]	No
35. Ceramica S.A. v. U.S. (C.I.T. 1982)	4 C.I.T. 168 (C.I.T. 1982)	**X**	36	No	No	No	No	No
36. Ceramica, S.A. v. U.S. (C.I.T. 1982)	4 C.I.T. 267 (C.I.T. 1982)	**X**	35	No	No	No	No	No
37. Salisbury v. U.S. (D.C. Cir. 1982)	690 F.2d 966 (D.C. Cir. 1982)	**X**	—	No	No	**Yes**	**Yes**	No
38. Republic Steel v. U.S. (C.I.T. 1982)	3 C.I.T. 117 (C.I.T. 1982)	**X**	—	No	No	No	No	No
39. Ganadera, S.A. v. Block (D.D.C. 1982)	556 F. Supp. 354 (D.D.C. 1982)	**X**	—	No	No	No	Unk	No
40. Halkin v. Helms (D.C. Cir. 1982)	690 F.2d 977 (D.C. Cir. 1982)	**X**	20	No	No	No	No	**Yes**
41. Ellsberg v. Mitchell (D.C. Cir. 1983)	709 F.2d 51 (D.C. Cir. 1983)	**X**	—	No	No	No	No	No
42. AT&T v. U.S. (Cl. Ct. 1983)	4 Cl. Ct. 157 (Cl. Ct. 1983)	**X**	—	No	No	No	No	No
43. U.S. Steel v. U.S. (C.I.T. 1983)	6 C.I.T. 182 (C.I.T. 1982)	**X**	—	No	No	No	No	No
44. In re Agent Orange **(E.D.N.Y. 1983)**[9]	97 F.R.D. 427 (E.D.N.Y. 1983)	Unk	45	No	No	No	No	Yes
45. In re Agent Orange **(E.D.N.Y. 1984)**[9]	98 F.R.D. 557 (E.D.N.Y. 1984)	Unk	44	No	No	No	No	No
46. Comp. Franc. v. Philips **(S.D.N.Y 1984)**[10]	105 F.R.D. 16 (S.D.N.Y 1984)	**F**	—	No	No	No	No	No
47. Hobson v. Wilson (D.C. Cir. 1984)	737 F.2d 1 (D.C. Cir. 1984)	**X**	—	No	No	No	No	No
48. Star-Kist, Inc. v. U.S. (C.I.T. 1984)	8 C.I.T. 305 (C.I.T. 1984)	**X**	—	No	No	No	No	No
49. Northrop v. McD. Doug. (D.C. Cir. 1984)	751 F.2d 395 (D.C. Cir. 1984)	**X**	—	No	No	No	No	No
50. Molerio v. FBI (D.C. Cir. 1984)	749 F.2d 815 (D.C.Cir. 1984)	**X**	—	No	No	No	No	No
51. Fitzgerald v. Penthouse (4th Cir. 1985)	776 F.2d 1236 (4th Cir. 1985)	**X**	—	No	No	No	Unk	No
52. Foster v. U.S. (Cl. Ct. 1987)	12 Cl. Ct. 492 (Cl. Ct. 1987)	**X**	—	No	No	No	**Yes**	No
53. Xerox v. U.S. (Cl. Ct. 1987)	12 Cl. Ct. 93 (Cl. Ct. 1987)	**X**	—	No	No	No	No	No
54. Kelly v. San Jose **(N.D. Cal. 1987)**[11]	114 F.R.D. 653 (N.D. Cal. 1987)	—	—	No	No	No	No	No
55. Guong v. U.S. (Fed. Cir. 1988)	860 F.2d 1063 (Fed Cir. 1988)	**X**	—	No	No	**Yes**	**Yes**	No
56. Weston v. Lockheed (9th Cir. 1989)	881 F.2d 814 (9th Cir. 1989)	**X**	—	No	No	No	**Yes**	No
57. In re U.S. **(D.C. Cir. 1989)**[12]	872 F.2d 472 (D.C. Cir. 1989)	**X**	—	No	No	No	No	No
58. Hudson River v. Navy (E.D.N.Y. 1989)	U.S. Dist. LEXIS 19034 (E.D.N.Y. 1989)	**X**	59	No	**Yes**[13]	No	No	No
59. Hudson River v. Navy (2nd Cir. 1989)	891 F.2d 414 (2nd Cir. 1989)	**X**	58	No	No	No	No	No
60. Patterson v. U.S. (D.N.J. 1989)	705 F. Supp. 1033 (D.N.J. 1989)	**X**	62	No	No	No	No	No
61. Nejad v. U.S. (C.D. Cal. 1989)	724 F. Supp. 753 (C.D. Cal. 1989)	**X**	—	No	No	No	**Yes**	No
62. Patterson v. FBI (3rd Cir 1990)	893 F.2d 595 (3rd Cir. 1990)	**X**	60	No	No	No	No	No
63. Zuckerbraun v. Gen. Dyn. (D. Conn. 1990)	755 F. Supp. 1134 (D. Conn. 1990)	**X**	64	No	No	No	**Yes**	No
64. Zuckerbraun v. Gen. Dyn. (2nd Cir. 1991)	935 F.2d 544 (2d Cir. 1991)	**X**	63	No	No	No	**Yes**	No
65. Wilkinson v. FBI (9th Cir. 1991)	922 F.2d 555 (9th Cir. 1991)	**X**	—	No	No	No	No	No
66. In re Under Seal (4th Cir. 1991)	945 F.2d 1285 (4th Cir. 1991)	**X**	—	No	No	No	No	No

67. Bowles v. U.S. (4th Cir. 1991)	950 F.2d 154, 156 (4th Cir. 1991)	**X**	—	No	No	No	**Yes**	No
68. N.S.N. v. DuPont (S.D.N.Y. 1991)	140 F.R.D. 275 (S.D.N.Y. 1991)	**X**	—	No	No	No	No	No
69. Maxwell v. First Nat. Bank (D. Md. 1991)	143 F.R.D. 590 (D. Md. 1991)	**X**	75, 76	**Yes**	No	No	**Yes**	**Yes**
70. Clift v. U.S. (D. Conn. 1991)	808 F. Supp. 101 (D. Conn. 1991)	**X**	25	No	No	No	**Yes**	No
71. Bareford v. Gen. Dyn. (5th Cir. 1992)	973 F.2d 1138 (5th Cir. 1992)	**X**	—	No	No	No	**Yes**	No
72. Richmark Corp. v. T.F.C. **(9th Cir. 1992)**[14]	959 F.2d 1468 (9th Cir. 1992)	—	—	**Yes**	No	No	No	No
73. Hyundai v. U.S. (S.D.N.Y. 1992)	1992 U.S. Dist. LEXIS 9738 (S.D.N.Y. 1992)	**X**	—	No	No	No	No	No
74. U.S. v. Koreh (D.N.J. 1992)	144 F.R.D. 218 (D.N.J. 1992)	**X**	—	No	No	No	No	No
75. Maxwell v. First Nat. Bank (D. Md. 1992)	143 F.R.D. 590 (D.Md. 1992)	**X**	76, 69	**Yes**	No	No	**Yes**	**Yes**
76. Maxwell v. First Nat. Bank (4th Cir. 1993)	998 F.2d 1009 (4th Cir. 1993)	**X**	75, 69	**Yes**	No	No	**Yes**	**Yes**
77. In re U.S. (Fed. Cir. 1993)	1993 U.S. App. LEXIS 14881 (Fed. Cir. 1993)	—	78, 81, 87, 96, 113	**No**	No	No	N/A	No
78. In re U.S. (Fed. Cir. 1993)	1993 U.S. App. LEXIS 14977 (Fed. Cir. 1993)	**X**	77, 81, 87, 96, 113	No	No	No	Unk	No
79. Bentzlin v. Hughes Co. (C.D. Cal. 1993)	833 F. Supp. 1486 (C.D. Cal. 1993)	**X**	—	No	No	No	**Yes**	No
80. In re Smyth (N.D. Cal. 1993)	826 F. Supp. 316 (N.D. Cal. 1993)	**F**[15]	—	No	No	No	No	No
81. McD. Douglas v. U.S. (Fed. Cl. 1993)	29 Fed. Cl. 791 (Fed. Cl. 1993)	**X**	77, 78, 87, 96, 113	No	No	No	No	No
82. Black v. U.S. (D. Minn. 1994)	900 F. Supp. 1129, 1136 (D. Minn. 1994)	**X**	85	No	No	No	**Yes**	No
83. Kronisch v. U.S. (S.D.N.Y. 1994)	1994 U.S. Dist. LEXIS 13591 (S.D.N.Y. 1994)	**X**	—	No	No	No	No	No
84. Yang v. Reno (M.D. Penn. 1994)	157 F.R.D. 625 (M.D. Penn. 1994)	**X**	—	No	No	No	No	No
85. Black v. U.S. (8th Cir. 1995)	62 F.3d 1115 (8th Cir. 1995)	**X**	82	No	No	No	**Yes**	No
86. Frost v. Perry (D. Nev. 1995)	161 F.R.D. 434 (D. Nev 1995)	**X**	89, 91,116	No	No	No	No	**Yes**
87. McD. Douglas v. U.S. (Fed Cl. 1996)	37 Fed. Cl. 270 (Fed. Cl. 1996)	**X**	77, 78, 80, 96, 113	No	No	No	No	No
88. Monarch, P.L.C. v. U.S. (Fed. Cl. 1996)	36 Fed. Cl. 324 (Fed. Cl. 1996)	**X**	90, 103	**Yes**	No[16]	No	No	No
89. Frost v. Perry (D. Nev. 1996)	919 F. Supp. 1459 (D. Nev. 1996)	**X**	96, 91, 116	No	No	No	No	No
90. Monarch, P.L.C. v. U.S. (Fed. Cl. 1998)	42 Fed. Cl. 258 (Fed. Cl. 1998)	**X**	88, 103	**Yes**	No	No	No	No
91. Kasza v. Browner (9th Cir. 1998)	133 F.3d 1159 (9th Cir. 1998)	**X**	85, 88, 113	No	No[17]	No	No	**Yes**
92. Linder v. Calero (D.D.C. 1998)	183 F.R.D. 314 (D.D.C. 1998)	**X**	93	No	No	No	No	No
93. Linder v. D.O.D. (D.C. Cir. 1998)	133 F.3d 17 (D.C. Cir. 1998)	**X**	94	**Yes**	No	**Yes**	No	No
94. **U.S. v. Klimavicius—Vil. (9th Cir. 1998)**[7]	144 F.3d 1249 (9th Cir. 1998)	**X**	—	No	No	No	No	No
95. Crater v. Lucent (E.D. Mo. 1999)	1999 U.S. Dist. LEXIS 22765 (E.D. Mo. 1999)	**X**	101,121, 124	No	No	No	**Yes**	No
96. McDonald D. Corp. v. U.S. (Fed Cir. 1999)	182 F.3d 1319 (Fed. Cir. 1999)	**X**	77, 78, 81, 87, 113	No	No	No	No	No
97. Tilden v. Tenet (E.D. Va. 2000)	140 F. Supp. 2d 623 (E.D. Va. 2000)	**X**	98	No	No	No	**Yes**	No
98. Tilden v. Tenet (E.D. Va. 2000)	2000 U.S. Dist. LEXIS 20037	**X**	97	No	No	No	**Yes**	No
99. Barlow v. U.S. (Fed Cl. 2000)	2000 U.S. Claims LEXIS 156 (Fed. Cl. 2000)	**X**	—	No	No	No	No	No
100. Virtual, Inc. vMoldova (D.D.C. 2000)	2000 U.S. Dist. LEXIS 15872 (D.D.C. 2000)	**X**	104	No	No	No	No	No
101. Crater v. Lucent (Fed. Cir. 2001)	255 F.3d 1361 (Fed. Cir. 2001)	**X**	94, 121, 124	**Yes**	No	**Yes**	No	No
102. DTM Research v. U.S. (4th Cir. 2001)	245 F.3d 327 (4th Cir. 2001)	**X**	—	No	No	No	No	No
103. Monarch, P.L.C. v. U.S. (Fed. Cir. 2001)	244 F.3d 1356 (Fed. Cir. 2001)	**X**	88, 90	**Yes**	No	No	No	No
104. Virtual Inc. v. Moldova (D.D.C. 2001)	133 F. Supp. 2d 9 (D.D.C. 2001)	**X**	100	No	No	No	No	No
105. U.S. v. T.R.W. (C.D. Cal. 2002)	211 F.R.D. 388 (C.D. Cal. 2002)	**X**	127	No	No	No	No	No

106. Global Relief v. O'Neill (N.D. Ill. 2002)	205 F. Supp. 2d 885 (N.D. Ill. 2002)	**Unk**[18]	—	No	No	No	No	No
***107. In re Gr. Jury Sub.* (S.D.N.Y. 2002)**[19]	218 F. Supp. 2d 544 (S.D.N.Y. 2002)	**F**	—	No	No	No	No	No
108. Ctr. for N.S. Studies v. U.S. (D.D.C. 2002)	215 F. Supp. 2d 94 (D.D.C. 2002)	—	109	No	No	No	No	**Yes**[20]
109.Ctr. for N.S. Stud. v. U.S. (D.C. Cir. 2003)	331 F.3d 918 (D.C. Cir. 2003)	—	108	No	No	No	No	**Yes**
110. Stillman v. D.O.D. (D.D.C. 2002)	209 F. Supp. 2d 185 (D.D.C. 2002)	—	—	No	No	No	No	No
111. Doe v. Tenet (9th Cir. 2003)	329 F.3d 1135 (9th Cir. 2002)	**X**	121, 125	**Yes**	No	No	No	No
112. Trulock v. Wen Ho Lee (4th Cir. 2003)	66 Fed. Appx. 472 (4th Cir. 2003)	**X**	—	No	No	No	**Yes**	No
113. McD. Douglas v. U.S. (Fed. Cir. 2003)	323 F.3d 1006 (Fed. Cir. 2003)	**X**	77, 78, 81, 87, 96	No	No	No	No	No
114. Edmonds v. F.B.I. (D.D.C. 2003)	272 F. Supp. 2d 35 (D.D.C. 2003)	**X**	119, 120, 130	No	No	**Yes**	No	**Yes**
115. Darby v. U.S. (9th Cir. 2003)	74 Fed. Appx. 813 (9th Cir. 2003)	**X**	—	**Unk**	No	Unk	Unk	No
116. Kasza v. Whitman (9th Cir. 2003)	325 F.3d 1178 (9th Cir. 2003)	—	86, 89, 91	No	No	**Yes**	No	**Yes**
***117. Horn v. Huddle* (D.D.C. 2004)**[21]	Under Seal But Available on the WWW	**X**	145	No	**Yes**	No	No	No
118. Tenenbaum v. Simonini (6th Cir. 2004)	372 F.3d 776 (6th Cir. 2004)	**X**	—	No	No	No	Unk	No
119. Burnett v. Al Baraka (D.D.C. 2004)	323 F. Supp. 2d 82 (D.D.C. 2004)	**X**	114, 120,130	No	No	No	No	**Yes**
120. Edmonds v. DOJ (D.D.C. 2004)	323 F. Supp. 2d 65 (D.D.C. 2004)	**X**	114, 119, 130	No	No	No	**Yes**	No
121. Doe v. Tenet (9th Cir. 2004)	353 F.3d 1141 (9th Cir. 2004)	**X**	111, 125	**Yes**	**Yes**	No	No	No
***122. Fountain v. New York* (S.D.N.Y. 2004)**[22]	2004 U.S. Dist. LEXIS 7539 (S.D.N.Y. 2004)	—	—	No	No	No	No	No
***123. Citgo v. Petroleos* (S.D.N.Y. 2004)**[23]	2004 U.S. Dist. LEXIS 23581 (S.D.N.Y. 2004)	—	129	No	No	No	No	No
124. Crater v. Lucent (E.D. Mo. 2004)	2004 U.S. Dist. LEXIS 28544 (E.D. Mo. 2004)	**X**	95, 101, 126	No	No	No	**Yes**	No
***125. Tenet v. Doe* (S.C. 2005)**[24]	544 U.S. 1 (2005)	**X**	111, 121	**Yes**	**Yes**	No	No	No
126. Crater v. Lucent (Fed. Cir. 2005)	423 F.3d 1260 (Fed. Cir. 2005)	**X**	95, 101, 124	No	No	No	**No**[25]	No
***127. Schwartz v. Raytheon* (9th Cir. 2005)**[26]	150 Fed. Appx. 627 (9th Cir. 2005)	**X**	105	No	No	No	**Unk**	No
128. Sterling v. Tenet (4th Cir. 2005)	416 F.3d 338 (4th Cir. 2005)	**X**	—	No	No	No	**Yes**	No
***129. Citgo v. Petroleos* (S.D.N.Y. 2005)**[23]	2005 U.S. Dist. LEXIS 2144 (S.D.N.Y. 2005)	**F-Unk**	123	No	No	No	No	No
130. Edmonds v. DOJ (D.D.C. 2005)	405 F. Supp. 2d 23 (D.D.C. 2005)	**X**	114, 119, 120	No	No	**Yes**	No	**Yes**
131. Doe v. Gonzales (D. Conn. 2005)	386 F. Supp. 2d 66 (D. Conn. 2005)	—	—	**Yes**	No	No	No	**Yes**[27]
***132. Arar v. Ashcroft* (E.D.N.Y. 2006)**[28]	414 F. Supp. 2d 250 (E.D.N.Y. 2006)	**X**	133	**Yes**	No	**Yes**	No	No
***133. Arar v. Ashcroft* (E.D.N.Y. 2006)**[28]	2006 U.S. Dist. LEXIS 45550	**X**	132	**Yes**	No	**Yes**	No	No
134. El-Masri v. Tenet (E.D. Va. 2006)	437 F. Supp. 2d 530 (E.D. Va. 2006)	**X**	139	**Yes**	**No**[29]	**Yes**	**Yes**	No
135. Terkel v. AT&T (N.D. Il. 2006)	441 F. Supp. 2d 899 (N.D. Ill. 2006)	**X**	—	**Yes**	No	**Yes**	**Yes**	No
136. Hepting v. AT&T (N.D. Cal. 2006)	439 F. Supp. 2d 974 (N.D. Cal. 2006)	**X**	—	**Yes**	No	**Yes**	No	No
137. Al-Haromain v. Bush (D. Ore. 2006)	451 F. Supp. 2d 1215 (D. Ore. 2006)	**X**	—	No	No	**Yes**	No	**Yes**
138. ACLU v. NSA (E.D. Mich. 2006)	438 F.Supp. 2d 754 (E.D. Mich. 2006)	**X**	144	No	No	**Yes**	No	No
139. El-Masri v. U.S. (4th Cir. 2007)	479 F.3d 296 (4th Cir. Mar. 2, 2007)	**X**	134	**Yes**	**No**[17]	**Yes**	**Yes**	No
140. U.S. v. Adams (D. Maine 2007)	473 F. Supp. 2d 108 (D. Maine 2007)	**X**	147	**Yes**	No	**Yes**	**No**[30]	No
***141. In re NSA Tel. Rec.* (N.D. Cal. 2007)**[31]	444 F. Supp. 2d 1332 (J.P.M.L. 2006)	—	147	No	No	No	No	No
142. Doe v. CIA (S.D.N.Y. 2007)	2007 U.S. Dist. LEXIS 201 (S.D.N.Y. Jan. 4, 2007)	**X**	—	**Yes**	No	No	**Yes**	No
143. NRDC v. England (C.D. Cal. 2007)	2:05-cv-07513-FMC-FMO Document 124	**X**	—	No	No	No	No	No
144. ACLU v. N.S.A. (6th Cir. 2007)	2007 U.S. App. LEXIS 16149 (6th Cir. 2007)	**X**	138	No	No	No	**Yes**	No

145. In re Sealed (D.C. Cir. 2007)	2007 U.S. App. LEXIS 17256 (D.C. Cir. 2007)	**X**	117	No	No	**Yes**	No	No
146. Wilson v. Libby (D.D.C. 2007)	2007 U.S. Dist. LEXIS 51978 (D.D.C. 2007)	—	—	No	No	No	No	No
147. In re NSA Tel. Rec. **(N.D. Cal.)**[32]	2007 U.S. Dist. LEXIS 53456 (N.D. Cal. 2007)	**X**	140, 141	**Yes**	No	**Yes**	No	No
148. Berman v. CIA (9th Cir. 2007)	2007 U.S. App. LEXIS 21072 (9th Cir 2007)	—	—	No	No	No	No	**Yes**
149. Mont. v. Etreppid Tech.[33] **(D. Nev. 2007)**	2007 U.S. Dist. LEXIS 79009 (D. Nev. 2007)	**X**	—	No	No	No	No	No
150. Al-Haramain v. Bush (9th Cir. 2007)	507 F. 3d 1190 (9th Cir. 2007)	**X**	137	**Yes**	No	**Yes**	No	No
151. Al-Kidd v. Gonzales **(D. of Idaho 2007)**[34]	2007 U.S. Dist. LEXIS 90548 (D. of Idaho 2007)	**X**	—	No	No	No	No	No
152. Crater v. Lucent (E.D. Mo. 2007)	2007 U.S. Dist. LEXIS 94946 (E.D. Mo. 2007)	—	95, 101, 124, 126	No	No	No	No	No

[1] The government has used the mosaic theory in the following non-state secrets decisions: *Berman v. CIA,* 378 F. Supp. 2d 1209, 1215-1217 (E.D. Cal 2005) (Extended discussion of the "mosaic theory" and its general outlines); *Florida Immigrant Advocacy Center v. NSA*, 380 F. Supp. 2d 1332 (S.D. Fl. 2005), 1342 n.7 (Court accuses plaintiffs of specifically trying to assemble classified information by consciously employing a mosaic collection technique in discovery); *North Jersey Media Group v. Ashcroft,* 308 F.3d 198 (3rd Cir. 2002), 219, 227 ("Lack of expertise" of judges to see the mosaic of national security interests).

[2] Assertion was made in briefs on appeal, but not by an executive body of the District of Columbia.

[3] The court compares the case to *U.S. v. Reynolds*, but gives no indication that the privilege has been asserted by the government. The court simply notes that the plaintiffs "seek also political information of activities which affect the foreign relations and public interest of the people of the United States. When respondents issued their insurance policies they knew, or should have known, that where military secrets and similar matters are at stake, certain information is privileged. . . In the case at bar the only reason for the refusal of the United States to supply the information requested is the determination by the Secretary of State that its disclosure 'would be prejudicial to the foreign relations of the United States and contrary to the public interest'." 142 F. Supp 551, 556 (D. Md. Adm. 1956). It seems doubtful that the United States formally asserted the privilege in this case.

[4] Relationship admitted, but certain details refused.

[5] These cases concern a writ of mandamus sought in federal court to prevent disclosure of personnel files and prisoner files. The state claimed the state secrets privilege, but the claim was denied for lack of proper invocation and there was an implied doubt whether even if appropriately asserted the privilege would be supportable.

[6] Assertion did not meet formal requirements of privilege as established in *Reynolds*, but court made an exception to these requirements since the disclosure of any of the affected material was already criminalized under the Invention Secrecy Act. 35 U.S.C. § 181; 597 F.2d 826, 828-29 (2nd Cir. 1979).

[7] Criminal action.

[8] Civil enforcement action. Dismissal of the case in favor of defendant who sought discovery of government documents.

[9] The government did not formally assert the privilege at this time, but it was in a serious bind since many of the documents requested by plaintiffs were classified. The government's main objection to being forced into assertion of the privilege concerned the procedures for assertion adopted by the special master. See pp.430-433 in the 1983 decision. The "mosaic theory" is alluded to in the 1983 decision, footnote 3 at 438.

[10] Assertion of the privilege by a French Agency that operated a government corporation and a French shipbuilding company. The assertion failed. At 25-26. The court noted in interesting dicta that "Indeed, even if the privilege had been properly invoked, the Court would likely have been inclined to find that [the plaintiff], by instituting this action, waived the privilege." At 25, n. 2.

[11] This case dealt with wholly a state matter, but the court carried on an interesting discussion, and adumbrated rules, for when the state secrets privilege should apply in a state civil matter where no federally held documents are requested.

[12] This case hinged on whether or not the remedy of mandamus was warranted by acts of the district court, but the appellate panel made conclusive observations concerning assertion of the state secrets privilege.

[13] Apparently the government raised the *Totten* Bar without formally asserting the state secrets privilege according to requirements set forth in *Reynolds*.

[14] In this case the state secrets privilege was raised by the government of China to prevent compulsion to answer discovery requests. The state corporation overseeing the Chinese company resisting discovery found that "almost all of its [the company facing discovery] financial information was classified a state secret and could not be disclosed." The Chinese corporation "contends that the state secrecy laws prohibit it from disclosing the information the district court ordered it to provide, that it would be subject to criminal prosecution if it did disclose such information, and that this prohibition necessitates the reversal of the discovery order and the contempt sanctions against it. The district court explicitly accepted Beijing's contention that the PRC's State Secrets Act barred disclosure of the information in question. We do so as well."

[15] Privilege asserted by the United Kingdom.

[16] But court dismissed *Totten* Bar motion without prejudice. 36 Fed. Cl. 324, 326. Plaintiff maintained it was in privity with government; government denied any contractual relationship with plaintiff.

[17] Courts relied on *Totten* in their analyses of the case.

[18] It is unclear if the government asserted the privilege. But it seems likely that it did not assert the privilege, hewing instead to the *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), line of law. Nevertheless, the following statement appears in the case: "One such [extraordinary] circumstance recognized by the court is the assertion of the 'state secrets privilege' by the government when 'acute national security concerns' are involved. In that situation, the court held that review of in camera and ex parte submissions was only appropriate when: a) the government demonstrated 'compelling national security concerns;' and b) the government publicly disclosed, prior to any in camera inspection, as much of the material as it could divulge without compromising the privilege. Id. (citing *Molerio v. Federal Bureau of Investigation*, 749 F.2d 815 (D.C. Cir. 1984))." At 887.
In this case, the defendants have acted in accordance with the rationale espoused in Abourezk. On March 27, 2002, the Attorney General of the United States filed a declaration in which he stated that "it would harm the national security of the United States to disclose or have an adversary hearing with respect to materials submitted to the [United States Foreign Intelligence Surveillance Court] in connection with this matter."

[19] This case involves a corruption matter with a "Republic" that "is recognized by the United States and is considered to be an important ally of this country. The Republic is home to vast natural resources that have been the subject of a number of large investments by American companies in joint ventures with Republic-owned companies." The "Republic" asserted the state secrets privilege along with a defendant corporation, but the assertion was rejected. Very thorough discussion of foreign assertion of the privilege, at 559-560.

[20] Effort by government to import "mosaic theory" into Exemption 7A of FOIA, which would wrongfully turn 7A into an "exemption dragnet." At 103. But this holding was reversed, and the "mosaic theory" seemingly accepted for 7A on appeal in entry 107 (*Ctr. for N.S. Studies v. U.S.*, 331 F.3d 918 (D.C. Cir. 2003)).

[21] Opinion under seal either accidentally or purposely leaked to the public.

[22] The court identified the *Reynolds* requirement of personal consideration of withheld materials by head of a department as providing the basis for determining a state law issue. At *10-11.

[23] Defendant state owned oil company argued in objection to a production order that it had no authority to allow persons without security clearances to receive certain requested files. A Venezuelan minister further claimed that the privileged files were "strictly confidential, as they are associated with the public interest and national security of Venezuela." At *9.

[24] *Totten* Bar held to be a distinct privilege from the state secrets privilege. 544 U.S. 1, 10-11.

[25] Reversed the lower court holding, *Crater v. Lucent* (1999), 1999 U.S. Dist. LEXIS 22765, on this point.

[26] Unclear if the government actually asserted the state secrets privilege.
[27] The "mosaic theory" was also noted in a motion to Justice Ginsberg on an emergency application to vacate the stay of a preliminary injunction. 126 S. Ct. 1 (2005). In the 2nd Circuit hearing concerning the stay, Judge Cardamone engaged in a brief but cogent analysis of the "mosaic theory" in a concurring opinion. 449 F. 3d 415, 422-423 (2006).
[28] Court did not reach issue of assertion of the state secrets privilege.
[29] The Government raised *Totten* Bar but the court found the government's position "problematic" ("The Totten bar is quite distinct from the state secrets privilege; it is not a privilege or a rule of evidence; it is instead a rule of non-justiciability that deprives courts of their ability to hear 'suits against the Government based on covert espionage agreements' even in the absence of a formal claim of privilege." 437 F. Supp. 2d 530, 540).
[30] No discovery, but involved an order from a Public Utility Commission to Verizon, Inc., to attend a show cause hearing for contempt for failure to provide requested information.
[31] This case removed and combined all cases to the Northern District of California concerning interception of communications by AT&T on behalf of the federal government. In many of those cases the government had already asserted the state secrets privilege and it was clear that the government would make the privilege the central feature of its defense. See, e.g., entry 138, *In re NSA Tel Rec.*, 2007 U.S. Dist. LEXIS 53456 (N.D. Cal. 2007).
[32] This ruling concerned an effort by the government to dismiss cases brought by five states. The government argued the Supremacy Clause of the Constitution and the state secrets privilege require the cases be dismissed at the pleading stage. The government lost on the Supremacy Clause and the court held in abeyance a ruling on the state secret claim in light of its previous ruling in *Hepting v. AT&T*, entry 124, which was on appeal.
[33] In a decision concerning ancillary and pendent jurisdiction of a fee dispute the court noted that in the present case "maintaining jurisdiction over all aspects of this proceeding is critically important, since this action concerns information subject to the military and state secrets privilege." At 9.
[34] The opinion in this case is quite confused about the state secrets privilege, apparently believing that it is generally a qualified privilege but in certain cases, as in those under facts similar to *Totten*, the privilege becomes absolute. The opinion also concludes that the state secrets privilege is a form of executive privilege.

