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# State Secrets and the Limits of National Security Litigation

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# State Secrets and the Limits of National Security Litigation

Robert M. Chesney\*

## *Abstract*

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

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

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

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

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

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

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<sup>1</sup> 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.<sup>2</sup> The government also has interposed the privilege in connection with litigation arising out of warrantless surveillance activities, albeit with less success so far.<sup>3</sup>

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?<sup>4</sup> 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*,<sup>5</sup> 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;<sup>6</sup> (b) the reviewing court has the ultimate responsibility to determine whether disclosure of the information in issue would pose a

<sup>2</sup> *Id.* at 539.

<sup>3</sup> 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).

<sup>4</sup> 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).

<sup>5</sup> *United States v. Reynolds*, 345 U.S. 1 (1953).

<sup>6</sup> *Id.* at 7–8.

“reasonable danger” to national security;<sup>7</sup> (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;<sup>8</sup> (d) the court can personally review the sensitive information on an *in camera*, *ex parte* basis if necessary;<sup>9</sup> and (e) once the privilege is found to attach, it is absolute and cannot be overcome by a showing of need or offsetting considerations.<sup>10</sup>

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.<sup>11</sup>

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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<sup>7</sup> *Id.* at 8–10.

<sup>8</sup> *Id.* at 11.

<sup>9</sup> *Id.* at 10.

<sup>10</sup> *Id.* at 11.

<sup>11</sup> *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.<sup>12</sup>

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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<sup>12</sup> 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*.<sup>13</sup> 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.<sup>14</sup>

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."<sup>15</sup> 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.<sup>16</sup> A number of successful operations followed, most but not all of which focused on the transfer of suspects to Egyptian custody.<sup>17</sup> According to Scheuer, the CIA's relationship with Egyptian intelligence was so close that "Americans could give

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<sup>13</sup> 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](http://www.newyorker.com/printables/fact/050214fa_fact6).

<sup>14</sup> *Id.* at 107.

<sup>15</sup> *Id.* at 108–09.

<sup>16</sup> *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).

<sup>17</sup> *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.”<sup>18</sup>

Since 9/11, the rendition program has grown beyond these initial parameters, though its current scope and purpose are the subjects of considerable dispute.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

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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<sup>18</sup> *Id.* at 110.

<sup>19</sup> 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).

<sup>20</sup> 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>.

<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> 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.<sup>24</sup>

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<sup>22</sup> 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>.

<sup>23</sup> 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[y]ing 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.*

<sup>24</sup> 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.<sup>25</sup> 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.”<sup>26</sup> 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,<sup>27</sup> his troubles began at a border crossing between Serbia and Macedonia on December 31, 2003.<sup>28</sup> El-Masri had boarded a bus that morning in his hometown of Ulm, Germany, en route to Skopje, Macedonia.<sup>29</sup> At the border, Macedonian authorities removed him from the bus and eventually confined him in a hotel room in Skopje.<sup>30</sup> There he remained incommunicado for twenty-three days, subjected all the while to repeated interrogation focused on his alleged involvement with al Qaeda.<sup>31</sup>

On the twenty-third day of his captivity, the Macedonians blindfolded El-Masri, placed him in a car, and drove him to an airport.<sup>32</sup> There he came into the custody of men he believed to be CIA agents.<sup>33</sup> 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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<sup>25</sup> See Kessler, *supra* note 23, at A18 (indicating that El-Masri’s suit was filed on Tuesday, December 6, 2005).

<sup>26</sup> *Id.*

<sup>27</sup> 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/222111gl20051206.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.

<sup>28</sup> See Complaint, *supra* note 27, ¶ 23.

<sup>29</sup> *Id.* ¶¶ 7, 23.

<sup>30</sup> *Id.* ¶ 23.

<sup>31</sup> *Id.* ¶¶ 24–26.

<sup>32</sup> *Id.* ¶¶ 27–28.

<sup>33</sup> *Id.* ¶¶ 28–31.

nally, knocked out by a pair of injections.<sup>34</sup> When he regained consciousness, he was in Afghanistan.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> El-Masri had to make do with “a bottle of putrid water in the corner of his cell.”<sup>38</sup> 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.<sup>39</sup>

Interrogations began the next night.<sup>40</sup> 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.<sup>41</sup> He was interrogated again on three or four other occasions, “accompanied by threats, insults, pushing, and shoving.”<sup>42</sup> Eventually, in March, El-Masri began a hunger strike.<sup>43</sup> 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.<sup>44</sup> El-Masri continued his hunger strike after this meeting; after the strike reached thirty-seven days, he was force-fed through an intranasal tube.<sup>45</sup>

In May, El-Masri was interviewed by a psychologist who indicated that El-Masri would soon be released.<sup>46</sup> Later that month, he was questioned on four separate occasions by a man who appeared to be German.<sup>47</sup> 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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<sup>34</sup> *Id.* ¶¶ 28–30.

<sup>35</sup> *Id.* ¶ 32.

<sup>36</sup> *Id.* ¶¶ 34–35.

<sup>37</sup> *Id.* ¶ 34.

<sup>38</sup> *Id.* ¶ 36.

<sup>39</sup> *Id.* ¶ 37.

<sup>40</sup> *Id.* ¶ 38.

<sup>41</sup> *Id.* ¶¶ 38–39.

<sup>42</sup> *Id.* ¶ 40.

<sup>43</sup> *Id.* ¶ 41.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* ¶¶ 41, 44.

<sup>46</sup> *Id.* ¶ 46.

<sup>47</sup> *Id.* ¶¶ 47–48.

he “was never to mention what had happened to him, because the Americans were determined to keep the affair a secret.”<sup>48</sup>

El-Masri was released at last on May 28.<sup>49</sup> That morning, his own clothes were returned to him, and he was placed (blindfolded) aboard a flight without being told the country of destination.<sup>50</sup> Upon landing, he was placed in a vehicle (still blindfolded) that drove around for several hours.<sup>51</sup> Eventually, he was taken out of the vehicle, and his blindfold was removed.<sup>52</sup> It was night, and El-Masri found that he was on a deserted road.<sup>53</sup> He was told to walk down the road without looking back.<sup>54</sup> When he rounded a bend, he encountered border guards who informed him that he was in Albania.<sup>55</sup> From the border station, Albanian officials took El-Masri directly to the airport in Tirana.<sup>56</sup> He was escorted through the airport and placed on a flight bound for Frankfurt.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> Though he was later reunited with his family, “El-Masri was and remains deeply traumatized” by these events.<sup>60</sup>

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,<sup>61</sup> 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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<sup>48</sup> *Id.* ¶ 48.

<sup>49</sup> *Id.* ¶ 49.

<sup>50</sup> *Id.* ¶¶ 49–51.

<sup>51</sup> *Id.* ¶¶ 52–53.

<sup>52</sup> *Id.* ¶ 53.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* ¶ 54.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* ¶¶ 55–56.

<sup>58</sup> *Id.* ¶ 56.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* ¶ 58.

