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STATE SECRET PROTECTION ACT OF 2009

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

ON

H.R. 984

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STATE SECRET PROTECTION ACT OF 2009

THURSDAY, JUNE 4, 2009

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 2:09 p.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Conyers, Delahunt, Johnson, Sensenbrenner, Franks, and King.

Staff Present: Heather Sawyer, Majority Counsel; and Paul Taylor, Minority Counsel.

Mr. NADLER. 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.

Today, the Subcommittee examines legislation that I have introduced, along with the distinguished Chairman of the full Committee, with Representative Tom Petri, and with several other Members of the Committee, that would codify uniform standards for dealing with claims of the state secrets privilege by the government in civil litigation.

In the last Congress, we had an oversight hearing on the state secrets privilege and a hearing on this legislation. The bill was reported favorably to the full Committee.

Our experience has demonstrated the destructive impact that sweeping claims of privilege and secrecy can have on our Nation. In order for the rule of law to have any meaning, individual liberties and rights must be enforceable in our courts. Separation-of-powers concerns are at their highest with regard to secret executive branch conduct, and the government simply cannot be allowed to hide behind unexamined claims of secrecy and become the final arbiter of its own conduct.

Yet, claims of secrecy have been used to conceal matters from Congress even though Members have the security clearance necessary to be briefed in an appropriately secure setting. That has been the case with respect to the use of torture, with the use of illegal spying on Americans, and other matters of tremendous national importance.

And let me add here that this issue is perhaps the most important issue, in my judgment, this Committee will face, because this

Committee is charged with enforcing civil rights and civil liberties under our Constitution. And there is an ancient maxim of law that says there is no right without a remedy. And if the government violates your rights, if it kidnaps you, it tortures you, it deliberately burns down your house, it wiretaps you without a warrant, whatever, how do you enforce your right against the government?

Well, the Administration could criminally prosecute its own members who have done so; that is unlikely. Congress could exercise oversight; that is hit or miss. Or the victim can sue in tort, he can sue the government for illegal wiretapping, for kidnapping, for intentional infliction of mental distress, for assault, whatever.

But if the government can eliminate that lawsuit on the pleadings simply by coming into court and using the magic incantation of the words "state secrets," and say, "This case should be dismissed because we say, in our unexamined assertion, that trying the case would necessitate the revelation of state secrets, case dismissed," then there is no recourse to the courts and there is no enforcement of rights. And rights without a remedy are illusory and we have no rights. Therefore, we must put some limits on this use of the state secret doctrine.

The same pattern of resorting to extravagant state secrets claims has been evident in the courts. While the Bush administration did not invent the use of the state secrets privilege to conceal wrongdoing, it certainly perfected the art. The state secrets privilege has been abused by prior Administrations to protect officials who have behaved illegally or improperly or simply in an embarrassing manner, rather than to protect the safety and security of the Nation.

The landmark case in the field, *U.S. v. Reynolds*, is a perfect case in point. The widows of three civilian engineers sued the government for negligence stemming from a fatal air crash. The government refused to produce the accident report, even refusing to provide it to the court to review, claiming it would reveal sensitive state secrets that would endanger national security. The Supreme Court concurred without ever looking behind the government's unsupported assertion that national security was involved.

Half a century later, the report was found, now declassified, online by the daughter of one of the engineers, and it clearly revealed no state secrets. It clearly could have been made available in a form that would have enabled those families to vindicate their rights in court. It did, however, reveal that the crash was caused by government negligence, which I suspect was the real reason for the invocation, or the invention in that case, of the state secrets doctrine.

Protecting the government from embarrassment and civil liability, not protecting national security, was the real reason for withholding the accident report. Yet these families were denied justice because the Supreme Court never looked behind the government's false claim to determine whether it was valid.

Similarly, in the Pentagon Papers case, then-Solicitor General Erwin Griswold warned the Supreme Court that publication of the information would pose a grave and immediate danger to national security. Eighteen years later, he acknowledged that he had never seen, quote, "any trace of a threat to the national security," unquote, from the publication of the information and further admitted

that, quote, "The principle concern is not with national security but rather with government embarrassment of one sort or another," close quote.

It is important to protect national security, and sometimes our courts have to balance the need for individual justice with national security considerations. Congress has in the past balanced these important, albeit sometimes competing, demands. In the criminal context, we enacted the Classified Informations Procedure Act. In FISA, we set up procedures for the courts to examine sensitive materials. Through the Freedom of Information Act, we sought to limit any withholding of information from the public whom the government is supposed to serve.

We can and should do the same in civil cases. Our system of government and our legal system have never relied on taking assurances at face value. The courts and the Congress have a duty to look behind what this Administration or any Administration says to determine whether or not those assurances are well-founded.

Presidents and other government officials have been known not to tell the truth on occasion, especially when it is in their interest to conceal something. The founders of this Nation knew that there needed to be checks in each branch of the government to prevent such abuses from taking the place. Or, in the words of the Ninth Circuit in the recent Jeppesen decision, "The executive cannot be its own judge." To allow that—and these are now my words—to allow that is to abandon all the protections against tyranny that our Founding Fathers established.

Courts have a duty to protect national security secrets, but they also have a duty to make an independent judgment as to whether state secrets claims have any merit. When the government itself is a party, the court cannot allow it to become the final arbiter of its own case. The purpose of this legislation is to ensure that the correct balance is struck.

I would just add that I am extremely disappointed that the Department of Justice has declined to provide a witness to discuss this very important issue at this hearing. I have met with the Attorney General, and I understand that a review of this policy is currently under way. Nonetheless, the Department continues to go into court while this review is under way and take positions that are remarkably similar to positions taken by the last Administration.

While I greatly appreciate the Attorney General's willingness to work with us, I believe that it should be possible to send someone to provide us with the Administration's views and to answer our questions to the extent that they are able. I hope this is not a sign of things to come.

I look forward to the testimony of our witnesses.

I would now recognize the distinguished Ranking minority Member, the gentleman from Wisconsin, Mr. Sensenbrenner, for his opening statement.

[The bill, H.R. 984, follows:]

I

111TH CONGRESS
1ST SESSION

H. R. 984

To provide safe, fair, and responsible procedures and standards for resolving claims of state secret privilege.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 11, 2009

Mr. NADLER of New York (for himself, Mr. PETRI, Mr. CONYERS, Mr. DELAHUNT, Ms. ZOE LOFGREN of California, Mr. FRANK of Massachusetts, and Mr. DOGGETT) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To provide safe, fair, and responsible procedures and standards for resolving claims of state secret privilege.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "State Secret Protection Act of 2009".

SEC. 2. STATE SECRET PRIVILEGE.

In any civil action brought in Federal or State court, the Government has a privilege to refuse to give information and to prevent any person from giving information

only if the Government shows that public disclosure of the information that the Government seeks to protect would be reasonably likely to cause significant harm to the national defense or the diplomatic relations of the United States.

SEC. 3. PROTECTION OF SECRETS.

(a) IN GENERAL.—The court shall take steps to protect sensitive information that comes before the court in connection with proceedings under this Act. These steps may include reviewing evidence or pleadings and hearing arguments ex parte, issuing protective orders, requiring security clearance for parties or counsel, placing material under seal, and applying security procedures established under the Classified Information Procedures Act for classified information to protect the sensitive information.

(b) IN CAMERA PROCEEDINGS.—All hearings and other proceedings under this Act may be conducted in camera, as needed to protect information that may be subject to the privilege.

(c) PARTICIPATION OF COUNSEL.—Participation of counsel in proceedings under this Act shall not be limited unless the court determines that the limitation is a necessary step to protect information the Government asserts is protected by the privilege or that supports the claim of privilege and that no less restrictive means of protection

suffice. The court shall give a written explanation of its decision to the parties and their counsel, which may be placed under seal.

(d) PRODUCTION OF ADEQUATE SUBSTITUTE PENDING RESOLUTION OF THE CLAIM OF PRIVILEGE.—If at any point during its consideration of the Government's claim, the court determines that disclosure of information to a party or counsel, or disclosure of information by a party that already possesses it, presents a risk of a harm described in section 2 that cannot be addressed through less restrictive means provided in this section, the court may require the Government to produce an adequate substitute, such as a redacted version, summary of the information, or stipulation regarding the relevant facts, if the court deems such a substitute feasible. The substitute must be reviewed and approved by the court and must provide counsel with a substantially equivalent opportunity to assess and challenge the Government's claim of privilege as would the protected information.

SEC. 4. ASSERTION OF THE PRIVILEGE.

(a) IN GENERAL.—The Government may assert the privilege in connection with any claim in a civil action to which it is a party or may intervene in a civil action to which it is not a party to do so.

(b) SUPPORTING AFFIDAVITS.—If the Government asserts the privilege, the Government shall provide the court with an affidavit signed by the head of the executive branch agency with responsibility for, and control over, the information asserted to be subject to the privilege. In the affidavit, the head of the agency shall explain the factual basis for the claim of privilege. The Government shall make public an unclassified version of the affidavit.

SEC. 5. PRELIMINARY PROCEEDINGS.

(a) PRELIMINARY REVIEW BY COURT.—Once the Government has asserted the privilege, and before the Court makes any determinations under section 6, the court shall undertake a preliminary review of the information the Government asserts is protected by the privilege and provide the Government an opportunity to seek protective measures under this Act. After any initial protective measures are in place, the Court shall proceed to the consideration of additional preliminary matters under this section.

(b) CONSIDERATION OF WHETHER TO APPOINT SPECIAL MASTER OR EXPERT WITNESS.—The court shall consider whether the appointment of a special master with appropriate expertise or an expert witness, or both, would facilitate the court's duties under this Act.

(c) INDEX OF MATERIALS.—The court may order the Government to provide a manageable index of the information that the Government asserts is subject to the privilege. The index must correlate statements made in the affidavit required under this Act with portions of the information the Government asserts is subject to the privilege. The index shall be specific enough to afford the court an adequate foundation to review the basis of the assertion of the privilege by the Government.

(d) PREHEARING CONFERENCES.—After the preliminary review the court shall hold one or more conferences with the parties to—

(1) determine any steps needed to protect sensitive information;

(2) define the issues presented by the Government's claim of privilege, including whether it is possible to allow the parties to complete nonprivileged discovery before determining whether the claim of privilege is valid;

(3) order disclosure to the court of anything needed to assess the claim, including all information the Government asserts is protected by the privilege and other material related to the Government's claim;

(4) resolve any disputes regarding participation of counsel or parties in proceedings relating to the claim, including access to the Government's evidence and arguments;

(5) set a schedule for completion of discovery related to the Government's claim; and

(6) take other steps as needed, such as ordering counsel or parties to obtain security clearances.

(e) SECURITY CLEARANCES.—If the court orders a party or counsel to obtain a security clearance, the Government shall promptly conduct the necessary review and determine whether or not to provide the clearance. If the necessary clearance is not promptly provided to counsel for a party, the party may propose that alternate or additional counsel be cleared. If within a reasonable time, alternative or additional counsel selected by the party cannot be cleared, then the court, in consultation with that party and that party's counsel, shall appoint another attorney, who can obtain the necessary clearance promptly, to represent the party in proceedings under this Act. When a security clearance for counsel sought under this Act is denied, the court may require the Government to present an ex parte explanation of that denial.

SEC. 6. PROCEDURES AND STANDARD FOR ASSESSING THE PRIVILEGE CLAIM.

(a) HEARING.—The court shall conduct a hearing to determine whether the privilege claim is valid.

(b) BASIS FOR RULING.—

(1) GENERALLY.—The court may not determine that the privilege is valid until the court has reviewed—

(A) except as provided in paragraph (2), all of the information that the Government asserts is privileged;

(B) the affidavits, evidence, memoranda and other filings submitted by the parties related to the privilege claim; and

(C) any other evidence that the court determines it needs to rule on the privilege.

(2) SAMPLING IN CERTAIN CASES.—Where the volume of information the Government asserts is privileged precludes a timely review, or the court otherwise determines a review of all of that information is not feasible, the court may substitute a sufficient sampling of the information if the court determines that there is no reasonable possibility that review of the additional information would change the court's determination on the privilege claim and the information reviewed is sufficient to enable to court

to make the independent assessment required by this section.

(c) STANDARD.—In ruling on the validity of the privilege, the court shall make an independent assessment of whether the harm identified by the Government, as required by section 2, is reasonably likely to occur should the privilege not be upheld. The court shall weigh testimony from Government experts in the same manner as it does, and along with, any other expert testimony.

(d) BURDEN OF PROOF.—The Government shall have the burden of proof as to the nature of the harm and as to the likelihood of its occurrence.

SEC. 7. EFFECT OF COURT DETERMINATION.

(a) IN GENERAL.—If the court determines that the privilege is not validly asserted, the information may be disclosed to a nongovernmental party or admitted at trial, subject to the other rules of evidence. If the court determines that the privilege is validly asserted, that information shall not be disclosed to a nongovernmental party or the public.

(b) NONPRIVILEGED SUBSTITUTE.—

(1) COURT CONSIDERATION OF SUBSTITUTE.—If the court finds that the privilege is validly asserted and it is possible to craft a nonprivileged substitute, such as those described in section 3(d), for

the privileged information that would provide the parties a substantially equivalent opportunity to litigate the case, the court shall order the Government to produce the substitute to the satisfaction of the court.

(2) REFUSAL TO PROVIDE.—In a civil action brought against the Government, if the court orders the Government to provide a nonprivileged substitute for information and the Government fails to comply, in addition to any other appropriate sanctions, the court shall find against the Government on the factual or legal issue to which the privileged information is relevant. If the action is not brought against the Government, the court shall weigh the equities and make appropriate orders as provided in subsection (d).

(c) OPPORTUNITY TO COMPLETE DISCOVERY.—The court shall not resolve any issue or claim and shall not grant a motion to dismiss or motion for summary judgment based on the state secrets privilege and adversely to any party against whom the Government's privilege claim has been upheld until that party has had a full opportunity to complete nonprivileged discovery and to litigate the issue or claim to which the privileged information is relevant without regard to that privileged information.

(d) APPROPRIATE ORDERS IN THE INTEREST OF JUSTICE.—After reviewing all available evidence, and only after determining that privileged information, for which it is impossible to create a nonprivileged substitute, is necessary to decide a factual or legal issue or claim, the court shall weigh the equities and make appropriate orders in the interest of justice, such as striking the testimony of a witness, finding in favor of or against a party on a factual or legal issue to which the information is relevant, or dismissing a claim or counterclaim.

SEC. 8. INTERLOCUTORY APPEAL.

(a) IN GENERAL.—The courts of appeal shall have jurisdiction of an appeal by any party from any interlocutory decision or order of a district court of the United States under this Act.

(b) APPEAL.—

(1) IN GENERAL.—An appeal taken under this section either before or during trial shall be expedited by the court of appeals.

(2) DURING TRIAL.—If an appeal is taken during trial, the district court shall adjourn the trial until the appeal is resolved and the court of appeals—

(A) shall hear argument on appeal as expeditiously as possible after adjournment of the trial by the district court;

(B) may dispense with written briefs other than the supporting materials previously submitted to the trial court;

(C) shall render its decision as expeditiously as possible after argument on appeal; and

(D) may dispense with the issuance of a written opinion in rendering its decision.

SEC. 9. REPORTING.

(a) IN GENERAL.—Consistent with applicable authorities and duties, including those conferred by the Constitution of the United States upon the executive and legislative branches, the Attorney General shall report in writing to the Permanent Select Committee on Intelligence of the House of Representatives, the Select Committee on Intelligence of the Senate, and the chairmen and ranking minority members of the Committees on the Judiciary of the House of Representatives and Senate on any case in which the Government invokes a state secrets privilege, not later than 30 calendar days after the date of such assertion. Each report submitted under this subsection shall

include all affidavits filed under this Act by the Government.

(b) OPERATION AND EFFECTIVENESS.—

(1) IN GENERAL.—The Attorney General shall deliver to the committees of Congress described in subsection (a) a report concerning the operation and effectiveness of this Act and including suggested amendments to the Act.

(2) DEADLINE.—The Attorney General shall submit this report not later than 1 year after the date of enactment of this Act, and every year thereafter until the date that is 3 years after that date of enactment. After the date that is 3 years after that date of enactment, the Attorney General shall submit a report under paragraph (1) as necessary.

SEC. 10. RULE OF CONSTRUCTION.

This Act provides the only privilege that may be asserted in civil cases based on state secrets and the standards and procedures set forth in this Act apply to any assertion of the privilege.

SEC. 11. APPLICATION.

This Act applies to claims pending on or after the date of enactment of this Act. A court also may relieve a party or its legal representative from a final judgment,

order, or proceeding that was based, in whole or in part, on the state secrets privilege if—

(1) the motion for relief is filed with the rendering court within one year of the date of enactment of this Act;

(2) the underlying judgment, order, or proceeding from which the party seeks relief was entered after January 1, 2002; and

(3) the claim on which the judgement, order, or proceeding is based is—

(A) against the Government; or

(B) arises out of conduct by persons acting in the capacity of a Government officer, employee, or agent.

○

Mr. SENSENBRENNER. Thank you, Mr. Chairman.

The state secrets privilege is a longstanding legal doctrine the Supreme Court most recently described in a case called *U.S. v. Reynolds*. In that case, the court made it clear that if the court, after giving appropriate deference to the executive branch, determines that public disclosure of information would harm national security, 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. While this doctrine may occasionally disadvantage someone suing in court, it is vital to protecting the safety of all Americans.

The roots of the state secrets privilege extend all the way back to Chief Justice Marshall, the author of *Marbury v. Madison*, who held that the government need not provide any information that would endanger public safety.

In the modern era, Congress debated the issue of the state secrets privilege under Federal law in the 1970's but ultimately chose to maintain the status quo, including elements of the privilege put in place by the Supreme Court in its Reynolds decision. The Fourth Circuit Court of Appeals recently employed the doctrine in affirming the dismissal of the case, including that the state secrets privilege has a firm foundation in the Constitution.

Not surprisingly, the privilege has played a significant role in the Justice Department's response to civil litigation arising out of our counterterrorism efforts following 9/11.

The state secrets doctrine remains strongly supported by today's Supreme Court. Even in its Boumediene decision granting habeas litigation rights to terrorists, Justice Kennedy, in his majority opinion, acknowledged the government's legitimate interest in protecting sources and methods of intelligence gathering and stated, "We expect the district court will use its discretion to accommodate this interest to the greatest extent possible," while citing the Reynolds state secrets case I mentioned earlier in doing so.

I oppose any efforts, including this bill, that invite the courts to deviate from the sound procedures they currently follow to protect vital national security information. H.R. 984 would preclude judges from giving weight to the executive branch's assessment of national security. And it would authorize courts not to use ex parte proceedings in conducting a review of privileged claims. And it would prevent courts from being able to dismiss a case when the government cannot defend itself without using privileged information.

The Obama administration is clearly not enamored with the approach of this legislation and has adhered in court to the doctrine as asserted by the previous Administration in at least three cases already. According to *The Washington Post* editorial page, the Obama administration's position on state secrets makes it hard to distinguish from its predecessor. Anthony Romero, the executive director of the ACLU, has written that the new Administration has embraced policies held over from the Bush era, including the use of the state secrets claim.

Last Congress, legislation essentially the same as H.R. 984 was cosponsored in the Senate by Senators Joe Biden and Hillary Clin-

ton, who are now President Obama's Vice President and Secretary of State. But this year, President Obama, Vice President Biden, and Secretary of State Clinton have gone silent on the bill. When asked about it recently, the Vice President's communications director said, quote, "No comment on this one here."

The legislation goes exactly in the wrong direction, so much so that even President Obama, Vice President Biden, and Secretary of State Clinton are running away from it. So should we.

And I yield back the balance of my time.

Mr. NADLER. I thank the gentleman.

I will now recognize the distinguished Chairman of the full Committee for an opening statement.

Mr. CONYERS. Thank you, Mr. Chairman. Thank you, Ranking Member Emeritus—I mean Chairman Emeritus.

The President is running away from a lot of things, so this is just one more of them. That doesn't mean that consideration is not extremely important.

We have been here before, ladies and gentlemen. I am for state secrets. There are some secrets that we've got to keep away from citizens and Congress people and everybody else—bloggers. But, wait a minute, which ones? Well, that is what we are here to try to sort out. We didn't say abolish state secrets. And, look, state secrets have been used so much to keep things secret that shouldn't have been kept secret; that is the problem.

And, by the way, let's take a look at the great statements of the President on this subject. He said, we've got to rein in state secrets privileges. He acknowledged that the privilege is overbroad and overused, and that he plans to embrace several principles of reform. He has agreed that state secrets shouldn't be used to protect information merely because it reveals the violation of law or it may be embarrassing to the government.

His Administration has also continued pressing an aggressive view of state secrets privileges in the court, adopting arguments perfected by the prior Administration. Earlier this year, in the Mohamed case, the Administration currently maintained the prior Administration's sweeping assertion that the very subject matter of the case was a state secret and that that should prevent judicial consideration of the case. The case was about torture.

A few months later, another case was brought against the government for unlawfully spying on its own citizens, Jewel. And our Administration again sought outright dismissal, arguing that litigating the case inevitably would require a harmful disclosure of state secrets and that the court need not examine any actual information on whether the case might proceed.

"It is too secret; we can't even talk about it. What do you mean, a remedy of their rights? This is a right apparently without any remedy at all. It is too secret to talk about. Don't you get it? It is so secret, we can't even hear the case to determine whether there is a right or a wrong involved or whether it is a case brought in error."

So, we remain encouraged that the Administration is taking a thorough review of the state secrets privilege and his assurance, number 44, that he will deal with Congress and the courts as co-

equal branches of government, and we can't sit idly by. Well, if we are co-equal, then that is what we are going to assert.

In closing, Chairman Nadler, it is unacceptable that the Department declined to even come to this non-secret meeting. Nobody is here. What is that about? They could not provide a witness. Why? Well, there is a review pending, and it is not solved, and it remains—until it is solved, they don't want to come before this co-equal branch of government with them. Okay. That doesn't sound very co-equal to me. They could have sent someone here to say, "We can't talk with you guys." They could have sent someone here to say that, "What we are doing is not concluded. We understand your concern about the matter."

So what is with this state secrets business? Well, let's see how far we can go. I am so glad to see Judge Wald. She has been in Judiciary so many times. And our former colleague, Asa Hutchinson, we are happy to see him back. Grossman is always on the case. Mr. Wizner, you are a relative newcomer here, but we welcome you.

And it is no secret that what we are going to say and do here today is going to be information for everybody to help decide how we resolve this situation.

Thank you for your indulgence, Chairman Nadler.

Mr. NADLER. Thank you, Mr. Chairman.

In the interest of proceeding to our witnesses and mindful of our busy schedule, 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, which we will only do in case of votes on the floor.

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 who is only able to be with us for a short time.

I would like now to introduce our panel of witnesses.

The first witness is the Honorable Patricia Wald, who has had a distinguished legal career. She served as a judge for the United States Court of Appeals for the D.C. Circuit from 1979 to 1999, serving as chief judge from 1986 to 1991.

Judge Wald was also a judge with the International Criminal Tribunal for the former Yugoslavia from 1999 to 2001 and was a member of the President's Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction from 2004 to 2005.

Judge Wald clerked for the Honorable Jerome Frank on the U.S. Court of Appeals for the Second Circuit and received her B.A. from the Connecticut College for Women and her J.D. from Yale Law School.

Asa Hutchinson is a former colleague of ours in the Congress and on this Committee, who served with distinction as a Member of this Committee.

In 1982, President Ronald Reagan appointed him United States Attorney. He represented the Third District of Arkansas from 1996 until President Bush appointed him as the Administrator of the Drug Enforcement Administration. In addition to his service on the Judiciary Committee, he was also a Member of the Intelligence Committee.

In January 2003, Representative Hutchinson was confirmed by the U.S. Senate to be the first Under Secretary of the newly created Department of Homeland Security, where he served until 2005. He subsequently founded the Asa Hutchinson Law Group in 2008 with his son, Asa III.

Andrew Grossman is The Heritage Foundation's senior legal policy analyst. Before being named as senior legal policy analyst in January 2008, Mr. Grossman was a writer, editor, and general analyst at Heritage, contributing to the think-tank's research program in domestic and economic policy, foreign policy, and legal affairs.

Mr. Grossman is a graduate of the George Mason University School of Law, where he served as senior articles editor of the George Mason Law Review. He received his master's degree in government from the University of Pennsylvania in 2007. In 2002, he received his bachelor's degree in economics and anthropology from Dartmouth College, where he edited the Dartmouth Review.

Ben Wizner has been a staff attorney at the ACLU since 2001, specializing in national security, human rights, and first amendment issues. He has litigated several post-9/11 civil liberties cases in which the government has invoked the state secrets privilege, including *El-Masri v. The United States*, a challenge to the CIA's abduction, detention, and torture of an innocent German citizen; *Mohamed v. Jeppesen, Dataplan, Inc.*, a suit against the private aviation services company for facilitating the CIA's rendition of torture applied to Muslim men; and *Edmonds v. Department of Justice*, a whistleblower retaliation suit on behalf of an FBI translator fired for reporting serious misconduct.

Mr. Wizner was a law clerk to the Honorable Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit. He is a graduate of Harvard College and New York University School of Law. And I must say I have a particular fondness for New York University School of Law since my son is currently a student at New York University School of Law.

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 to red when the 5 minutes are up.

Before we begin, it is customary for the Committee to swear in its witnesses. If you would please stand and raise your right hands to take the oath.

[Witnesses sworn.]

Mr. NADLER. Let the record reflect that the witnesses answered in the affirmative.

You may be seated.

The first witness is the Honorable Judge Wald.

TESTIMONY OF THE HONORABLE PATRICIA M. WALD, RETIRED CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Judge WALD. Thank you, Chairman Nadler, Chairman Conyers. I would like to make five brief points in the 5 minutes.

The first one is that the frequent use of the privilege in recent years to deny all relief to civil plaintiffs who have been injured by governmental action has become a matter of grave concern to lawyers, judges, legal scholars, and the American Bar Association. This total cutoff of relief is often unnecessary and, I think, produces rank injustice in many cases.

Now, in *U.S. v. Reynolds*, the Supreme Court acknowledged, and there is no dispute, that ultimately it is a judge who must decide whether the privilege applies or not. But judges who have been administering the privilege have struggled with varying success to find a middle way between national security and ensuring access by worthy plaintiffs to some form of remedy for their grievances.

Unfortunately, the judges have not been entirely consistent in the way they administer the privilege. Some show a readiness to dismiss cases outright on mere allegations or a conclusory affidavit, and some probe more intensely. Some judges actually look at the item that the state secrets privilege is raised as to, and some don't and are content to look at the government's affidavits. There isn't even any consistency as to how substantial the risk has to be to justify closing down the case.

So, in sum, I think there is a consensus: It is time to regularize the administration of the privilege in a way that protects national security but not at the expense of a total shutdown of civil process for worthy claimants.

I want to make two points here.

One, there is nothing that I can find in this bill that prevents the government from raising or invoking the state secrets privilege. And once the state secrets privilege has been found to apply, I find nothing in this bill that says the judge can make the government actually disclose that. There are various other kinds of substitutes, alternatives, but I really don't think that there is any instance in which this bill will make the government disclose something which has been identified by the judge as a state secret.

The second point I would make is that Congress's power under article 1, section 8, and article 3, section 2, of the Constitution to prescribe regulations on the admissibility of evidence in Federal courts has been used many times in the Federal Rules of Evidence, in FISA proceedings, in CIPA, and I don't think there has much doubt about their authority to do so.

Very recently, in the Al-Haramain case out in California, a district judge, in an exhaustive opinion, decided that the FISA procedures for treating information obtained under secret FISA warrants preempted invocation of the state secrets privilege—another vindication, at least at that level—we will see whether the government appeals or not—of Congress's power to legislate evidentiary rules.

Number three point: Federal judges in other contexts handle every day classified materials and secret materials and make decisions as to whether redacted versions can be disclosed or summaries made that can serve the purpose of continuing the litigation without in any way undermining national security. They do it all the time. They have, in many cases, used masters in formative indices like the Vaughn Index in Exemption 1, FOIA. They use sampling techniques where massive amounts of material are included.

This bill wisely incorporates into the civil law area of state secrets privilege many of these useful techniques with which judges are already familiar in order to minimize the number of cases—there will still probably be some—where dismissal of the entire claim will be necessary.