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February 13, 2008

Hon. Jerrold Nadler
Chairman
Subcommittee on the Constitution, Civil Rights,
and Civil Liberties
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Nadler:

I am respectfully submitting this written statement for the official record in furtherance of the Oversight Hearing on Reform of the State Secrets Privilege that your Subcommittee held on January 29, 2008. I urge your Subcommittee to push forward with legislative reform of the Executive Branch's use of, and the Judicial Branch's review of, the State Secrets Privilege.

By way of background, I am one of but a small handful of attorneys across the country who routinely handles national security matters in administrative and litigative proceedings. I know all too well the implications of litigating cases involving national security disputes and classified information. Oftentimes my clients' very identity or relationship to the United States Government is a highly classified secret. I am frequently in the trenches fighting with federal agencies concerning access to classified information in order to pursue my clients' claims. In fact, I have personally litigated a number of cases involving the State Secrets Privilege.[1] I also teach the D.C. Bar CLE courses on the Freedom of Information Act (which includes Exemption One national security challenges) and security clearance challenges, and I have testified several times before Congress on such topics as the State Secrets Privilege, national security

[1] For example, I was counsel of record in *Doe et al. v. CIA et al.*, 2007 U.S. Dist. LEXIS 201 (S.D.N.Y. Jan. 4, 2007)(currently on appeal to the Second Circuit); *Sterling v. Tenet et al.*, Civil Action No. 01-8073 (S.D.N.Y. Jan. 2003), *Sterling v. Tenet*, Civil Action No. 03-329, slip op. at 11 (E.D.Va. Mar. 3, 2004), *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005), *cert. denied. Sterling v. Goss*, 126 S. Ct. 1052 (2006); *Edmonds v. Dep't of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004), *aff'd*, 161 Fed. Appx. 6 (D.C. Cir.), *cert. denied*, 126 S. Ct. 734 (2005). I am also currently litigating another State Secrets Privilege case that is under seal and cannot be revealed. Additionally, although the privilege was ultimately not invoked, the issue was briefed and discussed in *Stillman v. Dep't of Defense et al.*, 209 F. Supp. 2d 185 (D.D.C. 2002), *rev'd on other grounds*, 319 F.3d 546 (D.C. Cir. 2003).

whistleblowers, security clearances and federal government polygraph programs.[2] Finally, I also serve as the Executive Director of The James Madison Project (*www.jamesmadisonproject.org*), which is a nonprofit organization that promotes government accountability and the reduction of secrecy (although the views expressed herein reflect the opinion of only myself and should not be attributed or ascribed to any organization with which I may be affiliated).

When the privilege was first articulated in its present form by the Supreme Court more than 50 years ago in *United States v. Reynolds*, 345 U.S. 1 (1953), it cautioned the Executive Branch that the privilege is "not to be lightly invoked." *Id.* at 7. More importantly, it warned that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.* at 9-10. Yet since that time the Judicial Branch has shirked its' responsibility and willingly permitted the Executive Branch to exploit and abuse the invocation of the privilege to defeat lawsuits that particularly challenge government misconduct. Given that, in my experience, I view it highly unlikely, especially given the charged nature of the current post-9/11 climate, that this pattern of practice will change, it is imperative that Congress step in and legislatively address the State Secrets Privilege.[3]

Senator Ted Kennedy has already recently introduced legislation in this arena – *State Secrets Protection Act* (S. 2533). In the coming weeks I understand you will also introduce appropriate legislation. As an initial matter I respectfully recommend you consider the following for incorporation into any draft legislation:

- Creation of a special Article III court or Article I administrative entity (or modification of existing courts or entities) to hear certain designated classified cases utilizing safeguarding procedures such as *in camera* hearings, special facility locations, cleared counsel and court staff, etc.;

- Adoption of statutory language that would impose clear requirements on federal judges to, prior to dismissing a civil case where the State Secrets Privilege is invoked, attempt discovery and implement safeguard procedures to prevent the disclosure of classified information, utilize independent classification experts either as advocates for the plaintiffs (such as where the individual counsel is not permitted or authorized to review the classified information) or as an educator to

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[2] *See e.g.*, "*White House Procedures for Safeguarding Classified Information*", Committee on Oversight and Government Reform, March 16, 2007; "*Whistleblower Protection Enhancement Act of 2007*", Committee on Oversight and Government Reform, U.S. House of Representatives, February 13, 2007; "*Can You Clear Me Now?: Weighing Foreign Influence Factors in Security Clearance Investigations*", Committee on Government Reform, U.S. House of Representatives, July 13, 2006; "*National Security Whistleblowers in the post-9/11 Era: Lost in a Labyrinth and Facing Subtle Retaliation*", Subcommittee on National Security, Emerging Threats, and International Relations, Committee on Government Reform, U.S. House of Representatives, February 14, 2006; "*Issues Surrounding the Use of Polygraphs*", testimony before the Committee on Judiciary, U.S. Senate, Washington, D.C., April 25, 2001.

[3] The last time Congress apparently substantively considered matters relating to the SSP was in the early 1970s when it contemplated including a SSP provision in the newly proposed Federal Rules of Evidence. Hearings on Proposed Rules of Evidence Before the Special Subcomm. On Reform of Federal Criminal Laws of the House Comm. On the Judiciary, 93rd Cong., 1st Sess. 181-85 (1973). Ultimately no provision was included.

> the court, require federal agencies to justify application of the State Secrets Privilege to each element of a plaintiff's claim or, under certain circumstances, consider granting judgment to a plaintiff where an agency precludes use of classified information judicially designated as relevant by the court; and

- Tasking the GAO to conduct a thorough examination of the historical invocation of the state secrets privilege and objectively analyze the appropriateness of at least a select – even random – sample of classified declarations that agencies have provided to federal courts to justify application of the privilege.

I understand some have cautioned the Congress not to exceed its' perceived constitutional role in authorizing the Judiciary to allegedly supplant its' opinion for that of the Executive Branch in national security matters. Such concern is misplaced, both as a matter of law and fact.

No one is suggesting the notion of deference be completely eliminated from the equation. What is sought is legislative requirement that the appropriate balancing, analysis and safeguards are applied in cases so that the State Secrets Privilege does not continue to serve as an absolute privilege through its mere invocation. In fact, the Judiciary has long possessed the constitutional legal authority to challenge – and even reject when appropriate – an Executive Branch national security decision. For example, in amending the Freedom of Information Act in 1974, Congress explicitly rejected the Supreme Court's decision in *EPA v. Mink*, 410 U.S. 73 (1973), which had limited the court's role in assessing security classifications and also overrode President Ford's veto. The 1974 Amendments explicitly empower courts to make a *de novo* determination of the propriety of a federal agency's classification decision. *Halkin v. Helms*, 598 F.2d 1, 16 (D.C.Cir. 1978).

Courts now frequently handle cases – whether criminal or civil – where classified information is at stake. The Foreign Surveillance Act (FISA) court, in particular, obviously addresses some of the most sensitive, classified issues that exist today. The importance of maintaining the proper balance cannot be understated. As the D.C. Circuit noted 25 years ago in adjudicating a First Amendment challenge to the CIA's classification determinations:

> while the CIA's tasks include the protection of the national security and the maintenance of the secrecy of sensitive information, the judiciary's tasks include the 'protection of individual rights. Considering that 'speech concerning public affairs is more than self-expression; it is the essence of self-government,' and that the line between information threatening to foreign policy and matters of legitimate public concern is often very fine, courts must assure themselves that the reasons for classification are rational and plausible ones.

McGehee v. Casey, 718 F.2d 1137, 1149 (D.C. Cir. 1983).

No doubt critics of any legislative attempt to address the State Secrets Privilege will further invoke the specter and dicta of *Department of the Navy v. Egan*, 484 U.S. 518 (1988), to illustrate that the Judiciary is not or should not be in a position to override Executive Branch

national security decisions. However, the proper interpretation of *Egan* merely dictates that, as a matter of statutory construction, the Merit System Protection Board did not possess the authority or jurisdiction to adjudicate the merits of security clearance determinations. That is all that *Egan* actually addressed. Had the Supreme Court desired to truly proclaim that the Executive Branch alone was the final arbiter on national security matters the same Justices would not have ruled *just four months later* in *Webster v. Doe*, 486 U.S. 592 (1988), that courts can properly "balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Id.* at 604-605.[4]

Having dealt with the State Secrets Privilege and other national security disputes for years and tried, without success, virtually every conceivable litigation tactic I can devise to attain judicial modification to or clarification of the SSP, it is crystal clear to me that any real viable reform of the State Secrets Privilege will only emanate from Congress. It is crucial, in my opinion, that in considering a legislative correction to this judicially created privilege that input be received from not only former and current judges and experts on classification determinations, but practitioners with actual experience in handling cases involving classified information in general and the State Secrets Privilege specifically.

In that vein, I would be more than willing to work with Members of this Committee and its Staff and provide greater elaboration on the history and practical application of the State Secrets Privilege, and more importantly to help craft appropriate legislative language. Thank you for your attention to this topic of significant public importance.

Sincerely,

/s/

Mark S. Zaid

cc: Hon. Trent Franks
Ranking Minority Member

[4] It is interesting to note that while the Executive Branch and its supporters will routinely caution that Article I judges are not sufficiently knowledgeable in the area of national security to challenge a federal agency's decision, Administrative Judges within the Department of Defense's Defense Office of Hearings & Appeals routinely overturn agencies' substantive adjudicative determinations regarding individuals' access to classified information.

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January 25, 2008

TO: The Honorable John Conyers, Chairman
The Committee on the Judiciary
United States House of Representatives

Attention: Caroline Mays

FROM: Lou Fisher LF
Specialist in Constitutional Law

SUBJECT: State Secrets Privilege

In response to your request concerning how state secrets privilege has emerged as such a central issue and why Congress is the most appropriate branch to supply much needed procedures and governing principles, please find the attached statement.

If you have any further questions, please call me at x 7-8676 or email me at lfisher@loc.gov. It has been my pleasure to assist you, and I hope that this information will be helpful.

The Law Library of Congress is the legal research arm of the U.S. Congress. We invite you to visit the Law Library website at www.loc.gov/law, which details all of our services and provides access to the Global Legal Information Network, a cooperative international database of official texts of laws, regulations, and other complementary legal sources of many foreign jurisdictions. Should you need further assistance with any other matter pertaining to foreign, comparative, or international law, please contact the Director of Legal Research by email at law@loc.gov or by fax at (202) 609-9264. Research requests may also be directed to the Law Library's Congress-only Hotline at (202) 707-2700, which is staffed whenever either Chamber is in session.

Attachment

Statement by Louis Fisher

Specialist in Constitutional Law,
Law Library of the Library of Congress

before the
Subcommittee on the Constitution, Civil Rights and Civil Liberties

House Committee on the Judiciary

"Reform of the State Secrets Privilege"

January 29, 2008

Mr. Chairman, thank you for inviting me to offer my views on the "state secrets privilege." My statement explains how the privilege has emerged as such a central issue and why Congress is the most appropriate branch to supply much needed procedures and governing principles.

There have been many state secrets cases over the years. The stakes today, however, are much higher. Following the terrorist attacks of 9/11, assertions of the privilege pose a greater threat to constitutional government and individual liberties in such cases as NSA surveillance and extraordinary rendition. The administration invokes the state secrets privilege to block efforts in court by private litigants who claim that executive actions violate statutes, treaties, and the Constitution. The executive branch argues that the President possesses certain "inherent" powers in times of emergency that override and countervail limits set by statutes, treaties, and constitutional provisions. Even if it appears that the administration has acted illegally, the executive branch advises federal judges that a case cannot allow access to documents without jeopardizing national security.

The interest of Congress in this issue is clear. Self-interested executive claims may override the independence we expect of federal courts, the corrective mechanism of checks and balances, and the right of private litigants to have their day in court. Unless federal judges look at disputed documents, we do not know if national security interests are actually at stake or whether the administration seeks to conceal not only embarrassments but violations of law.

Concealing Executive Mistakes

Administrations have invoked the claim of state secrets to hide misrepresentations and falsehoods. In the Japanese-American cases of 1943 and 1944, the Roosevelt administration told federal courts that Japanese-Americans were attempting to signal offshore to Japanese vessels in the Pacific, providing information to support military attacks along the coast. Analyses by the Federal Bureau of Investigation and the Federal Communications Commissions disproved those assertions by the War Department. Justice Department attorneys recognized that they had a legal obligation to alert the Supreme Court to false accusations and misconceptions, but the footuote designed for that purpose was so watered down that Justices could not have understood the extent to which they had been misled. Scholarship and archival discoveries in later years uncovered this fraud on the court and led to *coram nobis* (fraud against the court) cases that reversed the conviction of Fred Korematsu.[1]

A second *coram nobis* lawsuit came from Gordon Hirabayashi, who had been convicted during World War II for violating a curfew order. The Justice Department told

[1] Korematsu v. United States, 584 F.Supp. 1406 (D. Cal. 1984). See Louis Fisher, In the Name of National Security: Unchecked Presidential Power and the *Reynolds* Case 172 (2006).

the Supreme Court in 1943 that the exclusion of everyone of Japanese ancestry from the West Coast was due solely to military necessity and the lack of time to separate loyal Japanese from those who might be disloyal. The Roosevelt administration did not disclose to the Court that a report by General John L. DeWitt, the commanding general of the Western Defense Command, had taken the position that because of racial ties, filial piety, and strong bonds of common tradition, culture, and customs, it was impossible to distinguish between loyal and disloyal Japanese-Americans. To General DeWitt, there was no "such a thing as a loyal Japanese."[2] Because this racial theory had been withheld from the courts, Hirabayashi's conviction was reversed in the 1980s.[3]

Insights into executive secrecy also come from to the Pentagon Papers Case of 1971. This was not technically a state secrets case. It was primarily an issue of whether the Nixon administration could prevent newspapers from continuing to publish a Pentagon study on the Vietnam War. Solicitor General Erwin N. Griswold warned the Supreme Court that publication would pose a "grave and immediate danger to the security of the United States" (with "immediate" meaning "irreparable"). Releasing the study to the public, he warned the Court, "would be of extraordinary seriousness to the security of the United States" and "will affect lives," the "termination of the war," and the "process of recovering prisoners of war." In an op-ed piece, published in 1989, he admitted that he had never seen "any trace of a threat to the national security" from the publication and that the principal concern of executive officials in classifying documents "is not with national security, but rather with governmental embarrassment of one sort or another."[4]

During the October 18, 2007 hearing before the House Foreign Affairs and Judiciary subcommittees, Kent Roach of the University of Toronto law school reflected on similar problems in Canada of executive misuse of secrecy claims. He served on the advisory committee that investigated the treatment by the United States of Maher Arar, who was sent to Syria for interrogation and torture. Mr. Roach said the experience of the Canadian commission "suggests that governments may be tempted to make overbroad claims of secrecy to protect themselves from embarrassment and to hinder accountability processes." The commission concluded that much of the information about contemporary national security activities "can be made public without harming national security." A court decision in Canada authorized the release "of the majority of disputed passages."[5] The Royal Canadian Mounted Police (RCMP) described Arar and his wife

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[2] Hirabayashi v. United States, 627 F.Supp. 1445, 1452 (W.D. Wash. 1986); Fisher, In the Name of National Security, at 173.

[3] Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987).

[4] Erwin N. Griswold, "Secrets Not Worth Keeping," Washington Post, February 15, 1989, at A25; Fisher, In the Name of National Security, at 154-57.

[5] Kent Roach, Professor of Law and Prichard and Wilson Chair in Law and Public Policy, Witness Statement for Appearance before Foreign Affairs Subcommittees on International Organizations, Human Rights and Oversight and Judiciary's Subcommittee on the Constitution, Civil Rights, and Civil Liberties on Rendition to Torture: The Case of Maher Arar, October 18, 2007, at 2.

as "Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist movement." The Canadian commission concluded that the RCMP "had no basis for this description."[6]

The *Reynolds* Case

The pattern of misrepresentations by executive officials described above applies to the Supreme Court decision that first recognized the state secrets privilege, *United States* v. *Reynolds* (1953). On October 6, 1948, a B-29 plane exploded over Waycross, Georgia, killing five of eight crewmen and four of the five civilian engineers who were assisting with secret equipment on board. Three widows of the civilian engineers sued the government under the recently enacted Federal Tort Claims Act of 1946. Under that statute, Congress established the policy that when individuals bring lawsuits the federal government is to be treated like any private party. The United States would be liable in respect of such claims "in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages."[7] Thus, private parties who sued the government were entitled to submit a list of questions (interrogatories) and request documents. The wives asked for the statements of the three surviving crewmen and the official accident report.

District Judge William H. Kirkpatrick of the Eastern District of Pennsylvania directed the government to produce for his examination the crew statements and the accident report. When the government failed to release the documents for the court's inspection, he ruled in favor of the widows.[8] The Third Circuit upheld his decision. The appellate court said that "considerations of justice may well demand that the plaintiffs should have had access to the facts, thus within the exclusive control of their opponent, upon which they were required to rely to establish their right of recovery."[9] In so deciding, the Third Circuit supported congressional policy expressed in the Federal Tort Claims Act and the Federal Rules of Civil Procedure, all designed to give private parties a fair opportunity to establish negligence in tort cases. Because the government had consented to be sued as a private person, whatever claims of public interest might exist in withholding accident reports "must yield to what Congress evidently regarded as the greater public interest involved in seeing that justice is done to persons injured by governmental operations whom it has authorized to enforce their claims by suit against the United States."[10]

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[6] Id. at 3.

[7] 60 Stat. 843, '410(a) (1948).

[8] Fisher, In the Name of National Security, at 29-58,

[9] Reynolds v. United States, 192 F.2d 987, 992 (3d Cir. 1951).

[10] Id. at 994.

In addition to deciding questions of law, the Third Circuit considered the case from the standpoint of public policy. To grant the government the "sweeping privilege" it claimed would be contrary to "a sound public policy." It would be a small step, said the court, "to assert a privilege against any disclosure of records merely because they might be embarrassing to government officers."[11] The court reviewed the choices available to government when it decides to withhold information. In a criminal case, if the government does not want to reveal evidence within its control (such as the identity of an informer), it can drop the charges. To the court, the Federal Tort Claims Act "offers the Government an analogous choice" in civil cases. It could produce relevant documents under Rule 34 and allow the case to move forward, or withhold the documents at the risk of losing the case under Rule 37. In *Reynolds*, at the district and appellate levels, the government to withhold documents.

On the question of which branch has the final say on disclosure and access to evidence, the Third Circuit summarized the government's position in this manner: "it is within the sole province of the Secretary of the Air Force to determine whether any privileged material is contained in the documents and . . . his determination of this question must be accepted by the district court without any independent consideration of the matter by it. We cannot accede to this proposition."[12] A claim of privilege against disclosing evidence "involves a justiciable question, traditionally within the competence of the courts, which is to be determined in accordance with the appropriate rules of evidence, upon the submission of the documents in question to the judge for his examination *in camera*."[13] To hold that an agency head in a suit to which the government is a part "may conclusively determine the Government's claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution."[14]

Were there risks in sharing confidential documents with a federal judge? The Third Circuit dismissed the argument that judges could not be trusted to review sensitive or classified materials: "The judges of the United States are public officers whose responsibility under the Constitution is just as great as that of the heads of executive departments." Judges may be depended upon to protect against disclosure those matters that would do damage to the public interest. If, as the government argued, "a knowledge of background facts is necessary to enable one properly to pass on the claim of privilege those facts also may be presented to the judge *in camera*."[15]

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[11] Id. at 995.

[12] Id. at 996-97.

[13] Id. at 997.

[14] Id.

[15] Id. at 998.

The Supreme Court's Opinion

The government's insistence in the *Reynolds* case that it has a duty to protect military secrets came at the height of revelations about Americans charged with leaking sensitive and classified information to the Soviet Union. During this period Julius and Ethel Rosenberg were prosecuted and convicted for sending atomic bomb secrets to Russia. They were convicted in 1951, pursued an appeal to the Second Circuit the following year, and after a failed effort to have the Supreme Court hear their case they were executed on June 19, 1953. The years after World War II were dominated by congressional hearings into communist activities, the Attorney General's list of subversive organizations, loyalty oaths, security indexes, reports of espionage, and counterintelligence efforts. Alger Hiss, convicted of perjury in 1950 concerning his relationship to the Communist Party, served three and a half years in prison. The government pursued J. Robert Oppenheimer for possible espionage, leading to the loss of his security clearance in 1954.

In *Reynolds*, the government argued that it had exclusive control over what documents to release to the courts. Its brief stated that courts "lack power to compel disclosure by means of a direct demand on the department head" and "the same result may not be achieved by the indirect method of an order against the United States, resulting in judgment when compliance is not forthcoming."[16] It interpreted the Housekeeping Statute (giving department heads custody over agency documents) "as a statutory affirmation of a constitutional privilege against disclosure" and one that "protects the executive against direct court orders for disclosure by giving the department heads sole power to determine to what extent withholding of particular documents is required by the public interest."[17] Congress had never provided that authority and earlier judicial rulings specifically rejected that interpretation.[18]

In its brief, the government for the first time pressed the state secrets privilege: "There are well settled privileges for state secrets and for communications of informers, both of which are applicable here, the first because the airplane which crashed was alleged by the Secretary to be carrying secret equipment, and the second because the secrecy necessary to encourage full disclosure by informants is also necessary in order to encourage the freest possible discussion by survivors before Accident Investigation Boards."[19]

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[16] "Brief for the United States," United States v. Reynolds, No. 21, October Term 1952, at 9 (hereafter "Government's Brief").

[17] Id. at 9-10.

[18] Fisher, In the Name of National Security, at 44-48, 54-55, 61, 64-68, 78, 80-81.

[19] "Government's Brief," at 11.

The fact that the plane was carrying secret equipment was known by newspaper readers the day after the crash. The fundamental issue, which the government repeatedly muddled, was whether the accident report and the survivor statements contained secret information. Because those documents were declassified in the 1990s and made available to the public, we now know that secret information about the equipment did not appear either in the accident report or the survivor statements. As to the second point, about the role of informants in contributing to an accident report, that issue had been analyzed in previous judicial rulings and dismissed as grounds for withholding evidence from a court .[20]

Toward the end of the brief, the government returned to "the so-called 'state secrets' privilege."[21] The claim of privilege by Secretary of the Air Force Finletter "falls squarely" under that privilege for these reasons: "He based his claim, in part, on the fact that the aircraft was engaged 'in a highly secret military mission' and, again, on the 'reason that the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information concerning its operation on performance would be prejudicial to this Department and would not be in the public interest."[22]

Nothing in this language has anything to do with the *contents* of the accident report or the survivors' statements. Had those documents been made available to the trial judge, he would have seen nothing that related to military secrets or any details about the confidential equipment. He could have passed them on the plaintiffs, possibly by making a few redactions.

At various points in the litigation the government misled the Court on the contents of the accident report. It asserted: "to the extent that the report reveals military secrets concerning the structure or performance of the plane that crashed or deals with these factors in relation to projected or suggested secret improvements it falls within the judicially recognized 'state secrets' privilege."[23] *To the extent?* In the case of the accident report the extent was zero. The report contained nothing about military secrets or military improvements. Nor did the survivor statements.

On March 9, 1953, Chief Justice Vinson for a 6 to 3 majority ruled that the government had presented a valid claim of privilege. He reached that judgment without ever looking at the accident report or the survivor statements. He identified two "broad propositions pressed upon us for decision." The government "urged that the executive department heads have power to withhold any documents in their custody from judicial review if they deem it to be in the public interest." The plaintiffs asserted that "the

[20] Fisher, In the Name of National Security, at 39-42.

[21] "Government's Brief," at 42.

[22] Id. at 42-43.

[23] Id. at 45.

executive's power to withhold documents was waived by the Tort Claims Act." Chief Justice Vinson found that both positions "have constitutional overtones which we find it unnecessary to pass upon, there being a narrower ground for decision."[24] When a formal claim of privilege is lodged by the head of a department, 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."[25]

That point is unclear. If the government can keep disputed documents from the judge, even for *in camera* inspection, how can the judge "determine whether the circumstances are appropriate for the claim of privilege"? The judge would be arms-length from making an informed decision. Moreover, there is no reason to regard *in camera* inspection as "disclosure." As pointed out by the district judge and the Third Circuit in *Reynolds*, judges take the same oath to protect the Constitution as do executive officials. Chief Justice Vinson said that in the case of the privilege against disclosing documents, the court "must be satisfied from all the evidence and circumstances" before accepting the claim of privilege.[26] Denied disputed documents, a judge has no "evidence" other than claims and assertions by executive officials.

In his opinion, Chief Justice Vinson stated that judicial control "over the evidence in a case cannot be abdicated to the caprice of executive officers."[27] If an executive officer acted capriciously and arbitrarily, a court would have no independent basis for perceiving that conduct unless it asked for and examined the evidence. Chief Justice Vinson said that the Court "will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case."[28] Under some circumstances there would be no opportunity for *in camera* inspection: "the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."[29] On what grounds would *in camera* inspection jeopardize national security? It is more likely that national security is damaged by executive assertions that are never checked and evaluated by other branches.

Chief Justice Vinson further stated: "On the record before the trial court it appeared that this accident occurred to a military plane which had gone aloft to test secret electronic equipment."[30] On the day following the crash, newspaper readers around the

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[24] United States v. Reynolds, 345 U.S. 1, 6 (1953).

[25] Id. at 8.

[26] Id. at 9.

[27] Id. at 9-10.

[28] Id. at 10.

[29] Id.

[30] Id.

country knew that the plane had been testing secret electronic equipment.[31] Chief Justice Vinson concluded that there was a "reasonable danger" that the accident report "would contain references to the secret electronic equipment which was the primary concern of the mission."[32] There was no reasonable danger that he accident report would discuss the secret electronic equipment. The report was designed to determine the cause of the accident. There were no grounds to believe that the electronic equipment caused the crash. Instead of speculating about what the accident report included and did not include, the Court needed to inform itself by examining the report and not accept vague assertions by the executive branch. Without access to evidence and documents, federal courts necessarily abdicate their powers "to the caprice of executive officers."

The Declassified Accident Report

Judith Loether was seven weeks old when her father, Albert Palya, died in the B-29 accident. On February 10, 2000, using a friend's computer, she entered a combination of words into a search engine and was brought into a Web site that kept military accident reports. By checking that site, she discovered that the accident report withheld from federal courts in the *Reynolds* litigation was now publicly available. Expecting to find national security secrets in the report, she found none. After contacting the other two families, it was agreed to return to court by charging that the government had misled the Supreme Court and committed fraud against it.[33]

Unlike the successful *coram nobis* cases brought by Fred Korematsu and Gordon Hirabayashi, Loether and the other family members lost at every level. Initially they went directly to the Supreme Court. Later they returned to district court and the Third Circuit. Their appeal to the Court was denied on May 1, 2006. When the Third Circuit ruled on the issue, only one value was present: judicial finality. The case had been decided in 1953 and the Third Circuit was not going to revisit it, even if the evidence was substantial that the judiciary had been misled by the government.[34] There appeared to be no value for judicial integrity and judicial independence.

The Third Circuit pointed to three pieces of information in the accident report that might have been "sensitive." The report revealed "that the project was being carried out by 'the 3150th Electronics Squadron,' that the mission required an 'aircraft capable of dropping bombs' and that the mission required an airplane capable of 'operating at altitudes of 20,000 feet and above.'"[35]

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[31] Fisher, In the Name of National Security, at 1-2.

[32] United States v. Reynolds, 345 U.S. at 10.

[33] Fisher, In the Name of National Security, at 166-69.

[34] Herring v. United States, 424 F.3d 384, 386 (3d Cir. 2005).

[35] Id. at 391, n.3.

If those pieces of information were actually sensitive, they could have been easily redacted and the balance of the report given to the trial judge and to the plaintiffs. They were looking for evidence of negligence by the government, not for the name of the squadron, bomb-dropping capability, or flying altitude. As for the sensitivity, newspaper readers the day after the crash understood that the plane was flying at 20,000 feet, it carried confidential equipment, and it was capable of dropping bombs. That is what bombers do.

Conclusions

The experience with state secrets cases underscores the need for judicial independence in assessing executive claims. Assertions are assertions, nothing more. Judges need to look at disputed documents and not rely on how the executive branch characterizes them. Affidavits and declarations signed by executive officials, even when classified, are not sufficient.

For more than fifty years, lower courts have tried to apply the inconsistent principles announced by the Supreme Court in *Reynolds*. Congress needs to enact statutory standards to restore judicial independence, provide effective checks against executive mischaracterizations and abuse, and strengthen the adversary process that we use to pursue truth in the courtroom. Otherwise, private plaintiffs have no effective way to challenge the government through lawsuits that might involve sensitive documents.

There should be little doubt that Congress has constitutional authority to provide new guidelines for the courts. It has full authority to adopt rules of evidence and assure private parties that they have a reasonable opportunity to bring claims in court. What is at stake is more than the claim or assertion by the executive branch regarding state secrets. Congress needs to protect the vitality of a political system that is based on separation of powers, checks and balances, and safeguards to individual rights.

In the past-half century, Congress has repeatedly passed legislation to fortify judicial independence in cases involving national security and classified information. Federal judges now gain access to and make judgments about highly sensitive documents. Congressional action with the FOIA amendments of 1974, the FISA statute of 1978, and the CIPA statute of 1980 were conscious decisions by Congress to empower federal judges to review and evaluate highly classified information. Congress now has an opportunity to pass effective state secrets legislation.