<sup>61</sup> 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.<sup>62</sup> The complaint asserted three causes of action. First, El-Masri asserted a *Bivens* claim<sup>63</sup> premised on violations of both the substantive and procedural aspects of the Fifth Amendment Due Process Clause.<sup>64</sup> 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.<sup>65</sup> Second, El-Masri invoked the Alien Tort Statute (“ATS”)<sup>66</sup> as a vehicle to assert a claim based on violation of the customary international law norm against prolonged arbitrary detention.<sup>67</sup> 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.<sup>68</sup>

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*,<sup>69</sup> and El-Masri—as a noncitizen held outside the United States—faced even greater obstacles in his attempt to assert constitutional rights.<sup>70</sup> Had the court come to grips with the merits, therefore, it is possible that the com-

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<sup>62</sup> See Complaint, *supra* note 27.

<sup>63</sup> 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).

<sup>64</sup> See Complaint, *supra* note 27, ¶ 66.

<sup>65</sup> See *id.* ¶ 65.

<sup>66</sup> 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).

<sup>67</sup> See Complaint, *supra* note 27, ¶ 73.

<sup>68</sup> *Id.* ¶ 83.

<sup>69</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 694 (2004).

<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup> The stay was granted,<sup>73</sup> 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).<sup>74</sup>

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.<sup>75</sup> It is absolute in that it cannot be overcome by any showing of need by the opposing party.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup>

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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<sup>71</sup> 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).

<sup>72</sup> 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).

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

<sup>74</sup> 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](http://www.aclu.org/pdfs/safefree/govt_mot_dismiss.pdf).

<sup>75</sup> *Id.* at 4.

<sup>76</sup> See *id.* at 5.

<sup>77</sup> See *id.* at 10–11.

<sup>78</sup> *Id.* at 1.

<sup>79</sup> *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.<sup>80</sup> The district court, however, was not persuaded.<sup>81</sup>

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.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup>

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.”<sup>85</sup> Because “the entire aim of the suit is to prove the existence of state secrets,” there

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<sup>80</sup> 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](http://www.aclu.org/pdfs/safefree/elmasri_final_brief.pdf).

<sup>81</sup> See *El-Masri*, 437 F. Supp. 2d at 538.

<sup>82</sup> *Id.* at 535, 537.

<sup>83</sup> *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.”).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 539.

was no prospect of adopting special procedures tailored to prevent their disclosure while permitting the case to proceed.<sup>86</sup> “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.”<sup>87</sup>

The Fourth Circuit subsequently affirmed.<sup>88</sup> It acknowledged that “successful interposition of the state secrets privilege imposes a heavy burden on the party against whom the privilege is asserted.”<sup>89</sup> 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.<sup>90</sup>

## *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,<sup>91</sup> 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.<sup>92</sup> Levi had been appointed

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *El-Masri v. United States*, 479 F.3d 296, 313 (4th Cir. 2007).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> 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).

<sup>92</sup> 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.<sup>93</sup> 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.<sup>94</sup> 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.”<sup>95</sup> 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.<sup>96</sup> 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.”<sup>97</sup> Indeed, to some, “governmental secrecy serves no purpose other than to shield improper or unlawful action from public scrutiny.”<sup>98</sup>

Having thus acknowledged the current public mood, Levi pled first for appreciation of the government's legitimate need for some degree of confidentiality.<sup>99</sup> That need, he asserted, “is old, common to all governments, essential to ours since its formation.”<sup>100</sup> At bottom, “confidentiality in government go[es] to the effectiveness—and some-

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<sup>93</sup> 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).

<sup>94</sup> Levi, *supra* note 92, at 1–2.

<sup>95</sup> *Id.* at 1.

<sup>96</sup> 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).

<sup>97</sup> Levi, *supra* note 92, at 1–2.

<sup>98</sup> *Id.* at 2.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

times the very existence—of important governmental activity.”<sup>101</sup> 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.”<sup>102</sup> 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.”<sup>103</sup>

Levi acknowledged, however, that “of course there is another side—a limit to secrecy.”<sup>104</sup> 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.”<sup>105</sup> 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.”<sup>106</sup> 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.”<sup>107</sup>

Thus, Levi concluded, “we are met with a conflict of values.”<sup>108</sup> 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.”<sup>109</sup> On the other, “a

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<sup>101</sup> *Id.* at 4.

<sup>102</sup> *Id.* at 17–19.

<sup>103</sup> *Id.* at 18–21.

<sup>104</sup> *Id.* at 10.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 10–11.

<sup>107</sup> *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)).

<sup>108</sup> *Id.* at 13.

<sup>109</sup> *Id.*

duty of complete disclosure would render impossible the effective operation of government. Some confidentiality is a matter of practical necessity.”<sup>110</sup> 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.<sup>111</sup>

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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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 29.

preciate the larger significance of precluding consideration of El-Masri's claims.<sup>112</sup>

Precisely for this reason, the state secrets privilege has long been the subject of academic criticism.<sup>113</sup> Louis Fisher, for example, has devoted an entire book to the proposition that the state secrets privi-

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<sup>112</sup> 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](http://www.abanet.org/natsecurity/nslr/2006/NSL_Report_2006_07.pdf).

<sup>113</sup> *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 counter-majoritarian 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.”<sup>114</sup> 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.”<sup>115</sup> 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.<sup>116</sup>

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.”<sup>117</sup> 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.<sup>118</sup> 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.”<sup>119</sup> Third, “the privilege, as now construed, obstructs the constitutional duties of courts to oversee executive action.”<sup>120</sup>

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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<sup>114</sup> FISHER, *supra* note 4, at 253.

<sup>115</sup> *Id.* at 258.

<sup>116</sup> *Id.* at 262.

<sup>117</sup> Weaver & Pallitto, *supra* note 4, at 90.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

of national security goals.<sup>121</sup> 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.<sup>122</sup> 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.<sup>123</sup> 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.<sup>124</sup>

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<sup>121</sup> 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).

<sup>122</sup> 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](http://www.abanet.org/natsecurity/nslr/2006/NSL_Report_2006_09.pdf).

<sup>123</sup> 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).

<sup>124</sup> 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*.<sup>125</sup> *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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<sup>125</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

of State's office.<sup>126</sup> Lincoln objected, arguing that he should not testify "as to any facts which came officially to his knowledge while acting as secretary of state."<sup>127</sup> 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.<sup>128</sup> The Court suggested in dicta, however, that Lincoln would not have been "obliged" to disclose information "communicated to him in confidence."<sup>129</sup>

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.<sup>130</sup> 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.<sup>131</sup> 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."<sup>132</sup> 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."<sup>133</sup>

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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<sup>126</sup> *Id.* at 143.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 144.

<sup>129</sup> *Id.*

<sup>130</sup> *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.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 37.

<sup>133</sup> *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.<sup>134</sup>

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.<sup>135</sup> 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.<sup>136</sup> "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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<sup>134</sup> *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.

<sup>135</sup> 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).