I think that's a good thing for the following reason: While many of these techniques are very familiar, they are not absolutely, explicitly authorized, so that I had encountered cases in my own experience on the bench where the government would object to something, such as the use of a master, and it came up on appeal. Ultimately, we decided the judge could use a master, but the government objected. So I think it is a good thing to have these techniques actually explicitly recognized in the law.

I am not going to get into the Jeppesen case because I think the counsel over here at the end—I will only say that, to me, they did a very good thing in distinguishing using the state secrets privilege as a kind of "close-the-door because of the subject matter of this." In this case, it was extraordinary rendition. And the court said, no, the state secrets privilege is only about particular pieces of information, which you can raise them, you can debate them, you can litigate them, but you can't say, "No, we are not going to talk about secret prisons, and we are not going to talk about extraordinary rendition," because if you have other evidence that is not subject to the state secrets privilege, you should be able to go ahead. I thought that was very worthy.

The fourth point: Very briefly, I will point out some of the things in this bill that I think are very useful.

They require initially that the government asserts in affidavit form the factual basis for the claim of privilege. I don't think anybody could object to that. That the judge then makes a preliminary review and then confers with the party, even at that early stage, as to whether there are special protective provisions that need to be taken, such as a master or an index, akin to that used in FOIA cases, to make sure that it isn't disclosed even at this early stage.

He can then decide if, at that point, he is going to allow the parties to continue with discovery of materials that are not covered by the privilege to see if the case can go ahead without his stopping dead in his tracks and making the decision as to whether the privilege is involved. If he does find that the privilege could be an indispensable part of either the plaintiff's case or the defendant's dissent, then it provides guidance, long-needed guidance, as to what standard he should use.

Now, I think that the good thing about that is it allows cases to go forward which possibly will be able to be litigated without any use of the state secrets privilege at all or any substitute for it. If, however, the judge finds that, indeed, this is a truly legitimate case

for invocation of state secrets privilege, he then has a series of alternatives, which I don't think anybody could object to. They have been long used in CIPA. They are things such as stipulation, a summary that is not classified or secret, et cetera.

The criteria on which he makes a decision as to whether it is a state secret is whether or not significant harm is reasonably likely to occur. And I think that is one which is in line with some of what I would consider the best judging in the past. The government does have the burden of proving the nature of the harm, the likelihood of occurrence.

And this, I think, is very important, and I will save it, one of the two issues, I think, that can legitimately be discussed here today: that the court should weigh the testimony from government experts in the same manner it does and along with any other expert testimony. I think that is very important, that the judge makes an independent judgment, he looks at the testimony of the government, evaluates it the way that we have learned to evaluate expert testimony—namely, the qualifications of the expert, the experience of the expert, the cohesiveness of the testimony. And those are exactly the grounds on which one does give weight to expert testimony, and that is what should be applied here.

The last point I would raise I have raised before, but I want to underscore its importance. The bill does require the judge to actually look at it. He can't just look at the affidavit. He actually has to look at the evidence that is in dispute as a state secret. And I think that that is very essential, both as to the cases which will be dismissed because there simply is no alternative and as to the cases where he decides, no, there may be a good alternative. How can he say what is a good alternative that will satisfy the legitimate needs of the litigation if he doesn't even know what's in the material?

With that, I'll conclude. But I think this legislation is long overdue. I think it will be a great help to judges. And I don't think it will in any significant way impugn our national security.

Thank you.

[The prepared statement of Judge Wald follows:]

PREPARED STATEMENT OF THE HONORABLE PATRICIA M. WALD

STATEMENT OF PATRICIA M. WALD ON H.R. 984 (STATE SECRETS)
COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES

I wish to submit this statement in favor of H.R. 984 which seeks to establish procedures for regulating the invocation and decisional processes relating to the state secrets privilege in federal courts. The frequent use of the privilege in recent years to deny all relief to civil plaintiffs who have been injured by governmental action is a matter of grave concern to lawyers, judges and legal scholars. In my view this total cutoff of relief is often unnecessary and produces rank injustice in many cases. The state secrets privilege originated as a common law privilege designed to protect from public disclosure during judicial proceedings national security matters whose revelation would endanger the national welfare. Judges who administer the privilege have struggled with varying success to find a middle way between protection of national security and insuring access by worthy plaintiffs to the courts to remedy serious injuries at the government's hands. Unfortunately judges have not been consistent in the way they administer the privilege; some show a readiness to dismiss cases outright on the mere allegation or conclusory affidavit of the Government that national security would be at risk if the case continued. Although the U.S. Supreme Court in the Reynolds case (345 U.S. 1) acknowleged that ultimately it is the judge who must decide if national security does require nondisclosure of material alleged to present a risk, it did not mandate that the judge himself look at that material and make an independent judgement that such a risk was present. As a result some judges do look at it, others accept the government's word and do not. Nor is there consistency as to how substantial the risk must be to justify closing down the case. Finally in many cases it appears that the judge dismisses the case without a careful evaluation of whether the plaintiff might be able to make out his case with unprivileged material or whether using techniques employed in criminal cases and in FOIA proceedings, redacted or substitute evidence could be used in lieu of the disputed items. It is time to regularize the administration of the privilege in a way that fully protects national security but not at the expense of a total shutdown of civil process for worthy claimants. I believe H.R. 984 accomplishes that end.

I would first emphasize that Congress' power under Article I, Section 8 and Article III, Section 2 of the U.S. Constitution to prescribe regulations on the admissibility of evidence in federal courts is not to be questioned. It has done so in the Federal Rules of Evidence, in FISA proceedings and in CIPA . Congress has also legislated in the Freedom of Information Act to allow judges to decide, though on limited grounds,on citizen access to materials that the government resists disclosing because they have been classified In Al Haramain Islamic Foundation v Bush (N. D. Cal) a district judge in an exhaustive opinion recently decided that FISA procedures for treating information obtained under secret FISA warrants preempted invocation of the state secret privilege , a vindication of Congress' power to legislate evidentiary rules in the domain of national security cases.

Federal judges every day handle classified material and make decisions as to whether redacted versions can be disclosed or summaries made that need not be classified or

stipulations substituted for privileged material. They have used masters, informative indices and sampling techniques when massive amounts of material are involved and to the best of my knowledge no harmful leaks have resulted. In my view this bill incorporates into the civil law area many of these useful techniques with which judges are already familiar in order to minimize the number of cases where dismissal of the entire claim will be necessary. It in no way deprives the government of its right to invoke the privilege or requires it to disclose material which the judge finds is truly a security risk. But it does provide a healthy antidote to casual or purposeful abuse of the privilege to hide government misfeasance or embarrassing mistakes.

The Goal of State Secret Regulation

The goal of legislation on state secrets, in addition to producing consistency in court interpretations and fairness to worthy claimants, should be to allow claims to proceed as far as they can through the judicial process without endangering national security. That is not what is happening now, as the recent Ninth Circuit's recent decision in Mohamed v Jeppesen Dataplan makes clear. In that case the district court dismissed a suit under the Alien Tort Claims Act on the motion of the Government as an intervenor before any discovery or even an answer had been filed.The suit claimed damages against an airline company who had allegedly participated in the "extraordinary rendition" of the plaintiff to a foreign nation pursuant to a U.S.. government (CIA) program where he was tortured. The existence of such a rendition program had been widely publicized in U.S. media., and the Swedish government had publicly acknowleged "virtually every aspect of (the plaintiff's) rendition".The plaintiff argued that he could prove by publicly available evidence Jeppesen's role in transporting the plaintiff to the foreign nation at the behest of the United States., with knowledge of the consequences for the plaintif.. Nonetheless the district court dismissed the case on the Government's invocation of the state secret privilege supported by two affidavits, one classified, one not, alleging "serious damage" to national security if the case proceeded. The judge said that the "allegations of covert US military or CIA operations in foreign countries against foreign nationals" constituted the "core" of the suit and so the "the very subject matter of this case is a state secret". The judge did not rule on whether the plaintiff could have made out a prima facie case without resort to privileged information. His ruling was not dissimilar to that of the judge in the Al-Masri case involving torture allegations of another subject of rendition which was dismissed on the basis of a similar affidavit in the Eastern District of Virginia.

In Jeppesen however the Ninth Circuit Court of Appeals reversed the dismissal and remanded for further proceedings, ruling that upfront dismissals on the basis of "the very subject matter" of the suit were to be confined to situations where the Government and theplaintiff had an agreement that was by its very nature expected by the . parties to be secret, such as a contract for CIA undercover work See Totten v United States,92 U.S. 105 .Where no such agreement exists, the Ninth Circuit said, the judge's task is different under Reynolds; he must weigh the interests of the plaintiff and the circumstances of the case to make a determination that revelation of the allegedly privileged material is necessary to the plaintiffs prima facie case or to the Government defense and that if revealed, national security will be impugned. In making that determination "judicial control over the evidence cannot be abdicated to the caprice of the executive officers"

(quoting Reynolds) and the judge must make an" independent evaluation "of the claim The court of Appeals went on to examine the claim in the suit before it, finding that it did not depend exclusively on any proof that a rendition program existed at all, nor that any secret agreement existed beween the plaintiffs and the Government..It adopted instead a protocol of "excising secret evidence on an item-by-item basis, rather than foreclosing litigation altogether at the outset". In so doing it emphasized that the state secret privilege does not bar the litigation of allegations the Government objects to but only the discovery of the evidence itself that might qualify as privileged. It does not create a "zone of silence" around allegations that the Government says concern state secrets.; it protects only specific pieces of evidence not the facts themselves which the evidence may demonstrate.—"it cannot be invoked to prevent a litigant from persuading a jury of the truth or falsity of an allegation by reference to non-privileged evidence,regardless whether privileged evidence might also be probative of the truth or falsity of the allegation:". Thus, the appellate court concluded: "dismissal is justified if and only if specific privileged evidence is itself indispensable to establishing the truth of the plaintiff's allegations or a valid defense that would otherwise be available to the defendant".

The court further refused to rule that the plaintiff in Jeppersen would not be able to make out a prima facie case without access to the secret material.

> "We simply cannot resolve whether the Reynolds evidentiary privilege applies without (1) an actual request for discovery of specific evidence,(2)an explanation from plaintiffs of their need for the evidence,and (3)a formal invocation of the privilege...with respect to that evidence,explaining why it must remain confiden tial. ...Nor can we determine whether the parties will be able to establish their cases without use of privileged evidence without also knowing what non-privileged evidence they will marshal."

Provisions of H.R. 984

I have dealt at length with the Jeppesen opinion because it represents a remarkably similar preview of what H.R. 984 requires of trial judges faced with the invocation of the state secret privilege. The proposed legislation in section 4 et seq. requires the Government to assert in affidavit form the factual basis for the claim of privilege. The court must then make a preliminary review of the information and confer with the parties as to whether special protective steps need be taken such as appointment of a special master or if materials are massive submission of an index, akin to that used in FOIA cases, to indicate which parts of the material are privileged and why without revealing the material itself.(section 5) He then decides if the parties should be allowed to continue with discovery of materials not covered by the asserted privilege before he rules on the privilege so that if a prima facie case or defense can be based on such unexceptionable material, the case can go forward to judgement.He can also order security clearances for defense counsel, if necessary.

These preliminary steps will assure that cases which might validly go forward without any need to involve privileged material will not be cutoff prematurely , and in so doing would alleviate much of the justified concern lawyers, legal academics and commentators, including the American Bar Association, and the public have voiced that legitimate grievances against the Government should not be consigned to permanent oblivion and

that the Government will not be allowed to exercise unilateral power over the life and death of such claims in our courts.

Beginning with section 6, the bill sets out a clear and logical process for determining whether the claim of privilege is valid. In cases where it becomes clear that the material in dispute is indispensable to either the plaintiff or the Government. The bill provides first and foremost that the judge shall make an independent assessment of "whether the harm identified by the Government is reasonably likely to occur",i.e. ":significant harm to the national defense or the diplomatic relations of the United States". The Government has the burden of proof as to the nature of the harm and... the likelihood of its occurrence" In making that assessment the "court shall weigh testimony from Government experts in the same manner as it does,and along with, any other expert testimony". Section 7 then provides a series of alternatives to disclosure if the judge finds that the privilege has been legitimately raised and the material cannot be disclosed. They include provision by the Government of a substitute for the privileged document or testimony that gives the plaintiff a "substantially equivalent opportunity" to litigate the case.This could involve redaction, summarizing or stipulating relevant facts, all techniques with which courts are familiar under CIPA.If the Government refuses to provide such a substitute, after the judge rules that such a substitute is possible, the court may make an adverse finding against the Government on the relevant factual or legal issue. If on the other hand the judge finds that it is not possible to proffer an adequate substitute presumably the case would have to be dismissed although the bill presently is not entirely clear on this matter. See sections 7(b)@2) and (d). It may be wise to clarify whether the power to make orders such as striking testimony,making adverse findings etc. laid out in 7(d) embraces the situation where an adequate substitute is not possible .

Issues Raised By the Bill

There is an additional issue of what happens when the disputed information does not foreclose the plaintiff from making out a prima facie case but would foreclose the defendant from making out a valid defense. The Jeppesen case notes that under existing precedent the case would be dismissed. I note however that it appears that section 7 would allow the court to make orders "in the interest of justice", striking testimony or even dismissing a claim or counterclaim in that situation This would introduce a novel though equitable power in the courts that still falls short of requiring any disclosure and is deserving of discussion.

In prior hearings several issues have been raised as to the burdens and criteria the judge should use in deciding if the privilege applies.One is whether the judge should be required in all cases to personally view the secret material in making his independent assessment. Reynolds made no such requirement and in FOIA cases the judge is allowed in his discretion to look at the material but not required to do so. This bill requires that he view the material before ruling on its privileged status. It certainly seems that he ought to view the material himself rather than accept its description in the government affidavit in virtually all cases, although it is always possible to conceive of an exception,i.e. the precise formulas for nuclear weapons. . It is hard to see how without seeing the material for himself he could make the decisions required by the bill as to whether an adequate

substitute is possible or as to what kind of segregation or redaction of privileged material in a document would be adequate as a substitute. Where material is massive, sampling techniques or a master might be used to facilitate his review. See,e.g. In re U.S. Department of Defense,848 F2d 232 (D.C. Cir. 1988). Here I emphasize that federal judges handle classified and secret material in other contexts (FISA and CIPA) regularly and there are detailed written materials issued by the Federal Judicial Center as well as trained and cleared security assistants provided to insure its safekeeping.

Another issue that has arisen is whether the fact that material has been officially classified is sufficient to render it subject to the secrets privilege. The Ninth Circuit considered this claim and ruled the two categories are not synonymous; rejecting the precedent of FOIA Exemption 1 in this regard that if the judge finds material legitimately classified he is not empowered to release it. The Ninth Circuit found the FOIA situation distinguishable for several reasons. Foremost was a recognition that Reynolds warned that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers..without lead[ing] to intolerable abuses" and therefore according to the Ninth Circuit "A rule that categorically equated "classified"with "secret" matters would, for example, perversely encourage the President to classify politically embarrassing information simply to place it beyond the reach of judicial process". While classification may be a "strong indication of secrecy as a practical matter" it is not determinative and the judge must make his own evaluation on the distinct criteria of the secrets privilege. Secondly, the purposes of the two disclosure situations are very different; the balance of equities in a civil claim includes the plaintiff's interest in access to justice for a grievance against the government; in FOIA the plaintiff need make no showing of any injury to seek access to the material. I would add that the FOIA itself allows the judge to go beyond the classification label and look at the material to see if it has been "reasonably" classified.

The final issue I want to discuss is the standard by which Government affidavits will be evaluated in the judge's independent assessment. Past courts have used different standards, some giving great deference to the Government's identification of harm and consequences of disclosure. Other courts have insisted on a greater scrutiny of the logic and credibility of the Government's predictions. H.R.984 provides that the judge make his independent evaluation of the harm in a manner that weights the testimony of Government experts like those of other experts. Judges are confronted every day with expert testimony of all kinds and are accustomed to evaluating it on the basis of the expert's background,, firsthand knowledge of the subject, and inherent credibility as well as the consistency and persuasiveness of his testimony Thus police officers or law enforcement officials receive no special deference emanating from their status alone. Were Government experts in these cases to be treated differently from other experts solely because of their affiliation,, the overriding criteria of an independent judicial evaluation could be undermined. As an example, the testimony of a newly appointed Assistant Secretary or Division Head does not automatically warrant greater deference than that of a recently retired Secretary of the same agency who might be an expert on the other side. Other factors enter into the calculus of weight., The Government witness may be able to demonstrate his more up to date access to relevant information while the

retired official may be able to show he has dealt with similar matters over many years. The judge should look at all factors in making his evaluation of what weight is to be given to expert testimony. In earlier testimony I mentioned that the FOIA Exemption 1 Conference Report spoke of giving "substantial weight" to Government affidavits. Judge Skelly Wright of the D. C. Circuit subsequently interpreted that phrase in Ray v Turner,587 F2d 1187 (1978) as follows: "It is important to recognize the limits,as well as the value of this language...Stretching the Conference Committee's recognition of the "substantial weight" deserved by demonstrated expertise and knowledge into a broad presumption favoring all agency affidavits in national security cases would contradict the clear provisions of the statute and would render meaningless Congress' obvious interest in passing the provision [permitting judges to decide if the classification was reasonable] over the President's specific objections". Other courts have rejected Government affidavits in national security cases when they found them lacking in specificity or detail, when they evidenced bad faith or failure to account for contrary evidence. See,e.g., Campbell v D.O.J., 164 F.3d 70 (D.C.Cir. 1998) I believe that H.R. 984 provides sufficient guidance for judges in making their independent evaluations and. any additional provision applying to Government evidence alone would be in tension with the provision in this bill placing the burden of showing harm on the Government. As I said before, federal judges daily deal with expert evidence of all kinds, forensic, specialized law enforcement and intelligence, medical and accord it the weight it deserves without special preferences or presumptions. They will do the same with national security evidence.

Conclusion

I support H.R, 984

as a long overdue and eminently feasible means of insuring that the state secret privilege is administered in a consistent and fair way in our federal courts. Thank you for this opportunity to present my views.

Patricia M. Wald

U.S. Court of Appeals (ret.); Judge, International Crimial Tribunal for the former Yugoslavia (1999-2001)

May 22,2009

Mr. NADLER. Thank you.

And now I recognize for 5 minutes the Honorable Mr. Hutchinson.

TESTIMONY OF THE HONORABLE ASA HUTCHINSON, SENIOR PARTNER, HUTCHINSON LAW GROUP

Mr. HUTCHINSON. Thank you, Chairman Nadler. It is good to be in your courtroom again. Chairman Conyers, it is good to see you. Thank you for your distinguished leadership in the full Committee. My good friend, Ranking Member Sensenbrenner, thank you for

your leadership, as well. And, all Members of the Committee, it is good to be back to a Committee that I hold in fond admiration.

As you know my background has been principally in law enforcement and security as well as in elective office. But both as United States Attorney, as head of the DEA, and then in Homeland Security, obviously we handled national security matters, sensitive matters at the highest level. And I bring that background to this Committee, and I would emphasize certain principles that I think should be followed as you address this important legislation.

First, as has been acknowledged this morning already, there is a national security interest in protecting state secrets. This is not a figment of anybody's imagination. There are state secrets. There are things that we don't want the public to know, and certainly our enemies should not know that. There are many programs, sources, methods of surveillance, and numerous defense programs that need protection and secrecy. That is a given and must be done.

However, I think it is important to underscore also that any assertion of this state secrets privilege by the executive branch should not be immune from our Federal system of checks and balances. It is just fundamental to me in my governing structures, in my understanding of what our Founding Fathers created that we should not have an unfettered executive branch. They are co-equal branches of government. And the system of checks and balances is so critical to compensate for the failures of human nature.

And if you can imagine being in the executive branch and having some troublesome litigation filed, and you are advised that, "Well, we perhaps could claim the state secrets privilege and avoid substantial litigation," and there is a human tendency, when that privilege is there, to claim that privilege. And with the failures of human nature, even though that privilege many times is justifiably claimed, there also are historical instances where perhaps it was not appropriately claimed. Regardless, though, regardless, under our system of government there needs to be a check and balance, and the judiciary is the right position to do that.

And that is the third principle, I believe, that the courts have proven themselves capable of protecting classified information at the highest levels and establishing procedures to balance the interests of secrecy and justice. The illustrations, of course, are how they have very appropriately handled FISA matters, how the Classified Information Procedures Act has been implemented so well by the courts, and the handling of classified information under FOIA requests.

And I think you could also make the case historically that perhaps there has been more loose lips in other branches of government than within the judiciary. They have a good track record of protecting those things that have been entrusted to them.

And I might add, I pointed out my background as a law enforcement and national security official, but I also have been blessed to be in the private sector, and currently I am handling a national security case from the defense side. And guess what the first thing the courts required? Well, you've got to have your security, top-secret security clearances upgraded; you have to go and view the evidence in secure facilities. All the procedures are set up, even

though they are cumbersome, they are required, and they are implemented on a routine basis by the courts.

Another point that I think is relevant to make today, that currently, even though this is an historic doctrine, there is insufficient authority, insufficient clarity, and insufficient guidance for the courts to provide an independent review that I believe is important in our system of checks and balances. We have the Reynolds case that has been cited; the El-Masri case most recently in the Eastern District of Virginia. The Jeppesen case I understand will be discussed, the Fourth Circuit case. All of these reflect different approaches and different results—some better, some others are not so good, depending upon your viewpoint.

But I believe that Congress, being the important third branch of government, should act to provide the guidance and clarity in terms of what is the right approach to provide the independent review of when the state secrets privilege is asserted. House Resolution 984 is an excellent foundation to consider this. It provides for an independent assessment by the courts, does not require substantial deference.

And I know this is a little bit of a touchy issue, but if I might just make the point that, in other areas of litigation where there is some deference—FOIA, other regulatory areas—there are fine guidelines and history and regulations that give guidance in those areas that fine-tune it before it ever gets to the court. And perhaps there is the distinction between the deferences given in those circumstances and the independent review that is required here.

I want to abide by the time, but I think the bill is a good starting point for discussion. It does provide the independent assessment; clarifies that it is an evidentiary privilege, not an immunity doctrine; and it does provide the courts with the critical oversight.

Finally, I have enjoyed participating in the Constitution Project's bipartisan Liberty and Security Committee, which I have recently joined. And the report, entitled "Reforming the State Secrets Privilege," has been signed by more than 40 policy experts, former government officials, and legal scholars of all political affiliations. And I would ask that that report be included as part of the record in this hearing today.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Hutchinson follows:]

PREPARED STATEMENT OF THE HONORABLE ASA HUTCHINSON

Thank you for the opportunity to testify today in support of legislation to provide critical reforms to the state secrets privilege. I am grateful for the leadership of this Subcommittee in holding this hearing on a subject of critical importance to both our national security and the security of individual rights.

In addition to having served as a Member of Congress (R-AR), I have worked for many years in law enforcement and homeland security. I have served as United States Attorney, as Director of the Drug Enforcement Administration, and as Under Secretary for Border and Transportation Security at the Department of Homeland Security. Because of my law enforcement and security experience, I have a keen appreciation for our country's need to protect its national security information. However, my experience also demonstrates that it is important to reform the state secrets privilege to ensure that our courts provide critical oversight and independent review of executive branch state secrets claims. I believe that Congress needs to act to serve both goals, and help restore a proper balance between our need to safeguard national security information and our responsibility to ensure access to the courts for litigants.

The state secrets privilege was originally recognized as a doctrine to protect particular evidence from disclosure in litigation, when such disclosure might threaten national security. In recent years, however, it has evolved from an *evidentiary* privilege into an *immunity* doctrine, which has blocked any litigation of cases involving national security programs. Over the past twenty years, courts have dismissed at least a dozen lawsuits on state secrets grounds without any independent review of the underlying evidence that purportedly would be subject to this privilege. Not only does this create an incentive for overreaching claims of secrecy by the executive branch, but it has prevented too many plaintiffs from having their day in court. For example, in the case of *El-Masri v. United States,* the trial court and the U.S. Court of Appeals for the Fourth Circuit relied on the state secrets privilege to dismiss a lawsuit by Khaled El-Masri, a German citizen who, by all accounts, was an innocent victim of the United States' extraordinary rendition program. The case was dismissed at the pleadings stage, before any discovery had been conducted. No judge ever examined whether there might be enough non-privileged evidence to enable the case to be litigated, such as evidence from public accounts of the rendition and an investigation conducted by the German government.

In April of this year, the U.S. Court of Appeals for the Ninth Circuit issued a decision in *Mohamed v. Jeppesen Dataplan, Inc.,* which reflected a very different and much more encouraging interpretation of the state secrets privilege. The court held that cases cannot be foreclosed at the outset on the basis of the state secrets privilege, and that the trial court must "undertake an independent evaluation of any evidence sought to be excluded to determine whether its contents are secret within the meaning of the privilege." Such an independent review is essential to provide the necessary check on executive discretion. However, even if the Ninth Circuit's interpretation of the privilege stands after further litigation, it is still critical that Congress act to provide trial courts with the guidance they need to conduct such an independent review. The State Secrets Protection Act, H.R. 984, provides the type of legislative direction that would establish necessary oversight and a more appropriate balance in the application of the state secrets privilege.

Having served in both the Congress and the executive branch, I have a full appreciation for the need for a robust system of checks and balances, and a genuine respect for the role of our courts in our constitutional system. I also understand the natural tendency on the part of the executive branch to overstate claims of secrecy and to avoid disclosure whenever possible. It is judges who are best qualified to balance the risks of disclosing evidence with the interests of justice. Judges can and should be trusted with sensitive information and they are fully competent to evaluate independently whether the state secrets privilege should apply to particular evidence.

It is Congress' responsibility, and fully within its constitutional role, to enact such legislation to restore checks and balances in this area. Legislation to reform the state secrets privilege would not interfere with the President's responsibilities under Article II of the Constitution. On the contrary, the United States Constitution specifically grants Congress the power to enact "Regulations" regarding the jurisdiction of federal courts. U.S. CONST. Art. III, § 2. This includes the power to legislate reforms to the state secrets privilege.

Congress should reform the state secrets privilege and allow courts to independently assess whether the privilege should apply. I want to highlight several particular provisions of the State Secrets Protection Act, H.R. 984, that recognize this need for change and would institute reforms that I support.

Section 6 of the State Secrets Protection Act would provide the most basic and critical reform, by requiring that whenever the executive branch asserts the state secrets privilege, the judge must review the claim, including reviewing the actual evidence asserted to be privileged, and must make "an independent assessment" of whether the privilege applies. Section 3(b) of the Act provides that this hearing may be conducted *in camera,* so that there would not be a risk that the review itself might disclose any evidence. Judges are well-qualified to review evidence asserted to be subject to the privilege and make appropriate decisions as to whether disclosure of such information is likely to harm our national security. Judges already conduct similar reviews of sensitive information under such statutes as the Foreign Intelligence Surveillance Act (FISA) and the Classified Information Procedures Act (CIPA).

Section 6(c) provides that "The court shall weigh testimony from Government experts in the same manner as it does, and along with, any other expert testimony." Executive branch officials are entitled to the same respect and deference as any other expert witnesses but the judgment these officials make should not be without oversight. I do not believe it is appropriate, as the companion Senate bill does, to include language requiring that executive branch assertions of the privilege be given

"substantial weight." The standard of review in H.R. 984 provides proper respect for executive branch experts, whereas a "substantial weight" standard would unfairly tip the scales in favor of executive branch claims before the judge's evaluation occurs, and would undermine the thoroughness of the judge's own review. The standard of review in H.R. 984 would ensure that a court's independent review is meaningful and is not just a routine acceptance of executive assertions.

Section 7(b): This provision requires that if the judge finds that certain evidence is protected by the state secrets privilege, the judge should also assess whether it is possible to create a non-privileged substitute for the evidence that would allow the litigation to proceed. If a non-privileged substitute is possible, the court must order the government to produce such a substitute. This provision would help restore an appropriate balance in national security litigation, by ensuring both that national security secrets are protected from public disclosure and also that litigation will be permitted to proceed where possible. 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.