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State Secrets and the Limits of National Security Litigation

Robert M. Chesney*

Abstract

The state secrets privilege has played a central role in the Justice Department's response to civil litigation arising out of post–9/11 counterterrorism policies, culminating in a controversial decision by Judge T.S. Ellis concerning a lawsuit brought by a German citizen—Khaled El-Masri—whom the United States allegedly had rendered (by mistake) from Macedonia to Afghanistan for interrogation. Reasoning that the "entire aim of the suit is to prove the existence of state secrets," Judge Ellis held that the complaint had to be dismissed in light of the privilege. The government also has interposed the privilege in connection with litigation arising out of the National Security Agency's warrantless surveillance program, albeit with mixed success so far.

These events amply demonstrate the significance of the state secrets privilege, but unfortunately much uncertainty remains regarding its parameters and justifications. Is it being used by the Bush administration in cases like El-Masri v. Tenet, *as some critics have suggested, in a manner that breaks with past practice, either in qualitative or quantitative terms?*

I address these questions through a survey of the origin and evolution of the privilege, compiling along the way a comprehensive collection of state secrets decisions issued in published opinions since the Supreme Court's seminal 1953 decision in United States v. Reynolds *(the collection appears in the article's appendix). Based on the survey, I find that the Bush administration does not differ qualitatively from its predecessors in its use of the privilege, which since the early 1970s has frequently been the occasion for abrupt dismissal of lawsuits alleging government misconduct. I also conclude that the quantitative inquiry serves little purpose in light of variation in the number of occasions for potential invocation of the privilege from year to year.*

Recognizing that the privilege strikes a harsh balance among the security, individual rights, and democratic accountability interests at stake, I conclude with a discussion of reforms Congress might undertake if it wished to ameliorate the privilege's impact. First, with respect to the problem of assessing the merits of a privilege claim, consideration could be given to giving the congressional

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intelligence committees an advisory role in the evaluation process (on a supermajority basis). Second, with respect to the problem of harsh consequences for plaintiffs once the privilege is found to attach, special procedures might be adopted to permit litigation to continue in a protected setting (at least where unconstitutional government conduct is alleged).

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The state secrets privilege has played a significant role in the Justice Department's response to civil litigation arising out of post–9/11 counterterrorism policies, culminating in a controversial decision by Judge T.S. Ellis concerning a lawsuit brought by a German citizen—Khaled El-Masri—whom the United States allegedly had rendered (by mistake) from Macedonia to Afghanistan for interrogation.[1] Reasoning that the "entire aim of the suit is to prove the existence of state

1 *See* El-Masri v. Tenet, 437 F. Supp. 2d 530, 532–33 (E.D. Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007).

secrets," Judge Ellis held that the complaint had to be dismissed in light of the privilege.[2] The government also has interposed the privilege in connection with litigation arising out of warrantless surveillance activities, albeit with less success so far.[3]

These events amply demonstrate the significance of the state secrets privilege, but unfortunately much uncertainty remains regarding its parameters and justifications. Is it being used by the Bush administration in a manner that breaks with past practice—either in qualitative or quantitative terms—as some critics have suggested?[4] Even if not, is legislative reform desirable or even possible? I address both sets of issues in this article.

Part I begins by employing the El-Masri rendition litigation as a case study illustrating the impact of the state secrets privilege on security-related lawsuits. Part II then contextualizes the state-secrets debate by identifying the competing policy considerations implicated by government secrecy in general and the state secrets privilege in particular.

Against that backdrop, Part III surveys the origin and evolution of the state secrets privilege to shed light on both the analytical framework employed by courts to assess state secrets privilege assertions and the privilege's underlying theoretical justifications. Courts today continue to follow the analytical framework pioneered by the Supreme Court in *United States v. Reynolds*,[5] which can be summarized as follows: (a) the claim of privilege must be formally asserted by the head of the department charged with responsibility for the information;[6] (b) the reviewing court has the ultimate responsibility to determine whether disclosure of the information in issue would pose a

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2 *Id.* at 539.

3 *Compare* Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006) (denying motion to dismiss), *and* Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006) (denying motion to dismiss), *and* ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (denying motion to dismiss), *and* Hepting v. AT&T Corp., No. C-06-672 VRW, 2006 WL 1581965 (N.D. Cal. June 6, 2006), *with* Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006) (granting dismissal).

4 *See, e.g.*, LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 212, 245 (2006); Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1934 (2007) (disagreeing with this Article's conclusions regarding frequency and nature of Bush administration's invocations of the privilege); William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 108–32 (2005).

5 United States v. Reynolds, 345 U.S. 1 (1953).

6 *Id.* at 7–8.

"reasonable danger" to national security;[7] (c) the court should calibrate the extent of deference it gives to the executive's assertion with regard to the plaintiff's need for access to the information;[8] (d) the court can personally review the sensitive information on an *in camera*, ex parte basis if necessary;[9] and (e) once the privilege is found to attach, it is absolute and cannot be overcome by a showing of need or offsetting considerations.[10]

Notably, the survey indicates that post-*Reynolds* efforts to categorically exclude application of the privilege to suits alleging government misconduct did not gain traction. On the other hand, the survey also suggests that public disclosure of the allegedly secret information defeats the privilege. Furthermore, the survey supports the view that Congress can override the privilege through legislation in at least some contexts.[11]

The historical survey in Part III also provides a foundation for addressing the claim that the Bush administration has employed the privilege with unprecedented frequency or in unprecedented contexts in recent years. Neither claim is persuasive.

The quantitative inquiry is a pointless one in light of the significant obstacles to drawing meaningful conclusions from the limited data available, including in particular the fact that the number of lawsuits potentially implicating the privilege varies from year-to-year. The more significant (and testable) question is whether the reported opinions at least indicate a *qualitative* difference in the nature of how the privilege has been used in recent years. This question has several components, requiring an inquiry into (a) the types of information as to which the privilege has been asserted, (b) the process by which judges are to examine assertions of the privilege, and (c) the remedies sought by the government in connection with such assertions. On all three measures, the survey indicates that recent assertions of the privilege are not different in kind from the practice of other administrations.

To say that the current administration does not depart from past practice in its use of the privilege is not, however, to endorse the status quo as normatively desirable. In recognition of the fact that concerns for democratic accountability are especially acute when the

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7 *Id.* at 8–10.

8 *Id.* at 11.

9 *Id.* at 10.

10 *Id.* at 11.

11 *See infra* Part IV.

privilege is asserted in the face of allegations of unconstitutional government conduct, I conclude in Part IV with a discussion of reforms Congress might undertake in that context.

Both of the suggestions that I make raise a host of practical and legal questions, and I do not propose to work past those hurdles here. Rather, my aim is to stimulate creative thinking about the process by which the privilege is operationalized. First, I raise the possibility that the congressional intelligence committees might become involved in an advisory capacity at the stage during which the judge must determine on the merits whether disclosure of protected information would in fact endanger national security. The idea is to address concerns about the relative capacity of judges to make this merits determination, while avoiding exposure of the information to individuals who do not already have at least arguable authority to access the information.[12]

My second suggestion addresses the circumstance in which the judge has already determined that the privilege attaches and is now considering the consequences for the litigation. In many, if not most, cases, the consequence is simply to remove some item of information from the discovery process. In other cases, however, the loss of that information is fatal to the plaintiff's claim or functions to preclude a defendant from pleading or asserting a dispositive defense. Under the status quo, cases in those latter categories are simply dismissed. And yet there may be reasonable alternatives that do not simply visit an equally harsh result on the government. I propose that consideration be given to a regime in which the plaintiff may choose, in lieu of dismissal, to have the suit transferred to a secure judicial forum (akin to the Foreign Intelligence Surveillance Court) where special procedures—possibly including ex parte litigation moderated by the participation of an adversarial guardian ad litem—might accommodate the government's interest in security while better serving the individual and societal interests in accountability for unlawful government conduct. National security lawsuits challenging such policies as rendition and warrantless surveillance still would face tremendous hurdles in such a system, but courts would at least be able to grapple directly with the legal and factual issues that they raise.

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[12] Notably, this approach would have the effect of facilitating or spurring on the congressional oversight process, and in that respect it has some relation to the proposal made by Amanda Frost in *The State Secrets Privilege and Separation of Powers*, *supra* note 4, at 1931–32. Unlike Frost, however, I would not condition the judge's determination on a decision by Congress to conduct any particular oversight activities.

I. The Extraordinary Rendition of Khaled El-Masri

In February 2005, the *New Yorker* published an article by Jane Mayer titled *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*.[13] The article alleged the existence of a CIA program in which

> [t]errorism suspects in Europe, Africa, Asia, and the Middle East have often been abducted by hooded or masked American agents, then forced onto a Gulfstream V jet . . . . Upon arriving in foreign countries, rendered suspects often vanish. Detainees are not provided with lawyers, and many families are not informed of their whereabouts. The most common destinations for rendered suspects are Egypt, Morocco, Syria, and Jordan, all of which have been cited for human-rights violations by the State Department, and are known to torture suspects.[14]

Drawing on information provided by Michael Scheuer (who had been head of the CIA's Bin Laden Unit during the 1990s), Mayer explained that the rendition program actually had begun in the mid-1990s as a response to the tension that arose when the CIA knew the location of a suspected terrorist but, in Scheuer's words, "we couldn't capture them because we had nowhere to take them."[15] In its original form, the rendition program described by Scheuer involved the use of U.S. assets to capture a terrorism suspect overseas and transfer that person to the custody of another state either for criminal prosecution or to serve an existing sentence.[16] A number of successful operations followed, most but not all of which focused on the transfer of suspects to Egyptian custody.[17] According to Scheuer, the CIA's relationship with Egyptian intelligence was so close that "Americans could give

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13 Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14 & 21, 2005, at 106, *available at* http://www.newyorker.com/printables/fact/050214fa_fact6.

14 *Id.* at 107.

15 *Id.* at 108–09.

16 *See id.* at 109. The CIA's pre–9/11 rendition program may or may not have been distinct from the FBI's pre–9/11 efforts to bring suspects to the United States for criminal prosecution other than by use of extradition procedures. *See* WENDY PATTEN, HUMAN RIGHTS WATCH REPORT TO THE CANADIAN COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR 4–5 (2005); *see also* United States v. Yunis, 924 F.2d 1086, 1089 (D.C. Cir. 1991) (describing "Operation Goldenrod," in which the FBI in 1987 lured a hijacking suspect out of Lebanon onto the high seas, seized him, and with the assistance of the Navy brought him to the United States to stand trial).

17 *See* Mayer, *supra* note 13, at 109.

the Egyptian interrogators questions they wanted put to the detainees in the morning . . . and get answers by the evening."[18]

Since 9/11, the rendition program has grown beyond these initial parameters, though its current scope and purpose are the subjects of considerable dispute.[19] Critics and supporters agree that CIA renditions are no longer limited to persons as to whom existing criminal process is pending in the receiving state. They dispute, however, the purpose for which renditions take place.

According to critics, the essence of what has come to be known as "extraordinary rendition" is the transfer of a suspect to a foreign state to place that person in the hands of unscrupulous security services who will then use abusive interrogation methods; the United States would reap whatever intelligence benefits there may be from such measures, while maintaining a degree of plausible deniability.[20] The government denies that this is so, stating that the United States does not transfer individuals in circumstances where it is "more likely than not" that the person will be tortured or subjected to other forms of cruel, inhuman, or degrading treatment.[21]

The U.S. government has publicly acknowledged the existence of the rendition program at least at a high level of generality. In December 2005, for example, Secretary of State Condoleezza Rice made the following statement on the eve of a trip to Europe meant to address concerns about perceived excesses in post–9/11 U.S. counterterrorism policies, including concerns focused specifically on rendition:

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18 *Id.* at 110.

19 *Compare* Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007) (arguing that extraordinary rendition "has become a lawless practice aimed at perverting the rule of law in relation to terrorism"), *and* Leila Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT'L L. 309, 313–14 (2006) (concluding that extraordinary rendition "is not permissible under existing, applicable and well-established norms of international law"), *with* John Radsan, *A More Regular Process for Irregular Rendition*, 37 SETON HALL L. REV. 1, 7 (2006) (offering a nuanced approach for assessing diplomatic assurances in this context), *and* John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1184–85 (2004) (defending legality of renditions).

20 *See, e.g.*, THE COMM. ON INT'L HUMAN RIGHTS OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. & THE CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, N.Y. UNIV. SCH. OF LAW, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS" 5–6 (2004), *available at* http://www.nyuhr.org/docs/TortureByProxy.pdf.

21 *See, e.g.*, Response of the United States of America, U.N. Committee Against Torture 36–37 (May 5, 2006) (stating that it is U.S. "policy" to apply the more-likely-than-not standard as to all government components, even in circumstances deemed by the United States to be beyond the formal scope of Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85).

> For decades, the United States and other countries have used "renditions" to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice. In some situations a terrorist suspect can be extradited according to traditional judicial procedures. But there have long been many other cases where, for some reason, the local government cannot detain or prosecute a suspect, and traditional extradition is not a good option. In those cases the local government can make the sovereign choice to cooperate in a rendition. Such renditions are permissible under international law and are consistent with the responsibilities of those governments to protect their citizens.[22]

The very next day, it appears that Secretary Rice also conceded certain facts associated with a particular rendition episode. According to German Chancellor Angela Merkel, Secretary Rice admitted that the United States had erroneously rendered a German citizen named Khaled El-Masri from Macedonia to Afghanistan in the winter of 2004.[23] Although Rice's staff later contended that there had been no admission of error on the part of the United States, Secretary Rice did add publicly that

> [w]hen and if mistakes are made, we work very hard and as quickly as possible to rectify them. Any policy will sometimes have mistakes and it is our promise to our partners that should that be the case, that we will do everything that we can to rectify those mistakes. I believe that this will be handled in the proper courts here in Germany and if necessary in American courts as well.[24]

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22 Secretary of State Condoleezza Rice, Remarks upon Her Departure for Europe (Dec. 5, 2005), http://www.state.gov/r/pa/ei/pix/2005/57607.htm.

23 *See* Glenn Kessler, *U.S. to Admit German's Abduction Was an Error: On Europe Trip, Rice Faces Scrutiny on Prisoner Policy*, WASH. POST, Dec. 7, 2005, at A18; *see also* Joint Press Briefing by Condoleezza Rice and Angela Merkel (Dec. 6, 2005), http://www.state.gov/secretary/rm/2005/57672.htm (quoting Merkel as stating that the United States "has admitted that this man had been erroneously taken and that as such the American Administration is not denying that it has taken place"). Notably, *Der Spiegel* claimed in February 2005 that then–Director of Central Intelligence Porter Goss made the same concession to Germany's then–Interior Minister Otto Schily during a visit by the latter to Washington, D.C., with "the Americans quietly admitt[ing] to kidnapping el-Masri and vaguely impl[ying] how the whole matter had somehow gotten out of hand." Georg Mascolo & Holger Stark, *The U.S. Stands Accused of Kidnapping*, DER SPIEGEL, Feb. 14, 2005, http://www.spiegel.de/international/spiegel/0,1518,341636,00.html. According to *Der Spiegel*, the mistake resulted from a belief that Khaled El-Masri was the same person as a suspected al Qaeda member known as "Khalid al-Masri." *Id.*

24 Joint Press Briefing, *supra* note 23.

This belief would soon be put to the test. That very day, El-Masri filed a civil suit in the United States District Court for the Eastern District of Virginia, seeking damages and other appropriate relief arising out of his rendition experience.[25] Appearing at a news conference in Washington by way of a satellite link to Germany, El-Masri explained that he also sought an official apology and an account from the United States as to "why they did this to me and how this came about."[26] Notwithstanding Secretary Rice's apparent endorsement of judicial relief, however, this path ultimately foundered in the face of the government's assertion of the state secrets privilege.

A. To the Salt Pit

What precisely had happened to Khaled El-Masri? According to his complaint,[27] his troubles began at a border crossing between Serbia and Macedonia on December 31, 2003.[28] El-Masri had boarded a bus that morning in his hometown of Ulm, Germany, en route to Skopje, Macedonia.[29] At the border, Macedonian authorities removed him from the bus and eventually confined him in a hotel room in Skopje.[30] There he remained incommunicado for twenty-three days, subjected all the while to repeated interrogation focused on his alleged involvement with al Qaeda.[31]

On the twenty-third day of his captivity, the Macedonians blindfolded El-Masri, placed him in a car, and drove him to an airport.[32] There he came into the custody of men he believed to be CIA agents.[33] El-Masri claims that in short order he was beaten by unseen assailants, stripped, subjected to a body cavity exam, clothed in a diaper and tracksuit, hooded, shackled to the floor of a plane, and, fi-

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25 *See* Kessler, *supra* note 23, at A18 (indicating that El-Masri's suit was filed on Tuesday, December 6, 2005).

26 *Id.*

27 The following account derives from the allegations made by El-Masri in his lawsuit against former Director of Central Intelligence George Tenet and others. *See* Complaint, El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2005) (No. 1:05cv1417), *available at* http://www.aclu.org/safefree/extraordinaryrendition/22211lgl20051206.html. Because the case was dismissed at the pleading stage, *see El-Masri*, 437 F. Supp. 2d at 541, it is not clear whether and to what extent the U.S. government contests this narrative.

28 *See* Complaint, *supra* note 27, ¶ 23.

29 *Id.* ¶¶ 7, 23.

30 *Id.* ¶ 23.

31 *Id.* ¶¶ 24–26.

32 *Id.* ¶¶ 27–28.

33 *Id.* ¶¶ 28–31.

nally, knocked out by a pair of injections.[34] When he regained consciousness, he was in Afghanistan.[35] He had, in short, been subjected to "extraordinary rendition."

El-Masri was taken from the airport to what he later concluded was a prison known as the "Salt Pit," located in northern Kabul.[36] There he was placed in a cold cell containing no bed, but only a dirty blanket and a few items of clothing for use as a makeshift pillow.[37] El-Masri had to make do with "a bottle of putrid water in the corner of his cell."[38] The first night, he was taken to be examined by a person who appeared to be an American doctor; when El-Masri complained of the conditions in his cell, the doctor replied that conditions in the prison were the responsibility of the Afghans.[39]

Interrogations began the next night.[40] After El-Masri was warned that he "was in a country with no laws," the interrogator quizzed him regarding his associations with al Qaeda members and a possible trip to a jihadist training camp in Pakistan.[41] He was interrogated again on three or four other occasions, "accompanied by threats, insults, pushing, and shoving."[42] Eventually, in March, El-Masri began a hunger strike.[43] After twenty-seven days, he met with two American officials (along with the Afghan "prison director"), one of whom stated to El-Masri that he should not be held at the prison, though the decision to release him would have to come from Washington.[44] El-Masri continued his hunger strike after this meeting; after the strike reached thirty-seven days, he was force-fed through an intranasal tube.[45]

In May, El-Masri was interviewed by a psychologist who indicated that El-Masri would soon be released.[46] Later that month, he was questioned on four separate occasions by a man who appeared to be German.[47] During the last of these meetings, the man informed El-Masri once more that he was soon to be released, cautioning him that

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34 *Id.* ¶¶ 28–30.
35 *Id.* ¶ 32.
36 *Id.* ¶¶ 34–35.
37 *Id.* ¶ 34.
38 *Id.* ¶ 36.
39 *Id.* ¶ 37.
40 *Id.* ¶ 38.
41 *Id.* ¶¶ 38–39.
42 *Id.* ¶ 40.
43 *Id.* ¶ 41.
44 *Id.*
45 *Id.* ¶¶ 41, 44.
46 *Id.* ¶ 46.
47 *Id.* ¶¶ 47–48.

he "was never to mention what had happened to him, because the Americans were determined to keep the affair a secret."[48]

El-Masri was released at last on May 28.[49] That morning, his own clothes were returned to him, and he was placed (blindfolded) aboard a flight without being told the country of destination.[50] Upon landing, he was placed in a vehicle (still blindfolded) that drove around for several hours.[51] Eventually, he was taken out of the vehicle, and his blindfold was removed.[52] It was night, and El-Masri found that he was on a deserted road.[53] He was told to walk down the road without looking back.[54] When he rounded a bend, he encountered border guards who informed him that he was in Albania.[55] From the border station, Albanian officials took El-Masri directly to the airport in Tirana.[56] He was escorted through the airport and placed on a flight bound for Frankfurt.[57] When the flight arrived in Germany later that day, El-Masri was free for the first time since his captivity had begun five months earlier.[58] Eventually he made his way to his home in Ulm, only to discover that his wife and children had left Germany to live in Lebanon during his long, unexplained absence.[59] Though he was later reunited with his family, "El-Masri was and remains deeply traumatized" by these events.[60]

Assuming that these allegations are true, there would be no question that Khaled El-Masri has been subjected to a grievous injustice because of the rendition program and, as Secretary Rice herself suggested,[61] that the United States would have at least a moral obligation to do what it could to compensate him. Whether El-Masri can compel the government to provide such compensation through litigation is a different question, however—one that implicates the tension between the executive branch's responsibility for national defense and foreign

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48 *Id.* ¶ 48.

49 *Id.* ¶ 49.

50 *Id.* ¶¶ 49–51.

51 *Id.* ¶¶ 52–53.

52 *Id.* ¶ 53.

53 *Id.*

54 *Id.*

55 *Id.* ¶ 54.

56 *Id.*

57 *Id.* ¶¶ 55–56.

58 *Id.* ¶ 56.

59 *Id.*

60 *Id.* ¶ 58.

61 *See* Joint Press Briefing, *supra* note 23.

affairs and the judiciary's responsibility for vindicating individual rights.

B. To the Eastern District of Virginia

In December 2005, El-Masri filed a civil suit for damages in the United States District Court for the Eastern District of Virginia against former Director of Central Intelligence George Tenet, as well as a number of John Doe defendants and three corporations that El-Masri alleged functioned as fronts for CIA rendition operations.[62] The complaint asserted three causes of action. First, El-Masri asserted a *Bivens* claim[63] premised on violations of both the substantive and procedural aspects of the Fifth Amendment Due Process Clause.[64] In particular, El-Masri argued that he had been subjected to conduct that "shocks the conscience" and that he had been deprived of his liberty without due process.[65] Second, El-Masri invoked the Alien Tort Statute ("ATS")[66] as a vehicle to assert a claim based on violation of the customary international law norm against prolonged arbitrary detention.[67] Third, El-Masri also relied on the ATS to assert a claim for violation of the customary international law norm against torture and other forms of cruel, inhuman, or degrading treatment.[68]

Whether these causes of action were well-founded as a legal matter was open to considerable debate. For example, much uncertainty surrounds the issue of which customary international law norms can be enforced via the ATS in light of the strict criteria set forth by the Supreme Court in *Sosa v. Alvarez-Machain*,[69] and El-Masri—as a noncitizen held outside the United States—faced even greater obstacles in his attempt to assert constitutional rights.[70] Had the court come to grips with the merits, therefore, it is possible that the com-

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62 *See* Complaint, *supra* note 27.

63 *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (recognizing private right of action to recover damages for violations of constitutional rights by federal agents).

64 *See* Complaint, *supra* note 27, ¶ 66.

65 *See id.* ¶ 65.

66 28 U.S.C. § 1350 (2000); *cf.* Sosa v. Alvarez-Machain, 542 U.S. 692, 694, 715 (2004) (construing the ATS not to apply to claims "for violations of any international law norm with less definite content and acceptance among civilized nations than the eighteenth-century paradigms familiar when § 1350 was enacted," which is to say piracy, infringements of ambassadorial privileges, and violations of "safe conduct" assurances).

67 *See* Complaint, *supra* note 27, ¶ 73.

68 *Id.* ¶ 83.

69 Sosa v. Alvarez-Machain, 542 U.S. 692, 694 (2004).

70 *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990).

plaint would have been dismissed for failure to state a claim upon which relief may be granted, even assuming all the allegations to be true, but the court never reached the merits.

In early March 2006, five days before the defendants were due to respond to the complaint, the United States filed a motion requesting an immediate stay of all proceedings in the case.[71] Simultaneously, the government filed a statement of interest in which it formally asserted the state secrets privilege, arguing that El-Masri's suit could not proceed without exposure of classified information relating to national security and foreign relations.[72] The stay was granted,[73] and the following week the United States simultaneously moved both to intervene formally as a defendant and to have the complaint dismissed on state-secrets grounds (or, in the alternative, for summary judgment on that basis).[74]

According to the government's motion, the state secrets privilege flows from the powers and responsibilities committed to the executive branch by Article II of the Constitution.[75] It is absolute in that it cannot be overcome by any showing of need by the opposing party.[76] At the very least, it functions to preclude discovery of privileged information; at the most—as when the very subject matter of the litigation is itself a secret within the scope of the privilege—it may warrant dismissal of a suit.[77] Because both the claims and the defenses at issue in *El-Masri* "would require the CIA to admit or deny the existence of a clandestine CIA activity," the government asserted, the suit simply could not proceed.[78] In support, the government submitted both an unclassified declaration from the Director of Central Intelligence and also, on an ex parte, *in camera* basis, a classified version of the Director's declaration.[79]

On El-Masri's behalf, the ACLU responded that the central facts at issue in his case—including the details of his detention in Macedo-

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71 Motion for an Immediate Stay of All Proceedings by United States of America, El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05cv1417).

72 Statement of Interest, Assertion of a Formal Claim of State Secrets Privilege by United States Of America, *El-Masri*, 437 F. Supp. 2d 530 (No. 1:05cv1417).

73 Order of Mar. 9, 2006, *El-Masri*, 437 F. Supp. 2d 530 (No. 1:05cv1417).

74 *See* Memorandum of Points and Authorities in Support of Motion by Intervenor United States to Dismiss or, in the Alternative, for Summary Judgment at 1–2, *El-Masri*, 437 F. Supp. 2d 530 (No. 1:05cv1417), *available at* http://www.aclu.org/pdfs/safefree/govt_mot_dismiss.pdf.

75 *Id.* at 4.

76 *See id.* at 5.

77 *See id.* at 10–11.

78 *Id.* at 1.

79 *Id.* at 1, 18.

nia and Afghanistan and the role of the United States in orchestrating events pursuant to the rendition program—were no longer secrets at all, and that El-Masri could support his claims without the need for discovery of classified information.[80] The district court, however, was not persuaded.[81]

The court agreed with the government that the "privilege derived from the President's constitutional authority over the conduct of this country's diplomatic and military affairs," and that when properly asserted it was absolute in nature.[82] Relying on *Reynolds*, the court concluded that the government had followed the requisite formalities for asserting the privilege (by having the Director of Central Intelligence make the claim himself upon personal consideration of the issue) and satisfied the standard for showing that the information in question was sufficiently related to national security or foreign relations to warrant protection.[83] The court rejected El-Masri's argument that the government's public statements acknowledging the existence of the rendition program "undercuts the claim of privilege," reasoning that there is a

> critical distinction between a general admission that a rendition program exists, and the admission or denial of the specific facts at issue in this case. A general admission provides no details as to the means and methods employed in these renditions, or the persons, companies or governments involved.[84]

Having concluded that the government had properly asserted the state secrets privilege as to such details, the question remained whether El-Masri's suit could proceed. The court concluded that it could not because the government could not plead in response to the complaint without "reveal[ing] considerable detail about the CIA's highly classified overseas programs and operations."[85] Because "the entire aim of the suit is to prove the existence of state secrets," there

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80 Memorandum of Points and Authorities in Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment at 16–22, *El-Masri*, 437 F. Supp. 2d 530 (No. 1:05cv1417), *available at* http://www.aclu.org/pdfs/safefree/elmasri_final_brief.pdf.

81 *See El-Masri*, 437 F. Supp. 2d at 538.

82 *Id.* at 535, 537.

83 *Id.* at 537 (explaining as to the latter: "It is enough to note here that the substance of El-Masri's publicly available complaint alleges a clandestine intelligence program, and the means and methods the foreign intelligence services of this and other countries used to carry out the program. . . . [A]ny admission or denial of the allegations by defendants in this case would reveal the means and methods employed pursuant to this clandestine program and such a revelation would present a grave risk of injury to national security.").

84 *Id.*

85 *Id.* at 539.

was no prospect of adopting special procedures tailored to prevent their disclosure while permitting the case to proceed.[86] "Thus, while dismissal of the complaint deprives El-Masri of an American judicial forum for vindicating his claims, well-established and controlling legal principles require that in the present circumstances, El-Masri's private interests must give way to the national interest in preserving state secrets."[87]

The Fourth Circuit subsequently affirmed.[88] It acknowledged that "successful interposition of the state secrets privilege imposes a heavy burden on the party against whom the privilege is asserted."[89] Nonetheless, because the court thought it "plain" that the matter fell "squarely within that narrow class" of cases subject to the privilege, the court had no choice but to agree with the district court's determination.[90]

II. The Secrecy Dilemma

To fully appreciate the clash of values implicit in the government's invocation of the state secrets privilege in *El-Masri*, it helps to situate the case against the backdrop of the larger theoretical debate regarding the proper role of government secrecy in an open, democratic society. That debate has been with us since the early days of the republic,[91] and as a result there are many ways one might go about conveying its essential points. For present purposes, however, it seems especially fitting to draw on an event that occurred at the peak of the most recent era prior to 9/11 in which the demands of secrecy, democracy, and litigation came into sustained conflict.

A. The Tensions Inherent in Government Secrecy

In April 1975, Attorney General Edward Levi appeared before the Association of the Bar of the City of New York to deliver an address on the topic of government secrecy.[92] Levi had been appointed

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86 *Id.*

87 *Id.*

88 El-Masri v. United States, 479 F.3d 296, 313 (4th Cir. 2007).

89 *Id.*

90 *Id.*

91 *See generally* Saikrishna B. Prakash, *A Critical Commentary on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143 (1999) (including an insightful discussion of executive privilege).