<sup>136</sup> 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.”<sup>137</sup> These instances, he explained, included spousal privilege, attorney-client privilege, and the privilege against self-incrimination.<sup>138</sup> They also included an additional category, moreover, “in which particular evidence is excluded [because] disclosure might be prejudicial to the community.”<sup>139</sup> Exclusion in that context, Starkie explained, was rooted in “grounds of state policy.”<sup>140</sup>

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,”<sup>141</sup> shielding evidence of communications between informers and government officials to encourage such disclosures.<sup>142</sup> Second, Starkie provided numerous examples of what has since become familiar as the “deliberative process privilege.”<sup>143</sup> Under the deliberative process privilege, courts provide qualified protection to some government communications to facilitate internal discussions and operations.<sup>144</sup> The evidentiary disputes in *Marbury* and *Burr* are best thought of as falling under this heading.<sup>145</sup>

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*.<sup>146</sup> *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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<sup>137</sup> See STARKIE, *supra* note 136, § LXXVI, at 103.

<sup>138</sup> *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.

<sup>139</sup> *Id.* § LXXX, at 106.

<sup>140</sup> *Id.* (notation in margin).

<sup>141</sup> For a discussion of the “informer’s privilege” in historical perspective, 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).

<sup>142</sup> See STARKIE, *supra* note 136, § LXXX, at 106.

<sup>143</sup> 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).

<sup>144</sup> See *id.*

<sup>145</sup> 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.

<sup>146</sup> *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.<sup>147</sup> During the trial, prosecutors introduced into evidence a map of the Tower that had been found in the lodgings of the younger Watson.<sup>148</sup> 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.<sup>149</sup> 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."<sup>150</sup>

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,<sup>151</sup> 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.<sup>152</sup> Like Starkie, Roscoe cites *Watson*.<sup>153</sup> In addition, however, Roscoe cites the opinion of Lord Ellenborough in *Anderson v. Hamilton*<sup>154</sup> as

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<sup>147</sup> *Watson*, 171 Eng. Rep. at 596.

<sup>148</sup> *Id.* at 604.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> 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 Aterbury*, 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 "dis-serviceable to the Government" and useful to England's enemies).

<sup>152</sup> HENRY ROSCOE, *A DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL CASES WITH NOTES AND REFERENCES TO AMERICAN DECISIONS, AND TO THE ENGLISH COMMON LAW AND ECCLESIASTICAL REPORTS* 148 (George Sharswood ed., P.H. Nickline & T. Johnson, 1836).

<sup>153</sup> *Id.* at 148–49.

<sup>154</sup> *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.<sup>155</sup> *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.<sup>156</sup> 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.”<sup>157</sup> 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.”<sup>158</sup>

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.<sup>159</sup> 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.”<sup>160</sup> He then listed a number of examples, including what he called “*secrets of state*.”<sup>161</sup> 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.

<sup>155</sup> 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).

<sup>156</sup> *Anderson*, 8 Price at 244 n.\*, 146 Eng. Rep. at 1191 n.\*, 2 Br. & Bingh. at 156 n.(b).

<sup>157</sup> *Anderson*, 2 Br. & Bingh. at 156 n.(b).

<sup>158</sup> *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.

<sup>159</sup> 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE (7th ed., Boston, Little, Brown and Co. 1854).

<sup>160</sup> *Id.* § 236, at 328.

<sup>161</sup> *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*.<sup>162</sup> 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.<sup>163</sup>

Nonetheless, the security issue played a critical but unspoken role in the next significant development in the emergence of the state secrets privilege<sup>164</sup>—the Supreme Court's 1875 decision in *Totten v. United States*.<sup>165</sup> *Totten* concerned an attempt by the estate of an alleged Union spy to enforce a contract he claimed to have had with President Lincoln.<sup>166</sup> 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.<sup>167</sup> By a unanimous vote, however, the Supreme Court held that the Court of Claims should have dismissed the suit without reaching the merits.<sup>168</sup>

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

<sup>162</sup> GREENLEAF, *supra* note 159, § 250, at 347–49.

<sup>163</sup> *Id.* § 251, at 349.

<sup>164</sup> 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.

<sup>165</sup> *Totten v. United States*, 92 U.S. 105 (1875).

<sup>166</sup> *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).

<sup>167</sup> *Totten*, 92 U.S. at 106.

<sup>168</sup> *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.”<sup>169</sup> 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.”<sup>170</sup> 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.<sup>171</sup> 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.”<sup>172</sup>

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.<sup>173</sup> 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.<sup>174</sup>

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.<sup>175</sup> 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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<sup>169</sup> *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.

<sup>170</sup> *Totten*, 92 U.S. at 107.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 106–07.

<sup>173</sup> 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).

<sup>174</sup> See *Totten*, 92 U.S. at 107.

<sup>175</sup> *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*.<sup>176</sup> 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.<sup>177</sup> 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.<sup>178</sup> The county court issued attachments against them when they refused to comply, but the Supreme Court of Pennsylvania reversed on state constitutional grounds.<sup>179</sup> 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.”<sup>180</sup>

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<sup>181</sup>: *Beatson v. Skene*,<sup>182</sup> 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.”<sup>183</sup> 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

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<sup>176</sup> *Appeal of Hartranft*, 85 Pa. 433 (1877).

<sup>177</sup> *Id.* at 434.

<sup>178</sup> *Id.* at 435.

<sup>179</sup> *Id.* at 444–45.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 447 (citing *Beatson v. Skene*, (1860) 157 Eng. Rep. 1415 (Exch. Div.)).

<sup>182</sup> *Beatson v. Skene*, (1860) 157 Eng. Rep. 1415, 1421 (Exch. Div.).

<sup>183</sup> *Id.*

the department having custody of the paper.”<sup>184</sup> 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.<sup>185</sup> *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.<sup>186</sup>

## 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.<sup>187</sup> 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.<sup>188</sup>

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<sup>184</sup> *Id.* at 1421–22.

<sup>185</sup> *Id.* at 1421.

<sup>186</sup> Appeal of *Hartranft*, 85 Pa. 433, 447 (1877).

<sup>187</sup> 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”).

<sup>188</sup> 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,<sup>189</sup> and two others in the late 1930s involving equipment used in connection with gun sighting<sup>190</sup>—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.<sup>191</sup> 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*,<sup>192</sup> 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.<sup>193</sup> 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.<sup>194</sup> The charge required proof of the con-

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<sup>189</sup> See *Firth Sterling Steel*, 199 F. at 355 (citing *Totten*).

<sup>190</sup> 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).

<sup>191</sup> 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).

<sup>192</sup> *United States v. Haugen*, 58 F. Supp. 436 (E.D. Wash. 1944), *aff’d*, 153 F.2d 850, 853 (9th Cir. 1946).

<sup>193</sup> *Id.* at 437.