Section 7(c): This section would prohibit courts from dismissing cases on the basis of the state secrets privilege at the pleadings stage or before the parties have had the opportunity to conduct discovery. The provision would still permit dismissals on other grounds, such as for frivolousness. This section would help restore the doctrine to its proper role as an *evidentiary* privilege rather than an *immunity* doctrine, and would ensure that plaintiffs like Mr. El-Masri will be able to have a judge independently determine whether there is sufficient non-privileged evidence for their cases to be litigated.

Other sections: Several other provisions of H.R. 984 are designed to ensure that judges have the tools they need to conduct their independent reviews of state secrets claims, and should counter any concern that judges may not have the necessary expertise and background in national security matters to make these determinations. For example, Section 5(b) of the bill instructs the court to consider whether to appoint a special master with appropriate expertise to assist the court in its duties, and Section 6(b) enables the court to rely on sampling procedures when the evidence to be reviewed is voluminous.

These provisions would provide for independent judicial determinations of whether the state secrets privilege should apply and thereby help restore the critical oversight role of our courts. Granting executive branch officials unchecked discretion to decide whether evidence may be withheld under the state secrets privilege provides too great a temptation for abuse. I urge you to support these reforms contained in the State Secrets Protection Act and to help preserve our constitutional system of checks and balances. Finally, I am attaching to my prepared testimony a white paper released by the Constitution Project's bipartisan Liberty and Security Committee, which I have recently joined. The report, entitled *Reforming the State Secrets Privilege,* is signed by more than forty policy experts, former government officials, and legal scholars of all political affiliations. Although it was released before I joined this committee, I endorse its conclusions that judges should independently assess state secrets claims by the executive branch, and that Congress should clarify that judges, not the executive branch, must have a final say about whether disputed evidence is subject to this privilege.

Mr. NADLER. Without objection, that report will certainly be included in the hearing.

[The information referred to follows:]

REFORMING THE STATE SECRETS PRIVILEGE

Statement of the Constitution Project's
Liberty and Security Committee &
Coalition to Defend Checks and Balances

May 31, 2007

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Executive Summary*

What is the state secrets privilege? Under this privilege, the executive branch claims that the disclosure of certain evidence in court may damage national security and therefore cannot be released in litigation. Beginning with the Supreme Court decision in *United States v. Reynolds* (1953), some federal judges have treated as absolute the executive branch's assertion about dangers to national security.

Why should the privilege be limited? Unless claims about state secrets evidence are subjected to independent judicial scrutiny, the executive branch is at liberty to violate legal and constitutional rights with impunity and without the public scrutiny that ensures that the government is accountable for its actions. By accepting these claims as valid on their face, courts undermine the principle of judicial independence, the adversary process, fairness in the courtroom, and our constitutional system of checks and balances.

Significant ambiguities in the *Reynolds* decision have produced overbroad judicial readings of the state secrets privilege. Although the Supreme Court stated that judicial control over evidence in a case "cannot be abdicated to the caprice of executive officials," the Court nevertheless allowed the courts to abdicate their responsibility by its statement that:

> [W]e 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. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and 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.

What are some recent examples of assertions of the state secrets privilege? The state secrets privilege is currently being invoked in cases challenging the NSA eavesdropping program and in the extraordinary rendition cases of Maher Arar and Khalid El-Masri.

Can judges review classified matter without jeopardizing national security? Why is independent judicial review essential? Judges can, if necessary, review documents in private (also known as *in camera* review) without disclosing them to the public. Unless a judge independently examines the evidence claimed to be subject to the state secrets privilege, there is no basis for accepting the claim as valid. In litigation, to automatically accept an assertion as truth violates elementary principles of courtroom procedure. Review by an independent judge is especially

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* The Constitution Project sincerely thanks Coalition to Defend Checks and Balances Member Louis Fisher, Specialist in Constitutional Law, Law Library, Library of Congress, for drafting this Executive Summary to accompany the Constitution Project Statement on Reforming the State Secrets Privilege.

important when the government is the party to the case and when, if the information is not disclosed, individual rights and liberties may be abused.

Judges' acceptance of these executive branch claims as absolute reduces the public's trust and confidence in the judiciary by creating the appearance that two separate and co-equal branches of our government are instead operating as one. Judicial deference to executive claims of state secrets does not protect national security, but instead seriously weakens the interests of our country and our constitutional system of government.

History teaches that without independent judicial review of the executive branch's claim, the judge, the other parties to the case, and the public cannot know whether the claim is being asserted for legitimate reasons or to conceal embarrassment, illegality, or constitutional violations. In fact, as we now know, the documents withheld from the plaintiffs in the *Reynolds* case, which established this doctrine, themselves contained no state secrets. The executive branch misled the Supreme Court to cover up its negligence in a military airplane crash and to seek judicial endorsement of the state secrets privilege.

What Options Are Available to Courts Reviewing a State Secrets Claim? The courts have many options. In cases in which the government is a party, judges could offer the executive branch a choice between surrendering the requested documents for *in camera* inspection or forfeiting the case. In any kind of case, in exercising their independent role, judges should not consider edited documents or classified affidavits, statements, and declarations prepared by executive officials as adequate substitutes for the disputed evidence itself. If an entire document contains names, places, or other information that might jeopardize sources and methods, or present other legitimate reasons for withholding the full document from the other parties to the lawsuit, the judge – not the executive branch – should decide what type of redaction and editing will permit release of the document to the private litigant. Otherwise, the judge's independent review and authority will be replaced by the assertions of a party with an interest in shielding the information – and its own actions – from public scrutiny and accountability.

What Steps Should be Taken to Reform the Privilege? This report calls on judges to exercise their independent duty to assess the credibility and necessity of state secrets claims by the executive branch. Judges have the constitutional and legal authority to review and evaluate any evidence that the executive branch claims should be subject to the state secrets privilege. They are entrusted by the public to secure the rights of litigants and safeguard constitutional principles.

We therefore recommend that Congress conduct hearings to investigate the ways in which the state secrets privilege is asserted, and craft statutory language to clarify that judges, not the executive branch, have the final say about whether disputed evidence is subject to the state secrets privilege. This legislative action is essential to restore and strengthen the basic rights and liberties provided by our constitutional system of government, to provide fairness to parties to litigation, and to enable public scrutiny of governmental conduct and thus preserve accountability for executive actions.

REFORMING THE STATE SECRETS PRIVILEGE*

As interpreted by some courts, the state secrets doctrine places absolute power in the executive branch to withhold information to the detriment of constitutional liberties. We, the undersigned members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances, urge that the "state secrets doctrine" be limited to balance the interests of private parties, constitutional liberties, and national security. Specifically, Congress should enact legislation to clarify the scope of this doctrine and assure greater protection to private litigants. In addition, courts should carefully review any assertions of this doctrine, and treat it as a qualified privilege, not an absolute one.

Since the terrorist attacks of September 11, 2001, the government 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. The government is presently invoking the privilege in such cases as NSA eavesdropping and the "extraordinary rendition" cases of Maher Arar and Khalid El-Masri. The fundamental issue: what constitutional values should guide a federal judge in evaluating the government's assertion?

The state secrets privilege was first recognized in the United States Supreme Court decision *United States v. Reynolds*, 345 U.S. 1 (1953). Because of ambiguities in this landmark case, federal judges have discharged their responsibilities in widely different ways. Some have insisted on examining the document *in camera* to decide whether the private party should

* The Constitution Project sincerely thanks Louis Fisher, Specialist in Constitutional Law, Law Library, Library of Congress, for serving as the principal author of this statement and for guiding committee members to consensus on these issues. We are also grateful to Shayana Kadidal, Senior Managing Attorney, Center for Constitutional Rights; Robert Pallitto, Assistant Professor of Political Science, University of Texas at El Paso; William G. Weaver, Associate Professor, University of Texas at El Paso; and Mark S. Zaid, Krieger & Zaid, PLLC, for sharing their expertise on this subject and for their substantial assistance in the drafting of this statement.

receive the document unchanged or in some redacted form. Other judges adopt the standard of (1) "deference," (2) "utmost deference," or (3) treat the privilege as an "absolute" when appropriately invoked. The conduct of courts in these cases raises important questions about the principle of judicial independence, the concept of a neutral magistrate, fairness in the courtroom, the adversary model, and the constitutional system of checks and balances. The reforms we outline below would help to safeguard these important principles.

The Problem with *Reynolds*. The Supreme Court's 1953 ruling in *Reynolds* involved the authority of the executive branch to withhold certain documents from three widows who sued the government for the deaths of their husbands in a B-29 crash. They asked for the Air Force accident report and statements from three surviving crew members. In bringing suit under the Federal Tort Claims Act, they won in district court as well as on appeal to the U.S. Court of Appeals for the Third Circuit. Both those courts told the government that if it failed to surrender the documents, at least to the district judge to be read in chambers, it would lose the case. Under the tort claims statute, the government is liable "in the same manner" as a private individual and is entitled to no special privileges.

However, without ever looking at the report, the Supreme Court sustained the government's claim of privilege. It stated: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we 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. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and 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." *Reynolds*, 345 U.S. at 9-10.

In deciding not to examine the report, the Court was in no position to know if there had been "executive caprice" or not. On its face, the Court's ruling marked an abdication by the judiciary to a governmental assertion. What principled objection could be raised to the executive branch showing challenged documents to a district judge in chambers? Unless an independent magistrate examined the accident report and the statements of surviving crew members, there was no way to determine whether disclosure posed a reasonable danger to national security, that the assertion of the privilege was justified, or that any jeopardy to national security existed.

Moreover, the Court's ruling left unclear the meaning of "disclosure." Why would a federal court "jeopardize the security which the privilege is meant to protect" by examining the document in private? On what ground can it be argued that federal judges lack authority, integrity, or competence to view the contents of disputed documents in their private chambers to determine the validity of the government's claim? No jeopardy to national security emerges with *in camera* inspection.

The Court advised the three widows to return to district court and depose the three surviving crew members. There is evidence that depositions were taken, but after weighing the emotional and financial costs of reviving the litigation, the women decided to settle for 75% of what they would have received under the original district court ruling. As noted below, it was revealed years later that there were no state secrets to protect and that the government was simply seeking to avoid releasing embarrassing information.

Application of *Reynolds*. The inconsistent signals delivered in *Reynolds* regarding judicial responsibility, reappear in contemporary cases. For example, on May 12, 2006, a district judge held that the state secrets privilege was validly asserted in a civil case seeking damages for "extraordinary rendition" and torture based on mistaken identity, and on March 2, 2007, this decision was upheld on appeal. Khalid El-Masri sued the government on the ground that he had been illegally detained as part of the CIA's "extraordinary rendition" program, tortured,

and subjected to other inhumane treatment. His treatment resulted from U.S. government officials mistakenly believing that he was someone else.

The district court offered two conflicting frameworks. On the one hand, the court noted that it is the responsibility of a federal judge "to determine whether the information for which the privilege is claimed qualifies as a state secret. Importantly, courts must not blindly accept the Executive Branch's assertion to this effect, but must instead independently and carefully determine whether, in the circumstances, the claimed secrets deserve the protection of the privilege. . . . In those cases where the claimed state secrets are at the core of the suit and the operation of the privilege may defeat valid claims, courts must carefully scrutinize the assertion of the privilege lest it be used by the government to shield 'material not strictly necessary to prevent injury to national security.'" *El-Masri v. Tenet*, 437 F.Supp.2d 530, 536 (E.D. Va. 2006), quoting *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983).

Those passages suggest an independent role for the judiciary. However, the district court also offered reasons to accept executive claims. When undertaking an inquiry into state secret assertions, "courts must also bear in mind the Executive Branch's preeminent authority over military and diplomatic matters and its greater expertise relative to the judicial branch in predicting the effect of a particular disclosure on national security." *Id.* The state secrets privilege "is in fact a privilege of the highest dignity and significance." *Id.* The state secrets privilege "is an evidentiary constitutional authority over the conduct of this country's diplomatic and military affairs and therefore belongs exclusively to the Executive Branch." *Id.* at 535. The court stated that, "unlike other privileges, the state secrets privilege is absolute and therefore once a court is satisfied that the claim is validly asserted, the privilege is not subject to a judicial balancing of the various interests at stake." *Id.* at 537. Ultimately, the court upheld the government's claim of privilege and dismissed the case. On appeal, the Fourth Circuit affirmed the District Court's ruling, noting that "in certain circumstances a court may conclude that an explanation by the Executive of why a question cannot be answered would

itself create an unacceptable danger of injurious disclosure." *El-Masri v. United States*, 479 F.3d 296, 305 (4th Cir. 2007). In these situations, the Fourth Circuit stated, "a court is obliged to accept the executive branch's claim of privilege without further demand." *Id.* at 306.

Judicial Competence. The remarks above by both the district court and the Fourth Circuit in *El-Masri* imply that in national security matters the federal judiciary lacks the competence to independently judge the merits of state secrets assertions. The *El-Masri* district court cited this language from a 1948 Supreme Court decision: "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not 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." 437 F.Supp.2d at 536 n.7, quoting *C. & S. Air Lines v. Waterman S.S. Corp.* 333 U.S. 103, 111 (1948).

We object to this notion that the federal courts lack the competence to assess state secrets claims. First, nothing in state secrets cases involves publishing information "to the world." Second, the capacity of the Supreme Court in 1948 to independently examine and assess classified documents has been vastly enhanced over the past half-century by the 1958 amendments to the Housekeeping Statute, the 1974 amendments to the Freedom of Information Act (FOIA), the 1978 creation of the Foreign Intelligence Surveillance Act (FISA) Court, and the Classified Information Procedures Act (CIPA) of 1980. Louis Fisher, IN THE NAME OF NATIONAL SECURITY 124-64 (2006). Third, long before those enactments, federal courts have always retained an independent role in assuring that the rights of defendants are not nullified by claims of "state secrets." The 1807 trial of Aaron Burr illustrates this point. The court understood that Burr, having been publicly accused of treason on the basis of certain letters in the hands of the Jefferson administration, and therefore facing the death sentence if convicted, had every right to gain access to those documents to defend himself. *Id.* at 212-20. Thus, courts are fully competent to review and evaluate the evidence supporting a claim of

state secrets. If in such a case the government decides that the documents are too sensitive to release, even to the trial judge, the appropriate consequence in a criminal trial is for the government to drop the charges.

The Deference Standard. Another ground upon which courts have erroneously relied in upholding government claims of state secrets has been the deference standard from administrative law. In this context, the Supreme Court's 1984 decision in *Chevron* adopted the principle that when a federal court reviews an agency's construction of a statute, and the law is silent or ambiguous about the issue being litigated, agency regulations are to be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). If the agency's interpretation is reasonable it is "entitled to deference." *Id.* at 865.

The *Chevron* model has no application to the state secrets privilege. When application of the state secrets doctrine is litigated in court, this is not a situation in which Congress has delegated broad authority to an agency. Nor is there any opportunity, as there is in administrative law, for Congress to reenter the picture by enacting legislation that overrides an agency interpretation or by passing restrictive appropriations riders. Moreover, agency rulemaking invites broad public participation through the notice-and-comment procedure. By definition, the public is barred from reviewing executive claims of state secrets. Agency rulemaking is subject to public congressional hearings, informal private and legislative pressures, and the restrictive force of legislative history. Those mechanisms are absent from litigation involving state secrets. When the state secrets privilege is invoked, the sole check on arbitrary and possibly illegal executive action is the federal judiciary.

***Ex Parte* Review.** The deference standard is poorly suited for state secrets cases for another reason. When the executive branch agrees to release a classified or secret document to a federal judge, it will be read not only in private but *ex parte*, without an opportunity for private litigants to examine the document. The judge may decide to release the document to the

private parties, in whole or in redacted form, but the initial review will be by the judge. This procedure already presents the appearance of serious bias toward the executive branch and its asserted prerogatives. To add to that advantage the standard of "deference," "utmost deference," or treating the state secrets privilege as an "absolute" makes the federal judiciary look like an arm of the Executive. It undermines judicial independence, the adversary process, and fairness to private litigants. When the state secrets privilege is initially invoked, no federal judge can know whether it is being asserted for legitimate reasons or to conceal embarrassment, illegality, or constitutional violations.

Who Decides a Privilege? In his classic 1940 treatise on evidence, John Henry Wigmore recognized that a state secrets privilege exists covering "matters whose disclosure would endager [sic] the Nation's governmental requirements or its relations of friendship and profit with other nations." 8 Wigmore, EVIDENCE § 2212a (3d ed. 1940). Yet he cautioned that this privilege "has been so often improperly invoked and so loosely misapplied that a strict definition of its legitimate limits must be made." *Id.* When he asked who should determine the necessity for secrecy -- the executive or the judiciary -- he concluded it must be the court: "Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coördinate 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 . . . Both principle and policy demand that the determination of the privilege shall be for the Court." § 2378.

When the Third Circuit decided the *Reynolds* case in 1951, it warned that recognizing a "sweeping privilege" against the disclosure of sensitive or confidential documents is "contrary to sound public policy" because it "is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers." 192 F.2d at 995. The district judge directed the government to produce the B-29 documents for his

personal examination, stating that the government was "adequately protected" from the disclosure of any privileged matter. *Id.* at 996. To permit the executive branch to 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." *Id.* at 997. Moreover: "Neither the executive nor the legislative branch of the Government may constitutionally encroach upon the field which the Constitution has reserved for the judiciary by transferring to itself the power to decide justiciable questions which arise in cases or controversies submitted to the judicial branch for decision. . . . The judges of the United States are public officers whose responsibility under the Constitution is just as great as that of the heads of the executive departments." *Id.*

Judges are entrusted with the duty to secure the rights of litigants in court cases. Beyond this protection to individual parties, however, lies a broader institutional interest. Final say on the claim of a state secret must involve more parties than just the executive branch. Unchecked and unexamined assertions of presidential power have done great damage to the public interest and to constitutional principles.

From Rule 509 to 501. In the late 1960s and early 1970s, there were efforts to statutorily define the state secrets privilege. An advisory committee appointed by Chief Justice Earl Warren completed a preliminary draft of proposed rules of evidence in December 1968. Among the proposed rules was Rule 5-09, later renumbered 509. It defined a secret of state as "information not open or theretofore officially disclosed to the public concerning the national defense or the international relations of the United States." Here "disclosure" meant release to the public. Nothing in that definition prevented the executive branch from releasing state secrets to a judge to be read in chambers. Louis Fisher, "State Your Secrets," *Legal Times*, June 26, 2006, at 68; Fisher, IN THE NAME OF NATIONAL SECURITY, at 140-45.

The advisory committee concluded that if a judge sustained a claim of privilege for a state secret involving the government as a party, the court would have several options. If the claim

deprived a private party of material evidence, the judge could make "any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action." The Justice Department vigorously opposed the draft and wanted the proposed rule changed to recognize that the executive's classification of information as a state secret was final and binding on judges. A revised rule was released in March 1972, eliminating the definition of "a secret of state" but keeping final control with the judge. A third version was presented to Congress the next year, along with other rules of evidence. Congress concluded that it lacked time to thoroughly review all the rules within 90 days and vote to disapprove particular ones. It passed legislation to prevent any of the proposed rules from taking effect.

When Congress passed the rules of evidence in 1975, it included Rule 501 on privileges. It does not recognize any authority on the part of the executive branch to dictate the reach of a privilege and makes no mention of state secrets. Rule 501 expressly grants authority to the courts to decide privileges. The rule, still in effect, states: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof *shall be governed by the principles of the common law as they may be interpreted by the courts of the United States* in the light of reason and experience" (emphasis added). One exception expressly stated in Rule 501 concerns civil actions at the state level where state law supplies the rule of decision. Advocates of executive power might read the language "[e]xcept as otherwise required by the Constitution" to open the door to claims of inherent presidential power under Article II. However, even if this interpretation supports the existence of a state secrets privilege, it cannot overcome the rule that courts must assess and determine whether the privilege applies in a given case.

Agency Claims. The principle of judicial authority over rules of evidence included in Rule 501 appeared in a dispute that reached the Court of Federal Claims in *Barlow v. United States*, 2000

U.S. Claims LEXIS 156 (2000). On February 10, 2000, then-CIA Director George Tenet signed a formal claim of state-secrets privilege, but added: "I recognize it is the Court's decision rather than mine to determine whether requested material is relevant to matters being addressed in litigation." Tenet's statement reflects executive subordination to the rule of law and undergirds the constitutional principle of judicial independence. Most agency claims and declarations, however, simply assert the state secrets privilege without recognizing any superior judicial authority in deciding matters of relevancy and evidence. When an agency head signs a declaration invoking the privilege, is there any reason to believe the agency has complied with the procedural safeguard discussed in *Reynolds* that the official has actually examined the document with any thoroughness and reached an independent, informed decision? Agencies should not be permitted to police themselves in determining whether the state secrets privilege properly applies in a given case. As Tenet recognized, it is for the courts to decide whether the requested materials should be disclosed.

Aftermath of *Reynolds*. In its 1953 decision, the Court referred to the secret equipment on the B-29: "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. 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." In fact, the report was never given to the district court and there were no grounds for concluding that the report made any reference to secret electronic equipment. The Court was content to rely on what "appeared" to be the case, based on government assertions in a highly ambiguous statement by Secretary of the Air Force Thomas K. Finletter. His statement referred to the secret equipment and to the accident report, but never said clearly or conclusively that the report actually mentioned or discussed the equipment.

The Air Force declassified the accident report in the 1990s. Judith Loether, daughter of one of the civilian engineers who died on the plane, located the report during an Internet search in

February 2000. Indeed the report does not discuss the secret equipment. As a result, the three families returned to court in 2003 on a petition for *coram nobis*. Under this procedure, they charged that the judiciary had been misled by the government and there had been fraud against the courts. As recounted in Fisher, IN THE NAME OF NATIONAL SECURITY, the families lost in district court and in the Third Circuit. On May 1, 2006, the Supreme Court denied *certiorari*. The Third Circuit decided solely on the ground of "judicial finality." That is certainly an important principle. Not every case can be relitigated. However, the Third Circuit gave no attention to another fundamental value. The judiciary cannot allow litigants to mislead a court so that it decides in a manner it would not have if in possession of correct information. Especially is that true when the litigant is the federal government, which is in court more than any other party.

On the basis of the ambiguous Finletter statement produced by the executive branch, the Supreme Court assumed that the claim of state secrets had merit. By failing to examine the document, the Court risked being fooled. As it turned out, it was. Examination of the declassified accident report reveals no military secrets. It contained no discussion of the secret equipment being tested. The government had motives other than protecting national security, which may have ranged from withholding evidence of negligence about a military accident to using the B-29 case as a test vehicle for establishing the state secrets privilege.

What happened in *Reynolds* raises grave questions about the capacity and willingness of the judiciary to function as a separate, trusted branch in the field of national security. Courts must take care to restore and preserve the integrity of the courtroom. To protect its independent status, the judiciary must have the capacity and determination to examine executive claims. Otherwise there is no system of checks and balances, private litigants will have no opportunity to successfully contest government actions, and it will appear that the executive and judicial branches are forming a common front against the public on national security cases. The fact that the documents in the B-29 case, once declassified, contained no state secrets produced a

stain on the Court's reputation and a loss of confidence in the judiciary's ability to exercise an independent role.

Options Available to Judges. As with the district court and the Third Circuit in the original *Reynolds* case, federal courts can present the government with a choice: either surrender a requested document to the district judge for *in camera* inspection, or lose the case. That is an option when private litigants sue the government, as with the B-29 case. When the government sues a private individual or company, assertion of the state secrets privilege can also come at a cost to the government. In criminal cases, it has long been recognized that if federal prosecutors want to charge someone with a crime, the defendant has a right to documents needed to establish innocence. The judiciary should not defer to executive departments and allow the suppression of documents that might tend to exculpate. As noted by the Second Circuit in 1946, when the government "institutes criminal procedures in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege." *United States v. Beekman*, 155 F.2d 580, 584 (2d Cir. 1946).

When the government initiates a civil case, defendants also seek access to federal agency documents. Lower courts often tell the government that when it brings a civil case against a private party, it must be prepared to either surrender documents to the defendant or drop the charges. Once a government seeks relief in a court of law, the official "must be held to have waived any privilege, which he otherwise might have had, to withhold testimony required by the rules of pleading or evidence as a basis for such relief." *Fleming v. Bernardi*, 4 F.R.D. 270, 271 (D. Ohio 1941).

If the government fails to comply with a court order to produce documents requested by defendants, the court can dismiss the case. The government "cannot hide behind a self-erected wall [of] evidence adverse to its interest as a litigant." *NLRB v. Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961). Responsibility for deciding questions of privilege rests with an impartial

independent judiciary, not the party claiming the privilege, and certainly not when the party is the executive branch.

Whether the government initiates the suit or is sued by a private party, the procedure followed *in camera* to evaluate claims of state secrets should be the same. Federal courts should receive and review the entire document, unredacted. They should not be satisfied with a redacted document or with classified affidavits, statements, and declarations that are intended to be substitutes for the disputed document. If the entire document contains names, places, or other information that might jeopardize sources and methods or present other legitimate reasons for withholding the full document from the private party, the judge should decide the redaction and editing needed to permit the balance to be released to the private litigants.

Qualified, Not Absolute. The state secrets privilege should be treated as qualified, not absolute. Otherwise there is no adversary process in court, no exercise of judicial independence over available evidence, and no fairness accorded to private litigants who challenge the government. These concerns were well stated by the U.S. Court of Appeals for the D.C. Circuit in a 1971 case in which the court ordered the government to produce documents for *in camera* review to assess a claim of executive privilege. The D.C. Circuit argued that "[a]n essential ingredient of our rule of law is the authority of the courts to determine whether an executive official or agency has complied with the Constitution and with the mandates of Congress which define and limit the authority of the executive." Claims of executive power "cannot override the duty of the court to assure than an official has not exceeded his charter or flouted the legislative will." The court proceeded to lay down this warning: "no executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise the head of an executive department would have the power on his own say so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law." *Committee*

for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 794 (D.C. Cir. 1971). See Louis Fisher, "State Secrets Privilege: Invoke It at a Cost," NATIONAL LAW JOURNAL, July 31, 2006, at 23.

Legislative Action. We recommend that the responsible oversight committees in Congress, such as those handling issues relating to intelligence, judiciary, government reform and homeland security, conduct public hearings and craft statutory language designed to clarify judicial authority over civil litigation involving alleged state secrets. In the past, as with the 1974 amendments to FOIA, the creation of the FISA Court, and enactment of CIPA in 1980, Congress has recognized major responsibilities of federal judges in the area of national security. Judges now regularly review and evaluate highly classified information and documents to a degree that would have been unheard of even a half century ago. To maintain our constitutional system of checks and balances, and especially to assure that fairness in the courtroom is accorded to private civil litigants, Congress should adopt legislation clarifying that civil litigants have the right to reasonably pursue claims in the wake of the invocation of the state secrets privilege. These hearings are important to restore and strengthen the basic rights and liberties provided by our constitutional system of government.

Conclusion. For the reasons outlined above, application of the "state secrets doctrine" should be strictly limited. We urge that Congress enact legislation to clarify the narrow scope of this doctrine and safeguard the interests of private parties. In addition, courts should carefully assess any executive claims of state secrets, and treat this doctrine as a qualified privilege, not an absolute one. Such reforms are critical to ensure the independence of our judiciary and to provide a necessary check on executive power.

Members of the Constitution Project's Liberty and Security Committee & Coalition to Defend Checks and Balances

Endorsing the Statement on Reforming the State Secrets Privilege *

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Mr. NADLER. And I thank the witness.
I will now recognize Mr. Grossman for 5 minutes.

TESTIMONY OF ANDREW GROSSMAN, SENIOR LEGAL POLICY ANALYST, THE HERITAGE FOUNDATION

Mr. GROSSMAN. Good afternoon, Mr. Chairman, Ranking Member Sensenbrenner, and Members of the Subcommittee. My testimony today concerns the consequences of the State Secrets Protections Act, which would severely limit the state secrets privilege.

I have three points. First, this legislation is unnecessary because there is absolutely no evidence that the state secrets privilege has been abused. Second, it is unconstitutional because it ignores clear Supreme Court precedent of the President's power to safeguard national security secrets. And, third, this legislation would invite the courts to intrude on Congress's power and responsibility to make national security policy, upsetting the careful balances that Congress has struck.