92 Attorney General Edward Levi, Address to the Association of the Bar of the City of New York 1 (Apr. 28, 1975) (transcript available in Gerald R. Ford Presidential Library and Museum, Edward Levi Papers, Speeches and Scrapbooks Collection, Volume I).

by President Ford just two months earlier, at a time in which the public's faith in government had plummeted as a result of, among other things, the Watergate scandal and revelations in the media and Congress concerning abusive surveillance practices carried out within the United States in the name of national security.[93] In speaking to the leaders of the bar in New York City that night, Levi was engaged in a conscious effort to address that crisis of confidence.[94] In a characteristically measured and direct way, his comments captured the essence of the secrecy dilemma.

Levi opened by conceding that "[i]n recent years, the very concept of confidentiality in government has been increasingly challenged as contrary to our democratic ideals, to the constitutional guarantees of freedom of expression and freedom of the press, and to our structure of government."[95] He was speaking, of course, less than a year after the Supreme Court had foreclosed President Nixon's attempt to invoke executive privilege to prevent a special prosecutor from obtaining recordings and transcripts of White House conversations for use in a criminal prosecution.[96] In that context, Levi observed, it had come to seem that "[a]ny limitation on the disclosure of information about the conduct of government . . . constitutes an abridgment of the people's right to know and cannot be justified."[97] Indeed, to some, "governmental secrecy serves no purpose other than to shield improper or unlawful action from public scrutiny."[98]

Having thus acknowledged the current public mood, Levi pled first for appreciation of the government's legitimate need for some degree of confidentiality.[99] That need, he asserted, "is old, common to all governments, essential to ours since its formation."[100] At bottom, "confidentiality in government go[es] to the effectiveness—and some-

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93 *See, e.g.*, SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES OF THE UNITED STATES SENATE, S. REP. NO. 94-755 (1976) (better known as the Church Committee Report) (reporting results of investigation into surveillance and other intelligence activities).

94 Levi, *supra* note 92, at 1–2.

95 *Id.* at 1.

96 *See* United States v. Nixon, 418 U.S. 683, 711–13 (1974) (recognizing constitutional status of executive privilege for internal executive branch deliberations, but holding that the privilege must give way in that case to the competing interests of a pending criminal prosecution).

97 Levi, *supra* note 92, at 1–2.

98 *Id.* at 2.

99 *Id.*

100 *Id.*

times the very existence—of important governmental activity."[101] Among other things, government must "have the ability to preserve the confidentiality of matters relating to the national defense," a proposition that he viewed as "[c]losely related [to] the need for confidentiality in the area of foreign affairs."[102] Invoking the example of secrecy in the breaking of Axis codes during World War II, Levi pointed out that "[i]n the context of law enforcement, national security, and foreign policy the effect of disclosure" of sensitive information might prevent the government from acquiring critical intelligence, "endanger[ing] what has been said to be the basic function of any government, the protection of the security of the individual and his property."[103]

Levi acknowledged, however, that "of course there is another side—a limit to secrecy."[104] Invoking the First Amendment, Levi argued that "[a]s a society we are committed to the pursuit of truth and to the dissemination of information upon which judgments may be made."[105] This consideration matters in particular in light of our democratic form of government. "The people are the rulers," Levi reminded his audience, but "it is not enough that the people be able to discuss . . . issues freely. They must also have access to the information required to resolve those issues correctly. Thus, basic to the theory of democracy is the right of the people to know about the operation of their government."[106] Levi reinforced the point with words from James Madison: "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[107]

Thus, Levi concluded, "we are met with a conflict of values."[108] On one hand, a "right of complete confidentiality in government could not only produce a dangerous public ignorance but also destroy the basic representative function of government."[109] On the other, "a

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101 *Id.* at 4.

102 *Id.* at 17–19.

103 *Id.* at 18–21.

104 *Id.* at 10.

105 *Id.*

106 *Id.* at 10–11.

107 *Id.* at 11 (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON, 1819–1836, at 103 (G. Hunt ed., 1910)).

108 *Id.* at 13.

109 *Id.*

duty of complete disclosure would render impossible the effective operation of government. Some confidentiality is a matter of practical necessity."[110] Levi closed by observing:

> Measured against any government, past or present, ours is an open society. But as in any society conflicts among values and ideals persist, demanding continual reassessment and reflection. The problem which I have discussed this evening is assuredly one of the most important of these conflicts. It touches our most deeply-felt democratic ideals and the very security of our nation.[111]

In the final analysis, Levi's aim was to impress upon a skeptical audience that the government does have a genuine need for secrecy in some circumstances, while at the same time acknowledging that deference to that need will come at a cost in terms of accountability and the democratic process. He did not add, though it would have been very much in the spirit of his remarks to do so, that this tension is all the more acute when the government's assertion of confidentiality takes place not just at the expense of the public's generalized right to know, but also at the expense of a specific litigant who has turned to the judiciary to vindicate his or her rights in the face of alleged government misconduct. In the latter context, deference to the government's interest in maintaining confidentiality for security-related reasons conflicts not only with considerations of democratic accountability, but also with enforcement of the rule of law itself.

B. Criticism of the State Secrets Privilege

El-Masri demonstrates that the state secrets privilege in at least some circumstances can present precisely this exacerbated form of the government secrecy dilemma. One might object, of course, that it is far from clear that El-Masri's substantive claims were viable as a legal matter, and thus that invocation of the state secrets privilege in his case might not actually have entailed the additional costs described above. That objection fails to account, however, for the threshold harm to El-Masri in being denied the opportunity to attempt to establish even the legal sufficiency of his claims, a harm that arguably is experienced by the larger public as well. In any event, one need only imagine the same fact pattern arising with respect to an American citizen—thus eliminating questions regarding the legal sufficiency of the constitutional claim without altering the state-secrets problem—to ap-

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110 *Id.*

111 *Id.* at 29.

preciate the larger significance of precluding consideration of El-Masri's claims.[112]

Precisely for this reason, the state secrets privilege has long been the subject of academic criticism.[113] Louis Fisher, for example, has devoted an entire book to the proposition that the state secrets privi-

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112 It does not appear that any U.S. person with a manifest claim to constitutional rights (and thus the option for a *Bivens* claim) has been subjected to an extraordinary rendition. The closest example involves Maher Arar, a Syrian-Canadian dual citizen who was detained while transiting John F. Kennedy International Airport en route from Zurich to Montreal. *See* Arar v. Ashcroft, 414 F. Supp. 2d 250, 252–53 (E.D.N.Y. 2006). Arar was eventually removed, first to Jordan and then to Syria. *Id.* at 254. Arar's case does not fit precisely within the rendition paradigm because he was removed pursuant to the formal procedures of U.S. immigration law, but nonetheless is best thought of in rendition terms in light of his allegation that the aim of the removal was to place him in Syrian custody for interrogation purposes. *See id.* at 256. In any event, Arar's brief territorial connection with the United States placed him in a better position than the typical rendition, allowing him to assert constitutional claims, a proposition that he put to the test in a civil suit asserting a *Bivens* claim comparable to El-Masri's. *See id.* at 257–58. As in *El-Masri*, the government invoked the state secrets privilege as a ground to dismiss Arar's suit. *See id.* at 281. The district court ultimately declined to reach that issue, however, holding instead that there is a national security exception to *Bivens* such that there is no private right of action for alleged constitutional violations that "raise[ ] crucial national-security and foreign policy considerations, implicating 'the complicated multilateral negotiations concerning efforts to halt international terrorism.'" *Id.* (quoting Doherty v. Meese, 808 F.2d 938, 943 (2d Cir. 1986)). For a discussion of the merits of that opinion, compare Julian Ku, *Why Constitutional Rights Litigation Should Not Follow the Flag*, A.B.A. NAT'L SECURITY L. REP., July 2006, at 1, 1 3, with Stephen I. Vladeck, *Rights Without Remedies: The Newfound National Security Exception to* Bivens, A.B.A. NAT'L SECURITY L. REP., July 2006, at 1, 1, 4 6; both are available online at http://www.abanet.org/natsecurity/nslr/2006/NSL_Report_2006_07.pdf.

113 *See, e.g.*, RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 216–24 (1974); Frank Askin, *Secret Justice and the Adversary System*, 18 HASTINGS CONST. L.Q. 745, 760 (1991) (arguing that judicial deference to claims of secrecy is "unjustified by the realities of governmental operations," as "[b]ureaucrats will almost always opt for secrecy"); Sean C. Flynn, *The* Totten *Doctrine and Its Poisoned Progeny*, 25 VT. L. REV. 793, 793–94 (2001); Frost, *supra* note 4, at 1931–33; Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 156 (2006); J. Steven Gardner, *The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief*, 29 WAKE FOREST L. REV. 567, 587 (1994) (asserting that the "most forceful" objection to the state secrets privilege is that it "violates the constitutionally mandated separation of powers"); Kenneth W. Graham, Jr., *Government Privilege: A Cautionary Tale for Codifiers*, 38 LOY. L.A. L. REV. 861, 869–73 (2004); Sandra D. Jordan, *Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice After Iran-Contra*, 91 COLUM. L. REV. 1651, 1679 (1991) (contending that the judiciary lacks "a meaningful working standard to evaluate" national security-based secrecy claims); Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 SMU L. REV. 205, 248 (2000) (arguing that "use of the privilege easily fulfills the countermajoritarian nightmare in statutory interpretation," in that it enables "circumvention or rejection of a statutory program"); Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 586–87 (1982) (arguing that the "current judicial practice of ignoring the loss of evidence caused by upholding a privilege claim neglects the courts' duty to enforce constitutional and congressional restraints on executive activities").

lege is "an unnecessary . . . doctrine that is incoherent, contradictory, and tilted away from the rights of private citizens and fair procedures and supportive of arbitrary executive power."[114] Fisher argues that "[b]road deference by the courts to the executive branch, allowing an official to determine what documents are privileged, undermines the judiciary's duty to assure fairness in the courtroom and to decide what evidence may be introduced."[115] It is, in his view, a problem of constitutional magnitude:

> The framers adopted separation of powers and checks and balances because they did not trust human nature and feared concentrated power. To defer to agency claims about privileged documents and state secrets is to abandon the independence that the Constitution vests in Congress and the courts, placing in jeopardy the individual liberties that depend on institutional checks.[116]

In similar fashion, William Weaver and Robert Pallitto contend that there are at least three "powerful arguments for judicial oversight of executive branch action even if national security is involved."[117] First, they observe that "it is perverse and antithetical to the rule of law" to permit the government to employ the state secrets privilege to "avoid judgment in court" or public exposure in connection with unlawful conduct.[118] Second, an overly robust conception of the privilege would create an "incentive on the part of administrators to use the privilege to avoid embarrassment, to handicap political enemies, and to prevent criminal investigation of administrative action."[119] Third, "the privilege, as now construed, obstructs the constitutional duties of courts to oversee executive action."[120]

Complicating matters, concerns associated with the state secrets privilege in recent years have become inextricably intertwined with the larger debate concerning the Bush administration's generally expansive approach to executive branch authority, particularly in connection with the war on terrorism. That larger debate is, in significant part, a debate concerning the extent to which the executive branch must comply with statutory and other restraints when acting in pursuit

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114 FISHER, *supra* note 4, at 253.

115 *Id.* at 258.

116 *Id.* at 262.

117 Weaver & Pallitto, *supra* note 4, at 90.

118 *Id.*

119 *Id.*

120 *Id.*

of national security goals.[121] The debate itself is hampered by the secrecy that often comes hand-in-hand with the pursuit of security-related policies. This is particularly true where the state secrets privilege is concerned. Assertions of the privilege may have the immediate effect of curtailing judicial review, and also the indirect effect of reducing the capacity of both Congress and the voting public to act as a check on the executive. For example, if we assume for the sake of argument that at least some extraordinary renditions are unlawful, the practical effect of the result in *El-Masri* is to prevent a court from reaching that determination and potentially intervening to prevent further unlawful conduct.[122] Likewise, assertion of the privilege also reduces the information on this topic available to Congress and the public, to similar effect.

Some will argue that this is as it should be as courts ought not to interfere with wartime measures undertaken by the president in the exercise of his Article II responsibilities.[123] This is, to say the least, a controversial proposition. But it also is one that ought to be addressed in the first instance by the courts themselves. In some circumstances, a robust embrace of the state secrets privilege could prevent that from occurring. Put another way, the privilege has the capacity to prevent courts from engaging the most significant constitutional issue underlying the post–9/11 legal debate: whether and to what extent recognition of an armed conflict with al Qaeda permits the executive branch to act at variance with the framework of laws that otherwise restrain its conduct.[124]

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121 For an illustrative discussion, see generally Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213 (2005) (discussing assertions of Article II authority to violate statutory restraints in wartime).

122 In this respect, assertion of the privilege has a similar impact as would vigorous enforcement of the statutes criminalizing leaks of classified information. For a discussion of the latter problem, see the September 2006 issue of the ABA's *National Security Law Report*, which collects essays on the topic, available online at http://www.abanet.org/natsecurity/nslr/2006/NSL_Report_2006_09.pdf.

123 *See, e.g.*, JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 22–24 (2005) (arguing that Congress should rely on the power of the purse and on impeachment to check the executive branch's conduct in the security realm).

124 The capacity of the state secrets privilege to preclude consideration of this question is by no means limited to the context of rendition, of course. Indeed, the issue arguably is even more squarely presented by the controversy surrounding the administration's policy (or perhaps policies) associated with warrantless surveillance of communications relating to persons that have been linked in some fashion to al Qaeda (and perhaps other groups or individuals as well). *See* Alberto Gonzales, U.S. Att'y Gen., White House Press Briefing (Dec. 19, 2005), http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html. As in *El-Masri*, the government has interposed the state secrets privilege as a ground to terminate civil suits concerning such surveil-

Bearing these considerations in mind, the decision to dismiss Khaled El-Masri's lawsuit on state-secrets grounds takes on much broader significance. The stakes just described are among the weightiest possible constitutional considerations. The decision in *El-Masri* thus is an occasion for deeper exploration of the nature and scope of the privilege, as a prelude to consideration of what reforms, if any, might be desirable or even possible.

III. The Origin and Evolution of the State Secrets Privilege

Notwithstanding the magnitude of the competing policy considerations underlying the state secrets privilege, its nature and scope remain the subject of considerable uncertainty. Is it a constitutional rule derived from the separation of powers, or is it merely a common law rule of evidence of no greater stature than, for example, the spousal privilege? The question matters a great deal. If the former, there may be limits as to what Congress might do should it wish to alter or override the privilege's impact on national security-related litigation. If the latter, on the other hand, Congress is at liberty to chart its own course in reconciling the tension between the government's legitimate need for secrecy and the obligation to provide justice in particular cases.

A careful review of the origin and evolution of the privilege suggests that both explanations are true to some extent. The privilege emerged in the traditional common law way, through a series of judicial decisions tracing back at least to the early nineteenth century. These early pronouncements—some of which had constitutional overtones—dealt with a series of evidentiary questions that were quite distinct from one another and which did not necessarily concern matters of a diplomatic or military nature. In the hands of mid-nineteenth century treatise writers actively seeking to rationalize and systematize the body of common law evidentiary rules, these disparate threads

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lance, with mixed success thus far. *Compare* Terkel v. AT&T Corp., 441 F. Supp. 2d 899, 917–20 (N.D. Ill. 2006) (dismissing complaint for lack of standing after finding state secrets privilege applicable), *with* Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215, 1228–29 (D. Or. 2006) (upholding assertion of state secrets privilege as to information contained in a document that accidentally had been disclosed to plaintiffs, but allowing the plaintiffs to file affidavits *in camera* attesting to the contents of the document from their memories to support their standing in the case), *and* Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 994, 998–99 (N.D. Cal. 2006) (concluding that the surveillance program was no longer a secret and thus permitting suit to continue), *and* ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 764–65 (E.D. Mich. 2006) (concluding that the state secrets privilege does not apply to the information necessary for the plaintiffs to establish a prima facie case and allowing the suit to continue).

eventually were woven together under the umbrella concept of a multifaceted "public interest" privilege, some aspects of which were referred to under the subheading of "state secrets."

The state secrets privilege in its modern form emerged during the mid-twentieth century, against the backdrop of this common law ferment, thanks to the Supreme Court's seminal decision in *Reynolds*. Published opinions addressing the privilege remained uncommon for some years after *Reynolds*, but have become relatively frequent since a spate of national security-related litigation in the early 1970s. From that period onward, moreover, opinions discussing the privilege frequently have sounded separation of powers themes, suggesting a constitutional foundation to reinforce the common law origins of the doctrine.

What of the claim to the effect that the Bush administration has broken with past practice in asserting the privilege, either in quantitative or qualitative terms? Neither criticism, I conclude, is warranted. The fact of the matter is that the state secrets privilege produced harsh results from the perspective of individual litigants long before the Bush administration. In any event, attempts to allocate responsibility for the privilege to any single administration ultimately distracts from the more important task of considering whether and to what extent legislative reform of the privilege might be appropriate.

A. "Public Interest" Privileges in the Anglo-American Common Law Tradition

The first glimmer of the state secrets privilege in American law is found in *Marbury v. Madison*.[125] *Marbury* is of course famous for Chief Justice Marshall's deft assertion of the judiciary's power to nullify federal statutes on constitutional grounds, a landmark ruling concerning the separation of powers between the judiciary and Congress. In the course of the litigation in that case, however, the Court also addressed a basic question of evidentiary procedure that touched on distinct separation of powers concerns involving the judiciary and the executive.

Marbury had sought to elicit testimony from Attorney General Levi Lincoln—who had been the acting Secretary of State in the opening months of the Jefferson administration—concerning whether the commissions at issue in that case had been found in the Secretary

[125] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

of State's office.[126] Lincoln objected, arguing that he should not testify "as to any facts which came officially to his knowledge while acting as secretary of state."[127] Ultimately, the Court sided with Marbury, reasoning that there was nothing confidential about the information he sought concerning the location of the commissions at a particular point in time.[128] The Court suggested in dicta, however, that Lincoln would not have been "obliged" to disclose information "communicated to him in confidence."[129]

The *Marbury* dicta raised more questions than it answered. Did the Court mean to suggest that confidential communications to executive branch officials are privileged and hence both inadmissible and beyond the scope of discovery? Or was the point to suggest that courts lack the capacity to subject a cabinet official to judicial process (e.g., contempt proceedings) to compel compliance with any discovery order that might be issued? Assuming the former, was the basis for protection rooted in the common law of evidence, in constitutional considerations associated with the independence of the executive branch, or both?

Four years later, Chief Justice Marshall revisited the issue of confidential government information in connection with the treason trial of Aaron Burr.[130] During the trial, Burr sought production from President Jefferson of an inculpatory letter from General James Wilkinson, governor of the Louisiana Territory, describing Burr's alleged conspiracy.[131] Marshall proceeded with caution, noting that it was "certain" that there were some papers in the president's possession that the court "would not require" to be produced, but that the court would be "very reluctant[ ]" to deny production if the document "were really essential to [Burr's] defense."[132] Critically, Marshall also observed that the government in this instance was not resisting production on the ground that disclosure of the document would "endanger the public safety."[133]

Ultimately, the evidentiary dispute in that case became moot, sparing Marshall the need to take a firm stand with respect to privi-

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126 *Id.* at 143.

127 *Id.*

128 *Id.* at 144.

129 *Id.*

130 United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692). Chief Justice Marshall was riding circuit in this case.

131 *Id.*

132 *Id.* at 37.

133 *Id.*

lege issues. The record of the trial remains significant, however, for Marshall's introduction of the notion that risk to public safety might impact the discoverability of information held by the government.[134]

Some time would pass before an American court would speak directly to the public safety issue that Marshall raised in *Burr*, at least insofar as the record of published opinions indicates. But the absence of on-point case law in the United States did not entirely inhibit development of legal thought on the issue. Evidence treatises in circulation in the United States at that time relied extensively on English precedent. Indeed, they frequently *were* English treatises, republished with annotations to American authorities where possible. Through that medium, the bar in the United States in the early-to-mid 1800s would have been familiar with contemporaneous developments across the Atlantic.

At the turn of the nineteenth century, these treatises had relatively little to say on the topic of evidentiary privileges relating specifically to government information.[135] This began to change at least by the 1820s, however. The first American edition of Thomas Starkie's influential evidence law treatise, published in 1826, provides a good example.[136] "There are some instances," Starkie wrote, "where the law excludes particular evidence, not because in its own nature it is suspicious or doubtful, but on grounds of public policy, and because greater mischief and inconvenience would result from the reception

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134 United States v. Burr, 25 F. Cas. 187, 192–93 (C.C.D. Va. 1807) (No. 14,694). Another decision from this era reflecting the early American experience with public interest privileges is *Gray v. Pentland*, 2 Serg. & Rawle 22, 23 (Pa. 1815). *Pentland* was a libel lawsuit arising out of Gray's attempt to persuade Pennsylvania's governor to fire or otherwise take action against Pentland, who was at that time the "prothonotary" of the Court of Common Pleas in Allegheny County. *Id.* Pentland's libel claim turned on the existence of a deposition transcript that Gray allegedly had provided to the governor in support of Gray's claim of malfeasance. *Id.* The governor refused to provide Pentland with the original document, forcing him at trial to rely on a copy. *Id.* The trial court permitted him to do so, but the Supreme Court of Pennsylvania reversed on the ground that admission of the copy was tantamount to ordering production of the original, something the court was not inclined to do because the resulting breach of confidentiality might deter people from providing executive officials with needed information. *Id.* at 31.

135 *See, e.g.*, LEONARD MACNALLY, RULES OF EVIDENCE ON PLEAS OF THE CROWN, chs. XXI–XXII (Philadelphia 1811) (discussing attorney-client privilege, the privilege against self-incrimiuation, and related matters, but not governmental privileges).

136 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE AND DIGEST OF PROOFS IN CIVIL AND CRIMINAL PROCEEDINGS (Boston, Wells and Lilly, 1826). For reference to Starkie's inflnence, see Brnce P. Smith, *The Presumption of Guilt and the English Law of Theft, 1750–1850*, 23 LAW & HIST. REV. 133, 143 n.33 (2005) (citing C.J.W. ALLEN, THE LAW OF EVIDENCE IN VICTORIAN ENGLAND 20–23 (1997)). The original English edition of Starkie's treatise was published in 1824. ALLEN, *supra* at 20.

than from the exclusion of such evidence."[137] These instances, he explained, included spousal privilege, attorney-client privilege, and the privilege against self-incrimination.[138] They also included an additional category, moreover, "in which particular evidence is excluded [because] disclosure might be prejudicial to the community."[139] Exclusion in that context, Starkie explained, was rooted in "grounds of state policy."[140]

On close inspection, Starkie's "state policy" privilege appears to encompass three distinct lines of English precedent, though he does not clearly draw these distinctions himself. First, Starkie described a series of decisions reflecting what we would recognize today as the "informer's privilege,"[141] shielding evidence of communications between informers and government officials to encourage such disclosures.[142] Second, Starkie provided numerous examples of what has since become familiar as the "deliberative process privilege."[143] Under the deliberative process privilege, courts provide qualified protection to some government communications to facilitate internal discussions and operations.[144] The evidentiary disputes in *Marbury* and *Burr* are best thought of as falling under this heading.[145]

The third constituent category of Starkie's overarching "state policy" privilege involved neither informants nor intragovernmental communications. Instead, it concerned factual information that the government sought to keep from public disclosure on security grounds, as illustrated in the 1817 English decision *Rex v. Watson*.[146] *Watson* was a high-profile affair, concerning an alleged plot by Dr. James Watson, his son of the same name, and others to overthrow the

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137 *See* STARKIE, *supra* note 136, § LXXVI, at 103.

138 *Id.* §§ LXXVI–LXXIX, at 103–06. There was no doctor-patient or clergy privilege at that time, as Starkie notes. *See id.* § LXXVIII, at 105.

139 *Id.* § LXXX, at 106.

140 *Id.* (notation in margin).

141 For a discussion of the "informer's privilege" in historical prospective, see Cynthia M. Zalewski, In re Grand Jury Investigation*: Does the Informer's Privilege Exist Within the Grand Jury Setting?*, 23 U. TOL. L. REV. 645 (1992).

142 *See* STARKIE, *supra* note 136, § LXXX, at 106.

143 *See id.* § LXXX, at 106. For a thorough discussion of the origins and nature of the "deliberative process privilege," see Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279 (1989).

144 *See id.*

145 Theron Metcalf, the American editor of Starkie's treatise, cites to *Burr* and *Marbury* in a footnote at the end of the "state policy" section. *See* STARKIE, *supra* note 136, § LXXX, at 107 n.1.

146 Rex v. Watson, (1817) 171 Eng. Rep. 591, 604 (K.B.); *see* STARKIE, *supra* note 136, § LXXX, at 106.

British government through a series of acts that would include an assault on the Tower of London.[147] During the trial, prosecutors introduced into evidence a map of the Tower that had been found in the lodgings of the younger Watson.[148] In response, the defense produced a map of the Tower that had been freely purchased in a London shop, and then asked a long-time employee of the Tower to testify as to the map's accuracy.[149] The court refused to permit that question to be answered, reasoning "that it might be attended with public mischief, to allow an officer of the tower to be examined as to the accuracy of such a plan."[150]

Watson was not the first reported English case in which otherwise-relevant information was deemed inadmissible to preserve the government's security-oriented interest in secrecy,[151] but it does seem to have been the first to draw the attention of the nineteenth-century treatise writers. Henry Roscoe's *A Digest of the Law of Evidence in Criminal Cases*, published in the United States in 1836 under the editorship of George Sharswood, provides a similar account of privileges attaching to certain government communications and information.[152] Like Starkie, Roscoe cites *Watson*.[153] In addition, however, Roscoe cites the opinion of Lord Ellenborough in *Anderson v. Hamilton*[154] as

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147 *Watson*, 171 Eng. Rep. at 596.

148 *Id.* at 604.

149 *Id.*

150 *Id.*

151 In 1723, in connection with Parliament's consideration of a bill of pains and penalties against Bishop Francis Atterbury on charges of treason, Atterbury sought to examine postal clerks who had opened and reported his allegedly incriminating correspondence and also the cryptographers who had decoded the letters in question, in both instances with the aim of exploring the method by which the incriminating information had been gathered. Both motions were denied by the House of Lords, however, on the express ground that such testimony might be "inconsistent with the public safety." Transcript of Trial at 495–96, *Proceedings Against Bishop Atterbury*, 9 Geo. I (1723), *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS 323, 495–96 (T.B. Howell ed., 2000); *see also* Eveline Cruickshanks & Howard Erskine-Hill, The Atterbury Plot 208–09 (2004) (describing Atterbury's failed attempt to examine Rev. Edward Willes, one of the cryptographers involved in decoding the allegedly inculpatory letters, regarding the nature of his art, including Willes's response that to answer the question would be "disserviceable to the Government" and useful to England's enemies).

152 HENRY ROSCOE, A DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL CASES WITH NOTES AND REFERENCES TO AMERICAN DECISIONS, AND TO THE ENGLISH COMMON LAW AND ECCLESIASTICAL REPORTS 148 (George Sharswood ed., P.H. Nickline & T. Johnson, 1836).

153 *Id.* at 148–49.

154 Anderson v. Hamilton, (1816) 8 Price 244 n.*, 146 Eng. Rep. 1191 n.*, 2 Br. & Bingh. 156 n.(b) (Exch. Div.) (reported in the margin of *Home v. Bentinck*, (1820) 8 Price 225, 244 n.*, 146 Eng. Rep. 1185, 1191 n.*, 2 Br. & Bingh. 130, 156 n.(b) (Exch. Div.)). The English Reports report of the case, which memorializes the Price report of the case, matches the substance but not the precise language of the Broderip & Bingham report of the case. Although quotations in

an example of what he called the "matters of state" privilege.[155] *Anderson* involved a civil suit for false imprisonment brought against the governor of Heligoland, and raised the question of whether a plaintiff could compel production of correspondence between the governor and the secretary of state for the colonial department.[156] Lord Ellenborough refused the request, accepting the objection of the Attorney General that "the security of the state made it indispensably necessary, that letters written under this seal of confidence should not be disclosed, and that a breach of the privilege given by the law to such communications would be highly dangerous to the interests of the state."[157] Lord Ellenborough added that the letters "might be pregnant with a thousand facts of the utmost consequence respecting the state of the government . . . and the suspicion of foreign powers with whom we may be in alliance."[158]

In 1842, Professor Simon Greenleaf of the Harvard Law School confirmed the maturation of American evidence law by publishing *A Treatise on the Law of Evidence*, arguably the first successful volume of this nature to be written from an explicitly American perspective.[159] Following in the footsteps of Starkie and Roscoe, Greenleaf wrote that "[t]here are some kinds of evidence which the law *excludes . . . on grounds of public policy*; because greater mischief would probably result from requiring or permitting its admission, than from wholly rejecting it."[160] He then listed a number of examples, including what he called "*secrets of state*."[161] In explaining the content of that privilege, however, Greenleaf did not distinguish the security rationale of cases like *Watson* and *Anderson* from the administrative convenience underlying the deliberative-process privilege seen in cases such as

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the text are from the Broderip & Bingham report, their substance is reflected in the English Reports (Price) report.

155 ROSCOE, *supra* note 152, at 148–49. *Watson* also is cited in S. MARCH PHILLIPPS & ANDREW AMOS, A TREATISE ON THE LAW OF EVIDENCE 177 (8th London ed., with Notes and References to American Cases, Boston 1839).

156 *Anderson*, 8 Price at 244 n.*, 146 Eng. Rep. at 1191 n.*, 2 Br. & Bingh. at 156 n.(b).