<sup>194</sup> *Id.*

tractual relationship between the cafeteria owner and the federal government, but the government refused to disclose to the defendants the contracts themselves.<sup>195</sup> 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.”<sup>196</sup>

The enactment of the Federal Tort Claims Act (“FTCA”)<sup>197</sup> 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.<sup>198</sup> Occasions did arise, however, in which the emerging state secrets privilege was cited

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<sup>195</sup> *Id.* at 438.

<sup>196</sup> *Id.* The court went on to preclude oral testimony concerning the contracts, relying on the best evidence rule. *See id.* at 440.

<sup>197</sup> 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.).

<sup>198</sup> A series of opinions in the 1940s addressed the claim that internal investigative reports carried out by government agencies should be privileged from discovery regardless of their content, a claim that is quite distinct from an argument that a particular report should be withheld because it contains security-sensitive information. *See United States v. Cotton Valley Operators Comm.*, 9 F.R.D. 719, 721 (W.D. La. 1949) (dismissing civil antitrust enforcement action as sanction for failure to produce FBI investigative report), *aff'd by equally divided court*, 339 U.S. 940 (1950); *O'Neill v. United States*, 79 F. Supp. 827, 830–31 (E.D. Pa. 1948) (imposing sanctions for refusal to disclose FBI investigative report relevant to admiralty action, but denying that the case involves jeopardy to “the military or diplomatic interests of the nation”), *vacated on other grounds sub nom. Allmont 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.<sup>199</sup> 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.<sup>200</sup> 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.<sup>201</sup> During discovery, the plaintiffs sought production of a report drafted in connection with the Air Force's postaccident investigation.<sup>202</sup> The government resisted production, though not initially on state-secrets grounds.<sup>203</sup> 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."<sup>204</sup> 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.<sup>205</sup>

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."<sup>206</sup> In short, the gov-

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<sup>199</sup> 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).

<sup>200</sup> *Id.* at 2-3.

<sup>201</sup> The facts at issue in *Reynolds* are described in considerable detail in FISHER, *supra* note 4, at 1-3.

<sup>202</sup> See *Brauner v. United States*, 10 F.R.D. 468, 469 (E.D. Pa. 1950).

<sup>203</sup> *Id.* at 471-72.

<sup>204</sup> *Id.* at 472.

<sup>205</sup> *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).

<sup>206</sup> *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.’”<sup>207</sup> 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.<sup>208</sup> 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.<sup>209</sup>

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.<sup>210</sup> 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.<sup>211</sup> Citing *Totten* and *Firth Sterling Steel Co. v. Bethlehem Steel Co.*,<sup>212</sup> the court acknowledged that “[s]tate secrets of a diplomatic or military nature have always been privileged from disclosure in any proceeding.”<sup>213</sup> 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.<sup>214</sup>

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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<sup>207</sup> *Id.* at 990–91.

<sup>208</sup> *See id.* at 991.

<sup>209</sup> *See id.*; FISHER, *supra* note 4, at 58.

<sup>210</sup> *Reynolds*, 192 F.2d at 994.

<sup>211</sup> *Id.* at 994–96.

<sup>212</sup> *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353 (E.D. Pa. 1912).

<sup>213</sup> *Reynolds*, 192 F.2d at 996 (citing, inter alia, *Totten v. United States*, 92 U.S. 105, 107 (1875); *Firth Sterling*, 199 F. 353).

<sup>214</sup> *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.<sup>215</sup>

The Supreme Court eventually reversed and remanded the Third Circuit's decision in *Reynolds*.<sup>216</sup> 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.<sup>217</sup> 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."<sup>218</sup>

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.<sup>219</sup> 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."<sup>220</sup> 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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<sup>215</sup> *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).

<sup>216</sup> *United States v. Reynolds*, 345 U.S. 1, 12 (1953).

<sup>217</sup> *Id.* at 7–8.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 6–12.

<sup>220</sup> *Id.* at 6–7 (citing, inter alia, *Totten*).

matters stood differently.<sup>221</sup> 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.<sup>222</sup>

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.”<sup>223</sup> 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.”<sup>224</sup>

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.<sup>225</sup> 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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<sup>221</sup> 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).

<sup>222</sup> 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”).

<sup>223</sup> *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).

<sup>224</sup> *Reynolds*, 345 U.S. at 10.

<sup>225</sup> *Id.* at 9.

therefore that there is no sense in running the marginal risks associated with an *in camera*, *ex parte* review.<sup>226</sup>

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.”<sup>227</sup> 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.”<sup>228</sup>

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.<sup>229</sup> 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.”<sup>230</sup> 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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<sup>226</sup> *Id.* at 10.

<sup>227</sup> *Id.* at 11.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 10.

<sup>230</sup> *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.<sup>231</sup>

*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).<sup>232</sup> 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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<sup>231</sup> See, e.g., *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1229 (D. Or. 2006) (urging the government to consider redaction).

<sup>232</sup> See FISHER, *supra* note 4, at 167.

Fortunately, courts following in the wake of *Reynolds* seem largely to have avoided this fundamental error.<sup>233</sup> 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*,<sup>234</sup> each adding in small ways to the development and consolidation of the privilege.<sup>235</sup> The most notable of these was the Second Circuit's 1958 decision in *Halpern v. United States*,<sup>236</sup> 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.<sup>237</sup>

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<sup>233</sup> 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).

<sup>234</sup> 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.*

<sup>235</sup> 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).

<sup>236</sup> *Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958).

<sup>237</sup> 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.<sup>238</sup> 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.<sup>239</sup> 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.<sup>240</sup> 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.<sup>241</sup>

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.”<sup>242</sup> 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-

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§§ 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”).

<sup>238</sup> See *Halpern*, 258 F.2d at 37–38.

<sup>239</sup> *Id.* at 43.

<sup>240</sup> *Id.* at 43–44.

<sup>241</sup> See *id.* at 44.

<sup>242</sup> *Id.*

duce documents concerning allegations that they were involved in installing warrantless wiretaps in Las Vegas hotel rooms.<sup>243</sup> 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."<sup>244</sup>

The Nevada Supreme Court, however, agreed with the trial court's determination that the privilege did not apply in this context.<sup>245</sup> 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,<sup>246</sup> and because FBI agents had testified in other cases concerning the particular surveillance at issue.<sup>247</sup> 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."<sup>248</sup>

*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.<sup>249</sup> That changed, however, in 1973. From that point onward, as documented in the Appendix to this Article,<sup>250</sup> decisions touching on the privilege have been far more frequent.

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<sup>243</sup> *Elson v. Bowen*, 436 P.2d 12, 13–14 (Nev. 1967).

<sup>244</sup> *Id.* at 15–16.

<sup>245</sup> *See id.*

<sup>246</sup> *Id.* at 15.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 16.

<sup>249</sup> 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).

<sup>250</sup> *See infra* Appendix (identifying all published opinions addressing actual assertions of the state secrets privilege during the years from 1954 through 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.<sup>251</sup> Though Congress ultimately chose not to codify any privileges at all—leaving the status quo, including *Reynolds*, in place<sup>252</sup>—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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<sup>251</sup> 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).