I will begin with some background. Contrary to often-repeated claims, there is nothing sinister or unusual about the state secrets privilege. Seven separate requirements, including Department of Justice review and personal consideration by high-ranking Federal officials, ensure the privilege is used only when necessary to protect national security. And judges play a crucial role by ensuring that it has been properly invoked.

Though the results may appear harsh in some cases, that is true of all privileges. For example, courts have cited the speech or debate clause to throw out suits against Members of Congress and other legislators, involving invasion of privacy, defamation, incitements to violence, age, race, and sex discrimination, retaliation for reporting sexual discrimination, and larceny and fraud. Yes, these are harsh results, but for a greater good: unfettered speech in this legislative body. In the same way, the state secrets privilege advances a greater public good: protecting our Nation.

My first point today is that there is no evidence that the state secrets privilege is being abused or is being more frequently or in different ways than in the past. Data from 1954 through 2008 show that its use is rare. In reported opinions, the privilege was asserted seven times in 2007 and just three times in 2008. According to Robert Chesney of Wake Forest University, the evidence does not support the conclusion that the Bush administration used the privilege with greater frequency than other Administrations.

The data also shows the privilege is being used to protect the same national security interests as in the past. Over the previous four decades, most state secrets cases concerned intelligence programs, followed by military technology and contracts, and then diplomatic communications. That is the same pattern as today.

The data also showed the government is not seeking harsher remedies, such as dismissal of cases, any more than it has in the past.

Further, courts take seriously their duty to oversee their privilege. During the Clinton administration, courts refused to grant the requested privilege in 17 percent of opinions. That rose to 40 percent during the Bush administration. If anything, the courts have become less deferential.

Finally, President Obama, once a critic of the privilege, now recognizes its great importance. Every President, going back to Lyndon Johnson, has reached the same conclusion.

In sum, there is no evidence that the state secrets privilege is being misused, overused, or otherwise abused. That makes this legislation unnecessary.

My second point is that it is also unconstitutional. Unlike most other privileges, this one is grounded in the Constitution, specifically the powers it commits to the President. The Supreme Court has said as much in case after case, stating expressly that this constitutional power protecting military or diplomatic secrets, the very things covered by the privilege.

In my written testimony, I identify seven separate provisions of the act, including the core operative provision, that infringe on powers the courts have clearly stated belong to the executive. This legislation may also infringe on the judicial power by imposing a rule of decision on the courts with deciding some constitutional issues. That, too, would be unconstitutional. The result is that, based on its own precedents, the Supreme Court would most likely strike down this act.

My third and final point is that this legislation empowers judges to usurp Congress's own powers and responsibilities. In the constitutional design, Congress plays a leading role in national security. This includes creating and funding defense programs, some of which do require secrecy and stealth. But the legislation would force courts to expose aspects of key intelligence programs even if they ultimately rule in favor of the government on the privilege issue. This would end or severely hamper these programs, upsetting the careful balance struck by Congress in making national security policy.

But that is the goal of several of the groups that support this bill. It would give them a heckler's veto over programs they were unable to convince this legislative body to amend or to shut down. Perversely, some Members of Congress may welcome this result. By passing the buck to the courts, they could avoid the consequences of tough votes and controversial national security programs. Congress should not abdicate its responsibility or grant such legislative power to unelected judges.

In conclusion, there is no justification for this legislation. Beyond being unnecessary, it is risky. Members of Congress should focus on the greater public good and look past the narrow interests of those who would use the courts to make policy.

Thank you.

[The prepared statement of Mr. Grossman follows:]

PREPARED STATEMENT OF ANDREW M. GROSSMAN

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CONGRESSIONAL TESTIMONY

The SSPA: Unnecessary, Unconstitutional, And Undemocratic

Testimony before Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Committee on the Judiciary, United States House of Representatives

June 4, 2009

Andrew M. Grossman
Senior Legal Policy Analyst
The Heritage Foundation

Testimony of Andrew M. Grossman, Senior Legal Policy Analyst, The Heritage Foundation

The misnamed State Secret Protection Act of 2009 (H.R. 984) is dangerous, in terms of both its effect on national security and the violence it would do to the constitutional separation of powers. Congress should be aware of the following key points:

- The state secrets privilege has a 200 year history in the United States and has existed in essentially its present form for 135 years. It has been used by every president since Lyndon Johnson, up to and including President Barack Obama.
- There is absolutely no evidence of abuse of the state secrets privilege. Data from 1954 through 2008 show that its use is rare. In reported opinions, the privilege was asserted just seven times in 2007, and three times in 2008.
- There is no evidence that the state secrets privilege is being used more frequently than in the past or in cases where it is not needed. There is no evidence that it is being used to stifle cases on political grounds. There is no evidence that judges are unduly deferential to the executive when it is asserted; the trend is actually in the opposite direction.
- The State Secret Protection Act would force the government to admit highly classified secrets, such as the identities of spies, in the course of litigation, putting national security at risk.
- The State Secret Protection Act would give activists a "heckler's veto" over many national security programs created by the democratic branches of government.
- The State Secret Protection Act attempts to transfer powers clearly assigned to the President to judges, in violation of the Constitution. It is unconstitutional.
- The State Secret Protection Act is a cynical attempt by Congress to duck tough decisions in the national security arena—where bad decisions can have catastrophic consequences—by passing the buck to the courts.
- The state secrets privilege is only one of several "immunities" that can bar litigation altogether. For example, courts have cited the Speech and Debate Clause to dismiss suits against Members of Congress and other legislators involving invasion of privacy, defamation, wiretapping, incitements to violence, age, race, and sex discrimination, retaliation for reporting sexual discrimination, and larceny and fraud.
- The modern application of the privilege was defined in a 1953 case, *U.S. v. Reynolds*. The *Reynolds* framework carefully balance the sometimes harsh results of the state secrets privilege—the exclusion of relevant evidence or dismissal of a claim altogether—with the genuine needs of U.S. national security.
- Seven separate requirements, including Department of Justice review and "personal consideration" by high-ranking federal officials, ensure that the state secrets privilege is used only when necessary to protect national security.

My name is Andrew Grossman. I am Senior Legal Policy Analyst at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

My testimony this afternoon concerns the misnamed State Secret Protection Act of 2009 (H.R. 984, "SSPA"), which would regulate, and in some cases prohibit, the federal government's invocation of the state secrets privilege to prevent the disclosure of sensitive national security information and programs in civil litigation. The SSPA is dangerous, in terms of both its direct effect on national security and the violence it would do to the constitutional separation of powers, and I thank the Subcommittee for holding this hearing and considering my testimony on the consequences of this legislation.

As I will explain, Members of Congress should be wary of the SSPA for three reasons. First, it is unnecessary because there is *no evidence* of abuse of the state secrets privilege. Second, it raises serious constitutional concerns, particularly as regards the Article II duties assigned to the President. Third, the legislation can be seen as a cynical attempt by Congress to evade its constitutional duty to make tough decisions about our national security, and this abdication puts the nation's safety at risk. For these reasons, Congress should resist succumbing to pressure from political partisans and activists to force the disclosure of closely held national security information in civil lawsuits.

I. No Evidence of Abuse

On the terms of the justifications offered by its supporters, the SSPA is unnecessary. Contrary to repeated claims by civil liberties groups and others, recent use of the state secrets privilege is not different in kind or quantity than in the past. Despite more attention paid to the privilege in recent years—largely as a result of political opposition to the policies of the George W. Bush Administration and their embrace by the Obama Administration—the strong accountability mechanisms built into it continue to guarantee that it is not overused or otherwise abused. To understand this point requires some understanding of the privilege's historical pedigree.

Though usually discussion of the state secrets privilege begins with the Supreme Court's 1953 decision in *United States v. Reynolds*[1], that approach presents a pinched view of the privilege's history and scope—and perhaps this is deliberate. The privilege's first acknowledgement in the law of the United States—or at least the first in written reports uncovered by modern scholars—is typically accredited to Chief Justice John Marshall, who referred obliquely to executive privilege in *Marbury v. Madison* and, while riding circuit, to an intelligence-based privilege in the trial of Aaron Burr for treason. In the former case, Marshall allowed that while Attorney General Levi Lincoln could not be "obligated" to disclose "any thing [that] was communicated to him in

[1] *See, e.g.*, Carrie Lyons, The State Secrets Privilege: Expanding Its Scope Through Government Misuse, 11 Lewis & Clark L. Rev. 99, 111-112 (2007) (evaluating government "misuse" and judicial "misconstruction" of the privilege relative to *Reynolds*).

confidence," the fact whether the disputed commissions had been found in the office of the Secretary of State the disposition of the commissions "could not be a confidential fact," thereby relegating Marshall's brief description of the privilege to dicta.[2]

Marshall elucidated that privilege's application to secret communications and intelligence while presiding over the treason trial of Aaron Burr. Burr sought to admit a letter from General James Wilkinson, an essential witness against him, to President Jefferson, over the government's objection that the letter "contains matter which ought not to be disclosed."[3] The balancing of a party's need with the necessity of government secrecy in certain matters "present a delicate question," explained Marshall—one "which, it is hoped, will never be rendered necessary in this country."[4] Yet again, Marshall sidestepped the need for such balancing, because "certainly nothing before the court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety."[5] But "If it does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter…will, of course, be suppressed."[6] In such a case, said Marshall, "much reliance must be placed on the declaration of the president."[7] And, Marshall made clear, "The propriety of withholding it must be decided by [the President], not by another for him."[8] Though the issue was made moot when Jefferson, pressed to make a decision, consented to admission of the letter "excepting such parts as he deemed he ought not to permit to be made public,"[9] this formulation, as well as its rationale, would greatly influence the *Reynolds* court.

The issue would next arise in U.S. courts in the matter of *Totten v. United States*, the Supreme Court's 1875 decision which, though brief, merits careful consideration. Totten, heir to one William Lloyd, brought an action against the United States claiming that Lloyd had entered into a contract with President Lincoln to ascertain troop placements in the South and "other information as might be beneficial" to the North during the Civil War.[10] Such a contract would ordinarily be binding, Justice Field explained for the Court, but not in the circumstances presented by this particular case: "The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed."[11]

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[2] 5 U.S. (Cranch) 137, 144-45 (1803).
[3] United States v. Burr, 25 F.Cas. 30, 37 (1807)
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Burr*, 25 F.Cas. 187, 192.
[8] *Id.*
[9] *Id.* at 193.
[10] Totten v. United States, 92 U.S. 105, 105-06 (1875).
[11] *Id.* at 106.

On the basis of these facts, the Court propounded two rules, quite intertwined, one narrow and one broad. The narrow rule, that offered in most discussions of the case,[12] is simply that no suit may require disclosure of a spy's employment by the government. This was not framed as a privilege but as an absolute bar to litigation. Without such a bar, "whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public."[13] As the Court explained, "A secret service, with liability to publicity in this way, would be impossible."[14] It is thus an implied term of such contracts that the very act of suing for compensation is a breach of contract that defeats recovery.

Yet it is the broader rule, though less discussed by academics, which has proven more influential to the development of the law. Put simply:

> It may be stated as a general principle 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 be violated.[15]

Among these confidential matters are those typically covered by the various privileges, such as between a husband and wife or patient and physician. But, said the Court, "Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed."[16] Thus, in *some* circumstances relating to national security, lawsuits that would inevitably disclose state secrets, such as a spy relationship, are simply barred, because their very existence "is itself a fact not to be disclosed" and disclosure would be "a detriment to the public."[17] The Court would affirm this rule's vitality in *Reynolds*[18] and subsequently reaffirm it in a 2005 case.[19]

By 1875, then, the basic contours of the law were set. In cases where parties sought to subpoena or otherwise introduce state secrets, the courts would exclude materials that the executive determined to be "imprudent" to disclose, in effect giving the executive a privilege to protect certain information from disclosure. And lawsuits that, at their core, concern secret government relationships and activities, such as spy contracts, would simply be barred as non-justiciable. Even at this early date, the state secrets "privilege" was not strictly a privilege in every case; sometimes it would be a "threshold question" that could defeat a claim at the outset of the case.

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[12] *See, e.g.*, Hepting v. AT&T Corp., 439 F.Supp.2d 974, 980-81 (N.C. Ca. 2006).
[13] *Totten*, 92 U.S. at 106-07.
[14] *Id.* at 107.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Reynolds*, 345 U.S. at 11, n. 26.
[19] Tenet v. Doe, 544 U.S. 1, 8 (2005).

Understood in this historical context, *Reynolds* was less a revolution than a refinement, one that began the task of regularizing invocation and application of the privilege with respect to modern civil procedure. The case was brought under the Federal Tort Claims Act (FTCA) by the widows of three civilians killed in the crash of an Air Force bomber testing "secret electronic equipment."[20] The government refused to disclose its post-accident report, arguing that disclosure would, according to an affidavit of the Judge Advocate General of the Air Force, hamper "national security, flying safety, and the development of highly technical and secret military equipment."[21] The district court resolved the case in the plaintiffs' favor after the government declined to present the report for *ex parte*, *in camera* inspection.[22] The Third Circuit affirmed, holding that the FTCA had waived any privilege that the government might have had.[23]

In an opinion by Justice Vinson, the Supreme Court expounded a new framework for invocation of the privilege, drawing freely from legal precedent:

> The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. 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.[24]

Of this final step, the Court provided some elucidation by analogy to the privilege against self-incrimination, as described by Justice Marshall during the Burr trial. A court should consider "all circumstances of the case" in determining whether "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be disclosed."[25] But once the court has reached that determination, "the occasion for the privilege is appropriate, and 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."[26] Courts thus have significant flexibility and discretion in determining whether the government's use of the privilege is appropriate, but their inquiry is limited, with great focus, to that question alone. It also recognizes that in some instances, particular evidence will pose such a significant and obvious danger to national security that even *in camera* review is inappropriate. (After all, among other concerns, very few judges review evidence in secured rooms, encased in reinforced concrete and with doors that seal, designed to

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[20] *Reynolds*, 345 U.S. at 3.
[21] *Id.* at 4-5.
[22] *Id.* at 5.
[23] Reynolds v. United States, 193 F.2d 987, 993 (3rd Cir. 1951)
[24] *Reynolds*, 345 U.S. at 7-8.
[25] *Id.* at 10.
[26] *Id.*

prevent eavesdropping or outright theft.[27])

The necessity of the evidence to the party seeking to admit it is also a relevant consideration. "[T]he showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate."[28] The district court, explained the Supreme Court, should have been satisfied with the government's assertion alone, for the plaintiffs' need was tempered by the availability of alternative evidence on the same factual allegations. This is not, however, a balancing test, weighing necessity against risk. The Court was careful to explain that *no* showing of necessity, no matter how great, may overcome a determination that the privileges was properly asserted.[29] At most, great necessity may prompt a judge to scrutinize the basis of the assertion more closely.

It is worth, at this point, a brief historical detour. Some have argued, in recent years, that the declassified accident report proves that the privilege was asserted unnecessarily and improperly in *Reynolds*—in other words, that there was no risk at all that giving the report to the plaintiffs or court would have risked disclosing national security secrets. Courts that have examined this issue directly, however, reject that claim. After finding the declassified report, heirs of those killed in the crash brought suit against the United States in 2003, alleging that the Air Force had misrepresented the nature of the information contained in the report and thereby committed fraud on the court by improperly asserting the privilege.[30] A district court and the Third Circuit directly considered the issue of whether the government officers asserting the privilege had committed perjury; both courts rejected the accusation.[31] The courts found that the report contained extensive technical information about the B-29 bomber, as well as details about the electronic equipment (a classified experimental radar system) that was being tested.[32] As the district court explained, "Details of flight mechanics, B-29 glitches, and technical remedies in the hands of the wrong party could surely compromise national security."[33] In short, in this much-assailed case, history has confirmed that the assertion of the privilege was appropriate.

Since *Reynolds*, the courts have done little more than flesh out its approach. One notable development was judicial embrace of the analogy of foreign intelligence gathering to the construction of a mosaic: "Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate."[34] This view counsels strong deference to the executive's assertion of the privilege because "What may seem trivial to the uninformed

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[27] Del Wilber, *Surveillance Court Quietly Moving*, WASH. POST, March 2, 2009, at A2.
[28] *Reynolds*, 345 U.S. at 11.
[29] *Id.*
[30] Herring v. U.S., 424 F.3d 384, 386-89 (2005).
[31] *Id.* at 392.
[32] *Id.* at 391-92; Herring v. United States, 2004 WL 2040272, *6 (2004).
[33] *Herring*, 2004 WL 2040272 at *6.
[34] Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978).

[e.g., a judge], 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."[35] Another notable development was the taxonomy of possible dispositions of a case in which the privilege has been asserted[36]; these are incorporated into the discussion below. Most importantly, the courts built up a body of case law that would provide guidance in evaluating assertions of the privilege.

The *Reynolds* framework can be seen as a deliberate effort to balance the harsh reality of the state secrets privilege—the exclusion of relevant, and perhaps determinative, evidence or dismissal of a claim altogether—with the genuine needs of U.S. national security. It ensures that assertion of the privilege comports with procedural due process as it is practiced today and, to the extent it intrudes on substance, provides a check against abusive assertions. This dual nature—protecting procedural and substantive rights—is evident in the long list of requirements and protections that, post-*Reynolds*, must be satisfied to ensure that the privilege is not "lightly invoked."

First of all, the privilege may be invoked only by the United States, and not by a private litigant. This requirement alone greatly circumscribes the potential for abuse, as relatively few civil cases touch upon national security or classified matters.

Second, the privilege may not be asserted by a line attorney or even supervising attorney but only by the head of the department that has control over the matter, usually an agency head. This requirement ensures that the decision to assert the privilege will be subject to more extensive review, by more individuals and at higher levels of responsibility. It is analogous to the similar requirements in the Foreign Intelligence Surveillance Act (FISA) that high-ranking officials, such as the Attorney General and National Security Advisor, certify that applications made to the FISA Court meet the exacting requirements of the law.[37] Indeed, recognizing the value of independent certifications made by high-ranking officials, paired with precise judicial review, Congress greatly increased the FISA's reliance on this mechanism in the FISA Amendments Act of 2008.[38]

Third, it must be formally invoked. This requires a separate determination of the propriety of invoking the privilege by the Department of Justice, which is charged with conducting litigation for the United States and supervising litigation carried out by the government.[39] An agency head, acting alone, generally cannot assert the privilege without the concurrence of the Department of Justice. This ensures not only additional levels of review and accountability, but also that the proposed assertion of the privilege will be evaluated by legal and security specialists who will ensure that the United States uses the privilege in a consistent fashion that promotes national security over any agency's

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[35] *Id.* at 9.
[36] Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998).
[37] *E.g.*, 50 U.S.C. § 1802.
[38] Pub. L. 110-261 (2008).
[39] 28 U.S.C. § 516, 519.

parochial interests. Department of Justice lawyers are also especially attentive to identifying and rejecting weak claims that might ultimately undermine the privilege, providing another check against overuse of the privilege and its assertion in cases in which it is not necessary.

Fourth, the department head asserting the privilege must undertake "actual personal consideration" of the matter, just as Justice Marshall ruled was required of the President in the Burr trial. For a high-ranking official, typically carrying great responsibility, this is a significant and potentially burdensome requirement, demanding that he or she personally review the evidence or matter at issue and produce a declaration (or several in cases where classified and unclassified declarations are required) explaining, to the satisfaction of the court, why disclosing the evidence at issue would endanger national security. Typically, both requests and declarations will be reviewed by agency counsel and mid-level officials.[40] Only then are declarations signed and filed—under the penalty of perjury.

Fifth, after many levels of executive-branch review, the "court itself must determine whether the circumstances are appropriate for the claim of privilege"—that is, whether the government has demonstrated that there is a "reasonable danger" disclosure would harm national security.[41] *Reynolds* counsels that the privilege is not to be "lightly accepted" and that the showing of necessity of the party seeking to compel the evidence "will determine how far the court should probe" in determining whether the privilege is appropriate.[42] This inquiry may even include examination of the evidence at issue *in camera*.[43] Only when a claim is not supported by necessity will assertion of the privilege, with nothing more, suffice to invoke it.

That, however, is a rare occurrence because, as explained by Carl Nichols, former Deputy Assistant Attorney General in the Civil Division of the Department of Justice, the government's disclosures to the court are typically extensive:

> In making its determination, moreover, a court often reviews not just the public declarations of the Executive officials explaining the basis for the privilege, but also classified declarations providing further detail for the court's *in camera, ex parte* review. One misperception about the state secrets privilege is that the underlying classified information at issue is not shared with the courts, and that the courts instead are simply asked to dismiss cases based on trust and non-

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[40] *Examining the State Secrets Privilege: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2008) (statement of Carl Nichols, Deputy Assistant Attorney General), *available at* http://www.fas.org/sgp/congress/2008/021308nichols.html [hereinafter "Nichols"].
[41] *Reynolds*, 345 U.S. at 8, 10.
[42] *Id.* at 11.
[43] *Requiring* such examination, however, may go too far, given the President's inherent constitutional "authority to classify and control access to information bearing on national security." Dept. of the Navy v. Egan, 484 U.S. 518, 527 (1988).

> specific claims of national security. Instead, in every case of which I am aware, out of respect for the Judiciary's role the Executive Branch has made available to the courts both unclassified and classified declarations that justify, often in considerable detail, the bases for the privilege assertions.[44]

In a recent opinion, in a case that aroused no little controversy due to the government's assertion of the state secrets privilege, the Ninth Circuit professed itself "satisfied that the basis for the privilege is exceptionally well documented."[45] Among the evidence filed by the government for *in camera* review was the complete document which it sought to protect from disclosure.[46] In reaching its decision to affirm the exclusion of the document, the court relied on "[d]etailed statements," including classified information, that "underscore that disclosure of information concerning the Sealed Document and the means, sources and methods of intelligence gathering in the context of this case would undermine the government's intelligence capabilities and compromise national security."[47]

Sixth, the court, if it upholds assertion of the privilege, must decide what effect that decision has on the case before it. Assertion of the state secrets privilege does not, in theory and in fact, necessarily result in the dismissal of a case. As in *Reynolds*, the case may be able to proceed, just without the privileged evidence. In others cases, where the evidence is crucial, it will not.

This is no different than the application of any other privilege that results in the exclusion of evidence. For example, the attorney-client privilege protects communications between criminal defendants and their lawyers that would be extremely to government prosecutors; in some instances, without this evidence, prosecutors are unable to bring charges. Another example is the Speech and Debate Clause, which grants Members of Congress a testimonial privilege under which they "may not be made to answer questions" no matter the gravity of the claim involved.[48] It should not be controversial, then, when cases are not allowed to proceed for the same reasons that apply in other contexts. This generally occurs when, once the privileged evidence has been excluded, the plaintiff is simply unable to establish a *prima facie* case. This is the same as summary judgment following invocation of the doctor-patient or attorney-client privilege.

But the state secrets "privilege" is, as described above, sometimes more than a privilege, because it protects against the disclosure of secret facts, rather than just the use of certain evidence in court. For example, it is no violation of the doctor-patient privilege to prove the factual matters confessed to a psychiatrist by other means—e.g., an invoice or an email; under the state secrets "privilege," however, the very facts themselves may be off-limits. This would include, for example, lawsuits based on covert espionage

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[44] Nichols.
[45] Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190, 1203 (9th Cir. 2007).
[46] *Id.*
[47] *Id.* at 1204.
[48] Fields v. Office of Eddie Bernice Johnson, 459 F.3d 1, 14 (D.C. Cir. 2006).

agreements.[49] In the *Reynolds* court's words, cases are simply non-justiciable when "the very subject of the action…was a matter of state secret."[50] Or as formulated in *Totten*: "[P]ublic 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."[51]

This is, as in *Totten* and *Tenet v. Doe*, a complete bar on litigation. It is also, as the Supreme Court explained in *Tenet*, a "threshold question," like abstention, that a court may resolve before it even addresses jurisdiction.[52]

Yet this seemingly harsh result is not unusual in the law. For example, the Speech and Debate Clause, another of the Constitution's means to affect the separation of powers[53], renders Members of Congress, as well as their staff and invited witnesses, completely "immune from suit" for a wide variety of conduct that is "within the sphere of legitimate legislative activity."[54] On this ground, the courts have dismissed claims of invasion of privacy,[55] slander and libel,[56] civil rights violations,[57] wiretapping,[58] incitements to violence,[59] violations of First Amendment rights,[60] age discrimination,[61] racial discrimination,[62] sexual discrimination,[63] retaliation for reporting sexual discrimination,[64] larceny and fraud,[65] and McCarthyism.[66] Qualified immunity, as well,

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[49] *See, e.g.*, Tenet v. Doe, 544 U.S. 1, 3 (2005)
[50] *Reynolds*, 345 U.S. at 11, n. 26.
[51] *Tenet*, 544 U.S. at 8 (quoting *Totten*, 92 U.S. at 107).
[52] *Id.* at 6, n. 4.
[53] See, e.g., United States v. Johnson, 383 U.S. 169, 178 (1966).
[54] Doe v. McMillan, 412 U.S. 306, 311-12 (1973).
[55] *Id.* at 308-09; Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975).
[56] Coffin v. Coffin, 4 Mass. 1 (1808) (applying a virtually identical provision of a state constitution); Ray v. Proxmire, 581 F.2d 998 (D.C. Cir. 1978); Cochran v. Couzens, 59 App.D.C. 374 (D.C. Cir. 1930); Rusack v. Harsha, 470 F.Supp. 285 (D.C. Pa. 1978).
[57] Tenney v. Brandhove, 341 U.S. 367 (1951); Rockefeller v. Bingaman, 234 Fed. Appx 852 (10th Cir. 2007).
[58] Voinche v. Fine, 278 Fed.Appx 373 (5th Cir. 2008).
[59] Maarwi v. U.S. Congress, 24 Fed.Appx 43 (2nd Cir. 2001).
[60] National Ass'n of Social Workers v. Harwood, 69 F.3d 622, 629 (1st Cir. 1995) (applying a "parallel immunity…derived from federal common law [and] similar in scope and object to the immunity enjoyed by federal legislators under the Speech of Debate Clause").
[61] Bastien v. Office of Campbell, 209 F.Supp.2d 1095 (D.Co. 2002), *rev'd*, Bastien v. Office of Campbell, 390 F.3d 1301 (10th Cir. 2004).
[62] Browning v. Clerk, U.S. House of Representatives, 789 F.2d 923 (D.C. Cir. 1986).
[63] Walker v. Jones, 557 F.Supp. 366 (D.D.C. 1983), *rev'd*, Walker v. Jones, 733 F.2d 923 (D.C. Cir. 1984).
[64] Scott v. Office of Alexander, 522 F.Supp.2d 262, 267 (D.D.C. 2007).
[65] Smith v. Eagleton, 455 F.Supp. 403 (D.C. Mo. 1978).
[66] Stamler v. Willis, 287 F.Supp. 734 (D.C.Ill. 1968).

has a similar effect, shielding government officials from immunity for violations of civil rights and ending cases before the plaintiff has had an opportunity to conduct discovery.[67] As the Supreme Court has explained, this is so because "broad-ranging discovery and the deposing of numerous persons… can be peculiarly disruptive of effective government."[68]

In addition, dismissal or summary judgment may be mandated when the assertion of the privilege denies the defendant a complete defense to the claim.[69] This remedy may be available only when the court, through its review of affidavits and other materials to resolve the privilege claim, is also satisfied that the defense is availing.[70] Any other result "would be a mockery of justice," observed one court.[71]

Thus, outside the core of the state secrets privilege—that is, lawsuits specifically targeted at national security secrets—a judge exercises his or her usual discretion in determining whether a case will proceed, providing yet another procedural check on assertion of the privilege. Only when a lawsuit moves from the periphery to the core of clandestine operations is this discretion limited—for example, wholesale challenges to government intelligence programs. This is as it should be, considering the purpose of the privilege. The objects of these suits should usually be pursued, if at all, through the political process.