157 *Anderson*, 2 Br. & Bingh. at 156 n.(b).

158 *Id.* at 157 n.(b). The only American authorities on this issue noted by Sharswood in his annotation to Roscoe's volume were *Marbury*, *Burr*, and *Gray*. *See* ROSCOE, *supra* note 152, at 148 n.1.

159 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE (7th ed., Boston, Little, Brown and Co. 1854).

160 *Id.* § 236, at 328.

161 *Id.* Greenleaf was not the first to employ a version of the phrase "state secrets." Three years earlier, in *Clark v. Field*, 12 Vt. 485, 486 (1839), the Vermont Supreme Court used the phrase "state secrets" to refer to the privilege that attaches to grand jury proceedings.

Burr.[162] Indeed, Greenleaf did not cite *Watson* at all, and, in citing *Anderson*, did not draw attention to the security and diplomatic secrecy elements of Lord Ellenborough's opinion.[163]

Nonetheless, the security issue played a critical but unspoken role in the next significant development in the emergence of the state secrets privilege[164]—the Supreme Court's 1875 decision in *Totten v. United States*.[165] *Totten* concerned an attempt by the estate of an alleged Union spy to enforce a contract he claimed to have had with President Lincoln.[166] The Court of Claims had adjudicated the dispute, dividing equally on the question of whether Lincoln had authority to bind the United States contractually in this way.[167] By a unanimous vote, however, the Supreme Court held that the Court of Claims should have dismissed the suit without reaching the merits.[168]

Justice Field explained that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to

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162 GREENLEAF, *supra* note 159, § 250, at 347–49.

163 *Id.* § 251, at 349.

164 There were two state court opinions in the early 1870s which also have been cited with some frequency as early examples of the state secrets privilege. *See* Worthington v. Scribner, 109 Mass. 487, 488 (1872) (concerning the informant's privilege); Thompson v. German Valley R.R. Co., 22 N.J. Eq. 111 (N.J. Ch. 1871) (holding that a governor should not be compelled to produce in court any paper or document in his possession). Neither concerned secret information relating to the military or diplomatic activities of the U.S. government, however.

165 Totten v. United States, 92 U.S. 105 (1875).

166 *Id.* at 105–06. "Totten" was Enoch Totten, administrator of Lloyd's estate. *See* Transcript of Record at 3, *Totten*, 92 U.S. 105 (No. 167).

167 *Totten*, 92 U.S. at 106.

168 *Id.* at 106–07. In his reply to Totten's original petition, Assistant Attorney General Thomas Talbot did not assert any affirmative defenses, but instead denied the allegations that the United States owed money to Lloyd and that Lloyd had "borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government." Transcript of Record, *supra* note 166, at 2. The Court of Claims found that the agreement had in fact existed, but did not address the loyalty issue and was unable to come to agreement on the issue of the President's power to bind the United States to such a contract. *See id.* at 3–4. Totten's brief to the Supreme Court focused largely on that issue of authority. Brief for Appellant at 3, *Totten*, 92 U.S. 105 (No. 167). Solicitor General Phillips's brief in opposition argued that the claim was time barred (on the theory that Lloyd could have made applications for payment from behind enemy lines, if he had been truly loyal) and in any event that "in the matter of expenditures which are *secret*, and thus freed from the checks enjoined by the system of accounts in ordinary cases, there should be a precedent or subsequent sanction by Congress before a *right of suit* arises." Brief for the United States at 3–4, *Totten*, 92 U.S. 105 (No. 167). That is, Phillips argued that Totten's suit was "*of a class that necessarily does not warrant a suit against the United States unless it be shown that there is an appropriation for secret service outstanding and applicable.*" *Id.* at 5.

be violated."[169] In this respect, the confidentiality inherent in the employer-employee relationship for spies was analogous to—indeed, stronger than—the "confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose."[170] Just as "suits cannot be maintained which would require a disclosure" of such confidences, so too no suit could be maintained which would require disclosure of a spy's employment by the United States.[171] A contrary result, Field warned, would run the risk of exposing "the details of dealings with individuals and officers . . . to the serious detriment of the public."[172]

Seen in the context of the foregoing discussion, *Totten* at the time was best understood as a significant extension of the still-evolving concept of a state secrets privilege.[173] First, *Totten* followed the British example in *Watson* in recognizing a public-policy justification in American law for precluding public disclosure of information on security-related grounds. Second, and more significantly, *Totten* established the absolute nature of the state secrets privilege in at least some contexts, taking the concept to its logical extreme: as the facts and details of an espionage relationship cannot be disclosed, there would be no point in proceeding with litigation that would require precisely that.[174]

Notably, the Court in *Totten* did not actually require an assertion of privilege on the part of the executive as a precondition to its holding that espionage contract suits cannot be maintained; on the contrary, the court appears to have raised the issue on its own initiative.[175] One might conclude from this that the Court took the view that such suits are nonjusticiable as a constitutional matter. The Court at no point described its holding in separation of powers or other constitutional terms, however. Rather, the Court simply spoke in terms of the

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169 *Totten*, 92 U.S. at 107. This particular argument was not presented by the government at any stage in the proceedings, excepting the possibility that it may have been raised at oral argument. *See* Brief for the United States, *supra* note 168.

170 *Totten*, 92 U.S. at 107.

171 *Id.*

172 *Id.* at 106–07.

173 The Supreme Court recently has indicated that it views *Totten* as distinct from the state secrets privilege, though there is reason to question that conclusion. *See* Tenet v. Doe, 544 U.S. 1, 8–11 (2005).

174 *See Totten*, 92 U.S. at 107.

175 *Id.* at 106–07.

detrimental "public policy" ramifications of permitting lawsuits regarding unacknowledged espionage contracts to proceed.

The Supreme Court of Pennsylvania was more forthcoming about the theoretical foundations for the privilege when it confronted the issue in its 1877 decision *Appeal of Hartranft*.[176] The *Hartranft* litigation arose against the backdrop of the Great Railroad Strike of 1877, which had produced terrible violence between Pennsylvania national guardsmen and strikers in Pittsburgh during the summer of that year.[177] After order was restored, a grand jury in Allegheny County had subpoenaed Governor Hartranft and Pennsylvania National Guard officials to testify regarding their role in these events.[178] The county court issued attachments against them when they refused to comply, but the Supreme Court of Pennsylvania reversed on state constitutional grounds.[179] After observing that the power to issue an attachment against senior executive officials implied a variety of other powers to control the executive branch—a proposition fraught with separation of powers concerns—the court held that the executive department in any event had *exclusive* "power to judge . . . what of its own doings and communications should or should not be kept secret."[180]

One of the decisions that the *Hartranft* court cited in support of this total-deference obligation was not an American authority, but a British one[181]: *Beatson v. Skene*,[182] an 1860 decision concerning slanderous comments that a civilian official allegedly had made concerning Beatson, who at the time had been the commander of an irregular cavalry unit operating in Turkish territory at the time of the Crimean War. As it happened, Skene's comments were recorded in a letter that came into the custody of the Secretary of State for War, who declined to produce it for the litigation on the ground that "doing so would be injurious to the public service."[183] The court agreed, and went on to add that except in "an extreme case" judges should not even ask to see the documents in question once a claim of this sort has been made, but rather should leave the determination to "the head of

176 Appeal of Hartranft, 85 Pa. 433 (1877).

177 *Id.* at 434.

178 *Id.* at 435.

179 *Id.* at 444–45.

180 *Id.*

181 *Id.* at 447 (citing Beatson v. Skene, (1860) 157 Eng. Rep. 1415 (Exch. Div.)).

182 Beatson v. Skene, (1860) 157 Eng. Rep. 1415, 1421 (Exch. Div.).

183 *Id.*

the department having custody of the paper."[184] The court in *Beatson* reasoned that a contrary approach ordinarily would not be possible because, it believed, a judicial inspection "cannot take place in private" and thus necessarily would entail public exposure of the matter in issue.[185] *Hartranft* cited this rationale with approval, apparently not recognizing that the availability in American practice of *in camera*, ex parte review made the rationale of *Beatson* quite inapplicable.[186]

B. The Emergence of the Modern Privilege

1. Security Concerns

By the late nineteenth century, treatise writers in the United States had begun to refer expressly to a "state secrets" privilege. At this stage, however, they were using "state secrets" much as the early writers had referred to a "public interest" privilege: namely, as an umbrella concept integrating cases like *Totten* and *Hartranft* with precedents concerning the informer's privilege, the deliberative-process privilege, and the government-communications privilege.[187] It was not surprising, in light of this, that courts near the turn of the century frequently referred to "state secrets" when dealing with matters unrelated to national security or foreign relations.[188]

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184 *Id.* at 1421 22.

185 *Id.* at 1421.

186 Appeal of Hartranft, 85 Pa. 433, 447 (1877).

187 *See, e.g.*, JOHN FRELINGHUYSEN HAGEMAN, PRIVILEGED COMMUNICATIONS AS A BRANCH OF LEGAL EVIDENCE 295 (1889) (referring to "Secrets of State," in what might be the first volume treating evidentiary privileges as an independent subject); THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW (John Houston Merrill ed., 1892) (referring to a privilege for "state secrets").

188 There were at least three decisions referencing a "state secrets" privilege during the period between *Hartranft* and the 1912 decision in *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353 (E.D. Pa. 1912), which is discussed below. None, however, involved matters associated with security or foreign relations. Two are better viewed as an example of the more generalized public-interest privileges previously discussed. In *District of Columbia v. Bakersmith*, 18 App. D.C. 574, 577, 580 (1901), the Court of Appeals of the District of Columbia rejected without discussion the District's attempt to justify the withholding of municipal records relating to maintenance of a culvert on the improbable ground that all government records amount to "secrets of State." Similarly, in *King v. United States*, 112 F. 988, 996 (5th Cir. 1902), the Fifth Circuit declined to apply the state secrets privilege to preclude testimony concerning plea agreements a prosecution witness may have made with the government. The other decision, *In re Grove*, 180 F. 62, 67, 70 (3d Cir. 1910), did have a security concern. In that case, the Third Circuit reversed a contempt finding against a defendant who initially had refused to produce documents relating to the designs for a destroyer being built for the Navy, reasoning that the defendant had acted properly in suggesting that the materials might be protected by the state secrets privilege, even though the Navy ultimately disclaimed such protection. *Id.*

The core of a distinctive "state secrets" privilege, focused on security-related matters, did begin to emerge in the early twentieth century. The initial examples involved commercial disputes relating to military hardware. In a handful of cases prior to World War II—one in 1912 involving the designs for armor-piercing projectiles,[189] and two others in the late 1930s involving equipment used in connection with gun sighting[190]—courts invoked the privilege to preclude litigants from obtaining much-needed discovery, employing reasoning expressly predicated on the harm to national security that might follow from such disclosure.

The security-oriented privilege continued to develop as several mid-century developments combined to increase the occasions for its assertion.[191] The onset of World War II in particular was significant, as it brought with it a vast expansion of government activity at home and abroad relating to security and foreign policy, much of it highly classified. It was inevitable that civil and criminal cases relating to this new security establishment would raise issues concerning the exposure of sensitive information. In the 1944 decision *United States v. Haugen*,[192] for example, a district court was obliged to determine the impact of the state secrets privilege on a criminal prosecution arising indirectly out of the Manhattan Project.[193] Haugen was charged with intentionally defrauding the government by forging meal vouchers for use in a cafeteria serving persons involved in the construction of a Manhattan Project facility.[194] The charge required proof of the con-

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189 *See Firth Sterling Steel*, 199 F. at 355 (citing *Totten*).

190 *See* Pollen v. United States, 85 Ct. Cl. 673, 674, 679 (1937) (concluding that the paucity of decisions addressing the concept of a military secrets privilege merely "confirms the recognition" that such information cannot be disclosed); Pollen v. Ford Instrument Co., 26 F. Supp. 583, 585 86 (E.D.N.Y. 1939) (citing *Totten* en route to recognizing military secrets privilege asserted by intervenor United States, and denying discovery on that basis).

191 Writing in 1954, Charles McCormack observed that

> [i]n the last half-century in this country and in England, where the activities of government have so multiplied in number and widened in scope, the need of litigants for the disclosure and proof of documents and other information in the possession of government officials has correspondingly increased. When such needs are asserted and opposed, the resultant questions require a delicate and judicious balancing of the public interest in the secrecy of 'classified' official information against the public interest in the protection of the claim of the individual to due process of law in the redress of grievances.

CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 302–03 (1954).

192 United States v. Haugen, 58 F. Supp. 436 (E.D. Wash. 1944), *aff'd*, 153 F.2d 850, 853 (9th Cir. 1946).

193 *Id.* at 437.

194 *Id.*

tractual relationship between the cafeteria owner and the federal government, but the government refused to disclose to the defendants the contracts themselves.[195] The court agreed that the defendant could not discover them, observing that the "right of the Army to refuse to disclose confidential information, the secrecy of which it deems necessary to national defense, is indisputable."[196]

The enactment of the Federal Tort Claims Act ("FTCA")[197] in the immediate aftermath of the war permitted individuals to sue the government for its alleged tortious conduct, and thereby created new opportunities for the assertion and development of the state secrets privilege. Perhaps not surprisingly, given the large amount of military activity taking place in those years, FTCA suits frequently arose in connection with accidents involving military ships and vehicles, and in such instances plaintiffs naturally sought to acquire copies of internal investigation reports carried out by the relevant service. The government routinely resisted such requests on the ground that the public interest is better served by keeping postaccident investigations confidential, quite apart from any considerations of military or diplomatic secrets that might be contained in a given report.[198] Occasions did arise, however, in which the emerging state secrets privilege was cited

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195 *Id.* at 438.

196 *Id.* The court went on to preclude oral testimony concerning the contracts, relying on the best evidence rule. *See id.* at 440.

197 Federal Tort Claims Act, ch. 753, tit. IV, 60 Stat. 842, 842–47 (1946) (codified as amended in scattered sections of 28 U.S.C.).

198 A series of opinions in the 1940s addressed the claim that internal investigative reports carried out by government agencies should be privileged from discovery regardless of their content, a claim that is quite distinct from an argument that a particular report should be withheld because it contains security-sensitive information. *See* United States v. Cotton Valley Operators Comm., 9 F.R.D. 719, 721 (W.D. La. 1949) (dismissing civil antitrust enforcement action as sanction for failure to produce FBI investigative report), *aff'd by equally divided court*, 339 U.S. 940 (1950); O'Neill v. United States, 79 F. Supp. 827, 830–31 (E.D. Pa. 1948) (imposing sanctions for refusal to disclose FBI investigative report relevant to admiralty action, but denying that the case involves jeopardy to "the military or diplomatic interests of the nation"), *vacated on other grounds sub nom.* Alltmont v. United States, 174 F.2d 931, 931 (3d Cir. 1949); Bank Line Ltd. v. United States, 76 F. Supp. 801, 804–05 (S.D.N.Y. 1948) (permitting limited discovery, while acknowledging that a different outcome might have obtained had "military and diplomatic secrets" been involved); Wunderly v. United States, 8 F.R.D. 356, 357 (E.D. Pa. 1948) (requiring production of statement made by army officer in a letter to his superior, while emphasizing that no "military secrets, possibly protected by the scope of common law privilege, are involved"); Bank Line Ltd. v. United States, 68 F. Supp. 587, 588 (S.D.N.Y. 1946) (admiralty libellant sought production of Navy investigative report), *mandamus denied*, 163 F.2d 133, 139 (2d Cir. 1947). These cases frequently are cited in connection with the state secrets privilege as it is understood today, but are in fact better understood as examples of an attempt to extend the general "public-interest" privilege described previously to the entire category of accident investigation reports.

as a separate ground for resisting disclosure of such reports.[199] One such occasion resulted in the Supreme Court's 1953 decision in *Reynolds*, the seminal but troubled opinion that entrenched the state secrets privilege in its modern form.

2. *Crystallization of the Privilege in* Reynolds

Reynolds concerned a trio of FTCA suits brought by the widows of several men who died in the crash of an Air Force B-29 in Georgia.[200] At the time of the crash, the plane was on a mission to test classified radar equipment, a fact that eventually would prove a significant obstacle to the success of the suits.[201] During discovery, the plaintiffs sought production of a report drafted in connection with the Air Force's postaccident investigation.[202] The government resisted production, though not initially on state-secrets grounds.[203] Instead, the government at first asserted a generalized privilege for internal investigative reports based on the proposition that disclosure of such reports would deter "the free and unhampered self-criticism within the service necessary to obtain maximum efficiency, fix responsibility and maintain proper discipline."[204] Carefully noting the absence of a state-secrets claim, the court rejected the government's argument that it needed to shield the report to encourage self-criticism and thereby prevent future accidents.[205]

After the district court reached this conclusion, the government reasserted its argument in favor of an investigative-reports privilege, but this time added that disclosure of the report would "seriously hamper[ ] national security, flying safety, and the development of highly technical and secret military equipment."[206] In short, the gov-

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199 *See, e.g.*, Cresmer v. United States, 9 F.R.D. 203, 204 (E.D.N.Y. 1949) (in FTCA suit arising out of crash of Navy plane, district court conducted ex parte, *in camera* review of the accident report to ensure it contained nothing that would "reveal a military secret or subject the United States and its armed forces to any peril by reason of complete revelation" before granting motion to compel production).

200 *Id.* at 2–3.

201 The facts at issue in *Reynolds* are described in considerable detail in FISHER, *supra* note 4, at 1–3.

202 *See* Brauner v. United States, 10 F.R.D. 468, 469 (E.D. Pa. 1950).

203 *Id.* at 471–72.

204 *Id.* at 472.

205 *Id.* at 471–72. A similar fact pattern produced a similar result just a month earlier in Louisiana, in connection with a separate Air Force plane crash. *See* Evans v. United States, 10 F.R.D. 255, 257–58 (W.D. La. 1950) (ordering government to produce witness statements and other documents despite claim of an investigative-reports privilege).

206 Reynolds v. United States, 192 F.2d 987, 990 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

ernment now had invoked the state secrets privilege as an alternative ground for refusing production of the documents. The district court responded by ordering that the documents be produced to it for ex parte, *in camera* inspection "so that the court could determine whether the disclosure 'would violate the Government's privilege against disclosure of matters involving the national or public interest.'"[207] The government declined to comply, implicitly adopting the *Hartranft/Beatson* position that judges may not second-guess the government's assertion of the state secrets privilege.[208] The district court responded by ordering that the question of negligence be resolved in the plaintiffs' favor, and ultimately entered a $225,000 judgment on that basis.[209]

On appeal, the Third Circuit was careful to distinguish the state secrets privilege from the government's original attempt to shield the report on what it described as "housekeeping" grounds.[210] The court drew a distinction between a generalized assertion of need to withhold information in the "public interest" and a specific assertion that diplomatic or military secrets are in issue.[211] Citing *Totten* and *Firth Sterling Steel Co. v. Bethlehem Steel Co.*,[212] the court acknowledged that "[s]tate secrets of a diplomatic or military nature have always been privileged from disclosure in any proceeding."[213] It did not follow, however, that courts must simply accept the government's claim that the privilege is implicated. Rather, the court held that whether the privilege has been properly invoked "involves a justiciable question, traditionally within the competence of the courts, which is to be determined . . . upon the submission of the documents in question to the judge for his examination *in camera*," albeit on an ex parte basis.[214]

The Third Circuit's opinion in *Reynolds* was significant in several respects. First, it clearly distinguished the "state secrets" privilege (relating to military and diplomatic information) from the more generalized "public interest" privileges (associated with other forms of sensitive government information and communications). The court thus added a degree of clarity—and justification—that had been no-

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207 *Id.* at 990–91.

208 *See id.* at 991.

209 *See id.*; FISHER, *supra* note 4, at 58.

210 *Reynolds*, 192 F.2d at 994.

211 *Id.* at 994–96.

212 Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353 (E.D. Pa. 1912).

213 *Reynolds*, 192 F.2d at 996 (citing, inter alia, Totten v. United States, 92 U.S. 105, 107 (1875); *Firth Sterling*, 199 F. 353).

214 *Id.* at 997.

ticeably lacking in discussions of the privilege up to that point. Second, in the spirit of *Totten*, it affirmed the absolute nature of the state secrets privilege once properly attached. Third, the court insisted upon the ultimate authority of the judiciary to review (and thus potentially reject) the executive branch's assertion that diplomatic or military secrets in fact are present. This departed from the approach articulated in *Hartranft*, which had relied on the British precedent of *Beatson*. Indeed, the Third Circuit in *Reynolds* expressly rejected the government's invocation of a more recent British precedent following *Beatson*, deriding it as irrelevant in light of the differing roles of American and British judges within their respective constitutional structures.[215]

The Supreme Court eventually reversed and remanded the Third Circuit's decision in *Reynolds*.[216] Its decision to do so is best understood not as a rejection of the principles stated above, however, but rather as a refinement of them.

As an initial matter, Chief Justice Vinson's opinion for the majority articulated a set of formalities that must be satisfied for the government even to put the state secrets privilege into play.[217] In particular, "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer."[218]

The more interesting aspect of the decision, however, is the majority's discussion of the substantive standard for recognition of the privilege once properly asserted and of the judge's role in applying that standard.[219] By and large, these aspects of the holding were consistent with the views articulated by the Third Circuit in the opinion below. For example, Vinson affirmed the absolute nature of the "privilege against revealing military secrets, a privilege which is well established in the law of evidence."[220] In the criminal prosecution context, he observed, this might force the government to choose between asserting the privilege and dropping the charge, but in the civil context

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215 *Id.* (rejecting the analogy to Duncan v. Cammell, Laird & Co., [1942] A.C. 624, on separation of powers grounds, but also distinguishing the case on the ground that the military sensitivity of the information at issue in that case—involving the submarine *Thetis*—was manifest).

216 United States v. Reynolds, 345 U.S. 1, 12 (1953).

217 *Id.* at 7–8.

218 *Id.*

219 *Id.* at 6–12.

220 *Id.* at 6–7 (citing, inter alia, *Totten*).

matters stood differently.[221] Vinson cited *Totten* for the proposition that when the privilege attaches in a civil case, it must be upheld against any claim of need, even to the point of requiring dismissal of a suit.[222]

Vinson also agreed with the Third Circuit that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[223] But whereas the Third Circuit had implied that it might always be appropriate for the court to test the executive's claim through an ex parte, *in camera* assessment of the disputed information, Vinson required greater caution. Judges should not automatically engage in an *in camera*, ex parte review, he wrote, because it sometimes will be possible to determine from context alone "that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interests of national security, should not be divulged."[224]

This formulation only slightly modifies the Third Circuit's approach. It amounts to a description of the substantive standard governing the judge's assessment of the privilege claim itself, interwoven with a description of the logistics of applying that standard. As to the former, Vinson clarified that judges should use a "reasonable danger" test in assessing whether the information in question ultimately could be produced in the litigation without harm to national security.[225] As to the latter, Vinson cautioned that it sometimes will be obvious from context alone that the information qualifies under that standard and

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221 *See id.* at 12. Four years later, in *Jencks v. United States*, 353 U.S. 657, 670–72 (1957), the Court cited this aspect of *Reynolds* en route to holding that the "burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession." *See also* United States v. Moussaoui, 382 F.3d 453, 476 (4th Cir. 2004) (noting that, even under the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3 §§ 1–16 (2000 & Supp. IV 2004), in context of criminal prosecution, "the Executive's interest in protecting classified information does not overcome a defendant's right to present his case"); United States v. Paracha, No. 03-CR-1197, 2006 WL 12768, at *8 (S.D.N.Y. Jan. 3, 2006) (noting that the government may only invoke the privilege at the cost of allowing the defendant to go free).

222 *See Reynolds*, 345 U.S. at 11 n.26 (stating that the suit in *Totten* "was dismissed on the pleadings without ever reaching the question of evidence, since it was so obvious that the action should never prevail over the privilege").

223 *Id.* at 9–10. In that respect, *Reynolds* rebuffs the view expressed by then–Attorney General Robert Jackson in an opinion letter in April 1941 in which he described a generalized privilege pursuant to which both Congress and the courts must defer to executive determinations that disclosure of sensitive information would not be in the public interest. *See* Position of the Executive Department Regarding Investigative Reports, 40 Op. Att'y Gen. 45, 46, 49 (1941).

224 *Reynolds*, 345 U.S. at 10.

225 *Id.* at 9.

therefore that there is no sense in running the marginal risks associated with an *in camera*, ex parte review.[226]

But this left open several questions. First, how deferential should a judge be in determining whether information rises to the "reasonable danger" level? Later in the opinion, Vinson explained that the degree of scrutiny should be calibrated with reference to a litigant's need for the information: "Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted."[227] Conversely, where there was little apparent need—and Vinson thought there was little need in *Reynolds* insofar as the plaintiffs could get the information they sought via depositions instead—the judge should be deferential indeed, and the claim of privilege "will have to prevail."[228]

The second open question arose out of the distinction between the process of determining whether particular information is sufficiently sensitive to warrant protection and the process of determining whether the information in issue actually is present in the document or other source in question. The great flaw of the *Reynolds* holding concerns the latter inquiry, not the former. Vinson began his analysis by concluding that national security might reasonably be expected to suffer should there be public disclosure of information relating to the classified equipment that had been on board the B-29 at the time of its crash.[229] That was not a terribly controversial conclusion in and of itself. It did not automatically follow, however, that the Air Force's crash investigation report actually contained such information. And yet Vinson concluded that "there was a *reasonable danger* that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission."[230] Here Vinson is using "reasonable danger" not as the measure of whether the information could be disclosed without harming national security, but instead as the measure of whether such information was likely to be discussed in the crash investigation report. Put another way, Vinson employed the "reasonable danger" standard not just as a measure of how security-sensitive the information in issue must be to merit protection, but also as a measure of whether there is any point in having the judge look at the document in question in deciding whether such important information actually is present.

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226 *Id.* at 10.

227 *Id.* at 11.

228 *Id.*

229 *Id.* at 10.

230 *Id.* (emphasis added).

Such an approach to the question of *in camera*, ex parte review makes little sense. There are sound arguments for employing a "reasonable danger" test when it comes to the task of deciding whether the information itself warrants protection. Judges in general cannot be expected to have the requisite expertise, experience, and knowledge necessary to make fine-grained decisions regarding the national security implications of disclosure, and it arguably is desirable to err on the side of caution when dealing with military and diplomatic secrets. But these considerations have no application when it comes to deciding whether a given document or other source actually references such sensitive information. Judges are perfectly capable of making that determination and should be permitted to do so except where the surrounding circumstances make it perfectly obvious that such sensitive information is present (as with a request for production of weapon-design information, for example).

Rather than asking whether there is a "reasonable danger" that such information might be present, then, the standard for precluding *in camera*, ex parte review ought to be more akin to a "clear and convincing" standard. Even in that circumstance, moreover, courts should not forego *in camera*, ex parte review if the context suggests the possibility that any sensitive information that might actually be present nonetheless could be redacted.[231]

Reynolds itself amply demonstrates the folly of using a reasonable danger standard for determining whether security-sensitive information in fact is present. It is now known that the investigative report at issue in that case did not actually contain information about the classified equipment that had been aboard the doomed flight (which may explain why the state secrets privilege had not been invoked until after the district judge proved uninterested in the argument for a general investigative-reports privilege).[232] Had the Supreme Court permitted the district judge to conduct an *in camera*, ex parte review of the report, the judge presumably would have discovered this fact. The point is not that the court should have been permitted to second-guess the government's assertion that the nature of the radar equipment had to be kept secret, but rather that the court should have ensured that the report really did discuss the nature of that equipment (and that it did so in a manner not reasonably capable of redaction).

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231 *See, e.g.*, Al-Haramain Islamic Found. v. Bush, 451 F. Supp. 2d 1215, 1229 (D. Or. 2006) (urging the government to consider redaction).

232 *See* FISHER, *supra* note 4, at 167.

Fortunately, courts following in the wake of *Reynolds* seem largely to have avoided this fundamental error.[233] It remained to be seen, however, whether the privilege would begin to be invoked more frequently, whether it might result in dismissals more often (rather than in mere discovery limitations), and whether its theoretical foundations would become clearer.

C. *State Secrets in the Immediate Post-*Reynolds *Era*

A handful of state secrets decisions came down in the years immediately following *Reynolds*,[234] each adding in small ways to the development and consolidation of the privilege.[235] The most notable of these was the Second Circuit's 1958 decision in *Halpern v. United States*,[236] which dealt with a claim by an inventor who sought compensation for the government's decision to issue an order of secrecy precluding him from commercially exploiting certain patents with military applications, as provided in the Invention Secrecy Act of 1951.[237]

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233 *See generally infra* Appendix (indicating whether courts adjudicating assertions of the privilege have reviewed ex parte, *in camera* information in the course of resolving such claims).

234 Writing just after *Reynolds* in 1954, Charles McCormick in his influential treatise acknowledged the aspect of *Reynolds* generally supporting the involvement of judges in testing the executive's claim of the state secrets privilege, describing it as consistent with the "preponderance of views among the lower federal courts and among the writers." MCCORMICK, *supra* note 191, at 308. But McCormick was conspicuously silent regarding Vinson's use of the "reasonable danger" standard to limit the circumstances in which *in camera*, ex parte review is permitted. *Id.* at 308–09. Similarly, in the 1961 edition of John Henry Wigmore's classic treatise, *Evidence in Trials at Common Law*, John McNaughton, the edition's reviser, is noncommittal on the issue of the judge's role. On one hand, McNaughton wrote that

> [a] court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the court.