<sup>252</sup> 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.<sup>253</sup> 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*,<sup>254</sup> 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.*,<sup>255</sup> 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*,<sup>256</sup> 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.<sup>257</sup> According to the court in *Black*, all such privileges are constitutionally grounded in separation-of-powers concerns, but, contrary to *Reynolds*, none are "absolute."<sup>258</sup> 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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<sup>253</sup> 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).

<sup>254</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971).

<sup>255</sup> *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 368 F. Supp. 1098, 1139-41 (S.D.N.Y. 1973).

<sup>256</sup> *Black v. Sheraton Corp. of Am.*, 371 F. Supp. 97 (D.D.C. 1974).

<sup>257</sup> *Id.* at 100.

<sup>258</sup> *Id.*

and that the government therefore had an obligation to produce the FBI's classified investigative file on the plaintiff in that case.<sup>259</sup>

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*.<sup>260</sup>

*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.<sup>261</sup> 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).<sup>262</sup> 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.<sup>263</sup> 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,"<sup>264</sup> the Court explained, executive privilege is not absolute and may in appropriate circumstances give way to "the legitimate needs of the judicial process."<sup>265</sup> 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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<sup>259</sup> *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).

<sup>260</sup> *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").

<sup>261</sup> *Id.* at 686, 703.

<sup>262</sup> See *id.* at 705–06.

<sup>263</sup> See *id.*

<sup>264</sup> *Id.* at 706 (emphasis added).

<sup>265</sup> *Id.* at 707.

reasonable to say that the state secrets privilege also has constitutional underpinnings.<sup>266</sup>

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.<sup>267</sup> 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.<sup>268</sup> Even that obstacle, however, was overcome in some circumstances, as the D.C. Circuit’s decision in *Halkin v. Helms* illustrates.<sup>269</sup>

*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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<sup>266</sup> 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”).

<sup>267</sup> *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).

<sup>268</sup> *See, e.g., Spock*, 464 F. Supp. at 519 (noting that the intercepted communications in question were previously disclosed in a *Washington Post* article).

<sup>269</sup> *Halkin*, 598 F.2d at 10–11.

tions arising out of warrantless surveillance activities.<sup>270</sup> 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.”<sup>271</sup> 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.<sup>272</sup>

Siding entirely with the government, the D.C. Circuit reversed the determination that SHAMROCK no longer triggered state-secrets protection.<sup>273</sup> Whatever else may be known about SHAMROCK, the court reasoned, the particular targets of the operation had not yet been disclosed.<sup>274</sup> 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<sup>275</sup>—a range of other possible inferences.<sup>276</sup> 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.<sup>277</sup>

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<sup>270</sup> *Id.* at 3.

<sup>271</sup> *Id.* at 3–4.

<sup>272</sup> *Id.* at 5.

<sup>273</sup> *Id.*

<sup>274</sup> *See id.* at 8–9.

<sup>275</sup> 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).

<sup>276</sup> *See Halkin*, 598 F.2d at 8–9.

<sup>277</sup> *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,<sup>278</sup> 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.<sup>279</sup>

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.<sup>280</sup> 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.

<sup>278</sup> 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.

<sup>279</sup> 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).

<sup>280</sup> See *infra* Appendix.

and thirty-seven instead merely sought relief from discovery.<sup>281</sup> 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.<sup>282</sup> 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)

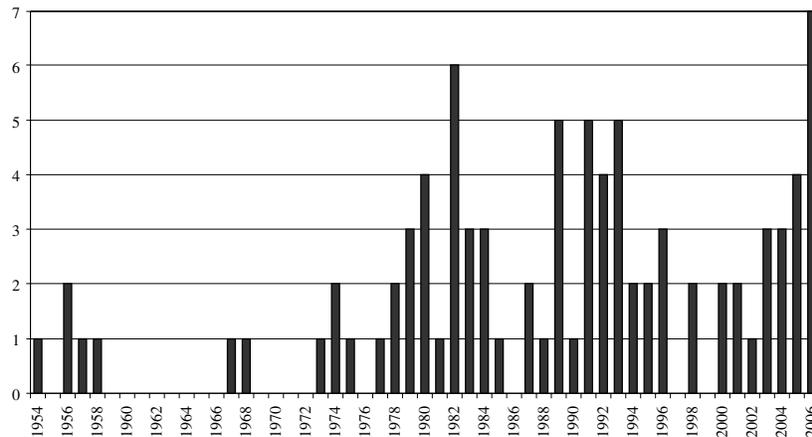
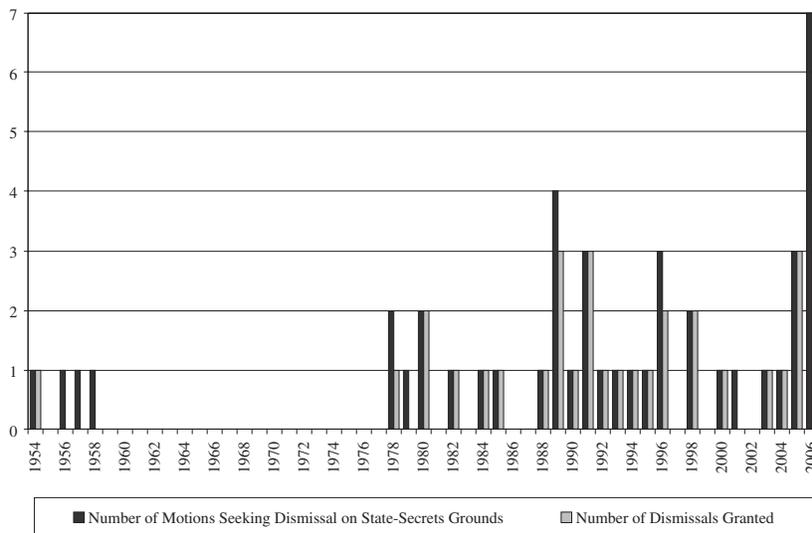


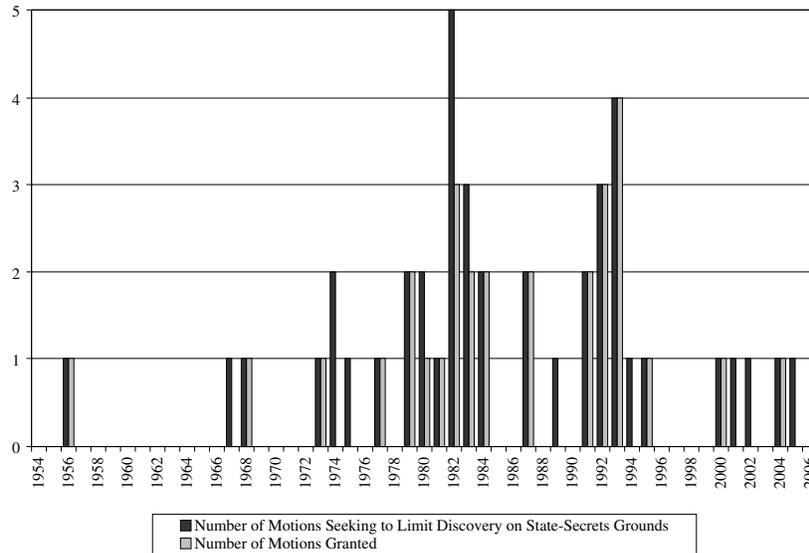
Chart 2 – Results in State-Secrets Cases Seeking Dismissal (1954–2006)



<sup>281</sup> See *id.* The government typically moves in the alternative for dismissal or for summary judgment.