Seventh and finally, as with other privileges, assertions of the state secrets privilege are appealable and are usually reviewed *de novo* by the courts of appeal.[72] This means that the appellate court accords the trial court's application of the standard no deference whatsoever and considers the issue anew. Aggrieved appellants thus have the opportunity for a second bite at the apple, to correct any legal errors, such as undue deference to the government's assertion, the trial court may have made. Further, in some cases, appellate courts have taken the unusual step of reconsidering factual determinations made at the trial court level[73]; when this occurs, the appellant is

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[67] *See* Siegert v. Gilley, 500 U.S. 226 (1991) ("Once a defendant pleads a defense of qualified immunity, "on summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. Until this threshold immunity question is resolved, discovery should not be allowed.") (internal quotations removed).
[68] Harlow v. Fitzgerald, 457 U.S. 800, 816-17 (1982).
[69] *Kasza*, 133 F.3d at 1166 (describing the possible effects of application of the state secret privilege); In re U.S., 872 F.2d 472, 476 (D.C. Cir. 1989); Molerio v. F.B.I., 749 F.2d 815, 825 (D.C. Cir. 1984) (dismissing a claim based on the court's review of an affidavit supporting the assertion of the state secrets doctrine that also provided a complete defense).
[70] *Molero*, 749 F.2d at 824-25.
[71] *Id.* at 825.
[72] *Al-Haramain*, 507 F.3d at 1196.
[73] *Id.* at 1203-04 (describing the appellate court's review of actual evidence underlying the government's assertion of the privilege).

essentially afforded a second trial—and a second opportunity to defeat aspects of the factual basis underlying the assertion of the privilege.

As this exercise makes clear, the requirements of the *Reynolds* framework provide extensive protections against abusive or improper assertions of the state secrets privilege and afford adverse parties significant opportunity to challenge both its invocation and its effect. The evidence supports this conclusion.

One source of evidence is quantitative analysis of cases. It is difficult, of course, to provide an exact count of the number of cases in which the privilege has been at issue, because not all cases result in published opinions. It is possible, however, to catalogue all published opinions adjudicating assertions of the privilege. Robert Chesney did this in a 2007 article, providing an appendix listing all such opinions since *Reynolds* through 2006.[74] The data collected in that useful article disproves many of the claims made about the state secrets privilege, particularly those concerning its use during the George W. Bush Administration.

As should be expected, given the procedural hurdles and checks, assertion of the state secrets privilege is rare. From 1954 through 2006, the privilege was adjudicated in 89 cases.[75] Most of these cases concern intelligence operations; a few concern each of military technology, military contracts, and diplomatic communications. In most, but not all, the assertion of the privilege was upheld. This demonstrates that the government uses the privilege only sparingly, when necessary, and that courts are willing to push back when they doubt its application.

A few trends in the usage of the privilege are visible, though the paucity of cases prevents confident analysis. Assertion of the privilege was rare until the early 1970s, when cases became more frequent, reaching a peak in 1982. This rise coincided somewhat with popular concern over the government's domestic intelligence activities—the subject of many of these cases—and dissipated as reforms engineered by the executive and Congress branch reined in excesses. There was another surge in the early 1990s, and then one beginning in 2004, about two years into the war on terrorism and around the time that the media began to report on classified programs. The final year of Chesney's study, 2006, witnessed seven assertions of the privilege in published opinions—a seemingly low number but, in fact, a new high.

Despite claims to the contrary, the privilege was not claimed more frequently by the Bush Administration. At least through 2006, Chesney concludes, the data "does not support the conclusion that the Bush administration chooses to resort to the privilege with greater frequency than prior administrations"—that is, the rate of assertion of the privilege relative to the amount of litigation implicating classified national security

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[74] Robert Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1315-32 (2007) [hereinafter "Chesney"].
[75] *Id.*

programs is little changed.[76] This is a more appropriate measure than just counting the number of cases because, unlike with prosecutions, the government does not control the number of civil cases filed that implicate state secrets. Indeed, the more irresponsible and obviously barred suits that are filed, the more the government will be forced to assert the privilege.

I attempted to replicate Chesney's methodology to provide data for the years 2007 and 2008. Federal courts, I found, issued seven reported opinions adjudicating the state secrets doctrine in 2007, and just three in 2008—for ten in total.[77] By comparison, the government contractor defense was adjudicated in more than twice as many published opinions over the same period. One reason for the decrease between 2007 and 2008 may be the aggregation of several lawsuits challenging National Security Agency programs in one court, perhaps resulting in fewer total opinions.

This result and Chesney's data are strong evidence that the privilege is asserted only rarely and that it is rarely, if ever, misused. After all, cases demonstrating misuse or inappropriately harsh results, such as dismissal based on a peripheral connection to national security, are those more likely to be contested and appealed, whether by the government or the party against whom the privilege has been asserted. Such cases, then, are disproportionately likely to result in published opinions. Similarly, activist litigation intended to alter government policies or strike down government programs are of some public interest, receive significant coverage in the media, and are often aggressively litigated. These too are more likely to result in appeals and published opinions.

There is also no evidence that the privilege is being asserted with respect to different kinds of subject matter than it was in the past. Chesney's data show that surveillance programs were the subject of extensive litigation in the 1970s and 1980s, resulting in some assertions of the privilege.[78] The other regular subjects of cases in which the privilege was asserted during that period were employment and contractual disputes within the military and the intelligence agencies and cases risking the disclosure of purely technical information, such as the operation of stealth aircraft technology.[79] The data, concludes Chesney, "does not support the conclusion that the Bush administration [was] breaking new ground with the state secrets privilege" in terms of subject matter.[80]

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[76] Id. at 1301.

[77] Westlaw search on ALLFEDS for opinions issued after 2006 using the terms: lead("STATE SECRET" /S PRIVILEGE!). I then reviewed each of the 62 results and attempted to apply Chesney's methodology. *See id.* at 1315, n. 335. As the methodology depends, to a small extent, on the subjective determinations of the reviewer, another researcher might well arrive at slightly different totals.

[78] Chesney, at 1303

[79] *Id.* at 1302-03; McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1020-25 (Fed Cir. 2003).

[80] Chesney, at 1305.

The 2007 and 2008 data do not alter that conclusion. Five of the opinions were in cases challenging NSA intelligence programs.[81] Two concerned "extraordinary rendition."[82] Two concerned the Valerie Plame affair and her attempt to collect damages from the federal government, as well as other defendants, for the disclosure of her identity.[83] (Neither of the Plame opinions directly adjudicated an assertion of the privilege but both considered it relevance to a *Bivens* inquiry.) The remaining case concerned allegations that a CIA agent stationed in Rangoon, Burma, had tapped the phone of a Drug Enforcement Administration agent also stationed there.[84]

There is also no evidence that the government has sought harsher remedies, such as dismissal, more often than in the past. Indeed, the government sought, and received, dismissal in the first state secrets case decided after *Reynolds* in 1954 and has sought dismissal regularly since the early 1970s.[85] Roughly, the Bush Administration sought dismissal or summary judgment in 70 percent of the cases in which it asserted the privilege through 2006. The Clinton Administration sought dismissal or summary judgment in 55 percent. Both were more likely to seek summary disposition in cases relating to intelligence policy and employment disputes involving classified programs. The Bush Administration simply faced a higher proportion of these suits, leading it to seek summary disposition in a slightly higher proportion of cases.

There is also no evidence that the courts have accorded inappropriate deference to executive assertions of the privilege in recent years. In cases with reported opinions, courts granted the government's requested relief 83 percent of the time during the Clinton Administration. Through 2006, courts granted the Bush Administration its requested relief 65 percent of the time; many of the rejections were in cases alleging warrantless domestic surveillance. Including the data from 2007 and 2008 reduces the Bush Administration's "win rate" to just 60 percent. And in its first few months, the Obama Administration has racked up a single loss, in the Ninth Circuit[86], and a looming loss (several procedural issues are disputed) in district court.[87] If anything, the courts have become less deferential to executive assertions of the privilege.

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[81] Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007); American Civil Liberties Union v. National Sec. Agency, 493 F.3d 644 (6th Cir. 2007); United States v. Adams, 473 F.Supp.2d 108 (D. Me. 2007); In re National Security Agency Telecommunications Records Litigation, 483 F.Supp.2d 934 (N.D. Cal. 2007); In re National Security Agency Telecommunications Records Litigation, 564 F.Supp.2d 1109 (N.D. Cal. 2008).

[82] El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007); Mohamed v. Jeppesen Dataplan, Inc., 539 F.Supp.2d 1128 (N.D. Cal. 2008).

[83] Wilson v. Libby, 535 F.3d 697 (D.C. Cir. 2008); Wilson v. Libby, 498 F.Supp.2d 74 (D.D.C. 2007).

[84] In re Sealed Case, 494 F.3d 139 (D.C. Cir. 2007).

[85] Chesney, app.

[86] Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992 (9th Cir. 2009).

[87] Joint Submission in Response to Court's April 17, 2009, Order at 12, In Re National Security Agency Telecommunications Records Litigation, No. 06-1791 (S.D. Ca. filed

Finally, the privilege has been embraced by the Obama Administration as a necessary tool to protect national security. This should come as no surprise, despite the charged rhetoric of the 2008 presidential campaign; the privilege has been used by every presidential administration since the Johnson Administration asserted it in 1967 to block discovery concerning warrantless surveillance by the FBI. (That assertion was rejected by the court.) The new Administration declined to change course in *Mohamed*, a suit challenging the CIA's "extraordinary rendition" program; the government lawyer responding to insistent questions from a Ninth Circuit judge stated that the position had been "thoroughly vetted with the appropriate officials within the new administration" and that "these are the authorized positions."[88] In *al-Haramain*, a suit by an Islamic charity accused of funding terrorism challenging an intelligence program, the Obama Administration stated, in a motion challenging the court's refusal to sustain its assertion of the privilege, that the "disclosure of classified information ... would create intolerable risks to national security."[89] The Administration has stated that, if the court orders it to disclose details about the program to the charity, it will appeal swiftly.[90] It is significant that President Barack Obama, who as a candidate was so critical of the Bush Administration's use of the privilege[91], has come to agree that, in some cases, its use is necessary and legitimate.

To summarize this review of cases applying the privilege, there is *no evidence* that the state secrets privilege—quite separate from the underlying legal doctrines that implicate the merits of any case—has been abused or misused during the Bush Administration or, more broadly, *at all*. There is *no evidence* that the privilege is being used frequently or in cases where it is not needed, no evidence that it is being used to stifle cases on political grounds, and no evidence that judges are unduly deferential to the executive when it is invoked. The fact that some cases concerning government policies have been bounced out of court by the privilege is both unexceptional (assertion of any privilege may, in some cases, defeat a claim) and appropriate—many of these cases, had they been allowed to proceed, would quite obviously have exposed secrets that would put

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May 15, 2009) (arguing that an order granting plaintiffs access to classified information would be improper in light of the state secrets privilege); David Kravets, *Showdown in NSA Wiretap Case: Judge Threatens Sanctions Against Justice Department*, Wired.com, May 26, 2009, http://www.wired.com/threatlevel/2009/05/wiretap-deadline/ (reporting that the government has "urged Walker to go ahead and order the release of the secret documents to the lawyers, so the Justice Department could appeal").

[88] John Schwartz, *Obama Backs Off a Reversal on Secrets*, N.Y. TIMES, February 9, 2009, at A12.

[89] Terry Frieden, U.S. vows to keep using 'state secrets' defense, CNN, May 30, 2008, http://www.cnn.com/2009/US/05/30/court.state.secrets/index.html.

[90] *Id.*

[91] *See* Jake Tapper, On 'State Secrets,' Meet Barack W. Obama, ABC News, April 10, 2009, http://blogs.abcnews.com/politicalpunch/2009/04/on-state-secret.html (noting that the Obama-Biden campaign identified the Bush Administration's use of the privilege as a "problem" that an Obama Administration would remedy).

U.S. national security at risk. Finally, the privilege has been employed sparingly by all administrations since Lyndon Johnson was in office, including the current Administration, demonstrating that protecting state secrets from disclosure is not, and should not be, a partisan or ideological issue.

This would seem to defeat any argument in favor of substantively limiting or procedurally hobbling the state secrets privilege, such as the SSPA would do. The Act would radically alter the privilege, placing a much higher—and at times, insurmountable—burden on the government to protect national security information that, in other contexts, is protected by strict laws and regulations carrying heavy criminal penalties for their violation.[92]

In general, the Act would require the government to disclose all evidence it claims is privileged to the court and then prove that public disclosure of each piece of evidence "would be reasonably likely to cause significant harm to the national defense or diplomatic relations of the United States"—a higher standard than that articulated in *Reynolds*. Gone would be *Reynold*'s sliding scale approach based on necessity, replaced with a mandate that the court personally review every bit of evidence, no matter the obviousness of the consequences of disclosure, the lack of necessity, or the risk of interception during proceedings, as acknowledged by the Court in *Reynolds*. Counsel for all parties would be presumptively authorized to participate in proceedings concerning the privilege—at least one hearing would be required. The court would accord government officials and experts no deference at all on national security matters, thereby requiring judges to determine weighty matters of national security policy and classification.

Further, in every case, whether or not the privilege is sustained, dismissal or summary judgment would be forbidden until the party against whom the privilege has been upheld "has had a full opportunity" to complete discovery and litigate the issue or claim to which the privileged material is relevant.[93] This would essentially overturn *Totten*, forcing the government to admit highly classified secrets, such as the identities of spies, in the course of litigation. It would also force the government to submit to "broad-ranging discovery" that itself would be "disruptive of effective government," particularly national defense.[94]

It is difficult to see how these changes could cut down on abuse or misuse of the state secrets privilege, because, as described above, none has been documented. It is clear, however, that the Act would cause the government to lose more often on the privilege issue and to expend greater effort, and disclose more information, even when it is able to prevail. The effect would be particularly harsh in *Totten*-style cases, in which the government would face the unattractive choice of being uncooperative and losing (by

[92] *E.g.*, 18 U.S.C. § 798 ("disclosure of classified information" can be punished by criminal fines and imprisonment of up to 10 years).
[93] SSPA, H.R. 984, 110th Cong. (2009).
[94] Harlow, 457 U.S. at 817.

default or on summary judgment) or actually litigating, which would itself confirm the existence of secret relationships and programs. One would expect the government to settle most cases or lose on default judgment, and this strategy would encourage a flood of litigants, some of them with frivolous claims that the government could not challenge lest it disclose state secrets merely by doing do. This would not be, in any way, an improvement over current law—quite the opposite.

The most significant effect, however, may be in activist lawsuits challenging government programs, which would be difficult or impossible to settle without shutting down large portions of our national security infrastructure. The only choice, then, would be to litigate, at considerable expense in terms of dollars and distraction. Because the government would lose more often—as a result of the Act's heightened standard and inordinately complex procedural requirements—the courts would play a major role in making national security policy by disclosing details about, and effectively ending, programs that have been authorized by the President and Congress. This would give activists a "heckler's veto" over many national security programs created by the democratic branches of government, to which such powers are textually committed in the Constitution. This consequence is discussed further below.

Finally, it is likely that the Act's procedures would result in the inadvertent disclosure of closely held national security information. This too is discussed below.

Far from being necessary, the SSPA would endanger national security. It offers no apparent benefits, other than the possibility, attractive to some, that activists with unpopular ideas could use it to achieve an end-run around the democratic process on issues relating to national security.

II. Serious Constitutional Concerns

The SSPA raises serious constitutional concerns by altering a privilege that has a constitutional dimension. Unlike most other privileges, which are supported solely by the common law or statutory law, the state secrets privilege is grounded in the powers committed to the President in Article II of the Constitution. Congress's undisputed power to codify or even abrogate common-law privileges by statute cannot extend to altering to the Constitution's assignments of authority and responsibility. Because it would radically restrict the authority of the President to safeguard military and diplomatic secrets and intelligence, the Act is likely unconstitutional.

As the Supreme Court explained in *C & S Airlines v. Waterman S.S. Corp.*, courts simply lack the constitutional authority and the expertise to make certain types of decisions that are assigned to the executive:

> 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. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[95]

This is not merely a prudential limitation on judicial power, but a bar to its exercise altogether. The courts both should not and "could not" second guess such decisions.[96]

Justice Potter Stewart provides a compelling explanation for the Constitution's investiture of this narrow but absolute band of power in the executive, and concomitant narrow and absolute bar on judicial discretion:

> [I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.[97]

The Court confirmed and elucidated the *C & S Airlines* rule in *U.S. v. Nixon,* in which it rejected the President's claim of executive privilege.[98] Nixon's assertion of the privilege fell short, explained the Court, because "[h]e does not place his claim of privilege on the ground they [the materials sought] are military or diplomatic secrets."[99] "As to those areas of Art. II duties," the opinion continues, the courts have "shown the utmost deference to Presidential responsibilities."[100] Put plainly, "to the extent this interest [a President's interest in confidentiality] relates to the effect discharge of a President's powers, it is constitutionally based."[101] In such cases, said the Court, the rule in *Reynolds* applies: "the court should not jeopardize the security which the privilege is

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[95] Chicago & Southern Air Lines v. Waterman S. S. Corp., 333 U.S. 103, 111 (1948).
[96] *Id.*
[97] New York Times Co. v. United States, 403 U.S. 713, 728 (1971) (Potter, J., concurring).
[98] United States v. Nixon, 418 U.S. 683, 713 (1974).
[99] *Id.* at 710.
[100] *Id.*
[101] *Id.* at 711.

meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."[102]

The SSPA seemingly ignores this clear jurisprudence and constitutional imperative, running roughshod over the separation of powers. Whereas *Reynolds* required a court to determine only whether the executive had properly asserted the privilege—i.e., that it had complied with the requisite procedures and that the assertion concerned a matter assigned to the executive, as determined by the deferential "reasonable power" standard—the Act would require courts to "determine whether the privilege claim is valid" by reviewing, for itself, all of the evidence asserted to be privileged and then determining "whether the harm identified by the Government…is reasonably likely to occur should the privilege not be upheld."[103] In this inquiry, the court "shall weigh testimony from Government experts in the same manner as it does, and along with, any other expert testimony," including that from other parties' experts or experts appointed by the court.[104]

In this way, the Act attempts to transfer a power clearly assigned to the executive to the courts. Under the Act, even when a matter falls clearly within the executive's constitutional purview, and clearly outside of the judiciary's, the executive's assertion of the need for confidentiality would be afforded no deference at all, nullifying the executive's power to maintain secrecy in state affairs. This is directly contrary to *C & S Airlines*, *Nixon*, and *Dept. of the Navy v. Egan*, in which the Court explained that the President's "authority to classify and control access to information bearing on national security…flows primarily from this constitutional investment of power [Art. II, § 2] in the President and exists quite apart from any explicit congressional grant."[105] Because the state secrets privilege is raised only by the executive and only (rather axiomatically) in cases that the executive determines threaten to reveal state secrets, a determination which

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[102] *Id.* at 710-11 (*quoting Reynolds*, 345 U.S. at 10).
[103] H.R. 984, § 6.
[104] *Id.* at §§ 6, 5(b).
[105] *Egan*, 484 U.S. at 527. This is very relevant to any analysis under *Youngstown*, particularly with respect to Justice Jackson's third grouping, when presidential power "is at its lowest ebb." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38, 640 (Jackson, J., concurring) ("[W]e can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress."); *see also id.* at 645 (Jackson, J., concurring) ("We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander-in-Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."). Providing further evidence that the protection of state secrets is within that "exclusive function," Justice Jackson was also the author of the majority opinion in *C & S Airlines*.

is assigned to the executive, the Act would be "unconstitutional in all of its applications," easily satisfying the most stringent test for facial invalidity.[106]

Further, the SSPA may also impermissibly intrude on the judicial authority conferred in Article III of the Constitution. As the Supreme Court observed in City of *Boerne v. Flores*, Congress lacks "the power to establish the meaning of constitutional provisions."[107] This limitation incorporates the Supreme Court's constitutional precedents:

> When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed.[108]

On this basis, the Court struck down the Religious Freedom Restoration Act ("RFRA") as an impermissible intrusion on its power to interpret the Constitution, explaining "it is this Court's precedent, not RFRA, which must control."[109]

The SSPA is similar to RFRA in that it purports to define the Constitution. Specifically, it would impose a rule of decision on the courts requiring them to adopt a narrow construction of presidential power in cases where the state secrets privilege is asserted. But as in *Boerne*, Congress does not legislate on a blank slate. As discussed above, the Court has held clearly and repeatedly that the state secrets privilege is grounded in Article II of the Constitution. By ignoring this precedent, the SSPA would usurp the power of the judicial branch "to say what the law is."[110]

Finally, several of the procedures specified in the Act also impinge on the executive prerogative described in *Egan*. First, the court may, at its discretion, order the executive to submit "all of the information that the Government asserts is privileged" for review by the court.[111] Second, the court may order the executive to produce "an adequate substitute [for protected information], such as a redacted version, summary of the information, or stipulation regarding the relevant facts, if the court deems such a substitute feasible."[112] Third, the court may order the executive "to provide a manageable

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[106] *See* Washington State Grange v. Washington State Republican Party, 128 S.Ct. 1184, 1190 (paraphrasing *Salerno*).
[107] City of Boerne v. Flores, 521 U.S. 507, 527 (1997)
[108] *Id.* at 536 (internal citation omitted).
[109] *Id.*
[110] *Id.* (quoting Marbury, 5 U.S. (Cranch) at 177).
[111] H.R. 984, § 6(b)(1)(A).
[112] *Id.* at § 3(d).

index of the information that the Government asserts is subject to the privilege."[113] Fourth, the court may order the executive to conduct a "prompt" review of any party or counsel to determine whether to provide that individual with a security clearance.[114] Fifth, the court may require that protected information be disclosed to counsel at the hearings required by the Act.[115] Sixth, the court may order the executive to disclose protected information after it determines that the privilege claim is not "valid."[116] Each of these procedures would, in some or all instances, violate the executive's constitutional authority "to classify and control access to information bearing on national security" and to "to determine whether an individual is sufficiently trustworthy to…give that person access to such information."[117]

In short, the no fewer than seven provisions of the SSPA, including its core operative provision, attempt to alter the constitutional separation of powers by reassigning powers from the executive to the judicial branch. In addition, the core provision may also impermissibly intrude the judicial power. Outside of the constitutional amendment process specified in Article V of the Constitution, Congress lacks the power to affect such changes.

III. Weakening Congress and National Security

By altering the structural relationship between the branches, the SSPA would also allow the courts to usurp Congress's power and responsibility—a result that the most cynical Members of Congress may welcome for its political benefits. This, in turn, threatens to undermine the effectiveness of national security policy, putting Americans at risk.

The constitutional separation of powers is no mere legal nicety but an essential bulwark against both tyranny and impotence. The Framers had experience with each of these ills, the former under British rule and the latter as citizens of states weakly bound by the Articles of Confederation. Thus they created an executive energetic in foreign affairs and national security but comparatively weak in domestic policy, recognizing that diplomacy and defense have aspects inimical to drawn-out deliberation, particularly in public. John Jay described one such need in Federalist No. 64:

> It seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate despatch are sometimes requisite. These are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions, who would rely on

[113] *Id.* at § 4(c).
[114] *Id.* at § 5(e).
[115] *Id.* at § 3(c).
[116] Id. at § 7(a).
[117] *Egan*, 484 U.S. at 527.

> the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular Assembly.

Further, as Alexander Hamilton concluded in Federalist No. 74, "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."

Thus, proposals which make exercise of this kind of executive power contingent on the approval of another branch sacrifice these advantages, as well as the accountability of the President for foreign affairs and national security.

Not all matters relating to foreign entanglements and defense are, of course, strictly executive affairs. In many, Congress plays an essential role in legislating programs that draw on its powers for the executive to carry out and in appropriating funds to these programs. And it is Congress, of course, that is responsible for declaring war, defining the laws of war, and raising and supporting armed forces.[118] This raises a question: what is sacrificed when this legislative power and responsibility is transferred to another branch, in this case the judiciary?

Perversely, that would be one of the consequences of the SSPA. This is because the state secrets privilege enforces the separation of powers not just between the executive and the judiciary, but also between Congress and the judiciary. By limiting judicial discretion in certain fields, it protects congressional policymaking in those fields. Broadly speaking, this is but one example of a textual commitment made to the legislative branch, the exercise of which should be and usually is met with the utmost judicial deference. In many instances, these powers are shared, in whole or in part depending on context, with the executive.[119] Thus, the courts should not, and usually will not, adjudicate matters that are "political questions," a subset of the larger class of matters committed to the legislature, the executive, or both of the political branches.

By impinging on the executive's ability to carry out programs that demand stealth and secrecy, the SSPA (if not struck down as unconstitutional) would allow the courts to intrude on matters that would otherwise be outside of the powers committed to the judiciary. Courts would have the power to expose and effectively end or at least hinder all manner of intelligence and national security programs approved by Congress that rely, in any measure, on stealth or secrecy. Even when the court ultimately rules that an assertion of the state secrets privilege was "valid," the damage of exposure will already have been done. In this way, the Act would empower courts, and private parties bringing cases before them, to make policy that had previously been the exclusive domain of the political branches.

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[118] U.S. CONST., Art. I, § 8.

[119] *See Egan*, 333 U.S. at 110 (explaining an instance in which "Legislative and Executive powers are pooled obviously to the end that commercial, strategic and diplomatic interests of the country may be coordinated and advanced…").

This proposition is not far-fetched. As described above, many of the lawsuits in which the government asserts the state secrets privilege concern intelligence and national security programs, some of which have been specifically authorized by Congress and some of which have proceeded under more general legislative authority with Congress's acquiescence.[120] Several of these lawsuits, launched and litigated by activist groups that have failed to convince Congress to adopt their agendas, are intended to end or significantly restrict these programs. The Act would facilitate these efforts, enabling activists to make an end-run around Congress's legislative process.

A *Totten*-style case presents a simple example. Assume that the most recent intelligence authorization bill, passed by Congress and signed by the President, permits the Central Intelligence Agency to conduct human intelligence activities in foreign states. Assume, as well, that Congress has also funded this program in its most recent appropriations bill. A single overseas agent or informant would be empowered, under the Act, to extract "graymail" from the Agency by threatening to reveal aspects of its human intelligence program through litigation.[121] The Agency would face a choice: it could either pay (through a settlement or default judgment) and thereby make itself a target for identical threats from scores of sources and employees, or it could fight the lawsuit, effectively acknowledging aspects of its program, including the existence of an intelligence relationship. In either case, potential informants are likely to regard the CIA with great wariness, for fear that their identities could be disclosed in litigation or by association with the disclosure of another. The human intelligence program, authorized and funded by Congress and carried out by the executive, would be effectively shut down by judicial interference.

As this simple hypothetical demonstrates, the direct consequences to national security of disclosing state secrets could be immense. But they are also straightforward and so need not be dwelled upon.

Less obvious, but no less pernicious, are the indirect consequences. The benefit of Congress's deliberative process, as concerns any number of intelligence and national security programs, would be undermined, as the courts upset carefully crafted balances hashed out in congressional committee and on the floor before being wrought into law. If such programs are to be ended or scaled back, it should be Congress, which legislates over a far broader canvas than any court hearing a particular case, that should do it, relying on its understanding of the nation's needs and the appropriate means of satisfying them. The courts, considering the law case by case, simply lack the institutional expertise and resources to make policy. The result, in all likelihood, would be worse policy that does not strike the appropriate balance between national security, individual rights, expense, efficacy, and all the other factors that Congress considers in writing legislation.

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[120] *E.g.*, Scott Shane, *Report Questions Legality of Briefings on Surveillance*, N.Y. TIMES, January 19, 2006 (describing intelligence briefings provided to "Republican and Democratic leaders of the House and Senate and of the Intelligence Committees, the so-called Gang of Eight").
[121] *See Tenet*, 544 U.S. at 11.

The other indirect effect, premised on cynicism, could do far more damage to Congress and our representative democracy. In recent years, Members of Congress have been accused for their unwillingness to intervene in controversial actions carried out by the executive branch. Some of these activities, such as certain aspects of foreign intelligence collection, may be beyond Congress's power to affect. Others, however, are not. This latter group includes the Bush and Obama Administration's use of funds earmarked for financial institutions to bail out and then purchase General Motors and Chrysler; the Federal Reserve's bank bailouts; the AIG bailout; the CIA's use of "enhanced interrogation techniques" including waterboarding; surveillance programs that intercept some communications that are arguably domestic in nature; and the use of National Security Letters. In each case, Congress held multiple hearings and many Members of Congress expressed their criticism, often in harsh, accusatory tones. In *none*, however, did Congress pass legislation significantly curtailing the executive's discretion or rescinding the statutory authority upon which the executive relied.