8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2379 (McNaughton ed., 1961). On the other hand, McNaughton went on to note that the "showing" required of the government in support of its claim of state secrets "need be slight and the technique of having the judge peruse the material *in camera* . . . may not be available." *Id.* McNaughton cited *Reynolds* for this proposition, but without comment. *Id.*

235 *See* Tucker v. United States, 118 F. Supp. 371, 372–73 (Ct. Cl. 1954) (dismissing compensation claim brought by alleged covert agent, on *Totten* grounds); Republic of China v. Nat'l Union Fire Ins. Co., 142 F. Supp. 551, 553, 556–57 (D. Md. 1956) (upholding privilege assertion as to diplomatic communications); Snyder v. United States, 20 F.R.D. 7, 9 (E.D.N.Y. 1956) (requiring ex parte, *in camera* production of accident report to test state secret claim).

236 Halpern v. United States, 258 F.2d 36 (2d Cir. 1958).

237 Invention Secrecy Act of 1951, ch. 4, 66 Stat. 3 (1952) (codified as amended at 35 U.S.C.

Halpern sued after the government declined to grant compensation under the Act, and the government responded in part by asserting that the suit could not go forward in light of the state secrets privilege.[238] The Second Circuit concluded, however, that when Congress created a framework for litigation of compensation decisions relating to secrecy orders under the Act, it necessarily anticipated the use of information that otherwise would be protected by the state secrets privilege.[239] As long as measures could be taken to "protect[ ] the overriding interest of national security during the course of a trial," then, evidence would not be withheld and the case could proceed.[240] In this case, where the plaintiff did not require production of any secret information he did not already possess, the court concluded that conducting the entire trial *in camera* should suffice to address the government's concerns.[241]

The court in *Halpern* specifically distinguished *Reynolds* and *Totten* on the ground that in this instance Congress had enacted "a specific enabling statute contemplating the trial of actions that by their very nature concern security information," and also on the ground that Halpern was "not seeking to obtain secret information which he does not possess."[242] Put another way, the state secrets at issue would be shared with no one who did not already have access to them, aside from the judge who would preside over the *in camera* trial. *Halpern* thus suggests that Congress has the power to permit trials for claims that depend in part on privileged information, at least so long as the litigant does not require access to classified information beyond what he or she can establish through their own knowledge and through nonprivileged discovery. To that extent, at a minimum, legislation may overcome the privilege in some circumstances.

Following *Halpern*, nine years passed before another published opinion addressed the privilege. When the topic did finally resurface, it concerned a fact pattern and interpretive issues that would reappear frequently in the years to come.

In 1967, the Supreme Court of Nevada in *Elson v. Bowen* considered whether it had the power to issue a writ of prohibition barring a trial judge from compelling federal agents to plead, testify, and pro-

§§ 181–188 (2000)); *see Halpern*, 258 F.2d at 37–38 (noting that the patent "deals with a manner and means whereby an object may escape observation and detection by radar").

238 *See Halpern*, 258 F.2d at 37–38.

239 *Id.* at 43.

240 *Id.* at 43–44.

241 *See id.* at 44.

242 *Id.*

duce documents concerning allegations that they were involved in installing warrantless wiretaps in Las Vegas hotel rooms.[243] The government argued that the writ was necessary to vindicate the attorney general's assertion of the state secrets privilege, explaining that pleading and discovery would "reveal F.B.I. tactical secrets."[244]

The Nevada Supreme Court, however, agreed with the trial court's determination that the privilege did not apply in this context.[245] It emphasized that the program no longer was secret because its details had been published in the *New York Times*, *Life*, and other newspapers and magazine,[246] and because FBI agents had testified in other cases concerning the particular surveillance at issue.[247] More controversially, the court also asserted that in any event the "government should not be allowed to use the claims of executive privilege . . . as a shield of immunity for the unlawful conduct of its representatives."[248]

Elson thus suggested two significant limitations on the privilege in addition to the potential legislative override identified in *Halpern*: (i) the privilege loses its force once the information at stake becomes public, and (ii) the privilege is categorically inapplicable when the government stands accused of unconstitutional conduct. Only one of these limitations, however, would survive.

D. The Privilege Reaches Maturity

In the first two decades after *Reynolds*, published opinions dealing with the state secrets privilege remained relatively rare.[249] That changed, however, in 1973. From that point onward, as documented in the Appendix to this Article,[250] decisions touching on the privilege have been far more frequent.

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243 Elson v. Bowen, 436 P.2d 12, 13–14 (Nev. 1967).

244 *Id.* at 15–16.

245 *See id.*

246 *Id.* at 15.

247 *Id.*

248 *Id.* at 16.

249 The only other published decision from this period, besides those already cited, is *Heine v. Raus*, 399 F.2d 785, 787–88 (4th Cir. 1968) (sustaining a state secrets objection to answering some but not all deposition questions, in connection with slander suit involving defendant's alleged relationship with the CIA).

250 *See infra* Appendix (identifying all published opinions addressing actual assertions of the state secrets privilege during the years from 1954 though 2006). The Appendix does not include pre-*Reynolds* decisions, though most of these are discussed in the text. It should be noted that the Appendix includes a number of decisions not included in prior compilations, and excludes some opinions that others did count; these cases were excluded based on the judgment that they do not actually involve adjudication of a state secrets claim. *Cf. supra* note 198 (identifying cases, such as *Bank Line*, involving "public interest" rather than "state secrets" claims).

The causes for this shift are difficult to identify with any certainty. At least some of the expansion no doubt reflects a general increase in the number of lawsuits being filed during this period. It also surely is significant that in the early 1970s, there was a vigorous debate in Congress concerning whether the newly proposed Federal Rules of Evidence should include a state-secrets provision.[251] Though Congress ultimately chose not to codify any privileges at all—leaving the status quo, including *Reynolds*, in place[252]—the debate inevitably increased awareness of the state secrets privilege.

At the same time, this period saw numerous other developments that combined to increase the range of circumstances in which the government might wish to assert the privilege. In the early 1970s, there were repeated revelations of possible misconduct within the

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[251] In brief, the original 1971 draft of proposed Federal Rule of Evidence 509 ("Military and State Secrets") would have recognized a privilege for information the release of which would pose a "reasonable likelihood" of harm to "the national defense or the international relations of the United States." Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 375 (1971). At the urging of Deputy Attorney General Kleindienst and Senator McClellan, that proposal was revised also to include protection for "official information," meaning "information within the custody or control of a department or agency of the government the disclosure of which is shown to be contrary to the public interest" and which satisfied certain additional criteria. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 251 (1973) (proposed Rule 509(a)(2)); *see Proposed Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the H. Comm. on the Judiciary*, 93d Cong. 180–81 (1973) [hereinafter *Hearings on Proposed Rules of Evidence*] (statement of Charles R. Halpern and George T. Frampton, Jr., on behalf of the Washington Council of Lawyers). This addition prompted sharp criticism, though it is important to note that the essence of the criticism was the attempt to expand beyond the scope of the state secrets privilege as it had been formulated in *Reynolds*, not to attack the privilege itself. *See, e.g.*, *Hearings on Proposed Rules of Evidence*, *supra*, at 181–85; *cf. id.* at 184 (contending that mere "international relations," as distinct from "national security," was not part of the existing privilege).

[252] Some commentators have suggested that the decision not to enact proposed Rule 509 reflects a rejection of some or all of the concepts contained within it. *See, e.g.*, FISHER, *supra* note 4, at 140–44. The House, Senate, and Conference Committee Reports do not necessarily support that conclusion, however, as they do not speak specifically of Rule 509 at all, but instead refer to the fact that the entire set of individual privilege provisions proved controversial to the extent that they "modifi[ed] or restrict[ed]" existing rules. *See, e.g.*, S. REP. NO. 93-1277, at 11 (1974). Put another way, the manifest intent of Congress in opting to adopt what became Rule 501—stating that the common law approach to privilege continues to apply—was to preserve the status quo, meaning that *Reynolds*, *Totten*, and their progeny continued to control with respect to the state secrets privilege. There were, to be sure, objections to Rule 509 raised by participants in congressional hearings. *See, e.g.*, *Hearings on Proposed Rules of Evidence*, *supra* note 251, at 181–85 (statement of Charles R. Halpern and George T. Frampton, Jr., on behalf of the Washington Council of Lawyers). But insofar as these objections were directed at the existing state secrets privilege (some objections were directed at proposed *expansions* of the privilege, including in particular an attempt to bring "official information" within its ambit), the action Congress ultimately took does not suggest that these objections were heeded. *See id.*

United States by agencies within the intelligence community, several of which involved warrantless surveillance undertaken in the name of national security.[253] These revelations, moreover, came in the wake of statutory and constitutional developments that paved the way for aggrieved parties to respond with litigation. With the enactment of statutory penalties for unlawful surveillance and the Supreme Court's recognition of a private right of action for constitutional violations in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[254] the conditions were particularly ripe for disputes regarding the state secrets privilege.

Not all of the 1970s cases were so dramatic, of course. Decisions such as *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*,[255] in which a district court precluded discovery of documents concerning intelligence including a foreign terrorist organization in connection with a posthijacking insurance dispute, were decidedly run-of-the-mill. But the surveillance cases of that era provided numerous opportunities to consider the nature and scope of the privilege in highly sensitive contexts, including the suggestions in *Elson* that the privilege is vitiated either by public disclosures or by allegations of unconstitutional government conduct.

The first of these decisions, *Black v. Sheraton Corp. of America*,[256] demonstrated the lingering uncertainty regarding whether the state secrets privilege, understood as a privilege relating to national security and foreign affairs, stood apart from other "public interest" privileges belonging to the government, including the deliberative-process privilege.[257] According to the court in *Black*, all such privileges are constitutionally grounded in separation-of-powers concerns, but, contrary to *Reynolds*, none are "absolute."[258] More significantly, perhaps, *Black* followed *Elson* in concluding that "evidence which concerns the government's illegal acts [is] not privileged" at all,

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253 For a discussion of these developments, see Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 806–07 (1989).

254 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971).

255 Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 368 F. Supp. 1098, 1139–41 (S.D.N.Y. 1973).

256 Black v. Sheraton Corp. of Am., 371 F. Supp. 97 (D.D.C. 1974).

257 *Id.* at 100.

258 *Id.*

and that the government therefore had an obligation to produce the FBI's classified investigative file on the plaintiff in that case.[259]

Some aspects of *Black* would fare better than others in subsequent cases. On one hand, its conclusion that the state secrets privilege derives from separation-of-powers considerations received indirect support just six months later when the Supreme Court issued *United States v. Nixon*.[260]

Nixon was not, of course, a state secrets privilege case. Rather, it involved the President's attempt to avoid production to the Watergate special prosecutor of tapes and transcripts of conversations among the president and his advisors, on the ground of general executive privilege.[261] Nixon argued initially for the proposition that the separation of powers precluded judicial review of his privilege claim, a proposition that the Court easily rejected (thus reinforcing the conclusion in *Reynolds* that all assertions of privilege at the very least are justiciable).[262] Nixon next argued, and the court agreed, that the President's need for confidentiality with advisors warranted recognition that executive privilege is a constitutionally derived privilege.[263] It did not follow, however, that all such intraexecutive communications were beyond discovery. "*Absent a claim of need to protect military, diplomatic, or sensitive national security secrets*,"[264] the Court explained, executive privilege is not absolute and may in appropriate circumstances give way to "the legitimate needs of the judicial process."[265] The reference to the possibility of a different result in a case involving security or diplomatic information was dictum, but the point was clear enough. State secrets—understood as military, diplomatic, and other information impacting national security—might be protected, at least to some degree, as a constitutional matter. If so, then it would be

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259 *Id.* at 101–02. Note that it is not entirely clear in *Black* that Attorney General Richardson asserted the state secrets privilege in particular, as opposed to a more general claim of executive privilege. *See also* United States v. Ahmad, 499 F.2d 851, 854 (3d Cir. 1974) (noting that Attorney General Mitchell in his affidavit referred to "present danger to the structure or existence" of the government and the "national interest" in asserting executive privilege).

260 United States v. Nixon, 418 U.S. 683, 708 (1974) (endorsing a qualified executive privilege as "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution").

261 *Id.* at 686, 703.

262 *See id.* at 705–06.

263 *See id.*

264 *Id.* at 706 (emphasis added).

265 *Id.* at 707.

reasonable to say that the state secrets privilege also has constitutional underpinnings.[266]

In contrast, the illegality exception enunciated both in *Black* and *Elson*—i.e., the proposition that the privilege cannot be invoked in response to allegations of unlawful government conduct—did not fare well in subsequent cases. There were several district and circuit court opinions after *Black* and *Elson* that adjudicated state-secrets claims in the face of civil suits alleging illegal surveillance or intelligence-gathering activity in the United States.[267] None followed *Black* and *Elson* in recognizing an illegality exception to the privilege. On the contrary, by sustaining the government's assertion of the privilege notwithstanding allegations of illegal activity (or, in some instances, recognizing that the government might be able to assert the privilege upon satisfaction of the formalities required by *Reynolds*), these decisions implicitly rejected such an exception.

The most significant problem that the government faced in using the state secrets privilege to obtain dismissal of the 1970s surveillance suits was not the possibility of an illegality exception, but instead the inconvenient fact that at least some of the supposedly secret information at issue had in fact become public through leaks, investigations, and other sources.[268] Even that obstacle, however, was overcome in some circumstances, as the D.C. Circuit's decision in *Halkin v. Helms* illustrates.[269]

Halkin involved a suit brought by twenty-seven individuals and organizations against the National Security Agency ("NSA"), CIA, Defense Intelligence Agency, FBI, Secret Service, and three telecommunications companies asserting constitutional and statutory viola-

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266 The Fourth Circuit took this position in affirming dismissal of El-Masri's lawsuit. *See* El-Masri v. United States, 479 F.3d 296, 303–04 (4th Cir. 2007) (concluding that the privilege "has a firm foundation in the Constitution, in addition to its basis in the common law of evidence").

267 *See* ACLU v. Brown, 619 F.2d 1170, 1172–74 (7th Cir. 1980) (en banc) (sustaining privilege in part and remanding to district court for consideration of whether *in camera* review would be appropriate); Halkin v. Helms, 598 F.2d 1, 5, 11 (D.C. Cir. 1978) (sustaining privilege in full); Spock v. United States, 464 F. Supp. 510, 518 (S.D.N.Y. 1978) (sustaining privilege but recognizing that some information already was in the public domain); Jabara v. Kelley, 75 F.R.D. 475, 489–94 (E.D. Mich. 1977) (sustaining privilege as to some but not all information); Kinoy v. Mitchell, 67 F.R.D. 1, 9–10 (S.D.N.Y. 1975) (postponing resolution of privilege claim pending government compliance with the *Reynolds* formalities).

268 *See, e.g.*, *Spock*, 464 F. Supp. at 519 (noting that the intercepted communications in question were previously disclosed in a *Washington Post* article).

269 *Halkin*, 598 F.2d at 10–11.

tions arising out of warrantless surveillance activities.[270] The government moved to dismiss the complaint on the ground that pleading in response to it "would reveal important military and state secrets respecting the capabilities of the NSA for the collection and analysis of foreign intelligence."[271] After reviewing both an open and a classified affidavit from the Secretary of Defense explaining the government's grounds for asserting the privilege, the district court dismissed the complaint insofar as one NSA program was concerned, but refused to do so as to the NSA's "SHAMROCK" program (involving the surveillance of international telegram traffic), on the ground that there had been sufficient public disclosures concerning that program to vitiate the privilege as to it.[272]

Siding entirely with the government, the D.C. Circuit reversed the determination that SHAMROCK no longer triggered state-secrets protection.[273] Whatever else may be known about SHAMROCK, the court reasoned, the particular targets of the operation had not yet been disclosed.[274] The court noted that disclosing this information would provide much insight of intelligence value, including the particular channels subject to surveillance, the communications likely to have been surveilled, who might be considered a target of interest, and—citing the "mosaic" theory of intelligence analysis[275]—a range of other possible inferences.[276] The fact that the plaintiffs contended that the underlying conduct was itself unlawful, moreover, did not enter into the analysis at all. Accordingly, the panel reversed the district court's holding as to SHAMROCK, and remanded for dismissal.[277]

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270 *Id.* at 3.

271 *Id.* at 3–4.

272 *Id.* at 5.

273 *Id.*

274 *See id.* at 8–9.

275 For thorough discussions of the mosaic theory across a range of contexts in which it arises, see generally Christine E. Wells, CIA v. Sims*: Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845 (2006); David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628 (2005).

276 *See Halkin*, 598 F.2d at 8–9.

277 *Id.* at 11. In this respect, *Halkin* illustrates the relationship between *Totten* and *Reynolds*. In some instances, a claim simply cannot proceed in light of the state secrets privilege, either because the privilege causes the plaintiff to lack necessary evidence or because even pleading in response to the complaint requires exposure of protected information. *Cf.* Tenet v. Doe, 554 U.S. 1, 2 (2005) (describing *Totten* as a "categorical . . . bar" distinct from the state secrets privilege as recognized in *Reynolds*). Notably, where application of the privilege will have such dire consequences, *Reynolds* clearly requires the maximum degree of judicial inquiry into the claim that state secrets are in fact at issue, and thus we see the court in *Halkin* clearly

With only a few arguable exceptions,[278] subsequent state secrets privilege rulings in the pre–9/11 era did not differ much from this reasoning, though the variations among fact patterns—particularly regarding the extent to which (i) the purported secret in fact became public and (ii) the government official invoking the privilege had complied with the *Reynolds* formalities—did result in some variation among outcomes.[279]

After only six opinions considering assertions of the privilege were published in the nineteen-year period from 1954 through the end of 1972, there were sixty-five such published opinions in the twenty-nine-year period from 1973 through the end of 2001.[280] Of these sixty-five opinions, twenty-eight sought the dismissal of some or all claims asserted by a plaintiff either against the government or a third party,

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affirming the propriety of ex parte, *in camera* consideration of the government's explanation. *See Halkin*, 598 F.2d at 9.

278 The government's invocation of the privilege was rejected outright by the Court of International Trade in a pair of cases arising out of industry attempts to trigger antidumping duties on steel imports from certain states. *See* Republic Steel Corp. v. United States, 538 F. Supp. 422, 423 (Ct. Int'l Trade 1982), *vacated sub nom.* United States v. Republic Steel Corp., 4 I.T.R.D. (BNA) 1324 (Fed. Cir. 1982); U.S. Steel Corp. v. United States, 578 F. Supp. 409, 413 (Ct. Int'l Trade 1983). In both cases, the petitioners sought production of diplomatic correspondence and related documents involving communications between U.S. and foreign officials, with the government resisting production under the foreign relations prong of the privilege. Apparently construing the privilege to extend only to such matters insofar as they either intersect directly with national security concerns or "extremely sensitive question[s]" such as "recognition of Communist China," the court rejected the privilege assertions. *See Republic Steel*, 538 F. Supp. at 423.

279 A review of other published opinions dealing with the privilege between 1975 and 1980 conveys a sense of this variation. *See, e.g.*, Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (requiring dismissal of complaint relating to Navy procurement contract); ACLU v. Brown, 619 F.2d 1170, 1173 (7th Cir. 1980) (en banc) (requiring district court to conduct *in camera* review of classified materials sought by plaintiffs in suit concerning domestic military intelligence activities); Clift v. United States, 597 F.2d 826, 830 (2d Cir. 1979) (concluding that dismissal was not yet appropriate in patent dispute involving encryption); United States v. Felt, 502 F. Supp. 74, 76–77 (D.D.C. 1980) (imposing advance notice requirement before defendants attempt to elicit certain testimony to preserve government's option to raise a state secrets objection); Sigler v. LeVan, 485 F. Supp. 185, 199–200 (D. Md. 1980) (dismissing claim based on privileged documents relating to counterintelligence practices, but otherwise permitting claim to proceed); United States v. Felt, 491 F. Supp. 179, 187–88 (D.D.C. 1979) (sustaining privilege as to all but two documents in connection with criminal defendant's request for information concerning their contacts with foreign powers); Spock v. United States, 464 F. Supp. 510, 518, 520 (S.D.N.Y. 1978) (recognizing applicability of privilege to wiretapping suit, but finding that the facts as to plaintiff already were public); Kinoy v. Mitchell, 67 F.R.D. 1, 8–9, 17 (S.D.N.Y. 1975) (delaying decision in warrantless surveillance suit pending compliance with the *Reynolds* formalities).

280 *See infra* Appendix.

and thirty-seven instead merely sought relief from discovery.[281] In both contexts, the government prevailed more often than not; twenty-three of the twenty-eight dismissal motions were granted, as were thirty of the thirty-seven discovery motions.[282] Charts 1, 2, and 3 below provide a year-by-year breakdown of this data for the entire period from 1954 through 2006.

Chart 1 – Published Opinions in State-Secrets Cases (1954–2006)

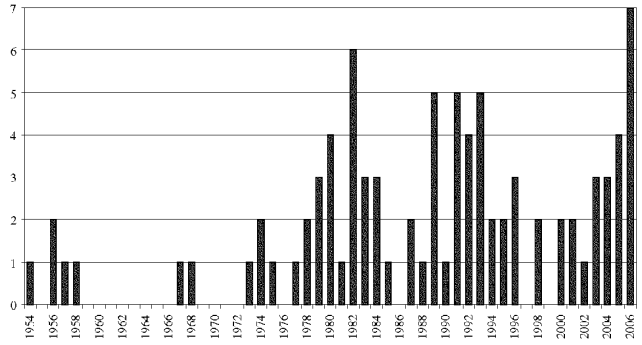
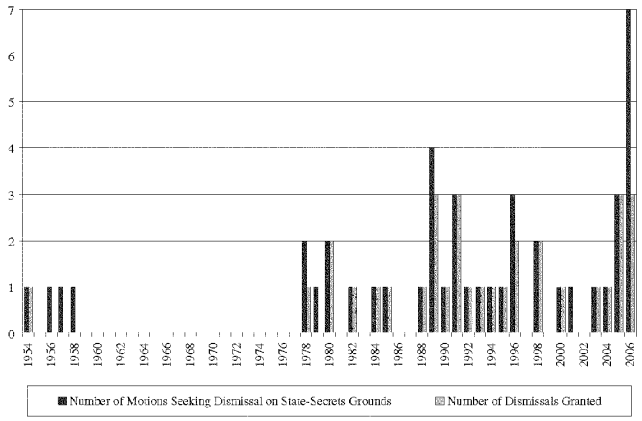


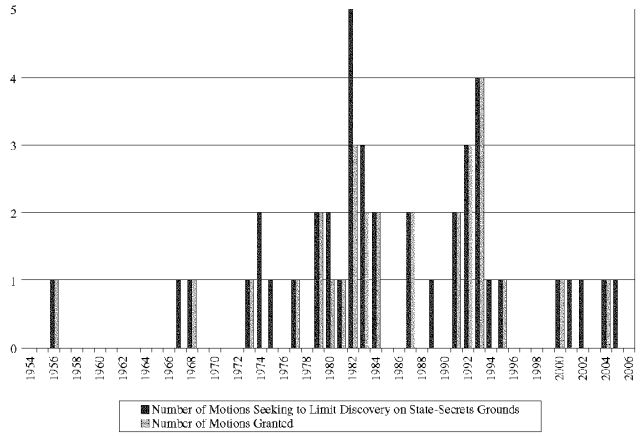
Chart 2 – Results in State-Secrets Cases Seeking Dismissal (1954–2006)



281 *See id.* The government typically moves in the alternative for dismissal or for summary judgment.

282 *See id.*

Chart 3 – Results in State-Secrets Cases Seeking to Limit Discovery (1954–2006)



E. State Secrets and the Post–9/11 Era

Counterterrorism policies and practices by their very nature tend to entail secrecy. In significant part, this reflects the fact that counterterrorism measures often depend on the effective collection, analysis, and distribution of intelligence. When the 9/11 attacks ushered in the current era of strategic prioritization of counterterrorism, it thus was inevitable that government secrecy would become a more significant issue in the overall national security debate. And when the particular methods of pursuing this strategic priority in the wake of 9/11 came to include such covert measures as extraordinary rendition and warrantless surveillance, it also was inevitable that the state secrets privilege would become a prominent litigation issue, just as it had been in the 1970s in connection with an earlier cycle of warrantless surveillance activities. The question thus arises: has the Bush administration used the privilege differently—either in qualitative or quantitative terms—than its predecessors?

A number of observers have claimed that the Bush administration has in fact used the privilege differently, in both respects. The leading account in this regard is an article published in *Political Science Quarterly* in 2005 by William Weaver and Robert Pallitto of the University of Texas–El Paso.[283] Weaver and Pallitto begin with the

[283] Weaver & Pallitto, *supra* note 4.

proposition that "executive branch officials over the last several decades have been emboldened to assert secrecy privileges because of judicial timidity and because of congressional ineffectiveness in reviewing the myriad of substantive secrecy claims invoked by presidents and their department heads."[284] Insofar as this claim concerns the state secrets privilege in particular, the quantitative aspect of the claim is consistent with the data described above. But the suggested causal mechanism fails to account for alternative explanations, including most notably an increase in the number of lawsuits implicating classified information and thus providing occasions to assert the privilege. In their view, in any event, this trend has taken a turn for the worse in recent years because of what they describe as "the impulse of the Bush administration to expand the use of the [state secrets] privilege to prevent scrutiny and information gathering by Congress, the judiciary, and the public."[285] Weaver and Pallitto conclude "that Bush administration lawyers are using the privilege with offhanded abandon" in at least some cases,[286] while simultaneously "show[ing] a tendency . . . to expand the privilege to cover a wide variety of contexts."[287]

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284 *Id.* at 86. Attributions of the state secrets privilege to a particular administration are especially problematic when using a data set based on published opinions, as it would be more sensible to focus on the date on which the privilege first was asserted by the Justice Department than on the date of the opinion. In the case of district court opinions ruling on motions presenting the privilege issue, that initial date often will be relatively close in time to the date of publication, but at least potentially could be a year or more in the past. With respect to circuit court opinions, the problem is much worse, as in most instances the initial assertion would have occurred at least a year in the past. One must take care to acknowledge the selection bias inherent in any assessment based exclusively on published opinions, for that measure by definition fails to account for the potentially numerous relevant decisions that went unpublished, not to mention the cases that resulted in published decisions on other grounds that obviated the need for the court to engage a state secrets-related motion that actually had been made. *See id.* at 101; Ahmed E. Taha, *Data and Selection Bias: A Case Study*, 75 UMKC L. Rev. 171, 173–74 (2006) (describing selection and other biases that distort the empirical picture presented by published judicial opinions). The reality is that we simply do not know, and have no way of finding out, just how frequently the privilege may have been asserted during any particular period.

285 Weaver & Pallitto, *supra* note 4, at 111; *cf. id.* at 89 (claiming that refusals of "litigation-related requests for classified documents . . . have reached new heights in the current Bush administration, where even routine requests for information by Congress and the courts are refused or stonewalled").

286 *Id.* at 109.

287 *Id.* at 107; *see also* Frost, *supra* note 4, at 1939–40 (asserting that the data in this article still supports the view that the Bush administration differs qualitatively and quantitatively from its predecessors); Fuchs, *supra* note 113, at 134–35 (indicating a heightened use of the state secrets privilege by relying on Weaver and Pallitto's data); Gardner, *supra* note 113, at 583–85 (asserting, in 1994, that "an alarming phenomenon has developed" over the "past twenty years," with the executive branch invoking the privilege "much more frequently" and in an increasing

The available data do suggest that the privilege has continued to play an important role during the Bush administration, but it does not support the conclusion that the Bush administration chooses to resort to the privilege with greater frequency than prior administrations or in unprecedented substantive contexts.

1. *The Problem of Assessing Frequency*

Consider first the question of frequency. As Weaver and Pallitto observe, the government does not maintain a master list of the occasions in which the state secrets privilege has been invoked.[288] Accordingly, the only practical way to assemble quantitative data on the subject is to combine the examples that can be identified from a search of published opinions with whatever additional examples can be unearthed revealing assertions of the privilege in cases that did not result in a published opinion. Given the difficulty of assembling a reliably complete set of unpublished examples, this is a decidedly unstable basis for making quantitative claims.[289]

Even if it were possible to identify all cases in which the government asserted the privilege, difficult questions of political attribution arise. Particularly with respect to cases identified by virtue of a circuit court opinions published in the first or second year of a presidential administration, it may well be the case that the original invocation of the privilege occurred under the prior administration. One can argue for attribution to either or both administrations in that circumstance, but in any event, one presumably should be at least as interested in the date of the original invocation of the privilege as in the date of any published opinions that may subsequently result. Accordingly, one would have to comb through the district court docket in each relevant case to identify the "origin" date for the initial assertion of the privilege to have a firm basis for attributing that assertion to a given administration.

Finally, and most significantly, even if it were possible to assemble an accurate and complete collection of all invocations of the privilege, year-to-year comparisons have little value unless one assumes that the government is presented each year with the same number of

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variety of substantive contexts); OPENTHEGOVERNMENT.ORG, SECRECY REPORT CARD 2006: INDICATORS OF SECRECY IN THE FEDERAL GOVERNMENT 7 (2006), http://www.openthegovernment.org/otg/SRC2006.pdf (indicating the government's heightened use of the state secrets privilege).

288 *See* Weaver & Pallitto, *supra* note 4, at 111.

289 *See* Taha, *supra* note 284.

occasions on which it might assert the privilege. Of course, that is not the case. Just as the general volume of litigation varies over time, so too do the occasions for invocation of the privilege. Some years will see more litigation implicating classified information than others, as recent experience with the NSA's warrantless surveillance program amply demonstrates. It makes little sense to compare the rate of assertions of the privilege in such a year to an earlier year in which few or no such occasions arose. Taken together, these considerations establish that there is little point in asking whether the government asserted the privilege at an unusually high rate in any given year.[290]

The more significant and appropriate question is whether the state secrets privilege has expanded in recent years in *substantive* terms.