<sup>282</sup> 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.<sup>283</sup> Weaver and Pallitto begin with the

<sup>283</sup> 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.”<sup>284</sup> 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.”<sup>285</sup> Weaver and Pallitto conclude “that Bush administration lawyers are using the privilege with offhanded abandon” in at least some cases,<sup>286</sup> while simultaneously “show[ing] a tendency . . . to expand the privilege to cover a wide variety of contexts.”<sup>287</sup>

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<sup>284</sup> *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.

<sup>285</sup> 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”).

<sup>286</sup> *Id.* at 109.

<sup>287</sup> *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.<sup>288</sup> 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.<sup>289</sup>

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).

<sup>288</sup> See Weaver & Pallitto, *supra* note 4, at 111.

<sup>289</sup> 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.<sup>290</sup>

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-

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<sup>290</sup> 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,<sup>291</sup> stealth technology,<sup>292</sup> data-mining,<sup>293</sup> and devices for linking underwater fiber optic cables.<sup>294</sup> 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.<sup>295</sup> Indeed, *Reynolds* itself was justified in these terms.<sup>296</sup>

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,<sup>297</sup> an employment discrimination suit at the CIA that would require proof of the status and duties of other employees,<sup>298</sup> and an attempt by defectors to establish an obligation on the part of the CIA to provide them with certain benefits.<sup>299</sup> The last of

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<sup>291</sup> 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).

<sup>292</sup> 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).

<sup>293</sup> 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).

<sup>294</sup> 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).

<sup>295</sup> 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).

<sup>296</sup> See *Reynolds v. United States*, 345 U.S. 1, 10–11 (1953) (concerning classified radar equipment aboard a military airplane that crashed).

<sup>297</sup> 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).

<sup>298</sup> See *Sterling v. Tenet*, 416 F.3d 338, 341–42, 349 (4th Cir. 2005) (affirming dismissal of complaint).

<sup>299</sup> 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.<sup>300</sup> That wrinkle aside, however, this cluster of “internal activities” cases broke no new ground in comparison to earlier eras.<sup>301</sup>

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,<sup>302</sup> a defamation action arising out of a counterintelligence investigation,<sup>303</sup> a suit relating to employment at a classified Air Force facility,<sup>304</sup> and a suit alleging religious discrimination as the motive for a counterintelligence investigation.<sup>305</sup> 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.<sup>306</sup>

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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<sup>300</sup> 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*).

<sup>301</sup> 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).

<sup>302</sup> 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).

<sup>303</sup> See *Trulock v. Lee*, 66 F. App’x 472, 473–78 (4th Cir. 2003) (affirming dismissal of complaint).

<sup>304</sup> See *Darby v. U.S. Dep’t of Def.*, 74 F. App’x 813, 814 (9th Cir. 2003) (affirming summary judgment).

<sup>305</sup> See *Tenenbaum v. Simonini*, 372 F.3d 776, 777–78 (6th Cir. 2004) (affirming summary judgment).

<sup>306</sup> 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<sup>307</sup> and extraordinary rendition.<sup>308</sup> 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.<sup>309</sup> 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.<sup>310</sup> 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.<sup>311</sup> 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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<sup>307</sup> 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).

<sup>308</sup> 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).

<sup>309</sup> 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.

<sup>310</sup> 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).

<sup>311</sup> 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.*,<sup>312</sup> 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."<sup>313</sup> 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.<sup>314</sup> "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.<sup>315</sup> 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."<sup>316</sup> 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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<sup>312</sup> *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006).

<sup>313</sup> 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>.

<sup>314</sup> *See id.* at 9–10.

<sup>315</sup> *Id.* at 10.

<sup>316</sup> *Id.* at 11.

of complaints rather than just exemption from discovery.<sup>317</sup> 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)*<sup>318</sup>

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.”<sup>319</sup> The case law, however, simply does not support that proposed distinction.<sup>320</sup>

<sup>317</sup> 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>.

<sup>318</sup> See *infra* Appendix.

<sup>319</sup> 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>.

<sup>320</sup> 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.<sup>321</sup> 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.<sup>322</sup> 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.<sup>323</sup> 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.<sup>324</sup>

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.<sup>325</sup> 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<sup>326</sup> and antidumping tariff decisions.<sup>327</sup> It might be best, then, to conceive of the state secrets privi-

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<sup>321</sup> 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).

<sup>322</sup> See *supra* Part III.A (discussing the role of *Marbury* and *Burr* in the privilege’s formative period).

<sup>323</sup> *United States v. Nixon*, 418 U.S. 683, 706 (1974).

<sup>324</sup> 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).

<sup>325</sup> For a discussion of these qualities, see Eric Posner and Cass Sunstein, *Chevronizing Foreign Relations Law*, 116 *YALE L.J.* 1170 (2007).

<sup>326</sup> 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).

<sup>327</sup> 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.<sup>328</sup> 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.<sup>329</sup> 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).

<sup>328</sup> 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.

<sup>329</sup> 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.<sup>330</sup> 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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<sup>330</sup> 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/nat-security/nslr/2006/NSL\\_Report\\_2006\\_11.pdf](http://www.abanet.org/nat-security/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.<sup>331</sup>

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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<sup>331</sup> 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.<sup>332</sup> 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.<sup>333</sup>

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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<sup>332</sup> See FISHER, *supra* note 4, at 253.

<sup>333</sup> 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<sup>334</sup>  
Published Opinions Adjudicating Assertions of the State Secrets Privilege after *Reynolds* (1951–2006)<sup>335</sup>

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 <i>Tucker v. United States</i>	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	<i>Totten</i> found applicable	Complaint dismissed

<sup>334</sup> 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).