The SSPA takes this cynicism to a new level. It would allow Congress to duck tough decisions in the national security arena—where bad decisions can have catastrophic consequences—by passing the buck to the courts. These are the same courts that have already come under criticism from the majority party in Congress for upholding state secrets claims and thereby declining to invalidate programs that Congress itself could eliminate with a single bill. The Act would take the pressure off of Congress to check executive overreaching, while giving Members still more targets to criticize in overheated floor statements. This result, pushing contentious matters out of the realm of debate, would be politically safe—which no doubt explains its attraction to some Members—but absolutely poisonous to the American politic.

Rather than attempt to alter the constitutional separation of powers so as to evade responsibility for government actions and omissions, Congress should confront these issues directly and forthrightly.

IV. The Greater Public Good

"Dismissal is a harsh sanction," the Fifth Circuit observed in one state secrets case. "But the results are harsh in either direction and the state secret doctrine finds the greater public good—ultimately the less harsh remedy—to be dismissal."[122] Congress should not sacrifice this greater good to ameliorate the unfortunate plight of the very few who suffer a harsh remedy under the law.

The SSPA would have that effect, putting the nation and its citizens at risk to aid the undemocratic efforts of activists who have been unable to sway Congress to adopt their risky policies. The Act, however, offers an indirect approach—shifting controversial and contentious issues to the courts—thereby promising to shield Congress from deserved opprobrium for allowing our nation's security to be placed at risk.

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[122] Bareford v. General Dynamics Corp., 973 F.2d 1138, 1144 (5th Cir. 1992).

This legislation is cynical. It is also unconstitutional and completely unnecessary to remedy any genuine ill. Congress should look past the parochial interests of those who would use the courts to make policy, as well as political expediency, and focus on the greater public good.

Mr. NADLER. Thank you.
I now recognize for 5 minutes Mr. Wizner.

TESTIMONY OF BEN WIZNER, NATIONAL SECURITY PROJECT STAFF ATTORNEY, AMERICAN CIVIL LIBERTIES UNION

Mr. WIZNER. Thank you, Chairman Nadler, Ranking Member Sensenbrenner, Chairman Conyers, and distinguished Members of this Subcommittee. I appreciate this opportunity to explain the ACLU's interest in reform of the state secrets privilege, an issue of critical importance to all Americans concerned about the unchecked abuse of executive power.

I also want to commend Chairman Nadler and the cosponsors of the State Secrets Protection Act, H.R. 984. If enacted, it would place reasonable checks and balances on the executive branch, reempower courts to exercise independent judgment in cases of national importance, and protect the rights of those seeking redress through our courts system.

More than 50 years have passed since the Supreme Court formally recognized the states secrets privilege in the *United States v. Reynolds*. During that time, Congress has never legislated to place reasonable restraints on the use of the privilege or to provide standards or guidelines to increasingly confused and divided Federal courts.

Congress's silence on this critical issue has become all the more troubling in recent years, as we have seen the state secrets privilege mutate from a common-law evidentiary rule designed to protect genuine national security secrets into an alternative form of immunity that is used more and more often to shield the government and its agents from accountability for systematic violations of the Constitution and this Nation's laws.

The ACLU has been involved in a series of high-profile cases in which the government has invoked the state secrets privilege in response to allegations of grave government misconduct, not simply to block access to specific information that is alleged to be secret, but to dismiss lawsuits in their entirety at the outset. This has happened in cases involving rendition and torture, warrantless surveillance, and national security whistleblowers. The dismissal of these suits does more than harm the individual litigants who are denied opportunity for redress. It deprives the American public of a judicial determination regarding the legality of the government's actions.

I have been personally involved in a number of these cases, including the case of Khalid El-Masri, a German citizen who was detained incommunicado by the CIA for nearly 5 months in a squalid Afghan prison in a tragic case of mistaken identity. Mr. El-Masri's case received such prominent press coverage in the United States and abroad that he truly became the public face of the CIA's extraordinary rendition program. Nonetheless, Mr. El-Masri's lawsuit was dismissed on the basis of an affidavit from the CIA, the very entity charged with wrongdoing, that characterized the entire subject matter of Mr. El-Masri's suit as a state secret. As a result, the one place in the world where Mr. El-Masri's ordeal could not be discussed was in a U.S. court of law.

A second ACLU lawsuit on behalf of victims of the CIA's rendition program, this one targeting a Boeing subsidiary, Jeppesen Dataplan, that provided flight services, enabling the clandestine transfer of our clients to overseas prisons where they were tor-

tured, was similarly dismissed on the basis of a CIA affidavit alone. And, as this Subcommittee knows, when the case reached the Ninth Circuit Court of Appeals in February, the Obama administration, in just its third week in office, stood behind the Bush administration's broad claim of state secrets.

In April, the Court of Appeals reversed the dismissal of the suit, holding that the government's state secrets claim was premature and overbroad. It held that the government's sweeping theory of state secrets, quote, "had no logical limit and amounted to an argument that the judiciary should effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and the limits of the law." The court held that the government's legitimate secrecy concerns would be amply protected during further proceedings, where the privilege could be invoked with respect to discrete evidence, not an entire lawsuit.

It will come as no surprise to the Subcommittee that, in my opinion, the Ninth Circuit got the law exactly right. But a single correct judicial opinion does not relieve Congress of its obligation to act in this area. Only Congress can provide a comprehensive scheme applicable to all courts that addresses all disputed aspects of the state secrets privilege and resolves the conflict and confusion in the courts. The need for uniform standards and practices is as urgent today as it was prior to the Ninth Circuit's ruling.

At a press conference the day after the Ninth Circuit's ruling in the Jeppesen case, President Obama was asked about his Administration's position on state secrets. The President responded, "I actually think that the state secrets doctrine should be modified. I think right now it's overbroad. Searching for ways to redact, to carve out certain cases to see what can be done so that a judge in chambers can review information without it being in open court—you know, there should be some additional tools so that it's not such a blunt instrument."

Congress should provide those additional tools by enacting H.R. 984.

Thank you.

[The prepared statement of Mr. Wizner follows:]

PREPARED STATEMENT OF BEN WIZNER

Testimony of Ben Wizner, Staff Attorney

American Civil Liberties Union

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

June 4, 2009

AMERICAN CIVIL LIBERTIES UNION

OFFICERS AND DIRECTORS

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

I am pleased to testify 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. In doing so, we also take this opportunity to commend Chairman Nadler for crafting H.R. 984, the State Secrets Protection Act of 2009, a bill that would put reasonable checks and balances on the executive branch, re-empower courts to exercise independent judgment in cases of national importance, and protect the rights of those seeking redress through our court system.

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. As the ACLU testified to this Committee last year, the Bush administration 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 the trust and confidence of the American people in our judicial system. As I will testify today, the Obama administration's early use of the state secrets privilege has only underscored the urgent need for legislative reform.

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 and other cases, courts have accepted government claims that the litigation must be dismissed on national security grounds without independently scrutinizing the evidence or allowing plaintiffs an opportunity to establish the truth of their allegations based on non-privileged information.

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 held accountable for its constitutional violations. The aggressive and expanding assertion 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. We therefore urge you to pass H.R. 984.

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: "[J]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[9]

Despite these cautions, the *Reynolds* Court sustained the government's claim of privilege over the accident report without ever looking at it. It did not, however, dismiss the lawsuit. Instead, the Court allowed the suit to proceed using alternative nonclassified information (testimony from the crash survivors) as a substitute for the accident report, and the case eventually settled. The declassification of the accident report many decades later highlighted the importance of independent judicial review. There were no national security or military secrets; there was, on the other hand, compelling evidence of the government's negligence.[10]

The Supreme Court has not directly addressed the scope or application of the privilege since *Reynolds*. In the intervening years, the privilege has slipped loose from its evidentiary moorings. 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. *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;[11] in cases of greater national significance;[12] 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."[13]

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, the NSA's warrantless data mining of calls and e-mails, and various telecommunication companies' participation in the NSA's surveillance activities.[14] 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.[15] And it has invoked the privilege to seek dismissal of suits challenging the government's seizure, transfer, and torture of innocent foreign citizens.[16]

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.[17] 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."[18] By contrast, the Court noted, the state secrets privilege deals with evidence, not justiciability.[19] 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.[20] 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.[21] 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.[22]

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.[23] Other courts properly have scrutinized the government's privilege claim with more rigor – insisting on a meaningful judicial role in assessing the reasonable risk of harm to national security should purported state secrets be disclosed.[24]

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.[25] Other courts have refused or declined to examine the allegedly privileged evidence, relying solely on secret affidavits submitted by the government.[26]

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 been involved in a series of high-profile cases in recent years in which the government has invoked the state secrets privilege in response to allegations of serious government misconduct. These cases serve more than just the narrow personal interests of the litigants; they serve the national interest by seeking a judicial determination that the government has acted unlawfully. Since *Marbury v. Madison* in 1803, it has been the role of the courts to determine what the law is. 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. Mr. 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. German and European authorities began official investigations of Mr. 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.[27] 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.[28] 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.[29]

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.[30] 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.[31] 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.[32]

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.[33] 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.[34]

The district court concluded that "El-Masri's private interests must give way to the national interest in preserving state secrets." But 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 legal values. In an amicus brief filed in support of El-Masri's appeal to the Fourth 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.[35] 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.[36]

The ACLU 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.[37] Jeppesen's involvement in the transfer of the plaintiffs and other terrorism suspects to countries where they faced brutal torture is a matter of public record, confirmed by documentary evidence and eyewitness testimony, including a sworn declaration by a former Jeppesen employee who was told by a senior company official of the profits derived from the CIA's "torture flights." Nevertheless, 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, and on February 13, 2008, the case was dismissed.

The ACLU appealed that dismissal to the U.S. Court of Appeals for the Ninth Circuit, which heard oral argument on February 9, 2009. On April 28, 2009, the court of appeals reversed the lower court's order of dismissal and remanded the case for further proceedings.[38] The court held that the government's invocation of the state secrets had been premature, because the privilege must be invoked with respect to discrete evidence, not an entire lawsuit, and the court could not engage in the "prospective consideration of hypothetical evidence."[39] The court observed that the government's "sweeping" rationale in support of dismissing the entire case at its outset "ha[d] no logical limit" and amounted to a demand that "the Judiciary should effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law."[40]

Noting that "the Executive's national security prerogatives are not the only weighty constitutional values at stake," the court, citing Justice Scalia's separate opinion in *Hamdi v. Rumsfeld*, emphasized that the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake."[41] Congress should affirm that same principle by enacting legislation that

formalizes, for the first time, the roles of the courts and of Congress in conducting much-needed oversight of the executive's use of the state secrets privilege.

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).[42] 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 *USA Today* 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."[43]

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.[44] The plaintiffs alleged that 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 held that the ACLU's challenge to the program could be made based solely on the goverument'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.[45] 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, by the court's standard, 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 in our constitutional system of competing powers among the separate branches of government.

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.[46]

A few days before the appeals court heard Edmonds' case, the Inspector General published an unclassified summary of its investigation of her claims.[47] 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."[48] 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."[49] 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.[50] 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.[51]

THE STATE SECRET PROTECTION ACT (H.R. 984)

The State Secret Protection Act (H.R. 984) takes great strides toward restoring essential constitutional checks on executive power. H.R. 984 restores the states secrets privilege to its common law origin as an evidentiary privilege by prohibiting the dismissal of cases prior to discovery. H.R. 984 also ensures independent judicial review of government state secrets claims by requiring courts to examine the evidence for which the privilege is claimed and make their own assessments of whether disclosure of the information would reasonably pose a significant risk to national security.

Courts have long experience in handling national security information responsibly and assessing its appropriate use in the judicial process. If history is any guide, there is no reason to believe that courts will lightly disagree with the government's assessment of national security risks. But the Supreme Court's historic decision to allow publication of the Pentagon Papers provides a vivid illustration of the importance of maintaining a vital and independent judicial role in national security cases as a constitutional safety valve against over-classification and excessive secrecy.

Congress has recognized as much in the Classified Information Protection Act,[52] the Freedom of Information Act,[53] and the Foreign Intelligence Surveillance Act.[54] Under each of these statutes, courts are charged with the responsibility of weighing the government's national security claims in a specific litigation context – whether it is a defendant's claim under CIPA that national

security evidence is critical to his or her criminal defense, the government's claim under FOIA that the release of government documents will jeopardize national security, or the claim of an aggrieved individual suing to redress an alleged violation of FISA.

Like these other statutes, H.R. 984 concerns a quintessential judicial determination – the admissibility of evidence – and is designed to ensure that those decisions are made by judges, not executive branch officials. By codifying the state secrets privilege, H.R. 984 will bring needed clarity and balance to an area of the law that is now desperately in need of both. It will accomplish this in several critical ways.

First, H.R. 984 requires judges to look at the evidence that the government is seeking to shield by invoking the state secrets privilege, unless the evidence is too voluminous, in which case the court can review a representative sample. This will address the too-frequent practice of relying exclusively on the government's affidavits in ruling on the state secrets privilege. The bill also places the burden of proof on the government that is trying to keep evidence secret, which is where it belongs.

Second, H.R.984 recognizes that judges can and should give due deference to the expert opinion of government officials without deferring entirely or abdicating their role as judges to make an independent assessment of the evidence. In order to assure that the court's decision is an informed one, the bill encourages the maximum participation possible by opposing counsel, and gives courts the authority to appoint a special master or independent expert to advise the court in appropriate circumstances.

Third, as a direct response to the increasing tendency of the government to seek, and courts to grant, motions to dismiss at the outset of litigation based on the state secrets privilege, H.R. 984 restores the state secrets privilege to its proper evidentiary role by providing that a case shall not be dismissed until the opposing party has had "a full opportunity" to complete discovery of non-privileged evidence and to litigate his or her claims based on that evidence.

Fourth, borrowing from CIPA, H.R. 984 empowers courts to order the production of a non-privileged substitute, if feasible, for the withheld evidence in cases where the privilege is upheld. If a non-privileged substitute is not feasible under the circumstances, the bill allows courts to "make appropriate orders in the interest of justice," including finding for or against a party on a factual or legal issue.

CONCLUSION

Time and again, the government has sought dismissal at the pleading stage based on the state secrets privilege, 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. Employed as it has been in these cases, the privilege permits the executive to render 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 antithetical to the values of a democratic society. The ACLU therefore supports H.R. 984, and urges its enactment as soon as possible.

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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 e. 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] *See*, Herring v. United States, Civil Action No. 03-5500 (LDD) (E.D. Pa. Sept. 10, 2004).
[11] 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.")
[12] Editorial, Too Many Secrets, N.Y. Times, Mar. 10, 2007, at A12, available at: http://www.nytimes.com/2007/03/10/opinion/10sat2.html?cx=1331182800&en=023b94ac28666f34&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.").
[13] Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 581 (1982).
[14] *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).
[15] 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).
[16] *See*, El-Masri, *supra*; Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissed on other grounds).
[17] Tenet v. Doe, 544 U.S. 1 (2005).
[18] *Id*, at 6.
[19] *Id*. at 9, 10.
[20] Reynolds, 345 U.S. at 3.
[21] *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).
[22] *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.

[23] *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").
[24] *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").
[25] *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).
[26] *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).
[27] *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
[28] *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*
[29] 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
[30] El-Masri v. Tenet, 437 F.Supp.2d 530 (E.D.Va. May 12, 2006).
[31] 28 U.S.C. § 1350.
[32] 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
[33] El-Masri v. Tenet, 437 F.Supp.2d 530, 532-34 (E.D.Va. May 12, 2006).
[34] El-Masri v. U.S., 479 F.3d 296, 313 (4th Cir. 2007) *cert. denied*, 128 S. Ct. 373 (U.S. 2007).
[35] 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
[36] 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
[37] 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).
[38] Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992 (9th Cir. 2009).
[39] *Id.* at 997.
[40] *Id.* at 1003.
[41] *Id.* at 1003-04, quoting Hamdi v. Rumsfeld, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting).
[42] 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.
[43] 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.
[44] ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006).
[45] ACLU v. NSA, 467 F.3d 590, 591 (6th Cir. 2006).

[46] *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).
[47] 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).
[48] *Id*, at 31.
[49] *Id*, at 34.
[50] 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
[51] Edmonds v. U.S. Dept. of Justice, 546 U.S. 1031, 126 S.Ct. 734, (U.S. Nov 28, 2005) (NO. 05-190) .
[52] Pub. Law 96-456 (1980).
[53] Freedom of Information Act, 5 U.S.C. § 552.
[54] Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801, et. seq.

Mr. NADLER. Thank you.

I'll begin the questioning by recognizing myself for 5 minutes.

Judge Wald, during markup of the bill in the Subcommittee in the last Congress, one of my colleagues cited your testimony last year as supporting a requirement that courts grant, quote, "substantial weight" to government assertions of the harm likely to be caused by public disclosure of information the government seeks to withhold as a state secret.

Is that accurate? Do you believe we should require the courts automatically grant special deference, substantial weight, or ut-

most deference, or something similar, to government assertions? That is the standard in the Senate companion bill but not in this bill, as you know.

Judge WALD. Yeah, Chairman Nadler, I'm glad you gave me an opportunity to address that point. When I was here before the House Judiciary Committee last year, you did not have a bill yet. No draft bill had actually been submitted. We were talking about principles of legislation.

One of the then-Administration officials raised the proposal that "utmost deference" be the standard. And in that colloquy that followed, I said, well, there are other places in legislation, like Exemption FOIA 1, that use "substantial weight."

I believe, though I don't have that quote right in front of me, but I believe I also attached to that what I later said in a supplemental letter that went to the House Judiciary Committee, I meant the same kind of weight that any expert witness gets. And I gave a quote from Skelly Wright in my former court in *Ray v. Turner*, in which he defines "substantial weight" to mean only the weight that is appropriate by the demonstration of qualifications, expertise, et cetera.

Mr. NADLER. Thank you. So you think the language in the current bill——

Judge WALD. I like the language in the current bill better. I think it's confusing. I'm sorry if I contributed to the confusion.

Mr. NADLER. That's fine. Thank you.

Now, if the language in the current bill is adequate to account for government expertise, what are the risks, if any, of putting in language about substantial weight or utmost deference? Why shouldn't we do that?

Judge WALD. Because I think that the basic principle and the one that was endorsed by the Supreme Court in Reynolds is the judge should be the decisionmaker as to whether the privilege applies, and he ought to make an independent assessment. Other parts of your bill say that. And I think it takes away from that underlying principle if you start saying, "Well, you make an independent assessment, but you'd better give a lot of weight, a lot of deference here," there.

Mr. NADLER. Okay. Thank you.

Congressman Hutchinson, those who oppose independent judicial review of government secrecy claims often argue that it is the President and the executive branch, not the courts, that have the greater expertise and responsibility for safeguarding national security.

This view, in my opinion, underestimates the ability and the responsibility of the courts in our constitutional scheme, and it also seems to overlook what you described in your testimony as, quote, the natural tendency on the part of the executive branch to overstate claims of secrecy and to avoid disclosure whenever possible, end quote.

Doesn't the argument regarding the superior expertise of the executive branch also overlook the potential conflict for the government in the case where the information it seeks to withhold might prove embarrassing, politically or otherwise, might provide evi-

dence of unlawful conduct or otherwise undermine the position it is taking in the case?

Mr. HUTCHINSON. Well, the key point is that we have to give the courts the tools and the guidance to assure an independent review. Any language, such as substantial deference, would undermine that independent review.

In terms of the ability of the courts to weigh expert testimony, that's what's marvelous about our judiciary and our rule of law in this country, is that you can have a judiciary listen; they don't have to be experts on patent law to make a fair decision or an expert in engineering to make a fair decision in an engineering case.

Mr. NADLER. So you would trust the expertise of the courts?

Mr. HUTCHINSON. The expertise of the courts to weigh fairly the expertise under normal guidelines of what's presented to them.

Mr. NADLER. Thank you.

Mr. Wizner, in cases that you have handled, the government has argued that the entire subject matter, like rendition to torture, is a state secret. In the last Congress, we held hearings on rendition. The government acknowledged that, quote, rendition is a valuable tool in the war on terror, end quote, and other governments have concluded, have conducted extensive examination of particular cases.

In view of these facts, what are we to make of the government's argument that the entire subject is too secret and warrants outright dismissal of the cases?

Mr. WIZNER. I think, Chairman, that it is evidence that the government's approach to secrecy in these matters is somewhat more opportunistic and malleable than it may seem. On very day that I was in court in San Jose, California, the Jeppesen case, responding to government lawyers' assertions that that case should be thrown out on subject matter grounds, former CIA Director Hayden was in Congress testifying that the CIA had water-boarded three individuals.

And so that, when it is in the government's interest to reveal those matters for whatever reason, the government is quite forthcoming with that information if it needs to put it in the public record to ensure that it can prosecute or execute alleged terrorists. When it finds itself in the position of being a defendant in a civil case, the same information becomes secret as a way of avoiding accountability.

Mr. NADLER. Thank you.

Without objection, I will grant myself 1 additional minute, so you can answer one more question.

Mr. Wizner, why should the government be required to prove item-by-item that disclosure of particular information, a particular piece of evidence, would harm national security? Why isn't it sufficient for the court to accept as reasonable the government's assertion that, in its expert view, litigation will require revelation of state secrets at some point, that dismissal is justified at the initial pleading stage?

Mr. WIZNER. Judges are not clairvoyant. Judges are not in a position at the beginning of the litigation to determine what evidence will or will not be necessary for the parties to make or defend their claims before that evidence has even been presented by either side.

And when that argument is being advanced by an executive branch official who stands to gain from the dismissal of the lawsuit, I think courts need to be more wary about it because of the inherent conflict of interest that's there.

It is never a waste of judicial resources to allow parties to have their day in court and to try to make their case. And a court cannot know at the outset that a plaintiff will not be able to come up with alternative means of proving its case without recourse to state secrets.

Mr. NADLER. Thank you very much.

And that concludes my questioning for the moment, maybe more than a moment.

I now recognize the distinguished Ranking Member of the Subcommittee, the former Chairman of the Committee, for 5 minutes, Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much.

Judge Wald, I have a quote from your testimony before the predecessor of this Committee, Subcommittee, on January 29, where you talk specifically about substantial weight being given to a government assertion. And you seem to approve that, and you also quoted the FOIA statute that requires a court to give substantial weight to a government assertion when someone is trying to get some information under the Freedom of Information Act.

Have you changed your mind since last year on this subject, and if so, why?

Judge WALD. I have not changed my mind. Perhaps I am in that close group of people currently who wish they had stated things a little bit more clearly the first time around.

Mr. SENSENBRENNER. We all have that problem.

Judge WALD. Yes, yes, but I do want to just, on this particular—as I pointed out, when I was before this Committee, there wasn't any bill. There wasn't anything that we were focusing on specifically. We were talking about principles.

When I talked about substantial weight, I used it as an example of a standard that was in FOIA exemption. But I do want to make one thing clear, Congressman Sensenbrenner. That is, it isn't even in the FOIA text. It's only in the conference committee report. So we don't even have an example where it's actually in the statute.

Now, many judges have cited it from the conference report, but it actually was in that thing we call legislative history.

I did use substantial weight the way, in my view, even looking at the phrase, I interpret it the way Judge Wright did, which says, and I have put that quote in my testimony here today as well as in the supplemental letter to the Committee, which says it does not mean some kind of blanket notion that when the witness comes and says, I represent the government, immediately, he gets deference—he or she gets deference.

That it means, according to Judge Wright, and I think that's the correct meaning, it means that you get the kind of weight, special weight from the judge that the qualifications, experience, and inherent persuasiveness and coherence of the testimony render it.

I could give you an example, but I don't want to use up other people's time.

Mr. SENSENBRENNER. Well, let me pursue this further.

Maybe I should compliment you as it is starting to sound like Justice Scalia, who doesn't think that anything we say over here makes any difference when a matter gets in court.

But, even if you accept legislative history using substantial weight in the FOIA request, it seems to me that the type of material usually requested in FOIA is much less sensitive than a material where an allegation of a state secret is asserted by the government.

And doesn't it concern you that we would be having different standards if we have different types of weight that are to be accorded to government assertions or Administration assertions when records or information are attempted to be sought from the government?

Judge WALD. Well, number one, I am not sure. I simply don't have the experience, although I have encountered both kinds of cases on the bench, both FOIA Exemption 1 and a form of state secrets. But I don't have the wide experience to validate what you say that somehow state secrets are likely to involve much more sensitive material.

In fact, my chief experiences with FOIA Exemption 1, and there were some very sensitive materials that were raised in some of those cases, including the aborted helicopter rescue of the people at the end of the Carter administration, et cetera.

But here I want to make another point, and that is that the Jeppesen case, I think, if I have the right case, specifically addressed this and pointed out that they believed that different standards might be appropriate because what is at stake in FOIA Exemption 1 is simply a citizen wanting to get the information, not having to show any particular injury or any particular stake in the balancing of equities; he just wants it.

On the other hand, if you are in a civil case, where there is an allegation of injury and serious injury, the stakes are much more important. So I am not sure.

And the third thing I want to point out is judges have interpreted FOIA Exemption 1 differently, as I have pointed out. Some won't even look at the material and take the government's affidavit at face value. But others look into the affidavit, and they say, well, it doesn't make a lot of sense to me, and I don't think it's credible, and I am not going to give it.

Mr. SENSENBRENNER. That gets to my final question. Currently we do have a body of law with a substantial deference standard that is in the current law that this legislation repeals and does not substitute another standard and basically makes this a matter of judicial discretion.

Aren't we likely to get less certainty on what is a legitimate claim of suppression of information if we start from scratch on what the case law would be rather than keeping the current standard in the law?

Judge WALD. I think not, because, as I said in my opening remarks, you have got—don't have a consistent body of law with a consistent standard now.

And, so, therefore, I think it's all over the map. I think it would be—we could almost begin anew with the standard that's in this

law and begin to build that body. I don't think we are going to lose anything in consistency from the current law.

Mr. SENSENBRENNER. Thank you.

I yield back.

Mr. NADLER. I thank the gentleman.

I now recognize for 5 minutes the distinguished Chairman of the Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

Since I know the President and the Attorney General better than anybody in this room, would you explain to me why the President is so ambivalent and why the Attorney General didn't send anyone to this hearing?

Judge WALD. Who is that addressed to, I am sorry?

Mr. CONYERS. Anybody.

Mr. GROSSMAN. If I could, there is a saying that I have heard from a lot of my friends who have been in the military, and that is, where he stands depends on where he sits.

When Senator Obama, when President Obama was in the Senate, and when he was campaigning for the Presidency, he had very different position on the state secrets privilege. Now that he is in the executive branch, and now that he has seen the usefulness and the utility of that and the importance of it, he seems to have reached a very different view.

I can understand that might be politically inconvenient for him to come here and say that, but I think there's some evidence that that is what has occurred.

Mr. CONYERS. I was afraid you would be the one that would answer my question.

Mr. DELAHUNT. Would the gentleman yield for a moment?

Mr. CONYERS. Yes.

Mr. DELAHUNT. Yes. Mr. Grossman indicated there is some evidence. What is the evidence? Are you speculating?

Mr. GROSSMAN. I am speculating based on the——

Mr. DELAHUNT. You're speculating. That's fine. I yield back to the gentleman.

Mr. CONYERS. No, please, go ahead. Why?

Mr. GROSSMAN. Both—when they were in the Senate, both Senator Biden and Senator Obama were both very strong critics of the state secrets privilege.

Since assuming office, the Administration has used the privilege in at least about three cases of which we are aware.

And in at least, in all three of those cases, were very controversial invocations of the privilege, cases that have resulted in much debate in this Congress as well as in the public sphere. These are the sorts of cases that Senator Biden especially was critical of prior to joining the executive branch.

So, yes, it is speculation. I have not asked anyone in the executive branch what their exact thinking on this is, but I think a reasonable conclusion can be drawn by the facts of what has actually occurred.

Mr. CONYERS. Well, since you have been so expert with the President, can you explain the Attorney General's failure to provide a witness?

Mr. GROSSMAN. No.

Mr. CONYERS. Anyone else want to weigh in on this?

Mr. HUTCHINSON. Well, I will just say, I think that, I appreciate the fact that the Attorney General is looking within the executive branch as to refining their internal procedures on assertion of the state privileges doctrine.

But, to me, that really raises the profile and the necessity of Congress to act.