2. *Has the Privilege Evolved in Substantive Terms?*

The question of substantive expansion can be understood in at least three ways, all of which require consideration. First, has the scope of the privilege changed in terms of the information that it protects? Second, has the analytical framework for privilege claims been modified so as to increase judicial deference to the executive branch? Third, has the nature of the relief sought in connection with privilege assertions changed so as to provide greater benefits to the government? The record of published opinions, whatever its other limitations, does provide a useful window into these three issues.

a. *The Nature of the Information Protected*

The first issue is whether the privilege has been used in recent years to protect information not previously thought to be within its scope. A comparison of recent assertions of the privilege to earlier examples suggests that it has not.

Published opinions during the Bush administration can be grouped into three broad categories with respect to the nature of the information in issue. The first and least controversial of these groups involves efforts to protect technical information related to national security. There have been at least four cases in the post–9/11 era in which the government invoked the state secrets privilege to prevent disclosure of technical information relating to national security, in-

[290] For what it is worth, the Appendix shows twenty-two published opinions dealing with the state secrets privilege between 2000 and 2006; twenty-five between 1990 and 1999; twenty-two between 1980 and 1989; fourteen between 1970 and 1979; and two between 1960 and 1969.

cluding information relating to missile defense,[291] stealth technology,[292] data-mining,[293] and devices for linking underwater fiber optic cables.[294] Such efforts are in keeping with the aims of state-secrets cases dating back at least as far as *Firth Sterling*, the 1912 case involving specifications for armor-piercing projectiles.[295] Indeed, *Reynolds* itself was justified in these terms.[296]

The second general category concerns the internal operations of agencies and departments involved in national defense and intelligence, including the military, the FBI, the CIA, and other components of the intelligence community. Under this heading one finds both employment and contractual disputes, and also matters pertaining to facilities management. There are, for example, cases in which the government seeks to protect information that would disclose whether particular individuals have covert employment or other relationships with the government. There have been at least three such cases in the post–9/11 era: a man who convinced a lender that he had a relationship with the CIA,[297] an employment discrimination suit at the CIA that would require proof of the status and duties of other employees,[298] and an attempt by defectors to establish an obligation on the part of the CIA to provide them with certain benefits.[299] The last of

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291 *See* United States *ex rel.* Schwartz v. TRW, Inc., 211 F.R.D. 388, 392–94 (C.D. Cal. 2002) (holding that the government failed to comply with the *Reynolds* formalities, but leaving an option for the government to renew its privilege claim in opposition to discovery request).

292 *See* McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1022–24 (Fed. Cir. 2003) (holding that state secrets privilege precluded contractor from asserting a "superior knowledge" defense in contract dispute relating to stealth technology).

293 *See* DTM Research, LLC v. AT&T Corp., 245 F.3d 327, 330, 334–35 (4th Cir. 2001) (quashing subpoena seeking information about government's data-mining technology).

294 *See* Crater Corp. v. Lucent Tech., Inc., 423 F.3d 1260, 1261–62 (Fed. Cir. 2005) (granting protective order against discovery of facts relating to manufacture and use of underwater coupling device).

295 *See* Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353, 355–66 (E.D. Pa. 1912) (excluding evidence for reasons of public policy and citing *Totten*); *see also, e.g.*, Bareford v. Gen. Dynamics Corp., 973 F.2d 1138, 1140, 1145 (5th Cir. 1992) (affirming dismissal of complaint relating to missile defense system); Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 545 (2d Cir. 1991) (affirming dismissal of suit relating to missile defense); Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1487, 1496 (C.D. Cal. 1993) (dismissing complaint relating to missile specifications and rules of engagement).

296 *See* Reynolds v. United States, 345 U.S. 1, 10–11 (1953) (concerning classified radar equipment aboard a military airplane that crashed).

297 *See* Monarch Assurance P.L.C. v. United States, 244 F.3d 1356, 1358, 1365 (Fed. Cir. 2001) (sustaining privilege but not immediately requiring dismissal).

298 *See* Sterling v. Tenet, 416 F.3d 338, 341–42, 349 (4th Cir. 2005) (affirming dismissal of complaint).

299 *See* Tenet v. Doe, 544 U.S. 1, 3–4, 11 (2005) (holding that *Totten* requires dismissal of suit by alleged former Cold War spies against the CIA).

these cases, *Tenet v. Doe*, was particularly significant because it clarified that unacknowledged espionage relationships cannot form the basis of litigation regardless of whether the state-secrets standard (that there exists a reasonable risk that disclosure would harm national security) has been met.[300] That wrinkle aside, however, this cluster of "internal activities" cases broke no new ground in comparison to earlier eras.[301]

The other cluster of "internal activities" cases could be classified as attempts to protect information describing security-sensitive internal policies and procedures. Under this heading, one finds a pair of decisions arising out of a whistleblower's claims of security breaches at the FBI,[302] a defamation action arising out of a counterintelligence investigation,[303] a suit relating to employment at a classified Air Force facility,[304] and a suit alleging religious discrimination as the motive for a counterintelligence investigation.[305] In each case, the complaint was dismissed or summary judgment was granted in recognition that the suit could not proceed in the absence of information within the scope of the privilege. Again, this was not a break with past practices.[306]

The third category, and no doubt the most controversial, concerns information about externally directed activities undertaken by the government in the name of national defense or intelligence. Under this heading, the government has sought to preclude challenges

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300 *See id.* at 8–9; *see also* A. John Radsan, *Second-Guessing the Spymasters with a Judicial Role in Espionage Deals*, 91 IOWA L. REV. 1259, 1287–90, 1296–98 (2006) (discussing *Tenet v. Doe*).

301 *See, e.g.*, Totten v. United States, 92 U.S. 105, 107 (1875); Maxwell v. First Nat'l Bank of Md., 143 F.R.D. 590, 600 (D. Md. 1992) (granting protective order relating to defendant's alleged relationship with CIA).

302 *See* Burnett v. Al Baraka Inv. & Dev. Corp., 323 F. Supp. 2d 82, 84 (D.D.C. 2004) (quashing deposition subpoena in part); Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65, 67, 81–82 (D.D.C. 2004) (dismissing complaint).

303 *See* Trulock v. Lee, 66 F. App'x 472, 473–78 (4th Cir. 2003) (affirming dismissal of complaint).

304 *See* Darby v. U.S. Dep't of Def., 74 F. App'x 813, 814 (9th Cir. 2003) (affirming summary judgment).

305 *See* Tenenbaum v. Simonini, 372 F.3d 776, 777–78 (6th Cir. 2004) (affirming summary judgment).

306 *See, e.g.*, Kasza v. Browner, 133 F.3d 1159, 1169–70 (9th Cir. 1998) (affirming dismissal of complaint regarding alleged environmental problems at classified military facility); Bowles v. United States, 950 F.2d 154, 155–56 (4th Cir. 1991) (dismissing the United States as a party in tort suit relating to State Department vehicle usage policies); Weston v. Lockheed Missiles & Space Co., 881 F.2d 814, 815–16 (9th Cir. 1989) (noting decision below dismissing complaint relating to Defense Department guidelines relating to security clearances); Tilden v. Tenet, 140 F. Supp. 2d 623, 627 (E.D. Va. 2000) (dismissing complaint relating to classified CIA procedures and personnel).

to two categories of covert activity aimed at collecting intelligence relating to the war on terrorism: warrantless surveillance[307] and extraordinary rendition.[308] Both have been the subject of leaks and some degree of official confirmation, and, as a result, are topics of intense political debate and public interest.[309] Separate from the question of whether these leaks and confirmations suffice to vitiate any privilege that might otherwise have attached to them, it is relatively clear that attempts to assert the privilege to shield the details of intelligence collection programs—including programs that allegedly violate individual rights—are by no means unprecedented. On the contrary, the warrantless surveillance issue in particular was the subject of extensive privilege litigation during the 1970s and early 1980s, resulting in no fewer than nine published opinions.[310] The current rendition cases, moreover, are not the first occasions on which courts have been asked to apply the privilege to protect information relating to cooperation foreign states may have given to the U.S. intelligence community.[311] Whatever else may be said of these sensitive cases, the nature of their subject matter does not support the conclusion that the Bush administration is breaking new ground with the state secrets privilege.

b. The Nature of Judicial Review

In addition to the possibility that recent assertions of the privilege differ as to the nature of the information sought to be protected, there also is the possibility that the government is advancing—and the

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307 *See, e.g.*, Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006); Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006); Hepting v. AT&T Corp., No. C-06-672 VRW, 2006 WL 1581965 (N.D. Cal. June 6, 2006); ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

308 *See* El-Masri v. Tenet, 437 F. Supp. 2d 530, 534 (E.D. Va. 2006); Arar v. Ashcroft, 414 F. Supp. 2d 250, 256–57, 287 (E.D.N.Y. 2006).

309 *See, e.g.*, Mayer, *supra* note 13; James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

310 *See* Ellsberg v. Mitchell, 709 F.2d 51, 52 (D.C. Cir. 1983) (sustaining privilege as to some but not all of the information in issue); Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982); Salisbury v. United States, 690 F.2d 966 (D.C. Cir. 1982); Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978); United States v. Ahmed, 499 F.2d 851 (3d Cir. 1974); United States v. Felt, 491 F. Supp. 179 (D.D.C. 1979); Spock v. United States, 464 F. Supp. 510 (S.D.N.Y. 1978); Kinoy v. Mitchell, 67 F.R.D. 1 (S.D.N.Y. 1975); Black v. Sheraton Corp. of Am., 371 F. Supp. 97 (D.D.C. 1974).

311 *See Felt*, 491 F. Supp. at 181–82, 187–88 (sustaining privilege as to documents reflecting defendants' overseas activities, though requiring limited production nonetheless in light of government's decision to prosecute); Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 368 F. Supp. 1098, 1104 (S.D.N.Y. 1973) (precluding discovery of CIA information relating to foreign terrorist organization).

courts accepting—new procedures for making the privilege determination. On close inspection, this turns out not to be the case.

A review of the government's state-secrets motion in *Hepting v. AT&T Corp.*,[312] a warrantless surveillance case, provides a useful way to approach the question of whether the government is advocating a new or different approach to the process of reviewing state-secrets claims. The government's brief begins by describing the *Reynolds* prerequisites for any invocation of the privilege: "'There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by the officer.'"[313] The brief goes on to assert that courts must provide great deference to the government's claim, deciding only whether the government has complied with procedural requirements and, if so, whether there is a "reasonable danger" that disclosure of the information at issue will harm national security.[314] "The court may consider the necessity of the information to the case only in connection with assessing the sufficiency of the Government's showing that there is a reasonable danger that disclosure of the information at issue would harm national security," the government argued, meaning that the degree of judicial scrutiny should increase with the litigant's need—but not that the privilege, if properly asserted, can be overcome.[315] The government also read *Reynolds* as discouraging even *in camera*, ex parte review by the judge of the factual predicate for the privilege claim, but properly acknowledged that "[n]onetheless, the submission of classified declarations for *in camera*, *ex parte* review is 'unexceptional' in cases where the state secrets privilege is invoked."[316] In short, nothing in this formulation appears to suggest a process that varies in any significant way from that employed in other post-*Reynolds* cases.

c. *The Nature of the Relief Requested*

Some commentators have suggested that the Bush administration is breaking with past practice by using the privilege to seek dismissal

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312 Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006).

313 Memorandum of the United States in Support of the Military & State Secrets Privilege & Motion to Dismiss or, in the Alternative, for Summary Judgment at 8, *Hepting*, 439 F. Supp. 2d 974 (No. 06-cv-672) (quoting United States v. Reynolds, 345 U.S. 1, 7–8 (1953)), *available at* http://www.eff.org/legal/cases/att/GovMotiontoDismiss.pdf.

314 *See id.* at 9–10.

315 *Id.* at 10.

316 *Id.* at 11.

of complaints rather than just exemption from discovery.[317] The data do not support this claim, however. The record of published opinions, however limited, demonstrates that the government has a long history of requesting dismissal (or summary judgment) on state secrets grounds. Table 1 below describes the rate at which the government has moved for dismissal of complaints based on the state secrets privilege, and the rate at which courts have granted such motions, on a per-decade basis, beginning in the 1970s.

Table 1 – Dismissal Motions in State-Secrets Cases (1971–2006)[318]

Decade	Motions	Grants
1971–1980	5	3
1981–1990	9	8
1991–2000	13	12
2001–2006	16	10

Whatever the implications of this data for the *quantitative* inquiry disparaged above, its implications are clear for the *qualitative* question of whether the government in recent years has begun to seek unprecedented forms of relief under the privilege. The government has been seeking outright dismissal of complaints on state-secrets grounds for quite some time, and has done so with considerable success at least since the 1970s.

Some critics concede that prior state secrets cases have resulted in dismissals but argue that recent practice nonetheless differs in that dispositive motions on the basis of the privilege are now being made at the pleadings stage. Indeed, one such article takes issue with my own analysis in the draft version of this article, concluding that "Chesney overlooks an important development that really is new—invocations of the privilege have long been coupled with motions to dismiss, but now the invocations of the privilege and motions to dismiss come *before* discovery has begun."[319] The case law, however, simply does not support that proposed distinction.[320]

317 *See, e.g.*, FROST, *supra* note 4, at 1933; Shayana Kadidal, *The State Secrets Privilege and Executive Misconduct*, JURIST, May 30, 2006, http://jurist.law.pitt.edu/forumy/2006/05/state-secrets-privilege-and-executive.php.

318 *See infra* Appendix.

319 D.A. Jeremy Telman, *Our Very Privileged Executive: Why the Judiciary Can (and Should) Fix the State Secrets Privilege*, 80 TEMP. L. REV. (forthcoming 2007) (manuscript at 25, on file with author), *available at* http://ssrn.com/abstract=986401.

320 *See, e.g.*, Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (affirming 12(b)(6) dismissal at the pleading stage on state secrets grounds).

F. Lessons Learned

What lessons may be learned from the foregoing discussion? Perhaps most significantly, the survey of the origin and evolution of the state secrets privilege suggests as a descriptive matter that the current pattern of implementation of the state secrets privilege does not depart significantly from its past usage. The privilege unquestionably produces harsh results from the perspective of the litigants against whom it is invoked, but that harshness has long accompanied the privilege and cannot be solely attributed to the current administration. So long as courts recognize a capacity in the government to preclude the discovery or use at trial of security-sensitive evidence, the reality under the modern doctrine is that some suits—including some entirely valid claims—will be dismissed.

To say that the privilege has long been with us and has long been harsh is not to say, however, that it is desirable to continue with the status quo. The modern privilege zealously protects the legitimate government interests identified earlier with respect to the benefits of secrecy. But given the degree of deference inherent in the "reasonable danger" standard mandated by *Reynolds*, there is some reason to be concerned that the privilege is overinclusive in its results, perhaps significantly so. At the same time, the use of the privilege to obtain dismissals of suits alleging government misconduct or unconstitutional behavior (as opposed to, say, breach of contract suits between government contractors) raises special concerns relating to democratic accountability and the rule of law. Bearing this in mind, it is fair to ask whether Congress has the power to alter the current framework for analysis of privilege claims, and if so, what sort of reform might be desirable.

IV. What Might Congress Do?

If Congress at some point considers modifying the state secrets privilege, questions will arise as to which aspects of the privilege can be changed and which changes might be desirable to improve the balance the privilege attempts to strike among the legitimate interests of litigants, the government, and the public.

The question of which aspects of the privilege Congress *can* change is complicated by the possibility that the privilege is best viewed not as a run-of-the-mill common-law evidentiary doctrine, but instead as one compelled at least in part by constitutional considera-

tions.[321] The privilege did emerge in traditional common-law fashion, of course, as described in detail in the preceding section. Even in its early, preconsolidation stages, however, there were indications that judges were drawing on separation-of-powers considerations in developing the rule.[322] More to the point, when the Supreme Court in *Nixon* recognized the constitutional foundations of executive privilege, it explicitly linked the privilege to "military, diplomatic, or sensitive national security secrets" and excepted such circumstances from its holding that executive privilege is merely qualified rather than absolute.[323] As the Fourth Circuit concluded in the course of affirming the dismissal of El-Masri's complaint, *Nixon* thus suggests that the state secrets privilege is at some level an artifact of Article II and the separation of powers.[324]

The constitutional core of the state secrets privilege is best understood as a consequence of functional considerations associated with the particular advantages and responsibilities of the executive branch vis-à-vis national defense and foreign relations.[325] Plainly, however, this constitutional core does not account for the full scope of the privilege as it has come to be understood. For example, not every bit of information relating to national defense and diplomacy may be withheld by the executive branch from Congress in its investigative mode, though the line between that which it may and that which it may not is far from clear.

More to the point, the history of the privilege itself is punctuated by occasional examples of legislation that courts have construed to override the privilege, at least to some extent, to facilitate litigation on topics such as security-sensitive patents[326] and antidumping tariff decisions.[327] It might be best, then, to conceive of the state secrets privi-

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321 *See* El-Masri v. United States, 479 F.3d 296, 303–04 (4th Cir. 2007) (stating that the privilege has a firm foundation in the Constitution).

322 *See supra* Part III.A (discussing the role of *Marbury* and *Burr* in the privilege's formative period).

323 United States v. Nixon, 418 U.S. 683, 706 (1974).

324 *See El-Masri*, 479 F.3d at 303–04; *cf.* Tenet v. Doe, 544 U.S. 1, 11 (2005) (Stevens, Ginsburg, JJ., concurring) (conspicuously describing *Totten* as a "federal common-law rule" and stating that Congress thus "can modify" that rule if it wishes to do so).

325 For a discussion of these qualities, see Eric Posner and Cass Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007).

326 *See* Halpern v. United States, 258 F.2d 36, 43–44 (2d Cir. 1958) (permitting, under the Invention Secrecy Act of 1951, ch. 4, 66 Stat. 3 (1952) (codified as amended at 35 U.S.C. §§ 181–188 (2000)), use of classified information already in the hands of a litigant, subject to special procedural protections, including the striking of a jury demand in favor of a sealed, *in camera* trial).

327 *See* U.S. Steel Corp. v. United States, 578 F. Supp. 409, 411–12 (Ct. Int'l Trade 1983)

lege as having a potentially inalterable constitutional core surrounded by a revisable common-law shell.[328] This shell developed over the decades out of respect for the prudential considerations that arise when the government's interests come into tension with the personal interests of litigants and the public's interest in effective government and democratic accountability.

Drawing the line between the core and the shell would not be an easy task, but the important point is that in theory there is at least some room for legislative modification of the privilege. Assuming that this is correct, this analysis suggests that Congress could legislate different rules for resolving state secrets privilege claims in at least some instances.

Should it do so? And if this is desirable, what might it do? The case for reform is strongest with respect to suits alleging unconstitutional conduct on the part of the government. Such suits presumably present the most compelling set of offsetting concerns in terms of the public's interest in democratic accountability and enforcement of the rule of law. Thinking along these lines no doubt informed the nondeferential (though ultimately uninfluential) approaches taken in *Black* and *Elson*, the cases discussed above in which courts declined to countenance assertions of the privilege in the face of allegations of unlawful government conduct.[329] No court since the early 1970s has shown interest in following that path, but one need not go so far as did the courts in *Black* and *Elson* to strike a different and possibly more desirable balance.

If Congress wishes to ameliorate the impact of the state secrets privilege in the special category of government misconduct suits, there are at least two areas for potential reform warranting consideration. The first possibility concerns the stage at which judges assess the merits of a properly formulated assertion of the privilege, a process governed by the forgiving reasonable-risk standard. This area could be addressed by tinkering with the calibration of that standard, or by al-

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(requiring disclosure of diplomatic communications under the statutory regime for challenging the decision not to adopt a compensatory tariff).

328 Assuming that this is the correct analysis, a question arises as to the status of this "common-law" shell. Is this aspect of the privilege a matter of federal common law, as Justices Stevens and Ginsburg conspicuously suggest (at least with respect to *Totten*) in their concurrence in *Tenet v. Doe*? *See Tenet v. Doe*, 544 U.S. at 11 (Stevens, Ginsburg, JJ., concurring). Is it a matter of state common law incorporated into federal civil practice via Rule 501 of the Federal Rules of Evidence? The question is an interesting one that bears further inquiry.

329 *See* Black v. Sheraton Corp. of Am., 371 F. Supp. 97 (D.D.C. 1974); Elson v. Bowen, 436 P.2d 12, 13–14 (Nev. 1967).

tering the process by which it is applied. My preference is for the latter.

Recalibrating the reasonable-risk test would increase the discretion of the judge to disagree with the executive branch's assertion that national security or diplomatic interests warrant exclusion of evidence (or dismissal of a complaint). Specifically, Congress might replace the "reasonable danger" standard established in *Reynolds* with a less deferential test, thus giving greater weight to the role of the judiciary as an institutional check on the executive branch. But enhancing a judge's freedom to second-guess executive branch assertions of national security or diplomatic dangers is not the same thing as enhancing the capacity of judges to render such assessments accurately. It would remain the case that judges as an institutional matter are nowhere nearly as well-situated as executive branch officials to account for and balance the range of considerations that should inform assessments of such dangers, a factor that counsels against pursuing this option.

What of the possibility of process-oriented reform at the merits stage? This deserves serious consideration. Although there are reasons associated with institutional competence not to increase the discretion of the judge in this context, there are offsetting concerns. If as a practical consequence judges will rarely if ever actually reject an assertion of the privilege, a perception may arise within the executive branch to the effect that judicial review has no true bite and that unwarranted assertions of the privilege nonetheless will be upheld. That such a state of affairs would be undesirable should not require explanation. But can this concern be reconciled with the institutional competence objection?

Perhaps so. Some have suggested that judges can remediate their expertise deficit by appointing nonparties with relevant expertise to advise with respect to the risks of disclosure.[330] Insofar as these advisors are to be drawn from outside the government, however, serious questions arise as to the prospects for identifying and obtaining the services of an individual with sufficient expertise and clearance. And in some circumstances there may be issues with perceived neutrality,

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330 *See, e.g.*, Telman, *supra* note 319 (manuscript at 14–16) (arguing for appointment of disinterested experts comparable to a Special Litigation Committee); Meredith Fuchs & G. Gregg Webb, *Greasing the Wheels of Justice: Independent Experts in National Security Cases*, A.B.A. NAT'L SECURITY L. REP., Nov. 2006, at 1, 3–5, *available at* http://www.abanet.org/natsecurity/nslr/2006/NSL_Report_2006_11.pdf (discussing a variety of mechanisms for appointing expert advisers).

just as there would be if the judge were to seek input from an executive branch official other than the one asserting the privilege. But this does leave one intriguing possibility: involving the congressional intelligence committees—the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence—in an advisory capacity.[331]

This suggestion plainly entails a great many practical and legal hurdles, and I do not mean to work through them all here. Rather, my hope is to further stimulate creative thinking about the processes by which the privilege is operationalized. Under this proposal, the judge would have the statutory option of calling for the views of the intelligence committees after having determined that the privilege has been asserted in conformity with the requisite formalities. The committees' views would not be binding, but would at least provide well-informed advice to the judge without requiring disclosure of information to persons who do not at least arguably have the authority to access it. Of course, one can expect that the committees might divide along partisan lines when faced with such an issue. To avoid that prospect, a recommendation to disallow the privilege should require a supermajority vote.

A second area for potential reform focuses on the consequences of successful invocations of the privilege. Assume for the sake of argument that the government is involved in patently unconstitutional conduct the public revelation of which almost certainly would cause significant diplomatic repercussions and damage to national defense through the exposure of sensitive sources and methods (possibly even risking the death of some individuals). In that case, even under a heightened standard of review, a judge would have little choice but to agree with the executive's assertion of the privilege. On that basis, the judge would dismiss the complaint, and rightly so, given that the only current alternative would be to reject the privilege and thus permit the suit to go forward notwithstanding the potential harm. Particularly given the significance of allegations of unconstitutional government conduct, would it not be wise to consider whether a third alternative should be made available between the polar opposites of public disclosure and dismissal?

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331 *Cf.* Amanda Frost, *Certifying Questions to Congress*, 101 Nw. U. L. Rev. 1, 3, 23–54 (2007) (discussing the constitutionality of a process by which courts can stay cases presenting difficult questions of statutory interpretation in order to refer the question to Congress, which may then enact new, dispositive legislation).

Some have argued that in this circumstance the government should be obliged to choose between permitting the suit to go forward or else having judgment rendered for the plaintiff, rather than simply receiving the benefit of having the complaint dismissed.[332] This approach has the virtue of forcing the government rather than the individual to internalize the costs of maintaining government secrecy. It has a vice as well, however, as the lack of a merits inquiry might encourage a multiplicity of suits not all of which would be warranted. The government-pays solution also is impractical and undesirable for litigants seeking nonmonetary relief, such as injunctions against the further conduct of certain government policies.

A related but more appealing alternative would be for Congress to take steps to permit suits implicating state secrets to proceed on an *in camera* basis in some circumstances. Borrowing from the approach exemplified in the Invention Secrecy Act as interpreted by the Second Circuit in *Halpern*, Congress might authorize judges who would otherwise be obliged to dismiss a suit on privilege grounds instead to transfer the action to a classified judicial forum for further proceedings. Such a forum—modeled on, or perhaps even consisting of, the Foreign Intelligence Surveillance Court ("FISC")—at a minimum would entail Article III judges hearing matters *in camera* on a permanently sealed, bench-trial basis.[333]

In the FISC, of course, the warrant application process is not adversarial; only the government participates. This reform proposal, in contrast, contemplates a sliding scale of adversarial or quasi-adversarial participation that includes resort to ex parte litigation if necessary. In circumstances in which the plaintiff already possesses the sensitive information, as in *Halpern*, there would be no obstacle to permitting the plaintiff to be involved (assuming representation by counsel capable of obtaining the requisite clearances). When the plaintiff does not have the information already, the judge might be given the authority to appoint a guardian ad litem to represent the plaintiff's interests, selected from among a cadre of, for example, federal public defenders with the requisite clearances. Although far from ideal as an example of the adversarial system—among other problems, the guardian would lack the ability to share classified information with the plaintiff and thus be less able than otherwise to fully

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332 *See* FISHER, *supra* note 4, at 253.

333 This raises a question about jury rights. One might address the Seventh Amendment concern by pointing out that these suits otherwise might not be heard at all in light of the state secrets privilege.

respond to it—this approach would be preferable to outright dismissal of a potentially meritorious claim involving government misconduct.

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These solutions are far from ideal from the perspective of any of the stakeholders in the debate over the state secrets privilege, and there are many difficult details that would still have to be resolved. But they do illustrate that there are alternatives to the status quo that could be considered, and it is my hope that the suggestions will stimulate further discussion of the issue.

Absent such reforms—and perhaps even with them—the prospects for lawsuits challenging the legality of sensitive intelligence-collection programs such as rendition and warrantless surveillance are relatively dim. The state secrets privilege as it currently stands strikes a balance among security, justice for individual litigants, and democratic accountability that is tilted sharply in favor of security, tolerating almost no risk to that value despite the costs to the competing concerns. This is understandable and appropriate in at least some contexts, but where the legality of government conduct is itself at issue, it may be appropriate to explore other solutions to the secrecy dilemma.

Appendix[334]

Published Opinions Adjudicating Assertions of the State Secrets Privilege after *Reynolds* (1951–2006)[335]

	Title	Court	Year of Decision	Govt. Role	Nature of information	Format of information	Relief Requested	*In Camera* Review?	Disposition of Claim	Disposition of Case
1	*Tucker v. United States*	Ct. Cl.	1954	Defendant	Military/Intelligence (plaintiff's employment as covert operative for military intelligence)	Facts relating to plaintiff's employment as covert operative for military intelligence	Dismiss complaint	No	*Totten* found applicable	Complaint dismissed

334 The following information derives from searches of the Westlaw "ALLFEDS" database for all cases referring to "state secrets" subsequent to the *Reynolds* decision. I reviewed each case thus identified to distinguish the subset involving actual assertions of the state secrets privilege. I then supplemented that set by using the "KeyCite" system to identify any additional cases of that type that may have been missed in the initial sweep (i.e., I searched for additional relevant cases by KeyCiting *Reynolds* and all other cases already identified).