<sup>335</sup> 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 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 <i>Republic of China v. Nat'l Union Fire Ins. Co. of Pitt.</i>	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 <i>Halpern v. United States</i>	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 <i>Halpern v. United States</i> (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 <i>in camera</i> basis, though not <i>ex parte</i>
5 <i>Elson v. Bowen</i> <sup>336</sup>	S. Ct. Nev.	1967	Defendant, Petitioner	Intelligence (FBI warrantless surveillance)	Testimony from FBI agent concerning warrantless surveillance activity	Petition for writ of prohibition overturning trial court order to answer questions	Yes	Privilege denied	Proceeded; witness must testify

U.S. government accommodated security clearance needs for litigation between military contractors, but that government's unwillingness to extend clearance to jurors required resort to a bench trial); *Robinson v. City of Philadelphia*, 233 F.R.D. 169, 171 (E.D. Pa. 2005) (referring without elaboration to an assertion of the state secrets privilege, among others, in context with no apparent connection to subjects that might implicate that privilege); *American-Arab Anti-Discrimination Committee v. Reno*, 883 F. Supp. 1365, 1376-77 & n.11 (C.D. Cal. 1995) (noting that the state secrets privilege had not been asserted in that case, but inaccurately citing the doctrine as a basis for judicial reliance on information presented on an *in camera*, *ex parte* basis); *Westmoreland v. CBS, Inc.*, 584 F. Supp. 1206, 1208-10 (D.D.C. 1984) (referencing state secrets in conjunction with broader assertion of executive privilege, but declining to "parse" that larger concept in order to rule on the matter); *Ganadera Industrial, S.A. v. Block*, 556 F. Supp. 354, 356 n.3 (D.D.C. 1982) (noting defendant's invocation of the state secrets privilege with respect to certain documents at an earlier stage in this administrative procedure action, but not adjudicating any privilege issues); *United States v. Feeney*, 501 F. Supp. 1337, 1346-47 (D. Col. 1980) (referencing the *Reynolds* procedures in the course of a long discussion of the various privilege issues that arise when Justice Department employees decline to provide information absent Attorney General authorization).

<sup>336</sup> 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 <i>Heine v. Raus</i>	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 <i>Pan Am. World Airways v. Aetna Cas. &amp; Sur. Co.</i>	S.D.N.Y.	1973	Third Party	Intelligence (CIA information relating to PFLP)	Documents	Preclude discovery	No	Privilege sustained	Proceeded
8 <i>Black v. Sheraton Corp. of Am.</i> <sup>337</sup>	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.

<sup>337</sup> 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 <i>United States v. Ahmad</i> <sup>338</sup>	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 <i>Reynolds</i> as a balancing test rather than absolute privilege)	Proceeded
10 <i>Kinoy v. Mitchell</i>	S.D.N.Y.	1975	Defendant	Intelligence <sup>339</sup> (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 <i>Reynolds</i> formalities	Proceeded

<sup>338</sup> 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.

<sup>339</sup> 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."

	<b>Title</b>	<b>Court</b>	<b>Year of Decision</b>	<b>Govt. Role</b>	<b>Nature of information</b>	<b>Format of information</b>	<b>Relief Requested</b>	<b>In Camera Review?</b>	<b>Disposition of Claim</b>	<b>Disposition of Case</b>
11	<i>Jabara v. Kelley</i> <sup>340</sup>	E.D. Mich.	1977	Defendant	Intelligence	Warrantless surveillance documents	Deny discovery	Yes	Privilege sustained as to some but not all information	Proceeded
12	<i>Halkin v. Helms</i>	D.C. Cir.	1978	Defendant	Intelligence (NSA warrantless surveillance)	Responsive pleading	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed
13	<i>Spock v. United States</i>	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	<i>Clift v. United States</i>	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	<i>United States v. Felt</i>	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

<sup>340</sup> 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).

	<b>Title</b>	<b>Court</b>	<b>Year of Decision</b>	<b>Govt. Role</b>	<b>Nature of information</b>	<b>Format of information</b>	<b>Relief Requested</b>	<b>In Camera Review?</b>	<b>Disposition of Claim</b>	<b>Disposition of Case</b>
16	<i>ACLU v. Brown</i>	7th Cir.	1979	Defendant	Intelligence (domestic military intelligence activity)	Interrogatory responses and documents	Relief from discovery	Yes	Privilege sustained	Proceeded
17	<i>ACLU v. Brown</i> (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	<i>United States v. Felt</i> (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	<i>Farnsworth Cannon, Inc. v. Grimes</i>	4th Cir. (en banc)	1980	Defendant	Military (Navy procurement contract)	Documents	Dismiss complaint	Unclear	Privilege sustained	Complaint dismissed
20	<i>Sigler v. LeVan</i>	D. Md.	1980	Defendant	Military/Intelligence (counter-intelligence 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	<i>Zenith Radio Corp. v. United States</i>	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 <i>Att'y Gen. of United States v. The Irish People, Inc.</i> <sup>341</sup>	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 <i>Salisbury v. United States</i>	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 <i>Halkin v. Helms</i> (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 <i>Nat'l Lawyers Guild v. At'y Gen.</i>	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 <i>Ceramica Regiomontana, S.A. v. United States</i>	Ct. Int'l Trade	1982	Defendant	Diplomatic	Communications from Mexican government	Preclude discovery	Yes	Privilege sustained	Proceeded

<sup>341</sup> 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.

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27	<i>Republic Steel Corp. v. United States</i>	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	<i>U.S. Steel Corp. v. United States</i>	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	<i>Ellsberg v. Mitchell</i>	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	<i>AT&amp;T v. United States</i>	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	<i>Molerio v. FBI</i>	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	<i>Northrop Corp. v. McDonnell Douglas Corp.</i>	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 <i>Reynolds</i> formalities	Subpoena quashed as to Defense but not State (pending <i>Reynolds</i> assertion)

	<b>Title</b>	<b>Court</b>	<b>Year of Decision</b>	<b>Govt. Role</b>	<b>Nature of information</b>	<b>Format of information</b>	<b>Relief Requested</b>	<b>In Camera Review?</b>	<b>Disposition of Claim</b>	<b>Disposition of Case</b>
33	<i>Star-Kist Foods, Inc. v. United States</i>	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	<i>Fitzgerald v. Penthouse Int'l, Ltd.</i>	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	<i>Foster v. United States</i>	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	<i>Xerox Corp. v. United States</i>	Ct. Cl.	1987	Defendant	Diplomatic	Letter from U.K. revenue official to IRS official	Deny discovery	No	Privilege sustained	Discovery denied
37	<i>Guong v. United States</i>	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	<i>In re United States</i>	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

	<b>Title</b>	<b>Court</b>	<b>Year of Decision</b>	<b>Govt. Role</b>	<b>Nature of information</b>	<b>Format of information</b>	<b>Relief Requested</b>	<b>In Camera Review?</b>	<b>Disposition of Claim</b>	<b>Disposition of Case</b>
39	<i>Weston v. Lockheed Missiles &amp; Space Co.</i>	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	<i>Hudson River Sloop Clearwater, Inc. v. Dep't of Navy</i>	E.D.N.Y.	1989	Defendant	Military	Location of nuclear weapons	Dismiss portion of complaint	No	Privilege sustained	Relevant portion of complaint dismissed
41	<i>Nejad v. United States</i>	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	<i>Greenpeace, U.S.A. v. Mosbacher</i>	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

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43	<i>Zuckerbraun v. General Dynamics Corp.</i>	D. Conn.	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	<i>Zuckerbraun v. General Dynamics Corp.</i> (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	<i>Bowles v. United States</i>	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	<i>In re Under Seal</i>	4th Cir.	1991	Third-party (statement of interest)	Intelligence (commercial dispute among private contractors arising out of unspecified government "project")	Facts relating to unspecified government project relating to national security	Deny motion to compel discovery	Yes	Privilege sustained	Complaint dismissed on subsequent summary judgment motion for lack of evidence