And so whether here or not, to me, they are working on their branch of government, but I am delighted the Congress is considering it at the same time, more comprehensive reform.

Mr. CONYERS. Well, Mr. Franks and I are the two people that raised the question of unconstitutionality more than anybody I can think of in this Committee.

What do you think about the unconstitutional charge on this measure, Mr. Wizner?

Mr. WIZNER. Well, I share the views expressed by Judge Wald in her opening remarks that Congress has the constitutional authority to legislate in this area.

I would only add that my understanding of the arguments that this bill would be unconstitutional would apply to equal force to the Freedom of Information Act, to the Foreign Intelligence Surveillance Act, and to the Classified Information Procedures Act.

These are all bills that give courts tools to handle sensitive and classified information and create procedures for courts to do that. None of those intrude on the President's constitutional authority, and neither does this legislation.

Mr. CONYERS. Judge Wald, would you further comment?

Judge WALD. Well, I certainly agree with what Mr. Wizner said.

All privileges, not all privileges, but many privileges have little, you know, sort of tinges of constitutionality about them, the executive privilege certainly. And you could on all go back and say, we need this; the executive has got to have this. It has got to have more power in order to fulfill its commander-in-chief powers or to fulfill, in the case of executive privilege, its ability to run the government.

But yet I think that these privileges have been considered to be susceptible to congressional concern going way back to 1969. When we were going to have Federal rules of evidence with more detail, there actually was one drafted to deal with the state secrets privilege. Then Congress abandoned the attempt to have a very specific set of codes on it.

So I don't think the Supreme Court in Reynolds or anyplace else suggested that this was some kind of sacrosanct constitutional privilege that couldn't be touched.

Mr. CONYERS. Asa Hutchison, what say you?

Mr. HUTCHINSON. Well, I think the argument is that somehow legislating in this area impedes the executive from his national security responsibilities in protecting our country. And I don't see any challenge to that authority at all.

The legislation that's being considered doesn't stop them from exercising state secrets, from implementing national security programs. It doesn't change the fact that they can assert that privilege.

It just says that, when it gets to the courts, after the fact always, when it's going to be reviewed, then there's going to be a process in our system of checks and balances.

So I do not see this as taking away from the authority of the chief executive in terms of national security.

Mr. CONYERS. Well, if we were in court, Mr. Grossman, you would be on the short end of this discussion.

Mr. GROSSMAN. That is perhaps true, numerically speaking.

I think if you look at the Supreme Court's decisions, their opinions, in Chicago and Southern Airlines, in Nixon, in Egan, time and time again, the Court has said that secrecy is in some domains a necessary incidence to the executive power and the commander-in-chief power. In other words, those powers cannot be fully exercised without a strong degree of secrecy.

Further, the Court has actually said that the executive has an innate constitutional power to control access to classified information. In other words, who is trustworthy enough to receive certain types of classified information, specifically in the diplomatic affairs, as well as in military and national security affairs.

It is my opinion that this legislation intrudes on that power that the executive has. For that reason, it would be unconstitutional.

Mr. NADLER. Would the Chairman yield for a moment?

Mr. CONYERS. Yes.

Mr. NADLER. Thank you.

Mr. Grossman, you cite these cases where the Supreme Court has said that secrecy is inherent in the executive.

But it is true, is it not, that the Supreme Court has always said these powers are not unlimited, not absolute. The Pentagon papers case, for instance, was a limitation on secrecy. In fact, no executive power, no congressional power, for that matter, is absolute.

Mr. GROSSMAN. You are correct that no power is absolute.

Mr. NADLER. Thank you.

Mr. GROSSMAN. At the same time, no power is empty either. And to devoid the executive of any discretion whatsoever on——

Mr. NADLER. Wait a minute. This bill, what we are discussing, doesn't devoid anything. It simply subjects the executive's power of secrecy in the context of Court cases to supervision by the Court and to ultimate approval by the Court. That's what it does.

So just to talk about empty—to just talk and throw around phrases about the executive's power, this and that, in fact, the Congress's power under article I—section—I forget which we quoted before—to regulate evidence, to regulate the admissibility of evidence; it's a very specific grant of power, and that's what this is doing.

Mr. GROSSMAN. I would argue, however, that that particular grant of power is not unlimited. For example——

Mr. NADLER. So you would argue that a general power supersedes a specific grant of power?

Mr. GROSSMAN. I would say it is not unlimited in the sense that, for example, this body could not abrogate the fifth amendment privilege against self-incrimination despite its power to regulate the——

Mr. NADLER. Because there's a specific limitation on that power. The general rule of instruction is that specific supersede generalities, and you are reversing that.

Mr. GROSSMAN. I would disagree. I think, very specifically, the Constitution assigns the executive power and the constitutional power to the President of the United States. If secrecy is a necessary incidence of that power, then that is the President's power.

Mr. NADLER. Okay.

Mr. CONYERS. Well, Mr. Grossman, if we were in court, I would ask you to come back to chambers after we finished our session, but I appreciate your constructive attempts to defend your proposition.

And I yield back, Mr. Chairman.

Mr. NADLER. Thank you.

I now recognize the gentleman from Iowa for 5 minutes.

Mr. KING. Thank you, Mr. Chairman.

Mr. Grossman, I want to compliment you on the nimble response to the Chairman of the full Committee.

First, though, I will welcome Mr. Hutchison back to the Judiciary Committee, and I thank all the witnesses for your testimony.

I would first like to ask Mr. Hutchinson, as I was able to hear most of the testimony here and review some of it in print and look back over the history of this country, and wonder when it is that I have been alarmed that the state secrets doctrine or executive privilege has caused someone to lose their rights or their privacy or made the Nation less safe, or was there anything in history that we needed to know about that we weren't able to learn from because it was rolled up in executive privilege.

The bottom line, and my question is, Mr. Hutchinson, what are we trying to fix here?

Mr. HUTCHINSON. You know, and that's where—I am not coming to this hearing in a critical fashion. Others have had different experiences.

I am coming to this from the standpoint that, regardless of the history of it, we have responsibility to make sure the potential for abuse is minimized by a system of checks and balances.

And I come at this as a conservative. I do not believe, in an unfettered and unchecked executive branch anymore than I believe in an unfettered and unchecked judiciary branch. We all have checks and balances.

And so here to say the executive can assert a state secrets privilege without any review, with a broad authority, unbridled authority, I think goes against the principles of our Founding Fathers. So that's sort of the direction I am approaching it.

Mr. KING. Well, I appreciate that. And I just—this is a point of information, as a long-time Member of Congress and esteemed former Member of this Committee, I'd ask if you have ever gone into a classified hearing, well, a classified hearing, given up your BlackBerry and your cell phone and come back and recovered that, and then stepped in front of a television screen and seen the similar briefing already coming out on the news almost simultaneously.

Mr. HUTCHINSON. Yes.

Mr. KING. I think all of us have. So that's the point of my concern. I wonder if you care to speak to that.

Mr. HUTCHINSON. And your point is well taken, that there is a history, and I might say I think that, of other branches of government that have spoken about classified information, the executive branch actually excels in that. And so often, something is classified, and 2 days later, you will see an official go out and speak about that subject.

Now, I think that the track record of the courts is totally different. I think part of it is they don't have to stand for election in the Federal judiciary.

And so they have a track record that is extraordinary in protecting classified information, both with the FISA courts, that I think has been exemplary, but also with the Classified Information Procedures Act.

Mr. KING. Yes, actually, I agree with the point that you have made, and I know it was made in the testimony earlier. I am glad it was brought out again, and I thank you for your response.

I turn to Mr. Grossman, in light of the nimble nature that you have responded to previous comments or questions, I would ask you if you could address this panel on the limit or the scope of the existing executive privilege state secrets doctrine.

Let me just say hypothetically, if there was a White House that had contracted with an enterprise that had the trappings of a criminal enterprise to engage in as a contractor and to working with developing the Census, which happens of course every 10 years here in the United States, and if the results of that census might dramatically change the congressional districts in America, change the political dynamics in America, if those results of counting the people were maybe extrapolated by a formula rather than the actual constitutional requirement to count people, and if that enterprise that appeared to be a criminal enterprise were something that happened to be also supportive of turning out the vote for that very same White House, would there be able to express or assert an executive privilege that would keep us from finding out the details of that contractual organization?

Mr. Grossman.

Mr. GROSSMAN. No, I do not believe that would be the case for the reason that that particular organization that you describe as well as the purpose to which that relationship is directed, do not concern national security. They do not concern military affairs, and they do not concern——

Mr. KING. I thank you, Mr. Grossman.

And then into this record I would like to point out that there are many more suspicious activities taking place with that hypothetical organization, which I will now name as ACORN. And I would like to see this Committee look into ACORN.

And I would ask the Chairman of the full Committee to reconsider his reconsideration. And I would ask the Chairman of the Subcommittee to take a look at the evidence, that has been filed into this record, which is substantial and purely justified an investigation of ACORN.

I would ask that you do so.

And I would yield back the balance of my time.

Mr. NADLER. And I will say that, after you join as a cosponsor of this bill, I will consider that request.

Mr. KING. Is that a deal?

Mr. NADLER. I now recognize for 5 minutes the distinguished gentleman from Massachusetts.

Mr. DELAHUNT. Yes, thank you, Mr. Chairman.

And let me extend a personal welcome to our former colleague and my friend, whom I remember having breakfast with during our first term together here in the Congress, talking about the separation of powers and other issues, as I am sure you remember, Asa.

It's great to have you here.

And by the way, you are sorely missed. It would be good to have you back on this side of the dais.

And I read your testimony, and I am in total agreement. I think you have really captured what the issues are.

And when we talk about the separation of powers, what we are really talking about are limitations on the power of each of the coequal branches.

And as I listen to Mr. Grossman, his version, or his understanding of article II, is clearly in line with, I think, Mr. Cheney's and Mr. Addington's.

And I, for one, believe that what has occurred over a period of time is the accretion of simply too much power, you know, to the executive. And, again, I want to be clear that this is no partisan tint to it. I think we are really talking about core constitutional order here. And people can have disagreements in terms of the powers of the executive.

And let me put this out. You know, when we talk about state secrets, underlying that is the power to classify, and I think what we have failed to do as a Committee is to examine the process of classification, because what I see again and again is classification of material that is later declassified or comes, as you suggest, or as the gentleman from Iowa indicated, goes into the public domain, and everyone is perplexed simply because there appears to be no rational basis for classifying that information.

So, you know, Mr. Grossman seems to have great confidence in the executive.

His testimony is that there's seven separate requirements, including Department of Justice review and personal consideration by high-ranking Federal officials, ensuring that the state secrets privilege is used only when necessary to protect state secrets.

And I respect the sincerity of his belief. Yet, at the same time, that, in my judgment, is not what the Founders designed when they created the Constitution and that there was meant to be these checks and balances. It's a distrust of government, if you will.

You indicated you are a conservative. I share your conservatism in this particular area because it is so fundamental.

You know, secrecy really is the hallmark of totalitarianism, and transparency is clearly an aspect of viable, healthy democracy. And I think we have got to keep that. We are out of balance. We are out of kilter now.

I am not here to defend the Obama administration. This is something that the United States Congress must do to reorder, if you will, the balance of powers and the separation of powers.

We ought to be looking at, how are things classified? I know how things are classified in some agencies. There's somebody in a cubical somewhere that's just redacting. You have experienced that.

Mr. Grossman, you make a statement that says that it could be unduly burdensome for the courts to have to actually review the information. What leads you to that conclusion?

Mr. GROSSMAN. That it would be unduly burdensome for courts to review classified information?

Mr. DELAHUNT. Right.

Mr. GROSSMAN. In certain cases, essentially, those that are challenging extensive secret programs, there may be enormous amounts of data that were subject to discovery.

Mr. DELAHUNT. How many of these cases you have been involved in?

Mr. GROSSMAN. Directly?

Mr. DELAHUNT. Right.

Mr. GROSSMAN. I am not a litigator.

Mr. DELAHUNT. The answer is, you haven't been involved in any of these cases?

Mr. GROSSMAN. I am a researcher. I do not litigate cases. That is——

Mr. DELAHUNT. Fine. Well, let me suggest to you, I have been involved, and as I know Mr. Hutchinson has as well, as a prosecutor in numerous cases. I have interacted with judges who are trial judges.

Let me assure you, the judiciary has the capacity; to suggest it's an undue burden on the judiciary simply is not accurate. And you ought to speak to some litigators and some judges before you make such statements, and I say that to you with respect.

Mr. NADLER. Thank you, Mr. Delahunt.

The gentleman from Arizona is recognized for 5 minutes.

Mr. FRANKS. Thank you very much, Mr. Chairman.

I, too, want to welcome my very respected friend, Asa Hutchison.

You know, I understand he is a little bit on the other side of the issue here today in a sense, but it just shows that even the most sage and wise among conservatives can become a little disoriented now and then.

But, no, actually, Mr. Chairman, I know that he is coming from essentially the same foundation and perspective that I do, perhaps come to a slightly different conclusion.

But we are very glad that you are here and thank you for your service, sir.

Mr. Chairman, I can't help but notice that the pattern that seemed to come from the conversation you had with Mr. Grossman.

You know, this Administration recently decried enhanced interrogation, and certainly in the campaign did the same. And, of course, as you also know, they reserved unto themselves the right to use the same techniques if they thought they were necessary.

Just recently, just, I think, today, the Administration called—Mr. Obama called the Iraq war a war of choice. And yet he chooses to continue to prosecute that war, and he has a withdrawal timetable, essentially the same as the Bush administration.

The Guantanamo Bay issue has been brought up a great deal, and yet it appears that the result will be either terrorists in the

United States subject to all of our constitutional rights or the creation of something essentially the same as Guantanamo Bay.

The surveillance techniques that were decried so profoundly by the Obama administration and Obama campaign have been essentially left in place the same way.

I even heard the President the other day say that we cannot sustain this deficit spending. It's enough to really amaze you sometimes.

The Obama—the Justice Department has invoked the state secrets privilege in three court cases since the President took office. According to the *Washington Post* editorial page, the Obama administration's position on state secrets makes it hard to distinguish from its predecessor.

According to *USA Today*'s editorial page, "The Obama administration's decision to embrace the Bush legacy on the state secrets doctrine has all the elements of hypocrisy."

Anthony Romero, the executive director of the ACLU, has written that, quote, when it comes to key national security policies, the Obama administration is continuing along the path paved by the previous Administration, end quote. The new Administration has embraced or only superficially modified several policies held over from the Bush era, including the use of the state secrets claim that the Justice Department invoked last month to throw out the ACLU suit on behalf of rendition victims.

This has not changed. This is definitely more of the same.

Now, Mr. Chairman, I just got to tell you, I am thankful that Mr. Obama has had some epiphanies lately. I hope that he accelerates those epiphanies, because I think the national security of the community and the economic future and the constitutional foundations of the Nation are at stake.

But with that said, I am going to give Mr. Grossman an opportunity, the ACLU said this has not changed, this is more of the same. And I am going to give you a chance to agree or disagree with the ACLU director.

Mr. GROSSMAN. I agree entirely, and I think its quite heartening. I think it demonstrates that this is not a partisan matter. This is something, it is not a political matter. It's about the safety of our Nation, and it's something where, between political—I am sorry, between Presidential administrations, there has been no disagreement.

Mr. FRANKS. Well, Mr. Chairman, I guess that's my main point. I know I took the opportunity to express some feelings that the Administration has been hypocritical in some of the attacks that it made on the previous Administration and has come to some realities that are always easy to ignore in a campaign.

What is important here, I think, is for all of us to realize that truth and time travel on the same road and that truth always has the last word and that somehow, perhaps in this institution and in our campaigns, we should try to figure out what's right instead of who is right all the time.

And with that, I yield back. Thank you.

Mr. NADLER. I thank the gentleman.

I think the purpose of this hearing is, regardless of the position of any Administration, to figure out what is right, not who is right. And I agree with the gentleman in that.

I thank the witnesses.

Without objection, all Members will have 5 legislative days to submit to the Chair written questions to the witnesses, which we will forward and ask the witnesses to respond 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, I thank the witnesses and the Members.

With that, this hearing is adjourned.

[Whereupon, at 3:40 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Auto Safety Group • Congress Watch • Energy Program • Global Trade Watch • Health Research Group • Litigation Group

June 5, 2009

Hon. Jerrold Nadler, Chairman
Hon. F. James Sensenbrenner, Ranking Member
House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties
United States House of Representatives
Washington, D.C. 20515

Re: The State Secrets Protection Act of 2009, H.R. 984.

Dear Chairman Nadler and Ranking Member Sensenbrenner:

The House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties is scheduled to consider key legislation to narrow the scope of the state secrets privilege this week. Public Citizen strongly supports the State Secrets Protection Act of 2009, H.R. 984, which would require careful, independent judicial review of claims of the state secrets privilege.

An open and accountable government is a cornerstone of our democracy. The Bush administration often worked in the shadows, away from public scrutiny, and its broad and excessive use of the state secrets privilege exemplified this abuse of power. In legal challenges regarding warrantless wiretapping, torture, and extraordinary rendition, the doors to justice were blocked repeatedly by the former administration's claims of state secrets privilege.

In criminal cases the courts have routinely and adequately resolved evidentiary issues regarding national security under the Classified Information Procedures Act (CIPA). However, in the civil justice system, the former administration was permitted to shield itself from accountability because of the judiciary's extreme deference to the administration's assessment of the likely harm from disclosures. The review and application of the privilege should be regularized and made more uniform throughout the judiciary.

It is time to meet President Obama's call for a more accountable government by allowing the courts to independently judge assertions of the state secrets privilege. We must rebalance the authority of the coequal branches of government as envisaged by our founders to restore our civil justice system and our civil liberties. H.R. 984 restores checks and balances by providing measured and necessary judicial review of claims of the state secrets privilege.

We thank you for your consideration of this key legislation and urge you and your colleagues on the committee to vote in favor of H.R. 984 without amendment. We would welcome an opportunity to discuss the issue of the state secrets privilege in more detail with you or your staff. Please do not

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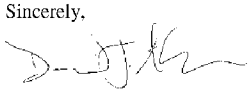
hesitate to contact Angela Canterbury (202-454-5188 or acanterbury@citizen.org) on this or any other issue of mutual interest.

Sincerely,



David Arkush
Director, Congress Watch
Public Citizen

Angela Canterbury
Advocacy Director, Congress Watch
Public Citizen

cc: Hon. John Conyers, Jr., Chairman
Hon. Lamar S. Smith, Ranking Member
Members of the House Judiciary Committee

June 11, 2009

Dear Chairman Nadler, Ranking Member Sensenbrenner, and Members of the Committee:

On behalf of the American Civil Liberties Union, its 53 affiliates and more than 500,000 members nationwide, we write in support of H.R. 984, the State Secret Protection Act and urge committee passage and floor consideration as soon as possible.

AMERICAN CIVIL LIBERTIES UNION

OFFICERS AND DIRECTORS

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 government 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 government'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. 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 the ACLU commends Representative Nadler for recently introducing 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 established 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.[ii] 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,"[iii] 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."[iv] 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."[v] 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.[vi]

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."[vii] 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."[viii] 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."[ix]

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,[x] 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.[xi]

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.[xii] 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[xiii], in cases of greater national significance[xiv]; 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."[xv]

In particular, since September 11, 2001, the government has invoked and defended 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.[xvi] 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.[xvii] 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.[xviii]

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.[xix] 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."[xx] By contrast, the Court noted, the state secrets privilege deals with evidence, not justiciability.[xxi] 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.[xxii] 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.[xxiii] 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.[xxiv]

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.[xxv] 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.[xxvi]

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.[xxvii] Other courts have refused or declined to examine the allegedly privileged evidence, relying solely on secret affidavits submitted by the government.[xxviii]

Most recently, the U.S. Court of Appeals for the Ninth Circuit ruled that a landmark American Civil Liberties Union lawsuit against Boeing subsidiary Jeppesen DataPlan Inc. for its role in the Bush administration's unlawful extraordinary rendition program can go forward. It reversed a lower court dismissal of the lawsuit, brought on behalf of five men who were kidnapped, forcibly disappeared and secretly transferred to U.S.-run prisons or foreign intelligence agencies overseas where they were interrogated under torture. The government had intervened, improperly asserting the "state secrets" privilege to have the case thrown out, a position that is maintained by the new administration. The Ninth Circuit ruled that the government must invoke the state secrets privilege with respect to specific evidence, not the entire suit.

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 STATE SECRET PROTECTION ACT (H.R. 984)

The ACLU commends Representative Nadler and cosponsors for introducing the State Secret Protection Act (H.R. 984), a bill that takes great strides toward restoring essential constitutional checks on executive power. H.R. 984 restores the states secrets privilege to its common law origin as an evidentiary privilege, by prohibiting the dismissal of cases prior to discovery. H.R. 984 ensures independent judicial review of government state secrets claims by requiring courts to examine *in camera* the evidence for which the privilege is claimed and make their own assessments of whether disclosure of the information 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. H.R. 984 uses the Classified Information Procedures Act (CIPA) as a model, and appropriately so, because CIPA has both protected the national security and the rights of individuals in adversarial proceedings against the government for more than twenty years.[xxix] 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 implicates issues of collective national interest, courts should be allowed to consider broader interests of justice in those cases that do involve torture in addition to torts.

H.R. 984 brings this balance to civil litigation. H.R. 984 would allow courts to protect evidence from disclosure that would legitimately harm national security, yet would allow the litigation to proceed if possible with non-privileged evidence. Like CIPA, H.R. 984 would allow courts to compel the government to produce non-privileged substitutes for privileged evidence and, if the government refuses to produce substitutes, would allow the court to resolve the issue in favor of the non-government party. These procedures would 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. For these reasons, the ACLU recommends committee passage and floor consideration as soon as possible.

For more information, please contact Michelle Richardson at mrichardson@dcaclu.org or (202) 715-0825.

Sincerely,

Caroline Fredrickson,
Director, Washington Legislative Office

Michelle Richardson,
Legislative Counsel

[i] 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).
[ii] Reynolds, 345 U.S. 1 (1953).
[iii] *Id*, at 6-7.
[iv] 8 John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW §2212a (3d e. 1940)(emphasis in original).
[v] *Id*.
[vi] Id, at § 2379.
[vii] Reynolds, 345 U.S. 1, 7-8.
[viii] *Id*, at 11.
[ix] *Id*, at 9-10.
[x] 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.").
[xi] *See*, Herring v. United States, Civil Action No. 03-5500 (LDD) (E.D. Pa. Sept. 10, 2004).
[xii] *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); *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); *El-Masri 437 F. Supp. 2d 530 (E.D. Va. 2006); Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissed on other grounds).
[xiii] 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.")
[xiv] 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.").
[xv] Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 581 (1982).
[xvi] *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).
[xvii] 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).
[xviii] *See*, El-Masri, *437 F. Supp. 2d 530 (E.D. Va. 2006)* ; Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissed on other grounds).
[xix] Tenet v. Doe, 544 U.S. 1 (2005).
[xx] *Id*, at 6.
[xxi] *Id*. at 9, 10.
[xxii] Reynolds, 345 U.S. at 3.
[xxiii] *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).
[xxiv] *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.

[xxv] *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").

[xxvi] *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").

[xxvii] *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).

[xxviii] *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).

[xxix] Pub. Law 96-456 (1980).

June 11, 2009

The Honorable Jerrold Nadler
2334 Rayburn Office Building
U.S. House of Representatives
Washington, DC 20515

The Honorable James Sensenbrenner
2449 Rayburn Office Building
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Nadler and Ranking Member Sensenbrenner,

The undersigned organizations representing a diverse universe of constituents who care about civil rights and civil liberties write in support of H.R. 984, the State Secret Protection Act. This bill strikes an appropriate balance between allowing plaintiffs to seek justice through our judicial system and protecting information that would endanger national security if released to the litigants or the public. We urge the bill's immediate passage.

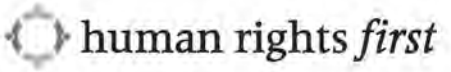
Over time, the common law state secrets privilege has evolved into an alternative form of immunity that has increasingly been used to shield the government and its agents from accountability in cases challenging national security programs. Instead of evaluating pieces of evidence on a case-by-case basis and excluding only the information that would harm national security, some courts have applied the privilege by dismissing cases in their entirety at the pleadings stage, thereby preventing citizens from seeking redress and barring a public airing of the merits of the case. Only legislation can stop this miscarriage of justice and ensure that the state secrets privilege is used only as a shield for national security information and not a sword to strike down cases prematurely.

H.R. 984 would permit the government to continue invoking the state secrets privilege. However, it would direct the executive branch to submit the evidence the government seeks to shield for an independent assessment by the judge, with the help of experts or special masters, about whether the state secrets privilege properly applies. If the privilege is determined to apply to a specific item, the judge would have flexibility in ordering the government to fashion a non-privileged substitute such as a summary, a redacted version of the evidence, a stipulation or other alternative in the interests of justice and the protection of national security. Additionally, hearings could be held in camera and ex parte; evidence, information and hearings could be governed by protective orders; and the executive branch could require private attorneys to obtain a security clearance before accessing protected information.

Ultimately, the State Secret Protection Act is not about releasing classified information to the public. It simply restores checks and balances by permitting federal judges to see and rule on evidence, and determine whether there is enough non-privileged evidence for a case to proceed. We urge committee passage and quick floor consideration of this important common sense bill.

Sincerely,
American Association of Law Libraries
American Civil Liberties Union
American Library Association
Association of Research Libraries

The Brennan Center for Justice
The Constitution Project
Electronic Frontier Foundation
Federation of American Scientists
Human Rights First
Liberty Coalition
National Association of Criminal Defense Lawyers
National Security Archive
OMB Watch
OpenTheGovernment.org
People For the American Way
U.S. Bill of Rights Foundation



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The Honorable Jerrold Nadler, Jr.
Chairman
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
House Judiciary Committee
United States House of Representatives
Washington, D.C. 20515

The Honorable F. James Sensenbrenner, Jr.
Ranking Member
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
House Judiciary Committee
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Nadler and Ranking Member Sensenbrenner,

I write to express Human Rights First's strong support of H.R. 984, the State Secret Protection Act of 2009. This legislation would encourage independent and meaningful judicial review of government actions while protecting against the disclosure of sensitive national security information. It would also encourage greater transparency and a more appropriate balance of powers on national security matters. The Act follows the rationale outlined by President Obama in his recent speech on national security at the National Archives, when he acknowledged that "national security requires a delicate balance" with transparency, but information should be released when there is "no overriding reason to protect [it]."

The states secrets privilege is a common-law rule that allows the government to block the discovery of information when it believes disclosure would harm national security. Since September 11, 2001, the government has invoked the state secrets privilege in cases challenging extraordinary rendition, torture and warrantless domestic surveillance, seeking dismissals of lawsuits at the pleadings stage before any evidence is requested or produced. Many courts have accepted the government's claims of risk to national security without independently reviewing the information in order to assess whether it could be disclosed without undue risk, or whether lawsuits may proceed without it. This practice has perpetuated a culture of unchecked power and a complete lack of transparency in the Executive Branch on national security issues. It has also

undermined the right of individuals to seek and obtain remedies for human rights violations resulting from government misconduct.

The State Secrets Protection Act of 2009 would address this continuing problem without requiring the release of sensitive national security information. The Act would prohibit the dismissal of cases prior to discovery, an essential step towards ensuring that state secrets claims are well-founded and not simply a means by which the government can avoid embarrassment or accountability for wrongful acts. President Obama agreed with this position in his speech at the National Archives, saying that the state-secrets privilege has been "over-used" and "we must not protect information merely because it reveals the violation of a law or embarrassment to the government." Using the Classified Information Procedures Act (CIPA) as a model, the legislation would require courts to independently examine the information for which the government asserts a privilege and decide whether disclosure of the information would pose an unreasonable risk to national security. The legislation would permit courts to order the government to provide non-privileged substitutes for sensitive information and to resolve the issue in favor of the plaintiffs if the government refuses. These provisions balance the need to protect sensitive national security information while facilitating the role of the courts as a meaningful check on executive power.

Legislative reform of the state secrets privilege is also necessary in order to ensure that the United States upholds its obligation under international law to provide access to effective remedies for human rights violations. The International Covenant on Civil and Political Rights (ICCPR), ratified by the United States more than a decade ago, guarantees an "enforceable right to compensation" for unlawful convictions and deprivations of liberty. When the dismissal of lawsuits alleging such government misconduct leaves no legally enforceable right to redress, the United States is in violation of its obligation under the ICCPR to provide such a remedy. Reforming the state secrets privilege would help bring the United States back toward compliance with international law.