335 In the course of compiling this data set, I encountered numerous examples of opinions whose claim to inclusion was marginal. As a rule of thumb, I did not include any opinion that merely referenced the existence of the privilege but did not explicitly adjudicate its applicability. Additionally, I categorically excluded (1) opinions addressing the national security exceptions to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (2000), on the theory that the FOIA privilege and the state secrets privilege are not coextensive (though plainly they have much in common), and (2) opinions arising out of criminal prosecutions implicating CIPA. These considerations led me to exclude a number of opinions that had been included in prior collections, such as that contained in Gardner, *supra* note 113, at 584 n.171, but I believe the end result is a more pertinent set of opinions. For a sampling of marginally related opinions excluded on various grounds, see, for example, *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 146–47 (1981) (noting in passing that *Reynolds* and *Totten* preclude litigation that would lead to the disclosure of certain confidential information, and observing that the plaintiffs' attempt in that case to compel the Navy to provide an environmental impact statement related to the possible positioning of nuclear weapons in Hawaii raised similar concerns); *Wilkinson v. FBI*, 922 F.2d 555, 558–59 (9th Cir. 1991) (referring to assertion of state secrets privilege but not adjudicating the claim); *Patterson v. FBI*, 893 F.2d 595, 600 (3d Cir. 1990) (noting superfluous assertion of the state secrets privilege in FOIA litigation, though not recognizing the assertion as superfluous); *United States v. Sarkissian*, 841 F.2d 959, 966 (9th Cir. 1988) (referring ambiguously to the state secrets privilege in the CIPA context); *United States v. Zettl*, 835 F.2d 1059, 1065–66 (4th Cir. 1987) (holding that the government should have opportunity to assert the state secrets privilege, but not adjudicating a privilege claim); *Hobson v. Wilson*, 737 F.2d 1, 63 n.181 (D.C. Cir. 1984) (affirming without discussion the trial court's unspecified "rulings on informer and state secrets privilege" grounds); *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130, 1132–33 (2d Cir. 1977) (observing that

	Title	Court	Year of Decision	Govt. Role	Nature of information	Format of information	Relief Requested	*In Camera* Review?	Disposition of Claim	Disposition of Case
2	*Republic of China v. Nat'l Union Fire Ins. Co. of Pitt.*	D. Md.	1956	Libellant (admiralty plaintiff)	Diplomatic communication	Memoranda of conversations	Deny motion to dismiss for failure to produce documents	No	Privilege sustained	Proceed without the requested information
3	*Halpern v. United States*	S.D.N.Y.	1957	Defendant	Military (radar evasion technology)	Patent application and related documents	Dismiss complaint or stay for indefinite period	No	Premature to assert privilege	Complaint dismissed on other grounds
4	*Halpern v. United States* (related to #3)	2d Cir.	1958	Defendant	Military (radar evasion technology)	Patent application and related documents	Dismiss complaint	Not needed	Rejected on ground that Congress waived privilege in special statutory scheme	Proceeded on *in camera* basis, though not ex parte
5	*Elson v. Bowen*[336]	S. Ct. Nev.	1967	Defendant, Petitioner	Intelligence (FBI warrantless surveillance)	Testimony from FBI agent concerning warrantless surveillance activity	Petition for writ of prohibition overturning trial court order to answer questions	Yes	Privilege denied	Proceeded; witness must testify

U.S. government accommodated security clearance needs for litigation between military contractors, but that government's unwillingness to extend clearance to jurors required resort to a bench trial); *Robinson v. City of Philadelphia*, 233 F.R.D. 169, 171 (E.D. Pa. 2005) (referring without elaboration to an assertion of the state secrets privilege, among others, in context with no apparent connection to subjects that might implicate that privilege); *American-Arab Anti-Discrimination Committee v. Reno*, 883 F. Supp. 1365, 1376–77 & n.11 (C.D. Cal. 1995) (noting that the state secrets privilege had not been asserted in that case, but inaccurately citing the doctrine as a basis for judicial reliance on information presented on an *in camera*, ex parte basis); *Westmoreland v. CBS, Inc.*, 584 F. Supp. 1206, 1208–10 (D.D.C. 1984) (referencing state secrets in conjunction with broader assertion of executive privilege, but declining to "parse" that larger concept in order to rule on the matter); *Ganadera Industrial, S.A. v. Block*, 556 F. Supp. 354, 356 n.3 (D.D.C. 1982) (noting defendant's invocation of the state secrets privilege with respect to certain documents at an earlier stage in this administrative procedure action, but not adjudicating any privilege issues); *United States v. Feeney*, 501 F. Supp. 1337, 1346–47 (D. Col. 1980) (referencing the *Reynolds* procedures in the course of a long discussion of the various privilege issues that arise when Justice Department employees decline to provide information absent Attorney General authorization).

336 There is some uncertainty with respect to whether *Elson v. Bowen*, 436 P.2d 12 (Nev. 1967), is best seen as an adjudication of the state secrets privilege. In that case, several FBI agents faced a civil suit in connection with warrantless surveillance activities. *See id.* at 13. During the litigation, the Justice Department ordered the

	Title	Court	Year of Decision	Govt. Role	Nature of information	Format of information	Relief Requested	*In Camera* Review?	Disposition of Claim	Disposition of Case
6	*Heine v. Raus*	4th Cir.	1968	Third Party	Intelligence (details of defendant's relationship with CIA)	Deposition testimony	Limit questions asked at deposition	Yes, though not clear how extensive	Privilege sustained as to some questions	Proceeded
7	*Pan Am. World Airways v. Aetna Cas. & Sur. Co.*	S.D.N.Y.	1973	Third Party	Intelligence (CIA information relating to PFLP)	Documents	Preclude discovery	No	Privilege sustained	Proceeded
8	*Black v. Sheraton Corp. of Am.*[337]	D.D.C.	1974	Defendant	Intelligence (warrantless surveillance of plaintiff for political purposes)	FBI files	Preclude discovery	No	Unclear if U.S. meant to invoke state secrets, but court construes state secrets privilege as part of the constitutional executive privilege and rejects it here (after a balancing analysis)	Proceeded, with facts deemed established against government

defendants not to comply with certain discovery requests, citing executive privilege and explaining that among other things the requested "information would reveal F.B.I. tactical secrets." *Id.* at 16. The court cited *Reynolds*, *id.* at 14, but did not articulate a *Reynolds* analysis and ultimately held that "government should not be allowed to use the claims of executive privilege and departmental regulations as a shield of immunity for the unlawful conduct of its representatives," *id.* at 16.

[337] As noted in the table above, there is some degree of uncertainty with respect to whether the opinion in *Black v. Sheraton Corp. of America*, 371 F. Supp. 97 (D.D.C. 1974), is best seen as an example of adjudicating an assertion of the state secrets privilege. The problem arises because the opinion frames the discussion primarily in terms of "executive privilege." *Id.* at 100. But on close inspection it appears that the court understood the concept of "executive privilege" to encompass state secrets concerning national security, *see id.* (observing that the privilege includes "military and diplomatic secrets"), and believed that *Reynolds* governed with respect to whether the privilege at issue had properly been asserted, *see id.* at 100–01.

	Title	Court	Year of Decision	Govt. Role	Nature of information	Format of information	Relief Requested	*In Camera* Review?	Disposition of Claim	Disposition of Case
9	*United States v. Ahmad*[338]	3d Cir.	1974	Defendant	Intelligence (FBI warrantless surveillance)	FBI files	Maintain protective order from earlier criminal case, precluding discovery of additional acts of tapping	n/a	Proceeded (but dicta describes *Reynolds* as a balancing test rather than absolute privilege)	Proceeded
10	*Kinoy v. Mitchell*	S.D.N.Y.	1975	Defendant	Intelligence[339] (warrantless surveillance)	Written records	Deny motion to compel production	Offered by gov't, but declined by court	Decision delayed pending compliance by gov't with the *Reynolds* formalities	Proceeded

338 It is a close call as to whether *United States v. Ahmad*, 499 F.2d 851 (3d Cir. 1974), should be included in this set. The appeal arose out of a civil suit against government officials for engaging in warrantless surveillance in the name of national security. *See id.* at 852 53. The surveillance had come to light previously in connection with a failed criminal prosecution, but information concerning the surveillance in the criminal case had been revealed subject to a protective order. *Id.* Once the civil suit was filed, the government defendants argued that they could not file an answer without compromising the earlier protective order. *Id.* The plaintiffs then asked the criminal trial judge to vacate the protective order, but the judge denied that motion. *Id.* By the time the Third Circuit ruled, the government defendants had changed their position, conceding that they could at least plead in response to the civil suit without modification of the protective order. *Id.* at 854. Nonetheless, anticipating that the issue would arise again at a subsequent point in the litigation, the Third Circuit proceeded to address the merits of the lower court's determination. *Id.* The court observed that the decision below turned on the existence of a government privilege to prevent the disclosure of facts that if divulged "would be injurious to the public security." *Id.* at 855. The court did not use the label "state secrets" in referring to this privilege, but it clearly stated that application of the privilege in issue is governed by *Reynolds*. *See id.* at 854 n.8, 855–56 & n.12. The court concluded with the observation that *Reynolds* provides the proper framework for any further litigation on the question of privilege that might arise in the case. *Id.* at 855 & n.12. In summary, then, *Ahmad* involved the actual application of the privilege at the district court level, combined with dicta in the appellate court on the subject, but no further adjudication at that stage.

339 The court in *Kinoy v. Mitchell*, 67 F.R.D. 1, 10 (S.D.N.Y. 1975), concluded that the state secrets privilege concerns only information relating "to the national defense or the international relations of the United States," categories that in its view excluded "'domestic security' investigations."

	Title	Court	Year of Decision	Govt. Role	Nature of information	Format of information	Relief Requested	*In Camera* Review?	Disposition of Claim	Disposition of Case
11	*Jabara v. Kelley*[340]	E.D. Mich.	1977	Defendant	Intelligence	Warrantless surveillance documents	Deny discovery	Yes	Privilege sustained as to some but not all information	Proceeded
12	*Halkin v. Helms*	D.C. Cir.	1978	Defendant	Intelligence (NSA warrantless surveillance)	Responsive pleading	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed
13	*Spock v. United States*	S.D.N.Y.	1978	Defendant	Intelligence (NSA warrantless surveillance)	Information relating to surveillance program and plaintiff	Dismiss complaint	Yes	Privilege sustained, but information already in public domain	Proceeded
14	*Clift v. United States*	2d Cir.	1979	Defendant	Intelligence (cryptographic encoding patent dispute)	Facts relating to cryptographic encoding patent dispute	Deny discovery	No	Unclear; privilege not properly asserted, yet acknowledged	Proceeded (dismissal inappropriate at this stage)
15	*United States v. Felt*	D.D.C.	1979	Prosecution	Intelligence/Foreign Relations (information relating to contacts between Weathermen organization and foreign powers)	Documents reflecting contacts between the Weathermen organization and foreign powers	Deny discovery	Yes	Privilege sustained, but court nonetheless ordered production of two documents out of respect for criminal defendants' rights	Proceeded

340 Later in the same litigation, the Sixth Circuit spoke indirectly but approvingly of the district court's disposition of the state secrets issue in that case. *See* Jabara v. Webster, 691 F.2d 272, 274–75 & nn.3 & 5 (6th Cir. 1982).

	Title	Court	Year of Decision	Govt. Role	Nature of information	Format of information	Relief Requested	*In Camera* Review?	Disposition of Claim	Disposition of Case
16	*ACLU v. Brown*	7th Cir.	1979	Defendant	Intelligence (domestic military intelligence activity)	Interrogatory responses and documents	Relief from discovery	Yes	Privilege sustained	Proceeded
17	*ACLU v. Brown* (same case as #16)	7th Cir. (en banc)	1980	Defendant	Intelligence (domestic military intelligeuce activity)	Interrogatory responses and documents	Relief from discovery	To be determined	District court was directed to consider whether plaintiffs' need was such as to warrant review	Proceeded
18	*United States v. Felt* (related to #15)	D.D.C.	1980	Prosecution	Intelligence (foreign intelligence snrveillance)	Facts relating to foreign intelligence surveillance	Imposition of an advance-notice reqnirement before defendants can elicit certain testimony	Reviewed classified affidavit	Privilege sustained	Proceeded, subject to notice reqnirement
19	*Farnsworth Cannon, Inc. v. Grimes*	4th Cir. (en banc)	1980	Defendant	Military (Navy procnrement contract)	Documents	Dismiss complaint	Unclear	Privilege sustained	Complaint dismissed
20	*Sigler v. LeVan*	D. Md.	1980	Defendant	Military/Intelligence (counter-intelligence practices and relationships)	Documents, facts relating to decedent's relationships	Dismiss complaint	Yes, an affidavit; but not of documents themselves	Privilege sustained as to documents; but not properly asserted as to relationships	Claim based on documents dismissed; gov't invited to reassert privilege as to relationships
21	*Zenith Radio Corp. v. United States*	Ct. Int'l Tr.	1981	Defendant	International trade communications	Documents	Relief from discovery	Yes	Privilege sustained as to some documents	Approving withholding of documents

	Title	Court	Year of Decision	Govt. Role	Nature of information	Format of information	Relief Requested	*In Camera* Review?	Disposition of Claim	Disposition of Case
22	*Att'y Gen. of United States v. The Irish People, Inc.*[341]	D.C. Cir.	1982	Plaintiff	Foreign Relations (U.K.-U.S. communications)	Documents	Deny discovery but permit civil enforcement action to proceed anyway	Yes	Privilege sustained	Proceeded to consider means short of dismissal by which action could continue without documents
23	*Salisbury v. United States*	D.C. Cir.	1982	Defendant	Intelligence (NSA surveillance of plaintiff reporter)	Facts relating to surveillance of plaintiff (including the fact thereof)	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed
24	*Halkin v. Helms* (related to #12)	D.C. Cir.	1982	Defendant	Intelligence (CIA surveillance activity)	Interrogatory responses and documents	Deny motion to compel	Only of classified affidavit of Director Turner	Privilege sustained without further inquiry	Complaint dismissed
25	*Nat'l Lawyers Guild v. Att'y Gen.*	S.D.N.Y.	1982	Defendant	Intelligence/Foreign Relations (FBI intelligence activities)	FBI Documents	Preclude discovery	Potentially yes, but to be determined	Proceeded	Proceeded
26	*Ceramica Regiomontana, S.A. v. United States*	Ct. Int'l Trade	1982	Defendant	Diplomatic	Communications from Mexican government	Preclude discovery	Yes	Privilege sustained	Proceeded

[341] The opinion below in this action, *Attorney General of United States v. The Irish People, Inc.*, 502 F. Supp. 63, 67 (D.D.C. 1980), does not directly engage the propriety of the government's invocation of the privilege in that case, other than to note that the government cannot simultaneously withhold documents on the basis of the privilege while moving forward as the plaintiff against the defendant newspaper.

	Title	Court	Year of Decision	Govt. Role	Nature of information	Format of information	Relief Requested	*In Camera* Review?	Disposition of Claim	Disposition of Case
27	*Republic Steel Corp. v. United States*	Ct. Int'l Trade	1982	Defendant	Diplomatic exchange: U.S-Romanian discussions	Cables from Commerce Department to U.S. Embassy	Motion for protective order removing cables from administrative record of antidumping petition	Yes	Privilege denied	Proceeded
28	*U.S. Steel Corp. v. United States*	Ct. Int'l Trade	1983	Defendant	Diplomatic exchange: U.S.-Brazil & U.S.-World Bank discussions	Documents	Motion for protective order removing cables from administrative record of antidumping petition	Yes	Privilege denied	Proceeded
29	*Ellsberg v. Mitchell*	D.C. Cir.	1983	Defendant	Intelligence (warrantless surveillance)	Information detailing surveillance in issue	Deny motion to compel and dismiss complaint	Yes	Privilege sustained as to some but not all information	Proceeded
30	*AT&T v. United States*	Ct. Cl.	1983	Defendant	Intelligence (cryptographic encoding patent dispute)	Facts relating to cryptographic encoding patent dispute	Preclude discovery	No (except for a classified affidavit)	Privilege sustained	Proceedings stayed until the information becomes available
31	*Molerio v. FBI*	D.C. Cir.	1984	Defendant	Intelligence	FBI's reasons for refusing to hire plaintiff	Dismiss complaint	Yes	Privilege sustained	Dismissal for lack of evidence affirmed
32	*Northrop Corp. v. McDonnell Douglas Corp.*	D.C. Cir.	1984	Third party	Military/Foreign Relations	Documents from Departments of Defense, State, Air Force, and Navy	Quash subpoena	No (court concludes not required)	Privilege sustained as to Defense, but State failed to follow *Reynolds* formalities	Subpoena quashed as to Defense but not State (pending *Reynolds* assertion)

	Title	Court	Year of Decision	Govt. Role	Nature of information	Format of information	Relief Requested	*In Camera* Review?	Disposition of Claim	Disposition of Case
33	*Star-Kist Foods, Inc. v. United States*	Ct. Int'l Trade	1984	Defendant	Diplomatic	Cables and internal memos relating to countervailing duty determination	Deny discovery	Yes	Privilege sustained (court declines to exercise statutory power to compel production)	Discovery denied
34	*Fitzgerald v. Penthouse Int'l, Ltd.*	4th Cir.	1985	Intervenor	Military (details of marine animal research)	Facts relating to Navy's marine animal research	Dismiss complaint	Yes (extent unclear)	Privilege sustained	Complaint dismissed
35	*Foster v. United States*	Ct. Cl.	1987	Defendant	Intelligence	Facts relating to U.S. use of a patent subjected by CIA to Invention Secrecy Act order	Deny discovery	Classified affidavit and unspecified documents	Privilege sustained	Discovery denied
36	*Xerox Corp. v. United States*	Ct. Cl.	1987	Defendant	Diplomatic	Letter from U.K. revenue official to IRS official	Deny discovery	No	Privilege sustained	Discovery denied
37	*Guong v. United States*	Fed. Cir.	1988	Defendant	Military/Intelligence	Fact that plaintiff was retained by CIA to conduct espionage in North Vietnam	Dismiss complaint	No	Privilege sustained	Complaint dismissed
38	*In re United States*	D.C. Cir.	1989	Defendant	Intelligence	Facts as to FBI's connection to plaintiff's decedent	Dismiss complaint	Yes	Remanded for consideration of privilege issues on an item-by-item basis	Proceeded

	Title	Court	Year of Decision	Govt. Role	Nature of information	Format of information	Relief Requested	*In Camera* Review?	Disposition of Claim	Disposition of Case
39	*Weston v. Lockheed Missiles & Space Co.*	9th Cir.	1989	Defendant	Intelligence (Defense Department guidelines possibly precluding homosexual employees of defense contractors from obtaining clearance)	Defense Department documents	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed (9th Circuit's decision does not agree or disagree with the merits)
40	*Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*	E.D.N.Y.	1989	Defendant	Military	Location of nuclear weapons	Dismiss portion of complaint	No	Privilege sustained	Relevant portion of complaint dismissed
41	*Nejad v. United States*	C.D. Cal.	1989	Defendant	Military	AEGIS weapon system technology; rules of engagement; operational orders for Navy ship	Dismiss complaint	No	Privilege sustained	Complaint dismissed
42	*Greenpeace, U.S.A. v. Mosbacher*	D.D.C.	1989	Defendant	Unclear	Possibly related to diplomacy associated with U.S.-Iceland whaling agreement	Deny discovery	Court decides to review the underlying documents	Proceeded	Proceeded

	Title	Court	Year of Decision	Govt. Role	Nature of information	Format of information	Relief Requested	*In Camera* Review?	Disposition of Claim	Disposition of Case
43	*Zuckerbraun v. General Dynamics Corp.*	D. Coun.	1990	Intervenor	Military (specifications and procedures for Navy missile-defense system)	Facts relating to Navy missile-defense system	Dismiss complaint	No (clear from unclassified affidavit that privilege applied)	Privilege sustained	Complaint dismissed
44	*Zuckerbraun v. General Dynamics Corp.* (related to #43)	2d Cir.	1991	Intervenor	Military (specifications and procedures for Navy missile-defense system)	Facts relating to Navy missile-defense system	Dismiss complaint	No (clear from unclassified affidavit that privilege applied)	Privilege sustained	Complaint dismissed
45	*Bowles v. United States*	4th Cir.	1991	Defendant	Unclear (relating to State Department policies regarding use of embassy vehicles in Oman)	Facts relating to State Department policies regarding use of embassy vehicles in Oman	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed
46	*In re Under Seal*	4th Cir.	1991	Third-party (statement of interest)	Intelligence (commercial dispute among private contractors arising out of unspecified government "project")	Facts relating to unspecified government project relating to national security	Deny motion to compel discovery	Yes	Privilege sustained	Complaint dismissed on subsequent summary judgment motion for lack of evidence

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47	*Clift v. United States* (related to 1979 opinion of the same uame)	D. Conn.	1991	Defendant	Intelligence (cryptographic encoding patent dispute)	Facts relating to cryptographic encoding patent dispute	Dismiss complaint	No (except for a classified affidavit)	Privilege sustained	Complaint dismissed
48	*N.S.N. Int'l Industry v. E.I. DuPont De Nemours & Co.*	S.D.N.Y.	1991	Intervenor	Military	Information relating to DARPA contract and armor technology	Deny discovery	No	Privilege sustained	Discovery denied
49	*United States v. Koreh*	D. N.J.	1992	Denaturalization proceeding	Intelligence	Intelligence sources	Deny document discovery	Classified declaration	Privilege sustained	Discovery denied; government required to stipulate to certain facts to proceed
50	*Maxwell v. First Nat'l Bank of Md.*	D. Md.	1991	Intervenor	Intelligence	Facts as to defendant's relationship with CIA	Motion for protective order	Yes	Privilege sustained	Proceeded
51	*Bareford v. Gen. Dynamics Corp.*	5th Cir. (other aspects vacated on petition for en banc)	1992	Intervenor	Military (missile-defense system used by Navy frigate)	Facts relating to missile-defense system used by Navy frigate	Dismiss complaint	Yes as to classified affidavit and report, but not as to all documents	Privilege sustained	Complaint dismissed
52	*Hyundai Merch. Marine, S.D. v. United States*	S.D.N.Y.	1992	Defendant	Unclear	14 documents relating to plaintiff's claim of negligent nautical maps	Deny discovery	Yes as to classified affidavits and the documents	Privilege sustained	Discovery denied

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53	*Maxwell v. First Nat'l Bank of Md.* (Related to #50)	4th Cir.	1993	Intervenor	Intelligence	Facts as to defendant's relationship with CIA	Motion for protective order	Yes	Privilege sustained	Proceeded
54	*Bentzlin v. Hughes Aircraft Co.*	C.D. Cal.	1993	Intervenor	Military (Maverick missile specifications; A-10 tactics; Gulf War rules of engagement)	Facts relating to Maverick missile specifications; A-10 tactics; Gulf War rules of engagement	Dismiss complaint	No	Privilege sustained	Complaint dismissed
55	*In re United States*	Fed. Cir.	1993	Defendant	Military	Facts relating to stealth aircraft technology	Mandamus reversing disclosure orders issued by Court of Federal Claims	Classified affidavit	Privilege sustained	Mandamus granted ordering Court of Federal Claims to vacate disclosure orders
56	*In re Smyth*	N.D. Cal.	1993	U.K. seeking extradition	Military/Intelligence	Northern Ireland investigative materials	Deny discovery	Attempted review of materials, but U.K. denied access	Privilege sustained as to two documents, not as to others	Proceeded, with rebuttable presumption against U.K. on certain issues
57	*McDonnell Douglas Corp. v. United States*	Ct. Cl.	1993	Defendant	Military	Stealth aircraft technology	Deny discovery	Classified affidavit	Privilege sustained	Proceed to determine if suit should be dismissed
58	*Yang v. Reno*	M.D. Pa.	1994	Habeas defendant	Internal government deliberations	Substance of discussions in interagency process regarding alien smuggling and China	Motion for protective order	No	Government failed to comply with *Reynolds* formalities for assertion of privilege	Proceeded with option to move again

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59	*Black v. United States*	D. Minn.	1994	Defendant	Intelligence	Facts as to alleged wrong-doers' relation-ship to govern-ment agencies	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed
60	*Black v. United States* (Related to #59)	8th Cir.	1995	Defendant	Intelligence	Facts as to alleged wrong-doers' relation-ship to govern-ment agencies	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed
61	*Frost v. Perry*	D. Nev.	1995	Defendant	Military (name of the operating facility in issne)	Name of the operating facility in issue in the case	Deny motion to compel	Classified affidavit only	Privilege sustained	Motion to com-pel denied
62	*Frost v. Perry* (Related to #61)	D. Nev.	1996	Defendant	Military	Facts related to classified mili-tary activities in Nevada	Summary judgment	Yes	Privilege sustained	Snmmary judg-ment granted
63	*McDonnell Douglas Corp. v. United States*	Ct. Fed. Claims	1996	Defendant	Military	Facts relating to stealth technol-ogy	Dismiss complaint	Classified affidavit	Privilege sustained	Complaint dis-missed, though plaintiff awarded costs plus inter-est
64	*Monarch Assurance P.L.C. v. United States*	Ct. Cl.	1996	Defendant	Intelligence	CIA employ-ment	Dismiss complaint	Classified affidavit	Privilege snstained	Proceeded to give plaintiff chance to prove case through nonprivileged evidence

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65	*Monarch Assurance P.L.C. v. United States* (Related to #64)	Ct. Cl.	1998	Defendant	Intelligence	CIA employment	Dismiss complaint	Classified affidavit	Privilege sustained	Complaint dismissed
66	*Kasza v. Browner*	9th Cir.	1998	Defendant	Military	Facts related to classified military activities in Nevada	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed
67	*Linder v. Calero-Portocarrero*	D.D.C.	1998	Defendant	Intelligence	Identity of intelligence source indicated in a diplomatic cable that otherwise was provided in full to plaintiffs	Deny discovery	No	Privilege sustained	Discovery denied
68	*Tilden v. Tenet*	E.D. Va.	2000	Defendant	Intelligence	Facts relating to CIA procedures and covert personnel	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed
69	*Barlow v. United States*	Ct. Cl.	2000	Defendant	Intelligence	NSA, CIA, and DIA documents relating to Pakistan's nuclear arms program	Motion for protective order	Classified and unclassified affidavits, but not the documents themselves	Privilege sustained	Discovery denied
70	*Monarch Assurance v. United States* (Related to #64 and #65)	Fed. Cir.	2001	Defendant	Intelligence	Facts relating to whether individual worked for CIA	Dismiss complaint	Yes	Privilege sustained	Proceeded (with possibility of summary judgment)

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71	*DTM Research, LLC v. AT&T Corp.*	4th Cir.	2001	Intervenor	Intelligence (data mining technology)	Facts relating to U.S. government's data-mining technology	Quash subpoenas to U.S.	Unclear	Privilege sustained	Proceeded (deemed not necessary to defendant)
72	*United States ex rel. Schwartz v. TRW, Inc.*	C.D. Cal.	2002	Subpoena recipient (qui tam)	Military	Documents relating to missile defense program	Deny discovery request	No	Government failed to comply with *Reynolds* formalities for assertion of privilege	Proceeded with option to move again
73	*McDonnell Douglas Corp. v. United States*	Fed. Cir.	2003	Defendant	Military	Facts relating to stealth technology	Strike "superior knowledge" defense	Yes	Privilege sustained	Defense struck
74	*Trulock v. Lee*	4th Cir.	2003	Defendant	Intelligence	Facts relating to CIA employees, procedures, and investigation into Chinese espionage	Dismiss complaint	No	Privilege sustained	Complaint dismissed
75	*Darby v. U.S. Dep't of Def.*	9th Cir.	2003	Defendant	Unclear	Unclear	Unclear	Yes	Privilege sustained	Summary judgment granted
76	*Tenenbaum v. Simonini*	6th Cir.	2004	Defendant	Unclear	Unclear	Motion for summary judgment	Yes	Privilege sustained	Summary judgment granted
77	*Edmonds v. U.S. Dep't of Justice*	D.D.C.	2004	Defendant	Intelligence/Foreign Relations	Facts relating to intelligence collection and foreign relations	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed
78	*Burnett v. Al Baraka Inv. & Dev. Corp.*	D.D.C.	2004	Third Party	Intelligence/Foreign Relations	Request to depose Sibel Edmonds	Quash subpoena	Yes	Privilege sustained	Motion to quash granted in part

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79	*Tenet v. Doe*	S. Ct.	2005	Defendant	Intelligence	Facts relating to alleged espionage relationship	Dismiss complaint	No	*Totten* described as a "categorical bar" distinct from the "state secrets evidentiary privilege"	Complaint dismissed
80	*Sterling v. Tenet*	4th Cir.	2005	Defendant	Intelligence	Facts relating to CIA's employment actions as to plaintiff	Dismiss complaint	Yes, but only to a limited extent	Privilege sustained	Complaint dismissed
81	*Crater Corp. v. Lucent Technologies, Inc.*	Fed. Cir.	2005[342]	Intervenor	Intelligence	Facts relating to manufacture or use of underwater "coupling" device	Motion for protective order limiting discovery	Yes	Privilege sustained	Proceeded, with possibility of dismissal if necessary
82	*Schwartz v. Raytheon Co.*	9th Cir.	2005	Intervenor	Military	Unclear, but related to performance of defense contract	Dismiss complaint	Unclear	Privilege sustained	Complaint dismissed
83	*Arar v. Ashcroft*	E.D.N.Y.	2006	Defendant	Intelligence/Foreign Relations	Facts relating to removal of plaintiff and subsequent interrogation	Dismiss complaint	Moot	Moot	Complaint dismissed on ground that *Bivens* has a national-security exception
84	*El-Masri v. Tenet*	E.D. Va.	2006	Defendant	Intelligence/Military/Foreign Relations	Facts relating to extraordinary rendition	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed

342 According to a 2001 decision in the same case, the district court first granted the government's privilege claim in 2000 or earlier.

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85	*Hepting v. AT&T Corp.*	N.D. Cal.	2006	Intervenor	Intelligence/Military	Facts relating to warrantless surveillance	Dismiss complaint	Yes	Proceeded	Proceeded
86	*Hepting v. AT&T Corp.* (Related to #85)	N.D. Cal.	2006	Intervenor	Intelligence/Military	Facts relating to warrantless surveillance	Dismiss complaint	Yes	Privilege inapplicable to general subject-matter of the suit as it is no longer secret; might arise later as to specific evidence	Proceeded
87	*Terkel v. AT&T Corp.*	N.D. Ill.	2006	Intervenor	Intelligence/Military	Facts relating to warrantless surveillance	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed
88	*ACLU v. Nat'l Sec. Agency*	E.D. Mich.	2006	Defendant	Intelligence/Military	Facts relating to warrantless surveillance	Dismiss complaint	Yes	Privilege denied on ground that it no longer is secret	Proceeded
89	*Al-Haramain Islamic Found., Inc. v. Bush*	D. Or.	2006	Defendant	Intelligence/Military	Facts relating to warrantless surveillance	Dismiss complaint	No	Privilege denied on ground that it no longer is secret	Proceeded