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47	<i>Cliff v. United States</i> (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	<i>N.S.N. Int'l Industry v. E.I. DuPont De Nemours &amp; Co.</i>	S.D.N.Y.	1991	Intervenor	Military	Information relating to DARPA contract and armor technology	Deny discovery	No	Privilege sustained	Discovery denied
49	<i>United States v. Koreh</i>	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	<i>Maxwell v. First Nat'l Bank of Md.</i>	D. Md.	1991	Intervenor	Intelligence	Facts as to defendant's relationship with CIA	Motion for protective order	Yes	Privilege sustained	Proceeded
51	<i>Bareford v. Gen. Dynamics Corp.</i>	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	<i>Hyundai Merch. Marine, S.D. v. United States</i>	S.D.N.Y.	1992	Defendant	Unclear	14 documents relating to plaintiff's claim of negligent nautical maps	Deny discovery	Yes as to classified affidavits and the documents	Privilege sustained	Discovery denied

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53	<i>Maxwell v. First Nat'l Bank of Md.</i> (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	<i>Bentzin v. Hughes Aircraft Co.</i>	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	<i>In re United States</i>	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	<i>In re Smyth</i>	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	<i>McDonnell Douglas Corp. v. United States</i>	Ct. Cl.	1993	Defendant	Military	Stealth aircraft technology	Deny discovery	Classified affidavit	Privilege sustained	Proceed to determine if suit should be dismissed
58	<i>Yang v. Reno</i>	M.D. Pa.	1994	Habeas defendant	Internal government deliberations	Substance of discussions in inter-agency process regarding alien smuggling and China	Motion for protective order	No	Government failed to comply with <i>Reynolds</i> formalities for assertion of privilege	Proceeded with option to move again

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59	<i>Black v. United States</i>	D. Minn.	1994	Defendant	Intelligence	Facts as to alleged wrongdoers' relationship to government agencies	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed
60	<i>Black v. United States</i> (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	<i>Frost v. Perry</i>	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	<i>Frost v. Perry</i> (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	<i>McDonnell Douglas Corp. v. United States</i>	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	<i>Monarch Assurance P.L.C. v. United States</i>	Ct. Cl.	1996	Defendant	Intelligence	CIA employment	Dismiss complaint	Classified affidavit	Privilege sustained	Proceeded to give plaintiff chance to prove case through nonprivileged evidence

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65	<i>Monarch Assurance P.L.C. v. United States</i> (Related to #64)	Ct. Cl.	1998	Defendant	Intelligence	CIA employment	Dismiss complaint	Classified affidavit	Privilege sustained	Complaint dismissed
66	<i>Kasza v. Browner</i>	9th Cir.	1998	Defendant	Military	Facts related to classified military activities in Nevada	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed
67	<i>Linder v. Calero-Portocarrero</i>	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	<i>Tilden v. Tenet</i>	E.D. Va.	2000	Defendant	Intelligence	Facts relating to CIA procedures and covert personnel	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed
69	<i>Barlow v. United States</i>	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	<i>Monarch Assurance v. United States</i> (Related to #64 and #65)	Fed. Cir.	2001	Defendant	Intelligence	Facts relating to whether individual worked for CIA	Dismiss complaint	Yes	Privilege sustained	Proceeded (with possibility of summary judgment)

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71	<i>DTM Research, LLC v. AT&amp;T Corp.</i>	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	<i>United States ex rel. Schwartz v. TRW, Inc.</i>	C.D. Cal.	2002	Subpoena recipient (qui tam)	Military	Documents relating to missile defense program	Deny discovery request	No	Government failed to comply with <i>Reynolds</i> formalities for assertion of privilege	Proceeded with option to move again
73	<i>McDonnell Douglas Corp. v. United States</i>	Fed. Cir.	2003	Defendant	Military	Facts relating to stealth technology	Strike "superior knowledge" defense	Yes	Privilege sustained	Defense struck
74	<i>Trulock v. Lee</i>	4th Cir.	2003	Defendant	Intelligence	Facts relating to CIA employees, procedures, and investigation into Chinese espionage	Dismiss complaint	No	Privilege sustained	Complaint dismissed
75	<i>Darby v. U.S. Dep't of Def.</i>	9th Cir.	2003	Defendant	Unclear	Unclear	Unclear	Yes	Privilege sustained	Summary judgment granted
76	<i>Tenenbaum v. Simonini</i>	6th Cir.	2004	Defendant	Unclear	Unclear	Motion for summary judgment	Yes	Privilege sustained	Summary judgment granted
77	<i>Edmonds v. U.S. Dep't of Justice</i>	D.D.C.	2004	Defendant	Intelligence/Foreign Relations	Facts relating to intelligence collection and foreign relations	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed
78	<i>Burnett v. AI Baraka Inv. &amp; Dev. Corp.</i>	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	<i>Tenet v. Doe</i>	S. Ct.	2005	Defendant	Intelligence	Facts relating to alleged espionage relationship	Dismiss complaint	No	<i>Totten</i> described as a "categorical bar" distinct from the "state secrets evidentiary privilege"	Complaint dismissed
80	<i>Sterling v. Tenet</i>	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	<i>Crater Corp. v. Lucent Technologies, Inc.</i>	Fed. Cir.	2005 <sup>342</sup>	Intervenor	Intelligence	Facts relating to manufacture or use of underwriter "coupling" device	Motion for protective order limiting discovery	Yes	Privilege sustained	Proceeded, with possibility of dismissal if necessary
82	<i>Schwartz v. Raytheon Co.</i>	9th Cir.	2005	Intervenor	Military	Unclear, but related to performance of defense contract	Dismiss complaint	Unclear	Privilege sustained	Complaint dismissed
83	<i>Arar v. Ashcroft</i>	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 <i>Bivens</i> has a national-security exception
84	<i>El-Masri v. Tenet</i>	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.

	<b>Title</b>	<b>Court</b>	<b>Year of Decision</b>	<b>Govt. Role</b>	<b>Nature of information</b>	<b>Format of information</b>	<b>Relief Requested</b>	<b>In Camera Review?</b>	<b>Disposition of Claim</b>	<b>Disposition of Case</b>
85	<i>Heping v. AT&amp;T Corp.</i>	N.D. Cal.	2006	Intervenor	Intelligence/Military	Facts relating to warrantless surveillance	Dismiss complaint	Yes	Proceeded	Proceeded
86	<i>Heping v. AT&amp;T Corp.</i> (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	<i>Terkel v. AT&amp;T Corp.</i>	N.D. Ill.	2006	Intervenor	Intelligence/Military	Facts relating to warrantless surveillance	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed
88	<i>ACLU v. Nat'l Sec. Agency</i>	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	<i>Al-Haramain Islamic Found., Inc. v. Bush</i>	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