Human Rights First strongly supports legislative reform of the state secrets privilege, and we urge the Committee's support of the State Secret Protection Act of 2009. Thank you for your leadership on this important issue.

Sincerely,

Elisa Massimino
Chief Executive Officer and Executive Director
Human Rights First

Statement of the Constitution Project
Submitted to the
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
of the House Judiciary Committee

June 4, 2009

The Constitution Project submits this statement to urge support for the State Secret Protection Act (H.R. 984). Since the terrorist attacks of September 11, 2001, the executive branch has repeatedly asserted the state secrets privilege in cases challenging the government's national security policies. A number of courts have treated the executive's claims as absolute without independently evaluating whether disclosure of evidence would endanger national security. The State Secrets Protection Act would implement critical reforms to protect actual national security secrets from public disclosure while permitting litigation to proceed where possible. The Constitution Project urges Congress to pass the State Secrets Protection Act to provide these essential reforms.

The Constitution Project is an independent think tank that promotes and defends constitutional safeguards. The Project brings together legal and policy experts from across the political spectrum to promote consensus solutions to pressing constitutional issues. Last year, the Constitution Project's Liberty and Security Committee and Coalition to Defend Checks and Balances issued a report entitled *Reforming the State Secrets Privilege* (attached). The statement is signed by more than forty policy experts, former government officials, and legal scholars of all political affiliations. It calls on judges to independently assess state secrets claims by the executive branch, and on Congress to clarify that judges, not the executive branch, must have a final say about whether disputed evidence is subject to this privilege.

The Expansion of the State Secrets Privilege and the Need for Reform

The states secrets privilege was first recognized by the U.S. Supreme Court in *United States v. Reynolds*, 345 U.S. 1 (1953), a case brought by three widows of civilian contractors against the government for negligence in a military plane crash that killed their husbands. The widows sought production of the Air Force accident report as part of the litigation. The Supreme Court refused to require the executive branch to turn over the report to the district court judge for an independent assessment of whether the report did indeed contain state secrets, concluding that forcing the government to disclose information it claimed was sensitive created an unacceptable risk to national security. However, more than four decades later, the Air Force declassified the accident report, revealing that it did not in fact contain sensitive security information, but only evidence of the government's negligence.

Since its inauspicious beginnings in *Reynolds*, the state secrets privilege has expanded almost beyond recognition. Rather than applying the doctrine simply to prohibit the disclosure of particular pieces of evidence, more recent court decisions have foreclosed any litigation of cases in which the state secrets privilege is asserted. For instance, in *El-Masri v. United*

States, 479 F.3d 296 (4th Cir. 2007), Mr. El-Masri sued the government on the ground that he was an innocent victim of the United States' policy of extraordinary rendition. According to his sworn declaration, he was mistakenly held in U.S. custody for almost five months, during which time he was beaten, drugged, repeatedly interrogated, and held in solitary confinement at a CIA-run "black site" in Afghanistan. The government asserted the state secrets privilege and the court dismissed the case at the pleadings stage, before any discovery had occurred. There was no effort to explore whether unclassified sources of evidence —— such as public statements by U.S. officials and investigations ongoing in Europe —— might be available to permit the case to proceed. Ultimately, the U.S. Supreme Court declined to review this case, foreclosing Mr. El-Masri's right to litigate his claim in court.

This past April, the U.S. Court of Appeals for the Ninth Circuit adopted a different interpretation of the state secrets privilege in *Mohamed v. Jeppesen Dataplan, Inc.* The court held that cases cannot be dismissed at the outset on the basis of the state secrets privilege, and that the trial court must "undertake an independent evaluation of any evidence sought to be excluded to determine whether its contents are secret within the meaning of the privilege." This independent assessment by the trial judge is essential to provide the necessary check on executive discretion. However, even if the Ninth Circuit's interpretation withstands further litigation, it is still critical that Congress enact the State Secrets Protection Act. The *Jeppesen Dataplan* decision does not provide trial courts with the guidance they need to conduct such an independent review. The State Secrets Protection Act, H.R. 984, would accomplish that important task.

Unless state secrets claims are subjected to independent judicial scrutiny, the executive branch is at liberty to violate legal and constitutional rights with impunity and without the public scrutiny that ensures that the government is accountable for its actions. By accepting these claims as valid on their face, courts undermine the principle of judicial independence, the adversary process, fairness in the courtroom, and our constitutional system of checks and balances. Furthermore, as demonstrated in *Reynolds*, there is too great a temptation for the executive branch to assert the privilege for illegitimate reasons, and not to protect information whose disclosure would harm national security.

Congress must act to bring the needed reform to this doctrine, and exercise its constitutional authority to enact legislation to reform the state secrets privilege. The Constitution specifically grants Congress the power to enact "Regulations" regarding the jurisdiction of federal courts. U.S. Const. Art. III, Sec. 2. This includes the power to legislate reforms to the state secrets privilege. Congress should establish new rules that will simultaneously protect individual rights and national security, and preserve access to the courts and our constitutional system of checks and balances.

Critical Safeguards in the State Secrets Protection Act (H.R. 984)

While there is a proper role for the state secrets privilege to protect actual national security secrets from public disclosure, the executive branch should not be able to hide behind this privilege on the basis of its own unchecked authority. The State Secrets Protection Act would implement many critical safeguards to protect national security secrets and also preserve access to courts:

- **The court can no longer rely on a state secrets claim to dismiss a case at the pleadings stage, allowing future litigants like Mr. El-Masri the opportunity to litigate their claims in court.**
  - ✓ Section 7(c) prohibits a court from dismissing a claim or granting a motion for summary judgment based on the state secrets privilege "until [the private] party has had a full opportunity to complete discovery of nonprivileged evidence and to litigate the issue or claim to which the privileged evidence is relevant without regard to that privileged information."

- **While the court is reviewing the evidence claimed to be subject to the privilege in order to determine whether the privilege should apply, the court is required to take steps to protect the sensitive information and to prevent its disclosure to outside parties. Thus, the review process itself does not create a risk of improper disclosure.**
  - ✓ Section 3 of the bill allows for all hearings and proceedings assessing privilege claims to be conducted *in camera* and *ex-parte* and permits the judge to issue protective orders, require security clearances for parties or counsel, place materials under seal, and apply additional security measures established under the Classified Information Procedures Act.

  - ✓ In order to further protect sensitive information, if the court determines that disclosure of information to a party or counsel, or disclosure of information by a party that already possesses it, presents a specified risk of harm, and that risk "cannot be addressed through less restrictive means," section 3(d) allows the court to "require the Government to produce an adequate substitute," such as redacted documents or a summary of the sensitive information, for use during the evaluation process.

- **The judge must independently examine all the evidence claimed to be subject to the privilege and determine whether the privilege claim is valid. The review is thereby meaningful, and the court does not simply defer to executive assertions.**
  - ✓ Section 6(b) requires the court to independently review all of the evidence claimed to be subject to the privilege and all information submitted by the parties related to the privilege claim.

  - ✓ A judge must independently examine the evidence claimed to be subject to the state secrets privilege to assess whether the claim is valid. Section 6(c) of the bill requires the court to make an "independent assessment of whether the harm identified by the Government…is reasonably likely to occur should the privilege not be upheld. The court shall weigh testimony from Government experts in the same manner as it does, and along with, any other expert testimony." This standard is preferable to the Senate version (S. 417, Section 4054(e)(3)), which requires the reviewing judge to give "substantial weight to an assertion by the United States relating to why public disclosure of an item of evidence would be reasonably likely to cause significant harm to the national defense or foreign relations of the United States." Although "substantial weight" is better than the "utmost deference" deference standard

advocated by some, we are concerned that it would nonetheless unfairly tip the scales in favor of executive branch claims before evaluation occurs, and undermine independent judicial review. The "independent assessment" standard contained in H.R. 984 recognizes that judges are capable of making such determinations and should not simply defer to the executive's claim that the privilege applies. The standard also ensures that executive branch experts would be accorded respect for their assessments as expert witnesses, but that these executive branch experts would not be accorded any special deference above other experts.

- **The court may receive assistance in assessing complex and voluminous information.**
  - ✓ To facilitate the court's review of the sensitive information, section 5(b) authorizes the court to appoint a special master or expert witness with appropriate expertise.
  - ✓ The court may also require the Government to organize its evidence into a clear and useful format. Section 5(c) permits the court to order the Government to provide a "manageable index of evidence the Government asserts is subject to the privilege" and "correlate statements made in the affidavit…with portions of the evidence" the Government asserts is privileged.
  - ✓ Section 6(b)(2) permits the court to rely upon "a sufficient sampling of the evidence" if the evidence asserted to be privileged is voluminous and "there is no reasonable possibility that review of the additional evidence would change the court's determination on the privilege claim."
- **If the court determines that the privilege is validly asserted, it will further assess whether the litigation may proceed through reliance on a nonprivileged substitute version of the evidence. If the court finds it is possible to craft such a substitute, the court must order the Government to produce one.**
  - ✓ Section 7(b) provides that if the court determines that the privilege applies but it is possible to produce a "nonprivileged substitute" for the evidence that "would provide the parties a substantially equivalent opportunity to litigate the case," then the court "shall order" the Government to produce that substitute.
- **If the court determines that the state secrets privilege validly applies to certain evidence, that evidence may not be disclosed. National security secrets will be protected.**
  - ✓ If the court determines that the privilege is validly asserted as to an item, section 7(a) prohibits the disclosure of that evidence to any "nongovernmental party or the public."

Thus, the State Secrets Protection Act would provide critical safeguards that are needed to ensure a proper balance of the interests of private parties, constitutional liberties, and national security. The Constitution Project urges Congress to enact this legislation to reform the state

secrets privilege and establish these much needed safeguards against executive abuse. This legislation would help to restore our system of checks and balances, and simultaneously protect national security and individual rights.

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Statement by Louis Fisher

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

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

House Committee on the Judiciary

The State Secrets Privilege Act of 2009
(H.R. 984)

June 4, 2009

Mr. Chairman, thank you for inviting me to offer my views on pending legislation, H.R. 984, to provide procedures for 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, judicial independence, 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 has argued 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.

In his remarks on national security, May 21, 2009, President Barack Obama expressed his views about the state secrets privilege. Referring to the privilege as "absolutely necessary in some circumstances to protect national security," he said he was "concerned that it has been over-used." He set forth this principle: "We must not protect information merely because it reveals the violation of a law or embarrassment to the government." His administration has been conducting a review of the practice of state secrets.

Given the application of the state secrets privilege in recent decades, I would like to see two sentences added to Section 2 of H.R. 984. First: "The state secrets privilege may not shield illegal or unconstitutional activities." We all recognize the need for state secrets, but I see no reason why the privilege should sanction violations of statutes, treaties, or the Constitution (violations either by the government or by private parties assisting in the violations). Second: "The assertion of a state secret by the executive branch is to be tested by independent judicial review, examining documents rather than declarations submitted by the executive branch." Too often judges rely on declarations instead of examining actual evidence. Executive branch assertions are assertions, nothing more. Declarations signed by executive officials, even when classified, are not sufficient.

Judges cannot make informed and independent decisions when they rely on executive branch declarations.

Concealing Executive Mistakes

Previous 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 footnote 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 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 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

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[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).

[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).

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 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.

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[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.

[6] Id. at 3.

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

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]

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 decided 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

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[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.

[11] Id. at 995.

[12] Id. at 996-97.

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]

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

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[13] Id. at 997.

[14] Id.

[15] Id. at 998.

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

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]

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

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[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.

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

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

[22] Id. at 42-43.

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 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

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[23] Id. at 45.

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

[25] Id. at 8.

[26] Id. at 9.

[27] Id. at 9-10.

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 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]

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[28] Id. at 10.

[29] Id.

[30] Id.

[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.

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]

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

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

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

June 5, 2009

The Honorable Jerrold Nadler
Chairman
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Nadler:

In the June 4 Subcommittee on the Constitution, Civil Rights, and Civil Liberties hearing on the State Secret Protection Act of 2009 (H.R. 984), several speakers referred to the Classified Information Procedures Act (18 U.S.C. app 3), which regulates the use of classified information in criminal prosecutions.

There seems to be much confusion concerning the operation of the Classified Information Procedures Act and how it relates to H.R. 984. Specifically, some claim, implicitly or explicitly, that H.R. 984 essentially extends the protections of the Classified Information Procedures Act to apply to civil cases or at least that the two are roughly analogous. This is incorrect; they are very different.

To advance understanding on this point, I have attached to this letter a straightforward comparison of H.R. 984 and the Classified Information Procedures Act for inclusion into the hearing record. It is my hope that this comparison will illuminate the significant differences between the two and resolve any confusion that may exist on this vitally important topic.

Sincerely,

Andrew M. Grossman
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The State Secret Protection Act Is Not Like the Classified Information Procedures Act (CIPA)

Andrew M. Grossman

Supporters of the State Secret Protection Act (H.R. 984, SSPA) regularly claim that its limitations on the state secrets privilege are analogous to those in the Classified Information Procedures Act (CIPA).[1] But CIPA, as its name reflects, is a purely procedural statute that imposes no substantive limitations on the assertion of the state secrets privilege. Further, in no case does CIPA *require* the government to disclose classified information to criminal defendants or the public. But when essential information is kept from a defendant, CIPA may require that some charges or even the entire case against him be dropped. In this way, CPIA carefully balances the essential need to protect secrecy in some state affairs with criminal defendants' constitutional rights.

The SSPA, by contrast, would significantly limit the government's ability to assert the state secrets privilege to protect even highly classified military, intelligence, and diplomatic information. And it would give judges complete discretion to order the disclosure of such information, no matter the potential risk to national security. In addition to violating the President's constitutional authority to enforce secrecy in certain domains,[2] the SSPA would risk disclosing sensitive intelligence and diplomatic relationships, to the detriment of the nation's security and foreign policy.[3] In the ways that count, the House's version of the State Secret Protection Act is entirely unlike the Classified Information Procedures Act.

This paper provides a brief comparison of the essential differences between CIPA and the SSPA, demonstrating that the two differ in more than a dozen significant ways. Each of the SSPA's departures from CIPA are ones that threaten the disclosure of national security secrets.

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[1] *See, e.g.*, *State Secrets Protection Act of 2008: Hearing on H.R. 5607 Before the Subcomm. on the Const., Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 109th Cong. 2 (2008) (statement of Rep. Jerrold Nadler, Chairman of the Subcomm.) (arguing that an identical bill in the previous Congress would "do the same in civil cases" as CIPA did "[i]n the criminal context."); State Secrets Protection Act of 2009: *Hearing on H.R. 984 Before the Subcomm. on the Const., Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2009) (statement of Asa Hutchison, former DHS Undersecretary) (stating that "[j]udges already conduct similar review of sensitive information under such statutes as…the Classified Information Procedures Act (CIPA)"), available at http://www.constitutionproject.org/manage/file/157.pdf;

[2] Chicago & Southern Air Lines v. Waterman S. S. Corp., 333 U.S. 103, 111 (1948); United States v. Nixon, 418 U.S. 683, 713 (1974); Dept. of the Navy v. Egan, 484 U.S. 518, 527 (1988).

[3] State Secrets Protection Act of 2009: *Hearing on H.R. 984 Before the Subcomm. on the Const., Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2009) (statement of Andrew M. Grossman, Senior Legal Policy Analyst, The Heritage Foundation), *available at* http://www.heritage.org/Research/LegalIssues/tst060409a.cfm.

The Comparison

CIPA (18 U.S.C. app 3)	H.R. 984
Cases are initiated by the government.	Cases are initiated by private parties.
If national security secrets are at risk of exposure, the government can have charges or the entire case dismissed.	A judge decides whether to dismiss claims. § 7(b).
The court must adhere to the security procedures established by the Chief Justice, which empower a DOJ-approved "court security officer" to impose extensive protections. § 9(a).	The court "shall take steps to protect sensitive information," but the judge has complete discretion as to what those steps shall be. § 3(a).
The government need provide the court with only an affidavit. § 4.	The government would have to provide *all* potentially privileged materials to the court. § 6 (b)(1)(A).
The government decides whether materials are classified and will be disclosed. § 1(a).	The judge decides whether materials are unprivileged and must be disclosed. § 7(a).
The government may make its showing *ex parte*. §§4, 6(c)(2).	The court must conduct two hearings, at least one of which will include opposing counsel. §§ 3(c), 6(a), 5(d)(2).
The government may submit an affidavit to the court explaining the need for nondisclosure. §§ 4, 6(c)(2).	The government *must* submit an affidavit to the court *and* make public an unclassified affidavit. § 4(b).
The government may choose to prepare a substitute for privileged information. §§ 4, 6(c)(1)(B).	The court may *order* the production of a substitute or redacted version of privileged information. §§ 3(d), 7(b).
The court has no authority to appoint an expert witness to speak to disclosure of the information.	The court may appoint a "special master" or "expert witness" to "facilitate the court's duties. § 5 (b).
Only judges, and staff with security clearances, may be given access to classified information. Security Procedures § 4.	The court, could grant access to anybody. § 3(a).
The court has no authority to order that a security clearance review be conducted.	The court may order the government to conduct an expedited security review to provide a party or counsel with a security clearance.

CIPA (18 U.S.C. app 3)	H.R. 984
The court gives strong deference to executive classification decisions and harm assessments. §§ 1, 4.	The court affords *no* deference to determinations made by government officials and experts. § 7.
Discovery against the government could be blocked to protect state secrets. § 4.	Discovery is mandated in every case. § 7(c).
If the privilege is rejected, the court may dismiss some or all counts, find against the U.S. on that issue, or strike a witness's testimony. § 6(e)(2).	If the privilege is rejected, the classified information is disclosed. § 7(a).

Conclusion

In the ways that count, the Classified Information Procedures Act and the State Secrets Protection Act are absolutely nothing alike. The former respects the President's authority to classify and protect important national security and diplomatic information, while the latter affords the executive branch no deference whatsoever, on the false assumption that judges are as qualified as intelligence specialists to make classification and disclosure decisions.[4] If anything, CIPA's deferential approach to the problem of classified information in criminal cases should lead Congress to be wary of the intrusive approach that the SSPA would bring to civil justice.

—Andrew M. Grossman is Senior Legal Policy Analyst in the Center for Legal and Judicial Studies at The Heritage Foundation.

[4] This is not to say, though, that CIPA's gloss on the state secrets privilege strikes the right balance in every case. In certain types of cases, for example, the law's assignments of burdens of proof hinder effective prosecution. But in the vast majority of cases, CIPA is both practical and fair.

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

June 9, 2009

I am submitting this statement to urge you to enact much-needed reforms to the state secrets privilege. The State Secrets Protection Act, H.R. 984, would take several important and necessary steps toward resolving the problems with the state secrets privilege, and I therefore urge you to support this legislation.

My background in the federal judiciary and in law enforcement leads me to conclude that these reforms provided by the State Secrets Protection Act would properly allow our courts to provide critical oversight and independent review of executive branch state secrets claims. I served as Chief of the Government Operations Section at the United States Department of Justice, as United States Attorney, and as a United States District Court Judge and Chief Judge of the United States District Court for the Western District of Texas. I was then appointed by President Ronald Reagan to serve as the Director of the Federal Bureau of Investigation, a position I continued to hold under Presidents George H.W. Bush, and William J. Clinton. I have devoted much of my career to law enforcement and the fair and effective operation of our justice system.

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 in which it is alleged that 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 without any independent review of evidence that purportedly would be subject to this privilege.

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, ultimately, 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 United States Attorney, 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. Legislation to reform the state secrets privilege would not interfere with the President's responsibilities under Article II of the Constitution. The United States Constitution specifically grants Congress the power to enact "Regulations" regarding the jurisdiction of federal courts. U.S. CONST. Art. III, § 2. This includes the power to legislate reforms to the state secrets privilege.

Congress should reform the state secrets privilege and allow courts to independently assess whether the privilege should apply. A number of provisions of the State Secrets Protection Act, H.R. 984, recognize this need for change and would institute reforms that I recommend.

First, Section 7(c) of H.R. 984 would prohibit courts from dismissing cases on the basis of the state secrets privilege at the pleadings stage or before the parties have had the opportunity to conduct discovery. The section is clear that the prohibition only applies to dismissals based upon the assertion of the state secrets privilege, and therefore the provision would not prevent dismissals on other grounds, such as for frivolousness. This section would provide a critical reform so that in the future, litigants like Mr. El-Masri will not have their cases dismissed before the parties can litigate, and a judge has the opportunity to evaluate whether there is enough non-privileged evidence available to permit a lawsuit to proceed.

Similarly, 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. 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). Section 6 of the State Secrets Protection Act would require that whenever the executive branch asserts the state secrets privilege, the judge must review the claim, including reviewing the allegedly secret evidence and must make "an independent assessment" of whether the privilege applies. Section 3(b) of the Act provides that this hearing may be conducted *in camera*, so that there would not be a risk that the review itself might disclose any evidence.

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. Section 7 of the bill would implement this recommendation. It provides that if the judge finds that certain evidence is protected by the state secrets privilege, the judge should also assess whether it is possible to create a non-privileged substitute for the evidence that would allow the litigation to proceed. If a non-privileged substitute is possible, the court must order the government to produce such a substitute. This provision would help restore an appropriate balance in national security litigation, by ensuring both that

national security secrets are protected from public disclosure and also that litigation will be permitted to proceed where possible.

This legislation would also address the concern that judges may not have the necessary expertise and background in national security matters to make these determinations. Section 5(b) of the bill instructs the court to consider whether to appoint a special master with appropriate expertise to assist the court in its duties.

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. Legislative reform is necessary to ensure that courts *not* accord "utmost deference" to executive branch national security officials. The State Secrets Protection Act would ensure that a court's independent review is meaningful and is not just a mindless acceptance of executive assertions. Section 6(c) provides that "the court shall make an independent assessment of whether the harm identified by the Government" is reasonably likely to occur if the evidence is disclosed, and that "The court shall weigh testimony from Government experts in the same manner as it does, and along with, any other expert testimony." Such officials are entitled to the same respect and deference as any other expert witness, and independent judges are needed to provide a check on executive discretion. I believe the "independent assessment" standard of review in the House bill is preferable to the Senate version (S. 417, Section 4054(e)(3)), which would require the reviewing judge to give "substantial weight to an assertion by the United States relating to why public disclosure of an item of evidence would be reasonably likely to cause significant harm to the national defense or foreign relations of the United States." The House language would ensure that the scales are not unfairly tipped in favor of executive branch claims prior to evaluation, and would protect the separation of powers by preserving independent judicial review.

These provisions would help restore the role of independent courts in determining whether the state secrets privilege should apply. 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. I urge you to support these reforms contained in the State Secrets Protections Act and to help preserve our constitutional system of checks and balances.

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

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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-incrimination, 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 influence, see Bruce 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. Nicklin & 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 natiou"), *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)

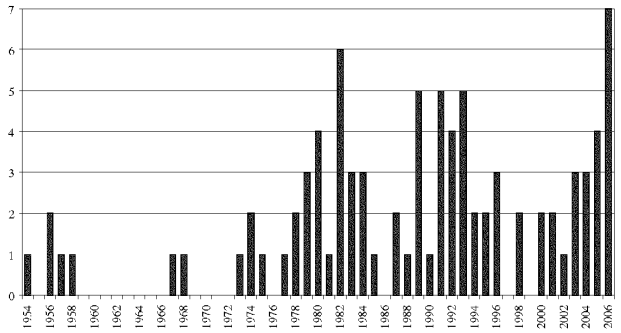
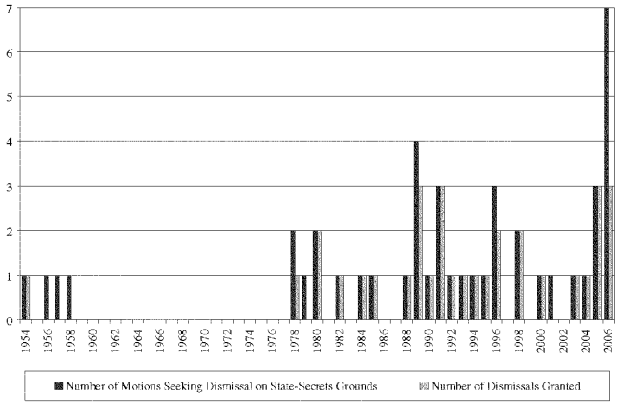


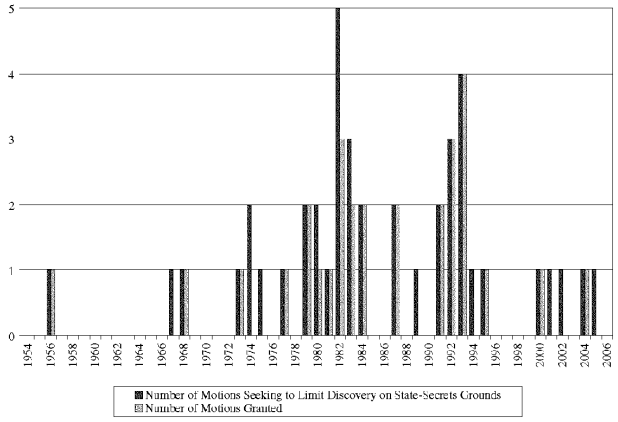
Chart 2 – Results in State-Secrets Cases Seeking Dismissal (1954–2006)



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]

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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 beuch trial); *Robinson v. City of Philadelphia*, 233 F.R.D. 169, 171 (E.D. Pa. 2005) (referriug without elaboration to an assertion of the state secrets privilege, among others, in context with no apparent conuection 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 intelligence 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 surveillance)	Facts relating to foreign intelligence surveillance	Imposition of an advance-notice requirement before defendants can elicit certain testimony	Reviewed classified affidavit	Privilege sustained	Proceeded, subject to notice requirement
19	*Farnsworth Cannon, Inc. v. Grimes*	4th Cir. (en banc)	1980	Defendant	Military (Navy procurement 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. Couu.	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

	Title	Court	Year of Decision	Govt. Role	Nature of information	Format of information	Relief Requested	*In Camera* Review?	Disposition of Claim	Disposition of Case
47	*Clift v. United States* (related to 1979 opinion of the same name)	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

	Title	Court	Year of Decision	Govt. Role	Nature of information	Format of information	Relief Requested	*In Camera* Review?	Disposition of Claim	Disposition of Case
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

	Title	Court	Year of Decision	Govt. Role	Nature of information	Format of information	Relief Requested	*In Camera* Review?	Disposition of Claim	Disposition of Case
59	*Black v. United States*	D. Minn.	1994	Defendant	Intelligence	Facts as to alleged wrongdoers' relationship to government 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 wrongdoers' relationship to government agencies	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed
61	*Frost v. Perry*	D. Nev.	1995	Defendant	Military (name of the operating facility in issue)	Name of the operating facility in issue in the case	Deny motion to compel	Classified affidavit only	Privilege sustained	Motion to compel denied
62	*Frost v. Perry* (Related to #61)	D. Nev.	1996	Defendant	Military	Facts related to classified military activities in Nevada	Summary judgment	Yes	Privilege sustained	Summary judgment granted
63	*McDonnell Douglas Corp. v. United States*	Ct. Fed. Claims	1996	Defendant	Military	Facts relating to stealth technology	Dismiss complaint	Classified affidavit	Privilege sustained	Complaint dismissed, though plaintiff awarded costs plus interest
64	*Monarch Assurance P.L.C. v. United States*	Ct. Cl.	1996	Defendant	Intelligence	CIA employment	Dismiss complaint	Classified affidavit	Privilege sustained	Proceeded to give plaintiff chance to prove case through nonprivileged evidence

	Title	Court	Year of Decision	Govt. Role	Nature of information	Format of information	Relief Requested	*In Camera* Review?	Disposition of Claim	Disposition of Case
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)

	Title	Court	Year of Decision	Govt. Role	Nature of information	Format of information	Relief Requested	*In Camera* Review?	Disposition of Claim	Disposition of Case
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

	Title	Court	Year of Decision	Govt. Role	Nature of information	Format of information	Relief Requested	*In Camera* Review?	Disposition of Claim	Disposition of Case
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